

# Green Mediation- A Way Forward for Resolving Environmental Disputes

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## ABSTRACT

In the past few decades, India has witnessed a sudden growth in environmental dispute litigations with the increase in industrialization and urbanization. There has been increasing tension between the ecology (environment) and the economy (development) of the country. For addressing and entertaining the disputes arising out of environmental issues, in India, three judicial bodies have been set up, namely: NGT (National Green Tribunal), High Court, and the Supreme Court. However, there has been a massive bundle of files of environmental litigation pending before the Courts for the past long years causing delay and compromising the quality of justice to be served, the reason being the lack of adequate infrastructure and overburdened Courts. Over and above, what makes the matter worse is the disproportionate role of judges in adjudicating disputes and citizens in making the law work. Hence, this paper aims to explore the possible solutions for the said problem by applying other alternative dispute redressal mechanisms.

**Keyword:** Green Mediation, ADR, Mediation Bill 2021

## INTRODUCTION

Indian culture since time immemorial has always recognized and appreciated the importance of nature, a clean and green environment. To maintain the same several laws, rules, and enactments have been framed, providing stringent punishment for the person who by his actions attempts to create nuisance in society by disturbing or destroying the cycle of nature. The holy texts across religions and age old-human practices have always highlighted the importance of preserving the environment and natural resources to maintain the balance of mother nature. They all have laid emphasized on sustainable lifestyles and moderation. However, the laws, orders, and regulations have undergone changes as human civilization evolved. Since its inception, humans have been relying on resolving their disputes through an amicable mechanism. During ancient times, the common disputes that arose over food, land, and mates were resolved amicably. To resolve the disputes various mechanisms were adopted, the traces of which can be found in the present alternate dispute resolution mechanisms. For instance, arbitration as a dispute resolution method was being used in the old Irish legal system, in which a trained individual known as *brithem* was appointed by the King as a judge who acted in the capacity of an arbitrator. Similarly, the culture of mediation has been deeply rooted in India. In earlier days, the disputes were facilitated by five knowledgeable men in the village known as *Panch* during the panchayat system. The procedure was not organized or formal in nature, but the same used to resemble the mediation. With the pace of development, this unorganized structure of mutually settling down the dispute turned into a systematic and organized structure and gradually became part of a formal dispute redressal system.

In the words of Liebmann, mediation is a- “*Process by which an impartial third party helps two (or more) disputants work out how to resolve a conflict. The disputants, not the mediators, decide the terms of any agreement reached. Mediation focuses on future rather than past behavior.*”<sup>1</sup> Mediation as a dispute resolution process has been recognized by the Indian legal system. Promoting the concept of mediation, Lok Adalat was established under the Legal Service Authority Act of 1987. Thereafter, in the year 1999, the Parliament passed the Code of Civil Procedure (Amendment) Act inserting Section 89 in the Act, whereby, civil courts are empowered to refer a civil case to any ADR mechanism including mediation “*where it appears to the court that there exist elements of a settlement which may be acceptable to the parties.*”

However, mediation has not been fully developed in its entirety as an alternative dispute resolution in India. At present, there is no concrete legislation regulating mediation in India, unlike, arbitration and conciliation. The Apex Court in the case of *M.R. Krishna Murthi v. New India Assurance Co. Ltd.*<sup>2</sup> acknowledged the need for a uniform law regulating mediation.

## ENVIRONMENTAL JUSTICE SYSTEM IN INDIA

In the quest for development, there has been an increase in industrialization and urbanization to satisfy the ever-growing and increasing needs of society. Consequently, the result of the same lead to the degradation, depletion, and destruction of the ecology, environment, and natural resources at a large scale. The situation has created tension between the economy and the ecology. The decline in the quality of the environment had adversely affected the wildlife and lifestyle of the people living in the society. This scenario has forced the government and agencies worldwide to raise their eyebrows and look into the matter concerning environmental disputes and strike a balance between ecology and economy through sustainable development.

Recognizing the importance of preserving, protecting, and improving the environment, the Constitution of India has incorporated Article 48-A<sup>3</sup> and Article 51-A (g)<sup>4</sup>. Article 48- A is a constitutional pointer to the State to protect and improve the environment, whereas, Article 51-A (g) confers a fundamental duty on the citizens of India to protect and improve the environment and compassion for living creatures. The legislation has enacted several environmental laws with the objective of protecting and preserving the environment, natural resources, and wildlife. Enforcement agencies have been set up for the proper and systematic implementation of the law enacted by the legislation. A robust dispute redressal mechanism has also been established for addressing the disputes arising out of environmental conflicts.

Over time the judiciary has played a vital role in shaping the objective and intention of the legislature behind the enactment of the laws, by creating a balance a balance between development (economy) and ecology. The Courts have time and again highlighted the importance of sustainable development and intergenerational equity. The Court through judicial precedents has developed several principles such as the ‘principle of sustainable development’, ‘precautionary principle’, ‘polluter pay principle’, ‘public trust doctrine’, and ‘intergenerational equity’ to deliver a quality environmental justice satisfying the interest of all the stakeholders involved in the process.

<sup>1</sup> Dr Rory Ridley-Duff, Dr Anthony Bennett, *Towards Mediation: developing a theoretical framework to understanding alternative dispute resolution*, Industrial Relations Journal, 2011.

<sup>2</sup> *M.R. Krishna Murthi v. New India Assurance Co. Ltd.*, Civil Appeal No. 2476-77 of 2019

<sup>3</sup> INDIA CONST., art. 48-A.

<sup>4</sup> INDIA CONST., art. 51-A (g).

In India, there have been mainly three Courts namely the Supreme Court, High Court, and NGT (National Green Tribunal) which have been established to address the issues relating to environmental disputes. The tiers of the judiciary below the High Court have a marginal role in the overall regulatory design, most of their cases are loaded with criminal prosecutions against the violators. In the past few decades, a dramatic rise in environmental cases has been witnessed by the Indian judiciary due to the active intervention of public interest groups, the indigenous community, environmentalists, moral groups, minorities, etc. who influences public policies through environmental conflicts. Environmental law matters need to be considered as ‘urgent matters’, which require speedy redressal as the interest of various stakeholders is involved in the process. The development of the nation to a great extent is dependent upon the quality of justice being delivered by the judiciary.

However, the judicial system is being paralyzed due to the overburdened Courts. The Courts are falling short of delivering a speedy and efficacious remedy due to the high pendency of the cases, compromising the quality of justice that needs to be served in environmental law cases. Delays in delivering proper redressal in environmental law cases have a significant adverse impact on society as well as the development of the nation. In the words of Justice A.H. Benjamin of Brazil- *“Environmental conflicts require quick action or response, which is incompatible with the slow pace of the Court system that, due to its bureaucracy and technical rituals, eventually becomes an obstacle to effective protection of the environment and economic progress.”*

According to EJ Atlas,<sup>5</sup> India is a leading nation when it comes to environmental disputes. There are 347 environmental disputes documented in India. In India, maximum disputes are a result of water management which includes dams and hydropower projects.<sup>6</sup> Indian Courts have more than 4.7 crores of pending cases<sup>7</sup> out of which more than 50,000 are related to environmental litigation in 2019. In the Apex Court and NGT, the number of pending was around 110 and 3573 respectively.<sup>8</sup> This is an alarming figure for the Indian judiciary. The number of pending cases is disproportionate to the number of judges.

The Apex Court has raised concerns about the aforementioned problem. Justice Dr. D.Y. Chandrachud in the case of *Bengaluru Development Authority v. Sudhakar Hegde*<sup>9</sup> observed:

*“Courts today are faced with increasing environmental litigation. A development project that was conceptualized as early as in the year 2005 has surfaced before this Court over 15 years later.....the period that has led up to the present litigation has involved a myriad of decisions and processes, each contributing to the delay of a project that was outlined to subserve a salient development policy of decongesting the city.....it is not only the environment that suffers a serious setback, but also the development of the nation.”*

Further, Professor Charles E Corker of the University of Washington School of Law said in a speech titled *“Litigating the Environment – are we overdoing it?”*<sup>10</sup>:

*“My answer is yes. We are overdoing our litigation of the environment. I do not mean that there are necessarily too many lawsuits being filed on environmental issues, and that we should somehow cut back – I would not know how, in any case – the number of those suits by ten percent, twenty percent, or fifty*

<sup>5</sup>ENVIRONMENTAL JUSTICE, <http://ejatlas.org/country/india>, last visited on 21 April 2023.

<sup>6</sup>*Id*

<sup>7</sup> MINISTRY OF LAW AND JUSTICE, <http://pib.gov.in/PressReleasePage.aspx?PRID=1786270>, last visited on 21 April 2023.

<sup>8</sup>Supra note 5

<sup>9</sup>*Bengaluru Development Authority v. Sudhakar Hedge*, (2020) 15 SCC 63

<sup>10</sup>Speech to the Thirteenth Annual Meeting of the Interstate Conference on Water Problems, Portland, Oregon delivered on 29 October 1970.

*percent. I do mean that a disproportionately large share of attention, effort and environmental concern is being focused on lawsuits. Lawsuits cannot accomplish, by themselves, solutions to the most pressing of our environmental problems. As a result, we are in some danger of leaving the most pressing environmental problems unsolved – or even made worse – because the commotion of litigation has persuaded us that something has been accomplished.”*

This raises the need for an alternative dispute resolution mechanism that is apt for the present situation.

## **SCOPE OF MEDIATION IN ENVIRONMENTAL DISPUTE**

Mediation is a form of alternative dispute resolution mechanism, wherein, both the parties to the dispute work together with the mediator, the third person, mutually appointed by the parties to the dispute and is generally neutral to the subject matter of the dispute, to reach an amicable solution, beneficial for both the parties having seat in the mediation. The process is voluntary in nature and has a ‘party-centric’ approach. Here, parties are the ultimate decision-makers of their disputes. They are at the liberty to decide the outcome of the session. However, the role of the mediator is restricted only to facilitating the process of mediation and does not reserve any power to impose a decision or order on the parties to the dispute. There always remains a ‘win-win’ situation for the parties, unlike litigation.

Mediation guarantees remedy for the subject matter in dispute in a time-bound manner, without causing a delay in the procedure of delivering justice. This feature of efficiency and effectiveness enhances the quality of the justice system by speedily disposing of the cases, satisfying both parties to the dispute. The procedure ensures the highest degree of disputant satisfaction. Mediation act as a helping hand to the overburdened Courts of justice to resolve the problem of the pendency of the cases. A wide range of nature of disputes can be resolved through mediation at the preliminary stage of conflict. It includes civil, corporate, commercial, family, employment and service, consumers, environment and planning, natural resources, and state-disagreements matters.

These unique features of mediation have attracted various corporates, legislatures, courts, tribunals, and other judicial bodies to adopt this procedure for settling down disputes. Justice D.Y. Chandrachud, in one of his speeches, addressing the issue of overburdened courts stated: *“As of today, 71,000 cases are pending before the Supreme Court. In view of these numbers, the dispute resolution mechanism like mediation is an important tool in increasing access to justice by providing redress and settlement of disputes in a non-adversarial manner, free from the formalistic procedural practices of the law.”*<sup>11</sup>

Environmental Mediation is a procedure for obtaining the time-bound redressal in matters concerning environmental disputes, wherein, all the parties and stakeholders to the dispute, with the assistance of the mediator i.e., the external person appointed by the consent of all the parties, attempt to settle down the dispute in an amicable manner, striking the balance between the interest of both the sides to the dispute. Amy defines Environmental Mediation as, *“an ad-hoc policymaking process in which representatives from environmental groups and business groups sit together with government officials and a neutral mediator to negotiate as a set of binding policies to resolve a particular environmental dispute.”*<sup>12</sup>

Environmental disputes are varied and complex in nature, involving the interest of various stakeholders such as the government, organizations, private individuals, corporate houses, the community, and the general public at large. There has always been a tussle between the government and the corporate houses,

<sup>11</sup>Courts extremely burdened, mediation important tool to tackle case pendency: Justice Chandrachud, Indian Express, August 22, 2022.

<sup>12</sup> Ashutosh Mishra, Prakash Tripathi, *Mediation in Environmental Disputes: An Indian Perspective*, November 2022.

as the interests of both parties are contrary in nature. Usually, government agencies aim at protecting the environment, in the capacity of guardian of the general public, whereas, corporate focuses on the development of the economy. Most of the time, it has been witnessed that the dispute creates a deadlock situation, which ultimately results in hampering the growth of society. Long pending litigation cases in the Court make the situation worse. Resolution of these disputes is of crucial importance to achieving the objective of sustainable development, by bridging the gap between ecological and economic development. Environmental disputes are entitled to be given a speedy redressal as it impacts society at large. One must remember that economy and ecology, both are the two wheels of the chariot of the progressive society. Society cannot progress and flourish by sacrificing either of them.

Several other jurisdictions across the world have incorporated the mechanism of mediation to resolve environmental disputes within their territory. Implementation of this mechanism in light of the international treaties will help to improve and enhance the quality of justice which needs to be served in cases of environmental disputes. Several countries like the USA, Canada, Japan, Switzerland, Austria, Australia, Denmark, Sweden, Netherlands, Italy, Great Britain, and Germany have successfully applied mediation as the ADR mechanism for resolving disputes arising out of environmental disputes. The same has been represented in a tabular format herein below:

|                      |   |
|----------------------|---|
| <p><b>USA</b></p>    | <p>In the U.S.A. the initiation of the environmental dispute began when Gerald W. Cormick and Jane E. McCarthy carried out a mediation process to settle a long-standing dispute about the construction of a dam on Snoqualmie River. Since the beginning of 1980s the mediation was institutionalized in the U.S., due to which various private and state mediation institutions were set up. Various environmental organizations such as WWF had favored this mediation.</p> <p>At present, there are no governing or regulatory bodies specifically for mediation. Associations such as American Arbitration Association (AAA), Federal Mediation and Conciliation Service, and the Civil Mediation Council are professional bodies that provide mediation services for disputes redressal including environmental disputes.</p> |
| <p><b>Canada</b></p> | <p>In Canada, the ADR process including mediation was given due importance during the 1980s when environmental conflicts were becoming difficult to be resolved through traditional ways. As the mediation mechanism developed twenty private and public mediation institutions were set up that provided services to resolve environmental disputes.</p> <p>Currently, the Alternative Dispute Resolution Institute of Canada (ADRIC) a non-governmental set the benchmark for ADR practices and training for mediators in Canada.<sup>13</sup></p>  |

<sup>13</sup>Kompas Professional, *Mediation Certification in Canada: What Are the Rules & Steps?*, visited on 21 April 2022, [https://blog.herzing.ca/kompass-online-training/mediation-certification-in-canada-what-steps-are-involved#:~:text=This%20organization%20is%20called%20the,Institute%20of%20Canada%20\(ADRIC\).](https://blog.herzing.ca/kompass-online-training/mediation-certification-in-canada-what-steps-are-involved#:~:text=This%20organization%20is%20called%20the,Institute%20of%20Canada%20(ADRIC).)



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|--------------|--|
| <b>Japan</b> | <p>To resolve the environmental dispute this country enacted the "<i>Law on Resolving Disputes Associated with Environmental Damage</i>" in 1960. The officers of members of the committee under the law were assigned as mediators.<sup>14</sup></p> <p>Now, Japan has a robust mediation process for environmental conflicts. In case of an environmental issue, any aggrieved person can file a complaint with the local government or file a case with the court. If the matter is of grave nature it is forwarded to Environmental Dispute Coordination Commission (EDCC). EDCC is a commission body that provides various ADR services including mediation.<sup>15</sup></p> |
|--------------|--|

Mediation in environmental disputes has also evolved through various cases. One of the most significant environmental disputes which were mediated was the *Snoqualmie River Conflict*. This case had an important implication on how mediation in environmental disputes has evolved. The area of Snoqualmie River Valley in Seattle is prone to heavy rain. To protect themselves from access to rainfall the residents and farmers requested a dam to be constructed on the river. Mediators were appointed to decide whether a dam can be built on the river. After several rounds of meetings, the parties tried to understand the point of view each other. In the end, residents gave up their demand for full protection from floods, the state got the right over hydropower plants and the environmentalists got some concession over the use of the land. The original conflict was regarding the construction of a small dam however, with the help of mediation parties were able to bargain which helped change the shape of the conflict in a different direction. The case represents the advantage of mediation over litigation in terms of the time and cost involved.

Another controversy that was addressed by mediation in the U.S. was the *Killington-Pico Ski Resorts* mediation case. The conflict involved issues concerning the use of the long trail, water use, and the general impact on the environment from the merger of Killington and Pico ski areas. The parties involved in the mediation process were National Park Service, Killington, and Pico Ski along with various conservation groups. The Federal Mediation and Conciliation Service (FMCS) of the U.S. was appointed as the mediator for the first time in an environmental conflict. The objective of the mediation was to explore alternatives to protect the environment and expand the ski area with the construction of ski lifts. Although initially there was hesitation from part of the environmentalist group the mediation was conducted smoothly. In the end, the parties agreed on the expansion of the ski area and the need for environmental protection. It was a successful mediation as parties had the autonomy to appoint the mediator.

There are around 150 environmental treaties. All those treaties have their own dispute redressal mechanism. Although the treaties are not mandatory in nature, the reference for mediation can be made. The treaties either make mediation an ‘option’ or a ‘step’. A brief of such treaties is as follows<sup>16</sup>:

<sup>14</sup> Weidner, Helmut, *Alternative dispute resolution in environmental conflicts - promises, problems, practical experience*, ISBN 3-89404-179-X, Edition Sigma, Berlin, pp. 11-55.

<sup>15</sup> An empirical evaluation of environmental Alternative Dispute Resolution methods Petyo Bonev, Shigeru Matsumoto August 2022 Discussion Paper no. 2022-08

<sup>16</sup> Christina Simokat, *Environmental Mediation Clauses in International Legal Mechanisms*, Mediate.com visited on 21 April 2023, <https://mediate.com/environmental-mediation-clauses-in-international-legal-mechanisms/>

| Names of Treaties  | Number of countries that signed the treaties | Role of Mediation to resolve disputes                         |
|--|--|---|
| The Antarctic Treaty, 1959   | 12   | Mediation is an option  |
| Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992                      | 7  | Mediation can be taken up as a step                           |
| Convention on the Conservation of Antarctic Marine Living Resources, 1982                                | 26 members and 11 acceding states            | Mediation is an option  |
| African Convention on the Conservation of Nature and Natural Resources, 1968                             | 38   | Mediation can be taken up as a step                           |
| The Vienna Convention for the Protection of the Ozone Layer, 1985  | 198  | Mediation can be taken up as a step                           |
| Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1986 | 11   | Mediation can be taken up as a step                           |
| United Nations Conference on Environment and Development: Agenda 21, 1992                                | 178  | Support mediation by providing training in mediation practice |
| Convention on Biodiversity, 1993   | 196  | Mediation can be taken up as a step                           |

India is now promoting the era of mediation. In the words of CJI N.V. Ramana, *“Active effort must be taken by courts to make negotiations and mediation mandatory as part of case management. With adequate cooperation from all stakeholders, ADR can emerge as a tool of social justice in the country. The concept of ADR, through Lok Adalats, Gram Nyayalayas, mediation and arbitration centres, has the potential to transform the legal landscape of India by providing millions of people a platform to settle their grievances.”* He further added: *“Conflicts have a human face. One must have the foresight to look beyond the conflict. A dispute should not spoil your relationship. Prolonged litigation can drain resources and cause animosity, and conflicts can be resolved in a neutral environment, where both parties are in a win-win situation. After all, life is a balancing act.”*

India in the 1960s took the recourse of mediation for resolving the Indus Water River dispute between India and Pakistan. The conflict raised over the distribution of water between India and Pakistan. After the partition India being the riparian region cut the flow of water to Pakistan. This threatened the agriculture of Pakistan as it was highly dependent on the river water for irrigation. In response, Pakistan approached the international community.

After a decade the World Bank took the initiative to assist both India and Pakistan by becoming their “mediator.” The role of the World Bank was limited to being a “facilitator” in the dispute. The major responsibilities of the World Bank were a) appointing a neutral expert on request of any parties; b) reference to the Court of Arbitration in case of failure of the mediation process; c) acting as a facilitator to ensure the protection of basic human rights. As an outcome of the mediation process, an Indus Water Treaty was signed by both countries which marked the end of a long-standing dispute. In order to implement the terms of the said treaty both countries cooperated and compromised. Rivers in the western part were made available to Pakistan with unrestricted use and India got the right to use rivers in the eastern part.

Ministry of Law and Justice introduced the Mediation Bill, 2021 with the objective to promote and facilitate mediation for the resolution of disputes. The Bill provides the procedure to conduct the mediation proceedings<sup>17</sup> and also dictates the role of the mediator in the proceedings conducted.<sup>18</sup> Further, it provides a robust mechanism for the enforcement of mediated settlement agreements.<sup>19</sup> It also gives the power to the Court or Tribunal to refer the parties to the mediation<sup>20</sup> and grant interim relief if any exceptional circumstances exist.<sup>21</sup> The Bill suggests the establishment and incorporation of the Mediation Council for promoting domestic and international mediation in India.<sup>22</sup> Moreover, it lays down the functions and duties of the Council.<sup>23</sup>

Schedule I of the Bill expressly excludes the subject matter falling under the jurisdiction of the National Green Tribunal Act, of 2010 from the realm of mediation.<sup>24</sup> However, Central Government is being empowered to amend the First Schedule by notification, if it is satisfied that same is necessary or expedient to do.<sup>25</sup> The Bill further provides the time limit for the completion of mediation proceedings. It states that the proceeding shall be completed within 180 days from the date of the first appearance before the mediator.<sup>26</sup> Further, time can be extended by the consent of the parties to the dispute, but the same cannot exceed the period of 180 days.<sup>27</sup> The Bill provides a time-bound mechanism to dispose of the cases.

In the words of CJI N.V. Ramana, “Active effort must be taken by courts to make negotiations and mediation mandatory as part of case management. With adequate cooperation from all stakeholders, ADR can emerge as a tool of social justice in the country. The concept of ADR, through Lok Adalats, Gram Nyayalayas, mediation and arbitration centres, has the potential to transform the legal landscape of India by providing millions of people a platform to settle their grievances.” He further added: “Conflicts have a human face. One must have the foresight to look beyond the conflict. A dispute should not spoil your relationship. Prolonged litigation can drain resources and cause animosity, and conflicts can be resolved in a neutral environment, where both parties are in a win-win situation. After all, life is a balancing act.”

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<sup>17</sup> Mediation Bill 2021, § 16

<sup>18</sup> Mediation Bill 2021, § 18

<sup>19</sup> Mediation Bill 2021, § 28

<sup>20</sup> Mediation Bill 2021, § 9

<sup>21</sup> Mediation Bill 2021, § 8

<sup>22</sup> Mediation Bill 2021, § 33

<sup>23</sup> Mediation Bill 2021, § 40

<sup>24</sup> Mediation Bill 2021, Schedule I

<sup>25</sup> Mediation Bill 2021, § 7

<sup>26</sup> Mediation Bill 2021, § 21(1)

<sup>27</sup> Mediation Bill 2021, § 21(2)



## CONCLUSION AND SUGGESTION

Mediation has paved the way for quick and efficient redressal of disputes without compromising the quality of justice which needs to be rendered in case of environmental disputes. India is now putting its best foot forward to implement mediation in their legal system with the objective of speedily disposing of cases in an efficient and timely manner. However, environmental disputes are still kept outside the purview of mediation. Environmental mediation has been successfully implemented in foreign jurisdictions. If the procedure for mediation is applied to resolve environmental disputes, it will assist the overburdened Courts, as disputes can be settled within a stipulated period of time.

Even if, mediation is made mandatory, the environmental law principles such as ‘the principle of sustainable development’, ‘precautionary principle’, ‘polluter pay principle’, ‘public trust doctrine’, and ‘intergenerational equity’ will not be violated in any manner. In cases of environmental disputes, time is of the essence as development is associated with the same. Delays in resolving environmental cases will gravely hamper the development of society at large. Considering both aspects of a healthy society, environmental mediation should be mandated. For the enforcement and implementation of the mediation mechanism, we need concrete legislation governing the mediation. India is still struggling to introduce a robust framework for regulating mediation, unlike arbitration and conciliation.

In India mediation has not yet evolved for resolving environmental disputes as compared to that of other foreign jurisdictions. One instance where mediation has grossly failed is in resolving inter-state river water disputes. The Cauvery water dispute was one such dispute where mediation failed to resolve the dispute between the three states of India. This was due to the absence of proper law to oversee mediation in India.

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