International Journal of Advance Research, IJOAR .org
Volume 4, Issue 11, November 2016, Online: ISSN 2320-9151

# DISPUTE MITIGATION AND RESOLUTION MECHANISMS: A BOON OR BANE FOR CORPORATE HEALTH!

DIVYA SOOD

*Author Details: Legal Consultant, Uttarakhand Electricity Regulatory Commission, Dehradun, Corporate and Energy Lawyer/Advisor, UPES, Dehradun, Adjunct Lecturer, IMS Unison, Dehradun, LLM Energy Law Specialisation (Gold Medalist). INDIA, PH-+91 9557560367.*

*E-mail: divyasood6@gmail.com*

ABSTRACT

The following paper studies whether mediation is a viable option for mitigating disputes arising out of the actions of oil and mining industries. The paper focuses on the viewpoints of both the investors and the affected communities (environment and indigenous people). It looks into both the remedial and preventive forms of mediation that can be implemented in these situations. The paper further expounds on a hybrid form of ADR known as med-arb and concludes by analysing the best possible methods of conflict resolution given the circumstances. The paper does not take into account the benefits of mediation to this industry in other matters. Also, events like the Iraq war, believed by many to have been an 'oil-war' are not taken into consideration.

KeyWords
Arbitration, Conciliation, Hybrid ADR, Investor Psychology, Jurisdiction as an Issue, Mediation, Oil and Mining Industry, Resource Conflicts.

# I. Introduction-

Jan Eliasson, United Nations Deputy Secretary-General states,

'Recent years have seen growing recognition of land and resource disputes as drivers of conflict and violence. In parallel, peace negotiations have increasingly addressed these issues directly. Indeed, all major peace agreements since 2005 include provisions on land and natural resources'. [1]

The aim of sustainable development is a difficult one, especially with our dependence upon non-renewable sources of energy. According to a mediation guide published by the UNEP[2], natural resources such as land, water, timber, minerals, metals and oil are vitally important sources of livelihoods, income and influence for countries and communities around the globe. When natural resources are poorly managed or inequitably shared, however, or when business operations are implemented without due consideration for context and communities, they can contribute to tensions that can escalate into violent conflict, or feed into and exacerbate pre-existing conflict dynamics.

Community damage caused by oil and mining industries-

The amazon rainforests provide a suitable case study to illustrate this point, where oil exploration in the regions has caused massive deforestation, dangerous toxins being pumped into the environment and violence.

The money at stake for both oil companies and governments is so vast that human rights and environmental destruction are merely regrettable necessities en route to enormous profits. Yet the indigenous peoples residing on these oil rich lands rarely reap the benefits. Oil extraction has contaminated what were previously some of the most bio diverse areas in the Amazon Basin and has been used as an excuse to push

[1] --'Natural Resources and Conflict a Guide for Mediation Practitioners' (First published in February 2015 by the United Nations Department of Political Affairs and United Nations Environment Programme) <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/2015Feb_UNDPA_UNEP_NRC_Mediation_full.pdf> accessed 19 February 2016.

[2] ibid

Indigenous communities off of their ancestral lands, made thousands gravely ill and contributed social unrest increased violence throughout the Amazon Basin.[3]

Prospects of investors in oil and mining industries-

While these concerns exist, oil producer and mining companies are desperately trying to conserve cash. Capital investment is being cut to the bone. This will sow the seeds of the next upturn, because lower spending today means lower production tomorrow. The question is, how many of today's dividends will still be standing by the time tomorrow comes?[4]

Conflicts between company interests and indigenous communities-

There is also growing awareness regarding the consequences of such industries to the environment as well as indigenous people.

In March 23, 2003, residents of the Esquel region declared a resounding "no" to gold mining. Around 80 percent of the citizens of Esquel voted against Meridian Gold's proposal to dig an open-pit gold mine less than 7 kilometers from their town.[5]

Failures of existing organizations to tackle the issue-

A March 2003 independent evaluation of that assessment revealed the inadequacies of the EIA (Environmental Impact Agency). To quote Dr. Robert Moran,

'Meridian's proposal "[...] is the classic example, which is all too common in Latin America, where an EIA describes short-term benefits and solutions, but fails to even begin to consider long-term consequences'.[6]

Such revelations have brought to light how the EIA, and similar bodies do not necessarily present the correct picture.

[3] -- 'Effects-Oil-Drilling-0 | Rainforest Foundation US' (*Rainforestfoundation.org*, 2016) <http://www.rainforestfoundation.org/effects-oil-drilling-0/> accessed 25 February 2016.

[4] --'The Outlook For Oil & Gas Producers And Mining Companies' (*Hargreaves Lansdown*, 2016) <http://www.hl.co.uk/news/articles/the-outlook-for-mining-oil-and-gas-investors> accessed 26 March 2016.

[5] 'EARTHWORKS | Esquel' (*Earthworksaction.org*, 2016) https://www.earthworksaction.org/voices/detail/esquel#.Vx1TGjZSiZw accessed 4 April 2016.

[6] ibid

Corporate Social Responsibility-

Corporate Social Responsibility (CSR) refers to voluntary actions undertaken by companies to either improve the living conditions (economic, social, environmental) of local communities or to reduce the negative impacts of their projects. By definition, voluntary actions are those that go beyond legal obligations, contracts, and license agreements. CSR is a means of ensuring that companies fulfill their social responsibilities. They usually invest in infrastructure (potable water, electricity, schools, roads, hospitals, hospital equipment, drainage repairs, etc.), building social capital (providing high-school and university education, providing information on HIV prevention, workshops on gender issues, information on family planning, improving hygiene, etc.), and building human capital (training local people to be employed by the mining enterprise or to provide outsourced services, promote and provide skills on micro business, aquaculture, crop cultivation, animal rearing, textile production, etc.)[7] Most CSR projects focus and incorporate three mains areas: the environment, social, and economic factors

## II. Mediation-

Mediation is a practice under which, in a conflict, the services of a third party are utilized to reduce the differences or to seek a solution. Mediation differs from "good offices" in that the mediator usually takes more initiative in proposing terms of settlement. It differs from arbitration in that the opposing parties are not bound by prior agreement to accept the suggestions made.[8]

Mediation is at the core of international relations. Under the Charter of the United Nations, especially, members assumed a much larger obligation than heretofore to settle their disputes in a peaceful manner. Article 2, paragraph 3, states inter alia that all members "shall settle their international disputes by peaceful means." Under Article 33 the parties to any dispute likely to endanger the maintenance of international peace and security are enjoined first to "seek a solution by negotiation,

[7] 'Corporate Social Responsibility & Mining – Miningfacts.Org' (*Miningfacts.org*, 2016) <http://www.miningfacts.org/communities/what-is-corporate-social-responsibility/#sthash.BzQEruxd.dpuf> accessed 26 March 2016.

[8] <http://academic.eb.com.ezphost.dur.ac.uk/EBchecked/topic/372184/ >mediation !!!

inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice." Should they fail to settle it by these means, they are called upon under Article 37 to refer it to the Security Council. The Council, or the General Assembly if the dispute is referred to it, then undertakes the form of settlement that it believes suited to the particular case.[9]

Mediation- as a remedial measure

In many countries there are standard procedures for mediating industrial disputes. In labor disputes, if the conflict does not fall within a labor-management agreement, or if it exceeds the capacity of such machinery to settle, the government usually provides a mediator.[10]

The United Nations Guidance for Effective Mediation was issued as an annex to the report of the Secretary-General on strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution.[11]The resolution, adopted by consensus, recognized the increased use of mediation, reflected on current challenges facing the international community in such mediation efforts, and called on key actors to develop their mediation capacities.[12]

The Guidance identified a number of key fundamentals that should be considered in mediation processes:

- preparedness;
- consent;
- impartiality;
- inclusivity;
- national ownership;
- international law and normative frameworks;

[9]<http://www.un.org/en/sections/un-charter/chapter-vi/>

[10]<http://academic.eb.com.ezphost.dur.ac.uk/EBchecked/topic/326911/> accessed 9 April 2016 labour-law!!!

[11]Ibid art. 66, 811.

[12]<http://peacemaker.un.org/sites/peacemaker.un.org/files/GARes_StrengtheningTheRoleOfMediation_ARES65283(english)_1.pdf>accessed 18 March 2016 !!!

- coherence; coordination and complementarity of the mediation effort; and quality peace agreements[13]

The guidance report is prepared by Mediation Support Unit (MSU), based in the Policy and Mediation Division of the Department of Political Affairs. MSU is a service provider that assists the mediation and facilitation initiatives of the United Nations, Member States, regional/ subregional organizations and other relevant partners. It is also the institutional repository of mediation knowledge, lessons learned and best practices.[14]

Mediating Natural Resource Conflicts is a collaborative research project undertaken by the Policy and Mediation Division of the United Nations Department of Political Affairs (DPA/PMD) and the Environmental Cooperation for Peacebuilding initiative of the United Nations Environment Programme (UNEP). It draws on the field experiences of mediators and mediation experts, specifically those with natural resource expertise. It also features lessons learned from UNEP's work on environmental diplomacy in different conflict-affected countries, with a particular focus on how to use impartial technical knowledge to equalize stakeholder information in a mediation process. [15]

The guide is pertinent to this study as it takes into account the interests of all related parties and shows how mediation can play a critical role in resolving conflicts over natural resources, preventing the outbreak of violence, and enhancing collaboration between adversaries.

## III. Mediation- as a Preventive Measure.

As mentioned, large-scale oil, gas, and mining projects threaten to generate adverse impacts for the local communities and indigenous peoples who inhabit these areas. For many project-affected communities, Free, Prior, and Informed Consent (FPIC)

[13]'UN Guidance For Effective Mediation | UN Peacemaker' (*Peacemaker.un.org*) <http://peacemaker.un.org/guidance-effective-mediation> accessed 21 February 2016.

[14]'Mediation Support Overview | UN Peacemaker' (*Peacemaker.un.org*) <http://peacemaker.un.org/mediation-support> accessed 26 February 2016.

[15]<http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/2015Feb_UNDPA_UNEP_NRC_Mediation_full.pdf >accessed 25 March 2016

represents a critical tool for ensuring that they have a say in whether and how extractive industry projects move forward

Augustine Niber, Executive Director for the Center for Public Interest Law (CEPIL) in Ghana states,

'FPIC as the principle that indigenous peoples and local communities must be adequately informed about projects that affect their lands in a timely manner, free of coercion and manipulation, and should be given the opportunity to approve or reject a project prior to the commencement of all activities. For indigenous peoples, FPIC is established as a right under international law, reflecting their standing as distinct, self-determining peoples with collective rights. However, FPIC is emerging more broadly as a principle of best practice for sustainable development, used to reduce conflict and increase the legitimacy of the project in the eyes of all stakeholders.' [16]

However, studies conducted by Oxfam in the Ghana region revealed that a majority of community members indicate that they often participated in decisions related to community development, but rarely in discussions or decisions around mining. Those decisions were generally reserved for community chiefs and opinion leaders and have typically been related to corporate social responsibility projects and replacing destroyed properties rather than free prior and informed consent of the communities for the projects themselves.[17]

In another research, Oxfam in Cambodia conducted research to gather perspectives from a range of stakeholders on how Canadian mining junior Angkor Gold applies its stated policy commitments in practice and to better understand the challenges and opportunities related to FPIC implementation. The research revealed that the company has not yet achieved FPIC from project-affected indigenous communities law.[18] This

[16]'More Consultation, Less Exploitation: The Extractive Industries And Community Consent | Oxfam GB | Policy & Practice' (*Policy & Practice*) <http://policy-practice.oxfam.org.uk/blog/2015/09/more-consultation-less-exploitation-extractives-and-community-consent> accessed 2 April 2016.

[17]Emily Greenspan, 'Social Conflict, Extractive Industries, National Human Rights Institutions And Most Importantly...Communities | Oxfam America The Politics Of Poverty Blog' (*The Politics of Poverty*, 2013) <http://politicsofpoverty.oxfamamerica.org/2013/04/social-conflict-extractive-industries-national-human-rights-institutions-and-most-importantly-communities/> accessed 22 March 2016.

[18] 'Current Situation of Mining Industry in Cambodia', General Department of Mineral Resources

was the case despite the company's stated commitment and the recognition of indigenous peoples' land and forestry rights in Cambodian law.

## IV. Has mediation been effective so far-

Unfortunately, governments and businesses alike have failed to make the guiding principles meaningful. In the meantime, corporate lobbyists have done everything possible to ensure the principles remain entirely voluntary. In general, civil society groups support the negotiation of a treaty while business is, on the whole, against.[19]

'Confront any company with evidence it has breached the UN principles and you can almost see the bemusement. They are not binding, after all. Nor are the widely referenced but equally poorly implemented OECD guidelines for multinational enterprises'.[20]

It is evident that mediation, despite its benefits, is not favourable to the communities damaged by the actions of companies. Given that, it must be analyzed why investors in these industries would push for such a method of dispute resolution.

## V. Why investors want mediation-

An investor is a person who allocates capital with the expectation of a future financial return.[21]The aim of the investor is to maximize profit on his share i.e get the highest dividend possible. As mentioned, investors are facing a difficult time in these industries. In 2015, Mining and exploration investment fell to its second largest year-over-year decline since 1948, the U.S. Bureau of Economic Analysis estimated.

---

(2013); Angkor Gold 2013 CSR Report, <http://www.angkorgold.ca/wp-content/uploads/2014/06/SCD-Report-2013_WEB-final.pdf.>accessed 15 March 2016 .

[19]Salil Shetty, 'Corporations Have Rights. Now We Need A Global Treaty On Their Responsibilities' (*the Guardian*, 2015) <http://www.theguardian.com/global-development-professionals-network/2015/jan/21/corporations-abuse-rights-international-law> accessed 30 March 2016.

[20] 'Guidelines For Multinational Enterprises - OECD' (*Oecd.org*, 2016) <http://www.oecd.org/corporate/mne/> accessed 23 March 2016.

[21] Tom C.W. Lin, (2015). 'Reasonable Investors'.*Boston University Law Review* (95) (461) 466

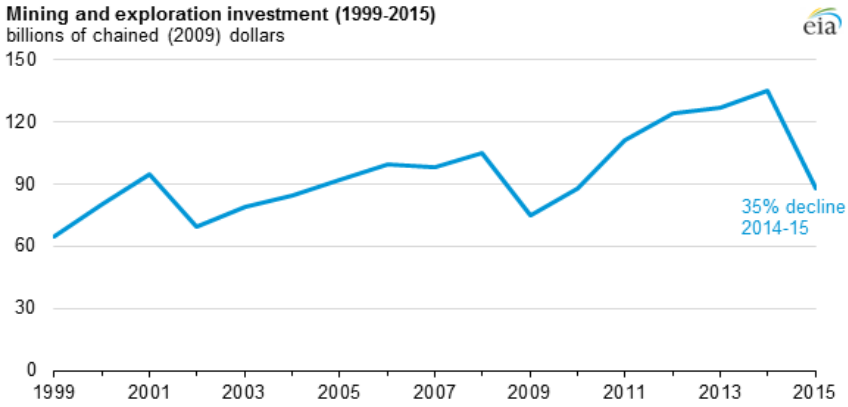


PHOTO: U.S. ENERGY INFORMATION ADMINISTRATION

This is only an indicative example that shows the financial problems being faced by the oil and mining industries.

U.S. coal companies also slashed investments last year as plunging prices, weakening demand and ballooning debt loads forced a handful of companies including Arch Coal and Alpha Natural Resources to file for bankruptcy protection.[22] Shares of Peabody Energy Corp., the world's largest private-sector coal company, lost more than 98 percent of their value since February 2015.[23]

Given these facts, it is obvious that investors are becoming wary of these industries.

Successful legal suits that financially cripple the industry by forcing them to remedy their wrongs have accompanied this, further reducing investment.

## VI. Claims arising out of law- suits-

A very good example of this factor is presented on following the activities of Leigh

[22]'Arch Coal (NYSE:ACI) Files For Bankruptcy As Plunging Prices, Weak Demand Batter US Coal Sector' (*International Business Times*, 2016) <http://www.ibtimes.com/arch-coal-nyseaci-files-bankruptcy-plunging-prices-weak-demand-batter-us-coal-sector-2259233> accessed 11 March 2016.

[23]'Oil Price Crash: US Mining And Exploration Investment Falls 35% As Energy Companies Curb Spending' (*International Business Times*, 2016) <http://www.ibtimes.com/oil-price-crash-us-mining-exploration-investment-falls-35-energy-companies-curb-2302053> accessed 26 March 2016.

Day; a law firm based in London

Started by former chairman of Greenpeace UK, Martyn Day, the firm now has 10 teams working in Sierra Leone, Nigeria, Peru, Kenya and other countries. The firm invests millions in a case and takes up to 50 lawyers and paralegals to a country to collect witness statements. Leigh Day has won around £150m for some of the poorest people on earth from some of the world's richest companies. In the past decade, they have challenged Shell, Trafigura, BP, Xstrata, Anglo American and Unilever, as well as the British and Japanese governments. Over this period, they have carved out a reputation for being the scourge of the corporates and a fierce upholder of human rights[24]. The same firm recently pulled off a legal coup in the form of a settlement with Shell Nigeria for £55m. Leigh Day represented 15,600 Ogoni farmers and fisherman whose livelihoods were shattered after two large oil leaks in 2008 and 2009. The original offer from Shell, back in 2011, was £4,000 for the whole community.[25]

The difference between the proposed amount of 4000£ as opposed to £55m is staggering. It shows how industries will go to any length in order to avoid responsibility for their actions.

To quote Martyn Day –

"We work in the dark, inhospitable corners of the world where miners, oil and mineral companies and governments can often get away with what they could not if they were working in Britain," says Day. "The multinationals recognise now that if we take them on, we do so seriously. We put the spotlight on them because they should be treating people in places like Bodo in Nigeria in the same way as they would people in Birmingham."[26]

[24]John Vidal, 'Lawyers Leigh Day: Troublemakers Who Are A Thorn In The Side Of Multinationals' (*the Guardian*, 2015) <http://www.theguardian.com/global-development/2015/aug/02/leigh-day-troublemaker-fight-dispossessed-lawyers> accessed 19 March 2016.

[25]Bibi Zee, 'Global Injustices: Getting Access To The Law Is Still Impossible For Most' (*the Guardian*, 2015) <http://www.theguardian.com/global-development-professionals-network/2015/jan/21/global-injustices-getting-access-to-the-law-is-still-impossible-for-most> accessed 26 March 2016.

[26]ibid (n 24)

## VII. Jurisdiction-

A three-day hearing in the High Court in London started on Tuesday 12 April, 2016 on behalf of 1826 Zambian villagers who are taking legal action against UK based mining giant Vedanta Resources Plc and its Zambian subsidiary Konkola Copper Mines (KCM). Leigh Day issued proceedings on behalf of the villagers against Vedanta and KCM at the High Court in London in July 2015.[27]
The current hearing was regarding the issue of jurisdiction.
Lawyers for the mining companies state that the claims should be tried in Zambia because the claimants are Zambian and the damage occurred in Zambia.

The Claimants however, subsistence farmers who are among the poorest inhabitants of Zambia, argue that the claims should be tried by the English courts. This is because UK-based Vedanta should bear equal legal responsibility, given its control over its mining subsidiary and alleged knowledge of the pollution.

The Claimants also bring to light a very real risk that they will not achieve justice if their claims are not tried in England, illustrated by the fact that they have received no assistance in Zambia during the 12 years they have been allegedly suffering from the pollution. The problem of jurisdiction in such cases is very pertinent as it is generally used by industries to shirk away from their responsibility.

## VIII. U.K v U.S.A in relation to recent cases-

According to Day the UK's justice system is "very good for bringing justice to people in the developing world for the operations of multinationals in that country". He says that the unified judicial system means that cases move forward quickly. "Our judges

[27] https://www.leighday.co.uk/News/News-2016/April-2016/Vedanta-Resources-challenge-jurisdiction-of-Zambia accessed 20 March 2016

have been excellent in saying 'cut to the chase'."[28]

But in other parts of the world holding multinational companies accountable for their actions is extraordinarily difficult.

The U.S. Supreme Court insulated multinational corporations from at least some lawsuits over atrocities overseas, scaling back a favorite legal tool of human-rights activists. The justices threw out a suit accusing two foreign-based units of Royal Dutch Shell Plc of facilitating torture and executions in Nigeria. The majority said the 1789 Alien Tort Statute generally doesn't apply to conduct beyond U.S. borders.[29]

In the word of Chief Justice John Roberts, "all the relevant conduct took place outside the United States."

Such a ruling will help a number of companies defeat similar lawsuits. Exxon Mobil Corp., Cisco Systems Inc., Chiquita Brands International Inc., Siemens AG, Daimler AG and Rio Tinto Group are all fighting Alien Tort Statute claims.[30]

In 2011, as part of the larger Civil Society Legal Strategy to Promote Environmental Compliance, Transparency and Accountability in Mining, the Centre for Environmental Rights commissioned a review to compile a comprehensive inventory of litigation about mining and prospecting rights decisions and to review such decisions in order to ascertain trends, successes, failures, lessons learnt, and where amicus curiae and other legal interventions may be effective.[31] Despite all such attempts however, no change has been seen and neither has any practical solution emerged for the problems referred to.

[28] Bibi Zee, 'Global Injustices: Getting Access To The Law Is Still Impossible For Most' (*the Guardian*, 2015) <http://www.theguardian.com/global-development-professionals-network/2015/jan/21/global-injustices-getting-access-to-the-law-is-still-impossible-for-most> accessed 5 April 2016.

[29] *Kiobel v. Shell Petroleum*, (10) 1491

[30] 'Companies Shielded As U.S. Court Cuts Human-Rights Suits' (*Bloomberg.com*, 2013) <http://www.bloomberg.com/news/articles/2013-04-17/companies-get-shield-as-top-u-s-court-curbs-human-rights-suits> accessed 8 April 2016.

[31] 'Mining Case Law Review' (*Centre for Environmental Rights*, 2015) <http://cer.org.za/virtual-library/judgements/case-law-reviews/mining-case-law-review> accessed 28 March 2016.

## IX. Mediation v Legislation with emphasis on confidentiality-

Given the above information it seems unlikely that investors would want such a policy for the benefit of the 'communities damaged' by the actions of the industries they invested in. Another major criticism revolves around the use the confidentiality clause as a method to avoid publicity. Globalization has facilitated an era where information is power. The advantage of legislation in this regard is that it lays down a precedent and brings to light all factors attached to a case. The same becomes ingrained as a part of daily life. The accountability also is far wider. In case of a confidential mediation agreement, the public may never find out what has happened. It is quite possible, given the opposition faced by oil and mining industries that they would wish to keep the details of the case confidential. However, this is disadvantageous to affected communities as much of their relief comes from public pressure due to an exchange of facts and information. In fact, such a system will further strengthen large industries while reducing their accountability.

Also, as has been shown, none of the processes involve the community as a whole. Even in cases of pre-emptive mediation, complete information is not provided which shows how the stronger party, i.e oil and mining industries, can easily misuse such a system. The aforementioned Oxfam reports found that the majority of community members interviewed reported that engagement by the company focused primarily on proposed community development projects—such as water pumps, tanks, upgrades to schools, etc.—rather than on decision making related to core mining operations and future plans. Most interviewees felt that they had inadequate information and feared that mining activities would continue without their consent using the protections of the government granted licenses.

## X. Advantages to community due to oil and mining industries-

Undoubtedly, industries like mining and oil lead to employment and the development of the community where such projects are established. However, there are many cases where all that remains are dilapidated structures and systems after the operation finishes. The aim should be towards building the community so that it may be self-

sustainable even after the company ceases its work i.e. the resources are depleted. Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.

According to the world bank website, in many cases, neither investment nor oil revenues have been able to guarantee economic growth or poverty reduction. Thus, the presence of major oil and gas industries has been associated with a variety of negative social and environmental outcomes. The so-called "Paradox of Plenty," where resource development fails to generate the sustainable benefits expected, is one of the most urgent challenges:

At the local level, where industry enclaves are surrounded by poor indigenous communities receiving little sustainable benefits from the development of extractive industries

At the national level, where revenues do not translate into long-term growth in human and physical capital, which forms the basis for sustained growth.[32]

The advancements in technologies and methods like fracking[33] further reduce the obvious benefits that the presence of such industry created for the indigenous community and its people.

## XI. Impartiality and enforceability-

An unbiased mediator, or board of mediators is very difficult to ensure. Apart from the fact that such disputes involve parties that are vastly different. As opposed to members of affected communities who are generally amongst the poorest and most impoverished people in the world, the oil and mining industries are controlled by the richest and most influential people. Apart from that, mediators have to grapple with a wider range of substantive issues. In contrast to the mostly ideologically based conflicts of the 1970s and 1980s, conflicts over the control of government, as well as natural and economic resources, dominate the present agenda. These disputes are

[32] --'Oil, Gas, And Mining Unit - Social And Economic Impact' (*Web.worldbank.org*, 2016) <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20220001~menuPK:463295~pagePK:148956~piPK:216618~theSitePK:336930,00.html> accessed 13 April 2016.

[33] --'What Is Fracking And Why Is It Controversial? - BBC News' (*BBC News*, 2016) <http://www.bbc.co.uk/news/uk-14432401> accessed 25 March 2016.

overlaid with ethnic polarization, socioeconomic tensions and poor governance, and are exacerbated by climate change'.[34]

Finally, even if mediation leads to a successful negotiation, it is not enforceable. Since the persons facing the negative impacts of such industries generally come from impoverished conditions, the advantage of mediation as a cheaper alternative does not exist in case of a default by the industries backed by their lobbies.

## **Part 2-**

### I. Hybrid ADR with emphasis on med-arb.

Arbitration and mediation are different processes with different purposes. The fundamental difference lies in who makes the final decision – a neutral third party or the parties themselves

It has been suggested that hybrid methods of ADR can present us with better alternatives. Med-arb is a melding of two well-established processes for conflict resolution into one hybrid process. In the truest form of med-arb, the same third-party neutral plays the role of both mediator and arbitrator

The following table provides a concise understanding of mediation, arbitration and their hybrids while pointing out their merits and de-merits. A study of the same allows for understanding the best method possible, provided such methods are used for conflict resolution between companies and damaged communities.

[34] UN Secretary General, 'Report of the Secretary General, Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution' (art. 66, para 13) 2012 United Nations, New York 811

| Process Name | Managed By | How To | Key Features & Advantages | Major Disadvantages |
|---|---|---|---|---|
| Mediation (Med) | Mediator | Parties go through a negotiating process where the parties themselves decide what the solution is. | Interest based negotiation. Parties make final decisions. Potential for transformation. Long-term satisfaction with agreements. Saves time with no arbitration. Confidential. | May not come to agreement, so time may be wasted. |
| Arbitration (Arb) | Arbitrator | Parties present their arguments to a neutral who makes the final decision for the parties. | Third party settles dispute. Due process. Guaranteed decision. Finality. Quicker than litigation. | Arbitration can be time-consuming. Costly. Potential for unsatisfied parties and resurfacing of conflict. |
| Med-Arb (Pure) | One person is both the mediator and the arbitrator | Mediation takes place and if all issues are not resolved it goes to arbitration to decide remaining issues. | Continuity of ideas via same neutral. Good chance of long-term satisfaction with agreements. Guaranteed decision. Finality. Speed of settlement. | Fear of arbitration decision pushes parties. Can be time consuming and expensive. Confidentiality issues. Coercive issues. |
| Med-Arb Diff | Mediator and | Mediation takes place and if all | Complete Separation of | Can be more time consuming |

| | | | | |
|---|---|---|---|---|
| | Arbitrator (two different people) | issues are not resolved it goes to arbitration to decide remaining issues. | processes. Confidentiality is maintained. Guaranteed decision. Finality. Speed of settlement. | and expensive compared with Med-Arb (Pure). |
| Med-Arb Diff-Recommendation | Mediator and Arbitrator (two different people) | Mediator submits a recommendation to Arbitrator on unresolved issues. | Mediation insights flow into arbitration. Guaranteed decision. | Confidentiality and power of Mediator are in question. |
| Co-Med-Arb | Mediator and Arbitrator (two different people) | Mediator and Arbitrator conduct fact-finding hearing together followed by mediation without the arbitrator. | Mediator and parties get a sense of what arbitration may look like. Facts are put out early for all to see. Guaranteed decision. | Can be time consuming and expensive as both arbitrator and mediator are paid for all time. |
| Med-Arb-Opt-Out | Mediator and possibly new Arbitrator | After normal Med-Arb mediation stage, either party can call for a new arbitrator. | Gives control to parties for better neutrality, confidentiality and feel. Fairness in neutrality. Guaranteed Decision | Extra time needed for new neutral to “catch- up” with details. Can be time consuming and expensive. |
| Arb-Med Same | One person is both | Arbitration concludes with sealed envelope of | All facts of the case are on the table prior to | Puts fear and uncertainty of decision into the |

| | | | | |
|---|---|---|---|---|
| | Arbitrator and Mediator | Arb decisions. Mediation then takes place to see if parties can settle without Arb decision. | mediation. Guaranteed decision. Neutral needs no catch-up time. | mediation. Confidentiality issues. |
| Arb-Med Diff | Arbitrator and Mediator (two different people) | Arbitration concludes with sealed envelope of Arb decisions. Mediation then takes place to see if parties can settle without Arb decision. | All facts of the case are on the table prior to mediation. Guaranteed decision. | Puts fear and uncertainty of decision into the mediation. Catch-up time needed by neutral. Can be time consuming and expensive. |
| MEDOLA | One person is both Mediator and Arbitrator | Mediation and Last Offer Arbitration. After mediation, each party submits their last offer and the arbitrator must decide between the two offers. | Parties make the final recommendation based on their new knowledge in mediation. Parties are forced to make a reasonable offer. Guaranteed decision. | Limits the discretion of the Arbitrator. Can be time consuming and expensive. |
| Med Windows in Arb | One person can act as both or a new mediator can be brought in. | Process can move to mediation at any time within the arbitration in order to better understand and solve specific | Parties are encouraged to mediate at strategic points. Creativity and flexibility are enhanced. | Can be time consuming and expensive. |

| | | | | |
|---|---|---|---|---|
| | | issues. | Guaranteed decision. | |
| High-Low Med-Arb | Mediator and Arbitrator | The last offer each party makes during mediation transfers as the high/low amounts the arbitrator can award. | Parties maintain some control over final decision. No surprises. Guaranteed decision. | Can be time consuming and expensive. |
| Binding Mediation | Mediator | After mediated agreement is signed, mediator makes decision on all remaining issues. | Very quick settlement. Guaranteed decision. | Power of mediator diminishes neutrality. Lack of due process of law. |

Most of the information in this chart was derived from two main sources; (Blankenship 2006) (Merrill 2007)[35] The central advantages of med-arb are the certitude of a defined outcome, greater efficiency in terms of time and money, and greater flexibility concerning process and timeline

The two most important concerns with med-arb are the inherent potential for "coercion" and the risk that confidential information gained during mediation may taint the med-arbiter's final decision. The best safeguard available to prevent these concerns from materializing is to allow each party the right after the mediation phase to "opt out" of having the same neutral continue into the arbitration phase.

The fact however is that almost all forms of ADR will present us with these advantages and concerns. For this reason it is important to understand the intricacies of using mediation as a tool for mediating natural resource conflicts.

[35] -- <http://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf > accessed 05 April 2016

II. Mediating natural resource conflicts.[36]

There are unique aspects of mediating natural resource conflicts that require additional considerations by the mediator.

1. Power asymmetries: These are a common and especially challenging feature in natural resource disputes. The power imbalances can be significant. First, a basic principle of interest-based negotiation is that all parties should get more from a negotiation than they are able to achieve without negotiating. In other words, they should only come to a resolution through mediation if they can achieve more than their best alternative to a negotiated agreement. Second, it is important to note that significant power asymmetries may mean that mediation is not the most appropriate tool to resolve a conflict

2. Multiple-level mediation tracks and integrated approaches: Natural resource disputes often involve dynamics and actors at more than one level. A multiple-level engagement or mediation strategy for natural resources may be appropriate, targeting actors at different levels and often involving mediators and facilitators at different levels. The processes should be complementary and preferably integrated. A mediation process to reach agreement with a limited number of parties may be complemented by other peace building tools with a broader range of actors at other levels.

3. Stakeholder engagement in natural resource mediation processes: Every mediation process involves a unique mix of stakeholders, which is why strategies for engaging different stakeholders should be considered. Understanding which actors to include in a mediation process, and the potential political impacts of including some and excluding others, is essential. In turn, ensuring consultation with a sufficiently wide set of stakeholders is crucial to establish and maintain the legitimacy of the process, and vital to its success.

[36] -- 'Natural Resources | UN Peacemaker' (*Peacemaker.un.org*, 2016) <http://peacemaker.un.org/mediation-support/featured-projects/natural-resources-project> accessed 3 April 2016.

4. Uniquely vulnerable stakeholders: Experience shows that certain categories of stakeholders warrant special attention in mediating resource conflicts because they face specific vulnerabilities linked to natural resource exploitation. In particular, certain stakeholders are not traditionally included in decision making, or can represent relevant interests in the talks that would otherwise be marginalized.. In some parts of the world, indigenous peoples as well as migratory pastoral communities are disproportionately affected by resource disputes given their historical and cultural connection to the land and its resources, and the associated customary rights they often claim or defend.

5.Natural resources in fragile states: Natural resources in conflict-affected and fragile states often act as powerful drivers of conflict for four main reasons. First, such states generally have weak governance institutions and limited capacities for conflict management and dispute resolution. Second, conflict-affected and fragile states typically have inequitable and non-transparent distribution of resource revenues and benefits. Third, civil society actors in these countries are usually constrained in their ability to demand efficiency, accountability, and transparency in the governance and management of natural resources. And finally, fragile and conflict-affected states are often characterized by the presence of armed groups, non-state actors, or criminal networks that have a strategic interest in maintaining instability in order to profit from illegal exploitation and trade of natural resources. Taken together, these factors can significantly influence the successful initiation and outcome of a mediation process.

## III. Suitability of mediation for natural resource conflicts-

Using mediation as an effective tool requires an ability to adapt it to the specificity of natural resource conflicts on the one hand, and a deep understanding of its limitations on the other. When applied to disputes not suited to a negotiated settlement, the intervention is likely to fail, resulting in a deterioration of the conflict and a potential loss of legitimacy for those involved in the mediation process.

Flexible mediation processes can be very useful when dealing with relationship issues and complex political dynamics. Furthermore, mediation offers many techniques and approaches to deal with complex technical and scientific information common to

resource disputes. Mediation can also be used to complement other peacebuilding tools

IV. Limitations of mediation to resolve natural resource conflict-

First, win-win solutions are not always possible, especially in situations of absolute resource scarcity or incompatible land use. Certain disputes are intractable by nature, especially when some parties refuse to enter into negotiation, or when the differences between core values cannot be reconciled.

Second, mediation is a more limited tool when major power imbalances exist between the parties. Similarly, for natural resources that are embedded in global (or at least external) supply chains, the parties to a mediation process may be unable to control key parameters such as market value and demand. In such cases, the potential impact of such uncertainty and price volatility on the mediation process needs to be considered.

Third, mediation is of limited use when the conflict is characterized by protracted or deep-rooted structural issues that can only be addressed through legal, economic, political, or social reforms. In other words, mediation is not intended to fundamentally transform unequal or unjust power relations or social structures, although in the context of broader mediation processes, such as peace agreements, it can establish a starting point for more suitable mechanisms.

Factoring the suitability and limitations of mediation together, experience shows that mediation tends to be particularly effective in addressing resource conflicts that involve unsustainable resource use, conflicting demands over resource use, or the sharing of revenues and benefits. Mediation is notably less effective in addressing those aspects of a dispute grounded in structural inequalities or different identities and cultural values; however, in these situations, mediation over natural resources can prove to be an entry-point to addressing broader conflict drivers as part of a more comprehensive peace agreement.

## Conclusion-

In my opinion, it is imperative to find methods of conflict resolution where communities have been affected by industrial activities. However, I feel that this should be done by increasing the liability of these industries and making them responsible for their actions.

Although a useful tool, mediation or even med-arb cannot be successfully used in these cases primarily because of the great disparity between conflicting parties. According to my analysis, on no count do such dispute resolution methods benefit affected communities, although they may be beneficial to investors due to decreased liability.

Even if states adopt such methods and create awareness regarding the same, there is no assurance that a difference will be made. It must be kept in mind that indigenous people affected by such actions are generally illiterate and cannot be expected to understand the intricacies presented. Also, as has been shown, all such attempts at educating relevant people have not been carried out as stipulated.

Cases of violations by large companies need to be brought to light instead of being allowed to hide behind 'confidentiality clauses'.

Finally, the creation of a common, enforceable international code is required. Such a code will remove the confusions arising out of 'jurisdictional problems', thereby ensuring a consistency in the deciding of such conflicts.

To conclude,

'Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes'. [37]

[37] <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf > accessed 24 March 2016

## Bibliography


### 1. Primary Sources

#### 1.1 Case Laws

*Kiobel v. Shell Petroleum*, (10) 1491

### 2. Secondary Sources

#### 2.1 Hard copy Journals

Tom C.W. Lin, (2015). 'Reasonable Investors'.*Boston University Law Review*(95) (461) 466

#### 2.2 UN Reports

UN Secretary General, 'Report of the Secretary General, Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution' (art. 66, para 13) 2012 United Nations, New York 811

#### 2.3 Online Journals& Websites

'Natural Resources | UN Peacemaker' (*Peacemaker.un.org*, 2016) <http://peacemaker.un.org/mediation-support/featured-projects/natural-resources-project> accessed 3 April 2016.

<http://www.mediate.com/pdf/V2%20MEDARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf> accessed 05 April 2016.

--'Oil, Gas, And Mining Unit - Social And Economic Impact' (*Web.worldbank.org*, 2016) <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20220001~menuPK:463295~pagePK:148956~piPK:216618~theSitePK:336930,00.html> accessed 13 April 2016.

<http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 24 March 2016.

'Mining Case Law Review' (*Centre for Environmental Rights*, 2015) <http://cer.org.za/virtual-library/judgements/case-law-reviews/mining-case-law-review> accessed 28 March 2016.

'Current Situation of Mining Industry in Cambodia', General Department of Mineral Resources (2013); Angkor Gold 2013 CSR Report, <http://www.angkorgold.ca/wp-content/uploads/2014/06/SCD-Report-2013_WEB-final.pdf.>accessed 15 March 2016.

'Guidelines For Multinational Enterprises - OECD' (*Oecd.org*, 2016) <http://www.oecd.org/corporate/mne/> accessed 23 March 2016.

Emily Greenspan, 'Social Conflict, Extractive Industries, National Human Rights Institutions And Most Importantly...Communities | Oxfam America The Politics Of Poverty Blog' (*The Politics of Poverty*, 2013) <http://politicsofpoverty.oxfamamerica.org/2013/04/social-conflict-extractive-industries-national-human-rights-institutions-and-most-importantly-communities/> accessed 22 March 2016.

'More Consultation, Less Exploitation: The Extractive Industries And Community Consent | Oxfam GB | Policy & Practice' (*Policy & Practice*) <http://policy-practice.oxfam.org.uk/blog/2015/09/more-consultation-less-exploitation-extractives-and-community-consent> accessed 2 April 2016.

<http://peacemaker.un.org/sites/peacemaker.un.org/files/GARes_StrengtheningTheRoleOfMediation_ARES65283(english)_1.pdf>accessed 18 March 2016 !!!

'UN Guidance for Effective Mediation | UN Peacemaker' (*Peacemaker.un.org*) <http://peacemaker.un.org/guidance-effective-mediation> accessed 21 February 2016.

'Mediation Support Overview | UN Peacemaker' (*Peacemaker.un.org*) <http://peacemaker.un.org/mediation-support> accessed 26 February 2016.

<http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/2015Feb_UNDPA_UNEP_NRC_Mediation_full.pdf >accessed 25 March 2016!!!

'Corporate Social Responsibility & Mining – Miningfacts.Org' (*Miningfacts.org*, 2016) <http://www.miningfacts.org/communities/what-is-corporate-social-responsibility/#sthash.BzQEruxd.dpuf> accessed 26 March 2016.

<http://academic.eb.com.ezphost.dur.ac.uk/EBchecked/topic/372184/>accessed 4 April 2016.

<http://www.un.org/en/sections/un-charter/chapter-vi/>accessed 20 April 2016.

<http://academic.eb.com.ezphost.dur.ac.uk/EBchecked/topic/326911/> accessed 9 April 2016.

'EARTHWORKS Esquel' (*Earthworksaction.org*, 2016) <https://www.earthworksaction.org/voices/detail/esquel#.Vx1TGjZSiZw> accessed 4 April 2016.

## 3. Other Secondary Sources

### 3.1 Newspaper Articles

--'What Is Fracking And Why Is It Controversial? - BBC News' (*BBC News*, 2016) <http://www.bbc.co.uk/news/uk-14432401> accessed 25 March 2016.

'Companies Shielded As U.S. Court Cuts Human-Rights Suits' (*Bloomberg.com*, 2013) <http://www.bloomberg.com/news/articles/2013-04-

17/companies-get-shield-as-top-u-s-court-curbs-human-rights-suits> accessed 8 April 2016.

Bibi Zee, 'Global Injustices: Getting Access To The Law Is Still Impossible For Most' (*the Guardian*, 2015) <http://www.theguardian.com/global-development-professionals-network/2015/jan/21/global-injustices-getting-access-to-the-law-is-still-impossible-for-most> accessed 5 April 2016.

'Arch Coal (NYSE:ACI) Files For Bankruptcy As Plunging Prices, Weak Demand Batter US Coal Sector' (*International Business Times*, 2016) <http://www.ibtimes.com/arch-coal-nyseaci-files-bankruptcy-plunging-prices-weak-demand-batter-us-coal-sector-2259233> accessed 11 March 2016.

'Oil Price Crash: US Mining And Exploration Investment Falls 35% As Energy Companies Curb Spending' (*International Business Times*, 2016) <http://www.ibtimes.com/oil-price-crash-us-mining-exploration-investment-falls-35-energy-companies-curb-2302053> accessed 26 March 2016.

John Vidal, 'Lawyers Leigh Day: Troublemakers Who Are A Thorn In The Side Of Multinationals' (*the Guardian*, 2015) <http://www.theguardian.com/global-development/2015/aug/02/leigh-day-troublemaker-fight-dispossessed-lawyers> accessed 19 March 2016.

Bibi Zee, 'Global Injustices: Getting Access To The Law Is Still Impossible For Most' (*the Guardian*, 2015) <http://www.theguardian.com/global-development-professionals-network/2015/jan/21/global-injustices-getting-access-to-the-law-is-still-impossible-for-most> accessed 26 March 2016.

--'The Outlook For Oil & Gas Producers And Mining Companies' (*Hargreaves Lansdown*, 2016) <http://www.hl.co.uk/news/articles/the-outlook-for-mining-oil-and-gas-investors> accessed 26 March 2016.