

University of the Western Cape

Faculty of Law

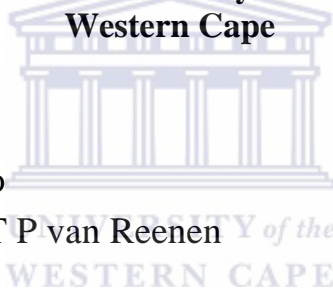
**Environmental Dispute Resolution in Tanzania and South Africa: A
Comparative Assessment in the Light of International Best Practice**

**A Research Paper Presented in Partial Fulfilment of the Requirements for
the Degree Magister Legum in the Faculty of Law of the University of the
Western Cape**

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Declaration

I declare that *Environmental Dispute Resolution in Tanzania and South Africa: A Comparative Assessment in the Light of International Best Practices* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Key Words

Alternative dispute resolution
Consensus building
costs
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Chapter 1: Introduction

1. Introduction and Problem Statement

The field of environmental law is an area of competing interests in which disputes are bound to occur. Most of the environmental disputes are cross-sectoral - covering such issues as agriculture, urbanisation, mining, fishing, housing and health. Thus the nature of environmental disputes requires both judicial mechanisms and non-judicial mechanisms. An ideal environmental dispute resolution mechanism should not only be accessible, affordable and effective but must also be adaptable to various environmental disputes in a given situation. Litigation is one of the established formal mechanisms for dispute resolution. Alternative dispute resolution mechanisms are other methods which are becoming increasingly popular in environmental disputes resolution.

This research examines the effectiveness of these dispute resolution mechanisms in environmental disputes and what improvements should be made in order to make those mechanisms suitable for these types of disputes. Important questions are: How can litigation assist in facilitating environmental dispute resolutions mechanisms especially with the relaxation of law of *locus standi* Are alternative dispute resolution mechanisms appropriate for use in resolving environmental disputes? If not so, what changes or improvements should be made?

2. Rationale for the Study

The research paper seeks:-

- (i). to establish the various mechanisms for environmental dispute resolution in South Africa and Tanzania.
- (ii). to analyze the purposes and the effectiveness of environmental dispute resolutions mechanisms.

(iii) . to evaluate the positive and the negative aspects of environmental dispute resolution mechanisms and suggest areas of improvement, if necessary.

3. Hypothesis

Environmental dispute resolutions mechanisms must be effective, accessible, affordable, appropriate and adaptable to various kinds of environmental disputes otherwise they can not lead to proper settlement of environmental disputes.

As a result, in every system of environmental dispute resolution, there is always a room for improvement, or a need for reform. The improvement can be effectively achieved where there is a consistent exposition of environmental dispute resolution mechanisms.



4. Significance of the Research

Environmental law is a rapidly growing branch of law in which there are many disputes which call for judicial and non-judicial methods of dispute resolution. Since environmental law is a dynamic area, it is essential that its mechanisms for dispute resolution be subjected to frequent review and reforms to ensure that those mechanisms respond to the needs of both society and the environment. This is precisely what this research aims to provide.

5. Research Methods

The research has been conducted by way of literature review. A number of relevant materials have been traced from the Internet. Materials from law libraries including the University of the Western Cape, Main Library, the University of Stellenbosch, Main Library, the University of Dar es laam, Main Library, Law Collection have also been used.

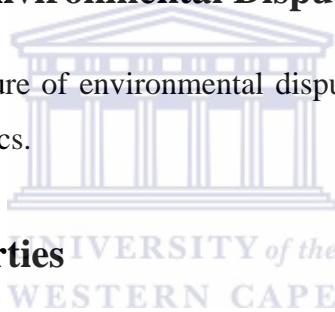
Chapter 2: Features and Essential Requirements of Environmental Dispute Resolution

2.1. Introduction

This chapter will analyse and discuss the basic features and essential requirements of environmental dispute resolution mechanisms. An examination of the nature of environmental disputes is an important before analysing the features and essential requirements of the environmental dispute resolution.¹

2.2. Nature of an Environmental Dispute

In order to understand the nature of environmental dispute resolution, it is important to delineate its major characteristics.



2.2.1. Multiple Parties

Environmental disputes often involve multiple parties such as government, public interest groups, private companies and private individuals and often there many parties in each categories.² An environmental dispute of this kind becomes complicated by issues such as information sharing, management, conflicts over fundamentally differing values, credibility and communication issues.³ In this case, there are normally two types of parties: those with and those without sufficient knowledge to interpret scientific and

¹ Andrew, J S, Making or Breaking Alternative Dispute Resolution? Factors Influencing Its Success In Waste Management Conflicts, *Environmental Impact Assessment Review*, 21 (2001) at p 109 [Electronic] Available: www.elsevier.com/locate/eiar [2008, May 04]

² Bingham, G & Haygood, L V, Environmental Dispute Resolution: The First Ten Years, *the Arbitration Journal*, December, 1986, Vol 41 No 4, pp 3- 14 at p 4. [Electronic] Available: Business Source Complete [2008, May 05]

³ MacNaughton A, L & Martin, J G, *Environmental Dispute Resolution: an Anthology of Practical Solutions*, 2nd edn, Chicago: American Bar Association, 2002, at p10 [Online] Available: < [http:// books.google.co.za/books](http://books.google.co.za/books) > [2008, July 16]

technical data.⁴ Apart from human beings and organizations that have legal standing, there are ecological receptors (flora and fauna) often directly affected by environmental decisions.⁵ There is also the question of future generations who will inherit the irreparable destruction wrought by today's actions (the extinction of endangered species.⁶ Although a government agency may offer representation in this case on the basis of public interest, political factors on the question of balancing economic development and environment may affect the government agency to provide effective presentation.⁷ Environmental groups may also represent this role.⁸

2.2.2. Subject-matter crosses professional borders

Environmental disputes normally go beyond the geographical and professional borders.⁹ A single environmental dispute can pose questions of science, engineering, economics, politics and public acceptance.¹⁰ Most environmental disputes are characterized by issues involving data interpretation and scientific uncertainty¹¹ to which many stakeholders have different but overlapping interests.¹² The presence of many stakeholders may present a significant level of scientific and economic uncertainty with regard to the nature and extent of risks presented by different activities and their resulting environmental contaminants.¹³ Consequently, there may be uncertainty as to the nature of the appropriate response and its associated economic impact.¹⁴ It has been suggested that environmental alternative dispute resolution mechanisms are suitable when complex, technical issues are involved because the parties can hire an arbitrator or mediator who

⁴ Opotow, S & Weiss L, Denial and the Process of Moral Exclusion in Environmental Conflict, *Journal of Social Issues*, Vol 56 No 3 (2000), pp 475-490 at 477. [Electronic] Available: SocIndex [2008, October 25]

⁵ Taylor, M, *et al*, Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices, *Dalhousie Law Journal*, Vol 22 (Fall, 1999) p 56 at pp 90-91 [Electronic] Available: Lexis Nexis Academic [2008, October 15]

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Idem*, at pp 6- 8.

¹⁰ Miller, J G & Colosi, T R, *Fundamentals of Negotiation: A Guide for Environmental Professionals* Washington: Environmental Law Institute, 1989, p 2. [Online] Available: [http:// books. google.co.za/books](http://books.google.co.za/books) [2008, July 20]

¹¹ Bingham & Haygood, *supra* note 2 at p 4.

¹² *Ibid.*

¹³ MacNaughton & Martin *supra* note. 3 at pp 5 & 9.

¹⁴ *Ibid.*

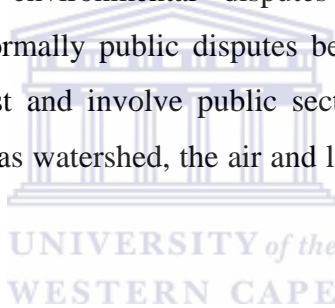
has expertise in the relevant area, rather than trying to educate a court or jury.¹⁵ Arbitrators and mediators have the option of hiring outside experts to provide the background necessary to understand the dispute despite its complexity.¹⁶

2.2.3. Cross- Cultural Values

Disputants normally have different personal values and priorities that generate conflict.¹⁷ This can result in complex environmental disputes when there are significant scientific and economic uncertainties of the dispute.¹⁸

2.2.4. Government Involvement

The other characteristic of environmental disputes is government involvement. Environmental disputes are normally public disputes because they are concerned with matters of great public interest and involve public sectors.¹⁹ Environmental disputes concern shared resources such as watershed, the air and land use evoking the dynamic of the commons.²⁰



2.2.5. Irreversible Decisions

The majority of environmental disputes typically involves irreversible decisions and implicates major alterations to the physical environment.²¹ Irreversible effects to environment include habitat destruction, pollution of portable drinking water and species

¹⁵ Stukenborg, C, The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts, *University of Dayton Law Review*, Vol 19 (1994), pp 1305-1339 at p 1337 [Electronic] Available: Westlaw [2008, September 02]

¹⁶ *Idem.*, at p 1338.

¹⁷ MacNaughton & Martin *supra* note 13 at p 9.

¹⁸ *Ibid.*

¹⁹ O'Leary & Bingham *The Promise and Performance of Environmental Conflict Resolution*, L, Washington, DC: Resources for the Future, 2003, p 4. [Online] Available : <http://books.google.co.za/books> [2008, July 31].

²⁰ Opotow, & Weiss, *supra* note 4 at 477

²¹ Ryan, M, Alternative Dispute Resolution in Environmental Cases: Friend or Foe, *Tulane Environmental Law Journal* Vol 10, Summer, 1997 pp 397 – 415, at p 413. [Electronic] Available: Westlaw [2008, October 22]

extinction.²² Damage to the environment demands urgent reparation and the issue extends beyond financial restitution.²³

2.3. Features and Requirements of Environmental Dispute Resolution

Scholars have identified several characteristics of environmental dispute resolution mechanisms. Crowfoot and Wondolleck²⁴ point out three characteristics of any given environmental dispute resolution: (i) voluntary participation by the parties involved in the dispute; (ii) direct – face to face group interaction among the representatives of the parties to the dispute; and (iii) mutual agreement or consensus decisions by the parties on the processes to be used and any settlement that may emerge.²⁵ O'Leary and Bingham²⁶ present the following requirements for a successful environmental dispute resolution, (i) participation is usually voluntary for all participants; (ii) the parties or their representatives must be able to participate directly in the process; (iii) any and all participants must have the option to withdraw from the alternative dispute resolution and seek a resolution through a more formal process, such as litigation; (iv) the third- party neutral must not have independent, formal authority to impose an outcome but rather should help the parties reach their own agreement; and (v) the parties must agree to the outcome or resolution of the dispute.

2.3.1. Relationship of the Disputants

A study conducted by Van Veen, Kreutzwiser and De Loë on rural water dispute experiences in southern Ontario, Canada found that the relationship of the disputants is

²² Susskind, L E & Secunda, J, Environmental Conflict Resolution: The American Experience, Napier, C, (ed), *Environmental Conflict Resolution*, London: Cameron May Ltd, 1998, p 29.

²³ Singer, S, The Use of ADR Methods in Environmental Disputes, *Arbitration Journal* (March 1992), pp 55- 67 at p56. [Electronic] Available: Business Source Complete [2008, May 05]

²⁴ Crowfoot, J E & Wondolleck, J M, Environmental dispute settlement Crowfoot, in J E & Wondolleck in *Environmental Disputes: Community Involvement in Conflict Resolution*, Washington, DC : Island Press, 1990, p 19. [Online] Available: < [http:// books. google.co.za/books](http://books.google.co.za/books)> [2008, July 16]

²⁵ *Ibid.*

²⁶ O'Leary & Bingham, *supra* note 19 at p 4.

one of the key factors in selecting an appropriate environmental dispute resolution method;

When people are on good terms, or wish to remain on good terms, then they should negotiate. If that does not work, then they should use a mediator, and avoid arbitration and litigation if at all possible. Similarly, if financial resources are limited, then use less formal techniques such as negotiation or mediation. . When prior problems, fundamental differences in values, or personality clashes exist, then try working with a mediator first. If that fails, then arbitrate or litigate. In the same way, when the issues are unclear, mediation should be tried first, followed by arbitration.²⁷

2.3.2. Voluntary Participation

Parties must be free to participate or withdraw from a process.²⁸ The voluntary nature of the process in deciding whether to participate and whether to concur in an agreement, gives parties freedom to exercise their judgment.²⁹ However, it must be pointed out that some parties may be reluctant to participate in environmental negotiation or mediation because they may want to (i) comply with an environmental regulation, (ii) to protect their locality, (iii) prevent the adoption of an agreement they would find difficult to implement.³⁰ In this case other mechanisms of environmental dispute resolution should be considered.

2.3.3. Consensus Building

An environmental dispute must be resolved by reaching a consensus. Consensus building is a process of seeking unanimous agreement where every one agrees they can live with whatever is proposed after every effort has been made to meet the interests of all

²⁷ Van Veen, D H, *et al*, Selecting Appropriate Dispute Resolution Techniques: A Rural Water Management Example, *Applied Geography*, Vol 23 (2003) 89–113 at 109. [Electronic] Available: www.sciencedirect.com [2008, October 21]

²⁸ Melling, T, Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-term Report, *Land & Water Law Review*, Vol 30 pp 57- 90 at p 62 [Electronic]. Available: Westlaw [2008, September 1].

²⁹ ²⁹ Goldberg, S B., et al., *Dispute Resolution*, Boston, Toronto: Little, Brown & Co., 1985, p 409.

³⁰ Opotow, & Weiss, *supra* note20 at 486.]

parties.³¹ The process is designed to remove misunderstanding, clarify interests and establish common ground between participants on the basis of non-adversarial approaches.³² In this process, participants treat each other with respect, to gain control over the outcome.³³ It is based on trust gained through openness in sharing information, early participation, a balanced agenda and representation.³⁴

2.3.4. Participation of Interested Parties

All interested parties must have an opportunity to participate in the process that creates the consensus. It follows that where a party is excluded from a process, any proclaimed resolution almost certainly will not satisfy their interests.³⁵ But it is not easy in all cases for all groups to have an opportunity to participate in the process.³⁶ The interests of the parties groups must be identified in order that areas of disagreement may be recognized.³⁷

2.3.5. Power Relationship

The informal process allows decisions to be made without procedural safeguards which less powerful groups may need.³⁸ The inability a party without adequate finances may be unable to engage in protracted negotiation or may be forced to settle more quickly.³⁹ This inability to continue the process could result in an outcome which is less fair than an

³¹ Susskind, L, *et al*, *The Consensus Building Handbook: A Comprehensive Guide to Reach Agreement*, Thousand Oaks, Calif: Sage Publications, 1999, p 6. [Online] Available: <http://books.google.co.za/> [2008, October 20]

³² Sidaway, R, *Resolving Environmental Disputes: From Conflict to Consensus*, London ; Sterling, VA Earthscan, 2005 p 63. [Online] Available: <http://books.google.co.za/> [2008, October 19]

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Idem.*, at pp 64-65.

³⁶ *Idem.*, at p 65.

³⁷ Smith, P M, *The Application of Critical Discourse Analysis in Environmental Dispute Resolution*, *Ethics, Place & Environment*, Vol 9 No 1, Pp 79-100 at p 87 [Electronic]. Available: EBSCO Host: Academic Search Premier [2008, April 08].

³⁸ Fiss, O *Against Settlement*, 93 *Yale Law Journal*, Vol 93, pp 1073-, at pp 1076-77

³⁹ Smith, E, *Danger-Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?* *Journal of Dispute Resolution*, (1996), pp 379 – 399, at pp 386-387. [Electronic] Available: Westlaw [2008, September 02].

outcome achieved by another method of dispute resolution.⁴⁰ Adjudication is preferable where there is an imbalance of power between the disputants and sometimes, the existence of adjudication may serve to bring the more powerful party to the bargaining table and reduce inequalities of bargaining power.⁴¹

2.3.6. Use of a Neutral Third Party with No Decision-making Authority

Another major feature of environmental dispute resolution is the presence of persons who identify themselves clearly as third parties who are not involved in the actual decisions made; they merely enable the other parties to reach their own decisions.⁴² The role of a neutral third party is to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.⁴³

2.3.7. Formulations of Solutions and Outcomes by the Parties

In most Alternative Environmental Dispute Resolution mechanisms compromise predominates and solutions are often designed to avoid substantive law.⁴⁴ Although negotiation may be based on substantive legal principles, emphasis is away from court-like application of relevant law to the dispute so as to end a dispute and create a framework for avoiding future disputes.⁴⁵

2.3.8. Agreement on the Outcome of the Resolution of the Dispute

⁴⁰ *Ibid.*

⁴¹ Goldberg, S B., et al., *Dispute Resolution*, Boston, Toronto: Little, Brown & Co., 1985, p 11.

⁴² Montgomery, R L & Kidd, J A H, An Appraisal of Environmental Conflict Management Provisions in New Zealand's Resource Management Act 1991, *Asia Pacific Viewpoint*, Vol 45 No 1,(April 2004), pp 105–123 at p 112. [Electronic] Available: Academic Search Premier [2008, August 11]

⁴³ *Ibid.*

⁴⁴ Brunet, E, Questioning The Quality of Alternate Dispute Resolution, *Tulane Law Review*, Vol 62, (November, 1987), pp 1-56 at pp 13-14 [Electronic] Available: Westlaw [2008, September 02]

⁴⁵ *Ibid.*

Apart from reaching an agreement, the parties must support the agreement through the implementation process.⁴⁶ Theoretically, the agreement will be implemented, and it will last because it diminishes the controversy and, at best, settles the key issues.⁴⁷ An agreement will also be more stable if provisions are included for renegotiation, should that become necessary.⁴⁸

2.4. Conclusion

The basic characteristics and the basic requirements of environmental dispute resolution mechanisms have been discussed in this chapter. The next chapter sets out the international best practices for environmental dispute resolution.



⁴⁶ Goldberg, *supra* note 41 at p 409

⁴⁷ Todd, S, Measuring The Effectiveness of Environmental Dispute Settlement Efforts, *Environmental Impact Assessment Review*, Vol 21 (2001), pp 97-110 at 105 [Electronic] Available: www.elsevier.com/locate/eiar [2008, June 04]

⁴⁸*Ibid.*

Chapter 3: International Best Practices

3.1. Introduction

Essentially, a dispute resolution is a method by which a dispute may be resolved. However, the phrase 'dispute resolution' is frequently being used to refer to dispute resolution methods which are alternative to litigation. In this regard, it is often referred to as 'alternative dispute resolution' with its acronym 'ADR'. Due to the criticisms levelled at its adjective 'alternative' the proponents of alternative dispute resolution are increasingly referring to the processes or procedures as 'dispute resolution'. As alluded to in chapter 1, environmental dispute resolution mechanisms has often emphasized on alternative environmental dispute resolution. Environmental dispute resolution is often understood as the application of alternative dispute resolution mechanisms to environmental disputes. In this sense, environmental dispute resolution excludes litigation as a mechanism of environmental dispute resolution.¹ Few proponents of alternative environmental dispute resolution, however, recognize litigation as also another mechanism for environmental dispute resolution.

This chapter seeks to examine international best practices of and for environmental dispute resolution as obtained from literature. The chapter approaches environmental dispute resolution as a process to resolve a particular environmental dispute whether through a voluntary or a judicial process.

3.2. Theoretical Background to Environmental Dispute Resolution Best Practices

Before proceeding to examine international best practices for environmental dispute resolution it is important to highlight their theoretical background. Three theoretical

¹ Lyster, R, Environmental Dispute Resolution, in Pretorius, P (ed), *Dispute Resolution*, Capetown, Wetton & Johannesburg: Juta & Co Ltd, 145.

approaches underlie environmental dispute resolution mechanisms. These are discussed by Crowfoot and Wondolleck.²

3.2.1. Resolving Environmental Disputes as Misunderstandings

The first theory assumes the existence of a societal consensus that the environment and the economic development are compatible and that consensus is reflected in societal values and laws and in the attitudes of leaders.³ Environmental disputes are misunderstandings caused by complexity in economic and environmental systems coupled with the human nature.⁴ Adaptation to change through education and information is the best way to achieve the societal consensus and to resolve environmental conflicts.⁵ Consequently, environmental disputes are best solved by the use of problem solving, information and education and negotiation.⁶

In this theory environmental disputes are seen as problems to be solved rather conflicts to be resolved.⁷ Amy observes that the characterization of environmental conflicts as misunderstandings arising from miscommunication, misinformation or scientific disagreements is wrong.⁸ The presumption that environmental disputes are simply a product of misunderstanding and do not involve some direct and unavoidable conflicts of interest between environment and economic development is not true.⁹ There are always conflicts between environment and economy and the misunderstandings, miscommunications, personalities, and data uncertainties are only a contributory factor.¹⁰

3.2.2. Resolving Environmental Disputes as Conflict of Interests

² Crowfoot, J E & Wondolleck, J M, Environmental dispute settlement Crowfoot, in J E & Wondolleck in *Environmental Disputes: Community Involvement in Conflict Resolution*, Washington, DC : Island Press, 1990. [Online] Available: [http:// books. google.co.za/books](http://books.google.co.za/books) [2008, July 16]

³ *Idem* at p 10.

⁴ *Ibid.*,

⁵ *Ibid.*

⁶ *Idem* at p 12.

⁷ Amy, D J, *The Politics of Environmental Mediation*, New York: Columbia University Press, 1987, pp 165-166.

⁸ *Idem* at pp 165-166.

⁹ *Idem* at p 170.

¹⁰ *Idem* at pp 171-172.

A second theory argues that while a society is intertwined between ongoing conflicts, there is an underlying consensus about the natural environment.¹¹ Environmental conflicts arise from different interest groups within the society such as industry, government, environmentalists, and the public.¹² Political democracy provides a venue for the expression and protection of these differences and promotes decision-making when differences need to be resolved.¹³ Environmental laws and regulations reflect agreements among different groups with differing interests.¹⁴ Consequently environmental disputes can be resolved through legislative decision-making by democratically elected representatives.¹⁵ During this stage, interest advocacy provides views, goals and values of the contending groups when they express their interests.¹⁶

Judicial settlement provides a secondary means because courts use statutes, a country's Constitution and Bill of Rights, documents which incorporate agreed upon values and beliefs of the society.¹⁷ Negotiation may be used in the operation of the legislative and judicial branches of government by active non-governmental organizations.¹⁸ The theory argues that mediation and negotiation are supplemental in legislative, regulatory and judicial process.¹⁹

Therefore, in order for environmental dispute resolution mechanisms to be effective and efficient they must be employed at the stage of policy-making and rule-making.

According to this theory an appropriate environmental dispute resolution is seen as the one that split the difference between equally valid interests by achieving a compromise in which each side gets some of what it wants.²⁰ But this is not always the case because environmental disputes are also based on values on how society and humanity relate to nature.²¹ Such values involve the way in which each person perceives the environment

¹¹ Crowfoot, J E & Wondolleck, *supra* note 2 at p 12.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Idem* at p 13.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Amy, *supra* note 7 at p 173.

²¹ *Idem* at p 174.

and the relationship of humans with the planet.²² Ryan argues that environmental disputes concerning values are not well suited to alternative environmental dispute resolution.²³ By treating disputes in terms of conflicting interests, rather than conflicting values, the mediation process, for example, suppresses the most fundamental issues at stake.²⁴

3.2.3. Resolving Environmental Disputes as Conflict of Values

According to a third theory social conflict including environmental conflict is deep and pervasive in the society.²⁵ As a result the theory argues that it is only the coercive power of the state in cooperation with economic power of specific individuals and organizations that can hold together society in the face of these basic differences.²⁶ Social institutions like schools, the media, and churches tend to promote utilitarian use of the environment while environmental values and practices are matters of principle to which all efforts must be taken to ensure the maintenance or advancement of these ideals.²⁷ These principles are embodied in established authorities and at other times they are presented by challenging citizens if those policies and practices are not in the interest of those in the society who lack political and economic power nor in the interest of achieving a future that is environmentally sustainable.²⁸ The theory concludes that environmental disputes involving basic matters of principle should be dealt with by established institutions like the courts, administrative agencies and legislatures.²⁹

3.3. Best Practices

²² Ryan, M, *Alternative Dispute Resolution in Environmental Cases: Friend or Foe*, *Tulane Environmental Law Journal* Vol 10, Summer, 1997 pp 397 – 415, at footnote 139. [Electronic] Available:Westlaw [2008, October 22]

²³ *Idem* at p 414.

²⁴ *Idem* at footnote 139.

²⁵ Crowfoot, J E & Wondolleck, J M, *supra* note 19 at p 14.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Amy, *supra* note 20 at p 185.

The first and the second theory of environmental dispute resolution dominate environmental dispute resolution literature. Moore describes environmental dispute resolution as ‘approaches where people meet face to face and use some form of consensus building or negotiation to seek a mutually acceptable resolution of disputed issues.’³⁰ O’Leary and Bingham observe that ‘environmental dispute resolution or environmental conflict resolution refer to various alternatives to dispute resolution techniques as applied to environmental conflicts’ and they ‘consists of a set of techniques, processes, and roles that enable parties in a dispute to reach agreement with the help of one or more third - party neutrals.’³¹ But as was correctly pointed out by Bingham and Haygood, alternative environmental dispute resolution processes are supplementary tools to litigation because they may (or may not) be more effective or efficient in particular circumstances.³²

Disputes over environmental issues are so varied that no new dispute resolution process is likely to be successful in all situations. Depending on the circumstances, the parties may prefer to litigate, lobby for legislative change, or appeal to an administrative agency for favorable action, rather than negotiate a voluntary resolution of the issues. This is a complicated strategic decision that is, and should be, affected by applicable laws and regulations, by the experiences and resources of the parties and their relationships with one another, as well as by their calculation of how well their interests will be served by different approaches.

It is therefore the assumption of this Paper that traditional environmental dispute resolution through courts and administrative bodies may be still appropriate depending on the nature of an environmental dispute in question.

3.3.1. Alternative Environmental Dispute Resolution

³⁰ Moore, S, Defining "Successful" Environmental Dispute Resolution: Case Studies From Public Land Planning In The United States and Australia, *Environmental Impact Assessment Review*, Vol 16 (1996) pp 151-169 at pp 151-152. [Electronic] Available: www.elsevier.com/locate/eiar [2008, May 06]

³¹ O’Leary R & Bingham, L, *The Promise and Performance of Environmental Conflict Resolution* Washington, DC: Resources for the Future, 2003, p 5-6. <<http://books.google.co.za/books>> [2008, July 31].

³² Bingham, G & Haygood, L V, Environmental Dispute Resolution: The First Ten Years, *The Arbitration Journal*, December, 1986, Vol 41 No 4, pp 3- 14[Electronic] Available: Business Source Complete [2008, May 05]

The first and the second environmental dispute resolution theories emphasize the use of environmental disputes resolution mechanisms by way of compromise or consensus building. In general the following mechanisms of environmental dispute resolution appear in different literature: mediation, facilitation, arbitration, conciliation, fact-finding, negotiated rule making, policy dialogue, non-binding minitrials, early neutral evaluation, and consultation. These mechanisms are preferred because they are described as the most appropriate, efficient, effective and cheaper methods of dispute resolution in general and environmental dispute resolution in particular. From this list, the following are the best international best practices: (i) mediation, (ii) facilitation, (iii) negotiation,(iv) arbitration and (v) litigation. This Paper describes as the best because of their acceptance in literature and use in different countries.

3.3.2. Mediation

Mediation is a widely used environmental dispute resolution mechanism. Amy defines mediation as ‘an informal process in which a neutral, third party mediator facilitates the resolution of an environmental dispute.’³³ Reuben defines mediation as a process in which a third-party neutral, called a "mediator," assists the parties in resolving their own dispute.³⁴ However, the term ‘environmental mediation’ is also broadly to refer to all forms of alternative environmental dispute resolution. Ross observes that

...the term environmental mediation is used very broadly in the literature to encompass all forms of environmental dispute settlement other than litigation. It is similar to the use of the terms ‘alternative dispute resolution, (ADR). In environmental contexts, the term mediation is used synonymously with ‘negotiation’, but may be used to refer specifically to negotiations or other joint solving forms which are facilitated by a third party whose main role is to help the participants to communicate to reach agreement.³⁵

In this paper environmental mediation is used in its narrower sense. Mediation is used as part of consensual approaches to alternative environmental dispute resolution, where a

³³ Amy, *supra* note 29 at pp 1-2.

³⁴ Reuben, R C, Public justice: Toward a State Action Theory of Alternative Dispute Resolution, *California Law Review*, Vol 85, No. 3. (May, 1997), pp 577-641 at p 581 [Electronic] Available: JSTOR [2008, July 22]

³⁵ Ross, H, Environmental Mediation, Becker, H A, & Vanclay, F, *The International Handbook of Social Impact Assessment*, Northampton, MA: Edward Elgar Publishing, 2003, at p 296. [Electronic] Available: <http://scholar.google.co.za/scholar> [2008, October 20]

mediator applies a form of assisted negotiation, enabling each side to (a) formulate its position clearly, (b) understand the position of the other side, (c) identify any areas of common ground, and (d) explore whether there are ways of resolving the points of difference.³⁶

Mediation is increasingly being used in Australia to encourage early and satisfactory settlement of environmental disputes.³⁷ Mediation is used to resolve environmental disputes in United States,³⁸ Canada.³⁹ In Land and Environmental Court in New South Wales, certain disputes can be referred to mediation before a hearing date in court.⁴⁰

Despite many successes associated with environmental mediation, it has been subject to several criticisms. First, environmental mediation may obscure the principled nature of environmental disputes by diverting disputants from political institutions like courts, administrative bodies and legislatures.⁴¹ Mediation can bypass and undermine regulatory processes without subjecting state officials to criticism or blame for compromising and dilution of legal provision and rights.⁴² The environmental statute in question may have been drafted in a manner that precludes a compromise.⁴³ This is especially so in enforcement cases where an entity is either in compliance or violation of the statute.⁴⁴ Parties who do not like a particular regulation may try to achieve a mediated settlement whereby they avoid the direct application of the rule.⁴⁵

³⁶ Tromans, S Environmental Mediation, *Water and Environment Journal*, Vol 13 No 2, Pp 112-114. [Electronic] Available: <http://www3.interscience.wiley.com/cgi-bin/fulltext> [2008, June 04]

³⁷ Dente, B, *Environmental Policy in Search of New Instruments*, Dordrecht, Boston : Kluwer Academic Publishers, 1995, p 88 [Electronic] Available: <http://books.google.co.za/books?l> [2008, October 11]

³⁸ Kubasek, N & Silverman, S G, *Environmental Law*, 5th edn, 2005, p 79

³⁹ Rounthwaite H I, Alternative Dispute Resolution in Environmental Law: Uses, Limitations, and Potentials in Hughes E L, *et al, Environmental Law and Policy*, 2nd edn, Toronto: Emond Montgomery Publications Ltd, 1998, at p517.

⁴⁰ *Ibid.*

⁴¹ Amy, *supra* note 33.

⁴² Modavi, N, Mediation of Environmental Conflicts in Hawaii: Win-Win or Co-Optation? *Sociological Perspectives*, Vol 39, No 2, Environmental Conflict (summer, 1996), pp 301-316 at p 303 [Electronic] Available: Jstor [2008, June 03]; Schoenbrod, D, Limits and Dangers of Environmental Mediation: A Review Essay, *New York University Law Review*, Vol 58, (December 1983), pp 1453- 1476 at pp 1466 -1467, [Electronic] Available: Westlaw, [2008, September 02]

⁴³ Kubasek, N, & Gary, S, Environmental Mediation, *American Business Law Journal*, Fall 1988, Vol 26 No 3, pp 5333- 555 at p 547 [Electronic] Available: Business Source Complete [2008, August 10]

⁴⁴ *Ibid.*

⁴⁵ *Idem* at p 549.

Secondly, the unequal power between participants in environmental mediation can undermine the extent to which this process is representative, fair and voluntary.⁴⁶ The process and outcome of environmental mediation is intensely shaped by larger political interests.⁴⁷ This is because there is imbalance of power among parties which depicts mediation as a non-egalitarian process that can benefit government or industry interests.⁴⁸ Thirdly, while litigation tends to increase public awareness and can serve as a means to strengthen the opposition group, resolution of an environmental dispute through mediation tends to avoid further mobilization of opposition.⁴⁹

3.3.3. Facilitation

Facilitation is a collaborative process in which a neutral third party assists a group of stakeholders in constructively discussing the issues in controversy.⁵⁰ It may take several forms ranging from scientific seminars to management meetings to public forums.⁵¹

Project XL of the United States Environmental Protection Agency uses facilitation to increase public participation by affected stakeholders in some of the agency's policy-making activities.⁵² The Office of Surface Mining Reclamation and Enforcement in the United States Department of Interior also uses facilitation before each proposed rulemaking to expand conflict resolution options and reduce the future potential use of litigation.⁵³ In practice the difference between facilitation and mediation is not always clear and these terms are sometimes used interchangeably.⁵⁴ However, the goal of facilitation is to improve communication and increase understanding but not to achieve an agreement.⁵⁵

⁴⁶ Amy, *supra* note 41 at p 148.

⁴⁷ Modavi, *supra* note 42 at p 303.

⁴⁸ Amy, *supra* note 46 pp 148-153.

⁴⁹ Modavi, *supra* note 47 at p 303.

⁵⁰ O'Leary & Bingham *supra* note 31 at p 11.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, .

⁵⁴ Sidaway, R, *Resolving Environmental Disputes: From Conflict to Consensus*, London; Sterling, VA Earthscan, 2005. at p 66 [Online] Available: <http://books.google.co.za/>[2008, October 19]

⁵⁵ *Ibid.*

3.3.4. Negotiation

Negotiation is a process whereby parties involved in a dispute or facing a common problem seek a mutually acceptable settlement or method of resolving their differences.⁵⁶

Negotiation is a voluntary process which a party can elect not to participate, or having once entered negotiations, any party can drop out⁵⁷ and there can be no settlement if the parties do not choose to agree.⁵⁸

Negotiation has the potential of producing results that are more acceptable to affected parties and which are easier to implement than those imposed by courts.⁵⁹ Although the basic negotiating process and skills apply to environmental disputes, negotiating environmental disputes may be very different.⁶⁰ Environmental disputes can prove to be very complex since they can involve both multiple substantive issues and multiple parties.⁶¹ In environmental disputes, identifying parties is sometimes difficult.⁶²

Negotiation is liable to be misused as was the case of early 1980's where the United States Environmental Policy Agency was trying to employ negotiation to cover up lax prosecution of environmental standards.⁶³

Negotiation may also be expensive especially in highly technical cases where it is costly but essential to gather relevant scientific information.⁶⁴

3.3.5. Negotiated Rule-Making

Negotiation rule making also known as regulatory negotiation or reg-neg is a process in which regulatory agencies design environmental regulations by first negotiating with

⁵⁶ Anstey, M, The Negotiation Process: Techniques of Negotiation and Dispute Resolution, in Pretorius, P (ed), *Dispute Resolution*, Capetown, Wetton & Johannesburg: Juta & Co Ltd, pp 12-38 at p 17.

⁵⁷ Bacow, L S & Wheeler, M, *Environmental Dispute Resolution*, New York : Plenum Press, 1984, p 26 [Online] Available: <http://books.google.co.za/>[2008, October 07]

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Miller, J G & Colosi, T R, *Fundamentals of Negotiation: A Guide for Environmental Professionals* Washington: Environmental Law Institute, 1989 at p 2 [Online] Available: [http:// books.google.co.za/books](http://books.google.co.za/books) [2008, July 20]

⁶¹ *Ibid.*

⁶² Bacow, & Wheeler, *supra* note 57. at p 26.

⁶³ *Idem* at p 26.

⁶⁴ *Idem* at p 27.

interested stakeholders.⁶⁵ It is a form of administrative rulemaking which had its origin in the United States.⁶⁶ Negotiated rule-making was successfully used by the Environmental Policy Agency in 1984 to develop rule governing non-compliance penalties for classes of heavy duty vehicles or engines that exceed allowable air quality emission levels.⁶⁷ This development led to the enactment of the Negotiated Rule Making Act in 1990 to legitimize negotiated rule making which led to its widespread use in the United States. Negotiated rulemaking offers a formal public consultation process in advance of a normal notice and comment process before the agency has formulated a full proposal.⁶⁸ The practice is also used in Canada.⁶⁹

The justifications given for negotiated rule-making are that (i) it encourages affected parties to reach an agreement at the outset (ii) it decreases the amount of time it takes to develop regulations (iii) it reduces or eliminates subsequent judicial challenges.⁷⁰ Negotiated rule making is designed to avoid litigation that may arise to challenge the new rule by generating agreement among the affected interests so that they abide by the decision and its implementation.⁷¹ Another reason for justification is that negotiated rule making produces quality rule and provides for the legitimacy of the rule created.⁷² Freeman and Langbein⁷³ present the arguments for and against negotiated rule making. Direct participation in rulemaking would produce both better quality rules and increase the rules' acceptability to those most affected by them.⁷⁴ Face-to-face interaction would lead to better information production, which in turn would improve rule quality because

⁶⁵ O'Leary & Bingham *supra* note 50 at p 12.

⁶⁶ Lyster, R, Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking, *Sydney Law Review*, Vol 25 (1998) [Electronic] Available: <http://www.austlii.edu.au/au/journals/SydLRev/> [2008, October 08]

⁶⁷ Susskind, L E & Secunda, J, Environmental Conflict Resolution: The American Experience, in Napier, C, (ed), *Environmental Conflict Resolution*, London: Cameron May Ltd, 1998, p 23.

⁶⁸ Tripp, T B J, & Alley, N G, Streamlining NEPA's Environmental Review Process: Suggestions For Agency Reform, *New York University Environmental Law Journal*, Vol 12 (2003), pp 74-110 at 92 [Electronic] Available Westlaw, [2008, October 11]

⁶⁹ Susskind, & Secunda, *supra* note 67 at p 23.

⁷⁰ Coglianese, C, Assessing Consensus: The Promise And Performance Of Negotiated Rulemaking, *Duke Law Journal* Vol 46 (April, 1997), pp 1255- 1349 at 1257. [Electronic] Available: Westlaw [2008, October 08]

⁷¹ O'Leary & Bingham, *supra* note 65 at p 12.

⁷² Freeman, J & Langbein, L, Regulatory Negotiation And The Legitimacy Benefit, *New York University Environmental Law Journal* Vol 9 (2000), pp 60-151 at p 69, [Electronic] Available: Westlaw [2008, October 10]

⁷³ *Ibid.*

⁷⁴ *Idem* at pp 72-73.

negotiations allow parties to trade interests in order to reach agreement, it would also enable them to educate each other, pool knowledge, and cooperate in problem solving.⁷⁵ Finally, sharing responsibility for rule development would foster in the parties a sense of ownership over the outcome, rendering it more acceptable--that is, more legitimate.⁷⁶

On the other hand, it has been argued that that even if a consensus-based approach to rulemaking is arrived at the process is insufficiently inclusive because only a limited number of parties can participate without negotiations becoming unwieldy.⁷⁷ Even if agencies could balance negotiating committees with representatives from all sides, no single interest could adequately represent the average voter or consumer.⁷⁸ The power to convene a negotiating group carries with it the power to manipulate outcomes.⁷⁹ The agency either alone or in collusion with powerful groups, might rig outcomes in advance through the selection of some stakeholders and the exclusion of others.⁸⁰ A consensus approach would favour more powerful, well-financed interests with access to money, information, and technical expertise which would then influence the outcomes.⁸¹

It has been rightly observed that judicial review is an important mechanism to ensure that negotiated rulemaking promotes the public interest, and that the consensus of the parties does not bind the agency to do something prohibited by the law.⁸²

3.3.6. Arbitration

Arbitration is one of the most established alternatives to litigation although some Alternative Dispute Resolution literature does not recognize arbitration as an alternative dispute resolution because arbitration is more akin to litigation.

Parties who have tried but failed to negotiate or mediate may refer their environmental dispute to arbitration. Arbitration process may be triggered either by statutory provisions directing compulsory arbitration in certain cases or by an agreement between parties. In

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Idem* at p 72.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*]

⁸¹ *Ibid.*

⁸² Lyster, *supra* note 66.

the former case, the process is referred to as compulsory arbitration, and the in latter voluntary arbitration.⁸³ There are two ways by which arbitration may be secured if the arbitration of the dispute in question is not mandated by statutory law.⁸⁴ First, parties may include a binding arbitration clause in a contract for all or certain disputes arising under the contract.⁸⁵ In the second place, parties may secure arbitration by entering into a submission agreement, which is a written contract stating that parties wish to settle their dispute by arbitration.⁸⁶ In either case, disputants are required to settle their disputes by arbitration and courts will defer to arbitration if the contract in dispute contains a binding arbitration clause.

An arbitrator or arbitration panel reviews or listens to evidence from each party and reaches a judgment.⁸⁷ The process is private and written justification for the decision is required unless otherwise agreed by the parties.⁸⁸

One distinct advantage of arbitration is that unlike judges, arbitrators are chosen for their specific environmental expertise.⁸⁹ Arbitration panels in environmental disputes usually contain people who served for many years in environmental areas.⁹⁰ Arbitration is also flexible as disputants can specify issues to be submitted to arbitration, select arbitrators or makes changes to the rules of procedure, determine whether the award will be binding, subject to review or merely advisory.⁹¹ Parties may also resolve to make their dispute resolution proceedings private which will deny public access.⁹²

Arbitration provisions appear in several United States statutes⁹³ including in the Federal Insecticide, Fungicide and Rodenticide Act of 1994⁹⁴ and in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),⁹⁵

⁸³Brand, J, *The Nature of the Arbitration Process*, in Pretorius, P (ed), *Dispute Resolution*, Capetown, Wetton & Johannesburg: Juta & Co Ltd, pp 93-101 at p 94.

⁸⁴ Kubasek, & Silverman, *supra* note 38 at p 79.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Agardy, F J, *et al*, *Practical Environmental Forensics*, New York: John Wiley & Sons, 2001, p 302. [Online] Available: <http://books.google.co.za/> [2008, October 20]

⁸⁸ *Ibid.*

⁸⁹ MacNaughton A, L & Martin, J G, *Environmental Dispute Resolution: an Anthology of Practical Solutions*, 2nd edn, Chicago: American Bar Association, 2002, p 46. [Online] Available: <http://books.google.co.za/books> [2008, July 16].

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Goldberg, S B, *et al*, *Dispute Resolution*, Boston & Toronto: Little, Brown & Co, 1985, p 189.

⁹³ Bingham & Haygood, *supra* note 32.

3.3.7. Litigation

As highlighted above, environmental dispute resolution mechanisms emphasize use of the Alternative Environmental Dispute Resolution processes in stead of environmental litigation.⁹⁶ There are arguments whether Alternative Environmental Dispute Resolution should act as a separate system outside the judicial system or as supplementary to the judicial system.⁹⁷ Stukenborg observes that there is a consensus that Alternative Environmental Dispute Resolution should only be used in cases involving well-established legal principles, when the main dispute involves the facts in the specific case.⁹⁸ The application of Alternative Environmental Dispute Resolution in such circumstances would reduce courts' caseloads and enable the traditional adversarial system to concentrate on the more important task of defining the various roles and responsibilities of governmental parties in environmental disputes.⁹⁹

While it is admitted that environmental litigation may not be appropriate to all environmental disputes, it remains important in certain environmental disputes and for enforcement purposes.¹⁰⁰ More importantly, there have been attempts have been to incorporate the Alternative Dispute Resolution processes as adjuncts to dispute settlement before courts.¹⁰¹

There are several reasons to justify the need to continue using environmental litigation.

3.3.7.1. Incentive to reach a settlement

⁹⁴ 7 USC.

⁹⁵ 42 USC.

⁹⁶ Lyster,R, Environmental Dispute Resolution, in Pretorius, P (ed), *Dispute Resolution*,Capetown, Wetton & Johannesburg: Juta & Co Ltd, at p 145.

⁹⁷ Stukenborg, C, The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts, *University of Dayton Law Review*, Vol 19 (1994), pp 1305-1339 at p 1336 [Electronic] Available: Westlaw [2008, September 02]

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Lyster,*supra* note 96 at p 145.

¹⁰¹ Mackie K J, *A Handbook of Dispute Resolution: ADR in Action*, London: Routledge, 1991, p 4. [Electronic] Available: [http:// books. google.co.za/books](http://books.google.co.za/books) [2008, July 28]

The threat of litigation may encourage parties to resolve the problem by negotiation, mediation and other alternative dispute resolution mechanisms instead of going to court.¹⁰²

3.3.7.2. Balance of Power

Environmental litigation has the potential to alter the balance of power which is normal feature of environmental disputes.¹⁰³ Litigation provides means to powerless groups and individuals to enforce rights and duties against private companies and governments.¹⁰⁴

3.3.7.3. Development of Law

Environmental litigation may be necessary for the development of law.¹⁰⁵

3.3.7.4. Publicity

Publicity of environmental litigation, especially where a party is found liable for environmental damage, may act as a disincentive to further environmental damage or pollution.¹⁰⁶

3.3.7.5. Public Empowerment

Another impetus for environmental litigation is the presence of what are known as ‘citizen suit’ provisions in the United States. In the United States, most federal environmental laws include a special citizen suit provision that allows any citizen to sue the Environmental Policy Agency to compel it to do its duty under the law.¹⁰⁷ A citizen

¹⁰² Lyster, *supra* note 100.

¹⁰³ *Ibid.*

¹⁰⁴ Dente, B, *Environmental Policy in Search of New Instruments*, Dordrecht, Boston : Kluwer Academic Publishers, 1995, p 82 [Electronic] Available: <http://books.google.co.za/books?l> [2008, October 11]

¹⁰⁵ Lyster, *supra* note 98.

¹⁰⁶ *Ibid.*, at p 146.

¹⁰⁷ Wald, P M, *The Role of the Judiciary in Environmental Protection*, *Boston College Environmental Affairs Law Review*, Vol 19 No 3 (Spring, 1992). [Electronic] Available: Academic Search Premier [2008, October 10]

suit provision enables citizen enforcers who are on the spot and who sometimes can make better decisions than distant bureaucrats about what needs to be done.¹⁰⁸ The provision also works to reduce the fear that over time enforcers and polluters, who deal with one another constantly, may work out "agreements" that are not necessarily true to the spirit of the environmental law in question.¹⁰⁹

Furthermore, public interest litigation may be taken to protect the environment by citizen groups of individuals.¹¹⁰ In public environmental litigation, the relief sought does not benefit the applicant financially and issues raised are substantial and require judicial interpretation to clarify the law and add to precedent.¹¹¹

3.3.7.6. Specialized Environmental Courts and Tribunals

The existence of a specialized environmental court may minimize most of the problems associated with traditional litigation. A court of that kind already exists in New South Wales Australia under the name of Land and Environmental Court. In Canada there are environmental appeals tribunals such as Alberta Environmental Appeal Board, Ontario Environmental Appeal Board, and British Columbia Environmental Appeals Board.¹¹²

In the United States there is an Environmental Appeals Board under the US Environmental Protection Agency¹¹³

The existence of either an environmental court, or appeal or tribunal is important for the uniformity and certainty of the law especially where it has exclusive trial and appellate jurisdiction over environmental litigation.¹¹⁴ Environmental matters involve highly specialized and intricate questions which could be adjudicated more efficiently by courts with expertise acquired from continual application of environmental statutes and

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Dente, *supra* note 104 at p 11

¹¹¹ *Ibid.*

¹¹² Tilleman, W A, Environmental Appeal Boards: A Comparative Look at The United States, Canada, and England, *Columbia Journal of Environmental Law*, Vol 21 (1996), pp 1-85, [Electronic] Available: Westlaw [2008, October 11]

¹¹³ *Ibid.*

¹¹⁴ University of Pennsylvania Law Review Comment, The Environmental Court Proposal: Requiem, Analysis, And Counterproposal, *University of Pennsylvania Law Review*, Vol 123, (January, 1975) pp 676-695 at p677 [Electronic] Available: Westlaw [2008, October 11]

regulations to technically complex issues.¹¹⁵ On the other hand, it has been argued that “‘expertise’ required in the judicial process is not technical know-how, but rather ‘the unique capacity to see things in their context’ since the law approach commonly accepted views of right and wrong”.¹¹⁶ However, it must be pointed out that judges in the generalist courts are reluctant to impose court orders or injunctions that may impede the scientific investigation process.¹¹⁷ They do not have a guide at the trial judge at the interface between science and the law.¹¹⁸

Finally, it is important to note that some environmental appeals boards or tribunals conduct Alternative Dispute Resolution in their appeal proceedings as supplementary to their normal procedures.¹¹⁹

3.4. Conclusion

Environmental Dispute Resolution mechanisms must take a multi-faceted approach. The nature of an environmental dispute will necessarily determine the best practice of environmental dispute resolution. It is dangerous to demand that consensus must be achieved in all environmental disputes. Resort to environmental litigation is necessary in some instances. In some cases, however, one party decides to settle a dispute voluntarily by admitting the allegations made by the other party, time and money will definitely be served. Perhaps the greatest challenge now is to determine an appropriate environmental dispute resolution for a particular environmental dispute.

¹¹⁵ *Idem* at p 688.

¹¹⁶ Rifkind, *A Special Court for Patent Litigation? The Dangers of a Specialized Judiciary*, 37 *A B A J* Vol 37 (1951), p 425. discussed in University of Pennsylvania Law Review Comment The Environmental Court Proposal: Requiem, Analysis, And Counterproposal, *University of Pennsylvania Law Review*, Vol 123, (January, 1975) pp 676- 695 at p 688 [Electronic] Available: Westlaw [2008, October 11]

¹¹⁷ Park, K J, Judicial Utilization of Scientific Evidence in Complex Environmental Torts: Redefining Litigation Driven Research, *Fordham Environmental Law Journal* , Vol 7 (spring, 1996), pp 483- 513 at 487 [Electronic] Available: Westlaw [2008, October 11]

¹¹⁸ *Ibid.*

¹¹⁹ Tilleman, *supra* note 113 at p 74.

Chapter 4: Environmental Dispute Resolution in Mainland Tanzania

4.1. Introduction

Environmental protection is one of the fundamental objectives and directive principles of State Policy.¹ Article 27 of the Constitution of the United Republic of Tanzania of 1977 imposes a general duty to every person to protect the natural resources of the United Republic of Tanzania and in particular every person is required, *inter alia*, to combat all forms of waste and squander. The Environmental Management Act, 2004,² is the framework legislation on environmental protection and management in Mainland Tanzania.³ Section 4 (1) confers the right to a clean, safe and healthy environment. This chapter examines the mechanisms for environmental dispute resolution in Mainland Tanzania in the light of international best practices. The next part provides a general overview of the environmental dispute resolution while the third part provides an evaluation. The fourth part is a conclusion.

4.2. Environmental Dispute Resolution Mechanisms

Basically, environmental dispute resolution in Mainland Tanzania is premised on the traditional method postulated by the third theory of environmental dispute resolution discussed in chapter 3.⁴ The law provides for resolution of environmental disputes through the administrative process and the judicial process.

Before examining the bodies charged with environmental dispute resolution, it is important to set out the administrative process under the Environmental Management Act. Environmental affairs are handled by the office of the Minister of State in the Vice

¹ The Constitution of the United Republic of Tanzania of 1977, Article 9 (c).

² (Act No 20/2004).

³ Environmental Management Act, 2004, s 2 (2)

⁴

President Office. The Minister has the overall responsibility on environmental matters which means the minister is responsible for articulation of policy guidelines for the promotion, protection and sustainable management of environment.⁵ The Environmental Management Act, 2004 establishes an advisory committee referred to as the National Environmental Advisory Committee.⁶ In addition, the law establishes the office of the Director of Environment⁷ whose functions includes coordination of environmental management activities; advising the Government on legislative measures and international environmental agreements; monitoring and assessment of environmental activities; preparing national report on the state of the environment.⁸ The National Environment Management Council (NEMC) is the body charged with the compliance, enforcement, and review and monitoring of environmental impact assessment.⁹ NEMC is required to submit a bi-annual report how it has implemented the provisions of the Environment Management Act.¹⁰ The functions of the Council include the power to carry out an environmental audit,¹¹ review and recommend for approval of environmental impact assessments,¹² identify projects and programmes or types of projects for which environmental audit or environmental monitoring must be carried out,¹³ enforce and ensure compliance of the national environmental quality standards.¹⁴ Finally, the Environmental Management Act establishes environmental bodies in sector ministries,¹⁵ at the regional¹⁶ and local government¹⁷ levels.

⁵ *Supra* note 3, s 13.

⁶ *Idem.*, s 11.

⁷ *Idem.*, s 14.

⁸ *Idem.*, s 15.

⁹ *Idem.*, s 17 (1).

¹⁰ *Idem.*, s 17 (2).

¹¹ *Idem.*, s 18 (2) (a).

¹² *Idem.*, s 18 (2) (d).

¹³ *Idem.*, s 18 (2) (e).

¹⁴ *Idem.*, s 18 (2) (f).

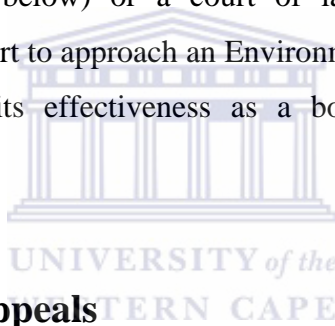
¹⁵ *Idem.*, s 30.

¹⁶ *Idem.*, s 34.

¹⁷ *Idem.*, s 36.

4.2.1. Environmental Management Committee

Section 37 (1) creates Environmental Management Committee from the Standing Committee on Urban Planning and Environment¹⁸ and the Standing Committee on Economic Affairs, Works and Environment¹⁹ for the City, Municipal and District to which such Standing Committee is established. One of the functions of the City, Municipal and District Environmental Management Committee is to resolve conflict among individual persons, companies, agencies, non-governmental organizations, Government departments or institutions about their respective functions, duties, mandates, obligations or activities under the Environmental Management Act.²⁰ There are no guidelines concerning the mode of dispute settlement to be followed. It is also not mandatory for parties to resolve their dispute before approaching the Environmental Appeals Tribunal (discussed below) or a court of law. As a result, it would be discretionary for a party to resort to approach an Environmental Management Committee. This in turn may diminish its effectiveness as a body for environmental dispute resolution.



4.2.2. Administrative Appeals

4.2.3. Minister

An appeal lies to the Minister from NEMC²¹ and from the Minister to the Environmental Appeals Tribunal and finally on a point of law to the High Court.²² It should be noted that the structure appeal is commendable in that it involves the Minister, who is a politician; the Environmental Appeals Tribunal which is composed of lawyers and laypersons and the High Court. The Minister is at the middle of this appellate system. The minister is likely to be influenced by political pressures in his decisions and also bearing in mind that there might a lack of consistency in environmental policy due to changes in the

¹⁸ It is established under s 42(1) of the Local Government (Urban Authorities) Act, 1982

¹⁹ It is established under s 74 (1) of the Local Government (District Authorities) Act, 1982

²⁰ *Supra* note 17, s 41 (c).

²¹ *Idem.*, s 18 (3).

²² See below.

ministers.²³ This issue underscored by the fact that it is at the discretion of the President to determine not only the structure but also the number of the cabinet Ministers.²⁴ It is therefore not surprising that environmental affairs might one day be assigned to a certain governmental department which would be subject to a particular Ministry.

4.2.4. Environmental Appeals Tribunal

An Environmental Appeals Tribunal is a body with an appellate jurisdiction²⁵ concerning (i) the decision or omission of the Minister for environmental affairs,²⁶ (ii) the imposition of or failure to impose a condition, limitation or restriction issued in accordance with the provisions of the Environmental Management Act and the regulations made under it,²⁷ and (iii) the decision of the Minister to approve or disapprove an environmental impact assessment.²⁸ Furthermore, the Tribunal has jurisdiction to interpret the provisions of the Environment Management Act where a reference is made to it by the NEMC.²⁹

One of the advantages of having tribunals is that they offer speedier, cheaper and more accessible justice essential for the administration of environmental matters.³⁰ Nevertheless, the Tribunal lacks original jurisdiction and must depend on appeals from decisions of administrative organs established under the Environmental Management Act. This restricts access to the Tribunal by people to have their environmental disputes resolved.

The Tribunal is composed of (i) a Chairman who is appointed by the President among persons who are qualified to be appointed as Judge, (ii) an advocate of the High Court recommended by the Tanganyika Law Society, (iii) one member with high academic

²³ Hogan, G & Morgan, D, *Administrative Law in Ireland*, 2nd edn, London: Sweet & Maxwell, 1991, 225-226.

²⁴ The Constitution of the United Republic of Tanzania of 1977, Article 36 (1).

²⁵ *Supra* note 21, s 204 (1).

²⁶ *Idem.*, s 206 (2) (a).

²⁷ *Idem.*, s 206 (2) (b).

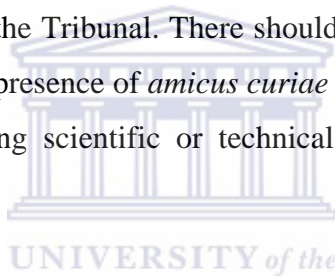
²⁸ *Idem.*, s 206 (2) (c).

²⁹ *Idem.*, s 206 (5).

³⁰ Hogan, G & Morgan, D, *Administrative Law in Ireland*, 2nd edn, London: Sweet & Maxwell, 1991, at pp 225-226.

qualifications and experience in environmental law and two other members who have demonstrated exemplary professional competence in the field of environmental management.³¹ The Chairman may invite persons with special skills or knowledge in environmental issues which are before the Tribunal to act as *amicus curiae* if the Tribunal thinks that such special skill or knowledge is necessary for the proper determination of the matter.³²

This composition of the Tribunal brings together a large degree of environmental law and management expertise which is required in environmental dispute resolution. The Chairman, the advocate and another person appointed by the Minister are lawyers. Two other members appointed by the minister come from the field of environmental management. There is a concern that the civil society ought also to have at least one person on this composition of the Tribunal. There should also be a person from the field of environmental science. The presence of *amicus curiae* will be particularly crucial in an environmental dispute involving scientific or technical issues which are matters that require expert knowledge.



The Registrar of the Tribunal is appointed by the Chief Justice from among the judicial officers.³³ The Chairman and other members hold the office for a term of three years but are eligible for reappointment for further one term.³⁴

The appeal to the Tribunal must be lodged within thirty days of after the occurrence of the event against which the appellant is dissatisfied.³⁵ The appeal is made in prescribed form.³⁶ The Tribunal is empowered to develop its own procedure and is not bound by any rules of procedure or evidence in the Criminal Procedure Act, Civil Procedure Code, and the Law of Evidence Act.³⁷ It is submitted that this discretionary power should be liberally used to relax the adversarial procedure used on courts of law. The rules of

³¹ *Supra* note 29, s 204 (1).

³² *Idem.*, s 204 (5).

³³ *Idem.*, s 212 (1).

³⁴ *Idem.*, s 204 (3)

³⁵ *Idem.*, s 206 (2).

³⁶ *Idem.*, s 206 (2).

³⁷ *Idem.*, s 207 (4)

evidence may also need to be flexible. This however does not mean that the Tribunal may act on evidence not disclosed to the parties.

A party to the proceedings before the Tribunal may appear in person or be represented by an advocate or by any other recognized agent.³⁸ The right to legal representation raises the question whether financial assistance may be available from public funds for representation before the tribunals.³⁹ But the right to sue in *forma pauperis* applies only where a party has filed a civil case and therefore, it would not extend to proceedings before the Tribunal⁴⁰

For the purpose of proceedings before it, the Tribunal may make the following orders (i) an order for securing an attendance of any person at any place where the Tribunal is sitting;⁴¹ (ii) an order for the discovery or production of any document concerning a matter before it or the investigation of any contravention under the Environmental Management Act;⁴²(iii) for taking evidence on oath⁴³ (iv) an order for summoning a person as a witness.⁴⁴ The following acts are criminalized, (i) failure to enter appearance before the Tribunal when required to do so,⁴⁵ (ii) refusal to take an oath before the Tribunal or refusal to produce any article or document when lawfully required to do so,⁴⁶ (iii) knowingly giving false evidence or information which such person knows to be misleading,⁴⁷ (iv) interrupting the proceedings of the Tribunal or committing a contempt.⁴⁸

³⁸ *Idem.*, s 207 (5).

³⁹ See Foulkes, D, *Administrative Law*, 5th edn, London: Butterworths,1982 at pp 141-142 discussing this question in relation to England.

⁴⁰ Court Fees Rules, GN No 308/1964

⁴¹ *Supra* note 38, s 206 (a).

⁴² *Idem.*, s 206 (b).

⁴³ *Idem.*, s 206 (c).

⁴⁴ *Idem.*, s 206 (d).

⁴⁵ *Idem.*, s 207 (7) (a).

⁴⁶ *Idem.*, s 207 (7) (b).

⁴⁷ *Idem.*, s 207 (7) (c).

⁴⁸ *Idem.*, s 207 (7) (d).

The Chairman and two members of the Tribunal constitute the quorum.⁴⁹The Chairman presides over the meetings of the Tribunal and in his absence any member elected by the members present at that meeting.⁵⁰ Since the Act does not provide how the decision would be reached, the common law principle would apply and the decision would be that of the majority.⁵¹ Any member who has interest in any matter which is subject of the proceedings before the Tribunal can not take part in those proceedings.⁵²

The law does not provide for the venue where the Tribunal will regularly sit but it is argued that the rules of convenience should apply in this case.

The Tribunal has power to confirm, vary or set aside the order, notice, direction or notice complained about.⁵³ It also has power to make orders relating to costs.⁵⁴The Tribunal may issue any appropriate order depending on the circumstances of the appeal.⁵⁵After hearing an appeal or any matter which has been referred to it by the NEMC,⁵⁶ the Tribunal may inquire into the matter and make an award in the form of a directive, order or recommendation.⁵⁷ The Tribunal must notify the concerned parties of the award⁵⁸ and it must specify the period within which the award is to be complied with.⁵⁹ The award of the Tribunal is binding as if it were a decree of a court.⁶⁰

The Chairman and other members of the Tribunal are immune from criminal prosecution and civil action for any act done or omitted to be done in good faith in discharge of their duties as members or officers of the Tribunal whether or not within the limits of their jurisdiction.⁶¹ Moreover an officer of the Tribunal who is bound to execute lawful warrants, orders or other process of the Tribunal can not be liable either for criminal

⁴⁹*Idem.*, s 207 (1)

⁵⁰ *Idem.*, s 207 (2).

⁵¹ Foulkes, D, *Administrative Law*, 5th edn, London: Butterworths, 1982 at p 144.

⁵² *Supra* note 50, s 207 (3).

⁵³ *Idem.*, s 206 (3) (a).

⁵⁴ *Idem.*, s 206 (3) (b).

⁵⁵ *Idem.*, s 206 (4).

⁵⁶ *Idem.*, s 208 (1).

⁵⁷ *Idem.*, s 208 (1) (a).

⁵⁸ *Idem.*, s 208 (1) (b).

⁵⁹ *Idem.*, s 208 (1) (c).

⁶⁰ *Idem.*, s 208 (2).

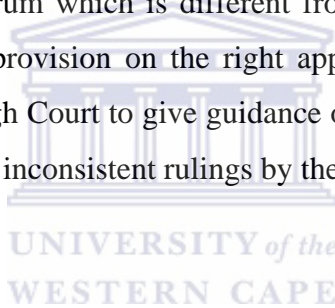
⁶¹ *Idem.*, s 210 (1).

prosecution or civil action in court for the execution of such warrant, order or other process which such an officer would have been bound to execute within the limits of the jurisdiction.⁶²

4.2.5. Judicial Process

4.2.5.1. Appeal to the High Court

A person aggrieved by the decision or order of the Tribunal may appeal on a point of law to the High Court within thirty days of such decision or order.⁶³ The appeal to the High Court is final⁶⁴ and there is no right to appeal to the Court of Appeal which is the highest court in Tanzania. The appeal to the High Court is heard by a panel of three judges,⁶⁵ a quorum which is different from ordinary civil cases in which single judges sit. The provision on the right appeal to the High Court is significant as it enables the High Court to give guidance on proper interpretation of the law so that they may not be inconsistent rulings by the Tribunal.⁶⁶



4.2.5.2. Civil Action

Any person may bring an action where a right to a clean, safe and healthy environment is threatened against the person whose act or omission is likely to cause harm to human health or environment.⁶⁷

Although this provision seems broadens the *locus standi* in instituting an environmental action, it seems as if this right to institute an environmental action is restricted to only when a right to clean, safe and healthy environment is being threatened and not when the right has actually been violated. This would mean that where environmental damage has occurred only the injured party would be entitled to bring an action before a court of law.

⁶² *Idem.*, s 210 (2).

⁶³ *Idem.*, s 209 (1)

⁶⁴ *Idem.*, s 209 (3).

⁶⁵ *Idem.*, s 209 (2).

⁶⁶ Wade, H W R & Forsyth, C F, *Administrative Law*, 9th edn, Oxford: Oxford University Press, 2004, 941.

⁶⁷ *Supra* note 65, s 5(1).

This reasoning may find support under section 225 of the Environmental Management Act. This provision provides that in addition to the system of enforcement provided for under the Environmental Management Act or any other written laws, the recourse to civil enforcement shall continue to give individuals who are injured by violations of Environmental Management Act a right to obtain compensation from the violators through ordinary civil suits.⁶⁸

4.2.5.3. Judicial Review

As noted above, an appeal from a decision or order of the Tribunal lies on a point of law to the High Court; it is argued that the decisions of the Tribunal may be still subject to judicial review by the High Court on the common law grounds.

4.3. Evaluation in the Light of the Best Practices

Tanzania Mainland approaches environmental dispute resolution through the traditional dispute resolution mechanism which is a characteristic of the third theory of environmental dispute resolution.

4.3.1. Alternative Environmental Dispute Resolution

Save for the land disputes⁶⁹ and labor disputes⁷⁰ which have separate dispute resolution mechanisms, all civil disputes are governed by the court-annexed alternative dispute resolution mechanisms. As a result an environmental dispute filed before a court of law, other than a primary court, like other disputes, must undergo the alternative dispute resolution procedure.⁷¹

The alternative dispute resolution process does not operate as a real alternative to adversarial system because it is under court supervision where advocates and their parties

⁶⁸ *Idem.*, s 225.

⁶⁹ The Courts (Land Disputes Settlements) Act, 2002 (Act No 2/2002).

⁷⁰ Labour Institutions Act, 2004 (Act No 7/2004).

⁷¹ Civil Procedure Code [Cap 33 Re 2002], O 8A, r 1

attend. As Gillah correctly observes, Alternative Dispute Resolution procedures should be removed from the adversarial system in order to provide for a real alternative to the adversarial system.⁷² It has also been pointed out that since legal profession makes lawyers to occupy partisan advisory and representative roles, lawyers have difficulties in adapting to the posture of impartial facilitator of other peoples' decision making.⁷³

Moreover, mandatory Alternative Dispute Resolution creates a risk that parties will be coerced into settling their dispute.⁷⁴ This may cause problems where there is an imbalance of power between and individual or environmental interest groups and industry or government.⁷⁵ Moreover, parties may use the process as a mere formality where the parties participate only reluctantly and with little active interest.⁷⁶

Although litigation remains as the major mechanism for environmental dispute resolution, it is important to create a framework for alternative environmental dispute resolution. The court-annexed procedure alternative dispute resolution may not be appropriate. The reason for court annexed alternative dispute resolution was to reduce the work-load and thus increase efficiency.⁷⁷ Although one of the major reasons for preferring alternative environmental dispute resolution is to increase efficiency, the nature of environmental disputes is another reason. Environmental disputes require intervention by people versed in environmental law and management but most Tanzanian advocates and judges are general practitioners.

⁷²Gillah, L M, *Efficacy and Adequacy of Alternative Dispute Resolution (ADR) In Facilitating A Desirable Settlement of Disputes and Promoting Access To Justice in Tanzania*, Unpublished LLM Thesis at the University of Dar es Salaam, 2006, p 86.

⁷³ Roberts, S, *Mediation in the Lawyers' Embrace*, *Modern Law Review*, Vol 55, pp 259-265 at p 261.

⁷⁴ Taylor, M, *et al*, *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices*, *Dalhousie Law Journal*, Vol 22 (Fall, 1999) pp 51- 124 at pp 90-91 [Electronic] Available: Lexis Nexis Academic [2008, October 15]

⁷⁵ Taylor, M, *et al*, *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices*, *Dalhousie Law Journal*, Vol 22 (Fall, 1999) pp 51- 124 at pp 90-91 [Electronic] Available: Lexis Nexis Academic [2008, October 15]

⁷⁶ Taylor, M, *et al*, *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices*, *Dalhousie Law Journal*, Vol 22 (Fall, 1999) pp 51- 124 at pp 90-91

⁷⁷ ⁷⁷ Court of Appeal of Tanzania, *The History of Administration of Justice in Tanzania*, 1st edn, Dar es Salaam: Mathews Bookstore & Stationers, 2004, p 78.

4.3.2. Access to Environmental Information

The right to access information is provided for under section 7 (3) (f). Under that subsection “every person exercising powers under the Environmental Management Act must observe the principle that access to environmental information, which enables citizens to make informed personal choices and encourages improved performance by industry and government”.

A Tanzanian citizen has freedom of access to information held publicly relating to the implementation of the Environmental Management Act and to the state of environment and actual and future threats to the environment.⁷⁸ A request for information may be refused on any of the following grounds⁷⁹ (i) the information to be sought would involve supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general manner, (ii) if the public order or national security would be affected by supply of information sought, (iii) for the protection of trade or industrial secrets, (iv) if the request is too vague or uncertain to enable identification of the information sought, or (v) if the organ on which request is made is unaware of the existence of the information sought. Written reasons must be given where request for information is refused.⁸⁰

The restriction to access information on the grounds of public order or national security and trade or industrial secrets are formulated in too general terms. Important adverbs such as ‘negatively, greatly where request for information is to be refused on the ground of public order or national security while adjectives such as ‘reasonable’, ‘legitimate’ and ‘consistent’ are missing. This can result in information relating to environment being refused on these grounds. This problem may be further complicated where a party initiate a civil action in court. Under the provisions of the Civil Procedure Code unpublished official records or communications may not be produced in any proceedings if the Minister states on oath that the production of such a document would be prejudicial to the public interest.⁸¹

⁷⁸ *Supra* note 68, s 172 (1),

⁷⁹ *Idem.*, s 172 (2).

⁸⁰ *Idem.*, s 172 (3).

⁸¹ s.132,Evidence Act [Cap 6 Re 2002];Order XI, Rule 10,15(3), Civil Procedure Code [Cap 33 Re 2002]

As stated above, information may also be refused if the organ on which request is made is unaware of the existence of the information sought. It is apparent that the freedom of access to information is limited to information held pursuant to the provisions of the Environmental Management Act. But there is a possibility for information which relates to environment being held under other laws. In other words, there are other laws which regulate environment in one way or another which means that the freedom of access to information ought to extend to information held under other laws which affecting the environment. There is a possibility for the staff in the Sector Ministries to just assume that they do not have any information relating to environment.

Finally, the law does not provide for freedom to access information privately held.⁸²

4.3.3. Cost

The question of cost has not been addressed despite the fact that section 5 (1) widens the *locus standi*. A party to approaching the Environmental Appeals Tribunal or a court of law will have to meet court fees, the cost of lawyers and, the risk of having to pay one's opponent's costs if one loses, and the uncertainty at the outset of litigation as to how large those costs will be.⁸³ In Tanzania, the common law rule that costs follow the event in litigation applies. Relaxation of the traditional requirements for standing is of little significance unless other procedural reforms are made particularly is this so in the area of funding of environmental litigation and the awarding of costs.⁸⁴ The fear, if unsuccessful, of having to pay the costs of the other side with devastating consequences to the individual or environmental group bringing the action will inhibit the taking of cases to court.⁸⁵

⁸² South African laws allow access to private information under certain defined conditions. This is discussed in the next chapter.

⁸³ Lord Justice Brooke, *Environmental Justice: The Cost Barrier*, *Journal of Environmental Law*, Vol 18 (2006) pp 341- 356 at p 345. [Electronic] Available:Westlaw [2008, October 16]

⁸⁴ *Idem.*, at p 346.

⁸⁵ *Ibid.*

4.3.4. Limitation of Time

The general rule under the Law of Limitation Act⁸⁶ provides that the period of limitation commence from the date on which the right of action for such proceeding accrues⁸⁷ and the right of action in respect of a proceeding accrues on the date on which the cause of action arises.⁸⁸ The rigidity of this rule has been relaxed in some countries.⁸⁹ In the United Kingdom, time begins to run against the injured party from the moment that he becomes aware that he has a cause of action, not from the moment that the party is actually injured.⁹⁰ Courts have discretion to allow suits after the time limitation has expired if it appears equitable to do so.⁹¹ In the United States, under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA),⁹² as amended by the Superfund Amendment and Authorization Act of 1986 (SARA),⁹³ statutes of limitation do not begin to run against the plaintiff until he or she knows or ought to know that the harm was caused by the defendant.⁹⁴ In this regard, Tanzanian is therefore lagging behind.

4.4. Conclusion

Environmental Dispute Resolution mechanisms in Tanzania needs to be revisited to reduce the anomalies outlined above. In particular, the mechanisms needs to provide for public participation in environmental dispute resolution. The confinement of environmental dispute resolution mechanisms to administrative agencies and courts of law is not an effective way of dealing with environmental disputes.

⁸⁶ [Cap 89 Re 2002]

⁸⁷ The Law of Limitation Act [Cap 89 Re 2002], s 4.

⁸⁸ *Idem.*, s 6.

⁸⁹ Juma, L, Environmental Protection In Kenya: Will The Environmental Management And Co-Ordination Act (1999) Make A Difference? *South Carolina Environmental Law Journal* (Spring, 2002), Vol 9, pp 181- 218 at 196 [Electronic] Available: Westlaw [2008, October 10]

⁹⁰ 24 Halsbury's Statutes of England and Wales 709, 712 (4th ed. 1998 discussed in Juma, *supra* note 89.

⁹¹ *Ibid.*

⁹² [42 U S C S. §§ 9601- 9675](#)

⁹³ Superfund Amendment and Authorization Act of 1986, [Pub L No 99-499](#),

⁹⁴ Juma, *supra* note 90.

Chapter 5: Environmental Dispute Resolution in South Africa

5.1. Introduction

The Constitution of the Republic of South Africa, 1996 provides for the constitutional and legislative foundation for the environmental protection. Section 24 (a) recognize the right of every person to an environment that is not harmful to their health or well-being. Section 24 (b) recognize the right of every one to have the environment protected, for the benefit of present and future generations, through reasonable legislative measures and other measures that prevent (i) pollution and ecological degradation; (ii) promote conservation (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The mechanisms of environmental dispute resolution in South Africa will be examined and evaluated in this chapter. One of the policy goals of the White Paper on Environmental Policy for South Africa, 1998 is to establish mechanisms to deal with intergovernmental disputes, and appeals and conflict resolution mechanisms and structures.¹

5.2. Environmental Dispute Resolution Mechanisms

The Republic of South Africa consists of national, provincial and local spheres of government² and the resolution of intergovernmental disputes are governed by the Constitution.³ It is beyond scope of this paper to discuss those conflicts. Suffice to mention that the Supreme Court emphasized in *Western Cape Minister of Education v*

¹ Government, *White Paper on Environmental Policy for South Africa*, 1998, Government Notice No 749/1998, Government printer: Pretoria, p 29.

² Section 40 (1).

³ The Constitution of the Republic of South Africa, 1996, s 41 (2). Chapter 3.

*Governing Body of Mikro Primary School*⁴ that there is a constitutional duty on organs of states to foster cooperative government and to avoid instituting legal proceedings against one another. Those organs have a duty to resolve amongst them at a political level where possible rather than through adversarial litigation.⁵ Section 2 (4) (m) provides that actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures. Section 7 (2) (f) of the National Environment Management Act requires that conflicts regarding the functions of national departments and spheres of governments be dealt with by the Committee for Environmental Co-operation. Conflict among national departments within the same sphere and between different spheres of government and between different spheres of government, private persons may be resolved by conciliation, mediation, arbitration and litigation.⁶

5.2.1. Alternative Environmental Dispute Resolution

The Minister for Environmental Affairs and Tourism is required to create a panel or panels of persons from which appointment of facilitators and arbitrators may be made or contracts entered into.⁷ Pending the establishment of this panel or panels, the Minister for Environmental Affairs and Tourism may adopt the panel established⁸ in terms of section 31 (1) of the Land Reform (Labour Tenants) Act, 1996.⁹ The Director- General for Environmental Affairs and Tourism may occasionally appoint persons or organisations with relevant knowledge or expertise to provide conciliation and mediation process.¹⁰

The Director- General of Environmental Affairs and Tourism is required to keep a record and to prepare an annual report on environmental conflict management for submission to

⁴ 2005 (20) BCLR discussed in Burns, Y & Beukes, M, *Administrative Law under the 1996 Constitution*, 3rd edn, Durban: LexisNexis Butterworths, 2006, p 44.

⁵ 2005 (20) BCLR discussed in Burns & Beukes *supra* note 4.

⁶ National Environmental Management Act, 1998, (Act No 107/1998, ss 17- 19; Du Plessis, W & Nel, J, An Evaluation of NEMA Based on a Generic Framework For Environmental Framework Legislation, *SAJELP* Vol No 8 (2001), pp 1-37 at pp 27-28.

⁷ *Idem.*, s 21 (1).

⁸ *Idem.*, s 21 (3).

⁹ (Act No. 3 of 1996)

¹⁰ *Supra* note 8, s 18 (8).

Committee for Environmental Coordination and the National Environmental Advisory Forum for the purpose of evaluating compliance and conflict management measures in respect of environmental laws.¹¹ The records, reports and agreements are available for inspection by the public.¹² The Director-General is required to designate an officer to provide information to the public on appropriate dispute resolution mechanisms for referral of disputes and complaints.¹³

5.2.1.1. Intergovernmental Conflict

A difference or disagreement between the Committee for Environmental Co-ordination and a national department regarding either a failure to submit or the content of an environmental implementation plan may be referred by the Director-General of Environmental Affairs and Tourism for determination by the Minister in consultation with the Ministers responsible for the Department of Land Affairs, Department of Department of Water Affairs and Forest, Department of Minerals and Energy and Department of Constitutional Development.¹⁴

A difference or disagreement between the Committee for Environmental Co-ordination and a province regarding either a failure to submit or the content of an environmental implementation plan may be referred by the Director-General to conciliation.¹⁵ If the conciliation fails or where the Director-General does not refer the dispute for conciliation, the matter may be referred to the Minister for Environmental Affairs and Tourism with a request for intervention in accordance with section 100 of the Constitution.

Section 17 directs any Minister, MEC Council or Municipal Council to refer a difference or disagreement concerning the exercise of any of its functions which may significantly affect the environment¹⁶ or before whom an appeal arising from a difference or

¹¹ *Idem.*, s 22 (2) (a).

¹² *Idem.*, s 22 (2) (d).

¹³ *Idem.*, s 22 (2) (c).

¹⁴ *Idem.*, s 15 (3).

¹⁵ *Idem.*, s15 (4)

¹⁶ *Idem.*, s 17 (1) (i) (a).

disagreement regarding the protection of the environment is brought under any law¹⁷ to either to refer such matter to the Director- General of Environmental Affairs and Tourism for conciliation or appoint a conciliator.¹⁸

Where conciliation or mediation is provided for under any other relevant law administered by such Minister, MEC or Municipal Council, reference for mediation should be made under such other law.¹⁹ For instance, the Minister of Water Affairs and Forestry may direct a dispute under the National Water Act be settled through mediation or negotiation.²⁰ The directive will specify the time and where the mediation or negotiation may start.²¹

However, where such Minister, MEC or Municipal Council considers conciliation inappropriate or if conciliation has failed, must make a decision.²²

A court or tribunal hearing a dispute regarding the protection of the environment may order the parties to submit the dispute to a conciliator appointed by the Director- General and suspend the proceedings pending the outcome of the conciliation.²³

The Director-General for Environmental Affairs and Tourism will define the conditions including the time-limits within which a conciliator will work.²⁴ The Director-General must appoint a conciliator who is acceptable to the parties save where parties to the dispute do not agree on the person to be appointed in which case, the Director- General may appoint a person who is experienced or knowledgeable in conciliation of environmental disputes.²⁵

A conciliator has the right to obtain the necessary information for the resolution of the difference or disagreement.²⁶ The conciliator may mediate the difference or disagreement,²⁷ make recommendations to the parties²⁸ or in any other manner which he

¹⁷ *Idem.*, s 17 (1) (i) (b).

¹⁸ *Idem.*, s 17 (1) (i).

¹⁹ *Idem.*, s 17 (1) (i) (cc).

²⁰ National Water Act, s 150 (1)

²¹ *Idem.*, s 150 (2)

²² *Supra* note 19, s 17 (1) (b) (ii).

²³ *Idem.*, s 17 (1) (3).

²⁴ *Idem.*, s 18 (1).

²⁵ *Idem.*, s 18 (1).

²⁶ *Idem.*, s 18 (2) (a).

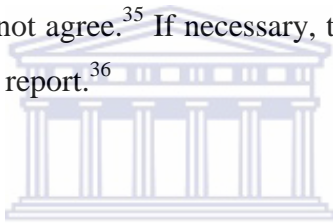
²⁷ *Idem.*, s 18 (2) (b).

²⁸ *Idem.*, s 18 (2) (c).

or she considers appropriate resolve the dispute or difference.²⁹ The conciliator must take into the national environmental management principles set out in section 2 of the National Environmental Management Act.³⁰

The proceedings of the conciliation are kept permanently³¹ and any member of the public may access a copy of the record upon payment of a fee.³² A report and an agreement reached in the conciliation process is available for inspection by the public and a member of the public may obtain a copy those documents upon payment of fees.³³

A conciliator must submit a report to the Director-General, the parties and the person who referred the matter for conciliation setting out the result of his or her conciliation, and indicating whether or not an agreement has been reached.³⁴ Where an agreement has not been reached, the report of the conciliator may contain his or her recommendations and reasons why parties could not agree.³⁵ If necessary, the conciliator may comment on the conduct of the parties in the report.³⁶



5.2.1.2. Other Conflicts

There is a different procedure for environmental disputes involving private parties. A person may request the Minister, a MEC or Municipal Council to appoint a facilitator to call and conduct meetings of interested and affected parties with the purpose of reaching agreement to refer a difference or disagreement to conciliation.³⁷

²⁹ *Idem.*, s 18 (2) (d)

³⁰ *Idem.*, s 18 (3).

³¹ *Idem.*, s 18 (4).

³² *Idem.*, s 18 (5).

³³ *Idem.*, s 18 (7) (d).

³⁴ *Idem.*, s 18 (7) (a).

³⁵ *Idem.*, s 18 (7) (b).

³⁶ *Idem.*, s 18 (7) (c).

³⁷ *Idem.*, s 17 (2) .

5.2.1.3. Arbitration

Where conciliation has failed to resolve the matter, a conciliator may enquire from the parties whether they wish to refer the matter to arbitration and the conciliator may with the concurrence of the parties refer the matter to arbitration and may with concurrence of the parties draft the terms of reference for such arbitration.³⁸ A difference or disagreement regarding the protection of the environment may be referred to arbitration³⁹ in terms of the Arbitration Act, 1965.⁴⁰

Where a dispute or disagreement has been referred to arbitration, the parties may appoint an arbitrator from the panel of arbitrators established in terms of section 21.

5.2.1.4. Investigation

The Minister for Environmental Affairs and Tourism may appoint a person or persons to assist such the Minister, a Municipal Council, MEC or another national Minister in the evaluation of a matter relating to the protection of the environment by obtaining information for such evaluation.⁴¹

5.2.2. Water Tribunal

The water tribunal is established under section 146 (1) of the National Water Act with jurisdiction in all provinces of the Republic of South Africa and it may conduct hearings anywhere in the Republic of South Africa.⁴² The tribunal is composed of the chairperson, a deputy chairperson, and additional members who are determined by the Minister for Water Affairs and Forestry.⁴³ The members of the Tribunal must be knowledgeable in

³⁸ *Idem.*, s 18 (6).

³⁹ *Idem.*, s 19 (1).

⁴⁰ (Act No. 42 of 1965).

⁴¹ *Supra* note 39, s 20.

⁴² *Supra* note 20, s 146 (2).

⁴³ *Idem.*, s 146 (3).

law, engineering, water resource management or related fields.⁴⁴ The members of the Tribunal are appointed by the Minister of Water Affairs and Forestry on the recommendation of the Judicial Service Commission.⁴⁵ The chairperson and the deputy chairperson may be appointed in a full-time or part-time capacity while the additional members must be appointed in a part-time capacity.⁴⁶ The chairperson may nominate one or more members of the tribunal to hear a matter and a decision by such member or members constitutes a decision by the tribunal.⁴⁷ The members of the tribunal are not liable for an act or omission committed in good faith while performing functions of the tribunal.⁴⁸

Section 148 (1) enumerates several issues to which an appeal lies to the tribunal.⁴⁹ The appeal must be commenced within thirty days after publication of the decision in the *Government Gazette* or reasons for the decisions are given whichever occurs last.⁵⁰

The chairperson has power to make rules which govern the procedure of the Tribunal including the procedure for lodging and opposing an appeal or an application and hearing and the fees payable in an appeal or an application.⁵¹

An appeal lies to the High Court against a decision of the tribunal on a question of law.⁵² A decision of the tribunal determining the liability for compensation or the amount of compensation under s 22 (9) of the National Water Act is also appealable on a question of law.⁵³ The appeal must be lodged within twenty-one days of the date of the decision of the tribunal.⁵⁴ The notice of appeal must set out every question of law in respect of which the appeal is lodged⁵⁵ and the grounds of appeal⁵⁶ and be lodged in the relevant High

⁴⁴*Idem.*, 146 (4).

⁴⁵*Idem.*, s 146 (5).

⁴⁶*Idem.*, s 146 (5).

⁴⁷*Idem.*, s 147 (1).

⁴⁸*Idem.*, 147 (4).

⁴⁹*Idem.*, 148 (1).

⁵⁰*Idem.*, s 148 (3).

⁵¹*Idem.*, s 148 (5).

⁵²*Idem.*, s 149 (1) (a).

⁵³*Idem.*, s 149 (1) (b).

⁵⁴*Idem.*, s 149 (2).

⁵⁵*Idem.*, s 149 (3) (a).

⁵⁶*Idem.*, s 149 (3) (b).

Court or water tribunal⁵⁷ and be served on every party to the matter.⁵⁸ The appeal to the High Court prosecuted as if it were an appeal from a Magistrate's Court to a High Court.⁵⁹

5.2.3. Litigation

5.2.3.1. Civil Action

Section 32 of NEMA which confers legal standing to enforce environmental laws is an elaboration of section 38 of the Constitution. Under that provision a person or group of persons may approach a court for relief in respect of any provision of NEMA including a principle contained in Chapter 1, or of any provision of a specific environmental management Act or of any other statutory provision concerning with the environmental protection or the use of natural resources.⁶⁰

The categories of persons who can bring environmental actions are spelled out in both section 38 of the Constitution and section 32 of NEMA and are almost the same. A litigant may be acting (i) in his or her own or group of persons' interests,⁶¹ (ii) on behalf of another person who can not act in their own name,⁶²(iii) in the interest of, or on behalf of, a group or class of persons whose interests are affected,⁶³ (iv) in the public interest⁶⁴ or (v) in the interest of protecting the environment.⁶⁵

⁵⁷ *Idem.*, s 149 (3) (c).

⁵⁸ *Idem.*, s 149 (3) (d).

⁵⁹ *Idem.*, s 149 (4) .

⁶⁰ *Supra* note 39, s 32 (1) as amended by National Environmental Management Amendment Act, 2003, (Act No 46/ 2003).

⁶¹ Constitution of Republic of South Africa, 1996, s 38 (a) and National Environmental Management Act, s 32 (1) (a) . National Environmental Management Act, 1998, (Act No 107/1998)

⁶² Constitution of Republic of South Africa, 1996, s 38 (b) of the Constitution and section 32 (1) (b) of National Environmental Management Act, 1998, (Act No 107/1998).

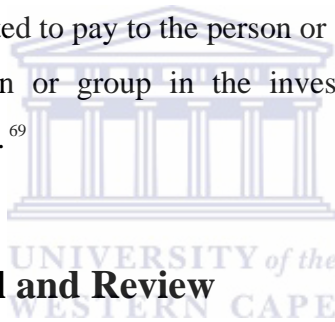
⁶³ Section 38 (c) of the Constitution and section 32 (1) (c) of the National Environmental Management Act, 1998, (Act No 107/1998).

⁶⁴ Section 38 (d) of the Constitution and section 32 (1) (d) of National Environmental Management Act, 1998, (Act No 107/1998).

⁶⁵ Section 32 (1) (e) of National Environmental Management Act, 1998, (Act No 107/1998)

A court has discretion not to award costs against a litigant who fails to secure the relief sought in action for a breach or threatened breach of a statutory provision providing for environmental protection or the use of natural resources.⁶⁶ This discretion will be exercised where the court is satisfied that the litigant acted reasonably out of concern of public interest or in the interest of protecting the environment and had taken proper efforts reasonably available for obtaining the relief sought.⁶⁷ This provision ameliorates the general rule that costs shall follow event and provide an encouragement for persons interested in environmental protection to approach a court for relief.

Nevertheless, where a litigant secures the relief sought, a court may, on application, award costs on appropriate scale to a person or persons entitled to practice as advocate or an Attorney who provided free legal assistance or representation to the litigant in the preparation for or conduct of the proceedings.⁶⁸ The court may also order that the party against whom the relief is granted to pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.⁶⁹



5.2.3.2. Appeal and Review

An appeal lies to the Minister of Environmental Affairs and Tourism against a decision taken by any person acting under a power delegated by the Minister under the provisions of NEMA.⁷⁰

⁶⁶*Idem.*, s 32 (2) as amended by section 6 (b) of the National Environmental Management Amendment Act, 2003, (Act No 46/ 2003).

⁶⁷ *Idem.*, s 32 (2). as amended by Section 6 (b) of the National Environmental Management Amendment Act, 2003, (Act No 46/ 2003).

⁶⁸*Idem.*, section 32 (3) (a). as amended by Section 6 (c) of the National Environmental Management Amendment Act, 2003, (Act No 46/ 2003).

⁶⁹ *Idem.*, s 32 (3) (a). as amended by Section 6 (c) of the National Environmental Management Amendment Act, 2003, (Act No 46/ 2003).

⁷⁰ *Idem.*, s 43(1).

5.3. Evaluation in the Light of the Best Practices

Participatory democracy characterizes environmental dispute resolution mechanisms in South Africa. Environmental dispute resolution put a high premium to conciliation of environmental disputes at intergovernmental level than between private persons.

While NEMA requires the Minister, MEC Council or Municipal Council to consider the desirability of conciliation of a difference or disagreement concerning the exercise of any of its functions which may significantly affect the environment, it only allows a person to request the Minister, a MEC or Municipal Council to appoint a facilitator and where necessary a conciliator. In other words, it is not mandatorily required for private persons to resolve their disputes through alternative environmental dispute resolution mechanisms.

This is also highlighted by the fact that the word ‘conciliation,’ which is hardly used in environmental dispute resolution literature features prominently as a mechanism for alternative environmental dispute resolution.

NEMA tries to provide an Alternative Environmental Dispute Resolution mechanism which meets the basic requirements of a successful environmental dispute resolution mechanism. A decision relating to a reference of a difference or disagreement to conciliation, appointment of a conciliator, facilitator or an investigator must take into considerations the following factors,

- (a) the desirability of resolving differences and disagreements speedily or cheaply;
- (b) the desirability of of giving indigent persons access to conflict resolution measures in the interest of the protection of environment;
- (c) the desirability of improving the quality of decision-making by giving interested and affected persons persons the opportunity to bring relevant information to the decision-making process;
- (d) any representations made by persons interested in the matter; and

(e) other relevant considerations relating to the public interest.⁷¹

In order to keep the use of Alternative Environmental Dispute Resolution mechanisms free from suspicion and corruption, it is necessary to ensure that the agencies using Environmental Alternative Dispute Resolution mechanisms allow public involvement through open meetings to discuss the issues, public records of the proceedings in the meetings, and public opportunity to comment on ADR decisions.⁷² It is therefore a progressive step that the proceedings in environmental dispute resolution may be available for inspection by the public.⁷³ However this raises another question to the question of confidentiality. One of the motivating factors for engaging in environmental dispute resolution is the assurance that the information used in environmental dispute resolution especially in mediation will not be used against a party in court.⁷⁴ This fear is likely to arise in cases of environmental disputes between private parties and national departments and it may be a factor discouraging alternative environmental dispute resolution.

The alternative environmental dispute resolution mechanisms depend on a panel appointed by the Minister of Environmental Affairs and Tourism under s 21 of NEMA. Apart from stating the power of the Minister to create the panel, the provision does not state the qualifications of those who would be appointed as conciliators, facilitators, investigators or arbitrators. Although the existence of this panel under the control of the Minister of Environmental Affairs and Tourism may provide some kind of professional accountability, it is important that the Minister be required to consult with all stakeholders in environmental matters so as to create a more balanced panel. In spite of the fact that the panel must be composed by people who are qualified in dispute resolution techniques, it would defeat the aim of environmental dispute resolution if they are not qualified in either environmental law and policy or environmental management.

⁷¹ *Idem.*, s 22 (1).

⁷² Stukenborg, C, The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts, *University of Dayton Law Review*, Vol 19 (1994), pp 1305-1339 at p 1337 [Electronic] Available: Westlaw [2008, September 02]

⁷³ *Supra* note 68, s 22 (2) (c) and (d).

⁷⁴ Boettger, U, Efficiency Versus Party Empowerment-Against A Good-Faith Requirement In Mandatory Mediation, *The Review of Litigation*, Vol 23 No 1 (Winter 2004), pp 1- 46 at p 26 [Electronic] Available: Academic Research Library [2008, August 16].

However, it must be recalled that the national environmental management principles serve as principles by reference to which a conciliator must make recommendations.⁷⁵

Regarding environmental disputes either between private persons themselves or with national departments, NEMA creates a more effective legal mechanism for enforcement by private persons.

It should be recalled that under section 32 (1) of NEMA a person or group of persons may seek appropriate relief, in the interest of protection of the environment, apart from other interest that may be sought before the court.

Under s 28 (12), a person may apply to a competent court for an order directing the Director-General or a provincial head of department to take certain stipulated measures if the Director-General or provincial head of department fails to inform the applicant in writing that he or she has directed an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which to take one of the stipulated steps to prevent pollution or degradation or to minimize and rectify such pollution or degradation of the environment. In *Hichange Investments (Pty) Ltd v Cape Produce*⁷⁶ an applicant successfully obtained an order directing the Director-General of Environmental Affairs and Tourism to order the respondent, to conduct an environmental impact assessment of the gases emitted from a semi-tanning owned by the respondent.

5.4. Conclusion

Environmental Dispute Resolution in South Africa takes a middle ground allowing for both public participation and resort to courts of law. Its mechanism however, is still subject to government control. There is a need to provide for a more independent body of environmental dispute resolution rather than using the Minister to create such a panel.

⁷⁵ *Idem.*, s 2(1) (d) and s 18 (3).

⁷⁶ 2004 (2) SA 393.

Chapter 6: Conclusions and Recommendations

6.1. Concluding Remarks

There is a qualitative difference between environmental dispute resolution mechanisms in Tanzania and South Africa, on the one hand, and with the international best practices, on the other. The environmental dispute resolution process in Tanzania provides for little participation of the citizen in resolving environmental disputes. In South Africa, environmental dispute resolution process while providing for citizen participation, the process is still State-centered. Thus, while environmental dispute resolution process in South Africa is much closer to international best practices, environmental dispute resolution process in Tanzania is very far from international best practices.

6.2. Recommendations

6.2.1 Tanzania

It may be noticeable that environmental disputes form only a small fraction of dispute resolution in Tanzania in general. This may be attributed partly to the nature of environmental dispute resolution processes themselves. The environmental dispute resolution processes do not provide for the greater participation of the citizens. This is not to say however, that there are no environmental disputes in Mainland Tanzania. It is noteworthy that land disputes have been so common to the extent of necessitating the creation of a High Court Division together with tribunals to deal with them. Time will come when the High Court Land Division and together with tribunals may be required to adjudicate environmental disputes. This is because land disputes are linked to environmental disputes. Furthermore, the growth of the mining industry within the country is likely to result in stronger need to address the environmental matters. Finally, there is a need to provide a formal forum for alternative environmental dispute resolution mechanisms out side the court system.



6.2.2. South Africa

Due to the increasing amount of environmental litigation, there is a need for the establishment of either an environmental court or a specialized tribunal to deal with environmental disputes in South Africa.

The provisions of NEMA which provide for alternative environmental dispute resolution should be amended to allow parties to environmental disputes select their own third parties to resolve their environmental disputes. The current mechanism for alternative environmental dispute resolution restrict the parties to environmental disputes to choose a third party because the panel is statutorily determined by the Minister, a MEC or Municipal Council.



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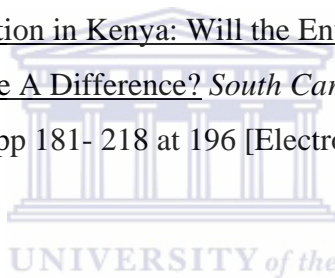
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