

**ALTERNATIVE DISPUTE RESOLUTION METHODS AS A TOOL
FOR THE RESOLUTION OF INTER-GOVERNMENTAL
ENVIRONMENTAL DISPUTES**

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Voorwoord

"God seën ons elk met ouers om ons lewenspad te begin en rigting te verskaf en met geliefdes en vriende om die pad te vervolmaak"

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1. Introduction

1.1 *The constitutional environmental right*

Section 24 of the *Constitution of the Republic of South Africa, 1996*¹ affords everyone a right to an environment that is not harmful to their health and well-being, and a right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.² The *National Environmental Management Act 107 of 1998*³ defines the environment as the surroundings within which humans exist. These are made up of land, water, atmosphere, micro-organisms, plant and animal life.⁴ This definition also includes any combination of the aforementioned and the inter-relationship among and between them, together with the physical, chemical and aesthetic and cultural properties and conditions that influence human health and well-being.⁵

It is apparent from a literal interpretation of section 24 of the 1996 Constitution, that legislative measures should promote sustainable development in South Africa.⁶ In this context the state is obliged to protect the rights of its citizens, thus including rights in section 24 of the 1996 Constitution.⁷ A positive obligation on government to realise sustainable development is directed at government as a

1 Hereafter referred to as the 1996 Constitution.

2 Section 24 of the 1996 Constitution.

3 Hereafter referred to as the NEMA.

4 Section 1(1) of the NEMA.

5 Section 1(1) of the NEMA.

6 The NEMA definition of sustainable development is employed for the purpose of this dissertation. Section 1(1) of the NEMA defines sustainable development as:

“...the integration of social, economic and environmental factors into planning, implementation and decision making, as to ensure that development will serve present and future generations”.

7 Section 7(2) of the 1996 Constitution provides that the state is obliged to protect the fundamental rights of its citizens. In *S v Makwanyane* 1995 3 SA 391 (CC) the court held that fundamental rights of persons must be protected and enhanced by the government. This places an obligation on government to realise the fundamental rights of its citizens, including the section 24 right.

whole. This encompasses the three spheres of government as well as the different line functionaries in each sphere.⁸

Governmental functions pertaining to the environment are sometimes exercised simultaneously by various line functionaries, organs of state, and spheres of government.⁹ This may set the scene for serious inter-governmental conflict, because departments acting as line functionaries may duplicate the functions of other departments with regard to a singular environmental issue.¹⁰ Emphasis should therefore be placed on environmental governance that is based on participation and co-operation in mutual and reciprocal relationships between all government departments and spheres of government involved with environmental governance.¹¹ Co-operative governance is specifically provided for in section 41 of the 1996 Constitution.¹² In environmental context, it arguably aims to co-ordinate environmental administration, thus preventing inter-governmental conflict.

8 <http://www.environment.gov.za/aboutus/aboutus-contents.asp> 20 Mar. Section 40(1) of the 1996 Constitution. Government is sub-divided into national, provincial and local spheres. In each sphere of government line functions are performed by various state departments. In environmental context, these include, *inter alia*, the Department of Water Affairs and Forestry (hereafter DWAF), the Department of Environmental Affairs and Tourism (hereafter DEAT) and the Department of Minerals and Energy (hereafter DME).

9 Section 239 of the 1996 Constitution defines an organ of state as any department or administration functional in the three spheres of government (national, provincial and local). It furthermore prescribes that any other functionary or institution may also qualify if it is exercising power or performing a function prescribed in the 1996 Constitution, or provincial Constitution, or exercises a public power or performs a public function in terms of any legislation. A court or a judicial officer is excluded from the definition.

10 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 35.

11 Environmental governance is defined for the purpose of this dissertation as:

“...the collection of legislative, executive and administrative functions, processes and instruments used by any organ of state to ensure sustainable behaviour by all as far as governance activities, products, services, processes and tools are concerned”.

Nel and Du Plessis “Unpacking Integrated Environmental Management: a Step Closer to Effective Co-operative Governance?” 89. See also in this regard Nel and Du Plessis 2004 *SA Public Law* 183.

12 Section 41 of the 1996 Constitution provides that spheres of government as well as the line functionaries, situated in each sphere, are under an obligation to co-operate with one another.

Inter-governmental disputes pertaining to matters of environmental governance may hinder government's obligation to further sustainable development. This may result in government's failure to adhere to its constitutional mandate. Inter-governmental disputes are usually resolved by way of memoranda of understanding¹³ and environmental management co-operation agreements.¹⁴ This raises the following question: can alternative dispute resolution¹⁵ substitute the dispute resolution methods currently used, in the environmental law field, to settle disputes emanating from inter-governmental relations?

ADR has been used effectively to resolve, *inter alia*, commercial, community and family disputes.¹⁶ ADR encompasses a variety of dispute resolution methods other than adjudication or litigation conducted by the judiciary. It involves the selection or design of a process best suited to both the dispute and parties to the dispute.¹⁷ The 1996 Constitution provides that inter-governmental disputes should, where possible, be resolved through alternative methods of dispute resolution rather than through adversarial litigation.¹⁸ The NEMA furthermore provides that conflict between organs of state should be resolved through conflict resolution procedures.¹⁹ Arguably ADR may be included.

This dissertation argues that ADR may effectively be employed as an alternative method to address inter-governmental disputes and prevent intervention by courts. By way of a literature review, this research firstly studies the obligation on the executive branch of government to administer environmental law in a co-operative manner. It then analyses the extent to which environmental administration may constitute inter-governmental conflict. In addition, current

13 Hereafter referred to as MOUs.

14 Hereafter referred to as EMCAs. For a discussion on MOUs and EMCAs see: Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 373.

15 Hereafter referred to as ADR.

16 Singer *Settling Disputes* 12.

17 Pretorius *Dispute Resolution* 1.

18 Section 41(3) of the 1996 Constitution.

19 Section 2(m) of the NEMA.

methods used to resolve inter-governmental environmental disputes are analysed, followed by a discussion on whether ADR is suitable for inter-governmental disputes. Lastly, sectoral environmental legislation is analysed to determine whether these statutes provide for dispute resolution methods for inter-governmental disputes. Against this background the most appropriate ADR method for inter-governmental disputes in environmental governance context is indicated.

2 Administration, implementation and enforcement of environmental law

2.1 Environmental administration

Constitutional law provides that the power of government must be separated under the principle of separation of power.²⁰ This principle provides that a distinction must be made between the legislative, executive, and judicial authority.²¹ The power and functions of government are not only delineated into separate manifestations of state power, but are further exercised in different spheres of government.²² In *Government of the Republic of South Africa v Grootboom*,²³ the court held that different spheres of government are created by the 1996 Constitution, and that the power and functions of government are allocated between these different spheres. This means that the state's authority is allocated and exercised in the national sphere, provincial sphere, and local

20 Currie and de Waal *The New Constitution & Administrative Law* 92-95.

21 Currie and de Waal *The New Constitution & Administrative Law* 95. Section 43 of the 1996 Constitution provides that legislative authority is vested in Parliament, Provincial legislatures and Municipal Councils. Section 165 of the 1996 Constitution provides that judicial authority is vested in the courts which must decide authoritatively and conclusively on a matter in controversy between non-governmental organs or between the state and non-governmental organs.

22 Currie and de Waal *The New Constitution & Administrative Law* 95.

23 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 67J – 68 B.

sphere of government.²⁴ Although the three spheres of government exist in a vertical sense, there is also a horizontal level in each sphere which comprises of various line functionaries.²⁵ This establishes a fragmented matrix of delineated state power which is exercised in the different spheres and line functionaries of government.

The executive includes all executive organs in the national, provincial and local spheres of government.²⁶ Whilst the legislature is fundamentally obliged to pass laws which will promote sustainable development, the executive is responsible for the implementation of these laws.²⁷ The implementation of law and the administration of policy are primarily conducted by the public administration.²⁸ In this regard all organs and functionaries of the executive entrusted with the duty to implement law, form part of the public administration.²⁹ Organs and functionaries responsible for implementation of law include: government departments, government administrations, the security forces, non-governmental organisations and the public service.³⁰ Hence, the administration forms part of the executive branch of government and state departments, acting as line functionaries. In an environmental context, environmental departments acting as executive line functionaries and situated in different spheres of government are responsible for

24 The principle of separation of state power includes that state power is performed by the legislative, executive and legal system of South Africa as described in Paragraph 1 and Currie and de Waal *The New Constitution & Administrative Law* 95.

25 National level of government contains executive and legislative authority, the provincial level of government contains executive and legislative authority, and the local level of government contains executive and legislative authority.

26 Burns *Administrative Law under the 1996 Constitution* 40. It should be noted that this dissertation is concerned with inter-governmental disputes relating to the adoption, implementation and administration of political and economical policies to realise sustainable development. Emphasis is accordingly placed on the executive branch of government which constitutes the body of environmental administration.

27 Section 24(b) of the 1996 Constitution provides that that the state is under an obligation to secure the fundamental right to an environment that is not harmful to the health and well-being of present and future generations through reasonable legislative and other measures.

28 Hoexter and Lyster *The new Constitutional & Administrative Law* 2.

29 Hoexter and Lyster *The new Constitutional & Administrative Law* 2.

30 Hoexter and Lyster *The new Constitutional & Administrative Law* 2-3.

the administration and implementation of environmental law.³¹ Environmental law is arguably promulgated to, *inter alia*, achieve sustainable development.³²

Schedules 4 and 5 of the 1996 Constitution determines the extent an organ of state will be allowed in the relevant sphere of government to exercise its authority.³³ Schedule 4 stipulates functional areas of concurrent national and provincial competence, where the national and provincial government will have concurrent authority to deal in these related matters. Schedule 4 provides for environmental matters which relate to the environment, administration of indigenous forests, agriculture, cultural matters, health matters, nature conservation, pollution control, soil conservation, tourism and trade.³⁴ Schedule 5, on the other hand, stipulates the functional areas where the provincial government has exclusive competence, and relates to environmental matters pertaining to provincial cultural matters and provincial roads and traffic.³⁵

31 At national level the following environmental departments act as executive line functionaries: DEAT; DME; DWAF; Department of Development, Local Government and Housing (hereafter DDLGH); South African Heritage Resources Agency (hereafter SAHRA). See in this regard <http://www.environment.gov.za/aboutus/aboutus-contents.asp> 20 Mar. At provincial level of government the following environmental departments act as executive line functionaries: (Eastern Cape Province) Department of Economic Affairs, Environment and Tourism; (Gauteng Province) Department of Agriculture, Conservation, Environment and Land Affairs; (KwaZulu Natal Province) Department of Agriculture and Environmental Affairs; (Limpopo Province) Department of Finance, Economic Affairs, Tourism and Environment; (Mpumalanga Province) Department of Agriculture, Conservation and Environment; (Free State Province) Department of Environmental Affairs and Tourism; (North Cape Province) Department of Agriculture, Land Reform, Conservation and Environment; (North West Province) Department of Agriculture, Conservation and Environment; (Western Cape Province) Department of Environmental Affairs and Development Planning. See in this regard <http://www.environment.gov.za/ProvAuth/ProvAuth-contents.asp> 4 Apr. There are furthermore various authorities that are involved with the administration of environmental law at local level. These functions are usually exercised by local and district municipalities. See in this regard Glazewski *Environmental Law in South Africa* 135-137. See also paragraph 1 above.

32 Environmental law encompasses all sectoral environmental legislation.

33 Glazewski *Environmental Law in South Africa* 137 - 139.

34 Glazewski *Environmental Law in South Africa* 138. Schedule 4 of the 1996 Constitution provides for functional areas over which both the national and provincial government have concurrent authority.

35 Glazewski *Environmental Law in South Africa* 138. Schedule 5 of the 1996 Constitution provides for functional areas over which the provincial government have exclusive competence.

3. Inter-governmental conflict pertaining to environmental governance

3.1 *Overlapping and duplication of environmental administration under sectoral environmental laws*

It may be deduced from the exposition in paragraph 2 above, that the current environmental administration and governance regime of South Africa is seriously fragmented in both a vertical and horizontal sense. Whilst fragmentation exists in a vertical sense between the different spheres of government, horizontal fragmentation exists between the various line functionaries in each sphere. This may lead to a real need for co-operative governance, because inter-governmental disputes may inevitably arise due to this fragmentation.³⁶ Fragmentation further creates a need for suitable mechanisms to resolve such disputes in those instances where co-operative governance cannot address conflict in an appropriate manner.

The problem of fragmentation is exacerbated by South Africa's fragmented environmental law regime. Environmental law is not contained in a single environmental statute, but is fragmented into a wide range of sectoral environmental legislation which has been enacted to comply with the requirements of section 24 of the 1996 Constitution.³⁷ The wide range of environmental legislation covers, amongst others, the conservation of resources, control of pollution, and land use and planning. Environmental administration is thus conducted on the basis of a fragmented set of environmental laws. As a consequence there is fragmented implementation and administration of

³⁶ Co-operative governance is discussed in paragraph 4.1.

³⁷ Section 24(b) of the 1996 Constitution requires the state to adopt reasonable legislative or other measure to secure the right to an environment that is not harmful to health and well-being and to protect the environment for present and future generations. In this regard examples of environmental law in South Africa include the *Atmospheric Pollution Prevention Act* 45 of 1956 and the *National Water Services Act* 108 of 1997. See also paragraph 6.1.

legislation and policies.³⁸ This may give rise to disjointed autonomous executive line functionaries responsible for environmental administration in different spheres of government.³⁹ The wide range of environmental legislation which must be implemented by the various environmental departments has, in addition, resulted in widespread duplication and overlapping of arrangements and inefficiencies in administrative processes and legal provisions.⁴⁰

It has been explained above that inter-governmental conflict may arise because of the fragmented nature of the current environmental governance sphere that includes environmental authorities and environmental legislation.⁴¹ Overlapping and duplication of environmental administration tasks by disjointed autonomous executive line functionaries are experienced in authorisations for waste disposal sites. The *Environment Conservation Act 73 of 1989*⁴² requires that before a waste disposal site is established an environmental impact assessment must be conducted under the authority of the DEAT.⁴³ The *National Water Act 36 of 1998*⁴⁴ requires that a water use licence must be issued by the DWAF if waste or water containing waste is discharged, or waste is disposed in a manner which may have a detrimental impact on a water resource.⁴⁵ DEAT and DWAF are different line functionaries and are required to implement and administer different environmental statutes which relate to the same activity.⁴⁶ This establishes overlapping and duplication of administrative processes by executive line functionaries which have their own administrative arrangements, requirements or

38 Kotzé "Towards Sustainable Environmental Governance in South Africa: Co-operative Environmental Governance and Integrated Environmental Management as Possible Solutions" 5.

39 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 35.

40 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 35.

41 See paragraph 2 above.

42 Hereafter the ECA.

43 Section 21 of the ECA.

44 Hereafter the NWA.

45 Sections 20(f) en 20(g) of the NWA.

46 Kotzé "Towards Sustainable Environmental Governance in South Africa: Co-operative Environmental Governance and Integrated Environmental Management as Possible Solutions" 5.

procedures.⁴⁷ Confusion and inefficiencies may be caused because different executive line functionaries are required to authorise a single environmental activity or issue.⁴⁸

Inter-departmental conflict may thus result if fragmented environmental executive line functionaries do not co-ordinate their functions and powers, and do not co-operate to administer, and implement, fragmented environmental legislation. Co-operative governance, it is argued, may be an important solution to this fragmented environmental law and governance dispensation, and may be a prerequisite for sustainable development to be achieved.

4. Co – operative Governance

4.1 The legislative framework for co-operative governance

Co-operation means that people or organisations decide, or are instructed, to work together.⁴⁹ The 1996 Constitution provides that government comprises of three spheres which are distinctive, interdependent, and interrelated.⁵⁰ It is the primary task of Chapter 3 of the 1996 Constitution to govern the relationship between the governmental spheres and to achieve co-operative governance.⁵¹

Co-operative governance is the co-ordination between the different spheres and line functionaries of government, and entails the alignment of policies, plans, and programs within these spheres, as well as between the different line functionaries situated in each sphere.⁵² Government is obliged to perform their powers,

47 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 38.

48 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 38.

49 Fox and Meyer *Public Administration Dictionary* 28.

50 Section 40(1) of the 1996 Constitution.

51 De Waal Currie and Erasmus *The Bill of Rights Handbook* 23.

52 Du Plessis and Nel 2001 *South African Journal of Environmental Law and Policy* 8.

functions and duties within the ambit of Chapter 3 of the 1996 Constitution.⁵³ Section 41 of the 1996 Constitution stipulates certain obligations which must be met by organs of state to achieve co-operative governance.⁵⁴ Spheres of government are instructed to co-operate because of the increase in the complexity of governmental activities and number of concurrent legislative matters; the interrelationship between governmental functions; and the duplication and overlapping of their functions.⁵⁵ The obligation to co-operate was confirmed in *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill*⁵⁶ where the court held that the 1996 Constitution is a single structure applicable to a single economy. For this reason, all levels of government must co-operate with one another.

In *Van Wyk v Uys NO*⁵⁷ the court held that organs in all spheres of government must promote and enhance co-operative governance; must assist and support each other; must consult on matters of common interest, and co-ordinate their actions. In *Uthukela District Municipality and Others v President of the Republic of South Africa and Others*⁵⁸ the court further emphasised that organs of state, which are obligated to exercise a power, or perform a function, must fulfil this obligation in co-operation with the other organs of state. Co-operation must thus be achieved between the same line functionaries as well as between organs of state in different spheres of government, thereby establishing co-operation and co-ordination between all spheres of government and manifestations of state power. This establishes a network of interaction between governmental organs

53 Section 40 (2) of the 1996 Constitution.

54 Section 41 of the 1996 Constitution provides that organs of state in each sphere must maintain peace, national unity and the integrity of South Africa, ensure the welfare of the citizens of South Africa, provide a efficient, transparent, accountable and unitary government, be loyal to the Constitution and honour constitutional status, institutions, powers and functions of the government, function according to the powers entrusted to them by the Constitution and exercise these powers and functions in a manner which does not encroach the government and must co-operate in trust and good faith.

55 De Villiers 1994 SA Public Law 430.

56 *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC).

57 *Van Wyk v Uys NO* 2002 5 SA 92 (C) 99F – 99G.

58 *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 1 SA 678 (CC) 683 D – 684 B.

entrusted with state power and functional in national, provincial or local spheres of government.⁵⁹

Section 41(2)(a) of the 1996 Constitution further stipulates that an act of Parliament must provide for structures or institutions to promote and enhance inter-governmental relations.⁶⁰ This requirement demands structures and institutions to contribute to the enhancement and promotion of inter-governmental relations.⁶¹ This is provided for in the NEMA. The NEMA should be read in conjunction with the constitutional provisions on co-operative governance. The NEMA was enacted to provide for co-operative governance by establishing principles for decision-making on matters which may affect the environment,⁶² institutions that will promote co-operative governance,⁶³ and procedures for co-ordinating environmental functions exercised by organs of state.⁶⁴ Although the NEMA seeks co-operative governance, increased

59 <http://www.pmg.org.za/docs/2000/appendices/001011IGR.htm> 6 May.

60 Section 41(2) of the 1996 Constitution.

61 Burger 2002 <http://www.gov.za/structure/coopgov.htm> 6 May. The *Intergovernmental Fiscal Relations Act* 97 of 1997 is an example of legislation which is provided for and introduces a structure or institution to promote co-operative governance. The Act provides for the Budget Council and the Local Government Budget Forum. A number of inter-governmental institutions have been instituted to promote and facilitate co-operative governance and promote inter-governmental relations. These institutions include the Presidential Co-ordinating Council (this institution comprises of the President, the Minister of provincial and local government and the nine premiers), Ministerial Clusters, Directors-Generals clusters, and the Forum of South African Directors General, Ministerial Forums (hereafter MinMecs) and a number of inter-governmental fora that are under the obligation to facilitate co-operative government and inter-governmental relations.

62 Chapter 4 of the NEMA makes provision for conciliation, facilitation, arbitration, and investigation. It further provides for appointment of a panel and remuneration of a person appointed under the NEMA.

63 Section 3 of the NEMA establishes the National Environmental Advisory Forum which has the objective to inform the minister of stakeholders' views regarding the application of the principles of the NEMA and to advise the minister on matters concerning environmental management and governance and of appropriate methods to monitor compliance with the principles of the NEMA. Section 7 of NEMA establishes the Committee for Environmental Co-ordination which has objective to promote the integration and co-ordination of environmental functions.

64 Section 11 of the NEMA provides for procedures for co-operative governance which include environmental implementation and management plans. Section 12 of the NEMA provides that the purpose of the procedures are to co-ordinate and harmonise environmental policies, plans, programs and decisions of executive line functionaries in order to minimize duplication of procedures, promote consistency in the exercise of functions, enhance co-operative governance, secure the protection of the environment, prevent unreasonable actions in

consistency, and minimisation of duplication, it does not give practical guidance on how to align fragmented and disjointed administrative and governance processes and structures.⁶⁵ No adequate guidance is furthermore given to facilitate inter-governmental dispute resolution. This may ultimately hamper the achievement of sustainable development. Hence, inter-departmental conflicts may still arise, resulting in a real need to identify practical and relevant methods to address inter-governmental disputes in the environmental governance sphere.

4.2 Inter-governmental Relations Framework Bill

Government drafted a bill –*Inter-governmental Relations Framework Bill*-⁶⁶ which recognises that government is liable to secure the right to a healthy environment and provides for an institutional framework to promote and facilitate inter-governmental relations.⁶⁷ It furthermore provides for mechanisms and procedures to facilitate and settle inter-governmental disputes.⁶⁸

The IRFB defines an inter-governmental dispute as a dispute between organs of state which may arise from a statutory power or function assigned to an organ of state or an agreement that provides for the implementation of a statutory power or function.⁶⁹ The objective of the bill is to establish a framework to ensure effective governance is achieved and emphasise the requirement of co-operation in this regard.⁷⁰ This objective is aimed to be achieved through inter-governmental structures⁷¹

respect of the environment and enable the Minister to monitor the achievement, promotion, and protection of sustainable development.

65 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 37.

66 <http://www.pmg.org.za/bills/041112IGR.htm> 15 Nov. Hereafter the IRFB.

67 The preamble of the IRFB.

68 The preamble of the IRFB.

69 Section 1(1) of the IRFB.

70 Section 3 of the IRFB.

71 Inter-governmental structures comprises of the President's Co-ordination Council, National inter-governmental forums, Provincial inter-governmental forums, Municipal inter-governmental forums, and inter-governmental structures which provide for technical support, consultation, status and internal procedures.

The IRFB furthermore provides for inter-governmental relations and the resolution of inter-governmental disputes.⁷² It would however only apply to inter-governmental disputes if other statutes do not address the dispute or the national or provincial executive is not required to intervene in the obligations of a province or municipality.⁷³ It requires that inter-governmental disputes must be resolved without resorting the dispute to adjudication and that dispute resolution procedures or mechanisms must be included in agreements which regulate the exercise of a power or performance of a function.⁷⁴ A party may after all reasonable efforts to resolve the dispute notify the other party that the dispute is a formal inter-governmental dispute.⁷⁵ The parties are then required to convene a meeting to determine the nature of the dispute and identify dispute resolution mechanisms and procedures in legislation or an agreement between the parties.⁷⁶ If legislation or an agreement provide for dispute resolution methods, those methods must be followed.⁷⁷ The parties are further allowed to appoint a facilitator to assist the parties to resolve the dispute.⁷⁸

Although the Bill provides for an institutional framework for inter-governmental relations and inter-governmental dispute resolution, it would only be effective once incorporated by legislation into law. It is however noteworthy that the Bill allows organs of state to make provision for dispute resolution methods and procedures and adequately give effect to ADR in inter-governmental disputes. The IRFB may accordingly serve as a useful legislative mechanism to facilitate inter-governmental dispute resolution in future. Since this Bill is still under development it will not be further discussed for the purpose of this dissertation.

72 Chapter 3 provides for inter-governmental relations, whilst Chapter 4 provides for inter-governmental dispute resolution.

73 Section 38 of the IRFB. For the required intervention by the national and provincial executive see sections 100 and 139 of the 1996 Constitution.

74 Section 39 of the IRFB.

75 Section 40(2) of the IRFB.

76 Sections 41(1)(a) and 41(1)(b) of the IRFB.

77 Section 41(1)(c) of the IRFB.

78 Section 41(1)(d) of the IRFB.

4.3 Current methods to resolve inter-governmental disputes

To settle inter-governmental disputes, section 41(2)(b) and section 41(3) of the 1996 Constitution require that all mechanisms, remedies, and procedures available and applicable to inter-governmental disputes be used and exhausted before a dispute may be referred to a court of law for litigation.⁷⁹ Avoidance of litigation between organs of state is an important aspect of co-operative governance. It entails more than an effort to settle the dispute at a political level. Each organ of state will have to re-evaluate its position fundamentally. Adjudication by a court will be denied if this obligation is not fulfilled.⁸⁰ The NEMA furthermore provides that conflict of interest that arises between organs of state must be resolved through conflict resolution procedures.⁸¹ Inter-governmental disputes concerning environmental issues are currently addressed by way of MOUs and EMCAs.⁸²

A MOU may be concluded between departments to resolve inter-governmental conflict. It is based on a general agreement within which parties agree on a certain issue in dispute.⁸³ The parties to the dispute agree on the extent of the performance of their powers and functions, to avoid duplication.⁸⁴ MOUs however do not function well, because they are concluded on a high political level and departments do not have legal standing or the necessary administration to

79 In *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 1 SA 678 (CC) the court confirmed the importance of section 41(3) of the 1996 Constitution and held that all available remedies must be exhausted before a dispute may be referred to a court.

80 *National Gambling Board v Premier, Kwazulu-Natal, and Others* 2002 2 SA 715 (CC) 728 G – 728 H.

81 Section 2(4)(m) of the NEMA.

82 See also paragraph 1 above.

83 A MOU, for example, was concluded between DEAT and the South African Local Government Association (hereafter SALGA) for the implementation of Local Agenda 21, and was based on the obligation that SALGA have to launch and provide a secretariat for the Local Agenda 21 Forum and that the needs of SALGA have to be identified.

84 In the context of the given illustration in paragraph 3, a MOU may be concluded between the DEAT and the DWAF to ascertain their powers and functions and assure that duplication does not occur.

implement them.⁸⁵ This means that MOUs are not enforceable between the parties. Furthermore, meetings created by way MOUs are often inadequate to discuss the issues at hand in depth. Also, the relevant officials may not always be available to attend the relevant meeting.⁸⁶ Hence, MOUs may not be the most effective means of achieving co-operative governance and avoid or resolve inter-governmental disputes.

EMCAs, on the other hand, are entered into for the purpose of promoting compliance with principles laid down in the NEMA, including principles of co-operative governance.⁸⁷ The competence to conclude an EMCA is provided by section 35 of the NEMA. This section provides that EMCAs can only be entered into with the agreement of every organ of state which is liable to perform a function in relation to the environmental matter, and with the agreement of the Minister and Members of Executive Committee concerned.⁸⁸ EMCAs can further only be entered into if the procedures of public participation and regulations made under section 45 of the NEMA are complied with.⁸⁹ Section 45 of the NEMA provides that the Minister may make regulations relating to the procedure for concluding an EMCA, the duration of an EMCA, requirements for furnishing information, general conditions, reporting procedures and monitoring and inspections.⁹⁰ The NEMA poses problems in relation to the conclusion of an EMCA, as all organs of state mandated to fulfil a function relating to a singular matter as well as the Minister and MEC concerned, must agree that a particular EMCA can be concluded. All organs of state must promptly be informed of the intention to conclude an EMCA, to ensure their participation and that the

85 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 207.

86 Centre for Environmental Management *Integrated Environmental Management System for the North West Province* 207.

87 Section 35(1) of the NEMA.

88 Section 35(2)(a) of the NEMA. Members of Executive Committee are hereafter referred to as MEC.

89 Section 35(2)(b) and 35(2)(c) of the NEMA.

90 Section 45(1) of the NEMA.

requirements for concluding an EMCA are complied with.⁹¹ EMCAs may thus only enhance co-operative governance if all procedures and requirements are met. This may prove to be time-consuming and complicated to administer and achieve. Because of the many disadvantages posed by EMCAs and MOUs, effective co-operative governance may not be achieved. This in turn, may frustrate the goal to achievement sustainable development.

5. Dispute resolution

5.1 Dispute resolution methods in South Africa

It can be deduced from the foregoing that there is a need to investigate other methods to avoid, and/or resolve inter-governmental disputes. Modern methods of dispute resolution are primarily based on appropriateness rather than on what is right or wrong.⁹² Thus an appropriate dispute resolution method may be selected according to certain criteria.⁹³ This criteria includes, costs relating to the dispute resolution, the time consumed by the process, the degree of finality achieved by the process, the finality of the decision made, the equity of the result, the effect that the dispute resolution method may have on the parties and their public image, and the effect that the process may have on human resources.⁹⁴ An appropriate dispute resolution method must thus be selected in consideration with the above mentioned criteria, whilst it is imperative that co-operative governance and sustainable development are enhanced in so doing.

Dispute resolution can be divided into two categories which include adjudication by a public authority and ADR.⁹⁵ The former dispute resolution is formal

91 Scholtz *Milieuconvenanten, Oftewel Omgewingsbestuur-Samewerkingsooreenkomste, as Selfregulerende Instrument in die Omgewingsreg: 'n Regsvergelykende ondersoek* 195 - 196.

92 Van der Berg 1998 *South African Journal of Environmental Law and Policy* 71.

93 Van der Berg 1998 *South African Journal of Environmental Law and Policy* 72.

94 Van der Berg 1998 *South African Journal of Environmental Law and Policy* 72 – 76.

95 Pretorius P *Dispute Resolution* 3.

adjudication, performed by courts of law, and the latter include alternative methods of dispute resolution outside the framework of court adjudication.⁹⁶

Emphasis is placed hereafter on the different methods of dispute resolution available, as well as their appropriateness to resolve inter-governmental environmental disputes.

5.2 Adjudication by a public authority

Adjudication by a public authority can be defined as an institutional method of dispute resolution which serves the court system.⁹⁷ Courts form the core of the judicial authority and are primarily entrusted with the obligation to interpret, apply, and enforce social values embodied in substantive legal principles.⁹⁸ Adjudication by a public authority has the advantage that a person can be compelled through law to participate in adjudication proceedings.⁹⁹ The 1996 Constitution provides that judicial authority is vested in the courts.¹⁰⁰ Courts are compelled to exercise this authority and decide authoritatively and conclusively over controversies which may exist between members of the public or between governmental organs and members of the public.¹⁰¹ Inter-governmental disputes between different organs of state can however only be referred to a judicial organ if all remedies available are exhausted and the dispute can not be settled through mechanisms or procedures which are available to the parties.¹⁰² It is thus clear that adjudication by a public authority will only be applicable if all other relevant dispute resolution mechanisms and procedures have been utilized and it may be argued that ADR methods may alternatively be applied.

96 De Vos 1993 *Tydskrif vir die Suid Afrikaanse Reg* 155.

97 Section 166 of the 1996 Constitution provides that the South African judicial authority is exercised by the Constitutional Court (section 167), the Court of Appeal (section 168), the High Court (section 169), Local Courts (section 170) or any other Court which is instituted by an act of Parliament.

98 Faris 1994 *De Jure* 334.

99 Pretorius *Dispute Resolution* 7.

100 Section 165(1) of the 1996 Constitution.

101 Currie and de Waal *The New Constitution & Administrative Law* 268.

102 Section 41(3) of the 1996 Constitution. See also paragraph 4.3 above.

5.3 Alternative dispute resolution

5.3.1 Alternative dispute resolution in South Africa

ADR is a method to resolve disputes and prevent litigation or adjudication through courts.¹⁰³ It is however not a substitute for the South African judicial system, but is rather complementary.¹⁰⁴ ADR includes methods which can be used to resolve disputes outside the framework of court adjudication.¹⁰⁵ ADR may thus in accordance with the 1996 Constitution and the NEMA qualify to be applied to inter-governmental environmental disputes.¹⁰⁶ This process offers the parties directly involved in a dispute an immediate and direct decision-making role in dispute resolution processes which are independent and free from court adjudication.¹⁰⁷

In *Makhazi v African Products Retirement Benefit Provident Fund and Another* and in *Mhlambi v Matjhabeng Municipality and Another* the court held that, in circumstances where it is required that ADR be resorted to before a court can be approached, all procedures provided must be utilised before the court may intervene in the dispute.¹⁰⁸ This means that in inter-governmental disputes, ADR may be appropriate, as it provides for procedures and mechanism which can be used to resolve a dispute at a political level and prevent resolution through the judiciary.

103 Webster *The Use of Alternative Dispute Resolution in Resolving Intellectual Property Disputes in South Africa* 1.

104 Omar 1996 *Consultus* 126.

105 De Vos 1993 *Tydskrif vir die Suid Afrikaanse Reg* 155.

106 Section 41(3) of the 1996 Constitution provides that inter-governmental disputes should, where possible, be resolved through alternative methods of dispute resolution rather than through adversarial litigation and section 2(m) of the NEMA provides that conflict between organs of state should be resolved through conflict resolution procedures.

107 Trollip *Alternative Dispute Resolution* 1.

108 *Makhazi v African Products Retirement Benefit Provident Fund and Another* 2003 1 SA 629 (W) 635A – 635 C and *Mhlambi v Matjhabeng Municipality and Another* 2003 5 SA 89 (O) 93 E – 93 H, are judgments based on the principles of labour law. The labour law require disputes to be resolved through the Commission for Conciliation, Arbitration and Mediation before a court will be allowed to intervene.

Methods of ADR can however only be implemented or used with the consent of parties to a dispute. It is thus voluntary of nature, in contrast with the coercive nature of adjudication.¹⁰⁹ ADR resolves disputes through a neutral third party and the parties to the dispute play an active role.¹¹⁰ Various methods of dispute resolution fall within ADR. However, the three primary methods which play a major role in the ADR process are negotiation, mediation and arbitration.¹¹¹ Other forms of ADR are derivatives or applications of these three methods.¹¹² They are categorised into sub-sections of ADR and include private decision-making and adjudication by a third party.¹¹³

The primary objective of ADR is to apply the most effective and appropriate method of dispute resolution.¹¹⁴ To select and design an appropriate method of dispute resolution, parties must have adequate knowledge of the dispute resolution process and the knowledge of other existing dispute resolution methods. The characteristics of various dispute resolution methods should be compared and assessed in order to determine the outcome of each dispute resolution method on the dispute.¹¹⁵ The selection and design of an appropriate method of dispute resolution should further be made by considering certain aspects. These aspects include: the suitability of the ADR method to the dispute; the parties' preferences; parties' active role; parties' willingness to resolve the dispute by ADR; parties' competence and willingness to use an ADR process; and the competence, objectivity and impartiality of third parties.¹¹⁶ Parties are thus entitled to select and design a process of dispute resolution which is best

109 Crous *Die Beslegtingsproblematiek in geval van Mediese wanpraktyks-geskille met spesifieke verwysing na die "Action for Wrongful Conception" en die "ADR" Proses* 311.

110 Petty 1992 *De Rebus* 656.

111 Faris 1994 *De Jure* 336. Other forms of ADR include an informal discussion, conciliation, facilitation, a mini trial, an investigation by a commission of enquiry and fact-finding which is discussed in paragraphs 5.3.1.1 and 5.3.1.2.

112 Pretorius P *Dispute Resolution* 3.

113 Pretorius P *Dispute Resolution* 3-5.

114 Pretorius *Dispute Resolution* 3.

115 Crous *Die Beslegtingsproblematiek in geval van Mediese wanpraktyks-geskille met spesifieke verwysing na die "Action for Wrongful Conception" en die "ADR" Proses* 6.

116 Crous *Die Beslegtingsproblematiek in geval van Mediese wanpraktyks-geskille met spesifieke verwysing na die "Action for Wrongful Conception" en die "ADR" Proses* 348 – 350.

suited for the dispute and through this promote the primary goal of ADR namely, to prevent adjudication and avoid disadvantages of the court system, enhance community development, facilitate access to justice, and usage of an appropriate dispute resolution method.¹¹⁷

5.3.1.1 Private decision-making

Private decision-making as an alternative to dispute resolution can be divided into various categories. This includes resolving disputes through an informal discussion, negotiation, mediation, conciliation, facilitation or, a mini trial.¹¹⁸

If parties decide on an informal discussion to resolve a dispute, they would discuss the problem and find an effective solution.¹¹⁹ Parties could however, in addition, use a more structured and planned process of negotiation. In this regard parties voluntarily engage in a temporary relationship, enabling them to learn each other's needs and interests and resolve the dispute through negotiation.¹²⁰

Mediation is a method which may be regarded as an extended form of negotiation. An impartial and independent third party, a mediator, is appointed to assist the parties in the negotiation process to reach an agreement. All decisions made in the process are made with the parties' consent and the mediator does not make any decision.¹²¹ The mediator is merely an assistant to resolve the dispute through negotiation and makes the parties aware of what is available rather than desirable.¹²² Mediation is thus used by parties to investigate the issues in the dispute and to find a solution which best suit their needs.¹²³

117 Pretorius *Dispute Resolution* 2.

118 Pretorius *Dispute Resolution* gives an analysis of alternative dispute resolution in the form of private decision-making on page 3.

119 Pretorius *Dispute Resolution* 3.

120 Pretorius *Dispute Resolution* 3.

121 Pretorius *Dispute Resolution* 4.

122 Trollip *Alternative Dispute Resolution* 41.

123 Krages BP 2004 <http://www.krages.com/bpkserv.htm> 5 Mar.

Mediation is an empowering process and a mediator is normally trained, impartial, and neutral. The mediator is not entrusted with authoritative decision-making power, but assists the parties to reach their own acceptable settlement. The primary task of the mediator thus entails to inform the parties of their options which would help the parties choose the most effective solution.¹²⁴

Conciliation is an extension of mediation. The third party, a conciliator, is entitled to make formal recommendations. These formal recommendations may enable the parties to resolve the dispute. The conciliator does not only qualify as an assistant, but has the power to make formal recommendations to the parties in dispute, enabling them to reach agreement and resolve the dispute.¹²⁵ The NEMA provides that a conciliator must obtain relevant information which may contribute to resolve the dispute, must act as a mediator, make recommendations to the parties, or act in any matter which is considered appropriate to resolve the dispute.¹²⁶

Facilitation is a process where a third party, a facilitator, assists two or more parties who are in dispute to resolve their dispute through communication regarding the dispute. The primary task of the facilitator is to bring the parties together, thereby enabling them to communicate with one another and to resolve the dispute through effective communication.¹²⁷ Facilitators act as intermediaries and have the primary objective to enable parties to agree on a possible solution through effective communication.¹²⁸

A mini-trial is another form of private decision-making and is used as a structured form of dispute resolution. Here, parties are obliged to present their case through abbreviated summaries. The mini-trial is conducted in private and lawyers of the

124 Stintzing 1994 *European University Studies* 46.

125 Pretorius *Dispute Resolution* 4.

126 Section 18(2) of the NEMA.

127 Pretorius *Dispute Resolution* 4.

128 Trollip *Alternative Dispute Resolution* 62.

parties give presentations or summaries of their clients' cases.¹²⁹ These summaries are laid before an impartial third party who will render an advisory opinion, should the parties so wish.¹³⁰

5.3.1.2 Private adjudication by a third party

Another method of dispute resolution is through adjudication by a third party. This can be divided into arbitration, the investigation of a commission of enquiry, and fact-finding.¹³¹

Arbitration is a form of dispute resolution where an impartial third party reviews evidence, hears arguments of disputants, and then makes a decision on the basis of the evidence before him. Arbitration is a method of speciality because the third party is chosen for his knowledge and expertise in a certain field.¹³² In South Africa, arbitration is conducted under the *Arbitration Act 42 of 1965*.¹³³ A dispute may be referred to arbitration if the parties agreed to this method of ADR. For international arbitration, the parties must consent to submit any dispute arising to arbitration by means of an arbitration agreement or arbitration clause in a contract.¹³⁴ The South African position is similar. An arbitration agreement is defined by the AA as a written agreement under which an existing dispute or a future dispute, specifically defined or described in the agreement, is referred to arbitration.¹³⁵ It is envisaged that an arbitration agreement may be entered into between organs of state to provide for arbitration. The AA further provides that the arbitration will be conducted by a single arbitrator unless the parties agree otherwise.¹³⁶ The parties usually chose an arbitrator. The arbitrator follows a

129 Trollip *Alternative Dispute Resolution* 61.

130 Pretorius *Dispute Resolution* 4.

131 Pretorius *Dispute Resolution* 5.

132 Krages BP 2004 <http://www.krages.com/bpksevr.htm> 5 Mar.

133 Hereafter the AA.

134 Redfern and Hunter *Law and Practice of International Commercial Arbitration* 135. For a further discussion on South African arbitration in conjunction with international commercial arbitration see Butler and Finsen *Arbitration in South Africa-law and practice*.

135 Section 1 of the AA.

136 Section 9 of the AA.

process which is fair to all parties and makes an award after receiving submissions from the parties.¹³⁷ The dispute should thus be referred to an impartial third party or arbitrator who will make an award according to the facts presented before him. An award has the advantage, that it may be made an order of a competent court of law.¹³⁸ The award which has been made an order of the court is enforceable and is regarded as a judgment made by a court or order of the court which has the same effect.¹³⁹

In a commission of enquiry, an impartial third party investigates a set of facts which relates to a dispute. The commissioner is mandated to investigate all circumstances relating to the dispute in co-operation with the parties and to make his/her recommendations. These recommendations enable the parties to take future action. The recommendations that are made by the commissioner may be required to be in the form of policy recommendations.¹⁴⁰

Fact-finding entails the appointment of a fact-finder to evaluate specified material presented by the disputants. The fact-finder is equipped with technical expertise. His task is to evaluate all relevant material to the dispute and draft a report. The report would summarise all the relevant facts relating to the dispute. Once these facts are established, parties will be able to negotiate a settlement.¹⁴¹

It is clear from the exposition above that various methods of ADR exist. The question accordingly arises as to which method or methods may be most appropriate to address inter-governmental disputes in environmental context.

137 Butler 1994 *Comparative and International Law Journal of Southern Africa* 121.

138 Section 31(1) of the AA.

139 Section 31(3) of the AA.

140 Pretorius *Dispute Resolution* 5.

141 Pretorius *Dispute Resolution* 5.

5.3.2 *The application of an appropriate ADR method to inter-governmental environmental disputes*

Before parties select and adopt a method of ADR, parties must examine all benefits forwarded by a particular method.¹⁴² An appropriate method of dispute resolution must be selected which best suit the needs of the parties. In inter-governmental environmental disputes, the selection will arguably have to be made against the background of, *inter alia*, sustainable development, provisions of various environmental sectoral statues, framework legislation, as well as constitutional provisions. It is furthermore proposed that the selected ADR method should contribute to the fundamental principles pertaining to co-operative governance.¹⁴³

If environmental departments require a dispute resolution process which is based on private decision-making, environmental departments may employ informal discussions, negotiation, mediation, conciliation, facilitation or a mini trial.¹⁴⁴ If, on the other hand, environmental departments require that the dispute resolution procedure must be conducted under the adjudication of a third party, then arbitration, an investigation by a commission of enquiry, or fact-finding may be appropriate.¹⁴⁵

Private decision-making may be more appropriate as environmental departments agree on a settlement under the various methods available.¹⁴⁶ In the United States of America, negotiation and mediation have successfully been employed

142 Trollip *Alternative Dispute Resolution* 65. The application of ADR was discussed in paragraph 5.3.1.

143 Van der Berg 1998 *South African Journal of Environmental Law and Policy* 72. Co-operative governance was discussed paragraph 4.1.

144 Pretorius *Dispute Resolution* on page 3 analyses private decision making as an alternative to dispute resolution. It is divided it into informal discussions, negotiation, mediation, conciliation, facilitation and a mini trial.

145 Pretorius *Dispute Resolution* 5.

146 Private decision making methods include, an informal discussion, negotiation, mediation, conciliation, facilitation or a mini trial.

to settle disputes with an environmental character.¹⁴⁷ Negotiation and mediation are appropriate for environmental disputes, because the parties are enabled to work through complex issues and interests.¹⁴⁸ Applying mediation to environmental disputes is especially advantageous. This is because environmental disputes may involve technical issues, scientific uncertainty, parties concerned may be equipped with different powers and resources, the possibility of affecting broader interests, the inter-organisational nature of the dispute and parties' lack of prior negotiating relationship.¹⁴⁹ These factors may lead to complex negotiations, and a mediator may be a prerequisite. Whilst negotiation entitles environmental departments to negotiate a settlement, mediation entitles environmental departments to negotiate a settlement with the assistance of a mediator.¹⁵⁰ Private decision-making methods are based on agreement, are enforceable, and allow environmental departments to consent to the extent to which their environmental administrative powers will be performed to avoid overlapping and duplication.

Adjudication by a third party on the other hand include an award by an arbitrator,¹⁵¹ recommendations of a commission of enquiry,¹⁵² and a report by a fact-finder which summarises all the relevant facts relating to the dispute and enable environmental departments to negotiate a settlement.¹⁵³ Arbitration may thus be useful if environmental departments cannot reach an agreement and need a third party to make a decision without the intervention of the judiciary.¹⁵⁴

147 Bingham and Haygood 1986 *The Arbitration Journal* 6.

148 Mediation is an extended form of negotiation and includes that an impartial and independent third party is appointed to assist the parties in the negotiation procedure to reach an agreement.

149 Bingham and Haygood 1986 *The Arbitration Journal* 4.

150 Pretorius *Dispute Resolution* 3.

151 Section 31(1) of the AA.

152 Pretorius *Dispute Resolution* 5.

153 Pretorius *Dispute Resolution* 5.

154 Chapter 4 of the NEMA also provides that private decision making methods in the form of conciliation or facilitation must first be conducted before arbitration as a method of adjudication by a third party will be conducted.

It is thus clear that ADR may be applied to inter-governmental disputes as it provides for dispute resolution procedures outside the framework of court adjudication,¹⁵⁵ and qualifies under the provisions of the 1996 Constitution and the NEMA.¹⁵⁶ Although ADR comprises of various methods which can be selected by environmental departments in relation to their needs, it may be preferable to firstly use private decision-making methods to enable environmental departments to settle an inter-governmental environmental dispute on agreement. If this fails, it may be appropriate to make use of a method of adjudication by a third party.

Mediation and negotiation may be the more appropriate methods of private decision-making, whilst arbitration may be a more preferable method of adjudication by a third party.¹⁵⁷ This does, however, not mean that other ADR methods are excluded from application. Disputing environmental departments have the choice to apply any ADR method which best suit their needs. Reference must however be made to environmental legislation to determine whether the application of ADR methods to inter-governmental environmental disputes are not limited, or in conflict with the objectives of such legislation. An analysis of environmental legislation may also indicate whether environmental laws do not contain provisions to regulate the resolution of inter-governmental environmental disputes.

6. Environmental legislation and ADR

6.1 *Environmental legislation providing for methods of alternative dispute resolution*

155 De Vos 1993 *Tydskrif vir die Suid Afrikaanse Reg* 155.

156 Section 41(3) of the 1996 Constitution provides that inter-governmental disputes should, if possible, be resolved through alternative methods of dispute resolution and section 2(m) of the NEMA provides that inter-governmental conflict should be resolved through conflict resolution procedures.

157 Negotiation, mediation and arbitration are regarded as the three primary methods of ADR.

Environmental law consists of, *inter alia*, environmental legislation enacted by the legislator to achieve the objectives of section 24 of the 1996 Constitution.¹⁵⁸ Therefore reference will be made to some environmental statutes to determine whether provision is made by them for the resolution of inter-governmental disputes, and whether ADR methods can be applied.

6.1.1 The NEMA

The NEMA provides for principles that apply to actions of organs of state which may affect the environment.¹⁵⁹ Organs of state are required to fulfil their obligations in conjunction with the state's responsibility to respect, protect and promote social and economic rights,¹⁶⁰ and must seek inter-governmental co-ordination and harmonisation of policies, legislation and actions.¹⁶¹ The NEMA furthermore provides for dispute resolution methods in chapter 4 and makes provision for conciliation, facilitation, arbitration, investigation, and the appointment of a panel of conciliators or arbitrators from which a selection of conciliators and arbitrators may be made.¹⁶²

The NEMA provides that any Minister, MEC or Municipal Council may, prior to a decision regarding any matter, refer the matter to conciliation if it is considered desirable.¹⁶³ Anyone may further request the Minister, MEC or Municipal Council to appoint a facilitator to assist interested and affected parties to reach an

158 Section 24(b) of the 1996 Constitution.

159 Section 2(1) of the NEMA. See also paragraph 4.1 above.

160 Section 2(1)(a) of the NEMA.

161 Section 2(1)(l) of the NEMA.

162 Chapter 4 of NEMA makes provision for conciliation, arbitration, investigation, appointment of panel and remuneration and relevant considerations, report and designated officers.

163 Section 17(1)(a) and (b) of the NEMA provides that any Minister, MEC or Municipal Council may in the circumstances of a difference or disagreement arising in relation to the exercise of its functions which significantly affects the environment, or before an appeal arises from the difference or disagreement regarding the protection of the environment, before making any decision, considers the desirability of referring the matter to conciliation. If the matter is referred to conciliation it will be either referred to the Director General for conciliation under NEMA, or a conciliator will be appointed under conditions determined.

agreement and to refer the dispute to conciliation.¹⁶⁴ A court or tribunal may suspend proceedings before it, and order that the dispute be referred to conciliation.¹⁶⁵ If conciliation is not effective and does not provide an adequate solution, the conciliator may with the parties' consent refer the matter to arbitration.¹⁶⁶ If the matter is referred to arbitration, the conciliator must draft a report which indicates the result of conciliation.¹⁶⁷ If no agreement was reached during conciliation, the report may contain the conciliator's recommendations and reasons.¹⁶⁸ Arbitration will be conducted under the provisions of the AA.¹⁶⁹ An investigation may further be conducted to evaluate a matter relating to the protection of the environment.¹⁷⁰

The NEMA provides for the resolution of inter-governmental disputes, but limits the availability and application of ADR methods. The NEMA does not contribute to the aspects, under which an appropriate selection of an ADR method must be made,¹⁷¹ and do not make the available ADR methods compulsory applicable.

164 Section 17(2) of the NEMA.

165 Section 17(3) of the NEMA.

166 Section 18(6) of the NEMA.

167 Section 18(7)(a) of the NEMA.

168 Section 18(7)(b) of the NEMA.

169 Section 19 of the NEMA provides that a difference or disagreement may be referred to arbitration under the AA, and the provisions and stipulations of the act will be applicable to environmental dispute resolution. See also paragraph 5.3.1.2 above.

170 Section 20 of the NEMA provides that the Minister may be assisted by an appointed person after consultation with a Municipal Council or MEC or another National Minister to assist such a Municipal Council or MEC or National Minister in the evaluation of a matter relating to the protection of the environment by obtaining information which may be relevant to the evaluation of the concerned matter.

171 Crous *Die Beslegtingsproblematiek in geval van Mediese wanpraktyks-geskille met spesifieke verwysing na die "Action for Wrongful Conception" en die "ADR" Proses* 348 – 350. Aspects which must be considered in adopting an appropriate approach include the suitability of an ADR method, preferences by the parties, the role of the parties, willingness to resolve the dispute with an ADR method, the competence and willingness to use an ADR method, and the characteristics of third parties.

6.1.2 *The NWA*

The *NWA* has the purpose to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled.¹⁷² It establishes a Water Tribunal to hear appeals against decisions which are made by a responsible authority, catchment management agency or water management institution under its provisions.¹⁷³ The tribunal is an independent body, has jurisdiction in all nine provinces, and may conduct hearings anywhere within its jurisdiction.¹⁷⁴ The tribunal comprises of a chairperson, deputy chairperson, and additional members, deemed appropriate or necessary by the Minister. Each member of the tribunal must have knowledge relating to law, engineering, water resources or any related field in this regard.¹⁷⁵ The chairperson will nominate one or more members of the tribunal, who must have the knowledge to hear the matter and make a decision. The decision made by the members will be regarded as a decision made by the tribunal.¹⁷⁶

The *NWA* further provides that the Minister may on request of the parties or on own initiative require that the dispute be settled through negotiation or mediation.¹⁷⁷ In this regard, an attempt will be made to resolve the dispute under the process of mediation or negotiation. These provisions are however only applicable to organs of state and members of the public where, for example, a dispute arises during the application for a water use licence contemplated in sections 41, 42, and 43 of the act. Hence, the provisions are only applicable to disputes arising between the relevant department and the public. No provision is made for the resolution of inter-governmental disputes.

172 Section 2 of the *NWA*.

173 Chapter 15 of the *NWA*.

174 Section 146(2) of the *NWA*.

175 Section 146(4) of the *NWA*.

176 Section 147(1) of the *NWA*.

177 Section 150 of the *NWA*.

6.1.3 *National Heritage Resources Act*

The *National Heritage Resources Act* 25 of 1999¹⁷⁸ has the purpose to promote management over heritage resources and to foster and conserve it for future generations.¹⁷⁹ Heritage resources are defined as any place or object that is of cultural significance.¹⁸⁰ Cultural significance refers to the aesthetic, architectural, historical, scientific, social, spiritual, linguistic, or technological value or significance.¹⁸¹ A heritage resources authority is liable to prescribe any license application procedures and requirements for permit applications, under the NHRA.¹⁸² A heritage resources authority, furthermore, has the discretion to issue a permit applied for under the required procedure and may subject the license to certain terms, conditions, and directions or restrictions.¹⁸³

The Minister or MEC must through regulations provide for a system of appeal to the South African Heritage Resources Agency¹⁸⁴ Council or provincial heritage resources council against a decision contemplated in the NHRA.¹⁸⁵ Anyone who wishes to appeal against a decision made by an authorised body must notify the Minister or MEC in writing within thirty days. The Minister or MEC will then appoint an independent tribunal which will consider the appeal referred to it. The tribunal normally involves three experts.¹⁸⁶ Disputes arising in relation to the discretion of issuing a permit will thus be referred to the SAHRA Council or a provincial heritage resources council. The dispute resolution method under the NHRA includes two parties of which one is a state organ and the other a private licence applicant. It therefore does not provide for inter-governmental disputes.

178 Hereafter referred to as NHRA.

179 The preamble of the NHRA.

180 Section 2 of the NHRA.

181 Section 2 of the NHRA.

182 Section 48(1) of the NHRA.

183 Section 48(2) of the NHRA.

184 Hereafter referred to as SAHRA.

185 Section 49(1) of the NHRA.

186 Section 49(2) and (3) of the NHRA.

6.1.4 *Local Government: Municipal Systems Act*

The *Local Government: Municipal Systems Act* 32 of 2000¹⁸⁷ provides principles, mechanisms, and processes for municipalities to fulfil their obligations.¹⁸⁸ It includes a whole chapter which deals with legal matters related to the provisions of the statute.¹⁸⁹ Municipalities are allowed to submit any action, claim, or proceedings to arbitration, unless the matter relates to its status, powers or duties, or the validity of its actions or by-laws.¹⁹⁰ It is primarily aimed at internal relationships within the local sphere of government or relevant municipality and does not address matters pertaining to inter-governmental conflict. Inter-governmental conflict usually relates to the exercise of a power and the performance of a function. These issues are not susceptible to arbitration and the LGMSA does not address disputes between different organs of state.

6.1.5 *Local Government: Municipal Structures Act*

The *Local Government: Municipal Structures Act* 117 of 1998¹⁹¹ provides for the establishment of municipalities. It defines different types of municipalities and provides for requirements pertaining to different categories and types of municipalities, criteria for determining different categories of municipalities, and the power and functions between categories of municipalities. It further regulates the internal systems, structures and office-bearers, and electoral systems.¹⁹²

This statute provides for disputes resolution between a district and local municipality which concerns the performance of a function or the exercise of a power. The MEC for local government in the relevant province are required to consult with the parties to the dispute and resolve the dispute by defining the

187 Hereafter referred to as the LGMSA.

188 The preamble of the LGMSA.

189 Chapter 11 of the LGMSA.

190 Section 109(2) of the LGMSA.

191 Hereafter referred to as the LGMSTA.

192 The preamble of the LGMSTA.

respective roles of the parties in the Provincial Gazette. The MEC thus defines the powers and functions of the parties to enable them to act accordingly.¹⁹³ The resolution of the dispute will thus be conducted by the MEC for the local government in the province in which the dispute arises. Municipalities are organs of state and the LGMSTA thus provide for dispute resolution in inter-governmental relations. The statute is however only applicable to organs of state in the local sphere of government and does not apply to other organs of state, situated in other levels of government. It may furthermore be argued that the MEC for local government gives an assessment of the powers and functions of municipalities to enable municipalities to act accordingly. Overlapping and duplication of powers and functions are not specifically addressed. Overlapping and duplication is a result of performance of functions and exercise of powers directly conferred by different legislation. Assessment of these powers and functions may be inadequate because assessment would lead to the objectives of the different legislation which are in conflict. Hence, no solution would be provided to resolve or avoid conflicting powers and functions conferred by different legislation.

6.1.6 *National Environmental Management: Biodiversity Act*

The *National Environmental Management: Biodiversity Act* 10 of 2004¹⁹⁴ has the main objective to manage and conserve biological diversity, the use of indigenous biological resources, and fair and equitable sharing of benefits pertaining to bioprospecting. The act aims to fulfil its objectives within the framework of the NEMA.¹⁹⁵

This statute regulates the issuance of permits authorising restricted activities, activities prohibited by the Minister in the Gazette through notice, bioprospecting involving indigenous biological resources, and the export of indigenous biological

193 Section 86 of the LGMSTA.

194 Hereafter referred to as the NEMBA.

195 Section 2 of the NEMBA.

resources.¹⁹⁶ A person may apply for a permit to be issued by an issuing authority. An issuing authority may either issue an unconditional or conditional permit or refuse to issue a permit.¹⁹⁷ A person who feels aggrieved by a decision of the issuing authority may appeal within thirty days to the Minister after the decision is made.¹⁹⁸ The Minister may consider the appeal and make a decision, refer it to the MEC for Environmental Affairs, or appoint a panel of persons to consider and deal with the related matter.¹⁹⁹

A dispute arising relating to the powers and functions of the issuing authority will thus be dealt with by the Minister, the MEC for Environmental Affairs or an appointed panel of persons. Whilst provision is thus made for dispute resolution between an aggrieved member of the public and an organ of state, no provision is made for the resolution of inter-governmental disputes.

6.1.7 *Some comments on ADR and environmental legislation*

Whilst the NEMA provides for inter-governmental dispute resolution, other sectoral legislation only makes provision for dispute resolution between executive line functionaries and non-governmental organs. The LGMSTA is the only exception and deals with inter-governmental conflict between district and local municipalities regarding the performance of their functions and exercise of their powers.²⁰⁰ It does however not provide for dispute resolution between organs situated on other levels of government and only relates to an assessment of powers and functions of applicable municipalities. The NEMA provides for fair decision making and conflict management.²⁰¹ In this regard it is provided that conciliation will only be applicable if any Minister, MEC or Municipal Council

¹⁹⁶ Section 87 of the NEMBA.

¹⁹⁷ Section 88 of the NEMBA.

¹⁹⁸ Section 94(1) of the NEMBA.

¹⁹⁹ Section 94(2) of the NEMBA.

²⁰⁰ Section 86 of the LGMSTA.

²⁰¹ Chapter 4 of the NEMA provides in section 17 and 18 for conciliation, in section 19 for arbitration, in section 20 for investigation and in section 17(2) for facilitation.

considers it desirable²⁰² and that a facilitator may be appointed at the request of anyone with the purpose to refer a dispute, difference, or disagreement, to conciliation.²⁰³ If conciliation is unsuccessful, arbitration may be conducted,²⁰⁴ or the matter may be evaluated through an investigation.²⁰⁵ The NEMA does not make these above mentioned ADR methods compulsorily applicable to an inter-governmental environmental dispute and alternative methods of ADR are not excluded nor limited from application. The provisions of the NEMA, however, provide that private decision-making methods must first be used, before arbitration as a method of adjudication by a third party will be applied.²⁰⁶

It may therefore be argued that ADR methods are not limited, nor excluded, or in conflict with environmental law. It is however unfortunate that sectoral legislation does not contain ADR methods to address inter-governmental environmental disputes. It is proposed that the purpose of ADR may have been greatly advanced if sectoral statutes also provided for methods of ADR to resolve inter-governmental environmental disputes. This not being the case, an appropriate method of ADR may thus be applied with the consent of the parties to the dispute, and an appropriate method of ADR must be selected according to the parties' needs and nature of the dispute.²⁰⁷

7. Conclusion

Various environmental departments are responsible to implement and administer a wide range of environmental legislation in South Africa. The South African environmental governance sphere is however characterised by regulatory

202 Section 17(1)(a) and (b) of the NEMA.

203 Section 17(2) of the NEMA.

204 Section 18(6) of the NEMA.

205 Section 20 of the NEMA.

206 Pretorius *Dispute Resolution* determines that conciliation and facilitation is methods of private decision-making and that arbitration is a method of adjudication by a third party on page 3-5.

207 See paragraph 5.3.2 for the application of ADR to inter-governmental environmental disputes.

fragmentation that manifests in disjointed autonomous line functionaries and overlapping and duplication of powers and functions.²⁰⁸ Fragmentation is furthermore a result of various sectoral environmental acts that are administered by various line functionaries in different spheres of government. This may give rise to serious conflict between various line functionaries located in the three spheres of government. In terms of the provisions on co-operative governance, environmental departments are however under the constitutional obligation to co-operate and co-ordinate their powers and functions in order to avoid conflict.²⁰⁹ Inter-departmental conflict is currently resolved by way of, *inter alia*, MOUs and EMCAs. The disadvantages that these procedures pose, may however not contribute to co-operative governance, the resolution and avoidance of inter-governmental disputes, or effective environmental administration.²¹⁰

ADR, on the other hand, proposes qualities and characteristics which are required by the 1996 Constitution and the NEMA to resolve inter-governmental disputes.²¹¹ Although ADR is not specifically provided for in most sectoral environmental acts as a method to resolve disputes between departments themselves, it can still be used as an alternative to litigation by environmental departments. Various methods of ADR are available,²¹² the three primary methods being, negotiation, mediation and arbitration.²¹³ Environmental departments may agree and select an appropriate ADR method, in consideration

208 Kotze "Towards Sustainable Environmental Governance in South Africa: Co-operative Environmental Governance and Integrated Environmental Management as Possible Solutions" 5.

209 Section 41 of the 1996 Constitution.

210 MOUs pose problems as they are concluded on a high political level and do not have legal standing or the necessary administration to implement it and because the meetings that are conducted are too short to discuss the relevant issues in depth and the relevant officials are also not always available to attend the relevant meeting. EMCAs, on the other hand, pose problems as all organs of state mandated to fulfil a function relating to a singular matter as well as the Minister and MEC concerned must agree that the EMCAs must be concluded.

211 Section 41(3) of the 1996 Constitution provides that inter-governmental disputes should, where possible, be resolved through alternative methods of dispute resolution rather than through adversarial litigation and section 2(m) of the NEMA provides that conflict between organs of state should be resolved through conflict resolution procedures.

212 ADR methods are categorised under the sub-sections of private decision-making and adjudication by a third party.

213 Faris 1994 *De Jure* 337.

with certain aspects, before it can be applied.²¹⁴ It may be preferable to use private decision-making methods which enable environmental departments to settle an inter-governmental environmental dispute on agreement, before a method of adjudication by a third party is used.²¹⁵ Negotiation and mediation may be the preferred private decision-making methods, while arbitration is the preferable method of adjudication by a third party. Mediation especially suits environmental inter-governmental disputes, because a mediator assists the parties in dispute to negotiate complex issues.²¹⁶

South African environmental governance entities are faced by various challenges in their quest to direct governance efforts on a sustainable path. The achievement of sustainable development should not be negated by inter-governmental disputes. It is proposed that, through ADR, environmental departments currently have a feasible option to address such conflicts, thereby giving effect to the constitutional obligation to realise sustainable development.

214 Crous *Die Beslegtingsproblematiek in geval van Mediese wanpraktyks-geskille met spesifieke verwysing na die "Action for Wrongful Conception" en die "ADR" Proses* 348 – 350. Aspects which must be considered include the suitability of the ADR method, preferences of the parties, parties' active role in dispute resolution, parties' desire to resolve the dispute by the adopted ADR method, the competence and willingness to use an ADR method, and the characteristics of third parties.

215 Mediation and negotiation may be more appropriate methods of private decision-making and arbitration may be a more preferable method of adjudication by a third part.

216 Bingham and Haygood 1986 *The Arbitration Journal* 4.

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