

**MEDIATING COMMUNITY/COMPANY ENVIRONMENTAL
DISPUTES IN THE OIL AND GAS INDUSTRY: A Guide for
Promoting Environmental Mediation in Emerging
Economies- Focus on Nigeria**

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ABSTRACT

Every civilized nation requires a system of justice in which aggrieved parties can obtain redress through the legal enforcement of their rights. Traditionally, litigation has served this purpose, satisfying the natural inclination of humans to settle disputes only under compulsion, even where dialogue or mutual agreement would serve adequately. This historical bias towards litigation is now giving way to consensual processes, principally mediation, as the first recourse in the settlement of these disputes.

Consequently, in the field of environmental law, mediation is emerging on a global scale as a new approach towards the collaborative resolution of disputes over proposed or completed developments that have environmental effects. This paper aims to expound on the “so-called” gains of environmental mediation, with the express purpose of advocating its increased adoption in developing countries, especially in the oil and gas-rich countries of Africa. The focus is on Nigeria, so far the largest producer among these countries.

A close examination of the strengths of the evidence in support of the use of environmental mediation raises two key questions. First, to what theoretical and practical extents do the advantages of environmental mediation work in favour of developing countries/emerging economies? Second, how can the confidential nature of mediation be “reconciled” with the need for members of the public to have access to the information obtained from these environmental mediations, which may have serious implications for their health and well-being?

The finding is that irrespective of the present emergence of mediation, environmental litigation is, to a large extent, still a structurally inadequate option in Nigeria. If properly utilised in settling environmental disputes, particularly those between foreign oil and gas companies, and the local communities hosting them, mediation is bound to reduce the adverse impacts of exploitation of these

resources on the human and natural environment of Nigeria. However, mediation is no panacea. Much of its success will depend on the particular mediator's skills and repertoire, as much as on the openness of potential disputants to the process.

Further, there exists a flexible overlap, as opposed to a conflict, between the confidentiality of mediation and the right of access to environmental information. This can be synchronized primarily by expanding the scope of participation in the mediation process. Both findings in this study, however, converge in the recognition that there is need for environmental mediators to be accorded statutory privilege. Such a move will not only bolster the practice and integrity of environmental mediation, but will also guard the key premises upon which it is founded, and avoid the likely incessant court interference from impeding the growth and viability of the promising new sector.

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DECLARATION

I HEREBY DECLARE THAT I AM THE AUTHOR OF THIS DISSERTATION. I ALSO DECLARE THAT ALL REFERENCES CITED HEREIN HAVE BEEN PERSONALLY CONSULTED BY ME AND DULY ACKNOWLEDGED WITH THEIR SOURCES CITED. THIS DISSERTATION HAS NOT BEEN PREVIOUSLY ACCEPTED IN THIS OR ANY OTHER UNIVERSITY FOR A HIGHER DEGREE.

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| <u>Shell Petroleum Development Company v. Farah</u> | [1995] 3 NWLR (Part 382)pg. 148 |
| <u>United States v. Nixon</u> | [1974] 418 U.S 683, 709 |

TABLE OF ABBREVIATIONS

| | |
|-------|---|
| ADR | Alternative Dispute Resolution |
| AGIP | Azienda Generale Italiana Petroli |
| EEs | Emerging Economies |
| ECHR | European Convention on Human Rights |
| ENE | Early Neutral Evaluation |
| GDP | Gross Domestic Product |
| GFC | Gas and Fuel Corporation of Victoria |
| LCIA | London Court of International Arbitration |
| LMDC | Lagos Multi-Door Court House |
| MTBE | Methyl Tertiary-Butyl Ether |
| NAOC | Nigerian Agip Oil Company |
| NCSC | National Centre for State Courts |
| NDCs | Niger Delta Communities |
| NGO | Non-Governmental Organization |
| NNPC | Nigerian National Petroleum Company |
| OGC | Oil & Gas Company |
| SECV | State Electricity Commission of Victoria |
| SERAC | Social and Economic Rights Action Centre, Nigeria |
| SRDA | Southern Region Development Authority, Tanzania |
| U.M.A | Uniform Mediation Act |

| | |
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| U.N.E.C.E | United Nations Economic Commission for Europe |
| UNEP | United Nations Environment Programme |
| WIPO | World Intellectual Property Organization |

1 Introduction

1.1 General

In the latter part of the 20th century, Alternative Dispute Resolution (ADR)¹/Mediation has gained prominence in the international business arena in preference to traditional litigation for settling diverse disputes.² In Australia,³ the U.S.A and Canada,⁴ mediation is actively advocated. English courts have recently found it appropriate to penalise litigants who failed to go to mediation.⁵ Increasingly, international petroleum contracts in China, Bangladesh and many other Asian countries provide for amicable settlement of disputes through mediation or conciliation.⁶ As a result, it is strongly anticipated that the energy/oil and gas industry worldwide, like many other specialized sectors,⁷ will follow this trend.⁸

Environmental conflict is an unavoidable aspect of oil and gas development for the simple reason that the industry's activities are intrinsically linked with impacts on the human and natural environment.⁹ The adverse effects¹⁰ of exploitation

¹ Owing to its unquestioned dominance of the field, mediation is commonly interchanged with the collective term "ADR", the definition of which includes negotiation, early neutral evaluation, expert determination, mini trials, and all other non-litigious means of resolving disputes. See below for further discussion.

² Macfarlane, J., *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing, 1997) pg. lx.

³ Clark, E., *The Role of Non-Litigious Dispute Resolution Methods in Environmental Disputes*; 2 The Australian journal of Natural Resources Law and Policy No. 2 (1995), pg. 212

⁴ Girard, J., *Dispute Resolution in Environmental Conflict: Panacea or Placebo?* (1999) <<http://www.fcj-fcj.org/full-text/girard.htm>> Last visited 13 December, 2003.

⁵ *Dunnett v Railtrack* [2002] EWCA Civ 302.

⁶ There is little or no distinction between the two terms. Maniruzzaman, A.F.M., *The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward*; 193 I.E.L.T.R (2003), pg. 197 (See Section 1.5 infra.) For ease of reference, both would be used interchangeably in this study.

⁷ The Information technology and Intellectual property industries are already championing this trend.

⁸ Connerty, A., *Dispute Resolution in the Oil and gas Industries*, 20 J.E.N.L.R 2 (2002), pg.145 Litigation in municipal courts and international arbitration remain the two major mechanisms for resolving disputes generally and environmental disputes in particular, in the oil and gas industry.

⁹ Gao, Z., *Environmental Regulation of the Oil and Gas Industries*; CEPMLP Journal Online, Vol. 2-11 Article, pg. 9; <<http://www.dundee.ac.uk/cepmlp/journal/html/article2-11.html>> Last visited 13 August, 2003.

tend to increase with the progress of development operations,¹¹ often impacting upon a large group of people, and sometimes lasting for a long time after the end of production activities.¹²

The oil-bearing regions in Nigeria¹³ present the classical case of oil industry-related environmental despoliation. Most of the country's oilfields are located in the sedimentary basins offshore and onshore the Niger River delta.¹⁴ This area¹⁵ is 70,000 square kilometers in size,¹⁶ and inhabited by about 20 million people.¹⁷ The oil it produces accounts for about 90% of Nigeria's foreign exchange earnings, 95% of the national budget and 80% of Gross Domestic Product (GDP).¹⁸ Since the first commercial discovery of oil in Nigeria,¹⁹ the region has remained attractive to many of the major multinational Oil and Gas Companies (OGCs) operating in the country, including Shell, Chevron, Elf and AGIP.²⁰ Like most other resource-rich parts of the developing world, the Niger delta is

¹⁰ Besides these traditional environmental effects, some new issues have recently been raised by natural resources industries particularly those relating to indigenous peoples, socio-economic and cultural impacts, as well as human rights issues; see *ibid.*, pg. 8

¹¹ *Ibid.*, pg.11.

¹² *Ibid.*, pg.11; see also, Ibeanu, O., *Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria*, Environmental change and Security Project Report, Issue 6, (Summer 2000) <<http://www.ciaonet.org/>> Last visited 12 December, 2003: "Fish store mercury in their brains for a long time, which can then easily pass into the human food chain with adverse effects on human populations" pg. 23

¹³ With proven reserves of 22.5 billion barrels of crude oil and 124 tcf of natural gas, Nigeria is recorded as the world's tenth largest producer of oil and gas. For full country profile, visit the African Mbendi website, <<http://www.mbendi.co.za/indy/oilg/af/ng/p0005.htm>> Last visited 18 December, 2003.

¹⁴ Worika, I.L., *Environmental Law and Policy of Petroleum Development* (Port Harcourt: Anpez Centre for Environment and Development, 2002) pg. 78

¹⁵ The Niger delta region comprises the following states of Nigeria: Abia, Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, Imo, Ondo, and Rivers; See Part 1 Art 2(2)(1) *Niger-Delta Development Commission Act*, No. 2 1999.

¹⁶ Akpobibibo, O., *Sustainable Development as a Strategy for Conflict Prevention: The Case Of the Niger Delta*, <http://www.ogele.org/features/features_nigerdelta.html> Last Visited 22 January, 2004

¹⁷ *Ibid.*, pg. 7.

¹⁸ *Ibid.*, pg. 8.

¹⁹ Oil was first discovered in Oloibiri, by Shell BP in 1956, after about 50 years of exploration. Mbendi website <<http://www.mbendi.co.za/indy/oilg/ogus/af/ng/p0005.htm>> Last visited 15 December, 2003.

²⁰ *Ibid.*, Mbendi website.

characterized by gross underdevelopment and acute poverty.²¹ Decades of incessant oil spills have damaged the means of subsistence of the communities and the people have had to contend with acid deposits from continuous gas flaring.²²

Environmental law is rapidly changing on a global and national scale, among other reasons, in response to these grim injustices of natural resources exploitation.²³ Under the new dispensation, the correlation between effective environmental protection and government accountability is well recognised.²⁴ Active public participation in environmental decision-making is considered a more potent tool than traditional command and control mechanisms, and as a prerequisite for viable environmental protection regimes.²⁵ The citizen has become entitled to accurate and current environmental information, which must be provided in an unhindered manner.²⁶ From this metamorphosis, the “human right to a decent environment” is slowly but steadily emerging.²⁷

In States with a developed legal system and a properly functioning, independent judiciary, environmental rights can, in principle, be enforced by litigating in

²¹ Ibid., Mbedi website; some explanation has been offered for this “gap syndrome” in resource-rich regions by the World Commission on Dams in its Report: *Dams and Development: A New Framework for Decision-Making*; Earthscan Website, <[http://www.dams.org/docs /report/wcdreport.pdf](http://www.dams.org/docs/report/wcdreport.pdf)> Last visited 16 January, 2004

²² Ibid., Mbendi website.

²³ Jones, P., *The Polluter Pays Principle and the EC Proposal on Environmental Liability: Anything New for Protecting the Ecosystems of Europe’s International Watercourses?*, pgs. 1-2, where the author recounts that the “Polluter Pays principle” was developed in the 1970’s “to distribute the costs of pollution to industry and to the consumer, and in so doing, maintain the environment in an acceptable state”.

²⁴ Gavouneli, M., *Access to Environmental Information: Delimitation of a Right*, 13 Tul.Envtl .L.J. 303 (1999-2000), pg. 303

²⁵ Ibid., pg. 303; see also, Convention on Access to Information, Public Participation, in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Adopted June 25, 1998. U.N.Doc.ECE/CEP/43., Art.5 (1)(c); which will be discussed in greater detail below.

²⁶ Reh binder E., and D., Loperena; *Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation*; < http://iceac.sarenet.es/acad_forumenglish/dlrandrehbinder.htm > Last Visited on 16 November, 2003.

²⁷ See Gavouneli, Supra FN 24, pg. 304.

national courts.²⁸ But enforcement in emerging economies (EEs)²⁹ meets with serious obstacles, principal among which is *locus standi* (or standing to sue).³⁰ Lamenting the findings of a post-Aarhus survey of developing countries, the executive director of UNEP states:

“A major challenge confronting these countries is how these consideration(s) are to be given legal effect... Environmental litigation is not yet well developed in Africa. The issue of locus standi has been a hurdle in most countries in obtaining access (to) the courts and in seeking enforcement of environmental law. Furthermore, lack of information networks and lax policy implementation in several countries has been a hindrance to furtherance of the three³¹ considerations in developing countries.”³²

Nigeria exemplifies this stereotype. In 1996, a Nigerian NGO, Social and Economic Rights Action Centre (SERAC), and the Centre for Economic and Social Rights, USA, sought to have audience before the African Commission on Human and Peoples' Rights regarding alleged violations of human rights by the Nigerian government (through NNPC) and Shell.³³ SERAC highlighted certain reasons for attributing pollution liability to the government and these included:

- Failure to enact sufficient environmental protection legislation
- Failure to monitor operations of oil and gas companies

²⁸ Ibid., pg. 304.

²⁹ Used here in the same sense as “developing countries”.

³⁰ See below for a discussion of the Songo songo gas pipeline scenario in Tanzania. Some countries are however making remarkable efforts to relax their *Locus Standi* laws. For the case of India, see Kirpal, B.N. (Justice), *Developments in India relating to Environmental Justice*; <http://www.unep.org/dpdl/symposium/Documents/Country_papers/INDIA%20.doc> Last visited 12 January, 2004.

³¹ Referring to the trio of access to information, public participation in decision-making, and access to justice in environmental matters; established as foundations of sustainable development under the Aarhus Convention.

³² Global Ministerial Forum, Twenty-first Session, Nairobi , 5-9 February 2001; UNEP/GC.21/4.; <<http://www.unep.org/GC/GC21/Documents/gc-21-04/K0000363.e-gc-21-4.doc>,> Last Visited 22 January, 2004.

³³ The Social and Economic Rights Action Center for Economic and Social Rights of Nigeria, Communication No. 155/95, African Commission on Human and Peoples' Rights.

- Failure to provide adequate information to the Ogonis³⁴ regarding adverse effects of oil and gas exploitation on their environment
- Failure to consult the Ogonis in respect of decisions which affected their environment
- Placing the country's legal and military powers at the disposal of the OGCs
- Failure to investigate attacks and punish perpetrators³⁵

In order to ascertain whether it could grant audience to SERAC, the Commission first determined whether SERAC had exhausted all local remedies. Noting that no application had previously been made to any domestic court by the NGO, it reasoned that this would not necessarily bar the hearing if it was evident that the remedy sought was in fact unobtainable in the local courts. It then found that such a remedy was not available in Nigeria, among other things, because:

- Many of the rights infringed were not protected under domestic law, and
- Despite international outrage against the Ogoni incidents, the government had not placed domestic machinery in place to provide remedies.³⁶

Close to 10 years on, the situation remains virtually the same.³⁷

³⁴ The ethnic group of the well-known poet and environmental rights activist (under the umbrella of MOSOP), Ken Saro-Wiwa, hanged along with eight others, 10 November, 1995 after a trial that seriously breached international due process standards. See Manby, B., The Price of Oil-Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities (New York, Human Rights Watch, 1999) pg. 9.

³⁵ Ibid., pg. 9.

³⁶ Ibid., pg.10.

³⁷ Uwais, M.L. (Chief Justice of Nigeria), *Recent Developments in Nigeria Strengthening Legal and Institutional Framework for Promoting Environmental Management*; Paper delivered at the Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg, South Africa, 18-20 August, 2002. <http://www.unep.org/dpdl/symposium/Documents/Country_papers/NIGERIA.doc> Last visited 18 December, 2003: "...apart from environmental agencies, the rest of the machinery needed to deliver "environmental justice" in the new context, have yet to be created, in both human and material dimensions."

This situation may be attributed mainly to the fact that there is a general dearth of environmental litigation in Nigeria.³⁸ A number of factors are responsible for this. In the very recent past, a great proportion of the citizenry was oblivious of environmental pollution surrounding them, irrespective of the causes.³⁹ The costs of legal action, including the cost of obtaining technical evidence, and the remoteness of venues for redress discourage even those who are environmentally knowledgeable.⁴⁰ This shortage has also been attributed to the placid nature of remedies which presently exist for environmental damage, and the general sentiment that actions instituted against polluting facilities in which government has an interest, equates to action against government itself.⁴¹

Alternative dispute resolution techniques, particularly mediation, have attracted global attention as a cheaper, faster and more satisfying way of reconciling and managing environmental conflict situations.⁴² What is revealed from a brief examination of mediation's history below is that mediation was not invented as an alternative to litigation. On this point, Lord Denning warns that:

"... parties cannot contract to oust the ordinary courts from their jurisdiction. They can of course agree to leave questions of law, as well as fact to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of law. They cannot prevent its decision being examined by the courts. If parties should

³⁸ Ibid., pg. 3

³⁹ The situation has been aptly described in these words: "...the citizens being uninformed, lived happily with the resultant pollution and hazardous wastes. Over time, hot and heavy, metal laden, coloured effluent discharged into streams by textile factories in certain localities assumed mythical references (including disease curative properties). Industrial effluents and sludge[s] were erroneously used as manure to produce "fresh" but deadly crops for the kitchens and dinning tables of our urban population. Fishes and crabs caught from polluted rivers and lagoons were sold and eaten freely. Containers of chemicals (and pesticides) littered the surroundings in open dump-sites waiting to be picked by innocent and illiterate folks who would use them to store their own food and water. Particulates from quarries, asphalt, cement and similar industries settled on many a house wife pots of soup forming layers of crust that inevitably get consumed as part of the regular meal. Fumes from stacks occlude sunlight and cause burning and other irritations of the eye, nose, lungs and skin." Adegoke, A., *The Challenges of Environmental Enforcement in Africa: The Nigerian Experience*; paper delivered at The Third International Conference on Environmental Enforcement, held in Oaxaca, México, 25-28 April, 1994

⁴⁰ Ibid., pg. 1.

⁴¹ See Uwais, supra FN 37, pg. 3.

⁴² Ibid., pg.3.

*seek by agreement to take the law out of the hands of the courts and put it in the hands of a private tribunal, without recourse at all to the courts in case of error, then the agreement is to that extent contrary to public policy and void."*⁴³

Nevertheless, law and policy makers, as well as governments in general, are increasingly turning away from adversarial dispute settlement methods in order to embrace mediation,⁴⁴ finding in its consensual approach, better opportunities for ensuring integrative environmental decision-making that attains sustainable development while maintaining "best conservation practice".⁴⁵ States have found that they can engineer and supervise environmental protection systems without jeopardising attractiveness to foreign investment;⁴⁶ but most importantly, communities and individuals can have their environmental needs met without compromising justice.⁴⁷

1.2 Aim of Study

The thesis of this study is twofold. First, that mediation is both workable and preferable to litigation as a means of resolving environmental disputes between host communities and multinational oil and gas/energy companies (OGCs) in emerging economies in general and Nigeria in particular; Secondly, that there is need to accord statutory privilege to the environmental mediator for mediation to be successfully established.

1.3 Nature of Environmental Disputes

There are certain notable features of environmental disputes, the recognition of which will enable the reader gain clearer insights into the dynamics of their

⁴³ Lord Denning in Lee v Showman's Guild of Great Britain [1959] 1 All E.R. 1175

⁴⁴ See Clark, supra FN 3, pg. 1.

⁴⁵ Fisher, D.E., Environmental Law, (Sydney: Law Book Company, 1993); as cited in Clark, E., supra FN 3, pg. 214, note 11

⁴⁶ See Clark, supra, FN 3, pg. 7.

⁴⁷ It is often argued by opponents of environmental mediation that justice is an alien consideration to the system, but this impression would be shown below to be largely unfounded.

resolution. First is that environmental disputes are contextually bound.⁴⁸ Experiences cannot necessarily be transported across countries, particularly where they differ in terms of social, economic, political and legal regimes which create the frameworks for resolving those disputes.⁴⁹ It is a lot easier, for instance, for individuals to have access to courts to enforce environmental law provisions in the U.S.A⁵⁰ than in Nigeria. In the latter case, the position remains unsettled.⁵¹

Secondly, environmental disputes and property rights are often closely interlinked.⁵² Poorly defined or inequitably assigned property rights are therefore a common feature of domestic environmental disputes. This fact is particularly important because as will be observed in the Nigerian case study in Section 3 below, property rights assigned under a state's laws may have implications for environmental degradation and compensation for it.⁵³

Thirdly, the body of research and theoretical study in the field of environmental dispute resolution is far from impressive. Although the subject has received some attention under various disciplines, e.g. sociology, psychology, and political science, there is no convergence of issues or dominant approach to be followed.⁵⁴ Similar ideas may therefore be presented differently across board.

⁴⁸ See Clark, *supra*, FN 3, pg. 215.

⁴⁹ See Fowler, R., *Environmental Dispute Resolution Techniques*; 5 Environmental and Planning Law Journal 122, (1992).

⁵⁰ For example, the Negotiated Rulemaking Act, 1990, USC 561-70 (Supp IV 1992), expressly authorises parties to use ADR methods to bring their cases before Federal Agencies.

⁵¹ See Oputa J.S.C., in the case of A.G. Kaduna State v. Hassan (1995) 2 NWLR pt 8, 483, where the learned Judge in referring to another case on the point of *Locus standi* stated "it is on the issue of locus standing that I cannot pretend that I have not had some serious headache and considerable hesitation in views on locus standi between the majority and minority judgments – between Justice of equal authority who were almost equally divided" See also, Hurilaws V. Nigerian Communications Commission & Ors.(Unreported) Suit No Fhc/L/Cs/39/2000.

⁵² Williams, P.R., *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabcikovo and Nagymaros Dams*; 19 Colum. J. Envtl L. 1, (1994).

⁵³ See Clark, *supra* FN 3, pg. 215.

⁵⁴ Burton, J.W., *A Holistic Approach to Conflict Resolution*; published proceedings of *On Common Ground: National Symposium and Skills Workshop*, National Local Government Environmental Resource Network, 30-31 March, 1995.

Lastly, environmental disputes often involve technical issues and multiple parties,⁵⁵ making them quite difficult to tackle. On this point, authors agree that effective resolution must integrate the various concerns including social, political, legislative, economic, technical, and bureaucratic concerns, thus avoiding the occurrence of loopholes which may hinder implementation of the mediation's outcome.⁵⁶

In spite of these seemingly limiting features, there is much anticipation that environmental mediation will enjoy increased acceptance and use, as much as research in Nigeria in the years to come.

1.4 What is Mediation/ADR?

Mediation is a structured negotiation process in which a neutral third party, chosen by the disputing parties, helps them to agree on a solution.⁵⁷ The mediator's role is to assist the parties in identifying the issues in dispute and to develop options or possible solutions to the dispute, which accommodate, as far as possible, the interests of both parties.⁵⁸ The main attraction of mediation is the prospect of reaching a harmonious solution, while preserving the relationship of the parties,⁵⁹ as opposed to the confrontational/legalistic approach of traditional litigation.

It is important to emphasise that mediation is of very antiquated origins. Its practice has been traced to Ancient Greece⁶⁰ and early civilisations, when chiefs

⁵⁵ See Clark, *Ibid.* FN 3, pg. 215; also Sanford, R., *The Politics of Agreement: Local governments as Innovators in Environmental management Conflicts*, in *On Common Ground*, *ibid.*

⁵⁶ Cormick, G.W., and B., Patton, *Environmental Mediation: Defining the Process through Experience*, in Lake, L.M., *Environmental Mediation: The Search for a Consensus*; (Colorado: Westview Press, 1981), pgs. 91-92.

⁵⁷ *Ibid.*, pgs. 2-3.

⁵⁸ Neutz, D., *Mediation*; *Brookfields Lawyers* (2003); <http://www.bookfields.co.nz/legal_services/mediation.html>, Last visited 18 December, 2003

⁵⁹ Walde, T., "Mediation/Alternative Dispute Resolution in Oil and Gas and Energy Transactions: Superior to Litigation from a Commercial and Management Perspective" **OGEL 2**

⁶⁰ Wikipedia Encyclopaedia; <http://en.wikipedia.org/wiki/Mediation> , Last Visited 28 January, 2004. Archaeologists have found evidence of the use of arbitration in the ancient civilizations of Egypt, Mesopotamia, and Assyria. Arbitration was extensively used by the ancient Greeks and Romans, and in a form substantially similar to that used today. Aristotle wrote, "For an arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express

and community elders traditionally mediated local disputes in one form or the other.⁶¹ In Rome, the mediator was variously referred to as *philantropus*, *interpolator*, *conciliator*, *interlocutor*, *interpres*, and eventually, *mediator*.⁶² Quakers in the United States have long served as arbitrators and mediators, and in Africa, informal neighborhood assemblies or “moots” have been traditionally called for by disputants, with little or no restrictions.⁶³ During such moots, a respected member of the community would serve as the mediator, bringing the parties to cooperative resolution of their disputes.⁶⁴ In China, like most other parts of Asia, mediation has always been recognized as the best way of resolving disputes, and litigation as the last resort since it involves a loss of face.⁶⁵ Reflecting on the ancient use in India of the (mediation-like) Panchayati system of dispute resolution, Anand states: “Agreements between parties took for granted a degree of self-discipline and mutual respect. Those who became involved, even in hotly contested disputes of great importance to their futures, financial or otherwise, co-operated with each other to give teeth to a consensual way of resolving differences.”⁶⁶

In comparison to mediation in this generic sense, the narrower field of environmental mediation is of relatively recent history, dating back only to the mid 1970’s⁶⁷, and traceable largely to the United States. The first documented case was the *Snoqualmie River* mediation.⁶⁸ Its success spurred immense interest and

purpose of securing full power for equity”; <http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_history.htm> Last visited 28 January, 2004.

⁶¹ During the Middle Ages, some cultures regarded mediation as forbidden practice, while others held it to be the preserve of traditional sages, visit Mediation/ ADR website <<http://www.mediationadr.net/mediainformation/MedInfo-GenPublic/History.htm>>, Last visited 23 December, 2003.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid., Mernitz, S., *Mediation of Environmental Disputes* (Westport: Praeger Publishers, 1980) pgs 65-73, for detailed history of environmental mediation.

⁶⁵ Ibid., The relative lack of lawyers in Japan has indeed been attributed to the country’s rich mediation history. See Ibid.

⁶⁶ Anand, A.S., (Dr.), (Chief Justice of India); Speech delivered at Presentation Ceremony for Post-Graduate Diplomas in ICADR, at Hyderabad, on Monday, 5 March, 2001. <<http://www.icadr.org/news-speechcj.html>> , Last visited 26 January, 2004.

⁶⁷ Cormick, G., The Myth, the Reality and the Future of Environmental Mediation, in *The Land Use Policy Debate in the United States*, De Neufville; J.I (ed) (New York: Plenum, 1981) Chapter 1

⁶⁸ See discussion of case in Mernitz , supra FN 60, pgs. 8-9.

research⁶⁹ into the use of mediation for environmental disputes. Additionally, the unprecedented explosion of environmental disputes, which occurred about the same time in the United States, resulted in an inundation of Federal courts with complex environmental suits, and barely any precedents to guide their resolution.⁷⁰ Disputants sought out alternatives to litigation as they became increasingly disenchanted with the gridlock, worsened by the burden of financial costs and delays.⁷¹ Environmental mediation proved preferable and has since enjoyed rapid growth, with more cases being adjudged “ripe”⁷² for the process.

1.5 Distinction between Mediation and Other Non-Litigious Methods of Environmental Dispute Resolution

Before a detailed discussion of mediation is embarked upon, it is important to understand how it differs from other forms of ADR. These include:

- Conciliation: The term tends to be most interchanged⁷³ with mediation. As in the latter, a third party intervenes to resolve issues between the disputing parties, but supposedly in a more involved manner.⁷⁴ In essence, there is hardly any difference between the two apart from the fact that while “mediation” is an Anglo-Saxon term, “conciliation” is of civil

⁶⁹ Talbot, A. R., *Settling Things: Six Case Studies in Environmental Mediation*, (Washington, D.C.: The Conservation Foundation, 1983) Foreword by W.K Reilley; pg. viii.: “Private organisations like the Ford foundation and the Andrew W. Mellon Foundation have funded experiments into the use of ADR in resolving environmental disputes”

⁷⁰ Leipmann, K.L., *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?* 14 B.C. Env'tl. Aff. L. Rev.93 (1984-1986), pg. 99.

⁷¹ *Ibid.*, pg. 100.

⁷² Ryan, M., *Alternative Dispute Resolution in Environmental Cases: Friend or Foe?* 10 Tul.Env'tl. L.J. 395 (1996-1997) pg. 399.

⁷³ For ease of reference to previous works, the thin distinction will be disregarded in this study.

⁷⁴ Genn, H., *Mediation in Action: Resolving Court Disputes Without Trial* (London: Calouste Gulbenkian Foundation, 1999), pg. 15; See also Clark, *supra* FN 3, pg. 154: “The extent to which the neutral takes an active part in seeking to bring about a settlement has commonly attracted the label of “mediator” or “conciliator”. However, it will be shown further along in this study that the significance of this distinction is lost where, as is now customary, the environmental mediator necessarily adopts an active (evaluative) approach in resolving disputes.

law origins.⁷⁵ Also, unlike in mediation, where a single facilitator is usually contemplated, there could be a “panel” of conciliators.⁷⁶

- Arbitration: This is similar to mediation in that the parties and their counsel⁷⁷ appear before a non-partisan third party. The fundamental difference is that the third party acts not as a facilitator to settlement, but as a decision-maker⁷⁸. An arbitral award is generally binding.⁷⁹ The neutral still renders a decision in non-binding arbitration, but, as the name indicates, it is only advisory in nature.
- Mini-trial: This involves attendance of a “hearing” before a neutral person, by senior executives of disputing organisations.⁸⁰ The process is more suited to corporations and therefore not suitable to the present context of our study.
- Early Neutral Evaluation (ENE): A neutral evaluator possessing legal or other expertise hears the core of the evidence from the parties/their representatives early in the case and gives a candid assessment of strengths and weaknesses of the parties’ cases, hopefully without need for further recourse to courts.⁸¹

⁷⁵ Hunter, M., *International Commercial Dispute Resolution: The Challenge of the Twenty-First Century*, 16 *Arbitration International*, 379 (2000) pg. 381, note 10.

⁷⁶ See Section 2 (Definitions) of the Uniform Mediation Act (UMA), (2001), which refers to “a mediator”, and Article 2 of the UNCITRAL Model law on International Commercial Conciliation which refers to “a third person or a panel of persons”, in defining conciliation.

⁷⁷ Lemieux, D., *Arbitration in the Field of Government Contracts* in Samson, C., and J. McBride, eds., *Alternative Dispute Resolution* (Sainte-Foy: Les Presses de l'Universite Laval, 1993) 215, pg. 220.

⁷⁸ Ibid.

⁷⁹ Schoenfield, M., and R. Schoenfield, "Legal Negotiations: Getting Maximum Results" in Mirsky, E., ed., *Dispute Resolution Alternatives Supercourse* (New York: Practising Law Institute, 1993) 147, pg.154.

⁸⁰ See Clark., *supra* FN 3, pg.155.

⁸¹ See Genn, *supra* FN 35, pg.15.

- Expert Determination: Here, the parties select a third party who is an expert in the relevant field, to make an independent, objective, and impartial determination of the facts in dispute.⁸²

This list is however not exhaustive of the various ADR methods.⁸³

1.6 Research Methodology and Arrangement of Sections

Given the dearth of academic resources on the present topic, and the paucity of empirically informed research, this study is based on the works of practitioners, previous authors and reports of researchers and commentators. Attempt is made to adapt, as closely as possible, the results of these studies, to the Nigerian oil and gas industry scenario. Hopefully, this study would provide guidance for emerging economies (especially in Africa) in general and Nigeria in particular.

The study is divided into three main sections: Section 2 immediately following discusses in a pointed, comparative style, the advantages of mediation over traditional litigation in the resolution of environmental disputes. It must be pointed out here that the idea of this comparison stems, not from a conviction that mediation is the modern day replacement of formal litigation *per se*, but from a perception of mediation as a timely expedient for addressing the bounding hostility between OGCs and host community, conventionally solved through litigation. The section therefore draws attention to the down sides of mediation, showing in appropriate instances, how the shortcomings may be remedied. We demonstrate that there are compelling reasons why mediation should be the first

⁸² Goldberg, S., eds.; Dispute Resolution: Negotiation, Mediation, and other Processes, (2nd ed)(Boston: Little Brown and Co.,1992) pg. 230. According to the author, "Unlike a mediator , an expert is expected to provide an answer to the particular matter submitted by the parties, and it is generally expected that an expert will reach a decision on the basis of his or her personal opinion and expertise, rather than on the parties' submissions or on law".

⁸³ There are other methods like "rent-a-judge" and "med-arb" (Note FN 306 below), which similarly engage third party intervention to achieve mutually satisfactory agreements between the parties. All have been discussed in many publications. See, for example Mackie, K. J., A Handbook of Dispute Resolution-ADR in Action; (London: Routledge and Sweet & Maxwell, 1991).

recourse for emerging economies, in dealing with environmental disputes. What becomes evident through the analysis is that the extent, to which mediation's benefits accrue to disputants, depends largely on the skills and experience of the particular mediator.

Section 3 is subdivided into two parts: The first discusses historical, cultural and environmental reasons why environmental mediation in Nigeria is imperative. It goes further to expound on research evidence and practice experiences which provide justification for the assumption that environmental mediation is quite practicable in Nigeria. In the second part, we itemise and discuss some specific components of the theoretical framework (guidelines) within which environmental mediation may be successfully developed and fostered in Nigeria. Hopefully, this skeletal guide will spur further research into the area, and encourage the acceptance and actual use of environmental mediation in the country.

Section 4 addresses the perennial bane of environmental mediation- the conflict between mediation confidentiality and the right of everyone to freely access environmental information. It endorses the widely-held view that there is need to accord statutory privilege to the mediator. However, this must be balanced with a system of regulated disclosure of vital environmental information. The section also conducts a brief evaluation of compatibility of Nigeria's Draft Freedom of Information Bill, soon to be passed into law, with this expedient.

The study is rounded off in Section 5 with a summary and some concluding remarks. All in all, the author hopes that this study will serve as a point of reference for actively promoting mediation in the highly volatile oil regions of Nigeria and the rest of the developing world.

2 Why are Environmental Disputes between Oil & Gas Companies and Host Communities Better Resolved through Mediation?

2.1 Introduction

*“The old order changeth giving place to new, and the same applies to the oil industry as it enters the 21st century.”*⁸⁴

In most developing countries, the major concern of governments is to provide essential amenities. Until the post-Rio wave of environmental awareness, environmental protection was tantamount to conservation of natural resources, while concerns over hazardous waste management or control of industrial pollution were treated as obscure and an attempt to retard the speed of industrialization.⁸⁵ This blasé attitude to environmental protection often requires a strong catalyst to jolt governments and the populace to their responsibilities, such as the illegal dumping in 1988, of toxic wastes originating from Italy, in the small port of Koko, in Nigeria.⁸⁶

It would be utterly simplistic to assert that mediation meets all of the inadequacies of environmental litigation completely. Nevertheless, the relative structural and procedural advantages which it has over litigation recommend it very highly.

The best argument for advocating mediation in the oil and gas industry is that contrary to the “battle” of litigation from which a “victor” and a “vanquished” must emerge⁸⁷, the prospect of maintaining ongoing relationships is paramount in mediation.⁸⁸ Certain aspects of mediation are particularly congruent with this goal.

⁸⁴ Dundas, H; *Nature of Conflict and Approaches to Dispute Resolution*, CEPMLP, Documentation Centre, Conference Papers, September, 2002.

⁸⁵ See Adegoke, A., supra FN 39, pgs. 43-44

⁸⁶ *Ibid.*, pg. 43.

⁸⁷ Zwetkoff, C., *Mediation in environmental Conflicts: The Belgian Methodology*, 9 Risk; Health, Safety and Environment 361 (Fall 1998), <<http://www.piercelaw.edu/risk/vol9/fall/Zwetkoff.pdf>> , Last visited 28 December, 2003.

⁸⁸ Martin, J. G., and M. S., Anshan; *Alternative Dispute Resolution for Oil and Gas Practitioners*; (Chicago Illinois: American Bar Association, 2001), pg 5; see also Walde, supra, FN 55, pg. 3.

The parties enter into the process voluntarily.⁸⁹ The mediator manages the negotiations without taking over,⁹⁰ and all parties have equal opportunity to make their input or to negotiate certain cherished values.⁹¹ Mediation depends on the principles of reciprocity- ensuring open exchange of information between the parties, and rectification- undoing past wrongs by compensating parties for losses suffered.⁹² Decision-making and fact-finding are jointly done,⁹³ turning the outcome into a future-oriented pact of compromises.

The relationship-preserving function of mediation however requires engineering by the mediator. He must first establish his trustworthiness beyond doubt before parties can trust him, and then one another, thus approaching the dispute with a truly co-operative, problem solving frame of mind.⁹⁴

Mediation is commonly noted as being faster than litigation⁹⁵ in reaching a final resolution. A case which aptly demonstrates the drag of litigation is the leading Nigerian case of Shell Petroleum Development Company v. Farah, dealing with compensation for oil pollution damage.⁹⁶ This case arose from an oil spill which occurred in one of Shell's oil wells in the Ogoni area of the Niger delta in 1970. The company argued that it had paid out £22,000 in compensation to individual claimants and had rehabilitated the land by 1975, thereby discharging its responsibilities.⁹⁷ Plaintiffs contended that there had been no rehabilitation of the polluted land, and provided evidence to show that Shell had entered negotiations

⁸⁹ However, note discussion below on court-ordered mediation.

⁹⁰ Stone, M., Representing Clients in Mediation (London: Butterworths, 1998), pg. 24

⁹¹ Such values could be an apology, or preferable mitigation steps which they wish to be recognised. See Girard., supra FN 4, pg. 10.

⁹² Moore, S.A, and S., Bache, *Spatial Scale and Environmental justice in Australian Environmental dispute Resolution: Does it Matter and to whom?* School of Environmental Law Murdoch; <<http://www.arbld.unimelb.edu.au/envjust/papers/allpapers/bache/home.htm>,> Last visited 14 December, 2003.

⁹³ See Leipmann, supra FN 70, pg. 97.

⁹⁴ Ibid.

⁹⁵ But see Clark, supra FN 3, pg. 230, "Mediation is not always cost effective. In any situation, the parties must weigh the relative cost of return via litigation/arbitration against mediation which may be too time consuming."

⁹⁶ [1995] 3 N.W.L.R (Part 382) pg. 148.

⁹⁷ See Manby, supra FN 34, pg. 157.

with them for a further period after 1975⁹⁸ regarding its continuing rehabilitation obligations. Shell declined taking any further action, and in 1989 plaintiffs sued in the high court and got awarded a total of U.S\$51,350 compensation in 1991.⁹⁹ Shell contested and lost the decision in 1995 at the Court of Appeal. The company has since appealed to the Supreme Court. In all, a period no less than 22years has elapsed since the occurrence of the pollution.

In sharp contrast, the mediation of the Storm King dispute took just a fraction of this time.¹⁰⁰ It concerned the granting of a construction permit by a state authority to the Consolidated Edison Company of New York for the purpose of building a hydroelectric power facility very close to the Hudson River.¹⁰¹ This project was opposed by some citizen groups concerned about the adverse health impacts which the project might have on them, as well as possible depletion of the river's aquatic life. Consequently, three court cases were instituted which lasted for over ten years, until both the delay and legal expenses overwhelmed the groups.¹⁰² Recourse was then had to mediation and the parties reached an amicable resolution in just one year, and at much less cost.¹⁰³

A comment must, nevertheless be made here regarding the fastness of environmental mediation. It will be seen below that the success of mediation depends on how its goals are articulated.¹⁰⁴ Although it is a fact that environmental mediation can be concluded with relative dispatch, time-efficiency may be a far less pertinent goal in the process. Environmental disputes, especially in the oil industry, are very complicated and time consuming.¹⁰⁵ Because of the enduring nature of the conflicts which often underlie

⁹⁸ Ibid., pg. 157.

⁹⁹ Ibid., pg. 158.

¹⁰⁰ See Ryan, M., supra FN 72, pgs. 400-402.

¹⁰¹ Ibid., pg. 401.

¹⁰² Ibid., pg. 402.

¹⁰³ Ibid.

¹⁰⁴ Parker, T., "Human Rights Dispute Resolution: protecting the Public Interest.", Website: <<http://www.cfcj-fcjc.org/full-text/parker.htm>>; Last visited 18 December, 2003.

¹⁰⁵ Saxe, D., *Water Disputes in Ontario: Environmental Dispute Resolution and the Public Interest*, in Macfarlane, J., (ed), *Rethinking Disputes: The Mediation Alternative*, (Toronto, Emond Montgomery Publications Limited, 1997).

them, ample allowance ought to be made in the process, for parties to calm their ill-feelings of past unfairness and discrimination, in addition to the relatively lengthy time needed to investigate factual or technical issues.¹⁰⁶ Mediators may therefore, consider balancing social justice goals with time-efficiency, for the process to be meaningful. The standards are his to set, and to follow.¹⁰⁷

Mediation is generally cheaper than litigation.¹⁰⁸ With increasing sophistication of environmental laws and litigation practice, ordinary members of society can hardly afford to litigate their oil pollution cases.¹⁰⁹ In Nigeria, the situation is aggravated by the fact that oil and gas pollution cases have been transferred from the State to the Federal high courts. Worse still, there is evidence to suggest that the OGCs resort to delay tactics to even lengthen such periods or frustrate the case. An illustration would suffice.

A claim had been made by members of the Oguta community for N100, 000 in compensation for a 1966 blockade of the plaintiffs' Iyi Efi creeks and farmlands by Shell. Negotiations ensued between the parties and in January 1985, Shell agreed to pay the amount, which it did not pay. The community sought to compel Shell in court¹¹⁰ and Shell filed a motion for an order of dismissal of the suit, instead of a statement of defense, on grounds that the matter was time barred. Strictly interpreting Nigerian law on the point, the trial court upheld Shell's position, justifying that the 6years stipulated for bringing an action from the date of causation had indeed elapsed. Fortunately, this decision was reversed on appeal. In the appellate court's view, Shell's admission of fault worked to stop time from running for the purposes of calculating the limitation period.¹¹¹

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ See Martin and Anshan, *supra* FN 88, pg.25.

¹⁰⁹ Uwais, *supra* FN 37, pg. 2.

¹¹⁰ *Nwadiaro v. Shell Petroleum Dev. Co. Ltd* [1990] 5 NWLR (Pt 150) 322.

pp. 338-339, paras. H-B. For a similar case of delay tactics, see *Shell Petroleum Development Company v. Uzaoru* [1994] 9 NWLR (Pt366) 56.

¹¹¹ Ibid.

Access to environmental litigation remains a major problem in most developing countries. The enormity of this inadequacy is underscored by the provisions of Principles 10 and 26 of the Rio Declaration¹¹² which require states to provide effective access to judicial and administrative processes including remedy and redress. Parties seeking to litigate environmental pollution matters are often saddled with the odious task of proving requisite standing to sue (or *Locus standi*), to be heard.¹¹³

The South African courts for instance, have traditionally adopted a narrow approach towards *locus standi*. A plaintiff who wishes to sue for environmental pollution must prove the existence of a right or a recognized interest that is direct and personal to him.¹¹⁴ However, the need to protect a person's dignity¹¹⁵ or to avoid potential threat to a person's health¹¹⁶ has been held to satisfy this requirement.

Again, in the mid-90s for example, a multi-million U.S dollar natural gas pipeline, was to be built to transport gas from the Songosongo area of Southern Tanzania to Dares salaam. This was strongly opposed by local inhabitants who feared health hazards among other things. After unsuccessfully negotiating with the government, an indigenous NGO, the Southern Region Development Authority (SRDA), instituted legal proceedings in the High Court of Tanzania. The case was promptly dismissed by the court on the grounds that SRDA had no *locus standi*, or a recognised legal capacity to bring action.¹¹⁷

Had this matter been submitted to mediation, the question of who should participate would have been much better handled. Practitioners and writers

¹¹² See Gao, *supra* FN 9, pg. 9.

¹¹³ See Walde, *supra* FN 55, pg. 10.

¹¹⁴ Milton, B., *Procedural Rights*, in: Wyk, V., (eds.), *Rights and Constitutionalism*, (Capetown: Kenwyn Publications, 1994) 401, pg. 421.

¹¹⁵ *Jacobs & Others v Waks & Others* [1993] 91 SA 521 (A) pgs. 534-535; See also *Wood v Ondangwa Tribal authority* [1975] (2) SA 294 (A) pg. 310; where the right to personal liberty was used successfully to establish *locus standi*.

¹¹⁶ *Dell v Town Council of Cape Town* [187.9] (9) Vol. 2.

¹¹⁷ Ringia D.W., and S.J., Porter; *Access to Environmental Information in Tanzania*, Lawyers Environmental Action Team (LEAT) (1999); <<http://www.lead.or.tz/publications/access.to.information/index.php>> Last visited 12 January, 2004.

generally agree that the key parties affected ought to be involved in the mediation process for it to be successful.¹¹⁸ Mediation is an open process which recognises the expertise of citizens in their own interests¹¹⁹, and though smaller numbers of participants may be desirable,¹²⁰ persons and groups are free to define themselves as stakeholders, and be accordingly integrated and empowered during the process.¹²¹ Qualitative experience and prowess of the mediator in this regard cannot be overemphasised.¹²²

There is a general assumption that justice is not factored into mediation's equation, and is therefore not attainable therein. This assumption is false and deserves detailed scrutiny. Strict adherence to unbendable laws is a method of achieving justice in litigation. Environmental disputes are often suffused with grey areas, and the appropriate solution is rarely "black or white". For instance, in the Tanzanian illustration above, the strictures of *locus standi* requirements prevented a balanced assessment of the health implications which close proximity to a proposed gas pipeline may indeed have on the concerned citizens. Litigation is a rigid process that emphasises form over substance. Parties are forced to formulate their cases to fit narrow legal definitions, dispensing with "frills" like the historical, social, political and even economic circumstances which place their dispute in its appropriate context. Clearly, this approach does not serve the ends of justice and must be avoided where it can be helped. Mediation, not only considers parties' rights and interests, but is also sympathetic to other concerns and individual needs, giving a customised quality to every agreement.¹²³

Instructively, a 1996 scientific study which examined the spatial scales for attaining environmental justice disclosed that distributive and procedural forms of justice are more likely to be achieved in regional mediation than at the level of

¹¹⁸ See Leipmann, *supra* FN 70, pg.103.

¹¹⁹ See Zwetkoff, C., *supra* FN 87, pg. 370.

¹²⁰ See Beierle and Cayman, *supra* FN 93, pg. 2.

¹²¹ See Ryan, M., *supra* FN 72, pg. 401.

¹²² See Section 3, below.

¹²³ see Zwetkoff, *supra* FN 87, pg. 372.

national courts.¹²⁴ It found that “The potential for procedural justice is greatest at local and regional scales because all those affected can feasibly be included in decision-making.”¹²⁵ The learned researchers confirm that participation is an indispensable aspect of environmental justice, and emphasise the need for genuine involvement of parties, including NGOs, who can represent non-human objects (such as the environment itself) and give them a voice.

Another way in which the litigation model aims to achieve justice is through consistency, i.e. by applying the same treatment to the same problem across time and space- the doctrine of precedents.¹²⁶ While the use of precedents may be suitable for predicting the outcome of cases, and perhaps limiting the time that would have, otherwise, been applied to devising new solutions, the fast pace of development of environmental law and the uniqueness of environmental disputes to their locality mean that what’s good for the goose may not necessarily be good for the gander.¹²⁷ Besides, many declarations on the environment are not binding in nature but are simply “soft law”.¹²⁸ They are therefore rarely applied by national courts. Save in the unlikely circumstance that the same mediator subsequently deals with same parties, in respect of identical or similar issues, mediation hardly has any use for precedents.¹²⁹ Every case is intricately explored to arrive at an agreement suitable to the parties.

Oil and Gas environmental disputes are often fraught with diverse technical dimensions for which judges possess little training.¹³⁰ As a result, courts tend to avoid delving into substantive technical areas, and end up delivering judgements, the equitable nature of which may be questionable.¹³¹ Where parties hire their

¹²⁴ See Moore and Bache, *supra* FN 92, pg. 8.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, pg. 373.

¹²⁷ *Ibid.*, “...prioritizing the accuracy and appropriateness of the solution to the local context brings satisfaction to parties during mediation”.

¹²⁸ See Reh binder and Loperena, *supra* FN 26, pg. 2.

¹²⁹ *Ibid.*

¹³⁰ See Liepmann, *supra* FN 70, pg 102; see also, Girard, *supra* FN 4, pg 5: “Consequently, it has long been the practice in various jurisdictions for administrative tribunals to be given the responsibility of hearing environmental disputes”.

¹³¹ See Liepmann, *ibid.*

separate technical experts, the burden is even greater as the courts are saddled with the odious task of wading through a maze of technical jargon to determine which of the experts to believe.¹³² But in mediation, technical details are hardly a problem for a number of interrelated reasons.

First, the mediator plays a neutral role, and the parties “own their case”. This implies that the parties become the ultimate fact finders and adjudicators, who themselves, more than the mediator, must firmly grasp the technical nitty gritty of their dispute.¹³³ Through mutual co-operation and exchange of valid information, the parties are able to educate each other regarding their respective positions, each becoming better acquainted with the legitimacy of the other’s stance, and therefore more likely and willing to compromise.¹³⁴

Nevertheless, where they opt to hire technical expertise for clarification of factual issues mediation offers the advantage that only a single source, to be agreed between the parties, is acceptable. This dispenses with the need for separately hired experts,¹³⁵ entailing lesser costs and avoiding possible conflict of findings. Additionally, studies have found that in pollution cases, agreements reached by reliance on jointly obtained expert evidence, prove more acceptable to the wider community who may have been represented at mediation sessions by spokespersons.¹³⁶

Secondly, though technical details of a dispute are generally useful, say in determining the link between an industrial discharge and environmental damage, the mediation approach is particularly beneficial because it recognises that

¹³² Ibid., pg. 7.

¹³³ See Zwetkoff, *supra* FN 87, pg 372. But see Martin and Anshan, *supra* FN. 88, pg. 25: “...a mediator familiar with the oil and gas industry is likely to be more efficient, and to handle the dispute in a “good business-sense manner”.

¹³⁴ See Leipmann, *supra* FN 70, pg. 102.

¹³⁵ Ibid., pg. 103.

¹³⁶ Ibid.

sometimes, the extent of danger posed by environmental pollution cannot be accurately predicted or ascertained, prior to or post-development.¹³⁷

Violent disruptions of development operations and kidnap of both expatriate and indigenous staff of foreign OGCs by youths and other members of local communities have become entrenched as a means of expression of the frustrations of these communities in developing countries.¹³⁸ Mediation secures the “social license to operate” for OGCs. “Social License”, in the present context, is the formal and informal approval a company requires from stakeholders to carry out its activities.¹³⁹ Its acquisition requires that companies develop on-going, positive relationships with the people who are likely to be affected by its activities, in order to enjoy support from them. According to Joyce and Thomson,

“company’s performance in the areas of safety, social and environmental management is critical to gain and retain this ‘social license’, and in doing so, the company is better positioned to gain access to new resources, receive regulatory approval to operate, attract higher-quality employees and enjoy support from a wider range of stakeholders.”¹⁴⁰

Finally, litigation is conducted with the utmost formality within a solemn setting “with a judge dressed in elaborate costume and with long established judicial ritual”¹⁴¹ The essence is to impress the disputants with the autonomy of justice and with the court’s unbending adherence to well recognised and time-honoured rules.¹⁴² Disputants therefore feel a “loss of control” when they turn their cases to

¹³⁷ Ibid.

¹³⁸ See below (Section 3.3.2), for examples of recent Nigerian incidents.

¹³⁹ Joyce, S. A., and I., Thomson; *Two Cultures of Sustainable Development*, CEPMLP Internet Journal Vol. 11, Article 7 (2002) pg. 1

¹⁴⁰ Ibid., pg. 1.

¹⁴¹ Ibid., pg. 104.

¹⁴² Merry, S., *Varieties Of Mediation Performance: Replicating Differences*; in Access to Justice (New York: Alan Hutchinson ed. 1990).

the lawyer,¹⁴³ becoming so intimidated as to believe they ought not to participate.¹⁴⁴

On the contrary, meetings in mediation are informal, conducted in simple, everyday language. Parties are rarely inconvenienced since proceedings are generally organised at reasonably convenient times and places, and within conducive settings.¹⁴⁵ The outcome of mediation is not the ideal but the practical. According to Colman J. in Dunnet v. Railtrack¹⁴⁶ “mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are mutually, commercially acceptable at the time of the mediation.”¹⁴⁷ The psychology of mediation is that a third party will be able to change the social and power dynamics of the conflict situation between the parties by providing information and knowledge, influencing their differing beliefs and behaviours during negotiations, a process which conquers the communication barriers between them, and ultimately paves the way to resolving the parties’ problem.¹⁴⁸ The essence of mediation is the focus on the interests of parties. Parties are challenged to consider whether they are aggrieved over the apparent subject matter or whether the persisting conflict is in fact, about control, power or authority.¹⁴⁹

¹⁴³ See Macfarlane, supra FN 2, pg. 5.

¹⁴⁴ At this point, the client may feel that he/she has become part of a ritualistic advocacy in which “the litigants are not the subject of the ceremony but the pretext for it”; see *ibid.*, quoting Simon, W., *The ideology of Advocacy: procedural Justice and Professional ethics*, (1978) Wisconsin Law review, 29, pg. 54.

¹⁴⁵ Fiske, E.P., *Reconceptualising Environmental Conflict Resolution: The Developmental Facilitation Approach* (1998); <http://www.montana.edu/wwwcommd/reconc.html> , Last visited 12 December, 2003; pg.7.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Goodpaster, G., *A Guide to Negotiation and Mediation* (New York: Transnational Publishers, 1997) pg. 204.

¹⁴⁹ Aubert, V., *Competition and Dissensus : Two types of conflict and Conflict Resolution*; (1963) 7 Journal of Conflict Resolution, pg. 26.

The mediation model emphasises the possibility of reconfiguring apparently intractable issues in a manner that permits resolution.¹⁵⁰ The process provides a less traumatic approach to conflict resolution¹⁵¹ in sharp contrast with the psychological brutality of adversarial litigation.

2.2 Limitations of Environmental Mediation

In spite of the above account, the statistics show that only about 10% of environmental disputes are actually successfully mediated.¹⁵² In general terms, mediation is a better choice when the issues are clearly defined and the disputants perceive that there is a balance of power between them, which demands that the parties negotiate.¹⁵³ Sometimes, matters involved in an environmental dispute may be so complex, bearing on broad policy decisions or ideological undertones. In such cases, the principles to be mediated upon might be so crucial that the parties would obviously not compromise them.¹⁵⁴ It may not be wise to mediate such disputes.¹⁵⁵ There are some other circumstances generally recognised as foreclosing the successful use of mediation, for instance where one party wishes to set a precedent in the matter, or where the parties cannot make a long-term commitment.¹⁵⁶

Government participation in environmental mediation has been seen as playing a “legitimising” role for the process¹⁵⁷, but it equally poses a serious challenge. It is not desirable for government officials to participate where this would entail giving

¹⁵⁰ Bennett, M.D., and M.S.G. Hermann., The Art of Mediation (Notre Dame: National Institute for Trial Advocacy, 1996) pg. 87.

¹⁵¹ Milne, A., *Mediation – A Promising Alternative for Family Courts*; 42 Juv. Fam. Ct. J. (1991) 61, pg. 63.

¹⁵² See Talbot, supra FN 69, pg. 12. This work is often cited as authority for this statistic, but judging from its date (1983), there is clearly need for further research as, expectedly, the figure must have greatly appreciated by now.

¹⁵³ See Leipmann, supra FN 70, pg. 104.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid., pg. 105

¹⁵⁷ Dotson, A.B., *Who and How: Participation in Environment Negotiation*; 4 Environmental Impact Assessment Review, (June 1983) 203, pg. 217.

away power during the process.¹⁵⁸ By and large, the mediators would, in each case have to be alert to the feelings of the parties regarding the appropriateness of mediated settlement, since the parties must have the final say and can, at all times, (as already stated) pull out of negotiations.

3 Focus on Nigeria: Case for Adopting Mediation in Environmental Conflict Resolution between OGCs and Host Communities

3.1 Introduction

Nigeria is a federal state with 36 states and a Federal Capital Territory (FCT) in Abuja. With a population of about 130 million it is Africa's most populous country; than 250 ethnic groups inhabit the country. The three "major" tribes in terms of number and clout are Hausa (29%), Igbo (18%) and Yoruba (21%).¹⁵⁹ The major multinational oil and gas companies operating within the area are Shell, ExxonMobil, Chevron, Texaco, Agip, TotalFinaElf, Esso and Conoco.¹⁶⁰ Shell is the largest and the oldest exploiter of the nation's oil reserves. The OGCs are in a mandatory joint venture relationship with the Nigerian government through the Nigerian National Petroleum Company (NNPC)¹⁶¹, with the latter holding a majority share of between 55 - 60 %.

The importance of the oil exploitation to the country cannot be overemphasized. Nigeria has suffered acute and persistent regression since the mid-1980s. Between 1975 and 2000 it consistently maintained negative real per capita GDP growth rate of 1.39 %.¹⁶² As stated earlier, the petroleum resources produced from the Niger delta presently add up to 95% of the national budget and 80% of

¹⁵⁸ Ibid.

¹⁵⁹ See statistics in Human Development Report, Nigeria 2000/2001 Millennium Edition, United Nations Development Programme (UNDP) Lagos, Nigeria; pgs. iii, vi, 10, 12, 17.

¹⁶⁰ Ibid., pg iii.

¹⁶¹ It may be noted that subgroups within the NNPC group are facing efficiency crises. For example, the total revenue realised from domestic sales and export in 2002 for Eleme Petrochemical Company Ltd, (a subsidiary of NNPC) was N5,565.29 million, as against the projected N11,718.54 million. With operating expenses totaling up to N7,839.96 million, its business was far from profitable. See *Petrochem News*, an in-house magazine of Eleme Petrochemical Company Ltd, (1st ed.) April 2003, pg. 17

¹⁶² Ibid., pg 17.

GDP.¹⁶³ It should not take a clairvoyant, therefore to ascertain that government bias lies heavily in favour of the OGCs. Nevertheless, the state of hostility currently existing between the companies and the local communities in the Niger delta is not wholly explained by this fact.

3.2 Understanding the Root of the Conflict

A good starting point is to make the often disregarded distinction between a “dispute” and a “conflict”. According to learned authors Collier and Lowe, a conflict¹⁶⁴ signifies “a general state of hostility between the parties.”¹⁶⁵ It often involves long-term, deep-rooted problems generally resistant to resolution.¹⁶⁶ A dispute on the other hand is “a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counterclaims, and denials and so on.”¹⁶⁷ A cursory examination of the historical relationship between the OGCs and their host communities in the Niger Delta reveals a rigidly intractable conflict situation stemming from sources, to a large extent, outside of the resulting environmental decay.¹⁶⁸

3.2.1 Pre-1978

Much of the trouble in Nigeria’s oil bearing regions today has been traced to the principal land legislation, the Land Use Act (LUA) of 1978¹⁶⁹, which altered the

¹⁶³ See Introduction (Section 1) above.

¹⁶⁴ The Webster’s Dictionary defines a conflict as “a battle, contest of opposing forces, discord, antagonism existing between primitive desires and instincts and moral, religious, or ethical ideals.”

¹⁶⁵ Collier, J., and V., Lowe, The Settlement of International Disputes- Institutions and Procedures; (Oxford: Oxford University Press, 1999) pg. 1.

¹⁶⁶ Burgess, H., and B., Spangler, *The Difference between “Conflicts” and “Disputes”*, <http://www.beyondintractability.org/m/conflicts_disputes.jsp> Last visited 3 January, 2004

¹⁶⁷ Collier and Lowe, supra FN. 162, pg. 1.

¹⁶⁸ The turbulent relationship between the OGCs and the Niger Delta Communities is well reported. See Ibeanu, O., *Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria*; Environmental Change and Security Project Report, Issue 6 (Summer 2000); Clark, H., (et al.) *Oil for Nothing: Multinational Corporation, Environmental Destruction, Death and Impunity in the Niger Delta*, A United States Delegation Nongovernmental Trip Report, Sept. 6-20, 1999; <http://www.n-h-i.org/Publications/Pubs_pdf/Nigeria_CorpAccount.pdf> Last visited 18 December, 2003.

¹⁶⁹ Land Use Act Cap 202 Vol.11 Laws of the Federation of Nigeria, 1990

manner of land ownership in the country.¹⁷⁰ Prior to this time, land belonged to the community¹⁷¹, the village or the family, never to the individual. All the members of the community, the village or family had equal right to it, but in every case, the Chief/headman of the community or village, or head of the family, was in charge of the land, and so often referred to as “the owner”. Multinational oil and gas companies gained access to portions of land for development activities by seeking and obtaining the consent of such head of a community, upon terms to pay adequate compensation for any damage to surface rights and compensation.¹⁷²

Both parties agreed upon the community’s compensation, at an annual rent which incorporated considerations of total loss of use the land, farm crops or buildings and any other losses, to the extent they considered adequate and fair¹⁷³ This way, compensation proved not only assuaging in its amount but also satisfactory in the process of arriving at same. The fact of receiving an additional annual rent was, to the Niger delta communities (NDCs), “an important way by which [they] partook in oil revenue”¹⁷⁴. There were other perks that came to the NDCs by virtue of being “landlords” to the OGCs, particularly, employment of their members for example, as security personnel to man the oil pipelines.¹⁷⁵

It appears from the scant evidence on the point that complaints regarding environmental degradation were tabled before the community “headman” who investigated the matter and ascertained the appropriateness of compensation.¹⁷⁶

¹⁷⁰ For a very detailed historical account, see Ebeku, K.S.A., *Oil and the Niger Delta People: The Injustice of the Land Use Act*, CEPMLP On line Journal Vol.9: Abstract 14, <<http://www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-14.html>- 26k> Last visited 13 December, 2003

¹⁷¹ By the traditional or customary agrarian land tenure system, individuals did not have complete control of the land, and the outright sale of land was an extremely rare occurrence. Individual occupants of land were identified, not by their actual possession of the land, but by the right they held. Angaye, G., *Who owns papa’s Land and Oil in Nigeria?*; Niger Delta University, Wilberforce Island, July 2002., <http://www.nigerdeltacongress.com/garticles/who_owns_papas_land_and_oil_in_n.htm>, Last visited 28 January, 2004

¹⁷² See Ebeku, supra FN 167, pg. 6.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., pg. 12.

¹⁷⁶ Ibid., pg. 10.

He would then require compensation to be paid in appropriate cases to particular individuals or communities as the case may be.¹⁷⁷ In the latter case, the amount would be equitably shared among the entire group.¹⁷⁸

3.2.2 Post-1978

With the introduction of the LUA in 1978 by a military regime, the system of land ownership in Nigeria has become dramatically altered. The federal government has unqualified right and control over the country's oil and gas resources¹⁷⁹, though found only within the Niger Delta expanse of the country. It farms out oil mining rights to the OGCs and receives royalties and rents in return¹⁸⁰. All land within a state is now vested in the state governor.¹⁸¹ He holds the land in trust for the people and allocates (urban land¹⁸²) to individuals and corporate entities under the Act. Ownership of land previously gained by other means reverts to the state government.¹⁸³ Thus, the LUA effectively divests traditional authorities of their control over the land.

The LUA has also resulted in the communities' loss of the right to compensation.¹⁸⁴ Upon a taking of land for the purposes specified, including petroleum/minerals development activities, compensation is to be paid to the "holder" or "occupier" under the relevant provisions of the "Minerals Act or the Petroleum Act or any legislation replacing the same."¹⁸⁵ Section 77 of the Minerals Act specifies what factors may be considered for the purposes of determining "fair and reasonable compensation". These include "any disturbance of the surface rights of such owner or occupier and ... any damage done to the surface of the land upon which ...prospecting or mining is being or has been

¹⁷⁷ Ibid., pg. 6

¹⁷⁸ Ibid.

¹⁷⁹ Owoeye, Y., *Land Ownership in Nigeria*; (2002) Olayinka, Owoeye & Co. Legal Practitioners, Nigeria, <<http://www.redmaf.com/pdf/landownership.pdf>> Last visited 13 January, 2004, pg. 1

¹⁸⁰ Ibid., pg. 2

¹⁸¹ Section 1, LUA, supra FN 166; see also Owoeye, *ibid.*, pg. 2

¹⁸² Section 2(1)(a) LUA; under the Act, rural land is controlled and allocated by the Local government authorities, see Section 2(1)(b) LUA, supra FN 166

¹⁸³ See Ebeku, supra FN 167, pg. 12

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

carried on..."¹⁸⁶ Pursuant to this provision, section 29 (3) of the Minerals Act further places it within the governor's powers to decide on who receives compensation owing to any community, and even the use to which such settlement amount may be put.¹⁸⁷ The prevailing practice is therefore, to pay compensation directly to the state governor and not to the community.¹⁸⁸

What may be further mentioned is that the Niger Delta peoples have never taken kindly to further being classified as "minority groups"¹⁸⁹, giving them a feeling of lack of identity in a nation which relies solely on proceeds from the region to fill its coffers.¹⁹⁰ To worsen issues, the Niger Deltans regard the OGCs and the government as one and the same.¹⁹¹ This idea is not unfounded as there is a long history of government-backed brutality meted out to the local communities, in response to both obvious and merely alleged interference with production activities.¹⁹²

3.2.3 The Issues

It is no surprise therefore that the perennial environmental disputes have revolved around inadequacy of compensation for ecological damage and clean up activities.¹⁹³ In effect, the LUA has enacted a conflict situation that manifests itself to varying degrees, in the disputes, especially between OGCs and the Niger delta communities, and sentiments which exacerbate them. The latter include:

- Deprivation of the communities' rents and royalties

¹⁸⁶ Section 17, LUA, supra FN 166

¹⁸⁷ The text of section 29(3), Minerals Act, may be reproduced for emphasis:

"If the holder entitled to compensation under this section is a community the governor may direct that any compensation payable to it shall be paid:

(a) to the community; or

(b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or

(c) into some fund specified by the governor for the purpose of being utilized or applied for the benefit of the community."

¹⁸⁸ See Ebeku, supra FN 167, pg. 10.

¹⁸⁹ Ibid., pg. 16.

¹⁹⁰ Ibid.

¹⁹¹ See Ibeanu, supra FN 165, pg. 21

¹⁹² Ibid.

¹⁹³ See an account in Manby, supra FN 34 pgs. 79-90.

- Lack of participation in determining compensation and a feeling of being “left out”
- A perception of heightened recklessness of OGCs in view of the fact that they no longer pay compensation for degradation of land “per se”
- A perception that the government is in alliance with the OGCs to deprive Niger delta community members of jobs which they had previously enjoyed as “landlords” of the OGCs
- Extreme poverty in the region attributable to oil and gas operations¹⁹⁴

Upon the occurrence of a pollution incident therefore, all these factors work to aggravate compensation issues, making litigation even more adversarial and unsuitable to meaningful resolution.

To reduce the amount to be paid in compensation, or totally avoid payment, the OGCs commonly allege sabotage by the communities, taking advantage of the fact that Nigerian law¹⁹⁵ does not condone the payment of compensation for sabotage cases.¹⁹⁶ They justify that some cases are very obvious, with pipelines showing evidence of hacksaw cuts, drilled holes or destroyed protective cages, and “where evidence is unclear, ultrasonic soundings are taken for further clarification.”¹⁹⁷

In many disputes the method of arriving at the compensation amount is more seriously contested.¹⁹⁸ The company itself determines what ought to be included. Shell, for instance has declined paying for damaged fishing nets which were

¹⁹⁴ See Ebeku, supra FN 167, pg. 21.

¹⁹⁵ Petroleum Production and Distribution (Anti-Sabotage) Decree No. 35 of 1975, Cap. 353, laws of the Federation of Nigeria (1990), Section 1.

¹⁹⁶ Nevertheless, it is quite difficult for the companies to successfully sue for sabotage as circumstantial evidence is insufficient under Law. The perpetrator must be either caught in the act, or sufficiently connected to the crime scene. See Manby, supra FN 34, pg.87.

¹⁹⁷ Shell International Letter to Human Rights Watch, Feb, 13 1998; cited in Manby, supra FN 34, pg. 82.

¹⁹⁸ Ibeanu, supra FN 165, pg. 22.

collected after an oil spill had been contained.¹⁹⁹ Again, expert evidence is seldom genuinely independent. This is more egregious in cases where sabotage has been alleged as to completely avoid or limit amount of compensation. To illustrate on December 31, 1996, an oil spill occurred from Elf's Obagi oilfield in the Niger Delta destroying a vast area of farmland, along with its fishponds.²⁰⁰ When an adjacent landowner's lawyer wrote to demand compensation, Elf's reply was to the effect that its investigations revealed sabotage by "unknown" persons and the company was therefore not liable to pay compensation.²⁰¹ No opportunity was offered the affected landowner to independently assess the sabotage and Elf's letter was cursory in its description.²⁰² But it put paid to the matter.

Monetary compensation is not always the issue. The communities also clamour "to have their farmlands back in order to repossess control of their lives and environment."²⁰³ In the illustration above, Human Rights Watch reports that the spill was cleared in less than one month, using the very crude method of shovelling up the oil on the surface and burning same on site.²⁰⁴ Irrespective of how much they are paid in compensation, the community members seek more than anything to be recognised and be allowed active participation in settling their own issues.²⁰⁵ Expressing this need, a community member, whose land had been acquired by NAOC, stated: "At times they invite us to discuss our problems with them, but when we go there they take us for a joke".²⁰⁶

Genuine independent efforts have previously been made by lawyers and environmental groups in an attempt to monitor compliance of OGCs with law and to help the claims process of the communities.²⁰⁷ Rather than applause, these

¹⁹⁹ See Manby, *supra* FN 34, pg. 81, note 12

²⁰⁰ *Ibid.*, pg. 84.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ See Clark, *supra* FN 165, pg. 37.

²⁰⁶ See Manby, *supra* FN 34, pg. 101.

²⁰⁷ *Ibid.*, pg. 165.

attempts have met with security force harassment, detentions and general repression.²⁰⁸

3.3 Environmental Mediation as a Workable Option in Nigeria

There is no one formula for predetermining whether any mediation will be successful but some guidance may be had from experiences of environmental mediation professionals.

3.3.1 Familiarity of Environmental Mediation

Zwetkoff cites as a reason for recommending environmental mediation in the Belgian scenario, the fact that mediation “rings a bell” to the lay person.²⁰⁹ This singular factor, he asserts, adds to the legitimacy and effectiveness of environmental mediation and gives the concept an empirical reality stemming from the arguments that citizens develop based on their experiences with mediation in other fields.²¹⁰

The idea that mediation is African in concept and origin is substantially widespread in the continent.²¹¹ Apart from historical accounts which are replete with mediation activity in many regions of Nigeria²¹², recent empirical research has shown that Nigerians prefer to resolve conflicts by informal modes, particularly mediation,²¹³ and would more readily submit to chiefs, headmen, elders or even religious leaders as appropriate neutrals.²¹⁴

²⁰⁸ Ibid.

²⁰⁹ See Zwetkoff, supra FN 87, pg. 361.

²¹⁰ Ibid.

²¹¹ Kiplagat, B., *Africa and Mediation: Is mediation Alien to Africa?*; Ploughshares Monitor, December, 1998.

²¹² For example Belmont, K., and A., Reynolds; *The Use of Institutions in the Management of Conflict in Religiously Plural Societies*; University of Notre Dame, Department of Government and International Studies Working Paper 99-9; Paper presented at the American Political Science Association, September 4 1999, Atlanta Georgia. Again, Under S.19(d) of the Constitution of the Federal Republic of Nigeria, (1999), “the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication” is a foreign policy objective.

²¹³ Khaminwa, A., *Peacebuilding and Co-existence in Nigeria*, in *The Afrobarometer- Violent Social Conflict resolution in Nigeria*, Briefing Paper No.2, August 2002.

²¹⁴ Ibid.

More importantly, Nigeria has recently benefited from the global campaign of the United States in advocating structured mediation/ADR²¹⁵ Mediation is anticipated to be a kinder, more flexibility and more confidential system than litigation, which will ultimately enhance understanding and communication between disputing parties

This development is seen as long overdue judging by the gross inadequacies of the country's judicial system. The court dockets are notoriously overloaded. There is evidence to show that in Nigeria, "it takes an average of four years to conclude a landlord-tenant case; four and a half years to conclude a civil case; and 22 years to conclude a case beginning in a magistrate court and ending in the Supreme Court!"²¹⁶ As a result, not more than 10% of all cases filed in Nigerian Courts ever get to the trial stage as majority are settled out of court or simply abandoned.²¹⁷ It is expected that mediation will provide easy access to justice,²¹⁸ and avoid the expense of litigation, which is becoming increasingly unaffordable to the common citizen,

What is easily noticeable is the intricate manner in which mediation introduced in Nigeria's depends entirely on the judiciary. The pioneer Lagos Multi-Door Court house (LMDC) established in 2002, is a first full fledged court-annexed mediation endeavour, first of its kind in Africa. It adopts an all-inclusive approach to ADR in general, comprising three 'doors'- ENE, mediation and arbitration. The multi-door concept provides litigants with alternative 'doors' for the resolution of their disputes, leaving "door of litigation" as the last resort.²¹⁹ Under the Nigeria Rule

²¹⁵ But ADR is not entirely a new concept in Nigeria. The *Arbitration and Conciliation Decree* (1988), contains broad outlines that are similar to those of ADR; see Aku, A., *Dispensing justice through Mediation*, The Daily Trust Newspaper, Tuesday, October 7, 2003.

²¹⁶ See Aku, *Ibid.*, also *Shell v. Farah* discussed above, Section 2.

²¹⁷ Sotuminu, I .A., (Chief Judge of Lagos State), Speech delivered on the occasion of the launching of the LMDC at the Lagos High Court on Tuesday June 11, 2002; <http://www.thisdayonline.com/archive/2002/06/18/200206_18law05.html> Last visited 28 January, 2004.

²¹⁸ Uzuakpundu, N., *Law And Human Rights: Magistrates And Alternative Dispute Resolution*; The Nigerian VanguardFriday, December 26, 2003, <http://www.vanguardngr.com/articles/2002/features/fe22_6122003_.htm>, Last visited 28 December, 2004.

²¹⁹ Kekere-Ekun, K.M.O., (Justice), *Promoting the Use of ADR Processes: The Role of Magistrates in Nigeria*; Paper delivered at an Abuja workshop for magistrates, organised by the

of Law Assistance Project, which is being funded by the United States Agency for International Development (USAID) the Nigerian government is working to establish three pilot courts the Abuja, Kaduna and Lagos specifically for providing ADR services in those parts of the country.²²⁰ The Magistrate plays a statutorily recognized²²¹ role in triggering ADR in that he must of his own accord, in appropriate cases, suggest ADR to disputants. Kekere-Ekun justifies this involvement by asserting that from experience, where the court advises disputing parties to explore the possibility of settling amicably out of court, they often explore ADR mechanisms, not previously contemplated, and find them rewarding.²²²

The Chief Judge of the FCT who has applauded the “ADR innovation, among other reasons, because “its confidentiality cannot be denied”, has enunciated the roles of the various actors:

“The role of the court ... includes the active management of cases ...and to take preventive and effective judicial control which would facilitate the over riding objective. The counsel’s responsibility is to the court and the legal profession. The counsel is ... to explore the ADR options in resolving claims or issues before resorting to litigation, give due consideration and support to suggestions,... for amicable settlement; and ... accept an advisory role while parties take the lead role in ADR sessions. On the part of the parties, they are expected ... to attend ADR sessions in good faith without undue request for

National Judicial Institute (NJI) on 26 December, 2003. See Excerpts at <http://www.vanguardngr.com/articles/2002/features/fe226_122003.htm> Last visited 28 December, 2004.

²²⁰ See Aku, supra FN 212, pg. 32.

²²¹ Magistrates’ Courts Law, Cap. 127 Laws of Lagos State (1994), Section 25: “In civil case, a magistrate shall, so far as there is proper opportunity, promote reconciliation among persons over whom the Magistrate has jurisdiction, and encourage and facilitate the settlement in an amicable way of matters of difference between them;” and Section 26: “In criminal cases a magistrate may encourage and facilitate the settlement in an amicable way of proceedings for common assault or any other offence not amounting to a felony and not aggravated in degree, on terms of payment of compensation or other terms approved by him.”

²²² See Kekere-Ekun, supra FN 216.

*adjournments as well as be actively involved and be willing to explore various options towards settlement*²²³

There is no doubt that the formal introduction of ADR in Nigeria is a clear step in the right direction bound to improve public participation in decision-making and citizens access to justice among other things. Nevertheless, although it is becoming common, e.g. in most contemporary industrialised countries of Asia e.g. Japan, Taiwan and China, for mediation to be done under court supervision,²²⁴ due caution must be applied in judicial involvement with, and regulation of mediation in Nigeria.

The political and social settings obtainable in the U.S.A and Nigeria are quite different. Independence, both political and financial, has scarcely been a selling point of the Nigerian judiciary. Citizens are unlikely to appreciate, albeit earnest, judicial back-up of mediation services, or regard same as genuinely facilitative of neutral dispute resolution. Again even if the scheme eventually engages the support of practicing lawyers, the citizens are bound to regard it as elitist, judging among other factors, from the cosmopolitan nature of the cities chosen for its establishment. It is interesting on this point to note that highly hostile commercial environments, such as the Niger delta, which are more urgently in need of the services, have not been first integrated into Nigeria's map of mediation. The prospect of traveling long distances to take advantage of the mediation services, might prove daunting, and is bound to involve great expense that may negate any cost benefits of mediation.

3.3.2 Stalemate/ Deadlock

Cormick posits that the reaching of a stalemate (or impasse/ deadlock) by the parties is a prerequisite for successful environmental mediation.²²⁵ The term

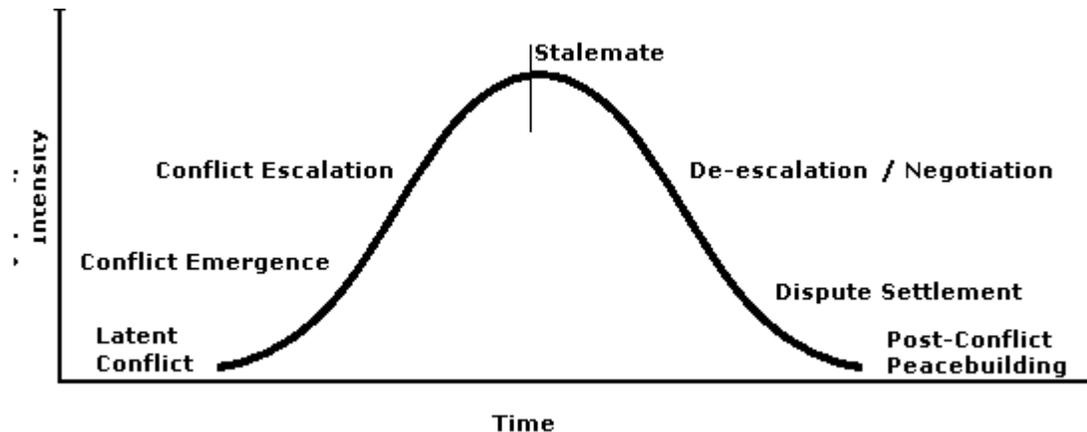
²²³ The learned justice just stops shy of prescribing the mediators roles!.

²²⁴ Noone, M., *Mediation* (London: Cavendish Publishing, 1996) pg. 6

²²⁵ Cormick, G., *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective*; in Talbot, supra FN 69, pg. 72; an author, indeed, attributes failure of an old mediation case, *The Foothills Dispute*, to non-occurrence of a stalemate. See Ryan, supra FN 72, pg. 403

refers to a situation in which neither disputant can win, and neither wants to back down or accept defeat.²²⁶ (See Fig. 1.1, below)

Fig. 1.1²²⁷



Source: Modified from Beyond Intractability .Org, Visited on 18/01/2004

The idea is that when parties reach a stalemate, a sort of equilibrium sets between them, in which both realize that the costs of continuing the resistance far outweigh the benefits to be gained, making the situation “ripe” for settlement proposals.

In the normal cycle of pollution compensation disputes in Nigeria, it is difficult to identify the point at which stalemates occur. Clearly, there is the issue of company dominance of dispute situations, to the extent that rather than a stalemate, one observes either a capitulation of the aggrieved party, or a fierce reprisal. These have had varying outcomes. Consider the following examples:

In July and August 2002, Amnesty International reported of mainly women-led protests particularly against Shell and Chevron, demanding proper compensation for pollution and for expropriated land, upon which they had previously relied for

²²⁶ Rubin, J. (et al.); *Social Conflict: Stalemate, and Settlement*, (2nd edn.) (New York: McGraw-Hill, Inc., 1994) pgs. 152-155

²²⁷ Source: Brahm, E., *Hurting Stalemate*, BeyondIntractability.Org., <<http://www.intractabl Eco nflict. org/m/stalemate.jsp>> Last visited 28 January, 2004

sustainable living of themselves and their families.²²⁸ Such actions have indeed worked with varying degrees of success- and failure. Some instances may be given.

On 29 July 2002, over 1,000 women from Ekpan, near Warri, in Delta State, besieged Chevron's administrative office, and barricaded the entrance. They reached an agreement with the company within hours, and the women left the building.²²⁹

Again in July 2002, around 180 women seized Chevron's Escravos Terminal. They were fed by the company for the duration, reaching an agreement with the company after ten days of negotiations. A memorandum of understanding (MOU) between the community and Chevron Nigeria representatives was signed on 17 July 2002.²³⁰

On 8 August 2002, over 3000 Itsekiri, Ijaw and Urhobo women, among who were some elderly women and those carrying babies, protested at the gates of the operational headquarters of both Shell Petroleum Development Company (SPDC) and Chevron Nigeria Ltd. in Warri (Delta State). According to testimonies given to an Amnesty International delegation, without warning and without giving any time for the protesters to disperse, a combined group of mobile policemen and soldiers unleashed attacks on the protesters, beating them up, throwing tear gas, and shooting in the air.²³¹

Despite realizing that such approaches go nowhere, it has been difficult for OGCs and the NDCs to re-appraise their disputes and consider settlement. Instead, extreme reactions have resulted from pent-up frustrations: Community members have traditionally had recourse to hostage taking and violent rampages, while the OGCs regularly co-opt government-supported armed retort.

²²⁸ Amnesty International; *Nigeria: Repression of Women's Protests in Oil-Producing Delta Region*; Report No. AFR 44/008/2003, <<http://web.amnesty.org/library/Index/ENGAFR440082003?open&of=ENG-NGA>> Last visited 12 January, 2004.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

In a recent occurrence for instance, an Ijaw group in the Burutu Local Government area of Delta State, threatened to disrupt the operations of Shell unless the company paid tenement rates demanded, and considered due to their community.²³² This eventuality can be extremely caustic to both sides, as they continue to expend resources and lives in the struggle, with barely any hope of victory.

For this reason, it is thought that environmental oil and gas disputes in Nigeria do not necessarily conform to the deadlock theory. In any case, contrary to the theory, a case study of 161 environmental mediations (Bingham, 1986) has shown that the propensity of parties to agree is not significantly affected by the existence of a deadlock.²³³ The best approach may, as yet consist in a case by case assessment of specific disputes, taking cognizance of the particular conflict situation(s) influencing them.²³⁴

3.3.3 Distribution of Power among Parties

Parties to mediation calculate the likelihood of their success and establish their bargaining positions based on the relative power of the other party. The multinational OGCs in Nigeria enjoy political dominance²³⁵, by virtue of the joint ventures which they operate with NNPC. Without effective support from the government, or technical assistance, the NDCs are in an inferior power position to the companies.²³⁶ In the event of an environmental dispute therefore, community groups are obliged to accept whatever “gestures” of compensation made by the latter.

²³² Aborisade, S.; *SPDC Threatened Over Tenement Rate*, The Punch, Nigeria, 21.7.2003, p. 12.

²³³ See Bingham, G., *Resolving Environmental Disputes: A Decade of Experience*.(Washington D.C.: The Conservation Foundation ,1986).

²³⁴ Marcus, A. A., (et al); *The Applicability of Regulatory Negotiation to Disputes Involving the Nuclear Regulatory Commission*; Administrative Law Review, 36 (Summer, 1984), pgs. 213-215

²³⁵ Principally, Shell, Mobil, Chevron, Elf, Agip and Texaco.

²³⁶ See Manby, supra FN 34, pg. 165.

But the position is fast changing. Disruptive violence is increasingly taking hold as a formidable tool to cushion this power deficit, creating a pseudo-balance with the politically dominant OGCs.²³⁷

3.4 Guidelines for Successful Application of Environmental Mediation in Nigeria

3.4.1 Voluntary or Mandatory Mediation

In its pure form²³⁸, access to mediation is voluntary. Recently, however, distinction is commonly drawn between “voluntary” mediation and “mandatory/court-ordered” mediation. The latter which has been popularized by the United States, it may be argued, is something quite different from core mediation as contemplated in this study and some of its features illustrate. As the term implies, court-ordered mediation occurs in response to a court’s mandate to settle, sometimes coupled with sanctions for failure to do so.²³⁹ Its close likeness to the adversarial remedies can be understood from the viewpoint of the problem which it has been developed to address namely: “the inability of existing law to decide many environmental disputes with reasonable dispatch and finality”.²⁴⁰ Thus it seeks to speed up mediation and to ensure that the outcome is binding on the parties. Government may wholly or partly fund the process, and approve of mediated resolutions.²⁴¹ Legislative rules are often applied to provide compromises adoptable by the parties, leaving the mediation process as a mere debate regarding how best to effect such rules.²⁴²

²³⁷ The power of violence or mere apprehension of being taken hostage by the local youths is a very potent influence. In the writer’s own experience in the Niger Delta area, expatriate employees of the OGCs are compelled to live-on-the-go, and be extra vigilant in a manner that interferes greatly with normal day to day living, without there even being a situation of alert.

²³⁸ A cursory assessment of recent literature on mediation will reveal a dizzying maze of diversely structured “models”, reflecting the generally unregulated and formative stage of present mediation practice.

²³⁹ In the United Kingdom decision of Dunnett v Railtrack [2002] EWCA Civ 302, the English Court of Appeal withheld Railtrack’s costs as a penalty for not participating in ADR, following the decision in Frank Cowl v. Plymouth County Council [2001] EWCA Civ 1935.

²⁴⁰ Schoenbrod, D., *Limits and Dangers of Environmental Mediation: A Review Essay*; 58 NYU Law Review (1983) 1453 pg. 1471.

²⁴¹ For example, mediation of the Hudson River dispute required the approval of two federal agencies, as well as agencies of non-participating states; see *ibid.*, pg. 1466

²⁴² *Ibid.*, pg. 1475

While this approach to mediation might have its virtues²⁴³, say in dealing more stringently with polluters,²⁴⁴ the implications which it has for confidentiality make it very unlikely that the mediator's promise of secrecy would remain secure,²⁴⁵ and even less likely that the process would enjoy the genuine commitment, openness, trust and collaboration of the participants. These have been judged crucial to the success of environmental mediation.²⁴⁶ The present author believes parties should be encouraged, not compelled to mediate. Prospective parties to mediation may therefore be cautioned that though mediation (court-ordered or otherwise) seeks to find agreement, they "neither must nor should reach agreements that do not meet their essential needs or responsibilities".²⁴⁷

3.4.2 The Mediation Process

It has been stated above that mediation is fundamentally a voluntary process in that consent to the process is free, and afterwards not binding.²⁴⁸ Both the mediators and the parties may walk away from the process without it ending, and without explanation.²⁴⁹ Even when it is concluded, the resulting agreement is in theory²⁵⁰, not binding on the parties.²⁵¹ Mediation is consensual. The mediator

²⁴³ Some authors have extolled the virtues of court-annexed mediation, stating that "mediation appears to be particularly powerful and effective in resolving conflicts when parties are most reluctant to enter the process voluntarily", and maintaining that there is empirical evidence to show that mandatory mediation is just as successful as normal mediation from the standpoint of settlement and satisfaction with the process. Ewen C.M.C., and T., Milburn; *Explaining a Paradox of Mediation*, 19 Negotiation Journal, (Jan 1993) pg. 23.

²⁴⁴ Some commentators have expressed doubt that environmental mediation, in its pure conception, is sufficiently rigorous for dealing with polluters.

²⁴⁵ Effects of this approach on the mediator's privilege will be seen below, Section 4

²⁴⁶ Refer to Section 4 below.

²⁴⁷ Cormick, G. W., *Using ADR to Resolve Complex Public Policy Disputes*; Osgoode Hall Law School Materials for Part-time LL.M specialising in ADR, Graduate Programme in Law (1997); cited in Martin and Anshan; supra FN 88, pg.17.

²⁴⁸ Bevan, A., *Alternative Dispute Resolution*, (London: Sweet and Maxwell, 1992) pgs. 27-28

²⁴⁹ See Noone, supra FN 221, pg. 7.

²⁵⁰ The practice however is to "give teeth" to the resulting agreement by entering a binding contract. We will see below that so far, mediated agreements in Nigeria are regarded as binding.

²⁵¹ *Ibid.*, It appears unsettled, however, whether the actual agreement to mediate in the event of a dispute is binding and enforceable by the parties. The author's opinion is that holding them as such will amount to prioritizing form (the agreement) over substance (the fundamentally consensual nature of mediations), and pre-empting the self-enforcing goal of mediation. Participation, after all, does not equate to commitment. But see Carroll, E., and B., Mackie; *International Mediation: The Art of Business Diplomacy*; (The Hague, Netherlands, Kluwer

may not impose decisions on the parties or determine the rightness or wrongness of their positions. Although he may skilfully urge the parties towards specific terms of agreement,²⁵² the mediator's place remains that of a neutral third party. His role, irrespective of his knowledge or expertise, is to bring the parties to their own resolution.²⁵³ He retains his legitimacy only within the scope of his mandate²⁵⁴ as determined by the parties.

Environmental mediation is serious business as it often concerns the health and livelihoods of complainants. Nevertheless, in the context of this study, there is need to accommodate the interests of community representatives who may be largely unaccustomed to structured procedure. Most authors prefer the very informal portrayal of the mediation procedure, but a moderate approach which combines for example Walde's six-step systematic and business-like approach²⁵⁵ with Goodpaster's light, informal style may serve best.²⁵⁶

In this first stage, after the mediator would have introduced himself to the parties, they then make submissions of their positions, views and supporting arguments often in a face-to-face²⁵⁷ meeting. The exercise is enhanced by the use of detailed questionnaires which ask in depth questions regarding the parties' histories of conflicting interests, and even their efforts reconciliation. When scrutinized, the parties' responses provide helpful pointers with which the mediator can build the big picture, and identify what is likely to work absent the

Publishers, 2001) pg.97: "Much depends on the jurisdiction and particular wording of a clause as to whether parties will be held bound by a court to follow a contractual mediation procedure before moving to litigation or arbitration".

²⁵² See Macfarlane, supra FN 2, pg.2.

²⁵³ As will be shown further along, it is increasingly becoming unpopular and impractical to maintain that any evaluation by the mediator will be out of place. For a very insightful discuss of the evaluative-facilitative debate, see Waldman, E. A., *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*; 82 Marq.L.Rev. 155 (1998-1999)

²⁵⁴ See Macfarlane, supra FN 2, pg. 19.

²⁵⁵ See Walde, supra FN 55, pgs. 10-11.

²⁵⁶ See Goodpaster, supra FN 145, pgs. 68-71.

²⁵⁷ Mediation, as a general rule, will take place only in the presence of the involved parties, irrespective of whether they are represented for the purpose; see Macfarlane, supra FN 2 pg. 12: "The importance of attendance of parties themselves cannot be overemphasised. This is the best way the parties' interests and needs can thoroughly be explored."

barriers to negotiation between the parties, and even identify what a “settlement” might be.²⁵⁸

The second stage entails private sessions (caucuses/shuttling) between each party with the mediator. This is the very sensitive stage where trust is consciously fostered and channels of communication are opened up between the parties. The idea of private sessions as a crucial aspect of the mediation is that it avoids harmful confrontation, and affords opportunity for the skilled mediator to modify a party’s attitude in a manner that would not be possible or appropriate in the presence of the other party.²⁵⁹ He may, for instance ask questions regarding the relative importance of the issues that a party has presented and suggest how the party might alter his position to every one else’s gain.²⁶⁰

The mediator must be well prepared through “intelligence gathering” through, discovering significant interests, feelings, jealousies and ambitions, for example of the parties. Questions may be asked by the mediator to further build up his store of information, but parties would normally not be allowed to pose counter questions to one another.²⁶¹ “Active listening of the mediator is of the utmost importance at this stage. At the end of it, the mediator would have secured a more realistic grasp of the conflict situation. The third stage involves joint sessions of active problem-solving and various styles can be adopted depending on what works for the mediator. He may engage tasking mind games which if skillfully employed, will reveal to the parties in a mortifying way, their self-righteous portrayals of the conflict situation. Walde’s model comprises two steps: first is to produce a “joint history” of the parties’. This would be of the root of conflict as perceived by the mediator²⁶² which often turns out as a surprise to the parties who would have coloured their separate versions with long-held prejudices. This may be followed by a “case assessment” the purpose of which is

²⁵⁸ Walde, supra FN 55, pg. 10.

²⁵⁹ See Stone, supra FN 90, pg. 59.

²⁶⁰ Higgins, J., *Mediation: The Training Component*, in Macfarlane, supra FN 2, pg. 361.

²⁶¹ See Macfarlane, supra FN 2, pg. 209.

²⁶² *Ibid.*, pg. 11.

to reflect on the legal, practical and even political implications of the case.²⁶³ The purpose of both is to “shake’ the self-righteousness” of both parties and to expose them to the realities of the other side’s point of view, and to evenly dispose them towards settlement.²⁶⁴

The last or decision-making stage may be preceded by yet another round of shuttling during which the mediator may “(sow) the seed of a possible solution into the peoples’ minds and then nurture growth- until they see the solution as theirs.”²⁶⁵ Parties differences would have become sufficiently narrowed to enable them identify the necessary trade-offs/compromises required for meaningful resolution of their problem.²⁶⁶ The final outcome is clarified and confirmed²⁶⁷ and this may occur in a climactic “mediation meeting” conducted in a manner that ensures the diffusing of any lingering vestiges of opposition.²⁶⁸

3.4.3 The Mediator

The mediator is central force of any mediation.²⁶⁹ He (or she) would be a neutral non-adjudicating person who is chosen by the parties and who seeks to guide them to a settlement.²⁷⁰ He/she can be significantly helpful in achieving the goals set out for any environmental mediation, and stands to make or mar the mediation process.²⁷¹ It has already been stated that environmental mediation is often contextually bound. This implies that the peculiarities of the Nigerian oil industry need to be jointly taken into cognisance with the role of the mediator, in

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid., while this style is highly commendable in the context of environmental conflicts, the obvious caution must be emphasised that care must be taken not to impose, rather than persuade such a painstakingly nurtured “settlement” on the parties who must have the final say, and the line between the two may be very thin.; see also Goodpaster, supra FN 145, pg. 214, where the author integrates “caucuses” and joint sessions into the last stage.

²⁶⁶ See Goodpaster, supra FN 145, pg. 214.

²⁶⁷ Ibid.

²⁶⁸ See Walde, supra FN 55, pg. 11.

²⁶⁹ See Ryan, supra FN 75, pg. 402

²⁷⁰ See Walde, supra FN 3, pg. 4

²⁷¹ Kovach, K. K., and Love, L. P., *Evaluative Mediation is an Oxymoron; 14 Alternatives to the High Cost of Litigation*, (1996), pgs. 31-32.

order to rightly determine the person to mediate environmental disputes. The following discussion takes on that task.

One of the first issues which the environmental mediator faces is the Evaluation/facilitation ethical debate. "Evaluation" opponents greatly emphasise the autonomy of the parties, asserting that it will only remain unfettered if the mediator maintains strict neutrality.²⁷² The suggestion has been made that that by virtue of just being in that position, a mediator wields great power which can interfere with the autonomous decision-making of the parties as his opinion would always hold sway.²⁷³ Where the mediator is not perceived to be neutral, parties will not be inclined to reveal the underlying interests and needs surrounding their positions.²⁷⁴ They ascribe mainly therapeutic goals to the process of mediation such as expanding parties' consciousness²⁷⁵, enhancing their self-awareness²⁷⁶ and deepening their self-knowledge and empathy with opposing parties.²⁷⁷

Some other writers prefer and encourage the evaluative approach. They equate pure facilitation with passivity which does not augur well for numerous complicated matters which are now submitted to mediation.²⁷⁸ They assert that disputants have always sought the opinion of the mediator, considering that it helps rather than diminishes their chances of reaching settlement. One author particularly qualifies that if parties intelligently wish to have their matter narrowly evaluated, the mediator should, by all means oblige them as this enhances their self-determination.²⁷⁹

²⁷² Ibid.

²⁷³ The Editor, 98 Harvard Law Review (1984-1985), 441 pg. 445; This commentary suggests that the mediator can be enabled in fostering an agreement on the parties by the sheer force of his personality or his stature in the community.

²⁷⁴ Ibid.

²⁷⁵ Fuller, L. L., *Mediation- Its Forms and Functions*; 44 S. Cal.L. Rev. 305, 325 (1971)

²⁷⁶ Ibid., pg. 274

²⁷⁷ Ibid.

²⁷⁸ Menkel-Meadow, *Is Mediation the Practice of Law?*; 14 Alternatives to the High Cost of Litigation, (1996) 57, pg. 61: "Complex mediation these days often involves legal questions and mediator prediction or evaluation of the legal merits or "likely outcomes" of cases. Wouldn't you want a mediator with legal expertise if you were involved in an important case?"

²⁷⁹ Ibid.

Maintaining that any evaluation is unethical would, to my mind, result in placing unnecessary burden on the mediation process and could furnish grounds for endless post-mediation suits. There is great value for instance in the mindful sensitising of disputants as to the repercussions of not settling their dispute.²⁸⁰ Clearly, two adverse possibilities are presented by evaluation: parties' loss of self-determination and mediations loss of impartiality. It seems inconceivable that parties to environmental disputes will reach a truly satisfactory autonomous settlement in total oblivion to prevalent norms. Moreover, the very definition of the consummate environmental mediator assumes a moderately evaluative approach, as shown below.

Accordingly, Maniruzzaman states that "a mediator or conciliator, who does not bow to legalism, but is more amenable to realism, can perhaps strike a balance, a fair balance that a reasonable man will expect in the circumstances".²⁸¹ This, he emphasizes, is where mediation is likely to bring blessings to a vulnerable party, at least by allowing it to deal with "an understanding mediator whose role is that of a healer not a hired gun".²⁸² In this light, the transformative approach is often contrasted with problem-solving mediation which is settlement-oriented, focusing on reaching a mutually agreeable settlement of the instant dispute. The NDC/OGC mediator must aim to transform the parties, especially the communities, by empowering them to understand their own situation and needs, as well as those of others.²⁸³ To this end, six characteristics which have been attributed to "the consummate environmental mediator" who is both ethical and effective may be mentioned:

- Advocacy for sustainable development
- Environmental Literacy

²⁸⁰ Ibid., pg. 63

²⁸¹ Maniruzzaman, A.F.M., *The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward*, 193 I.E.L.T.R (2003) pg. 197

²⁸² Ibid., pg. 197.

²⁸³ Bush, B.R.A, and J.P., Folger; The Promise of Mediation (San Francisco: Jossey- Bass, 1994)

- Significant life experience
- Commitment, integrity and trustworthiness
- Ability to adopt different dispute resolution styles and behaviours
- Superb Planning and organizational capacity²⁸⁴

Based on the above considerations, the following points are suggested regarding the choice of environmental mediators in Nigeria.

1. He/she must be truly independent of both the OGCs and the Nigerian government. For this reason, particularly with regard to the government, retired judges and other key members of the Nigerian judiciary generally ought to be disqualified.
2. It would be preferable if the mediator is not a native of the particular community (ies) involved in the dispute. However, this alone should not act as a bar as long as the person's neutrality and professionalism can be adequately ascertained.
3. The proposed mediator may or may not belong to a particular mediating programme or institute²⁸⁵. Individuals may be qualified in their own right.
4. Government officials and other representatives acting in that capacity may be disqualified.
5. Membership of an environmental NGO should act as an advantage, not a bar to acting as an oil industry environmental mediator in Nigeria.

²⁸⁴ Elix, J., *The Meaning of Success- Measuring Outcomes in Public Policy Dispute Resolution*; University of West Sydney (2003); <http://www.leadr.com.au/ELIX.PDF>, Last Visited 13 December, 2003.

²⁸⁵ The practice in the United States is for environmental mediators to belong to one or more of the numerous, thriving "Environmed" Programmes. While the benefits of such an arrangement cannot be ignored, for instance in affording some certification/decertification mechanism which may act as a check on the excesses of mediators, the tendency of this trend to "institutionalise" mediation has been criticised.

The above is only to act as a guide and may be extrapolated as necessary.

3.4.4 Setting the Goals

Environmental mediation goals necessarily vary from case to case.²⁸⁶ Care must be taken to set out the goals to be achieved in each instance with a view to effectively matching the person, qualities and skills of the mediator with these goals.

Much of the literature on environmental mediation goals²⁸⁷ is attributable to the work of researchers Beierle and Cayford.²⁸⁸ They conducted an experiment in which they identified a number of “social goals” i.e. particular expectations of how increased involvement of the public will improve decision-making. The aim of this exercise was to find out ways of resolving long-standing environmental disputes, and to build capacity for solving future ones.²⁸⁹ The goals selected were:

- Incorporating public values into decisions
- Increasing substantive quality of decisions
- Resolving conflict among competing interests
- Create opportunities for building trust in institutions
- Educating and informing the public²⁹⁰

The learned researchers examined 239 diverse case studies to determine the spread of these results through the wider society. The experiment showed two significant results: that mediation achieves the social goals of public participation

²⁸⁶ Recall the point made above relating to a choice between time efficiency and social justice/disputants' transformation. See Section 2, above.

²⁸⁷ O'Leary, R., *Environmental Mediation: What Do We Know and How Do We Know It?* in Blackburn, J.W., and W. Bruce, eds. *Mediating Environmental Conflicts: Theory and Practice* (Westport: Connecticut: Quorum Books, 1995) pg. 26.

²⁸⁸ Beierle, T. C., and J., Cayford; *Evaluating dispute Resolution as an Approach to Public Participation; Resources for the Future*, <<http://www.rff.org/Documents/RFF-DP-01-40.pdf>> Last visited 17 December, 2003

²⁸⁹ Ibid.

²⁹⁰ Ibid., pg. 4; These goals will be revisited below.

better than other comparable options, but the effect is felt only among the small participating group.²⁹¹ This poses a great challenge to the NDC/OGC mediator. Mediations would usually operate by creating an open forum to accommodate the maze of actors and stakeholders.

Of primary concern in our present context is the goal of public participation.²⁹² On this note, when parties are very heterogeneous, and the conflict is so complex, what inevitably happens is that only a few of the participants are actually involved in negotiations.²⁹³ To achieve the goal of public participation, the mediator must “make a conflicting forum converge onto a mutually acceptable solution.”, and evidence of this convergence must be seen through the whole network of stakeholders.²⁹⁴

This underscores why a seasoned mediator must know how to identify a set of core goals and stick to them.²⁹⁵ The ethical dilemma presented by the above situation, i.e., maintaining the openness of the proceedings versus achieving social significance of the mediation outcome, ought, in our present context, to be resolved by prioritizing participation. The simple reason is that groups in the NDC, currently nurse deep-seated feelings of discrimination and “lack of voice”, which would be greatly hurt by any attempt at limiting participation. Where the actual participants in the negotiations desire long-term co-operation and peace badly enough, they can consciously engineer wider social significance of the outcome, say, by educating and informing the wider public.²⁹⁶

Other goals which may be alternately or simultaneously considered in environmental mediation include

²⁹¹ Ibid., pg. 5.

²⁹² See Beierle and Cayford; supra FN 285, pg.3; the authors support the view that where citizens harbour deep feelings of deprivation and discrimination, public participation ought to be a primary concern.

²⁹³ See Zwetkoff, supra FN 87, pg.365, where a similar Belgian Scenario is described.

²⁹⁴ Ibid.

²⁹⁵ Morris, C., *The Trusted Mediator: Ethics and Interaction in Mediation*, in Macfarlane, supra FN 2, pg. 308; also Fiske, supra FN 142, pg. 6.

²⁹⁶ This represents one of Beierle and Cayford’s “social goals” mentioned above.

- Improving communication between the disputants and understanding of the other person's point of view;²⁹⁷
- Releasing anger by meeting face-to-face with the other party and having a chance to voice one's mind and be listened to;²⁹⁸
- Increasing awareness of the weaknesses and strengths of a party's position based on mediator's comments made during private sessions;²⁹⁹
- Exposure to innovative settlement ideas suggested by the mediator; as well as
- Recognition of latent but significant issues (such as unfounded prejudices) that may be involved in the dispute but about which parties were not previously aware.³⁰⁰

In the next section, the question of how to protect the entire mediation process from being upset by confidentiality issues will be addressed. Meanwhile, it ought to be agreed from the above discussion, that the benefits which Oil and gas companies and communities in Nigeria stand to gain by adopting mediation far outweigh the losses, if any.

²⁹⁷ See Morris, *supra* FN 292, pg. 309

²⁹⁸ *Ibid.*

²⁹⁹ Carroll, E., and B., Mackie; International Mediation: The Art of Business Diplomacy (The Hague, Netherlands, Kluwer Publishers, 2001) pgs. 52-53.

³⁰⁰ *Ibid.*, pgs. 105-106.

4 Confidentiality in Environmental Mediation: Should Third Parties have Access to Confidential Information?

4.1 Introduction

Mediation is frequently described as a “safe haven” to discover opportunities for settling disputes.³⁰¹ This requires that parties have the assurance that what they say in private, whether to each other, or to the mediator, will not be disclosed outside of the mediation. Many common law jurisdictions, like Nigeria, protect settlements reached in the spirit of compromise, especially if the parties have entered into an agreement to maintain confidentiality.³⁰² On the other hand, the right of citizens to “accurate, current, relevant and complete”³⁰³ environmental information is increasingly recognised as a “pillar” of sustainable development.³⁰⁴ The apparent polarity of these goals, poses significant problems for the mediation of environmental disputes in the oil and gas industry.

Confidentiality may be the bane of environmental mediation on two specific accounts. First, in so far as all mediation occurs in the shadow of the law,³⁰⁵ there is the tendency that keeping information obtained from environmental mediation confidential, may hinder the availability of evidence, where it is needed in subsequent litigation. Secondly, owing to the fact that the public is recognised as

³⁰¹ See Carroll and Mackie, supra FN 296, pg.42.

³⁰² Ibid.

³⁰³ Gavouneli, M., *Access to Environmental Information: Delimitation of a Right*, 13 Tul. Envtl. L.J.; 303 (1999-2000), pg. 304.

³⁰⁴ Bruch, C., *Regional Opportunities for Improving Environmental Governance through Access to Information, Public Participation, and Access to Environmental Justice*, 8th Session of the African Ministerial Conference on Environment (AMCEN), Abuja, Nigeria, 3-6 April 2000, pg. 2; <<http://www.eli.org/pdf/csamcen00.pdf>>, Last visited 15 January, 2004. In addition to a right to access information, public participation in environmental decision-making, and access to justice, are the other two of the tripartite (pillars) established by Aarhus, for the purpose of improving the accountability, credibility and effectiveness of governmental decision-making on environmental matters.

³⁰⁵ See Walde, supra FN 55; where the author states that “Mediation makes no sense except as a pre-litigation formality to play for time”. He qualifies however, that most times, tensions would subside, dispensing with the need for litigation. See also Stone, *ibid.* FN 90, pg 5: “Although mediation is a voluntary process, it operates in a context where litigation is a potential factor and exerts an influence”.

having an interest in the sustainability of the environment, confidentiality in environmental mediation has been criticized for impinging on this right.³⁰⁶

It is in the above context that this section aims to clarify the concept of mediation confidentiality, and to propose the way forward for developing countries newly embracing environmental mediation.

4.2 Confidentiality: Meaning and Scope

Confidentiality may be understood from three different perspectives:

4.2.1 Internal/External:

Internal confidentiality precludes a mediator from divulging information obtained during the private sessions with one party to another party, without the informing party's permission.³⁰⁷ This approach recognises that parties to mediation have special interests and needs which they hope to meet through the process. By disclosing these interests and needs in caucus, disputants afford the mediator further opportunity of grasping the underlying reasons for their respective "positions".³⁰⁸ Information provided by the parties may consist of certain personal confidences or business intricacies, which, if let out, may seriously embarrass the parties or be used against them in future by potential adversaries and competitors. In the same vein, it is commonly provided in mediation rules that a mediator may not subsequently act as arbitrator or judge regarding the same issue, since this is likely to predispose him to taking sides.³⁰⁹

³⁰⁶ See Schoenbrod, supra FN 237, pg.1466.

³⁰⁷ See Zamboni, supra FN 34; also Stone, M., Representing Clients in Mediation (London: Butterworths,1998), pg. 21.

³⁰⁸ See Gray, O.V., *Protecting Confidentiality of Communications in Mediation*,36 Osgoode Hall Law Journal, 4 (1998), pg. 671.

³⁰⁹ It is convenient to state here that the hybrid version of mediation, "med-arb", often based on parties' agreement that if the mediation is unsuccessful, the mediator transmutes to an arbitrator, in order to render a binding decision between them, is not recommended by the author. This is because a presumption of prejudice against his/her (arbitral) award may prove difficult, if not impossible to rebut.

External confidentiality has raised more controversy as it prevents mediation participants from disclosing information to third parties, including courts.³¹⁰ It refers to the acceptance of parties³¹¹ that all shall treat as confidential, whatever is said, or that transpires in the mediation, as well as the final outcome.³¹² Additionally, it implies that the mediator will not be required to testify in subsequent legal proceedings,³¹³ and his notes will not be recovered or tendered in evidence.³¹⁴

4.2.2 Conduct/communication:

Distinction is made here between the verbal, written or other recorded communications of parties, which must be protected, and the parties' conduct which ought to be open to court scrutiny.³¹⁵ An example of the latter would be the fact that a party did not actually attend a mediation session, but not the fact that he nodded in response to a question. The second should be protected.³¹⁶ This distinction stems primarily from an objective interpretation of Section 2(2) of the Uniform Mediation Act (UMA) which refers to mediation communications as "statements made orally, through conduct, or in writing or other recorded activity". By extrapolation, if in the course of mediation, an OGC's technical expert consistently avoids commenting on a community spokesperson's allusions of a link between the discharged effluents from the company's operational site, and certain health complications discovered among members of the local community,

³¹⁰ See supra, FN 303, pg. 1470.

³¹¹ This duty will also extend to parties' lawyers where they are in attendance. In the case of Bernard v. Galen Group, Inc., the court found that plaintiff's counsel wilfully breached the confidentiality agreement by writing in, to request an end to the court-ordered mediation because "the process is a very expensive waste of time" and "defendants failed to make any serious settlement offer".

³¹² See Stone, supra. FN 304, pg. 21.

³¹³ The knowledge that a mediator will not testify against them, increases the parties' assurance of the mediator's neutrality. See further discussion below.

³¹⁴ Indeed, the notes made by mediators during mediation sessions would often comprise incoherent records of their observations and disjointed pieces of information from parties. See Gray, *ibid.* FN , pg.674. It is doubtful that such notes would be of any evidential value to the courts, or of any informative quality to the public.

³¹⁵ See Burnley, R., and G., Lascelles ; "Mediating Confidentially- Conduct and Communications" <http://www.mediate.co.uk/news/full.html?id=7>, Last visited 04/01/2003

³¹⁶ *Ibid.*

should this silence be admissible in litigation to prove the company's knowledge, or imminent danger to the community?³¹⁷

4.2.3 Privacy/Secrecy:

Confidentiality in mediation is often defined in relation to either mediation privacy or secrecy. These are two different things. Mediation is secret where the parties keep the existence, negotiation, resolution and perhaps re-instatement away from public knowledge.³¹⁸ It would be private, on the other hand, where the mediation proceedings, as well as documents provided therein, remain exclusive to the participants,³¹⁹ whether or not the mediation's existence is common knowledge. Unlike secrecy, privacy may be seen as the other side of the confidentiality coin in that it is not an end in itself, but exists for the purpose of maintaining confidentiality.³²⁰ Whereas "privacy" may loosely be interchanged with "confidentiality", secrecy of environmental mediation would be suggestive of fraud, intimidation, or outright subversion of justice.

Any successful consideration of the usefulness or otherwise of confidentiality in mediation, must contemplate these various facets, which the wider concept conceals.

³¹⁷ In the author's view, there ought to be no doubt that such evidence is admissible in court. To hold otherwise would impugn the legitimacy of the mediation process, and detract from its integrity. Environmental mediation creates a forum for dialogue, not a theatre for zombies. Such silence would strongly suggest consent under the laws of most common and civil law jurisdictions, and so, even where the parties have contracted to keep all mediation conduct confidential, the contract may be found contrary to public policy for purporting to preclude the production of evidence, the disclosure of which is not privileged as a matter of law. (See Freedman, L.R., and M. L., Prigoff; *Protecting Confidentiality in Mediation*; 98 Harv. L. Rev. 441 (1984-1985), pg. 41: "Agreements to suppress evidence are generally void as against public policy") If confidentiality were to be so strictly construed, even an offer, made and accepted during mediation will be impossible to enforce. See Zamboni, M., *Confidentiality in Mediation*; Int. A.L.R. 2003, 6(5)175, pg.178

³¹⁸ The Editors; *Colloquium on the Implications of Secrecy in Environmental law*; (1993); 2 N.Y.U.E.L.J, pg. 187.

³¹⁹ The Swedish Supreme Court has defined such privacy to mean that "the public does not have any right of insight by being in attendance at the hearings, or having access to documents in the matter". See Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc (Bulbank); Yearbook Comm Arb'n XXVI (2001), pgs. 291-298.

³²⁰ See Tooney J. in Bulbank, *ibid.*, pg. 293.

4.3 Does Confidentiality Play a Functional Role in Mediation?

Much is to be gained from protecting the confidentiality of mediations. In the recently decided case of Olam v. Congress mortgage Co. (Olam), it was stated that confidentiality is of absolute importance to mediation because “parties would be reluctant to make the kind of concessions and admissions that pave the way to settlement”.³²¹ Effective mediation is pivoted on candour.³²² Because the mediator lacks coercive powers, his task of helping the parties reach an agreement can only be achieved where the parties are open about their interests and underlying grievances, their willingness to mediate, and to genuinely make compromises.³²³ With increased openness comes a better chance of reaching an amicable agreement. Confidentiality creates that atmosphere of mutual trust necessary to encourage parties to engage in settlement discussions with the requisite openness and candor, while avoiding the intrusive guardedness which comes with the knowledge that information disclosed may return to haunt them.

Practitioners maintain that confidentiality is necessary to guarantee the fairness of the mediation process,³²⁴ and that a fair mediation is several steps towards a successful mediation.³²⁵ When negotiating parties provide information, they are not protected by the usual checks and restrictions of evidential and procedural rules which litigation affords.³²⁶ Therefore, they are concerned that they be treated fairly during, and even after the mediation, particularly, that their personal privacies do not get revealed.³²⁷ In the present context of OGCs and host communities, if mediation is not confidential, the companies could use their legal and experiential sophistication to sift out information, useful for thrashing the

³²¹ Olam v Congress Mortgage Company , 68 F. Supp. 2d 1110 , 1134 (N.D.Cal. 1999), <<http://www.mediate.com/articles/olamcase.cfm>> Last visited 13 December, 2003; See also Folberg, J., and A., Taylor, Mediation: A Comprehensive Guide To Resolving Conflict Without Litigation; (San Francisco: Jossey-Bass, 1984) pg. 264, where the authors expressed the view that parties’ expectation of confidentiality is critical to the success of any mediation.

³²² See Freedman and Prigoff; supra FN 315, pg. 38.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ See Noone, supra FN 221, pg. 55.

³²⁶ See Freedman and Prigoff, supra, FN 315, pg. 39.

³²⁷ Ibid., also refer to “internal/external” approach to confidentiality in Section 3, above, for the context in which the term “fairness” is used here.

latter in subsequent litigation, leaving the process unfairly prejudicial to, and exploitative of the legally naïve community members. Confidentiality has been shown to be essential to the mediation process, and beneficial to the parties and the mediator alike; the former in not being personally or commercially jeopardised, and the latter, in not being required to testify.

Confidentiality makes the apparent neutrality of the mediator more credible and real.³²⁸ Every mediator is naturally expected to be neutral. This means that he is absolutely independent of the parties, having no single previous business dealings with them.³²⁹ This yardstick, as rightly pointed out by Carroll and Mackie, will only achieve neutrality at a minimum.³³⁰ The knowledge that the mediator will not testify against them in court gives more impetus for the parties to regard him as sufficiently neutral³³¹ to effectively mediate between them.³³²

There is a function of confidentiality which is cathartic in nature, and the advantage of which is not restricted to the mediation process alone. Relations between OGCs and host communities are often so highly charged that non-antagonistic discuss is first assumed to be collusion by the wider group.³³³ The atmosphere of trust engendered by confidentiality enables parties to express their true fears, doubts, feelings and interests previously. The result is that even if the mediation does not lead to a “settlement”, participants develop an increased understanding of the interests of the other parties.³³⁴ This, for some authors, is the single, most important benefit of environmental mediation.³³⁵

³²⁸ Ibid., pg. 446: “Both the appearance and the reality of the mediators neutrality are essential to generating the climate of trust necessary for effective mediation”.

³²⁹ See Carroll and Mackie, supra FN 296, pg. 20.

³³⁰ Ibid., pg. 21.

³³¹ Ibid., author presents a detailed discussion of the benefits of mediator’s neutrality.

³³² According to Freedman and Prigoff “...court testimony by a mediator, no matter how carefully presented, will inevitably be characterised so as to favour one side or the other. This would destroy the mediator’s efficacy as an impartial broker”, supra FN 315, pg. 38.

³³³ See Ibeanu, supra FN 165, pg. 22.

³³⁴ Croce, C., *Negotiation Instead of Confrontation*; EPA Journal (April,1985) pgs. 23-23; in *Mediating Environmental Conflicts: Theory and Practice*, J. Walton Blackburn and Willa Bruce, eds. (Westport: Connecticut: Quorum Books,1995) .

³³⁵ Ibid.

Various other functional roles have diversely been attributed to mediation confidentiality. For instance that the efficacy of the mediator's fact-finding process hinges solely on his ability to ensure the confidentiality of communications made to him by the parties.³³⁶ Also, according to the Ethics Committee of the Society of Professionals in Dispute Resolution, confidentiality is a key player in maintaining the integrity of the mediation process.³³⁷

Mediation ought to be protected against distraction and harassment.³³⁸ In communities like the Niger Delta where contemporary mediation is still a fledgling practice, there would always be ardent non-believers in the process, as well as dedicated diversionist groups who profit from the conflict situation. It is easy to foresee a situation where they whimsically disrupt mediation proceedings under the pretext of enforcing court subpoenas on the mediator. Such subpoenas can not only encumber the process but also discourage volunteer mediators from offering their services.

The above discussion clearly establishes the indispensability of confidentiality to mediation. The next task is to ascertain whether there are any commonly recognised standards of mediation confidentiality and if so, whether they are cognisant of the "subsequent litigation" and "access to information" considerations.

4.4 Confidentiality under the Institutional rules of mediation

The LCIA Mediation Procedure provides for confidentiality in rather strict terms thus:

"The mediation shall be confidential. Unless agreed among the parties, or required by law, neither the mediator nor the parties may disclose to

³³⁶ Brown, H and A., Marriott; *Protecting Confidentiality in Mediation*, pg. 445; this author therefore equates the necessity for confidentiality to mediators with that of physicians, psychiatrists and attorneys, in their respective professional capacities.

³³⁷ See Freedman and Prigoff, supra FN 315, pg. 39, citing Hay, Carnevale, & Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 Just. Sys. J, (1984) 228, pg. 230.

³³⁸ See Freedman and Prigoff, supra FN 315, pg. 38.

*any person any information regarding the mediation or any settlement terms, or the outcome of the mediation.*³³⁹

It further prohibits the making of any formal records or transcripts of the process³⁴⁰, stipulating that any documents made specifically for the purpose of the mediation will be accorded the privilege of being “without prejudice”³⁴¹. The documents will not be admissible in evidence in the course of any subsequent litigation or arbitration which concerns the mediated dispute.³⁴² The extent to which the mediator’s protection can be overruled by agreement of the parties is however unclear since Article 10.3 quoted above appears to conflict with Article 11.2. In the latter, the mediator himself, along with the Court and its other officials, is excluded from “any legal obligation to make any statement to any person about any matter concerning the mediation...”³⁴³ This implies that the parties cannot exercise their waiver to jeopardise the absolute protection of the mediator. Hopefully, the apparent conflict will be clarified in future amendments of the Rules.³⁴⁴

Confidentiality is of the essence in mediation under the World Intellectual Property Organisation (WIPO) Mediation Rules of 1994.³⁴⁵ Therein, all participants and any other persons who attend the mediation or any of its private sessions, “shall respect the confidentiality of the mediation, and may not, unless otherwise agreed by the parties *and the mediator*³⁴⁶, use or disclose to any

³³⁹ London Court International Arbitration Rules (Adopted January 1,1998,); I.L.M. Volume Xxxvii, Number 3, (May, 1998); Article 10.3.

³⁴⁰ Ibid., Article 10.5.

³⁴¹ Ibid., Article 10.2.

³⁴² Ibid., Article 10.4.

³⁴³ Ibid., Article 11.2.

³⁴⁴ An offshoot of this latter provision which may be pointed out is the fact that where parties have not elected their mediator, and the court, having considered the nature of the dispute, appoints a mediator for the parties (See generally, Article 1, LCIA Rules), the parties remain at the absolute mercy of the mediator, whom they cannot compel to testify, the result of whose facilitation is not subject of any in-house scrutiny, and whose competence is therefore unascertainable. While this may seem irrelevant for mediations in general, there are implications for environmental mediations because as we shall discuss below, much of the success of environmental mediations depends on the skill, personal experience and even mental bias of the particular mediator

³⁴⁵ World Intellectual Property Organisation(WIPO) Mediation Rules (1994) ILM 34 (1995), 559 (Adopted October 1, 1994)

³⁴⁶ Emphasis mine.

outside party any information concerning, or obtained in the course of the mediation.”³⁴⁷

For added assurance, all participants are to sign “an appropriate confidentiality undertaking” before they may take part.³⁴⁸ The mediator may freely hold private sessions with each of the parties but cannot disclose any information obtained to the other party without being expressly permitted by the informing party.³⁴⁹ Furthermore, where a party submits written information to the mediator to consider confidentially, any subsequent authorization to disclose must also be in written form.³⁵⁰ Like the LCIA Rules, the WIPO Rules prohibit recordings of any kind from being made of the mediation.³⁵¹

So far the most stringent provision regarding confidentiality is Article 16 of the Rules the provisions of which bear repeating:

“Unless otherwise agreed by the parties, each person involved in the mediation shall, on the termination of the mediation, return to the party providing it, any brief, document or other material supplied by the party, without retaining any copy thereof. Any notes taken by a person concerning the meetings of the parties with the mediator shall be destroyed on the termination of the mediation.”³⁵²

Notice that this last part admits of no exception whatsoever. Nevertheless, the mediator is required to promptly submit notice of termination of the exercise, which notice will state among other things, whether the settlement was “full or partial”.³⁵³

³⁴⁷ WIPO Mediation Rules, Supra FN 336, Article 15.

³⁴⁸ Ibid.

³⁴⁹ Ibid., Article 11.

³⁵⁰ Ibid., Article 12(c).

³⁵¹ Ibid., Article 14.

³⁵² Emphasis mine.

³⁵³ It is doubtful whether this inclusion has any relevance beyond mere statistics.

Apart from verbal and written information, the WIPO Rules also protect the conduct of mediations in that without his consent, the fact of a party's non-indication of willingness to accept settlement proposals may not be introduced in court in evidence by the other party.³⁵⁴ Confidentiality of mediations under the WIPO Rules is further guaranteed by the provision which bars a mediator from concurrently or afterwards, acting in judicial, arbitral or, any other capacity in relation to the mediation's subject matter.³⁵⁵

The UNCITRAL Conciliation Rules of 1982³⁵⁶ creates some ambiguity in its terms regarding confidentiality. Without clearly stating that the conciliations are confidential, it places a duty upon the parties and the conciliator to "keep confidential all matters relating to the conciliation proceedings."³⁵⁷

It is not clear from this provision whether confidentiality is automatic, such as ought to be recognised without further ado, or no confidentiality until parties and conciliator, by agreement (or conduct perhaps) become bound to a promise of confidentiality.³⁵⁸ The latter would seem more likely if the above confidentiality provision is read in the light of Article 10 of the Rules, which require the conciliator, where not instructed otherwise by the informing party, to disclose

³⁵⁴ WIPO Mediation Rules, supra FN 343, Article 17(iv); see generally, Article 17 which enumerates specific aspects of the mediation which may not subsequently be introduced in evidence.

³⁵⁵ Ibid., Article 20.

³⁵⁶ UNCITRAL Model Law on International Commercial Conciliation;; Annex I Report of the UNCITRAL Official Records of the General Assembly (A/57/17) (Adopted June 24, 2002). Note that the Nigerian Mediation Rules are modelled after these rules. See the Arbitration and Conciliation Act, Chapter 19, Laws of the Federation of Nigeria 1990, particularly Article 14, which provides: "The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."

³⁵⁷ United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules, United Nations General Assembly Resolution 35/52 (Adopted December 4, 1980); Article 14.

³⁵⁸ The recently published model law is more explicit. It provides in Article 9 that: "Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement". See UNCITRAL Model Law on International Commercial Conciliation; Adopted by the Commission on 24 June 2002 at its 35th Session in New York; Annex I Report of the United Nations Commission on International Trade Law Official Records of the General Assembly (A/57/17).

“factual information” received from one party to the other party, to allow the latter to offer appropriate explanation.³⁵⁹

The usual prohibition of the conciliator from subsequently acting in arbitral or judicial capacity, or appearing as a party’s witness in such proceedings is contained in Article 19. Also parties may not provide evidence relating to expressed views/suggestions, admissions, proposals or willingness, to accept them, in any arbitral or judicial litigation.³⁶⁰

The Optional Conciliation Rules of the PCA, which virtually replicates the UNCITRAL Rules, differs only slightly from the latter. It explicitly recognises the right of parties not to keep any, or all of the various aspects of their conciliation, confidential.³⁶¹ Again, the confidentiality protection will not preclude disclosure of information which is required in the course of concurrent judicial proceedings instituted under rules³⁶² to preserve a party’s rights.³⁶³

Another set of institutional rules which contain relevant guidance on confidentiality are the International Chamber of Commerce (ICC) ADR Rules. In the “General Provisions”, the duty is framed in these terms:

“In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law, the ADR proceedings, including their outcome are private and confidential. Any settlement agreement between the parties shall similarly be kept confidential except that a party shall have the right to disclose it to the extent that such

³⁵⁹ While this provision may assure fairness of the conciliation exercise, caution may be had to the complications which may arise therefrom, especially since conciliation under the rules leads to a binding agreement (Art.13(3)). For example, should a party subsequently deny such disclosed fact in litigation, a court may not hesitate in finding the conciliator compellable as the sole witness for the other party.

³⁶⁰ See Article 20 generally.

³⁶¹ Permanent Court of Arbitration Optional Conciliation Rules; International Bureau of the Permanent Court of Arbitration, Basic Documents (1998) (Adopted July 1, 1996), Article 14. This is in line with dual the principles of self determination and autonomy of the parties.

³⁶² Ibid., Article 16.

³⁶³ Ibid., Articles 14 and 16, when read together, exclude concurrent arbitral proceedings instituted for the same purpose, from the protection of confidentiality. The reasoning behind this is not very clear.

*disclosure is required by applicable law or necessary for purposes of its implementation or enforcement”.*³⁶⁴

The rules of the American Arbitration Association (AAA) are to similar effect as the ICC and LCIA rules but they additionally protect the mediator from being compelled to disclose any reports, documents or other records received in that capacity or to testify as witness in any adversarial forum,³⁶⁵ and prohibit as the WIPO Rules, the keeping of any formal records of transcripts of the mediation.³⁶⁶

Strict confidentiality is required under the Hong Kong International Arbitration Centre (HKIAC) Mediation Rules (1999). It states that “Mediation is a private and confidential process.”³⁶⁷ Mediation information, documents and communications, are regarded as being privileged and “without prejudice”.³⁶⁸ The settlement agreement is also confidential, to the extent such protection does not hinder implementation or enforcement.³⁶⁹ While it stipulates that the mediator may not later be called as a witness by any of the parties, or act as arbitrator, adjudicator, representative, expert witness or counsel in any proceedings³⁷⁰, it carefully avoids the question of what specific aspects of the mediation may or may not feature in such subsequent litigation. Rather, the provision is made that-

“Nothing that transpires during the course of the mediation is intended to or shall in any way affect the rights or prejudice the position of the parties to the dispute in any subsequent arbitration, adjudication or litigation.”³⁷¹

³⁶⁴ International Chamber of Commerce Alternative Dispute Resolution Rules; Number 809, (Adopted July 2001).Article 7.1. It is interesting to note that the Commission’s 1998 rules of Arbitration do not regulate confidentiality; See Zamboni, *ibid.* FN 33, pg. 183.

³⁶⁵ Commercial Mediation Rules of the American Arbitration Association, Reproduced in Martin, J. G., and M. S., Anshan; Alternative Dispute Resolution for Oil and Gas Practitioners; (Chicago Illinois: American Bar Association, 2001), Pg. 149, Appendix J.; Rule M-12

³⁶⁶ *Ibid.*, Rule M-13.

³⁶⁷ Hong Kong International Arbitration Centre Mediation Rules: Effective from 1 August 1999

Published by the International Trade Centre, (March 30, 2003); Section 12.

³⁶⁸ *Ibid.*,Section 12 (i).

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*,Section 14.

³⁷¹ *Ibid.*,Section 12 (ii).

Taken together, the institutional Rules of Mediation provide the following exceptions to the rule of confidentiality:

- (i) Parties' own waiver of the protection.
- (ii) The requirements of public policy
- (iii) Information will be properly disclosed where this is necessary to enforce a mediation agreement.
- (iv) Without much qualification, *subsequent litigation* is identified as one circumstance under which confidentiality must bow to disclosure.

It is clear from the above examination that confidentiality is central to mediation under all the mentioned institutional rules. Nevertheless, no clear delimitations or standards for applying this concept can be uniformly observed through these rules. It is not completely clear whether mediations are confidential *simpliciter*, or only in association with contracts between parties, or rules declaring them to be so. But most interestingly, the exception of access to information is hardly mentioned. Therefore it is worthwhile to examine the right of access to information, to determine whether, on its own merits, exception can be deduced regarding mediation confidentiality, in a manner applicable to dispute resolution between oil and gas companies and host communities generally.

4.5 Public Access to Environmental Information versus Mediation Confidentiality

By article 16 of the World charter for Nature, information must be publicly disclosed "in time to permit public consultation and participation".³⁷² Persons and groups must also have the opportunity to participate in the formulation of decisions which directly affect their environment, and to have any environmental

³⁷² World Charter for Nature (1982), UN GA RES 37/7, Adopted by United Nations General Assembly Resolution 37/7 28 October 1982; <<http://www.un.org/documents/ga/res/37/a37r007.htm>.> Last visited 15 January, 2004.

degradation or damage redressed.³⁷³ The landmark exposition of public access to environmental information is however found in the Rio Declaration (Agenda 21), which provides:

*“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities including information on hazardous materials and activities in their communities and the opportunity to participate decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available”.*³⁷⁴

Perhaps the most far reaching international document on the issue of access to information is the Aarhus Convention of 1998.³⁷⁵ Signatories to this convention are required to make environmental information readily available to the members of the public, in the form requested, regardless of whether or not an interest is disclosed.³⁷⁶ They are further requested to establish processes which will enable the adequate flow of information to public authorities in respect of any existing or proposed activities that may affect the environment to a significant extent.³⁷⁷ The aim is that in the event of any threat to human health or to the environment as a result of human activities:

³⁷³ Ibid., Art. 23.

³⁷⁴ Principle 10, United Nations Conference on Environment And Development, Rio Declaration On Environment And Development, U.N. Doc. A/CONF. 151/S/Rev. 1 (1992), *reprinted in* 31 ILM 1992, 874. Also available at <http://www.unep.org/Documents/Default.asp?DocumentI_D=78&Article> Last visited 12/11/2003.

³⁷⁵ Convention on Access to Information, Public Participation, in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Adopted June 25, 1998. U.N.Doc.ECE/CEP/43. This convention was signed in Aarhus, Denmark by thirty-nine states and the EC under the auspices of the United Nations Economic Commission for Europe (U.N.E.C.E); See Gavouneli, M., *supra* FN 300, pg. 317.

³⁷⁶ Ibid., Art. 4(1)(a) and (b)

³⁷⁷ Ibid., Art. 1(1)(b).

“...all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.”³⁷⁸

This Convention seeks to provide a basis upon which citizens may judicially enforce their substantive and procedural environmental rights, but then, in accordance with national laws.

4.5.1 Important “Public Access” Issues Relevant to Emerging Economies³⁷⁹

Certain aspects of the right of access to environmental information appear to make its exception for the purposes of environmental mediation not worthwhile. The emphasis under Aarhus, of electronic databases for the dissemination of environmental information in pursuance of which signatories undertake to “establish progressively coherent, nationwide system of pollution inventories or registers on a structured computerised and publicly accessible database compiled through standardised reporting”³⁸⁰ is certainly not cognisant of the social, economic and other structural inadequacies of EEs. More so in the context of the oil and gas industry where, as already noted, adverse impacts of

³⁷⁸ Ibid., Art. 5(1)(c).

³⁷⁹ It may be argued that such regional initiatives as the Aarhus Convention are not applicable to Africa, and therefore irrelevant in considerations of environmental principles applicable to the continent. But this is not so. Developing international rights, duties, and procedures on citizen participation have potential impacts on African countries at both national level and international levels, because as countries adopt and implement the conventions, multilateral development banks incorporate them into their practices, and international trade discussions emphasise public participation. These international mediums tend to exert pressure on the national level, as loans and project financing are increasingly conditional upon requirements of public participation, and treaties rely on information, participation, and accountability for their implementation. Therefore, as Bruch points out, “international norms are not just something “out there,” but ultimately can directly impact Africa.” See generally, Bruch, *supra* FN 301; Again, according to Jeremy Wates, Secretary t the Aarhus Convention, “Although the convention is regional in scope, it is in fact open to accession throughout the world” <http://www.grida.no/news/index.cfm.html> ; Last visited 6 March, 2004.

³⁸⁰ See Aarhus Convention, *supra* FN 25, Art. 5(9).

upstream development are more critically felt by the rural poor.³⁸¹ It is no surprise then that various environmental advocates in Africa have expressed reservations as to acceding to the convention.³⁸²

Again, the international declarations on public access do not adequately empower Non-governmental Organisations (NGOs), as representatives of individual and public interests. In defining the “public” to whom information is to be made available, the Aarhus Convention refers to “one or more natural and legal persons, and in accordance with national legislation or practice, their associations, organisations or groups”³⁸³

Again identifying the “public concerned” in whose interest participation in environmental decision-making is broadened, the Convention refers to “the public affected or likely to be affected by or having an interest in the environmental decision-making”.³⁸⁴ Interpreted proactively, this definition may include NGOs but hardly in the light of the further addition that “...for the purposes of this definition, non-governmental organisations promoting environmental protection *and meeting any requirements under national law* shall be deemed to have an interest.”³⁸⁵ Regarding the italicised portion, it is common knowledge that national courts do not usually effectuate the principles of international environmental law to the degree that rights accrue to NGOs from their violation.³⁸⁶

Thirdly, Article 4(8) of Aarhus permits state parties to levy access fees before making environmental information available, the amount of which may be graduated along a “schedule of charges” which states are enjoined to prepare for

³⁸¹ A writer emphasises that eight of the ten poorest countries in the world are in Africa, and equally twenty-nine of the thirty-four countries that the UN ranks lowest on the basis of human development, life expectancy, accounting for income, and education...” Thus citizens are more concerned about locating firewood, food, water and forage than they are about participatory principles”, see Bruch, supra FN 301, pg. 7.

³⁸² See Bruch, supra FN 301, pg. 8.

³⁸³ See Art. 2(4), Aarhus Convention; also Gavouneli, supra FN 300, pg. 319.

³⁸⁴ Ibid., Art 2(5).

³⁸⁵ Ibid.

³⁸⁶ See Reh binder, E., and D., Loperena; “Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation” pg. 2 ; < http://iceac.sarenet.es/acad_forumenglish/dlrandrehbinder.htm> , last visited 9 December, 2003.

the purpose. Distinction may be made between circumstances in which partial payment of such charges will be acceptable and when payment must be in full or compulsorily in advance.³⁸⁷ The tendency of this provision to be abused by public authorities and to ultimately frustrate accessibility of information is easily perceptible. In this regard, with respect to a similar provision under the EC Code of Conduct in pursuance of the Council Directive on access to information relating to the environment,³⁸⁸ it has been advised that to be reasonable, the access fee must not "...authorise member states to pass unto those seeking information the entire amount of the costs, in particular, indirect ones, actually incurred for the state budget in conducting an information search."³⁸⁹

Lastly, the numerous vague³⁹⁰ and widely framed exceptions to the provisions on access to information strongly militate against its entrenchment. Art. 4 of the EC Code of Conduct mentioned above, access is compulsorily excepted where disclosure may jeopardise public security, court proceedings, international relations, monetary stability, or investigations and inspections.³⁹¹ Access is also deniable to protect individuals and their privacy, as well as industrial or commercial secrecy.³⁹²

One may to note also, that access to environmental information will be denied in order to protect "confidentiality as requested by the natural or legal persons that supplied the information".³⁹³ There seems to me no difficulty in finding this provision sufficient to protect mediation disclosures. Notice that whereas other exceptions refer to information sourced by public authority, this exception recognises the possibility that private individuals and businesses are indeed entitled to their privacies. A learned observer has therefore commented that "any

³⁸⁷ *Ibid.*

³⁸⁸ European Community Council Directive, 90/313/EEC, 1990 O.J (L 158) pg. 56.

³⁸⁹ See *Commission V. Germany*, Case C-217/ 97 (1999), 3 C.M.L.R. 277, 300.

³⁹⁰ Consider Art. 3(3) of EC Directive 90/313, *Ibid.* by virtue of which a requester may be denied access if the information relates to unfinished documents, internal communication or data , or "where the request is manifestly unreasonable or formulated in too general a manner."

³⁹¹ See Commission Decision 93/731/EC, 1993 O.J (L 340) 43.

³⁹² *Ibid.*

³⁹³ *Ibid.*

competent national administrator should be able to come up with a decent justification to refuse a request.”³⁹⁴

4.5.2 Attitude of the Courts to the “Right of Access to Environmental Information”

An appreciable degree of innovative activism has been observed in a number of judicial decisions. On the question of the “rights” nature of access to environmental information, the European Court of Human Rights (ECHR) has associated this right with “first generation” fundamental rights particularly the right to life and the right to privacy and family life. Two cases illustrate.

Anna Maria Guerra and 39 others v. Italy:³⁹⁵

This case was brought in pursuance of Article 10 of the European Convention on Human Rights (ECHR).³⁹⁶ Applicants, who lived close to a chemical factory in the town of Manfredonia, contended that the government failed to make vital environmental information available to them regarding the potential environmental risks posed by the factory or any measures to be taken in the event of a major accident. Evidence showed that the government had classified the factory as “high risk”, since it had previously caused a serious explosion resulting in many casualties.³⁹⁷ The Court found a violation not of Article 10 as such, but of Article 8 of the Convention in which the right to family, home and private life is guaranteed.³⁹⁸

³⁹⁴ See Gavouneli, supra FN 300, pg. 313.

³⁹⁵ App. No. 14967/89, 26 Eur.H.R.Rep.357 [1998], < <http://www.eel.nl/cases/ECHR/querra.htm>,> last visited 13 February, 2004

³⁹⁶ This Article provides that Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” See European Convention for the Protection of Human Rights and Fundamental Freedoms.

³⁹⁷ See Shelton, D., *Human Rights and the Environment: Jurisprudence of Human Rights Bodies* (Geneva: Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment) 14-16 Jan. 2002, pg. 14; < <http://www.unhcr.ch/environment/bp2.pdf>> , Last visited 28 January, 2004

³⁹⁸ Ibid.

In reaching its decision the Court made an interesting distinction to the effect that the duty of the state to provide access to environmental information relates to information which is willingly submitted by others. The state is under no obligation “to collect and disseminate information of its own motion.”³⁹⁹

McGinley & Egan v. United Kingdom:⁴⁰⁰ The contention of applicants in this case was that they were entitled to environmental documents which held clues as to how much exposure they had suffered, in view of their proximity to the Christmas Island nuclear testing ground during the 50’s. The ECHR made no bones about finding that they were so entitled; finding that access to the required information was intricately linked with their right to private and family lives (Article 8).⁴⁰¹

The European Court of Justice has elucidated on the appropriate balance with regard to the numerous exceptions which riddle the public access provisions in the Hautala Case.⁴⁰² It reiterates that a public authority must endeavour to uphold the principle of public access, or at the least partial access to environmental information.⁴⁰³ Where certain information is to be excluded before granting a request , the administrative burden of such exclusion must not be overly disproportionate to the aspects sought to be protected.⁴⁰⁴ In general, exceptions to the right of access must be construed narrowly in order to enable the “widest possible access to documents”.⁴⁰⁵

³⁹⁹ *Ibid.*, note 124 at para. 53. A similar interpretation is discernible under the EC Code of Conduct *Ibid.*, where accessible documents have been interpreted as “any written text , whatever its medium, which contains existing data and is *held* by the Commission or the Council.” See *Bavarian Lager Co.*, (1993) 3 C.M.L.R, pg. 547. Gavouneli points out that the use of “held” rather than “created” by the court implies that documents would have been submitted to government by other sources as opposed to created. See Gavouneli, *supra* FN 300, note 124, pg. 309.

⁴⁰⁰ 27 Eur.H.R.Rep. 1,277 (1995).

⁴⁰¹ Gavouneli, *supra* FN 300, pg 326, offers a slightly varying approach, see López Ostra v. Spain; 20 Eur.H.R.Rep.277[1995]

⁴⁰² Hautala v. Council, (1997)3C.M.L.R, 528,542.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*, See also Gavouneli , *supra* FN 300, pgs. 314-315.

⁴⁰⁵ Warning issued by the EC Court of First Instance in the case of *Bavarian Lager*, *ibid.* note 129;Gavouneli, *supra* FN 300, 310.

4.6 Lessons from Public Interest Arbitration

Both English⁴⁰⁶ and European⁴⁰⁷ courts generally uphold strict confidentiality of arbitral proceedings.⁴⁰⁸ In the case of Dolling Baker v. Merret⁴⁰⁹, Parker L.J. relying on the existence of an implied duty of confidentiality on the parties, found that it was not possible to produce documents used in previous arbitrations in subsequent arbitrations where both are unrelated and without the agreement of the involved parties, or an order of the court.⁴¹⁰ More recently in Ali Shipping Corp v. Shipyard Trogir⁴¹¹, the court held that there was a restricted obligation of confidentiality arising as a corollary to the private nature of arbitral proceedings. The fact that an arbitral award might have persuasive in a related dispute has been found insufficient to avoid this implied duty of confidentiality.⁴¹² But it would not prevent the disclosure of an award where it is necessary for a party to establish legal rights against a third party.⁴¹³

Conversely, under Australian law no general duty of confidentiality exists.⁴¹⁴ In the leading case of Esso Australia resources Ltd. V. Plowman⁴¹⁵, the main feature of which was the involvement of two public authorities- the State Electricity Commission of Victoria (SECV) and the Gas and Fuel Corporation of Victoria (GFC), the principle was established that use of confidential arbitral information is lawful, among other things, where significant “public interest can be established.”⁴¹⁶

⁴⁰⁶ Ibid.

⁴⁰⁷ Paulsson, J., and N., Rawding, *The Trouble with Confidentiality*, Arb. Intn'l, Vol. 11, No. 3, pg. 303; Sir Patrick Neil summarises as follows: “...the common understanding has always been that not only are arbitrations to be held in private, but that all information concerning them and what transpires in the arbitration room is to be treated as strictly confidential.” (1996) 3 Arbitration, pg. 62.

⁴⁰⁸ See Freedman and Prigoff, supra FN 315.

⁴⁰⁹ [1990] 1 W.L.R. 1205.

⁴¹⁰ Zamboni, M., *Confidentiality in Mediation*; Int. A.L.R. 2003, 6(5) 175-190, pg. 178

⁴¹¹ [1998] 1 Lloyd's Rep. pg. 643

⁴¹² See Coleman, J., in Insurance Co. v. Lloyd's Syndicate [1995] 1 Lloyd's Rep. pg. 272.

⁴¹³ Ibid.

⁴¹⁴ See Zamboni, supra FN 408, pg. 181.

⁴¹⁵ [1995] 183 C.I.R. 10

⁴¹⁶ Zamboni, supra FN 408, pg. 78.

In the well reported case of Methanex Corporation v United States of America,⁴¹⁷ certain interested parties requested among other things, to have access to the documents of the arbitration. In that case, a chemical producing company, Methanex sued the State of California over a ban on the use of one of the company's products, methyl tertiary-butyl ether (MTBE) added to petrol to reduce emissions. However, the parties had entered agreement to limit the disclosure of the document as of the arbitral proceedings and based on the existence of this agreement, the arbitral tribunal decided that "it had no power to order that the parties disclose to the petitioners documents generated for the arbitration because the parties had made an agreement that restricted disclosure".⁴¹⁸ In arriving at this decision, the tribunal had recourse to Article 15 of the UNCITRAL Rules of Arbitration granting it ample discretion to conduct the arbitration in such manner as it deems appropriate.⁴¹⁹

Relying on this same provision, however, the tribunal historically created a leeway for allowing public access to confidentiality protected arbitrations while considering a second request of the interested parties: i.e. for Submission of amicus briefs, preferably after reading the submissions of the parties.⁴²⁰ Finding that this question was not specifically addressed in the UNCITRAL arbitration rules, it reasoned that the overwhelming nature of public interest in the matter necessitated a balancing with the additional financial burden on the parties and arrived at the conclusion that "it could be appropriate to allow amicus written submissions from these Petitioners."⁴²¹

It is clear from the above discussion that even the courts define confidentiality differently. Advocates of strict mediation confidentiality can glean some lessons here. First, even where the confidentiality obligation is most strictly upheld; the courts would, in the interest of public policy devise ways of getting around the rule. Secondly, confidentiality of settlement can be lawfully overturned for

⁴¹⁷ (Pending; NAFTA Cases 2002) <http://www.state.gov>, Last visited 28 February, 2004.

⁴¹⁸ Zamboni, supra FN 488, pg. 79.

⁴¹⁹ Ibid...

⁴²⁰ Ibid.

⁴²¹ Ibid.

purposes of enforcement; and thirdly, the involvement of public authorities predisposes settlement outcomes to judicial scrutiny.

4.7 Current Judicial Attitude to Mediation Confidentiality

The question here is whether the confidentiality of mediation would prevent third parties from having access to information obtained from the mediation proceedings. It is pertinent to analyse two recently-decided U.S. cases- Olam v. Congress Mortgage (Olam),⁴²² and Foxgate Homeowners' Association, Inc v. Bramalea Ltd (Foxgate).⁴²³

Olam: In this case, the court compelled a mediator to testify on the issue of plaintiff's mental capacity to sign a mediation agreement at the time of mediation.⁴²⁴ In arriving at its decision, the court relied on Rinaker v. Superior Court (Rinaker)⁴²⁵ in which a balancing test was established to wit: "whether the value of the mediator's testimony would outweigh the values and interests that would be harmed if the mediator were compelled to testify."⁴²⁶

This decision raises serious questions regarding the exception of parties' waiver to strict mediation confidentiality. In so far as the court relied on this exception to compel mediator testimony, there appears to be no qualification to the exception. It is especially confusing since the court left open the question of sufficiency of one party's objection. The court simply stated that "...if a party to the mediation were objecting to compelling the mediator to testify, we would be faced with a substantially more difficult analysis."⁴²⁷

If interpreted narrowly, Olam would still be in line with conventional practice where the parties can freely exercise their autonomy to either protect or leave

⁴²² Co. [1999] (N.D. Cal) 68 F. Supp. 2d1110.

⁴²³ 78 Cal. App. 4th 653.

⁴²⁴ For a critical comment on the case, see Madison, *Is Mediation Confidential? A Critique of the Olam and Foxgate*; Decisions 5 [2000] No. 2 ADR Currents 1 (AAA June-August).

⁴²⁵ 62 Cal.App.4th 155,74 Cal. Rptr.2d 464 (3d Dist. 1998).

⁴²⁶ In this case, there was in actual fact, nothing stopping the court from compelling the mediator's testimony in line with a court order, as did eventually happen. See Zamboni, *supra* FN 408, pg. 181

⁴²⁷ Quoted in Fisher, *supra* FN 426, pg. 18.

their settlement discussions open.⁴²⁸ But a broad interpretation which permits a single party's waiver will, it is submitted, lead to a proliferation of mediation abuses which could ultimately frustrate the spirit and intent of consensual mediation. Olam also leaves unaddressed, the question of whether a mediator can similarly be compelled to testify as to the details of private sessions with parties.

Foxgate: This case resulted from an appeal filed by the defendant and his attorney against an order which imposed sanctions of over US\$30,000 upon them for their failure to provide their expert witness in a court-ordered mediation., The California court held that the mediator could be compelled to tell the court, not only whether a party had disobeyed a court order, but also that *in his opinion* the party had done so intentionally.⁴²⁹ In its reasoning, absent such compulsion, it would have no way of ascertaining whether or not its orders were followed in the mediation and would therefore be "stripped of its inherent power to police and control its own processes"⁴³⁰

What is more worrisome about this decision is that the mediator was compelled to testify despite a statutory guarantee of his privilege.⁴³¹ It is the opinion of the author that this decision is fundamentally flawed because even where mediation is court-ordered, the idea is to encourage and not compel settlement. The notion of a party's intentional disobedience, of a court order to settle is oxymoronic, especially since mediation is the parties' own process and not belonging to the courts. Distinction ought therefore to be made between instances where courts

⁴²⁸ Bingham M.R., in Re D [Minors] [1993] 2 All ER 639, where he states that "A substantial , and to our knowledge, unquestioned line of authority establishes that where a third party ...receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said *without the parties' agreement*."

⁴²⁹ Burnley and Lascelles; supra FN, 312; pg. 17.

⁴³⁰ See Fisher, supra FN 426, pg. 2.

⁴³¹ Section 703.5 of the California Evidence Code states that "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify in any subsequent civil proceeding as to any statement, conduct, decision or ruling, occurring at or in conjunction with the prior proceeding..." See Zamboni, supra FN 408, pg.181, note 57. See also part 4 of this study where it has been argued that a statutory guarantee is a prerequisite for protecting the confidentiality of mediations, considered herein (Section 2) to be of the utmost importance.

order a particular settlement between disputants, and where it orders parties to reach amicable resolution.

It is convenient at this point to do a quick take of the trend of freedom of information in developing countries.

*4.8 Freedom of Information in Developing Countries*⁴³²

Developed countries have historically adopted a separate legislation approach towards the right to information, albeit with varying attitudes. Most European countries like Germany, France and Britain have maintained a noticeable degree of secrecy, perhaps borne out of a genuine concern for effective governance.⁴³³ On the other hand, since its Freedom of the Press Act of 1766, Sweden has been unparalleled by any other legal system, in according this right to its citizens.⁴³⁴ Other Nordic countries like Finland⁴³⁵ and Denmark⁴³⁶ have since followed suit.

In most developing countries, however, notions of a right of access to information are derivable mainly from constitutional provisions. For example, Article 174 of the National Constitution of Fiji explicitly requires Parliament to enact law granting to the public, freedom of access to the official documents of government and its agencies. But increasingly, these countries are realising the need for separate legislation to secure citizens' right to information. This fact is demonstrated, for instance, in the enactment of the Freedom of Information Act of Trinidad and Tobago, effective February 20, 2001, and the Access to Information and Protection to Privacy Act of Zimbabwe, 2002.⁴³⁷

⁴³² Federal Republic of Nigeria; Official Gazette , No. 91, Lagos- 8th December, 1999

⁴³³ Araya, M., *Corporate Environmental Disclosure: A Missing Piece in the Investment Governance Puzzle*; Yale Centre for Environmental Law and Policy; <<http://www.gets.org/pages/corporatedisclosure.pdf>> Last visited 13 December, 2003.

⁴³⁴ Ibid.

⁴³⁵ See Publicity of Documents Act of 1951

⁴³⁶ See Public Access Act of 1970.

⁴³⁷ It may commented here that though the Zimbabwean purports to provide access to information, it does, in fact, limit this access, principally by according wider powers of media sensorship to the government.<http://www.humanrightsinitiative.org/publications/chogm/chogm_2003.html> Last visited 28 March, 2004.

Similarly, Nigeria is soon to pass a Freedom of Information (F.O.I) Act.⁴³⁸ Although the proposed law does not specifically mention the protection of mediation or other contractual confidences, it appears that the confidential nature of environmental mediation information obtained during mediation may be affected by this law. The aim of the bill is stated as being to make “public records” and information more freely available,⁴³⁹ but the term “public” is not specifically defined. However, it appears from the definition of related terms that the widest interpretation is to be given to the expression.⁴⁴⁰ A “public document” in respect of which disclosure must be made, could be in any form as long as it touches on a matter of “public interest”.⁴⁴¹ Such public records or information may be disclosed where they relate to public health, public safety, or where they involve the protection of the environment. The information may be written or otherwise recorded. The bill specifically recognizes legal practitioner/client relationship as privileged,⁴⁴² and protects information arising from those relationships from disclosure.

So far, only provision which appears to protect companies engaging in environmental mediation is Section 18 of the Bill. It provides that business information may not be disclosed where this may cause competitive harm to suppliers of the information.⁴⁴³ The question of access to environmental information is, nevertheless still left hanging.

Intensifying the use of environmental mediation in Nigeria requires that more cognizance is taken of the emerging trends in international and domestic environmental law. Specifically, the fundamental premise that democratic governance cannot be successfully achieved where adequate environmental information is not available to the public must be acknowledged. The right to

⁴³⁸ For an up-to-date progress report on this Bill, visit <http://www.privacyinternational.org/issu es/foia/FOI_survey3.01.pdf> Last visited 18 February, 2004

⁴³⁹ See Nigerian F.O.I. Bill, supra FN 433, at Preamble

⁴⁴⁰ Ibid., Section 15.

⁴⁴¹ Ibid., Section15(1).

⁴⁴² Ibid., Section 20(3).

⁴⁴³ Ibid., Section (18)(1)(a).

access environmental information is considered an aspect of the right to freedom of expression⁴⁴⁴, and as earlier stated, is widely guaranteed under the Aarhus Convention among others.

4.9 Some Potential Points of Convergence between Environmental Mediation and Access to Environmental Information

In Section 3 above, (the Niger Delta Case study), I listed a number of social goals of mediation identified by researchers Beierle and Cayford. I will now apply a number of those goals to disclose some convergence between the seemingly conflicting purposes of mediating environmental disputes and ensuring public access to information. The social goals of environmental mediation include:

Incorporating public values into decisions: This goal is regarded as fundamental to democracy⁴⁴⁵. It appears from the work of the learned authors that owing to the differences which exist in the values preferences and assumptions of communities, direct participation of the public without hindrance, by locus standi issues for instance, will better capture the interest of the public.⁴⁴⁶

Increasing substantive quality of decisions: The quality of mediated settlement is greatly enhanced by the fact that citizens identify relevant information, discover their mistakes and generate alternatives that are more in tune with the wider public.

Educating and informing the public: The education which the mediation process affords is “fundamental education that integrates information about the problem at hand with participants’ intuition, experience, and local knowledge...” This

⁴⁴⁴ See Gavouneli, supra FN 300, pg. 323.

⁴⁴⁵ See Stern P.C. and H.V. Fineberg ; (Washington D.C: National Academy Press, 1996) 157-158.

⁴⁴⁶ See Beierle and Cayford, *Ibid*.

facilitates the development of a common perception of solutions to similar problems.

Eminent mediator Schwartz,⁴⁴⁷ further bases mediation on 3 values- valid information, free and informed choice, internal commitment to those choices.

Valid information has two aspects. Firstly, parties do not just mutually share information relevant to the dispute. They elucidate with examples in a manner that enables the other party to independently ascertain the truth or falsity of the basic information. Secondly, information exchanged is understood by the parties, not under the colour of their prejudices but from the perspective in which it is actually offered.

Free and informed choice means that parties seized of valid information can knowledgeably set or adjust their goals and the paths towards achieving them. Informed choice and internal commitment is the ultimate goal of the information cycle. Parties who make free and informed choices for themselves take responsibility for their resolution. They are more internally committed towards making it work, not because they would be penalized otherwise or even rewarded for doing so, but simply because the decisions are “theirs” and intrinsically compelling.⁴⁴⁸ The parties take responsibility for effective implementation of the settlement and as research shows, they continually seek to obtain new valid information through which they may assess the continued viability of their decisions or the need for change.

4.10 Towards Testimonial Privilege of the Mediator

We have seen in the previous section that despite its lack of force, the anti-disclosure criticism levelled against environmental mediation is, in principle, a formidable one. In this section, the author will argue for statutory guarantee of

⁴⁴⁷ Schwartz,R.,The Skilled Facilitator: Practical Wisdom for Developing Effective Groups (Jossey-Bass Publishers, 1994).

⁴⁴⁸ Ibid.

privilege for the environmental mediator but at the same time, demonstrate that there is indeed the potential of enhancing access of persons to environmental information through this means.

Without being specifically protected under national law, confidentiality as enunciated under the institutional rules will not avail parties to mediation. What happens in practice is that parties enter an agreement to guarantee confidentiality either as part of the agreement to mediate⁴⁴⁹ or as a separate contract⁴⁵⁰. But the validity of such contracts in judicial proceedings is open to doubt.⁴⁵¹ The risk always looms that a court may find the agreement “void as against public policy”.⁴⁵² So far therefore, the strongest protection that can avail the parties and the mediator is a statutory guarantee of privilege.⁴⁵³ Opinion is strongly divided on this issue, and so the question is: To grant or not to grant?

Proponents of mediator privilege have given various reasons for their view.⁴⁵⁴ Some assert that the tension between litigation and mediation is compounded by the uncertain legal status of confidentiality, thus necessitating clear legal protection of the mediator, which can only be guaranteed by statute.⁴⁵⁵ If the mediator’s privilege is not enshrined in law, third parties can easily subpoena him to testify in respect of any aspects of the mediation.⁴⁵⁶

There is every reason for mediators to be wary of such a development. Compelling mediators to testify or to produce their notes on the mediation would

⁴⁴⁹ See Appendix 1.

⁴⁵⁰ See Appendix 2.

⁴⁵¹ Brown, H and A., Marriott, *Protecting Confidentiality in Mediation* (1984) 98 Harvard Law Review 441, pg. 450.

⁴⁵² Cronk v. State, 100 Misc. 2d. 680, 686,420, N.Y.S.2d, 113 117-118, where a contractual agreement could not bar the hearing of evidence.

⁴⁵³ See Leipmann, supra FN 70, pg. 96.

⁴⁵⁴ Gray, O.V., *Protecting Confidentiality of Communications in Mediation*,36 Osgoode Hall Law Journal, 4 (1998), where he states that in order to guarantee his neutrality, the environmental mediator must be recognised as having a special privilege. See also Leipmann, supra FN 70, pg. 95- “Unless environmental mediators are granted testimonial privilege, and their written communications are protected from compulsory process sought by third parties, environmental mediators may not be able to honour their promises of confidentiality.”

⁴⁵⁵ See Freedman, L.R., and M.L., Prigoff; Confidentiality In Mediation: The Need For Protection; 2 Ohio St. J. on Disp.Resol.37 (1986-87)pg. 39.

⁴⁵⁶ Leipmann, supra FN 70, pg.108.

seriously damage the integrity of the process, and discourage prospective parties and the public in general from using mediation.⁴⁵⁷ Writers agree that this will be of immense consequence to environmental mediation because there are compelling reasons for which mediation must be preferred to litigation, in the resolution of environmental disputes⁴⁵⁸.

Should a mediator be compelled to testify in court against any one of the parties, it would be difficult for him to assert, or for the parties to recognise his impartiality, irrespective of the extent to which his testimony is objective.⁴⁵⁹

Absence of mediator privilege also has repercussions for the actual conduct of mediations. An apprehension of future compulsion would interfere with the disposition of the mediator, because he will preoccupy himself with maintaining a clear record that will withstand the rigours and intrigues of courtroom scrutiny.⁴⁶⁰ Specifically, the mediator may avoid taking any notes of the process where there is the likelihood of compelling their production.⁴⁶¹ The mediator may adopt a less spontaneous, overly deliberate style, and become less willing to utilise any unconventional strategies which encourage compromise and creative resolutions between the parties.⁴⁶² Alternatively, he may constantly gauge the information he solicits with a view to minimising the scope of evidence, for the knowledge of he

⁴⁵⁷ Harter, P.J., *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality* (1989)41 Admin. L.Rev. 315 pg. 32, See also Gray, Supra, FN 445, pg. 674: "Disputants may be deterred from resorting to mediation voluntarily, or from participating meaningfully in a mandatory mediation if they know that a mediator may later be compelled to testify against their interests".

⁴⁵⁸ See McCarthy, Negotiating Settlements: A Guide to Environmental Mediation (1984, pg 55.)

⁴⁵⁹ See Harter, supra FN 458, pg. 43.

⁴⁶⁰ McCrory, *Environmental mediation-Another Piece for the Puzzle* (1981)6 Vermont L.Rev. 49 pgs. 56-58.

⁴⁶¹ See Leipmann, supra FN 70, pg.109; referring to certain Guidelines for mediators under a Florida Dispute Resolution programme which advises that "if notes are taken during a mediation hearing..., once the procedure is over, discard whatever is not required to adequately maintain the files.", Citing Freedman; *Confidentiality: A Closer Look in Alternative Dispute Resolution: Mediation and the Law- Will Reason Prevail?* (1983), Special Committee on Dispute resolution, Public Services Division, American Bar Association, pg. 70.

⁴⁶² Recall that flexibility is one of the hallmarks of environmental mediation .the mediator is generally not subject to court rules of procedure. He therefore enjoys a free hand in instinctively altering procedures so as to meet the needs of changing situations- playing by ear.

potentially stands to jeopardise the privacy of the informing party.⁴⁶³ Such defeatist reactions can only work to banish the professionalism and efficiency characteristic of mediation. On this point, a learned author has cautioned that “If a mediator could be sued, form could prevail over substance and procedural flexibility could be the victim”.⁴⁶⁴

Opponents of statutorily protected mediator privilege have countered the above arguments point for point. They argue that neither common law nor public policy accommodates such a privilege and that there is no compelling reason to upset the norm.⁴⁶⁵ At common law, it is presumed that the public is entitled to every person’s evidence.⁴⁶⁶ A system which upholds non-disclosure of mediation communication is fundamentally at odds with this presumption and contrary to the ends of justice it is argued.⁴⁶⁷

In the litigation of certain environmental cases, the mediator may be the only source of information upon which a plaintiff may rely to prove the harm,⁴⁶⁸ or potential health hazard, for which relief is sought. The consequence of statutory privilege of the mediator in this respect may be calamitous, particularly where action to be taken in pursuance of the verdict is of a permanent nature.⁴⁶⁹

Environmental mediation is generally not subject to any regulations or common standards.⁴⁷⁰ Mediators are generally not licensed practitioners. In essence, they are accountable to no one.⁴⁷¹ As a wholly consensual process, parties are free to quit at any time and there are no guidelines or restrictions for parties who desire to dispense with mediators’ services or summarily sue them. The knowledge of

⁴⁶³ See Gray, O.V.supra, FN 305, pg. 675.

⁴⁶⁴ See McCrory, supra FN 461, pg. 56.

⁴⁶⁵ See Freedman, supra FN 212, pgs. 68-69.

⁴⁶⁶ Cases cited for this position include United States v. Nixon [1974] 418 U.S 683, 709; and Blackmer v. United States (1932) 284 U.S. pg. 421.

⁴⁶⁷ Freedman, supra FN 212, pg. 68, citing Elkins v. United States [1960], 364 U.S 206, pg. 234.

⁴⁶⁸ See Leipmann, supra FN 70, pg. 105.

⁴⁶⁹ Ibid.

⁴⁷⁰ A cursory examination of any mediation text or report will disclose one thing- that it is a narrative of the writer’s “tested and trusted” individual approach or style or pattern.

⁴⁷¹ See Freedman and Prigoff; supra FN 212, pg. 440.

the mediator that he could be subjected to judicial review, they argue, will act as a check on his excesses and as a deterrent to any dishonest practices.

Other opponents believe that since mediation has sailed smoothly to the wide practice that it now enjoys, without being seriously disadvantaged by a lack of mediator privilege, the need for such privilege remains elusive.⁴⁷² But this argument is countered by the fact that in many jurisdictions, environmental mediation is conducted under an assumption that it is privileged⁴⁷³, making parties less inclined to subpoena the mediator. As earlier pointed out, to be truly neutral the mediator's privilege must be both apparent and real.⁴⁷⁴

In order to grant the privilege therefore, the widely known Wigmore test establishes four principal conditions which the courts must ascertain in order to accord a mediator with privilege in any circumstance:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁴⁷⁵

⁴⁷² See McCrory; supra FN 461, pg. 57; In the light of the recently decided United States cases of Foxgate and Olam for example, it is doubtful that this argument can still be reasonably made.

⁴⁷³ See Freedman and Prigoff, supra FN 212, pg. 442. They caution that such presumption of privilege in favour of the mediator makes it even more imperative that a statutory privilege be granted "in order to match reality with belief".

⁴⁷⁴ *Ibid.*, pg. 446.

⁴⁷⁵ Wigmore, J.H., Evidence in Trials at Common Law, (Boston: Little Brown, 1961), Vol. 8 at Paragraph 2285. It is necessary to point out that though statutory guarantees of confidentiality as proposed here may be ideal nationally, on an international level, it stands the risk of being thwarted when another country has no similar protection. Therefore there is still need for international organisations like the International Bar Association (IBA), or bodies such as the UNCITRAL, to draft an international Convention on Mediation.

It is important to emphasize that when the mediator's privilege granted, the parties' access to important information will not be jeopardized. Although the task of the mediator is not fact-finding, he is required to diligently ascertain the parties' positions, their areas of agreement and of course, the compromises they are willing to make.⁴⁷⁶ This task does indeed require the mediator to know all the facts of the case. Therefore the general policy of privileges supports the granting of mediator privilege.⁴⁷⁷

The courts are familiar with the ethical dilemmas concerned with the granting of privilege to mediators. In United States v. Nixon,⁴⁷⁸ the court stated that privileges "are not created lightly nor expansively construed, for they are in derogation of the search for the truth".⁴⁷⁹ Therefore, in so far as the disputing parties are fairly and accurately represented in the mediation process, the reluctance of judges to create privileges because they hinder discovery of truth is, to my mind, inconsequential.

In the case of Adler v. Adams⁴⁸⁰, some neighbourhood and environmental groups who had taken part in a mediation over extension of a highway, argued that adequate cognizance was not given to their opinions since they were not physically present. The pertinent question has been why the mediator still carried on with negotiations. Talbot explains that owing to the fact that these parties declined to be bound by the outcome of the settlement, and were adamant about negotiating, the mediator resorted to a "second-best" solution which was securing the agreement of affected jurisdictions, particularly as this was acceptable to the planning authorities.⁴⁸¹ Cormick rationalises that factors such as the prospects of long delay in court (up to 5 years), exorbitant expense, or even losing government funding for the project, may have informed the mediator's decision to

⁴⁷⁶ See Leipmann, supra FN 70, pg. 121.

⁴⁷⁷ Elkins v. United States, 364 U.S. 206,233-34 [1960] particularly, the dissenting judgement of Frankfurter J.

⁴⁷⁸ See supra, FN 424.

⁴⁷⁹ See Wigmore, supra FN 476, pg. 710.

⁴⁸⁰ No. 673-73c2 (W.D.Wash. 1979.)

⁴⁸¹ See Talbot , supra FN 76, pg. 96

continue with the mediation.⁴⁸² A mediator must therefore ask himself, prior to commencing any negotiations, whether all the parties who have a stake in the outcome of the negotiations are represented.⁴⁸³

Confidentiality in mediation does not necessarily hinder the smooth running of litigation. Environmental mediation is a dispute resolution process necessitated by circumstances of increasing inadequacy of the litigation model. Information obtained in the course of mediation is often generated strictly for that purpose and would be non-existent without the occurrence of the mediation. Therefore, it is inconceivable that mediation would prevent the production of otherwise admissible or discoverable, relevant evidence. If the mediation itself is the subject of a suit, there ought to be no doubt that such information can be appropriately tendered in evidence before a court.

Going by the rules establishing it, the right to access environmental information rests rather precariously. Nevertheless, it is a self-justifying right, the goals of which can, to a reasonable extent, be achieved within the mediation process itself.

⁴⁸² See Cormick and Patton, *supra* FN 52, pg. 92.

⁴⁸³ *Ibid.*

5 CONCLUSIONS

Mediation, though an imperfect art, is a better option for resolving environmental, and related disputes between foreign oil companies and host communities in Nigeria because it seeks amicable agreement, where courts seek verdicts, thereby preserving the relationship between these parties. Even without the emergence of mediation in preference to litigation in the field of environmental dispute resolution, the likely danger exists that these disputes may not be accurately and fairly resolved, owing to the numerous administrative loopholes which attend the judicial settlement of these disputes. Judges lack the time, the know-how, and even the rules (precedents) to enable the proper handling of environmental disputes. Worse still, unavoidable delays caused by incessant adjournments and overloaded court dockets remind of the equitable maxim that justice delayed is justice denied.

The disputes themselves are not suited to the dynamics of litigation as litigable issues often conceal underlying feelings, prejudices, and age-old grievances, none of which would normally be addressed in the course of litigation, or even considered relevant. The situation is aggravated by the technical nature of the issues involved in these disputes, especially where the question relates to the adequacy of, or compensation for environmental damage/pollution resulting from oil and gas activities.

A successful mediation provides the parties with a chance to truly be heard, and to generate innovative solutions to their dispute, in a manner that focuses on the future and not the past. Its key advantages include the control which parties have over the process, especially in selecting their mediator, and avoiding trial. Nevertheless, environmental mediation is not a straight forward or an easy process, and its time-saving advantages are somewhat over-emphasised.

Conflict may have numerous negative impacts but it can be a catalyst for positive social change. The oil producing communities in the Niger delta region of Nigeria are indeed marginalized groups clamouring for redress of injustices and

inequities of resource distribution in the country. Conflict is therefore an inherent feature of their struggle for change. Mediation promises to provide the leverage they need to assert their claims and creates opportunity for building bridges between these communities and their erstwhile arch oppressors- the oil and gas developing companies.

Although these companies are large transnational conglomerates, which have sufficient financial resources to litigate for long and tortuous periods, coupled with the expertise and clout to always be sure of “victory”, they stand to benefit immensely from the mediation of their disputes with the local communities in significant ways. In transactions with developed countries like Canada and the United Kingdom, there is no acute need for amicable, contract based dispute mechanisms because these countries have long developed predictable and reliable judicial systems, providing valuable order to business disputes.

On the contrary, in Nigeria, many of the complex, technical issues resulting from oil and gas operations have not been previously dealt with by the courts. National laws are insufficient. Procedural safeguards for environmental litigation, where they exist, have not fully matured. Though the OGCs currently enjoy considerable government back-up, these days may be numbered as the new democratic dispensation gains momentum. Social pressure may bring to bear upon government policies, and the influence of governments of developing countries generally, over the judiciary, is an unquestionable fact.

Through mediation, the OGCs can acquire, and continuously renew their social license to operate. This would be evident in a reduction in the incidents of staff kidnapping and incessant disruptions of operations. The mediation of disputes with host communities will also provide the much-needed global image laundering, particularly in the cases of Shell and Chevron in Nigeria.

Like any other mediation, effective mediation of environmental disputes between OGCs and host communities in Nigeria requires three things: motivation of disputants, invitation of mediator, and mediator resources, especially skills. No

mediation can occur unless the parties to the dispute desire or at least acquiesce in the involvement of a mediator. The varying degrees, to which potential disputants may be motivated to settle a dispute or restructure/manage the terms of an agreement, may explain the difference in the use of mediation and other non-adversarial means of dispute resolution in any setting. While OGCs in Nigeria may be motivated to mediate environmental disputes because of expectations of profit, community members may have a strong incentive to use mediators in order to be compensated for environmental damage, and to achieve their empowerment goals, and these two would not necessarily coincide in every case.

To be effective, mediators in the oil and gas industry, like in other domain, must be substantially skilled and experienced. The essence of this requirement stems from their recognized ability to influence the parties to reach an agreement. These mediators generally have no coercive power. The basis of their influence essentially resides in the relationships they create with the disputants and their expertise. Legal knowledge, though of significant functional value, is not indispensable. More importantly, it should not constitute the main source of mediators' respect or influence.

Mediators' effectiveness and influence also comes from their legitimacy. This would principally be guaranteed by the signing of a mediation agreement/contract by the parties and the mediator, appointing him as such and promising to maintain the integrity of the process, particularly, its confidentiality.

Confidentiality is the key to the success of environmental mediation because, to a large extent, it guarantees the frankness of the negotiating parties and the sincerity of communications they exchange during the mediation process. Emphasis has been made on the point that mediation is not an information gathering exercise. Various mechanisms abound which are particularly aimed at obtaining environmental information.

However, in line with changing trends towards greater environmental accountability and the increasing “human rights” status of environmental rights in international domestic environmental law, mediation advocates are increasingly seeking ways of aligning the practice with the goals of public participation, community empowerment, and most importantly, access to environmental information. Chiefly, wider and more active participation of community members and groups is encouraged in these mediations as a means of ensuring the dispersal and inculcation of the informational benefits of any pollution mediation. Nevertheless, due caution ought to be applied in developing this trend because in the long run, mediation may not thrive if reasonable expectations of confidentiality are not met.

So far, the best option for aligning mediation practice with the growing demand for industry and government environmental accountability is to guarantee the privilege of environmental mediators by statute. Apart from securing the privilege and continuity of mediation practice, a properly framed mediation privilege will additionally act as a check on the excesses of the mediators, clearly stipulating instances when they will be compelled to testify as to the mediation proceedings and information or conduct, of both themselves and the participants.

Certain distinguishing qualities of environmental disputes justify the granting of professional privilege to environmental mediators over and above other mediators. These include the potential of permanent impact which pollution may have on the human and natural environment, the tendency of these disputes to involve government and public agencies, as well as the tremendous expenses and time required to litigate them.⁴⁸⁴

In future, it is expected that the practice of mediating environmental disputes will continue to grow in the oil and gas industry, and we are likely to witness statutory protection granted to mediators to accord them limited protection which would necessitate that they always act in good faith. This may have implications for the

⁴⁸⁴ See Leipmann, *supra* FN 70, pg. 126.

continued informal and flexible nature of mediation, as it presently exists. However, with increased recourse to the option will come increased testing of its potentials. It is important for members of the legal profession to join forces with environmental mediation advocates to bolster the fledging field, because ultimately, mediation would always be subject to the law, and the law courts.

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Appendix 1: Sample Agreement to Mediate

This is an agreement between _____ and _____, hereinafter "parties," and _____, hereinafter "mediator," to enter into mediation with the intent of resolving issues related to: _____.

The parties and the mediator understand and agree as follows:

1. Nature of Mediation

The parties hereby appoint _____ as mediator for their negotiations. The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative, consensual and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties are encouraged to secure such advice throughout the mediation process and are strongly advised to obtain independent legal review of any mediated agreement before signing that agreement. The parties understand that the mediator's objective is to facilitate the parties themselves reaching their most constructive and fairest agreement. The parties also understand that the mediator has an obligation to work on behalf of each party equally and that the mediator cannot render individual legal advice to any party and will not render therapy within the mediation.

2. Scope of Mediation

The parties understand that it is for the parties, with the mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation Is Voluntary

All parties here state their good faith intention to complete their mediation by an agreement. It is, however, understood that any party may withdraw from or suspend the mediation at any time, for any reason.

The parties also understand that the mediator may suspend or terminate the mediation if s/he feels that the mediation will lead to an unjust or unreasonable result, if the mediator feels that an impasse has been reached, or if the mediator determines that s/he can no longer effectively perform his/her facilitative role.

4. Confidentiality Absolute

It is understood between the parties and the mediator that the mediation will be strictly confidential. Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding. Only a mediated agreement, signed by the parties may be so admissible. The parties further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties. The mediation is considered by the parties and the mediator as settlement negotiations. The parties understand the mediator has an ethical responsibility to break confidentiality if s/he suspects another person may be in danger of harm.

5. Full Disclosure

Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party of the mediation if the mediator determines that the disclosure is relevant to the mediation discussions.

6. Mediator Impartiality

The parties understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation or in any court or other proceeding. The parties agree that the mediator may discuss the parties' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations, as all mediation negotiations must involve all parties directly. The mediator will provide copies of correspondence, draft agreements, and written documentation to independent legal counsel at a party's request. The mediator may communicate separately with an individual mediating party, in which case such "caucus" shall be confidential between the mediator and the individual mediating party unless they agree otherwise.

7. Litigation

The parties agree to refrain from pre-emptive manoeuvres and adversarial legal proceedings (except in the case of an emergency necessitating such action), while actively engaged in the mediation process.

8. Mediation Fees

The parties and the mediator agree that the fee for the mediator shall be \$_____ per hour for time spent with the parties and for time required to study documents, research issues, correspond, telephone call, prepare draft and final agreements, and do such other things as may be reasonably necessary to facilitate the

parties' reaching full agreement. The parties further understand that copying, postage and long-distance phone calls will be billed to them. The mediator shall be reimbursed for all expenses incurred as a part of the mediation process. A deposit payment of _____ toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this agreement. Any unearned amount of this deposit fee will be refunded to the parties.

The parties shall be jointly and severally liable for the mediator's fees and expenses. As between the parties only, responsibility for mediation fees and expenses shall be _____

The parties will be provided with a monthly accounting of fees and expenses by the mediator. Payment of such fees and expenses is due to the mediator no later than 15 days following the date of such billing, unless otherwise agreed in writing. A 1.5% monthly service charge will be made for any payment of fees and expenses not so timely made.

Should payment not be timely made, the mediator may, at his/her sole discretion, stop all work on behalf of the parties, including the drafting and/or distribution of the parties' agreement, and withdraw from the mediation. If collection or court action is taken by the mediator to collect fees and/or expenses under this agreement, the prevailing party in any such action and upon any appeal therefrom shall be entitled to attorney fees and costs therein incurred.

The parties understand that they shall be responsible for two hours of the mediator's time at the above stated rate for any appointment which they do not attend and do not provide at least 24 hours advance notice of the cancellation.

Dated this ____ day of _____, 200__

Source: Melamed, J., "Sample Agreement to Mediate", The Strauss Institute for Dispute Resolution (August, 1998) Available online at <http://www.mediate.com/articles/melamed6.cfm>, Last Visited 28/01/2004.

Appendix 2: Mediation Confidentiality Agreement

I. Confidentiality of Mediation

This Mediation is considered a private discussion. The only documents to be retained at the conclusion of the Mediation are the Agreement to Mediate, the signed Confidentiality Agreement and the Resolution Agreement. No notes, evidentiary information or case files are retained by the mediator after the Mediation is concluded.

The ADR Act of 1996 protects all communications and documents that are shared with the mediator in private. The mediator will not share information that you give him/her in private with the other party without your express consent. The mediator will not willingly testify on behalf of any party or submit any type of report on the substance of this mediation. Additionally, the mediator will not discuss the substance of the mediation with AMS management officials or other employees.

The parties understand that the ADR Act only covers private communications with the mediator. It does not protect oral communications made with the other parties present or documents a party makes available to other parties. Additional confidentiality can be agreed to by both parties, as specified in Part III below.

II. Exceptions to Confidentiality

In unusual circumstances, a judge can order disclosure of information that would prevent a manifest injustice, help establish a violation of law, or prevent harm to public health and safety. Further, information concerning fraud and criminal activity or threats of imminent harm will not be considered confidential in this mediation and must be reported immediately to the Alternative Resolution Program Manager or other responsible official.

By signature, I acknowledge that I have read and understood the Statement of Confidentiality of Mediation and the Exceptions to Confidentiality.

Participant

Participant

Participant

Mediator

III. *Agreement to Additional Confidentiality*

The parties understand that they can contract for **additional confidentiality** and they agree to do so in this matter. Specifically, the parties agree to keep oral communications or documents shared with the other parties confidential, unless required by court order to submit them. They agree to not discuss the substance of the Mediation with other AMS employees.

By signature, I acknowledge that I agree to keep confidential all oral and written communications shared in connection with this Mediation.

Participant

Participant

Participant

Mediator

Source: United States department of Agriculture (USDA), Alternative Resolution Service, available online at <http://www.ams.usda.gov/ar/forms/Confidentiality%20Statement.doc> , last visited 28/01/2004