

# Dispute Avoidance and Dispute Settlement in International Environmental Law

## – Conclusions by the International Group of Experts – \*

1. The UNEP Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II), which has among its objectives "to develop further the mechanisms to facilitate the avoidance and settlement of environmental disputes", has endorsed a strategy of developing "methods, procedures and mechanisms that promote, inter alia, informed decisions, mutual understanding and confidence-building, with a view to avoiding environmental disputes and, where such avoidance is not possible, to their peaceful settlement."

2. Dispute settlement has long been a focus of inter-State relations, and it remains an important tool for dealing with international environmental problems. Recently, the international community has paid increasing attention to the need to develop and use means of dispute avoidance, and to the closely related question of improving implementation of, and compliance with, international obligations. These concepts,

while being relevant to many fields of human activity, play a particularly important role in international environmental law because the behaviour leading to environmental disputes may cause grave harm, sometimes irreversible, to the environment and human health and because reparation, even if available, often cannot adequately compensate for environmental harm, such as long-term soil degradation, deforestation, and loss of biological diversity. In order to meet these concerns, recently negotiated regimes relating to international environmental issues have relied to a greater extent on dispute avoidance methods and approaches, using them in an innovative and multifaceted manner.

3. Sustainable development, which requires the integration of economic, environmental and social policies, provides an overall framework for avoidance and settlement of disputes in the field of environmental protection. Certain principles and approaches that are emerging in the process of achieving sustainable development, such as the precautionary approach, prevention

of environmental harm, common but differentiated responsibilities of States, global partnership and equity, are of particular relevance to the development of effective means of environmental dispute avoidance and settlement.

4. In developing dispute avoidance and dispute settlement regimes, it should be taken into account that the mechanisms contained therein are mutually supportive in serving the aim of enhancing and promoting implementation of and compliance with international environmental commitments. Dispute avoidance mechanisms which prevail during the pre-dispute phase, and dispute settlement mechanisms both serve the overarching aims of achieving peaceful and co-operative relations in the environmental field and avoiding environmental harm. Seen from this perspective, dispute avoidance has many advantages vis-a-vis dispute settlement, just as prevention of environmental harm is preferable to cure.

5. Where avoidance or prevention of disputes is not possible or has failed, the mechanisms of peaceful settlement of disputes are

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\* See also page 72 (UNEP/GC.20/INF/16).

essential. Article 33 of the United Nations Charter enumerates the following means of dispute settlement: "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements, or other peaceful means of [the disputing parties'] own choice." Most environmental agreements incorporate such means, among which the parties may choose.

6. Various mechanisms developed in environmental agreements for the wider purpose of implementation and compliance are of particular importance for dispute avoidance and can contribute significantly to maintaining a cooperative spirit between countries. They include the collection of data, reporting, fact-finding, inquiry, inspection, compliance procedures, consultation, capacity building activities, incentives, and gathering and sharing of information through, *inter alia*, transboundary environmental impact assessment and early notification.

7. In situations that are capable of leading to an environmental dispute, consultation between the parties concerned is likely to be helpful. This method of dispute avoidance deserves further elaboration and wider application.

8. A particularly promising recent innovation, also closely connected with dispute avoidance, is the development of compliance procedures, such as the procedure to address cases of non-compliance under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Typically, such mechanisms are multilateral, easily triggered, non-adversarial and facilitative and tailored to the specific circumstances of the particular regime. Multilateral compliance mechanisms have the following characteristics that warrant their increased use in addressing environmental problems:

(a) Compliance procedures are designed to be forward-looking, facilitative, non-confrontational and emphasize cooperation; whereas dispute settlement tends rather to be retrospective, time-consuming and confrontational.

(b) Environmental issues, in order to be dealt with satisfactorily, often require multilateral responses. Compliance procedures, which by their nature are multilateral, are better equipped to provide such a response than mechanisms of dispute settlement, which are bilateral in character.

(c) Compliance procedures aim primarily at enabling States to achieve compliance, rather than determining violations of international obligations. Thus, they are more effective for bringing about environmental improvement.

(d) In general, dispute settlement procedures depend on consent of the disputing parties. If such consent is not obtained, dispute settlement will not occur. Compliance procedures, being non-adversarial, are more easily triggered as their application typically does not require consent by the parties concerned.

9. In elaborating dispute avoidance and dispute settlement mechanisms with respect to a particular environmental problem, a comprehensive approach should be applied which

would also allow environmental problems to be addressed as early as possible. A comprehensive approach includes the formulation of norms which promote compliance and implementation and the creation of mechanisms designed to fit the specific situation on the basis of taking into account the nature of the environmental problem, the structure of the legal obligation, the actual capacities of the concerned countries, and other relevant circumstances. If public education, information, awareness and transparency are strengthened, there will be a better understanding of environmental problems and of the need for their early solution. This in turn will contribute to environmental dispute avoidance. Likewise, if scientific questions are identified and resolved using the best methods available, including enhanced scientific research on environmental issues, there will be less likelihood of environmental disputes arising.

10. It is important to build appropriate capacities in developing countries, including the development and strengthening of institutions, in order to enhance understanding of international environmental regimes and ability to comply with international obligations. This could be supported by transfer of technology and financial and technical resources as referred to in the Rio Declaration and Agenda 21. Similar actions may be appropriate with respect to countries with economies in transition.

11. Experience gained in addressing other international issues, e.g. in the fields of the law of the sea, human rights, disarmament and international trade law, should also be regularly monitored with a view to profiting from the best achievements in related contexts when elaborating and operating dispute avoidance and dispute settlement mechanisms in international environmental law.

12. Intergovernmental bodies, such as UNEP, can, and should, play an important role in facilitating and assisting in the avoidance and settlement of international environmental disputes by way of providing, as appropriate, scientific and technical expertise, fact-finding services, administrative, logistic and other support. Furthermore, intergovernmental organizations may exercise a facilitative role also by the improvement of channels of communication, through serving as a forum for discussions and consultations, and by convening international conferences and meetings. Activities within the framework of regional organizations and arrangements can be important in dispute avoidance and dispute settlement. Such activities should be enhanced since some environmental problems are best dealt with at the regional level.

13. Recent environmental agreements have established a range of institutions, including governing bodies and secretariats, which by reason of their functions can contribute to the settlement of disputes which may arise under such agreements. Further, certain agreements accord to such bodies specific functions which

promote the avoidance of environmental disputes.

14. International and regional financial institutions can, and should, play an important role in environmental dispute avoidance and dispute settlement. This role may be fulfilled through, *inter alia*: providing incentives to countries to resolve environmental problems, such as giving in appropriate cases financial or technical assistance; approving only projects that are environmentally sound and that, at the very least, do not create international tensions, but help relieve already existing tensions or serve to prevent the creation of new ones; and taking into account compliance by countries with their environmental obligations in approving projects.

15. Rapid developments in telecommunication and information technology have the potential to facilitate dispute avoidance and dispute settlement. They allow speedy and inexpensive "virtual meetings" and facilitate the spreading of environmentally sound technology and the collection, compilation, communication and dissemination of information. However, such technologies should be used with prudence, with particular attention to the capacity of all concerned States to use them. New data management techniques, such as those used by the United Nations Compensation Commission, can play a facilitative role in situations where many persons are injured by a single environmental incident; but the design of such techniques must be carefully coordinated with the relevant facts and the underlying legal questions.

16. Affected persons should have the opportunity to protect their interests in environmental issues in an effective manner, including access to administrative and judicial proceedings in the country where the potentially harmful activity is to take place or has occurred. Such access should be without discrimination on the basis of residence or nationality of persons who may be affected by adverse environmental consequences resulting from proposed or existing activities. As a means of dispute avoidance, therefore, it is important that legal systems grant to affected persons equal access to, and treatment in, administrative and judicial proceedings.

17. The role of civil society – such as individuals, environmental NGOs, the business community and trade unions – in helping to avoid disputes has been beneficial and should be enhanced in appropriate ways. Civil society can, for instance: provide technical assistance; alert governments and intergovernmental organizations to environmental problems; elaborate and implement voluntary codes of conduct in the private sector; provide relevant information and assist in information exchange and distribution; and enhance public awareness and acceptance of environmental regimes and thus promote compliance with those regimes. Civil society can also make a valuable input during the dispute settlement process. Moreover, public access to information and the decision-making process is essential. □