UNEP/PCA Advisory Group on Dispute Avoidance and Settlement concerning Environmental Issues

convened by the United Nations Environment Programme
in cooperation with the Permanent Court of Arbitration

Peace Palace, The Hague, The Netherlands, 2-3 November 2006

Executive Summary

1. Following on from previous work undertaken under the auspices of the United Nations Environment Programme (UNEP) in 1998-1999, an Advisory Group convened by UNEP and the Permanent Court of Arbitration (PCA) met in the Japanese Room at the Peace Palace in The Hague on 2 and 3 November 2006, to consider recent developments, including the work of PCA, in the field of dispute avoidance and settlement concerning environmental issues.

2. A list of participants is contained in Annex I.

3. The advisory group benefited from the following documentation:

    i. A report commissioned by UNEP on Recent Developments in Dispute Avoidance and Settlement in Environmental Law by Dr. D. French (October 2006) (contents page included as Annex II);

    ii. A briefing note by UNEP on avoidance and settlement of environmental disputes (Annex III);

    iii. The publication *Dispute Avoidance and Dispute Settlement in International Environmental Law – Compilation of Documents* (UNEP, 2001); and

    iv. *The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* by Mr. D. Ratliff (LJIL, 2001).

4. The Advisory Group adopted a series of conclusions (Annex IV) with specific advice to UNEP as to how it might take forward its mandate with regard to the subject matter of the meeting.

5. The Advisory Group advised UNEP to develop sets of guidelines, through the convening of government and other experts, on:

    i. Ways of increasing access to justice on environmental matters, inter alia, through public interest lawsuits to apply and implement environmental laws;

    ii. Use of preliminary remedies in environmental disputes; and

iii. Use of environmental expertise in dispute settlement concerning environmental issues (e.g., with respect to the qualifications of third parties such as mediators and arbitrators, involved in dispute settlement and as an input to dispute settlement processes).

Summary of Meeting

6. Mr. T. van den Hout, Secretary-General of the Permanent Court of Arbitration, welcomed the experts to the Peace Palace and opened the meeting with some general remarks about the importance of dispute settlement. He elaborated on the difficulty in defining international environmental disputes, and pointed out that there is an inextricable link between natural resources disputes and those concerning the environment. He thereby emphasised that environmental disputes are often highly politicized, which politicization affects such disputes' justiciability. He also discussed the recent experiences of the PCA in international environmental dispute settlement and dispute avoidance, and encouraged the experts to arrive at conclusions that could give guidance to future policy makers, states, lawyers, judges, and international organizations which would encourage peaceful resolution of international environmental disputes in a law based forum, and demonstrate how the existence of dispute resolution clauses in an agreement may prevent disputes from arising.

7. Dr. I. Rummel-Bulska, Principal Legal Officer and Chief, Environmental Law Branch, Division for Environmental Law and Conventions, UNEP, welcomed the participants and expressed her delight and gratefulness that such a prominent group of experts accepted the invitation. She explained UNEP's mandate in this area, based on the third Montevideo Programme for the Development and Periodic Review of Environmental Law, adopted in 2001 by the UNEP Governing Council. One of the important subjects in the Montevideo Programme is avoidance and settlement of environmental disputes. It has the objective to improve the effectiveness of measures and methods for their avoidance and settlement. The strategy to reach this objective is through developing and promoting new and existing means for avoiding environmental disputes and, where such avoidance is not possible, for their peaceful settlement. The Montevideo Programme identifies among other actions to be undertaken by UNEP in coordination with States to: "Identify the most effective mechanisms for settling environmental disputes" and to "Promote innovative approaches and mechanisms for settling environmental disputes." She further elucidated UNEP's expectations of the meeting, which would hopefully give guidance to UNEP and its partners could do in the field of dispute avoidance and settlement concerning environmental issues. She emphasized the necessity to look at the issue from the national, regional and global perspective. As an example, she highlighted the emergence of national environmental tribunals as a rising trend at national level.

8. A paper on Recent Developments in Dispute Avoidance and Settlement in Environmental Law was presented by Dr. French. In particular, he sought to raise two broader – systematic – issues, namely (i) the extent to which there is a

conceptual and/or principled framework to what currently exists and (ii) whether the current array of mechanisms and procedures in place is at risk of causing fragmentation, both institutionally and in terms of a developing jurisprudence? His suggestion was that if the international community wishes to try to avoid, as it claims it does, the risks of fragmentation and incoherency in approach to global problems, then as far as possible, and in the light of the peculiar demands of individual situations, dispute avoidance and dispute settlement mechanisms should reflect and be grounded upon a coherent conceptual base. As regards issue (ii), a distinction was made between institutional proliferation and incoherence in the developing jurisprudence, and recognized both the challenges and opportunities of ensuring a more integrated approach. In conclusion, it was suggested that there is a real case to be made to reflect on some of the broader systematic issues surrounding environmental dispute avoidance and dispute settlement, including (a) consideration of the necessity of elaborating a conceptual framework in this area, (b) adopting a much more critical approach to the benefits and risks of institutional proliferation and (c) seeking to develop a more integrated approach in judicial reasoning, to avoid the emergence of a disparate jurisprudence.

9. Prof. D. Magraw presented some comments on the issues of transparency and public participation in environmental dispute avoidance and settlement. He addressed the role of four inter-related issues with respect to the avoidance and settlement of environmental disputes, namely (1) transparency, also referred to as access to information; (2) public participation; (3) access to justice; and (4) accountability. He elaborated on the serious problems with respect to each of these issues, and pointed out that this meeting could make a significant contribution to resolving all four. His remarks are attached as Annex V.

10. The discussion was assisted by the circulation of a paper by Mr. D. Ratliff (PCA Legal Counsel) on five key questions (see Annex VI).

11. A number of participants highlighted issues that they would have liked to have seen included, or discussed in more depth. These included:

    i. the increased reliance by civil society on dispute settlement procedures, particularly at the national level (specific reference being made to recent high-profile cases in Nigeria and South Africa);

    ii. the establishment of bespoke funds within the climate change regime to promote further implementation by developing country Parties and least developed country Parties of their commitments;

    iii. greater attention to regional examples of dispute avoidance and settlement.

12. As regards the more wide-ranging debate of general topics, issues considered included (highlighted here only as a summary):

i. the scope of the topic under discussion (in particular, to what extent natural resource management should be considered alongside environmental protection?);

ii. the linkages between dispute avoidance and dispute settlement;

iii. institutional proliferation and the risks of incoherence (in particular, tensions between State sovereignty and harmonisation);

iv. public participation and transparency (e.g., (i) third party intervention and *amicus curiae* briefs, (ii) variable public participation in environmental impact assessment, (iii) cultural barriers to effective public participation, and (iv) alternative – more collaborative – modes of dispute avoidance and sentence);

v. developments at the national level;

vi. issues in recent case-law (e.g., (i) restrictive incidental procedures of ICJ, (ii) inclusion of references to soft law (i.e., in the PCA *Iron Rhine* arbitration);

vii. instructive examples from other areas that may be of some utility in this area (e.g., (i) CESCR periodical reports, (ii) proposed universal peer review under the Human Rights Council, (iii) rules on multiplicity of forums as found in private international law);

viii. potential relevance of *actio popularis* /countermeasures by non-injured States; and

ix. role of UNEP, especially at the national level (e.g., developing relevant guidelines and disseminating best practice).

13. Referring to the conclusions of the International Group of Experts on Dispute Avoidance and Settlement UNEP that convened in 1998 and 1999, it was noted that things had changed since that time, in particular there was an increase in examples of public participation at the national level, increase in number of relevant cases and increase in range of non-compliance mechanisms.

14. Issues further considered included:

i. semantic and conceptual notion of a ‘dispute’ (in particular, whether or not there is a need to consider it in purely legal terms – many participants noted that whilst ultimately there must be a ‘legal’ element, dispute avoidance is not just about rules and principles, but also practicalities and methodologies);

ii. the emphasis of dispute avoidance on prevention (i.e., the period prior to ‘crystallisation’ of the formal dispute);

iii. different ‘phases’ of dispute avoidance (one participant suggested that there was a continuum ranging from (i) not being aware of what is happening (thus justifying a right to information), through (ii) wanting to play a role in decision-making (thus justifying a right to participate), (iii) the use of formal dispute avoidance measures (to seek to mitigate negative consequences) and finally (iv) admission of a formal dispute (and recourse to dispute settlement mechanisms));

iv. mechanisms of dispute avoidance (a wide-ranging discussion including consideration of both ‘techniques’ (i.e., availability of appropriate information, existence of forums for debate, capacity-building and infrastructure, collaborative problem-solving) and regional experiences);

v. significance of public participation and access to information in dispute avoidance;

vi. role of local and indigenous communities in dispute avoidance;

vii. recognition that whilst UNEP can validly consider, and give guidance on, the range of actors involved and techniques that are appropriate in dispute avoidance, analysis of the causes of disputes is beyond its purview;

viii. the development and dissemination of guidelines on access to justice on environmental issues;

ix. to what extent proliferation of mechanisms and institutions is, in itself, a cause of concern;

x. the lack of recourse to formal dispute settlement provisions within environmental agreements;

xi. role of UNEP in this area / what States may find useful (e.g., dissemination of information / identification of best practice / maintaining up-to-date databases on institutions / case-law at all levels (national, regional and global));

xii. how to promote expertise in arbitration / judicial settlement, both in terms of who the arbitrators are and when/how scientific/technical ‘experts’ should be utilised;

xiii. role of PCA Environmental Rules as providing a good starting-point for the development of more general rules/principles;

xiv. interdisciplinary nature of environmental arguments and the effect of this on arbitration / judicial settlement;

xv. whether how one defines an ‘environmental dispute’ is relevant (nb. the answer to this may be different at the national and global levels);

xvi. identification of common concepts, principles, and themes;

xvii. importance of preliminary procedures (i.e. provisional measures) in environmental dispute settlement, at all levels;

xviii. limitations of current remedies;

xix. current ‘difficulties’ in national environmental dispute settlement (including preliminary measures, remedies, difficulties of a statute of limitations, *res judicata*, limited role of criminal law, civil participation and locus standi, nature of environmental damage, etc); and

xx. enforcement of dispute settlement awards (an interesting example of a ‘soft’ provision can be found in the PCA Environmental Conciliation Rules, which at article 12.4 provides for the possibility of the establishment of an Implementation Committee to advance a settlement agreement).

15. The Advisory Group formed a drafting sub-group under the rapporteurship of Prof. Magraw with a view to prepare a draft of the content of conclusions of the meeting which were considered and discussed in the plenary.

16. The general structure and foundation of the conclusions were largely supported and discussions were primarily limited to more specific issues and matters of language, agreement being reached on all points by consensus.

17. It was agreed that the next step would be for UNEP, with PCA, to convene a larger group, containing governmental experts, to begin considering guidelines of the topics identified in the conclusions.

18. Following the adoption of the conclusions, the Advisory Group concluded, with thanks being given to the co-chairs, UNEP and PCA staff members present, the UNEP consultant, the drafting group rapporteur, and, more generally, to UNEP and the PCA.

Annex I

United Nations Environment Programme

Permanent Court of Arbitration

Advisory Group on Dispute Avoidance and Settlement Concerning Environmental Issues

Peace Palace, The Hague, 2-3 November 2006

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Annex II

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Annex III

UNEP NOTE ON AVOIDANCE AND SETTLEMENT OF ENVIRONMENTAL DISPUTES

(The Hague, 2-3 November 2006)

1. Introduction

The latest Montevideo Programme for the Development and Periodic Review of Environmental Law, which sets UNEP's activities in the field of environmental law, was adopted in 2001 by the UNEP Governing Council. One of the important subjects in the Montevideo Programme is avoidance and settlement of environmental disputes. It has the objective to improve the effectiveness of measures and methods for their avoidance and settlement. The strategy to reach this objective is through developing and promoting new and existing means for avoiding environmental disputes and, where such avoidance is not possible, for their peaceful settlement. The Montevideo Programme identifies among other actions to be undertaken by UNEP in coordination with States to: "Identify the most effective mechanisms for settling environmental disputes" and to "Promote innovative approaches and mechanisms for settling environmental disputes."

Governing Council Decision 22/17 IIA adopted in 2003 calls on the Executive Director to support… the improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law… to carry out their functions on a well informed basis with the necessary skills, information and material with a view to mobilizing the full potential of the judiciaries around the world for… promoting access to justice for the settlement of environmental disputes.

Among UNEP's previous activities in the area of dispute avoidance and dispute settlement in environmental law, three expert working groups were held on the issue, and their conclusions were submitted to the Governing Council, who noted with appreciation this study at its 20th session in 1999. In 2001, the results of the study and further relevant documents were compiled in a publication entitled "Dispute avoidance and dispute settlement in international environmental law".

2. Recent developments in relation to environmental dispute avoidance and settlement

During the last years, a large number of new developments have taken place on environmental dispute avoidance and settlement, at the international, regional and national levels. Environmental disputes are growing in quantity, and an abundance of environmental-related subjects is being considered by various judiciary and arbitration bodies.

Among the noteworthy developments that have taken place over the last few years are current events such as:

- the Lebanon oil spills, demonstrating the link between environmental disputes and environmental security;
- the Argentina/Uruguay Pulp Mills Case, being the first dispute of a predominantly environmental character before the International Court of Justice;

- the environmental and natural resources related disputes before the WTO Dispute Settlement Body;
- the environmental and natural resources disputes before PCA administered tribunals, including the first ever maritime delimitation cases submitted to UN Convention on the Law of the Sea Annex VII Tribunals;
- compliance procedures and dispute settlement under the UNFCCC and the Kyoto Protocol; access to justice for individuals and environmental liability dispute settlement;
- lack of recourse to dispute settlement procedures in MEAs;
- the increase in cases involving environmental measures and recourse to arbitration under bilateral investment treaties;
- elements of the "common but differentiated responsibilities"-debate and the view of environmental dispute settlement in developing countries;
- the increased establishment of specific national environmental courts; and
- the multiplication of the amount of cases containing environmental concerns before national and regional courts and/or other judicial bodies.

3. Exploring possible actions

UNEP considers it important to review these developments that have taken place, and wishes to solicit views of a prominent group of experts on how the international community can be engaged to develop a more comprehensive view of the current compartmentalized developments. Issues that will be discussed are, among others:

- What are the common features, if any, among the recent developments as described above?
- What can be done at the international, regional and national level to enhance dispute avoidance and settlement?
- Is there any role for an intergovernmental or international institution to attempt to frame these developments, or at least keep track of them?

UNEP supposes not only to keep record of the proliferation of developments in environmental dispute avoidance and settlement, but, in accordance with its catalyzing role, aspires to examine if any specific actions can be undertaken. It might be possible to provide the wide range of institutions and bodies involved in environmental dispute avoidance and settlement with some guidance, for instance on applicable concepts/principles, such as locus standi, action popularis, etc.

UNEP envisages that the work of this expert group will feed into the next stage of the Montevideo Programme processes, which will start in 2008 and is expected to set out UNEP's environmental law activities including areas of concentration for the next decade.

It is our expectation that the expert group meeting UNEP is organizing in partnership with the Permanent Court of Arbitration (PCA) will address the above issues, while building on previous work undertaken in the area. We are pleased to work together with PCA since this renowned intergovernmental organization has taken the lead in developing some innovative approaches to environmental dispute avoidance and settlement.

Annex IV

Advisory Group on Dispute Avoidance and Settlement Concerning Environmental Issues

(convened by the United Nations Environment Programme (UNEP)
in cooperation with the Permanent Court of Arbitration (PCA)
Peace Palace, The Hague, The Netherlands, 2-3 November 2006)

Conclusions

Introduction

UNEP has dealt with issues relating to the avoidance and settlement of disputes concerning the environment for several decades, including pursuant to the Montevideo Programmes for the Development and Periodic Review of Environmental Law (II and III) and Governing Council Decision 22/17 IIA (2003). A group of experts formed in 1998-1999 submitted conclusions to the Governing Council, which noted with appreciation this study at its 20th Session in 1999. The UNEP/PCA Advisory Group on Dispute Avoidance and Settlement Concerning Environmental Issues met at the Peace Palace in The Hague on 2 and 3 of November 2006 and reviewed recent developments, including, *inter alia,* the work of the PCA and the ICJ in the field of environmental dispute settlement.

The following are the Conclusions of the Advisory Group:

1. The avoidance and settlement of disputes concerning environmental issues should be understood and approached in a broad sense, considering all relevant approaches and techniques. What will be effective in one situation or jurisdiction may not be as effective in another, due to specific factors such as the legal norm in question, the environmental conditions at stake, the particular actors and stakeholders concerned, the institutions that may be involved, cultural considerations that may be relevant, and the level at which the problem is arising.

2. Environmental problems arise at national, regional and global levels. Dispute avoidance and settlement procedures must also be considered at these levels, which are often interrelated. Activities could include, *inter alia*, all of the methods articulated in article 33 of the United Nations Charter at the international level, and their counterparts at the national level. Thus legal and non-legal methods should be considered.

3. In the field of environmental protection in particular, harm to the environment and human health and the disputes that often arise therefrom should be prevented as far as possible. Thus efforts to avoid disputes need to be taken early and consciously as a priority. It has become one of the major trends of international and national environmental law-making to address the environmental problem by tackling potential disputes at the earliest possible time and thereby seek to prevent harm to the environment and human health.

4. 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 for achieving sustainable development, such as precaution, the prevention of environmental harm, common but differentiated responsibilities of States, global partnership and equity, the polluter pays principle, environmental impact assessment

and integrated permitting are of particular relevance to the development of effective means of environmental dispute avoidance and settlement at national, regional and global levels.

5. Dispute avoidance and dispute settlement are linked at national, regional and global levels. For instance, the inclusion of a binding dispute settlement clause in an environmental agreement might encourage the parties to that agreement to implement it. This linkage should be explored and elaborated, with an eye to furthering the protection of the environment and human health.

The work on the avoidance and settlement of disputes concerning environmental issues should focus on the following:

I. With respect to both avoidance and settlement of disputes concerning environmental issues:

1. Taking into account that transparency and meaningful access to information are at the core of efforts to protect the environment and human health at all levels and are essential to the avoidance and settlement of disputes concerning environmental issues, UNEP should explore and promote the most appropriate methods to:

(a) increase the access of the public to information,
(b) ensure that information provided is in a form and manner that make it both accessible and comprehensible to the public.

2. Taking into account that public participation also plays an essential role in protecting the environment and human health, UNEP should further explore and promote public participation as it relates to:

(a) bringing environmental hazards to the attention of competent authorities and other stakeholders,
(b) commenting on proposed environmental agreements, laws and regulations,
(c) providing input to environmental impact assessments,
(d) filing *amicus curiae* briefs in cases raising environmental issues,
(e) monitoring and assessing the implementation of environmental agreements, laws and regulations,

bearing in mind the expanding set of actors involved in the international legal system.

3. UNEP should develop the following three sets of guidelines, through the convening of government and other experts, on

- Access to justice on environmental matters, including public interest lawsuits to apply and implement environmental laws,
- Use of preliminary remedies in environmental disputes
- Use of environmental expertise in dispute settlement concerning environmental issues (e.g., with respect to the qualifications of third parties such as mediators and arbitrators, involved in dispute settlement and as an input to dispute settlement processes).

II. With respect to avoidance of disputes concerning environmental issues:

1. In UNEP's capacity-building work with respect to formulating and adopting laws and agreements, it should seek to maximise:

(a) clarity of language,
(b) use of modalities to enhance implementation and compliance, such as data collection, reporting, monitoring, fact-finding, inquiry, inspection, auditing, compliance procedures, consultation, incentives, gathering and sharing of information through, *inter alia*, transboundary environmental impact assessment, early notification and compliance and enforcement indicators.

2. UNEP should also promote the use of collaborative problem-solving techniques in environmental decision-making.

III. With respect to the settlement of disputes concerning environmental issues:

1. In the light of the growth of mechanisms and bodies handling disputes concerning environmental issues, UNEP should compile and make available:

- a database containing national and regional specialist environmental tribunals,
- a database of international judicial and arbitral cases concerning environmental issues.

2. The Advisory Group also identified the following issues, in addition to those identified above, that are important with respect to the settlement of disputes concerning environmental issues, and recommends that they be taken up a later stage:

- type of remedies, such as restoration or compensation,
- statute of limitations, because of the frequently long delay between cause and effect,
- the possible role of criminal law,
- aspects of procedures to facilitate effective alternative dispute resolution (e.g., confidentiality in mediation),
- burden of proof.

The Hague, 3 November 2006

Annex V

Advisory Group on Dispute Avoidance and Settlement Concerning Environmental Issues

Transparency and Public Participation in Dispute Avoidance and Settlement

Remarks by Daniel Magraw, Center for International Environmental (CIEL)
2 November 2006

I was asked to address the role of four inter-related issues with respect to the avoidance and settlement of environmental disputes. These issues are: transparency, also referred to as access to information; public participation; access to justice; and accountability. As we shall see, there are serious problems with respect to each of these; and UNEP could make a significant contribution to resolving all four.

Focusing first on the settlement of disputes, I begin with the proposition that environmental disputes virtually always involve significant public policy issues. This is especially true of cases involving a State as a respondent, which, except for cases involving apportioning natural resources and territory, almost invariably allege wrongdoing of some sort by the State and may have major implications for the public fisc because of the amount of potential liability. Moreover, regardless of whether a State is a party, environmental disputes typically involve important natural resource allocation or preservation questions or serious public health issues. This tends to be true regardless of the provenance of the dispute, the process according to which it is being considered, the forum in which it is proceeding, or the level (global, regional or national) at which it is occurring. Examples include:

- International Court of Justice (ICJ) – the Gabcikova case and the Nauru case;
- Permanent Court of Arbitration (PCA) – maritime boundary disputes;
- International Tribunal on the Law of the Sea (ITLOS) – the Blue Fin Tuna case;
- World Trade Organization (WTO) – the Shrimp/Turtle case and the Brazil Retreaded Tyres case;
- Regional trade agreements (RTAs) – S.D Myers case (ban on export of PCBs) and Metalclad case (denial of a permit for a waste disposal site), both under the North American Free Trade Agreement (NAFTA);
- Bilateral investment treaties (BITs) – Cochabamba and Buenos Aires water cases and Chile fisheries case;
- Human rights agreements – San Mateo mine tailings-pollution case and Inuit climate change case, both in the Inter-American Commission on Human Rights;
- Multilateral environmental agreements (MEAs) – 2006 tragedy from hazardous waste illegally exported to the Ivory Coast;
- Ad hoc arbitrations – Greenpeace vs. France (Rainbow Warrior) arbitration; and
- National proceedings – myriad civil and criminal court cases, administrative proceedings, arbitrations and mediations concerning environmental issues.

With the exception of the human rights proceedings and many proceedings at the national level, each of these lacks fundamental elements of transparency, public participation, access to justice and accountability that characterize democratic legal systems governed by the rule of law. For example, in the ICJ briefs are ordinarily not released to the public before hearings and *amicus curiae* briefs are not allowed; in the WTO, hearings are almost always held *in camera* and briefs are not made public unless the parties agree; with rare exceptions (e.g., the NAFTA), under RTAs disputes are held *in camera*, submissions are not released to the public, and *amicus curiae* briefs are not allowed; under BITS, it sometimes is not even possible to know that disputes have occurred, and it is typically impossible for the public to see the parties'

submissions and often the holdings of the tribunal; and ad hoc arbitrations may occur without the public ever knowing they exist or having the opportunity to see the submissions or the ruling. It is thus clear that there is a tremendous democracy deficit in environmental dispute settlement.

This democracy deficit matters and should be eliminated; but this is not obvious to all persons. It is thus important to clarify why this is true. If we take transparency and opportunities for public participation as examples, we find that increasing them would serve important societal values.

Perhaps most importantly, increasing transparency and the opportunity for meaningful public participation would increase the quality of decisions. This is the case for several reasons. Increasing transparency and public participation would provide helpful information, ideas and perspectives otherwise unavailable to decision makers. It would create an incentive for all participants in dispute settlement to perform at a higher level of competence because these actors would know that their work product would be open to public scrutiny. It would decrease corruption, cronyism and nepotism in dispute settlement because sunshine disinfects (to paraphrase Justice Oliver Wendell Holmes). It would also reduce the risk of inconsistent results, because outcomes of disputes would be known and could be consulted in resolving related disputes and compared over time. In addition, transparency is necessary in order to enable public participation. Without pertinent information, public participation cannot occur in an informed and meaningful manner. Increasing transparency thus serves all of the interests served by public participation.

Increasing transparency and public participation would also increase the likelihood that decisions settling disputes will be effectively implemented. This is partly because the quality of the decisions is likely to be better (as described above) and partly because it will tend to increase the political will to implement decisions. There is a political adage: If you want people to be present at landing, they must be there at takeoff. This applies to dispute settlement just as in other areas.

Increasing transparency and public participation would also enhance the credibility and legitimacy of the dispute settlement process and outcome in question, because it will increase knowledge about how the process functions, combat any latent suspicion about the process, and increase confidence in its decisions. It will also increase the credibility and legitimacy of the legal system – international or national – for the same reasons. Increasing transparency and public participation would also support democratic values as a general matter because transparency and public participation are so central to democratic systems and the rule of law.

The fundamental importance of the benefits just described is particularly obvious with respect to protecting the environment and human health. As is well known, transparency and public participation of a variety of types have been crucial to catalyzing action and achieving improvements at both the international and domestic levels.

Finally, increasing transparency and public participation can be accomplished without undue cost, delay or disruption. This is demonstrable from the experience with: holding televised dispute settlement proceedings in the WTO and International Centre for the Settlement of Investment Disputes (ICSID); ICSID's register of cases and practice of posting the most recent developments in cases on its web site; NAFTA parties' release of their submissions and rulings in cases; and the acceptance of *amicus curiae* briefs by ICSID and WTO panels and the WTO Appellate Body.

The foregoing analysis is applicable to dispute avoidance as well as dispute settlement. This is evident from an examination of three examples. Cooperation – between different elements of society for both domestic and international problems, and among States with

respect to international problems – is often the best form of dispute avoidance with respect to environmental issues. There is an immense body of experience pointing to the conclusion that transparency and public participation are essential to successful cooperation. Similarly, transparency and public participation has been critical to improving the environmental performance of international financial institutions (IFIs), which has led to the avoidance of environmental disputes. Civil society was instrumental in convincing the World Bank to adopt environmental policies and to form the Inspection Panel; and the World Bank now requires that its projects have "broad community support" (which requires both transparency and public participation) which avoids environmental disputes, in addition to improving the overall likelihood that projects serve the goal of sustainable development. Third, the more than 100 fact-finding processes that have been conducted to avoid environmental disputes under the auspices of the International Joint Commission of the 1909 Boundary Water Treaty (Canada – United States of America) have used transparency and public participation to improve the quality of the information available to, and the legitimacy of, the processes.

There are essentially two approaches available to resolve the democracy deficit identified above. First, it could be approached on a piecemeal basis. This would involve trying to improve performance of specific dispute avoidance or settlement situations, processes, or institutions. Second, it could be approached on a systematic, coordinated basis, supported by a strong analytic framework. The former has the virtue of being susceptible to immediate action. Over the long term the latter has the advantage of being able to achieve greater consistency and a more reasoned prioritization, taking into account the full range of environmental issues and a more careful identification of the precise advantages of increased transparency and public participation in specific circumstances. They are not mutually exclusive; and I believe that both should be taken. Both approaches should take into account, of course, conditions and developments with respect to disputes that do involve environmental issues, since legal systems and the law cannot be neatly compartmentalized into environmental and non-environmental boxes.

UNEP could play several different roles with respect to achieving progress in these areas. First, UNEP could identify certain priority areas and seek to achieve progress in the short-term in these areas. This could involve, for example, exploring and appropriately promoting ways to achieve increased transparency (access to information), public participation, access to justice (which often includes the two foregoing elements), and accountability, in specific situations involving environmental issues in which dispute avoidance or settlement is advisable in the short term. Second, in the longer term, UNEP could engage in more overarching work applicable across a range of environmental dispute avoidance and settlement situations. Examples could include the preparation of guidelines on one or more of the four areas considered in my comments, or of an overarching analytic framework examining the benefits of one or more of these four areas. These projects are not mutually exclusive and could be engaged in simultaneously.

In undertaking work such as that just described, UNEP should consider working with partners such as the Permanent Court of Arbitration (PCA), in order to take advantage of the PCA's experience with the arbitration and conciliation of disputes relating to natural resources or the environment, as well as the convening capacity of the PCA. Other institutions with relevant experience include ICSID, the WTO, and the NAFTA Free Trade Commission and North American Commission on environmental Cooperation.

At a time when domestic and international legal systems are struggling with problems of governance, effectives and legitimacy, removing the democracy deficit in dispute avoidance and settlement ranks among the most important of UNEP's challenges and opportunities.

Annex VI

Advisory Group on Dispute Avoidance and Settlement Concerning Environmental Issues[*]

Key Questions

1. What elements influence the justiciability of international environmental disputes, and what factors motivate States to have recourse to adjudication or arbitration of an international environmental dispute; either as a discrete dispute or as an element in a larger dispute? As a sub-issue, what is the importance for international environmental law of environmental/natural resources disputes being increasingly resolved as part of a larger economic or territorial dispute?

2. What common principles and procedures are seen in environmental dispute resolution at the national, regional, and global level? Would these principles (and procedures to the extent they may be seen as principles) lend themselves to codification? Who are the common actors?

3. Is there a trend toward greater use of certain fora for resolution of such disputes, and how can any such trend be explained? What role do economic concerns, multinationals, and bilateral investment treaties play in the development of international environmental law? Are international environmental concerns encouraging use of such procedures?

4. Is proliferation of fora for resolution of international environmental disputes a positive or negative trend? For example, a multiplicity of fora for resolution of environmental disputes might mean that an urgent dispute could be addressed more quickly, but it might also mean that there is conflicting competence and create an obstacle to dispute resolution.

5. What are the links between dispute avoidance (non-compliance procedures) and dispute settlement, and should they be strengthened?

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[*] Presented by Dane Ratliff, PCA Legal Counsel.