

PD CAP 507

Robert E. Stein  
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January 13, 1986

Dear Mr. Stein:

I have received and reviewed your final report entitled "The Settlement of Environmental Disputes: A Forward Look" and find that it fulfills our expectations. I encourage you to contact L. Michael Hager, Director, International Development Law Institute because the report may be useful for the basis of training sessions that the institute might hold on dispute settlement. It may also be useful for similar sessions held by other organizations concerned with international environmental issues and legal aspects of development programs.

Best Wishes,

Stephen F. Lintner, Ph.D.

cc: SER/AAM/ST, J. Bergman

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**December 19, 1985**

**Dr. Steven Lintner**  
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**U.S. Agency For International Development**  
**Washington, D.C. 20523**

re. Purchase order No. NEB-0178-0-00-5178-00

Dear Steve:

Attached are ten copies of our report to the World Commission on Environment and Development **The Settlement of Environmental Disputes: A Forward Look**. I very much appreciated going over the report with you and hope that you find your comments reflected in the final version. As soon as I get back from my vacation, I will send a copy to Mike Hager with the suggestion that it be used as the basis of a training program that we might be able to develop together.

The report was an interesting one to write, and although this is the final version for the Commission, I suspect that over the next year it will be able to be further changed to reflect new practice.

I am sending a copy of this letter to Alan Eisenberg of your contract office in the expectation that we can now receive full payment of AID's portion of the contract fee.

With best wishes for a happy holiday, I will call you the first week in January when I return.

Yours sincerely,

  
Robert E. Stein

cc. Mr. Alan Eisenberg

*J*

**ENVIRONMENTAL MEDIATION INTERNATIONAL**  
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**The Settlement of Environmental Disputes**  
**A Forward Look**

**A Report for the**  
**World Commission on Environment and Development**

**By**  
**Robert E. Stein and Geoffrey Grenville-Wood**

**December 1985**

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**The Settlement of Environmental Disputes  
A Forward Look  
By  
Robert E. Stein and Geoffrey Grenville-Wood\***

**I. Introduction**

In its Mandate for Change, The Commission states that it wishes to examine new forms of cooperation:

"that can break out of existing patterns and influence policies and events in the direction of needed change."<sup>1</sup>

The Commission adopted an alternative agenda, that permits it "to consider and propose strategies that are mainly anticipatory and preventive in character, rather than reactive and curative."<sup>2</sup>

Thereafter, the Commission articulated the need for consideration of the ways in which environmental disputes could be avoided and settled. It is the purpose of this paper to provide for the Commission, a survey of the ways in which environmental disputes have been and are being avoided and settled and to make some suggestions as to the kinds of techniques that might be used, or used more frequently to make the process of avoiding and settling environmental disputes more effective.

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\*Robert E. Stein is President and Geoffrey Grenville-Wood is Vice President of Environmental Mediation International, an organization set up to use mediation and related techniques in the settlement of environmental and resource disputes. They direct EMI's offices in Washington D.C. U.S. and Ottawa Canada respectively. Jennifer Woods, a research assistant with EMI also contributed to the paper. Financial assistance for Research and Preparation for this paper was provided by the World Commission on Environment and Development and the U.S. Agency for International Development. Any mistakes or omissions are solely the responsibility of the authors.  
1.WCED, "Mandate for Change, Key Issues, Strategy and Workplan. Adopted by the Commission at its inaugural meeting in Geneva, Oct. 1984, and revised, 1985.

<sup>2</sup>Id. at p. 32.

## II. The Present Situation

At the UN Conference on the Human Environment at Stockholm, States agreed to a Declaration that contained principles of responsibility for environmental actions. Principle 21 provides the basis for international environmental responsibility when it states *inter alia* that:

"States have... the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."<sup>3</sup>

As noted above, there has also been an effort, both nationally and internationally, to review projects before they are approved with a view to assessing their environmental impact and thus avoiding environmental harm before it occurs. Some states, including the United States and Canada use techniques of environmental assessment to review activities before they receive approval by a national<sup>4</sup>, state<sup>5</sup> or provincial<sup>6</sup> agency.

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<sup>3</sup> The declaration was later approved by a vote of the United Nations General Assembly. Another part of that Principle confirms the right of the states to exploit their own resources pursuant to their own environmental policies. This phrase should be read in the context of the phrase quoted above. See, Sohn, "The Stockholm Declaration on the Human Environment" 14 Harv. Int'l. L.J. 423 (1973).

<sup>4</sup> In the US see National Environmental Policy Act 42 U.S.C. §§4321 *et. seq.* In Canada see the Environmental Assessment Review Process.

<sup>5</sup> See, for example the State Environmental Assessment Act of New York, (1975).

<sup>6</sup> Environmental Assessment Act of Ontario, R.S.O. 1980 c.

Internationally, multilateral lending institutions<sup>7</sup> as well as some bilateral aid agencies<sup>8</sup> and the European Communities<sup>9</sup> have provisions for environmental review of projects. Moreover, some multinational corporations have had some of their projects subject to environmental impact assessment, and through the World Industry Conference on the Environment have agreed to review projects for environmental impacts.<sup>10</sup>

For the purposes of this paper, the concern is not only with the importance of these procedures, but also with the ways in which the public, both individually and in groups, can have an opportunity to comment on and influence the environmental soundness of a project or program. The paper will also deal with ways in which such procedures may provide a forum for making known any disagreement with the conclusions reached. In the United States, there are provisions for using the judicial system to test the adequacy<sup>11</sup> or timeliness of an environmental impact system.<sup>12</sup> In Canada, a quasi-judicial tribunal system has been set up in some of the provinces and at the federal level to adjudicate an environmental impact assessment.<sup>13</sup> While the judicial system may not be appropriate in many countries, having some mechanism to accomplish this purpose that fits within the specific legal and social structure of the

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<sup>7</sup> See the Environmental Guidelines of the World Bank, (1984) and the Declaration of Environmental Policies and Procedures Relating to Economic Development adopted February 1, 1980 by the African Development Bank, Arab Bank for Economic Development in Africa, Asian Development Bank, Caribbean Development Bank, Inter-American Development Bank, World Bank, Commission of European Communities, OAS, UNDP, UNEP.

<sup>8</sup> Environmental Guidelines of US AID, 22 CFR part 216

<sup>9</sup> Council Directive of 27 June 1985 on the Assessment of the effects of certain public and private projects on the environment; Ten Years of Community Environment Policy. Commission of the European Communities, March 1984.

<sup>10</sup> Statement of the World Industry Conference on Environmental Management, Versailles, France, Nov. 1984

<sup>11</sup> See the National Environmental Policy Act, 42 USC §§ 4321 *et seq*

<sup>12</sup> See above

<sup>13</sup> See The Ontario Environmental Assessment Board, or The Federal Environmental Assessment Review Agency.

country involved is an essential aspect of preventing and settling environmental disputes before they have caused environmental harm.

### **National and International Disputes**

There are several types of situations where environmental disputes might arise. First, are disputes involving environmental problems that occur completely within a particular country.<sup>14</sup> This would include interjurisdictional disputes within a county, between different levels of governments. Second are those disputes with physical environmental features that cross a boundary.<sup>15</sup> Third, are those disputes affecting an area of the commons.<sup>16</sup>

International disputes may be settled on an ad hoc basis, or pursuant to an international agreement. Where there is an international agreement, a procedure is usually spelled out that may either be very general, obligating the parties to settle their disputes by peaceful means<sup>17</sup>, or very specific, setting out a variety of procedures and kinds of tribunals or mechanisms that are to be used in specific circumstances.<sup>18</sup> Between some countries eg. Canada and the United States, there is an existing institution, the International Joint Commission,<sup>19</sup> which has been given authority to settle certain disputes between the two countries by a variety of means. One recent case involved concern expressed by Canada and by environmental groups on both sides

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<sup>14</sup> It is recognized that there are certain environmental problems that have their origins and effects within a country but are of international significance. For example, international concern with a significant cultural building, or an endangered species.

<sup>15</sup> This category includes emissions into the ocean from land across boundaries, and long range transmission of air pollutants.

<sup>16</sup> For example, the oceans or Antarctica.

<sup>17</sup> Convention for the Protection of the Mediterranean Sea Against Pollution, Article 22.

<sup>18</sup> See Articles 186-91 and Appendix VI of the Third Law of the Sea Convention.

<sup>19</sup> Created by the Boundary Waters Treaty of 1909 between the United States and the United Kingdom on behalf of Canada.

of the border that the raising of a dam in the State of Washington to produce more power would flood wilderness recreation land in Canada. The Commission, which has authority to approve the raising and lowering of water levels across the border, set up a mediatory mechanism that was able to resolve the problem. The results were incorporated into an agreement between the City of Seattle and the Province of British Columbia, and were confirmed in a treaty concluded between the two national governments.<sup>20</sup>

In other international situations, there may be neither an international agreement governing the issue, nor an existing body that can be seized of the dispute. In that instance, states can choose mechanisms that seem useful and that are mutually agreeable. Domestically, the laws and procedures of a country govern the settlement of their disputes. Since the UN Stockholm Conference, the number of ministries or other government agencies working with environmental issues has grown dramatically. Over one hundred developing countries now have a high level administrative body to deal with the environment, compared to fewer than 10 in 1974.<sup>21</sup> Yet with procedures in place, both domestically and internationally, there are still a number of obstacles to the successful settlement of environmental disputes that need to be overcome.

### **Obstacles to Settlement**

One of the obstacles to settlement is the uncertainty of scientific data. For example, the U.S. administration announces that it does not know enough to regulate acid rain; industry questions how much cleanup is really needed at a hazardous waste site; a government official asks how much a decision maker needs to know before a policy decision is made to permit or stop an activity with possible environmental effects. Yet

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<sup>20</sup>See the Agreement between the United States and Canada, April 2 1984 on the Skagit River.

<sup>21</sup>Hoy and Bestisle, "Environmental Protection and Economic Development in Guatemala's Western Highlands" Vol. 18 J. of Developing Areas p. 161 (Jan. 1984).

there are cases where the lack of uniform scientific data has not held up action. An independent source to examine that data to provide guidance for the decision maker and to assess the risk of action and non-action may be useful.

A second obstacle to settlement is political will. Even if the decision maker believes that enough is known, decisions are slowed by political opposition, not always related to the issue at hand. For example, to support his constituents, a municipal official opposes the siting of a waste treatment facility in his political jurisdiction<sup>22</sup> or a government decides not to act on a situation of transboundary pollution because of other considerations such as trade or because its country is not affected by the emission.

Third, there are situations in which an economic reality clashes with an environmental one. If jobs are needed in an area, compromises may be made with pollution controls. In some developing countries, development activities are seen as contrary to environmental control.

Fourth, where attempts have been made to use some of the newer techniques of dispute settlement, such as arbitration, mediation or conciliation, they are at times not used, because they are "new", because governmental officials believe dispute settlement mechanisms will take power out of their hands, which it does with some of these techniques, such as judicial settlement or arbitration, more than it does others, such as mediation or conciliation. Finally, officials may well believe that the system is working well and that, with environmental laws in place, no further initiatives are necessary.

In its 1984 State of the Environment report, the UN's Economic and Social Commission for Asia and the Pacific (ESCAP) recognized that laws were not enough, and stressed the

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<sup>22</sup>In North America that has become known as the "NIMBY Syndrome" for Not In My Back Yard, and the facility is known as a "LULU" Locally Unwanted Land Use. See the report of the Institute for Environmental Negotiation, "Not in My Back Yard, Community Reaction to Locally Unwanted Land Use" University of Virginia, (1985).

importance of better implementation and enforcement of environmental legislation.<sup>23</sup> Implementation would certainly include the use of techniques that can more effectually assist in the avoidance and settlement of environmental disputes.

### III. Techniques for Change

There are a number of techniques that can be used to avoid as well as to settle environmental disputes. These include both formal and informal techniques. Often, use of mechanisms such as broader consideration during the earlier stages of the environmental assessment or a consultation process to assist in the avoidance or anticipation of environmental harm can be valuable.

Can this be done? Internationally, the anticipatory mechanisms usually looked to include consultation, information exchange and notification. Additionally as noted above, environmental assessments may be carried out by one country, with other affected countries participating.<sup>24</sup> Each of these techniques is important and can make easier some of the initial contact on a problem by other interested states.<sup>25</sup> The Nordic Convention of 1974 incorporates these principles of notification and consultation. However, some of these more formal techniques have been used successfully in some countries in the planning and assessment stages of the problem.<sup>26</sup> Environmental impact assessment can moreover be used to obtain agreement on policies or rules.<sup>27</sup>

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<sup>23</sup> See ESCAP, State of the Environment Report, 1984, pp.46-7.

<sup>24</sup> See for example, U.S. Executive Order 12114 which calls for joint assessments for activities carried out in a country other than the U.S.

<sup>25</sup> See OECD Principles on Transfrontier Pollution. See Lammers, principles 11,12,13,15.

<sup>26</sup> For example, the provisions of the Law of the Sea Convention, The U.S. Canadian International Joint Commission, or the Tripartite Commission for the Upper Rhine Region.

<sup>27</sup> Phillip J. Harter, "Regulatory Negotiation: The Experience So Far," Resolve, Winter 1984, pp. 4-10.

## **Formal Techniques**

1. Arbitration, the use of an independent third party to reach a conclusion on a matter submitted for decision, is increasingly being used internationally to settle commercial and related problems. Arbitration is usually more binding on the parties and even in most domestic systems cannot be appealed unless the arbitrator has acted arbitrarily. A number of international agreements call for arbitration to settle environmental disputes. Because of the newness of many of these agreements, their provisions have not yet been tested. Moreover, institutions such as the World Bank's International Center for the Settlement of Investment Disputes, (ICSID) or the International Chamber of Commerce's Court of Arbitration, as well as the arbitration procedures of The UN Conference on Trade and Development (UNCTAD) and the International Court of Justice's Permanent Court of Arbitration can all be drawn upon to provide qualified impartial arbitrators. While ICSID, the ICC, UNCTAD or the Permanent Court have not yet arbitrated environmental disputes, there certainly is no impediment to their doing so, if the parties choose to bring a dispute to them.

2. Mediation and conciliation involve the services of an independent third party who uses that position to bring the parties to a common agreement on a solution to a problem that the parties can accept. The mediator or conciliator may report to the parties but the essence of these techniques is that they are voluntary. The parties must agree with the decision. In some cases, these techniques may be preferable to arbitration. As one careful observer of international dispute settlement put it,

"The advantages attributed to domestic arbitration, speed, economy and informality are reversed in international disputes... UNCITRAL

Conciliation Rules, in contrast to the UNCITRAL Arbitration Rules, apply to parties seeking an amicable settlement of disputes rather than the adversary proceedings, such as arbitration and litigation."<sup>28</sup>

Another commentator adds that "Conciliation may be an advantage when you want procedural flexibility."<sup>29</sup> Thus, in addition to arbitration some of the institutions described above can also use mediation or conciliation to settle a dispute.<sup>30</sup>

Domestically, mediation has begun to be used in several countries specifically to settle environmental disputes. Mediators have been drawn from the private sector as well as from government agencies. A number of organizations now exist to supply impartial arbitrators and mediators, and in the United States, there have been over one hundred and sixty examples of environmental disputes being settled through the uses of mediation.<sup>31</sup> Internationally mediators can come from governments, international organizations, or the private sector. In one recent boundary dispute, the Holy See was asked to supply the mediator.<sup>32</sup>

3. A third option for the settlement of disputes is the use of legal proceedings. In some countries, legal actions have provided a vehicle for citizen groups concerned about environmental issues to officially make their views known and to enforce compliance

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<sup>28</sup> DeVries, "International Commercial Arbitration: A Contractual Substitute for National Courts" 57 Tulane L. Rev. 42 at 61 and 77 (1982).

<sup>29</sup> Amerisinghe, "Dispute Settlement Machinery in Relations Between States and Multinational Enterprises with Particular Reference to ICSID" 11 Int'l Lawyer p.57.

<sup>30</sup> Mediation is used by ICSID, UNCTAD and the ICC.

<sup>31</sup> See Bingham, Resolving Environmental Disputes: A Decade of Experience The Conservation Foundation, (1986).

<sup>2</sup> Dispute between Chile and Argentina over the Beagle Channel. See Joint Declaration of Peace and Friendship, January 1984 and Treaty of Peace and Friendship, November 1984.

with environmental laws, regulations and standards. They have made it possible for government agencies to bring industry or municipalities into compliance with the law. Legal proceedings can be used to avoid environmental harm, as in the anticipatory suits under the National Environmental Policy Act in the U.S. It is, moreover a traditional remedy both nationally and internationally to assess liability and compensation.

4. Administrative proceedings are a fourth option. In some countries such as Canada, the United States, inter alia, with respect to hazardous waste facilities, and more recently, India, in the field of occupational health and safety, administrative proceedings are more appropriate than judicial proceedings. Here, a governmental tribunal may have the power of approval, and hearings can be conducted to permit the various parties to state their positions and give evidence on their view of the preferred outcome. In some situations these proceedings, as a result of their essentially adversarial nature, have taken on so much of the formality of a judicial proceeding that attempts have been made to introduce mediation or related techniques to streamline the process.<sup>33</sup> Internationally, the Board may be made up of governments, who usually have the power to decide.

5. A final technique which builds on some of the above is regulatory negotiation, the use of negotiation, with an impartial convenor to obtain agreement from interested private parties and the responsible government agency to a rule or standard. In some countries such negotiation has existed for some time with the affected industry. Its newer application also includes consumer and environmental groups.

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<sup>33</sup> See Grenville-Wood, "Environmental Dispute Resolution: Canadian Approaches and Trends." Paper prepared for seminar on Environmental Law in Indonesia and Canada: Present Approaches and Future Trends, Bandung, Indonesia July, 1985.

## Informal Techniques

1. Although mediation and conciliation are described above, they are linked to more informal techniques by their reliance on the requirement for acceptance of the parties to a dispute to any solution before it becomes effective. Mediation is a form of negotiation with a third party neutral. In international usage, conciliation differs from mediation in that the conciliator will make suggestions for a solution as a part of a report to the parties.

2. Perhaps the most widely used technique for the settlement of disputes, environmental or otherwise, is negotiation. It is always tried first, and when it fails, other techniques may be suggested or called for. In some situations, negotiation - with or without a third party - may be the only technique available to parties to a conflict, in the absence of agreement to use other processes. However, negotiation can often be more effective if one of the other techniques is threatened or will automatically follow if negotiation does not succeed within a designated period of time. Then, the possible expense and time necessary to settle a problem through other techniques may make negotiation more attractive.

3. An additional technique which builds on negotiation and mediation is the establishment of a group, with an independent convenor, the purpose of which is to agree on policy initiatives that otherwise would be subject to long and expensive battles in court or other more formal fora. For example, in the United States, several private organizations have convened groups to consider such diverse issues as, labeling of chemicals, advertising policy for pesticides, policy for disposal of low level radioactive waste, and regional water use policy. In several European countries, industry, environmental groups and governmental representatives have met with an

independent chairman to consider an acceptable phosphate level for detergents. In each of these activities, there were several objectives: first to obtain agreement from all of the interested parties to a policy; and second, to secure the implementation of that agreement in a timely manner.

#### **IV. The wider use of dispute settlement techniques to settle disputes**

Recent events have made it clear that environmental considerations of development will have to be more fully integrated if development is to succeed. The previous sections of this paper provide ample evidence that techniques do exist which could assist in the avoidance of disputes both effectively, and before environmental harm takes place. Yet these techniques have not received widespread use with the result that some disputes are not resolved before harm has been caused. It is the purpose of this section to suggest some ways to use the existing techniques more effectively. In doing so it will be necessary to separate the domestic from the international use of those techniques, even though there will invariably be some overlap.

##### **The settlement of disputes within a country**

Within countries, the most important ingredient for the successful settlement of environmental disputes is to have a legal or policy infrastructure which will provide a framework in which environmental issues can be assessed and then settled before an event has happened. This may form a part of a planning process or flow from legislation or administrative action. In Japan, for example, the Law on the Settlement of Environmental Pollution Disputes has institutionalized the use of conciliation, mediation and arbitration for dispute resolution. A second step is to provide, as a part of that infrastructure, a flexible set of mechanisms that can provide options for

settlement, without providing opportunities for needless delay and a waste of time and money.

If arbitration or mediation are used, a sufficient pool of independent third parties should be available who can maintain the confidence of the parties to the dispute. These individuals can be drawn from existing institutions in the country that may have worked in other sectors, e.g. labor or commercial disputes, or can be trained and selected specifically for their environmental expertise. No one profession should have a preeminent position in the pool of available mediators and arbitrators. An additional group that must have a developed understanding of these processes, is the cadre of government decision makers, who may in some instances serve as negotiators, mediators, hearing officials or arbitrators. Training can be helpful to familiarize the officials with the options that are available.

### The settlement of international disputes

Internationally, there are number of recent international agreements that deal with environmental issues that should be mentioned because of the ways in which they have encouraged the selection of techniques for the early settlement of environmental disputes. The agreements concluded under the auspices of the regional areas program of UNEP all contain dispute settlement clauses that contain a variety of options to settle disputes.<sup>34</sup> The Convention on the Mediterranean calls first for negotiation "or any other peaceful means of their own choice, and then for arbitration".<sup>35</sup> Another

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<sup>34</sup> There are eleven regions presently identified in the Regional Seas Program, the Mediteranean, Kuwait and the Gulf, West and Central Africa, Wider Caribbean, East Asian Seas, South-East Pacific, South Pacific, Red Sea and Gulf of Aden, East Africa, Southwest Atlantic, and South Asian Seas.

<sup>35</sup> See Convention for the Protection of the Mediteranean Sea against Pollution (1976) Art 22, and the Kuwait Regional Convention (1978) which also begins with negotiation but then refer parties to the Judicial Commission to be established as a part of the regional organization for the Protection of the Environment.

excellent example are the dispute settlement provisions of the Law of the Sea Agreement.<sup>36</sup> Often, dispute settlement clauses are left to the end of the negotiations before insertion in the final text of an agreement. During the Law of the Sea discussions, a separate committee was formed to draft provisions governing the settlement of a wide variety of disputes including those arising from the environmental and resource use provisions of the agreement. The committee was also to adapt its work to the changes in the text being drafted and considered by other committees. This process resulted in the possible use of a broad spectrum of techniques including mediation, arbitration, and the creation of a special tribunal. An international judicial tribunal represents another possible instrument for use. Some of these institutions have in a more or less direct way been involved in environmental dispute settlement.

The International Court of Justice in the Hague has heard a number of cases that have been instrumental in the development of principles of international environmental law.<sup>37</sup> The Court can sit both as a full court or in chambers of fewer members, e.g. five members.<sup>38</sup> This process can reduce the time required for the Court to reach a decision. The Court, however, can only hear disputes between States, and a very important question is whether this is sufficiently broad based for environmental and natural resource issues. For example, the European Commission of Human Rights can decide disputes brought by a person as well as a government. The arbitral tribunal of ICSID

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<sup>36</sup> See Adede, "The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention" 11 *Ocean Develop. and Int'l L. J.* 125 (1982).

<sup>37</sup> See for example the Corfu Channel Case (1946) I.C.J. Rep.

<sup>38</sup> A Chamber of five judges heard the Gulf of Maine Dispute between Canada and the United States. Decision of October 12, 1984. The implications of the Court's decision can have significant environmental and resource management impacts as the two countries address issues of management of the trans-boundary stocks, and access to the resource in light of the Court's decision. The agreement submitting the dispute to the Court, however, specifically precluded consideration of these issues by the panel.

decides cases between a government and a corporation. Interestingly, the agreement between Canada and the United States over the Skagit River, calls for the Secretary General of ICSID to select the neutral arbitrator, if parties can not reach agreement on the selection themselves.<sup>39</sup>

A second issue to pose is whether any existing tribunal has a broad enough jurisdictional base or experience to hear environmental disputes. Should there be a separate tribunal, or even center for the settlement of environmental disputes? In the Law of the Sea negotiations, early drafts called for separate tribunals for disputes involving the sea bed, fishery resources and environmental disputes. In the final text, however, it was agreed to have a single tribunal to deal with all disputes arising from activities covered by the agreement.<sup>40</sup> A separate panel of environmental experts was, however called for.

Many of the tribunals and other dispute settlement institutions described above are global in their approach. The International Court of Justice, the International Center for the Settlement of Investment Disputes, The Law of the Sea Tribunal, draw their membership from all over the world. Some UN organizations such as the UN Environment Program, the Food and Agriculture Organization, the World Health Organization, and the World Bank through their programs and resolutions have the ability to assist in the avoidance of environmental disputes. For the first time in its history, the 1985 Annual Report of the World Bank included a section on the relationship of environment and development, and emphasized the efforts of the Bank since 1970 in assessing environmental implications of Bank projects and thus avoiding

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<sup>39</sup>See the Annex to the Agreement between Canada and the United States, *supra*, note 20. Appendix C, Section 2, Article 3.

<sup>40</sup>See Adede, *supra* note 36. Sohn, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point The Way?" 46 Law and Contemp. Prob. 195 (1983).

later environmental problems and disputes.<sup>41</sup> However, for some issues, a less than global approach may be more effective. Thus the UNEP regional seas program approached the problem of marine pollution from the perspective of those countries directly interested. The Organization for Economic Cooperation and Development, through its Environment Directorate has harmonized policies of member countries that have both a geographic and market relationship for issues that affect both of these factors.<sup>42</sup> The European Community is able to take binding actions for all of the members of the Community, and the Court of the Community can be used against member states that do not give effect to Community actions or to judgments of the Court.<sup>43</sup> Other regional organizations such as the Organization of American States engage in examination of environmental implications of development assistance projects carried out but do not have bodies that have exercised specific dispute settlement functions in the environmental area.<sup>44</sup> What is clear is that there is a potential, only partly realized for these established organizations, some of which have engaged in environmental activities, to apply their expertise and credibility to the settlement of environmental disputes in the regions. These groups could also perform significant service if they were to assist member countries in developing their own capability to anticipate, avoid and settle environmental and resource disputes that occur within a particular country. The means to accomplish that task are discussed in

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<sup>41</sup>1985 Annual Report of the World Bank at 71-4.

<sup>42</sup>The OECD activities in the Chemicals area were designed to have both salutary trade and environmental effects by developing a common approach to testing of new chemicals. In this program, the OECD also carried out a mediatory role in harmonizing approaches of the United States on the one hand and the European Community on the other.

<sup>43</sup>See for example, pp. 14,15 of the Second Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law 1984, COM(85) 149 final.

<sup>44</sup>The Department of Regional Development of the OAS in 1984 published a volume Integrated Regional Development Planning: Guidelines and Case Studies from OAS Experience which describes that agencies experience in including environmental analysis as part of their program.

the following sections. A more comprehensive set of dispute avoidance and dispute settlement instruments is needed. Existing institutions are not now adapted to deal with these issues. Whether they can be, or a new institution is needed, remains an important question.

## V. Overcoming Obstacles

One of the first issues for the international community to consider is whether approaches can be more effective if handled on an ad hoc or systematic basis. As the previous discussion makes clear, both for domestic as well as international environmental disputes, the development of an appropriate infrastructure, including appropriate and enforceable laws and procedures, or workable dispute anticipation and settlement provisions in international agreements can provide more certainty and be more effective than an ad hoc approach. If those involved in a transaction, be they individuals, corporations or governments, understand the context of a proposed project dispute settlement and enforcement provisions, they may be more willing to accept the obligations called for. The Law of the Sea Conference experience of treating dispute settlement as something to accompany and not follow the substantive discussion may have contributed to the willingness of some countries to put faith in that agreement.

It is also important to develop in both international agreements and procedures of bilateral or multilateral lending agencies, ways to anticipate environmental concerns, and have a mechanism or mechanisms that can resolve these concerns before the problem causes environmental harm.

Some situations will be impossible to anticipate. For these, there currently is reliance on domestic processes, or those few international mechanisms that are in place. These

may not be well equipped to deal with the complex mix of legal, technical and economic factors that can be involved in an environmental dispute. Having mechanisms in place that have developed credibility is an important ingredient to success. Mechanisms do not have to be only governmental or intergovernmental. A cadre of scientific or technical experts who can be drawn upon, or experts in environmental law or dispute settlement whose independence is known can be of considerable assistance. The World Environmental Center in New York, with cooperation from corporations and other institutions has begun to develop lists who can be drawn on.

Based on the experience to date, the most effective dispute settlement mechanisms are those that provide a continuum of approaches to the avoidance or settlement of disputes. The end point should be a binding form of dispute settlement, for example, administrative determination, arbitration or judicial settlement. Before that, however, it is recognized that negotiation and mediation or conciliation can offer an alternative that may be more effective from a time and cost perspective and may also provide a way for parties that must continue to work together to do so. The difficult task is to frame the set of settlement mechanisms so that they take into account regional, national and even sub-national approaches to dispute settlement in other areas in order to maximize their acceptance.

## **VI. The Special Situation of Developing Countries**

It is always dangerous to generalize when attempting to provide an analysis of any particular situation within a group of countries. In spite of this caveat this section will attempt to assess the general position of developing countries with some reference to particular examples that might be illustrative and appropriate. There will always be differences between individual countries given the wide divergence in a number of

factors, such as, the degree of "development"; the legal, political and administrative systems in effect, cultural differences, and the climatic and physical nature of the country. Nevertheless, there are some important points to be made and some relevant conclusions to be drawn.

This part of the paper will deal primarily with mechanisms for dealing with environmental disputes within countries, rather than between or among countries. The comments made elsewhere in this report relating to international and trans-frontier disputes apply without any essential modification to developing countries. Also, it should be noted that the comments made below with respect to national institutions and the building up of a core of expertise, have application to the trans-national and international situations. This is so, since national policies, attitudes and capacities have a direct bearing on international relations and disputes. Thus, if there is a notable lack of environmental expertise or institutional arrangements in a given country, it is likely that the ability of that country to respond to international disputes with neighbors or within its region will be severely circumscribed.

It has become apparent that there is, in developing countries generally, an increasing concern with environmental issues. Some countries have enacted environmental control or anti pollution legislation while others are in the process of preparing legislation or other regulatory provisions. The major dilemma facing such countries is that despite the activities of many organizations and lending institutions, environmental protection is still seen by some as a hindrance to development of the industrial base that is an essential element of their development plans. In addition, the need to negotiate resource exploitation and other agreements with major corporate entities requires the host developing country to face up to the hard choice of permitting the exploitation at the expense, apparently, of environmental concerns.

So often, it seems that these environmental concerns play a minor role in the decision making process simply because the need for development is evident and the pressure is on to make decisions quickly before the "benefactor" moves on to a competing site. The need is clearly, thus, to establish a more systematic and institutionalized process for obtaining environmental clearance for projects that are likely to have an impact. In the absence of such institutionalized processes, the environmental concerns will be too easily negotiated away when faced with hard facts brought forth in favor of direct investments and resultant jobs, royalties, and similar rewards. Such institutionalization is important from a domestic perspective. Domestic industry and development projects may be the principal sources of environment problems in some areas. It can easily be argued that unless domestic entities take steps in the direction of environmental assessment and compliance with certain minimal standards, it is unrealistic to expect outside (international) interests to do so. Moreover, permitting this type of double standard may make it more difficult to require environmental assessment that works.

From a domestic view point, as well, the lack of assessment and approval systems means that all too often impacts are recognized only after a project has been in place and when it may be too late. In such instances, it is frequently the case that environmental impacts were not even seriously considered in the project planning or construction phases. One example of such an event arose when a housing project in one developing country, involving several hundred dwellings was approved by the responsible Ministry. The project was built and the inhabitants moved into the dwellings. Several months later it was found that the drinking water in a nearby urban area was becoming increasingly polluted. It was learned, upon further investigation, that the sewage from this new development was being channelled, in various ways, into the

source system for the city drinking water. Thus, policy makers now face the question, what can be done retroactively to alleviate the problem? Of course, such problems and challenges are not the exclusive preserve of developing countries. The United States<sup>45</sup> Canada<sup>46</sup> and many European Countries<sup>47</sup> are now living with the results of environmentally insensitive decisions made many years earlier.

The question to be addressed now is not who to blame nor is it only how to correct the particular environmental damage. It is essential to put in place processes and systems that will enable governments and citizens to assess impacts in advance and thus be in a better position to weigh all the factors prior to approving particular projects. What is needed, then, in many developing countries, and in many developed countries, is an impact assessment system, supported by a mechanism for approval. Tied to this mechanism must be a decision making authority which has in its mandate the capacity to assist in negotiating terms and conditions of approval. Even for countries with a developed system of codes and regulations there is the need, as expressed by the President of Colombia, to "now establish practical tools to enforce it."<sup>48</sup> And all of the above require one essential ingredient, a cadre of trained professionals who will operate the systems and provide the expertise needed to make those systems function.

Much of the development debate over the last several decades has centered around the idea that an early order of business was to provide the infrastructure so that industry could locate in such countries. The current need is for a different kind of

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<sup>45</sup>For example, Love Canal and other abandoned hazardous waste sites.

<sup>46</sup>A recent shipment of old transformers were only found to have PCB's in them when they breached spilling PCB's over a long stretch of roadway in Ontario.

<sup>47</sup>See, for example problems with hazardous waste in the Netherlands, and pollution of the Rhine, and recent concern in the FRG with acid rain damage to forests.

<sup>48</sup>Statement of President Belisario Betancur on the occasion of World Environment Day, 5 June 1985, INFOPALC, p. 4.

infrastructure to protect against the accelerating degradation of the environment. It may not be sufficient for developing countries to enact laws of general application. Unless such laws have provisions for mandatory impact assessment and approval, they will be essentially hortatory and ignored or bypassed when the hard bargaining begins, whether with domestic or foreign proponents. An independent assessment and approval system is the best guarantee that environmental concerns will be examined and dealt with.

There is still the issue of how to resolve or avoid the disputes that will almost inevitably arise once standards are set and approvals sought. The legal and administrative system in many industrial countries is such that the disputes in the environmental field are resolved either in the courts or through some other form of adversarial proceeding. Although there is an important role for such processes, they may not be conducive to the most effective decision making and policy formulation in problems faced by developing countries. With the exception of those countries that have a close link to the essentially adversarial common law system, a more consensual approach to dispute resolution is better accepted and understood. Additionally, in developing countries, informal techniques are used far more frequently to settle disputes than are formal processes. In some countries, regional and ethnic approaches may well take precedence over national approaches. It may prove confusing for an international lender or developer which assumes that one set of rules will govern a transaction, while the domestic party assumes something completely different. Even with careful drafting of documents calling for settlement under national or international rules, differences can occur.<sup>49</sup> Therefore, it is important to be sure that the mix of systems is understood in the country in which the project is located, so that realistic dispute

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<sup>49</sup> See for example, Johnson and Lintner "Centralism and Pluralism: Legal Issues in three Middle Eastern Development Projects" in Mayer (ed) Property, Social Structure, and the Law in the Modern Middle East 237 (1985)

settlement options can be agreed to.<sup>50</sup> It is, moreover, important for a country to establish a reference point to provide the necessary information and perhaps to oversee the various processes that come into play.

The experience in both Canada and the United States has been such that increasingly dissatisfaction is being expressed with the efficiency and effectiveness of these systems. It is clear that some disputes require adjudication. Those situations will arise where some independent third party will have to make decisions that may be unpalatable to one or more of the interested parties and where the issues were such that compromise and negotiation were impossible. The existence of that form of dispute settlement and its unpredictability is often the best incentive for parties to negotiate a compromise. What is too often lacking is a mechanism that can facilitate that compromise.

In the Canadian province of Ontario an experiment is currently underway regarding the siting of a solid waste disposal facility. The responsible tribunal, the Environmental Assessment Board, has requested that mediators under its aegis, but independent from its control, attempt to assist the parties, the various municipalities and citizens groups in the affected area, to reach an agreement on where the facility should be located. The Board, in this case will have to conduct a hearing, in any event, and it will be required to make a decision. The question is whether the proceedings before the Board will be on the basis of an agreed proposal which the Board will likely endorse and make part of its order, or whether there will be a lengthy and adversarial hearing with examinations and cross-examinations.

Since a more consensual dispute resolution fits into the indigenous approach of so many countries, mechanisms should be considered to be put into place to provide for

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<sup>50</sup>Id. at 259.

this form of settlement. For example, Indonesia's Constitution states that the Republic is based on five principles, the Pancasila, the fourth of which is that democracy "shall be led by the wisdom of unanimity arising from deliberations amongst representatives." This principle represents the national predisposition for consensual decision making and current dispute settlement techniques are based on this principle. Beyond this point, it should also be borne in mind that this non-adversarial process permits and encourages all the various policy interests to be involved in the decision making and provides an institutional forum in which all the different concerns may be addressed.

## **VII. Conclusions and Recommendations for the Commission**

### **General Conclusions**

This paper contains two sets of conclusions. The first set are applicable to both developed and developing countries, while the second set are keyed to the specific needs of developing countries

1. There are two distinct aspects of dispute settlement that must be addressed. The first are those disputes or disagreements that are found in the planning stages of a project or program. For these, environmental assessment has proven to be an effective tool in some countries but has not been used in many where its use would prove beneficial. Internationally, there is no requirement for using assessment, although it is called for in a number of agreements. Additionally, the increased acceptance of notification and consultation as part of the planning process would also be useful, recognizing the pitfall of it being used to delay. The introduction of dispute settlement mechanisms such as conciliation and mediation or arbitration in advance of environmental damage is also considered desirable for those situations, principally domestic, in which other mechanisms have not provided the ability to integrate the views of those interests which by law, regulation, or legitimate interest have a voice in the decision making process.

2. The settlement of environmental disputes after harm has been created must be subject to procedures that have a finite binding conclusion. That is not to say that the only way to reach that stage is to begin with a binding approach. There may well be reasons where agreement is sought from many parties, eg. in the cleanup of a hazardous waste site, or after a large disaster, in which preliminary mechanisms such as negotiation and mediation can be helpful in reaching a conclusion. In some domestic situations there is little awareness of the potential of these mechanisms, while in others, they have long been part of the fabric of dispute settlement outside of the environmental area.

3. The two previous conclusions lead to a third, that both domestically within a country as well as internationally, a continuum of approaches offers the most effective way to settle disputes, both in an anticipatory and after the fact way. The continuum must be carefully crafted to end with a conclusive or binding result, and not provide escapes into delay and avoidance.

4. While internationally there are mechanisms available to settle a wide variety of disputes, they all suffer from some shortcoming as they might apply to environmental disputes. They may only be available to states, or to those from a particular region, leaving corporations or environmental and other interested groups without access. They may not offer a continuum of approaches, but provide only arbitration or judicial settlement. They may never have worked in the environmental area or have the ability to provide independent technical assistance. Does this mean that there is a need for a new tribunal or Center for the Settlement of Environmental Disputes? The concept deserves careful study in comparison with the use of existing institutions or their possible adaptation to better enable them to settle environmental disputes.

**Conclusions specifically directed to developing countries**

1. There is an increasing level of concern for environmental issues which has expressed itself in the preparation of legislation and regulatory guidelines in some countries, while in others consideration is now being given to initiating this process.
  2. However, the existence of legislation, in itself, is not sufficient to protect the environment and further environmental concerns. This is in large measure due to the lack of professional environmental and legal expertise in many countries which makes it difficult to implement and administer existing or proposed laws.
  3. Institutional mechanisms need to be developed and established that will provide the on-going framework for environmental management and a focal point for environmental decision making with authority to take decisions affecting governmental agencies or ministries that might have differing views as to the inclusion of environmental objectives in the decision making process. While the primary scope of such institutions should be national, some functions could be exercised on a regional basis in order to provide the effective use of limited expertise.
  4. These institutions should provide for dispute avoidance and resolution techniques that are consonant with each country's legal, cultural and administrative make-up.
- These conclusions are of necessity general in nature and do not apply to a particular country or group of countries. They result from the observation and analysis of a number of different situations. It is essential that in reviewing these findings, each country should examine its own needs and objectives to draw its own conclusions from the discussion in this report.

### **Recommendations at the National Level**

1. In developing countries especially, but not exclusively, there is a need for increased education and professional training for present and prospective environmental administrators, managers and legal officers in the fields of environmental assessment, management, administration and dispute resolution. To this end, The Commission should recommend:

- a) that this need be filled and that filling it be given increased priority by bilateral and multilateral agencies and funding institutions; and

(b) that experts and institutions with particular expertise should be enlisted to assist in this educational and training effort.

2. The Commission should consider recommending that a national analysis be made by all countries of the appropriate institutional and legal framework best suited to provide for meaningful environmental input into the development plans for that country. This framework should be applied to general planning decisions and to specific project by project decision making. Where such a framework is in place, the analysis should be extended to include the effectiveness of the system, and the means it provides for the settlement of disputes. Finally, countries that do not presently have a focal point in the national government to coordinate environmental input into development plans should create such a focal point in a manner that is consistent with their legal and administrative system.

3. The Commission should encourage all countries to adopt a continuum of dispute avoidance and settlement mechanisms, available to the private sector, including individuals, groups and corporations, that is both flexible and effective, and that will result in a binding decision.

#### Recommendations at the International Level

1. The Report of the World Commission should draw attention to the fact that concerted action on the international level is largely dependent on the systematic assessment, management and regulation of environmentally sensitive activities at the national level.

2. The Commission should urge that when international agreements dealing with environmental issues (whether bilateral or multilateral) are being negotiated, a continuum of appropriate and effective dispute avoidance and settlement provisions be included and considered by the negotiators as part of the substantive provisions of the agreement contemporaneously with their development.

3. Parties to existing agreements on subjects relating to environment and resource management should review those agreements, where appropriate, with a view to strengthening their dispute avoidance and settlement provisions along the lines recommended in the previous paragraph.

4. The Commission should consider the establishment of an international ad hoc study team to review existing institutions and mechanisms to more effectively avoid and settle international environmental and resource disputes. The team could consider, *inter alia*:

(a) what institutions presently exist that are or could be made amenable to handling environmental and resource disputes

(b) The need for a separate center and services to be offered by it;

(c) the means for establishing the Center, if needed, and the scope of disputes to be handled by it.

5. The Commission should recommend to intergovernmental dispute settlement institutions, such as the International Court of Justice, the Permanent Court of Arbitration, the International Center for the Settlement of Investment Disputes and the

center managing the UNCTAD conciliation and arbitration rules, as well as to non-governmental dispute settlement organizations, that as a matter of immediate need, they strengthen and expand their work to include environmental and natural resource disputes. Those institutions that maintain expert panels in different fields should be strongly encouraged to add a panel of experts in environmental and resource dispute settlement.