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Alternative Dispute Resolution in Environmental Cases

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Alternative Dispute Resolution Methods (ADR)

- Negotiation
- Mediation
- Arbitration
- Conciliation



Benefits of ADR

- Less expensive
- Less time consuming
- Encourages constructive and sustainable dispute solutions
- Legally enforceable by the courts
- Gives stakeholders a sense of ownership
- Gives the public a sense of involvement
- Increases access to justice



Alternative Dispute Resolution

The implementation of ADR varies between UNECE member states

It often takes the form of a public or private:

- Ombudsman scheme
- Consumer complaint board
- Private mediator
- Trade association

→ Which of the above procedures is the most appropriate will depend on the nature of the dispute to be resolved



Article 16 Aarhus Convention

SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. For a dispute not resolved in accordance with para.1 above, a party may accept one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation: (a) Submission of the dispute to the ICJ; (b) Arbitration in accordance with the procedure set out in annex II.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in para. 2 above, the dispute may be submitted only to the ICJ, unless the parties agree otherwise.



UN General Assembly Resolution 65/283

Adopted 22 June 2011 “Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution”

Recognizes the growing interest in and the provision of mediation, and its use as a promising and cost-effective tool in the peaceful settlement of disputes, conflict prevention and resolution;

Recognizes the useful role that mediation can play in preventing disputes from escalating into conflicts and conflicts from escalating further, as well as in advancing the resolution of conflicts and thus preventing and/or reducing human suffering and creating conditions conducive to lasting peace and sustainable development, and in this regard, recognizing that peace and development are mutually reinforcing.



UN General Assembly Resolution 65/283

2. Invites Member States, as appropriate, to optimize the use of mediation and other tools mentioned in Chapter VI of the Charter for the peaceful settlement of disputes, conflict prevention and resolution;

3. Welcomes the contributions of Member States to mediation efforts, as appropriate, and encourages them, where appropriate, to develop national mediation capacities, as applicable, in order to ensure coherent mediation and responsiveness;



The Minamata Convention on Mercury- Art. 25

1. In case of dispute: negotiation, or other peaceful means
2. (a) Arbitration in accordance with Annex (b) Submission of the dispute to the ICJ
3. Regional economic integration organization: “like effect”
4. Declaration made pursuant to para. 2 or 3 shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depositary
5. The expiry of a declaration, a notice of revocation or a new declaration shall in no way affect proceedings pending before an arbitral tribunal or the ICJ, unless the parties to the dispute otherwise agree.



The Minamata Convention on Mercury- Art. 25

6. If the parties to a dispute have not accepted the same means of dispute settlement pursuant to para. 2 or 3, and if they have not been able to settle their dispute through the means mentioned in para.1 within twelve months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to a **conciliation commission** at the request of any party to the dispute. The procedure set out in Part II of Annex E shall apply to conciliation under this Article.



Dispute Settlement Provisions in MEAs

The Cartagena Protocol on Biosafety

- Establishing procedures and mechanisms for compliance, COP:MOP BS-1/7 (2004)
- The Creation of a Compliance Committee
- The Facilitative approach, art I-III
- The Enforcement approach, art VI



Estonia

Mediation through The Estonian Association of Mediators

Conciliation through the Chancellor of Justice

An Agreement reached through ADR is enforceable under the Conciliation Act (Sections 6271 and 6272 of the Code of Civil Procedure)



Estonia

ADR Case Law:

- ICCP Permit for the Kunda Pulp Plant Factory

-An example of successful mediation between NGOs and developers. An enforceable agreements regarding conditions of a IPPC permit was reached

- The Saaremaa Deep Harbour

-An example showing that sometimes the outcome of a mediation does not satisfy any of the stakeholders

- Mining Permit for the Merko Oil-Shale Mine

-An example of how stakeholders come to an agreement through mediation and injunctive relief



Ukraine

Ukrainian mediation center (UMC)

Only on a voluntary basis

Parties have the right to at any time reject a solution suggested by the mediator and instead apply another method of resolving the dispute



Ukraine

ADR Case Law:

- **Returning the Protected Status to Natural Areas in the Lviv Region**
 - *An example of ADR being a more effective use of time. In this case it saved a forest that might otherwise have been cut down during the long period of administrative or judicial process*
- **Znesinnia Regional Landscape Park Versus Electric Power Supplier**
 - *An example of how the high level of interest shown by the public proved to be an important motivation for the stakeholders to compromise through mediation*



Hungary

- Directive 2008/52/EC was implemented in Hungary in 2009. Since then, binding rules for the professional education of mediators have to be observed
- The enforceability of ADR settlements has been facilitated by allowing for their subsequent approval by the court
- Cost incentives have been extended
- Recent reforms aim at the further strengthening of mediation as an alternative to court proceedings



Hungary

ADR Case Law:

- Szentgál Regional Landfill

- An example of how two NGOs tried to facilitate a conflict through the use of ADR. No agreement could be reached in this case as the parties could not agree on the same ADR process

- Route 10

- An example of how ADR-mechanisms are not fruitful when too many stakeholders with different objectives are involved in a dispute



Conclusion

- The use of non-compliance mechanisms in MEAs - an example of successful dispute settlement/avoidance provisions (sometimes only on paper)
- The movement towards ADR use in several UNECE member states
- The use of ADR increases access to justice, both for the public and for NGOs

However

- ADR is in fact often not used or it is being used without a strong level of commitment, especially when disputes involve public authorities
- ADR is not always appropriate. E.g. The Hungarian Route 10 Case shows the complexity of ADR when too many stakeholders are involved in a specific dispute

The Task Force on Access to Justice could perhaps look into conciliation provisions in MEAs and assess their effectiveness, or impediments. The TF could also seek cooperation with organizations like Mediators Beyond Borders International, to see how ADR could be strengthened in environmental disputes, and work with organizations like UNEP, civil society and other partners to further work on ADR in environmental matters and promote the use of collaborative problem-solving techniques in environmental decision-making.