DISPUTE AVOIDANCE AND DISPUTE SETTLEMENT IN INTERNATIONAL ENVIRONMENTAL LAW - SOME REFLECTIONS ON RECENT DEVELOPMENTS

Gerhard Loibl[*]

[*] **Associate Professor, Institute of International Public Law and International Relations, University of Vienna, Austria.**

LOIBL

I. Introduction

It is now twenty-five years since the first UN Conference - the Stockholm Conference on a Human Environment - focused on environmental issues was held in 1972. Twenty years later, in 1992 the UN Conference on Environment and Development, held in Rio de Janeiro, underlined the importance of environment for the world community and marked the close connection between development and environment by the evolution of the notion of "sustainable development". It was pointed out that environmental issues have to be seen in a wider context. "Sustainable development" is now at the very centre of international efforts for the development of international regulations concerning environmental issues. This is for instance underlined by Decision 18/9 of the Governing Council of UNEP which called upon UNEP to elaborate "international environmental law aiming at sustainable development".[1] Thus, the interrelatedness of environmental protection and economic development is underlined. Yet, it should be borne in mind that the notion of "sustainable development" also includes a third dimension: the social dimension. This is clearly emphasised in the Rio Declaration on Environment and Development,[2] and also reflected in international environmental agreements of the "second generation".[3] Thus, international agreements dealing with environmental issues are not one-dimensional - *i.e.* dealing only with environmental protection as such - but take into account the three dimensions of "sustainable development".[4]

Not only the creation of international instruments dealing with environmental issues have been considered in recent years but also the question how to ensure that States apply the rules agreed upon. Thus, the question of dispute avoidance and dispute settlement have gained the interest of the international community.

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[1] UNEP-Governing Council Decision 18/9 adopted on 26 May 1995, para. 4 (UNEP/GC.18/40).

[2] Cf. Principles 5 and 9 of the Rio Declaration. Already at the Stockholm Conference it was underlined that most of the environmental problems in developing countries were created by underdevelopment (para. 4 of the Stockholm Declaration).

[3] The term "Environmental Instruments of the Second Generation" may be referred to in several ways: first, by drawing the line at the Rio Summit, thereby limiting the range to the so-called Rio Conventions, which would leave out the Montreal Protocol and the Basel Convention; second, by subsuming all recent instruments that feature at least some of the innovative elements which can be viewed as being conducive to the overall concept of sustainable development, among them, the preventive approach. It is the second meaning that the author has in mind.

[4] In the context of this article the term "environment" will be used as including the notion of "sustainable development", in the sense perhaps best described by the terminology used by UNEP: "international environmental law aiming at sustainable development".

II.Definition of Terms

When discussing dispute settlement and dispute avoidance other notions which have been raised in the international debate have to be considered such as implementation, compliance and effectiveness. These notions have found increased attention in international fora[5] and academic writings[6] in recent years. This international discussion only gained the attention of the broader public at the beginning of the nineties of this century. Before, the international community focused on the question of creating international law trusting that states would apply the fundamental principle of "*pacta sunt servanda*" - as contained in Art. 26 of the Vienna Convention on the Law of Treaties 1969[7] - once they had accepted a particular treaty as binding for themselves. International practice has shown that this is not enough to ensure compliance with and implementation of the provisions agreed upon. As a consequence, mechanisms have been developed in international law which deal with the issues of "implementation", "compliance" and "effectiveness". This development has been described by Schachter who stated that for a long time "within UN bodies comfort was taken in the pious hope that governments which acknowledged their legal obligations would carry them out, at least most of the time."[8] But a number of factors, such as public pressure, the end of the Cold War and the dissolution of the communist bloc led to a change of attitude of the international community, giving attention not only to the creation of international law but also to its "implementation", "compliance" and "effectiveness".

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[5] Cf. Agenda 21, Chapter 39; the UNEP "Revised Montevideo Programme for the Development and Periodic Review of Environmental Law" 1992 (see Gonzalo Biggs, The Montevideo Environmental Law Programme, 87 AJIL [1993], pp. 328).

[6] Cf. N. Kassik, Le contrôle en droit international (1933); Lazare Koppelmanas, Le Control International, 77 RdC (1950-II), pp. 57; Hugo J. Hahn, Internationale Kontrollen, 7 AVR (1958/59), pp. 88; Stephen M. Schwebel (ed.), The Effectiveness of International Decisions (1971); Jean Charpentier, Le Contrôle par les Organisations Internationales de l´Exécution des Obligations des États, 182 RdC (1983-IV), pp. 143; I. I. Lukashuk, Control in Contemporary International Law, in: W. E. Butler (ed.), Control over Compliance with International Law (1991), pp. 5; Gerhard Loibl, Dispute Prevention and Possible Legal Instruments in the Field of the Environment, in: Österreichische außenpolitische Dokumentation, Sondernummer "UN-Green Helmets - A Model System for the Settlement and Prevention of Environmental Disputes" (1992), pp. 36; Oscar Schachter, United Nations Law, 88 AJIL (1994), pp. 1, at pp. 9; Andronico Adede, Management of Environmental Disputes: Avoidance versus Settlement, in: Winfried Lang (ed.), Sustainable Development and International Law [1995], pp. 115; Gerhard Loibl, Comment on the Paper of Andronico Adede, in: Winfried Lang (ed.), Sustainable Development and International Law [1995], pp. 125. These issues are also discussed under the title of "dispute avoidance" in various international fora (e.g. Commission for Sustainable Development, UNEP, OECD).

[7] Art. 26 of the Vienna Convention on the Law of Treaties 1969 under the heading "*pacta sunt servanda*" reads:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[8] Oscar Schachter, United Nations Law, 88 AJIL (1994), pp. 1, at p. 9.

"Implementation" concerns the measures taken by the States on the national law level in order to transform the internationally agreed rules. "Compliance" deals with the question whether the rules are applied on the national level. "Effectiveness" concerns the question whether the rules agreed upon by the States are the proper means for achieving the set goal.[9] Whereas "implementation" and "compliance" are issues which are to be considered during elaboration of rules of international law, the question of "effectiveness" is to be considered at a later stage, *e.g.* during review conferences.[10]

Traditionally, the means to ensure "implementation" of and "compliance" with international law has been self-help of the States affected by violations.[11] A step forward was taken when mechanisms for "dispute settlement" were established which could be used by a subject of international law whose rights were infringed to present its claims.[12] Particularly, in the area of international economic law these means have been further elaborated by granting access also to individuals (both physical and juridical persons) [13] to such internationally established dispute settlement mechanisms.[14] By establishing such dispute settlement procedures the international community gave States and/or individuals the opportunity to bring up claims concerning the implementation of and/or compliance with international law. But it is up to the State or individual to make use of the mechanisms in a particular case.

Mechanisms which aim at ensuring implementation of and compliance with international law on a continuous basis have been elaborated in areas of international

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[9] In this context also the question of efficiency has to be seen. Efficiency is defined as performing tasks to produce the best yield at the lowest costs for the resources available (cf. Black's Law Dictionary, abriged, 6 ed. (1991)).

[10] E.g. compare the evolution of the regime created under the Montreal Protocol on Substances that Deplete the Ozone Layer (cf. Richard Elliot Benedick, Ozone Diplomacy - New Directions in Safeguarding the Planet [1992]).

[11] Cf. Friedrich Berber, Lehrbuch des Völkerrechts, Vol. 3, 2nd ed. (1977), pp. 91.

[12] E.g. the Hague Permanent Court of Arbitration, the Permanent Court of International Justice, the International Court of Justice.

[13] Disputes are to be settled between the parties - i.e. between individuals and/or subjects of international law. Thus, the consideration of the dispute in the inter-State level is avoided. This has the advantage that disputes are not dealt with in a political framework, but are rather dealt with on the "technical" level. The aim is a "depolitization" of disputes, i.e. political considerations - as would be taken into account on the inter-State level (such as diplomatic concerns) - are not to be taken into account, but the dispute is solely viewed as a legal issue between the parties to the dispute.

[14] Cf. e.g. ICSID and the Iran-US Claims Tribunal. After the First World War so called "Mixed Arbitral Tribunals" were established between States which granted individuals access to submit claims arising out of events connected with the First World War (Norbert Wühler, Mixed Arbitral Tribunals, in: Rudolf Bernhardt [ed.], Encyclopedia of Public International Law, Instalment 1 [1981], pp. 142; Rudolf Blühdorn, Le Fonctionnement de la Jurisprudence des Tribunaux Arbitraux Mixtes créés par les Traités de Paris, RdC 41 [1932-III], pp. 141; Walter Schätzel, Internationale Gerichtsbarkeit [1960], pp. 172 and pp. 243).

law where the implementation and compliance is in the interest of all States concerned as the competitiveness of national economies is affected[15] or the national security might be threatened.[16] Such mechanisms have been developed in areas of international law such as human rights, international labour law and international environmental law but also in treaties dealing with narcotic drugs[17] and arms control. They include *e.g.* regular reporting systems, non-compliance procedures, notification systems, monitoring, inspection and fact-finding systems.[18]

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[15] Cf. Heinrich Lammasch, Das Völkerrecht nach dem Kriege (1917), pp. 54. He points to the problems of the protection of workers and social security. The International Labour Organisation which deals with these issues has mechanisms to deal with implementation and compliance (cf. S. A. Ivanov, The International Labour Organisation: Control over Application of the Conventions and Recommendations on Labour, in: W. E. Butler (ed.), Control over Compliance with International Law [1991], pp. 153; Francis Wolf, Human Rights and the International Labour Organisation, in: Theodor Meron (ed.), Human Rights in International Law - Legal and Policy Issues [1984], pp. 273; Nicolas Valticos, L'evolution du système de contrôle de l'Organisation internationale du travail, in: International Law at the Time of its Codification - Essays in Honour of Roberto Ago, Vol. II [1987], pp. 505; Nicolas Valticos, The International Labour Organisation, in: Stephan Schwebel (ed.), The Effectiveness of International Decisions [1971], pp. 134; E.A. Landy, The Effectiveness of International Supervision - Thirty Years of I.L.O. Experience [1966]). Mechanisms for monitoring compliance have also been created by the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations 1961. A Committee on Capital Movements and Current Invisible Operations - known as "CMIT" - composed of persons appointed in their individual capacity has been created to monitor compliance by OECD member states (cf. OECD, Introduction to the OECD Codes on Liberalisation [1995], pp. 27).

[16] In the area of arms reduction and limitation states have agreed on a number of mechanisms in order to ensure implementation and compliance (cf. Serge Sur [ed.], Verification of Current Disarmament and Arms Litimitation Agreements: Ways, Means and Practices [1991]). E.g. under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993 (32 ILM [1993], pp. 800) mechanisms have been created in order to "verify" the implementation of and compliance with the agreed provisions (cf. Winfried Lang/Walter Gehr, La Convention sur les Armes Chimiques et le Droit International, 38 AFDI [1992], pp. 136). A further example is the inspection-system which has been created within the framework of the International Atomic Energy Agency and the Treaty on the Non-Proliferation of Nuclear Weapons 1968 (7 ILM [1968], pp. 811).

[17] See Alfons Noll, International Drug Control, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I (1992), pp. 1103.

[18] In academic writings these mechanisms have also been discussed under the title "international supervision" and "international control". Cf. Hugo Hahn, Internationale Kontrollen, 7 Archiv des Völkerrechts (1958), pp. 88; E. A. Landy, The Effectiveness of International Supervision - Thirty Years of I.L.O Experience (1966); Stephen Schwebel (ed.), The Effectiveness of International Decisions (1971); H. A. H. Audretsch, Supervision in European Community Law (1978); Ian Brownlie, Principles of Public International Law, 4th ed. (1990), pp. 644; Hugo J. Hahn, International Controls, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 9 (1986), pp. 177; I. I. Lukashuk, Control in Contemporary International Law, in: W. E. Butler, Control over Compliance with International Law (1991), pp. 5; Patricia W. Birnie/Alan E. Boyle, International Law and the Environment (1992), 160 ff.; Lawrence E. Susskind, Environmental Diplomacy - Negotiating More Effective Global Agreements (1994), pp. 99.

The mechanisms adopted by the various international instruments vary with their legal character. As treaty practice in recent years shows States tend to put more weight on mechanisms concerning implementation and compliance. Almost all treaties concluded in recent years - *e.g.* in the environmental area - include dispute settlement provisions by international arbitration or by the International Court of Justice. But they are only mandatory for those Parties which have explicitly accepted binding third party dispute settlement. Complementing these arrangements mechanisms of "soft enforcement" have been elaborated. The latter are of particular importance in areas where States could not agree on stringent obligations. In such cases "soft enforcement" mechanisms could be seen as supporting the elaboration of provisions into more precise obligations as the national authorities are reminded of the goals set forth in an international agreement.

Taking into account these developments in international law "dispute avoidance" is to be understood in a broad sense, *i.e.* all means and methods which could help to avoid the arising of disputes between States. Therefore, it does not only comprise all mechanisms established with the aim to ensure implementation and compliance on the international level but also means on the municipal level which could be used to prevent that a dispute arises on the inter-State level.

III.The sources and structure of international environmental law:

International environmental law is mainly based on two sources: international treaty law and customary international law. Although customary international law plays an important role in the evolution of international environmental law, treaty law has become the main and dominant source of international environmental law.[19] Whereas the basic principles of international environmental law are found in customary international law, treaty law has elaborated these principles into more concrete rights and obligations.[20] One of the reasons for the dominant role of treaty law in international environmental law might be that this area of international law has been emerging rather fast. This might be due to the fact that environmental problems

[19] See for instance the Register of International Treaties and other Agreements in the Field of the Environment published by UNEP which list multilateral treaties. The register published in 1993 lists 169 treaties which have been concluded till 1992. Since then such important treaties like the United Nations Framework Convention on Climate Change (1992), the Convention on Biological Diversity (1992) or the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification Particularly in Africa (1994) have been concluded on the global level. On the regional level various agreements have been elaborated such as the ECE-Convention on Environmental Impact Assessment in a Transboundary Context (1991). But it has to be borne in mind that this register leaves out all bilateral treaties which are in force.

[20] For a detailed description of the sources of international environmental law see Alexandre Kiss/Dinah Shelton, International Environmental Law (1991), pp. 96; Patricia Birnie/Alan Boyle, International Law and the Environment (1992), pp. 82; Philippe Sands, Principles of international environmental law, Vol. 1 (1995), pp. 103.

have been faced only rather recently and there was no time for the creation of customary international law.[21]

When looking at the evolution of international law it has to be noted that the classical reciprocal system of international law has been supplemented by an increase of rules which take into account the common interests of mankind. Thus the classical bilateralism is more and more enriched by increasing multilateralism. This tendency reflects a trend in international relations: the classical relationship between States in international law was characterised by the principle of reciprocity. Modern developments have lead to more focus on concerns for the world community as new areas of international law have been added, such as human rights and environmental issues. Thus, the implementation of and compliance with international regulations is no longer concerning only two (or a limited number of) States, but more and more the world community as a whole. But looking at international law it does not seem sufficient to merely distinguish between bilateralism and multilaterlism. There are degrees between these two extremes, depending on the evolution of international rules.

This may also be seen in the area of international environmental law.[22] The evolution towards recognition of community responsibility is expressed in Principle 7 of the Rio Declaration on Environment and Development by stating: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities."[23]

When scrutinising international environmental law different aims and purposes of international regulations may be distinguished - although any such distinction leaves questions open:

- transboundary effects are to be prevented or minimised,
- protection of the "national" environment in the interest of the "international community", and
- protection of "global commons".

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[21] E.g. the challenge of global climate change has only been acknowledged by the international community in the last years. Thus, the time to create customary rules dealing with this issue was not sufficient. The international community opted for the elaboration of international treaty law dealing with the challenge of climate change.

[22] Cf. Bruno Simma, From Bilateralism to Community Interest in International Law, RdC 250 (1994-VI), pp. 218. In regard to the protection of the envrionment the author states: "Turning to international concern for the environment, this field provides a particularly impressive illustration of the movement from bilateralism to community concerns in international law" (p. 238).

[23] ILM 31 (1992), pp. 874. A similar provision is found in Art. 3 of the United Nations Framework Convention on Climate Change (ILM 31 (1992), pp. 848) which reads: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsiblities and respective capabilities. Accordinngly, the developed country Parties should take the lead in combating change and the adverse effects thereof."

When looking at the first category it becomes clear that this is the classical situation which leads to the creation of the core environmental regulations. The underlying principles are territorial sovereignty and territorial integrity. The UN-Convention on the Law of the Non-navigational uses of international watercourses, which has been adopted by the General Assembly as recently as May 1997, is an example for such rules. The main controversy was the question how to balance territorial sovereignty on the one hand and territorial integrity on the other hand.[24] This example also shows that it is not simple reciprocity in international water law which could help to solve problems as it is very rarely that the up-stream State is at the same time a down-stream State within the same river-system.

Looking at the second category States are obliged to protect the environment within their own territory. Negative effects of non-application of these rules are not felt as such outside the State not fulfilling its obligations. An example would be the Ramsar Convention on the Protection of Wetlands of International Importance especially as Waterfowl Habitat (1971). States are obliged to protect areas of international importance they have notified to the Ramsar Bureau.[25] If they do not live up to their commitments they violate international law, but factual effects of the violation are not felt outside their territory immediately.

The third category concerns international rules which aim at the protection of so-called global commons. This is not a legal term but describes the fact that the international community has identified certain areas which are in the interest of the State community, such as Antarctica, the world climate or the ozone layer. An example for this type of international rules is found in the Montreal Protocol on Substances that Deplete the Ozone Layer. They aim at the protection of the ozone layer which is in the interest of all States as the negative effects of the depletion are felt by the world community as a whole.

It should be taken into account that the effects of the second and third category listed might be very similar. In both cases the effect is the protection of objects which have been agreed upon by the international community as being of particular value. Whereas, in regard to the second category the international community has agreed that States should take measures on the municipal level with the primary aim of protecting their own environment, the third category aims at the protection of environmental resources which are of interest to the international community as a whole. This distinction might seem a bit artificial, but tries to take note of the current stage of international development - no consensus has been yet reached in the international community that environmental resources that might be of interest to the international community are to be regarded as raising international attention yet. An example for this state of international law is the Convention on Biological Diversity. The preamble on the one hand affirms "that the conservation of biological diversity is a common concern of humankind",[26] on the other hand

[24] See Art. 5 to 7 of the Convention (cf. UN-Doc. A/51/869).

[25] Art. 8 designates the International Union for the Conservation of Nature and Natural Resources (IUCN) as the bureau of this Convention.

[26] Preambularpara. 3.

reaffirms "that States have sovereign rights over their own biological resources".[27] This dichotomy is also found in the Convention's operative articles. Art. 3 of the Convention - restating Principle 21 of the Stockholm Declaration - reads: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Furthermore, the Convention provides for in-situ[28] and ex-situ measures[29] of conservation. Thus, both categories - second and third, as distinguished above - could be found in this Convention. But it should be noted that these provisions underline that the international community is currently reviewing what is to be seen in the common interest. In international environmental law distinctions are in motion. The Convention on Biological Diversity might be seen as an example that the two categories might be intermerging in the future, leading to an increased "common concern" for environmental resources.[30]

In this context it should be noted that the traditional concept based on reciprocity is of little value for international environmental law as their is - hardly - any situation envisable - as in other areas of international law, such as international trade - where measures based on reciprocity would be helpful for environmental protection.

IV. Dispute Avoidance and Dispute Settlement in International Environmental Law

Before looking at the issues of dispute avoidance and settlement in international environmental law one should bear in mind two different situations in international environmental law: firstly, treaty regimes have been established to deal with specific environmental issues; secondly, no specific treaty has been concluded and the general rules of international law apply.

In international law a number of general instruments have been elaborated to be used in case of disputes, *e.g.* regional instruments for disputes settlement within the OAS, the OAU or the Council of Europe. On the global level the most well known example is the International Court of Justice. Although proposals were made to create specific instruments to be used in case of environmental disputes none of

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[27] Preambularpara. 4.

[28] Art. 8.

[29] Art. 9.

[30] Future developments in the area of sustainable development might give rise to a new categorization of the regulations dealing with environmental issues. Perhaps the trend - which seems to be emerging at the moment - to regard environmental issues as being of "community interest" will increase in the next years thus giving rise to a new classification of environmental regulations.

these suggestions has lead to the creation of a general system of dispute settlement (and dispute avoidance) in the environmental area.[31]

In contrast, when looking at specific treaty regimes, it has to be noted that most of them contain provisions for dispute settlement and dispute avoidance, e.g the Montreal Protocol, the Basel Convention or the UN-Framework Convention on Climate Change. Thus, these mechanisms are to be applied only within the treaty regime, *i.e.* to the rules established by the specific treaty regime.

Thus, when talking about dispute avoidance and dispute settlement in international environmental law and recent developments, the evolution of mechanisms within the specific treaty regimes is meant.

Reasons for the evolution of mechanisms of dispute avoidance and settlement within treaty regimes:

- States are reluctant - as can be seen also in other areas of international law - to accept mechanisms for dispute avoidance and dispute settlement on a general basis. They tend to limit the application of such mechanisms to specific situations.
- The rules of international environmental law vary depending on the issues they are addressing.[32] No general instrument on environmental law has been yet adopted by the international community - with the exception of declarations of principles. The international community has not yet overcome the difficulties to establish an international environmental treaty based on a holistic approach to the environment.[33] Thus, the argument has been brought up that mechanisms dealing with dispute avoidance and dispute settlement should be "tailor-made" for the specific treaty rules they are established for.

Reasons for the increased awareness of the need for dispute avoidance mechanisms in international environmental treaty regimes:

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[31] Cf. e.g. the proposal made by a number of Central European States during the prepatory process for UNCED to elaborate a comprehensive system for the prevention and settlement of disputes in the environmental area (UN.Doc. A/Conf. 151/L.29 and A/Conf. 151/WG.III/L.1). See also UN-Green Helmets - A Model System for Settlement and Prevention of Environmental Disputes, Österreichische Außenpolitische Dokumentation, Sondernummer (1992).

[32] See above Chapter III.

[33] Cf. the discussions during the 50th UN-General Assembly on the future work programme of the ILC. One of the suggestions for the future work programme was to deal with environmental issues. The discussions in the 6th Committee of the GA showed the difficulties of such a task and expressed the reluctance of States to endeavour on such an ambitious project. In GA-Resolution 50/45 adopted on 11 December 1995 this scepticism was reflected. While other topics proposed by the ILC were welcomed, in regard to to the topic concerning the law of the environment the ILC was only asked to "initate a feasibility study".

Although the issue of dispute avoidance has been discussed in a number of areas of international law it is noticeable that international environmental law has been one of the areas where dispute avoidance - in its different facets - has gained wide attention. What are the reasons for this development?

- •The rationale that it is better to avoid the arising of disputes than settling them once they have arisen.
- •International environmental rules are in general not self-executing but need to be implemented on the municipal level by States. Furthermore, States have to ensure that the rules are complied with by authorities and individuals (both physical and juridical persons). Thus mechanisms encouraging States to take the necessary steps on the municipal level should be enhanced.
- •International Environmental law is not based on reciprocity.[34] Thus, the classical means of ensuring compliance - by other States which are infringed in their rights by not applying the violated rules in its relations with another State[35] - are principally of no or of little help in the environmental area, *i.e.* expressed in the simplest way: deterioration of the environment due to the non-application of international environmental law cannot be compensated by non-application of these very rules by other States. Thus, other means have to be elaborated to enhance compliance.
- •Non-application of international environmental law leads to deterioration of environmental resources. Classical dispute settlement only comes into play when a dispute has arisen. In case of the environment this might be too late to prevent permanent damage. Thus, it seems more rational to take measures at the earliest time possible. In short it may be stated: "prevention is better than cure".
- •The increased awareness of the international community for environmental issues and their interest to protect certain environmental resources. It is no longer the individual State who has an interest in the compliance with certain international law rules, but the international community. Thus, mechanisms have to be established which reflect the common interest of the international community in implementation and compliance and also give assistance to States facing difficulties in their efforts.

This list - which is not exhaustive - might help to explain why international environmental law has experienced an increase of mechanisms which might be referred to as dispute avoidance mechanisms.

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[34] See above Chapter III.

[35] E.g. in the area of international trade law a violation of agreed rules by one State might be very effectively answered by infringed States by non-application of the rules in relation to the "violator". The "violator" will experience a negative effect for its foreign trade and thus might be willing to observe the rules.

V.Dispute Settlement

Provisions concerning dispute settlement are found in nearly all international environmental law treaties which have been negotiated and concluded in the last years. They follow the traditional pattern - known from other areas of international law - and contain the means and methods of dispute settlement listed in Art. 33 UN-Charter.[36]

The most common means and methods of dispute settlement found in international environmental agreements are:

Negotiations and consultations are mentioned explicitly in nearly all international agreements as a means of dispute settlement. *E.g.* Art. 11 para. 1 of the Vienna Convention for the Protection of the Ozone Layer 1985 states: "In the event of a dispute between the Parties concerning the interpretation or application of this Convention, the parties should seek solution by negotiation". Similar provisions are found in other international agreements such as Art. 14 para. 1 of the UN-Framework Convention on Climate Change, Art. 20 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 or Art. 13 of the ECE-Convention on Long-Range Transboundary Air Pollution 1979. In a number of treaties - those which have been concluded earlier - these are the only obligatory means of dispute settlement. As regards the practical application of these methods very little can be said as in regard to the conventions recently concluded hardly any dispute is known.

Conciliation: some environmental agreements provide for conciliation in case no agreement is reached by the parties to a dispute by means of negotiation or consultation. Examples are found in Art. 11 para. 5 of the Vienna Convention for the Protection of the Ozone Layer 1985,[37] Art. 27 para. 4 of the Convention on Biological Diversity[38] and Art. 9 paras. 5 and 6 of the Second Sulphur Protocol 1994 to the ECE-Convention 1979.[39] *E.g.* Art. 11 para. 5 of the Vienna Convention for the Protection of the Ozone Layer 1985 reads: "A conciliation commission shall be created upon request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party. The commission shall render a final and recommendatory award, which the parties shall consider in good faith." More detailed rules on the establishment and the working procedure of the conciliation commission are contained in Annex 2 Part 2 of the Convention on Biological Diversity and Art. 9 of the Second Sulphur Protocol. So far - to my

[36] Cf. Tomuschat in Simma (ed.), The Charter of the United Nations - A Commentary (1994), Art. 33, pp. 505; J. G. Merrills, International Dispute Settlement, 2nd. ed. (1991).

[37] ILM 26 (1987), pp. 1516.

[38] ILM 31 (1992), pp. 818.

[39] YbIEL 5 (1994), pp. 743.

knowledge - no dispute concerning these conventions has been referred to conciliation.

Arbitration and judicial settlement: Most of the international environmental agreements which have been concluded in recent years contain opting-in provisions in regard to international arbitration and judicial settlement. Such clauses are found *e.g.* in Art. 20 para. 3 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989[40] or Art. 9 para. 2 of the of the Second Sulphur Protocol 1994 to the ECE-Convention 1979.

Although during the negotiations very little opposition has been found to such provisions, only very few States have made declarations as to the effect of accepting arbitration as a means of dispute settlement in regard to disputes concerning application or interpretation of the said agreement. *E.g.* in the context of Art. 20 para. 3 of the Basel Convention only Norway has so far made a declaration accepting both arbitration and judicial settlement as means of dispute settlement and Poland has accepted arbitration. All other States parties to the convention - as of 31 December 1996 108 States - have not made any declarations in regard to Art. 20 para. 3.[41] Thus, it is not surprising that so far no disputes concerning the interpretation or application of the Basel Convention have been submitted to arbitration or judicial settlement.

Taking into account the various provisions on dispute settlement which have been included in international treaties dealing with environmental issues a rather sophisticated system of dispute settlement has been elaborated in recent years. This might be exemplified by Art. 27 of the Convention on Biological Diversity 1992:

Art. 27 of the Bio-Diversity Convention obliges the parties to seek a solution to a dispute by negotiation. If the parties are unable to reach an agreement by negotiation they may jointly seek the good offices of or mediation by a third party.[42] The parties may - at any time - accept arbitration or the jurisdiction of the ICJ as

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[40] Art. 20 para. 3 of the Basel Convention which reads: "When ratifying, accepting, approving, formally confirming or acceding to this Convention, or at any time thereafter, a State or political and/or economic integration organization may declare that it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) submission of the dispute to the International Court of Justice; and/or

(b) arbitration in accordance with the procedures set out in Annex IV.

Such declarations shall be notified in writing to the Secretariat which shall communicate it to the Parties."Similar provisions concerning arbitration and the jurisdiciton of the ICJ are found in Art. 11 of the Vienna Convention for the Protection of the Ozone Layer 1985 (ILM 31 (1987), pp. 1529), Art. 27 of the Convention on Biological Diversity (ILM 31 (1992), pp. 818), Art. 14 of the Framework Convention on Climate Change (ILM 31 (1992), pp. 848) or Art. 28 of the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (ILM 33 (1994), pp. 1328).

[41] Source: Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 1996.

[42] In other words: The parties to a dispute are - according to Art. 27 of the Bio-Diversity Convention - *obliged* to negotiate, whereas recourse to good offices and mediation is only optional (the parties "may jointly seek" good offices or mediation).

compulsory (Art. 27 para. 3). Annex II Part 1 to the Bio-Diversity Convention regulates the arbitration procedure in more detail: *grosso modo* it can be noted that each of the parties to a dispute appoints one arbitrator who then, by common agreement, shall designate the president of the tribunal (Art. 2 of Annex II/1). If during a period of two months the president has not been designated, the Secretary General of the UN shall, at the request of a party, designate the president; the same shall happen, if one of the parties does not appoint an arbitrator (Art. 3 of Annex II/1). The award is binding upon the parties and - unless the parties to the dispute otherwise agree - shall be without appeal.

If the parties to a dispute should not have accepted arbitration or the jurisdiction of the ICJ as compulsory, the dispute is subject to conciliation pursuant to Annex II Part 2. Thus, a conciliation commission shall be created upon request of one party. This commission is comprised of 5 members, two appointed by each party and a president chosen jointly by those members. Unless the parties to the dispute otherwise agree the commission shall adopt its own rules of procedure. The commission shall render a "proposal for resolution of the dispute, which the parties shall consider in good faith." (Art. 5 of Annex II/2).

Similar dispute settlement systems have been elaborated *e.g.* in Art. 20 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989, Art. 28 of the U.N. Convention to Combat Desertification in Countries Experiencing Serious Draught and/or Desertification, Particularly in Africa 1994, Art. 14 of the U.N. Framework Convention on Climate Change 1992 and Art. XIII of the Bonn Convention on the Conservation of Migratory Species of Wild Animals 1979.

In conclusion it has to be noted that - although sophisticated systems of dispute settlement have been elaborated - the provisions found in international environmental treaties follow traditional patterns. Emphasis is put on negotiations as a means of dispute settlement. Only recently States have tended to accept conciliation commissions as a mandatory means of dispute settlement. Arbitration or recourse to the ICJ only play a very limited role in the settlement of disputes concerning international environmental law. Various reasons have been put forward for this: the uncertainty of the legal commitments undertaken by States, the relatively new field of regulation, etc. However, it should not be overlooked that these methods also serve another function: to avoid disputes. States deciding whether to implement or comply with an international obligation will take into account the risks which they are taking when not applying the rules agreed on the international level.

In the context of dispute settlement by the ICJ it should be briefly mentioned that in recent years the ICJ dealt with cases that had an environmental dimension. They did not concern questions of interpretation or application of specific treaties but raised environmental issues of a general nature in the context of a more complex factual and legal situation, *e.g.* the Nauru Case[43] or the case between Slovakia and

[43] Case Concerning Certain Phospate Lands in Nauru (Nauru v. Australia). This case concerned a "dispute ... over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence". The case was removed from the list by the ICJ after the parties reached agreement (ICJ-Reports 1993, pp. 322).

Hungary concerning the Gabcikovo-Nagymaros Project.[44] The recently established environmental chamber of the ICJ[45] - consisting of seven members - has not heard a case yet. It remains to be seen whether in the future the attitude by States not to accept the jurisdiction of the ICJ for possible disputes arising out of international environmental treaties will change.

VI. Dispute Avoidance

A. Mechanisms of dispute avoidance on the international level:

There are a number of mechanisms found in international environmental agreements which are to ensure the implementation of and the compliance with the internationally agreed regulations and which hence are to be regarded as dispute avoidance mechanisms. These mechanisms - which are also found in other areas of international law, *e.g.* economic law or human rights law - differ to the extent they transfer competencies to international institutions and bodies.
Mechanisms found in international agreements dealing with environmental issues are:

Reporting: Provisions setting up reporting requirements are found in nearly all international agreements. Art. 13 para. 3 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 states that the Parties "shall transmit, through the Secretariat, to the Conference of the Parties established under Article 15, before the end of each calendar year, a report on the previous calendar year containing" certain information required. Art. 7 of the Montreal Protocol on Substances that Deplete the Ozone Layer obliges States "to provide to the secretariat, within three months of becoming a Party, statistical data on its production, imports and exports of each of the controlled substances for the year 1986, or the best possible estimates of such data where actual data are not available". Furthermore, each party shall provide statistical data on its annual production, imports and exports to Parties and non-Parties, no later than nine months after the end of the year to which the date relates.[46] Art. VIII of CITES (Convention on international trade in endangered species),[47] Art. 26 of the Convention on Biological Diversity or Art. 12 of the UN-Framework Convention on Climate Change[48] contain

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[44] Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia). This case was brought before the ICJ by special agreement between the parties (ILM 32 (1993), pp. 1293).

[45] ICJ Press Communiqué No. 93/20 of 19 July 1993. Cf. also Robert Jennings, The Role of the International Court of Justice in the Development of International Environmental Protection Law, RECIEL 1 (1992), pp. 240.

[46] Art. 7 para. 2.

[47] Alexandre Charles Kiss (ed.), Selected Multilateral Treaties in the Field of the Environment (1983), pp. 289.

[48] ILM 31 (1992), pp. 849.

similar provisions. But not only legally binding agreements contain reporting provisions. Reports are also submitted in regard to the measures taken in implementing the decisions adopted by the "Commission for Sustainable Development"[49] or the OECD Decisions and Recommendations.[50]

Reporting requirements remind States of their international commitments and may have the effect of keeping the public aware of the internationally agreed rules and exercise pressure that these rules are applied on the municipal level. Such reporting procedures are found very often in international agreements which are to be implemented on the national level by legislative measures.

The main issue remains what is to be done with the reports submitted by the State Parties. A possibility is to entrust a body - either consisting of government experts or individuals - to look at the reports and issue recommendations how the performance could be improved on the municipal level. Such procedures are found mainly in the human rights area.[51] Still there are some lessons to be learned. What are the consequences for States being late in providing reports or reports which cover only parts? In the human rights area the experience is not entirely positive. As has been pointed out in a number of surveys on State practice only very few States fulfil their reporting requirements within the time frame set by the international agreements. Yet there is no possibility to force States to meet their reporting obligations.[52]

In the environmental area a similar development has to be noted. As was pointed out in regard to the London Dumping Convention[53] only about 60 per cent of

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[49] Para. 3 of GA-Res. 47/91 - the wording is already contained - in Para. 38.13 of Agenda 21 states: "...the Commission of Sustainable Development shall have the following functions: [...]

(b) to consider information provided by Governments, including, for example, information in the form of periodic communications or national reports regarding the activities they undertake to implement Agenda 21, the problems they face, such as problems related to financial resources and technology transfer, and other environment and development issues they find relevant." E.g. Austria submitted such a report in March 1994 on the measures taken for the implementation of Agenda 21. Such a reporting requirement had already been established in GA-Res. 44/228 of 22 March 1990 in which the General Assembly decided to convene the United Nations Conference on Environment and Development (UNCED). In op. para. 11 of Part II all States were invited "to take an active part in the preparations for the Conference, to prepare national reports, as appropriate, to be submitted to the Prepatory Committee in a timely manner, and to promote international co-operation and broad-based national preparatory process involving the scientific community, industry, trade unions and concerned non-governmental organizations."

[50] See e.g. the reporting requirement established in the 1993 procedural guidelines on trade and environment and the summary of the reports submitted by OECD-governments (OCDE/GD(95)63).

[51] See Andreas Khol, Zwischen Staat und Weltstaat. Die internationalen Sicherungsverfahren zum Schutz der Menschenrechte (1969).

[52] Cf. Louis Henkin/John Lawrence Hargrove (eds.), Human Rights: An Agenda for the Next Century (1994). In this volume, in particular, the contribution of Anne F. Bayefsky entitled "Making the Human Rights Treaties Work" scrutinizes the reporting practice of States under human rigths treaties (pp. 229).

[53] ILM 11 (1972), pp. 1291.

the parties have complied with their reporting obligations imposed by the treaty. Less than 40 per cent of the developed nations and 20 per cent of the developing nations which are parties to CITES have submitted annual reports in recent years. Reporting has also been lax in regard to obligations under the Montreal Protocol, particularly by less developed parties.[54] Decision VII/14 adopted at the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer[55] noted that the implementation of the Protocol by those Parties that have reported data is satisfactory. But it had also to take note with regret that only 82 out of 126 Parties that should have reported data for 1993 have reported and that only 60 Parties have reported data for 1994.[56] Thus, in conclusion it can be said that the experience is not very different from other areas of international law, e.g the human rights area.[57]

Looking at this record of States fulfilling their reporting requirements under international environmental agreements it remains doubtful whether reporting as the sole mechanism for promoting compliance with environmental obligations is a successful instrument.

Monitoring: A number of international environmental agreements obliges the Parties to establish monitoring systems, which aim at a continuous collection of data on the environmental situation. Such systems are mostly established on the municipal level, only very rarely have such systems been established on an international level. Within the framework of the ECE-Convention 1979[58] the parties have established EMEP,[59] the "co-operative programme for the monitoring and evaluation of the long-range transmissions of air pollutants in Europe". Data are collected on the municipal level and then are analysed on the international level by EMEP. The first and second Sulphur-Protocol[60] refer to EMEP. States which do not fulfil their annual reporting obligations have to accept the data provided by EMEP as the basis for review by the implementation committee which then forms the basis for decision taken by the Executive Committee.

The US-Canada "Agreement on Air Quality" 1991 provides for close co-ordination in monitoring air quality and exchange of information and data.[61]

On the global level a system for the collection of environmental data has been set up by UNEP. GEMS - Global Environmental Monitoring System - was

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[54] Cf. OECD, Dispute Settlement in Environmental Conventions and other Legal Instruments (1995), pp. 11.

[55] ILM 26 (1987), pp. 1541.

[56] See UNEP/OzL.Pro.7/12, Decision VII/14.

[57] Cf. Anne F. Bayefsky, Making the Human Rights Treaties Work, in: Louis Henkin/John Lawrence Hargrove (eds.), Human Rights: An Agenda for the Next Century (1994), pp. 229.

[58] ILM 18 (1979), pp. 1442.

[59] ILM 24 (1985), pp. 484.

[60] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, text: YbIEL 5 (1994), pp. 743.

[61] Art. VII. Annex 2 lays down the details. text in: ILM 30 (1991), pp. 676.

established after the Stockholm Conference on the Human Environment 1972. On the basis of data provided by States, international organisations and national institutions reports on the situations in various environmental sectors are made.

Inspection: Inspection systems are very rare in international environmental law. They are found in areas which affect the environment such as regional fisheries bodies (NAFO) or the Chemical Weapons Convention.[62] In principle two types of inspection systems have to be distinguished: routine inspections and challenge inspections. Moreover, a distinction has to be made on the persons or institutions entitled to undertake inspections: international or national bodies. Within the field of nuclear energy the IAEO has been given the authority to routinely inspect nuclear installations or to initiate inspections. But nuclear technology is an area of great concern to all States and, therefore, special rights have been given to the IAEO in regard to observe the implementation of and the compliance with the internationally agreed rules. In the area of environmental protection such inspection mechanisms have not been developed yet. This might be seen as an expression that in general environmental concerns are not yet seen as an area of such serious concern by the international community that such mechanisms are deemed necessary.

Notification and Consultations: Notification requirements on measures taken are found mainly in the area of environmental impact assessment or transboundary emergencies. In these areas States are obliged to notify potentially affected States either on a planned activity or on an incident which might affect the territory of other States.

Fact-finding: The instrument of fact-finding is limited to the establishment of the facts in a particular case. Such mechanisms could be used not only in regard to regulations contained in an international agreement but also if a situation between two states could be clarified simply by establishing the facts through an independent body.

Non-Compliance-Procedures: The creation of non-compliance procedures is a new evolution in international environmental treaties.[63] These procedures - which may be regarded as an evolution of reporting systems known from other areas of international law - are characterised by their co-operative, non-confrontational and

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[62] Cf. Jozef Goldblat, Arms Control (1994), pp. 220 who describes the "challenge inspection" as contained in the area of nuclear safeguards (in accordance with the 1971 NPT Model Safeguards Agreement), the European CSBMs (Confidence- and Security-building measures within the framwork of the OSCE) and the Chemical Weapons Convention 1993.

[63] For a detailed discussion of this question see Günther Handl, Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio, Colorado Journal of International Environmental Law and Policy 5 (1994), pp. 305; Martti Koskenniemi, Breach of treaty or non-compliance? Some reflections on the enforcement of the Montreal Protocol, YbIEL 3 (1992) pp. 123.

non-judicial nature[64] and in their task to provide primarily an amicable solution to problems arising in connection with the application, implementation of and compliance with environmental agreements.[65] Under the non-compliance procedures a committee - consisting of a limited number of State representatives - is established which is not only entrusted with the task to discuss reports provided by States and/or the Secretariat but also to look into specific cases of non-compliance by a State party. The committee then may suggest ways and means to improve the implementation of and compliance with the internationally agreed rules by a specific State. Decisions are to be taken by the organ established by the treaty which encompasses all parties to the treaty which could be described as a "carrot and stick approach" ranging from incentives, assistance to suspension of certain rights and privileges under the treaty regime in question.[66] The first precedent for such a non-compliance system has been elaborated in accordance with Art. 8 of the Montreal Protocol on Substances that Deplete the Ozone-Layer.[67] Another non-compliance system has been adopted by the parties to the Oslo Protocol to the ECE-Convention on Long-Range Transboundary Air Pollution.[68] Both procedures have been established within treaty-regimes dealing with environmental issues which are in the interest of the world community or a large number of States.[69] Lack of

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[64] cf. UNEP/Ozl.Pro.7/12, para. 39 (Report of the President of the Implementation Committee).

[65] Cf. Para. 23.1 of the Luzerne Declaration Concerning the Environment 1993 which states that non-compliance procedures should be based on the following understanding:

" - aim to avoid complexity

- non-confrontational

- transparent

- leave the competence for the taking of decisions to be determined by the Contracting Parties

- leave the Contracting Parties to each convention to consider what technical and financial decisions may be required, within the context of the specific agreement- include a transparent and revealing reporting system and procedures, as agreed to by the Parties".

[66] Annex V of the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 - which was adopted by the 4th Meeting of the Conference of the Parties in Stockholm 1992 - lists under the title "Indicative list of measures that might be taken by a meeting of the Parties in respect to non-compliance with the Protocol" the following:

"1. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.

2. Issuing cautions.

3. Suspension in accordance with the applicable rules of international law concerning the suspension of the operation of the treaty, of specific rights and privilegies under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanisms and institutional arrangements." (YbIEL 3 (1992), p. 821).

[67] Annex IV of the Montreal Protocol contains the non-compliance procedure.

[68] Art. 7 of the Oslo Protocol on Further Reduction of Sulphur Emissions 1994 establishes an Implementation Committee to deal with issues of non-compliance.

[69] Efforts to establish such procedures are under way also in regard to UN-Framework Convention on Climate Change. Art. 13 called upon the Conference of the Parties to "consider the establishment of a

implementation or compliance does not only affect one State, but the community of States party to the treaty. The common interest of the parties is underlined by the readiness of the parties to support the individual States in their efforts to implement and comply with the agreed rules. This *ratio* of non-compliance procedures has been proved in the first instances of non-compliance by individual parties to the Montreal Protocol. Prior to the Seventh Meeting of the Parties in Vienna, 1995, the Committee became confronted with information submitted by some Parties with economies in transition with regard to their difficulties to comply with their obligations under the Protocol. With respect to Belarus, Bulgaria, Poland and Ukraine, negotiated decisions were approved by the countries concerned and could, therefore, be adopted by the Meeting of the Parties by consensus.[70] However, the Russian Federation did not agree to similar recommendations in the Committee and later in the Meeting of the Conference of the Parties. Despite these objections the Meeting of the Parties adopted a decision by "consensus minus one". This decision called for a combination of "rewards" and "punishments", in particular to request from Russia more detailed information for consideration by the Committee at a later intersessional meeting, furthermore to impose restrictions on Russia's trade in substances controlled by the Montreal Protocol[71] and, finally, to encourage funding agencies[72] to provide financial assistance, despite Russia's anticipated non-compliance.[73] The situation can be looked upon as an ongoing "grace period" under which the measures decided by the Meeting of the Parties remain on the table, until full compliance by the Party concerned had been accomplished.[74]

Thus, the non-compliance procedure has passed its first test. The important contribution to implementation of and compliance with international environmental treaties by non-compliance procedures has also been acknowledged in the meetings of the Commission on Sustainable Development and UNEP.[75]

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multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

[70] Cf. Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer, 4th ed. (1996), pp. 141.

[71] Russia was allowed to export controlled substances to the members of the Commonwealth of Independent States (provided they were Art. 2 States, i.e. States applying "Control Measures"). In doing so, the Russian Federation will "undertake the necessary action to secure that no re-export will be made from the Commonwealth of Independent States, including Belarus and Ukraine, to any Party to the Montreal Protocol." (Decision VII/18. para. 8).

[72] The funding agency in question would be the Global Environmental Facility (GEF); Russia's high levels of consumption and production of controlled substances render it ineligible for drawing from the Multilateral Fund; *see* Werksman, *below*

[73] *See* Decision VII/18 of the 7th Meeting of the Parties in "Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer", 4th ed. (1996), pp. 143.

[74] The "Russian case" is summarised in YbIEL 6 (1995), p. 222; for more detailed information, see Jacob Werksman: Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime, ZaöRV, *56* (1996), pp. 750.

[75] Cf. the Report on Dispute Avoidance and Settlement in YbIEL 7 (1996), forthcoming.

In academic writings the question has been raised whether such non-compliance- procedures are to be seen as an improvement in regard to dispute settlement or whether they have a detrimental effect on efforts to settle disputes. The question of the relationship between dispute avoidance mechanisms as established by the Montreal Protocol Regime and the traditional settlement mechanisms has been raised several times. In particular lawyers have criticised that no clear distinction has been drawn between the areas of application of dispute avoidance and dispute settlement mechanisms. Critics have pointed out that the non-compliance procedure is executed by a political committee which is not likely to follow rules of interpretation and application of legal norms. Its conclusions, therefore, will be based on political considerations. Thus the normative character of the norms under consideration might be softened. Therefore, such procedures are unlikely to increase the adherence to obligations by the parties to international environmental treaties.

In dealing with this criticism the different aims of the traditional dispute settlement procedures and dispute avoidance procedures have to be borne in mind. The latter aims at the solution of problems on a non-confrontational basis whereas the traditional system is based on confrontational procedures.[76] One of the most valuable achievements of non-compliance procedures lies in the capability to avoid resort to formal dispute settlement procedures. [77] Thus, dispute settlement and non-compliance procedures have to be seen as two separate mechanisms providing different instruments for the implementation of and compliance with international environmental treaty law.[78]

B.Means on the municipal level which could be used for dispute avoidance:

When referring to dispute avoidance one should not forget to take into account the means available on the municipal level which could perform a useful function for the avoidance of disputes on the inter-State level. If disputes of a transboundary nature can be settled on the municipal level between the individuals concerned they are not likely to reach the inter-State level. Therefore, reference should be made to the means available on the municipal level.

1. Administrative and civil law means:

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[76] Cf. also Art. 9 para. 4 of the Oslo Protocol which reads: “The application of the compliance procedure shall be without prejudice to the provisions of article 9 of the present Protocol”. Art. 9 deals with dispute settlement.

[77] Patricia W. Birnie - Alan Boyle, International Law and the Environment (1994), p. 177.

[78] Cf. Iwona Rummel-Bulska, Implementation Control: Non-compliance Procedure and Dispute Settlement: From Montreal to Basel, in 'The Ozone Treaties and their Influence on the Building of International Environmental Regimes', Österreichische außenpolitische Dokumentation, Special issue, Winfried Lang (ed.).The author states (with reference to the Working Group of Legal Experts on Non-compliance) "that the non-compliance and dispute settlement procedures [...] were 'two distinct and separate procedures which could well exist in parallel[...]' and that '...the Parties should have the right to exercise either option in any given situation'". See also Martti Koskenniemi, Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol, 3 YbIEL (1992), pp. 123.

The main issue discussed in regard to administrative and civil law means are the issues of access of individuals - residing outside the country of jurisdiction - and non-governmental organisations to municipal authorities and courts on a non-discriminatory basis. By means of administrative and civil law (tort) procedures they could bring actions against individuals and companies whose performance does not correspond to the internationally agreed rules and which - by way of implementation into the legal systems - are applicable on the municipal level. The access to these means of municipal law should be open also to persons residing in another country but which are or are likely to be affected by activities undertaken within the jurisdiction of the State. Within the OECD[79] and the ECE[80] regulations have been elaborated which aim at safeguarding the access of foreigners on the basis of "non-discrimination" and "equal right of access".[81] On the global level these means for enforcing environmental regulations have not been met with great enthusiasm. For a large extent this is due to the fact that States are only willing to grant the right of access on the basis of reciprocity and if States regard the legal systems of other countries as having the same or a comparable standard of administration of justice. Thus, regulations on access are mainly found in Europe and North America.[82]

2. Criminal law and administrative criminal law:

Furthermore, the use of criminal law on the municipal level could be a useful means for enforcing environmental rules. In some environmental conventions the State parties are obliged to adopt criminal legislation to sanction violations of international agreements. CITES (Art. VIII para. 1), the Environmental Protocol to the Antarctic Treaty 1991,[83] the MARPOL-Convention 1973/78[84] and the First Additional Geneva Protocol 1977[85] are examples of agreements stipulating that States are to adopt criminal legislation for violators.

The use of criminal law as a means for enforcing international environmental regulations is discussed in a number of international fora:

a. The UN-Commission on Crime Prevention and Criminal Justice which adopted resolutions on "the role of criminal law in the protection of the environment" at its session in 1993: The Commission identified three categories of activities which should be penalised in connection with international conventions

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79 See OECD, OECD and the environment (1986), pp. 142.

80 Cf. Art. 9 of the ECE-Convention on the Transboundary Effects of Industrial Accidents 1992 (ILM 31 (1991), pp. 1330).

81 See Patricia W. Birnie/Alan E. Boyle, International Law and the Environment (1992), pp. 197. The authors describe the work undertaken within the OECD and other international bodies.

82 See Günther Handl, Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch (1992), pp. 88.

83 ILM 30 (1991), pp. 1455.

84 Alexandre Charles Kiss (ed.), Selected Multilateral Treaties in the Environment (1983), pp. 320.

85 ILM 16 (1977), pp. 1391.

(*e.g.* the Basel Convention): (a) offences with transboundary effects (or possible effects) on the world, such as greenhouse gases, (b) offences affecting countries other than the one in which they were committed; and (c) conduct that should be considered an offence in every country.[86] The Commission stressed in its report that criminal prosecution is not to be undertaken if the activities are made within the frame set by international agreements (*e.g.* air emissions which are within the limits set by regulations concerning the ozone layer).

Criminal law and environment has been a topic in the discussions of the Commission also in recent years. But proposals such as a draft resolution expressing the idea of the establishment of an International Court of Justice on the Environment, so as to improve the means for prosecuting extraterritorial and transboundary crimes, failed to gain the necessary support by the delegations.[87]

b. Work undertaken within the Council of Europe by the "Committee of Experts for the Protection of the Environment through Criminal Law": The aim of this project is among others (1) harmonisation of national criminal laws for serious environmental offences; and (2) developing common understanding in regard to some of the problems of international co-operation, in regard to environmental crime, such as search and seizure measures, the duty to inform competent authorities of neighbouring states in case of environmental accidents with transboundary implications, corporate criminal liability and the right to participate in criminal proceedings.[88]

In 1996 the Committee of Experts presented a draft convention which proposes that States should establish certain activities which lead to environmental degradation as criminal offences, others as administrative offences.

VII. Concluding Remarks

As developments in international environmental law show, the issues of implementation, compliance and effectiveness have gained the attention not only of academics but also of practitioners. The evolution of international environmental norms shows that States have become more aware of the fact that environmental law-making alone is not enough. Efforts must be undertaken to ensure the application of rules agreed by the elaboration of both dispute avoidance and dispute settlement mechanisms. Although it is to be hoped that States are willing to entrust independent

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[86] Cf. Report on the Meeting of the ad hoc Expert Group on more effective forms of international cooperation against transboundary crime, including environmental crime, held in Vienna from 7 to 10 December 1993 (E/CN.4/1994/4/Add.2, 10).

[87] Draft resolution submitted by the delegation of Costa Rica at the 5th session of the United Nations Commission on Crime Prevention and Criminal Justice (cf. Gerhard Loibl/Markus Reiterer, International Criminal Law and the Environment, Environmental Policy and Law 26 (1996), pp. 192). On the reactions of States at the 6th session of the Commission see Gerhard Loibl/Markus Reiterer, Criminal Law and the Protection of the Environment, Environmental Policy and Law 27 (1997), forthcoming).

[88] Cf. Report on the Council of Europe in YbIEL 3 (1992), pp. 501, 502.

international bodies with this task it is not realistic to hope that States are willing to transfer large parts of their sovereign rights to such independent bodies.

As has been pointed out nearly all international environmental agreements contain sophisticated systems for dispute settlement. They range from negotiations and consultations to judicial settlement by the ICJ; but one has to bear in mind that very few States on a voluntary basis have accepted the jurisdiction of the ICJ for environmental issues and in practice States are even more reluctant to make use of such dispute settlement procedures. It is doubtful whether this reluctance will change in the near future.

Although dispute settlement mechanisms might be seen as a deterrent they appear to be of little help in enhancing implementation of and compliance with global environmental treaties, where failure to comply would affect many States (*e.g.* the Climate Change Convention).

Means of enforcement on the municipal level might prove to be an effective tool to ensure the compliance and effectiveness of international environmental regulations by individuals and municipal authorities. Administrative, civil and criminal law procedures could be used effectively to this end. In order to achieve this aim a number of obstacles have to be overcome, *e.g.* States must be willing to accept the standard of administration of justice in an other State as being on the same level or States agree on standards for the administration of criminal justice both on the international and municipal level.

A positive evolution in the environmental field is the development of a number of mechanisms which could be put under the heading of "dispute avoidance". Reporting, Notification, Monitoring, Inspection and Non-compliance procedures are all found in international environmental agreements. This development has to be welcomed - in particular - for two reasons:

- in regard to environmental pollution: prevention always is better than cure
- in regard to disputes: avoiding confrontations between States is better than disputes which might at the end not be limited to environmental considerations but will include political implications as well.

New procedures or mechanisms, particularly conducive to "dispute avoidance", have recently been introduced in environmental treaty regimes, or are presently being discussed or designed. The first "test" for the non-compliance procedure established under the Montreal Protocol has clearly proven the advantages of mechanisms aiming at preventing non-compliance over measures designed to be taken only after a breach of commitments or even after environmental harm has occurred.

In order to strengthen the trend towards a global acceptance of the notion preventing disputes by enhancing individual compliance, two elements should be born in mind:

First, the inevitable linkage between the degree of stringency of obligations under the respective treaty and the degree of strictness of this treaty's compliance mechanism have to be considered. Thus, the shape of the dispute avoidance regime will to a large extent be determined by the degree of normativity of the rules it should safeguard.

Second, the sensitivity of States about having their individual performance too rigidly scrutinised has to be taken into account. It has been attempted to overcome this sensitivity by highlighting the supportive and constructive features of the procedure under consideration. As the example of the climate regime demonstrates, such an approach seems only useful if the commitments under consideration are flexible enough to justify it.

If a genuine contribution to dispute avoidance is to be achieved through enhanced implementation and compliance the designers of the respective procedures will have to bear the task to strike the right balance between all these correlated elements in order to succeed in tailoring these innovative and delicate mechanisms to the requirements of the instruments they shall serve.

The notion of achieving dispute avoidance through enforced compliance by individual parties with their commitments is gaining - on a global level - increased and, one may wish to say, irreversible support.