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Compliance under international environment law: settlement of dispute and its enforcement

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INTRODUCTION

Today International Environmental Law is arguably setting the pace for cooperation in the international community in the development of international law. There are nearly nine hundred international legal instruments that are either primarily directed to international environmental issues or contain important provisions on them.[1] Ensuring compliance by members of the international community with their international environmental obligations continues to be a matter of serious concern.[2] This is reflected in the attention the issue received at United Nations Conference on Environment and Development (UNCED), in the negotiation and implementation of recent environmental agreements, and in the growing number of environmental disputed brought before international judicial bodies.[3] The response to those concerns has included the development of existing mechanisms for implementation, enforcement and dispute settlement. (such as the specialized rules for arbitrating environmental disputes promulgated by the Permanent Court of Arbitration in 2001), as well as new approaches such as the non-compliance mechanisms established under a number of environmental agreements, and the role given to the UN Compensation Commission over environmental claims.

The problems of International Environment law

Of the reasons proffered for renewed efforts, at least three are especially relevant:

- It is apparent that states are taking over more international environmental commitments, of increasing stringency.
- The growing demands on access to finite natural resources, such as freshwater and fish, provide fertile conditions for conflicts over the use of natural resources.
- As international environmental obligations increasingly intersect with economic interests, states that do not comply with their environmental obligations are perceived to gain unfair competitive advantage from non-compliance.[1]

Non-compliance is seen to be important because it limits the effectiveness of legal commitments, undermines the international legal process and can lead to conflict and instability in the international order and occurs for a variety of reasons.[5] It raises three distinct but related issues relating to implementation, enforcement and conflict resolution:

- What formal and informal steps must be taken to implement a state's international legal obligation?
- What legal or natural person may enforce international environmental obligations of other states?
- What techniques, procedures and institutions exist under international law to resolve conflicts or settle disputes over alleged non-compliance with international environmental obligations?

Since the Fur Seal arbitration of 1893, a considerable number of environmental disputes have been submitted to international dispute resolution arrangements and the rate of submission appears to have increased significantly in the past: including trans-boundary air pollution[6]; the

Philippe Sands, Jacqueline Peel, "Principles of International Environment Law", Cambridge University Press 136 (3rd Edn, 2012)

diversion of the flow of international rivers[7]; protection of marine environment[5]; the relationship between environmental laws and foreign investment protection treaties[8]; access to environmental information; environmental impact assessment[9]; procedural obligations relating to notification of information and consultation[5]; responsibility for rehabilitation of mined lands[5], etc.

Implementation: States implement their international environmental obligations in three distinct phases[5]:

1. **National law:** Once a state has formally accepted an international environmental obligation, usually following the entry into force of a treaty which it has ratified or the act of an international organisation by which it is bound, it will usually need to develop, adopt or modify relevant national legislation, or give effect to national policies, programmes or strategies. Some treaties expressly require parties to take measures to ensure the implementation of obligations*h*6, or to take appropriate measures within their competence to ensure compliance with the convention and any measures in effect pursuant to it,[7] or to designate a competent national authority or focal point for international liaison purposes to ensure domestic implementation[8] The 1982 UNCLOS includes provisions for implementation of pollution requirements from different sources, and enforcement by states of their laws and regulations adopted in accordance with the Convention and the implementation of applicable rules and standards[2], and also ensures that recourse is available under their legal system for prompt and adequate compensation for damage caused by marine pollution by persons under their jurisdiction.[9]
2. **National compliance:** Once an obligation has been domestically implemented, the party must ensure that it is complied with by those within its jurisdiction and control. Numerous treaties expressly require parties to ensure such compliance[6], or to apply sanctions for failing to implement measures.[7] Others specifically provide for the application of criminal penalties or for the 'punishment' of violation.[8] National judges meeting shortly before the World Summit on Sustainable Development adopted the Johannesburg 'Principles on the role of Law and Sustainable Development', which affirmed their adherence to the 1992 Rio Declaration which laid down the principles of sustainable development, affirmed that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are 'crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law'.[9]
3. **Reporting:** The third element of national compliance arises from the requirement that states must usually report national implementing measures. Most environmental agreements expressly require parties to report certain information to the international organisation designated by the agreement. The information to be reported typically includes: statistical information on production, imports and exports;[6] information on emissions or discharges;[7] information on the grant of permits or authorisations,[8] including the criteria therefor[9] information on implementation measures which have been adopted;[10] details of decisions taken by national authorities;[11] scientific information;[6] and information on breaches or violations by persons under the jurisdiction or control of the party.[7] These reports may be required annually or bi-annually, or according to some other time-frame.[8]

International Enforcement: "Enforcement" is understood as the right to take measures to ensure the fulfilment of international legal obligations or to obtain a ruling by an appropriate international court, tribunal or other body, including an international organisation, that obligations are not being fulfilled. International enforcement may occur at the instigation of one or more states, or an international organisation, or by non-state actors.[6]

Enforcement by states: To be in a position to enforce a rule of international environmental law, a state must have a standing, and to have standing it must be able to show that it is, in the words of the International Law

Commission (ILC), an 'injured state'. Art 42 of the ILC's 2001 Articles on State Responsibility provides:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

a. that State individually; or
b. a group of States including that State, or the international community as a whole, and the breach of the obligation:
c. specially affects that State; or
d. is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

The ILC Articles also envisage that a state other than an 'injured state' is entitled to invoke responsibility of another state if:

a. the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
b. the obligation breached is owed to the international community as a whole."

Damage to a state's own environment: A number of international agreements commit parties to protect environmental resources located exclusively within their territory, for example the conservation of non-migratory species, or habitats or watercourses located within their territories. In these circumstances, other parties to the agreement could claim to be an injured state such as to allow them – at least in theory- to bring an international claim.[6]

Damage to the environment of other state: In situations involving damage to its environment, or consequential damage to its people or their property or other economic loss, a state will not find it difficult to claim that it is an 'injured state' and that it may bring an international claim. N the *Trail Smelter*[6] case, the United States invoked its right not to be subjected to the consequences of trans boundry air pollution from sulphur emissions in Canada and bring a claim against Canada for having violated its rights. Australia, in the *Nuclear Tests*[7] case, argued that French nuclear tests deposited radioactive fallout n Australian territory, which violated its sovereignty and impaired its independent right to determine the acts that should take place within its territory.

Damage to the environment in areas beyond national jurisdiction: The *Nuclear Tests*[6] case and the *Fur Seals*[7] dispute, both cases raised the issue of whether a state had a standing to bring an environmental claim to prevent damage to an area beyond national jurisdiction, even if it had not itself suffered any material damage. This raises the possibility of bringing an action on the basis of obligations that are owed *erga omnes*, either on the basis of a treaty or on the basis of customary law. As a general matter, when one party to a treaty agreement believes that another party in violation of its obligations under that treaty or agreement, it will have the right, under the treaty or agreement, to seek to enforce the obligations of the party alleged to be in violation, even if it has not suffered material damage.[6]

Enforcement by International organisations: Whilst international organisations play an important legislative role in the development of international environmental law, their enforcement function is limited. International organisations are international legal persons that may seek to protect their own rights and enforce the obligations that others have towards them.[6] Sovereign interests have, however, led states to be unwilling to transfer too much enforcement power to international organisations and their secretariats, although there are some indications that this reluctance is being overcome. The 1982 UNCLOS also introduces innovative arrangements by endowing some of its institutions with a range of enforcement powers. Thus, the Council of the International Seabed Authority can: 'supervise and co-ordinate the implementation' of Part XI of UNCLOS and 'invite the attention of the Assembly to cases of non-compliance'; institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in case of non-compliance; issue emergency orders 'to prevent serious harm to the marine environment arising out of activities in the Area' and direct and supervise inspectors to ensure compliance.[6] A Legal and Technical Commission, one of the Council's organs, is entitled to make recommendations to the Council on the institution of proceedings and the measures to be taken following any decision by the Seabed Disputes Chamber.[7]

Enforcement by non- state actors[6]: According to the traditional rules of public international law, non-state actors are not international legal persons except with the limited confines of international human rights law and its associated fields. Environmental organisations have also been involved in the international implementation and enforcement process although their primary role continues to be at the national level, through political means or by recourse to administrative or judicial procedures for enforcing national measures adopted by a state in implementing its international treaty and other obligations.

Enforcement by National courts[6]: UNCED endorsed a stronger role for the non-governmental sector in enforcing national environmental laws and obligations before national courts and tribunals, as reflected in Agenda 21

and the Rio Declaration[7] and now applied in the 1998 Aarhus Convention.[8]

International enforcement: Under some regional human rights treaties, individual victims, including non-governmental organisations, may bring complaints directly to an international body. In the recent years they have also gained access to some international proceedings from which they were previously excluded, in the sense that they are increasingly recognised as being able to file *amicus curiae* petitions.[7]

International Conflict Settlement: Art 33 of the UN Charter identifies the traditional mechanisms, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties' own choice[8]

Diplomatic means of dispute settlement

Negotiation and consultation: In the Fisheries Jurisdiction case, the ICJ set forth basic objectives underlying negotiation as an appropriate method for the resolution of a dispute. The ICJ held that the objective of negotiation should be: "the delimitation of the rights and interests of the parties, the preferential rights of the coastal state on the one hand and the rights of the applicant on the other, to balance and regulate equitably questions such as those of catch-limitation, share allocations and 'related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions."[9] Environmental treaties refer, more or less as a matter of standard practice, to need to ensure that parties resort to negotiation and other diplomatic channels to resolve their disputes before making use of other formal methods.[10]

Mediation, conciliation, fact finding and international institutions: When negotiations and consultations fail, a number of environmental treaties endorse mediation[7] and conciliation[8] (or the establishment of a committee of experts[9]) to resolve disputes, all of which involve the intervention of a third person. Some examples are like the role of International Joint Commission established by Canada and the United States in the 1909 Boundary Waters Treaty.[10]

Non compliance procedures: Article 18 of the Kyoto Protocol called the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol to approve, at its first session, 'appropriate and effective procedures and mechanisms to address cases of non-compliance', with the caveat that any procedures and mechanisms entailing binding consequences 'shall be adopted by means of an amendment to the Protocol. In 2001, at the seventh Conference of the Parties, the parties adopted a decision on the compliance regime for the Kyoto Protocol, which is among the most comprehensive and rigorous established so far.[7] The compliance regime consists of a Compliance Committee made up of two branches: a facilitative branch which provides advice and assistance for compliance; and the Enforcement Branch which has the power to apply the consequences to the parties to promote compliance.

Inspection procedures of multilateral development banks[8]: The World Bank became the first multilateral bank to create an Inspection Panel to receive and review requests for inspection from a party that claimed to be affected by a World Bank Project, including environmental harm[9], followed by Asian Development Bank(1995)[10], and others.

Legal Means of Dispute settlement: *Arbitration* International arbitration has been described as having 'for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for the law, and also submit in good faith to the award.[7] The Permanent Court of Arbitration has sponsored the adoption of arbitration rules specifically designed to address needs arising from the arbitration of disputes relating to the environment and natural resources.[8]

International Courts

1. International Court of Justice The contentious jurisdiction of the ICJ can arise in at least two ways. First, under Art. 36(1)of its statute. The ICJ has jurisdiction by agreement between parties to the dispute, either by a special agreement whereby two or more states agree to refer a particular dispute and defined matter to the ICJ, or by a compromissory clause in a multilateral of bilateral treaty.. Some examples are in the *Fisheries Jurisdiction* case, Spain challenged the enforcement of fisheries conservation measures taken by Canada in areas beyond its exclusive economic zone.[7] It can issue advisory opinions8 and interim measures of protection[8]
2. UNCLOS and ITLOS[9:] Part XV of the UNCLOS addresses compulsory dispute settlement, allowing states at the time of signature, ratification or accession or at any time thereafter to designate any of the following dispute settlement procedures: the International Tribunal for The Law of the Sea (established in accordance with Annex VI to UNCLOS); the ICJ; an arbitral tribunal (constituted in accordance with Annex VII to UNCLOS); and

special arbitral tribunal (constituted in accordance with Annex VIII to UNCLOS)[10]

3. WTO Dispute Settlement Body[7:] The 1994 WTO Agreement introduced as an Annex the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU). The WTO dispute settlement is governed principally by Articles III and IV of the WTO Agreement and the DSU. Working Procedures have been adopted for panel and Appellate Body proceedings,[8] as have Rules of Conduct. It has applied the rules of international law in the *Beef Hormones*[9] case (precautionary principle)
4. European Court of Justice and Court of First Instance Environmental cases brought before the ECJ may raise issues concerning the interpretation and application of international environment law, in addition to relevant rules of EU law and the most frequent route is Art 258 of the EU Treaty.[7]

CONCLUSION

Principles 10 and 26 of the Rio Declaration called on states to provide, at the national level, 'effective access to judicial and administrative proceedings, including redress and remedy' and internationally to 'resolve all their environmental disputes peacefully and by appropriate means and in accordance with the Charter of the United Nations.' Agenda 21 recognised the limitations of existing arrangements, including the inadequate implementation by parties of their obligations, the need to involve international institutions and environmental organisations in the implementation process, and the gaps in dispute settlement mechanisms. It called upon the parties to international agreements to 'consider procedures and mechanisms to promote and review their effective, full and prompt implementation', and on the international community more broadly to consider broadening and strengthening the capacity of the mechanisms in the UN system to identify, avoid and settle international disputes, in the field of sustainable development, taking into account existing bilateral and multilateral agreements for the settlement of disputes.[8] The limitations inherent in the international arrangements for ensuring compliance with international environmental obligations are well apparent, and developments in international law alone will not be sufficient to overcome the political, economic and social reasons lying behind non-compliance. Nevertheless, the law, processes and institutions can make a difference. Addressing compliance requires a comprehensive effort to develop rules and institutional arrangements at three levels: implementation, enforcement and dispute settlement. First, with regard to implementation, the provision of technical, financial and other assistance to states, particularly developing states, highlights the growing 'internationalisation' of the domestic implementation and legal process, and an awareness that international environmental law will not achieve its objectives if it does not also take account of the need, and techniques available, for improving domestic implementation of international environmental obligations. Second, with regard the enforcement, states have often been unwilling, for a variety of reasons, to bring international claims to enforce environmental rights and obligations. Within the past decade, however, it appears that this reluctance is being replaced by an increasing willingness by states to have resort to international adjudicatory mechanisms to enforce international environmental obligations, and important decisions have been handed down by the ICJ, ITLOS, arbitral tribunals and the WYO Appellate body. Broadening the category f persons formally entitled to identify violations and to take measures to remedy them is a process that is underway and which should be further encouraged if states and other members of the international community are to be subjected to the sorts of pressure that will lead them to improve compliance with their obligations. Third, the disputes before various international courts have shown, the availability of a broad and growing range of mechanisms for dispute settlement, including the compulsory jurisdiction of certain regional and sectoral courts and other international bodies, suggests an important and growing role for independent, international adjudication.. This does not mean that existing arrangements may be said to be adequate; states increasingly have a choice of international for a before which to take an environmental dispute, and the factors they will take into account in electing to take a case before one international court or tribunal, rather than another, will include the likely costs, the speed of the proceedings, and the possible outcome, as well as the ability of a particular court or tribunal to engage with scientific and technical issues of some complexity. There is thus a considerable potential for states to engage in 'forum shopping' in their selection of dispute settlement for a. which may contribute to the fragmentation of international environmental law.[7]

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