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THE TIME FOR LOFTY SPEECHES IS OVER – IT IS TIME FOR IMPLEMENTATION: THE PROBLEMS OF 50 YEARS OF APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW

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ABSTRACT: The global environment is not in a better shape than 50 years ago (climate change, loss of biodiversity, pollution, waste of natural resources, poverty). As main reasons for the limited result of the legal efforts to appropriately preserve and protect the environment, the contribution identifies poor drafting of environmental agreements, the absence of effective implementation mechanisms and their full application, and the attemps to keep information on non-compliance with commitments within the closed club of contracting parties. The article suggests a number of possibilities to improve the present situation and concludes that the full and effective application of (international) environmental law is the biggest problem which environmental lawyers face.

RESUM: El medi ambient global no està en millor forma que fa 50 anys (canvi climàtic, pèrdua de biodiversitat, contaminació, malbaratament de recursos naturals, pobresa). Com a principals raons del resultat limitat dels esforços legals per preservar i protegir adequadament el medi ambient, l'aportació identifica la mala redacció dels acords ambientals, l'absència de mecanismes d'execució efectius i la seva plena aplicació, i els intents de conservar la informació sobre l'incompliment de compromisos dins del club tancat de parts

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contractants. L'article suggereix una sèrie de possibilitats per millorar la situació actual i conclou que l'aplicació plena i eficaç del dret ambiental (internacional) és el major problema al qual s'enfronten els juristes ambientals.

RESUMEN: El medio ambiente global no está en mejores condiciones que hace 50 años (cambio climático, pérdida de biodiversidad, contaminación, desperdicio de recursos naturales, pobreza). Como principales razones del limitado resultado de los esfuerzos legales para preservar y proteger adecuadamente el medio ambiente, la contribución identifica la mala redacción de los acuerdos ambientales, la ausencia de mecanismos efectivos de implementación y su plena aplicación, y los intentos de mantener información sobre el incumplimiento de los mismos compromisos dentro del club cerrado de las partes contratantes. El artículo sugiere una serie de posibilidades para mejorar la situación actual y concluye que la aplicación plena y efectiva del derecho ambiental (internacional) es el mayor problema al que se enfrentan los juristas ambientales.

KEYWORDS: Environmental reporting – Compliance committees – Dispute settlements – The promotion of legal values – Participation of civil society

PARAULES CLAU: Informes mediambientals – Comitès de compliment – Solució de controvèrsies – Promoció de valors jurídics – Participació de la societat civil

PALABRAS CLAVE: Informes ambientales – Comités de cumplimiento – Solución de controversias – Promoción de valores jurídicos – Participación de la sociedad civil

There are about 500 multilateral environmental agreements (MEAs) in force, plus an unknown number of bilateral or regional agreements. Limited attention has been given, though, to the question of monitoring implementation, application, compliance and enforcement of these agreements[1]. The 50th anniversary of the Stockholm Declaration on the human environment[2] might be an opportunity to have a closer look at these issues[3].

This contribution will, in a first section, give a short indication of the global environment today. It will then discuss the influence of the drafting of agreements on their subsequent application. A third section will discuss one by one the legal mechanisms to ensure application of the agreements, followed by a presentation of some agreements, where application monitoring was successful. The contribution will conclude with some lessons that might be learned from 50 years of monitoring the application of international environmental agreements.

I. THE GLOBAL ENVIRONMENT, 50 YEARS AFTER STOCKHOLM

The Stockholm Declaration of 1972 and the Rio Declaration on Environment and Development of 1992[4] did not adress the question of implementing international environmental law at all. It may be possible, though, to derive from the reference to the "management" of natural resources in these documents conclusions on active measures to ensure compliance with MEAs. At the World Summit at Johannesburg in 2002, a "plan of implementation" of Sustainable

[1] The terminology in legal literature varies. Here, "implementation" is understood as including all measures, binding or not binding, to ensure the fulfilment of the objectives on an agreement. "compliance" is the conformity of national provisions, rules and activities with the international agreement. "Application" refers to putting into social reality the legal provisions of an agreement. "Enforcement" finally means all administrative, penal or civil law means that are used to oblige a contracting party to align to the requirements of an agreement.

[2] United Nations Conference on the Human Environment, Stockholm Declaration of 16 June 1972.

[3] See Jan Klabbers, "Compliance procedures", in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press. Oxford, 2007, p. 995; Jutta Brunnée, "Enforcement mechanisms in international law and international environmental law", in *Environmental Law Network International Review,* nº 1, 2005, p. 1; Peter H. Sand, "Enforcing CITES: the rise and fall of trade sanctions", in *Review of European, Comparative and International Environmental Law*, vol. 22(3), 2013, p. 251; Wayne B. Gray and Jay P. Shimshack, "The effectiveness of law monitoring and enforcement. A review of the empirical evidence", in *Review of Environmental Economics and Policy*, vol. 5(1), 2011, p. 3.

[4] Rio Declaration on Environment and Development, 14 June 1992.

Development was adopted[5]. This plan mainly addressed the need and the possibilities of financial assistance from developed to developing countries. It did not go into details of implementing MEAs or international environmental law in general.

Generally, it does not seem exaggerated to argue that international environmental law agreements were based on the implicit assumption that it was sufficient to lay down legal objectives, principles and commitments and that these then would be implemented by the contracting parties. That approach was in line with the concept of national sovereignty in environmental matters, which was emphasized in the Stockholm Declaration and repeated in the Rio Declaration[6]. This was the main reason why the different MEAs contained so few provisions on implementation, compliance, sanctions for non-compliance and dispute settlement procedures. In particular, the possible ccontroversies between the secretariat of an agreement –normally the Conference of the Parties (CoPs) of the agreement– and a non-complying contracting party, or between two contracting parties found limited attention.

At present, the United Nations authorities mention the “triple crisis” of international environmental law: the threat of climate change, the loss of biodiversity and the increasing environmental pollution. This crisis is certainly not reduced by the 2022 war in Ukraine. And it is unforeseeable to what extent the new world order, which China and Russia are asking for in the context of the Ukranian war, will affect the United Nations, public international law in general and international environmental law in particular. The core difference between the approach between Russia/China and the present system of the United Nations, as far as concerns its implications on the environment appears to be that neither Russia nor China value the individual person as endowed with fundamental rights and having a value in itself: human life does not really matter for these countries.

[5] Johannesburg, Plan of implementation of the World Summit on Sustainable Development, 2002.

[6] Stockholm Declaration (n. 2), principle 21: “States have… the sovereign right to exploit their own resources pursuant to their own environmental policies”. Almost identical is the wording of principle 2 of the Rio Declaration (n. 4).

The global agreements to fight climate change –in particular, the UN Framework Convention of 1992, the Kyoto Protocol of 1997 and the Paris Agreement of 2015– did not cause the greenhouse gas emissions to be reduced. From 1990 to 2021, the GHG-emissions rose, globally, by around 40 per cent[7]. The target of keeping the warming-up of the planet at two degrees Celsius above pre-industrial levels and work towards an 1.5 degree increase, was fixed by the Paris Agreement, but an 1.1 percent increase was already reached in 2020.

As regards biodiversity loss, the Gobal Environmental Outllok 5 stated in 2021[8]: "Biodiversity is declining at an unpresented rate, and the pressures during this decline are intensifying". The decline affects all regions in the world, despite the efforts of international organisatons and of States to take action against it.

Recently, the worsening pollution of the oceans has received some attention[9]. For air pollution, the World Health Organisation reported in 2022 that "almost the entire gobal population (99%) breathes air that exceeds WHO air quality limits and threatens their health"[10]. No precise global data are available for soil and freshwater pollution[11], though all available publications point to the fact that pollution is high and, in general, increasing.

To take another example: the UNEP report on the Mediterranean region in 2021 indicates that "Mediterranean countries are not on truck to achieve and fully implement the agreed upon goals… The majority of observed trends show

[7] The international organisations did not succeed to establish a uniform way of calculating GHG-emissions. UN, UNEP, the World Bank, the International Energy Agency etc all publish their own data, based on different calculation methods and extrapolations.

[8] UNEP, Secretariat of the Convention on Biological Diversity, Global Biodiversity Outlook 5. Montreal, 2021, p.10.

[9] See Philip J. Landrigan *et al*., "Human health and ocean pollution", in *Annals of Global Health*, vol. 86(1), 2020, p. 151, introduction: "Pollution of the oceans is widespread, it is worsening and its geographic extent is expanding. Ocean pollution is a complex and ever-changing mixture of chemicals and biological materials that includes plastic wastes, petroleum-based pollutants, toxic metals, manufactured chemicals, pharmaceuticals, pesticides and a noxious stew of nitrogens, phosphrous, fertilizer and sewage". See also the contribution to this monographic of Esperanza Orihuela Calatayud, "La protección de mares y océanos: una gobernanza azul esquizoide necesitada de tratamiento urgente", in *Revista Catalana de Dret Ambiental*, vol. 13(2), 2022.

[10] WHO, Ambient air quality data base update 2022. Status report. Geneva, 2022.

[11] See Convention on the protection and use of transboundary watercourses and international lakes (1992) and Convention on the law of non-navigational uses of international watercourses (1997) and the contribution to this monographic of Laura Movilla Pateiro, "La ecologización del derecho de los cursos de agua internacionales", in *Revista Catalana de Dret Ambiental*, vol. 13(2), 2022.

developments that are either progressing toward the set targets, but at an insufficient rate or unequally across the countries, or moving away from the target"[12], an observation that might well be typical for most global MEAs and most regions.

It is a commonplace that nothing undermines the authority – of parents, teachers, bosses, governements or others – more than rules which are fixed, but then are not applied. This also applies to international law in general and to international environmental law in particular. Yet, this commonplace is all too often ignored in practice. The application of environmental agreements is mainly addressed by the drafting of agreements and by the application mechanisms, which the agreement itself fixes.

II. THE INFLUENCE OF THE DRAFTING OF ENVIRONMENTAL AGREEMENTS

It is difficult to establish a precise causal link between the state of the global environment and the application or lack of application of specific international environmental agreements, as these agreeements do not cover all sectors, all pollutants and all activities, and as their geographic extension is normally limited. Yet, attention may be drawn on the relevance of the drafting of international environmental agreements. When the environmental commitment, laid down in the provisions of an agreement, is general or vague, the implementation is normally poor, as contracting parties invoke their sovereign right to decide themselves on the measures which are to be taken. For example, the Convention on Biological Diversity provides the "Each Contracting party shall, in accordance with its particular conditions and capabilities, develop national strategic plans and programmes for the conservation and sustainable use of biological diversity"[13]. The Convention on desertification of 1994 is hardly more precise with regard to legal obligations, requiring contracting parties to "combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification"[14]. The Convention on long-

[12] UNEP/MAP, Medium-term strategy 2022-2027, UNEP/MAP JG.25/27 of 9 December 2021, section 29.
[13] Convention on Biological Diversity, Article 6.
[14] UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (1994).

range transboundary air pollution requires contracting parties to "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution"[15]. And the Convention of the Law of the Sea is, with regard to pollution, equally general[16]. The two conventions on watercourses limit themselves to protect, reduce and control pollution of international watercourses[17].

Regional environmental agreements are likewise often rather general. This applies for example to the OSPAR Convention on the protection of the North-East Atlantic which asks contracing parties, among other things, to take all possible steps to prevent and eliminate pollution by dumping from offshore sources[18]. The Barcelona Convention on the protection of the Mediterranean requires contracting parties to take all appropriate measures to prevent, abate, combat, to the fullest extent possible, pollution. These last two conventions and the Helcom Convention on the protection of the Baltic Sea installed a rather intense form of intergovernmental cooperation to protect the respective sea.

Decisions are normally taken by the Conference of the Parties and are, under certain conditions, binding[19]. In practice consensus is looked for, which means that progress in cooperation depends, in each individual case, on the political decision of each contracting party. The same applies to the agreements on the Rhine, Danube, Elbe and Odra rivers in Europe, where international cooperation works relatively well. The reason for the taking and implementing relatively effective measures in these examples is the political will of the contracting parties to reach results.

This is different with the ASEAN region, where the environmental cooperation is based on the assumption that the implementation of measures shall entirely be left to each State. For example, the agreement on transboundary haze pollution (2002), left it to each contracting party to take or not to take measures to fight

[15] Convention on Long-range Transboundary Air Pollution (1979), Article 2.
[16] UN Convention on the Law of the Sea, Article 194: "States shall take… all measures… that are necessary to prevent, reduce and control pollution of the environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities".
[17] Water Convention 1992 (n.11), Article 2(2.a); Water Convention 1997 (n.11), Articles 21(2).
[18] OSPAR Convention, Articles 4 and 5.
[19] See on this aspect Tim Staal, *Authority and legitimacy of environmental post-treaty rules*, Bloomsbury Publishing. London, 2019.

air pollution. And the rather concrete ASEAN agreement on the conservation of nature and natural resources (1985) was not ratified by sufficient States to enter into effect.

In North America, no regional environmental agreement exists. A Commission for environmenal cooperation which was set up, is limited to the publication of non-binding “faculty records”.

Overall, the drafting of international environmental agreements did not much improve over the last 50 years. The obligations of the contracting parties are all too often fixed only in general terms, which do not allow a serious assessment of compliance. Subsequent protocols or other decisions by the CoPs are sometimes more specific –see the regional concentions on the European seas– ; however, this mainly leads to intergovernmental cooperation, not so much to the implementation and application of the international agreement.

In particular, with regard to the defence of international law and the promotion of compliance monitoring as well as in view of the crisis provoked by the Russian aggression on Ukraine, it is not particularly helpful that the USA are not contracting party of the Convention on Biological Diversity, the Law of the Sea, the Kyoto Protocol, the Aarhus Convention and the Cartagena and Nagoya Protocols, and are an uncertain party to the Paris Agreement. This absence from important international agreements weakens the coherence of the defence of the global environment and the values which are underlying the different environmental agreements. As the United States exercise an important influence on the negotiations of agreements, even when they are only an observer and not a contracting party –financial contributions and staff policy being the main vehicles for that– their exampe might show to some contracting parties that compliance and full application of the agreement is finally not that important.

III. IMPLEMENTATION MECHANISMS

Implementation mechanisms are those provisions in an agreement which shall ensure or at least facilitate the compliance of the contracting parties’ commitments with the provisions of the agreement.

In 2017, the United Nations Environmental Programme (UNEP) published a study on compliance mechanisms under 19 selected MEAs[20]. The study examined 11 agreements concluded between 1970 and 1990, but only two agreements concluded since 2001. It resumed the different means to ensure implementation as:

- Information on performance;
- Non-compliance procedures;
- Carrots and sticks in cases of non-compliance;
- Dispute resolution procedures.

The study found that 15 of the 19 agreements had requested the transmission of information from the contracting parties, in order to allow a performance review; 16 agreements had instituted dispute-resolution procedures, 10 non-compliance procedures and 8 carrots or sticks to ensure implementation. These data hide considerable differences in the approach towards implementation and compliance.

A number of agreements provided for compliance mechanisms and asked the Conference of the parties to act as compliance surveillance body or set up a specfic compliance committee. However, compliance procedures mainly served to promote the compliance with the agreement, acting as a help-desk and making available finances, instead of enforcing the application of the agreement's provisions[21]. Even when an agreement considered that the omission to transmit information constituted a case of non-compliance –this was the case, for example, of the Ramsar Convention, the CITES, the Montreal and the Kyoto Protocols–, the consequences were limited. For example, under the Montreal Protocol, which passes generally to be an agreement which reached

[20] UNEP, Compliance mechanisms under selected multilateral environmental agreements. Nairobi, 2017. The examined agreements were: Ramsar Convention on Wetlands (1971); Convention on World Cultural and Natural Heritage (1972); CITES (1973); Convention on Migratory Species (1979); Convention on Biological Diversity (1992); Convention on Desertification (1994); Convention on Plant Genetic Resources (2001); Basel Convention on Waste (1989); Rotterdam Convention on Prior Informed Consent (1998); Cartagena Protocol (2000); POP Convention (2001); Convention on the Ozone Layer (1985); Montreal Protocol on the Ozone Layer (1987); Framework Convention on Climate (1992); Kyoto Protocol (1997); Whaling Convention (1946), Convention on the Dumping at Sea (1972); Convention on the Law of the Sea (1982); Convention on Straddling and Highly Migratory Fish Stocks (1995).

[21] Sandrine Maljean-Dubois, Imad Ibrahim and Jessica Owley, "The Paris Agreement Compliance Mechanism: Beyond COP 26", in *Wake Forest Law Review*, vol. 11, 2022, p. 153.

its objectives, the contracting party only is informed, and as a last instance warned ("cautioned") that it should comply with its information obligations.

1. Reporting obligations

In the digital era, reporting by the contracting parties on the performance in implementing and applying the agreement's provisions, should have become easier, and this includes the publishing of the different national and international reports. However, in practice no significant change appears to have taken place. Contracting Parties continue to be often late in submitting their reports. For example, under the Biodiversity Convention, the 6th national implementation reports were due by the end of 2018. One year later, 50 contracting parties, about 25 per cent, had not yet submitted their reports[22]. A deficit of reporting of about twenty percent of the Contracting Parties can also be observed for the Aarhus Convention[23]. Such delays slow down or impair the establishment of implementation reports for the agreement itself and affect the effective management of the agreement. Under the Barcelona Convention, several implementation reports are outstanding since a number of years, and neither a list of the submitted reports nor the content of these reports are publicly available. Other conventions ask for a specific code, in order to get access to implementation reports.

The reporting obligation as the main instrument of promoting the implementation of an international agreement normally takes the form of self-reporting: the contracting party informs of measures taken (and results obtained) in implementing the agreement, either in the form which it chooses or by filling in a template elaborated by the MEA's bodies. Verification of the information and data that were transmitted either by the secretariat or by experts only seldom takes place. Conformity studies –studies whether the legal obligations were complied with– are not made. This is all the more regrettable as States have the habit of reporting –at best– on measures taken, but not on results achieved, and normally do not report on omissions. Inspections and

[22] Convention on Biological Diversity, Note of 9 December 2019, SCBD/IMS/JMF/MC/86437.

[23] UNECE, Synthesis report on the state of implementation of the Convention, ECEMP.PP/2021/6 of 14 October 2020 (38 of 47 reports); similar data on previous reports (37 of 47 reports in 2017, 39 of 47 reports in 2014).

audits of the transmitted data or of implementation in general are likewise very exceptional.

The Paris Agreement followed the Montreal Protocol in establishing a group of scientific/technical experts, who are capable of assessing the information transmitted by the contracting parties. Both these agreements also require the transmission of annual reports to the secretariat, though the majority of MEAs require the contracting parties only to report at regular intervals[24]. The vague term of "nationally determined contribution" in the Paris Agreement has as the consequence that the experts' examination of the national reports is formalistic rather than substantial; the examination does, of course, not check, whether the national contribution reflects indeed the "highest possible ambition".

Most of the environmental agreements do not regularly report on the state of implementation and compliance of the agreement itself. For members of the public, academics, NGO representatives or others, it is often difficult to follow precisely to what extent an agreement is actually applied. Rather, such information remains, at best, in the closed club of the secretariats and (some of) the contracting parties. This lack of transparency clearly is an obstacle to a continued discussion on the objectives, strengths and weaknesses of the agreement

2. Non-compliance procedures

Non-compliance proceduress consist mainly in the establishment of a compliance committee which shall identify and discuss cases of non-compliance. Such committees report generally to the Conference of the Parties. The compliance committees consist of a number –six to twelve– of experts, nominated by the Conference of the Parties, which shall take into consideration the geographical balance. Normally, the members of the committees are government officials or government representatives. Only the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (1998) gives environmental organisations the possibility to have representatives of civil society appointed as members of the committee.

[24] Frequently, the Conference of the Parties determines the interval. It is doubtful, though, whether the fixing of such intervals is legally binding.

The Committee meetings are normally not public; exception again is the Aarhus Convenion, where all meetings are public and where also all documents, submissions, findings, etc are published.

The compliance committee may be seized by a contracting party which indicates itself that it is not complying with its obligations, by another contracting party or by the Conference of the Parties. The secretariat of an agreement may normally not seize the compliance committee. The Aarhus Conventions also allows members of civil society to make submissions to the committee. And it is significant that of the 194 submissions which reached the Aarhus Convention Compliance Committee until April 2022, only three were from a contracting party, while 191 were submitted by members of civil society (the public). This figure alone shows the huge potential which access by the public to the compliance committees of environmental agreements would have and it is regrettable that this potential is not used.

The limitation to allow only States to address a compliance committee is one of the main reasons why the compliance committees are often seen as having “no teeth”: indeed, contracting parties regularly have no interest to discuss cases of non-compliance, be they introduced by themselves or by other contracting parties. The active involvement of members of the public would ensure at least some sort of public discussion on the case of non-compliance in question.

The findings of the compliance committee are regularly addressed to the CoPs. These findings are not published, exception: Aarhus Convention. The CoPs have normally all powers to adopt measures in order to ensure compliance. Such measures include a declaratory statement that a contracting party is in breach, a warning, the exclusion from meetings, the loss of voting rights, trade restrictions, financial sanctions and different forms of making the name of the non-complying party public (“name and shame”). However, often enought the rules of procedure of the compliance committees limit the available sanctions, and even those sanctions, which are admitted, are never used in full. At best, the COPs state that this or that contracting party is in non-compliance with its obligations. Even this soft form of “name and shame” is not popular with the States.

Practically no agreement uses the “name and shame” approach in full. Sometimes, the act of non-compliance is announced in a CoP decision, without naming the contracting party responsible for it. The Montreal Protocol is more outspoken in this regard, but does not either report, if, how and when the contracting party which was named re-introduced compliance[25].

The compliance committees under the different agreements take a long time for their procedures. They do not normally lay account of their activity by regularly reporting on their measures and the follow-up to them. The consequence is that any case of non-compliance is kept once more within the closed club of the contracting parties of the specific agreement. The absence of representatives of civil society in the compliance committees and its meetings contributes to this secrecy policy. The compliance committees do not either publish regular (annual) reports on their activity with regard to the state of the respective agreement, which is another reason why environmental law infringements receive so little attention.

Once a case of non-compliance is established, the CoPs normally have as instruments of response at their disposal the technical support, financial assistance in order to reach compliance and the pronouncing of some forms of the above-mentioned “sanctions”.

Technical support consists, in particular, in assisting in capacity building or in technology transfer, in scientific or technical expert advice or studies. The financial assistance is destined to ensure that the contracting party in question complies with its obligations under the agreement. Of course, such an assistance is not appropriate when a contracting party omits, for example, to report (in time) on its measures to implement the agreement. Financial assistance may be helpful to substitute environmentally dangerous substances (Montreal Protocol, POP Convention, Minamata Convention), but has its limits when measures need to be taken, for example, to protect biodiversity or the water quality.

“Sanctions” might, as mentioned, consist in warnings (“cautions”), in the obligation to elaborate an action plan for enduring application, in the exclusion

[25] See, for example, Montreal Protocol, Decisions X/20 to X/28.

of participating in meetings, trade restrictions or in the taking away of voting rights. While warnings do not appear to need an explicit authorisation in the agreement itself, the suspension of voting rights or the obligation to submit an action plan for repairing an omission needs at least an authorising decision by the CoP. Trade restrictions were in particular laid down in trade-related agreements such as CITES or the Kyoto Protocol. However, such restrictions were more theoretical than constituting an active form of sanctions that were used by the CoPs. Generally, one observes a considerable reluctance of the different CoPs to apply any form of sanction or even to inform on the number of warnings or other sanctions which were addressed to non-compliant parties, or on non-compliance in general.

3. Environmental dispute settlements

It would be theoreticlly possible to establish a dispute settlement mechanism following the model of the World Trade Organisation (WTO). However, no State is likely to accuse another State of non-compliance with environmental commitments as regards climate change, biodiversity loss or pollution questions. The few cases handled so far by the International Court of Justice confirm this assessment.

A way forward could be not to limit access to a dispute settlement mechanism to States, but also allow environmental organisations, an environmental ombudsman or a compliance committee to introduce such proceedings before a dispute settlement body. Attemps in this direction might be started with regional agreements, such as OSPAR or one of the UNECE agreements. However, little scientific discussion on such questions has taken place so far. And the examples of Norway and Iceland in the whaling question demonstrate that even environmentally-minded States are not ready to accept majority decisions on what they perceive to be an interference with their sovereignty.

The last fifty years did not even lead to a discussion on such issues, not to talk of any evolution. Whether future reflections on the rights of nature, the Fridays for Future or other initiatives from the side of civil society will cause movement to the present standstill, remains to be seen.

IV. SUCCESSFUL APPLICATIONS

An agreement, which is generally considered to have been successful, is the Montreal Protocol on substances which deplete the ozone layer, as the production and use of such substances has decreased or even stopped, and the ozone layer seems to recover. Therefore, it may be useful to have a closer look at the reasons for this success. Opinions certainly differ in this regard. The following circumstances appear to have contributed to the positive results of the Protocol:

1. There is an annual meeting, where the management of the Protocol is discussed and, when necessary, new measures –in particular the inclusion of new substances– is decided.
2. Contracting Parties have to report annually on their measures and the results obtained. The reports are scrutinised by the other parties, which also have the courage to make critical comments.
3. A group of experts continuously verifies the data, the evolution of the ozone layer and the need to take new measures; its reports are quickly made available to the policy-makers.
4. The Protocol deals with a limited number of substances –ten substances– which allows a tight monitoring of the data on the evolution of production and use, and the quick interference by the Protocol bodies, when things develop into the wrong direction.
5. Decisions regarding non-compliance are immediately made public. This “name and shame” approach incites parties to make efforts in order to comply with the Protocol’s requirements.
6. There is a financial mechanism to assist parties that have difficulties to respect the commitments undertaken.
7. The public –in this case in particular industries which could be concerned of competitive impacts– has the possibility to submit comments, draw attention to possible errors or deliberate wrong data etc and thus increase the chance of the general respect of the Protocol.

These circumstances suggest that compliance checking is a task that needs to be executed continuously; where cases of non-compliance are found or suspected, immediate, open and transparent measures are to be taken. Decisions are to be brought to the knowledge of all contracting parties and are

to be published, in order to give full effect to the “name and shame” element of enforcement.

The UNECE Aarhus Convention also is considered to be relatively successful. It provides in particular for public participation in decision-making –through the compliance committee– of the CoP, full publication of data and documents concerning possible cases of non-compliance and the possibility of civil society to influence the composition of the compliance committee. It does not have financial means to help contracting parties to comply with their obligations, and the meetings of the CoP takes place only once every three years. Civil societies, individuals and NGOs regularly use the findings of the Aarhus compliance committee to increase pressure on national public authorities. A comparison with the Escazu-Agrement for Latin America, which has the same objectives as the Aarhus Convention, is not possible because the first meeting of the Escazu CoP only took place at the end of April 2022 and several decisions on compliance monitoring had still to be taken by then.

The Paris Agreement, adopted in 2015, provides for some compliance mechanisms, though it is too early to make a final assessment of its effectiveness. The national reports on the emission of GHG-gases and their evolution from 1990 till 2021 are not published, though rectified figures are. There is a compliance committee, which is, however, as mentioned, much more a help desk than a body to ensure compliance. It works hand in hand with climate-related experts, who are capable of identifying national fake news or erroneaus data. The public has no possibility to participate in the decision-making of the compliance committee or, indeed, of the CoP. The CoP meets annually, which allows a quick assesment of orientations that go into the wrong direction, and regularly publishes information on the state of greenhouse gas emissions. However, the essential commitment of contracting parties consists in nationally determined contributions (NDC) to reduce greenhouse gas emissions; this weak objective cannot be repaired by the activity of the compliance committee and the experts’ advice and opinions.

As there is no binding commitment by each party to reduce emissions by a certain percentage or by a certain amount, the only way of holding individual contracting parties responsible is the public discussion of their behaviour –a

poor enforcement mechanism–. Its weakness is further underlined by the growing controversies between Russia/China and the Western countries, which is likely to heavily influence cooperation in environmental, including climate-related matters.

A successful implementation finally is the EU mechanism on the application of EU environmental law. The specific features of the mechanism consist of an independent enforcement body which has to ensure the application of EU environmental law (the European Commission), the possibiity of the Court of Justice of the EU to finally decide on breaches of EU environmental law at the request of the Commission –more than 600 judgments until now–, the possibility of effective financial sanctions in cases of continued infringements, and a –limited, it is true– possibility for the public to declench compliance procedures. An obvious weakness of the EU system is its ignoring of international environmental agreements, which will be further discussed below.

V. LESSONS TO LEARN

What then are the lessons learnt by 50 years of experience with the application of international environmental agreements? The Russia/China challenge of 2022 requires a reflection, which values the "West" should defend in international environmental law. The following values appear to be vital for any international system of environmental law and should be promoted, even though the United States might not be ready to accept them[26]:

1. The promotion of legal values

- *The rule of law*: In one EU piece of legislation, this system was described (not defined) as follows[27]: "the rule of law… includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process, effective judicial protection, including access to justice, by impartial and independent courts, also as regards fundamental rights, separation of powers, and non-discrimination and equality before the law". The protection of fundamental rights and non-discrimination are

[26] It should not be forgotten that the United States do not have a federal Department for the protection of the environment. In international environmental negotiations, the USA are thus normally represented by the Department of Commerce and/or the Department of State.

[27] EU Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ 2020, L 433 I, p. 1, Article 2(a). See also n. 29, below.

principles that also need to be defended by interntional environmental agreements.

- *Openness*: National application reports and CoP conclusions on compliance should systematically be made public; communication on successes/failures of compliance should be improved. Name and shame provisions of non-complying countries should be clarified, extended and better communicated. The decision-making process should be more open. Transparency and accountability of national and international authorities need to be considerably increased. Participation of civil society should be improved, in order to get away from the closed-club mentality.
- *Integration*: Integration means, on the one hand, the integration of environmental requirements into other policy sectors. However, on the other hand, it also means that solutions which were developed in other policy areas, shall be transferred to the environmental sector. For example, the dispute settlement procedures in multilateral –WTO– or bilateral trade agreements might form models for dispute settlement procedures in the environmental sector. It is not convincing to grant competitors in bilateral trade agreements the right to initiate such procedures, but not allow, in environmental matters, environmental NGOs or appointed persons or bodies (Ombudsman) to initiate similar proceedings. Generally, much too little attention has been paid in the past on environmental impacts of trade, energy, transport or other agreements –including the models which they might contain for solving non-compliance problems–.

There is only one environment. Thus, compliance with international environmental agreements is not a significantly different problem than compliance with national environmental law. The environment has no voice. And the environment does not have a strong lobby group behind it to defend, promote and push its interests. This is different to agriculture policy and law, where farmers groups stand behind, transport law (transporters), energy law (energy producers and distributors), competition policy and law (competitors) etc. The environmental organisations with their permanent shortage of human

and financial resources do not play the same role as lobby groups as these wealthy, powerful, profit-oriented interest groups. Hence it is necessary to discuss environmental impairments in public, monitor the application of the agreed provisions and ensure that environmental impairments are not treated as unavoidable, but irrelevant concerns.

2. Global or regional agreements

Not all international environmental agreements could or should be dealt with in the same manner. Making an agreement which is accepted by some 200 States requires compromises in the drafting of the text, which go at the expense of legal precision, enforceability and monitoring. The control of global agreements is much more complicated than that of regional agreements. And the reluctance of the United States to enter into global environmental agreements might be a further reason to consider the making of regional agreements.

Of course, there is the risk that only some regions elaborate environmental agreements which are meaningful; not many regional environmental agreements exist in Africa, Latin America and Asia. A way forward might thus be to amend, in appropriate cases, regional environmental agreements –in particular European regional agreements– subsequent to their adoption, in order to allow the accession of countries which do not belong to the region in question. The two water conventions, mentioned above, are examples of this kind: they were elaborated under the auspices of the UNECE, but later amended to allow the accession of other countries.

Agreements to fight climate change will certainly require most of all global agreements, because of the global nature of the challenge. Agreements to fight biodiversity losses could well preferably be regional. Where countries such as the ASEAN countries are opposed to any interference with their sacred sovereignty, this opposition applies to global and regional agreements in the same way. Pollution control could well be dealt with at regional level, though product-related agreements –Montreal Protocol, POP-Convention, CITES– are perhaps better adopted at global level, because of their competitive and trade-related impacts.

3. Transparency

It is very obvious that greater transparency in the management and monitoring of international environmental agreements is necessary. The environment has no voice. It does not make sense to restrict the assess to and the use of environment-related information and decisions to some government officials[28]. Decisions on compliance and on non-compliance as well as their justifications should be made public. This also includes national implementation reports, the assessment by the secretariat of the MEA, the reports of the compliance committees, the measures taken to obtain compliance and their success/failure, etc. In particular, the UN institutions appear to have difficulties with greater transparency.

Most enforcement tools do not work at international level: the loss of voting rights, suspension of membership or pecuniary sanctions are very often purely theoretical and are not pronounced in the daily practice of international environmental agreements. Increased transparency may also promote research, education and teaching in environmental matters, areas where greater involvement of civil society is highly desirable. Public opinion, informed of the threat to the environment or of other specfic environmental problems, can play an important role in the taking of decisions, at national as well as at international level.

Transparency is one of the core values of democratic governance and should be promoted and pushed for in all environmental agreements. The lack of openness and transparency never worked in favour of environmental protection.

4. Participation of civil society

More thought should therefore be given to public participation in decision-making. States and their representatives prefer confidential discussions and decisions. Looking at that aspect from the environmental point of view, though, clearly shows that civil society has a lot to contribute to the question, whether and how well an agreement is applied in practice. After all, it must not be forgotten that the question is not to make the public participate in the elaboration of international environmental provisions, but to apply existing provisions, to which the contracting parties have committed themselves. The

[28] Aarhus Convention, Recital 17: “Public authorities hold environmental information in the public interest”. This also applies to authorities of an international agreement.

last decision on international environmental law is still with the CoP, thus with official representatives of States. Below that level, though, public participation – including the utilisation of the know-how and the experience of environmental organisations– can be most helpful. The Aarhus Convention constitutes a good example.

In these days, when Russia and its allies directly challenge the rule of law[29], it is more than appropriate to remember that the even application of the law is fundamental to the rule of law. The statement of Hugo Grotius, one of the founders of modern public international law, that "all evil starts, when man departs from law", aimed in particular at the application of and compliance with the –natural, customary or treaty– law, not at the making of law. Indeed, it is difficult enough to elaborate rules of national or international environmental law. But it is even more destructive for a society not to apply the existing rules and satisfy itself with far-spread non-compliance.

It is obvious, though, that the environmental community organises itself better at international level. As long as each national, regional or international environmental NGO pursues, in international negotiations, its own agenda, there is no hope that the voice of the environment will be heard. In the 19th century, Karl Marx asked workers from all countries to unite, because he anticipated that, otherwise, economic interests would prevail over disunified social interests. The same pattern can be observed at present in the conflict of interests between economic and environmental interests: unless environmental interests get better bundled and organised at international level, they will be outnumbered, reduced to marginal functions such as trade unions or religious bodies, and will have very limited chance of promoting the planet's interests.

5. The responsibility of environmental lawyers

[29] The World Project of Justice states that the rule of law requires the accountability of public authorities and private actors under the law, that the law is clear, publicized and stable and evenly applied, that processes by which the law is adopted, administered, adjudicated and enforced are accessible, fair and efficient, and that justice is delivered evenly by competent, independent representatives and neutrals who are accessible, have adequate resources and reflect the makeup of the communities which they serve. See <https://worldjusticeproject.org/about-us/overview/what-rule-law> [last access, 16 April 2022]. The description of EU Regulation 2020/2092 (n. 27), quoted above, appears more precise, though.

Hence, the lessons for lawyers from 50 years of application of international environmental law is that lawyers should raise their voice and denounce, permanently and as loudly as they can, the cases of non-compliance. Lawyers have the necessary know-how; and when they discuss issues of (international) environmental law, they are under a moral obligation to denounce the cases of non-compliance; otherwise, they miss their job. Environmental lawyers in particular have the tendency to work in splendid isolation and to look at environmental law as it is formulated, but not as it is applied. With regard to international environmental law, they have a tendency of not being auto-critical with their own country of provenance, though such auto-criticism would give them the legitimacy to criticize the application of international agreements by others.

One of the most striking examples in this regard is the application of international environmental agreements by the European Union. The EU has concluded, next to its member States, a considerable number of such agreements. Such agreements form integral part of EU law[30]. Yet, the EU ignores to monitor the application of those international agreements, unless it has itself adopted secondary EU legislation to transpose the international obligations through regulations or directives into EU obligations. And the Commission which has the task to ensure that EU law –including the ratified international environmental agreements– "is applied" in and by the EU and its member States[31], ignores this obligation with regard to international environmental agreements[32]. No discussion on this deliberate lack of application takes place at EU level.

The lack of application of (international) environmental law is the biggest legal problem which environmental lawyers face. By discussing objectives, principles, priorities and other aspects of law-making, but omitting to denounce the non-

[30] See for example EU Court of Justice, case C-240/09, Leoochranárske zoskupenie, ECLI:EU:C:2011:125, paragraphe 3: "The Aarhus Convention was signed by the Community and subsequently approved… Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union".

[31] TEU, Article 17: "The Commission… shall ensure the application of… measures adopted by the institutions".

[32] Between 1958 and 2022, the EU Commission brought only one single case before the EU Court of Justice, because a member State had not complied with its obligations under an international environmental agreement, see CJEU, case C-239/03, Commission v. France, ECLI:EU:C:2004:598. The Court of Justice held that such actions were admissible.

application of the law, they become co-responsible of the present state of environmental law, which is so strongly marked by law on paper, but not by law in practice. In environmental law there exist numerous glorious terms, such as sustainable development, common but differentiated responsibilities, common heritage of mankind, protection of present and future generations, ecosystems, wildlife and habitat conservation, the ecological footprint, the integration of environmental requirements in other policies, precaution and prevention, high levels of environmental protection, or rights of nature. But these terms do not help the environment so much.

Rather, the devil of environmental protection is in the detail: globally and regionally, internationally and nationally, everybody agrees that the environment needs protection. Yet, when it comes to concrete cases, for example the weighing of interests in nature conservation against tourism or against the construction of a golf course, the voice of lawyers is all too often not raised; and when it is raised it is all too often not heard.

6. A voice for the environment

Lessons from 50 years of environmental law suggest that environmental lawyers should start giving a voice to the environment by denouncing the absence of law application. This has necessarily to start at local level. It makes no sense to deplore the absence of application of international environmental law, when the national, regional or local application of the provisions of environmental law are ignored or accepted. All too often, unfortunately, lawyers (believe to) need research funding, attorneys' mandates and other financial support from public authorities, which makes them keep silent on cases of the non-application of environmental law. As the child in the fairy-tale of Andersen which raised its voice to declare that the emperor had no clothes, they should have the courage –or naivety– to state loudly and clearly that the environment is not properly protected, and not hide in academic ivory towers. They should claim transparency, the publication of reports and all relevant data and call any non-compliance by its name. Secrecy is not helpful for the environment, never.

International environmental law is normally not applied by a contracting party, because of lack of will, lack of diligence or lack of resources[33]. At least, the first two reasons of lack of compliance could and should be better addressed by environmental lawyers, as the third reason, the lack of resources or capacities requires more the intervention of help-desks than that of lawyers. Who else than lawyers can legally defend the environment against omissions to apply the law which had previously been agreed? Fifty years have shown in all clarity that the application of environmental agreed provisions is not a self-runner.

"The time for lofty speeches and commitments is over. It is time for implementation"[34]. This formulation from a United Nations body suggests that the first priority for the next fifty years should be not the elaboration of new environmental provisions, but the effective application of existing rules.

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