PRELIMINARY EFFORTS IN IMPLEMENTING THE RIO TARGETS

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I. INTRODUCTION

Four years have elapsed since the United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro on June of 1992. It has now become evident that the Earth Summit gave a significant, general impulse for the future evolution of international law on the protection of the environment.[1] Twenty years after the fundamental Stockholm Conference on the Human Environment[2] it has once again enlivened global environmental consciousness, "setting in motion or accelerating the search for solutions to global environmental problems and refocusing attention on the necessity for a more equitable distribution of resources among nations."[3] Rio has also tried to narrow the gap between the concepts of environment and development. New institutional arrangements for the follow-up, such as the Commission on Sustainable Development (CSD),[4] but in particular the integration of non-state actors (NGOs and individuals) into the future process, should ensure that the Rio basis will not be lost. Whether the UNCED goals can be achieved or not and whether the Rio momentum will remain viable and credible depends finally on the crucial problem of implementing the UNCED commitments into corresponding, satisfying and concrete domestic policy and regulatory measures. Preliminary experiences in the aftermath of the Conference show

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[1] P.H. Sand, *UNCED and the Development of International Environmental Law*, 3 Y.B. INTL. ENVTL. LAW 3 (1993).

[2] *See* for the Conference and various Documents, *The Results from Stockholm*, BEITRÄGE ZUR UMWELTGESTALTUNG A10 (1973).

[3] G. Handl, *Controlling Implementation of and Compliance with International Commitments: The Rocky Road from Rio*, 5 COLORADO JOURNAL OF INTERNATIONAL AND ENVIRONMENTAL LAW AND POLICY 305 (1994).

[4] In Chapter 38.11 of Agenda 21 the UN General Assembly was mandated to establish the CSD. The 53-member Commission was formally established by GA Resolution 47/91 of 22 December 1992; GA Resolution 191, UN GAOR, 47th Sess. 93rd plenary meeting, UN Doc. A/Res/47/191 (1993). In general CSD has the task to monitor, analyze and report the progress in the implementation of the Agenda. For its detailed functions *cf.* Chap. 38.13 et seq. of Agenda 21.

that States were not sufficiently adhering to the programs agreed to at Rio and that progress in implementing Agenda 21 was decried as "depressingly slow."[5] Although this behavior is discouraging, one should bear in mind that this phase of implementation will take a long time, perhaps decades.

The following treatise will examine whether the complex Rio concept of "sustainable development and environment" has already led to new legal instruments for the development of international environmental law, and if so, which instruments. Then it must be asked whether these instruments are formulated precisely enough to be implemented effectively. Subsequently, a few examples will be presented to illustrate preliminary efforts at legal implementation in most recent State practice. In doing so, new models of cooperation between State and industry, the current IUCN Draft International Covenant on Environment and Development, as well as the latest tendencies concerning mechanisms of sanction will be explained.

II. THE ASSIGNMENTS OF THE RIO DECLARATION AND AGENDA 21

As Maurice Strong correctly reminded us, UNCED was neither the beginning nor the end of the process by which the international community seeks to address the various emerging threats to the global environment.[6] It was based on numerous pillars; such as the Stockholm Declaration on the Human Environment and its 109 Recommendations of 1972, the UN Shared Natural Resources Principles of 1978 and the World Charter for Nature of 1982, all framing the fundamental legal principles necessary for an embryonic international law on the environment.[7] In the

[5] For numerous examples *see* G. Handl, *supra* note 3, at 306 with further references.

[6] *See* statement by M.F. Strong, UNCED Conference Proceedings, Vol. 11 (1993); *idem*, Beyond Rio: Prospects and Portents, 4 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 21 (1993).

[7] For a historical review of the proceedings from Stockholm to Rio, *cf.* H. Hohmann, Ergebnisse des Erdgipfels von Rio. *Weiterentwicklung des Umweltvölkerrechts durch die UN-Umweltkonferenz* von 1992 in NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT, NVwZ 311 (1993); U. Beyerlin, Rio-Konferenz 1992: *Beginn einer neuen globalen Umweltrechtsordnung?* in ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 124 (1994); for a comprehensive survey and analysis of the whole UNCED process *see* P. MALANCZUK, SUSTAINABLE DEVELOPMENT: SOME CRITICAL THOUGHTS IN THE LIGHT OF THE RIO CONFERENCE IN SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE, (K. Ginther/E. Denters/P. de Waart, eds.) (1995) at 23.

eighties, many international environmental agreements remodeled such "soft-law" instruments into "hard" legally binding treaty law. The following are relevant examples of fundamental conventions concerning the various fields of environmental law:

- the Geneva Convention on Long-Range Transboundary Air Pollution of 1979[8] with its amending Protocols on Sulphur Emissions,[9] Nitrogen Oxides[10] and Volatile Organic Compounds;[11]
- the Vienna Convention for the Protection of the Ozone Layer of 1985[12] with the Montreal Protocol;[13]
- United Nations Convention on the Law of the Sea of 1982;[14]
- the two IAEO Conventions on Early Notification, respectively on Assistance in the Case of a Nuclear Accident of 1986;[15] and
- the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[16]

UNCED could also rely, *inter alia*, upon the excellent preparatory work of the World Commission on Environment and Development (Brundtlandt-Report of 1987) and the UNEP proposals for the Conventions on Biological Diversity and Climate Change.

The final results of the Rio Conference are manifested by the following five Documents agreed on, which have differing degrees of importance:

[8] Convention of 13 November 1979, 18 I.L.M. 1442 (1979).

[9] Protocol of 8 July 1985, 27 I.L.M. 701 (1988).

[10] Protocol of 31 October 1988, 28 I.L.M. 214 (1989).

[11] Protocol of 18 November 1991, 31 I.L.M. 573 (1992).

[12] Convention of 22 March 1985, 26 I.L.M. 1516, 1529 (1987).

[13] Protocol of 16 September 1987, 26 I.L.M. 1541, 1550 (1987).

[14] Convention of 10 December 1982, 21 I.L.M. 1261 (1982).

[15] Conventions of 26 September 1986, 25 I.L.M. 1370, 1377 (1986).

[16] Convention of 22 March 1989, 28 I.L.M. 657 (1989). It entered into force on 5 May 1992.

- the Rio Declaration on Environment and Development;
- the Forest Principles;
- Agenda 21;
- the Convention on Biological Diversity; and
- the Framework Convention on Climate Change.

Both Conventions have entered into force in the meantime.

In the following discussion, a brief examination will be undertaken as to whether Rio had an innovative impulse for the creation of new legal instruments or whether it was merely a more precise reiteration of legal mechanisms since Stockholm. As the topic is intricate and complex, attention should be directed to the Declaration and to Agenda 21, as both documents, contrary to the aforementioned two conventions, found a general and minimum consensus among the participating States.

A. Rio Declaration

In viewing the contents of the 27 Declaration Principles from a legal standpoint, one has to distinguish between principles prescribing predominantly moral-political obligations and those which may have a legal impact, in particular, by the reiteration and precise definition of existing customary law.[17] To the first category belong the programmatical statements that, *inter alia*, "human beings are at the center of concerns for sustainable development..." and are "entitled to a healthy and productive life in harmony with nature" (Principle 1) and that the "right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations" (Principle 3). In consequence thereof, "environmental protection shall constitute an integral part of the development process..." (Principle 4). Political assignments reflect all the Principles referring to economic, trade and financial aspects, such as the "task of eradicating poverty" (Principle 5), the concept of co-operation in "a spirit of global partnership" and of "common but differentiated responsibilities" with regard to industrialized

[17] *See* also U. Beyerlin, *supra* note 7, at 133; for a comprehensive analysis of the various principles *cf.* P. Malanczuk, *supra* note 7, at 29.

ized and developing States (Principle 7), which shall strengthen the support of sustainable development by financial resources and technologies. This concept, which is a mere expression of general corrective justice principles and which ought to have been given greater emphasis in international law,[18] reflects, *inter alia*, a new dimension of consciousness when compared to Stockholm.

Under the second category of principles, which fortifies the existing customary law rules, are the following: the prohibition against causing damage to the environment of other States (Principle 2), the principles of information and consultation, as well as of prior notification and early warning, in cases of potential or actual, significant adverse and transboundary environmental effects (Principles 18 and 19) and the call for the peaceful settlement of environmental disputes (Principle 26). The explicit formulation and adoption of the precautionary and polluter-pays-principle into the catalogue of principles, which is distinct, is to be welcomed (Principles 15 and 16). The same applies to the precise, obligation-like principles on equal access of individuals to information, as well as to judicial and administrative proceedings (Principle 10). The Environmental Impact Assessment is now enunciated as a national instrument by Principle 17. It is worth mentioning that such principles, reiterating and strengthening customary law, were already encompassed in numerous recent treaties, both before and after Rio, and are therefore legally binding. To give but a few examples:

- the precautionary-principle is set forth in the Convention for the Protection of the Marine Environment of the North-East Atlantic;[19]
- the Convention on the Protection and Use of Transboundary Watercourses and International Lakes;[20]
- the UN Convention on the Transboundary Effects of Industrial Accidents;[21]

[18] *See* G. Handl, *International Environmental Law: Promises and Perils of Agenda 21 in Agenda 21 and Latin America: The Challenge of Implementing Environmental Law and Policy* (Paper prepared for the Inter-American Development Bank) (1994) at 55.

[19] *Cf.* art. 2, paragraph 2 lit. a of the Convention of 22 September 1992; 32 I.L.M. 1072 (1993).

[20] *Cf.* art.3 of the Convention of 17 March 1992, 31 I.L.M. 1313, 1316 (1992).

[21] Art. 2 of the Convention of 17 March 1992, 31 I.L.M. 1330 (1992).

- the ECE Code of Conduct on Accidental Pollution of Transboundary Inland Waters;[22] and

- the Climate Change Convention;[23]

- the polluter-pays-principle is incorporated in the form of the so-called "owner" or "operator" liability in numerous civil liability conventions in the field of oil pollution and nuclear activities,[24] in the preamble of the International Convention on Oil Preparedness, Responses and Co-operation,[25] the aforementioned Transboundary Watercourses Agreement,[26] and North- East Atlantic Convention.[27] Comprehensive regulations are contained in the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment;[28]

- the instrument of the Environmental Impact Assessment is laid down in the Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[29] in EU Directive 85/337[30] and was transformed into various national laws.[31]

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[22] *Cf.* under III of the Code as adopted by the Economic Commission for Europe at its forty-fifth session (1990) by decision C (45); Doc. E/ECE/1225 - ECE/ENVWA/16.

[23] *See* art. 3, paragraph 3 using the soft formulation "Parties should take precautionary measures" instead of "shall". For the text *see* 22 EPL 258 (1992).

[24] *Cf.* for instance art. III of the Brussels Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (liability of the owner of a ship), 9 I.L.M. 45 (1970); art. II of the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 (liability of the operator of a nuclear installation), 2 I.L.M. 268 (1963); for further numerous examples *cf.* A. Rest, *Fortentwicklung des Umwelthaftungsrechts. Völkerrechtliche und international-privatrechtliche Aspekte in Dokumentation zur 12. Wissenschaftlichen Fachtagung der Gesellschaft für Umweltrecht*, Berlin (1989) at 104.

[25] Convention of 30 November 1990, 30 I.L.M. 735 (1991).

[26] Art. 2, paragraph 5, lit.b.

[27] Art. 2, paragraph 2, lit.b.

[28] *Cf.* arts. 6, 7 and 11 of the Convention of 21 June 1993, 32 I.L.M. 1228 (1993).

[29] UN Convention of 25 February 1991, text published in W.E.Burhenne, *International Environmental Law, Multilateral Agreements*, under No. 991:15/1.

[30] *Directive on Impact Assessment of 27 June 1985*, EU OFF. J. No. L175, at 40.

[31] *Cf.* for instance *the German Environmental Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung bei bestimmten öffentlichen und privaten Projekten) of 12 February 1990*, GERMAN OFF. J. I 2705 (1994).

In general, the Rio Declaration's catalogue of principles embodies some new incentives which, partially, could be "legal crystallizers" for a future international environmental law.

B. Agenda 21

Agenda 21, representing a comprehensive "action program", is perhaps the most significant and ambitious document from an international legal viewpoint. It prescribes in 40 chapters, running to several hundred pages of printed text,[32] minutely detailed measures and instruments for the implementation of the targets of the Rio Declaration. Although it is a non-binding catalogue of measures, a number of Agenda 21 positions and principles are nevertheless part and parcel of established customary international law. "Agenda 21 can be expected to leave few areas of international environmental law untouched"[33] and unbiased. Chapter 39 perspicuously deals with international legal instruments and mechanisms for the implementation of the concept of sustainable development. In its "basis for action" concerning the treaty-making process, it first demands "the further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns."[34] After having emphasized the essential significance of the participation in and the contribution of all countries to treaty-making at the global level in the field of international law on sustainable development in general, special stress for adequate participation by and contribution of developing countries in this process is postulated.[35] As past legal instruments and agreements have rarely reflected the concern and interests of developing countries in an adequate manner, a review of these instruments is held necessary.

From a "systemic" legal viewpoint, two conceptual aspects of Agenda 21, manifesting a new and welcome progressive thinking, are worth mentioning. First, Section III, entitled "Strengthening the Role of Major Groups", focuses on empowering "non-state actors" to ensure environ-

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[32] For the final text of Agenda 21 *see* United Nations, United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/26 (Vol. I-IV) (1993); *cf.* also Agenda 21: Earth's Action Plan, (N. Robinson, ed.), New York (1993). By comparison, the analogous 1972 Stockholm Conference Action Plan consists of 109 recommendations covering a mere 40 typed pages, reprinted in 11 I.L.M. 1421 (1992).

[33] *See* G. Handl, *supra* note 18, at 51.

[34] *Cf.* chapter 39, paragraph 1, lit. a.

[35] Chapter 39, paragraph 1, lit. 1c.

mentally sound sustainable development. It emphasizes the need for broad public participation by individuals, groups and organizations,[36] and of indigenous people and their communities in decision-making.[37] Having stressed the vital and constructive role of Non-Governmental Organizations in modern society, Chapter 27 calls for real participation by NGOs – which should be recognized as partners in the implementation of Agenda 21.[38] The fledgling empowerment of non-state actors is clearly characterized as "implementation of participatory democracy."[39] For the time being, it would be decidedly premature to conclude that the emerging trend to enhance the legal status of non-state actors could yet diminish the legal role and importance of States (*i.e.* their sovereign rights, as principal actors in the international legal system). But it is quite obvious that certain actors possess, or are about to acquire, a procedural capacity in their own right to pursue recognized environmental legal interests at the international level.[40] By posing mainly a moral challenge to the State system at the present time, the whole of the UNCED instruments, including the Rio Declaration, the Biodiversity Convention and Agenda 21, keep prying open the door to a less state-centered transnational legal system; making possible, perhaps in the future, the enhancement, on the substantive law level, of the legal position of individuals or groups vis-à-vis the state.[41] Altogether, the actuating of the influence of non-state actors by informational and participatory entitlements is desirable and future-oriented from the viewpoint of creating a necessary counterweight to the increasing internationalization of local or national environmental decision-making.

Quite significant as well are the new aspects of justice objectives, which refer to the recognition of the special needs of developing countries, as entailing the responsibility on the part of the international community at large to effect a North-South redistribution of wealth for the purpose of securing long-term global environmental stability. The acceptance of distributive justice as an essential objective of the evolving international public order on the environment goes far beyond a mere re-affirmation of Principles 9 and 12 of the Stockholm Declaration[42] and

[36] *Cf.* chapter 23, Preamble under paragraph 2.

[37] Chapter 26.

[38] Cf. chapter 27, paragraph 1.

[39] *Id.*

[40] *See* G. Handl, *supra* note 18, at 53.

[41] As to the existence of a right to a decent environment that can be claimed by individuals, G. Handl, *supra* note 18, at 53, is right when stating, "it is difficult to see in the Rio instruments an endorsement of a generic human right to a healthy environment as some might be tempted to imply".

[42] For the text *see* 11 I.L.M. 418 (1972).

achieves the implementation of the target of "global partnership for sustainable development."[43] Therefore, for example, Chapter 33.3 of Agenda 21, after identifying "economic growth, social development and poverty eradication as first and overriding priorities in developing countries and... themselves essential to meeting national and global sustainability objectives," sets down that, "(the) transfer of financial resources and technology to developing countries will serve the common interests of developed and developing countries and humankind in general, including future generations." The concept of "common but differentiated responsibilities"[44] also seems to reflect aspects of distributive justice, although it is only an expression of general corrective justice principles.[45]

In most countries, the development of Agenda 21 national implementation programs has already commenced. Whether the challenge of implementation can be met successfully or not will depend on the will of States, especially on the voluntary disposal of financial resources by the industrialized nations, as well as on their commitments regarding the transfer of technology.[46]

III. PRELIMINARY EFFORTS OF LEGAL IMPLEMENTATION OF THE RIO TARGETS IN STATE PRACTICE

An attempt will now be made to illustrate, by means of some recent examples in state practice, that the Rio targets at certain points have indeed found a precise legal implementation.

A. Decision In Re Oposa

While legal experts and politicians will continue to engage in intensive, intricate, and inconclusive discussion and analysis of the multivarious elements of the very vague and complex concept of "sustainable

[43] *Cf.* chapter 1, paragraph 1, "Preamble".

[44] This concept is ruled in principle 7 of the Rio Declaration and art. 3, paragraph 1, of the Framework Convention on Climate Change.

[45] *Cf.* G.Handl, *supra* note 18, at 55.

[46] The very skeptical position of the developing countries is shown by the following remark: "In reality, Agenda 21 represents a relatively chauvinistic political and economic model being put forward by the Nations of the North. It is basically an announcement that, 'we understand the problem and here are the solutions'." *See* A. AL-GAIN, *Agenda 21: The Challenge of Implementation* in A LAW FOR THE ENVIRONMENT, ESSAYS IN HONOR OF W.E. BURHENNE, at 21, 27 (1994).

development"[47] to make it more definite and thereby more effective, its components of a right to a healthy and decent environment, as well as of intergenerational equity and responsibility, have already been implemented by jurisdiction for the first time.

In this regard, the decision of the Supreme Court of the Philippines on 30 July 1993 in the case of *In re Oposa* merits special attention.[48] To stop the continuing deforestation of their country, a group of minors named Oposa, duly represented and joined by their respective parents, brought a class suit against the Secretary of the Department of Environment and Natural Resources (DENR). The aim of the suit was to obtain a decision ordering the cancellation of all existing logging permits which the DENR had issued to different companies on the basis of Timber License Agreements. The plaintiffs also demanded that the defendant should desist from accepting, processing, renewing or approving new timber license agreements. They contended that they were all "citizens of the Republic of the Philippines and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforests." They emphasized that the suit was filed not only for themselves, but also for others who were equally concerned "but so numerous that it is impracticable to bring them all before the Court." Impressive is the assertion of the claimants that they "represent their generation as well as generations yet unborn." As to the cause of action, the plaintiffs argued their constitutional right to a balanced and healthful ecology according to

[47] *Cf.* for instance the International Symposium on "Sustainable Development and International Law", 14-16 April 1994, Baden near Vienna. The various contributions are published in SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW, (W. Lang, ed.), London/Dordrecht/Boston (1995). As E. Primosch, *The Spirit of Sustainable Development within Authoritative Decision-Making Process* in 47 AUSTRIAN J. OF PUBLIC INT'L. LAW 81, 82 (1994) has concisely pointed out, "the concept consists of three basic community policies: 1. Human rights, democracy and social justice; 2. Rights of future generations relating to humankind's natural and cultural heritage; 3. Protection of the environment by reducing anthropogen emissions and impacts. The concept also includes a catalogue of guiding principles, such as the principles of solidarity, of common but differentiated responsibility, of inter-generational equity, of prevention and precaution and the polluter-pays principle. The concept was also characterized as "a notion around which legally significant expectations regarding environmental conduct have begun to crystallize" and which in time may even become a norm of *ius cogens*. *See* G.HANDL, ENVIRONMENTAL SECURITY AND GLOBAL CHANGE: THE CHALLENGE TO INTERNATIONAL LAW IN ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW (W. Lang/H. Neuhold/K. Zemanek, eds.) at 59, 80 (1991).

[48] The text of the judgement is published in 33 I.L.M. 173 (1994); for the details of the case *see* A. Rest, *The OPOSA Decision: Implementing the Principles of Intergenerational Equity and Responsibility* in 24 ENVIRONMENTAL POLICY AND LAW 314 (1994); A. LA VINA, THE RIGHT TO A SOUND ENVIRONMENT IN THE PHILIPPINES: THE SIGNIFICANCE OF THE MINORS OPOSA CASE IN REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW at 246 (1994).

balanced and healthful ecology according to Sections 16 and 15 of the 1987 Philippine Constitution and their claim to the protection of the State in its capacity as parens patriae. First, the justices granted the *locus standi* of the plaintiffs for the class action in general. Second, they held the principle of intergenerational responsibility legally binding by stating that, "needless to say, every generation has a responsibility to the next, to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology". The minors' assertion of their right to a sound environment constitutes," at the same time, "the performance of their obligation to ensure the protection of that right for the generations to come." The justices further emphasized that, "although the rights to a decent environment and to health were formulated as State policies (*i.e.* imposing upon the State a solemn obligation to preserve the environment), such policies manifest individual rights not less important than the civil and political rights enumerated under the Bill of Rights of the Constitution." Not surprisingly, the decision was criticized, and it was remarked that the justices had failed to prove the existence of a direct subjective individual right to a decent environment because the implementation of the State's duty to preserve and protect the environment stands at the discretion of the competent State organ.[49] Despite all possible criticism, the decision is praiseworthy because it has given a very important incentive for the implementation of a right to a decent environment and of the concept of intergenerational equity and responsibility. The special geographical situation, as well as the consciousness and proximity of the Filipino people to their forests and nature in general, may be the reason why the Supreme Court of a developing country has rendered such a "logical" and seminal decision, whereas, in the case of a so-called industrially-developed country, the probability of such a decision could be a rarity, if not well-nigh an impossibility.

B. New Models of Cooperation Between State and Industry and Most Recent Eco-Management Instruments

As environmental problems in principle must be solved within one generation to meet the goal of sustainable development (*i.e.* time is pressing and the vital implementation of State environmental policy can only be achieved by strenuous efforts and the strong participation of all spectrums of society, especially of industry) new models of cooperation between State and branches of industry, based on a new understanding of

[49] For further critical remarks *see* A. Rest, *supra* note 48, at 316.

environmental management, were developed in the end-phase of the eighties. These models are voluntary agreements concluded between the government or public authorities and bodies of industries attempting, in general, to effectuate the precautionary principle and the impact assessment mechanism. Such modern eco-management tools were developed by industry to flank or complement, but not to replace, the occasional, cumbersome and time-consuming national legislation and to support and speed up the licensing system; both of which frequently lack the essential flexibility to meet the needs of the day. Voluntary agreements are well-known under the denotation "Covenant" in the Netherlands,[50] the name "Eco-Contract" in Denmark[51] and "self-obligation or agreement" in Germany.[52] As this author has discussed elsewhere and in detail the various models and contents of these agreements, especially their numerous legal problems,[53] which are centered mainly around the question of whether the State organ is entitled to renounce its public law competence prescribed by constitutional law (*i.e.* to enact legal regulations and to impose sanctions), it suffices to concentrate on the potential advantages of such tools.

A significant benefit to industry and companies is that they have more freedom to choose a propitious time at which to introduce improvement measures; for example, carrying out soil cleanup operations when a plant is being replaced. In addition, bottlenecks to environmental improvement are discussed at a national rather than local level so that, for example, research needed to bring an abatement technology to market can be sponsored jointly by the private sector and the Government. Furthermore, such tools increase the certainty of future investment for industry.

[50] *Cf.* for example Covenant concerning: the use of phosphates in detergents (1987), the limitation of CFCs in aerosols (1988), asbestos lined friction materials in cars (1988), packaging (1991); *see* also Statement of intent basic metal industry (1992), Statement of intent concerning energy-saving, involving 14 different industries (1992). A SURVEY OF FURTHER COVENANTS IS PUBLISHED IN ENVIRONMENTAL CONTRACTS AND COVENANTS: NEW INSTRUMENTS FOR A REALISTIC ENVIRONMENTAL POLICY? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE (J. van Dunné, ed.) at 309 (1993).

[51] For details *see* J. Jörgensen, *Legislation on "Eco-Contracts in Denmark" in Environmental Contracts and Covenants, Id.* at 73.

[52] *Cf. Selbstverpflichtung zur Einstellung der Produktion voll-halogenierter Fluorchlorkohlenwasserstoffe* (1990); *Selbstverpflichtung zur Rücknahme und Verwertung von Fluorchlorkohlenwasserstoffen und Kälteölen aus Kälte- und Klimageräten* (1990), both published in BUNDESTAGSDRUCKSACHE 11/8166, Anlage 6, 7.

[53] A. Rest, *New Legal Instruments for Environmental Prevention, Control and Restoration in Public International Law*, 23 EPL 260 (1993); *idem, Verbesserte Umwelt durch neue Formen internationaler Zusammenarbeit und Sanktionierung? in A Law for the Environment, supra* note 46, at 103.

The authorities also stand to benefit. Since detailed initiatives are worked out by the companies themselves, regulators have to make less effort. Environmental problems which are difficult to address via permits, such as energy efficiency, waste reduction, or soil cleanup, are comprised within the company's improvement plans. It is also hoped that the long duration and the integrated nature of the improvement programs will encourage firms to reduce pollution at its source rather than by add-on measures. And, last but not least, the authorities will gain time to focus their attention on recalcitrant business. It is worth mentioning that the "Covenant" model has also been used as a transboundary contract; as illustrated by the "Rhine Contract" of 1991 concluded between the Municipality of Rotterdam and the German Association of Chemical Industries. The contract aims to improve the water quality and reduce the huge quantity of contaminated mud in Rotterdam harbor.[54]

Altogether, these pilot schemes of cooperation should be further scrutinized in practice. They can be very effective (*i.e.* achieving environmental objectives), efficient (*i.e.* doing so at the lowest possible cost), and equitable (*i.e.* sharing the burden among the members of a target group in a fair manner). Nevertheless, it must be stressed that the agreement mechanism can be applied only under the following conditions within a country: (a) a mature environmental policy that underpins mutual respect and understanding, (b) experienced and credible parties within both government and industry and (c) a tradition of consensus-seeking and joint problem solving.[55]

The current tendency to achieve stronger participation by industry in the implementation of State environmental policy with regard to sustainable development is now tacitly adopted in the EEC Council Regulation of 1993 which allows voluntary participation by companies in the industrial sector in a Community Eco-Management and Audit Scheme.[56] It combines the instrument of environmental management and control developed in the science of business[57] with the "command and control

[54] For the details *cf.* A. Rest, *Id.* at 265.

[55] For further conditions *see* P. Winsemius, *Environmental Covenants and Contracts: New Instruments for a Realistic Environmental Policy*, ENVIRONMENTAL LIABILITY L. REV. 89 (1993).

[56] *Cf.* EEC Regulation No. 1836/93 of 29 June 1993, published in: OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, No. L 168/1.

[57] U. Steger (ed.), UMWELT-AUDITING (1991); *idem*, HANDBUCH DES UMWELTMANAGEMENTS. ANFORDERUNGS- UND LEISTUNGSPROFILE VON UNTERNEHMEN UND GESELLSCHAFT (1992).

approach"[58] (*i.e.* a new flexible and external control not based on police law or order law of the internal, operational, and environmental protection mechanism of the company by independent publicly accredited environmental verifiers and registration of the examined site in a public register). Having emphasized the special role of companies "to reinforce the economy and to protect the environment throughout the Community"[59] and underlining that industry has "its own responsibility to manage the environmental impact of its activities and therefore should adopt a pro-active approach in this field,"[60] the Regulation imposes on the company a number of duties, which can be stated in a nutshell as follows: it must (1) adopt a company environmental policy "which, in addition to providing for compliance with all regulatory requirements regarding the environment, must include continuous improvement of environmental performance";[61] (2) conduct an environmental review of the site, taking into account, *inter alia*, aspects of assessment, control, and reduction of the impact of the activity concerned, energy management, raw materials management, waste avoidance, product planning etc.;[62] (3) introduce an environmental program for the site;[63] (4) establish an environmental management system applicable to all activities at the site;[64] (5) carry out or cause to be carried out environmental audits at the sites concerned;[65] (6) prepare an environmental statement following an initial environmental review and the completion of each subsequent audit or audit cycle for every site; and (7) have examined the environmental statement by an accredited and independent environmental verifier.[66] After such examination the site will be registered in a list published each year in the Official Journal of the EEC.[67]

[58] *Cf.* D. Sellner and G. Schnutenhaus, *Umweltmanagement und Umweltbetriebsprüfung ("Umwelt-Audit") - ein wirksames, nicht ordnungsrechtliches System des betrieblichen Umweltschutzes?*, NVwZ 928 (1993); to the historical development of eco-audits in the USA *cf.* J. Scherer, *Umwelt-Audits: Instrument zur Durchsetzung des Umweltrechts im europäischen Binnenmarkt?*, NVwZ 11 (1993).

[59] *Cf.* Preambular introduction of the Regulation.

[60] *See* preambular remarks.

[61] *Cf.* art. 3, paragraph (a), with Annex I.

[62] Art. 3, paragraph (b), with Annex I, Part C.

[63] Art. 3, paragraph (c); art. 2, paragraph (c).

[64] Art. 3, paragraph (c); art. 2, paragraph (e); the requirements concerning the environmental management system are elaborately regulated in Annex I, Part B.

[65] Art. 3, paragraph (d); art. 4.

[66] Art. 3, paragraph (g); art. 4; Annex III.

[67] *Cf.* arts. 8 and 9.

Additionally, such registration plays a publicity role for the company. The implementation of the Regulation, which must also be seen in connection with the very controversially discussed draft EEC Directive on Integrated Pollution Prevention and Control,[68] will certainly be confronted with difficulties in the member States.[69] The success of the Regulation will depend finally on the preparedness of the companies to join this instrument. Experiences from abroad, especially in the USA, give cause for optimism. Altogether, this new model is to be welcomed because of its preventive effects for environmental protection and its transparency by early information and participation of the public concerned.

C. Draft International Covenant on Environment and Development

The priority for the implementation of the Rio assignments and the development of international environmental law is also stressed by the very progressive and ambitious Draft International Covenant on Environment and Development of the World Conservation Union (IUCN) and the International Council of Environmental Law (ICEL) of March 1995.[70] This is already stipulated in its Preamble.[71] The Covenant, which was launched during the UN Congress on Public International Law in New York, held from the 13th to the 17th of March 1995, will be officially presented to the UN in 1995 on the occasion of its fiftieth anniversary. The Covenant can be characterized as an integrated legal framework aimed at initiating further intergovernmental negotiation for a

[68] *Cf.* for the text *see* OJEEC 1993, No. C 311, at 6, (Com.(93) final); for the current discussion *cf.* J. Schnutenhaus, *Stand der Beratungen des IPPC-Richtlinienvorschlags der Europäischen Union*, NVwZ 671 (1994); I. Appel, *Emissionsbegrenzung und Umweltqualität: Zu zwei Grundkonzepten der Vorsorge am Beispiel des IPPC-Richtlinienvorschlags der EG*, DVBl. 339 (1995).

[69] For the difficulties in Germany *cf.* D. Sellner/J. Schnutenhaus, *supra* note 58, at 932; W. Ewer, *Öko-Audit: Der Referentenentwurf für ein Umweltgutachter-und Standortregistrierungsgesetz und die Übergangslösung zur Anwendung der EG-Öko-Audit-Verordnung*, NVwZ 457 (1995).

[70] *Cf.* Draft International Covenant on Environment and Development, Commission on Environmental Law of IUCN in cooperation with International Council of Environmental Law, Gland, Bonn, March 1995. *See* also P. Hassan, THE IUCN DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT: BACKGROUND AND PROSPECTS IN ESSAYS IN HONOR OF W.E. BURHENNE, at 39 (1994).

[71] The last preambular paragraph reads, "[c]onsidering that the existing and future international and national policies and laws on environment and development need an integrated legal framework to provide individuals, States, and other entities, with ecological and ethical guidance, as recommended by the United Nations Conference on Environment and Development in Rio de Janeiro in June 1992".

global treaty on environmental conservation and sustainable development,[72] as well as for the purpose of preparing new implementation mechanisms. The Draft's objective is not only to restate or codify existing environmental law but to assist the evolution of "soft-law" into "binding law".[73] Its 72 Articles and XI Parts, flanked by a comprehensive commentary,[74] follow a holistic approach and cover nearly all fields relevant for balanced environmental protection and development. Part II strengthens and reinforces the most widely accepted and established fundamental principles of international environmental law, such as respect for all forms of life, common concern of humanity, prevention and precaution, and of the right to development.[75] The principles on intergenerational equity and eradication of poverty express[76] the truism that a certain minimum level of economic well-being is a precondition for sustainable development.[77] Part III contains overarching general obligations that apply irrespective of environmental sectors or differing types of activities and sets forth the rights and duties of Parties,[78] States and individuals.[79] A sectoral approach is chosen by the obligations relating to natural systems and resources in Part IV; dealing with the aspects of stratospheric ozone, global climate, soil, water, natural systems, biological diversity, and cultural and natural heritage.[80] Obligations for the prevention of harm and pollution, which may be caused by various activities and processes relating to waste and the introduction of alien or modified organisms, are contained in Part V.[81] Global issues, such as demographic policies, consumption patterns, eradication of poverty, trade

[72] *Cf.* Foreword at XVI.

[73] *Id.*

[74] *Cf.* at 25, 176.

[75] *See* arts. 2, 3, 6, 7, and 8.

[76] Arts. 5 and 9.

[77] *Cf.* Commentary to art. 9.

[78] "Parties" to the Covenant can also be "regional economic integration organizations", *Cf.* arts. 67 and 68.

[79] Arts. 11, 12; the following articles concern "integrating environment and development (art. 13); transfer of transformation of environmental harm (art. 14) and prevention of and response to emergencies (art.15).

[80] *Cf.* arts. 16-22.

[81] *See* arts. 23-26.

and environment, economic activities of foreign origin and military and hostile activities are tackled in the obligations of Part VI.[82] Part VII comprises and extends the traditional rules concerning problems of transboundary pollution and shared natural resources.[83] The very focal Part VIII, on "Implementation and Cooperation", seeks to develop the national and international procedures necessary to assess, monitor, and control environmental impacts. It establishes the duties to share environmental information and technology, to provide international financing and foster public awareness through training and education.[84] Very comprehensive as well, are the obligations concerning physical planning, environmental standards and controls, monitoring of environmental quality, scientific and technical cooperation, and national and international financial resources.[85] A nearly self-executing character is manifest in the regulation concerning environmental impact assessments.[86] The prescriptions on instruments of sanction in Part IX, referring to responsibility and liability,[87] as well as the Articles on compliance and dispute avoidance in Part X,[88] merit further consideration because they are very promising and innovative from a legal viewpoint. Part XI contains the formal mechanisms available to change the Covenant, details the means to adhere to it, its entry into force, and other procedural matters.

1. RESPONSIBILITY/LIABILITY AS INSTRUMENT OF SANCTION

The Draft Covenant is, as far this author is aware, the only one that incorporates a well-balanced combination of the State responsibility/liability concept with the civil liability regime. It endorses an approach

[82] Arts. 27-32.

[83] Arts. 33 and 34.

[84] *Cf.* Foreword at XV.

[85] *See* arts. 36, 38, 39, 40, 45, 46; art. 46, paragraph 2 calls upon the parties "to endeavor to augment their aid programs to reach the UN General Assembly target of 0.7 % of Gross National Product for Official Development Assistance or such other agreed figure as may be established."

[86] Art. 37; further prescriptions concern national action plans (art. 35); development and transfer of technology (art. 41); sharing benefits of biotechnology (art. 42); information and knowledge (art.43) and education, training and public awareness (art. 44).

[87] Arts. 47-55.

[88] Arts. 56-63; Part X also rules potential conflicts with existing treaties (art. 56) and concurrent jurisdiction (art. 58).

that was also proposed by the UN ECE Task Force Guidelines on Responsibility and Liability Regarding Transboundary Water Pollution[89] and by the UN International Law Commission (ILC) in its earlier project on State Liability.[90] Most traditional conventions concerning the field of oil pollution, nuclear energy, and transport are based either on: (a) the pure civil liability concept, prescribing an operator's or owner's liability;[91] (b) the rule of civil liability with a residual obligation for States to ensure payment of compensation;[92] or (c) a combination of the civil liability regime with residual State liability.[93] The growing tendency to accentuate the civil liability approach for socio-political reasons is exemplified, *inter alia*, by the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment[94] and the EEC Commission Green Paper on the Repair of Environmental Damage.[95] It seems doubtful whether this trend can adequately meet the needs of a future environmental law, especially regarding the protection of the

[89] For the advantage of combining the two concepts and to the Guidelines *cf.* A. Rest, *New Tendencies in Environmental Responsibility/Liability Law: The Work of the UN/ECE Task Force on Responsibility and Liability Regarding Transboundary Water Pollution*, 21 EPL 135 (1991).

[90] *Cf.* J. Barboza, Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law of March 1990; UN Doc. A/CN.4/428 and 428 Add.1; for a survey *cf.* A. Rest, *Ecological Damage in Public International Law. International Environmental Liability in the Drafts of the UN International Law Commission and the UN/ECE Task Force*, 22 EPL 31 (1992); in his tenth Report of April 1994 the Special Rapporteur, J. Barboza, has favored the civil liability approach; *cf.* UN Doc. A/CN.4/459.

[91] For a detailed survey on the various so-called civil liability conventions *see* A. Rest, BERÜHRUNGEN DES VÖLKERRECHTLICHEN UND ZIVILRECHTLICHEN SCHADENERSATZES IM INTERNATIONALEN UMWELTRECHT IN RECHTSFRAGEN GRENZÜBERSCHREITENDER UMWELTBELASTUNGEN (M. Bothe/M. Prieur/G. Ress, eds.) at 223 (1984); *idem*, *New Legal Instruments*, *supra* note 53, at 266 with further references.

[92] *Cf.* art. III, Brussels Convention on the Liability of Operators of Nuclear Ships (1962); art. VII, Vienna Convention on Civil Liability for Nuclear Damage (1963); in general the Brussels International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (1971) achieves to guarantee compensation.

[93] *Cf.* art. 8, paragraph 3, of the Wellington Convention on the Regulation of Antarctic Mineral Resource Activities (1988).

[94] For the text of the Lugano Convention of 21 June 1993, *see* 32 I.L.M. 1228 (1993).

[95] *See* EEC Doc. Com. (93)47 final of 14 May 1993. Although this is a paper for discussion and not yet a final decision on the concept, it seems to favor the civil liability approach. The Special Rapporteur of the ILC-project on State Liability now favors the civil law approach, *see* note 90. On a recent Colloquium of the University of Osnabrück, of 8-9 April 1994, the Drafting of a future Environmental liability Convention, to be prepared for the Permanent Bureau of the Hague Conference, was on the agenda. The discussions were also influenced by civil law and private international law aspects. *Cf.* INTERNATIONALES UMWELT-HAFTUNGSRECHT I: AUF DEM WEGE ZU EINER KONVENTION ÜBER FRAGEN DES INTERNATIONALEN UMWELTHAFTUNGSRECHTS, (Ch. von Bar, ed.), Köln/Berlin/München (1995). An illustrative survey on the various Civil and State Liability Conventions is printed, *Id.* at 250.

environment *per se* and of the Global Commons. To put the whole burden of liability on the shoulders of the private polluter alone is unfair because it disregards the fact that an activity of a State's organ, for instance the issuing of a permit or the omission of an adequate control of the private injuring activity, can also be co-causal for the harm and therefore should lead to State liability. The question of whether or not the consequence should be a primary or secondary State liability, or should end in a system of joint liability, is yet to be answered and must be left open here. By and large, the general concept of the Draft signals movement in the right direction. By establishing State responsibility "for the breach of its obligations under this Covenant or other rules of international law concerning the environment"[96] the compliance of the treaty is likewise guaranteed. Unlike numerous other environmental conventions which lack such direct mechanisms of sanction and thereby, not infrequently, remain "toothless paper tigers", this Covenant is extremely pioneering. The incorporation of the State responsibility concept was influenced by the ILC Draft Articles on State Responsibility;[97] which reflect customary international law. State responsibility for failure to prevent harm is enunciated in Article 50.

The Covenant also introduces with Article 48 a result-oriented, strict State liability in case of significant harm (*i.e.* for harm resulting from an activity which is not a breach of an international obligation).[98] It shall apply in situations of accidental damage and does not provide remedies for cases of potential harm or risk of harm, a case the ILC has also tried to regulate.[99] The Draft seems to be more realistic and can expect greater acceptance by governments than the ILC project. The Covenant also takes into account the growing tendency to incorporate a strict liability regime

[96] *Cf.* art. 47 of the Draft Covenant.

[97] Art. 1 of the ILC Draft Articles on State Responsibility, Part I, adopted by the Commission on first reading. *Cf.* Volume II, part 2 of YILC 30 (1980) reads "[e]very internationally wrongful act of a State entails the international responsibility of that State." An "internationally wrongful act" is defined in article 3 as occurring when "(a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of that State."

[98] Art. 48 reads, "[e]ach State Party is liable for significant harm to the environment of other States or of areas beyond the limits of national jurisdiction, as well as for injury to persons resulting therefrom, caused by acts or omissions of its organs or by activities under its jurisdiction or control."

[99] For the "risk-approach" *cf.* J. Barboza, Fourth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, April 1988 (A/CN.4/413) under paragraphs 24 and 44 et seq.; *see* also Fifth Report, April 1989 (A/CN.4/423) paragraph 2 et seq.

into national environmental protection laws.[100] The scope of Article 48 is broad: it regulates harm to the State, the environment *per se*, including the Global Commons, and injury to physical and legal persons. Such State liability, until today, could only be found in the Convention on International Liability for Damage caused by Space Objects[101] and that singles out this approach as unique and progressive. As to the consequences of responsibility/liability, Article 50 obliges the polluter State to first cease the activities causing significant harm to the environment. Such duty, reflecting the idea of prevention, is generally recognized in international law.[102] In case damage has already occurred, the application of the principle of restitution in kind (*i.e.* re-establishment of the situation that existed prior to the harm) is required and stressed. Future-oriented as it is, Paragraph 1 of Article 49 lays down the policy that the harmed components of the environment should be replaced by equivalent components.[103] This concept, emphasizing restitution in *natura*, best meets the idea of reparation and protection of the environment *per se* and is thus more appropriate than monetary compensation. It reflects as well the steadily increasing "nature-swaps" approach that is also conceived in the ECE Task Force Guidelines, the WCED Legal Principles, and incorporated in the Council of Europe Convention on Civil Liability and the ILC Draft Articles on State Responsibility.[104] Furthermore, Article 49 calls upon the parties to develop and improve the remedial methods for environmental harm, "including measures for rehabilitation, restoration and reinstatement of habitats of particular conservation concern." When the harm to the environment is irreversible or cannot be repaired in kind, monetary compensation is prescribed as an appropriate form of reparation. This includes the costs of all reasonable measures of reinstatement actually undertaken, or to be undertaken, as well as costs for reasonable measures to prevent or minimize harm. As clarified in the commentary,[105] in the

[100] *Cf.* for example the German Environmental Liability Act of 10 December 1990 in OJ (BGBl.) 2634 (1990).

[101] *Cf.* Article II of the Convention of 29 March 1972, 961 UNTS 187.

[102] *Cf.* Trail Smelter case in RIAA, vol. III, Decision of 11 March 1941, at 1938; *see* also art. 21, paragraph 2(a) of the WCED Legal Principles for Environmental Protection and Sustainable Development of the Expert Group of Environmental Law (1986) in Report of the World Commission on Environment and Development, "Our Common Future", 4 August 1987, (UN Doc. A/42/427).

[103] *See* the Draft's Commentary, *supra* note 70, to art. 49, at 146.

[104] For a comprehensive survey *cf.* A. Rest, *Ecological Damage in Public International Law*, *supra* note 90, at 34; art. 8 of the ILC Draft Articles on State Responsibility emphasizes the "essentially and predominantly compensatory function" of the "reparation by equivalent." *Cf.* GAOR, Forty-Fifth Session (1990), Supplement No.10 (A/45/10) under paragraph 344, at 190.

[105] Commentary to art. 49, at 147.

constituting an "international crime",[106] satisfaction as a traditional sanction instrument, personal responsibility and punitive sanctions might apply. The well-known civil law remedies for cessation and compensation, covering the operators and owners liability, are laid down in Article 52. Based on the "Non-Discrimination-Principle",[107] the harmed individual is granted such remedies irrespective of his or her nationality and domicile. In this context, the Commentary also stresses the need for further development of the ecological damage concept in most national legal systems.[108] Parallel to the substantive law requirements, Article 53 grants to every potential or *de facto* injured person a "right of access to administrative or judicial procedures" equal to that of nationals or residents of the State of origin, including access to information and participation of the public, especially in impact assessment procedures. These rights are incorporated, *inter alia*, in numerous recent Conventions and EEC Directives.[109] Progressive as well is the regulation contained in Paragraph 2 of Article 53; which ensures that the "adversely affected person" can proceed directly against the Polluter State or its entities and that the State against which proceedings have been instituted may not claim immunity from jurisdiction.[110] Article 55, which grants to persons and interest groups affected in a legally protected interest a right in the form of trusteeship to claim appropriate remedies for the protection of the Global Commons, is also innovative indeed. This approach should complement the concept of "*erga omnes* obligations."[111]

[106] *Cf.* art. 19, paragraph 3 (d), of ILC Draft Articles on State Responsibility (1980), *supra* note 97, and arts. 22 paragraph 2(d) and 26, ILC Draft Code of Crimes Against Peace and Security of Mankind (1991) (UN Doc.A/46/10).

[107] This Principle was for the first time adopted in the OECD Council Recommendation Concerning Transfrontier Pollution of 1974, (C(74) 224, Annex Title C), 24 I.L.M. 242 (1975); it is incorporated in art. 3 of the Nordic Environmental Convention of 19 February 1974, 13 I.L.M. 591 (1974); and in Principle 10 of the Rio Declaration (1992).

[108] *Cf.* Commentary to art. 52, at 150.

[109] *Cf.* art. 14 of the Council of Europe Convention on Civil Liability, *supra* note 94; art. 9 of the Convention on Transboundary Effects of Industrial Accidents of 17 March 1992, 31 I.L.M. 1330 (1992); EEC Council Directive on Freedom of Access to Information on the Environment of 7 June 1990 (90/313/EEC), No. L 158/56 EEC OJ (1990); EEC Directive on Impact Assessment of 25 June 1985 (85/337/EEC), No. L 175 EEC OJ 40 (1985).

[110] Art. 54 reads: "Parties may not claim sovereign immunity in respect of proceedings instituted under this Covenant." For similar regulations *cf.* art. 13(e) of the Paris Nuclear Liability Convention (1960); art. X, paragraph 3, of the Vienna Nuclear Liability Convention (1963); and art.X, paragraph 3, of the Brussels Convention on the Liability of Operators of Nuclear Ships (1962).

[111] *Cf.* Commentary to art. 55, at 154; to the concepts of Common Heritage of Mankind, Common Concern and *erga omnes* obligations *see* A. Rest, *Ecological Damage in Public International Law*, *supra* note 90, at 32.

Altogether, Part IX of the Draft Covenant offers a set of useful and thought-provoking instruments of sanction needed for enhanced environmental protection for the present generation and for posterity as well.

2. COMPLIANCE MECHANISM

To avoid dispute settlement procedures and to guarantee the effective implementation of treaty obligations, the Covenant introduces the very flexible, policy-oriented compliance mechanism;[112] which reflects a growing tendency in more recent environmental treaties.[113] This is based on the view that the traditional concept of reciprocity in treaty relations is inadequate to achieve the objective of the Covenant. Other non-reciprocal fields of international law, such as human rights, and the protection of Antarctica, have long used compliance mechanisms to enhance implementation of treaty obligations.[114] Echoing Agenda 21, the Draft Covenant seeks to promote this trend.[115] By a mixed set of instruments, *inter alia*, reporting, re-negotiation, and financial support requirements, the Party which cannot implement the treaty instantaneously shall be enabled to meet the obligations concerned. Such a "non-confrontational" mechanism is specifically appropriate in cases of inadequacies due to the lack of national capacity, in particular of its financial situation, and will be useful in the context of "modern international environmental law which relies on the principle of common but differentiated responsibilities and where obligations are often progressive or interrelated."[116] It makes clear that, upon concluding the treaty, the Parties have only achieved a general agreement on an obligation and not a concrete commitment and thereby re-negotiation for implementation seems necessary.

[112] Art. 61 reads "... [p]arties shall maintain or promote the establishment of procedures and institutional mechanisms to assist and encourage States to comply fully with their obligations and to avoid environmental disputes. Such procedures and mechanisms should improve and strengthen reporting requirements, and be simple, transparent, and non-confrontational."

[113] *Cf.* art. 8, Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, 26 I.L.M. 1541 (1987); art. 23, Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992, 32 I.L.M. 1069 (1993).

[114] Art. 14 of the Madrid Protocol to the Antarctic Treaty on Environmental Protection of 4 October 1991, provides for the establishment of an inspection procedure whose reports are widely available and an additional means for facilitating compliance.

[115] *Cf.* paragraphs 39.8-39.10.

[116] *See* Commentary to art. 61, at 162, that refers to the Convention on Biological Diversity and Climate Change.

ment may assess performance and make recommendations in a "non-adversarial" context before an inter-State dispute arises. Nevertheless, it shall apply without prejudice to the operation of the dispute settlement procedure.

D. Current Project: The International Court for the Environment

Article 62 of the Draft Covenant establishes the venues available to States for the peaceful settlement of disputes concerning the interpretation or application of the Covenant's obligations. In a non-exhaustive list of suggested mechanisms, it recommends the Permanent Court of Arbitration as arbitral tribunal and the ICJ and the International Tribunal for the Law of the Sea as judicial settlement instruments. Beyond these proposals, the Parties are also allowed to pursue other peaceful means of their choice. Unfortunately, the Covenant makes no provision for a means by which injured non-state-actors, especially individuals, shall be granted access to an international judicial institution to be established in cases of transnational pollution; in particular, when States refuse to protect their own nationals by filing a claim against the Polluter State's organs. On scores of occasions, this author has forcefully pleaded the need for an International Environmental Court apprised of and attentive to the pros and cons of the environmental issue.[117] A survey on transnational litigation concerning, for instance, the famous cases of Chernobyl, Mochovce, Wackersdorf, Soboth and the River Rhine Salinisation, to name but a few, manifests that the rights of the harmed victims are not sufficiently protected by national civil or administrative courts.[118] A successful lawsuit against a foreign authority which is directly or indirectly involved in a harmful activity is always hindered; either because of immunity from jurisdiction of the plaintiff in his home-courts or foreign courts or under the pretext of immunity from enforcement of a judgment. To enhance the legal position of the adversely affected individuals, the call for the establishment of an International Court for the Environment is steadily increas-

[117] A. Rest, *A New International Court of Justice for the Environment to Implement Environmental Responsibility/ Liability Law?* in TRIBUNALE INTERNAZIONALE DELL'AMBIENTE (A. Postiglione, ed.), Rome (1992), at 247; *idem, New Legal Instruments for Environmental Prevention,Control and Restoration in Public International Law*, 23 EPL 260, 269 (1993).

[118] For a comprehensive survey of the various law cases and further references *see* A. Rest, *Need for an International Court for the Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation*, 24 EPL 173 (1994).

steadily increasing in literature[119] as well as in practice, as evidenced, *inter alia*, by the most recent activities and programs of the International Court of Environment Foundation in Rome, the International Bureau of the Permanent Court of Arbitration, The Hague and EUROSOLAR in Bonn.[120] The project has also been presented to IUCN. An International Working Group has already started to examine the complex legal question of judicial competence and delimitation of existing courts. An International Environmental Court could certainly strengthen the mechanism of sanction, especially the effectiveness of the liability regime, and further promote the development of international environmental law. In the end, the establishment of such a Court will depend on the political will of States that, in general, presupposes a voluntary restriction on their sovereignty.

IV. CONCLUSION

In terms of substantive and binding legal obligations the Rio Conference has produced meager results with regard to the vague "umbrella-concept" of sustainable development. The hope of achieving substantial commitments from the North to increase the flow of finances and technology to developing countries has also failed to materialize.[121] On the whole, the implementation of the ambitious Rio targets is depressingly slow; as evidenced, once again, by the recent Berlin Summit on Climate Change.[122] But, despite all legitimate criticism, it cannot be denied that Rio, especially the Declaration and Agenda 21, has revived environmental consciousness and given a further impulse for the development of international environmental law in the follow-up process. Small preliminary efforts in State practice as to the implementation of international legal instruments and mechanisms according to Chapter 39 of Agenda 21 are now apparent. In jurisprudence, the

[119] *Cf.* A. Postiglione, THE GLOBAL VILLAGE WITHOUT REGULATIONS. ETHICAL, ECONOMIC, SOCIAL AND LEGAL MOTIVATIONS FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT, FLORENCE (1992); *idem, An International Court for the Environment?*, 23 EPL 73 (1993); for the strengthening of mechanisms of sanction the Commission of Experts of the World Federalist Movement (WFM), also seems to favor such Court. *Cf.* Proposal for A General UN System for Protection of the Environment by adoption and execution of binding regulations, Oslo, December 1991, under Chapter B paragraphs 7-9.

[120] For the details *see* T. Lörcher, PROJECT OF AN INTERNATIONAL COURT FOR THE ENVIRONMENT IN PERSPECTIVES OF AIR LAW, SPACE LAW AND INTERNATIONAL BUSINESS LAW FOR THE NEXT CENTURY (K. H. Böck-stiegel, ed.) (1996).

[1] *Cf.* P. MALANCZUK, SUSTAINABLE DEVELOPMENT: SOME CRITICAL THOUGHTS IN THE LIGHT OF THE RIO CONFERENCE, *supra* note 7, at 23, 50.

[2] For a critical survey of the Conference of 28 March to 7 April 1995 *see* ARCHIV DER GEGENWART of 7 April 1995, at 39883.

international legal instruments and mechanisms according to Chapter 39 of Agenda 21 are now apparent. In jurisprudence, the famous *Oposa* decision has enforced the principle of intergenerational responsibility and equity, and declared the principle as legally binding. It also confirmed the existence of a right to a decent environment as incorporated in the Constitution of the Philippines. Novel and flexible pilot schemes for voluntary agreements and eco-contracts between industry and State organs in Europe are attempting to reconcile and promote environmental protection with economic progress. These goals can be effectuated by eco-management and auditing tools offered by companies, in combination with the traditional State command and control system. The implementation of the Rio assignments is also stressed by the innovative IUCN Draft Covenant on Environment and Development. The framework Convention, in general, aims to transform "soft law" into "hard law" and to create new implementation mechanisms which will give assistance to the conclusion of further treaties. Besides the codification of customary law principles, it offers a complete set of economic and legal instruments for the prevention of harm to the environment. Eminently future-oriented are, in particular, the new sanction mechanisms which guarantee the compliance and enforcement of treaty obligations. By a well-balanced and unique combination of the State Responsibility/Liability concept with the civil liability regime, optimal compensatory effects are achieved. The Draft especially emphasizes the approach of restitution in kind by the incorporation of progressive reinstatement measures (i.e. the introduction of equivalent components of the environment for the replacement of the destroyed elements). Favoring restitution in *natura*, and not exclusively monetary compensation, will best meet the idea and need for protection of the environment *per se*. The regulation regarding the "non-confrontational" compliance mechanism also demonstrates that the Draft drives at a more efficient implementation of treaty obligations in the future. A fruitful contribution towards the enhancement of the legal position of individuals in case of harmful transnational effects will be seen in the most recent project concerning the establishment of an International Court for the Environment.

To sum up, some progressive and future-oriented legal mechanisms and instruments for the development and implementation of international environmental law have already been elaborated in recent State practice. Compared to the ambitious Rio targets as a whole, this is indeed only a small step. But it must not be forgotten that the elaboration of international legal instruments is always dominated by the political will of the State community. Our ecosystem is the best indicator to tell us whether the on-going UNCED process will succeed or fail.