Workshop on "Institution-Building in International Environmental Law"

Summary of the Discussion

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In introducing the main subjects, Professor Beyerlin presented a catalogue of questions[1] that might attract the attention of participants without prejudging any of the ideas put forward in the papers presented. He invited participants to make use of the time for discussions and reminded them that the objective and purpose of the workshop was to develop constructive ideas as well as proposals which, given the presence of various government officials, could be injected into the political process.

1. Strategies of International Environmental Law-Making

Based on the papers presented by Ms. Sommer[2] and Professor Handl as well as the comment given by Dr. Farooque, the participants approached the subject from various angles.

Many speakers raised questions on the appropriate level (regional or universal) of law-making in international environmental relations. There was agreement that universal rules are not necessarily the best approach: not only might the standards agreed upon be less

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[1] U. Beyerlin, State Community Interests and Institution-Building in International Environmental Law (this volume), 602 at 624 et seq.

[2] J. Sommer, Environmental Law-Making by International Organisations (this volume), 628.

stringent (the lowest common denominator) than those that could be achieved at a regional level but universal agreements might also fail to take into account regional or local particularities. Recent developments in the Pacific region were given as examples for attempts at successful regional regulation, in particular the activities of the South Pacific Regional Environment Progamme (SPREP) which became an independent and autonomous regional organisation in 1991. Reference was also made to the Geneva Convention on Long-Range Transboundary Air Pollution. In response to the question why a convention as successful as the latter was not transferred to the universal level, a discussant pointed to political resentments vis-à-vis European-type solutions. While most participants agreed that global problems necessitated global agreement, some speakers argued that seeking universal membership might be an impediment to the effective fight against global warming, since a limited number of states could prevent further progress. These speakers suggested that in a case of pressing problems the majority of states should proceed without obstructing states.

Closely related to the appropriate level of law-making was the issue of the subjects of law-making, in particular the participation of actors in the negotiation of instruments. The question was raised whether negotiations should involve as many states as possible or whether there should be a delegation of negotiating powers. Also, a distinction was made between delegation *stricto sensu* and situations where states "involuntarily" delegate powers. Such latter situations could be the acceptance of a package deal or the concept of "environmental stewardship" with only a limited number of states reaching agreement on behalf of the international community. A more difficult case coming close to coercion would be the subjugation of smaller states under the prerogatives of more powerful ones. The experience of negotiating the UN Framework Convention on Climate Change showed, it was argued, that – as a matter of fact – only a small number of states were in a position to actually exercise bargaining power while weaker states, though formally equal, did not play a part in deciding the critical issues. Nevertheless, as several speakers pointed out, negotiations could be left with a limited number of states if participation in the negotiations was based on the principle of representation. The negotiating of the Chemical Weapons Convention within the framework of the Conference on Disarmament was given as an example.

Moving beyond negotiations some participants more generally addressed the issue of treaty amendment by majority voting and the effect

of treaty rules on non-parties. While Article 34 of the Vienna Convention on the Law of Treaties remained the starting point, some speakers referred to Article 2, paragraph 9, of the Montreal Protocol providing for the possibility to adopt adjustments of Annexes to the Protocol by a simplified decision-making procedure, whereby decisions binding on all parties may, as a last resort, be taken by majority vote. One discussant also pointed to Article 33 of the 1995 Agreement for the Implementation of the Provisions of the UN Convention of the Law of the Sea, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, a provision obliging states parties to "take measures ... to deter ... activities ... of non-parties which undermine the effective implementation of this Agreement". There was no agreement on whether or not the establishment of objective territorial regimes should also be considered as indirect (retrospective) delegation of powers in respect of third states. Reference was made to regions only accessible to a limited number of states. Agreements relating to such regions could nevertheless have an impact upon states outside the relevant geographical area. The 1994 Bering Sea Agreement was mentioned as an example.

Some participants underlined the fact that states were not generally prepared to delegate far-reaching rule-making powers to treaty organs. It was pointed out that the 1994 decision of the Conference of the Parties to the Basel Convention to prohibit the export of hazardous wastes from OECD countries to non-OECD states, although adopted by consensus, did not constitute a legally binding prohibition. Hence, the Conference of the Parties adopted a formal amendment in 1995 which will become binding only upon ratification according to Article 17, paragraph 5, of the Convention. Other participants argued that the 1994 decision could be interpreted as a delegation of powers to the Conference of the Parties, while the 1995 decision implied taking back this delegation.

In view of the various levels, organs, and institutions involved in international environmental law-making, a situation described by one discussant as "chaos", the question was raised whether to establish an overall international institution with centralized rule-making powers. This matter was controversely discussed among the participants. The centralization of law-making powers, it was argued, could contribute to a more coherent way of addressing environmental problems, *inter alia*, by substituting an integrated cross-media approach for the piecemeal approach. Also, a "reinventing of the wheel" and the overlapping of different regimes could be minimised if not avoided. However, the majority of

participants remained sceptical vis-à-vis a "General Agreement on the Environment" comparable to the GATT/WTO. In taking up the suggested parallel to international economic law, a discussant pointed out that the GATT/WTO was a highly integrated field of international law while international environmental law was rather fragmented. This fragmentation should not necessarily be considered as negative. It was argued that *ad hoc* law-making avoided overloading negotiations with too many issues. A piecemeal approach could facilitate agreement among states by way of decoupling a particular issue from other matters and from general political considerations. Also, this approach would leave room to develop some agreements further and quicker than others. The general scepticism of most discussants towards centralized rule-making did not prevent agreement among participants to have treaties inter-related and to some extent also interlocked.

In this context the role and functions of UNEP and the CSD became a major issue of the debate. While some speakers argued that there was no competition between the two in the law-making context, others noticed a strong institutional competitiveness. Several participants described UNEP as a forum, providing a catalyst function and serving as a "generating institution" in international environmental law-making. In view of UNEP's broad mandate disagreement arose as to whether UNEP was successful in its role as a law-making machinery within the UN system. While some participants argued that UNEP was badly organized and did not deserve much further support, others called for reforming and strengthening UNEP. One speaker suggested that if UNEP were abolished it would have to be reinvented again. While UNEP was seen as a law-making institution, the CSD was considered as a review body with coordinating functions. Its role in international environmental law-making was perceived as being limited to the uncovering of deficiencies and to the encouraging of other international bodies to initiate relevant law-making processes. The limited staff of the CSD, it was argued, would anyhow not be in a position to provide secretariat functions for law-making. In the end, participants agreed that the success of both, UNEP and the CSD, was dependent on the political will of participating states. Duplication of work and overlapping functions could not be attributed to these institutions but could be traced back to competition between various government departments (trade and economic relations, development, environment, etc.) representing their states in these institutions. Whether or not states agreed to negotiate within the UNEP framework was not always transparent. A speaker pointed to the fact that UNEP was chosen as a

forum for the negotiations for the UN Convention on Biodiversity while it was not chosen as a forum for the climate change negotiations.

2. *Compliance Control and Compliance Assistance*

Based on the papers presented by Ambassador Lang[3] and Dr. Marauhn[4], participants spent some time discussing the scope of compliance control. This being a relatively new concept designed to address enforcement problems, the discussants agreed that compliance control included both, a routine and an *ad hoc* or challenge procedure. The increasing use of routine procedures, according to several discussants, would contribute to a growing "compliance culture", eventually improving the implementation and the effectiveness of international environmental agreements through confidence-building. There was agreement, however, that this required the further development of the concept of compliance control. One of the issues addressed was the definition of "non-compliance". While participants found it impossible to draw a clear line between "non-compliance" and "breach of treaty", they, nevertheless, agreed upon some distinctions between the two notions. Thus, it was argued that there existed different tolerable levels of compliance while the question whether there is a "breach of treaty" was a matter of "yes" or "no". Some participants saw the issue to be further complicated by the introduction of such concepts as the principle of "common but differentiated responsibilities", leaving room for much ambiguity as to the primary obligations assumed under an environmental agreement. In view of these difficulties it was argued by several speakers that compliance control systems could not be transferred from one convention to another since the obligations to be controlled differed in numerous respects. Several participants therefore favoured the adoption of tailor-made compliance control regimes.

The speakers agreed that data reporting was at the core of compliance control. It was considered to be the basis of routine as well as *ad hoc* procedures. The question was raised why the experience with self-reporting of states was not as good as it could be. Reasons considered were diverse, ranging from a lack of capacities to a lack of political will to co-op-

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[3] W. Lang, Compliance Control in International Environmental Law: Institutional Necessities (this volume), 685.

[4] T. Marauhn, Towards a Procedural Law of Compliance Control in International Environmental Relations (this volume), 696.

erate. It was also argued by some participants that there were too many reporting obligations with too many different formats. Some assistance could be provided here by the secretariats established under various international environmental agreements. Other discussants argued that the experience was not as bad as it seemed. They also pointed to the fact that national self-reporting could have a positive effect on domestic environmental law. Compliance with reporting obligations, it was noted, required national data collection which in turn could also help to enforce environmental law domestically. Information obtained through that process could be used by NGOs for litigation in national courts.

The contribution of NGOs to compliance control was also debated in general. One of the discussants illustrated the role of NGOs as drawing the attention of governments to environmental problems, making public the behaviour of governments and assessing the performance of governments. Thus, NGOs assumed an important "watchdog"-function. Specifically, in regard to the reporting systems, NGOs, it was argued, could play an important role in the efforts to improve the present situation. Information made public by NGOs could supplement insufficient or even substitute false (or rather euphemistic) reporting of states, thus inducing them to improve compliance with their reporting obligations. Numerous speakers noted with regret that the formal position of NGOs in treaty organs was still fairly limited. On the other hand, it was suggested that there were good reasons not to admit NGOs to bodies like the Montreal Protocol Implementation Committee since states were rather prepared to really co-operate if the confidentiality of the information presented was guaranteed.

Two further important issues taken up by various participants were the evaluation of information on compliance and reactions to non-compliance. First, the contribution of secretariats in receiving and processing information was stressed. The processing of such information, it was pointed out, often served as a kind of filter before forwarding information to the Conference of the Parties. Several participants pointed to the important role of expert committees in routine as well as in non-compliance procedures. One discussant illustrated this aspect by critically reviewing the temporary existence (1984–1989) of the "Technical Expert Committee" (later renamed "Technical Committee") under CITES. While this Committee helped to address numerous implementation problems, its dissolution and replacement by the Management Committee in 1989 might have been due to the fear of governments to be exposed to too much scrutiny. As several speakers pointed out, the role of

expert bodies should, nevertheless, be limited. There was agreement that only a political body such as the Conference of the Parties should be empowered to decide upon reactions to non-compliance. Full membership and governmental representation within such a treaty organ would ensure participation of a state party under scrutiny in the consideration of the case and would also guarantee the "peer review" of one state by another one. Also, only a political body would be in a position to flexibly respond to alleged cases of non-compliance, including not only sticks and carrots, but also the authentic interpretation of the relevant agreement.

Compliance assistance was considered as one of the possible reactions to non-compliance. The papers presented by Dr. Gündling[5] and Mr. Sand[6] as well as the comment presented by Mr. Navid[7] stimulated a vivid debate on various aspects of compliance assistance. As to the substance of compliance assistance the terms "additionality" and "incremental costs" were discussed. It was argued that these terms did not solve the question of the adequacy of funding. A discussant suggested that general funding rules might be helpful in this context. Adequacy, as was illustrated by one participant, was not purely a matter of figures but also of substance. Assistance needed optimization which included that financial support would really be used in the developing countries. Instead, it was shown, financial assistance would often be used to pay experts coming from donor states thus eventually returning support to developed countries instead of remaining with the developing ones. A controversial issue was whether or not recent international environmental agreements would not only oblige the developed countries to provide funds but also make the obligations imposed upon developing countries dependent on the provision of these funds, i.e. whether some of these agreements introduced an element of conditionality or the *do ut des* principle into the body of multilateral international environmental law. No agreement could be reached on the interpretation of such norms as Article 20, paragraph 4, of the UN Convention on Biodiversity. While some discussants argued that developing countries were only obliged to comply with environmental norms if funds were provided by the industrialised countries, others

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[5] L. Gündling, Compliance-Assistance in International Environmental Law: Capacity-Building Through Financial and Technology Transfer (this volume), 796.

[6] P. Sand, Institution-Building to Assist Compliance with International Environmental Law: Perspectives (this volume), 774.

[7] D. Navid, Compliance Assistance in International Environmental Law: Capacity-Building, Transfer of Finance and Technology (this volume), 810.

criticised this approach as undermining the credibility of international environmental law.

3. Conclusions

In the course of the discussion, numerous participants noted that the dividing lines between the making of rules, their interpretation and implementation, their application and compliance control could no longer be considered to be as clear as an analyst might wish. It was argued that non-compliance procedures with the various acceptable degrees of compliance and with their broad range of possible reactions to cases of alleged non-compliance would lead to individual rather than general law application. Thus, compliance control would always include an element of negotiation since amicable or conciliatory solutions were sought with each individual party concerned. While most participants recognized this as a trend, there was no clear idea as to whether this would contribute to the effectiveness of international environmental law or not. It was argued that the search for amicable solutions could lead to open-ended obligations which in turn might again impede the assessment of the compliance of states parties. This could make a treaty regime void of clear expectations, thus devaluing the substantive provisions of the agreement. Participants agreed that the workshop had contributed to shedding some light on these problems. However, there would be a need to intensify research on these matters.