

ENVIRONMENTAL LAW-MAKING IN THE EUROPEAN CONTEXT AND ITS RELATIONS TO INTERNATIONAL ENVIRONMENTAL AGREEMENTS

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I. INTRODUCTION

In Europe—and I am taking Europe not just in the limited geographical sense, but in a more political way—environmental regulations have been created and further evolved by different means and instruments: bilateral agreements, limited regional agreements, and multilateral agreements adopted by nearly all European States. Moreover, although, no European organization has been created to deal with environmental issues as such, a number of international organizations have actively taken up environmental issues in recent years. Let me just name a few, perhaps those which have been most prominently involved in environmental law making: United Nations Economic Commission for Europe, Council of Europe, European Communities/European Union and the Nordic Council. Depending on their structure and powers they have produced a variety of international instruments ranging from declarations and resolutions to legally binding rules.

Although environmental issues have already been high on the agenda in Europe in the last decades, due to the interest of the public after a number of incidents which affected the environment, the Rio Summit has put even more focus on the environment, and thus served as a catalyst for environmental regulations in a number of areas. But one should not overlook that also political changes in Central and Eastern Europe have increased the awareness of environmental problems and accelerated these developments.

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II. INTERNATIONAL ORGANIZATIONS IN EUROPE THAT HAVE BEEN ACTIVE IN ENVIRONMENTAL LAW-MAKING: SOME EXAMPLES

A. *Economic Commission for Europe (ECE)*

The member states of the United Nations Economic Commission for Europe (ECE) encompass the European States and the former Soviet Republics, as well as the USA and Canada. The ECE, when it was established in 1947, was comprised of to comprise the industrialized States of the North, now it has fifty-five member countries, twenty-six of which are countries in transition. Thus, the structure of the ECE membership has changed in the last years, and different ways of enhancing international environmental law-making have to be experienced.

ECE has been active in the elaboration of rules and regulations dealing with environmental issues in a transboundary context already in the seventies. A number of international conventions were elaborated and adopted under the auspices of the ECE: the Convention on Long-range Transboundary Air Pollution 1979, and its Protocols dealing with the emission reduction and monitoring of certain pollutants; the Convention on Environmental Impact Assessment in a Transboundary Context 1991 (Espoo-Convention); the Convention on the Transboundary Effects of Industrial Accidents 1992 and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992. These conventions differ in the way they are to be implemented. Whereas the 1979 Convention was a framework convention envisioning the further development of air pollution reduction by protocols adopted by all States of the region, the latter conventions are to set minimum standards, thus leaving it to the bilateral level or limited multilateral level to enhance more stringent obligations. The use of such an approach — although already taken up in some universal environment instruments — on the global level should be further scrutinized.

Within the ECE, moreover the process “Environment for Europe” has been set up. It aims at improving the environmental situation, thus leading to sustainable development in the ECE member states, in particular those in central and eastern Europe, as well as in the CIS-Republics. An Environmental Action Program, for Central and Eastern Europe was adopted at the Ministerial Meeting in Luzern in April 1993. It is built on three main pillars: (1) the integration of environmental considerations into the process of economic reconstruction to ensure sustainable development; (2) institutional capacity building, including an efficient legal and administrative framework as well as managing capacity, training and education; and (3) immediate assistance programs comprising actions which bring immediate or short term relief to regions where human health

or natural ecosystems are severely jeopardized by environmental hazards, taking into account also transboundary environmental problems. Cooperation between the States is not limited to central governmental level, but is extended to local authorities, local financial institutions, private industry, and the indispensable participation of the informal sectors. As a recent study has shows, financial assistance rendered to central and eastern European States might be made more efficient by mainly two means: to support the development of more efficient bureaucratic structures within the States and to have international tenders. The experience to be learned from this "Process for Europe" is that environmental cooperation is not to be limited to central governments, but a more widespread cooperation is necessary.

B. Council of Europe

Within the Council of Europe environmental issues have been discussed in various fora and a number of international environmental agreements have been elaborated under the auspices of the Council of Europe, such as the "Convention on the Conservation of Wildlife and Natural Habitats" (Bern Convention). the most recent agreement is the "Convention on Civil Liability for Damage Resulting front Activities Dangerous to the Environment 1993" (Lugano Convention), which has not entered into force so far. It is very unlikely that this Convention is to enter into force in the near future as it contains rather extended rules on liability. Critics have argued that such an extended scope - both including damage resulting from accidental pollution and chronic pollution - is not practicable. A further effort is currently undertaken in elaborating a "Convention on the Protection of the Environment through Criminal Law." The draft defines types of offenses against the environment that may be necessary to establish as criminal offenses under domestic law. These include "international offenses," for example, the discharge, emissions, or introduction of a quantity of substances and radiation into the environment "which causes a serious damage to persons or which create a danger of such damage." Furthermore, an infringement of a law, administrative regulation, or decision by a competent authority that "causes serious damage or deterioration to a component of the protected environment, or which is likely to cause such damage to persons" may also be considered a criminal offense. Moreover, provisions dealing with the question of jurisdiction and international cooperation are contained in the draft. Thus, a uniform criminal environmental law is to emerge in Europe.

An interesting point is also that environmental issues are dealt with in the area of human rights. The European Convention on Human Rights has proved to be a successful instrument to deal with environmental questions, although a "right to a healthy environment" - as has been discussed in international fora in the last years- is not included in the European Convention. The European Commission of Human Rights (ECHR) and European Court of Human Rights have both dealt with cases concerning environmental protection. Environment related cases have been decided by the ECHR on the basis of articles guaranteeing speedy access to objective judicial hearings or the protection of private property. In 1994, a case was brought before the Strasbourg authorities under Article 8 of the European Convention on Human Rights which states "everyone has the right to respect for his private and family life, his home, and his correspondence." The European Court of Human Rights held unanimously that Spain had violated a family's right to privacy when local authorities allowed operation of a waste treatment plant just a few meters from the family's home. The ECHR ordered the Spanish government to pay 5.5 million pesetas (US \$ 42,000) in damages and legal fees. This example shows that the traditional human rights approach can incorporate new developments such as environmental issues effectively. For the UN, the conclusion can be drawn that it might be a more useful way to give consideration to already existing human rights instruments to be used for the protection of the environment than to create a new "right to a healthy environment."

C. European Community

The European Community did not have an environmental dimension at the time of its creation. Only in the further development of the Communities were environmental issues discussed and regulated within the Communities. In the Single European Act 1986, the European Community was given explicit competence for environmental issues. Article. 130(r)(s), and (t) were inserted stating that the community will ensure a high level of protection for the environment. Thus, the integration efforts were extended to environmental issues. The environmental competence of the Community was further enlarged by the Treaty of Maastricht in 1992.

In contrast to other international organizations the community has a so-called "supra-national" structure, enabling it to adopt legally binding rules with majority decisions. According to Article of the 189 ECT, as amended by the Treaty of Maastricht, "the European Parliament acting jointly with the Council, and the Commission shall make regulations and

issue directives, take decisions, make recommendations. In the area of environmental policy the two main legal acts used are regulations and directives." A regulation shall have general application and shall be legally binding in its entirety and directly applicable in all member States without further acts of implementation. They are binding both for authorities and individuals. In contrast, a directive is "binding, as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Thus, member states are obliged to implement directives by national legislation within the time limit frame. The European Court of Justice (ECJ) has been given the competence to hear cases where member States have not implemented the adopted rules. Such a structure is unique in international relations. No other international organization on the international or regional level has been given that wide competence and member states have transferred sovereign rights upon an international organization. Thus, the frame for environmental regulations and rules within the EC differs, to a large extent, from any other international set-up.

In the development of environmental rules, the Community has mainly made use of "directives." States have to implement these directives within their national legal system, but it is within their discretion which kind of national legal instruments they use. In a number of cases, States have failed to implement directives fully or on time. The Commission which has been entrusted with the observance of the implementation of the obligations set by Community law has taken up these cases and brought them before the ECJ. It is interesting to see that the majority of cases were based on information provided by individuals to the Commission.

The competence of the EC to pursue an environmental policy is based on the following provisions: Article 130(r) paragraph. 2 of the ECT states: "Community Policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter shall pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies." The decision-making procedure in the environmental policy area is set out in Article. 130(s) of the ECT.

Article 130(t) of the ECT is a safeguard clause for more stringent measures on the national level: "The protective measures adopted pursuant to Article 130s shall not prevent any Member State from

maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.”

These provisions of the ECT recognize that different situations exist in the various regions within the Community. Moreover, it is clearly stated that member States are not prohibited from taking more stringent steps in order to ensure the protection of the environment. The reference to the compatibility with the Treaty refers to other Community activities, in particular those dealing with the establishment of the internal market (Art. 7a, Art. 100a).

This shows that the development of the European Community has led to the result that environmental issues are dealt with side by side with economic matters. Environmental rules and regulations have become an integrated part in Community law. Such developments could take place on the international level as well, as environmental issues have become the concern of other fields of international law. The WTO is a good example for this. But I would rather take the EC as an example for future development on a global level. The unique institutional structure of the EC is very unlikely to be copied on a global level in the near future. Binding majority decisions and a universal judicial system will not be completed on the global level.

III. WHAT ARE THE LESSONS TO BE LEARNED FROM THE EUROPEAN EXPERIENCE

The following principles for international environmental law-making can be deduced from the European practice make the principle of subsidiary or the search for the most suitable level for creating environmental regulations: this principle which is now found in Article. 3(b) of the “Maestricht I Treaty” is of interest not only to such supranational organizations as the European Union, but I would say that it serves as guidance for other international organizations. Before indulging in international efforts for the creation and development of international regulations, thought should be given to the question of which level of international cooperation is best suited for the envisioned international regulation. Depending on the environmental problems discussed - whether of global, regional, or bilateral concert - and the detailed rules of the intended regulation the suitable level has to be found. But subsidiarity is not an excuse for neglecting environmental issues. Subsidiarity only can be understood in the sense that after an objective evaluation of all the issues involved, the most suitable solution has to be adopted. Political considerations might in practice lead to the conclusion that only the second

best solution is achievable at a given moment, but an objective evaluation is a useful instrument for further law-making.

Even within the well-defined regional scope of Europe, it is self-evident that rules which might be adequate to the environmental issues in a certain region, may not be suitable to the conditions prevailing within another region. For example, climatic conditions in the north might require different solutions for environmental problems, than conditions found in southern Europe. International environmental regulations and rules which are developed within certain regions also differ in regard to their intensity and complexity of lawmaking. They are only as good as the parties allow them to be. If the States parties to an agreement are a relatively cohesive and homogeneous group with a strong political commitment to environmental protection, the rules and regulations adopted will be relatively elective. On the other hand if these criteria do not exist within the group of States concerned environmental regulations are less likely to be accepted.

Harmonization of environmental rules and regulations has been achieved in the European context only within the member states of the European Union. This shows, that such common standards of a high level can only be achieved if similar geographical, climatic, social, and economic conditions prevail. Otherwise, harmonization will only be of limited value. But one should not forget, that a first step to achieve more harmonized environmental rules and regulations, is to be seen in setting limits for emissions for each State. This approach has been taken by setting emission standards in the Protocols to the ECE Convention 1979. It is left to the States to adopt regulations on the municipal level enabling them: to reach the ceilings for national emissions set in international agreements. Harmonization of environmental standards even on the European level so far has not been very successful, except within the supranational structure of the EC.

Further development of existing environmental conventions by data collection is a prerequisite for the elaboration of adequate environmental rules. The European Community as well as the ECE-Convention 1979 and its Protocols established institutional arrangements to ensure that the relevant environmental data are collected on an objective basis.

An essential point of environmental law is to ensure that the agreed rules and regulations are implemented and complied with. The EC has created a very effective system concerning the monitoring and control of the activities undertaken in the member States. As already pointed out, the Commission has been entrusted with the task to observe the member States' behavior. But this is a unique experience. The establishment of

implementation or non-compliance mechanisms could be useful means in this context. Although on the global level implementation or non-compliance mechanisms have been set up or are under discussion, the ECE has listed criteria on which such mechanisms should be based.

In the Declaration adopted at the Lucerne Meeting of the Environmental Ministers the contracting parties to environmental conventions were urged to work towards non compliance regimes which:

- (1) aim to avoid complexity;
- (2) are non-confrontational;
- (3) are transparent;
- (4) leave the competence for the taking of decisions to be determined by the Contracting Parties;
- (5) leave the Contracting Parties to each convention to consider what technical and financial assistance may be required, within the context of the specific agreement; and
- (6) include a transparent and revealing reporting system and procedures, as agreed to by the Parties.

Such mechanisms are to be seen as a supplement to traditional means of dispute settlement. Nearly all environmental treaties which have been adopted on regional and international levels in recent years include mechanisms for the settlement of disputes, such as negotiations, consultations, arbitration, etc. But experience has shown that very rarely these mechanisms are really used. Thus, other institutional arrangements have to be found in order to deal with transboundary environmental issues.

As regards mechanisms for the settlement of disputes, in the European context emphasis has been given to the concepts of equal access to municipal courts and administrative authorities for persons resident outside the fora State based on nondiscrimination. The idea behind these issues is to avoid the confrontation between States on transboundary environmental issues, leading to a depolitization of conflicts, but it raises a number of questions, such as how information is distributed in other States or what substantive law is applied. In my view "equal access and nondiscrimination" are only accepted by States when they have trust in the administrative and judicial system of the other States concerned. Only if standards of administrative and judicial procedures are regarded as similar or equal in the States concerned will such a system be accepted. The Member States of the European Community and the Nordic Council are examples for this. In order to transfer this experiment to a global level it needs more elaborate examination of the different legal systems. I raise my doubts that "equal access and nondiscrimination" will be used on a global level in the near future taking into account the state of the world.

As I tried to show, some of the experiences made on the European level might be applied for global law-making, although adaptations may be necessary.