

Session 5

SOME MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAs)

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1. Nature and Origin of Negotiations

1.1. Introduction

In this is an era of dramatic change in international affairs, we can observe unprecedented examples of interdependence in a variety of the fields, such as environment, trade, economics, politics and security, etc. These trends often seek resolution through the mechanism of international negotiation. International negotiation and mediation have become a prevalent form of international activity. They are the principal non-violent means by which both official and unofficial actors resolve or manage international disputes and search for mutually acceptable agreements that satisfy joint goals.

International Negotiation addresses the processes of negotiations concerned with political, security, environmental, ethnic, economic, business, legal, scientific, and cultural issues and conflicts among nations, international and regional organizations, multinational corporations and other non-state actors.

International environmental regimes involve complex interactions between the parties, their sub-national jurisdictions, their citizens and, sometimes, other stakeholders. In practice it often takes several rounds of negotiation before an effective regime emerges. The rules governing these regimes differ from one to another reflecting the provisions of the relevant agreement. However all draw on customary international law and a range of practices and principles that have become widely accepted.

The various regimes address a wide variety of issues, ranging from toxic substances to the protection of elephants, from air pollution to biodiversity. As well, they must respond to changing scientific information about the environment, changing perceptions of the significance of this information, and the constant feedback from the successes and failures of the measures adopted in support of their objectives.

International environmental regimes are based on consent. Scientifically based assessments of environmental developments provide the foundation for most of these agreements, and all of this activity depends on a free flow of information and ready access to decision-making in the regime. Transparency and participation are

arguably the most important implementation tools of international environmental regimes but implementation may need the help of arm's-length agencies like an NGO.

Even then, implementing a Multilateral Environmental Agreement (MEA) at the national level and monitoring its progress at the international level are not simple matters. Among other things they require continual adjustment of the regime that is a result of intensive further research on the environmental problem, and on the regime's effectiveness. Public debate on the results of the research is also very essential tool in the actual implementation of the regime at a national level.

1.2. Conference of Parties (COP)

The COP is an entity representing all States and is responsible for the overall implementation of the MEA objectives. It reflects the political will of the contracting States and is designed to keep pace with the changing requirements of the sectoral environmental issue. It not only reflects the authority of the convention but also gives effect to the in-built law making process. All the Subsidiary bodies constituted under the MEA report to and function under the COP.

The Conference of the Parties (COPs) is the governing body of a Convention, and advances implementation of the Convention through the decisions it takes at its periodic meetings.

COP generally comes in session once in a year or two years. A formal amendment to the Convention or adoption of a separate Protocol to the Convention requires acceptance and/or ratification of the parties.

2. Climate Change

2.1. Introduction

Awareness about the climate, its development and changes differs in different communities. It has presumably, always been high among the more intelligent members of primitive societies living in vulnerable regions. To establish a history of the changes in climate is not easy because of the difficulties in obtaining truly representative measurements. Climate change has been universally recognised as a global problem. While, historically, the preponderance of greenhouse gas emissions have been in developed countries, emissions will increase rapidly with expected and needed economic growth in developing countries. The principal reason for lack of progress is that in developing countries, climate change is not an important focus of economic or development policy and only recently has it been considered among national environmental policy objectives. Climate change remains too marginal compared to the pressing issues of food security, poverty, natural resource management, energy needs and access, or urban land use to capture the attention of leading actors. Various parties to the United Nations Framework Convention on Climate Change (UNFCCC) 1992, as well as independent scientific analysis, have reiterated that strong and inclusive global cooperation that integrates sustainable development and climate change policy objectives will be needed to address these global environmental issues.

Current international climate change policies have been uniquely driven by global environmental policy concerns, and very little attention has been given to local development and the environmental impacts of specific policies. However, from the local perspective, ancillary benefits of climate change policies, such as increased energy efficiency and the health impacts of local air pollution, may be significant and may therefore be very important in promoting local action.

The earth's climate is determined in large part by the presence in the atmosphere of naturally occurring greenhouse gases, including in particular water-vapour, carbon dioxide (CO₂), methane (CH₄), CFCs, nitrous oxide (N₂O) and tropospheric ozone (O₃). These are transparent to incoming shortwave solar radiation but absorb and trap long wave radiation emitted by

the earth's surface. Their presence exerts a warming influence on the earth. Scientific evidence suggests that continued increases in atmospheric concentrations of selected greenhouse gases due to human activities will lead to an enhanced 'greenhouse effect' and global climate change.

2.2. Convention on Climate Change

Because of United Nations Conference on Environment and Development's (UNCED) political prominence, many international environmental debates were merged into the process, such as those of the conventions on climate change and biodiversity, which were not negotiated at UNCED or in the Preparatory Committee (Prepcom) meeting but were signed in Rio following separate negotiations. Formal international discussion of a convention on climate change began in 1988 with the establishment of the Inter-governmental Panel on Climate Change (IPCC), an advisory body of scientists and officials that assessed comprehensively climate science, impacts, and response strategies. IPCC served as a forum for "pre-negotiation", because many of its participants expected it to be followed by formal negotiations under the same authority. Instead, the UN General Assembly passed a resolution on December 1990 that established the Inter-governmental Negotiating Committee (INC).

The negotiation of a treaty to address climate change and its effects was formally set in motion by the UN General Assembly determined that 'climate change is a common concern of mankind' and urged governments and intergovernmental and non-governmental organisations to collaborate in concerted effort to prepare, as a matter of urgency, a framework convention on climate change. The 1992 Convention on Climate Change went beyond the scope of the 1985 Vienna Convention, which took nearly three times as long to negotiate among a smaller group of states. The word 'Framework' in the title is something of a misnomer, since the 1992 Convention established:

1. Commitments to stabilise greenhouse gas concentration in the atmosphere at a safe level, over the long term, and to limit emissions of a greenhouse gases by developed countries in accordance with soft targets and timetables.

2. A financial mechanism and a commitment by certain developed country parties to provide financial mechanism and a commitment by certain incremental costs and adaptation measures;
3. Two subsidiary bodies to the conference of the parties ;
4. A number of important guiding 'Principles'; and
5. Potentially innovative implementation and dispute settlement mechanisms

The Convention was the first international environmental agreement to be negotiated by virtually the whole of the international community, with 143 states participating in the final session of the INC/FCCC. The relation between the Climate Change Convention and vital national, economic, social and environmental interests was evident from the different interest groups of states which emerged during the negotiation.

Preamble , definition, objective and principles

The Convention's Preamble reflects a wide range of interests. It includes matters jettisoned from the 'Principles', and expressly recognises, inter-alia, 'the principle of sovereignty', that the largest share of historical and current global emissions has originated in developed countries. The Preamble also refers to the concepts of 'per capita emissions' and 'energy efficiency', matters which did not receive sufficient support to be included in the operational part of the Convention.

The ultimate objective of the Climate Change Convention is to stabilise greenhouse gas concentration in the atmosphere 'at a level that would prevent dangerous anthropogenic interference with the climate system'. However, the Convention implicitly recognises that some climate change is inevitable, since the objective is to be achieved within a timeframe sufficient to allow 'ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'. Parties should adopt measures and policies which are 'precautionary', 'cost-effective' and 'comprehensive', and which take into account different 'socio-economic contexts'. Finally, throughout the

'Principles', section and elsewhere in the Convention, reference is made to the need to ensure 'sustainable economic growth' in order to address the problems of climate change.

Commitments

➤ General

The general commitments include the development of national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and the formulation and implementation of national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing emissions and removals of these gases and by facilitation of adequate adaptation to climate change.

➤ Specific

At the heart of the Convention are the specific commitments relating to sources and sinks of greenhouse gases binding in all developed country parties and the EC under Article 4 (2). The extent of these commitments is unclear as a result of the convoluted, language agreed to by way of compromise between developed and developing countries. The parties agreed 'to begin a process to enable [the conference of the parties] to take appropriate action for the period beyond 2000, including the strengthening of the commitments of the Parties through the adoption of a protocol or another legal instrument. This process led to the adoption of a protocol to the Convention at the third conference of the parties in Kyoto in 1997. The Kyoto Protocol set quantified targets and a timetable for the reduction of greenhouse gas emissions by developed country parties.

The convention provides for 'joint implementation' by parties of their policies and measures which would lay the foundation for the efforts of those states which sought to ensure that emission reductions should be carried out in the most 'cost effective' way possible. The Convention additionally requires that 'a certain degree of flexibility', should be allowed to develop country parties 'undergoing the transition to a market economy'.

Institutional arrangements

The Climate Change Convention establishes a conference of the parties, a secretariat, two subsidiary bodies and a financial mechanism. It met for the first

time in 1995 and has subsequently met annually. It has several functions, including:

- i) To examine periodically the obligations of the parties;
- ii) To facilitate the co-ordination of measures
- iii) To promote and guide comparable methodologies for preparing inventories of greenhouse gas emissions.
- iv) To assess the implementation of the Convention by all parties and the overall effect of measures; and
- v) To adopt regular reports on the implementation of the Convention.

A multidisciplinary Subsidiary Body for Scientific and Technological Advice was established to provide information on scientific and technological matters to the conference of the parties. A Subsidiary Body for Implementation was established to assist the conference of the parties in the assessment and review of the implementation of the Convention. Although some states wanted to limit participation, both subsidiary bodies are open to participation by all parties.

The convention defines a financial mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology. The mechanism is required to have an equitable and balanced representation of all parties within a transparent system of governance.

Implementation and Dispute Settlement

Apart from the role of the conference of the parties and the Subsidiary Body of Implementation, the Convention provides for the possibility of establishing a 'multilateral consultative process' for the resolution of implementation questions, which will be available to parties on their request. This whittles down two more ambitious original proposals. Additionally, a dispute settlement Article provides for possible compulsory recourse to arbitration or the International Court of Justice with the consent of relevant parties to a dispute, as well as the possibilities for the compulsory establishment of a conciliation commission with the power to

make a recommendatory award, at the request of one of the parties to a dispute twelve months after notification of the dispute. The Convention provides for amendment, the adoption and amendment of Annexes, and the adoption of Protocols, no reservations are permitted. Prior to its entry into force, Article 21 of the Convention established interim arrangements concerning the designation of an interim secretariat, co-operation with the IPCC and other scientific bodies.

2.3. The 1997 Kyoto Protocol

Introduction

The Kyoto Protocol to the Framework Convention on Climate Change was adopted by the third conference of the parties in December 1997. Negotiations for Protocol to the Convention commenced in 1995 after the first conference of the parties, meeting in Berlin, determined that the commitments provided for in Article 4(2) (a) and (b) of the Convention were ‘not adequate’ and decided to launch a process to strengthen the commitments of Annex 1 parties through the adoption of a protocol or another legal instrument. The process was not intended to introduce any new commitments for non-Annex I parties, but merely to ‘reaffirm existing commitments in Article 4.1 and continue to advance the implementations of these commitments. Negotiations were to be conducted as matter of urgency with a view to adopting the results at the third conference of the parties in 1997. At the second conference of the parties at Geneva in 1996, a Ministerial Declaration was adopted by which Ministers urged their respective representatives to accelerate negotiations on a legally binding protocol or another legal instrument. Given the economic and developmental implications, it is not surprising that the Kyoto Protocol negotiations were among the most difficult and complex ever conducted for a multilateral environmental agreement. Deep divisions between the parties emerged in relation to a range of key issues, such as emissions reduction targets, sinks, emissions trading, joint implementation and the treatment of developing countries. In early 2001, the future of the Protocol was thrown into doubt with the announcement by President George W. Bush that the United States (responsible for a quarter of 1990 global greenhouse gas emissions) would not ratify the Protocol. Nevertheless, at the resumed session of the sixth conference of the parties, held in Bonn in July 2001, the remaining states parties reached agreement on mechanisms for implementing commitments under the Protocol. The Bonn Agreements were not drafted as a legal text, but, at a

political level, reflected an important breakthrough on many of the critical negotiating issues, and a clear signal that the world community was prepared to go ahead with the Kyoto Protocol, even without United States support. The parties were able to incorporate almost all of the deals made in Bonn into the legal text of the 'Marrakesh Accords', a series of decisions concerning the implementation of the Kyoto Protocol which paved the way for its entry into force.

Policies and Measures

Article 2 of the Protocol contains a list of policies and measures which parties may implement in order to achieve their quantified limitation and emission reduction targets. During negotiations for the Protocol, the European Union pushed for the adoption of mandatory and co-ordinated 'policies and measures' but this was resisted by the United States, Canada, Australia and some other Annex 1 parties who sought a more flexible approach, with policies and measures to be determined principally by each individual party. This latter approach was largely adopted in Article 2, which provides that each Annex 1 party, in achieving its emissions limitation and reduction commitments under Article 3, shall implement policies and measures 'in accordance with its national circumstances'. A list of indicative measures follows, which includes enhancement of energy efficiency, the protection and enhancement of sinks, the promotion of sustainable forms of agriculture, increased research on and use of new renewable forms of energy, measures to limit or reduce emissions in the transport sector and the limitation or reduction of methane emissions.

Entry into force and Amendments

In order to enter into force, the Protocol requires the ratification, acceptance, approval or accession of at least fifty-five parties to the Convention, which must include Annex I parties which accounted for at least 55 per cent of the total carbon dioxide emissions of Annex 1 parties in 1990. The refusal of the world's largest greenhouse emitter, the United States, to ratify the Protocol made the participation by other Annex I parties with significant emissions, such as Japan, the European Community and Russia, essential for the Protocol to come into force.

Amendments to the Protocol can be adopted by a three-fourths majority vote of the parties present and voting at the meeting at which it is proposed for adoption,

followed by its ratification or acceptance by at least three-fourths of the parties to the Protocol.

Negotiations on a successor to the Kyoto Protocol dominated the 2007 United Nations Climate Change Conference. A meeting of environment ministers and experts held in June called on the conference to agree a road-map, timetable and 'concrete steps for the negotiations' with a view to reaching an agreement by 2009.

2.4. Climate Change and Sustainable Development

By wastefully exploiting natural resources, and by the thoughtless application of technology, the industrial and agrarian societies have attained a potential for inflicting damage on a scale that has seriously endangered the survival of man on this planet. Data records clearly indicate that the increase in past trends is currently maintained in practically all areas that are of environmental global warming, troposphere ozone, air, soil and water pollution, including chemical and radioactive wastes, as well as allergies, viral and carcinogenic diseases. There are a large number of protective measures available, but their effectiveness in reducing the climate impacts varies widely. Climate and environment are some of the most critical factors on which a sustainable future depends. They must therefore be protected.

The term “sustainable development” has its origins in the International Union for the Conservation Of Nature’s (IUCN’s) 1980 World Conservation Strategy report (IUCN, WWF and UNEP, 1980), but it was with the World Commission on Environmental and Development report, entitled *Our Common Future* (1987) that the term gained broad currency. The commission defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’

The most conspicuous services that the natural environment provides are food and inputs to production, including energy, metals and timber. The natural environment also provides more fundamental services, without which human life on earth would not be possible. These are known as Global Life-Support services, since they provide the basic necessities to allow human life such as food, shelter, and the maintenance of suitable climatic and atmospheric conditions.

3. Ozone Depletion

3.1. Introduction

The Ozone Layer comprises of the O₃ molecules (Ozone) that are found in the earth. 90% of atmosphere O₃ is found in the stratosphere with maximum concentration occurring at altitudes of 25 kms over the equator and 15 kms over the poles. The Ozone Layer is thought to provide a shield against harmful exposure to ultraviolet radiation from the sun and controls the temperature structure of the stratosphere. O₃ also acts as a greenhouse gas at lower altitude, is a respiratory irritant, and can adversely affect plant growth. Since the 1990's there have been losses in the ozone layer above the Arctic. Since then, significant thinning has also been discovered in the northern hemisphere and ozone depletion has become progressively greater over the course of the 1990's. Serious levels of UVB radiation have been observed over Antarctica, Australia and Mountainous regions of Europe, and damage to phytoplankton has been discovered in Antarctica.

The depletion of the Ozone Layer is caused by the anthropogenic emission of certain inert gases, particularly chlorofluorocarbons (CFCs) and halons. When these gases reach the Ozone Layer; they are exposed to ultraviolet rays and break down, releasing free chlorine (from CFCs) and bromine (from halons) which break up the Ozone molecules and deplete the Ozone Layer increased levels of ultraviolet rays are thought to cause harm to human health and the environment, including organisms in the marine environment . CFCs are used extensively as refrigerants, air conditioner, coolants, and aerosol spray can ingredients and in the manufacture of Styrofoam.

The protection of the Ozone Layer from these destructive elements is the subject of a complex legal regime comprising the 1985 Vienna Convention for the Protection of the Ozone Layer (the 1985 Vienna Convention) and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the 1987 Montreal Protocol). Since 1990, there have been various adjustments to the production and consumption of controlled substances. Since the 1960s monitoring functions have been carried out by states individually and jointly, as well as under the World Meteorological Organisation (WMO) Global Ozone Observing System. In 2002, evidence began to emerge to suggest that the global regime was limiting

the rate of increase in the degradation of the Ozone Layer over the Antarctica might begin to decrease in magnitude, following a decrease in the levels of the Ozone depleting gases in the stratosphere and of the Ozone depleting chemicals in the troposphere.¹

3.2. Ozone thinning, Ozone holes and the UVR problem

A key question in the global change research is how far human influence on the atmospheric Ozone will actually increase the deleterious effect of UVR reaching the earth's surface. Concern over the thinning of the stratospheric Ozone goes back to the International Geophysical Year of 1957, when an international network of 'Dobson Stations' was set up to monitor atmospheric ozone using a technique pioneered by a scientist of the same name.

The strength of this threat, coupled perhaps with a feeling that this was one aspect of adverse global change about which, 'something could be done' led to the production and use of 'substances that deplete the Ozone Layer' was signed by the governments of most nations at a meeting in Montreal in 1987, aiming at a 50% reduction in production of CFCs by the year 2000. Tighter structures were agreed for the developed nations than for the developing nations. Most people would see the signing of the Montreal convention as a great victory for those concerned with global issue, as indeed it was. None the less, the interplay of politics and economies in this type of international agreements are rarely as simple as they may seem, the environmental danger represented by CFCs had been evident to the chemical industry for some research and development directed to finding alternative propellant and other substances for CFCs were naturally interested in seeing CFCs put under restriction. The Montreal Protocol took care of those interests.

3.3. 1985 Vienna Convention

The Vienna Convention was negotiated over 5 years under the auspices of UNEP. It was the first treaty to address a Global atmospheric issue and is open to participation by all states. It has attracted widespread support from all industrialised nations and a very large number of developing countries. It

¹ UNEP Press Release, 16 September 2002

established a framework for the adoption of measures ‘to protect human wealth and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the Ozone Layer’². The Vienna Convention does not set targets or timetables for action but requires four categories of ‘appropriate measure’ to be taken by parties in accordance with means at their disposal and their capabilities, and on the basis of relevant scientific and technical considerations. These obligations are: co-operation or systematic observations, research and information exchange; the adoption of appropriate legislative or administrative measures and co-operation on policies to control, limit, reduce or prevent activities that are likely to have adverse effects resulting from modifications to the Ozone Layer; and co-operation in the formulation of measures, procedures and standards to implement the Convention as well as with competent international bodies. Parties are free to adopt additional domestic measures, in accordance with international law, and maintain in force compatible measures already taken. The Convention also requires co-operation in the legal, scientific and technical, socio-economic and legal information relevant to the Convention subject to rules of confidentiality, and the development and transfer of technology and knowledge taking into account the particular needs of developing countries.

The parties transmit information to the conference of the parties on their implementation measures. That body is entrusted with the implementation of the Convention, assisted by a Secretariat whose services are provided by UNEP. The conference of the parties has other functions including the adoption of protocols.

3.4. 1987 Montreal Protocol and the Adjustments and Amendments

- *Introduction*

The first and to date the only Protocol to the Vienna Convention is the 1987 Montreal Protocol. It is a landmark international environmental agreement, providing a precedent for new regulatory techniques and institutional arrangements and the adoption and implementation of innovative financial mechanisms. With hindsight, the Montreal Protocol appears to be relatively straightforward instruments and the fact that it approach has subsequently been

² Art. 2(1); the ‘Ozone Layer’ is defined as ‘the layer of atmospheric ozone above the planetary boundary layer’ : Art 1(1)

relied upon extensively in other international environmental negotiations belies the controversy and complexity surrounding it at the time of its negotiations. Montreal Protocol sets forth specific legal obligations including limitations and reductions on the calculated levels of consumption and production of certain controlled Ozone depleting substances. Its negotiations and conclusion, shortly after the 1985 Vienna Convention were prompted by new scientific evidence indicating that emissions of certain substances were significantly depleting and modifying the Ozone Layer and would have potential climatic effects. Like the Vienna Convention, the Montreal Protocol and its amendment have attracted widespread support. The 1990, 1992 and 1997 Amendments and Adjustments introduced important changes to the Montreal Protocol.

- *Control Measures: Consumption and Production*

Article 2 of the 1987 Montreal Protocol adopted limitation and reductions requirements on the consumption and production of all Annex A substances. By Article 6, as amended by the '92 and '99 Amendments the parties are assess with the assistance of panels of experts all the Article 2 control measures on the basis of available scientific environmental, technical and economic information. Montreal Protocol also provides for transfer of production and the rules regarding facilities under construction.

By Article 2(8) of the 1987 Montreal Protocol, parties which are member states of regional economic integration organisation may 'jointly fulfil' their obligations provided that their total combined level of consumption does not exceed levels set by the Protocol, and that certain procedural obligations are fulfilled (the parties to any such agreements must inform the Secretariat and all member states of the regional organisation, and the organisation itself).

- *Control Measures: trade in controlled substances*

Article 4 of the Montreal Protocol established innovative trade provisions to achieve its environmental objectives. Although initially somewhat controversial, they are now widely recognised for their effectiveness in creating incentives for states to become party to the Protocol. These measures address the trade in controlled substances by parties with states which are not parties to the Protocol; the trade in products containing controlled substances.

Montreal Protocol also requires parties to discourage exports of technology for producing and using controlled substances, and to refrain from providing new subsidies, aid, credits, guarantees or insurance for the export to non party states of production, equipments, plants or technology which would facilitate the production of controlled substance, certain exceptions to this exists.

- *Developing Countries*

The 1987 Montreal Protocol included provisions to take account of the special needs of developing countries, including large users of CFCs such as India and China, who were unwilling to become parties to the Protocol. Article 5(1) of the Protocol allowed developing country parties whose calculated level of consumption was less than 0.3 kilograms per capita a grace period of ten years beyond dates set for phase-out in Article 2(1) to (4) of the Protocol. In addition, but without specifying how it was to be achieved, the parties agreed to facilitate access to ‘environmentally safe alternative substance’ and to provide developing countries with substitute products.³

³ 1987 Montreal Protocol, Art. 5(2) and (3).

4. Hazardous Material and Waste

4.1. Introduction

A Hazardous Material is such a material that poses a substantial or potential threat to public health or the environment. A Hazardous Waste is a waste which is also dangerous to the health and environment in general. These may exhibit one or more of these characteristics:

- It is ignitable or highly inflammable
- It is prone to oxidizing
- It is highly corrosive
- It is toxic
- It is radioactive
- It is eco-toxic
- It is explosive

4.2. The Basel Convention

In response to waste management, many countries met in Basel, Switzerland for the Basel Convention to create an International treaty to end the immoral dumping and exporting of hazardous waste principally from developed countries to undeveloped countries. The Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal is an international treaty that seeks to end the unethical dumping and exporting of hazardous waste primarily from developed countries to undeveloped countries.

The Basel Convention was adopted on March 22, 1982 in Basel, Switzerland. It was entered into force on May 2, 1992. Currently the Basel Convention has been ratified by 63 countries, although the treaty is not legally binding unless the country has adopted it. Four countries who are parties to the Convention but have not adopted it are the United States, Australia, New Zealand, and Canada.

The Convention proposes three steps to minimize hazardous waste:

1. Lower the production of hazardous waste. It has been proven that cleaner production diminishes the cost of the producer and decreasing the damage done to the environment.
2. Treat and dispose of hazardous waste near their origin. It is better to dispose of hazardous materials locally because it will lower the chance, of spilling or leaking of the hazardous waste and if any problems occur, they would occur in the hands of its creator, thus inspiring the workers and communities to find a solution.
3. Diminish international movement of hazardous waste. The Basel Convention works to lower the movement of hazardous waste through a set of agreed rules and regulations.

4.3. The Ban Amendment

After the initial adoption of the Convention, some countries as well as certain environmental organizations argued that it did not go far enough. It was argued that a total ban on shipment of all hazardous waste to developing countries must be imposed. In particular, the original Convention did not prohibit waste exports to any location except Antarctica but merely required a notification and consent system known as "prior informed consent" or PIC.

This led to the Basel Ban Amendment in 1995. The Amendment, though not yet in force, but morally binding on the signatories, banned all dumping and exporting of hazardous waste. The Basel Ban applies to export for any reason, including recycling.

- **Basel Action Network**

The Basel Action Network (BAN) was created to help the Ban Amendment progress across the globe. The BAN is a global organization that is located in the US, Europe, and Asia. BAN works on many campaigns to improve the world. They work against the growth of toxic trade, products, and technologies. BAN is also a definitive source of information on toxic trade; they want to help journalists and the general public to become more aware of toxic trade and inform people who are responsible for irresponsibly disposing of E-waste. BAN is also recognized by the UK as the leading organization in environmental issues.

5. Multilateral Environmental Agreements and Dispute Settlement Mechanism

5.1. Introduction

Since World War II, there has been a steady expansion of multilateral negotiations/conference diplomacy within international relations. Except for the management of relations between neighbouring states and the strategic relationship between the two superpowers during the Cold War, multilateral negotiations become the dominating feature in the international arena.

Dispute settlement provisions are not unique to Multilateral Environmental Agreements (MEAs) — they have long been an essential element of international Agreements, because they provide the procedures by which disagreements among the Parties regarding the agreement can be resolved.

Dispute settlement provisions are included in a growing number of MEAs (most of the major global MEAs have dispute resolution mechanisms). Despite the number of available procedures, in practice States have shown reluctance to submit to the formal dispute settlement. In part, this is due to the fact that most of these provisions are not compulsory. Thus, in order for an aggrieved Party to avail itself of the mechanism, the other Party must consent to using the mechanism. Generally speaking, MEAs tend to focus on mechanisms that promote compliance, rather than on formal dispute settlement procedures. In more than a decade, the provisions for an arbitral tribunal under the CBD have never been invoked formally — and this is not unique for MEAs.

Some Basic Concepts

According to Article 33(1) of the UN Charter:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

Clearly, this provision applies to environmental disputes. The list proposed includes almost all the means of peaceful settlement of interstate disputes, well established in international law.

- *Negotiation* means proposals made by one or the other of the parties to a dispute and the reaction to the other party, including counterproposals, in

order to reach an agreement. Negotiations should be conducted in good faith, the parties must carefully examine the proposals of their partners and try to make progress towards an agreement. Unilateral acts which could comprise the result of the negotiation should be avoided.

- *Good offices*, which are not listed in Article 33(1), consist in the intervention of a third party trying to persuade the parties to a dispute to meet and find pacific means of settlement
- *Enquiry* is the establishment of the facts of a determined case by an independent body.
- *Mediation* consists in bringing the parties to a dispute together and submitting to them concrete proposals for the settlement of the dispute.
- *Conciliation* is a combination of enquiry and mediation; a third party first established the facts of the case and then makes proposals for the settlement.
- *Arbitration* is the settlement of a dispute by a third party – a single person, an existing body or a commission specially created-whose decision is accepted in advance by the parties to the dispute.

In all these cases all the parties to the dispute must agree on a procedure and on the choice of the third party who will be charged with the enquiry, mediation, conciliation or arbitration.

The two remaining means of settlement, judicial settlement and resort to regional agencies or arrangements, are different, since the bodies which play the role of third parties pre-exist and have established procedures which must be followed. Regional agencies or arrangements mostly have a potential character which may influence the terms of the settlement. Judicial settlement generally means a decision by the International Court of Justice, the main judicial organ of the UN, the statute of which is annexed to the UN Charter (Article 92). This body consists of 15 independent judges. Its jurisdiction must be explicitly accepted by states which equally accepted the Court's jurisdiction, or by a special agreement for a determined case. Decisions of the Court are always obligatory and must be executed. Although the decision of the Court has no binding force except between the parties and in respect of that particular case, its scientific and moral authority is such that rules stated by the Court in its decision are generally considered to express customary international law.

Settlement Authorities

One of the fundamentals of international environmental law is the 1941 arbitral award in the Train Smelter Case. During the following long period, no international jurisdiction or arbitration tribunal decided environmental issues on the merits of the case, in spite of the fact that many treaties related to environmental protection explicitly state that disputes arising from the application or interpretation of their clauses should be referred either to the International Court of Justice or to arbitration. Practically all the recent major treaties adopted in this field include such provisions. Agenda 21 also encourages recourse to the ICJ which has formed a special Chamber in order to be prepared to deal with any environmental case. Recent developments have improved the situation. In an advisory opinion of 1996 on the Legality of the Threat or Use of Nuclear Weapons, the ICJ recognised the importance of environmental protection and confirmed Principle 21 of the Stockholm Declaration. In addition, the 1997 judgment in the case of the Gabčíkovo-Nagymaros Project insists on the need to take environmental norms into account even for the application and interpretation of former treaties.

The fact that until now international jurisdictions were not used for the settlement of environmental disputes can be explained in different ways. One explication is that in many international environmental treaties provisions related to dispute settlement also include the resort to organisms created by individual environmental treaties, such as a conference of the parties or an implementation committee, for questions which the implementation or the interpretation of the treaty concerned can raise.

Another possible explication is that states obviously prefer to give priority to the compensation of victims of transfrontier pollution or other harmful environmental effects, rather than getting involved in international negotiations or dispute settlement procedures. The increasingly accepted solution is to transfer concrete problems from the interstate level to the interpersonal level. When a transnational element is present in a case which could create jurisdictional or interstate problems- e.g. transfrontier pollution harms private property in the neighbouring state-the polluter and the victim are directed to bring the case before the domestic authorities which are competent according to the rules of international private law. Also, states have sought to overcome the difficulties by prior agreement, in concluding treaties or adopting other international texts, to resolve at least some of the problems in three fields where the effects of environmental harm may be the most serious: the production of nuclear energy, the transportation of oil or other hazardous substances by sea and oil pollution caused by seabed activities.

The 1960 Paris Convention on Third Party Liability in the field of Nuclear Energy, drafted for members of OECD, and the 1963 Vienna Convention on Civil

Liability, open to all UN member states, contain regulations concerning the compensation of victims of nuclear activities.

Marine pollution by oil or by hazardous substances, in particular compensation for environmental injury that may be caused by it, is regulated by an entire system based on the 1969 International Convention on Civil Liability for Oil Pollution Damage as modified several times.

Several common traits are found in these agreements:

- Identification of the polluter is assured through a presumption which channels responsibility. Thus in case of damage, the responsibility automatically is imputed to the exploiter of the hazardous installation or the ship owner, whether they are at fault or not.
- The solution of the problem of liability is facilitated by imposing strict liability or damage, which means that no fault is required to decide that the person designated is liable. However, a certain number of escape clauses corresponding e.g. to fraudulent conduct of the victim, war, natural catastrophe, exist to avoid such liability.
- Jurisdictional competence is determined in designating the proper forum, in some cases that of the plaintiff, in other cases that of the polluter or in permitting the victim the free choice of a tribunal.
- The execution of judgments rendered is assured in foreign countries.

Such solutions can help prevent international disputes.

a) Law of the Sea Tribunal

With the entry into force of the UN Convention on the Law of the Sea (UNCLOS) in 1994, the Law of the Sea Tribunal was established. The Tribunal may hear any dispute concerning the application or interpretation of UNCLOS, except as otherwise provided in the Convention. Its jurisdiction also extends to disputes concerning the interpretation or application of other agreements related to the purposes of UNCLOS that are submitted to the Tribunal in accordance with the other agreements. In deciding cases, the Tribunal applies the United Nations Convention on the Law of the Sea and other rules of international law not incompatible with the Convention. The Tribunal is competent for disputes arising between the following entities:

- States Parties;

- State enterprises, natural persons, or legal or judicial persons that are sponsored by States Parties and carrying out activities in the “Area” (namely, the seabed, ocean floor, and subsoil thereof lying beyond the limits of national jurisdiction); and
- the “Authority” (which is the organization through which States organise and control activities in the Area) or the “Enterprise” (which is the organ of the Authority that carries out activities in the Area as well as the transporting, processing, and marketing of minerals recovered from the Area).

Alongside the Seabed Dispute Chamber, which has jurisdiction in disputes regarding activities in the Area, the Tribunal may form such chambers, composed of three or more of its elected members, as it considers necessary for dealing with particular categories of disputes.

b) *The International Court of Environmental Arbitration and Conciliation (ICEAC)*

It facilitates the settlement of environmental disputes submitted by States, natural persons, or legal persons through conciliation and arbitration. It was established in 1994 in Mexico by 28 lawyers from 22 different States.

Upon request, the Court may give Consultative Opinions relating to disputes and other issues of environmental law. Consultative Opinions may be:

- Preventive, to ascertain whether a proposed action is compatible with environmental law;
- Confirmatory, to confirm that an action has been carried out in compliance with environmental law; or
- Denunciatory, to enquire whether an action by another person complies with environmental law, and if not to make that information available to the international community.

For example, in 2003, the Court issued a Consultative Opinion on the Compatibility between Certain Provisions of the Convention on Biological Diversity and the Agreement on Trade Related Aspects of Intellectual Property Rights as to the Protection of Traditional Knowledge. Other Consultative Opinions relate to “Regulation of Fishing Methods and Gear,” “Protection of the Meridian Frog,” and the transportation and disposal of waste and dangerous substances in Sonora, Mexico.

In resolving disputes and in issuing Consultative Opinions, the Court invokes and applies a range of bodies of law, including:

- international treaties and applicable private contracts;
- general rules and principles of international environmental law;
- relevant national law, in accordance with generally accepted rules of private international law; and
- any other principles, rules, or standards that the Court deems relevant, including equity.

c) International Court of Justice

The ICJ is the primary judicial organ of the United Nations. Pursuant to provisions in various international agreements (including the Statute of the ICJ, the organic document establishing the ICJ), the ICJ is charged with resolving various disputes between States. States can recognise compulsory jurisdiction of the Court; in doing so, many States exempt certain classes of cases from compulsory jurisdiction. This partial exemption is controversial but has been upheld. The ICJ can also issue non-binding Advisory Opinions at the request of UN bodies.

There are 15 Members of the Court, who are elected by the UN Member States and other States Parties to the Statute of the ICJ. In some instances, Judges Ad Hoc may sit on an ICJ panel to hear and decide a case. Pursuant to Article 38 of the ICJ Statute, the Court may consider a variety of legal sources in deciding cases:

- international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognised by civilized nations;
- subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The ICJ differs from many other international tribunals in that:

- ICJ judges must be continuously at the disposal of the Court and cannot sit on other tribunals;
- the ICJ is permanent in its constitution and its established rules; and
- Parties do not have to pay fees or administrative costs, which are covered by the UN.

Recognising the rapid growth of international environmental law and the growing number of international cases that touched on environmental matters, the ICJ established a specialised Chamber for Environmental Matters in July 1993. The Chamber consists of a panel of seven ICJ judges. The Chamber is empowered to hear environmental cases only with the consent of the parties to the case. As a practical matter, though, the ICJ's environmental cases generally proceed through the standard ICJ process, and have yet to take advantage of the specialised Chamber.

d) Permanent Court of Arbitration

Established in 1899, the Permanent Court of Arbitration (PCA) resolves disputes among States, private parties, and intergovernmental organisations through arbitration, conciliation, and fact finding. It claims to be “the first global mechanism for the settlement of inter-state disputes.”

Each Party to the PCA can appoint up to four arbitrators (“Members of the Court”) to a standing roster. When there is a dispute for the PCA to resolve, each Party appoints two arbitrators from this roster, and the four arbitrators (two from each Party) select an umpire.

The International Bureau is the PCA's Secretariat. It assists parties in selecting arbitrators, and performs other legal and administrative functions. English and French are the official working languages of the PCA, although the Parties can agree to conduct proceedings in any language.

The PCA has adopted guidelines and model clauses for traditional dispute settlement in environmental treaties. These generally rely upon and build upon precedents, since existing approaches have been tested and are more likely to be adopted. In 2001, the PCA Administrative Council adopted Optional Rules for

Arbitration of Disputes Relating to the Environment and/or Natural Resources. The Environmental Conciliation Rules, adopted in 2002, complement the earlier rules on arbitration. These Rules were developed by the International Bureau and a working group and drafting committee of experts in environmental law and arbitration.

The PCA also provides guidance on drafting environment-related dispute settlement clauses. For example, in 2003 the UNECE approved reference to the PCA Environmental Arbitration Rules in its draft “Legally Binding Instrument on Civil Liability under the 1992 Watercourses and TEIA Conventions.” The PCA has also collaborated with the CBD, the Bio safety Protocol, and UNFCCC COPs. The PCA convenes seminars on international law and publishes the papers in independent volumes. These have included International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms (2001) and Resolution of International Water Disputes (2003).

e) Strategic Use of International and Domestic Dispute Resolution Mechanisms in the Danube Delta Case

In 2003, The Government of Ukraine approved a project to dig a deep-water navigation channel through Ukraine’s portion of the Danube Delta Biosphere Reserve. Ecopravo-Lviv (EPL), a Ukrainian public interest environmental law NGO, challenged this decision on both environmental and procedural grounds (including a lack of public participation in the EIA process). In addition to seeking remedies in national courts (see case study under Guideline 41(i)), EPL filed complaints with a variety of relevant international bodies in late 2003 and early 2004. These include:

- The Compliance Committee of the [Aarhus Convention] (on access to information, public participation in decision-making and access to justice in environmental matters). Romania also subsequently filed a complaint with the Compliance Committee;
- The Implementation Committee of the Espoo Convention (on EIA in a transboundary context). [The Implementation Committee refused, by a vote of 4-3 in 2004, to consider the complaint.] Romania subsequently filed a complaint with the Implementation Committee;
- A Letter of Emergency Notification filed with the Executive Secretary of the Convention on the Conservation of Migratory Species;
- An Emergency Complaint filed with the Permanent Secretariat of the International Commission for the Protection of the Danube River; and

- A Letter of Notification filed with the Secretariat of the African-Eurasian Waterbird Agreement (AEWA).

In addition EPL has raised the issue with the Ramsar Convention and the UNESCO Man and Biosphere Programme, and both institutions have expressed concern about the channel.

This strategy of seeking relief through multiple domestic courts and international dispute resolution mechanisms can be resource intensive. Also non-state actors that seek recourse from an international mechanism may — but not necessarily — be required to exhaust domestic remedies first. Exhaustion of remedies depends on the terms of the particular MEA or institution, and there often are exceptions for specific instances (e.g., emergency or futility).

UNEP's study on Dispute Avoidance and Dispute Settlement in International Law

A 2001 UNEP study on “Dispute Avoidance and Dispute Settlement in International Law” highlighted methods for resolving potential disputes regarding MEAs. The study emphasised the need to address potential disputes at the earliest possible stage in order to avoid disputes, as well as utilising informal, non-confrontational approaches to address disagreements and disputes. Ideally, dispute settlement provisions of an MEA will simply be there as a “safety net,” to be employed only when measures to promote compliance and avoid disputes have not been effective. Dispute settlement provisions typically call for less confrontational measures, such as good offices and conciliation, to be attempted first. If these are unsuccessful, more formal measures such as arbitration or other judicial arrangements may be employed.

Increasingly, dispute settlement bodies accept complaints by NGOs and private individuals against States, as well as interventions (including *amicus curiae* or “friend of the court” briefs) by NGOs in disputes between States. These bodies include, for example, the World Trade Organization (*amicus* briefs), the Inter-American Court for the Protection and Promotion of Human Rights (complaints in environmental cases), and the International Court of Justice (*amicus* briefs).