INTERNATIONAL REGULATIONS

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Summary

Most of the international regulations are not binding unless the state in question wishes to respect the obligations by adopting the provisions in the framework of national legislation. Even if the states agree to do so, compliance is not very effective as there is almost no sanction for non-compliance. Even then, for the last 60 years pollution control regulations have evolved through international cooperation and, as a result, there are now a number of such regulations covering many areas of pollution control.

1. Introduction

Ever since the early nineteenth century, there has been relentless degradation of the environment due to increasingly greater exploitation of natural resources, rapid industrialization and fast-growing consumerism, while response to the consequential problems had largely been *ad hoc* reactions. However, over time it became clear that effective response to pollution problems with regional or global impact demanded international cooperation. The first recorded case of international cooperation for pollution control occurred in 1941 when the USA and Canada decided to submit the

issue of the emission of sulfur fumes from a Canadian smelter, and consequential damage to US crops, trees, etc., to a tribunal. This case is considered a major milestone in the evolution of international environmental law. Subsequent establishment of the United Nations in 1945 and its various agencies, especially those (e.g. UNEP) working directly or indirectly with environment problems, provided a major world forum that has been instrumental in development of international environmental law. Experience of the last sixty years or so has concentrated minds on the need for international cooperation to minimize or eliminate risks of serious trans-boundary pollution events with potential or manifest international impact, especially the following events to mention but a few: the explosion at the Chernobyl nuclear power plant in 1986 and consequent trans-boundary transport of radioactive particles to various parts of Europe. Fire in 1986 at a Swiss warehouse and consequent pollution of the river Rhine that threatened the safety of drinking water in the neighboring countries. And the phenomena of acid rain, ozone layer depletion, and global warming whose impacts recognize no national borders and affect everyone.

International treaties and agreements obliging signatory States to implement pollution control measures would appear to be most effective in controlling trans-boundary pollution. Invariably such treaties and agreements are fruits of protracted and painstaking negotiations, and they demand effective international collaboration. Unfortunately, narrow national self-interest and sovereignty of nation States often get in the way. The effectiveness of international regulations depends on the extent of their compliance. Concern for effective compliance has been reflected in the negotiations of recent international environment agreements and in efforts to develop mechanisms for implementation, enforcement and dispute resolution. To this end, in July 1993 the International Court of Justice established a Chamber for Environmental Matters. Increasing focus on compliance stems from the following among others: first, States that are signatory to treaties but do not fulfill their obligations enjoy undue and unfair economic advantages over those that fulfill their obligations. Second, growing need for natural resources and the shrinking resource base could persuade some of the States to contemplate territorial expansion that would violate the principle of State sovereignty, thus creating conditions for conflict. And third, with mounting environmental degradation, environmental obligations and commitments to be fulfilled to control such degradation are becoming more and more stringent. Consequently, non-compliance is becoming an increasingly more attractive option.

2. Basic elements of international environmental law

As we have already pointed out, international regulations on environmental protection do not have a supreme source of authority. They are formed by consensus reached among sovereign States on the agreed behavior of specific subjects based on a system of generally applicable rules. Those rules may or may not be reflected in national legislation, and compliance with them by the signatory States is voluntary, because, even if statutory compliance instruments were available (and they are not), effective sanctions would still be difficult to impose. In the case of non-compliance with international environmental regulations, only persuasion can normally be employed to secure compliance. This is the main difference between national and international

regulations. The domain of national regulations is the sovereign territory of a State. International regulations may also have the same domain, provided the national legislature ratifies such treaty, to which the particular state is a signatory, containing the regulations to be complied with. International regulations may also apply within "Global Commons" over which all States share jurisdiction; and within areas that are not "Global Commons", over which jurisdiction is jointly exercised by several States in accordance with the provisions of a particular treaty or treaties.

International law is defined as "the body of rules that are legally binding on States in their intercourse with each other". Such rules derive their authority from four sources, in accordance with Article 38 (1) of the Statute of the International Court of Justice: Treaties, International Custom, General Principles of Law, and Subsidiary Sources (decision of courts and tribunals, and writings of jurists, etc.). The International Law Commission has identified a number of sources from which the rights and obligations of States and other members of the international community arise:

- Bilateral or multilateral treaty, or a treaty provisions for a third State.
- Binding decisions of an act of an international organization.
- A rule of customary international law.
- The judgment of an international court or tribunal.
- A right created or established in favor of a particular State.

Treaties, also known as conventions, accords, agreements and protocols, are the primary sources of international legal rights and obligations for environmental protection. They can be adopted bilaterally, regionally or globally. According to the 1969 Vienna Convention on the Law of Treaties, a treaty is defined as "an international agreement concluded between States in the written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Treaties are the major instruments in the area of international environmental pollution regulations. As this is a relatively new area, the existence of rules of customary law is difficult to establish because this requires examination of uniformity, consistency and generality of the practice of States with regard to their norms and behavior on environmental protection over time. Similar arguments also hold true for general principles of law, because the very important principle of State sovereignty comes into conflict with international laws on environmental protection. Judicial decisions of international bodies (courts and tribunals) binding on States provide evidence of consensus between States on certain issues, but they cannot be considered a source of international law.

3. International environmental treaties and their implementation

Treaties on environmental pollution regulation are binding on the signatory States in relation to obligations and norms of behavior on agreed issues. Usually treaty provisions become binding on the signatory States only after some of them have ratified it. In the case of environmental treaties, usually only a small number of the States need to ratify. A treaty, after it has been in force for a considerable number of years and adopted by a large number of countries, generally acquires strong law-making effect.

Even when a treaty is not in force, it can have persuasive law-making effect. A treaty signed by several influential (i.e. economically and militarily strong) States can also have strong law-making effect. Most of the treaties on the environment begin with the adoption of a framework treaty specifying the obligations of the parties. Protocols are subsequently adopted setting out the details of the obligations. However, the conclusion of a treaty can be a step-by-step and long-drawn out process. The first step is the identification of an environmental issue or problem that requires international cooperation for its solution. The second step in to identify the appropriate international institution to act as the legislative forum (e.g. United Nations Environmental Programme, United Nations General Assembly, etc.). Once such a body is identified, the next step is to establish a negotiating process. This may be an informal *ad hoc* group of government experts, a formal institutional structure, or a subsidiary body established to act as a legislative forum. The process can be open-ended or with a deadline. Once negotiation over the draft text is over, it adopted subject to signature. The treaty then enters into force in accordance with its provisions.

3.1 Compliance with treaties

The signatories to a treaty, which comes into force after having been adopted and ratified, must adopt it in their national legislation, policies and programmes and ensure that such measures and instruments as mentioned in the treaty are implemented in totality by the subjects under its jurisdiction and control. Once a State has formally accepted a primary international pollution regulation, it usually needs to develop or modify national legislation or give effect to national activities on that issue by administrative or other means. Once such international obligation is enshrined in domestic legislation, it is necessary to ensure compliance by subjects within the States' jurisdiction and control. States usually ensure compliance through public authorities. However, public authorities often lack the resources and commitment needed for the job. Consequently, there is a growing tendency to shift responsibility for compliance to the citizens and non-governmental organizations by gradually allowing them "effective access to judicial and administrative proceedings, including redress and remedies".

Methods employed for achieving compliance with international pollution regulations are many and varied. Some, used for facilitating compliance, may well be considered as compliance incentives, while others seek to set out liabilities of the State for environmental damage. Making available financial resources, transferring essential technology and providing technical information are considered to be incentives for encouraging compliance. There are two main sources of incentive finance: multilateral development loan from lending institutions that consider the appropriateness of borrowers' activities relative to appropriate international environment standards. And international public sector funds (from the Global Environment Facility, for example) to meet partial costs of making environmental improvements. Compliance is usually monitored with an information system comprising two elements: reporting, for which the State is responsible; and access to, and dissemination of, environmental information. International environmental treaties require States to report on measures taken by them to give effect to their treaty obligations to the implementing body or institution. The reporting requirements may, however, vary from treaty to treaty, and so may the extent

of compliance. Some of the treaties (the Convention on Climate Change, for example) provide for necessary financial resources to meet the incremental cost incurred by developing countries in fulfilling their reporting obligations. Reporting, which requires the provision of a large amount of detailed information, places a significant burden on the State. And so greater participation of international organizations and NGOs in reporting is being encouraged. Access to, and dissemination of, environmental information is considered to be a powerful tool for influencing and changing the behavior of citizens, as well as for facilitating their participation in the decision-making process. There have been a number of initiatives to facilitate this process, notably the establishment of international rights of access to information on the environment, and the establishment of independent international observation and monitoring programs.

In the case of non-compliance, international treaties can impose liability on the offending State, or directly on an actor causing environmental damage. Recent treaties, those on the transport of dangerous goods and hazardous activities for example, address civil liability. Compliance can also be forced using economic instruments. Many statements have already been made endorsing the use of taxes, emission charges and tradable emission permits, but no binding international legal instrument has yet been established. Use of trade prohibition is another very powerful instrument against non-compliance, as has been demonstrated in the 1987 Montreal Protocol and its 1990 amendment. Once a State has failed to respect and fulfill its obligations, the question arises as to who could enforce compliance. When there is direct damage to its environment, or consequential damage to its people or their property or other substantial losses, a State may prove that it is an "injured state" and can bring international claims. It is not so, however, if the damage is caused in areas beyond national jurisdiction. In such cases the right of a State to enforce obligations of other parties will usually be settled as per the provisions of the treaty. The EC Treaty allows a Member State, which takes the view that another Member State did not fulfill its treaty obligations, to bring the matter before the European Court of Justice. Under EC law there is no requirement to prove that the State making the claim has actually suffered damage. With a few exceptions, this is not the case however in most of the international environmental treaties. In the case of the exceptions (notably the 1987 Montreal Protocol and the 1989 Basel Convention), if a signatory State fails to fulfill its obligations, the other signatory States may invoke the non-compliance or dispute settlement mechanism without having to show that it has actually suffered damage.

International organizations have very limited powers to enforce international treaties, because the States are unwilling to transfer such powers to them. However, under the EEC Treaty, the European Commission has instruments to force the Member States to fulfill their obligations including judicial measures that can be taken by the European Court of Justice.Non-governmental environmental organizations are slowly becoming important actors in enforcement. Acting formally or informally, their primary role is almost exclusively at the national level. Employing political means or by taking recourse to administrative and/or judicial procedures, they seek to enforce the obligations of international treaties. Although they are proving to be effective nationally, both their role and effectiveness at the international level are at present very limited.

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Biographical Sketch

After graduating from Calcutta University (India) in 1967, **Dr. Prabir Ganguly** worked for four years in Indian coal mines in various capacities, rising to the position of Manager of a large coal mine. In 1971 he went to what was then Czechoslovakia to do his PhD, which he completed in 1975. He worked in the coal industry in India until 1980 as a senior planning engineer. In 1980 he took up an assignment to work at the University of Liberia in West Africa. He completed this assignment in 1986, following which he joined the Faculty of the Technical University of Ostrava in the Czech Republic. During his tenure at that university he became head of the Institute of Environmental Engineering and "Phare Project Management Cell" of the university. Currently he is the Director of the Centre for European Studies of that university.

Dr. Ganguly has been responsible for organising and participating in several international postgraduate teaching and training programmes sponsored by the Commission of the European Communities, as well as a number of international conferences and seminars.

Dr. Ganguly has published widely, mainly on sustainable development, environmental protection and related issues. He is on the Editorial Board of the journal, *Environment, Development and Sustainability* published by the Kluwer Academic Publishers of Dordrecht, the Netherlands.