

State Community Interests and Institution-Building in International Environmental Law

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I. Introduction

The most striking expression of institution-building in international relations is the establishment of a universal or regional international organization which enjoys the legal capacity to act as a (functionally restricted) subject of international law. The history of this type of international institution-building traces back to the second half of the 19th century when a number of administrative unions, for instance the International Telegraphic Union (1865) and the Universal Postal Union (1874), were established by States. However, these bodies still lacked the capacity for making decisions on behalf of their founding members. The first important international organization *stricto sensu* was the International Labour Organisation, which came into being in 1919 along with the League of Nations. Only after the Second World War were the broad majority of the currently existing universal international organizations established, most of which are specifically linked to the United Nations. Among them are *inter alia* the Food and Agriculture Organization (FAO), the United Na-

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tions Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the World Meteorological Organization (WMO), the International Maritime Organization (IMO) and, in a wider sense, also the International Atomic Energy Agency (IAEA).

The emergence of international organizations enjoying legal personality in international relations reflects the phenomenon that the former "international law of co-existence" has been replaced or at least supplemented by a growing body of "international law of cooperation", in which international organizations increasingly play a prominent role. In this context, it is of particular importance that only half a century ago States started to recognize that a growing number of international problems in economic, social, cultural and educational fields could not effectively be solved by mere international treaty-making, but rather by establishing specialized international organizations empowered to deal with the pertinent problems substantially on their own.

A closer look at today's list of Specialized Agencies of the United Nations and other international organizations with legal capacity reveals that none is primarily entrusted with the task of protecting the global environment. One reason is that in 1945 States apparently had not yet become aware of the severe vulnerability of the ecological system of our planet. Thus, neither in Article 1, para. 3, nor in Article 55 does the United Nations Charter take any notice of environmental problems. Correspondingly, even today institution-building in international environmental relations is, in comparison with other subject-areas, rather imperfect. If at all, it occurs mostly within the framework of a specific international environmental treaty.

Certainly, establishing a Specialized Agency to be endowed with responsibilities in the field of international environmental protection is not the only method to be employed by the United Nations for dealing with this issue. Rather, through its various organs and subsidiary organs, the United Nations itself could address the problem of ecological degradation. However, it has taken the United Nations a long time to do so. The United Nations Environmental Programme (UNEP) was first established in 1972, as a follow-up to the Stockholm Conference. For twenty years this was the only institution within the United Nations system which was specifically enabled to deal with global environmental problems. In 1992, at the Earth Summit of Rio, States agreed to create the United Nations Commission on Sustainable Development (CSD). According to the mandate laid down in Agenda 21 and in Resolution 47/191 of the United Nations General Assembly, the CSD is designed to pursue two rather con-

flicting aims simultaneously: environmental protection and development. However, as will be shown later, UNEP and the CSD, both being only subsidiary bodies of the United Nations Economic and Social Council, suffer from a lack of powers and severe structural deficiencies. Therefore, at least currently, they hardly appear to be able to perform their broad range of tasks sufficiently.

This is why in the preparatory process of, as well as in the follow-up to, the Rio Conference a variety of initiatives, which aim at the establishment of institutions better suited to operate an effective high-level environmental crisis management have been launched. Among them are not only proposals regarding ways and means of strengthening UNEP and/or the CSD, but also the call for a "green" Security Council¹ or even an omnipotent General Environmental Organisation² to be newly established within the United Nations system. Although the latter maximal demands appear to be rather illusionary, there is urgent need to reflect on innovations suitable for further developing environmental institution-building. The following deliberations are intended to lay some ground for a thorough discussion of this issue.

In a first step, it will be shown that during the last decades the concept of international environmental law has fundamentally changed as regards the objects to be pursued: Whereas, for a long time international environmental law was determined by the fact that individual State interests were at stake, in the post-Stockholm period environmental interests which States have in common increasingly became the focus of international treaty-making (see II.). Second, the question concerning what kind of relationship exists between the recognition of "common interests" and institution-building in international environmental relations will be examined. A closer look at State practice will show that the relevant institution-building serves different objects and the extent to which States are ready to allocate powers to an institution apparently depends on the latter's specific functions (see III.). Finally, as regards the further development of institution-building in international environmental relations, a number of

¹ In the 1989 United Nations General Assembly the New Zealand Government advanced the proposal to establish an Environmental Protection Council. Compare the relevant statement in G. Palmer, *New Ways to Make International Environmental Law*, *American Journal of International Law* 86 (1992), 259 et seq., at 279.

² See J.L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, *Harvard Environmental Law Review* 19 (1995), 241 et seq., at 257, 268 et seq.

questions will be identified and recommended for further consideration (see IV.).

II. From Individual State Interests to State Community Interests

In 1989 Jutta Brunnée characterized the situation of international (environmental) law as follows: "... international law is at a turning point from a system balancing conflicting sovereign interests to one of constructive interaction for the common good. The concept of 'common interest' is the frame of reference for an international law meeting the challenges of the future"³. Actually, traditional international environmental law as it appeared in the era prior to the 1972 Stockholm Conference dealt almost exclusively with environmental exploitation or utilization conflicts between neighbouring States. It was designed to address situations where the territorial sovereignty of the exploiting or utilizing State competed with the territorial integrity of the neighbouring State(s) affected by emissions. The mass of international treaties concluded at that time were bilateral or regional ones. Moreover, they pursued rather repressive than preventive aims⁴.

As regards the rather rare universal conventions prior to the Stockholm Conference, most of them were more utilization-oriented than genuinely ecological in nature. As a rule, States were not yet ready to consider the environment, wholly or in part, as a common good to be protected irrespective of the question whether in the given case territorial State interests were at stake⁵. In this respect, the International Convention for the Regulation of Whaling of 2 December 1946⁶, which genuinely provides for the proper conservation of whales, was rather exceptional. In its preamble, it stresses "the interest of the nations of the world in safeguarding for

³ J. Brunnée, "Common Interest" – Echoes from an Empty Shell?, Some Thoughts on Common Interest and International Environmental Law, *ZaöRV* 49 (1989), 791 et seq., at 792.

⁴ See more specifically regarding that period of international environmental law E. Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, *Georgetown Law Journal* 81 (1993), 675 et seq.; U. Beyerlin, *Rio-Konferenz 1992: Beginn einer neuen globalen Umweltschutzordnung?*, *ZaöRV* 54 (1994), 124 et seq., at 125 et seq.

⁵ Compare U. Beyerlin, *Staatliche Souveränität und internationale Umweltschutzkooperation, Gedanken zur Entwicklung des Umweltvölkerrechts*, in: *Festschrift für R. Bernhardt* (1995), 937 et seq., at 942.

⁶ Text in: UNTS 161, 143; P.W. Birnie/A. Boyle, *Basic Documents on International Law and the Environment* (1995), 586.

future generations the great natural resources represented by the whale stocks” and recognizes that “it is in the common interest to achieve the optimum level of whale stocks”.

The gradual evolution from traditional to modern international environmental law is reflected in the 1972 Stockholm Declaration on the Human Environment. In this legally non-binding document the participating States, *inter alia*, proclaimed:

“To defend and improve the human environment for present and future generations has become an imperative goal for mankind ... A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest”⁷.

Declaring a certain category of environmental issues to be a “common interest” is a new phenomenon in international environmental law, although it is difficult to determine what the concept of “common interest” means in substance. Its definition is all the more problematic as there are other related concepts such as “global commons”⁸ “commonality of interests”⁹, “common concern of mankind”¹⁰ and “common heritage of mankind”¹¹. With the exception of the latter concept which will be dealt with later, these related concepts appear to coincide essentially with that of “common interest”. They all give expression to the acknowledgement that there are some environmental issues which are so serious and fundamental in nature that they are of immediate concern for the whole (universal or regional) State community. Examples of such “qualified” environmental issues include such phenomena as sea-level rise and desertification, both caused by the global warming of the Earth’s atmosphere and ozone depletion, as well as the threatened exhaustion of non-renewable natural resources and various forms of severe degradation of our ecosystem.

⁷ Text in: Birnie/Boyle, *ibid.*, 1 et seq., at 3 et seq.

⁸ See M. Imber, *Environment, Security and UN Reform* (1994), 48 et seq.; J. Werksman, *Consolidating Governance of the Global Commons: Insights from the Global Environmental Facility*, in: G. Handl (ed.), *Yearbook of International Environmental Law (YIEL)* 6 (1995) (forthcoming).

⁹ See Brown Weiss (note 4), at 710.

¹⁰ See in particular A. Kiss, *The International Protection of the Environment*, in: R.St.J. Macdonald/D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983), 1069 et seq., at 1083 et seq.

¹¹ See e.g. A. Kiss/D. Shelton, *International Environmental Law* (1991), 15 et seq.; P.W. Birnie/A. Boyle, *International Law and the Environment* (1992), 120 et seq.

At least theoretically, situations where environmental problems affecting a “common interest” are at stake must be separated from those where competing individual State interests produce an environmental utilization conflict between neighbouring States¹². In the latter case, a sovereignty conflict must be settled. Here, States must try to come to a fair compromise by means of mutual yielding. Sometimes such a compromise may also lie in the interest of the whole State community, but not as a rule. In the first case, where States face an environmental problem so elementary and far-reaching that it affects the whole State community, they are called upon to meet that problem on behalf of the State community, since their individual interests are superseded by the “common interest” involved. Admittedly, in the process of jointly identifying a “common interest”, determining its scope and coming to an understanding about the ways and means to be employed to meet that interest, States will also be inclined to look after their own interests. However, due to the compelling necessity to redress the imminent global environmental threat, they are much more urged to reach an agreement for meeting that “common interest” than in the case of mere rivalry between sovereign States’ interests.

This abstract finding may raise the question whether any immediate legal effects flow from the identification of an environmental issue as a “common interest”.

As a rule, the acknowledgement of States that a certain environmental issue affects a “common interest” does not necessarily mean that the treaty-making States concerned have waived claim to any sovereign rights in that respect. In most cases, such an acknowledgement appears to be nothing more than the rather abstract commitment of States to exercise their sovereign rights henceforth in such a manner that the State community’s interests will be duly met. States having made such a contractual commitment keep their formal sovereignty, but promise to confine its operation to the extent necessary to meet any superior “common interest” at stake in a given case¹³.

¹² A considerable number of environmental treaties made in the period subsequent to the Stockholm Conference primarily pursue this aim. Among them are the conventions mentioned below on p.9 et seq.

¹³ In this sense Brown Weiss (note 4), at 710, who stresses that “states have agreed to constrain ‘operational sovereignty’, while continuing to retain formal national sovereignty”. Compare P.M. Haas/R.O. Keohane/M.A. Levy (eds.), *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993), 21.

Thus, for instance, in the preamble of the Bonn Convention on the Conservation of Migratory Species of Wild Animals of 23 June 1979¹⁴, the States parties, while keeping their territorial jurisdiction, commit themselves to take measures concerning the conservation of migratory species of wild animals that live within or pass through their national jurisdictional boundaries “for the good of mankind”. In the preamble of the Berne Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979¹⁵, the signatory States recognize that “wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations”. However, under both conventions, States have reserved their sovereign right to decide on national measures to be taken for implementing their contractual obligations. The tension between State sovereignty and “common interest” becomes most evident in the preamble of the Convention on Biological Diversity which affirms that “the conservation of biological diversity is a common concern of humankind”, on the one hand, and that “States have sovereign rights over their own biological resources”, on the other.

Thus, the mere commitment of contracting States to consider certain environmental issues to be a “common interest” is hardly able to lend the treaty concerned a new legal quality. Rather, such an interest must be clearly manifested in some “qualified” operative norms of the treaty. The understanding of States in respect of “institution-building” may prove to be such a “qualified” treaty element which possibly points to the “common interest” character of the treaty as a whole. In this case, the treaty must be interpreted and applied in the light of the “common interest” clause. Another immediate legal effect flowing from such a clause may be that any State’s international obligation to meet a “common interest” is owed *erga omnes*, with the consequence that any other State can demand its fulfilment. However, this assumption raises difficult questions which cannot be answered here¹⁶.

Treaties pointing to a “common interest” with regard to environmental problems which possibly affect the territorial sovereignty of a contracting State must be viewed separately from treaties concerning areas beyond na-

¹⁴ Text in: ILM 19 (1980), 15; Birnie/Boyle (note 6), 433.

¹⁵ Text in: Cmnd. 8738; Birnie/Boyle (note 6), 455.

¹⁶ See in particular Kiss/Shelton (note 11), 16 et seq. In general compare J.A. Frowein, Reactions by not Directly Affected States to Breaches of Public International Law, *Recueil des Cours* 248 (1994-IV), 353 et seq., at 363 et seq., 405 et seq.

tional jurisdiction or control. Such areas, for instance outer space, the High Seas and Antarctica, were formerly considered *res nullius*¹⁷. Today they are treated as *res communis omnium*. Thus, the exploration and utilization of outer space were declared by the 1967 Outer Space Treaty¹⁸ to be the “province of all mankind”. Twelve years later the Moon Treaty of 1979¹⁹ declared the moon and its resources to be the “common heritage of mankind”. The same happened with the deep-seabed area and its resources in Part XI of the United Nations Law of the Sea Convention of 10 December 1982²⁰. This area was placed under the jurisdiction of the Sea-Bed Authority as an international organization representing “all mankind”. The relevant treaties establishing a legal regime for Antarctica²¹ fall short of an acknowledgement that this area and its mineral resources are the “common heritage of mankind”, although it must not be subjected to national jurisdiction.

However, the principle of the “common heritage of mankind” does not primarily aim at protecting the environment in the areas concerned. It is, rather, generally designed to ensure peaceful use and to exclude any claim or exercise of sovereign rights over these areas and their resources. Moreover, it provides that any resource utilization must be carried out for the benefit of mankind as a whole. However, there still seems to be a dissent on some of the specific impacts of the “common heritage” principle²². Thus, it cannot be taken for granted that this principle offers any substantial guarantees in favour of the environment in the areas concerned, because environmental protection including resource conservation is only one interest among others covered by it. This is confirmed by the treaties concerned: Preserving the ecological soundness of outer space was no real issue at the time when the pertinent treaties were concluded; the deep-

¹⁷ Compare A. Verdross/B. Simma, *Universelles Völkerrecht*, 3rd. ed. (1984), 736, 742 et seq.

¹⁸ Treaty on Principles Governing the Activities of States in the Exploration and the Use of Outer Space, Including the Moon and Other Celestial Bodies of 27 January 1967, Text in: UNTS 610, 205.

¹⁹ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 18 December 1979, Text in: ILM 18 (1979), 1434.

²⁰ Text in: ILM 21 (1982), 1261. See in particular Articles 136 and 137 of the Convention (ibid., at 1293).

²¹ See the treaties mentioned below (notes 24 and 25).

²² See for instance R. Wolfrum, *The Principle of the Common Heritage of Mankind*, *ZaöRV* 43 (1983), 312 et seq., particularly at 332 et seq.

seabed mining regime, also in its revised form of 1994²³, is primarily utilization-oriented; and as regards the Antarctic area, a satisfactory environmental regime was first established by the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988²⁴ and the Protocol on Environmental Protection to the Antarctic Treaty of 21 June 1991²⁵.

The principle of "common heritage of mankind" certainly had some influence on the development of the idea that a growing number of serious forms of pollution and degradation of the global environment affect the whole State community and are therefore considered to be a "common interest". However, it differs from the latter concept in two important respects. First, it is only applicable in areas beyond national jurisdiction and therefore cannot collide with existing State sovereignty. Second, due to its primarily utilization-oriented approach, it addresses environmental problems only incidentally. By contrast, the concept of "common interest" reflects a slow, but continuing process of decreasing State sovereignty which corresponds to a growing number of State community concerns. Such a process particularly takes place in international environmental relations²⁶.

The supposed new "common interest" approach in international environmental treaty-making practice certainly does not displace the old approach focusing on the settlement of conflicting individual State interests. It rather opens a supplementary way to address serious global environmental problems. Even today, a large number of multilateral treaties does not reflect the parties' understanding of "common interest", but their readiness to settle conflicting interests by means of compromise. Thus, at least originally, the Geneva Convention on Long-Range Transboundary Air Pollution of 13 November 1979²⁷ pursued the traditional concept of striking a balance between conflicting individual interests of neighbour States, whereby "neighbour State" is understood to be any State affected by emissions originating from the territory of another State. To this category also belong such important multilateral treaties as the Espoo Con-

²³ Compare the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which was adopted on 28 July 1994 (text in: 33 ILM [1994], 1309). The signatories agreed to apply the Agreement provisionally with effect from 16 November 1994 when the Law of the Sea Convention entered into force.

²⁴ Text in: ILM 27 (1988), 859.

²⁵ Text in: ILM 30 (1991), 1461.

²⁶ Compare Beyerlin (note 5), at 943 et seq.

²⁷ Text in: ILM 18 (1979), 1442; Birnie/Boyle (note 6), 277.

vention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991²⁸, as well as the IAEA Conventions on Early Notification of a Nuclear Accident and on Assistance in the Case of a Nuclear Accident or Radiological Emergency, both of which opened for signature on 26 September 1986²⁹.

Some more recent international treaties, for instance the Framework Convention on Climate Change of 9 May 1992³⁰ and the Convention on Biological Diversity of 5 June 1992³¹, put more emphasis on “sustainable development” than on a “common interest” to be pursued. Thus, it may be asked whether “common interest” and “sustainable development” reflect different ideas which possibly compete with each other. Although the concept of “sustainable development” is not yet satisfactorily clarified as regards content and (political or legal) effects³², it appears compatible with the “common interest” approach of environmental rule-making, because one of its most important elements is “intergenerational equity”. This term means that States must behave in such a way that the developmental and environmental needs of present and future generations are duly met³³. However, the concept of “sustainable development” modifies the “common interest” approach by obliging States politically, although not legally to take no decision in the field of environmental protection to the detriment of the needs of development. The latter are deemed to be equivalent to environmental needs. Thus, henceforth the concept of “common interest”, understood in the light of “sustainable development”, requires that environmental protection constitute “an integral part of the development process and cannot be considered in isolation of it”³⁴.

III. “Common Interest” and Institution-Building in Practice

In determining the relationship between “common interest” and institution-building in international environmental relations, it can be taken

²⁸ Text in: ILM 30 (1991), 802; Birnie/Boyle (note 6), 31.

²⁹ Texts in: ILM 25 (1986), 1369.

³⁰ Text in: ILM 31 (1992), 849; Birnie/Boyle (note 6), 252.

³¹ ILM 31 (1992), 818; Birnie/Boyle (note 6), 390.

³² For a more detailed discussion of “sustainable development” see e.g. U. Beyerlin, *The Concept of Sustainable Development*, in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996), 95 (forthcoming).

³³ Compare Principle 3 of the Rio Declaration on Environment and Development (text in: ILM 31 [1992], 874, at 877).

³⁴ Principle 4 of the Rio Declaration, *ibid.*

for granted that the understanding of States to consider an environmental issue to be a "common interest" does not immediately give rise to any legal obligation to establish an international institution and to delegate substantial powers to the latter. Just as little speaks in favour of maintaining that States' understanding of the "common interest" character of a given environmental issue is a logical precondition for institution-building. There is, rather, evidence in relevant international treaties that States often have been ready to establish international environmental institutions although they did not consider the given environmental issue to be a "common interest". For instance, already in 1909 the United States and Canada established the International Joint Commission³⁵ for dealing with environmental utilization conflicts resulting from their competing sovereign interests. The same applies to the commissions for the protection of the Rhine³⁶ and the Mosel³⁷ which function as fora for settling or avoiding conflicts in the relationship between the riparian States concerned.

Thus, it is only an agreement by States to establish a "qualified" type of environmental institution which may reflect, at least to a certain degree, their understanding of the "common interest" character of the issue being at stake³⁸. But what are the criteria for distinguishing "qualified" from "unqualified" institution-building? To identify such criteria, existing international environmental practice will now be looked at more closely. In so doing, two separate categories of international environmental institutions will be discerned: (1) treaty-specific environmental institutions; and (2) general environmental policy institutions.

³⁵ See the Washington Treaty Relating to the Boundary Waters and Questions Arising along the Boundary between the United States and Canada of 11 January 1909 (text in: P. Sands/R.C. Tarasofsky/M. Weiss [eds.], *Documents in International Environmental Law*, Vol. II A [1994], 551) and the Agreement between Canada and the United States of America on Great Lakes Water Quality of 22 November 1978, as amended by the 1983 and 1987 Protocols (text in: *ibid.*, 559).

³⁶ See the Berne Convention on the International Commission for the Protection of the Rhine against Pollution of 29 April 1963 (text in: BGBl. 1965 II, 1432; UNTS 994, 3).

³⁷ See the respective Protocol Concerning the Constitution of an International Commission for the Protection of the Mosel against Pollution of 20 December 1961 (text in: BGBl. 1962 II, 1102; UNTS 940, 211).

³⁸ This does not necessarily mean that "institution-building" is considered the only treaty element able to show that a "common interest" is at stake in the given case. There may be others, for instance the strictness and density of substantive obligations which States have been ready to accept. However, the delegation of broad and substantial powers to an international institution is probably most striking in this respect.

1. Treaty-specific environmental institutions

The extent to which the contracting States allocate powers to a body belonging to this category of environmental institutions depends on the functions accorded to that body in view of reaching the treaty object. Thus, the currently existing treaty-specific institutions are typically concerned with the following spheres of action:

- (a) consultation and coordination;
- (b) rule-making;
- (c) compliance assistance;
- (d) compliance control; and
- (e) dispute settlement³⁹.

These classifications are made notwithstanding the fact that a number of relevant bodies appear to be multi-functional.

(a) Consultation and coordination

The majority of pertinent international environmental bodies serve only as fora for the exchange of information, consultation and coordination between the contracting States; due to their consultative function they are empowered to make proposals and recommendations with regard to the implementation and development of the obligations imposed on the States parties. Such a mandate is in particular typical for a number of international commissions charged with the environmental protection of transfrontier watercourses⁴⁰.

One of the earliest examples for bodies of this type is the US-Canadian International Joint Commission which was established under the 1909 Boundary Waters Treaty between the two States⁴¹. Its original powers were rather far-reaching, but only of limited environmental relevance. Under the 1978 US-Canadian Great Lakes Water Quality Agreement⁴² the environmental powers of the International Joint Commission have been broadened. They include collecting data, conducting research and in-

³⁹ See for a similar categorisation of environmental institution-building P. Sands, *Principles of International Environmental Law*, Vol. I (1994), 67 et seq.

⁴⁰ Compare for a more detailed survey on, and analysis of, pertinent institution-building in this field Birnie/Boyle (note 11), 241 et seq.; A. Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (1993), 151 et seq.

⁴¹ For the text see *supra*, note 35.

⁴² See *ibid.*

vestigations, making recommendations, and reporting on the effectiveness of measures taken under the Agreement⁴³.

Another very recent example, the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, signed by several Danubian States on 29 June 1994, provides for the establishment of the International Commission for the Protection of the Danube River⁴⁴. Apart from its mere consultative functions, the Commission will be also enabled to take binding decisions which are, however, not directed to amending the underlying treaty, but rather, of a technical nature⁴⁵.

(b) Rule-making

Quite a number of the just mentioned consultative bodies are also enabled under the pertinent treaties to elaborate proposals and recommendations respecting the further development of the underlying treaty-regime. For instance, the International Danubian Commission, under Article 18, para. 5, of the relevant convention, "submits proposals to the Contracting Parties concerning amendments or additions to this Convention or prepares the basis for elaborating further regulations on the protection and water management of the Danube River"⁴⁶. However, it is up to the Contracting States to decide whether or not they should follow the recommendations made by the Commission. Thus, in principle, bodies possessing recommendatory powers may give important impulses for States parties to enter into a rule-making process but do not have immediate rule-making power. As a rule, this also applies to the Conferences of the Parties established under a large number of modern environmental conventions⁴⁷.

There may be situations where there are doubts whether the Conferences of the Parties are allowed to further develop the treaty-regime

⁴³ Compare Birnie/Boyle (note 11), 245 et seq.; Sands (note 39), 359, 361–62.

⁴⁴ This Convention has not yet entered into force. See its text in: Bundesrat, Drucksache 268/95, 12 May 1995.

⁴⁵ In this context it is noteworthy that the International Commission for the Protection of the Danube River will be empowered to decide on the cooperation with international and national organizations or with other bodies engaged or interested in the protection and water management of the Danube River in order to enhance coordination and avoid duplication of work (see Article 18, para. 6, of the pertinent Convention; *ibid.*, at 19).

⁴⁶ *Ibid.*

⁴⁷ Compare e.g. Article 7 of the Climate Change Convention and Article 23 of the Biological Diversity Convention.

concerned without observing the formal requirements of the treaty's amendment procedure. Thus, on 25 March 1994 the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989⁴⁸ adopted by consensus Decision II/12 banning all hazardous waste exports from OECD to non-OECD countries. Greenpeace International alleged that Decision II/12 was already legally binding as a mere application of the Basel Convention⁴⁹. This assumption neglected the wording of the relevant provisions of the Basel Convention, which at that time did not cover such an export ban. Actually, the position of Greenpeace has been refuted by the fact that on 22 September 1995 the Conference of the Parties adopted an amendment to the Basel Convention⁵⁰ which confirmed its former Decision II/12. This amendment will not come into force until it has been ratified by 75 per cent of the signatories to the Convention⁵¹.

However, there are some exceptions to the principle that treaty-specific bodies are not allowed to make rules with immediate legal effect for the States parties concerned⁵². For instance:

- the International Whaling Commission can adopt regulations which are “effective” for parties not raising objections; in 1983 it even decided to adopt a moratorium on commercial whaling⁵³;
- the consultative meetings of the parties to the London Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matters of 29 December 1972⁵⁴ are empowered to amend the Annexes to that Convention⁵⁵;

⁴⁸ Text in: ILM 28 (1989), 649.

⁴⁹ In this sense K. Stairs, Greenpeace International, in his (unpublished) legal analysis of that decision. See the latter's text in: *Environmental Policy and Law* 24 (1994), 290; compare also *ibid.*, 251.

⁵⁰ Decision III/1: Amendment to the Basel Convention, text in: UNEP/CHW.3/35, 28 November 1995. Compare also *International Environment Reporter*, 4 October 1995, 753.

⁵¹ Article 17, para. 5, of the Basel Convention.

⁵² Compare in particular Sands (note 39), 116, and J. Sommer, *Environmental Law-Making by International Organizations* (in this issue), 628 et seq., at 650 et seq.

⁵³ See for details again Sands (note 39), 115, 433–436, and particularly G. Rose/S. Crane, *The Evolution of International Whaling Law*, in: P. Sands (ed.), *Greening International Law* (1993), 159 et seq., at 169 et seq.

⁵⁴ ILM 11 (1972), 1294; Birnie/Boyle (note 6), 174

⁵⁵ Sands (note 39), 115.

– the Conference of the Parties to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987⁵⁶ may ultimately adopt with a two-thirds majority adjustments to this Protocol which are legally binding on all parties without the possibility of objection⁵⁷. The Convention on Climate Change and the Biological Diversity Convention establish a similar amendment procedure; however, contrary to the Montreal Protocol, they prescribe that any amendment adopted by the Conference of the Parties becomes binding only if afterwards ratified by the contracting States⁵⁸;

– finally, the 1985 resolution of the consultative meeting to the above-mentioned London Dumping Convention adopted an indefinite moratorium on dumping of radioactive waste at sea, although this body was not expressly empowered to do so under the Convention⁵⁹.

(c) *Compliance assistance*

In a number of modern environmental treaties, States parties commit themselves to assisting those contracting parties which, for whatsoever reason, are not able to take the necessary national measures for implementing the legal obligations imposed on them by the treaty concerned. This means, in practice, that primarily developing States parties to a treaty are entitled to request compliance assistance from industrial States parties. This new method of ensuring the implementation of an environmental treaty is inspired by Principle 7 of the Rio Declaration, which holds that “(i)n view of the different contributions to global environmental degradation, States have common, but differentiated responsibilities”⁶⁰. Although legally non-binding in nature, this principle shows that today industrial States are politically urged to include, as appropriate, a mechanism of compliance assistance in an environmental treaty concluded with developing States.

⁵⁶ Text in: ILM 26 (1987), 1550; Birnie/Boyle (note 6), 224. The Montreal Protocol is based on the Vienna Convention for the Protection of the Ozone Layer of 22 March 1985 (text in: ILM 26 [1987], 1529; Birnie/Boyle [note 6], 211).

⁵⁷ Compare Sands (note 39), 114–115, and particularly Palmer (note 1), at 274 et seq.

⁵⁸ Compare Article 15, para. 3, of the Climate Change Convention and Article 29, para. 3, of the Biological Diversity Convention.

⁵⁹ The way prescribed by the Convention would have been to adopt formally an amendment to the Convention to include all radioactive wastes in its Annex I; compare Sands (note 39), 312–313.

⁶⁰ ILM 31 (1992), at 877.

Examples of treaties providing for compliance assistance include the Biological Diversity Convention and the Framework Convention on Climate Change. Under both conventions the developed countries shall provide such financial resources, including the transfer of technology, needed by the developing countries to meet “the full incremental costs of implementing measures” which the latter are obliged to take⁶¹. Both conventions provide for the establishment of a specific “financial mechanism” for the transfer of relevant financial resources to developing countries which shall function “under the authority and guidance of, and be accountable to, the Conference of the Parties”⁶². Whereas the latter is a specific treaty-related body, the Global Environment Facility (GEF) – originally established by the World Bank in association with UNDP and UNEP in 1991⁶³ and considerably restructured in 1994⁶⁴ – is empowered, on an interim basis, to carry out the operation of the financial mechanism for the implementation of the Biological Diversity Convention⁶⁵ and the Convention on Climate Change⁶⁶. Thus, under both conventions two different bodies are entrusted with compliance assistance: it is up to the respective Conference of the Parties to take the principal decision on granting and apportioning the financial transfer in the given case; GEF has to manage the specific operational problems in implementing this decision.

(d) Compliance control

Traditionally the enforcement of international environmental law relies on the idea that an environmental harm caused by one State to the detriment of another must be repaired. Therefore, an injured State asserting a claim for transboundary pollution damage has to vindicate the interna-

⁶¹ Article 4, para. 3, of the Climate Change Convention; compare also the similar wording of Article 20, para. 2, of the Biological Diversity Convention.

⁶² Article 21, para. 1, of the Biological Diversity Convention; compare also Article 11, para. 1, of the Climate Change Convention.

⁶³ GEF is based on a resolution of the World Bank's Board of Executive Directors and on supplementary tripartite procedural arrangements between UNDP, UNEP and the World Bank.

⁶⁴ The Instrument for the Establishment of the Restructured Global Environmental Facility (see text in: ILM 33 [1994], 1273; Environmental Policy and Law 1994, 192) was accepted by representatives of 73 States at a GEF Participants meeting in Geneva (March 1994).

⁶⁵ Compare Articles 21 and 39 of this Convention.

⁶⁶ Compare Articles 11 and 21, para. 3, of this Convention.

tional responsibility or liability of the harming State before an international court⁶⁷. However, this method of enforcement has not hitherto proven to be effective in practice. For instance, recent pollution disasters including Chernobyl and Sandoz have not resulted in the adjudication of an international claim by one State against another⁶⁸. Other coercive instruments for enforcing environmental law, such as sanctions, have also often failed to reach their aim⁶⁹.

This is why as recently as about ten years ago States parties to environmental treaties started to agree upon another method of ensuring the implementation of their contractual obligations⁷⁰. Since in most cases non-compliance is not due to intention, but rather to lack of capacity, the new method of compliance control is not confrontational in character. Instead, it is guided by the idea of solidarity and partnership⁷¹. Accordingly, a number of more recent environmental treaties employ a procedure including some of the following elements: States have to submit periodic reports to the Conference of the Parties. On the basis of these reports the latter is able to undertake a regular and systematic assessment and evaluation of the contracting States' behaviour regarding treaty implementation⁷². To a certain degree, this non-adversarial process produces transparency and mutual confidence among the contracting parties⁷³.

Mechanisms creating such an "active treaty management" are contained for instance in four protocols to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, namely in the First and Second Sulphur Emissions Protocols of 8 July 1985⁷⁴, respectively 14 June 1994⁷⁵, in

⁶⁷ Compare e.g. Kiss/Shelton (note 11), 348 et seq.; Birnie/Boyle (note 11), 139.

⁶⁸ Birnie/Boyle, *ibid.*, 137.

⁶⁹ See for instance Sands (note 39), 148 et seq., particularly 154.

⁷⁰ See in general for the development of this new method of ensuring compliance in theory R. Bilder, *Managing the Risks of International Agreement* (1981); A. Chayes/A.H. Chayes, *On Compliance, International Organizations* (1993), 175 et seq.; W. Lang, *Verhinderung von Erfüllungsdefiziten im Völkerrecht*, in: *Festschrift für H. Schambeck* (1994), 817 et seq.

⁷¹ Compare T. Marauhn, *Towards a Procedural Law of Compliance Control in International Environmental Relations* (in this issue), 696 et seq.

⁷² For further details see Marauhn, *ibid.* Compare also P. Széll, *The Development of Multilateral Mechanisms for Monitoring Compliance*, in: W. Lang (ed.), *Sustainable Development and International Law* (1995), at 97 et seq.

⁷³ See in particular A.H. Chayes/A. Chayes/R. Mitchell, *Active Compliance Management in Environmental Treaties*, in: Lang (note 72) *ibid.*, at 75 et seq.

⁷⁴ Text in: ILM 27 (1988), 707.

⁷⁵ Text in: ILM 33 (1994), 1542.

the Nitrogen Oxides Protocol of 31 October 1988⁷⁶, and in the Volatile Organic Compounds Protocol of 18 November 1991⁷⁷, as well as in the 1987 Montreal Protocol⁷⁸ to the 1985 Vienna Convention for the Protection of the Ozone Layer.

Whereas many of these instruments remain silent as regards the question how to redress alleged non-compliance, Article 23 (b) of the 1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic⁷⁹ provides that the Commission shall “when appropriate, decide upon and call for steps to bring about full compliance with the Convention, and decisions adopted thereunder...”⁸⁰.

(e) Dispute settlement

As a rule, dispute settlement bodies established under, or provided by, environmental treaties do not show any particularities. Their functions range from mediation, conciliation and inquiry to judicial and quasi-judicial settlement. As regards environmental dispute settlement within the treaty system concerned, the following three specific bodies may be pointed to by way of example:

– The Conferences of the Parties appear to be generally enabled to adopt an authentic interpretation of a treaty provision in dispute among the parties⁸¹;

– the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context⁸² provides in Article 3, para. 7, that in case of dissent among the parties on the question whether there is likely to be a significant adverse transboundary impact caused by a proposed activity, any party concerned may submit that question to an inquiry commission to be established in accordance with the provisions of Appendix IV to the Convention⁸³; however, the final conclusion of this enquiry commission is not immediately binding on the parties involved in the dispute;

⁷⁶ Text in: ILM 28 (1989), 212.

⁷⁷ Text in: ILM 31 (1992), 573.

⁷⁸ For its text see note 55.

⁷⁹ See its text in ILM 32 (1993), 1069.

⁸⁰ *Ibid.*, at 1084. Very similar are the non-compliance procedures under the Montreal Protocol and the 1994 Sulphur Protocol; compare again *Maruhn* (note 71), at 701 et seq.

⁸¹ *Sands* (note 39), 68, 378, quotes in this context an authoritative interpretation adopted by the CITES Conference of the Parties in 1983.

⁸² See its text in: ILM 30 (1991), 800.

⁸³ *Ibid.*, at 805.

– the Berne Agreement Regulating the Withdrawal of Water from Lake Constance of 30 April 1966⁸⁴ provides that in case of dissent among the riparian States on a specific technical question a mixed consultative committee has to consider that question with a view to preparing the way for an agreement (Article 8). Where such an agreement cannot be reached, any riparian State may submit the case to an arbitral commission which ultimately is enabled to adopt a final binding decision (Articles 9–11).

2. General environmental policy institutions

As already indicated, in contemporary international environmental relations there is lack of universal or regional international organizations possessing international legal personality which are entrusted by States with overall powers to deal specifically with environmental problems.

At the universal level, WHO, FAO, WMO, IMO, and IAEA do not primarily deal with environmental protection. As regards UNEP and the recently established CSD, neither are subjects of international law able to act on their own. At the regional level, there are also a number of important international organizations, in particular the European Union, the OECD, the OSCE, and the UN Economic Commission for Europe, established under Article 68 of the UN Charter. Each of them plays a growing role in the development of international environmental law. However, none of these international organizations has primary responsibility for environmental protection. Nevertheless, the ECE in particular exercises an important catalytic function in this field⁸⁵; others, for instance the WHO and the IAEA, even have powers to adopt regulations or at least “soft law” rules with environmental relevance⁸⁶.

UNEP and the CSD are certainly the most important bodies entrusted with functions in the field of global environmental protection. Neither was established on the basis of an enabling international treaty, but rather, in the case of UNEP, by a resolution of the United Nations General As-

⁸⁴ Text in: BGBl. II (1967), 2313.

⁸⁵ Among the conventions sponsored by the ECE are the Convention on Long Range Transboundary Air Pollution of 1979, the Convention on Environmental Impact Assessment of 1991, the Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992 (text in: ILM 31 [1992], 1330), and the Convention on the Protection and Use of Transboundary Water Courses and Lakes of 17 March 1992 (text in: ILM 31 [1992], 1312).

⁸⁶ See for details Sommer (note 52), particularly at 635 et seq., 645.

sembly⁸⁷ in 1972, and, in the case of the CSD, by resolutions of the General Assembly⁸⁸ and a decision taken by ECOSOC⁸⁹, pursuant to the latter's mandate in Agenda 21. Thus, both lack the independent status of UN specialized agencies. Whereas UNEP is directly linked to the General Assembly, the CSD is a functional commission (subsidiary body) of ECOSOC established in accordance with Article 68 of the UN Charter⁹⁰.

The status of these two bodies and their capacity to contribute to the effectuation of international environmental protection may later be discussed in detail by others. Here, only a few important divergencies between them need to be stressed.

First, the mandates and, correspondingly, the spheres of action of the two institutions are rather different: Whereas UNEP can fully concentrate its efforts on environmental actions, the CSD is bound to tackle problems of environmental protection and development as an integrative task and to deal therefore with both on an equal footing⁹¹. Thus, it cannot be taken for granted that UNEP and the CSD will always act in concert.

Second, the individual responsibilities of UNEP and the CSD are not identical, although both institutions are destined to play a key role in the implementation of Agenda 21 within the scope of their respective competence.

In the past UNEP has contributed considerably to the further development of international environmental law by sponsoring a number of very important environmental treaties⁹². Accordingly, Agenda 21 calls upon UNEP to strengthen "its catalytic role in stimulating and promoting environmental activities ... throughout the United Nations system"⁹³; on the other hand, UNEP has rather failed to fulfil its original commitment

⁸⁷ Resolution 2997 (XXVII) of 15 December 1972.

⁸⁸ Resolution 47/191 of 22 December 1992. Compare also the Resolution 48/442 of 14 October 1993 for implementing the Resolution 47/191.

⁸⁹ ECOSOC Decision 1993/207 of 12 February 1993.

⁹⁰ ECOSOC Decision 1993/215 of 12 February 1993. According to this decision the rules of procedure of the functional commissions of the ECOSOC should apply to the CSD. Compare also the Report of the UN Secretary-General, UN doc. E/1993/12 of 29 January 1993.

⁹¹ Compare Beyerlin (note 32), at 95.

⁹² Among them are e.g. the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 3 March 1973, the Convention on the Protection of the Ozone Layer of 1985, including the Montreal Protocol of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, and the Biological Diversity Convention of 1992.

⁹³ Agenda 21, Chapt. 38.22 (a).

to provide policy guidance for the direction and coordination of environmental programmes within the United Nations system⁹⁴.

As regards the CSD, its responsibilities appear to be overbroad and rather vague. According to Agenda 21, it is up to the CSD "to ensure the effective follow-up of the (Rio) Conference as well as to enhance international cooperation and rationalize intergovernmental decision-making capacity for the integration of environment and development issues and to examine the progress in the implementation of Agenda 21 at the national, regional and international levels"⁹⁵. From this wording is unclear whether the primary responsibility of the CSD is initiating international treaty-making processes (apart from, or together with, UNEP⁹⁶), coordinating relevant UN activities, or even monitoring compliance.

Third, UNEP seems to possess much more experience and professional skill in the field of environmental protection than the newly established CSD, which as yet has only a small budget and a weak personnel sub-structure at its disposal.

Ultimately, environmental protection does not yet appear to be satisfactorily institutionalized within the United Nations system. First, there is lack of a clear-cut division of competences, which entails the risk of rivalries between UNEP and the CSD. Second, the activities of both bodies are not sufficiently coordinated. Third, the overbroad and indefinite responsibilities of the CSD hardly coincide with the modest powers entrusted to it⁹⁷. Fourth, for years UNEP is reported to have been faced by severe structural problems which could imperil its further work; moreover, there is some evidence that particularly the developing countries are

⁹⁴ Compare Imber (note 8), at 83, and 111; H.F. French, *Partnership for the Planet – An Environmental Agenda for the United Nations* (1995), 35.

⁹⁵ Agenda 21, Chapt. 38.11.

⁹⁶ For instance, in April 1995 the Third Session of the CSD decided to establish an open-ended *ad hoc* Intergovernmental Panel on Forests to "assess action already undertaken to combat deforestation and forest degradation and to promote management, conservation and sustainable development of all types of forests, including environmental and socio-economic impacts; and against that background to propose options for future action" (Commission on Sustainable Development, Report on the Third Session [11–28 April 1995], UN doc. E/CN.17/1995/36, at 49). These options might include: a global convention of forests; a protocol to the Biological Diversity Convention; or better use of the already-existing Forests Principles, adopted at Rio de Janeiro on 13 June 1992, as a legally non-binding instrument (text in: ILM 31 [1992], 881). Compare R.G. Tarasofsky, *The International Forests Regime: Legal and Policy Issues* (1995).

⁹⁷ Compare French (note 94), 33: "... its mandate is so broad that priorities are often difficult to discern ... (T)he CSD commands no resources of its own and has no coercive or regulatory powers ...".

beginning to turn away from UNEP. In any case, neither UNEP nor the CSD prove to be examples of “qualified” international environmental institution-building.

3. Some conclusions

Our cursory look at the phenomenon of “institution-building” in international environmental relations has revealed that even today States are rather reluctant to entrust international bodies with broad decision-making functions. In most cases, States have not yet been ready to use institutional patterns going beyond the traditional mode of mere inter-State cooperation, namely exchange of information, consultation and coordination. As a rule, they persist in clinging to the traditional concept of sovereignty and are therefore not ready to transfer powers to an international body able to take binding decisions by majority vote⁹⁸. Thus, international environmental institution-building considerably contrasts with that within the European Community, which is inspired by the idea of integration. Only exceptionally, for instance in the case of the 1987 Montreal Protocol, have States waived their insistence on full formal sovereignty by establishing a procedure which allows the Conference of the Parties to make immediately binding amendments to the Protocol by mere majority vote. This is at least a first important step towards facilitating and accelerating environmental rule-making.

As regards the enforcement of international environmental treaties, it appears that States parties are increasingly switching from the traditional concepts of State responsibility and authoritative adjudication to the innovative concepts of compliance assistance and compliance control. This bears clear testimony to the preparedness of States to rely more on an active treaty management aiming at ensuring treaty implementation than on redressing non-compliance by employing confrontational and coercive instruments. Environmental treaties pursuing this new approach typically provide that it is up to the respective Conference of the Parties to take the necessary decisions concerning compliance assistance and compliance control. With regard to enabling developing countries to implement their contractual obligations, GEF is considered to be the appropriate institution best suited to manage the operation of relevant financial transfers. Al-

⁹⁸ Compare for the distinction between patterns of cooperation and of integration W. Lang, *How to Manage Sustainable Development*, in: K. Ginther/E. Denters/P.J.I.M. de Waart (eds.), *Sustainable Development and Good Governance* (1995), at 100.

though there is certainly a need to develop further the procedural and institutional structures of compliance assistance and compliance control, their very existence already reflects the acknowledgement by States of the need to consider compliance with important global environmental treaties to be a “common interest”, as well as their preparedness to establish a collective regime of treaty compliance.

Although the new mechanisms of compliance assistance and compliance control appear to be promising, they do not entirely supersede the traditional means of dispute settlement. On the contrary, in cases where a State party cannot be brought to comply with its obligations by non-confrontational means the other States parties must be able to take appropriate authoritative measures against that State⁹⁹. Apart from adjudication as a means of ensuring treaty compliance which should be considered only as a last resort, it appears to be more promising to establish specific treaty-related intergovernmental bodies providing for both formal and informal methods of dispute settlement such as conciliation and enquiry. The few mechanisms in environmental treaties mentioned above may perhaps serve as a model in this respect.

Admittedly, modern environmental treaty practice still reflects the continuing reluctance of States to delegate substantial powers to international institutions. Nevertheless, there are, as far as rule-making and compliance control are concerned, at least some modest beginnings of “qualified” environmental institution-building which signal a certain decrease of the traditional thinking of States based on sovereignty. This finding offers a promising starting point for further debate regarding the question of “institution-building”.

IV. Perspectives of Institution-Building: Questions for Further Consideration

1. In principle, there are two alternatives of environmental institutions which States can choose to establish:

- (1) institutions designed to work specifically within the environmental treaty system concerned; or
- (2) high-level institutions working in fields transcending individual treaties.

⁹⁹ See Agenda 21, Chapt. 39.10. Compare A.O. Adede, Management of Environmental Disputes: Avoidance versus Settlement, in: Lang (note 72), 115 et seq., and G. Loibl, Comment on the Paper by Andronico Adede, *ibid.*, 125 et seq.

Whether the first or the second option appears to be preferable depends on the environmental situation at issue in the given case; possibly, a typology of relevant situations may be of some help in making the “right” choice. Moreover, it appears to be necessary to identify substantive criteria determining that decision.

2. Our short survey of international environmental relations has revealed that all important institutions working in this field are intergovernmental in character. Thus, they suffer from certain deficiencies in their capability to act. This is why it may be necessary to bring more often bodies into play which are composed of independent experts; at least, such bodies could perhaps assist the existing intergovernmental institutions by placing their expert knowledge at the disposal of the latter¹⁰⁰.

3. Another important issue to be dealt with is the level of institution-building – regional or universal – best suited to attaining a high degree of environmental protection. The proper response here probably depends on the function accorded to the institution concerned. Thus, what appears to be an appropriate solution regarding the institutionalization of international rule-making, may be unapt for ensuring treaty-compliance or dispute settlement.

4. We should also address the question how to achieve a better division of labour between the different institutions working in the same sphere at one and the same level, as well as at different levels. Moreover, we should consider appropriate mechanisms for coordinating efforts when more than one body is involved in a certain task.

From these general issues flow a number of more special ones also requiring attention:

5. With regard to international environmental rule-making it should be asked how to widen and effectuate the possibilities of the Conferences of the Parties and other bodies established within the treaty system concerned to adopt certain categories of rules or amend those rules so that they are immediately binding on States parties.

6. The same question arises with regard to international organizations working in the field of environmental protection.

7. It is particularly important to determine the specific functions of UNEP and the CSD in the international process of environmental rule-making. Since there is no doubt that international treaty-making will also in future be dominated by States, the focus of our considerations should

¹⁰⁰ Compare Article 9 of the Climate Change Convention.

be whether henceforth UNEP and/or the CSD may exercise a sponsoring, incentive or even initiating function in this respect.

8. Discussion is necessary concerning the phenomenon of emerging private environmental standards which may play an important supplementary role in the international rule-making process traditionally governed by public law. In this respect, the efforts as yet undertaken by the International Organization for Standardization (ISO) are of particular concern¹⁰¹.

9. As regards compliance control, a number of modern international environmental treaties show that the Conferences of the Parties play the key role. Therefore, our attention should centre on the questions: (1) how to strengthen the possibilities of these bodies for providing an effective control, and (2) how to further develop and refine the relevant procedures. To answer these questions, it may be useful to look at the relevant methods and mechanisms employed in other realms, in particular that of arms reduction control¹⁰².

10. The establishment of an overall, high-level compliance control system appears neither to be possible nor desirable. Nevertheless, there may be a certain need for the secretariats of, and possibly also for the Conferences of the Parties to, environmental treaties to enter into certain arrangements for institutionalized inter-action among each other. It should be asked which solutions exist in this respect.

11. Another point to be examined is whether UNEP and/or the CSD could exercise some high-level monitoring functions in regard to compliance control.

12. Further, we should reflect on ways and means to bring the NGOs into play in the process of treaty compliance control – a task which is dominated by bodies composed of government representatives. Possibly, NGOs may prove to be able to exercise a certain “watch-dog”-function in this respect.

13. Compliance assistance raises similar questions. Our primary concern should be: (1) how to determine the specific roles of the relevant Conferences of the Parties and GEF, and (2) how to organize a more effective procedural inter-action between these two institutions.

¹⁰¹ Compare in particular N. ROHT-ARRIAZA, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, *Ecology Law Quarterly* 22 (1995), 479 et seq.

¹⁰² Compare W. LANG, *Compliance with Disarmament Obligations*, *ZaöRV* 55 (1995), 69 et seq.; M. BOTHE/B. GRAEFRAH/M. MOHR (eds.), *Tatsachenfeststellung in den internationalen Beziehungen* (forthcoming).

14. Apart from that, we should try to clarify the relationship between the developing States parties' obligation to comply with pertinent substantive treaty provisions, on the one hand, and the industrialized States parties' duty to facilitate that compliance by assisting the developing States parties financially, on the other. Is there a legal reciprocity between both obligations or only a factual one? Beyond this, is there a need for re-shaping the aims and process of compliance assistance in expressed light of the concept of "common but differentiated responsibilities" of States in Principle 7 of the Rio Declaration, the meaning, as well as the effects of which are far from clear¹⁰³?

¹⁰³ Compare R. Wolfrum, *The Convention on Biological Diversity: Using State Jurisdiction as a Means of Ensuring Compliance*, in: Wolfrum (note 32), 373.