

Compliance Assistance in International Environmental Law: Capacity-Building Through Financial and Technology Transfer

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I. Introduction

Environmental degradation as a global phenomenon affects all States. They all must take action to protect their peoples and ecosystems and share the responsibility to protect the common environmental heritage. However, the world we live in is a world of inequalities. States are not equal with regard to resources and capacities, and that applies to the environmental sector as well. International environmental law must take existing inequalities into account. It must either differentiate between obligations of industrialized countries and developing countries, or provide for mechanisms to assist developing countries to comply with the obligations which they have accepted under international treaties.

International environmental law so far does both, with a trend to favour financial and technical assistance.¹ The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer² and the 1992 Framework Convention on Climate Change³ are examples to illustrate the principle of “common but differentiated responsibilities”. They provide for different obligations for developed and developing countries, requiring that developed countries take the lead in protecting the ozone layer and combatting

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¹ See J. Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, *Hastings International and Comparative Law Review* 14 (1991), 905 ff.

² ILM 26 (1987), 1550 ff.

³ ILM 31 (1992), 851 ff.

climate change, respectively.⁴ Principle 7 of the Rio Declaration – not binding as such but definitely spelling out basic principles of international environmental law – reads:

“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

Mechanisms to provide financial, technical and technological assistance to developing countries to help build up their environment management capacity are increasing in number and importance; it is probably fair to say that they have become regular features in international environmental treaty practice. This article attempts to give an overview of major assistance programmes and activities, and points at some of the issues connected with their practical implementation. It starts with a brief description of environment problems in developing countries and a clarification of the term “capacity-building” as the ultimate objective of all international assistance efforts.

II. Environmental Problems in Developing Countries

Developing countries have always insisted in that the environmental problems which they face are in many respects different from those of the developed countries of the North.⁵ Developing countries are often confronted with much more basic and fundamental environmental problems, such as lack or pollution of drinking water, deterioration of public health, loss of soil fertility in rural areas or air and water pollution in rapidly growing urban areas. Environment degradation in developing countries is often more dramatic; not simply a question of quality of life but rather a matter of survival. The causes of environmental problems are different and so are the approaches which are to be used to address those problems.

⁴ On climate change see D. B o d a n s k y, *Managing Climate Change*, Yearbook of International Environmental Law 3 (1992), 60; S. O b e r t h ü r, *Politik im Treibhaus. Die Entstehung des internationalen Klimaschutzregimes*, 1993.

⁵ See N t a m b i r w e k i (note 1), at 924; see also M. W ö h l k e, *Umweltzerstörung in der Dritten Welt*, 1987.

Not so much has changed in this respect since developing countries presented their case at the 1972 UN Conference on the Human Environment in Stockholm. The famous statement of the then Indian Prime Minister, Indira Gandhi still characterizes the situation in many developing countries⁶:

“We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Are not poverty and need the greatest polluters? How can we speak to those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at the source? The environment can not be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.”

Economic constraints, population growth, the lack of technologies for environmentally friendly alternatives increase the pressure on an environment which is already degraded. It would be a misinterpretation to say that developing countries do not take environment protection seriously; they take it as seriously as developed countries do. The fact is that there are constraints from which they cannot escape. How much sense does it make to point at the rights of future generations when there is no way for the present generation to survive?

Developing countries need economic progress if they are to solve their environmental problems just as developed countries do. A standard argument used by politicians in developed countries says that economic development – some even say growth – is the basis of sound environmental policies, and there is nothing wrong with it. It should be accepted with regard to developing countries as well. They need economic development which is environmentally friendly and which leads to “alternative modes of survival”.⁷

In 1972, the UN Conference on the Human Environment proclaimed:⁸

“In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap between

⁶ Quoted in Ntambirweki (note 1), 906.

⁷ Ibid., at 926.

⁸ See: Results from Stockholm, 1973, 17.

themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development.”

Consequently, the Stockholm principles emphasized the relationship between development and environment protection:

“Principle 8: Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.”

“Principle 9: Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.”

“Principle 10: For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management since economic factors as well as ecological processes must be taken into account.”

20 years later the Rio Declaration⁹ reminded everyone that the right to development must be fulfilled to meet the developmental and environmental needs of present and future generations (Principle 3), and that the eradication of poverty is an indispensable requirement for sustainable development (Principle 5). The very first paragraph of the Agenda 21¹⁰ points at the interrelationship between poverty and environmental degradation:

1.1 “Humanity stands at a defining moment in its history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns, and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can – in a global partnership for sustainable development.”

The first substantive chapter of Agenda 21 (Chapter 2)¹¹ deals with acceleration of sustainable development in developing countries thus illus-

⁹ ILM 31 (1992), 876 ff.

¹⁰ Reprinted in: N. Robinson (ed.), *Agenda 21. Earth's Action Plan*, 1993, 1.

¹¹ *Ibid.*, 4.

trating that improved economic development in most countries of the world is the key to a better environment provided that it is economic development which respects the carrying capacity of the earth and the limits to the use of natural resources.¹² The participants at the Rio Conference had many good reasons to remind the world community of those basic dependencies between environment and development – or between environmental degradation and poverty; despite all changes that occurred in some regions between 1972 and 1992, the situation in most countries remains dramatic.

III. “Capacity-Building”

“Capacity-building” refers to a fairly complex process. “Capacity” in the context of compliance with international law obligations may mean:

- the availability of governmental institutions to implement international obligations at the national level and to ensure that the measures taken are enforced. This includes environmental administrative structures (line ministries, environmental agencies, environmental councils, scientific boards); environmental rules and regulations, based on sound environmental policies, providing command-and-control measures where necessary and economic incentives where possible; mechanisms for effective rule-making and enforcement; well-trained and sufficiently equipped personnel for environmental monitoring and environmental management; and systems for environmental information and education established in both the formal and informal sectors;

- the availability of resources to comply with measures taken to implement international obligations. This refers to the economic, technical and financial capabilities and means required for environmental management by both governmental and private actors. It is the economic basis of environment protection and natural resource conservation which has been discussed above. A normative system providing for rules, regulations, standards and other requirements is useless if the addressees are not in a position to comply with them;

¹² On sustainable development as the key approach to environmental protection and conservation see: World Conservation Strategy. Living Resource Conservation for Sustainable Development. Prepared by IUCN, UNEP and WWF 1980; Our Common Future. Report by the World Commission on Environment and Development, 1987; Caring for the Earth. A Strategy for Sustainable Living. Published by IUCN, UNEP and WWF, 1991. See also the German “Sachverständigenrat für Umweltfragen”, Umweltgutachten 1994 and Umweltgutachten 1996; both attempt to define the concept of “sustainable development”.

– the establishment and functioning of a non-governmental sector as “watch-dog” for the government and the private sector alike. Non-governmental organizations are important actors on the environmental stage: On the one hand, non-governmental organizations put pressure on governments to formulate and implement environmental policy; on the other hand they may assist governments to enforce environment protection measures through provision of information or even technical services.

Effective environmental management by government requires scientific expertise and accurate collections of data.¹³ It also requires financial resources and personnel to participate in international treaty-making and related implementation processes.¹⁴ Establishment of policies, administrative structures, and rules and regulations may involve complex processes based on sophisticated and broad knowledge which in many countries is not available. Equally difficult is the establishment of effective enforcement mechanisms; environmental law tends to be badly enforced, nationally and internationally. To improve enforcement, a range of measures may be taken, including public information and education, better training and equipment of governmental inspectors, participation of citizens and environmental groups in administrative procedures, and liberalizing standing to sue to challenge governmental actions in courts.

Assistance to capacity-building should be as comprehensive as possible and should cover all components mentioned above (institution-building; setting of norms and standards; building up the non-governmental sector; provision of technical and financial resources and of information, education and training). Such a comprehensive approach to capacity-building may be ambitious; it is, however, the more realistic approach to international and global environmental protection. In most cases, at least to most developing countries, provision of assistance is the more effective alternative to sanctions.¹⁵ Assistance may also be the better alternative to the application of the principle of “common but differential responsibilities” since the latter may result in postponing global solutions to pressing en-

¹³ See also: P. Lawrence, *Regional Strategies for the Implementation of Environment Conventions: Lessons from the South Pacific?*, *Australian Yearbook of International Law* 15 (1994), 203 ff. (217 ff.)

¹⁴ *Ibid.*

¹⁵ See K. Kummer, *Providing Incentives to Comply with Multilateral Environmental Agreements: An Alternative to Sanctions?*, *EurEnv LR* 1994, 256 ff. She considers incentives, particularly assistance and international cooperation, “a very useful supplement to the imposition of sanctions or other measures of a punitive character”, (263); she does, however, not advocate the replacement of sanctions by incentives (*ibid.*).

vironmental problems. Provision of assistance, however, requires a good deal of environment awareness and political will.

IV. Commitments to Provide Financial and Technical Assistance

Commitments to provide financial and technical assistance are now regular features in international environment treaties; at least the major and, in practice, most important international conventions, such as the Montreal Protocol, the Basel Convention, the Framework Convention on Climate Change and the Convention on Biological Diversity provide for mechanisms of assistance. In addition, in numerous "soft law" instruments states committed themselves to render financial and technical assistance; they confirmed their commitments in the documents adopted at the 1992 Rio Conference (Rio Declaration, Forest Principles, Agenda 21). Furthermore, international organizations provide assistance to capacity-building in environment management as part of their programmatic activities; reference may be made to the Global Environmental Facility (GEF),¹⁶ jointly administered by the World Bank, UNDP and UNEP, the Capacity 21 Programme of UNDP, and the law and institution-building activities of UNEP.¹⁷

The 1992 Rio Declaration urges states to

"cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies." (Principle 9)¹⁸

The "non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests"¹⁹ (the "Forest Principles") makes numerous references to financial and technical assistance, e.g. Principles 1(b), 3(b), 7(b), 9(a), 10, 11 and 12(d). Principle 1(b) provides that

"The agreed full incremental cost of achieving benefits associated with forest conservation and sustainable development requires increased international cooperation and should be equitably shared by the international community."

¹⁶ On the GEF see Yearbook of International Environmental Law 4 (1993), 289 f.; 5 (1994), 293 f.

¹⁷ On UNEP's capacity-building activities see Yearbook of International Environmental Law 4 (1993), 550 ff. (560 ff.); 5 (1994), 546 ff. (551 ff.).

¹⁸ ILM 31 (1992), 877.

¹⁹ ILM 31 (1992), 882 ff.

Principle 7(b) appeals to states to provide “specific financial resources to developing countries”, whereas Principles 10 and 11 recommend the provision of “new and additional financial resources” and the “transfer of environmentally sound technologies and corresponding know-how”, respectively. Also relevant and highly interesting is Principle 12(d), which provides:

“Appropriate indigenous capacity and local knowledge regarding the conservation and sustainable development of forests should, through institutional and financial support, and in collaboration with the people in local communities concerned, be recognized, respected, recorded, developed and, as appropriate, introduced in the implementation of programmes. Benefits arising from the utilisation of indigenous knowledge should therefore be equitably shared with such people.”

The “Forest Principles” are not legally binding; however, their influence on the on-going law-making processes – the efforts to negotiate an agreement on forest conservation and sustainable use – is considerable. The future forest agreement – whatever its status will be, either a separate convention or a protocol additional to the Convention on Biological Diversity – will definitely contain provisions similar to the principles quoted above.

The references in Agenda 21²⁰ to international financial and technical assistance are too numerous to be fully documented here. Of major importance in this regard may be Chapters 8 (“Integrating Environment and Development in Decision-Making”), 33 (“Financial Resources and Mechanisms”), 34 (“Transfer of Environmentally Sound Technology, Cooperation and Capacity-Building”), and 39 (“International Legal Instruments and Mechanisms”). In addition, a number of “substantive” chapters in Section 2 dealing with “Conservation and Management of Resources for Development” address the issue of financial and technical assistance.

Chapter 8.14 points at the particular legislative needs in developing countries and calls for technical support to those countries to accomplish the goals of developing and implementing “integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles”.²¹ Chapter 8.19 specifically calls for international technical assistance in environmental law-making:

“Competent intergovernmental and non-governmental organizations could cooperate to provide Governments and legislators, upon request, with an inte-

²⁰ See Robinson (note 10).

²¹ *Ibid.*, 121.

grated programme of environment and development law (sustainable development law) services, carefully adapted to the specific requirements of the recipient legal and administrative systems. Such systems could usefully include assistance in the preparation of comprehensive inventories and reviews of national legal systems. Past experience has demonstrated the usefulness of combining specialized legal information services with legal expert advice. Within the United Nations system, closer cooperation between all agencies concerned would avoid duplication of databases and facilitate division of labour. These agencies could examine the possibility and merit of performing reviews of selected national legal systems".²²

Chapter 39 of Agenda 21 dealing with improving international environmental law addresses the particular situation of developing countries and recommends technical and financial assistance to make their participation in law-making and law-implementation more effective. Chapter 39.9 provides:

"In all these activities and others that may be pursued in the future, based on the above basis for action and objectives, the effective participation of all countries, in particular developing countries, should be ensured through appropriate provision of technical assistance and/or financial assistance. Developing countries should be given "headstart" support not only in their national efforts to implement international agreements or instruments, but also to participate effectively in the negotiation of new or revised agreements or instruments and in the actual international operation of such agreements or instruments. Support should include assistance in building up expertise in international law particularly in relation to sustainable development, and in assuring access to the necessary reference information and scientific/technical expertise".²³

Agenda 21, although not legally binding, reflects a broad consensus of states and international organizations. It will influence future law-making processes and may even contribute to the formation of customary international environmental law.²⁴ It may also determine the interpretation of "hard" international law, particularly treaty law. Therefore, it is advisable, also to international lawyers, to take the non-legal commitments contained in Agenda 21 seriously.

²² Ibid., 123.

²³ Ibid., 625.

²⁴ On the formation of customary international environmental law see H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law*, 1994, and the review by L. Gündling, *Yearbook of International Environmental Law* 5 (1994), 642 ff.

Legally binding commitments to provide technical and financial assistance are contained in the Montreal Protocol on Substances that Deplete the Ozone Layer²⁵. Its 1987 version provided for technical assistance only (Article 10). The 1990 London Amendments²⁶ established a financial mechanism to assist developing countries with implementing and complying with the provisions of the treaty (new Article 10). The financial mechanism is to help meet “all agreed incremental costs” of developing countries. The financial mechanism is also expected to support the transfer of “the best available, environmentally safe substitutes and related technologies” (new Article 10 A). Between 1994 and 1996 some 145 million US \$ were contributed to the Multilateral Fund. In 1994 the legal status of the Fund as a body under international law was clarified.²⁷

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal²⁸ provides for international cooperation in technical matters, including cooperation in environmentally sound management of wastes, assistance with monitoring human health aspects and technology transfer (Article 10). Funding mechanisms of a voluntary nature were provided for to cover costs of regional and subregional training and technology transfer centres (Article 14 para. 2). Another funding mechanism was to be established to assist in cases of emergency (Article 14 para. 2).²⁹

In the Framework Convention on Climate Change³⁰ technical and financial assistance to developing countries plays a major role. Article 4(1)(c) calls for international cooperation and technology transfer. Article 4(3), most importantly, contains the obligation of developed countries to “provide new and additional financial resources to meet the agreed full costs incurred by developing countries” in complying with the provision of the Convention. Article 4(5) contains another, more specific obligation of developed countries to provide access to environmentally sound technologies and know-how.

Moreover, the provision of technical and financial assistance is linked to the implementation of developing countries’ commitments under the

²⁵ ILM 26 (1987), 1550 ff.

²⁶ ILM 30 (1991), 537 ff.

²⁷ See Yearbook of International Environmental Law 5 (1994), 160 ff. (163).

²⁸ ILM 28 (1989), 657 ff.

²⁹ On the technical assistance and training activities under the Convention see Yearbook of International Environmental Law 5 (1994), 218 ff. (220).

³⁰ ILM 31 (1992), 851 ff.

Convention: Provision of assistance is made a condition for implementation by developing countries. Article 4(7) reads:

“The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”.

Article 11 of the Framework Convention on Climate Change provides for the establishment of a financial mechanism to fund, *inter alia*, technology transfer. On an interim basis, the GEF is entrusted to fulfill the functions of the financial mechanism (Article 21(3)), provided that GEF is “appropriately restructured”. In 1996, GEF as restructured in 1994³¹, continues to be the funding mechanism under the Framework Convention on Climate Change; the mechanism provided for in Article 11 is still under preparation. Controversies concern the definition of “agreed full incremental costs” and the relationship between the various funding mechanisms.³²

Similar mechanisms – and similar difficulties – are built into the Convention on Biological Diversity.³³ The Convention also provides for technical and financial cooperation and requires the establishment of a specific funding mechanism. Developed country parties shall provide new and additional financial resources to enable developing countries to meet the “agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention and to benefit from its provisions” (Article 20(2)). The Convention on Biological Diversity contains a similar “conditional link” between the implementation of the convention by developing countries and the implementation by developed countries of their commitments to provide assistance (Article 20(4)). Here again, GEF is entrusted on an interim basis to function as a funding mechanism (Article 39).

Functioning of the funding mechanisms in both conventions will, first of all, depend on their establishment by the Conferences of the Parties. Another major issue is the clarification of the concept of “incremental

³¹ On the restructuring of the GEF see Yearbook of International Environmental Law 4 (1993), 286 ff. (289 f.); 5 (1994), 291 ff. (293 f.).

³² See Yearbook of International Environmental Law 5 (1994), 164 ff. (167).

³³ ILM 31 (1992), 822 ff.

costs” which is a complex theoretical concept of cost-benefit analysis. In general, “incremental costs” may be described as

“... the entire extra cost incurred by a party to implement a particular action (for example a policy, program or project) in order to fulfill a treaty obligation, compared to the cost of another action (a baseline action) the party would have undertaken had it not been a treaty Party.”³⁴

V. Some Practical Issues and Difficulties of Technical and Financial Assistance

A first major problem is the number and variety of assistance programmes and projects. Many multilateral assistance programmes coexist, even within the UN system. Assistance programmes are carried out, for example, by UNEP, UNDP, the World Bank, UNIDO, FAO, WHO, and UN secretariats of the various conventions. Sometimes these organizations have joint programmes (GEF) which may overlap with their separate individual programmes. Multilateral programmes coexist with bilateral ones; often they operate in similar – or even the same – areas and cooperate with the same partners in developing countries. As a consequence there may be competition between donors; coordination may be lacking. The feeling that donor coordination is needed is wide-spread; many complain but the situation is difficult to improve. There may be political, institutional and even psychological obstacles. Inter-agency coordination may be difficult because of the numerous actors in the environmental area and the size and complexity of the programmes.

The need for donor coordination may, furthermore, increase bureaucratic costs that assistance programmes may involve anyway. Coordination mechanisms, again, imply employment of personnel, meetings and follow-up activities. However, many assistance programmes are already administered by structures of considerable size and may involve lengthy and costly procedures. To some extent, bureaucracy is unavoidable, also in the field of technical and financial assistance; there may, however, be potential for improvement, i.e. decrease of bureaucratic costs.

A related problem is the scarce personnel resource base in developing countries – the very target of assistance activities. Often assistance overburdens the staff in counterpart institutions which the projects are expected to support. Various international donors may compete for the

³⁴ See L. Glowka et al., *A Guide to the Convention on Biological Diversity*, 1994, 103 f.

scarce time of the same few staff members. Availability of counterparts is crucial indeed.

International assistance is often blamed for imposing on developing countries political objectives which are not considered to reflect their true priorities. International financial transfers are often linked to conditions, such as the prior development of environmental action plans, the establishment of environment management institutions or the introduction of environmental legislation. Sometimes, as it is the case with financial transfers within GEF, a condition is that the recipient country ratifies the relevant international convention before it receives assistance. The argument goes that such "conditionality" interferes with the principle of sovereignty ("eco-imperialism") because the establishment of policies, institutions and legislation are considered internal affairs. On the other hand, it must be considered legitimate to expect that financial transfers are used to improve environmental management in the recipient country, provided that the specific conditions, particularly the political, administrative and legal traditions are respected and that inappropriate approaches are avoided. As far as the requirement of prior ratification of relevant international treaties is concerned, the argument of interference with national sovereignty is not well founded; financial means to help comply with international treaties simply imply that those treaties are in force for the respective countries.

International assistance, both technical and financial, is important and essential. However, it has limitations; it is, or should not be, the only approach to the solution of global environmental problems. There is a risk that developed countries may escape from their obligations to take the necessary environmental actions "at home" by providing (some) international financial and technical assistance. In many areas, particularly with the protection of the atmosphere (climate change, ozone layer destruction), developed countries bear the major responsibility to take action within their own jurisdiction. The situation is similar to "joint implementation" under FCCC; "joint implementation" should not become a substitute for environmental policy at home. The major responsibility to solve global environmental problems rests with the developed countries which have to find the path to sustainable living.

Finally, international assistance needs to be effective and sustainable. Effectiveness points at what is often called "ownership" of assistance activities: Projects need to be country-driven; counterparts in developing countries must feel that projects are their own. This implies that projects are coordinated and carried out basically by developing country institu-

tions, and that expatriate expertise is limited to what is absolutely necessary. Again, a constraint in many countries may be the availability of local staff and experts. Often non-governmental organizations may be useful partners and should be involved.

Environmental capacity-building through financial and technical assistance needs to be a sustainable process. This is easy to accept but difficult to implement in practice. There is a risk that, once the project is completed, the capacity-building process comes to an end leaving behind institutional ruins and jobless people.