obligation entails state responsibility and the remedy lies in suit for reparation.[3] As against these formal dispute settlement procedures, one notices that a number of modern day environmental agreements or treaties lay emphasis on dispute avoidance, wherein more technical means of compliance or implementation are relied upon. It may thus be stated that non-compliance of a treaty obligation, would in effect raise three issues relating to:

(i) the implementation of an agreement or treaty;

(ii) enforcement wherein breach or non-fulfillment of obligation occurs; and

(iii) dispute avoidance or dispute settlement mechanisms for redress.

For the purpose of this study compliance would involve implementation and enforcement, which are two logical steps that States would have to undertake after an agreement has been negotiated. States, it is observed, largely comply with agreements, as environmental problems call for greater interdependence and often reflect collective aspirations or individual interests. Under international law there could be different approaches to the enforcement of an environmental obligation. State responsibility for a breach of obligation would involve reparation. Such responsibility could also entail liability for risk creating activities. Enforcement involves enactment of domestic legislation made applicable to their nationals. The central facet of compliance and the effectiveness of an environmental regime is dependent upon the capacity of States to enforce laws. Non-fulfillment of this obligation at the domestic level would involve recourse to administrative, civil and criminal bodies. The settlement of disputes would involve recourse to either diplomatic or judicial means of settlement.[4]

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[3] *Chorzow Factory* (Germany v. Poland), PCIJ, Ser. A.No.17, p.29.

[4] For a comprehensive study of 'Dispute Avoidance and Dispute Settlement' see the Report of the International Group of Experts, UNEP/GC.20/INF/16, 1999, pp.1-70.

It is against this backdrop that this Background Note would attempt and seek to portray the broad contours of developments occurring in this area with a view to facilitate the consideration of the ways and means of effective implementation, enforcement and dispute settlement in international environmental law,[5] by the representatives of Member and Observer delegates to the Accra Session.

Implementation

States adopt different ways and means to fulfill environmental obligations when an agreement enters into force. The implementation of environmental treaties generally involves change in or an enactment of domestic legislation to secure compliance with international standards. In this regard it may be recalled that Agenda 21 calls upon States to adopt national policies by way of local Agenda 21's to fulfill international commitments.[6]

Moreover, Principle 11 of the Rio Declaration calls upon States to enact effective environmental legislation. A progressive model for a comprehensive legislation is provided by the United Nations Convention on the Law of the Sea, (UNCLOS) 1982. It provides for state jurisdiction over pollution from different sources and enforcement by States by applying laws consistent with international law and also application of international rules and standards. It also calls upon States to provide legal redress by courts for damage caused by marine pollution.

Several States administer such legal redress through their public authorities. Principle 10 of the Rio Declaration in its concluding section states that "....effective access to

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[5] for a detailed analysis of the subject, refer to Phillipe Sands, *Principles of International Environmental Law: Framework, Standards and Implementation* (Manchester, 1995), pp.141-178.

[6] Report of the United Nations Conference on Environment Development (UNCED) A/Conf.151/126/Rev.1. (vol.1) 1993. Chapter 8.

judicial and administrative proceedings including redress and remedy shall be provided". The Rio Declaration also casts responsibility upon the civil society to participate in resolving environmental issues. Citizen suits or public interest group litigation or *actio popularis*/class actions, though very successful in domestic legal systems, are not available under international law. Non-governmental organizations play an important role in disseminating information on the environment and increasing public awareness about environmental protection. Though States alone have a standing in international law to implement international obligations, there are a few treaty institutional frameworks which allow enforcement of environmental obligations by some international environmental bodies.

A number of instruments provide compliance mechanisms for improving their institutional effectiveness. These mechanism are measures or procedural requirements which States undertake to implement their international environmental obligations. They include

(a) monitoring of agreements;

(b) reporting the progress;

(c) inspection;

(d) fact-finding missions;

(e) consultations; and

(f) in-built compliance mechanisms.

State lay emphasis on these dispute avoidance techniques to address environmental problems at the implementation stage, as they are largely non-confrontational and transparent in nature.

Monitoring of Agreements

Monitoring of an environmental agreement would generally involve collection of data which would help in identifying a problem, assessing and evaluating its performance. The UNEP's Global Environment Monitoring System (GEMS) performs such a role. There are a number of treaties, which provide for such a mechanism. Article 7 of the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 prescribes submission of "statistical data on its production, imports and exports...., or the best possible estimate of such data where actual data are not available". Similarly, Article VIII, paragraph 7, of the Convention on the International Trade in Endangered Species, 1973 (CITES) requires Parties to "transmit statistics annually on the number and types of permits and certificates granted; the States with which such trade occurred...". Monitoring provisions, it is thus seen, play an important role in collection, collation and dissemination of data necessary for the improvement of implementation of an agreement.

Reporting includes a timely appraisal in the form of a report often sent either to the conference of contracting parties, standing committees, secretariats or other review bodies set up under an agreement. Reporting plays an important function in: (i) assessing the implementation of international commitments; (ii) making aware of the difficulties faced by Parties in implementation; and (iii) making aware of the need for review or strengthening the mechanism needed for improving implementation. For example, Article 12 of the United Nations Framework Convention on Climate Change hereinafter referred to as (UNFCC) requires all Parties to communicate to the Conference of Parties steps taken to implement the Convention. Moreover, a Subsidiary Body for Implementation (SBI) was established under Article 10, paragraph 2 (a) to assist the Conference of Parties in implementation of the Convention.

Article 13, paragraph 3 of the Basel Convention on the Control of the Transboundary Movement of Hazardous Substances and their Disposal, 1989 provides that States shall

"transmit, through the Secretariat, to the Conference of the Parties..... a report on the previous calendar year, containing the following information....'. Similar reporting provisions exist in Articles 7 and 8 of the Kyoto Protocol to the UNFCC 1997; Art. VIII of the CITES, 1973; Article 26 of the Convention on Biological Diversity, 1992; and Article 26 of the UN Convention on Combating Desertification 1994.

Inspection

Inspection serves the purpose of verification of reports. They are conducted either by States or international bodies. Instances of inspection can be seen in the International Whaling Convention, 1946; Article VII of the Antarctic Treaty, 1959 and in Article 220 of UNCLOS, 1982.

Fact - finding

This tool of dispute avoidance essentially consists of an inquiry conducted by a fact-finding body constituted by States Parties to agreements. Fact-finding as opposed to inspection provisions, which are found as a necessary clause in agreements, is resorted to in exceptional circumstances. The CITES and the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 1991 contain provisions on fact-finding.

Consultations

Consultation between parties serve as useful confidence-building measures that help to avoid escalation of an issue into a dispute. Principle 19 of the Rio Declaration states that "States shall provide prior and timely notification and relevant information to potentially affected states... and shall consult with those states at an early stage in good faith". An advanced consultative mechanism is found in the UNFCC wherein Article 13 provides for a Multilateral Consultative Process. The Ad Hoc Group responsible for finalizing work on this mechanism has concluded its task in 1997. Consultation mechanisms found in General Agreements on Tariffs and Trade (GATT) and in Article 4 of the WTO Dispute Settlement

Understanding serve as an advanced dispute settlement procedure. Other instances where consultation is provided for include Article 6 of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses and Article 14 of the Convention on Biological Diversity.

Compliance Mechanism

Besides dispute avoidance techniques, there exist a number of compliance procedures, which have been developed under environmental agreements. These procedures are co-operative, non-confrontational and non-judicial in nature. They are instrumental in a large way for amicable settlement of environmental disputes. One such developed mechanism is the non-compliance procedure found in the Article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer, which was further strengthened upon the creation of an Implementation Committee consisting of ten Parties, by the Copenhagen Amendments in 1992. This Committee can receive written submission from a Contracting Party, which expresses its inability or reservations in compliance, owing to the status of another party, regarding similar efforts towards implementation. Furthermore, the Implementation Committee may request information on non-compliance and submit the same to the Secretariat of the Convention to be reported at the Conference of Parties. The Conference of Parties can then recommend a number of steps to be undertaken to ensure full compliance. The function of the Committee therefore is to help all States to comply with the Protocol and thereby fulfill their obligations. Similar provisions of implementation mechanism are present in the Long Range Transboundary Air Pollution Convention, 1979 and the South Pacific Nuclear Free Zones Treaty (Raratonga), 1985.

The effectiveness of a convention depends directly upon the capacity of States in implementing its provisions at the domestic level. Developing States, it may be stated, face a number of constraints in fulfilling international commitments. Chief among them being the lack of resources, lack of technical know-how and trained personnel, absence of public awareness

and often a deficient growth of environmental laws and institutional capacities. The UNEP's Montevideo Programme for the Development and Periodic Review of Environmental Law of 1990's is an important endeavour in this regard.[7]

Enforcement

Though dispute avoidance and other confidence-building measures are now the preferred modes of ensuring compliance, conflicts can arise when a State fails to fulfill its obligation under a treaty. Therein lies the need for resorting to formal means of responsibility of a State for breach of an international obligation. Enforcement involves the right of a State to take measures to implement an international legal obligation or to obtain a ruling by an appropriate international court, tribunal or other body, including an international organization, that obligations are not being fulfilled. Breach of an international obligation would involve reparation to the injured State.[8] Under customary law an injured State has a right of reprisal and peaceful counter measures.[9] State responsibility for an 'injured State' according to Draft Article 5 of the International Law Commission work on the same topic, could arise from the provisions of a bilateral or multilateral treaty, a binding decision of an international court or organization, and a rule of customary international law.

However, there are difficulties in applying the traditional test of state responsibility in the field of environmental law. Customary international law in the field of environment suffers from doctrinal inconsistencies as regards breach of an obligation in the strict sense. There are two schools of thought on the subject. While one believes that state responsibility

[7] UNEP Governing Council Decision 17/25, May 1993. The mid-term review of the Montevideo Programme for the Development and Periodic Review of Environmental Law-II, conducted in 1996 stressed on the importance of strengthening implementation mechanism of existing multilateral environmental instruments.

[8] Supra f. n.3.

[9] Naulillaa Case, 2 RIAA (1928), p.1012.

arises out of breach of obligation, which is supported by existing, though limited State practice, the other approach believes that strict and absolute liability exists not based on any breach of obligation, but arising independently out of general principles of law, good neighbourliness or doctrine of abuse of rights.

Furthermore, the ILC making a subtle difference in state responsibility for internationally wrongful acts and liability for risk bearing albeit lawful activities, placed a new topic on its agenda entitled "International Liability for Injurious consequences Arising out of Acts Not Prohibited by International Law". In this regard, it may be noted that the ILC has completed a first reading of the draft articles on 'Prevention of Transboundary Damage from Hazardous Activities'.

State responsibility will flow wherein environmental damage is caused: (a) to the environment of a State; and (b) to the area beyond national jurisdiction.

A. Damage to environment of a State

Though customary international law offers few instances of state practice having developed in the area of state responsibility for environmental damage, there are a few cases, which have stood the test of time. In the *Trial Smelter Case*,[10] the United States brought a case against Canada for being affected by Transboundary air pollution by sulphur fumes. The case established that responsibility would flow on account of an internationally wrongful act committed by a State using its territory in a deleterious way causing detriment to the rights of others. Similarly in the *Lake Lannoux Arbitration*,[11] wherein the issue was the use of the River Carol by riparian States in such a way that the proposed works by one (France) would affect the right to use of the another (Spain), it was held that notice of harm ought to be given, when it was known that the activity

[10] Trial Smelter Arbitration (US V. Canada) 3 RIAA 1907 (1941).

[11] Lac Lannoux Arbitration (France V. Spain) 24 ILR 101 (1957).