Improving Compliance Mechanisms of the International Waste Trade Regime by Introducing Economic Compliance Incentives

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Daniela Wehlend

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I. Introduction

Between February and May 2009 more than 1,400 tons of toxic waste were shipped into the Brazilian port of Santos, São Paulo and two other southern ports of the country.[1] This toxic waste, misleadingly marked as "recyclable plastics," came from the United Kingdom. It mostly consisted of used diapers, condoms, syringes, household waste and hospital waste, e.g. used blood bags. The containers were finally detected and held by Brazilian port and environmental authorities. Their United Kingdom counterparts had to take the waste back and start investigations in order to find out who was responsible for the illegal transport and the attempt to illegally dispose of these wastes.[2]

Not all cases of illegal traffic and disposal of hazardous wastes end up by being detected and returned. In 2006, hundreds of tons of toxic oil sludge that emitted the poisonous gas hydrogen sulfide were dumped in various sites around the city of Abidjan in Côte d'Ivoire. These dumping grounds, mostly landfills, were not adequately equipped for the safe disposal of these wastes. The Deputy Director of the Côte d'Ivoire Office of the Prime Minister reported – on 28 November 2006 to the Conference of the Parties of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (hereinafter, Basel Convention)[3] – that the illegal dumping had caused more than 100,000 citizens to suffer from symptoms like nausea, vomiting, skin reactions, severe headaches and nose bleeds.[4] Indeed, sixty-nine people were hospitalized and at least ten people died of poisoning. Moreover, environmental consequences included air pollution, contamination of water sources, closure of the city's household waste treatment center for two months and contamination of the food chain. The incident further caused a halt for many economic activities. Fishermen, bakers and farmers had to discontinue their work and industries had to lay off workers.

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1 "Brazil demands return of UK waste", BBC Online 18 July 2009, available at <http://news.bbc.co.uk>.

2 See note 1.

3 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989, available at <http://www.basel.int>.

4 UNEP *Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Report on the 8th Mtg, Doc. UNEP/CHW8/16, para. 25.

This waste had been transported on behalf of *Trafigura*, a multinational commodities trade company based in the Netherlands, but coordinating its shipping activities from London.[5] *Trafigura* ordered the toxic sludge to be sent to Côte d'Ivoire, where it was handed over to *Tommy* – an unqualified and ill-equipped local company. *Tommy* had accepted the disposal of the sludge for a much cheaper price than any European company. Nonetheless, *Tommy* then had its workers dump the waste in mostly open-air spaces in Abidjan. In July 2010, a Dutch court found *Trafigur*a guilty of the illegal export of hazardous wastes.[6]

Illicit movement and dumping of toxic and dangerous products and wastes are serious problems. These types of acts are severe enough to be called a "serious threat to human rights, including the right to life, the enjoyment of the highest attainable standard of physical and mental health and …[to] other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to clean water, food, adequate housing and work, particularly of individual developing countries that do not have the technologies to process them."[7] In addition, even the enjoyment of "civil, political, economic, social and cultural rights and the right to development"[8] is feared to be in danger.

All the states that were directly or indirectly involved in the cases described above are State Parties to an international convention that was negotiated within the framework and under the auspices of UNEP. UNEP regulates toxic waste movements to foreign countries within the framework of the Basel Convention. The Basel Convention limits transboundary waste movements to the greatest extent possible by requiring that the generation of hazardous wastes should be avoided in the first place. Moreover, the Convention mandates that the treatment of the wastes should take place as close as possible to the site of the wastes' origin. Indeed, transboundary movements of hazardous wastes

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5 P. Murphy, "British Court to hear Ivorian waste class action", Reuters Online 2 February 2007, available at <http://www.reuters.com>.

6 "Trafigura found guilty of exporting toxic waste", BBC Online 23 July 2010, available at <http://www.bbc.co.uk>.

7 UN High Commissioner for Human Rights, *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, Doc. E/CN.4/RES/2005/15.

8 Human Rights Council Resolution, *The adverse Effects of the Movement and Dumping of toxic and dangerous Products and Wastes on the Enjoyment of Human Rights*, Doc. A/HRC/RES/12/18.

are only allowed when the technology necessary to treat the wastes in a safe way is not available in the country of the wastes' origin and when it is guaranteed that the country of destination possesses adequate disposal facilities. If a transboundary movement of hazardous wastes cannot be avoided by any means, the core obligation of the Basel Convention is to manage this movement and disposal in an environmentally sound manner.[9] This core obligation is expressed in procedures (based on the principle of prior informed consent) that keep each movement under permanent monitoring. Moreover, State Parties to the Basel Convention are required to criminalize the illegal traffic of hazardous wastes.

The Basel Convention was negotiated in the late 1980s, a decade in which several major incidents related to the illegal transport and disposal of hazardous wastes[10] led to public protests and a growth of awareness regarding the danger and harm of these activities. The large subscription to the Basel Convention – 178 Member States as of 2011 – shows that the subject matter does not lack general approval. Nonetheless, this thesis is based upon the determination that mere compliance with the Basel Convention is not adequate. In particular, it points out, that the illegal traffic of hazardous wastes to developing countries is barely under control.

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9 P. Birnie/ A. Boyle, *International Law and the Environment*, 2002, 433 et seq.

10 The odysseys of the cargo ships *Karin B*. and *Khian Sea* were crucial for the ascending public call for making waste trade safer and fairer. The *Karin B*. carried toxic waste from Italy to Nigeria, resulting in the dumping of reported 6.000 drums of chlorinated solvents, waste resins, and some highly toxic polychlorinated biphenyls (PBCs) in Nigeria. The Italian government ordered the wastes back, when the case was made public, but Italian authorities objected the return, forcing the *Karin B*. to wander the Mediterranean and North Sea, before Italy finally accepted the wastes back. S. Greenhouse, "Toxic Waste Boomerang: Ciao Italy!", New York Times Online 3 September 1988, available at <http://query.nytimes.com>. The *Khian Sea* was carrying 28 million pounds of municipal and industrial incinerator ash from the city of Philadelphia (United States). The ash contained dangerous and toxic compounds, including aluminum, arsenic, chromium, copper, lead, mercury, nickel, zinc and dioxins. 2000 tons of ashes were dumped in Haiti, but when the nature of the ashes came out, further dumping was consequently denied by other states. Finally, the ashes disappeared and the ship showed up at an Asian port with an empty hold and a new name, *Pelicano*; "After two years, Ship dumps toxic Ash", New York Times Online 28 November 1988, available at, see above.

Moreover, the thesis deals with the separate and unclear future of the Basel Ban Amendment. The Basel Ban Amendment was adopted by the 2nd Conference of the Parties to the Basel Convention in 1994 and implemented as an amendment to the Convention by the third Conference of the Parties in 1995. It contained an immediate ban on the export of hazardous wastes from OECD to non OECD-countries. The Ban Amendment has not yet entered into force, as it has to be ratified by three-fourths of the Parties which accepted it. This is mainly due to a conflict regarding the interpretation of article 17.5 of the Ban Agreement.[11] So far, only the EU and EFTA have implemented a regulation prohibiting hazardous wastes transports for disposal to any state which is not a member of one of these two organizations.[12]

However, inspections in major European ports designated to detect illegal transport of hazardous wastes conducted by IMPEL-TSF,[13] reveal the ongoing regularity of violations. Between e.g. 2006 and 2008, 300 hazardous wastes shipments (each of them carrying waste freights of up to hundreds of tons of waste) were found to be in non-compliance with specific regulations. 40 per cent of these wastes shipments turned out to be illegal waste transports, while a further 60 per cent violated administrative rules.[14]

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11 See in detail below and article 17 para. 5 Basel Convention, "Instruments of ratification, approval, formal confirmation or acceptance of amendments shall be deposited with the Depositary. *Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them or by at least two thirds of the Parties to the protocol concerned who accepted them*, except as may otherwise be provided in such protocol. The amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval, formal confirmation or acceptance of the amendments." (Emphasis added).

12 EC Regulation on Shipments of Wastes, Doc. 1013/2006, arts 34 and 36. Article 34 prohibits the exports of all wastes for disposal purposes to third countries (states which are not members of the EU or EFTA). According to article 36 of the Regulation, waste movements for recovery purposes are possible within the OECD.

13 Transfrontier Shipment Branch of the European Union Network for the Implementation and Enforcement of Environmental Law, available at <http://impeltfs.eu>.

14 The International Hazardous Waste Trade through Seaports, INECE-SESN Working Paper of 24 November 2009, 8, available at

From October 2008 to March 2011, further 3,897 transfrontier shipments of waste, which left European exit points, underwent physical inspections regarding compliance with the EC Waste Shipment Regulation. 833 of the inspected wastes shipments, which amount to slightly over 21 per cent, turned out to be in violation of the EC Waste Shipment Regulation requirements or related national requirements.[15]

These and other inspections indicate that the African continent is a favorite destination for many categories of European hazardous waste,[16] notwithstanding the fact that 51 African states are members of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa[17] (hereinafter, Bamako Convention). It was negotiated and adopted in order to compensate the perceived flaws of the Basel Convention, and strictly bans imports of all kinds of hazardous wastes for both disposal and recycling purposes into its Member States.

It is therefore possible to conclude that an export prohibition in the region of the generation and an import prohibition in the region of destination taken together do not successfully prevent illegal transboundary waste movements and its disposal. This thesis argues that this unsatisfying situation is due to the fact that the Basel Convention and its offspring treaties do not address the source of the problem.

The attractiveness of disposing of wastes in developing countries and those with economies in transition is, *inter alia*, due to "the disappearance of landfill sites in industrialized countries, escalating disposal costs, and the difficulty of obtaining approval for incineration facilities."[18] The increased costs of hazardous wastes disposal – coupled with a permanent urgent need for space to dispose the immense quantities of hazardous wastes produced in industrialized societies and "an increasing demand [of many developing states] for secondary base materials from waste recycling – provides an incentive for some actors to make

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<http://www.inece.org>. The Seaport Environmental Security Network of the International Network for Environmental Compliance and Enforcement is a partnership organization of government and non-government enforcement and compliance practitioners from more than 150 countries, more information available at <http://www.inece.org/seaport>.

15 IMPEL-TFS Enforcement Actions, Actions II, Final Report of 28 April 2011, 21, available at <http://impeltfs.eu>.

16 Id., see note 15, 43.

17 African Union Treaties, Bamako Convention.

18 Birnie/ Boyle, see note 9, 406 et seq.

profits through illegal operations."[19] Illegal waste movement is a profit-driven business which in most cases is conducted by private enterprises rather than state agencies, and is fueled by a constant demand for cheap waste solutions.

II. Concept of Investigation

This thesis aims to find new approaches to improve compliance with the Basel Convention. Chapter III. consists of an overview of the Basel Convention, its scope and mechanisms and the criticisms it faces. Parts IV. and V. are dedicated to the development of two different but very closely linked ideas about the development of a new compliance mechanism.

The first idea gives an initial basic overview of existing methods to ensure compliance with Multilateral Environmental Agreements (hereinafter, MEAs). It emphasizes the methods which probably respond most effectively to situations of non-compliance which derive from the predominance of economic needs and advantages over environmental considerations or from the incapability to comply. Specifically, the idea of (economic) incentives and compliance assistance, as the most feasible methods to enhance compliance, will be presented.

According to Wolfrum, compliance with MEAs, especially through State Parties with limited financial and technical resources, is best achieved by two mechanisms. "[E]ither by balancing environmental commitments by potential economic benefits which make adherence to the respective treaty and compliance therewith in general more acceptable or by assisting individual States in particular cases in the compliance with obligations entered into."[20] Regarding economic incentives used to enhance compliance with MEAs, hopes are high. For example, Montini identifies a "trend towards a progressive partial shift from the traditional command and control approach to an increased use of economic instruments for environmental regulation."[21] He further states,

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19 The International Hazardous Waste Trade through Seaports, see note 14, 4.

20 R. Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 1999, 110 et seq.

21 M. Montini, "Improving Compliance with Multilateral Environmental Agreements through Positive Measures: The Case of the Kyoto Protocol on Climate Change", in: A. Kiss/ D. Shelton/ K. Ishibashi (eds), *Economic*

that "economic instruments are particularly helpful in the environmental sector insofar as they may help achieving the goal of sustainable development."[22]

Given that the developed compliance system should be, *inter alia*, based on economic or market-based approaches, a ban on transboundary movement of hazardous wastes to developing countries might be a misguided approach to the goal of a safer system of transboundary movements of hazardous wastes. Many developing countries lack the administrative structure to properly supervise compliance with the Basel Ban or with a regional Convention that bans the import of hazardous wastes and other wastes. Indeed, illegal waste traffic is promoted rather than abolished.

Further, a ban does not take into account that many developing countries resent being generally deemed incompetent to deal with hazardous wastes. Instead, a controlled permission to transport hazardous wastes to developing countries for disposal and recycling purposes could constitute an economically valuable option for these countries to develop a highly-productive and environmentally sound industry – if the right conditions are met. This thesis will highlight how controlled global movement of hazardous wastes could even improve compliance with the Basel Convention. Additional to an economically driven compliance system, the thesis will suggest "back-up" mechanisms that are not yet integrated in the Basel Convention. Examples of such mechanisms could be either random on-site inspections on waste treatment facilities in any country or movement permits based on the eligibility of waste treatment facilities.

The second idea departs from the fact that economic incentives and compliance assistance methods are both closely related to the finance mechanisms of MEAs. This is due to the fact that their application generally depends on the monetary resources available to a convention to use for this purpose. The Basel Convention indeed provides for a compliance assistance mechanism and a fund to finance compliance projects for State Parties in need. It suffers, though, from a chronic lack of resources. For example, voluntary State Party donations, which constitute the main source to finance compliance projects, are insufficient and generally not in time. Simultaneously to the review of compliance enhancement measures, this paper will scrutinize the finance systems ap-

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Globalization and Compliance with International Environmental Agreements, 2003, 168 et seq.

22 Montini, see note 21, 168 et seq.

plied in other MEAs and the successful interplay that finance systems and economic incentives are able to develop if adequate market-based schemes are applied. It will present examples of MEAs whose performance regarding this interplay between incentives, assistance and funding is – put bluntly – much more successful than through the application of the Basel Convention. Specifically, two MEAs will be analyzed in Part V. in order to examine whether their strategies and mechanisms could be useful for the compliance system of the Basel Convention. The MEAs chosen to be examined for these purposes are the Montreal Protocol on Substances that Deplete the Ozone Layer[23] and the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[24] Both MEAs are universal and rather old and, according to the treaty design distinction of Wolfrum, "result-orientated",[25] since they provide for rigorous reduction goals of the use and production of the respective substances they address, and for strict time-frames for countries to reach certain reduction levels. Nonetheless, these MEAs are chosen because they use economic incentives and compliance assistance measures, but they use different approaches: for example, the Montreal Protocol, similarly to the Basel Convention, bases its incentives and compliance support on the classical system of developed State Parties contributing to a fund that is used to finance compliance in developing State Parties. However, contrary to the Basel Convention Technical Trust Fund, contributions to the Multilateral Fund for the Implementation of the Montreal Protocol (MPMF) are obligatory. This fund applies a traditional incentives approach which does not address projects in developed State Parties. For its part, the Kyoto Protocol, apart from applying the classical approach of "developed States financing compliance in developing States", provides for some economic features which are amongst the most innovative of their kind: a market-based Emission Trading system, that can be joined by developed State Parties and a secondary funding system which, apart from receiving traditional state donations, is co-financed by the Clean Development Mechanism: the monetary equivalent of two per cent of those Emission

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23 Available at <http://unfccc.int>.

24 Ibid.

25 U. Beyerlin/ P. Stoll/ R. Wolfrum, "Conclusions drawn from the Conference on Ensuring Compliance with MEAs", in: U. Beyerlin/ P. Stoll/ R. Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice*, 2006, 260 et seq., see Chapter IV.

Trading Units, developed states generate through carrying out global-warming-projects in developing countries, go into the fund.

The stimuli and ideas extracted from literature and other MEAs will be recapitulated at the end of Part VI. The idea of a Basel Convention that facilitates legal waste trade and is supported by Member States motivated to improve the current situation by the incentives elaborated in this paper will be revisited.

III. The Basel Convention: History, Scope, Mechanisms

1. History and Background

The Basel Convention was negotiated following various high profile cases of major pollution and fraud regarding shipments of hazardous wastes for disposal purposes abroad. Acknowledging that the Convention's non-binding, recommendatory antecedent document, the "Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes" needed to be supplemented by a binding treaty, the Governing Council of the UNEP[26] mandated its Executive Director to form a working group designated to develop a global convention regarding transboundary movements of hazardous wastes. The working group's draft convention was adopted by the UNEP Governing Council in June 1987.[27] In the framework of an international conference held in Basel, Switzerland, from 20-22 March 1989, the draft convention was adopted by the participating parties. The Basel Convention entered into force on 5 May 1992, when the requirement of 20 ratifications was finally met. At present, the Basel Convention is one of the most extensive global MEAs. With currently 178 State Parties[28] it has almost universal membership. The United States, Haiti and Afghanistan are signatory states to the Basel Convention, but have not ratified it yet.[29]

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26 More information available at <http://www.unep.org>.

27 UNEP *Report of the Governing Council on the Work of its 14th Sess.*, 8-19 June 1987, GAOR 42nd Sess. Suppl. No. 25; *Adoption of Draft Decision 14/30 on Environmentally Sound Management of Hazardous Wastes*, Doc. UNEP/GC.14/L.37–M, paras 125-127.

28 Available at <http://www.basel.int/ratif/convention.htm>.

29 Information available at, see above.

2. Scope

"Wastes" being defined in article 2, are defined as hazardous by the Basel Convention, when either listed in Annex I of the Convention or when considered to be hazardous by the domestic legislation of a Member State.[30] Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be "other wastes" for the purposes of the Convention.[31] Annex I includes, *inter alia*, clinical wastes from medical care in hospitals, waste substances and articles containing or being contaminated with polychlorinated biphenyls (PCBs) or waste containing arsenic, selenium or cadmium compounds.[32] Additionally, these wastes have to demonstrate at least one of the hazardous characteristics listed in Annex III, like flammability, toxicity or explosiveness.[33] "Other Wastes" include household wastes and residues arising from the incineration of household wastes.[34] Every State Party has the obligation to report to the Basel Secretariat within six months from the beginning of its membership, which wastes other than in Annex I of the Convention are considered to be hazardous under national legislation.[35] "Disposal", according to the Basel Convention, encompasses both disposal and recycling.[36]

Trade in hazardous substances not intended for disposal, such as chemicals, is not subject to regulation by the Basel Convention.[37] This issue is primarily addressed by the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention),[38] developed by FAO and UNEP and adopted in 1998. Further excluded from the scope of the Basel Convention is radioactive waste,[39] given that it is

30 Basel Convention, article 1 para. 1 lit. a and b.
31 Ibid., article 1 para. 2.
32 Ibid., Annex I Categories of Wastes to be Controlled, Y 1, 10, 23, 24, 25.
33 Ibid., Annex III List of Hazardous Characteristics.
34 Ibid., Annex II, Categories of Wastes requiring Special Consideration, Y 46, 47.
35 Ibid., article 3 para.1.
36 Ibid., article 2 para. 4 and Annex IV Disposal Operations.
37 Birnie/ Boyle, see note 9, 430 et seq.
38 More information available at <http://www.pic.int/home>.
39 Basel Convention, article 1 para. 3.

subject to other regulatory regimes and wastes arising from the "normal operations of a ship.[40]"

3. Trade Restrictions and Exceptions

Though it constitutes its prime topic of regulation, the Basel Convention does not address the transboundary movement of hazardous wastes as the first issue. Rather, it calls upon the Member States to reduce the "generation [of hazardous wastes and other wastes] to a minimum in terms of quantity and/or hazardous potential"[41] and to dispose of their wastes in their own territories, "as far as it is compatible with environmentally sound and efficient management."[42] Kiss and Shelton would go as far as to say that "one of its [the Basel Convention's] objectives is to make the movement of hazardous wastes so costly and difficult that industry will find it more profitable to cut down on waste production."[43] In certain specified cases, the transboundary movement of hazardous wastes is prohibited. This is the case when a State Party decides to prohibit the import of any hazardous wastes covered by the Basel Convention into its national territory.[44] Further, export of hazardous wastes to non-parties[45] and to the world regions which are located in the area south of 60° South latitude[46] is prohibited. The Non-Party prohibition is subject to an exception when the wastes in question are covered by agreements or arrangements which are compatible with the environmentally sound management of hazardous wastes and other wastes as required by the Basel Convention.[47]

This is reflected e.g. in the OECD Guidance Manual for the Control of Transboundary Movements of Recoverable Wastes, Council Decision C (2001) 107/FINAL, 8, where it says: "The Decision recognized

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40 Ibid., article 1 para. 4.

41 Ibid., Preamble, para. 3.

42 Basel Convention, Preamble, para. 8.

43 A. Kiss/ D. Shelton, *Guide to International Environmental Law*, 2007, 212 et seq.

44 Basel Convention, article 4 para. 1 lit. a.

45 Ibid., article 4 para. 5.

46 Ibid., article 4 para. 6.

47 Ibid., article 11. See also A. Daniel, "Hazardous Wastes, Transboundary Impacts", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012.

the desirability of appropriately controlled international trade in waste materials destined for recovery, and that efficient and environmentally sound management of waste may justify some transfrontier movements in order to make use of adequate recovery or disposal facilities in other countries."[48] Many developing countries, though, considered transboundary waste trade an "unacceptable practice"[49] which they sought to abolish completely. This opinion prevailed especially amongst the Member States of the OAU.

Article 11 of the Basel Convention was designated to mitigate this divergence. Based on article 11, State Parties can enter into agreements on waste movements to and from non-parties or implement a stricter regime regarding transboundary waste movement than the Basel Convention. Article 11 grants the possibility for State Parties to enter into bilateral, multilateral and regional agreements, both with other State Parties and non-parties.

Current examples of regional conventions that regulate transboundary movements of hazardous wastes are, *inter alia*, the already mentioned Bamako Convention,[50] the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal[51] from 1996, the Protocol to the UNEP Convention for the Protection of the Mediterranean Sea against Pollution and the Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region[52] from 1995. All of them prohibit the import of hazardous wastes into the territory of their State Parties.

As already mentioned, the second Conference of the State Parties to the Basel Convention in 1994 agreed on a complete ban on the movement of hazardous wastes from OECD to non-OECD countries intended for final disposal. Transboundary movements for recycling purposes should be phased out by 31 December 1997. The third Conference of the State Parties decided in 1995 to implement the ban as an

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48 See, for example: OECD, Guidance Manual for the Control of Transboundary Movements of Recoverable Wastes, Council Decision C (2001) 107/Final, 8 et seq.

49 Birnie/ Boyle, see note 9, 428 et seq.

50 See under "Introduction" in this paper.

51 Available at <http://www.basel.int>.

52 Available at <http://www.sprep.org>.

amendment to the Basel Convention.[53] The ban has not entered into force, as mentioned above, basically, because it is not clear to what date the ratification requirement of three-fourth of the State Parties refers. Supporters of the Basel Ban Amendment claim that the requirement of three-fourth historically refers to three-fourth of the total number of State Parties at the time of the amendment. This would equal 62 ratifications from the then 82 State Parties. To date 69 Parties have ratified the ban; accordingly, it could already have entered into force.[54] On 5 May 2004, though, the United Nations Office of Legal Affairs issued an interpretation of article 17 para. 5 Basel Convention, recommending a "current time approach" to interpret the ratification requirement. "In such circumstances, the Secretary-General [as depositary] is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment (the current time approach)."[55] A newer attempt to solve this deadlock was conducted by 118 Basel Member States at the 10th Conference of the Parties in Cartagena, Columbia, in October 2011, by agreeing on a possible bar for the entry into force of the Basel Ban Amendment. As decided in the so-called CLI ("Country Led Initiative") the Amendment will enter into force for those State Parties which want to adhere to it once additional 17 parties ratify it.[56]

4. Organs

The Organs of the Basel Convention are designated to achieve and monitor compliance with this MEA, to promote cooperation and to review and further develop the Convention's mechanisms and strategies. The head organ of the Basel Convention is the Conference of the Par-

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53 Basel Convention, article 4A para. 1 states that "[e]ach Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII"; see also UNEP *Report of the 3rd Mtg of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Doc. UNEP/CHW.3/34.

54 Information available at <http://www.basel.int>.

55 Recommendation of 5 May 2004 from the United Nations Office of Legal Affairs, available at <http://www.basel.int/legalmatters>.

56 Indonesian-Swiss Country led Initiative to improve the effectiveness of the Basel Convention, Doc. UNEP/CH.10/5.

ties (hereinafter: COP), which consists of representatives of the governments of all State Parties. It is the governing body of the Basel Convention and meets at intervals of approximately one to three years. During these meetings, the COP is supposed to carry out a revision of the implementation processes in and the cooperation amongst the Basel Convention State Parties and on the results of compliance strategies developed in prior meetings. The COP decides on the *modus operandi* in order to maintain and improve compliance with the Basel Convention. In order to constantly improve the Basel Convention's performance, the COP has the faculty to not only amend the Convention and its Annexes,[57] but also to adopt protocols to the Convention[58] and to establish subsidiary bodies endowed with specified tasks and duties, when considered necessary.[59] The COP has made use of all of these possibilities. In order to be sufficiently prepared in these meetings, the COP has a permanently established assistant body, the Open Ended Working Group (OEWG), which is supposed to review the implementation of the COP's decisions and of the Convention in general.

The Secretariat is a permanent institution and serves as the administrative and executive body of the Basel Convention. Its office is located in Geneva, Switzerland. It is the center where all the information of the Member States regarding the Basel Convention is handed in, collected, interpreted and distributed to the COP and to the Member States. State Parties are supposed to report to the Secretariat, which then prepares and transmits reports based on the information received.[60] Further, the Secretariat prepares the COP and other meetings,[61] reports its own activities before the COP[62] and serves as a contact point for any technical party enquiry. The Secretariat also has an assistant body, the Extended Bureau. State Parties which are, *inter alia*, in search of technical know-how, assistance regarding the handling of the notification system of the Convention or a consulting firm in order to conduct examinations on wastes or treatment facilities[63] can approach the Secretariat in order to receive search assistance, data, or addresses, if available. The Secretariat's faculties are strictly limited to these competences of execution

57 Basel Convention, article 15 para. 5 lit. b.
58 Ibid., article 15 para. 5 lit. d.
59 Ibid., article 15 para. 5 lit. e.
60 Ibid., article 16 para. 1 lit. b.
61 Ibid.
62 Ibid., article 16 para. 1 lit. c.
63 Ibid., article 16 para. 1 lit. g.

and assistance; it is not designated to do its own verification or control work on the reports that are submitted to it.

5. Regional Centers

The Basel Convention tries to respond to the gap regarding the availability of technology and funds that exists between developed State Parties and developing State Parties or Parties with economies in transition. Its preamble deals with the existing concern about "the limited capabilities of the developing countries to manage hazardous wastes and other wastes"[64] by immediately pronouncing an answer to the problem of technology transfer, especially to developing countries.[65] The idea of technology transfer stems from the overall concept of international cooperation to address the problem of transboundary waste movements and disposal.[66] While drafting the Basel Convention, the idea of creating regional centers which should assist with compliance and implementation and distribute technology and training to regions in need, was foreseen and implemented in article 14.[67] From 1994 on, the wish to establish Basel Convention Regional Centers – (hereinafter: BCRCs) was reiterated in several COP Decisions[68] and an election of headquar-

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64 Basel Convention, Preamble para. 20.

65 Ibid., Preamble para. 21.

66 Ibid., article 10 para. 2 lit. d.: "[t]o this end, the Parties shall: (…) cooperate actively, subject to their national laws, regulations and policies, in the transfer of technology and management systems related to the environmentally sound management of hazardous wastes and other wastes. They shall also co-operate in developing the technical capacity among Parties, especially those which may need and request technical assistance in this field."

67 Ibid., article 14 para. 1: "[t]he Parties agree that, according to the specific needs of different regions and subregions, regional or sub-regional centres for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation should be established. The Parties shall decide on the establishment of appropriate funding mechanisms of a voluntary nature."

68 UNEP *Report of the 1st Mtg Meeting of the Conference of the Parties to the Basel Convention*, Decision I/13, *Establishment of Regional Centers for Training and Technology Transfer*, Doc. UNEP/CHW.1/24; UNEP *Report of the 3rd Mtg of the Conference of the Parties to the Basel Convention*, Decision III/19, *Establishment of Regional or Sub-Regional Centres for Training and Technology Transfer Regarding the Management of Hazard-*

ters began. Today there exist 14 BCRCs (four in Africa, four in Asia, three in Central and Eastern Europe, three in Latin America). According to COP Decision VI/3, their core functions are to identify, develop and strengthen mechanisms for the transfer of technology, conduct training programs and workshops on environmentally sound management of wastes and on minimization of waste-generation.[69] They also should serve as focal points for the collection and provision of information regarding technology and know-how, implementation assistance, and conduct networking between State Parties.[70] Furthermore, they are supposed to coordinate regional cooperation between the Rotterdam, Stockholm and Basel Conventions. Most of the centers are founded as national legal entities of the host state. Each center is supposed to create its own funding strategy, which should involve the host states, the private sector, environmental NGOs and international organizations. The sources of the Basel Convention's own Technical Trust Fund are partly dedicated to the BCRCs.

6. Finances

The finance system of the Basel Convention is best described as a ragbag, since at first no coherent and encompassing strategy existed. Provisions regarding finances are found in separate articles in the Convention itself, but they refer more to the creation of financial back-up mechanisms for specific situations than to a general compliance funding system. According to article 6 para. 11, transboundary waste movements shall be covered by insurance, bond or other guarantee as may be required by a state of import or any state of transit which is a party.[71] Further, article 14 para. 2 states that "the establishment of a revolving fund to assist on an interim basis in case of emergency situations to minimize damage from accidents arising from transboundary move-

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ous Wastes and other Wastes and the Minimization of their Generation, Doc. UNEP/CHW.3/35; UNEP *Report of the 7th Mtg of the Conference of the Parties to the Basel Convention*, Decision VII/9, *Basel Convention Regional Centres: Report on Progress*, Doc. UNEP/CHW.7/INF/7.

69 UNEP *Report of the 6th Mtg of the Conference of the Parties to the Basel Convention*, Doc. UNEP/CHW.6/4.

70 Ibid.

71 Article 6 para. 11 Basel Convention.

ments of hazardous wastes and other wastes or during the disposal of those wastes" shall be considered by the Parties.[72]

A comprehensive attempt to concretize article 14 para. 2 Basel Convention was established through the foundation of two funds: a Trust Fund for the Basel Convention and a Trust Fund to Assist Developing Countries and Other Countries in Need of Technical Assistance in the implementation of the Basel Convention (Technical Trust Fund). Both were established during the first COP in 1992. The Trust Fund basically serves to cover "the ordinary expenditure of the Secretariat (…)"[73] and is financed by non-obligatory contributions of the State Parties. State Party contributions are based on the United Nations' scale of assessments.[74] Voluntary donations of Non-members or NGOs are also possible. The Technical Trust Fund was founded with the objective to "assist Developing Countries and other Countries in Need of Technical Assistance in the Implementation (…)"[75] and provides support for: (a) technical assistance, training, and capacity building; (b) the Basel Convention Regional Centers; (c) participation of the representatives of developing country parties and parties with economies in transition in Convention Meetings.[76] It is managed by the Secretariat, which is fully accountable to the COP. It is supposed to serve as the Basel Convention's main source to address the needs its State Parties might have in order to fulfill their obligations. It should especially be designated to grant financial support to compliance activities taking place in the world's economically weaker regions. Accordingly, it constitutes one of the Basel Convention's major compliance assistance instruments. According to the Study of Possible Options for Lasting and Sustainable Financial Mechanisms, conducted by UNEP and FAO, the Technical Trust Fund "has successfully provided assistance to numerous developing country party representatives so that they might attend convention meetings."[77]

The 5th COP in 1999 decided furthermore that parties suffering from an accident that occurred during a transnational movement of

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72 Ibid., article 14 para. 2.

73 See note 68.

74 Ibid.

75 Available at <http://www.basel.int>.

76 UNEP/FAO *Study of Possible Options for Lasting and Sustainable Financial Mechanisms*, Doc. UNEP/FAO/RC/COP.3/13.9 and E. Brown Weiss/S. McCaffrey, *International Law and Policy*, 2nd edition 2006, 1070 et seq.

77 UNEP/FAO, see note 76, 11 et seq.

hazardous wastes should be eligible to receive financial support from the Technical Trust Fund as emergency assistance and compensation for damage.[78] The Fund might also be used to cover costs that arise from a situation covered by the Basel Liability Protocol, if the liable perpetrator cannot be found or is not in a position to make the payment himself.[79] Until the waste is handed over to the disposer, the exporter or generator of the waste who has the obligation to notify the transnational movement according to article 6 Basel Convention is liable for damages. Later on the disposer is liable. The Technical Trust Fund is financed by voluntary donations of undefined amounts by State Parties and Non-Parties and, occasionally, by international organizations or NGOs. In the biennium 2008/2009, the Basel Convention Trust Fund had a total income (consisting of voluntary donations, interest income and miscellaneous income) of 7.2 Million US$.[80] In the same period, the Technical Trust Fund received 2.6 Million US$.[81] As of 30 September 2011, the Trust Fund had received only 4.1 Million US$,[82] while the Technical Trust Fund had received 1.1 Million US$ regarding the same period.[83]

7. Duties of the Member States

It is the Member States' first duty to take appropriate legal, administrative and other measures to implement and enforce the provisions of the Convention including measures to prevent and punish conduct in contravention of the Convention. Furthermore, State Parties have to comply with extensive and detailed information and publication requirements. First and foremost, these duties include the implementation of the Prior Informed Consent Procedure and the waste tracking system inherent to the Basel Convention. State Parties have to designate one or

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78 UNEP *Report of the 5th Mtg of the Conference of the Parties to the Basel Convention*, Doc. UNEP/CHW.5/29, 58 et seq.

79 Ibid.

80 Trust Fund for the Basel Convention: Status of Contributions as at 31 December 2008 and 30 September 2009.

81 Technical Trust Fund For the Basel Convention: Status of Contributions as at 31 December 2008 and 30 September 2009.

82 Trust Fund for the Basel Convention: Status of Contributions as at 30 September 2011.

83 Technical Trust Fund for the Basel Convention. Status of Contributions as at 30 September 2011.

more competent authorities and one focal point,[84] which are in charge of the supervising and informational duties and have to respond to enquiries of national actors. These bodies have to be announced to the Secretariat within the first three months of the date the Convention enters into force for each State Party.

Through these bodies, which hand information over to the Secretariat, the Parties have to inform each other about any relevant decisions (e.g. a change of policies regarding the acceptance of imports of hazardous wastes into their territory) or occurrences (e.g. accidents).[85] Furthermore, before the end of each calendar year they have to hand over detailed information regarding the conduct of transboundary movements of hazardous wastes and other wastes, and their disposal in the previous year.[86] This information is compiled in a public annual report by the Secretary. The principle of the crucial Prior Informed Consent Procedure is that receiver and transit states have to give their "prior, informed and written consent"[87] before hazardous waste is moved into or through their territory. Transit states that are Parties to the Convention can waive this requirement.[88] However, if they wish to do so, they have to inform the other State Parties beforehand through the Secretariat.[89]

Crucial actors in a successful Prior Informed Consent Procedure are the competent authorities of the states of export, transit and import of the wastes. The authority of the exporting state (or the waste generator or exporter through the authority) notifies the purpose of a waste export/transit to the states of import or transit. This notification has to contain sufficient information in order to ensure that these states can make their decisions on an "informed" basis. A prospective state of import or transfer has to receive enough information to be able to "assess the possible environmental impacts of the proposed transfer, as a basis

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84 Basel Convention, article 5 paras 1 and 2.

85 Ibid., article 13 para. 2 lit. e.

86 The requested information has to contain data about, *inter alia*, the amount, categories, characteristics, origin and destination, transit states and disposal method of the wastes imported or exported, descriptions about the measures taken to reduce or eliminate waste generation, or information about measures taken in order to implement the Convention, Basel Convention, article 13 para. 3.

87 Birnie/ Boyle, see note 9, 431 et seq.

88 Basel Convention, article 6 para. 4.

89 Ibid., article 13 para. 2.

for its decision whether or not to accept the proposed transfer."[90] The Basel Convention regulates what kind of information should be provided.[91] States of import and transit have to answer in writing through their respective competent authorities whether they consent to the movement, deny it, or whether they need further information.

The key of the system is that the competent authority of the State Party of export "shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that: (a) The notifier has received the written consent of the State of import; and (b) The notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question."[92] It is due to the Prior Informed Consent Procedure that Birnie calls the Basel Convention a unique mechanism that is "thus based on a system of environmental responsibility shared among all states involved in each transaction."[93]

The tracking system is based on the use of a movement document that has to be signed by every person who is in charge during the ongoing transboundary movement. The movement document consists of a standardized set of information requirements that facilitate tracking.[94] As soon as the wastes arrive at their disposal site of destination, the disposer has to inform both the exporter and the competent authority of the exporting state of the arrival and of the completion of the due disposal. If these notifications do not arrive, the state of the exporter is supposed to alert the state of the importer.[95] As a general obligation, State Parties are supposed to promote the reduction of the generation of wastes to a minimum,[96] in order to ensure the availability of adequate disposal sites within their territory[97] and that the personnel involved is sufficiently trained.[98] Further, states are held to cooperate[99] and to en-

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90 K. Kummer-Peiry, "Prior informed consent", in: Wolfrum, see note 47, 1 et seq.

91 Basel Convention, Annex V A.

92 Ibid., article 6 para. 3 lit. a and b.

93 Birnie/ Boyle, see note 9, 430 et seq.

94 Daniel, see note 47, 4 et seq.

95 Basel Convention, article 6 para. 9.

96 Ibid., article 4 para. 2 lit. a.

97 Ibid., article 4 para. 2 lit. b.

98 Ibid., article 4 para. 2 lit. c.

99 Ibid., article 10.

sure the environmentally sound management of wastes, both in their own territory and, as far as possible, in other states. A State Party to the Basel Convention that has reason to believe that hazardous wastes will not be treated in an environmentally sound manner in its own territory shall prohibit the import of the wastes in question.[100] When doubts arise about the ability of another State Party to treat wastes in an environmentally sound manner, states are supposed to prevent exports of wastes to these states.[101]

The Basel Convention does not provide a detailed description of "environmentally sound management"[102] of wastes, but the COP regularly establishes legally non-binding "technical guidelines."[103] They define what is meant by "environmentally sound management" of different types of wastes.[104] Parties have progressively been developing these guidelines since 1994, including the following criteria to assess the soundness of certain waste movements: whether the regulatory and enforcement infrastructure can ensure compliance; whether waste sites are authorized and are of adequate standard to deal with the waste in question; whether operators of wastes sites are adequately trained; whether sites are monitored; whether waste generation is minimized through best practice and clean production methods.[105] Birnie concludes that these guidelines are not obligatory. However, their adoption by the Parties gives them persuasive force as a basic standard for states in order to fulfill their obligations under the Basel Convention.[106]

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100 Ibid., article 4 para. 2 lit. g.

101 Ibid., article 4 para. 2 lit. e.

102 Basel Convention, article 2 para. 8 "'Environmentally sound management of hazardous wastes or other wastes' means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."

103 Available at <http://www.basel.int>.

104 Up to January 2011, 15 technical guidelines were existent, as draft documents or already adopted by the Conference of the Parties. They refer, *inter alia,* to environmentally sound management of Persistent Organic Polluters (POPs), dismantled ships, used car tires or substances containing polychlorinated biphenyls or DDT.

105 Basel Convention Technical Working Group: *Guidance Document on the Preparation of Technical Guidelines for the Environmentally Sound Management of Wastes Subject to the Basel Convention.*

106 Birnie/ Boyle, see note 9, 433 et seq.

Transboundary waste movements that take place without notification, without positive response from the state of import, with consent obtained fraudulently, are not in conformity with the documents accompanying the procedure or that will result in deliberate illegal disposal are deemed to be "illegal traffic" by the Basel Convention.[107] State Parties are supposed to consider illegal traffic in hazardous wastes and other wastes as criminal[108] and shall take appropriate legal measures in order to guarantee juridical prosecution.[109] The state of origin of the waste generally faces a duty to re-import the waste in question.[110]

In order to address the need to clarify responsibilities and indemnification duties in case of incidents related to transboundary movements of wastes, the COP adopted the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal[111] (hereinafter: Liability Protocol) in 1999. This Protocol defines exactly the responsibilities of all actors involved in a transaction and is also effective regarding illegal traffic. The person that notified the shipment pursuant to article 6.1 Basel Convention is liable for damage resulting from a transboundary movement or disposal of hazardous wastes.[112] Liability shifts to the disposer once he has taken possession of the waste.[113] The Liability Protocol is not yet in force, demanding twenty ratifications to enter into force. By November 2011, it had only received ten ratifications.

8. Compliance Mechanism

In order to strengthen the assertiveness of the Basel Convention the Parties decided to implement a Mechanism for Promoting Implementation and Compliance. This mechanism was established by Decision VI/12 during the 6th COP in 2002 as a subsidiary body to the COP

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107 Basel Convention, article 9.

108 Ibid., article 4 para. 3.

109 Ibid., article 9 para. 5.

110 Ibid., arts 8 and 9 para. 2 lit. a.

111 Decision V/9 of the Conference of the Parties and the Open ended Working-Group, *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*, available at <http://www.basel.int>.

112 L. Bergkamp, *Liability and Environment*, 2001, 36 et seq.

113 Bergkamp, see note 112, 36 et seq.

under article 15 para. 5 lit. e of the Convention.[114] The objective of the mechanism is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, and monitor the implementation of and compliance with the obligations under the Basel Convention.[115] These faculties are conducted by the 15 member Basel Convention Implementation and Compliance Committee (hereinafter: Compliance Committee) and have to be exercised in a manner that is "non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention."[116]

There are two ways in which the Compliance Committee may act: Specific Submissions (article 9) and General Reviews (article 21). The specific submission procedure may be triggered by Parties which announce their own struggle complying with the Basel Convention[117] to the Committee (Self-Trigger) or by a Party that is concerned about incompliance of another Party with which it is directly involved under the Basel Convention.[118] This Party-to-Party Trigger is therefore narrowed to the possibility of announcing incompliance of other State Parties only in situations related to a specific transaction under the Basel Convention. Finally, the Secretariat may trigger compliance difficulties of a Party which are related to the reporting and information obligations under article 13 para. 3 of the Convention[119] (Secretariat Trigger). According to Shibata, the purpose of this restriction is to limit the authority of the Secretariat so that it will not actively investigate and search for possible compliance difficulties faced by the Parties.[120]

The Party-to-Party Trigger and the Secretariat Trigger require prior consultations with the Party in question before the Compliance Committee starts investigating. If these consultations do not render satisfactory results, the Committee may start a "facilitative procedure": it tries to determine the prime roots and causes of the compliance problem and

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114 UNEP Brochure, *The Basel Convention Mechanism for Promoting Implementation and Compliance*, 3 et seq.

115 UNEP Basel Convention Compliance Committee, *Terms of Reference*, Doc. UNEP/P/CHW.6/40, Decision VI/12.

116 Terms of Reference, article 3, see note 115.

117 Ibid., article 9 lit. a.

118 Ibid., article 9 lit. b.

119 Ibid., article 9 lit. c.

120 A. Shibata, "The Basel Compliance Mechanism", *RECIEL* 12 (2003), 183 et seq. (191).

offers assistance in solving it. It can provide the Party with advice, non-binding recommendations or information regarding the strengthening of the Party's domestic regulatory regime or the elaboration of voluntary compliance plans and follow-up agreements. The Committee does not provide financial and technical assistance, but it provides advice regarding access to this assistance.[121] As a secondary measure, the Committee may ask the COP to give further advice and make statements. In the worst case, the COP can issue a "Cautionary Statement."[122] It is the only measure under the mechanism which has a negative connotation.[123] As an auxiliary activity, the Compliance Committee may conduct general reviews on issues of compliance and implementation under the Convention. It can do so, if asked by the COP, or on its (own) decision regarding any general issue that may have arisen while undertaking its prime function of dealing with specific submissions.[124]

The success of the Compliance Committee is questionable. In its report to the 9th COP in June 2008, the Compliance Committee stated that by the date of its 6th Committee Meeting in February 2008 no specific submission according to article 9 of the Terms of Reference had been made.[125] At the same conference, the Committee itself presented a list of flaws that might cause this negligence,[126] *inter alia*, the inability of the Committee to initiate consideration of a particular case of implementation and compliance difficulties of which it becomes aware or the lack of resources to assist Parties that are determined to face difficulties in implementation and compliance.

9. Criticized Deficiencies of the Basel Convention

When the Basel Convention entered into force it was celebrated as a milestone that would make international waste trade fairer, safer and more transparent and would effectively fight illegal waste traffic. It was called "one of the international agreements at the forefront of integrat-

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121 Shibata, see note 120, 193.

122 Terms of Reference, article 20 lit. b, see note 115.

123 Shibata, see note 120, 194.

124 Terms of Reference, arts 21 and 24, see note 115.

125 *Report of the Compliance Committee and Work Program for the Committee for the Period 2009-2010*, Docs UNEP/CHW/CC/7/10 and UNEP/CHW/CC/7/5, article 26.

126 See note 125, article 26 lit. a – e.

ing environmental justice principles into global international trade."[127] Transboundary movements of hazardous wastes would no longer be solely governed by international soft-law instruments, like the Cairo Guidelines, and national legislations regarding liability and conflict of laws, but would receive appropriate, treaty-based regulation. Today, criticisms of the Basel Convention range from calling it a "relative success"[128] to a "woeful shortfall in achieving environmental justice."[129] Severe incidents of waste pollution like the *Trafigura* Case in Côte d'Ivoire or the repeated detections of attempts to illegally move hazardous wastes from European ports to Africa or Asia indeed show that the Basel Convention is lacking teeth, especially when it comes to the prevention of illegal traffic of wastes and accidents related to it. Daniel describes four essential weaknesses of the Basel Convention regarding the performance of the State Parties: "Failure to report, failure to appoint competent authorities, failure to adopt implementing legislation and non-compliance related to illegal traffic."[130]

The following section will give a short overview about the most common criticisms of the Basel Convention. According to article 13 para. 3 State Parties are supposed to hand in an annual report of their activities regarding the transboundary movement of hazardous wastes to the COP through the Secretariat. This reporting system does not work effectively, which is, in the first place, due to the fact that some State Parties to the Basel Convention still fail to do adequate reporting or indeed any reporting at all. This is a crucial flaw, since reporting systems, together with inspection or external monitoring "constitute the foundation of any effective scheme of compliance control, for they provide the factual state of compliance by Parties with treaty obligations."[131] Even more drastic, Chayes, Handler Chayes and Mitchell

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127 V. Blayre Campbell, "Ghost Ships and Recycling Pollution: Sending America's Trash to Europe", *Tulsa Journal of Comparative and International Law* 12 (2004-2005), 189 et seq. (212).

128 Birnie/ Boyle, see note 9, 438.

129 L. Widawsky, "In my Backyard: How enabling Hazardous Waste Trade to Developing Nations can improve the Basel Convention's Ability to achieve Environmental Justice", *Lewis & Clark Law Schools Environmental Law* 38 (2008), 577 et seq. (581).

130 Daniel, see note 47, 3.

131 A. Shibata, "Ensuring Compliance with the Basel Convention – its unique features", in: Beyerlin/ Stoll/ Wolfrum, see note 25, 69.

state that "non-reporting is often small in itself but may prove to be indicative of more significant forms on noncompliance."[132]

No or insufficient reporting leads to a condition of non-transparency which frustrates any attempt to compare or assess a nation's compliance rates and might even serve as a disincentive to report properly for the other State Parties. Moreover, the Secretariat announced during the 7th Report Session of the Compliance Committee in June 2009 that by 2006 twelve Parties had not yet handed in any annual reports since the Basel Convention came into force for them, 112 Parties had handed in incomplete reports. Another 77 Parties had not yet submitted their 2006 report by the date of the Report Session.[133] By 20 July 2009, 92 Parties had not transmitted a report for 2007.[134] However, the malfunctioning of the reporting system cannot be attributed to the State Parties alone. The Secretariat has the obligation to "prepare and transmit reports based upon information received in accordance with Articles 3, 4, 6, 11 and 13 (…)."[135] Read together with article 13, the Secretariat may prepare its independent reports on the status of implementation by the Parties.[136] This includes that the Secretariat might even give its own statement about the annual compliance situation, including an opinion about each country's performance. But the Secretariat has restrained itself from making use of the possibility of making commentaries right to the Parties. In fact, "it has demonstrated some restraint, having prepared only a 'compilation' of the annual reports submitted by the Parties as well as more concise 'Country Fact Sheets'."[137] The latest comparable data regarding imports and exports of hazardous wastes and other wastes which are directly accessible to the State Parties and are not hidden in one of the numerous protocols provided on the home-

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132 A. Chayes/ A. Handler Chayes/ R.B. Mitchell, "Managing Compliance. A Comparative Perspective", in: E. Brown Weiss/ H. Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, 2000, 39 et seq. (39).

133 UNEP *Report of the 7th Sess. of the Basel Convention Implementation and Compliance Committee 25-26 June 2009*, Doc. UNEP/CHW/CC/7/10, item 4 of 3 August 2009.

134 UNEP *Report Status of National Reporting 2007 by Parties to the Basel Convention pursuant to Article 13 para. 3 of the Convention, as of 20 July 2009*. This report does not differentiate between Parties which actually never have handed in a report or handed in an incomplete or invalid report.

135 Basel Convention, article 16 para. 1 lit. b.

136 Shibata, see note 131, 71.

137 Ibid.

page of the Basel Convention date back to 2004. And last but not least, Shibata states, that the COP, which according to article 15 para. 5 Basel Convention "shall keep under continuous review and evaluation the effective implementation of this Convention", does not fulfill its task: "In practice, however, the COP and its subsidiary body, the Open-Ended Working Group (OEWG), undertakes neither a review of each individual report nor a substantive evaluation of the Secretariat's compilation reports."[138] He finally analyses: "Thus, while the reporting system has been formally established under the Basel Convention, in practice, this system has not been fully utilized as a compliance control mechanism."[139]

Another common point of criticism of the Basel Convention is the fact that there is no effective system of control. As far as compliance control is concerned, the Compliance Committee is permitted to act only in response to one of the triggers listed in article 9. It does not have any monitoring function regarding any given current waste transactions and does not review the annual reports.[140] The Secretariat's power to investigate and to review compliance with the Basel Convention in the Member States is similarly limited. Its facility to trigger the Compliance Committee is limited to situations of non-compliance with the Parties reporting obligations under article 13 para. 3.[141] The Verification provision in article 19 of the Basel Convention grants the possibility to Parties to inform the Secretariat of a possible breach of obligations by any other Party, if it has reason to suspect so.[142] In contrast to the Party-to-Party Trigger of the Compliance Mechanism, direct involvement under the Basel Convention with the Party in question is not required. Any Party can make allegations against any other Party, only with the condition to inform this Party at the same time as the Secretariat. However, article 19 does not reveal in any way, how the Secretariat is supposed to act when confronted with such an allegation. Ac-

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138 Ibid.

139 Ibid., 72.

140 Shibata is of the opinion that Parties did deny this function to the Compliance Committee. They argued that reviewing and analyzing all the annual reports would overburden the Committee and "drastically change the nature of the [compliance] mechanism", Shibata, see note 131, 72.

141 Again, it was proposed to give the Secretariat the full competence to announce any act of non-compliance it became aware of through the annual reports. This was denied as well by most of the States Parties. See Shibata, see note 120.

142 Basel Convention, article 19.

cording to Shibata, the power of the Secretariat would encompass neither investigations nor fact-finding missions[143] at the sites in questions.

An external compliance control mechanism is missing in the Basel Convention. External monitoring could be provided by e.g. the United Nations, by state authorities or by NGOs. In particular, NGOs seem to play a sometimes quasi-symbiotic role together with MEAs: they check the validity of Party reports and try to ensure that the State Parties' compliance performance and, especially, breaches of Convention obligations are made public. They also conduct their own research and generate compliance reports that are independent of the reports submitted by the Parties.[144] The Basel Convention refers to information submitted by "intergovernmental and non-governmental entities" as valid sources on which the Secretariat might prepare its reports.[145]

The Prior Informed Consent Procedure has also received criticism. Insufficiencies of this procedure are closely related to the fact that the Parties' performances under the Basel Convention are not assessed and controlled by any assigned authority. Like the annual reports, documents of this procedures do not undergo external reviews. Reliable information on whether a certain waste transaction in the scope of the Basel Convention will take place in an environmentally sound manner depends entirely on the persons, agencies and enterprises involved in the transaction in question. Besides, the process of Prior Informed Consent does not require prior inspection of waste facilities. It just requires that the state of import confirms the existence of a contract between the exporter and the disposer of the waste that specifies the environmentally sound treatment of the wastes in question.[146] For Widawsky, this level of ensuring environmentally sound management is low.[147] If the requirements of a proper procedure of Prior Informed

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143 Shibata, see note 131, 73.

144 Kiss/ Shelton, see note 43, 304.

145 Basel Convention, article 16 para. 1 lit. b: "The functions of the Secretariat shall be to prepare and transmit reports based upon information received in accordance with Articles 3, 4, 6, 11 and 13 as well as upon information derived from meetings of subsidiary bodies (…) as well as upon, as appropriate, information provided by relevant intergovernmental and non-governmental entities."

146 Basel Convention, article 6 para. 3 lit. b.

147 "Although the PIC procedure encourages pre-trade dialogue and consent among exporters and importers, its reliance on exporters and importers to verify that their facilities comply with ESM, without inspections of the facilities to substantiate this claim, is inadequate protection against untrained,

Consent are not fulfilled by the State Parties, illegal traffic, the "probably biggest problem facing the Basel Convention"[148] flourishes. Illegal traffic of hazardous wastes is a profit-driven crime and is almost always linked to environmentally unsound transport and disposal. In particular, those developing countries which lack adequate technologies, disposal facilities and personnel capacities to deal safely and in an environmentally sound way with hazardous materials suffer the impacts of hazardous wastes disposed in their territories. Fraud, corruption, the use of "shell companies", all undermine efforts to control the trade,[149] and in many cases it is not only the companies involved which conduct illegal waste trade – states, developing and developed ones, also participate in the transaction.

The Basel Convention is trying to regulate rather than to combat waste transactions. Exporters and generators of hazardous wastes, because they want to circumvent costly treatments and strict regulation in their own country seek options abroad that involve less stringent regulation and lower costs. Importers and recipient states often cooperate simply because of the possibility to earn high profit. Birnie criticizes: "A regime of shared responsibility may be desirable, but it is not clear that importing states will necessarily have the strongest interest in protecting themselves nor that exporting states will in practice do this for them."[150] Widawsky alleges that misrepresentation (which is only one of the elements that can constitute illegal traffic) is profitable, not only for the exporting companies, but also for the importers.[151] The jurisdiction, however, remains within the exclusive power of the individual states.

It adds to the problem that the Basel Ban Amendment, which was supposed to raise the level of protection for developing countries against streams of hazardous wastes they cannot deal with, has still not entered into force. However, due to the disadvantages and flaws that are inherent to ban concepts (like higher prevention and detection costs and a higher rate of illegal activity), it is questionable whether the Ban Amendment offers a step towards a sustainable global waste solution or if it might rather act as an obstacle. The Basel Ban Amendment had al-

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conniving, careless, or poor nations or companies looking for profits from waste trading." Widawsky, see note 129, 605.

148 Birnie/ Boyle, see note 9, 436.

149 Ibid., 437.

150 Ibid.

151 Widawsky, see note 129, 605.

ready received heavy criticism while it was negotiated; in particular, the inclusion of recyclable waste in the ban was controversial and viewed as too restrictive in the eyes of many industrialized nations.[152]

The Basel Ban raises a two-fold problem. Apart from the question, whether a ban would jeopardize rather than strengthen the attempt to extinguish illegal movements of hazardous wastes, many experts perceive that the Basel Ban might collide with the rules of the WTO and the GATT.[153] As is known, the GATT establishes a system of non-discrimination, which is based on the principles of the Most Favorite Nation Clause (MFN; Article I), National Treatment (NT; Article III) and the Elimination of Quantitative Restrictions (Article XI).

Ishibashi expresses the concern that, while the provisions regarding trade restrictions and regulations of the Basel Convention itself might be covered by the General Exceptions Clause of Article XX[154] of the GATT, a ban which prohibits any trade between the parties themselves and between parties and non-parties, however, may constitute an infringement of the GATT/WTO provisions, if it is regarded as creating

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152 N. Bombier, "The Basel Convention's Complete Ban on Hazardous Waste Exports: Negotiating the Compatibility of Trade and Environment", *Journal of Environmental Law Practices 7* (1997), 325 et seq. (325).

153 The GATT's central aims are the gradual elimination of barriers to international trade and the abolishment of protectionist state policies.

154 The provisions which could affect the Basel Ban are Article XX, lit. b and g of the GATT. Article XX constitutes: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (…) b) necessary to protect human, animal or plant life or health; (…) g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". Article XX requires the application of the least trade-restrictive measures necessary in order to achieve its protective aims. A ban probably never can be considered as the least trade-restrictive measure. Furthermore, the distinction drawn by the Basel Ban between developed countries and developing countries is based on the belonging of States to political organizations such as the OECD and the EU. According to K. Ishibashi, "it is not clear how to justify such discrimination."

arbitrary or unjustifiable discrimination.[155] However, no state has so far brought up an international dispute regarding a clash between the international waste trade regime and WTO rules.

10. Financial Problems

The financial problems of the Basel Convention probably constitute the root causes for, or at least a major contribution to, its unsatisfactory performance. The Basel Convention suffers from a general lack of funding. Both the Trust Fund and the Technical Trust Fund are too poorly provided with financial resources to facilitate all the activities the Basel Convention should realize in order to fulfill its own aims. In 2008 the Basel Convention Trust Fund had 3.6 Million US$ available;[156] by 30 September 2011 it had a sum of 4.1 US$ to hand.[157] The Basel Convention Technical Trust Fund, which is entirely based on voluntary financing, generally receives even fewer financial donations. In 2005 it was funded with 1,471,507 US$.[158] Remarkably, the United States, which have not ratified the Basel Convention yet, contributed 135,000 US$. In 2011 the Technical Trust Fund had only received 1,1 Million US$ by the end of September.[159] The most generous donators were EUROPAID (353,866 US$), Norway (200,378 US$) and, again, the United States (175,000 US$). Sadly, these funds are "insufficient to meet the Convention's needs"[160] and generally deprive the Convention's organs from fulfilling many of their tasks. The Basel Convention is only able to realize a few projects, not exclusively because of "severe funding con-

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155 K. Ishibashi, "Environmental Measures Restricting Waste Trade", in: K. Ishibashi/ A. Kiss/ D. Shelton (eds), *Economic Globalization and Compliance with International Environmental Agreements*, 2003, 69 et seq. (69).

156 Trust Fund for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Status of contributions as at 31 December 2008, Annex I.

157 Trust Fund for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Status of contributions as at 30 September 2011, Annex I.

158 Basel Convention Trust Fund to Assist Developing Countries and other Countries in Need of Technical Assistance. Status of contributions 2005.

159 See note 83, Annex II.

160 Widawsky, see note 129, 602.

straints"[161] but also because nearly all the contributions are earmarked for specific uses.[162] The fact that there are almost no discretionary funds available makes it difficult for the Technical Trust Fund to develop a coherent strategy for project development and support. Just to compare: in order to clean up the pollution caused by the hazardous sludge dumped in the city of Abidjan in the *Trafigura* Case, the government of Côte d'Ivoire had to spend 22 Million Euros by December 2006.[163] The cleaning of the soil alone was then estimated to cost around 30 million Euros. The outcome of an immediate fundraising was low, except in the case of Japan, which donated 2 million US$ for the technical clean-up operation.[164] The Basel Convention Regional Centers, which are supposed to run their own finance mechanisms, but whose funds in reality depend directly on the contributions made to the Technical Trust Fund, face difficulties in doing effective work due to their sometimes "extremely precarious financial situation."[165] Experience has shown that the performance of the Centers is directly related to the amount of financial resources for activities administered by each centre.[166]

The Liability Protocol, which was described as "a significant step towards recourse action",[167] is not in force. Long explains, that many developing nations might have been reluctant to ratify the Protocol because, "contrary to their original need for assistance to cope with hazardous incidents, the Protocol as negotiated actually created significant loopholes in liability that would undermine developing nations' abili-

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161 Study of Possible Options for Lasting and Sustainable Financial Mechanisms, see note 76, 12.

162 Ibid., 13.

163 Just to compare: in order to clean up the pollution caused by the hazardous sludge dumped in the city of Abidjan in the *Trafigura* Case, the government of Côte d'Ivoire had to spend 22 Million Euros by December 2006, cf. UNEP *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and other Wastes in its 8th Mtg*, Doc. UNEP/CHW.8/16, 7.

164 Ibid.

165 *Report of the Review of the Operation of the Basel Convention Regional and Coordinating Centers as of 30 November 2009*, 11.

166 Ibid.

167 UNEP *Report of the 6th Mtg of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Doc. UNEP/CHW.6/40, 59.

ties to deal with wastes."[168] This refers especially to article 4 of the Liability Protocol, which states that the concept of strict liability encompasses generators and exporters of hazardous wastes to be liable until the disposer has taken possession of the wastes. Developing State Parties often receive waste imports and host the disposers. And although the Basel Convention requires generators and exporters of hazardous wastes to ensure environmentally sound treatment of these wastes abroad, developing State Parties were afraid to be left alone with eventual clean-up and reparation costs. This loophole was said to give industrialized nations little incentive to ensure that environmentally sound facilities exist in the importing nation.[169] Furthermore, Parties tend to pay late. Delays in payment of the fund contributions and pledges that are never paid at all are a regular issue in each COP.[170] During the 9th COP, Parties decided to introduce penalties for contribution delays. Parties, whose contributions are in arrear for two or more years shall not be eligible to become a member of any bureau of the COP or its subsidiary bodies. Parties whose contributions are in arrear for four or more years shall not be entitled to vote at any meeting of the COP unless the Conference otherwise decides.[171]

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168 J.A. Long "Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and their Disposal", *Colo. J. Int'l Envtl. L.& Pol'y* 11 (2000), 253 et seq.

169 Long, see note 168, 257-258.

170 See the following statements: "The Conference expresses its concern over the delays in payment of the agreed contributions by Parties as well as voluntary contributions by Parties and non-Parties according to the agreement reached at the first meeting of the COP in accordance with which: 'all contributions are due to be paid in the year immediately preceding the year to which the contributions relate'", UNEP *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and other Wastes in its 4th Mtg*, Doc. UNEP/CHW.4/35, Decision IV/22; "The COP (…) expresses its concern over delays in payment of agreed contributions by Parties (…) and urges all Parties to pay their contributions promptly and full (…)", UNEP *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and other Wastes in its 9th Mtg*, Doc. UNEP/CHW.9/39, Decision IX/31.

171 UNEP *Report of the Conference of the Parties to the Basel Convention*, see note 170.

IV. Compliance Theory and Means of Compliance in International Environmental Law

1. Definitions of Compliance in International Environmental Law

Successful compliance with international agreements is defined in many ways. The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, a non-binding reference document designated to provide compliance advice for State Parties to MEAs of all kinds,[172] provide two different definitions: the section on Guidelines for Enhancing Compliance with Multilateral Environmental Agreements (Chapter I) refers to compliance as the "fulfillment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement";[173] while the section on National Enforcement, and International Cooperation in combating Violations of Laws implementing Multilateral Environmental Agreements (Chapter II) describes compliance as the "state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licenses and authorizations, in implementing multilateral environmental agreements."[174] The difference between these two aspects of compliance is clearly marked by the international approach of the former and the internal, national approach of the latter definition. The first definition refers to the compliance of State Parties with their respective international obligations. The second one refers to treaty-conforming national legislation that regulates the behavior of private actors within a State Party.

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172 In the light of many MEA Secretariats trying to develop successful compliance strategies, the UNEP incorporated the topic of compliance with, enforcement of, and implementation of, MEAs into its Work Program 2000 - 2001. The Guidelines were adopted by the 7th Special Sess. of the Governing Council of UNEP in 2002 and are now broadly available for use by governments, Convention Secretariats and all those interested. E. Maruma Mrema, "Cross-cutting Issues Related to Ensuring Compliance with MEAs", in: Beyerlin/ Stoll/ Wolfrum, see note 25, 201 et seq. *(*212).

173 UNEP *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (2), UNEP Governing Council*, Decision SS.VII, 2004.

174 Ibid., 8.

The Guidelines further distinguish between the terms of "Implementation" and "Enforcement", based on the different moments of regulation in which these acts come into effect. Implementation, therefore, "refers to, inter alia, all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments, if any."[175] Enforcement, on the other hand, encompasses the protection of these implemented regulations and the actions taken in a situation of breach: "Enforcement means the range of procedures and actions employed by a State, its competent authorities and agencies in order to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and/or punished through civil, administrative or criminal action."[176] Enforcement includes a set of actions, i.e., the adoption of laws and regulations, reviews, etc., including various enabling activities and steps, which a state may take within its national territory to ensure compliance with an MEA (Guidelines 9 and 38).[177]

There exist other definitions which do not recognize the terms compliance, implementation and enforcement as different processes created by the adherence to a treaty, but as different stages of the compliance situation as a whole, on the national and the international level. According to Shelton, "Compliance includes implementation, but is broader, concerned with the factual matching of State behavior and international norms (…)."[178] Compliance (here used as an umbrella term encompassing compliance, implementation and enforcement) has different levels: first, there is compliance with the international treaty obligations the State Parties enter into. Since Parties to an MEA generally are states, compliance with MEAs therefore means "State Compliance" and might encompass, *inter alia*, reporting obligations or the establishment of na-

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175 Ibid., 2.

176 Ibid., 9.

177 Maruma Mrema, see note 172, 212, and *UNEP Guidelines on Compliance* see note 173, Guidelines 9 and 38.

178 M. Fitzmaurice, "Compliance with Multilateral Environmental Agreements", *Hague Yearbook of International Law* 20 (2007-2008), 19 et seq., (23), citing D. Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft-Law'", in: D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, 2000, 5.

tional treaty authorities. As a "second step",[179] this level is complemented by the national legislation of a State Party that addresses persons or enterprises which are operating within the realm of the MEA in question and therefore affect the State Party's international performance. Their conduct needs to be regulated in conformity with the MEA in order to enable the state to comply. Within their national legislations, State Parties have to implement both the MEA in question and further regulations which secure and enforce compliance, and address non-compliance situations. The latter regulations apply different approaches and strategies. In a nutshell, they can be distinguished as confrontational, or adversarial measures that apply classical "control and command" structures; and non-confrontational or non-adversarial measures, which aim at facilitating compliance.[180]

2. Basic Introduction to Compliance Theory

A lot of research has already been done on possible reasons why states comply or do not comply with their obligations stemming from international treaties. This topic becomes even more sensitive in the realm of international environmental treaties, since they often do not provide for (immediate) advantages for the State Parties. They rather address the protection of global commons (like water, air, or the environment as a whole) and call for restrictions in certain (profitable) economic activities or for major financial contributions. Sometimes they address environmental issues which do not directly damage, nor even directly affect every state – like desertification, or the protection of certain plant or animal species. MEAs are "drafted and accepted in the interest of the whole humankind"[181] and "include obligations for all contracting parties without reciprocity."[182] As a rule, non-compliance with an obligation aimed at preserving and protecting certain global environmental goods does not have any direct detrimental impacts on an individual

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179 N. Matz, "Financial and other Incentives for Complying with MEA Obligations", in: Beyerlin/ Stoll/ Wolfrum, see note 25, 301 et seq. (303).

180 Wolfrum, see note 20, 110 et seq.

181 A. Kiss, "Reporting Obligations and Assessment of Reports", in: Beyerlin/ Stoll/ Wolfrum, see note 25, 229 et seq. (229).

182 Kiss, see note 181, 229.

State Party.[183] It rather affects the treaty community of states as a whole.[184] Do State Parties not comply with their obligations stemming from an international treaty, because they do not achieve any (immediate) advantage from it? According to Chayes, Handler Chayes and Mitchell this is not the case. They refer to deliberate treaty violations as "dramatic, but rare exceptions rather than the rule"[185] and focus on incapability of states as the main cause of non-compliance: "As several country studies demonstrate, governments often fail to comply because they lack financial, administrative, informational, or regulatory capacities."[186] This problem can be especially pressing when the treaty targets private and individual behavior not directly under a government's control.[187]

Based on this assertion, the Managerial School on Compliance Theory was elaborated, an approach, according to which the "reasons for non-compliance are most likely to be found in the terms of an obligation, lack of capacity to carry out an obligation and a change of circumstances."[188] Accordingly, the strengthening of regulatory regimes requires "a strategy of integrated, active management of compliance that addresses the real sources of noncompliance, without necessarily expecting to achieve perfect implementation and compliance"[189] and they suggest management tools such as transparency, reporting, verification and monitoring, dispute resolution and capacity building as "the key to designing a regime to encourage compliance."[190] A central idea of their approach is that "a managerial model of compliance suggests that regimes usually keep noncompliance at acceptable levels by an interactive process of discourse among the parties, the treaty organization, and the

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183 U. Beyerlin/ P. Stoll/ R. Wolfrum, "Conclusions drawn from the Conference on Ensuring Compliance with MEAs", in: Beyerlin/ Stoll/ Wolfrum, see note 25, 359 et seq. (360).

184 Beyerlin/ Stoll/ Wolfrum, see note 183, 360.

185 Chayes/ Handler Chayes/ Mitchell, "Managing Compliance: A Comparative Perspective", in: Brown Weiss/ Jacobson, see note 132, 40 et seq. (40).

186 Chayes et al., see note 132, 40.

187 Ibid., 41.

188 T.E. Crossen, "Multilateral Agreements and the Compliance Continuum", *Geo. Int'l Envt'l L. Rev.* 16 (2004), 473 et seq., (483), see also A. Chayes/ A. Handler Chayes, *The new Sovereignty: Compliance with International Regulatory Agreements*, 1995.

189 Chayes et al., see note 132, 40.

190 Crossen, see note 188, 12.

wider public."[191] Maintaining the same logic of argumentation, a very strong constraint is pronounced against confrontational compliance means. Not only would their research "indicate that in the face of non-compliance, coercive [confrontational] sanctions[192] are not only ineffective but inherently unsuitable,"[193] they would go as far as to state that "efforts to negotiate sanction clauses into treaties and to invoke unilateral sanctions for violations are largely a waste of time."[194]

On the other end of the range of compliance theories, there are scholars who favor coercive means to achieve countries' compliance. Guzman presumes that countries' attitudes towards compliance are not driven by their economic and administrative capability to comply, but by a simple calculation whether a breach of or compliance with the MEA is more cost-efficient; and by the consideration, how badly the country's reputation on the international stage might be affected by a breach. According to Guzman, a country's decision to follow international law reflects a judgment that the costs of violation outweigh the benefits.[195] He calls for adversarial measures, especially sanctions as reasonable means to ensure and enforce compliance, although he admits that it is "difficult to achieve effective multilateral sanctions."[196] He argues that sanctions will work best in bilateral relationships and complex, ongoing relationships:[197] "By punishing offenders today, states increase the likelihood of compliance tomorrow because the threat of future punishment is credible."[198]

The most prominent theory on treaty compliance that is in favor of sanctions is advanced by Downs and his colleagues.[199] Within their ap-

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191 Chayes et al., see note 132, 41.

192 Introductory information on sanctions and other confrontational means, see Chapter 4. a.

193 Chayes et al., see note 132, 41.

194 Ibid.

195 A.T. Guzman, "A Compliance-Based Theory of International Law", *Cal. L. Rev*. 90 (2002), 1823 et seq. (1853).

196 Guzman, see note 195, 1868.

197 Crossen, see note 188, 28 and Guzman, see note 195, 1868.

198 Guzman, see note 195, 1868.

199 G.W. Downs/ D.M. Rocke/ P.N. Barsoom, "Is the good news about compliance good news about cooperation?", *International Organizations* 50 (1996), 379 et seq. (379) and J. Brunnée, "Enforcement Mechanisms in International Law and International Environmental Law", in: Beyerlin/ Stoll/ Wolfrum, see note 25, 2 et seq., 11.

proach, sanctions are understood as a "broad range of measures that create costs or remove benefits",[200] which serve especially when non-compliance with an international treaty is an attractive option. This is the case where treaties require states to depart significantly from what they would have done in the absence of a treaty ("depth of cooperation").[201] Other authors argue that compliance with international treaties is not only due to the respective enforcement mechanisms, but to the treaty's structure as a whole. In the words of Mitchell: Regime design matters.[202] Brown Weiss and Jacobson established four groups of crucial variables which have to be taken into account while elaborating an effective international agreement: (1) the characteristics of the activity involved; (2) the characteristics of the accord; (3) the international environment; and (4) factors involving the country.[203] According to Brown Weiss and Jacobson, in the rarest of cases states willfully do not comply with their treaty obligations; compliance rather depends on conditions such as the number of actors involved, the acceptance and support of the treaty objectives by the international community (major international conferences, public opinion, media, international non-governmental organizations, and international financial organizations), precision and perceived equity of the obligations, the administrative capacity of a state or the effective application of enforcement measures like reporting requirements, incentives and sanctions.[204]

3. Compliance and Treaty Design of MEAs

Despite the research done in the field of compliance with international law obligations and especially with MEAs, and all the valid compliance

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200 G.W. Downs, "Enforcement and the Evolution of Cooperation", *Mich. J. Int'l L.* 19 (1998), 319 et seq. (320), found in Brunnée, see note 199, footnote 46 (11).

201 Downs et al., see note 199, 383.

202 R.B. Mitchell, "Regime design matters: intentional oil pollution and treaty compliance", in: B.J. Cohen/ Ch. Lipson (eds), *Theory and structure in international political economy: an international organization reader,* 1999, 207 et seq., 207.

203 E. Brown Weiss/ H. Jacobson, "Assessing the record", in: E. Brown Weiss/ H. Jacobson (eds), *Engaging Countries: Strengthening Compliance with Environmental Accords*, 1998, 6 et seq.

204 Brown Weiss/ Jacobson, see note 203, 528.

theories available,[205] scholars nowadays agree upon the idea that no singular compliance strategy exists, which is applicable overall to MEAs. This is due to the heterogeneity of environmental issues and to the multiple structures that MEAs apply today. Compliance Mechanisms are as diverse as the treaties they are featured by. However, scholars seem to agree that sanctions are a "'last resort', after other methods have failed"[206] and generally do not constitute the preferred compliance method in international environmental law. Classical dispute settlement solutions of international law have hardly been made use of, either.[207] Brown Weiss and Jacobson further state that MEAs should not exclusively address states as Parties to the respective treaties, but should be able to modify, through them, the behavior of enterprises and individuals.[208] Beyerlin, Wolfrum and Stoll point out, that opting for a certain method and procedure of compliance control "depends on the very type of the respective agreement, particularly the design and content of obligations that it imposes on its parties."[209]

Bringing the discussion back to the Basel Convention, Beyerlin, Stoll and Wolfrum make two important observations regarding its treaty design: first, the Basel Convention is an MEA that "clearly shows elements of bilateralism."[210] This implicates, that it might be most effi-

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205 A not exhaustive list of further theoreticians would encompass, e.g. Harold Koh or Thomas Franck. Koh seeks to explain compliance as arising from a three-part process of interaction, interpretation and internalization. Through a combination of, *inter alia*, lobbying, transnational public litigation, and norm sponsorship by prominent government and private sector figures – to which Koh refers to as "vertical" process - international norms are invoked, argued over and interpreted. See N. Craik, "The International Law of Environmental Impact Assessment", 2008, 188 et seq., citing H. Koh, "Why do Nations obey International Law", *Yale J. Int'l. L* 106 (1997), 106 et seq. According to his Fairness Theory, Franck argues that a perception that the law is substantively and procedurally fair encourages compliance. See Crossen, see note 188, 15 and T. Franck, "Fairness in International Law and Institutions", 1998.

206 Brown Weiss/ McCaffrey, see note 76, 236 et seq.

207 The Basel Convention requires its States Parties to settle their disputes regarding interpretation and application of, or compliance with the Convention through negotiations and other peaceful means. If these measures fail, the parties can agree to submit their case to the ICJ or to an arbitration tribunal. See Basel Convention, article 20 and Annex VI.

208 Brown Weiss/ Jacobson, see note 203, 511.

209 Beyerlin/ Stoll/ Wolfrum, see note 25, 359.

210 Ibid., 260.

cient if the "directly affected State(s) unilaterally responded to the non-compliant State",[211] which affects the compliance enforcement methods that would serve such a treaty. Second, the Basel Convention mainly provides for "action-orientated" obligations, which generally have an "only abstractly defined objective."[212] They further lack a precise time limit for achieving this objective and a clear-cut definition of the action to be taken.[213] The opposite would be treaties with result-orientated obligations, which constitute clear aims (e.g. a certain amount of emission reduction within a defined period of time, as in the Kyoto Protocol).[214] As far as "action-orientated" treaties are concerned, Beyerlin, Stoll and Wolfrum resume that "the lack of efficiency of the control mechanisms identified in respect of this type of MEA is the direct result of the latter's design."[215] They further conclude, that "particular mechanisms still have to be developed which would provide for an efficient compliance control of action-orientated MEAs taking into consideration the objective they pursue."[216]

4. Means to Ensure Compliance

a. Confrontational Means

As stated above, mechanisms to ensure compliance are differentiated as confrontational and non-confrontational means. Confrontational means generally have a somewhat negative connotation and encompass sanctions or retaliatory actions, negative incentives and penalties.[217] Sanctions are of a coercive and punitive character and have to be "credible and potent"[218] in order to be effective. Furthermore, sanction provisions have to be backed up by a strong and credible enforcement structure. They lose effect if states are free to believe that incompliance will never lead to an actual launch of sanctions because of a lack of funding

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211 Ibid., 261.
212 Ibid.
213 Ibid.
214 Ibid., 362.
215 Ibid., 361.
216 Ibid.
217 E. Brown Weiss, "Strengthening National Compliance with International Environmental Agreements", *Env. Policy & Law* 27 (1997), 297 et seq.
218 Mitchell, see note 202, 210.

or of political will. Sanctions may be economic, like trade embargos and import prohibitions for goods produced in the sanctioned country, or political, like the withdrawal of diplomatic missions from the territory of the sanctioned state. Moreover, there are negative incentives which are rather aimed at abolishing certain privileges.[219] Matz points out the example of a loan tied to certain conditionalities that might be called in if the state did not comply with those conditions.[220] Sanctions, on the contrary, "penalize non-compliant behavior by limiting the exercise of rights or reduce the position of a state below the ordinary."[221] The Basel Convention uses a prohibition of trade with Non-Parties[222] as a general objective; it does not, however, apply sanctions or other adversarial mechanisms to ensure compliance.

b. Non-confrontational Means

Non-confrontational means to enhance compliance with MEAs consist of procedural means, like reporting, monitoring and verification, site inspections and procedures to address situations of non-compliance. Furthermore, there are facilitative measures like financial and other economic incentives, compliance assistance, capacity building or technology transfer.

aa. Procedural Means: Reporting, Monitoring, Verification

Procedural means are core methods to enhance compliance with MEAs, because they allow that a State Party's performance regarding the obligations it assumed can be reviewed and evaluated. The UNEP Guidelines refer to reporting, monitoring and verification as "provisions that can help promote compliance, by, inter alia, potentially increasing public awareness."[223] Reporting, according to the UNEP Guidelines, requires Parties to make "regular, timely reports on compliance, using an appropriate common format."[224] Monitoring refers to the collection of these data, and "in accordance with provisions of a multilateral envi-

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219 Matz, see note 179, 312.

220 Ibid.

221 Ibid.

222 Basel Convention, article 4 para. 5, "A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party."

223 UNEP *Guidelines on Compliance*, see note 173, 3.

224 See note 173.

ronmental agreement can be used to assess compliance with an agreement, identify compliance problems and indicate solutions."[225] Fitzmaurice further states that monitoring may encompass activities such as on-site field visits or regular conferences at which the states report.[226] The bodies assigned to collect and monitor the acquired data might be Secretariats to the MEAs, or special bodies, sometimes assisted by NGOs.[227] Finally, verification is the process of determination whether a party is compliant or not. The principal source of verification might be national reports.[228]

bb. Non-compliance Procedures

The UNEP Guidelines further recommend the inclusion of non-compliance mechanisms and bodies into MEAs, such as Compliance Committees. They should be used as "a vehicle to identify possible situations of non-compliance at an early stage and the causes of non-compliance and to formulate appropriate responses […]."[229] They should be non-adversarial and include procedural safeguards for the non-compliant State Party;[230] the power to emit final determinations of non-compliance, however, is supposed to remain with the Conference or Meeting of the Parties of the respective MEA, or to a body named by them.[231]

The Basel Convention generally and genuinely applies procedural means and a non-compliance procedure, providing for a reporting system managed by the Basel Convention Secretariat and a Compliance Committee, designated to address cases of non-compliance, when triggered to do so. It does not make use, however, of verification procedures in order to secure validity and correctness of the reports handed to the Secretariat. "Monitoring" within the Basel Convention is basically reduced to the generation of data compilations; on-site visits are not scheduled (the Compliance Committee, though, may hold "with the agreement of a Party(ies), information gatherings in its or their ter-

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225 Ibid.
226 Fitzmaurice, see note 178, 3.
227 Ibid.
228 UNEP *Guidelines on Compliance*, see note 173.
229 Ibid.
230 Ibid.
231 Ibid.

ritory for the purpose of fulfilling its functions)."[232] Shibata concludes, that the Basel Convention, "if the terms 'inspection' and 'external monitoring' were understood in the usual sense as used in international law […], does not provide such obligatory, pre-established systems of inspection or monitoring of the Parties' implementation of, and compliance with, the convention's obligations."[233]

cc. Facilitative Means

Facilitative means aim at enhancing compliance with MEAs by providing material help, like technology or funding, and immaterial support, like know-how. Many MEAs offer compliance assistance to their State Parties in order to make compliance possible in the first place. Matz distinguishes between incentives and compliance assistance as "the latter consist of transfers or of actions that enable a state to be compliant. Incentives are granted to induce compliance, they are granted when the development of a compliance project has been concluded successfully."[234]

c. Economic Incentives

In the UNEP Guidelines, economic compliance incentives are considered feasible mechanisms for both the implementation of an MEA into the national legal system and for the institutional framework to enforce compliance with the MEA on the national level. As far as national implementation is concerned, economic instruments are named as tools that parties can consider to make use of, as long as this is in conformity with their obligations under applicable international agreements.[235] Furthermore, states are held to make "use of economic instruments, including user fees, pollution fees and other measures promoting economically efficient compliance"[236] in order to enforce compliance and combat violations. According to Matz, incentives of a financial or other kind are most commonly known from national legal orders.[237] They might consist of tax advantages, e.g. for companies which successfully

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232 Terms of Reference, article 22 lit. d, see note 115.

233 Shibata, see note 131, 72-73.

234 Matz, see note 179, 306.

235 UNEP *Guidelines on Compliance*, see note 173.

236 Ibid.

237 Matz, see note 179, 303.

comply with a certain emission regime or apply environmentally sound production technology, or of public financial awards granted to those who do so. The Rio Declaration of the United Nations Conference on Environment and Development[238] (UNCED) emphasizes the utility of economic instruments to enhance sustainable development, when being applied at the national level, in its Principle 16: National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[239] International Environmental Declarations like the Rio Declaration and its successor documents refer to the overall goal of sustainable development rather than to the special field of compliance with MEAs. Since these aims are so closely linked, these documents provide feasible strategies for both aims. The Agenda 21 provides for more concrete economic mechanisms to implement national environmental policies and consequently calls for the "effective use of economic instruments and market and other incentives."[240] The Agenda 21 effectively links funding mechanisms which facilitate treaty regimes to globally finance and conduct environmentally sound and sustainable projects with economic incentives to comply with MEAs. It thereby emphasizes trade mechanisms and bilateral cooperation. Article 33.17 of Agenda 21 calls for the "mobilization of higher levels of foreign direct investment and technology transfers through national policies that promote investment and through joint ventures and other modalities"[241] and for "innovative financing", which includes, *inter alia*, "the use of economic and fiscal incentives and mechanisms" and "feasible tradable permits."[242] In the successor UNCED meeting to Rio, the World Summit on Sustainable Development in Johannesburg 2002, emphasized the importance the international community should give to economic mechanisms. The Johannesburg Plan of Implementation recognizes "the importance of foreign direct investment flows in support

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238 *Rio Declaration on Environment and Development*, Doc. A/CONF.151/26 (Vol. I).

239 Rio Declaration, Principle 16, see note 238.

240 Agenda 21, Doc. A/CONF.151/26/Rev.1 (Vol. I.), Chapter 8.

241 Ibid., Chapter 33.17.

242 Ibid., Chapter 33.18 lit. b and c.

of sustainable development"[243] and "continues to enhance the mutual supportiveness of trade, environment and development with a view to achieving sustainable development […]."[244]

As is shown above in the UNEP Guidelines and the Rio Declaration, international declarations regarding environmental law and sustainable development, often address economic incentives as a subject to be realized at national levels. The Basel Convention does not provide any incentive mechanism in its compliance system, but leaves their creation and implementation to the State Parties. The direct inclusion of economic incentives into MEAs might be more effective, though. Economic incentives that directly stem from MEAs need to be implemented in national law in order to be applied, like any other provision of international law. The advantage would be, though, that in this way MEAs directly provide an incentive framework as part of their treaty design, which could then be adapted as a whole and fully developed in the national legislations of State Parties. Incentive regulations, ready to be implemented by State Parties, benefit a treaty characteristic that is deemed essential to facilitate compliance with the UNEP Guidelines.[245]

A further positive aspect of specific compliance incentives which directly stem from an MEA is that these provisions probably receive a high level of acceptance from the State Parties. They might have participated in the treaty negotiations and therefore have accepted the incentive provisions beforehand or were able to inform themselves about these provisions before they adhered to the MEA in question and could make preparations. The strategy of preparing states for compliance before they ratify is especially considered in the Montreal Protocol, where prospective State Parties can apply for preparation support from the MPMF.

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243 UN Department for Economic and Social Affairs, Division for Sustainable Development, Johannesburg Plan of Implementation, Chapter X, article 84.

244 Johannesburg Plan of Implementation, Chapter X, article 97, see note 243.

245 UNEP *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements*, see note 173, article 14 lit. a (3), "To assist in the assessment and ascertainment of compliance, the obligations of parties to multilateral environmental agreements should be stated clearly."

d. The Example of the Convention on Biological Diversity

There indeed exist MEAs which provide a compliance system based on economic incentives. The Convention on Biological Diversity[246] (CBD) provides – on a framework basis – the incentive of access to resources or resource markets[247] in order to achieve technical and scientific cooperation[248] between host states and states wishing to operate in their territory. This means, states which want to participate in the exploitation of genetic resources in the territory of another state, have to grant technical and scientific cooperation and technology transfer to the host state, especially, when the latter is not in the economic position to exploit its resources by itself. The concept of the CBD is that the benefits of the exploitation should be shared and the host states should be compensated for granting access to their resources. Article 16 para. 3 of the CBD generally obliges State Parties to take legislative, administrative or policy measures to transfer technology to those State Parties, in particu-

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246 Convention on Biological Diversity.

247 Matz, see note 179, 315.

248 Convention on Biological Diversity, article 18, "1. The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions. 2. Each Contracting Party shall promote technical and scientific cooperation with other Contracting Parties, in particular developing countries, in implementing this Convention, inter alia, through the development and implementation of national policies. In promoting such cooperation, special attention should be given to the development and strengthening of national capabilities, by means of human resources development and institution building. 3. The Conference of the Parties, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation. 4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts. 5. The Contracting Parties shall, subject to mutual agreement, promote the establishment of joint research programmes and joint ventures for the development of technologies relevant to the objectives of this Convention."

lar developing countries, which provide access to genetic resources.[249] The possibility to participate in the use of genetic resources and to have access to technologies and investigation equipment "attaches an economic value to biodiversity"[250] which shall serve as incentive for both host states and involved states to protect the resources and treat them sustainably. This principle is also called "benefit-sharing". Probably the most prominent MEA using economic and market-based incentives as a compliance enforcement mechanism is the Kyoto Protocol.

e. Compliance Assistance and Capacity-Building

Compliance assistance does not reward compliance as incentives do, but provides for funds and other means to facilitate compliance in the first place. Therefore, measures like capacity-building, technology transfer, awareness raising and financial transfers can serve as compliance assistance measures or as incentives, depending, when they are applied. The prospective of achieving compliance assistance may as well be seen as an incentive to adhere to or to comply with an MEA. However, compliance assistance consisting of transfers of financial resources in order to enable developing State Parties to comply with their obligations, e.g. by covering the incremental costs resulting from the implementation of an agreement, are a common feature of most modern international environmental agreements.[251]

Environmental treaties often implicate the capacity of the State (Parties) to govern,[252] and to translate and implement international MEA obligations feasibly into their domestic legislation. Where State Parties lack an efficient administration or the means to build such an administrative system themselves, capacity-building may be the most useful assistance method to facilitate compliance. The UNEP Guidelines recognize compliance assistance as a necessary measure in order to ensure the capability of particularly developing countries to comply with their MEA obligations: "The building and strengthening of capacities may be needed for developing countries that are parties to multilateral environmental agreements, particularly the least developed countries, as well as parties with economies in transition to assist such countries in

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249 Convention on Biological Diversity, article 16 para. 1; Wolfrum, see note 20, 114.

250 Wolfrum, see note 20, 110 et seq.

251 Matz, see note 179, 307.

252 Chayes et al., see note 185, 52.

meeting their obligations under multilateral environmental agreements."[253] This includes, *inter alia*, the provision of technology and funds, but refers particularly to the realization of adequate training for the locally competent authorities, in order to enable them to implement and overlook national compliance.

Gündling develops a three-step approach to the "fairly complex process"[254] of capacity building. He states that first, "'Capacity' in the context of compliance with international law obligations may mean the availability of governmental institutions to implement international organizations at the national level and to ensure that the measures taken are enforced."[255] This includes "environmental administrative structures, environmental rules and regulations, based on sound environmental policies, providing command and control measures where necessary and economic incentives where possible […]."[256] Second, he analyzes that compliance capacity needs resources: "This refers to the economic, technical and financial capabilities and means required for environmental management by both governmental and private actors."[257] He points out an essential conclusion valid for the entire compliance debate in international environmental law: "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."[258] As the third essential measure in order to build capacity, Gündling calls for the establishment and functioning of a non-governmental sector as "watchdog" for the governments and the private sectors alike.[259]

The Rio Declaration, Agenda 21 and the Johannesburg Plan call for capacity building.[260] Concerning this matter, the Basel Convention only

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253 UNEP *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements*, see note 173, 6.

254 L. Gündling, "Compliance Assistance in International Environmental Law: Capacity-Building through Financial and Technology Transfer", *ZaöRV/HJIL* 56 (1996), 796 et seq. (800).

255 Gündling, see note 254, 800.

256 Ibid., 800.

257 Ibid.

258 Ibid.

259 Ibid., 801.

260 See, *inter alia,* Rio Declaration on Environment and Development, Principle 9: "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the

contains a shallow provision regarding international cooperation,[261] which calls upon State Parties to work together in the fields of development and implementation of new environmentally low-waste technologies and to provide technology and capacity to manage it for countries in need, especially developing countries. The BCRCs constitute an attempt to facilitate technologies and adequate capacity training in developing countries, but – like the Technical Trust Fund, whose funds are supposed to finance capacity-building and technology transfer – they fall too short of financial supplies to permanently provide support. The Compliance Committee is – in a similarly imprecise way – held to review general issues of "accessing technical and financial support, particularly for developing countries, including technology transfer and capacity-building"[262] under the direction of the COP.

5. Financing Compliance with MEAs

Compliance with MEAs is costly. Costs stem, in principle, from internal measures State Parties have to take in order to create an administrative structure (focal points, responsible national authorities), and from the external duties State Parties assume, like periodic contributions to the MEA in question, or penalty payments for non-compliance. Departing from the viewpoint that developed countries carry the major responsibility for today's global environmental deterioration because they produce and consume most of the damaging substances, and further have more resources (like technology and funds) available, MEAs and international environmental declarations additionally tend to provide for developed State Parties to bear the biggest part of the costs which sustainable development parameters put on developing countries.[263]

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development, adaptation, diffusion and transfer of technologies, including new and innovative technologies". Agenda 21, para. 34 para. 4: "There is a need for favourable access to and transfer of environmentally sound technologies, in particular to developing countries, through supportive measures that promote technology cooperation and that should enable transfer of necessary technological know-how as well as building up of economic, technical, and managerial capabilities for the efficient use and further development of transferred technology."

261 Basel Convention, article 10 para. 2 lit. c and d and para. 10 lit. e.

262 Terms of Reference, article 21 lit. c, see note 115.

263 The Principle of Common, but Differentiated Responsibilities is, *inter alia*, manifested in Principle 7 of the Rio Declaration: "States shall cooperate in

Financial mechanisms of MEAS can be categorized according to their function, how they are administered, and how they are funded.[264] Brown Weiss and McCaffrey explain that with respect to function, a financial mechanism may serve either a funding or a coordinating function. A funding mechanism provides financial resources to help a country address its technical and capacity needs. In contrast, a coordinating mechanism primarily assists in resource mobilization by identifying possible outside sources of funding and other assistance and helping countries apply for them.[265] Furthermore, MEAs can be administered in a singular, stand-alone way or within the framework of an entity that operates multiple conventions. According to Brown Weiss, a stand-alone mechanism is treaty-specific, i.e., it administers a mechanism for a single MEA. In contrast a multipurpose operational entity administers the financial mechanisms of more than one MEA.[266] Finally, with respect to how a mechanism is funded, four types exist. A mechanism can be funded by voluntary contributors, by mandatory contributions, by sources other than contribution, or by a combination of these.[267] According to these definitions, the Basel Convention Technical Trust Fund can be described as a stand-alone, voluntary funding mechanism. It serves the Basel Convention alone and it receives direct funding on a voluntary basis. The MPMF has a similar structure as a single funding mechanism, but requires obligatory contributions from the State Parties.

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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." The Principle includes two elements: the first concerns the common responsibility of states for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take account of differing circumstances, particularly in relation to each state's contribution to the creation of a particular environmental problem and its ability to prevent, reduce and control the threat. See P. Sands, *Principles of International Environmental Law,* 2003, 286 et seq.

264 Brown Weiss/ McCaffrey, see note 76, 1068.

265 Ibid., 1068-1070.

266 Ibid., 1069.

267 Ibid.

Many international organizations, provide funds to finance environmentally sound developing projects. Typical forms of funding are requirement-bound loans or grants stemming from selective, purposeful funds these organizations administer. In 1991, the Global Environment Facility (GEF) was established by the World Bank, in cooperation with the UN and its relevant specialized agencies (UNEP, UNDP).[268] The GEF provides grants to developing countries and countries with economies in transition for projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, and persistent organic pollutants.[269] It further constitutes the financial mechanism for four major environmental conventions: the Convention on Biological Diversity; the United Nations Framework Convention on Climate Change; the United Nations Convention to Combat Desertification; and the Stockholm Convention on Persistent Organic Pollutants. The GEF itself is funded by its Member States. The contributions it receives in periodic replenishment rounds are used to fund projects of different scales in countries eligible to apply for funding. In order to get grants from the GEF, countries either have to be a State Party to the respective treaty (for biodiversity and climate change projects) or fulfill the requirements needed to borrow from the World Bank or to receive UNDP technical assistance.[270] From 1991 until 1 December 2011, the GEF has allocated 10 billion US$ and (co-)financed about 2,800 projects. Four replenishment cycles have already been realized, the fifth started in November 2008. UNEP and FAO called the GEF an "effective and credible facility for funding activities that delivers significant global environmental benefits."[271] Montini describes the GEF as the "most important example of a financial mechanism devised for funding environmental protection at the global level."[272] Although being celebrated as a successful funding mechanism, the GEF faces the same difficulties as any contribution-based financial vehicle of an MEA. Brown Weiss writes that the main shortcoming of the GEF's financial resources is that they are relatively modest, given the critical and complex environmental challenges they are being asked to address.[273]

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268 Montini, see note 21, 163.

269 Information available at <http://www.thegef.org>.

270 Brown Weiss/ McCaffrey, see note 76, 1050.

271 UNEP/ FAO Study, see note 76.

272 Montini, see note 21, 163.

273 Brown Weiss/ McCaffrey, see note 76, 1053.

6. Possible Strategies to Enhance Compliance with and Funding of the Basel Convention

Concluding the review of economic incentives and compliance assistance strategies which are used in MEAs or recommended in international environmental declarations and of the ways they are financed – what strategies could possibly be useful to enhance compliance with the Basel Convention?

A feasible basic approach might be to stop deeming movements of hazardous wastes from developed to developing countries as an evil and therefore undesirable trend which jeopardizes efforts to protect developing countries from environmental harms. On the contrary, it could be considered as trade in goods which brings economic benefits to the receiving countries, given that they are enabled to deal with the waste streams in an environmentally sound way. Global trade in hazardous wastes is an enormous and profitable business, and though environmentally sound technologies to deal with or to avoid hazardous wastes are on the rise in developing countries the world is still far away from generating significantly fewer quantities of hazardous wastes. As long as the disposal of hazardous wastes is cheaper and bureaucratically easier in developing countries, waste streams entering these countries, legally and illegally, probably will not run dry. The control of global waste flows will remain a "ubiquitous problem that affects both developing and developed nations",[274] which is "beautifully" demonstrated by the quantities of hazardous wastes still illegally leaving the EU to Africa and Asia.

The Basel Ban Amendment does not take up this idea. On the contrary, it sweepingly deems all developing countries as ineligible to deal with hazardous wastes. This approach might have been supported by many developing countries, especially among the African State Parties to the Basel Convention, but simultaneously faces rejection by those countries, which consider (some) hazardous wastes, e.g. electronic waste, as valuable sources for the extraction of prime materials. Widawsky states that although the Basel Ban was proposed as a mechanism to impose a strict rule in order to protect the health and safety of developing countries, it may be cutting of a source of income.[275] Instead of creating a ban, which is not yet in force, but hovering in space and defining the direction the Convention is taking, the Basel Convention

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274 Bombier, see note 152, 347.

275 Widawsky, see note 129, 615.

should take up an approach according to which waste movements to developing countries are considered as preferable and where emphasis is put on regulations in order to enhance safety and profitability of these movements. Restrictive regional conventions like the Bamako Convention ought to be re-thought as well.

Developing countries need economic progress if they are to solve their environmental problems just as developed countries do.[276] But in order to be enabled to handle hazardous wastes in an environmentally sound way, developing states will need help and support from developed ones. Put bluntly, an import ban for hazardous wastes creates little incentives to State Parties which are in a position to help in building up waste treatment facilities to do so, because later they would not be able to use these facilities. The numerous regional conventions that prohibit the import of hazardous wastes to their State Parties also hinder developed countries, which aim for environmental protection in a framework that enables safe waste trading,[277] to actively build up waste infrastructure in developing countries.

How can legal waste trade with developing countries be made safe, environmentally sound and beneficial in a way that outweighs the economic "advantages" of illegal trading? The answer might be found in a system of feasible economic incentives and compliance assistance that addresses both developing and developed State Parties. A compliance system of the Basel Convention should directly respond to the economic activity that is behind the environmental issue in question (in this case: trade in hazardous wastes) and address the private actors in this field. The GEF also considers "enhanced private sector involvement"[278] as a crucial aspect for sustainable environmental projects to be successful.

Economic incentives in MEAs are traditionally focused on raising the attractiveness of compliance in developing State Parties. As far as global waste movements – a business attractive to actors on both the "winner" and "victim" country's side – are concerned, it might be a more useful approach to include developed countries, which produce and export the highest quantities of hazardous wastes into an incentive system. States and enterprises which invest in the development of safe

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276 Gündling, see note 254, 799.

277 Widawsky, see note 129, 615.

278 GEF Evaluation Office, GEF Annual Performance Report 2005, Doc. GEF/C.28/ME/2/Rev.1 (26) and Brown Weiss/ McCaffrey, see note 76, 1051.

waste treatment facilities or in capacity building in developing countries should be granted advantages for doing so. On the national level, State Parties to the Basel Convention could grant tax advantages or funding for entrepreneurs who carry out such projects in developing counties. However, special tax-related environmental measures are complex topics which alone raise a multitude of legal questions and would go far beyond the scope of this article.

On the MEA level, the Basel Convention could widen the access to funds of the Technical Trust Fund to developed State Parties and their national enterprises given that they finance or carry out environmentally sound waste projects or compliance assistance projects in developing State Parties. Gündling makes an important statement about the quality that assistance activities of developed states in developing ones should have in order to be effective and sustainable: "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 institutions and that expatriate expertise is limited to what is absolutely necessary."[279] If developed countries genuinely acted up to this legitimate "ownership"[280] approach towards waste treatment projects in developing countries, they would lose predominance over the foreign projects they finance or carry out, possibly including over the intellectual property involved – a further disincentive to assist developing countries to comply with the Basel Convention.

Access to funds from the Technical Trust Fund not only for states which are in need of assistance, but also for those states and enterprises which actively assist, coupled with the possibility to legally move hazardous wastes to developing countries might contribute to the solution of two major dilemmas of the Basel Convention: illegal waste trade and poor financial conditions of the Convention's funding vehicles. These two approaches could – simply put – make compliance with the Basel Convention easier and more attractive. Developed State Parties accordingly would have a powerful incentive, not only to comply with their obligations under the Basel Convention, but also to assume their global responsibility as the leading generators of hazardous wastes and – more generally – under the global environmental principle of common, but differentiated responsibilities. The possibility to achieve funding for their own national investors willing to invest in or carry out waste

279 Gündling, see note 254, 808-809.

280 Ibid., 808.

treatment activities in developing countries perhaps would even enhance the willingness of State Parties to the Basel Convention to make adequate donations to the Technical Trust Fund and to genuinely pay their pledges.

In order to stabilize the two Funds of the Basel Convention and to avoid the permanent financial issues to which so many stand-alone conventions that are financed by State Party donations are prone, the funding system could be integrated into the GEF. This could happen in form of a reduced system that grants access to GEF funding to Basel-related projects like investments in waste treatment facilities or compliance assistance and capacity building projects in developing State Parties; or by making the GEF generally accountable to the Basel Convention by letting it operate its financial mechanisms. In order to prevent the scarcity of funds, authorities of the GEF pronounce an approach that also serves as a strategy for the Basel Convention: "Yet the private sector has historically been slow to invest in projects that produce global environmental benefits. In most cases, significantly expanding such investments may depend on the extent to which the conventions incorporate market mechanisms that provide incentives to attract private investment flows."[281]

Putting a feasible, investment-friendly system of economic incentives and rewards for compliance assistance in place might be an innovative adaptation for the compliance system of the Basel Convention. However, these measures cannot stand alone, but need to be backed up by functional treaty control and classical compliance enhancement mechanisms. Incentives to comply with the Basel Convention, whether granted in form of compliance assistance or in form of rewards for successfully completed compliance processes, still have to focus mainly on developing State Parties. And while trade in hazardous wastes may be carried out legally, illegal waste movement activities have to be tracked down tightly and be punished strictly by State Parties. As far as compliance control is regarded, the Basel Convention already contains reporting obligations for the State Parties and an encompassing PIC-requirement for transboundary movements of hazardous wastes. What is missing are internal or external bodies to verify the outcome of these systems of auto-control. Currently, neither PIC-documentation nor national reports are being reviewed in-depth before being published or compared by the Secretariat. Taking into consideration that bilateral re-

281 GEF Annual Performance Report 2005, 28, see note 278 and Brown Weiss/McCaffrey, see note 76, 1053.

sponse to non-compliance might be an effective tool within the realm of the Basel Convention, valid PIC-information is of utmost importance. It guarantees that State Parties are aware of breaches which affect them or are carried out by their nationals and can react appropriately.

Widawsky goes one step further and recommends the creation of a body that "inspects facilities to ensure their compliance with ESM standards set forth by the Parties."[282] Currently, the Compliance Committee of the Basel Convention may carry out on-site inspections if they are deemed necessary to conduct a proper non-compliance procedure. Widawsky, on the contrary, talks about on-site inspections as a more open, trade-friendly alternative to the Basel Ban which is less punitive towards those developing countries which actually seek participation in the global hazardous waste trade. These inspections might take place as a regular part of a PIC-procedure or even on request of countries regarding their own facilities. This body could therefore grant or deny authorization permits for facilities on the basis of these inspections.[283] A great advantage of these prior-to-trade inspections then would be that they ground their movement permits or denials on the eligibility of single facilities, and not sweepingly on the estimation of conditions of entire countries.

V. Incentives to Grant Compliance Assistance for Developed State Parties in other selected MEAs

1. Introduction

The last Chapter was dedicated to the attempt of developing ideas on how compliance with the Basel Convention could be improved. These considerations were based on the general discussion and current developments regarding compliance with international environmental law. The present Chapter is dedicated to review two different MEAs, the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the Montreal Protocol on Substances that Deplete the Ozone Layer. The emphasis of the investigation is put on the economic incentives these treaties use in order to enhance compliance, and on the linkage of these incentives to compliance activities that developed State Parties carry out in developing Member States. This Chapter

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282 Widawsky, see note 129, 617.

283 Ibid.

does not pretend to give an exhaustive analysis of these MEAs. *Inter alia*, the topic of compliance control mechanisms will be omitted. As stated above, the focus will be exclusively on incentive systems, on funding mechanisms, and on eventual linkages between treaty funding and compliance incentives used in these MEAs. The compliance mechanisms of both MEAs are – as a whole – clearly not eligible to be included into the Basel Convention. This examination aims at finding single aspects or principle patterns of the reviewed mechanisms which could, in an adapted form, improve the Basel Convention's approach to compliance.

2. Compliance and Funding Mechanisms of the Montreal Protocol on Substances that Deplete the Ozone Layer

The Montreal Protocol on Substances that Deplete the Ozone Layer was negotiated within the framework of the Vienna Convention for the Protection of the Ozone Layer (hereinafter: VCPOL) and came into force on 1 January 1989.[284] The VCPOL initiates research and information exchange, and the adoption of national policies to protect the ozone layer, but it does not require specific reduction levels of the consumption of Ozone Depleting Substances (ODS), mostly halo carbons, chlorofluorocarbons (CFCs), hydroclorofluorocarbons (HCFCs) and methyl-bromide.[285] The Montreal Protocol, concretizing the ideas of the VCPOL, provides for a reduction and final phase-out of the production and consumption of ODS. 96 chemicals are currently controlled. Developing State Parties are granted longer phase-out periods than developed State Parties, with an aspired phase-out of 99.5 per cent of almost all controlled substances by 2030.

a. The Financial Mechanism of the Montreal Protocol: The Multilateral Fund

The MPMF, the financial vehicle of the Montreal Protocol, is financed by mandatory contributions of the developed State Parties to the Montreal Protocol and is well respected by UNEP. As usual within the United Nations' treaty system, payments are based on the United Na-

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284 Information available at <http://ozone.unep.org>.

285 K. Madhava Sarma/ S. Andersen/ D. Zaelke/ K. Taddonio, "Ozone Layer, International Protection", in: Wolfrum, see note 47.

tions assessment scale, but are agreed upon every three years by the States Parties. Accordingly, the Fund is replenished every three years. The main objective of the MPMF is to give compliance assistance to developing State Parties through the provision of funds and technology.[286] As of November 2011, 45 State Parties are considered contributors while 147 are eligible to receive funds.[287] Contributions can be paid in form of bilateral direct investments in ozone-sound projects, but only to an amount that equals up to twenty percent of the total contribution of a country. Such bilateral programs require the approval of the Executive Committee,[288] the managing body of the Fund, which consists of seven members from developed, and seven members from developing State Parties. The Fund accomplishes its aims by financing activities such as the closing of ODS production facilities, converting of existing manufacturing facilities, training personnel, paying royalties and patent rights on new technologies, and establishing national Ozone Offices.[289] Project development is conducted by the Executive Committee together with the four different Implementation Agencies of the MPMF: UNEP, UNDP, UNIDO and the IBRD.

The only countries eligible to receive support from the MPMF are developing countries. They can apply for funding designated to develop a compliance program before they become a State Party to the Montreal Protocol, in order to have a functioning compliance system in place by the time of accession. As a next step, they are eligible to receive support for the implementation of the required national Montreal Protocol institutions (National Ozone Units) and for personnel capacity building.[290] More complex projects, like performance based, multi-year agreements, encompass investment project activities (focusing on the conversion or shutting down of enterprises that use or produce ODS), regional management plans, and multi-year agreements between governments and the Executive Committee.[291] Frequently, projects are not entirely financed by the MPMF but need co-funding. All countries with economies in transition (not eligible to apply for funding from the MPMF) that are seeking assistance for a project designated to comply

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286 Brown Weiss/ McCaffrey, see note 76, 1074.

287 Information available at <http://www.multilateralfund.org>.

288 Madhava Sarma et al., see note 285, 4.

289 Brown Weiss/ McCaffrey, see note 76, 1074.

290 Ibid.

291 Ibid., 1076.

with the Montreal Protocol, are eligible to apply for financial aid from the GEF.

The MPMF is frequently described as the most successful global multilateral environmental agreement.[292] Nevertheless, it faces the same difficulties as every global environmental fund, such as late payments or no payments at all. By 3 June 2011, 21 contributor Parties had paid their 2011 contributions either fully or partially, together having paid a sum of 38,45 million US$. This amounts to about a third of the overall agreed contribution sum for 2011, which is 133,34 million US$.[293] The situation was different in 2010, when contributions were almost completely fulfilled. Of the complete contribution sum of 133,34 million US$, 126,88 million US$ were actually paid.[294] A similarly satisfying outcome in pledges was reached in 2009. From its inception in 1991 to 2010, the fund had a total income of over 2,89 billion US$.[295]

b. Possible Conclusions from the MPMF

It seems possible to state, that the level of the Parties' funding commitment to the MPMF is traditionally high and that the MPMF has successfully managed to enforce compliance with its obligations in both developing and developed State Parties and therefore diminished the harmful effects of the use of ODS. Sarma calls the overall reduction of the use and consumption of ODS "impressive and beyond the mandate of the Montreal Protocol."[296] Indeed, reduction levels of the different ODS range between 85 and 99 per cent. Regarding both funding and project realization, the MPMF is substantially more effective than the Basel Convention Technical Trust Fund. The question is, if a simple status change of the Technical Trust Fund from "voluntary" to "mandatory" would raise the payment moral of State Parties. The more probable scenario might be that State Parties to the Basel Convention would not even agree to this change. Besides, the MPMF grants funding to de-

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292 Ibid., 1074.

293 Report of the 63rd Mtg of the Executive Committee, Doc. UNEP/OzL.Pro/ExCom/64/3, Annex 1, Trust Fund for the Implementation of the Montreal Protocol, Report from the Treasurer: Status of Contributions and Disbursements as at 3 June 2011, 4.

294 Report from the Treasurer, see note 293, 5.

295 Ibid., 3.

296 Madhava Sarma et al., see note 285, 7.

veloping State Parties only, an approach that the Basel Convention should overcome.

The MPMF, though, constitutes a successful example of developed countries accepting the costs of implementing the obligations of the Montreal Protocol in their territories and the greater part of the costs that occur in developing Member States for the same purpose. Would this be due to the "prominence" of the problem of ozone depletion or to a greater awareness of the fact that the use of ODS in any place in the world has negative global environmental effects? A reason for this behavior could be the intensive pre-examination and exact development of the projects prior to realization and the use of a country's eagerness towards compliance as an eligibility criterion, even before it becomes a Party to the Montreal Protocol. Furthermore, the strong involvement of many intergovernmental organizations which enjoy a reputation of being trustworthy and effective in the project development process.

What the Basel Convention possibly could copy from the MPMF is the way bilateral investments are being fostered and integrated into the funding system. In order to perform better, the Basel Convention has to develop a system that attracts foreign investment in waste treatment projects in developing countries. Insofar, the system of direct investments, which serve as discounts for the State Parties's contributions, could be adopted from the MPMF. Due to the importance of foreign investments in waste treatment facilities or capacity-building projects in developing countries, these direct investments could even cover more than the MPMF's 20 per cent of the total contribution of each State Party.

3. Compliance and Funding Mechanisms of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)

The Kyoto Protocol to the UNFCCC was adopted on 11 December 1997 and entered into force on 16 February 2005. Similar to the Montreal Protocol, the UNFCCC makes the aims of the Convention obligatory. It sets binding targets.[297] Annex I countries according to the UNFCCC are bound to reduce their greenhouse gas (GHG) emissions. This reduction amounts to an average of five per cent against 1990 levels

[297] The Kyoto Protocol has 192 Parties; information available at <http://unfccc.int>.

over the five-year period 2008 – 2012. Parties not listed in Annex I of the UNFCCC and Annex B of the Kyoto Protocol (which are mostly developing State Parties) are not bound by emission reduction targets, nor do they actively participate in the market mechanisms the Kyoto Protocol provides to reach its aims.

a. Flexible Mechanisms and Funding under the Kyoto Protocol

The Kyoto Protocol now might be the most market-based and incentive-driven existing MEA, applying a highly complex and innovative trade scheme that intensively connects compliance incentives with a funding mechanism. Put simply, the annual amount of allowed GHG emissions (measured in metric tons) is calculated and distributed to the countries participating in the reduction efforts. Further, the Kyoto Protocol creates four types of emission certificates: Assigned Amount Units (AAUs; the quantity of emissions permitted to each State Party), Removal Units (RMUs, they can be obtained by e.g. domestic reforestation programs), Emission Reduction Units (ERUs) and Certified Emission Reductions (CERs).

In order to fulfill their reduction obligations, State Parties have to carry out sufficient, autonomously funded "domestic action". On a complementary level, they can make use of the Flexibility Mechanisms in order to reduce costs and alleviate the burden of domestic reduction.[298] These mechanisms consist of Emission Trading (ET; article 17 Kyoto Protocol), Joint Implementation (JI; article 6 Kyoto Protocol) and the Clean Development Mechanism (CDM; article 12 Kyoto Pro-

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298 In order to be eligible to participate in the Mechanisms, Annex I Parties further need to meet the following criteria: they must have ratified the Kyoto Protocol, they must have calculated their assigned amount in terms of tones of CO2-equivalent emissions; they must have in place a national system for estimating emissions and removals of greenhouse gases within their territory; they must have in place a national registry to record and track the creation and movements of ERUs, CERs, AAUs, and RMUs [the mostly tradable reduction units created by the Kyoto Protocol], and must annually report such information to the Secretariat; and they must annually report information on emissions and removals to the Secretariat. Information available at <http://unfccc.int> and article 6 Kyoto Protocol. There exist further detailed eligibility criteria for each mechanism.

tocol). Their implementation is specified in the Marrakesh Accords of 2001.[299]

Joint Implementation allows commitment-bound Annex I State Parties to invest in emission-reduction projects in other Annex I countries,[300] thereby generating ERUs. Thus, the investing State Party can then obtain and "use" these ERUs "to partially satisfy its [own] limitation or reduction commitment."[301] The Clean Development Mechanism is similarly project-orientated, but refers to projects that Annex I State Parties carry out in the territory of developing State Parties which are not (yet) bound by emission reduction obligations. Montini explains that the peculiarity of the CDM is the fact that it is designed to accomplish a twofold objective.[302] On the one hand, it aims at assisting Annex I Parties to fulfill in part their limitation or reduction commitments; on the other, it aims at helping non-Annex I countries to achieve sustainable development.[303] A further difference to the JI is that CDM creates CERs, which are new tradable units, while JI leads to the transfer of existing Kyoto Units[304] from one participating state to the other.

The principle of Emission Trading is, that states which use fewer Kyoto Units than they are granted because they produce less GHG emissions, may sell part of their unit stock. States that emit more than they are eligible for may buy emission certificates. All four Kyoto Units can be used for ET. In order to prevent states from selling out their emission certificates instead of fulfilling their reduction objectives, they have to keep a commitment period in reserve.[305] States may not drop under a level equal to 90 per cent of its assigned amount.[306]

Public and private "Legal Entities" of the eligible State Parties are clearly given the possibility to participate in the Flexibility Mechanisms.[307] States are free to decide whether to allow such participation,[308]

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299 Report of the Conference of the Parties on its 7th Sess., held at Marrakesh from 29 October to 10 November 2001, Doc. FCCC/CP/2001/13/Add.4.

300 Montini, see note 21, 157.

301 Ibid., 174.

302 Ibid.

303 Montini, see note 21, 174.

304 M. Schröder, "Joint Implementation", in: Wolfrum, see note 47.

305 Schröder, see above.

306 Ibid.

307 Article 6 para. 3 and article 12 para. 9 Kyoto Protocol provide for the participation of legal entities in the JI and CDM programs. The Marrakesh

and they remain responsible under the Protocol for the activities of their nationals. Only international ET is feasible for the Kyoto Protocol's trading system, the sale of Kyoto Units from one national company to the other would not be recognized as a feasible transaction.

Schröder refers to Joint Implementation when he writes, that "being able to get involved both in the investing and the hosting side of a project, legal entities are likely to become the main drivers of the mechanism."[309] This assertion, however, might be appropriate for all the flexible mechanisms. Complementary to the flexible mechanisms with their restricted access, the UNFCCC and the Kyoto Protocol provide funding for projects that enhance the protection of the ozone layer. These funds are designated to serve the countries that are not eligible to participate in the Flexibility Mechanisms. At the 7th COP of the Kyoto Protocol 2001 (the same COP that decided on the Marrakesh Accords), State Parties decided to create an Adaptation Fund[310] in order to finance concrete adaptation projects and programs in developing countries that are parties to the Kyoto Protocol.[311] The Adaptation Fund has worked since 2009 and is financed by voluntary pledges of governments and by a share of proceeds from CDM projects. The monetary value of two per cent of the CERs that are issued for a CDM project has to be transferred to the Adaptation Fund.[312] As of 31 October 2010, about 202 million US$ were deposited in the Adaptation Fund; over 130 million US$ coming from the 2 per cent scale of created CERs, and the rest coming from governmental donations. By September 2010 two projects, one in Senegal and one in Honduras, were approved for financing by the Adaptation Fund.

The 7th COP also agreed on the creation of two more funds which should further serve the implementation and realization of GHG reduction projects worldwide. They should not be directly related with the Kyoto Protocol Mechanisms and only have a voluntary donation finance system: the Least Developed Country Fund[313] (LDC) has the

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Accords (Annex to the Marrakesh Accords, article 5, see note 299) introduce legal entities to the Emission Trading system.

308 Schröder, see note 304.

309 Ibid.

310 Report of the Conference of the Parties on its 7th Sess., see note 299, 52.

311 Information available at <http://www.adaptation-fund.org>.

312 Information available at <http://www.climatefundsupdate.org>; CDM projects in the World's Least Developed Countries are exempted.

313 Report of the Conference of the Parties, see note 299, 43.

objective to address the special needs of 48 least developed countries regarding climate change adaptation and GHG reduction projects.[314] According to Climate Funds Update, the fund had e.g. received over 219 million US$ by 8 October 2010 from 22 developed donor states.

The second fund, the Special Climate Change Fund (SCCF) focuses on long-term projects that support country adaptation to climate change. It is accessible for all countries which are not listed in Annex I of the UNFCCC. It had received e.g. about 133 million US$ from 14 donor countries by 8 October 2010. In addition to its general role as the financial mechanism to the UNFCCC, the GEF administers both the LDC and the SCCF separately from the Climate Change Focal Area. The Adaptation Fund is administered by the Adaptation Fund Board, to which the GEF provides secretariat services on an interim basis.

b. Possible Conclusions from the Kyoto Protocol Flexible Mechanisms

What conclusions could possibly be drawn and what ideas that are feasible for the Basel Convention could be extracted from the mechanisms of the Kyoto Protocol? The Flexibility Mechanisms cannot be entirely transferred into another MEA that regulates a different subject (variations of Emission Trading, though, have successfully entered into various MEAs). The Kyoto Protocol has its own system of tradable permits. Wastes, on the contrary, are perhaps not eligible to be subject of a virtual trade, because they are traded and moved themselves.

What indeed might serve as a functioning compliance system of the Basel Convention are the general principles and ideas on which the Kyoto Protocol is built. Although things are not perfect, and by the end of the first GHG-reduction period 2008-2012 some developed nations will not have fulfilled their reduction obligations to the full extent, the Flexibility Mechanisms of the Kyoto Protocol still are an outstanding example of successful and innovative integration of economic incentives into the compliance system of an MEA. In particular, the Clean Development Mechanism typifies an approach, which rewards compliance assistance with economic benefits for the (developed) State Party that grants it. Kyoto Units obtained in a CDM-project abroad serve the assisting State Party to comply with its own reduction obligations. The CDM is therefore creating a "symbiotic" approach to compliance assistance, economic incentives and treaty funding. Financial

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314 Ibid. and <http://www.climatefundsupdate.org>.

outcomes of the CDM, though, are not directed into one of the Funds that belong to the Kyoto Protocol area, but are directly put into projects that serve to achieve the actual Kyoto goals.

Helping developing nations and protecting them from the harms of hazardous wastes is a major goal of the Basel Convention. Nevertheless, no waste reduction levels are defined in the Basel Convention; goals and approaches regarding this matter are left to the national legislations of the State Parties. What could be incorporated into the Basel Convention is the idea of the Clean Development Mechanism: State Parties which facilitate compliance assistance in developing countries in form of direct investment, training, capacity-building or bilateral trade possibilities, should be rewarded.

VI. Conclusions

It is not new that solutions to the flaws of the Basel Convention and methods to halt illegal waste trade have to be found within the realm of global economy. Principle 12 of the Rio Declaration states, *inter alia*, that "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation."[315] Abdul Haseeb Ansari puts it like this: "It is now said that trade is not an end in itself; rather, it is a means to achieving the end. The end is environmentally sustainable development."[316]

The Basel Convention, though, will not be able to reach a safe, sound, and economically beneficial waste trade system in a stand-alone way. In order to reach the optimal "Issue Linkage"[317] between trade and the protection of the environment from waste-related damages, measures have to be taken on all levels of law: within the global and regional waste trade regimes, the global trade regime of the WTO, within bilateral investment agreements and last but not least within national legislations. The Basel Convention, however, being the international

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315 Rio Declaration, see note 238.

316 A.H. Ansari, "Free Trade Law and Environmental Law: Congruity or Conflict?", *IJIL* 41 (2001), 1 et seq. (1).

317 D. Shelton, "The Impact of Economic Globalization on Compliance", in: K. Ishibashi/ A.Kiss/ D. Shelton (eds), *Economic Globalization and Compliance with International Environmental Agreements*, 2003, 40 et seq.

treaty at the forefront of the establishment of a safe global waste movement mechanism, urgently has to give up on cumbersome mechanisms that are hard to administer, like a complete trade ban, and needs to be adapted to the needs of a safe global waste trade.

As Beyerlin, Stoll and Wolfrum express, action-orientated MEAs like the Basel Convention need to provide their own control structure in order to be effective.[318] The establishment of an internal or external body which reviews the State Parties' annual reports and carries out on-site inspection procedures on waste treatment facilities, might constitute a promising measure to end the inefficiency of the current mechanisms. If not externalized, both tasks could be carried out by, or under the auspices of the Basel Convention Secretariat. As far as bilateral responses to breaches are concerned, verification of PIC-documentation might be a tool to enable State Parties to detect and respond to illegal waste movements into and from their territory. The Basel Convention, however, cannot provide a functioning national response system. A "review organ" of the Basel Convention, though, could, as a basic step, provide states with information regarding non-compliance in their territory or by their national private actors.

The Convention's main challenge, however, is to confront the flourishing illegal trade activities in hazardous wastes from developed to developing countries by increasing the attractiveness of compliance with its obligations. This means in the first place, that the Basel Ban Amendment should never enter into force, and that the concept of regional waste regimes prohibiting imports of hazardous wastes into their State Parties' territories should be rethought. So far, import bans, even coupled with export bans in states which are huge generators of hazardous wastes, have not led to overall satisfactory results. This is shown by the illegal hazardous waste flows that enter Africa from the European Union.

Still State Parties are perfectly able to prohibit the import of hazardous wastes into their territory, according to the regular provisions of the Basel Convention. But those developing State Parties which want to participate in the global waste trade should be enabled to do so. The implementation of economic compliance incentives for developing and developed State Parties alike and the improvement of the Basel Convention's financial mechanisms could constitute feasible steps to achieve this aim. As long as most developing countries do not possess sufficient means of their own to develop a modern waste industry infrastructure,

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318 Beyerlin/ Stoll/ Wolfrum, see note 25, 261.

developed states have to provide assistance, from capacity-building to entire investment projects in waste facilities. An improved Basel Convention compliance mechanism should be based on such considerations and, hence, reward assistance activities of developed State Parties and their national entities and make such projects subject to funding.

The idea of the Clean Development Mechanism applied by the Kyoto Protocol is an excellent example of rewarding developed State Parties for the compliance assistance or project investment they carry out in developing State Parties. Granting financial support to developed State Parties and their national enterprises which carry out environmentally sound and sustainable waste-related projects in developing State Parties, coupled with the actual possibility to then dispose hazardous wastes in these countries, might bring developed State Parties into compliance. The availability of adequate waste treatment facilities and the possibility to play a role in the global waste trade business might decrease the "attractiveness" for developing State Parties to accept illegal and harmful waste loads. In both developed and developing State Parties, these measures could "persuade" non-state actors into compliance, which is, according to Shelton, "a key factor in the environmental field, where most activities that cause harm to the environment are conducted by the private sector."[319] This system has to be backed up by strong and credible control mechanisms and strict national legislations regarding illegal waste traffic.

Due to its unique scope and topic, the Basel Convention will have to find an appropriate, tailor-made, and "attractive" compliance mechanism. In order to be applicable, this approach needs to be based on a functioning funding mechanism. The Technical Trust Fund, the designated project funding vehicle of the Basel Convention, should remain voluntary, but could increase its attractiveness by offering the possibility to finance projects which are carried out and financed by developed State Parties. A discount possibility which equals costs that stem from direct assistance in developing State Parties, as offered by the MPMF, could serve as a further incentive for Member States to pay their pledges and simultaneously dedicate themselves to waste treatment infrastructure in developing countries.

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[319] Shelton, see note 317, 35.