Complying with and enforcing of environmental law: a critical appraisal of the mechanisms used at the international and the European level

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Abstract: Despite the vast number of environmental agreements and laws coming into force their impact are not the anticipated ones, as clearly seen from the degradation of the natural environment. This is largely due to ineffective enforcement of and compliance with the environmental obligations encompassed by all these laws and treaties. Thus, enforcement and compliance mechanisms are of paramount importance for the achievement of environmental conservation, as environmental results matter at the end of the day. This paper seeks to identify and assess the institutional mechanisms for enforcement of and compliance with international and European environmental law. It explores recent developments and provides a critical appraisal of the mechanisms and procedures developed globally and regionally with regard to the fulfilment of states' environmental commitments. It concludes with further steps which may enhance compliance and improve enforcement of environmental obligations at both the international and EU level.

Keywords: environmental protection; international environmental law; European environmental law; enforcement and compliance; non-compliance procedures; sanctioning mechanism; indirect sanctions.

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1 Introduction

Despite the increase in the number of treaties, legislation and guidelines that states are nowadays called to comply with, implement and enforce, environmental protection and nature conservation have not been equally ameliorated. On the contrary, phenomena of non-compliance with environmental obligations and lack of enforcement of environmental commitments are very common both at the European and international level and may have rather serious implications, from environmental degradation to political insecurity and conflicts over natural resources.

The issues of enforcement of and compliance with environmental commitments are being addressed both at the international and EU level. Due to the different nature of these two legal orders different tools and mechanisms are in use and different rules apply to the states involved. This paper first explores the enforcement and compliance mechanisms available at the international level and then the ones in force at the EU level. The differences indicated demonstrate the different perspective of these two legal orders, which try by variant means to address the problems of states' non-compliance with their environmental obligations and confront the lack of enforcement of environmental rules.

2 Enforcement and compliance at the international level

2.1 Definition and legal basis

There is no single definition for the enforcement of environmental obligations in international law. In general, the enforcement of international law mostly relates to sanctions and penalties of a collective nature imposed by the Security Council or in the framework of self-defence according to the Charter of the United Nations (Brunnée, 2005). It is said that this definition of enforcement is unduly narrow (Brunnée, 2005), because it cannot include other means of enforcement which may better apply to environmental issues. With respect to the definition of enforcement of environmental requirements, the OECD Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus and Central Asia offer a useful approach defining enforcement "as the set of actions that governments or others take to correct or halt behavior that fails to comply with environmental requirements" (OECD, 2002). Correspondingly, compliance "is the behavior response to regulatory requirements that ensures the protection of human health and the environment. For the regulatees, being in compliance means obeying environmental requirements established by law" (OECD, 2002). More definitions have been proposed both for compliance as "a state in which environmental requirements are met and maintained" and enforcement as "the use of legal tools to assist in and compel compliance with environmental

requirements, and in some contexts to establish liability or responsibility for harm to the public or environment from polluting activities" (Wasserman, 1994).

Obviously, the multiplication of environmental agreements at the international level has not led to better environmental protection. Although states have made commitments through several international treaties to protect their own natural environment, they usually stand liable for damages provoked to the environment of other states (i.e., Trail Smelter Case) or to areas beyond national jurisdiction (Nuclear Tests Case). Effectiveness of environmental protection depends on the enforcement of environmental legislation and of other environmental policies and standards (Paquin and Sbert, 2004). With respect to enforcement of international environmental law it refers:

a to the implementation of a state's international environmental obligations

b the person (legal or natural) who can enforce these obligations

c the means offered by international law to resolve possible conflicts and settle disputes (Sands, 2003).

In international law, soft and hard law documents, which aim at tackling environmental challenges, may offer the legal basis for the development of enforcement and compliance mechanisms. First of all, the Principle 10 of the Rio Declaration (Rio Declaration for Environment and Development, 1992) explicitly states that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided". Apart from Principle 10, other environmental soft law documents also refer to compliance with and enforcement of environmental obligations. The UN A/RES/37/7 (1982), the Agenda 21 (1992) and the Johannesburg Plan of Implementation (2002) are considered amongst the most important of them (Redgwell, 2007). General principles of international environmental law, such as the principle of common but differentiated responsibility, also apply to the implementation of environmental obligations.

All these documents are non-binding, of course, but still considered to demonstrate a strong consensus on the part of the international community. Nevertheless, after the 1972 UN Conference on the Human Environment in Stockholm a vast number of multilateral environmental agreements (hereinafter MEAs) has been signed covering a broad range of environmental challenges such as biodiversity conservation, protection of the ozone layer, climate change and combating desertification. The abovementioned documents, whether of a binding nature or not, offer the legal basis for the development and implementation of enforcement and compliance mechanisms at the international level.

2.2 Mechanisms included in the MEAs

Usually the MEAs include mechanisms and tools which aim to enhance compliance with and enforcement of environmental obligations. Capacity building measures and financial assistance are the most common measures used for compliance with environmental commitments (Brunnée, 2005). This is partly due to the decentralised nature of international law and the lack of a central enforcement mechanism unlike national legal orders.

Non-compliance mechanisms in the MEAs may also assist in complying with environmental obligations. Non-compliance procedures have become a very useful tool in the field of international environmental law (Klabbers, 2008) and it seems that their establishment and extended use may map the road for enforcement and compliance at the

international level. These procedures are included in several MEAs which have established subsidiary bodies addressing issues of compliance. The first multilateral environmental agreement to identify and address non-compliance of the parties is the Montreal Protocol (1989) to the Vienna Convention on the Ozone Layer (Douma et al., 2010). Other MEAs followed such as the Biosafety Protocol (2000), the Aarhus Convention (1998) and the Kyoto Protocol (1997). In general, the non-compliance procedures in MEAs consist of financial or technical assistance as well as penalties; the latter usually consisting of further reporting requirements for the violating state (Douma et al., 2010).

The Montreal Protocol (1987), which is considered to be one of the most successful treaties in the field on international environmental law (Cardesa-Salzmann, 2011), may offer a clear picture of how the non-compliance mechanisms work. In particular, any state which is party to the protocol and has reservations for another state's compliance with its obligations may submit a written complaint and hand it to the secretariat. The Implementation Committee established by the protocol is authorised to examine and report on received complaints. After the committee's report the meeting of the parties may decide on the recommendations to be addressed or the measures to be taken in order for the violating state to comply with its obligations arising from the protocol.

It is worth noting that the Kyoto Protocol has already moved one step forward by including not only amicable solutions but also sanctions applied when a party is violating its obligations arising from the protocol. Similarly, it is explicitly stated in the Biosafety Protocol that the Conference of the Parties (COP) may decide upon additional measures in 'cases of repeated non-compliance' (Brunnée, 2005). Furthermore, the implementation of the Kyoto Protocol within the EU countries demonstrates the problems of enforcement of international law and respectively the interlinkages to the EU law. Both the EC and member states are parties to the Protocol. The Protocol uses three systems to control emissions, the registry system, the reporting system and the verification system. This combined method used by the Protocol to check states' compliance is further strengthened by the Community's own monitoring system, with additional pertinent tools to measure compliance of EU member states. However, despite the dual character (both international and European) of the compliance mechanism, it still did not prevent implementation problems (Tabau and Maljean-Dubois, 2010) which led to the suspension of Greece from the Kyoto flexible mechanism in 2008.

2.3 The role of international organisations and non-state actors

It is said that non-state actors and particularly environmental organisations are the watchdogs of development, application and enforcement of international environmental law (Sands, 2003). Although it is not that usual for non-state actors to enforce obligations, their role in states' compliance with environmental obligations may be quite important. This mainly refers to international organisations and less to other non-state actors.

At the international level the United Nations Environment Programme (UNEP) makes a lot of efforts to address compliance and enforcement issues. The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, which are the result of a participatory process, provide parties with general guidance on how to implement and enforce the provisions of the MEAs they have signed. The Guidelines are followed by the UNEP Manual on Compliance with and Enforcement of Multilateral

Environmental Agreements, which address particular target groups, such as legislators, administrative agencies, judiciary, enforcement officers, civil society, local authorities and private sector. Of course, this is a non-binding document which cannot impose further obligations to the parties, but seeks to help them in implementing their obligations under the MEAs. Thus, it attempts firstly, to assist parties in complying with their commitments which result from the signature of international environmental treaties and secondly, to strengthen implementation of MEAs at the international and national levels. The Guidelines aim at promoting the implementation of various MEAs in the fields of chemicals, biodiversity conservation, climate change and others (Bruch and Mrema, 2007). They also seek to promote implementation of future MEAs (Bruch and Mrema, 2007). The Guidelines provide a clear framework for the negotiation, preparation and implementation of an environmental treaty. Effective participation during the negotiation stage is a sine qua non-element, according to Guidelines 11 and 12 (Bruch and Mrema, 2007). Moreover, the Guidelines confirm the necessity of institutional mechanisms and procedures, such as monitoring and reporting, dispute settlement and non-compliance mechanisms (Bruch and Mrema, 2007).

In addition, it is worth noting that the UNEP addresses not only the issues of compliance with MEAs in its Manual, but also includes a chapter on the treatment of environmental crimes. The part of the Guidelines which refers to enforcement mostly includes suggested measures at the national level, inter alia effective legislation, public awareness, environmental education, appropriate regulatory framework and promotion of international cooperation. Correspondingly, UNEP assists states in complying with and enforcing MEAs directly through their national legislation. The main tool to achieve this is the technical assistance provided to parties to draft regulations and laws. To this end UNEP developed the Bali Strategic Plan on Technology Support and Capacity-Building adopted in February 2005.

Apart from the Guidelines, UNEP is running the Montevideo Programme for the Development and Periodic Review of Environmental Law; in the framework of the Montevideo III and IV several key points have been identified and served as an input for the Colombo Process on Enforcement and Compliance of Environmental Law. UNEP has been mandated to strengthen and facilitate the effective implementation of MEAs by identifying the common features of them, the synergies and interlinkages.

Other international actors also seek to promote enforcement and compliance at the international level. The International Network for Environmental Compliance and Enforcement (INECE) works especially with a focus on indicators which assess domestic implementation of MEAs. Recently, the INECE community adopted the Whistler Statement in the context of the 9th INECE International Conference on Environmental Compliance and Enforcement (Whistler Statement, 2011).

As already mentioned, OECD has developed the Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus and Central Asia (OECD, 2002). The Guiding Principles aim to assist governments in implementing an effective and efficient system of environmental enforcement and compliance mechanisms, in fostering cooperation and information exchange amongst all parties involved in environmental enforcement and compliance promotion and in providing a framework for assessment (OECD, 2002). Although the OECD Guiding Principles are a non-binding document concerning a narrow range of countries, it provides member states with definitions of enforcement and compliance as mentioned before.

Furthermore, development banks, such as the World Bank and the European Bank for Reconstruction and Development (EBRD), apply environmental policies and exercise their activities according to particular set-in-advance standards when financing development projects. These policies and standards used during their financing activities may assist recipient countries in complying with international environmental principles and practices. They also widely use inspection mechanisms which may report on the appropriateness or not of a certain project to continue. In addition, they have developed in several occasions specific guidelines, such as the Equator Principles of the International Financial Corporation (IFC), which offer a baseline for compliance with environmental (and other) obligations. It is worth mentioning that these mechanisms may be accessed by members of the local communities where the projects are implemented or even by NGOs on behalf of the local stakeholders. In many occasions development banks have funded projects aiming at the promotion of environmental inspection and enforcement, such as the pertinent project in Belarus (UNEP, 2006).

The role of the private sector, and especially of multinational corporations, is equally important when it comes to assisting states in complying with their environmental obligations. For instance, Foreign Direct Investment (FDI), as long as particular standards and legislation are respected, may serve the promotion of sustainable development and sound environmental management. Project finance agreements signed between states, private sector and other agents (e.g., development banks as previously mentioned) often include specific clauses with regard to the protection of the environment; thus, contracting parties, that is states, have to comply with these requirements in order to receive financing. Non-compliance with domestic and international environmental legislation and standards as required by the FDI contracts may have implications on the investment and the contractual relations among the parties.

2.4 Dispute settlement

International environmental law and its principles are applied and promoted through dispute settlement. Respectively, dispute settlement offers another mechanism of enforcement and compliance with environmental obligations at the international level; it must be distinguished, though, from non-compliance procedures. Dispute settlement, either through arbitration procedures or international courts, is a judicial mechanism of enforcing international environmental law with all the consequences arising from non-compliance with the court's ruling The International Court of Justice (ICJ) and many permanent tribunals, such as the World Trade Organization (WTO) Appellate Body, the International Tribunal for the Law of the Sea (ITLOS) and, of course, the European Court of Justice (CJEU) have ruled on very important environmental cases (Fur Seals Arbitration, Trail Smelter Case, New Zealand v. France, Yellow-Fin Tuna, Metalclad v. Mexico, Gabcikovo-Nagymaros to name but a few). In particular, the WTO dispute settlement agreement stresses that "prompt compliance with the ruling/recommendations of the Dispute Settlement Body (DSB) is essential in order to ensure effective resolutions of disputes" (Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 21 par. 1); the DSB monitors how rulings are implemented (Art. 21). These courts and tribunals have greatly assisted in the development of international environmental law and the promotion of sustainable development.

Furthermore, many international environmental treaties include specific provisions for arbitration procedures. In 1993 ICJ established a special Chamber for Environmental Matters; it should be noted that so far no case has ever been brought before it. Last but not least, there is an ongoing academic debate on the necessity of the establishment of an international court explicitly for environmental issues. This certainly remains to be seen and it is unlikely that it will ever be established; one of the arguments against this initiative is the nature of environmental damages, for which 'corrective justice' cannot restore the environmental damage already caused. This argument generally applies to judicial procedures and it is also a reason for which preventive measures are favoured in environmental issues.

2.5 Critical appraisal

The special nature of international law encompasses the compliance measures as the most appropriate towards strengthening implementation of environmental agreements. This requires the cooperation of governments which should be capable of applying the relevant obligations within their state and enforcing them through measures and mechanisms developed at the national level. A coherent way of working towards that aim would be by building up thematic and operational synergies, as already undertaken in the context of UNEPs work on compliance with and enforcement of MEAs. In particular, the parties of environmental agreements could develop their national regulatory framework integrating a broad range of obligations into a single law (Bruch and Mrema, 2007). This is feasible especially when clustering MEAs around a common theme, such as biodiversity conservation for instance, or around operational issues, such as capacity building and training (Bruch and Mrema, 2007).

It is said that "weak legislation can produce weak compliance, but unenforced strong legislation can have the same effect" (Jacobson and Brown-Weiss, 1995). The challenges faced by the global community call for effective efforts to implement environmental commitments at the international level. Implementation of MEAs at the national level is of utmost importance, if environmental protection is at stake. The abovementioned mechanisms used at the international level offer a coherent framework of general principles for compliance with and enforcement of environmental obligations. Nevertheless, a case-by-case approach is needed for each country, as it leaves more room and flexibility in the choice of mechanisms and respects the different needs and capabilities in each case.

3 Enforcement and compliance at the EU level

3.1 The monitoring and sanctioning mechanism in the EC Treaty

There are no specific provisions for the effective enforcement of the European environmental law; the general provisions of Articles 258–260 TFEU apply when monitoring member states compliance with the EU law. Pursuant to article 258 TFEU, if the Commission discovers an infringement of the EU law, it initiates a preliminary ruling procedure, in order to pursue a 'peaceful' compliance of the pertinent state. This administrative procedure officially begins by sending the letter of formal notice and ends with the issue of the reasoned opinion, in which the Commission makes an express

finding on the failure to fulfil obligations and gives the member state a time-limit to comply. In case that the state fails to act, the Commission may bring the case before the CJEU, which simply issues a declaratory judgement. If the particular member state fails to comply with the CJEUs judgement, the Commission launches a second round of the same procedure, but this time if it brings the case again before the CJEU, the Commission may request the imposition of payment obligations against the member state concerned (Art. 260 TFEU).

This procedure, apart from the pecuniary sanctions clause, exists from the very first founding treaty of the European Economic Community (EEC). On the contrary, the capability of imposing pecuniary sanctions came into force after 1993 and it is an innovative approach of the first Treaty on EU (Maastricht Treaty).

The CJEU may impose either a penalty payment or a lump sum. The penalty payment is suitable for the purpose of inducing the state to put an end to the infringement as soon as possible, while the lump sum is suitable for the purpose of assessing the consequences for public and private interests of the failure of the state to comply with its obligations, particularly where the infringement has persisted for a long time after the issue of the first judgement of the Court. In spite of the wording of the relevant article on the disjunctive imposition of either a penalty payment or a lump sum, the CJEU cumulatively imposed both sanctions for the same infringement on France which did not ensure the monitoring of fishery activities according to the provisions of community law (C-304/02).

The imposition of pecuniary sanctions is crucial for the effective implementation of the CJEUs judgements which indicate a member's state non-compliance with the European environmental law. However, the imposition of sanctions was not introduced as an automatic procedure each time an infringement of the EU norms was found. Their imposition takes place only in the second round which adds more time to an already long procedure and only after a respective request by the Commission and the CJEUs judgement. The Lisbon Treaty, introduced some modifications with an aim to improve the monitoring and sanctioning mechanism, that, in certain cases, reduce the duration of the said mechanism. According to the new Article 260 of the EC Treaty par. 3, the Commission may, 'if it deems appropriate', request the CJEU to impose monetary sanctions on a member state even in the first round of the procedure if the concerned state fails to fulfil its obligation to notify, after the expiry of the time-limit, the necessary measures transposing a legislative directive into national law. Also, the Lisbon Treaty shortens the duration of the pre-litigation procedure of the second round, as the Commission only has to send a formal letter of notice defining the time-limit for achieving compliance and is exempted from having to send a reasoned opinion.

3.2 The disadvantages of the mechanism especially with regard to the auditing of enforcement of environmental legislation

This procedure against a member state is quite satisfactory but certainly there is some criticism which highlights its disadvantages (Krämer, 2007; Hedemann-Robinson, 2007). As no special procedure for infringements has replaced so far that of 258 TFEU in the environmental field, the mechanism of Articles 258–260 TFEU is not very effective when it comes to the treatment of environmental violations. Its main disadvantage is the time length of the procedure which may take up to six years. Besides the launch of the procedure against a member state does not impose any obligation on the state to prevent and/or terminate the illegal activity as long as there is a pending procedure for a

declaratory judgement by the CJEU. The reason for the long procedure is not only the time needed for the whole process (pre-litigation and judicial stage), but also that it was initially designed to come up with a solution out of court discretion, and not necessarily to lead to 'public condemnation' of the particular member state. To this end the Commission has broad discretion to decide to start, continue, or terminate the pre-litigation process and in its effort to find a 'peaceful' settlement does not hesitate to extend the time of the procedure as may be needed to convince the state.

But even if it appeals to the CJEU, the imposition of sanctions comes too late after the completion of the second round. The very long procedure can be catastrophic in case there is a risk of ecological damage due to failure to comply with environmental regulations. Thus, the declaratory judgement of the CJEU which simply ascertains the infringement, but also the decision of the second round which will impose economic sanctions cannot prevent ecological damage that has already taken place.

An effective shortening of the procedure could come up if the Commission had the authority in the framework of its own competence, to issue directly to the defending state binding decisions or sanctions to compel compliance. Such a power is not new to the Commission, as it is already included in the context of competition cases (a.86 para.3 TEC), where there has been no reaction by member states. However, it seems that member states do not wish to extend the competence of the Commission with regard to monitoring member states' compliance with environmental provisions; and this is probably due to the fact that they want to retain the current structure of this mechanism which is basically a procedure of negotiations and settlement between the Commission and member states as opposed to binding decisions.

One of the criticisms on the appropriateness of the procedure, particularly with regard to the monitoring of the implementation of environmental provisions, is the fact that the Commission is informed for violations by the Member States primarily by individuals or other member states and much less by its own services. Of course, member states are obliged to respond with good faith (Art. 10 TFEU) to any Commission's request for control and to provide any information requested; but the respective article is so broadly worded that it cannot impose by itself systematic controls and inspections. Even in the case of specific complaints the Commission is not entitled to ask for an inspection in disputed areas by its own services or by the national authorities based on the 258 TFEU and in any case the element of surprise is lost (Hedemann-Robinson, 2007). In addition, there is lack of appropriate technical personnel and necessary funds.

Furthermore, the Commission, according to Article 211 TFEU, is not just responsible to audit the implementation of European environmental law by member states in the sense of simply integrating the relevant provisions into the national legal order, but it is obliged to pursue the application of these provisions in practice. However the Commission has no inspectors, local observers, laboratories or other organisations that could provide an objective description of the practical implementation of European environmental law. Moreover, a closer monitoring of the practical implementation of the EU environmental legislation disturbs the member states, since it may reveal the collusion that sometimes exists between the economic operators and administrations on issues of use or contamination of water, air or soil.

Finally, the activation of the monitoring and sanctioning mechanism may not be the best solution for the case of infringements resulting from the wrong interpretation by the member states of the environmental directives due to their unclear wording (Beijen,

2011). Thus, instead of focusing efforts on the activation of the mechanism, it would be preferable to apply preventive procedures (Borzsák, 2011) which are based:

a on the review of the content of certain directives

b on providing all necessary information to

c collaborating with the national authorities that are responsible for applying environmental law.

3.3 The issue of the Committee's withdrawal from the proceedings

After the introduction of the scheme of penalties in the Treaty of Maastricht on the European Union (1993), the Commission opened proceedings against member states that could have led to the imposition of penalties, but it was also careful to withdraw its application as soon as a member state brought the infringement to an end. The first time when the Commission was determined to follow this process and when the CJEU imposed penalties in the end, concerned Greece in 2000 (C-387/97). The Commission continued to follow the same withdrawal tactics, in order for the proceedings not to end up to the Court of Justice, provided that the member state fulfils its obligations or simply takes steps towards this direction. However, the Commission's withdrawal, after the case was brought to the Court of Justice, becomes especially crucial.

At a first glance, the Commission's withdrawal due to the delayed compliance of the concerned member state and the removal of the case from the Court's register seems rational given that the purpose of the whole proceeding against a member state is to convince the state to comply and not necessarily to lead it before the Court. Also, the Commission's withdrawal tactics is justified by theory, since this way the Commission can manage better the proceedings against a member state. Due to the possibility of withdrawing the Commission becomes more resolute to open proceedings, in order to consolidate the idea of a routine procedure.

But on the other hand, the Commission's withdrawal makes it more difficult for individuals to seek state's liability for the breach of EUs environmental law. This position was endorsed by the CJEU when called upon to decide the issue of the delayed compliance of a state with the case pending (C-39/72). The involved state's argument that the action should be dismissed for lack of subject or lack of legal interest on the part of the Commission was not accepted by the ECJ on grounds relating to the incurrence of the involved state's liability towards individuals. A decision ascertaining an infringement by a member state constitutes a useful 'weapon' in the hands of individuals, in the context of the non-contractual liability of the state (C-6/90), in order to receive compensation for losses suffered based on the contrary to the EU provisions behaviour of the member state. In other words, the existence of such a decision means that the national judge, who shall have to decide on a relevant compensation demand, will consider the infringement of the EU law by the member state as res judicata and will not proceed to his own judgements (C-314-316/81 and 83/82). Moreover, the non-withdrawal of the application allows the CJEU to proceed to the interpretation of the relevant provisions and thereby to prevent potential recurrences of the infringement in the future. So, for all the above reasons it is not recommended for the Commission to withdraw applications, at least when

proceedings are pending before the CJEU. In fact, if the Commission withdraws from the procedure, the CJEU cannot proceed to the continuation of the trial on its own initiative and it is obliged to erase the case from its register, since Article 78 of the Rules of Procedure of the CJEU allows the applicant to withdraw unilaterally and at any stage of the procedure before the pronouncement of the judgement.

Furthermore, the perspective of the Commission's withdrawal creates additional problems, mainly because it allows member states to follow delaying tactics with incalculable consequences for the environment. In particular, they do not hesitate to comply at the last minute, even just before the ruling on the sanctions, in order to cause the Commission's withdrawal and the rejection of the application. Moreover, the member state involved may take some steps to demonstrate willingness to come into compliance, in order to persuade the Commission to withdraw from the procedure (Houppermans and Pecho 2006), but it is not certain that there will be no recurrence of the infringement when the member state escapes the risk of a judgement against it by the CJEU. In order to avoid such delaying tactics, in 2005 the Commission announced (SEC/2005/1658) that it will change its tactics regarding sanctions. Specifically, after the imposition of both a penalty payment and a lump sum on France (C-304/02) by the CJEU, the Commission announced that from that time on it would start asking the CJEU to impose both forms of sanctions. That decision was due to the fact that while the penalty is imposed for the future, the imposition of a lump sum may discourage delaying tactics.

The Commission, however, continued withdrawing from the proceedings, even from procedures of the second round (C-503/04 and C-119/04), aggravating the problem and, obviously, acting against the purpose of its Communication (SEC/2005/1658) to discourage states from delaying the procedure.

The Commission may follow the withdrawal tactics even for cases covered by Article 260 par. 3 introduced after the Lisbon Treaty (when the Commission is allowed to request the immediate imposition of sanctions in the first round of infringement proceedings, Art. 258 par. 2), for non-notification of the transposition measures for a directive by a member state. Already, the first approach of the Commission to the new mechanism of immediate imposition of sanctions has been rather hesitant since, by making use of the transitional provisions of the procedure that it included in its Communication (OJ C 12, 15.1.2011/1), the Commission rushed to withdraw from six pending cases that concerned the non-notification of transposition measures of several directives by five member states (C-398/10, C-396/10, C-246/10, C-291/10, C-410/10, C-286/10). However, the Commission's withdrawal is in contradiction with the drastic procedure introduced by the Lisbon Treaty and there is nothing to preclude the member states from using delaying tactics. Therefore, the risk of hampering legal certainty and transparency through the withdrawal tactics does exist.

3.4 The role of the Commission and the political dimension of the control and penalty mechanism

Unlike the litigation phase of the proceedings against a member state where, as the CJEU expressly declared, there is no place for political views (C-177/04), this is not the case for the pre-litigation phase of the proceedings and for the phase that follows the CJEUs decision to impose sanctions.

In particular, as regards the pre-litigation phase, the political dimension has always been obvious. The Commission, being pro-European and independent from governments,

was considered by the authors of the founding Treaties as the most appropriate body to monitor the application of community law by the member states. Indeed, the Commission was granted wide discretion to decide when to open proceedings against member states, to manage the procedure throughout the pre-litigation phase and *to bring proceedings before the* CJEU. Although in the beginning the Commission was rather careful as to when to initiate proceedings against a member state, because such an action risked being characterised even as hostile to member states, later on it attempted to turn this procedure to an almost routine process. Nevertheless, it had, and always has, the prerogative of weighing the circumstances as to when to open proceedings, while its handling of the cases is characterised by a manifest lack of transparency.

The introduction of the penalty mechanism by the Maastricht Treaty equally did not limit the Commission's discretion in the application of Article 260 TFEU. This is a major weakness of the penalty mechanism. The reason for this is that the imposition of penalties causes political inconvenience in the member states; it would be naive to believe that the Commission is not subjected to pressure in the exercise of its functions under Article 260 (2), as the Commission is ultimately not as independent as envisaged by the drafters of the Treaties to be. The Commission's powers (executive, quasi-judicial and legislative), raise the question of whether it is able to actually take charge of the proceedings against a member state in a sufficiently independent manner (Hedemann-Robinson, 2007; Williams, 2002). The need for settling disputes out of court, which is an objective tacitly implied in Article 258 TFEU, may be influenced by the need to reach consensus on its legislative proposals in the Council. In general, the Commission did not avoid negative comments about the lack of transparency in monitoring the application of Community law, at least with regard to the environment. Even the obligation imposed on it by the Ombudsman to keep a record of the complaints it receives, without of course publishing them, eventually faded away.

The political dimension of the Commission's handling of infringement cases is also enhanced by the weaknesses of the system of legal protection in the member states. In particular, the acts of national institutions that are contrary to the environmental rules of EU law are hardly ever contested before national courts, in the absence of a broad interpretation of the public's right to access to justice. As a result, it is the Commission, and not the CJEU, who becomes the ultimate interpreter of EU law, and this fact paves the way for the Commission to open negotiations with the member states in closed sessions, in the spirit of 'package meetings' (Krämer, 2009). At the end of these meetings any intention to open or continue proceedings against a member state has been usually abandoned.

Moreover, the Commission's withdrawal from the proceedings after the involved state has taken some steps towards compliance remains a subject of discussions that either approve or disapprove this practice of the Committee, because quite often such behaviour by a state poses a risk of delaying tactics. It is also remarkable that even though the Commission, both with its relevant Communication (SEC/2005/1658) and its attitude, has made efforts to prevent such manipulations, it keeps withdrawing from proceedings even within the application of the framework of Art. 260 par. 3 TFEU new mechanism on the immediate imposition of sanctions in the first round of infringement proceedings. The Commission's haste to withdraw from six cases by making use of the transitional provisions included in its more recent Communication (2011/C 12/01) raises questions and proves its hesitation to apply the new mechanism.

The political dimension is also present in the phase that follows the CJEUs decision to impose sanctions. If the member state fails to comply with the judgement and also refuses to pay the penalty or/and the lump sum imposed, then the case will inevitably be resolved at political level. This became obvious from the very beginning with the first judgement against Greece, upon which the ECJ had imposed a penalty payment as a sanction for failure to close an illegal waste site. The waste site was closed and the penalty was paid only after persistent pressure from the European Parliament's environment committee (Corbetti et al., 2003).

3.5 The effectiveness of the sanctioning mechanism

The absence of sanctions from the Treaty establishing the EEC was due to the low level of integration within the EEC and the experience of the Treaty authors from the sanctioning mechanism of the European Coal and Steel Community Treaty that had fallen into disuse. The authors of the founding Treaties knew well that the member states would voluntarily comply with the CJEUs judgements because by signing the treaties they affirmed their determination to comply. If, on the other hand, they were not determined to comply, a sanctioning mechanism would be insufficient and they would have to resort to diplomatic negotiations in order to resolve the dispute. For many years, compliance depended on the good will of the member states and there were no extreme cases of non-compliance. However, the journey towards integration necessitated the adoption of a sanctioning mechanism for states which non-comply with judgements made against them. Nevertheless, the adoption of a sanctioning mechanism does not necessarily provide solutions in extreme cases of recalcitrant member states and both the Commission and the CJEU know well that sanctions should be used with restraint. The reason is probably known. It soon became clear that if there is a powerful lobby inside the 'accused' state, which is opposed to compliance with specific European provisions, state usually prefers to pay the economic sanctions than to comply. This is exactly the reason why, in cases when sanctions are finally imposed, they should cost the state more money than the profits it would earn through non-compliance.

The economy by which these sanctions are imposed is clearly demonstrated by the fact that, although this mechanism was introduced in 1993, the CJEU imposed sanctions for the first time after seven years, in July 2000. Since then, the use of sanctions remains rather limited.

Statistics demonstrate that most disputes between the Commission and member states are resolved out of court, without even publishing the reasons for these arrangements. Moreover, this is the goal of the preliminary procedure prior to the appeal to the CJEU and of the strategy adopted by the Commission.

In addition, the idea of appeal to the CJEU does not mean that member states hurry to comply once brought against it. On the contrary they try to present to the Commission a marginal legislative progress in the end of the pre-litigation procedure, in order to gain time and delay appeal to the CJEU. But even if the judicial procedure is already initiated they do not hesitate to use up all the necessary time and to comply just before the end of the second round, in order for the CJEU not to impose the threatened sanctions.

There are two risks when impositing economic sanctions for the breach of environmental provisions:

a mitigating the importance associated with the very act of imposing sanctions

b taking the character of a pollution tax which reminds the negative version of the 'polluter pays principle' (Smets, 1998).

From another view, the logic of a sanction which uses money to assess the environmental damage is rather unsatisfactory. A penalty that would trigger the obligation to reverse the damage would be more effective.

Finally, the question which way the CJEU could enforce payment of sanctions under the 260 TFEU still remains. The issue has not yet arisen, but will possibly do in the future, so in such a case the prestige of the CJEU and its decision are questioned. However, it is suggested that the CJEU may enforce the state to pay financial sanctions ordering the recovery or suspension of European funds until the imposed economic sanctions are paid (Krämer, 2003; Wenneras, 2007). For such extreme cases of non-compliance it has been also suggested to trigger the procedure laid down in Article 7 (2) TEU providing that the European Council can suspend specific rights of the member state relating to its participation in the EU, in case the Council unanimously affirms the existence of a serious and continuous infringement of the principles and the fundamental rights upon which the Union is based and which are referred to in Article 2 TEU (Jack, 2010). This is a very serious form of political controlling and sanctioning which has never been applied and which seems very difficult to be applied for environmental infringements by member states, even if it is considered that the protection of the environment constitutes a fundamental value of the Union. So, the application of Article 7(2) TEU is strongly related to whether the right to the environment is among the fundamental rights referred to in Article 2 TEU. But it is not clear, or at least it does not arise from CJEUs case-law, that Article 37 of the Charter of Fundamental Rights, which lays down the Union's obligation to promote a high level of environmental protection, also implies a fundamental right of individuals to the environment.

4 Indirect sanctions

Apart from enforcement of direct economic sanctions, indirect sanctions also constitute legal methods that contribute to the effective enforcement of environmental law. The issue here is the possibility of the CJEU to order precautionary measures against the recalcitrant state and the partial elimination of the impact of an infringement through individual actions.

4.1 The order for precautionary measures against member states

Another legal action against member states is the possibility of an order for precautionary measures by the CJEU against the recalcitrant State. The procedures of articles 258 and 260 TFEU against a member state are indeed so time consuming (Krämer, 2007) that sometimes when they are completed, it is no longer important, because as a result of this action some consequences have become irreparable. The combination of the procedure against a member state with the order for precautionary measures can be extremely useful in certain environmental violations where a declaratory judgement of the first round or a judgement to impose sanctions on the second round is too late to prevent irreversible ecological damage resulting from improper or non-implementation of European environmental law. This combination was not obvious from the start. It was not until the

late 1970s that the CJEU clarified that it was possible for the Commission to request precautionary measures against a member state in proceedings against the Commission (31/77 and 58/77R). This reticence is mainly due to the fact that proceedings against a member state result in a declaratory judgement (Gray, 1979) which, according to Article 278 TFEU, has no suspensory effect, while, due to the separation of powers and the autonomy of the member states (C-6/60), the CJEU cannot identify and impose on the state the measures it has to take in order to fulfil its obligations arising from the law of the Union. The obligation of the state to take the appropriate measures in order to comply with CJEUs judgement against it arises from the Treaty and not from the judgement itself (Article 260 TFEU). In fact, at first the Commission was very hesitant to request an order for interim measures in the course of an action against a member state for the breach of environmental provisions (for example, C-42/89).

However, after 2007, the Commission showed a great interest in the use of interim relief measures with outstanding results, since it finally began requesting such measures in the procedure against a member state for breach of European environmental legislation (Hedemann-Robinson, 2010). This evolution considerably strengthened the powers of the Commission against member states (C-503/06R, C-193/07R, C-76/08R).

More specifically, according to the special provisions of the Treaty on interim relief (Articles 278 and 279 TFEU), the Commission is entitled to ask the CJEU to order the defendant state to suspend the application of national provisions that are allegedly contrary to EU law or to take appropriate measures in order to discontinue immediately the national activity that is allegedly contrary to EU law. The aim of these provisions is to preserve the status quo as long as the procedure against a member state is still pending before the CJEU. It goes without saying that the Commission can ask for an order for interim measures only after the completion of the administrative procedure of the first round (258 TFEU) and not in the second round of the procedure (Article 260 TFEU).

Although the Commission's relevant Communication (COM 2008, 773 final) refers to the process of interim measures in relation to particular forms of very serious infringements such as situations in which citizens are or could be exposed to serious harm or their life quality could be seriously degraded, the recent practice of the Commission demonstrates that this option applies equally to all violations of EU environmental legislation, whenever there is a risk of irreparable ecological damage.

4.2 Enforcement through individuals

Apart from enforcement through the EU sanctioning mechanism, effective enforcement of EU environmental law is achieved through the 'vigilance' of individuals. EU law enables individuals to activate more effective enforcement of environmental legislation at both EU and national level. At EU level, individuals may appeal to the Commission regarding breaches by member states, in order for the Commission to initiate proceedings against them. However, these appeals do not bind the Commission to launch proceedings against a member state. The Commission has broad discretionary power, which is related to political considerations, to weigh things and handle the complaints, although in recent years, the recommendations of the European Ombudsman have forced the Commission to follow some 'ethics' as to the complainants. In addition, natural and legal persons may highlight breaches of environmental legislation by member states, pursuant to their right to refer to the European Parliament. However, the EU Parliament has no legal power to compel the Commission to start infringement procedures against member states.

Individuals have actually more possibilities to control the conduct of the Commission if they appeal to the European Ombudsman. And this is because one bad report regarding the Commission's mishandling of a case against a member state may defame the Commission, which makes it more careful.

Further, at national level, individual action is leading to indirect sanctions against member states which do not comply with EU environmental law. Invoking provisions with direct effect by individuals annuls the effects of state's non-compliance with its obligations. Indeed, the CJEU has further developed the direct effect of environmental directives, in order to assist individuals in directly invoking them before national courts (C-72/95 και C-201/02).

Also, in accordance with the spirit of the Aarhus Convention and the directives for the incorporation of this convention into EUs legal order (2003/4, 2003/35), the CJEU expanded through its case law the access of non-environmental NGOs to national courts in order to review the national measures that are incompatible with EUs environmental provisions. Of course, the above legislative texts leave up to the member states the discretion to define the requirements for the access of the public concerned to justice, so that their traditional approaches, which are quite different from one state to another (Heermann, 2009) and often particularly restrictive, are not affected. Yet, from the whole spirit of the above texts it is clear that the member states are encouraged to facilitate access to justice in general, and especially that of the environmental NGOs which was also highlighted and promoted by the case-law of the CJEU. The result after the intervention of the CJEUs case-law seems to be a limitation of the discretion and the procedural autonomy of the member states to define the said conditions, as well as the recognition of an almost automatic right to justice for the environmental NGOs (C-115/09). Furthermore, the CJEU also turns towards the national courts on which it puts pressure to give flexible interpretations on the respective national procedural rules in order to ensure the environmental NGOs access to justice so that they can contribute to a more effective enforcement of EU environmental law (C-240/09).

But even though the CJEU is very generous regarding citizens' right of access to national courts, and particularly that of the environmental non-governmental organisations, it remains particularly strict when it comes to access to the CJEU itself. This attitude, which reflects CJEUs restrictive case law regarding this issue, was also applied to environmental issues; history has shown that there was no change in its case law even after the Aarhus Convention and the regulation 1376/2006. This attitude caused the intervention of the Compliance Committee on fulfilling commitments under the Aarhus Convention, which has noted that the CJEU should treat more favourably appeals by environmental NGOs on environmental issues (decision of 14/04/2011). The Compliance Committee refrained from giving its views as to the EUs failure to comply with its obligations under the Aarhus Convention as this would have raised the question of the relationship between international law and EU law. It focused instead on the CJEU to which it made recommendations to change orientation in order to ensure respect of the Convention.

If the CJEU does not change orientation, the threat of a new decision by the Compliance Committee on the application of the Aarhus Convention will continue to exist. Of course, no provision was made, in the context of CJEUs jurisdiction to give advisory opinions (Article 300 TFEU), for the Aarhus Convention to be assessed before it is signed with regards to its compatibility with the European treaties, in order to prevent

EUs accession and avoid the possible international responsibility of the Union for non-compliance with the obligations arising from it.

Therefore, the danger of the conflict between the European Treaties and the Aarhus Convention is visible. To resolve this conflict, the EU side, basing its reasoning on the autonomy of the EU legal order and the constitutional structure of the Union, supports that European treaties take precedence over international treaties. However, the other side refers, in addition to the pacta sunt servanda principle, to a number of arguments according to which EU is committed to respect its obligations under international law (Marsden, 2012).

4.3 State non-contractual liability

It is difficult to establish the conditions that give rise to the non-contractual liability of the state in case of a breach of EU environmental law (Prechal and Hancher, 2002). This is because the rules on the non-contractual liability of the state (C-6/90) were designed in order to restore damage to personal legal interests and not damage to collective goods. More specifically, in order to be able to render the state liable for damage caused by a breach of the EU law, apart from providing evidence for the conditions of the damage and the causal link between the breach and the damage sustained by the applicant, it is also necessary that the breached provision of the EU law confers to the individuals rights that can be identified in the text (directive). However, the vast majority of the environmental provisions aim to protect collective interest and not personal interests. There are, also, some environmental provisions whose purpose is not exactly to protect the environment from a people-centred perspective, but to protect the natural environment, for instance to protect endangered species.

Consequently, breaches of EU provisions that protect collective interest are generally excluded from the system of non-contractual liability of the state. In other words, the condition that the damage must be personal excludes any claim for compensation by an individual for damage caused on the environment itself due to non-compliance of the state with the environmental provisions of EU law.

Nevertheless, the important changes that have taken place all these years on the architectural structure and the objectives of the EU show that the Union's goals have considerably changed since the times of the EEC when the only central objective was the establishment and functioning of the common market. Considering the new circumstances, the EUs objective is to protect the environment effectively. Therefore, the criterion of CJEUs formulated case-law on the grant of rights to individuals in order to give rise to the non-contractual liability of the state does not help towards this objective. A positive step in this direction would be the recognition by the CJEU, through a broad interpretation of Article 37 of the Charter of Fundamental Rights, of a fundamental right to the environment. In fact, a good effort in this respect is made by a case-law of the CJEU that was formulated after the Aarhus Convention, which considerably promotes the access of environmental NGOs to national courts for environmental issues (C-240/09), whose right to invoke environmental provisions that protect exclusively the public interest has already been recognised (C-115/09).

It goes without saying that rendering the state liable for damages does not give rise to any monetary compensation, but obliges the state to proceed to the restoration of the natural environment. However, it is not easy to reverse the case-law developed by the Court, because this issue is connected with some well-established approaches of civil law

according to which the rules on civil liability cannot serve any other functions but compensatory and preventive functions only (Bergkamp, 2001). Nevertheless, Directive 2004/35 sets these reservations aside and introduces a sui generis or administrative law responsibility by recognising the obligation of an operator to restore, at a reasonable cost, the damage caused to the environment by his activity. The same reasoning would also apply to the state's responsibility to restore the damage caused to the environment due to its non-compliance with the environmental provisions of EU law. Obviously, in such a case the right to appeal will be available to environmental NGOs.

4.4 Critical Appraisal

History has shown that CJEUs case law is friendly to the environment. First of all, we cannot but notice that the first case, when the Commission asked and the CJEU imposed sanctions, concerned infringement of environmental provisions (C-387/97). Neither can we ignore the fact that four out of nine decisions imposing penalties concern cases related to environmental damage. Also, it is no coincidence that, in a case concerning the conservation of fishery resources, the ECJ proceeded to a teleological interpretation provoking a wave of reaction, it overlooked the wording of the relevant article on the disjunctive imposition of either a penalty payment or a lump sum and cumulatively imposed both (C-304/02). Furthermore, in a case concerning public health and the environment and, in particular, the failure of France to comply with a directive for genetically modified organisms, the CJEU imposed a lump sum even though, in the meantime, France had complied (C-121/07) and the Commission had withdrawn the original request.

Similar conclusions may be reached with respect to ordering interim measures. The infringement of EU environmental laws is among the cases that are in priority as to the use of the possibility to order interim measures.

This special treatment is not only due to the inclusion of the environmental protection in Article 2 of the Treaty, among the objectives of the EU, but also because the need to protect the environment is now urgent and compelling. Or, it could be the result of realising that the environmental sector is at a disadvantage compared with all other sectors, because there is no organised body to support and promote its interests.

However, judging by the behaviour of the EU institutions and the reaction of the member states, we can conclude that the imposition of monetary penalties is not a panacea for the effective enforcement of the European environmental law. Also, there is an implicit conclusion that, in practice, a greater success can be achieved by using political pressure or persuasion rather than by imposing penalties (Schermers, 1972). The same logic is also the basis of the principle of sustainable development (Dekleris, 2000). Instead of penalties, this principle suggests the use of mechanisms which rely on information, persuasion, and indirect coercion to respect the environment by creating incentives, primarily financial, in order to promote environmentally friendly behaviour, not necessarily due to ecological sensitivity, but because this option serves the economic interests of the polluter. A very effective tool for the enforcement of EU environmental law also seems to be the comparative publication of information about the compliance of member states with the said law (Rechtshaffen, 2007). The Commission has already presented data about the member states' compliance in its annual reports, but there are many gaps because the member states do not monitor or collect such data, or present information about whether their companies comply in practice with the rules of EU

environmental law. However, the publication of such data, since it generates negative publicity for the states and their companies with the worst environmental performance creates strong motives for effective compliance.

Finally, the contribution of indirect sanctions to the effective enforcement of the EU environmental law, mainly through individuals who apply to the CJEU or to national courts so as to reverse the negative consequences of environmental breaches, is quite remarkable. CJEUs case-law has considerably promoted the access of environmental NGOs, mainly to national courts, in order to monitor state violations of the EU environmental law. However, a reversal of the case-law, with a view to recognising the state's obligation to restore the damage caused to the environment by its conduct contrary to the EU environmental law, will also contribute significantly to effective enforcement.

5 Conclusions

It has been said that lately there is a paradigm shift from normative development to implementation (Bruch and Mrema, 2007). This paper has demonstrated that in both legal orders, the international and EU, compliance with and enforcement of environmental obligations is of utmost importance. Apparently, enforcement mechanisms seem to be stronger at the EU level, whereas at the international level there is a clear preference to compliance procedures and mechanisms. The strong presence of enforcement mechanisms in the EU context does not, however, guarantee a better result with regard to environmental protection, as the previous analysis has argued.

In international law, and partly due to the nature of international environmental law, the parties to the treaties seek to promote implementation and compliance of the member-states by using mostly financial incentives and technological assistance as well as established monitoring procedures; enforcement mechanisms do not seem to be popular at the international level. This ascertainment does not equal, though, to environmental degradation at all cases. As mentioned above, there have been other successful mechanisms of compliance with environmental obligations at the international level as well. Another difference between the two legal systems is that, at EU level, persons as subjects of EU law have at their disposal rights and mechanisms which permit them to contribute to a more effective enforcement of EU environmental law.

Joined efforts are needed at both levels in order to secure compliance with environmental obligations. The CJEU can work towards that direction when invoking direct application and effect of international environmental treaties (Marsden, 2011). Other critical suggestions in order to enhance compliance and enforcement at both levels could be summarised in the establishment of monitoring and review mechanisms, the active involvement of non-state actors in promoting implementation of and compliance with international and European environmental law, the strengthening of dispute settlement provisions in international environmental agreements, the active involvement of the public and other stakeholders and the extensive use of incentive mechanisms such as eco-labelling and certification. The parallel examination of the two different legal systems with regard to the enforcement of environmental regulation and compliance with environmental obligations has demonstrated that enforcement mechanisms do not always have the desirable results; the use of sound implementation mechanisms and compliance incentives must be the overall goal of each legal order in the global effort to promote environmental protection.

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