

MARYNA MEDVEDIEVA*

**THE NON-CONFRONTATIONAL
AND CONFRONTATIONAL MEANS
OF IMPLEMENTATION OF INTERNATIONAL
ENVIRONMENTAL LAW**

**KONFRONTACYJNE I NIEKONFRONTACYJNE
ŚRODKI IMPLEMENTACJI MIĘDZYNARODOWEGO
PRAWA OCHRONY ŚRODOWISKA**

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ABSTRACT

The article provides some insight into the means of international environmental legal rules implementation. The author elaborates a classification of those means dividing them into non-confrontational

* Associate Professor of Law, Department of International Law, Institute of International Relations, Kyiv National Taras Shevchenko University.

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and confrontational ones. The non-confrontational means include: informational means; scientific, technical and financial means; multilateral international agreements without binding obligations; diplomatic means of settling international disputes. The confrontational means to ensure compliance with international environmental agreements include: invocation for responsibility; application of sanctions (counter-measures) allowed by international law; unilateral trade restrictions that are not sanctions; settlement of disputes before international judicial and quasi-judicial institutions.

Keywords

International environmental agreements; implementation; settlement of disputes.

STRESZCZENIE

Celem artykułu jest wprowadzenie w problematykę środków służących wdrażaniu międzynarodowego prawa ochrony środowiska. W opracowaniu przedstawiono klasyfikację tych środków według podziału na niekonfrontacyjne i konfrontacyjne. Do tych pierwszych zaliczono: środki informacyjne, naukowe, techniczne i finansowe, wielostronne umowy międzynarodowe bez wiążących zobowiązań, środki dyplomatycznego rozwiązywania sporów międzynarodowych. Do środków konfrontacyjnych, zapewniających wykonanie międzynarodowych umów środowiskowych, zaliczono: realizację odpowiedzialności prawnej, zastosowanie sankcji dopuszczalnych w prawie międzynarodowym, jednostronne restrykcje handlowe niebędące sankcjami, rozwiązywanie sporów w drodze postępowania przed międzynarodowymi instytucjami sądowymi lub *quasi-sądowymi*.

Słowa kluczowe

Międzynarodowe umowy środowiskowe; implementacja; rozwiązywanie sporów.

Today the issue of implementation of international legal standards for the protection of the environment is one of the most pressing and important problems of modern International Environmental Law. Since the late 1970s, when people became



aware of their activities' detrimental impact on the environment, the international community efforts were aimed at developing environmental standards. States and international organizations adopted various international treaties, declarations, resolutions governing the international cooperation in wild fauna and flora species protection, habitats preservation, preventing oceans and atmosphere pollution, and limiting human activities dangerous for the environment. However, since the 2000s it became clear that the agreements reached are not enough and that the main problem of the effective functioning of International Environmental Law (hereinafter – IEL) is a problem of its implementation. Although there is a plenty of multilateral environmental agreements, which now number more than 500, they are not properly complied with by state- and non-state actors, and this affects the efficiency of IEL. The evidence of this trend is the rapidly deteriorating global environment: in spite of international initiatives we meet the challenges of climate change, pollution, wild species and their habitats disappearance, destruction of historical cultural sites, desertification, soil erosion, and associated with unsafe environmental conditions the challenges of famine, human diseases, the slowing pace of economic development. Despite almost universal participation in some international environmental agreements they do not reach the proclaimed objectives and desired results. This is due to their insufficient enforcement in both international and national law. These issues are especially urgent for Ukraine in view of the decisions taken in 2011 by bodies of several multilateral environmental conventions (Espoo, Aarhus conventions and Kyoto protocol) concerning Ukraine on its non-compliance¹, initia-

¹ Decision V/4 adopted by the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context at its fifth session. Review of compliance. Excerpt from ECE/MP.EIA/15. <http://www.unece.org/fileadmin/DAM/env/documents/2011/eia/decision.V.4.e.pdf>; Decision IV/9h on compliance by Ukraine with its obligations under the Convention Adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its fourth session. Excerpt from the Addendum to the Report of the fourth session of the Meeting of the Parties



tion of some new cases of non-compliance in the framework of these conventions and decisions adopted by the European Court of Human Rights on cases brought by Ukrainian nationals against Ukraine regarding environmental damage².

We attempted to classify the means of implementation of IEL on non-confrontational and confrontational. The non-confrontational means include: 1) information exchange, environmental impact assessment, the notification of affected states, consultation, reporting, monitoring, verification and inspection (so called informational means); 2) technical and financial assistance, scientific and technical cooperation, economic incentives/market mechanisms (so called scientific, technical and financial means); 3) non-compliance mechanisms in multilateral environmental agreements; 4) diplomatic means of settling international disputes. The confrontational means to ensure compliance with international environmental agreements include: 1) invocation of responsibility; 2) application of sanctions (countermeasures) allowed by International Law; 3) unilateral trade restrictions that are not sanctions; 4) settlements of disputes before international judicial and quasi-judicial institutions.

Non-confrontational means of implementing IEL are characterized by the following features: 1) they consist in collecting, analyzing and exchanging (unilaterally or reciprocally, regularly or occasionally) the information about the state of natural objects and emissions, on the one hand, or information on the implementation by a state of its international legal commitments, on the other; 2) concern data of scientific, technical, legal or ad-

(ECE/MP.PP/2011/2/Add.1). http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/Excerpts/Decision_IV-9h_Compliance_by_Ukraine_e.pdf; Final decision. Party concerned: Ukraine. Enforcement Branch of the Compliance Committee of the Kyoto Protocol; CC-2011-2-9/Ukraine/EB, 12 October 2011. http://unfccc.int/files/kyoto_protocol/compliance/questions_of_implementation/application/pdf/cc-2011-2-9_ukraine_eb_final_decision.pdf.

² *Case of Dubetska and others v. Ukraine*. Judgment of the European Court of Human Rights, 10 February 2011. [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103273#{%22itemid%22:\[%22001-103273%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103273#{%22itemid%22:[%22001-103273%22]}).



ministrative nature which must be true, accurate, timely and objective; 3) are the means of international dispute prevention, a form of international control, a prerequisite for enforcement and/or a reaction to non-compliance; 4) aim to provide comprehensive assistance to states in fulfilling their obligations and encourage non-parties to access; 5) are mandatory or voluntarily applied pursuant to the principle of international co-operation; 6) are closely interrelated as links of one process that helps to ensure the prevention of dangerous activities causing environmental damage, violation of international environmental agreements, to make an overall assessment of the efficiency of environmental agreement implementation, to take into account public opinion, the rights and legitimate interests of all stakeholders, to develop appropriate measures to eliminate or mitigate any potential harm to environment.

Providing in multilateral environmental agreements and complying by states with the obligation to cooperate in the exchange of information, to notify dangerous activities, to conduct an environmental impact assessment, consultations, monitoring, verification, inspection or provide regular reports is an indispensable prerequisite for the effective implementation of such agreements. Sometimes the implementation of certain international instruments is not effective due to scientific uncertainty or lack of scientific evidence, as in the case of treaties incorporating the precautionary principle and the ecosystem approach. Non-compliance with the obligations to notify all affected States by a state of origin of planned activities with potential negative consequences for the environment of these states, failure to notify such information in due terms and manner may endanger the performance of a treaty and make the elimination of the negative effects of hazardous activities impossible, as in cases with the accident at the Chernobyl nuclear power plant or construction by Ukraine of deepwater navigational canal "Danube – Black Sea" in the Ukrainian part of the Danube Delta in the area of the Danube Delta Biosphere reserve.

Regarding environmental impact assessment in a transboundary context, we must admit that International Court of Justice in its judgment on the *Pulp Mills* case of 2010 deter-



mined that “In this sense, the obligation to protect and preserve, under Article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”³. Moreover, this obligation is not of a procedural nature (along with the obligation to provide information to an international body and notification of an affected party), but refers to substantive obligations. The International Tribunal for the Law of the Sea in its Advisory opinion “Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area” of 2011 stressed that “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”⁴. We may conclude: there is enough international treaty and judiciary practice to recognize that environmental impact assessment is now more than just a technical or procedural rule and that it gained the status of international legal principle.

Under the provisions of multilateral environmental agreements consultations shall be initiated immediately after a state of origin of proposed dangerous activity having notified all affected states, but their conduction does not give the right to an affected state to require a full stop of this proposed activity. Consultations only ensure that the wishes and interests of affected states shall be considered by a state of origin. We suggest that in order to improve the effectiveness of environmental trea-

³ *Case concerning pulp mills on the River Uruguay* (Argentina v. Uruguay), Judgment of the International Court of Justice of 20 April 2010. <http://www.icj-cij.org/docket/files/135/15877.pdf> at 60–61.

⁴ Advisory opinion of the Seabed disputes chamber of International Tribunal for the Law of the Sea on “Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area”, 1 February 2011. www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf at 44.



ties during their elaboration states should prescribe in detail the mechanism of inquiry to a committee or commission of scientific experts in case there is a disagreement regarding the transboundary impact of an activity, and its findings should be final and obligatory for the parties to the dispute at the stage of consultations. We think that such procedure provided in the Espoo Convention (Convention on environmental impact assessment in a transboundary context, 1991) can be a useful model for other agreements.

Reporting is another non-confrontational means of IEL implementation. There are three ways to verify and monitor countries' national reports: 1) implementation review, which aims at verifying the legal and administrative measures a country adopts to meet the requirements of multilateral environmental agreements; during implementation review the conditions of compliance by a state under each article of a convention are estimated and specific difficulties in the performance of legal rules are analyzed; 2) compliance review, which aims at determining specific questions of compliance or non-compliance with the obligations of states under environmental conventions; 3) effectiveness review, which aims at determining the effectiveness of the whole regime established by certain environmental agreement and the achievement of its objectives; it is not strictly focused on the actions of parties individually, but rather can look at the impact of these actions collectively⁵.

Concerning monitoring, verification and inspection we must admit that sometimes in literature these terms are confused but, to our mind, they belong to different means of implementation of multilateral environmental agreements. Typically, monitoring refers to reviewing the scientific and technical conditions that affect environment by an independent body or group of experts; or refers to implementation reviewing (verification of legal and administrative measures a country

⁵ Raustiala K., *Reporting and review institutions in 10 multilateral environmental agreements*, Nairobi, UNEP (2001), at 10–14; Bodansky D., *The art and craft of international environmental law*, Cambridge, Harvard University Press (2010), at 242.



adopts to meet the requirements of multilateral environmental agreements)⁶. The review of accuracy of scientific and technical information and other data not related to the administrative and legal measures (such as emissions data), which states provide to secretariats of multilateral environmental agreements, is called verification. Inspection is the form of international control on site carried out by international observers and / or national observers of state parties on mutual basis. Its main goal is a targeted collection of data for the purpose of determining if there is a breach of international obligations. Inspection system is provided in international agreements regulating fisheries and conservation of marine living resources⁷.

The mechanisms of information exchange, environmental impact assessment, consultation, reporting, monitoring, verification and inspection are directly related to the procedures of non-compliance established under multilateral environmental agreements. The author gives its own definition to these procedures. Non-compliance procedures are procedures of a non-confrontational nature, which are created in accordance with multilateral environmental agreements and subsequent decisions of the conferences/meetings of the parties, are accomplished within a special committee in the event of non-compliance with international obligations under these agreements by the parties and are directed to applying the legal measures intended to help a non-compliant state meet its international legal obligations and protect the “collective interest”. The main features of non-compliance procedures are the following: non-confrontational nature, flexibility, adaptability to specific multilateral environmental agreements, transparency to the public, multilateralism, possibility of adjusting the obligations, quickness and simplicity. We also name some institutional features of non-compliance

⁶ Rose G., Kurukulasuriya L., Perera A. and Krebs M., *Compliance mechanisms under selected multilateral environmental agreements*, UNEP, Earthprint, 2007, at 21–22.

⁷ United Nations Convention on the Law of the Sea 1982, Convention for the Regulation of Whaling 1946, Agreement on Straddling Fish Stocks 1995, Convention on the Conservation of Antarctic Marine Living Resources 1980.



procedures: 1) the procedure is conducted by a committee that reviews the status of compliance; the committee members may be representatives of state parties to multilateral environmental agreements or act in their individual capacity as independent experts; 2) non-compliance procedure may be triggered by one or some of the following ways: by a state unable to fulfill the obligations in duly or timely manner, by one state against another, by the secretariat of the convention, when there is reason to believe that a party does not fulfill the terms of the agreement or by a committee during periodic implementation review; under the results of review a committee prepares a report, including recommendations, and submits it for consideration and approval to the conference of the parties, which follows the implementation of its decisions concerning specific state; 3) as a rule the bodies of multilateral environmental agreements do not define situations of non-compliance but provide measures for response: a) the decision to grant assistance, including technical or financial one, technology transfer, information support, b) the requirement to provide plan of compliance by an authorized state body, c) caution, d) suspension of rights and privileges under multilateral environmental agreements, and e) financial and trade sanctions⁸.

Examples of effective implementation of economic instruments in multilateral environmental agreements are Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973, Convention on Biodiversity 1992 with protocols, the UN Framework Convention on Climate Change 1992 and Kyoto protocol 1997, as well as international agree-

⁸ Weiss E., *Understanding compliance with international environmental agreements: The baker's dozen myths*, "University of Richmond Law Review" (1999), Vol. 32, No. 5, P. 1555–1585; Crossen T., *Multilateral environmental agreements and the compliance continuum*, "Georgetown International Environmental Law Review" (2003–2004), Vol. 16, P. 473–500; Ehrmann M., *Procedures of compliance control in international environmental treaties*, "Colorado Journal of International Environmental Law and Policy" (2002), Vol. 13, Issue 2, P. 377–443; Rinceanu J., *Enforcement mechanisms in international environmental law: Quo vadunt?*, "Journal of Environmental Law and Litigation" (2000), Vol.15, No. 2, P. 147–178.



ments on fisheries and protection of marine living resources. The mechanism of providing financial and technical assistance has several aspects: 1) the provision of such assistance can be deemed as part of ensuring the obligation to cooperate between equal parties⁹, or as part of the principle of common but differentiated responsibilities¹⁰; 2) on the one hand, such assistance may be used as a method to promote and facilitate compliance with multilateral environmental agreements, to prevent non-compliance (for example, China and India agreed to ratify Montreal Protocol on Substances that Deplete the Ozone Layer only under the condition that Multilateral Fund be established by developed countries; financial mechanism was one of the main requirements of developing countries during elaborating and adopting the climate change and biodiversity treaties¹¹); on the other hand, such assistance may be used as a response to non-compliance, i.e. as a measures of response to violations of the international environmental agreement provisions under non-compliance procedures.

The confrontational means to ensure compliance with international environmental agreements include, as was mentioned above, the invocation of responsibility (liability) of states (non-state actors) for breach of international obligations, for crimes against environment and environmental damage. International responsibility of states in the field of environmental protection is based on the concept of “due diligence” which is reduced to the duty of states to exercise every effort, to take all necessary measures (for example, to adopt laws, set up review bodies, punish offenders, etc.) to prevent pollution which may be a result of a dangerous activity carried out under their jurisdiction or control. Due to the reluctance of states to be responsible for environmental damage, practical impossibility to

⁹ Art. 7 of International Convention on Oil Pollution Preparedness, Response and Cooperation 1990, Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, 1986.

¹⁰ Art. 5(5) of the Montreal Protocol, art. 4(7) of the UN Framework Convention on Climate Change, art. 20(4) of the Convention on Biodiversity.

¹¹ Bodansky D., at 244.



institute proceedings against a state and receive adequate compensation the only effective alternative for victims is to claim civil liability under international conventions.

At present, no international treaties or international judicial institutions provide a complete and unambiguous definition or classification of types of international crimes against environment, including so called ecocide. We think that it is necessary to make a clear distinction between the most serious and ordinary offenses in the field of environmental protection by means of International Criminal Law or International Environmental Law in order to determine the extent of responsibility. The author proposes to expand the subject matter jurisdiction of the International Criminal Court by adopting the additional protocol, which would include all internationally wrongful acts that cause a widespread, long-term and severe damage to the natural environment, when committed not only during an armed conflict but also in peacetime. International judiciary and treaty practice, as well as the practice of states, is not uniform and coherent as to whether a rule prohibiting a widespread, long-term and severe damage to the environment belongs to the category of *jus cogens*, but it is likely it will get such a status in the future. It then will mean that people or states violating this shall be subject to the most rigid form of responsibility. The same can be said concerning *erga omnes* obligations. Recognizing *erga omnes* nature of the obligation not to cause a a widespread, long-term and severe damage to the environment will afford to suit a guilty state in an international court not only by an injured state but also by any other interested party who will act on behalf of the whole international community. The UN International Law Commission recognized that an example of collective commitments or obligations *erga omnes partes* may be the obligation to protect the environment. Regarding the obligations concerning the international community as a whole or obligations *erga omnes*, the practice of the International Court of Justice shows that there is no room for obligation to protect environment.



Still, doctrine¹² and recent Advisory opinion of the Seabed disputes chamber of International Tribunal for the Law of the Sea on “Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the area” of 1 February 2011 witness to the contrary.

In IEL there is not enough treaty and judicial practice of applying the international sanctions (countermeasures) as a matter of self-help, except for the practice of some regional fisheries organizations, the practice of the CITES bodies and the decision of the International Court of Justice in the case of *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) 1997. Retaliatory reciprocal measures provided for in Article 60 of the Vienna Convention on the Law of Treaties 1969, are ineffective countermeasures because implementation of multilateral environmental agreements aim to achieve the common good (protection of environment), and mutual non-compliance or breach will lead to further violations and the deterioration of the initial state of the environment. Due to the lack of State practice, there is some uncertainty regarding the legality and proportionality of countermeasures, including seizure and survey of the ship, taken by one state against another to protect marine living resources in areas beyond national jurisdiction¹³. The practice of imposing sanctions under the Convention on International Trade in Endangered Species of Wild Fauna and Flora shows that most effective sanctions are collective countermeasures in the form of trade restrictions imposed on a non-compliant

¹² Виноградов С.В., *Международное право и охрана атмосферы*, Москва, Наука, 1987; Кукушкина А.В., *Становление принципа экологической безопасности в современном международном праве*, „Московский журнал международного права” (1994), № 4, С.86–98; M. Ragazzi, *The concept of international obligations erga omnes*, Oxford, Clarendon Press, 1997.

¹³ Guilfoyle D., *Interdicting vessels to enforce the common interest: Maritime countermeasures and the use of force on the high seas*, “International and Comparative Law Quarterly” (2007), Vol. 56, No. 1, P. 69–82; Rayfuse R., *Countermeasures and high seas fisheries enforcement*, “Netherlands International Law Review” (2004), Vol. 51, No. 1, P. 41–76; Orellana M.A., *The law on highly migratory fish stocks: ITLOS jurisprudence in context*, “Golden Gate University Law Review” (2010), Vol. 34, Issue 3, P. 459–495.



state, because they directly affect its economic interests. And this is really an incentive for the implementation of environmental rules. The author believes that providing in international environmental agreements and applying the mandatory economic sanctions is one of the most effective means to ensure their implementation. Unilateral trade sanctions taken by states pursuant to the rules of multilateral environmental agreements may raise questions about their legitimacy as countermeasures because very often a state applying them is not directly injured in the sense of art. 49 of the UN International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, and a state against which they are applied is a third party having not agreed to be bound by a certain treaty.

The effectiveness of international legal sanctions applied within the framework of international environmental conventions sometimes are questioned as doubtful due to the fact that they do not aim at achieving the goal of environmental treaties, namely they do not allow a non-compliant state to meet its international obligations. As a result not only infringed may be the interests of the state itself but also a collective interest of the whole international community. However, collective trade restrictions against a non-compliant state or threat of deprivation of rights and privileges became an effective tool for multilateral environmental agreements implementation, since very often they managed to change the behavior of a state in such a way that it fulfilled its obligations, if we speak of a state party, or performed requirements of a convention or became party to a convention, if we speak of a state non-party.

Some unilateral trade restrictions can not be considered legitimate countermeasures, as they aim at enforcing the domestic rules and regulations and are not affiliated with the internationally wrongful act of another State. Such restrictions do not apply to enforce multilateral environmental agreements, although very often their objective is protection of common or shared natural resources, such as marine living resources and oceans, but mainly with the help of national law which thus acquire extraterritorial character (WTO cases *US-Tuna-Dolphin* 1990, 1994 and 2012 and *US-Shrimp-Turtle* 2001 and 2008).



Another type of “non-legitimate countermeasures” are so called special trade obligations provided in multilateral environmental treaties: state parties agree to limit on a mutual basis their trade interests in order to protect the environment and achieve the purpose of a treaty. Thus such trade restrictions are not applied in response to an internationally wrongful act, but are applied as permitted way of regulation of bilateral or multilateral relations between state parties¹⁴. The third case of trade restrictions which are not countermeasures is also provided in multilateral environmental agreements. Such restrictions are applied against state non-parties to a treaty in order to encourage them to become a party to an agreement and prevent a situation when a treaty is deprived of its object and purpose due to the actions of these third states¹⁵.

Traditional coercive means of peaceful settlement of international environmental disputes with the help of third parties (international courts and arbitration) are not frequently used today. Judicial means are more efficient for resolving the bilateral disputes between states but not for resolving the disputes arising out of multilateral environmental treaty. The traditional means of peaceful settlement of international disputes are an effective way to implement environmental standards only when the breach of bilateral or multilateral agreements results in causing specific environmental or other damage to one or more states and (or) when a case regards the interpretation and application of a multilateral environmental treaty. When it comes to implementing rules for the protection of the global environment, which is “common interest/concern” of humanity, and the specific direct damage to a particular state is absent, the traditional means of peaceful settlement of international disputes is powerless, due to the problems of defining the injured

¹⁴ Art. 4 and 6 of the Basel Convention, art. 14 of the Convention on Biodiversity, art. 7–9 of the Cartagena Protocol, art. 10, 12 of the Stockholm Convention, art. 2 of the CITES.

¹⁵ Art. 4 of the Montreal Protocol, art. 4(5) of the Basel Convention, the practice of regional fisheries organizations.



state, *locus standi* and difficulties in applying the concept of *actio popularis*.

There are scholars who believe that resolving the international disputes by means of traditional adjudication is an effective way of developing and implementing International Environmental Law, and there are ones who believe that in such particular area of international relations as environmental management and protection, cooperation on a multilateral basis rather than judicial confrontation seems more essential¹⁶. The majority of cases considered by the ICJ or other international judicial bodies mostly concerned the interpretation or application of bilateral treaties whose implementation had some environmental consequences. International courts did not have an opportunity to apply multilateral environmental agreements often because the dispute participants were not parties to these agreements, or a court found lack of jurisdiction in the case, or dispute participants concluded bilateral agreements to resolve the dispute. However, traditional coercive means of dispute resolution have had a positive impact on the development and implementation of International Environmental Law: they became a springboard for establishing closer cooperation between the parties and search for more effective ways to resolve the dispute. We think that effective and efficient alternative way for compulsory dispute resolution is non-compliance procedures established under multilateral environmental agreements which aim at resolving disputes on the grounds of multilateralism.

Concerning the resolution of environmental disputes by courts and quasi-judicial bodies “external” to IEL the author argues that in some cases the practice of courts/committees on human rights and dispute settlement bodies of trade organizations such as WTO or NAFTA shows that more and more attention is paid to environmental issues. Some decisions provided that nowadays environmental considerations became a limiting factor for certain types of human dangerous activities. This trend indicates a “greening” of modern International Law.

¹⁶ Stephens T., *International courts and environmental protection*, New York, Cambridge University Press, 2009, at 2.



The author proves the inability of the law of international responsibility and international sanctions to address issues regarding responsibility (liability) and compensation for environmental damage, due to the following factors: 1) until recently it was common practice that only an injured state invoked the responsibility of another state which was in breach of its international obligations; despite the opportunity provided by customary international law¹⁷ for a state other than an injured state to invoke responsibility and sue a responsible state in an international court on the grounds of breaching the *erga omnes* obligations relating to protection of the global environment – on behalf of the whole international community – such an opportunity was never used except for in *the Whaling in the Antarctic* case pending in the ICJ; 2) it is unfavorable for the implementation of international environmental rules that private individuals lack the right to sue in the ICJ a state which breached its international obligations; 3) responsibility of a state or individuals for environmental violations usually results in compensation for damage caused, that is not always effective for preventing pollution, and in most cases it is more than difficult to prove a causal link between the wrongful act and the damage caused to environment; 4) there is no uniform understanding and definition of “environmental damage” as well as “significant” or “substantial” damage in international treaty and court practice; 5) the invocation of the state of necessity as a circumstance precluding wrongfulness of the act was never applied by international courts to justify measures related to environmental protection because of a possible danger of setting a precedent, when in order “to safeguard an essential interest against a grave and imminent peril”¹⁸ a state adopts measures for the protection of environment which, however, violate international legal obligations of that state; 7) there is no practice in international

¹⁷ Codified in art. 48 and 54 of the UN International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

¹⁸ Art. 25 of the UN International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001.



law when individuals responsible for the commission of environmental crimes are prosecuted and punished; in theory only crimes against the environment committed during international armed conflict can be prosecuted; 8) states prefer invocation of liability and redress mechanisms provided for in civil liability agreements because of their reluctance to compensate damage and involve interstate mechanisms to resolve potential disputes.

To conclude, we must admit that multilateral environmental agreements should include the optimal ratio of non-confrontational and confrontational means of their implementation, herewith the priority should be given to the application of the non-confrontational ones as means of dispute prevention, and the latter should be regarded as an integral but subsidiary part of the implementation mechanism. Traditional (confrontational) methods to ensure compliance with international environmental agreements are not always effective, as they do not solve the problem of pollution and do not contribute to the protection of the “collective interest”.

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Kontakt e-mail:

medvedieva.maryna@gmail.com

