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IMPROVING ENFORCEMENT OF INTERNATIONAL ENVIRONMENTAL LAW BY ENHANCING ENVIRONMENTAL DEMOCRACY

- LESSONS FROM THE EUROPEAN REGIME OF PUBLIC INTEREST LITIGATION -

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ABSTRACT

One of the most urgent challenges of today is the decay of natural life resources. Although, the last 35 years saw the creating of numerous environmental agreements, environmental conditions have not improved as these treaties suggest. One of the main reasons for this situation is the lack of proper enforcement of international environmental law. The pitfalls of enforcement of international environmental law are mainly due to the lack of financial private interest in environmental law. In recent years, the gap in the representation of environmental interests has been filled by NGOs. They have been more and more able to safeguard the interests of the environment. NGOs have chosen ways to safe the environment by participating in law-making and monitoring. This role has been acknowledged and valued by both international organisations and national governments. However, they are not able to enforce environmental agreements, because they mostly lack legal standing before international and domestic courts. Existing monitoring bodies are insufficient due to lack of financial resources and the fragmentation of international environmental law. Although, NGOs filled this gap and have great influence in law-making and monitoring, they do not have access to justice before international fora. However, this access to justice is a viable mean in enforcing international environmental law because environmental decision often remain unchallenged. This fact is based on the state-focused litigation scheme at the international level and the need to be individually concerned at the domestic level. Environmental decisions often do not affect individual rights, due to the nature of the environment as a res communis. Therefore, someone has to have a voice for the environment. NGOs are well-equipped to fill this gap. The main reason is that NGOs are not restricted by international politics and that they have the vital information from their participation in law making and monitoring. The decay of natural resources is a global environmental phenomena and supra-national in scope. Therefore, it exceed the capacity of individual states.

In recent years, participatory rights developed a great deal. Mainly the Aarhus Convention contributed to an enhancement of environmental democracy. It grants citizens and their organisations the right to environmental information and access to justice in environmental matters. This convention is on its way to be well-implemented in Europe. It is highly desirable, that this regional development will be transferred to the international level in the future.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) compromises approximately 12.300 words.

I INTRODUCTION

> "Man is endowed with reason and creative powers to increase and multiply his inheritance, yet up to now he has created nothing, only destroyed. The forests grow ever fewer; the rivers parch; the wild life is gone; the climate is ruined; and with every passing day the earth becomes uglier and poorer."[1]

One of the most urgent challenges of today is the decay of natural life resources. Examples range from global climate change via biodiversity depletion, to site contamination, acid rain, air pollution and oil contaminated coasts. To fight these environmental problems, international environmental law provides the appropriate legal instruments.

Environmental law is a relatively new field of international law.[2] As countries industrialised environmental pollution environmental issues has became more prevalent. Despite a number of specific decisions and treaties the field of international environmental law did not really take off until the 1960s due to specific research on the different impacts of industrialisation such as air pollution and acid rain, for example. In general, the environmental field has developed in an ad hoc manner in response to specific environmental harm. Environmental Liability is one of the main example for this development. The last 35 years saw the creating of numerous environmental agreements. Environmental law has become "one of the most dynamic areas of the international legal system".[3] Although all these treaties reflect a growing global environmental awareness, environmental conditions have not improved as these treaties suggest. One of the main reasons for this situation is the lack of proper enforcement of international environmental law. "Enforcement" is defined as "the compelling of obedience" to law.[4] Nevertheless, we should have

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[1] Anton Chekhov, Uncle Vanya, act I (circa 1896).

[2] David Hunter, James Salzmann, Durwood Zaelke (ed's) *International Environmental Law and Policy* (2nd ed, Foundation Press, NewYork, 2002), 280.

[3] Jeffrey L. Dunoff *From Green To Global* 19 (1995) Harv.Envtl.L.Rev. 241, 241.

[4] Blacks Law Dictionary 549 (7th ed.1999).

in mind that international environmental law is not completely disobeyed, although, some of the well-intentioned environmental agreements remain unenforced.[5]

The pitfalls of enforcement of international environmental law are mainly due to the lack of financial private interest in environmental law. On the contrary, this lack is not found in other areas of law like trade law for example, which is concerned with economic matters. The only area of environmental law in which economical interest are tackled is environmental liability. Therefore, the paper will analyse environmental liability provisions in more depth, on the European level.

The absence of economical interest creates further obstacles, like the insufficiency of existing monitoring bodies, mainly the United Nations Environmental Programme (UNEP). These bodies mostly cannot work properly because of their short financial funds. In today's capitalist world, states are mainly concerned with their economies and as a lot of environmental regulations seems to hinder industrial interest, on which states are relying, environmental interests fall short. This explains why states seem to have little interest in monitoring and enforcing environmental law properly.

In recent years, the gap in the representation of environmental interests has been filled by NGOs. They have been more and more able to safeguard the interests of the environment. NGOs have chosen ways to safe the environment by participating in law-making and monitoring. The role of NGOs in monitoring the implementation of international treaties has been acknowledged and valued by both international organisations and national governments.[6] However, they are not able to enforce environmental agreements, because they mostly lack legal standing before international and domestic courts. Their increased asset should lead to a greater role in enforcing environmental law.

This insufficiency of monitoring bodies goes hand in hand with the lack of access to justice on the international level, because without proper monitoring of environmental matters nobody would know what the actual state of the

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[5] Andrew Watson Samaan *Enforcement Of International Environmental Treaties: An Analysis* (1993) 5 Fordham Envtl. L.J.261, 273.

[6] Chiara Giorgetti *The Role Of Nongovernmental Organizations In The Climate Change Negotiations* (1998) Col. J. Int'l Entl. L & Pol'y,115.

environment is. However, the need for environmental information is a precondition to enforcing environmental law. Since NGOs play an increasing role in law-making and monitoring they should also play a bigger role in enforcement. The same problem of lacking private financial interests is partly hindering the proper enforcement of environmental law. If no private financial interests are concerned, no individual right is affected. However, in most systems only the individual concern justifies to challenge an environmental decision. This criteria of individual concern is not only due to financial interest but takes also basic rights such as health and life into account.

Though, the problem which occurs in environmental law is that theses basic needs are relatively seldom tackled by environmental decisions, at least in developed countries. Therefore, it is highly likely that nobody will challenge environmental decisions, only because nobody is individually concerned. On the other hand, this lack of plaintiffs does not mean that an environmental decision is not worth challenging to safeguard environmental interests. The uneforcing of provisions and plans harming the environment is due to a lack of environmental democracy.

NGOs are perfect to enforce environmental provisions because there is a high likelihood that they worked on their making and monitoring. In addition, they do not have to take political and economical issues into consideration as states have to. NGOs could give the environment the voice that it needs so much.

This paper will examine the rise of NGOs and their legal status at the international level, especially in the European law system. It will analyse the effectiveness of existing monitoring bodies, the existing access to justice and the proposals that have been made to enhance these areas.

A milestone in environmental democracy on the international level is the Aarhus Convention.[7] Although regional in scope it influenced the development of environmental democracy in an important way. Therefore, it will be examined closely.

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[7] UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, that was adopted and signed, also by the Community, at the fourth ministerial conference in Århus (Denmark), 23-25 June 1998. In the following "Aarhus Convention".

The regional European regime of participatory rights will be examined afterwards, because it has been greatly influenced by the Aarhus Convention. As environmental liability is the main point at which economical interests are tackled in the same way as environmental matters, a recently proposed Directive of the Commission concerning environmental liability will be considered. It is a good example to illustrate these competing interests, and will serve as an example of the development of participatory rights in Europe. A further step of environmental democracy has been taken by a very recent proposal for a Directive on access to justice in environmental matters.

As Margot Wallström, European Commissioner for the Environment pointed out:

> "Empowering people to protect their environment is a cornerstone of effective policymaking. Citizens must be given the right to know how good or bad the state of the environment is and to participate in decision-making that will affect their health and quality of life. A well-informed and active public means more effective environmental legislation and better enforcement policies. Citizens will now be able as environmental watchdogs."[8]

The paper will emphasise that the European regime of participatory rights is on its way to more environmental democracy. The paper will promote the thesis that the only viable way to safeguard environmental interests is to give NGOs access to justice. Without enhancing environmental democracy enforcement of environmental law will not be improved. In Europe NGOs gain more access to justice on the domestic level. However, this is only the beginning and it is foreseeable that these developments will be influence the European dimension of access to justice. Therefore, it is only a question of time until these developments will be further transferred to the international level.

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[8] >http://www.participate.org/documents/EC-press-release-aarhus-25-10-03.pdf< (last accessed on 10 December 2003).

II RISE OF NGOs

A History and evolution of NGO's

In today's world of international environmental law NGOs have gained an increased role in law-making and monitoring. In the last decades, NGOs are playing an increasingly significant role in the development of international law, by influencing the drafting of international treaties for example. The legal consequence of the rise of NGOs is an increase in their participatory rights. These participatory rights must be strengthened in order to secure their gained position in international decision making and monitoring. The need for a legal standing of organisations is based on the rise of environmental NGOs in recent years.

Non-state actors are more influential than ever before, and there are numerous NGO's. The fact that the number of participating NGOs at the Rio Earth Summit exceeded the number of states speaks to the growing number of importance of them.[9] Environmental NGOs play a role in the "establishment and enforcement of environmental priorities."[10] However, they are not a new phenomenon. Their existence on the international arena can be dated back almost centuries ago, depending on the view point.[11] Nevertheless, the recent involvement of NGOs in the international realm intensified in the 1970s and 1980s, when these entities began to grow in number, size, and diversity.[12] The interest in the environment has

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[9] Rüdiger Wolfrum, Nele Matz in Rüdiger Wolfrum, Armin von Bogdany (ed's) *Conflicts in International Environmental Law*, Springer Berlin 2003, 204.

[10] A. Dan Tarlock, *The Role of Non-Government Organizations in the Development of International Environmental Law*, 68 Chi.-Kent L. Rev.(1992), 62.

[11] Some authors regard the Christian churches and their spiritual and secular orders in the 6th century A.D. as the first kind of NGOs. The most authors, however, regard private organisations in the 18th century as the first predecessors of today's NGOs. The Covenant of the League of Nations of 1919 established no formal rules governing the relationship between the League of Nations and NGOs. Rather, it referred in Article 25 only to the national organisations of the Red Cross. In 1921 the first attempt to recognise NGOs legal status was made by the the League Council with respect to Article 24, which addressed the relationship with other international organisations, a wide interpretation in order to incorporate NGOs in this Article. However, this idea has been abolished only two years later.

[12] Steve Charnovitz *Two Centuries Of Participation: NGOs And International Governance* (1997) 18 Mich. J. Int'l L. 261, 544.

increased substantially since the 1980s, which has led to the rise of environmental NGOs (ENGOs).

B Reasons for growing NGO participation

There are various reasons for the increased influence of NGOs at the international level. The most important one is the process of globalisation. Globalisation is commonly defined as the "denationalisation of clusters of political, economic, and social activities"[13] that undermine the ability of the sovereign State to control activities on its territory, due to the growing need to find solutions for global problems, like the pollution of the environment, on an international level. Other reasons are the faster telecommunications systems and world wide media companies. The creation of international environmental law is a result of a increased general awareness for the protection of the environment. Moreover, in all the main international conferences in recent years, like the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (UNCED) [14], one can observe increasing NGO participation.[15] The UNCED established a new style of operations for NGOs in relation to their governments. Citizen participation in policy making was enhanced by public meetings, increased lobbying, and the submission of alternative plans. NGOs are able to fill the niche in international law which is created by the state-centered notion of international law because of three advantages that they have over nation states.[16] First, they can "articulate powerful universal, single-purpose standards," because they do not have to trade off for other objectives. Second, they have "little incentive to subordinate science to other political or economical considerations." Finally, they can often cooperate with local

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[13] Jost Delbrück *Globalization Of Law, Politics And Markets- Implications For Domestic Law-A European Perspective* (1993) 1 Ind. J. Global Legal Stud. 9 , 11.

[14] United Nations Conference on Environment and Development: Convention on Biodiversity, opened for signature June 5, 1992, 31 I.L.M. 822 (hereinafter UNCED).

[15] Patricia Waak *Shaping A Sustainable Planet: The Role Of Non- Governmental Organizations* (1995) 6 Colo. J. Int'L Envtl. L. & Pol'Y 345, 346.

[16] Chiara Giorgetti *The Role Of Nongovernmental Organizations In The Climate Change Negotiations* (1998) Col. J. Int'l Entl. L & Pol'y, 120.

environmental groups.[17] NGOs directly participate in the enforcement of international environmental standards by lobbying, monitoring, and denouncing states' behaviour and by allocating resources.[18]

NGOs' influence is built on a niche that other international actors are ill-equipped to fill. Because NGOs are gaining a more and more important role and influence in international decision-making process, there is also a growing need for recognising their internationally legal standards.

Another point of view is given by Karsten Nowrot, who points out that legal status for NGOs arises from the character of international law itself.[19] He argues that because of the increasingly important and influential role in the area of international realm, regarding international law as a system with the objective of ensuring legal certainty and international peace.[20] Whether the need for access to justice is based on this rather theoretical view or on the assessment of today's reality of making and enforcement of international environmental law does not concern the outcome: the need for an increased environmental democracy. Without sufficient enforcement methods the law itself is useless.

Existing legal fora are inadequate in respect to international environmental disputes and NGOs have proved their ability to fill this role in international environmental law in recent decades.

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[17] A. Dan Tarlock, *The Role Of Non-Government Organizations In The Development Of International Environmental Law* (1992) 68 Chi.-Kent L. Rev., 65.

[18] A. Dan Tarlock, *The Role Of Non-Government Organizations In The Development Of International Environmental Law* (1992) 68 Chi.-Kent L. Rev., 75.

[19] Karsten Nowrot *Legal Consequences Of Globalization: The Status Of Non-Governmental Organizations Under International Law* 6 Ind. J. Global Legal Stud. 601.

[20] Karsten Nowrot *Legal Consequences Of Globalization: The Status Of Non-Governmental Organizations Under International Law* 6 Ind. J. Global Legal Stud. 601.

C Why NGOs should have a standing

Most important are three arguments that support a need for a standing of NGOs before international courts and fora. The first one is that all global environmental phenomena are supra-national in scope and therefore, exceed the capacity of individual states. The second one is based on the rise of NGOs in recent decades. This increase in participation must lead to an increase in their access to justice. NGOs do participate in today's treaty making as never before, nevertheless they do not have the same status of participation in monitoring their enforcement. Some regard NGOs as the most cost effective enforcement available to the international community.[21] Steve Charnovitz states that "enforcement by private entities such as international environmental organisations can be more persuasive than the more conventional governmental approach."[22] The main reason he concludes is that NGOs are not restricted by international politics. A lot of NGOs have the advantage of being independently funded. Therefore, they can focus limited financial resources on special issues. They are not influenced by lobbying of the industry which is a great factor for a states government in terms of economical growth. This advantage is described as "politically independence".[23] As Saaman notes that "[i]nternational agencies are neither shackled by international politics or influenced by political pressures, since, for the most part, they are generally privately funded".[24] Consequently, NGOs could make use of a number of enforcement techniques, for example organising boycotts; bringing complaints to international authorities.

NGOs uses the fact that public officials are particularly sensitive to publicity. Because of their ability to mobilise public support, NGOs are often essential to the

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[21] Steve Charnovitz *Two Centuries Of Participation: NGOs and International Governance* (1997) 18 Mich. J. Int'l L. 274.

[22] Steve Charnovitz *Two Centuries Of Participation: NGOs and International Governance* (1997) 18 Mich. J. Int'l L. 274.

[23] Steve Charnovitz *Two Centuries Of Participation: NGOs and International Governance* (1997) 18 Mich. J. Int'l L. 274/275.

[24] Andrew Watson Samaan *Enforcement of International Environmental Treaties: An Analysis* (1993) 5 Fordham Envtl. L.J. 261, 274.

creation and functioning of international environmental regimes.[25] Another notable case in connection with the role of NGOs in judicial proceedings is the arbitration between France and Greenpeace following the destruction of the Rainbow Warrior by French government agents in a New Zealand port in 1985. It was the first time that an international damages case was arbitrated by agreement between a State and an international NGO.

Finally, the third argument for a standing of NGOs is that the environment is a res communis. Consequently, the protection of the environment is naturally more often a public interest rather than an individual concern. Nevertheless, many legal systems only allow challenging of environmental decisions when one is individually concerned. Hence, many decisions that harm the environment remain unchallenged and the law remains unenforced. It is the most important task of NGOs to raise a voice for the environment. They are only able to fill this gap if they will get enhanced access to justice.

C NGOs and international law

1 recent acknowledgement at the international level

The United Nations Conference on Environment and Development, 1992, is often cited as a catalyst with respect to NGOs participation. At this conference NGO networking and financial support enabled 1400 NGOs to attend the conference as UN-recognised participants.[26]

The United Nations Framework Convention on Climate Change (UNFCCC) to which was added the Kyoto Protocol[27] established a precedent for the involvement of NGOs in negotiations of international treaties and Articles 4(1)(i),

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[25] Andrew Watson Samaan *Enforcement Of International Environmental Treaties: An Analysis* (1993) 5 Fordham Envtl. L.J. 261, 274; For instance, NGOs were instrumental in initiating the first truly world wide campaign to stop the slaughter of whales by using graphic videos.

[26] Michael Mason *Environmental Democracy* (Earthscan Publications Ltd, London, 1999) 217.

[27] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, Conference of the Parties, 3d Sess, Agenda Item 5, U.N. Doc. FCCC/CP/1997/Add.1.

7(2)(l) and 7(6) of the Convention address the role that NGOs were to play in the international climate change negotiations. Article 7(6) established the rule for admission to negotiating proceedings, stating:

> "Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one-third of the Parties present object."

This essentially allowed ENGOs access to all negotiations following the Convention and leading up to the signing of the Kyoto Protocol.

2 NGOs as subject of international law?

Formal consultative status for international NGOs has been available since 1968 through accreditation by the UN Economic and Social Council, but this mechanism has not been widely employed until recently. UN consultative status is accorded to those NGOs of "international standing" who are representative of relevant fields of competence and are democratically constituted.[28]

Rüdiger Wolfrum emphasis the view that "the fact that NGOs are not, in general, subjects of international law, is not the decisive factor with respect to the role they play in coordinating international environmental law."[29] Although this is debatable, he highlights the need for placing NGOs on equal footing with international organisations in order to clarify the status of NGOs in public international law.[30] The author of this paper strongly agrees with that view.

While it is possible to grant the status and rights of a subjects of international law to a NGO it has been limited so far to the status of the Committee of the International Red Cross. For the last years, despite the increased size, numbers and involvement of NGOs there has not been any significant trend toward formalising

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[28] Michael Mason *Environmental Democracy* (Earthscan Publications Ltd, London, 1999) 218.

[29] Rüdiger Wolfrum, Nele Matz in Rüdiger Wolfrum, Armin von Bogdany (ed's) *Conflicts in International Environmental Law* (Springer, Berlin 2003) 206.

[30] Rüdiger Wolfrum, Nele Matz in Rüdiger Wolfrum, Armin von Bogdany (ed's) *Conflicts in International Environmental Law* (Springer, Berlin 2003) 206.

the public law nature of NGOs. If this right is withhold from them they must have at least the right to litigate cases before domestic and -in the future- before international courts.

C Short survey of the development of the European environmental policy

The development of the European environmental policy began in the 1970s. During the ratification of the treaty of Rome 1956/1957 the signatories did not realise the dimension of transboundary environmental matters. The first environmental action programme was released in 1973. This programme focused on industry, energy, agriculture, transportation and tourism. In the following years the biggest part of environmental law of the Member States has been released on the European level, while Member States implement these measures. Beside the founding of the European Environmental Agency (EEA) and the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL) the environmental policy had still a low status in European policy. The basis for European environmental law is the European File (EEA) of 1987, because after its release the objective of an European Single Market was combined with environmental protection[31] and environmental policy was noticed as an individual field of policy.[32] The Objectives of European environmental policy are stated in Article 174 p. 1 EC Treaty.[33] The Treaty of Maastricht of 07 February 1997, till then the biggest amendment of the EC Treaty, has not stated any essential amendments for the environmental policy.[34] This chanced for the first time, with the

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[31] Article 95 p. 3 EC Treaty.

[32] Article 174-176 EC Treaty.

[33] 1. Community policy on the environment shall contribute to pursuit of the following objectives: - preserving, protecting and improving the quality of the environment, protecting human health, - prudent and rational utilisation of natural resources, - promoting measures at international level to deal with regional or world wide environmental problems. 2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

[34] Florian T. Furtak *Nichtregierungsorganisationen (NGOs) im politischen System der Europäischen Union – Strukturen und Beteiligungsmöglichkeiten* (tuduv –Verlags-GmbH, München, 2001) 128.

Treaty of Amsterdam, 2 October 1997, which implemented environmental protection into Article 2 of the EC Treaty. Further, newly implemented has been an Article 6 which stipulates that environmental matters must be considered in all European policies.

III INSUFFICIENCY OF EXISTING MONITORING BODIES

A Fragmentation of environmental law

Existing monitoring bodies often are hindered by the fragmentation of international environmental law. After a treaty is negotiated, adopted and ratified it must be implemented and monitored for compliance. [35] However, one of the general problems of enforcing international environmental law is the process of monitoring existing treaties. This task could be either fulfilled by a monitoring body or by NGOs.

Categories of international law are treaties, general principles of law and customary international law.[36] Treaties are a traditional source of law. Their primary function is to create specific legal obligations between parties from expressed consent of States. They can also contribute to the development of customary international law. Article 2. 1 (a) of the Vienna Convention defines treaty as "an international agreement concluded between States in written from and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". The Vienna Convention on the Law of Treaties is widely accepted as part of customary international law. It is even widely accepted among non-parties.[37] Partly, this Convention expresses the traditional view of international law that non-state actors can be neither subjects nor authors of international law. Therefore, another Convention was ratified dealing with this problem: the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.[38]

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[35] Ratification is defined in Article 11 of the Vienna Convention on the Law of treaties.

[36] Article 38 (1) of the International Court of Justice Statutes.

[37] For example, the USA never ratified the Vienna Convention. Nevertheless, the US Dept. of State has declared that the principles are binding upon the US. (page 206)

[38] 25 I.L.M. 543 21 March 1986.

One of the obstacles to enforce all these treaties is due to the fact that we have an overwhelming number of environmental treaties that have been composed since 1972.[39] The term "treaty congestion" has been "stamped" by Professor Edith Brown Weiss. The statement of Professor Brown Weiss that a plurality of treaties might lead to overlapping provisions has been relativised by the argument rising from the Vienna Convention on the Law of Treaties. However, as many modern treaties establish their own institutions, the lack of co-ordination between them continues. A fragmentation of the environmental system occurs, because the main institutions operate independently of each other. Not only does the problem of splintered centrality arise, but they also do house their central offices in different countries and far away from their various joint projects and operations.

Although, the various secretariats, monitoring processes and dispute resolution procedures have different responsibilities, they have still the same purpose to protect the global environment. The obstacle that there are numerous institutions is linked to another issue. Further obstacles for effective implementation/enforcement are sufficient political, administrative and economic capacity. Many of the institutions have calls on the administrative sector of states. This leads to the fact, as Professor Brown Weiss points out, that even industrialised states with well-developed regulatory mechanisms and bureaucracies show signs of being overwhelmed.[40] Due to the fragmentation of international environmental law no sufficient monitoring body exist so far. In addition, the lack of economical interests in international environmental law aggravates the monitoring. To illustrate this problem the paper will turn to analyse the United Nations Environmental Programme more closely.

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[39] Edith Brown Weiss International Environmental Law: Contemporary Issues And The Emergence Of A New World Order (1993) 81 Geo L. J. 697/698.

[40] Edith Brown Weiss *International Environmental Law: Contemporary Issues And The Emergence Of A New World Order* (1993) 81 Geo L. J. 702.

B UNEP

The Conference on Human Environment in Stockholm[41], Sweden, held by the United Nations in 1972 was a major turning point in international environmental law.[42] The Stockholm Conference is widely recognised as the "cocoon from which the chrysalis of international environmental law emerged as a legal subject in its own rights."[43] The Conference had three major results: an action plan to protect the global environment, the United Nations Environmental Programme (UNEP) and related funds and the Stockholm Declaration.

The United Nations Environmental Programme (UNEP) is a subsidiary organ of the United Nations that was created by UNGA Resolution 2997 (XXVII) after the Stockholm Conference on the Human Environment in 1972. The political organs of the UN have recognised international legal personalities, i.e. are deemed to be subjects of international law. The United Nations Environmental Programme played major role in developing treaties and other international legal instruments. At the time of its creation in 1972, UNEP was the exclusive multilateral agency concerned with the environment. Its particular role within the United Nations system was seen to identify emerging environmental problems and help to shape an international solutions. In the following decades, the exclusive role of UNEP was progressively undermined because many other United Nations agencies started to involve themselves in the environmental field.[44]

UNEP is based on a decision by the Stockholm UN Environment Conference of June 1972.[45] However, it was not created as a UN specialised Agency, but as an

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[41] Doc. A/8730 (1972).

[42] However, a series of principles which turned into hard law emerged from this Convention, such as the principles 1 –5 which recognised collective responsibility to future generations and create the general obligation to conserve natural resources.

[43] Lakshaman D. Guruswamy, *International Environmental Law: Boundaries, Landmarks, And Realties* (1995) 10 Nat. Resources & Env't. 43.

[44] Report of the Office of Internal Oversight Services on the review of the United Nations Environment Programme and the administrative practices of its secretariats, including the United Nations Office in Nairobi (A/51/810), available via: >http://www.un.org/Depts/oios/reports/a51810/51-810e.htm< (last accessed on 10 December 2003).

[45] General Assembly resolution 2997 (XXVII) (Institutional and financial arrangements for international environmental cooperation) of 15 December 1972, available via:

institution subordinate to the General Assembly. Therefore it has no power to participate in international law and cannot be a party of an international treaty. According to the Resolution 2997 (XXVII), UNEP is structured in three main organs. These are the Governing Council, a Secretariat, and the Environment Fund. The Governing Council consists of 58 State Representatives, chosen every four years from the General Assembly. It is the main body of UNEP and comes together every two years. Its main functions and responsibilities are held in the General Assembly resolution 2997 (XXVII), for example, the promotion of international cooperation in the field of the environment, providing general policy guidance for environmental programs within the United Nations and to keep under review the world environmental situation.[46]

Agenda 21 has assigned UNEP with a greater role in lawmaking as before, recognising its contribution to international environmental relations.[47] The tasks that were assigned by Resolution 2997 (XXVII) and Agenda 21 establish UNEP as the principal institution for steering and guidance in international environmental law.[48] However, "Agenda 21 does not specify which measures UNEP can, or should, adopt in making use of its competence regarding the coordination of agreements. Neither can Agenda 21, as a political non-binding declaration, grant a legal mandate to UNEP or widen its competences in this respect."[49] Therefore, UNEP's chance to be transformed into a UN Specialised Agency is far from realisation. UNEP has played a leading role in the promotion of regional conventions aimed at, e.g., protecting the seas against pollution. UNEP has evolved into a standing structure for negotiating draft resolutions sent, after their evaluation, to the General Assembly.[50] Despite the ambitious layout of UNEP serious problems lead to the insufficiency of the body.

<http://ods-ddsny.un.org/doc/RESOLUTION/GEN/NR0/270/27/IMG/NR027027.pdf?OpenElement> (last accessed on 19.06.2003).

[46] <http://www.unep.org/Documents/Default.asp?DocumentID=43&ArticleID=2623> (last accessed on 20.06.2003).

[47] Agenda 21, Chap. 38.21, 38.22a.

[48] Rüdiger Wolfrum, Nele Matz in Rüdiger Wolfrum, Armin von Bogdany (ed's) *Conflicts in International Environmental Law* (Springer, Berlin, 2003) 181.

[49] Rüdiger Wolfrum, Nele Matz in Rüdiger Wolfrum, Armin von Bogdany (ed's) *Conflicts in International Environmental Law* (Springer, Berlin, 2003) 182.

[50] David Hunter, James Salzmann, Durwood Zaelke (ed's) *International Environmental Law and Policy* (2nd ed, Foundation Press, NewYork, 2002), 250.

The key problem UNEP is facing is that its role following the United Nations Conference on Environment and Development needs clarification. Pursuant to a report of Internal Oversight reviewing UNEP it is not clear to staff or to stakeholders what that role should be.[51] Due to this unclearness the funds of UNEP are still a lot smaller than the fund of the biggest NGO in the US; and they are still declining.

Most UNEP activities are financed through voluntary contributions, most of which come from a small number of donors. In addition there is a modest contribution from the regular budget of the United Nations, but the bulk of UNEP activities are funded from the Environment Fund or from trust funds, of which UNEP has more than 50. Confronted with declining resources, managers of the UNEP have not yet made all of the necessary hard choices.[52] Since they have had fewer resources with which to operate. Most of the UNEP's staff time and energy has been spent in paring down programmes, resulting in less time to think or to do environmental work. Therefore visible environmental results were reduced also. However, this lead to reduced donor confidence and lower contributions. However, in reaction to the current deepening lack of resources further programme reductions occurred.

These problems have been worsened by the limited ability of the newly established United Nations Office at Nairobi. UNEP is headquartered in Nairobi, Kenya and the secretariats for the major MEAs are scattered throughout the world.[53] Pursuant to the Report of the Office of Internal Oversight "the Office's overdependence on voluntary (extrabudgetary) funding is inappropriate, and its staffing composition is in some respects insufficient in number and in quality. As it

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[51] Report of the Office of Internal Oversight Services on the review of the United Nations Environment Programme and the administrative practices of its secretariats, including the United Nations Office in Nairobi (A/51/810), available via: >http://www.un.org/Depts/oios/reports/a51810/51-810e.htm< (last accessed on 10 December 2003).

[52] Report of the Office of Internal Oversight Services on the review of the United Nations Environment Programme and the administrative practices of its secretariats, including the United Nations Office in Nairobi (A/51/810), available via: >http://www.un.org/Depts/oios/reports/a51810/51-810e.htm< (last accessed on 10 December 2003).

[53] Dena Marshall *An Organization For The World Environment: Three Models And Analysis* (2002) 15 Geo. Int'l Envtl. L. Rev. 79.

stands, the Office does not have the capacity to discharge its responsibilities adequately."[54]

A *Possible solutions*

A possible solution for the insufficiency of international bodies could be the creation of a supranational body. For example, the German Advisory Council on Global Change (WBGU) addresses the question of whether existing institutions within the United Nations framework can handle the growing challenges of global environmental governance, and suggests, how the existing regimes should change.[55] While the German Advisory Council on Global Change recognises that UNEP and other existing UN institutions currently face unhappy reputations, it proposes not to abolish them, but rather to restructure them gradually into a new umbrella organisation.

For the purpose of the paper only two different approaches for creating a supranational body should be mentioned. The first consists of broadening the power of an existing body, the second of creating an entirely new one as the WBGU proposed.

1 Broadening the Power of the Security Council or establishing a "Green Security Council"?

Recently the suggestion of a Green(er) Security Council occurred in the international environmental law debate. This new Security Council should be modelled like the existing one. What is most appealing about this theory is the wide power of the existing Security Council, as stated in Chapter VII of the Charter. However, just to broaden the power of the Security Council to environmental

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[54] Report of the Office of Internal Oversight Services on the review of the United Nations Environment Programme and the administrative practices of its secretariats, including the United Nations Office in Nairobi (A/51/810), available via: >http://www.un.org/Depts/oios/reports/a51810/51-810e.htm< (last accessed on 10 December 2003).

[55] German Advisory Council on Global Change (WBGU), World in Transition Vol. 2: New Structures for Global Environmental Policy, 2001, 3.

conflicts is not possible because of its "primary responsibility for maintenance of international peace and security".

Also, the proposed new Green Security Council is far from its realisation. The suggested institution must be comparable with the existing Security Council. However, an amendment of the UN Charter would be necessary. Considering the veto power of the permanent Members, it would be not easy to amend. Not only would this be a time consuming process it also raises the question of two existing Councils side by side.

2 An international environmental organisation

There are three proposed organisations at the moment: the Global Environmental Organisation (GEO)[56], the International Environmental Organisation (IEO)[57], and the World Environmental Organisation (WEO)[58].

All of these three proposals suggest another structure. According to its proponents, a GEO would be "lean, flexible, and focused on the specific challenges presented by international environmental problems."[59] One of its central functions would be to be an effective response to global environmental matters. The IEO would be an umbrella organisation restructured out of the UNEP and other existing UN institutions. Further, it would be based on the WTO model.[60] The concept of the WEO, on the other hand, intends to "facilitat e and complete environmental deal-making".[61] These proposals seem to be leading in the right direction, however, they are far from realisation.

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[56] Daniel C. Esty & Maria H. Ivanova *Making International Environmental Efforts Work: The Case ForA Global Environmental Organisation* Yale Center for Envtl L. & Pol'y Working Paper Ser., Working Paper No. 2/01, 2001.

[57] German Advisory Council On Global Change (WBGU) *World in Transition Vol. 2:New Structures For Global Environmental Policy* (2001).

[58] John Whalley & Ben Zissimos *What Could A World Environmental Organization Do?* (2001) 1 Glob. Envtl. Pol. 29-34.

[59] Daniel C. Esty & Maria H. Ivanova, n 27.

[60] German Advisory Council On Global Change (WBGU) *World in Transition Vol. 2:New Structures For Global Environmental Policy* (2001).

3 Evaluation

It would be a significant step to establish such an organisation, supervising treaty implementation and enforcement. The best way would be to use the existing network of UNEP, because it is already an organisation dedicated to environmental matters. On the other hand, it should not be disregarded that the establishment of a supranational body is likely to be opposed by one of the global major players, the U.S. It does not only showed its disrespect for international matters recently, but also refused to sign one of the global Protocols, the Kyoto Protocol. Very recently Russia decided also not to ratify it. These examples show today's insecurity of international negotiations. It can be assumed that if global players might not be interested in an international solutions, the establishment of another international body would turn out to be almost impossible. The establishment of a supranational body would be desirable, however, it does not seem a viable option in the present.

IV INSUFFICIENT ACCESS TO JUSTICE FOR NGOs ON THE INTERNATIONAL LEVEL

Despite the fact that NGOs play a major role in law-making and monitoring, there is almost no access to justice in public interest litigation. The probability that a state will bring a case to the ICJ against another state, claiming that the latter undertakes actions harming the environment, is very small. One of the reasons is that most states fear counterclaims because they too have done something to harm the environment.[62] Johanna Riceanu points out that "expanding the scope of standing before the ICJ and allowing international organisations to not only use the advisory jurisdiction of the World Court, but also use the Court's contentious

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[61] John Whalley & Ben Zissimos *What Could A World Environmental Organization Do?*,(2001) 1 Glob. Envtl. Pol. 29, 30.

[62] Mary Ellen O'Connell *Enforcing The New International Law Of The Environment* (1992) 35 GYIL 293, 318.

jurisdiction in order to claim environmental harm, might bring more contentious cases to litigation."[63]

Within the domestic legal system there is a well-developed system for creating and enforcing law[64] despite the fact that NGOs often lack a standing. In comparison to international law where the law-making system is far less developed. Under the principles of international law established by Hugo Grotius and his successors, each nation is independent and sovereign. No supra-national legislature exists with the power to create law applicable to the entire world. Moreover, States are the primary subjects of international law. Few international regimes allow the participation of non-state actors in lawmaking.

Consequently, the existing international law-making system is inadequate for dealing with global environmental challenges. The rules of international law mostly justify or legitimate the practical exercise of state power.

In addition to lacking a general law-making institution, the international legal system remains remarkable non-democratic.[65] Individuals, corporations, and other organisations recognised as juridical persons under the domestic law of individual states lack formal recognition before international courts or in other international fora. All these non-state actors suffer under a "procedural disability", i.e. they lack direct access to international fora. In most fora in the international system, individuals and NGOs are currently granted no legal standing, for example individual citizens completely lack standing in the International Court of Justice (ICJ). Providing standing for NGOs to address environmental wrongs can be accomplished in the two ways as David A. Ardia describes: "enlarging the jurisdiction of current international tribunals such as the ICJ, or by granting NGOs standing in domestic courts through domestic implementing legislation."[66]

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[63] Johanna Rinceanu *Enforcement Mechanism In International Environmental Law Quo Vadunt? Homo Sana In Natura Sana* (2000) 15 Envtl. L. & Litig. 147.

[64] David Hunter, James Salzmann, Durwood Zaelke (ed's) *International Environmental Law and Policy* (2nd ed, Foundation Press, NewYork, 2002), 198.

[65] David Hunter, James Salzmann, Durwood Zaelke (ed's) *International Environmental Law and Policy* (2nd ed, Foundation Press, NewYork, 2002), 199.

[66] David S. Ardia *Does The Emperor Have No Clothes? Enforcement Of International Laws Protecting The Marine Environment* 19 Mich. J. Int'l L., 563.

Individuals and or other non-state actors, which suffer harm from another state or the citizens of other states must rely upon their own state to employ international law on their behalf[67], because only states have a standing before the International Court of Justice.[68] The states may have a legal duty to his citizens, but it does not have a duty to international society. More sufficient enforcement procedures can be achieved either by reforming an existing institution or by creating an entirely new one.

Especially in the case of transnational corporations, that have the economical ability to move their companies around to the country with the lowest environmental standards, victims of environmental hazards have a only the choice to bring legal action to domestic courts. However, the courts will mainly regard the domestic environmental system. International environmental law aspects are not similarly regarded and implemented by domestic courts.[69] Moreover, it could be impossible to bring legal action before domestic courts at all because of procedural obstacles such as the forum non-convenience.

A number of international enforcement systems exists in the United Nations and Europe as a regional system. They address international disputes with an increased focus on environmental disputes. Despite the existing alternatives of many international fora, each of these lack the possibility for an appropriate forum for individuals or NGOs seeking compulsory jurisdiction.

Among these tribunals are the International Court of Justice (ICJ), the International Court of Environmental Arbitration and Conciliation (ICEA), the Permanent Court of Arbitration (PCA) and the European Court of Justice (ECJ).

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[67] David Hunter, James Salzmann, Durwood Zaelke (ed's) *International Environmental Law and Policy* (2nd ed, Foundation Press, NewYork, 2002), 200.

[68] Article 34 Statute of the International Court of Justice. Article 34, p. 1: Only states may be parties in cases before the Court.

[69] Peggy Rodgers Kalas *International Environmental Dispute Resolution And The Need For Access By Non-State Entities* 2001, 12 Colo. J. Int'L Envtl. L. & Pol'Y 193.

A *Judicial Proceedings at the International Level*

In the case of dispute settlement judicial proceeding son the international level are insufficient for Non-state actors. International treaties, courts tribunals and arbitral panels traditionally limit legal access to state entities.[70] Article 2 (3) of the Charter of the United Nations obligates states to settle their disputes in a peaceful manner, while Article 33 outlines the central mechanism by which the peaceful settlement of disputes can be effected. However, the United Nations does not insist on their Members to actually settle their disputes. Furthermore, the Unites Nations does not require settling the disputes by legal procedures, only a peaceful way is required.

Art. 33 of the UN Charter provides a range of procedures for dispute settlement, including arbitral and judicial measures. This paragraph will address the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA).

1 Judicial Proceedings – International Court of Justice (ICJ)

The International Court of Justice acts under the patronage of the United Nations. The Court may accept environmental cases, however, only states have a standing before it. Neither Private individuals have access to the Court, nor do NGOs.[71] Because NGOs are not yet recognised as active participants in the norm-creating process of customary international law, their activities and statements cannot be regarded as State practice and opinio juris in the sense of Article 38(1)(b) of the Statute of the International Court of Justice.[72]

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[70] Peggy Rodgers Kalas *International Environmental Dispute Resolution And The Need For Access By Non-State Entities* (2001) 12 Colo. J. Int'L Envtl. L. & Pol'Y 191.

[71] Article 34 Statute of the ICJ.

[72] See Statute of the ICJ Article 38.

Despite the existence of the possibility to change these proceedings by amending the ICJ's Charter[73], this chance has not been used so far. As an good example for not taking this opportunity, serves the establishment of a new Chamber.

The opportunity to give non-state actors access to the ICJ has not been used in the process of establishing a new Chamber for Environmental Matters. While the Chamber was established in 1993 and is presently composed of seven judges, elected for three years, the chance to change the proceedings before the ICJ has not been taken. Furthermore, this Chamber has not been used to date. Since its establishing the Chamber is open to criticism. One point of criticism is the fact that it is in the hands of the parties alone whether to refer the case to the Chamber.[74] Further, members of the Chamber do not have any greater experience in environmental matters than non-member judges. Finally, under the Statute of the ICJ the parties are allowed to choose an ad hoc Chamber, which will consider the views of the parties on the composition of the Chamber.[75]

Unfortunately, the possibility to give access to the ICJ for non state actors has not been used so far.

2 European Court of Justice ECJ

The European Court of Justice is the judicial arm of the European Union. Since, the 80s the European Commission brought more than 55 cases before the ECJ dealing with the failure of Member States to comply with environmental regulations. Even more cases has been brought before the Court involving the non implementations of Regulations and Directives.

The European Court of Justice, in contrast to the ICJ, had dealt with a lot more environmental cases. It could be assumed from this number that the ECJ has a wider environmental awareness than the ICJ, which is based in the European tradition to deal with environmental matters.

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[73] Article 69 Statute of the ICJ.

[74] Article 26, p 3 Statute of the ICJ.

However, until today only states and EC organs have a standing before the Court. The most notable recent development concerning access to justice at EU level is a decision by the Court of First Instance in May 2002 opening the door for more access. Unfortunately, the European Court of Justice shortly thereafter (July 2002) took a decision promptly slamming the door closed again. Some experts speculate that the European Court of Justice prefers to wait for a better case upon which to base a change in its jurisprudence.[76]

The recent developments in the European scheme of public participation will be further analysed in the scope of the proposed Directive on Environmental Liability and, most importantly, the very recent proposed Directive on access to justice in environmental matters.

3 Arbitral Proceedings – Permanent Court of Arbitration (PCA)

On June 19, 2001 the PCA Administrative Council adopted the Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ("Environmental Rules").[77] These new rules advanced the proceedings of the PCA. Now any combination of parties is possible. Meaning that States, NGO's, multilateral corporation and individuals can be a party before the PCA and even a multi-party arbitration is admission. Open to criticism is the absence of compulsory jurisdiction. [78]

5 International Environmental Court?

In recent years the problem of enforcing international environmental law was addressed by the proposal for an International Environmental Court, that should

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[76] Seminarreport of the European Environmental Bureau (EEB), *New Chances for Better Enforcement of EU Environmental Legislation,* 20th September 2002, Brussels, 71.

[77] <http://www.pca-cpa.org/ENGLISH/EDR/> (last accessed on 19.07.2003).

[78] Charles Qiong Wu *A Unified Forum? The New Arbitration Rules For Environmental Disputes Under The Permanent Court Of Arbitration* (2000) 3 Chi. J. Int'l L. 263, 264.

allow more participation by non-state entities.[79] Therefore, in 1989, the Hague Declaration on the Environment called for the creation of a new institutional authority within the UN system.[80]

To support this proposition there have to be proved that existing institutions are not sufficient to deal with international environmental disputes and that they cannot be transformed to an institution that is able to deal with these disputes.[81] Even if this will be proved, the problem of its establishment is still remaining. The IEC could would possible only be realised through a multilateral treaty. However, such a treaty is not in sight and states seem to be reluctant to give up a further piece of their sovereignty to create this new institution. This position is supported by their lack of enthusiasm to bring disputes before other, existing, international courts and tribunals.

6 The Role of NGOs as Amici Curiae and Public Interest Litigators in International Judicial Bodies

NGOs are especially active as amici curiae in the regional human rights systems of the Americas and Europe.[82] The European Court of Human Rights, after first showing reluctance to allow NGOs to submit amicus briefs in pending cases, permitted third party intervention in some cases and then amended Article 37(2) of its Rules of Procedure in 1982 to create an explicit legal basis for these submissions.

Through litigation NGO participate as amici curiae in international judicial bodies and contribute to the development of international law. NGOs acting in this

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[79] See e.g. Amedeo Postiglione *Essay: A More Efficient International Law On The Environment And Setting Up An International Court For The Environment Within The United Nations* (1990) 20 Envtl. L. 321; Philippe Sands in Jacob Werksman (ed) *The International Court of Justice and the European Court of Justice* in *Greening International Institutions* (Earthscan, London 1996) 219-35; Kenneth F. Mc Callion & H Rajan Sharma *Environmental Justice Without Borders: The Need For An International Court Of The Environment To Protect Fundamental Environmental Rights* (2000) 32 Geo. Wash. J. Int'l L. & Econ. 351.

[80] Hague Declaration on the Environment, 11 March 1989, U.N. Doc. A/44/340, 28 I.L.M. 1308, 1309-10 (1989).

[81] Sean D. Murphy *Does The World Need A New International Environmental Court?* (2000) 32 Geo. Wash. J. Int'l L. & Econ. 333, 333.

way can influence the interpretation and sometimes the creation of international law through international courts and tribunals.[83]

In the later on more analysed example of Greenpeace v. Commission, where the NGO challenged a decision of the Commission of the European before the European Court of Justice they were denied locus standi before the Court.[84]

INTERIM-CONCLUSION: Non of the existing fora is able to help global environmental disputes and in the most of them neither NGOs nor individual have a standing. In the case where they have a standing, the fora only give advisory or consultative opinions, meaning no compulsory jurisdiction is provided. In addition, the tool of "amici curiae" is not very helpful, because it does not provide the same rights as a claimant have. Therefore, their interests and the public interest of the environment are not are protected and the enforcement of international environmental law is insufficient.

V ÅRHUS CONVENTION - RECENT DEVELOPMENT OF PARTICIPATORY RIGHTS

One giant step forward in the development of international law in the field of environmental democracy was the adoption of the Aarhus Convention. A key element in saving the environment is the strengthening of citizens' environmental rights so that these members of the public and their representative organisations can play a full and active role in environmental law.[85]

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[82] Dinah Shelton *The Participation Of Non-Governmental Organizations in International Judicial Proceedings* 88 AM. J. INT'L L. 611, 619 (1994).

[83] Karsten Nowrot *Legal Consequences Of Globalization: The Status Of Non-Governmental Organizations Under International Law* 6 Ind. J. Global Legal Stud. 632.

[84] See Greenpeace and Others v. Commission 1995 ECR II, 2209, para. 60.

[85] UN/ECE Convention on Access to Information, Public Participation in decision-Making and Access to Justice in Environmental Matters *The Aarhus Convention: An Implementation Guide* (United Nations, New York and Geneva, 2000)V.

In recent years there have been an impressive development in terms of participatory rights of NGOs and individuals on the European level. The most important legal instrument in terms of participatory rights is the UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. It was adopted on 25 June 1998 in the Danish city of Århus (Aarhus) at the Fourth Ministerial Conference in the "Environment for Europe" process. [86] It is also open to Non-EC Members. It entered into force on 30 October 2001. At an extra-ordinary meeting of the Parties, held on 21 May 2003 in Kiev, 36 States and the European Community signed the Protocol at the Meeting of the Parties.[87] It is therefore the first international instrument of increasing environmental democracy. On the Second meeting of the Task Force on Access to Justice in Geneva 20-21 November 2003 the Aarhus package was adopted by the European Community.

Its importance was described by Kofi A. Annan:

> "Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations." Kofi A. Annan

The Aarhus Convention lays down the basic rules to promote citizens' involvement in environmental matters and enforcement of environmental law, by establishing a number of rights of the public (citizens and their associations) with regard to the environment. Public authorities (at national, regional or local level) are to contribute to allowing these rights to become effective. The Aarhus Convention consists of three pillars, each of which grants different rights to the public. The first pillar gives the right of the right of everyone to receive

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[86] UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, that was adopted and signed, also by the Community, at the fourth ministerial conference in Århus (Denmark), 23-25 June 1998. In the following "Aarhus Convention".

[87] <http://www.unece.org/env/pp/> last accessed on 10. November 2003.

environmental information that is held by public authorities ("access to environmental information – Article 6 of the Aarhus Convention")[88]; the second one gives the right to take these comments into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making- Article 7 of the Aarhus Convention"); and, finally, the third pillar provides the right to challenge, in a court of law, public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice – Article 9 (2) & (4) of the Aarhus Convention").[89]

The Aarhus Convention is a milestone in the history of environmental agreements. It links government accountability and environmental protection by granting the aforementioned rights to the public and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.[90] Article 13 of the Preamble of the Aarhus Convention emphasis the role NGOs can play in environmental protection.[91]

VI STATUS QUO OF PARTICIPATORY RIGHTS AT THE EUROPEAN LEVEL

Currently, at EU level, there is no possibility for environmental organisations or environmentally concerned citizens to bring cases before the European Court of Justice challenging actions or omissions by the EU institutions (in particular, the European Commission).[92] This is not entirely true, because, in fact, there is an action at the European level, which will turn out to be insufficient, that is stipulated

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[88] This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Citizens are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession.

[89] <http://europa.eu.int/comm/environment/aarhus/> (last accessed on 24 October 2003).

[90] <http://www.unece.org/env/pp/> last accessed on 10 November 2003.

[91] "[13] Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection."

[92] Seminarreport of the European Environmental Bureau (EEB), *New Chances for Better Enforcement of EU Environmental Legislation,* 20th September 2002, Brussels, 71.

in Article 230, p. 4 EC Treaty. However, this sole legal action is an insufficient instrument to safeguard environmental interests. This analysis will be followed by recent developments in the area of participatory rights with respect to historical reasons for this progress.

A *Action of voidness - Article 230 p. 4 EC Treaty*

Until today, NGOs do not have general access to justice and there are only a few legal actions for them against decisions of a European organ. Only Article 230, p. 4 EC Treaty grants a standing to associations before the European Court, if they are affected by a decisions of the Council or the Commission.[93]

However, the jurisdiction of the ECJ and the Court of the first instance, in reality only one European body, is indifferent in terms of legal standing for organisations. *Reich* concluded that: "The court will, under certain circumstances, grant standing to associations, though it has not shaped a specific theory on this matter."[94] Whether this conclusion is right will be evaluated in the following paragraph.

1 special legitimacy preconditions of Article 230, p. 4 EC Treaty

> Article 230, p. 4 stipulates: Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

At the first glance we have to acknowledge that there is no limitation of the potential subjects that have a right to sue. Every natural or legal person has a right to sue. Basic constellation of Article 230, p.4 EC Treaty is the challenge of a

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[93] Article 230, p. 1 EC Treaty (amended by the Treaty of Nice): The court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of Acts of the Council, of the Commission of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-a-vis third parties.

[94] Reich in Micklitz/Reich (ed's) *Public Interest Litigation before European Courts*)Nomos Verlagsgesellschaft, Baden-Baden,1996), 14.

decision which was addressed to the claimant. In this case there are no further requirements for the claimant. However, actions of voidness of non-addressees are only possible with some limitations. Non-addressees must prove that the decision concerns them directly and individually. Therefore, the most difficult requirement for a successful application by associations is being "directly and individually concerned".

(a) Definition of "decision"

The first problem in this context is the definition of "decision". Even if the legal act in not named as a decision, it could be a decision in the sense of Article 230 p.4 EC Treaty with the consequence that it could be challenged.[95] For the legal definition only the objective criteria are important.[96] Thus, a decision is an individual action which refers to a single individual case and has legal external effects.[97] Further problems could arise from the distinction between a regulation and a decision, that Article 230, p. 4 EC Treaty stipulates. However, the distinction seems to be more and more irrelevant, as long as the complainant proves that he/she/it is directly and individually concerned.[98]

(b) "individually concerned"

The problem of an action by a non-addressee is to be "individually and directly concerned". This was first brought on the agenda with a case Greenpeace raised against the commission, challenging the decision to built two power-plants on the Canary Islands. Greenpeace submitted that the Commission had financed two oil power plants without checking their ecofriendliness. The Court of the first instance stated in its decision that neither individuals, nor NGOs that are not individually concerned, have a standing before a European Court.[99] The ECJ

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[95] Börries Ahrens *Die Klagebefugnis von Verbänden im Europäischen Gemeinschaftsrecht,* (Nomos, Baden-Baden, 2001) 98.

[96] See for example the decisions of the ECJ 19-22/62 – Federation Nationale de la Boucherie en gros, 60/81 – IBM.

[97] Relevant decision of the ECJ: 60/81 – IBM.

[98] Börries Ahrens *Die Klagebefugnis von Verbänden im Europäischen Gemeinschaftsrecht,* (Nomos, Baden-Baden, 2001) 103.

[99] T-585/93, 9 August 1995.

decided, being the Court of the final instance, as well that the claimants were not individually concerned in the sense that is stipulated by Article 230 EC Treaty.[100]

The requirement of being individually concerned deals with the direct effect of the decision. Directly concerned is an individual or association only in the case if the challenged decision results in an infringement without any further circumstances.[101] This criteria has been the subject of criticisms since it has been established.[102] Main point of criticism has been the criteria of individualism, because it seemed to imply that nobody else could be concerned in that way, except the addressee. Nevertheless, the ECJ had a very strict interpretation of this criteria until 1977. Since then, one could be individually concerned, if the person or legal entity has been participated in the forgoing procedure.[103] This new criteria is mainly important in cases dealing with competition law. In fact, competition and trade law issues have been the reason to change the mind of the ECJ.

Until October 2003, the Community Law did not oblige the Member states to implement an altruistic legal action of organisations in their states. Organisations do not have a general standing before the EC Courts so far, however, it should be mentioned that there is a possibility for NGOs to raise environmental issues. The most important tool is the possibility to lodge an environmental complaint before the European Ombudsman.[104] For this remedy no individual concern is necessary. Nevertheless, the complaint does not have the same legal consequences as an action does.

Non-egoistic (altruistic) legal actions serve the purpose of suing for general reasons like the public welfare, instead of an egoistic reason and/or a personal interest. There are some older provisions that provided an obligation to establish a

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[100] C-321/95, 2 April 1998.

[101] Börries Ahrens *Die Klagebefugnis von Verbänden im Europäischen Gemeinschaftsrecht* (Nomos, Baden-Baden, 2001) 105.

[102] See for example: Gert Nicolaysen *Anmerkungen zu den Urteilen ECJ 10/68 and 18/68 – Eridania*, EuR 1970, 161.

[103] ECJ 24/76 – Metro.

[104] In 1998, for example, the European Ombudsman received 1372 Complaints- 237 from individuals, 63 from organisations/NGOs and 60 from companies. Most of these complaints dealt with the claim of not receiving environmental information.

legal standing in the Member States. However, a standing has only been granted limited to very particular cases.

2 Problems of the "concept of interest"

In so far as the implementation of legal actions of organisations is a duty of the Member States. Further, it has to be questioned whether NGOs might be entitled to have access to justice detached from an individual interest (without the designed European provisions.)

Such a right could only arise from the concept of interest which is inherent to European Law, 230 EC treaty. The organisations would be concerned in their interest when the provision in questions deals with interests and purposes that the organisation states in their statutes.

Some authors consider the opinion that the European system implies the possibility for a legal action for organisation because the European system does not only deal with the special individual interests. However, this statement, on which the author of this paper agrees is followed by the thought that therefore, it is not necessary to implement a legal standing for NGOs.[105] This is considered to be true in the case when individual interests are concerned. As long as the rights of individuals are concerned, that are members of the NGO, the NGO itself is also concerned in the sense that it can argue a violation of NGO rights. In this case the right to sue is given to the NGO and a special provision stating an action is not necessary.

However, this view is highly arguable. A system based on the general concept that interest could be either altruistic or individual is much more open to the idea of a legal standing of NGOs as other systems. Nevertheless, the implementation of such an action would still be necessary. The mere implication of such an action is not enough to constitutes a sufficient right for organisations. Without such a legal statement the authorisation for an action would not be ensured enough. Consequently, it would not be possible to sue a public authority without problems.

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[105] Astrid Epiney, Kaspar Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht*, (Erich Schmidt Verlag Gmbh & Co KG, Berlin, 2002) 387.

If we consider the opposite, it is unlikely that the need for the implementation of individual legal access rights would be denied considering the case that the European system would be based on the implied view that individuals have a legally subjective right.

The problematic of the view that the right to sue should only arise from the violation of individual rights, is that every single provision must be examined whether it really states an individual right.[106] It is highly unlikely that this special character could be proven in every European environmental provision. Therefore the implementation of a legal action for organisations is not unnecessary. This action would make the need to prove the individuals rights protecting character of a provision, which can be highly debated, dispensable and would allow a legal action of NGO also in the case where such a provision is not considered.

In addition, a general duty of the Member states to provide extensive possibilities to enforce a non-compliance with the Community law by the way of a legal action could not be derived from the general duty of effective application of community law. This principle is meant by Article 10 EC Treaty.[107] The basic principle of the autonomy of the Member States with regard to administrative procedures and administration of justice is inherent to the Community law. This principle would be endangered by implying a duty to provide extensive legal access out of Article 10 EC Treaty, because it would imply an insufficiency of the Member States.[108]

B Other European Instruments providing provisions for public participation

1 Directives 90/313 and 85/337

First to mention is the Directive 90/313 for free access to environmental information. This Directive dealt with the right of the Member States and of every natural or legal entity to apply to administration to receive environmental

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[106] Astrid Epiney, Kaspar Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht* (Erich Schmidt Verlag Gmbh & Co KG, Berlin,2002) 388.

[107] See for the jurisdiction of the ECJ: ECJ Rs. C-213/89, Slg. 1990, I-2433; ECJ Rs. C-217/88, Slg 1990, I-2879; ECJ, Rs. C-19/92, Slg. 1993, I-1663.

[108] Astrid Epiney, n 104, 391.

information without a proven interest. In the case this application for access is rejected the Member States have to provide an judicial procedure to control this decision.[109] The right to free access for environmental information is for everybody, therefore even environmental NGOs have this right. Taking the provision of the Directive into account which stipulates the need for a judicial procedure, we can conclude, that there must also be a way for NGOs to get this decision and to have legal access to the Courts. In this respect, the Community Law provides a duty for the Member states to implement the right for a legal action for organisations.

Although, it seems a sufficient way to safeguard environmental interests, it is a weak instrument, because the possibility to challenge a decision existed only in the narrow case of not receiving environmental information. Even if the NGO got the information afterwards, there is no possibility to challenge a decision based on these information. In addition, there is no way to challenge the value of the information itself. The legal action is beschränkt of the right to have an insight into the environmental information and nothing more.

Moreover, there is a number of Community environmental provisions that provide different legal rights for single persons or entities. For example Article 6 section 2 of the Directive 85/337[110] concerning ecofriendliness, states that the Member states have to provide possibilities for the "public" to participate in the applications. The public shall have a right to have access to the applications and have a further right to consider the facts before the application will be granted. All these provisions raise the question of a definition of the term "public". It is not clear and not defined which persons are addressed by this term. The mentioned Directive give a range for implementing these rights. However, from the author's point of view, it should be clear that for reaching the best legal effects the term "public" must compromise all the persons that might be affected by the applications and the following permits. These persons must not be necessarily individuals but could also be legal entities.

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[109] Article 4 Directive 90/313.

[110] Directive on the proof of ecofriendliness (Umweltverträglichkeitsprüfung-UVP).

A differentiation between altruistic and egoistic matters is not known to these provisions. Furthermore, a consideration of NGOs arises from the purpose of such provisions providing legal access to information in that sense as they shall ensure a comprehensive consideration of interests.

VII Recent developments of participatory rights in European environmental law

A Directive 2003/35

Since signing the Aarhus Convention in 1998, the EC has taken important steps to restructure the approach of public authorities to openness and transparency. All 15 EC Member States have signed the Convention. Nevertheless, ratification is proceeding slowly in most Member States.[111] It updated existing legal provisions in order to meet the requirements of the Århus Convention. In particular, two directives concerning access to environmental information and public participation in environmental decision-making , "first" and "second pillar" of the Århus Convention have been adopted by the European Parliament and the Council earlier in 2003. They have to be implemented in national law by 2005.

In terms of public access to environmental information the main instrument is Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.[112] A more recent development is Directive 2003/35/EC[113] by amending article 15 a (a), (b) of the Directive 96/61/EC.[114] The amended Article 15

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[111] Seminarreport of the European Environmental Bureau (EEB), *New Chances for Better Enforcement of EU Environmental Legislation,* 20th September 2002, Brussels, 71.

[112] OJ L 41 of 14.02.2003, p. 26.

[113] "Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes concerning the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC", adopted 25.06.2003.

[114] Article 15 a: Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) have a sufficient interest , or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before court of law ... What constitutes a sufficient

(b) reads now: What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, *consistently with the objective of giving the public concerned wide access to justice* (emphasis added).

Recently, the European Commission proposed two Directives. One concerns environmental liability and deals partly with participatory rights. This Directive will be analysed, because it excellently illustrates the competing values between economy and environment. The second proposed Directive deals expressively with access to justice in environmental matters and will be examined afterwards.

B Proposed Directive On Environmental Liability

1 Definition

After this overview, the paper will embark on the analysis of the proposed Directive on environmental liability. The Proposal for a European Directive on Environmental liability supports the thesis that liability enforces existing standards and is a powerful deterrent against non-compliance.[115] This Directive was proposed in 2002 and has recently been amended in May 2003. It is based on the European White Paper on environmental liability.[116] Before embarking on analysing the participatory rights in a recent proposed Directive on environmental liability, it seems practical to explain the term of environmental liability.

In the European context, environmental liability is defined as an obligation to pay. This definition is given by the EC in the White paper on environmental liability. In this paper, the Commission states "environmental liability makes the causer of environmental damage (the polluter) pay for the remedying the damage that he has caused."[117] The definition is clearly influenced by the effort of the EC to

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interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice.

[115] Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, COM (2002) 17 final, 4.,6.

[116] White paper on environmental liability, COM (2000) 66 final, 9 February 2000.

[117] White paper on environmental liability, COM (2000) 66 final, 9 February 2000, 7.

implement the polluter pays principle and does not include other measures of definitions.

The polluter-pays- principle is mentioned in Article 174 (2) of the EC Treaty.[118] It implies that it is the polluter who must bear the costs of an environmental damage, because he is responsible for it.[119] This principle is the theory behind most economical environmental instruments. It imposes the social costs of environmental pollution directly on the producer, whereas usually these external costs are borne by the public or the victims of pollution.[120]

Not all kind of damages can be remedied through environmental liability. It is not a suitable tool for diffuse damage and wide spreading pollution, because in these cases it is impossible to link the damage to activities of certain individual actors.[121]

2 *Green Paper on remedying environmental damage*[122] *and Resolution of 20 April 1994*[123]

In May 1993, the Commission published its Green Paper on remedying environmental damage. In 1994, a resolution called on the Commission to submit "a proposal for a directive on civil liability in respect of future environmental damage."[124] This resolution was based on Article 192 (2) of the EC Treaty, which enables the Parliament to ask for submission of a legislative proposal.

In following debates the Commission decided to reply to the resolution by preparing a White Paper on environmental liability. Furthermore, in the light of the

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[118] "Community policy on the environment shall be [...] based on the precautionary principle and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

[119] http://www.bvdm-online.de/uwlexikon/v/verursacherprinzip.nclk(last accessed 22.September 2003).

[120] Sanford E. Gaines, Ricardo Katz *Nonregulatory Approaches To Environmental Protection For Cuba: Lessons From The United States And Chile* (2003) 16 Tul. Envtl. L. J.848.; Sanford E. Gaines *From Economic Equity To Environmental Ethos,* (1991) 26 Tex. Int'l L.J.463.

[121] White Paper, 13.

[122] Communication of 14 May 1993 (COM (93) 47 final) presented to the Council, the Parliament and the Economic and Social Committee.

[123] Resolution of 20 April 1994 (OJ C 128, 9.5.1994).

[124] Resolution of 20 April 1994 (OJ C 128, 9.5.1994, 165).

Treaty of Amsterdam an environmental liability regime will bring better integration of environmental considerations in all sectors.[125]

3 European White Paper on Environmental Liability 09 February 2000

The crucial incident for a European approach to environmental liability was the case of oil spills near the European coast. These events raised the question of who should pay for the environmental damage. In addition, it clarified the rivalry between private financial economical interests and environmental interests. The European Community decided that not the taxpayer, as usual, should bear the costs, but the polluter. The White Paper aimed at implementing the polluter-pays-principle as one of the main reasons for introducing an EC liability regime. It is said that a proper liability regime will help to enforce existing environmental standards. Furthermore, it is a way to balance competing interests in environmental law and strengthen the safeguards of environmental interests.

(a) Access to Justice –Enforcement

A case of environmental damage differs from traditional cases of damage in the way that the protection of the environment is a public interest, whereas, in traditional cases, personal goods and rights are concerned. Due to the public interest the state has the first responsibility to act if the environment is or is threatens to be damaged.[126] In recent years, there is growing acknowledgement that the public has to become aware that the whole "public" civilisation should be responsible for the environment. The Commission has referred to the need for such an enhanced access to justice in its communication to the Council and Parliament, entitled "Implementing Community environmental law"[127].

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[125] The treaty of Amsterdam introduced in Article 6 of the EC Treaty the principle that environmental protection requirements must be integrated into definition and implementation of other Community policies and activities.

[126] White Paper, 22.

[127] COM (96) 500 final.

(i) The two-tier approach

In terms of enforcement, a two-step access to justice has been proposed. In the first place, the state should be responsible. Public interest groups promoting environmental protection shall be deemed to have an interest in environmental decision-making[128] (first tier). If the state does not exercise its right, a legal action instituted by an association (organisations) is proposed, i.e. public interests groups have the right to act on a subsidiary basis (second tier). This legal action should apply to judicial and administrative review and, in addition, to tort-claims against the polluter. The White Paper concluded that the most appropriate option for European environmental liability would be a European Directive.

The unamended proposal of 2002 aims to establish a framework whereby environmental damage would be prevented or remedied. It defines environmental damage in the context of its factual application framework. The factual application framework of the Directive shall be reduced to three types of damages (Art.3 Abs1 & 2 Abs.18): damages with respect to biodiversity, to water and to soil/ land contamination.[129]

(c) Enforcement by citizens

The access to justice scheme applies the two-tier approach, which was proposed in the White Paper. In the first place domestic environmental authorities will be responsible for enforcing provision in terms of restoring and precaution environmental damages of bigger impact. In addition, supplemental procedural rights, without prejudice to any investigation initiated by the competent authority, should be given to persons adversely affected or likely to be adversely affected by

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[128] Article 2 (1) of the Århus Convention.

[129] Biodiversity: which is protected at the Community levels, waters covered by the Water Framework Directive and human health when the source of the threat to human health is land contamination.

environmental damage and to qualified entities in the area of environmental protection. These legal subjects shall be entitled to submit any observations relating to the damage to the competent authority and request it to take action under the proposed Directive.[130] The competent authority has to investigate the case and decide what action to take. This decision should be communicated to the applicant. To review the decision following such a request, the concerned persons and the entities should have access to court or another independent and competent body.[131]

It must be emphasised, that there will be no possibility for individuals or entities to take direct legal action against the polluter. However, for individuals there will be the possibility to sue the polluter under civil liability procedures.

(i) Scope of access to justice

(ii) Scope of access to justice for individuals

The right of individuals to take legal action against the competent authority is not new. In German environmental law, for example, the right to sue originates from a personal infringement in individual rights.[132] The directly affected person has a right to sue if the relevant environmental provisions also serve for protection of individual rights and not only for protection of common welfare.

From the authors point of view, in terms of the new Directive, the question will occur, whether the scope of the access to justice will be interpreted widely or narrowly. Article 14 (1) only stipulates "adversely affected or likely to be affected". It is not clear whether this effect must reach an impact on personal rights or whether is it sufficient to claim an impact in aesthetic or ecological well-being.

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[130] Article 14,1.

[131] Article 15, 1.

[132] Section 42 Verwaltungsgerichtsordnunng (VwGO).

(ii) Scope of access to justice for qualified legal entities

Qualified legal entities, like approved environmental NGOs, are entitled to sue despite the claim of an invasion of a specific personal right of their own, or in terms of their members. This results in implementing a legal action of organisations in a way that does not exist so far.

Germany, for example, has an non-individual (altruistic) legal action of an organisation in its Conservation Act.[133] However, the scope of the proposed Directive is wider because it does not only refer to conservation, but also includes water and soil. In the European context the proposal is a new way of enforcing, because a legal action of organisations is not established at the European level so far.

(ii) Criticism

This new legal instrument might be a good way to improve environmental liability and its enforcement. However, at the European level it could collide with existing jurisprudence of the ECJ and the Court of first instance, the EC.

Six environmental organisations, BirdLife International, Greenpeace, the European Environmental Bureau, Friends of the Earth Europe, WWF and Seas at Risk were mainly concerned about the citizens' access to justice. They stated that: "The Directive must ensure that all "qualified entities" are given the right to take direct legal action in the case of imminent damage to the environment."[134] Because of transboundary pollution, globalisation and to do justice to the rise of NGOs in the last decades the need for enhanced access to justice had become clear in the debate about the Directive on environmental liability.

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[133] Section 61 BNatSchG. Qualified environmental organisations have the right to sue arising not only the invasion of individual rights but they can also reprove interests of common weal.

[134] >http://www.eeb.org/press/pr_liability_directive_04_03_03.htm< (last accessed 10 December 2003).

C *Proposed Directive on access to justice in environmental matters*

Very recently, the European Commission released a proposal for a Directive on access to justice in environmental matters. [135] One of the principles of the ambitious Aarhus Convention is to enable the public to assume responsibility for the environment by granting them the right to bring violations of environmental law before a court. This proposal will allow citizens as well as their organisations to play their part in the enforcement of environmental law.

This very recent proposal for a Directive should covers two objectives aiming at a better enforcement of environmental law. First, it shall contribute to the implementation of Aarhus Convention, mainly its third pillar, and secondly, it shall accomplish shortcomings in controlling the application of environmental law.[136] For the intention of this paper the proposed Directive will only be examined in terms of the first aim aforementioned by the Directive.

Article 4 of the proposed Directive establishes the criteria for determining which members of the public have legal standing. Members of the public must have a sufficient interest in the related administrative act or omission or maintain the impairment of a right, where the administrative procedural law of the Member States concerned requires this as a precondition to have access to review procedures. "Members of the public" means one or more natural or legal persons, and their associations, organisations or groups .[137]

However, with setting up these criteria, the reasons the Commission gives for deciding against a general right of legal standing for every natural persons are as follows: Because the generalised requirement of an "actio popularis" is incompatible with the principle of subsidiarity in the light of the fact that the

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[135] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, Brussels, 24 October 2003, COM (2003) 624 final, 2003/0246 (COD).

[136] Explanatory memorandum, page 2 via: <http://europa.eu.int/comm/environment/aarhus/#1>last accessed on 15 November 2003.

[137] Article 2 (b).

Aarhus Convention leaves the possibility of laying down criteria under national law.[138]

Article 5 of the proposed Directive states legal standing of qualified entities. "Qualified entity" means any association, organisation or group, which has the objective to protect the environment and is recognised according to the procedure laid down in Article 9.[139] These certain groups will not be required to have a sufficient interest or maintain the impairment of a right. They have access to justice without having a sufficient interest or maintaining an impairment of a right. The matter of review in respect of which an action is brought must be covered specifically by the statutory activities of the qualified entity and the review falls within the specific geographical area of activities of that entity.[140] The criteria for being recognised as a qualifying entity are extensively stated in Article 9.

1 Criticism of the proposed Directive on access to justice in environmental matters

The proposal is by all means a historical step towards an improvement of environmental democracy. Nevertheless, it could have been more forward-looking. A broader provision, meaning a general legal standing without the restrictions to interests, the impairment of rights or the need to be a qualified entity are subject of criticism by NGOs.[141] Against an "actio popularis" has been said that it would lead to an unwanted increase in actions before the courts and could lead to misuse. However, these arguments have not been proofed. An increase in litigation has not been surveyed. A Swiss study proofed that NGOs do not misuse their legal standing and that the success rate of their actions is over 50 %. [142]

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[138] Explanatory memorandum, page 12 via: <http://europa.eu.int/comm/environment/aarhus/#1>last accessed on 15 November 2003.

[139] Article 2 (c).

[140] Article 5 (1).

[141] Explanatory memorandum, page 9 via: <http://europa.eu.int/comm/environment/aarhus/#1>last accessed on 15 November 2003.

[142] Börries Ahrens *Die Klagebefugnis von Verbänden im Europäischen Gemeinschaftsrecht,* (Nomos, Baden-Baden, 2001) 107.

In the reasoning of the proposed Directive the Commission states that an "actio popularis" is not explicitly required by the Aarhus Convention, and therefore, will not be implemented in the Directive.[143] However, the criteria of being a qualified entity, stipulated in Article 5, has also not be addressed by the Aarhus Convention as the Commission acknowledge itself.[144] Nevertheless, the Commission describes these criteria extensively in its proposal, despite the fact that these criteria has been the subject of criticism by NGOs for a long time. Usually these criteria shall ensure that NGOs do not misuse their rights, but as mentioned above, this has never been the case. A further point of criticism concerns the criteria themselves. From the authors point of view, particularly that the claimed environmental wrong must fall within the specific geographical area of activities of an entity is unnecessary and will create problems in the future. Two kind of problems occur within this scope. One problem could either be that there is no entity which was active in this geographical area before the environmental wrong; or that an existing entity, while the environmental matters are covered specifically by its statutory activities, these activities never were in this geographical area, because the specific environmental wrongs were never done in this area before. This will be especially true in terms of the enlargement of the EU. There are probably fewer environmental NGOs, e.g. in Turkey or Slovenia, concerning themselves with whatever potential environmental harms will be done in the future. These NGOs will possibly not have the opportunity to use the access to justice provided by Article 5. These concerns are the more alarming as the states that will join the EU have a lesser status quo of environmental law than the most Member States.

Furthermore, it is said in terms of criticism that legal actions of organisations are only focused on political problems rather than on judicial problems. This, however, is certainly not true as the high rate of judicial success these actions have implies.

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[143] Explanatory memorandum, page 9 via: <http://europa.eu.int/comm/environment/aarhus/#1>last accessed on 15 November 2003.

[144] Explanatory memorandum, page 13 via: <http://europa.eu.int/comm/environment/aarhus/#1>last accessed on 15 November 2003.

VIII CONCLUSION

Two main problems are responsible for improper enforcement of national and international environmental law. First to mention is that environmental law lacks private financial interest. This lack is responsible for the insufficiency of existing monitoring bodies and partially for the lack of access to justice for NGOs. States concern themselves rather with economical issues than environmental issues, i.e. environmental problems are not regarded as important as trade issues for example. Therefore, states will not go before international courts because of the fear that another state might reveal environmental wrongs of the party that originally went to court.

Secondly, the environment is a res communis and often environmental decisions do not tackle individual interests, but "only" the environemnt. Nevertheless, does the European system only allow actions by parties that are individually concerned.

In recent years, however, NGOs filled this niche with their participation in law-making and monitoring. This development is not surprising, because NGOs are well equipped to enforce environmental law. They are not bound to political interests of states and often have the advantage of being independently funded. Their increased influence must be acknowledged by an increase in access to justice.

The Aarhus Convention was a first and important step to more environmental democracy. Although it is regional in scope, it is a milestone and sets an example for the international community. It will have great impact on the European system of participatory rights.

So far, the status quo of legal instruments at the EC level is not encouraging. But an opportunity remains. Despite its pitfalls the proposed Directive is still an improvement of enforcement of environmental law in terms of enhancing environmental democracy. It remains to be seen whether and in what shape this proposed Directive will find its way through the European organs. Overall, it can be said that an enhancement of environmental democracy is on its way on the European level. If a legal standing for NGOs will be implemented by every Member State the future need for such an action before the ECJ could not be longer

denied. The Community has the obligation to implement the Aarhus Convention. My conclusion here is that there is still a long road ahead, but there will be a Directive in the end.

The EC will be a good example for the international level. Despite the fact that NGOs do not have a legal standing before international fora and still lack formal recognition as a subject of international law, the increase in participation at recent international conventions is a sign that the international community recognises NGOs more and more. Undoubtedly, it will take some time to convince the international community, but we should have the vast and promising development of international environmental law in recent years in mind.

With enhancing environmental democracy before international fora we will improve enforcement of international environmental. If the right steps are taken, we might have a chance to prove Anton Chechov wrong: "…. and with every passing day the earth becomes uglier and poorer! … ?"

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