PART III

COMPLIANCE

INTRODUCTION TO THE DISCUSSION ON COMPLIANCE[1]

Patrick Széll[2]

Absence of effective enforcement and sanctions in early MEAs

Each of us would, I imagine, find it strange if our national legislature were to enact a new law that imposed duties on the public, but did not make effective provision for the enforcement of those duties or the imposition of sanctions for their breach. Such legislation would be criticized as incomplete and defective. Why is it then that international environmental legislation, i.e. multilateral environmental agreements (MEAs), makes little or no effective provision for enforcement or sanctions?

This was a question that many involved in the negotiation of MEAs started asking about twenty years ago, leading eventually to the development of compliance procedures. For treaties that contained no rigorous obligations, such as the Vienna Convention for the Protection of the Ozone Layer[3] or UNEP's Regional Seas Conventions,[4] the absence of an incisive policing mechanism was not a problem. For treaties with more onerous norms such as the Montreal Protocol on Substances that Deplete the Ozone Layer,[5] the various protocols to the Geneva Long-range Transboundary Air

[1] This paper is based on a lecture given by the author on 31 August 2004.

[2] Former Head of the International Environmental Law Division, Department of the Environment of the United Kingdom.

[3] The Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987) 1529, www.unep.org/ozone/pdfs/viennaconvention2002.pdf.

[4] The texts of the numerous Regional Seas Conventions and Protocols are available at www.unep.ch/seas/main/hconlist.html.

[5] Montreal Protocol, *infra* note 12.

Pollution Convention,[6] or the Kyoto Protocol,[7] the question was of greater concern. It was important that their obligations were observed not just for the credibility of the MEA in question, but also for the sake of the environment.

Before 1987, there were just three ways in which the observance of obligations in MEAs could be supervised:

(a) Article 26, Vienna Convention on the Law of Treaties.[8]
Article 26 states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This reflects a fundamental and widely-recognized rule of international law but does not bring with it any automatic sanctions.

(b) Settlement of disputes.
Traditional dispute settlement procedures as incorporated in most MEAs are weak. Article 11 of the Vienna Ozone Convention, for example, only calls for negotiation or conciliation, unless both sides to the dispute agree to accept another, more far-reaching, form of dispute settlement. Only rarely have states agreed to compulsory third party dispute settlement under MEAs. Examples of these can be found in Article 32 of the OSPAR Convention,[9] in Part XV of the United Nations Convention on the Law of the Sea[10], and in Article 18 of the Council of Europe's Bern Convention on the Conservation of European Wildlife.[11] Two conclusions may be drawn:
(i) bilateral processes such as traditional dispute settlement procedures are not suitable for ensuring the enforcement of breaches that are essentially multilateral in nature; and
(ii) MEA Parties are not prepared to allow the performance of their obligations to be made subject to compulsory third party settlement.

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[6] Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf. The texts of the eight protocols to the CLRTAP are available at www.unece.org/env/lrtap/status/lrtap_s.htm.

[7] The Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22, unfccc.int/resource/docs/convkp/kpeng.pdf.

[8] Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331, www.un.org/law/ilc/texts/treaties.htm.

[9] Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, in force 25 March 1998, 32 *International Legal Materials* (1993) 1069, www.ospar.org/eng/html/welcome.html.

[10] United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261, www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[11] Convention of the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, *Council of Europe Treaty Series* 104, conventions.coe.int/Treaty/en/Treaties/Html/104.htm.

(c) Peer pressure.
Peer pressure, applied at successive meetings of Conferences of Parties, on the basis of information received from various sources, including the Parties themselves as provided for under the reporting rules of certain MEAs, has over the years been the most effective sanction. Inevitably, however, this has tended to operate unevenly. Parties have varied in their vulnerability to peer pressure: some have been more receptive than others to outside suggestions and criticism, while some have been more forthcoming than others when providing data.

Whilst all three of these mechanisms have played their part, something extra was required for MEAs that were becoming increasingly normative. This was not least because the Parties to such treaties needed assurances that any costly economic steps they took to meet their commitments were being matched by the equally conscientious observance by other Parties of *their* commitments. In a nutshell, what was needed was a verification process that was more compelling than peer pressure, yet less confrontational and more multilateral than dispute settlement.

Montreal Protocol leads the way

The breakthrough came in 1987. Article 8 of the Montreal Protocol[12] provided that:

> The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.

Originally, this Article was little more than a tough negotiating ploy on the part of the USA aimed at keeping maximum pressure on the EC, its principal foe in the Protocol negotiations. As tabled by the USA, the Article was much more detailed, but was introduced too late in the process to stand any chance of being adopted as it stood. The negotiators could do no more than lay the foundation stone for a compliance regime in the treaty, and leave it to the Meeting of the Parties (MOP) to carry the idea forward.

What was subsequently developed by the MOP was very different from what the USA had originally envisaged. The MOP looked carefully at the available precedents from the fields of human rights, international trade law as embodied by the General Agreement on Tariffs and Trade (GATT) and arms control, but in the end opted to work with a blank sheet of paper and design its own system from scratch. The Working Group that developed the proposals identified a number of criteria that a compliance regime should satisfy. These criteria were affirmed by the MOP and, in later years, have

[12] Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf.

remained the basis on which all MEA compliance procedures have been structured: a compliance regime should aim to avoid complexity; be non-confrontational, conciliatory and co-operative; be transparent; and decisions, should be taken by the MOP, not by a subordinate body.

The logic is clear: MEAs such as the Montreal Protocol are better off with a compliance regime that assists and encourages Parties in breach to comply, than with one that is accusatorial in manner. Moreover, if Parties were subjected to a judicial process such as court proceedings or arbitration, they would become defensive and secretive, with the consequence that the environment, in this case the ozone layer, not the Parties themselves, would be the loser. In the case of an MEA such as the Montreal Protocol, non-compliance is frequently the consequence not of malice or greed, but of technical**,** administrative or economic problems. A regime that works with rather than against Parties in difficulty is appropriate.

The Montreal Protocol's compliance regime in a nutshell

The Montreal Protocol's compliance regime provides that where a party or the secretariat has reservations regarding another party's observance of its obligations, it can make a submission to the Implementation Committee (IC). In considering a submission, the IC may request and gather further information. The Committee seeks, where necessary, to secure 'an amicable solution'[13] to cases before it, on the basis of respect for the Protocol. The regime also makes provision for Parties to trigger the compliance process in respect of themselves, in the form of self-referrals, demonstrating thereby the essentially co-operative character of the process.

The IC is composed of the representatives of ten Parties, selected on the basis of equitable geographical distribution. They are elected for periods of two years, renewable once. One can contrast this to the regime applicable to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[14] where the Compliance Committee members serve in their personal capacities.

The IC has no decision-taking powers. Rather, it makes recommendations to the MOP. For those who developed the regime, this answered the concern that the Committee, given that it was not fully representative of the MOP, should not have such powers.

[13] Annex III: Noncompliance Procedure, *Report of the 2nd Meeting of the Parties to the Montreal Protocol*, UNEP/OzL.Pro.2/3, www.unep.org/ozone/Meeting_Documents/mop/02mop/MOP_2.asp.

[14] Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (hereinafter Aarhus Convention), Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, www.unece.org/env/pp/documents/cep43e.pdf.

The IC reports regularly to the MOP which, as the sovereign body of the Montreal Protocol, has certain powers. For example, the MOP can encourage Parties to seek financial assistance from the Global Environment Facility (GEF) or guidance from the Montreal Protocol's Technical and Economic Assessment Panel (TEAP). It can issue cautions and, arguably, impose a suspension.

Trends and conclusion

The Montreal Protocol's Implementation Committee has met since 1990 and those of the LRTAP Convention[15] and CITES[16] for the past seven and ten years, respectively. To date, these three ICs have the most practical experience of operating a compliance system. A number of other ICs have started work only comparatively recently. These include the ICs of the Basel Convention on Transboundary Movements of Hazardous Wastes,[17] the Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[18] the Alpine Convention[19] and the Aarhus Convention.[20] Others have yet to begin their work. These include the Multilateral Consultative Process (MCP) of the United Nations Framework Convention on Climate Change[21] which was agreed - save for one point relating to composition – in 1998, the compliance procedure of the Kyoto Protocol[22] which was adopted in 2001 and will now become operative with the Protocol's entry into force, and the compliance regime of the Cartagena Protocol on Biosafety.[23]

[15] LRTAP Convention, *supra* note 6.

[16] Convention on International Trade in Endangered Species of Wild Flora and Fauna, Washington D.C., 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, www.cites.org/eng/disc/text.shtml.

[17] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, 28 *International Legal Materials* (1989) 657, www.basel.int/text/con-e.htm.

[18] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802, www.unece.org/env/eia/eia.htm.

[19] Convention Concerning the Protection of the Alps, Salzburg, 7 November 1991, in force 6 March 1995, 31 *International Legal Materials* (1992) 767, www.ecolex.org/ecolex/en/treaties/treaties_fulltext.php?docnr=3047&language=en.

[20] Aarhus Convention, *supra* note 14.

[21] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[22] Kyoto Protocol, *supra* note 7.

[23] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, www.biodiv.org/doc/legal/cartagena-protocol-en.pdf.

It is perhaps not too early to identify some trends, and hazard some conclusions, about the nature and success of MEA compliance procedures, though inevitably they will be based mainly on the experience of the Montreal Protocol and LRTBAP Convention:

a) Infringement of sovereignty: MEA negotiations have consistently shown countries to be very sensitive to the external scrutiny of their performance. Hence, there is a need for a policing system that is supportive, constructive and respectful of national sovereignty.

b) Correlation: There is an inevitable correlation between the strictness of a treaty's compliance and enforcement regimes and the strictness of its substantive obligations. Countries are ready to undertake tougher commitments if supervision is light, and vice versa.

c) Settlement of disputes v. non-compliance: Although dispute settlement procedures are scarcely ever resorted to in MEAs, they are nevertheless useful as an ultimate deterrent. Dispute settlement and compliance regimes complement each other well. Compliance procedures are intended for regular use; dispute settlement will always be for exceptional use. Compliance procedures are more environmentally friendly: they are aimed at getting a party that is in breach to put matters right, rather than at pointing a finger of blame. Compliance procedures reflect a collective concern for meeting a treaty's obligations, rather than a bilateral one as is the case with dispute settlement.

d) Acting through decisions of the Parties: The practice of setting out all the procedural detail of a non-compliance regime in a decision of the Conference of the Parties, rather than attempting to do so in the treaty itself, is now well established and likely to be copied in all MEAs. The advantage is that in the early days of an MEA, the Parties and the MEA itself benefit from the Conference of the Parties having the possibility of adjusting the detail of the regime as and when necessary and in the light of experience.

e) Tailor-made regimes: Notwithstanding the textual similarity of all compliance regimes adopted to date, there is no case for building a single, uniform regime for all MEAs. Every MEA is different. Their obligations and their Parties differ. Each regime should be tailored to suit the individual case.

f) IC composition: Countries, not individuals, serve on the Implementation Committees of the Montreal Protocol, CLRTAP, CITES and other MEAs. It has been argued that the regimes would be stronger and more efficient if the Committees were composed of individuals acting in their personal capacities, rather than of representatives of countries elected to the IC. There would be, it is said, greater objectivity and expertise and more consistent attendance by members at meetings. A good number of countries are, however, nervous about taking such a step although it is known to work well in other contexts such as international courts.

Change is unlikely in the near future, at least until such time as Parties have acquired greater familiarity with, and confidence in, the work of their IC.
On the question of the most appropriate qualifications and background for IC members, whether selected to represent their countries or in their personal capacities, a mixture of expertise would seem to be the best solution. Committees composed merely of lawyers are not competent when it comes to assessing matters with a high scientific and/or technical content. Scientists and technicians presiding alone are not ideal as they tend to lack the required experience of judicial/administrative process and method. A committee formed of diplomats and policy experts alone can generate the suspicion of politicising a process that has to be very objective if it is to win and retain credibility. Fortunately perhaps, as long as Parties do the choosing, ICs will tend to reflect a cross-section of disciplines. Chance may well be, in the end, the shrewdest selector.

g) Impact of IC reports: Having begun their work some years ago, the reports to the parent bodies of the ICs of the Montreal Protocol and CLRTAP still tend to be cautious and limited in their proposals. Their work, nevertheless, has had a positive impact. Merely by annually demonstrating to the Parties that their performance is under scrutiny, pressure is applied on them to meet their obligations.

h) The need for precise obligations: It is easier – and more meaningful – to apply a compliance regime to a normative treaty, with its precise standards and deadlines, than to a framework agreement with unspecific, and sometimes even unclear obligations, as with the United Nations Framework Convention on Climate Change.

i) Confidence-building: No IC can establish its reputation and create confidence overnight. It takes time for Parties to get used to having their performance regularly reviewed but not fearing the process. Every MEA that sets up such a process is likely to have to go through such a confidence-building period. During that time, any feelings of frustration should be suppressed and replaced by patience and optimism.

Compliance

Issues for discussion:

(a) IC composition. Should Implementation Committee (IC) members represent their countries or be appointed, like ICJ judges, in their personal capacities? What are the advantages and disadvantages of the two options?

(b) NGO participation. The Aarhus Convention's IC allows cases to be triggered by members of the public. Most MEAs refuse NGOs and other members of civil society such a right. Are they right in doing so?

(c) Transparency of proceedings. What would be the impact on the work of ICs if their proceedings were to be held in public? Are the present rules of most MEAs, which ensure that the proceedings of their ICs are held in private, justifiable in terms of (i) the environment, (ii) the public in general and (iii) the Parties whose cases are under examination? Should there be rules for confidentiality?

(d) Respect for sovereignty. Have states a right to be sensitive about intrusions on their sovereignty in the course of the review of their compliance with treaty obligations? Can compliance review be carried out in a thorough and effective manner if a state's sovereignty has to be fully respected?

(e) Sanctions. Can a compliance regime be effective if the treaty it serves does not provide for the imposition of strong sanctions? How, if at all, can sanctions be introduced in support of a compliance regime after a treaty has been adopted?

(f) Cases concerning an IC member's own country. Should an IC member be able to take part in IC proceedings when the issue under discussion is the compliance of the member's own country? If so, should any conditions be placed on his/her participation?

IMPLEMENTATION, COMPLIANCE AND ENFORCEMENT OF MEAS: UNEP'S ROLE[1]

Elizabeth Maruma Mrema[2]

Introduction

The United Nations Conference on the Human Environment, held in Stockholm in 1972, set off a remarkable increase in the number of environmental treaties. Before that date, only a dozen international instruments related to the environment could be counted, whereas there are now approximately 700 multilateral environmental agreements (MEAs).[3] In this context, it is therefore clear that creating MEAs is at least seen as the most feasible, if not the best, means to combat environmental degradation. However, one the implications of this multiplication is that the main concern has become not whether there are enough legal tools to protect the environment but whether those in place are actually effective. To put it differently, the issue is whether states are indeed complying with and enforcing MEAs or not. The answer to this, of course, is that a lot remains to be done. Even within strong regional organizations such as the European Union, compliance problems overshadow the successes of the environmental *acquis communautaire.*

Inadequate implementation or lack of it is, of course, particularly strong in developing countries. Even though they sign and ratify treaties for multiple reasons – international pressure, domestic interests, etc. – many of these states may not effectively be able to implement or enforce them nationally. Some of the multiple reasons for this also affect developed countries. A series of recent United Nations Environment Programme

[1] This paper is based on a lecture given by the author on 31 August 2004. It was prepared with the assistance of Stanislas de Margerie, a student of law at the University of Sorbonne, who was an intern from July to September 2004 in the Division of Environmental Policy Implementation, United Nations Environment Programme.

[2] Senior Legal Officer, Implementation of Environmental Law Branch, Division of Environmental Policy Implementation, United Nations Environment Programme.

[3] Ronald Mitchell, 'International Environmental Agreements: A Survey of their features, Formation and Effects', 28 *Annual Review of Environmental Resources* (2003), 429-61.

(UNEP) regional workshops to review a Manual on Compliance with and Enforcement of MEAs,[4] held in 2003 and 2004 with more being carried out in 2005, revealed some of the key challenges facing developing countries. A few of these can be mentioned for illustration purposes: political and budgetary priorities focus on economic and poverty issues and not on the environment; inadequate awareness of environmental laws, or lack of it, by the regulated community, judges, lawyers, etc.; concerns that strict standards, implementation or enforcement may deter investors or cause them to turn to other countries; inadequate co-ordination with other states; environmental agencies and ministries are not always "respected" by older sectoral agencies and ministries; lack of transparency, of the importance of non-governmental organizations (NGOs) or of civil society participation, which are all closely related to a country's democratic situation; inadequate national legislation or lack of it; lack of awareness of the relevant regulations, including among industry, consumers or enforcement authorities; inadequate financial, human and technical resources, or lack of them; the costs of compliance, which create a financial incentive for evasion; inadequate penalties; problems with detection; lack of information and economic intelligence; and shortcomings in transboundary co-operation and monitoring.

Some difficulties are equally caused by MEAs themselves in that a number of them duplicate or overlap each other in several respects, including institutional arrangements for their implementation, follow-up, reporting and co-ordination. This has resulted in a lack of coherence and inadequate implementation, synergy and interlinkages both at the national and regional level. This in turn has created loopholes that undermine the very measures or functioning mechanisms put in place by the conventions.

UNEP too has a share of blame in the increasing number of new MEAs over the years. In the last decades, UNEP has focused its environmental law activities on the development of international environmental law rather than on its implementation. It facilitated, inspired, spearheaded and played a catalytic role in the development of several soft law and hard law instruments. The international community has now shifted its focus to the implementation of agreed international norms and policies, as is testified *inter alia* by the outcome of the World Summit on Sustainable Development (WSSD) and the Johannesburg Plan of Implementation.[5] The international community's task is to advance and enhance the implementation of agreed international norms and policies, and to monitor and foster compliance with environmental principles and international agreements. However, as international environmental law and its accompanying national legislation for environmental protection increase in quantity, complexity and sophistication, unfortunately the opportunities and determination to evade such laws through orchestrated criminal activities also increase.

[4] *Infra* note 26.

[5] World Summit on Sustainable Development, *Johannesburg Plan of Implementation*, www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

Role of Global and Regional Bodies in Implementing MEAs

Shortcomings or inadequacy in the implementation of MEAs has been noted not only globally but also at the regional and national levels. Consequently, both the MEA secretariats and regional bodies have in recent years taken up initiatives to assist states parties to their MEAs, either specifically or generally, with measures and mechanisms to strengthen compliance, enforcement and implementation of those MEAs at the regional or national levels. For example:

(a) The United Nations Economic Commission for Europe (UNECE) has developed Guidelines for strengthening compliance with and implementation of MEAs[6] building upon the UNEP Guidelines adopted in 2003;
(b) The Organization for Economic Co-operation and Development (OECD) supported the Newly Independent States with the development of principles for environmental enforcement authorities;[7]
(c) The English speaking Caribbean adopted a set of Guidelines on Implementation of MEAs in 2000;[8]
(d) The Association of Southeast Asian Nations (ASEAN) are developing mechanisms to promote compliance and enforcement of MEAs in that region. The Guidelines propose options for more effective implementation of MEAs in those countries. They also selectively draw upon successfully adopted elements from the implementation strategies of individual countries in the region;
(e) The North American Commission for Environmental Co-operation, formed by the USA, Canada and Mexico, have established a North American Working Group on Environmental Enforcement and Compliance Co-operation (EWG) as its working arm to deal with these issues.

[6] United Nations Economic Commission for Europe, *Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements (MEAs) in the ECE Region*, UNECE Doc. ECE/107 (2003), www.unece.org/env/documents/2003/ece/cep/ece.cep.107.e.pdf.

[7] Organization for Economic Co-operation and Development, *Draft Principles for Effective Environmental Enforcement Authorities in [Transition Economies] of Eastern Europe, Caucases and Central Asia* (2002), www.oecd.org/dataoecd/45/52/2766225.pdf.

[8] United Nations Environment Programme, *MEAs Implementation in the Caribbean: Report and Guidelines*, UNEP/LAC-IGWG.XII/Inf.7 (2000), www.pnuma.org/foroalc/esp/bbexb07i-MEAsImplementationintheCaribbean.pdf.

Convention secretariats of major global MEAs are also taking initiatives to promote adherence by countries to bring MEAs effectively into force. Examples include:

(a) Implementation and compliance mechanisms under the Montreal Protocol;[9]
(b) Parties to the UNFCCC are developing procedures and mechanisms for compliance under the Kyoto Protocol;[10]
(c) Parties to the Basel Convention[11] are developing elements for monitoring the implementation of and compliance with obligations under the Convention;
(d) Parties to the Convention on Biological Diversity[12] are developing procedures and mechanisms to promote compliance and to address cases of non-compliance within the framework of the Biosafety Protocol;[13]
(e) Parties to the Convention on International Trade in Endangered Species (CITES)[14] are equally developing a comprehensive plan to concretely address, *inter alia*, compliance and enforcement issues. The CITES Secretariat also regularly reviews and analyzes the national laws of parties to determine whether such laws meet CITES implementation requirements. Consequently, collaboration with and support from the convention secretariat, as well as Interpol and the World Customs Organization is, in this process, *sine qua non* for the successful implementation of the guidelines on compliance and enforcement.

[9] Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf.

[10] The Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22, unfccc.int/resource/docs/convkp/kpeng.pdf.

[11] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, 28 *International Legal Materials* (1989) 657, www.basel.int/text/con-e.htm.

[12] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf.

[13] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, 31 *International Legal Materials* (2000) 1027, www.biodiv.org/doc/legal/cartagena-protocol-en.pdf.

[14] Convention on International Trade in Endangered Species of Wild Flora and Fauna, Washington D.C., 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, www.cites.org/eng/disc/text.shtml.

Compliance Does Not Necessarily Contradict Competitiveness

It is undeniable that one of the reasons environmental agreements take so long to be effectively implemented is that many national stakeholders fear taking steps in this direction. Whether in governments, which have as an objective the economic well-being of the country, or in industry, which aims to retain competitiveness and keep costs low, it is felt by many that environmental enforcement is a brake to economic development. This opinion, however widespread, seems largely misleading.

This view does not, indeed, take into account the fact that in rapidly evolving markets one of the most important and efficient responses from businesses is innovation. Environmental regulations are not the only factor to take into account. Trade regulations, changing consumer needs and competition from developing countries are all issues that are dealt with on a continual basis by industry. As a result of this, new behaviour appears with the common goal of adapting to the evolving situation. The reason why environmental regulations are sometimes seen as last on the list of urgent issues might, in fact, be that most of them derive from international or national regulations, which as written rules and despite their compulsory character are not internal factors to the economy itself, such as globalization, for example. They are perceived as outputs from governments that although directed at making the Earth a liveable planet, an objective which everyone would surely agree with, have the side effect of hindering economic development or activity.

Once again, this does not take into account the fact that properly designed environmental standards can trigger major innovations, and eventually create market value. In order not to make this sound like a seducing, albeit exaggerated theory, a few examples follow. In California, for example, the success of air pollution emissions reduction industries was a direct consequence of the state setting stringent environmental standards. Sweden's domination of the cellulose pulp processing industry is very clearly due to the extremely efficient production machinery developed by national industries to meet the country's high air and water quality as well as waste standards. In the Netherlands, to take another "local" example, intense cultivation of flowers in small areas contaminated soil and groundwater with pesticides, herbicides, and fertilizers. Due to increased regulation on the issue, the flower industry responded by putting in place a closed-loop system, with flowers growing in reused and circulating water. The need for chemical substances was subsequently reduced, product quality was improved through more precise monitoring and handling costs went down because flowers grew on specially designed platforms.

The Global Competitiveness Report 2001-2002 provides further evidence of this. Daniel Esty, from Yale Law School, and Michael Porter, from Harvard Business School, insist that '[t]he research reveals that there is no evidence that higher environmental quality compromises economic progress. Environmental performance is positively and highly correlated to GDP per capita. The . . . preliminary evidence suggest[s] that coun-

tries with stricter environmental regulations than would be expected at their level of GDP per capita enjoy faster economic growth.'[15]

On a more general basis, the European Commission released a report in 2001 on the costs and benefits of implementing the European *acquis communautaire* in new member countries.[16] This 'environmental acquis comprises around 300 Directives and Regulations, including daughter directive and amendments, and has been estimated to require an investment of around 80 to 120 billion EUR for the ten Central and Eastern European countries alone.'[17] One of the report's most remarkable conclusions is that 'In narrow monetary terms, the assessed benefits are likely to be of the same order of magnitude if not larger than the costs of implementing EU directives.'[18] This conclusion was obtained taking into account the low end of the benefit estimates, and not including several key environmental benefits. The scope of benefits analyzed was large, including, among others, health benefits through the reduction of illnesses, for example; resource benefits in the form of benefits to forestry, agriculture and fisheries; and wider economic benefits through attracting investment, reduced imports of primary materials due to recycling and reuse and tourism development. These illustrations, therefore, highlight the well-known economic benefits of environmental compliance for the population in general, but also remind that it is not an enemy of competitiveness.

An objection to this can be made in that the benefits of environmental compliance concern a broad and diffuse group of society, whereas the costs of implementing obligations would be endured by a small amount of economic stakeholders. If this is partly true, it remains that not only is the benefit-cost ratio globally positive for the community, a fact which should be taken into account by decision-makers of all kinds, but also that environmental compliance can be cost-effective at company level as well.

In a paper prepared for the Inter-American Development Bank, Lawrence Pratt[19] observes that 'superior environmental performance will be rewarded in the long run in

[15] Michael Porter, Jeffrey Sachs and John McArthur, 'Executive Summary: Competitiveness and Stages of Economic Development', *The Global Competitiveness Report 2001-2002* (Oxford University Press, 2001) 16-25, at 24, www.cid.harvard.edu/cr/pdf/GCR0102%20Exec%20Summary.pdf. For the full article see Daniel Esty and Michael Porter, 'Ranking National Environmental Regulation and Performance: A Leading Indicator of Future Competitiveness', *The Global Competitiveness Report 2001-2002* (Oxford University Press, 2001) 78-100, www.isc.hbs.edu/GCR_20012002_Environment.pdf.

[16] European Commission, *The Benefits of Compliance with the Environmental Acquis* (European Commission: Brussels, 2001), europa.eu.int/comm/environment/enlarg/pdf/benefit_xsum.pdf.

[17] *Ibid.*, at ii (footnote omitted).

[18] *Ibid.*, at xl (emphasis omitted).

[19] Lawrence Pratt, *Rethinking the Private Sector-Environment Relationship in Latin America*, Background Paper for the Seminar on the "New Vision for Sustainability: Private Sector and the Environment", IDB/IIC Annual Meeting of the Board of Governors New Orleans, Louisiana (March 25, 2000), www.iadb.org/mif/v2/files/Pratt-eng.pdf.

most industries and in national development.'[20] He goes on to note that 'Both theory and an emerging body of empirical evidence on the topic show that under most circumstances, improved environmental performance should improve a number of aspects of firm competitiveness, especially in developing countries.'[21] His research refutes the idea that adoption of stricter environmental standards by multinational enterprises constitutes a liability that depresses market value. On the contrary, the evidence from their analysis indicates that positive market valuation is associated with the adoption of a single stringent environmental standard around the world. In fact, he even observes that firms with a global environmental policy have a significantly higher market value than firms with lesser standards.

Considerations Regarding Developing Countries

These considerations and conclusions are also pertinent for developing countries. The latter are potentially the most reluctant to comply with environmental obligations because regulations in this area are easily perceived as a threat to already fragile economies. Economic stakeholders argue that increased costs to upgrade technology and treat externalities would hurt company level cost-competitiveness in the international marketplace and restrictive national environmental standards would encourage companies to invest in countries with less stringent standards. Environmental standard-setting and enforcement is therefore perceived by many as a luxury for wealthier countries, which developing countries can ill-afford. It cannot be denied that there is a large part of truth in these arguments. The temptation is then for developing countries to become the backyards of developed countries which could use them as not only a place where manpower is cheaper, but also where the authorities close their eyes to low-cost and dangerous environmental practices.

There are, however, many reasons why this should not be so. As recent empirical and theoretical experience shows, this traditional view is largely incorrect for most developing countries. For a start, to respond to the concern that complying with standards would make countries less attractive to foreign investment, another aspect of the issue must be considered: financier risk. Experiences in industrialized countries show that financial companies, which specialize in equity and insurance, reduce risks and increase opportunities by paying close attention to companies' environmental performance. Companies with a good environmental record are usually those which have enforced the toughest norms, and have lower accident rates or judicial proceedings with neighbouring communities or regulators.

Many financiers in developing countries argue that financial risk in the environment only concerns wealthy countries but there is evidence that this is not true. As regulatory systems are not as elaborate in developing countries where the legislation and legal

[20] *Ibid.*, at 3 (emphasis omitted).

[21] *Ibid.*, at 4.

frameworks are less sophisticated, responsibility is harder to assign and to predict and the general situation for the financial sector is rather unstable, with higher insurance costs. Top Latin American companies with higher levels of environmental performance are already receiving better credit terms from international banks.[22]

Other relevant proof of this comes from the study of trade regulations at an international level, which are evolving to allow countries to restrict imports on the basis of environmental criteria. In the field of tropical timber, for instance, the Agreement of the International Tropical Timber Organization currently permits any WTO member country to prohibit the importation of wood or wood products that are not certified as coming from sustainable sources. Although this has not been used against a producer country, it is a sign that developing countries, which are the main exporters of tropical wood, should enforce environmental regulations. In fact, the economies of most developing countries are based on natural resources which fall under a number of multilateral environmental agreements on water, wetlands, etc.

As awareness rises in developed countries, sanctions for contravening these rules could be detrimental. For instance, when it was discovered that a few containers from Chile contained grapes with a level of pesticides too high for the U.S. market, all Chilean grapes underwent a lengthy embargo. This remark can be easily generalized to trade agreements between developing countries and developed countries.

The North American Free Trade Agreement (NAFTA),[23] between the U.S.A., Canada, and Mexico includes a parallel agreement that compels the parties to undertake a wide range of activities aimed at strengthening environmental performance, resource management and co-operation.[24] As a result of this, Mexico undertook a major change in its environmental regulations, with a very clear improvement in the standards met by Mexican exporters.

In fact, trade agreements are an example of how the benefits of implementation and enforcement of environmental regulations outweigh by far those of not doing so. As authors Lawrence Pratt and Carolina Mauri put it, 'the correct calculus to be made by trade and economy ministers is essentially the following: "our companies can gain a 1 or 2% cost advantage on average if they are allowed to pollute without controls

[22] Lawrence Pratt and Carolina Mauri, 'Environmental enforcement and compliance and its role in enhancing competitiveness in developing countries', *7th INECE Conference Proceedings* (forthcoming 2005).

[23] North American Free Trade Agreement, 8 and 17 December 1992, Washington D.C., 11 and 17 December 1992, Ottawa, 14 and 17 December 1992, Mexico City, in force 1 January 1994, 32 *International Legal Materials* (1993) 296, www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.

[24] North American Agreement on Environmental Co-operation, 8 and 17 December 1992, Washington D.C., 11 and 17 December 1992, Ottawa, 14 and 17 December 1992, Mexico City, in force 1 January 1994, 32 *International Legal Materials* (1993) 1480, www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english.

(damaging public health, weakening the natural resource base, etc), or we can implement our environmental legislation as a key piece of a trade integration package that will reduce the cost of accessing the world's largest market by three to fifteen percent of product value."' Aside from the objections of some vested political interests, the issue is rather clear-cut.'

UNEP Guidelines on Implementation of MEAs

In the global efforts to ensure that existing MEAs are complied with, enforced and implemented, in February 2002, governments at the Seventh Special Session of the UNEP Governing Council adopted the Guidelines on Compliance and Enforcement of MEAs,[25] which had been developed under the auspices of UNEP. These Guidelines try to address issues of implementation of MEAs in a focused and co-ordinated way. They provide much needed tools and approaches to negotiations and measures to ensure developing countries and countries whose economies are in transition appreciate fully their overall interest in becoming party to the different instruments and are given the means to implement them. The Guidelines respond to the international community's urgent need for enhancing compliance with and implementation of MEAs through institutional improvements, enhanced organizational co-ordination, strengthened national environmental implementation and enforcement mechanisms, capacity-building and training. The Guidelines, a pragmatic outcome of experience-sharing, and based on the views of both governments and MEA secretariats, seek to engage countries through a menu of options for strengthening the implementation of MEAs and the enforcement of national laws, regulations and policies.

It is clear from the Guidelines that implementation and enforcement of MEAs at the national level does not begin with the ratification of or accession to MEAs but from the period of negotiation of MEAs themselves. It is at this time that government positions are made, ensuring that national interests are reflected in the final texts of MEAs which, once they are ratified or acceded to and once they enter into force, are thereafter implemented at the national level. Consequently, to facilitate the role of the parties in the national implementation of MEAs, the Guidelines equally provide tools and measures for countries to take prior and during the negotiations in preparation for their implementation when they become binding upon states. The Guidelines, therefore, seek solutions for addressing the shortcomings in the implementation of MEAs listed above, which otherwise undermine the effectiveness of an MEA regime or a party's ability to live up to its obligations.

[25] Guidelines on compliance with and enforcement of multilateral environmental agreements, UNEP/GCSS. VII/4/Add.2 (2002), www.unep.org/GC/GCSS-VII/. A copy of the guidelines is annexed to this article.

Definitions of Terms

Although the terms compliance and enforcement are often used loosely and interchangeably, in so far as the Guidelines are concerned, compliance refers to the situation in which a state is with regard to its obligations under an MEA, i.e. whether it is in compliance or not. Enforcement on the other hand, refers to a set of actions, i.e. adopting laws and regulations, monitoring outcomes, etc., including various enabling activities and steps, which a state may take within its national territory to ensure implementation of an MEA. In other words, the term compliance is used in an international context while the term enforcement is used in a national one. Both ought to lead to effective implementation of specific MEAs or clusters of MEAs.

Nature and Scope of the Guidelines

The Guidelines, though not specific to any environmental agreement and relevant to present and future MEAs, provide approaches for enhancing compliance and implementation, recognizing that each MEA has been negotiated in a unique way and has its own independent legal status. The Guidelines acknowledge that compliance mechanisms and procedures should take account of the particular characteristics of the MEA in question. They emphasize that enforcement is essential for securing the benefit of laws, protecting the environment, public health and safety, deterring violations and encouraging improved performance. They anticipate a broad range of environmental issues, including global and regional environmental protection, management of hazardous substances and chemicals, prevention and control of pollution, desertification, conservation of natural resources, biodiversity, wildlife and environmental safety and health.

The purpose of these Guidelines is, specifically, to assist, among others, governments, national enforcement agencies, NGOs, the private sector and relevant stakeholders in enhancing and supporting compliance with and implementation of MEAs. They outline actions, initiatives and measures for states to consider for strengthening national enforcement and international co-operation in combating violations of laws implementing MEAs. They intended to facilitate consideration of compliance issues at the design and negotiation stage and also after the entry into force of the MEAs, at conferences and meetings of the parties.

The scope of the Guidelines is to address the enforcement of national laws and regulations implementing MEAs in a broad context, under which states, consistent with their obligations under such agreements, develop laws and institutions that support effective enforcement and pursue actions that deter and respond to environmental law violations and crimes. Some of the key approaches to fulfil include the promotion of appropriate and effective national laws and regulations implementing specific MEAs or cluster of MEAs. The Guidelines accord significance to the development of institutional capacities through co-operation and co-ordination among governments and international organisations for increasing the effectiveness of enforcement.

Conclusion

The Guidelines on compliance with and enforcement of MEAs discussed in this paper are general in nature and serve as a toolbox to assist the parties and prospective parties to MEAs in their implementation and enforcement of MEAs. However, improving compliance, enforcement and implementation of MEAs calls for practical, tangible guidance. In this regard and to provide a practical tool to further assist countries with a better understanding of the content of the Guidelines, UNEP has developed a Manual on Compliance with and Enforcement of MEAs.[26] This manual expands on the Guidelines and is being tested through a series of regional workshops. The Manual is intended to facilitate the use of the tools and checklist provided in the Guidelines through explanatory texts, practical examples, best/bad practices and case studies, checklists and other concrete assistance and advice to foster implementation. The Manual will be most useful as a reference document in which users will pick and choose what is most helpful and useful to them. Different provisions will be helpful to different users, such as legislative drafters or enforcement officers. If well utilized and referred to as a guide to the implementation of MEAs, it is hoped that the Guidelines and the Manual, when completed, will greatly improve compliance, implementation and enforcement of MEAs.

[26] United Nations Environment Programme, *Draft Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (as of November 2004)*, www.unep.org/DEPI/programmes/meas-draft-manual-nov24-fullversion.pdf.

ANNEX

GUIDELINES ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS[1]

1. In its decision 21/27, dated 9 February 2001, the Governing Council of the United Nations Environment Programme (UNEP), recalling the Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme and the Malmö Ministerial Declaration, requested the Executive Director "to continue the preparation of the draft guidelines on compliance with multilateral environmental agreements and on the capacity-strengthening, effective national environmental enforcement, in support of the ongoing developments of compliance regimes within the framework of international agreements and in consultation with Governments and relevant international organizations."
2. Pursuant to that decision, draft guidelines were prepared for submission to the UNEP Governing Council special session for review and adoption. They were adopted in decision SS.VII/4.
3. The guidelines are advisory. They provide approaches for enhancing compliance with multilateral environmental agreements and strengthening the enforcement of laws implementing those agreements. It is recognized that parties to the agreements are best situated to choose and determine useful approaches in the context of specific obligations contained in the agreements. Although the guidelines may inform and affect how parties implement their obligations under the agreements, they are non-binding and do not in any manner alter these obligations.
4. The guidelines are presented in two chapters: the first chapter deals with enhancing compliance with multilateral environmental agreements and the second chapter deals with national enforcement, and international cooperation in combating violations, of laws implementing multilateral environmental agreements.

[1] Guidelines on compliance with and enforcement of multilateral environmental agreements, UNEP/GCSS. VII/4/Add.2 (2002), www.unep.org/GC/GCSS-VII/.

I.
Guidelines for Enhancing Compliance with Multilateral

Environmental Agreements

Introduction

5. Strengthening of compliance with multilateral environmental agreements has been identified as a key issue. These guidelines provide approaches to enhance compliance, recognizing that each agreement has been negotiated in a unique way and enjoys its own independent legal status. The guidelines acknowledge that compliance mechanisms and procedures should take account of the particular characteristics of the agreement in question.

A. Purpose

6. The purpose of these guidelines is to assist Governments and secretariats of multilateral environmental agreements, relevant international, regional and subregional organizations, non-governmental organizations, private sector and all other relevant stakeholders in enhancing and supporting compliance with multilateral environmental agreements.

B. Scope

7. These guidelines are relevant to present and future multilateral environmental agreements, covering a broad range of environmental issues, including global environmental protection, management of hazardous substances and chemicals, prevention and control of pollution, desertification, management and conservation of natural resources, biodiversity, wildlife, and environmental safety and health, in particular human health.
8. The guidelines are intended to facilitate consideration of compliance issues at the design and negotiation stages and also after the entry into force of the multilateral environmental agreements, at conferences and meetings of the parties. The guidelines encourage effective approaches to compliance, outline strategies and measures to strengthen implementation of multilateral environmental agreements, through relevant laws and regulations, policies and other measures at the national level and guide subregional, regional and international cooperation in this regard.

C. Definitions

9. For the purpose of this chapter of these guidelines:
   (a) "Compliance" means the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement; [2]
   (b) "Implementation" refers to, inter alia, all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments, if any.

[2] Acknowledging that the term compliance has distinct relevance within the respective fields covered by both chapters and is a term well known and understood by those involved in both fields, albeit with a different understanding, it was decided to use two different definitions for this term in these guidelines, one for each chapter.

D. Compliance considerations

1. Preparatory work for negotiations

10. To facilitate compliance with multilateral environmental agreements, preparatory work for negotiations may be assisted by the following actions:
    (a) Regular exchange of information among States, including through the establishment of forums, on environmental issues that are the subject of negotiations and the ability of the States to address those issues;
    (b) Consultations in between negotiating sessions on issues that could affect compliance among States;
    (c) Workshops on compliance arranged by negotiating States or relevant multilateral environmental agreement secretariats that cover compliance provisions and experiences from other agreements with participation of Governments, non-governmental organizations, the private sector and relevant international, regional and subregional organizations;
    (d) Coordination at the national level among ministries, relevant agencies and stakeholders, as appropriate for the development of national positions;
    (e) Consideration of the need to avoid overlaps and encourage synergies with existing multilateral environmental agreements when considering any new legally binding instrument.

2. Effective participation in negotiations

11. To facilitate wide and effective participation by States in negotiations, the following actions may be considered:
    (a) Assessment of whether the issue to be addressed is global, regional or subregional, keeping in mind that, where appropriate, States could collaborate in regional and subregional efforts to promote implementation of multilateral environmental agreements;
    (b) Identificationof countries for which addressing an environmental problem may be particularly relevant;
    (c) Establishment of special funds and other appropriate mechanisms to facilitate participation in negotiations by delegates from countries requiring financial assistance;
    (d) Where deemed appropriate by States, approaches to encourage participation in a multilateral environmental agreement, such as common but differentiated responsibilities, framework agreements (with the content of the initial agreement to be further elaborated by specific commitments in protocols), and/or limiting the scope of a proposed multilateral environmental agreement to subject areas in which there is likelihood of agreement;
    (e) Transparency and a participatory, open-ended process.

3. Assessment of domestic capabilities during negotiations

12. Participating States could, in order to support their efforts to negotiate a multilateral environmental agreement and determine whether they would be able to comply with its provisions, assess their domestic capabilities for implementing the agreement under negotiation.

4. Compliance considerations in multilateral environmental agreements

13. The competent body of a multilateral environmental agreement could, where authorized to do so, regularly review the overall implementation of obligations under the multilateral environmental agreement and examine specific difficulties of compliance and consider measures aimed at improving compliance.
14. States are best placed to choose the approaches that are useful and appropriate for enhancing compliance with multilateral environmental agreements. The following considerations may be kept in view:
    (a) Clarity: To assist in the assessment and ascertainment of compliance, the obligations of parties to multilateral environmental agreements should be stated clearly;
    (b) National implementation plans could be required in a multilateral environmental agreement, which could potentially include environmental effects monitoring and evaluation in order to determine whether a multilateral environmental agreement is resulting in environmental improvement;
    (c) Reporting, monitoring and verification: multilateral environmental agreements can include provisions for reporting, monitoring and verification of the information obtained on compliance. These provisions can help promote compliance by, inter alia, potentially increasing public awareness. Care should be taken to ensure that data collection and reporting requirements are not too onerous and are coordinated with those of other multilateral environmental agreements. Multilateral environmental agreements can include the following requirements:
        (i) Reporting: Parties may be required to make regular, timely reports on compliance, using an appropriate common format. Simple and brief formats could be designed to ensure consistency, efficiency and convenience in order to enable reporting on specific obligations. Multilateral environmental agreement secretariats can consolidate responses received to assist in the assessment of compliance. Reporting on non-compliance can also be considered, and the parties can provide for timely review of such reports;
        (ii) Monitoring: Monitoring involves the collection of data and in accordance with the provisions of a multilateral environmental agreement can be used to assess compliance with an agreement, identify compliance problems and indicate solutions. States that are negotiating provisions regarding monitoring in multilateral environmental agreements could consider the provisions in other multilateral environmental agreements related to monitoring;
        (iii) Verification: This may involve verification of data and technical information in order to assist in ascertaining whether a party is in compliance and, in the event of non-compliance, the degree, type and frequency of non-compliance. The principal source of verification might be national reports. Consistent with the provisions in the multilateral environmental agreement and in accordance with any modalities that might be set by the conferences of the parties, technical verification could involve independent sources for corroborating national data and information.
    (d) Non-compliance mechanisms: States can consider the inclusion of non-compliance provisions in a multilateral environmental agreement, with a view to assisting parties having compliance problems and addressing individual cases of non-compliance, taking into account the importance of tailoring compliance provisions and mechanisms to the agreement's specific obligations. The following considerations could be kept in view:
        (i) The parties can consider the establishment of a body, such as a compliance committee, to address compliance issues. Members of such a body could be

party representatives or party-nominated experts, with appropriate expertise on the relevant subject matter;

(ii) Non-compliance mechanisms could be used by the contracting parties to provide a vehicle to identify possible situations of non-compliance at an early stage and the causes of non-compliance, and to formulate appropriate responses including, addressing and/or correcting the state of non-compliance without delay. These responses can be adjusted to meet varying requirements of cases of non-compliance, and may include both facilitative and stronger measures as appropriate and consistent with applicable international law;

(iii) In order to promote, facilitate and secure compliance, non-compliance mechanisms can be non-adversarial and include procedural safeguards for those involved. In addition, non-compliance mechanisms can provide a means to clarify the content, to promote the application of the provisions of the agreement and thus lead significantly to the prevention of disputes;

(iv) The final determination of non-compliance of a party with respect to an agreement might be made through the conference of the parties of the relevant multilateral environmental agreement or another body under that agreement, if so mandated by the conference of the parties, consistent with the respective multilateral environmental agreement.

5. Review of effectiveness

15. The conference of the parties of a multilateral environmental agreement could regularly review the overall effectiveness of the agreement in meeting its objectives, and consider how the effectiveness of a multilateral environmental agreement might be improved.

6. Compliance mechanisms after a multilateral environmental agreement has come into effect

16. Compliance mechanisms or procedures could be introduced or enhanced after a multilateral environmental agreement has come into effect, provided such mechanisms or procedures have been authorised by the multilateral environmental agreement, subsequent amendment, or conference of the parties decision, as appropriate, and consistent with applicable international law.

7. Dispute settlement provisions

17. In principle, provisions for settlement of disputes complement the provisions aimed at compliance with an agreement. The appropriate form of dispute settlement mechanism can depend upon the specific provisions contained in a multilateral environmental agreement and the nature of the dispute. A range of procedures could be considered, including good offices, mediation, conciliation, fact-finding commissions, dispute resolution panels, arbitration and other possible judicial arrangements which might be reached between concerned parties to the dispute.

E. National implementation

1. National measures

18. Compliance assessment: Prior to ratification of a multilateral environmental agreement, a State should assess its preparedness to comply with the obligations of that agreement. If areas of potential non-compliance are identified, that State should take appropriate measures to address them before becoming a party to that agreement.
19. Compliance plan: If a State, once it becomes a party to a specific multilateral environmental agreement, subsequently identifies compliance problems, it may consider developing a compliance plan consistent with that agreements obligations and inform the concerned secretariat accordingly. The plan may address compliance with different types of obligations in the agreement and measures for ensuring compliance. The plan may include benchmarks, to the extent that this is consistent with the agreement that would facilitate monitoring compliance.
20. Law and regulatory framework: According to their respective national legal frameworks, States should enact laws and regulations to enable implementation of multilateral environmental agreements where such measures are necessary for compliance. Laws and regulations should be regularly reviewed in the context of the relevant international obligations and the national situations.
21. National implementation plans: the elaboration of national implementation plans referred to in paragraph 14 (b) for implementing multilateral environmental agreements can assist in integrating multilateral environmental agreement obligations into domestic planning, policies and programmes and related activities. Reliable data collection systems can assist in monitoring compliance.
22. Enforcement: States can prepare and establish enforcement frameworks and programmes and take measures to implement obligations in multilateral environmental agreements (chapter 2 contains guidelines for national enforcement, and international cooperation in combating violations of laws implementing multilateral environmental agreements).
23. Economic instruments: In conformity with their obligations under applicable international agreements, parties can consider use of economic instruments to facilitate efficient implementation of multilateral environmental agreements.
24. National focal points: Parties may identify national authorities as focal points on matters related to specific multilateral environmental agreements and inform the concerned secretariat accordingly.
25. National coordination: Coordination among departments and agencies at different levels of government, as appropriate, can be undertaken when preparing and implementing national plans and programmes for implementation of multilateral environmental agreements.
26. Efficacy of national institutions: The institutions concerned with implementation of multilateral environmental agreements can be established or strengthened appropriately in order to increase their capacity for enhancing compliance. This can be done by strengthening enabling laws and regulations, information and communication networks, technical skills and scientific facilities.
27. Major stakeholders: Major stakeholders including private sector, non-governmental organizations, etc., can be consulted when developing national implementation plans, in the definition of environmental priorities, disseminating information and specialized knowledge and monitoring. Cooperation of the major stakeholders might be needed for enhancing capacity for compliance through information, training and technical assistance.
28. Local communities: As appropriate, parties can promote dialogue with local communities about the implementation of environmental obligations in order to ensure compliance in conformity with the purpose of an agreement. This may help develop local capacity and

assess the impact of measures under multilateral environmental agreements, including environmental effects on local communities.

29. Women and youth: The key role of women and youth and their organizations in sustainable development can be recognized in national plans and programmes for implementing multilateral environmental agreements.
30. Media: The national media including newspapers, journals, radio, television and the Internet as well as traditional channels of communication, could disseminate information about multilateral environmental agreements, the obligations in them, and measures that could be taken by organizations, associations and individuals. Information could be conveyed about the measures that other parties, particularly those in their respective regions, might have taken to implement multilateral environmental agreements.
31. Public awareness: To promote compliance, parties could support efforts to foster public awareness about the rights and obligations under each agreement and create awareness about the measures needed for their implementation, indicating the potential role of the public in the performance of a multilateral environmental agreement.
32. Access to administrative and judicial proceedings: Rights of access to administrative and judicial proceedings according to the respective national legal frameworks could support implementation and compliance with international obligations.

2. Capacity-building and technology transfer

33. The building and strengthening of capacities may be needed for developing countries that are parties to multilateral environmental agreements, particularly the least developed countries, as well as parties with economies in transition to assist such countries in meeting their obligations under multilateral environmental agreements. In this regard:
    (a) Financial and technical assistance can be provided for building and strengthening organizational and institutional capacities for managing the environment with a view to carrying forward the implementation of multilateral environmental agreements;
    (b) Capacity-building and technology transfer should be consistent with the needs, strategies and priorities of the country concerned and can build upon similar activities already undertaken by national institutions or with support from multilateral or bilateral organizations;
    (c) Participation of a wide range of stakeholders can be promoted, taking into consideration the need for developing institutional strengths and decision-making capabilities and upgrading the technical skills of parties for enhancing compliance and meeting their training and material requirements;
    (d) Various funding sources could be mobilized to finance capacity-building activities aimed at enhancing compliance with multilateral environmental agreements, including funding that may be available from the Global Environment Facility, in accordance with the Global Environment Facility mandate, and multilateral development banks, special funds attached to multilateral environmental agreements or bilateral, intergovernmental or private funding;
    (e) Where appropriate, capacity-building and technology transfer activities and initiatives could be undertaken at regional and subregional levels;
    (f) Parties to multilateral environmental agreements could consider requesting their respective secretariats to coordinate their capacity-building and technology transfer initiatives or undertake joint activities where there are cross-cutting issues for cost-effectiveness and to avoid duplication of efforts.

F. International co-operation

34. There is a recognized need for a commitment by all countries to the global process of protecting and improving the environment. This may be furthered by the United Nations and other relevant international organizations, as well as through multilateral and bilateral initiatives for facilitating compliance. In this regard, steps can be taken for:
    (a) Generating information for assessing the status of compliance with multilateral environmental agreements and defining ways and means through consultations for promotion and enhancement of compliance;
    (b) Building and strengthening capacities of, and transferring technologies to, developing countries, particularly the least-developed countries, and countries with economies in transition;
    (c) Sharing national, regional and subregional experiences in environmental management;
    (d) Evaluating by conferences of the parties, in the context of their overall review of the effectiveness of their respective multilateral environmental agreement, the effectiveness of mechanisms constituted under such multilateral environmental agreements for the transfer of technology and financial resources;
    (e) Assisting in formulating guidance materials which may include model multilateral environmental agreement implementing legislation for enhancing compliance;
    (f) Developing regional or subregional environmental action plans or strategies to assist in the implementation of multilateral environmental agreements;
    (g) Fostering awareness among non-parties about the rights, benefits and obligations of becoming a party to a multilateral environmental agreement and inviting non-parties as observers to meetings of decision-making bodies under multilateral environmental agreements to enhance their knowledge and understanding of the agreements;
    (h) Enhancing cooperation among multilateral environmental agreement secretariats, if so requested by the parties to the respective multilateral environmental agreements.

II.
Guidelines for National Enforcement, and International Co-operation in Combating Violations, of Laws Implementing Multilateral Environmental Agreements

Introduction

35. These guidelines recognize the need for national enforcement of laws to implement multilateral environmental agreements. Enforcement is essential to secure the benefits of these laws, protect the environment, public health and safety, deter violations, and encourage improved performance. These guidelines also recognize the need for international cooperation and coordination to facilitate and assist enforcement arising from the implementation of multilateral environmental agreements and help to establish an international level playing field.

A. Purpose

36. These guidelines outline actions, initiatives and measures for States to consider for strengthening national enforcement and international cooperation in combating violations of laws implementing multilateral environmental agreements. The guidelines can assist Governments, its competent authorities, enforcement agencies, secretariats of multilateral environmental agreements, where appropriate, and other relevant international and regional organizations in developing tools, mechanisms and techniques in this regard.

B. Scope

37. The guidelines address enforcement of national laws and regulations implementing multilateral environmental agreements in a broad context, under which States, consistent with their obligations under such agreements, develop laws and institutions that support effective enforcement and pursue actions that deter and respond to environmental law violations and crimes. Approaches include the promotion of appropriate and effective laws and regulations for responding appropriately to environmental law violations and crimes. These guidelines accord significance to the development of institutional capacities through cooperation and coordination among international organizations for increasing the effectiveness of enforcement.

C. Definitions

38. For the purpose of this chapter of these guidelines:
    (a) "Compliance" means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements;[3]

[3] Acknowledging that the term compliance has distinct relevance within the respective fields covered by both chapters and is a term well known and understood by those involved in both fields, albeit with a different understanding, it was decided to use two different definitions for this term in these guidelines, one for each chapter.

(b) "Environmental law violation" means the contravention of national environmental laws and regulations implementing multilateral environmental agreements
(c) "Environmental crime" means the violations or breaches of national environmental laws and regulations that a State determines to be subject to criminal penalties under its national laws and regulations;
(d) "Enforcement" means the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and/or punished through civil, administrative or criminal action.

D. National enforcement

39. Each State is free to design the implementation and enforcement measures that are most appropriate to its own legal system and related social, cultural and economic circumstances. In this context, national enforcement of environmental and related laws for the purpose of these guidelines can be facilitated by the following considerations.

1. National laws and regulations

40. The laws and regulations should be:
(a) Clearly stated with well-defined objectives, giving fair notice to the appropriate community of requirements and relevant sanctions and enabling effective implementation of multilateral environmental agreements;
(b) Technically, economically and socially feasible to implement, monitor and enforce effectively and provide standards that are objectively quantifiable to ensure consistency, transparency and fairness in enforcement;
(c) Comprehensive with appropriate and proportionate penalties for environmental law violations. These would encourage compliance by raising the cost of non-compliance above that of compliance. For environmental crime, additional deterrent effect can be obtained through sanctions such as imprisonment, fines, confiscation of equipment and other materials, disbarment from practice or trade and confiscation of the proceeds of environmental crime. Remedial costs should be imposed such as those for redressing environmental damage, loss of use of natural resources and harm from pollution and recovery of costs of remediation, restoration or mitigation.

2. Institutional framework

41. States should consider an institutional framework that promotes:
(a) Designation of responsibilities to agencies for:
(i) Enforcement of laws and regulations;
(ii) Monitoring and evaluation of implementation;
(iii) Collection, reporting and analysis of data, including its qualitative and quantitative verification and provision of information about investigations;
(iv) Awareness raising and publicity, in particular for the regulated community, and education for the general public;
(v) Assistance to courts, tribunals and other related agencies, where appropriate, which may be supported by relevant information and data.
(b) Control of the import and export of substances and endangered species, including the tracking of shipments, inspection and other enforcement activities at border crossings, ports and other areas of known or suspected illegal activity;

c) Clear authority for enforcement agencies and others involved in enforcement activities to:
   (i) Obtain information on relevant aspects of implementation;
   (ii) Have access to relevant facilities including ports and border crossings;
   (iii) Monitor and verify compliance with national laws and regulations;
   (iv) Order action to prevent and remedy environmental law violations;
   (v) Coordinate with other agencies;
   (vi) Impose sanctions including penalties for environmental law violations and non-compliance.

(d) Policies and procedures that ensure fair and consistent enforcement and imposition of penalties based on established criteria and sentencing guidelines that, for example, credibly reflect the relative severity of harm, history of non-compliance or environmental law violations, remedial costs and illegal profits;

(e) Criteria for enforcement priorities that may be based on harm caused or risk of harm to the environment, type or severity of environmental law violation or geographic area;

(f) Establishing or strengthening national environmental crime units to complement civil and administrative enforcement programmes;

(g) Use of economic instruments, including user fees, pollution fees and other measures promoting economically efficient compliance;

(h) Certification systems;

(i) Access of the public and civil society to administrative and judicial procedures to challenge acts and omissions by public authorities and corporate persons that contravene national environmental laws and regulations, including support for public access to justice with due regard to differences in legal systems and circumstances;

(j) Public access to environmental information held by Governments and relevant agencies in conformity with national and applicable international law concerning access, transparency and appropriate handling of confidential or protected information;

(k) Responsibilities and processes for participation of the appropriate community and non-governmental organizations in processes contributing to the protection of the environment;

(l) Informing legislative, executive and other public bodies of the environmental actions taken and results achieved;

(m) Use of the media to publicize environmental law violations and enforcement actions, while highlighting examples of positive environmental achievements;

(n) Periodic review of the adequacy of existing laws, regulations and policies in terms of fulfilment of their environmental objectives;

(o) Provision of courts which can impose appropriate penalties for violations of environmental laws and regulations, as well as other consequences.

3. National coordination

42. Coordination among relevant authorities and agencies can assist national enforcement, including:

(a) Coordination among various enforcement agencies, environmental authorities, tax, customs and other relevant officials at different levels of government, as well as linkages at the field level among cross-agency task forces and liaison points, which may include formal agreements such as memoranda of understanding and rules of procedure for communication, as well as formulation of guidelines;

(b) Coordination by government agencies with non-governmental organizations and the private sector.

(c) Coordination among the authorities responsible for promoting licensing systems to regulate and control the importation and exportation of illicit substances and hazardous materials, including regulated chemicals and wastes.

4. Training for enhancing enforcement capabilities

43. Training activities for enhancing enforcement capabilities can comprise of:
    (a) Programmes to build awareness in enforcement agencies about their role and significance in enforcing environmental laws and regulations;
    b) Training for public prosecutors, magistrates, environmental enforcement personnel, customs officials and others pertaining to civil, criminal and administrative matters, including instruction in various forms of evidence, case development and prosecution, and guidance about imposition of appropriate penalties;
    (c) Training for judges, magistrates and judicial auxilliaries regarding issues concerning the nature and enforcement of environmental laws and regulations, as well as environmental harm and costs posed by violations of such laws and regulations;
    (d) Training that assists in creating common understanding among regulators, environmental enforcement personnel, prosecutors and judges, thereby enabling all components of the process to understand the role of each other;
    (e) Training of environmental enforcement personnel including practical training on inspection techniques, advanced training in investigation techniques including surveillance, crime scene management and forensic analysis;
    (f) Development of capabilities to coordinate action among agencies domestically and internationally, share data and strengthen capabilities to use information technology for promoting enforcement;
    (g) Development of capabilities to design and use economic instruments effectively for enhancing compliance;
    (h) Development of innovative means for securing, raising and maintaining human and financial resources to strengthen enforcement;
    (i) Application of analytical intelligence techniques to grade and analyse data and provide information to assist in targeting resources on environmental criminals.

5. Public environmental awareness and education

44. Public environmental awareness and education can be increased by the following actions:
    (a) Generating public awareness and environmental education, particularly among targeted groups, about relevant laws and regulations and about their rights, interests, duties and responsibilities, as well as about the social, environmental and economic consequences of non-compliance;
    (b) Promoting responsible action in the community through the media by involving key public players, decision-makers and opinion-builders in such campaigns;
    (c) Organizing campaigns for fostering environmental awareness among communities, non-governmental organizations, the private sector and industrial and trade associations;
    (d) Inclusion of awareness and environmental educational programmes in schools and other educational establishments as part of education;
    (e) Organizing campaigns for fostering environmental awareness and environmental educational programmes for women and youth;
    (f) Organizing campaigns for encouraging public involvement in monitoring of compliance.

E. International cooperation and coordination

45. Consistent with relevant provisions in multilateral environmental agreements, national enforcement of laws and regulations implementing multilateral environmental agreements could be supported through international cooperation and coordination that can be facilitated by, inter alia, UNEP. The following considerations could be kept in view.

1. Consistency in laws and regulations

46. States, within their national jurisdictions, can consider developing consistent definitions and actions such as penalties and court orders, with a view to promoting a common approach to environmental law violations and environmental crimes, and enhance international cooperation and coordination, for environmental crimes with transboundary aspects. This may be facilitated by:
    (a) Environmental laws and regulations that provide appropriate deterrent measures, including penalties, environmental restitution and procedures for confiscation of equipment, goods and contraband, and for disposal of confiscated materials;
    (b) Adoption of laws and regulations, implemented and applied in a manner that is consistent with the enacting state's international obligations, that make illegal the importation, trafficking or acquisition of goods, wastes and any other materials in violation of the environmental law and regulations;
    (c) Appropriate authority to make environmental crime punishable by criminal sanctions that take into account the nature of the environmental law violation.

2. Cooperation in judicial proceedings

47. Cooperation between and amongst states in judicial proceedings may be facilitated by:
    (a) Cooperation in judicial proceedings and procedures related to testimony, evidence and similar matters, including exchange of information, mutual legal assistance and other co-operative arrangements agreed between the concerned countries;
    (b) Developing appropriate channels of communication with due respect for the various systems in place in different states, for timely exchange of information relevant to the detection of environmental law violations as well as pertaining to the judicial process.

3. Institutional framework

48. States can consider the strengthening of institutional frameworks and programmes to facilitate international cooperation and coordination in the following ways:
    (a) Designation and establishment of channels of communication and information exchange among UNEP, the secretariats of multilateral environmental agreements, the World Customs Organization and relevant intergovernmental entities, research institutes and non-governmental organizations, and international law enforcement agencies such as the International Criminal Police Organization (Interpol) especially through its "Green Interpol" activities;
    (b) Strengthening measures to facilitate information exchange, mutual legal assistance and joint investigations with other enforcement entities with the objective of strengthening and promoting greater consistency in laws and practices;
    (c) Development of infrastructure needed to control borders and protect against illegal trade under multilateral environmental agreements, including tracking and information systems, customs codes and related arrangements, as well as measures that could help lead to identification of illegal shipments and prosecution of offenders;

(d) Development of technology and expertise to track suspect shipments, accompanied by information on specific production sources, the import and export of regulated chemicals and wastes, licensing systems, customs and enforcement data;
(e) Strengthening mechanisms to facilitate information exchange regarding verification of illegal shipments and coordinating procedures for storing, processing and returning or destroying confiscated illegal shipments, as well as development of confidential channels, subject to domestic laws, for communicating information regarding illegal shipments;
(f) Designation of appropriate national and international points of contact to be forwarded to the UNEP enforcement database;
(g) Facilitation of transborder communications between agencies, considering that States may designate responsibility on the same subject to different agencies, such as customs, police or wildlife officials;
(h) Establishment of regional and subregional programmes providing opportunities for sharing information and strengthening training for detecting and prosecuting environmental crimes;
(i) Allocation of adequate resources to support the effective enforcement and effective implementation of policies.

4. Capacity-building and strengthening

49. Developing countries, particularly the least developed countries, and countries with economies in transition, require the building and strengthening of capacities for enforcement. It is recognized that environmental enforcement may be affected by conditions of poverty and governance that need to be addressed through appropriate programmes. The following measures can be considered for building and strengthening capacities for enforcement:
(a) Coordinated technical and financial assistance to formulate effective laws and regulations and to develop and maintain institutions, programmes and action plans for enforcement, monitoring and evaluation of national laws implementing multilateral environmental agreements;
(b) Development of specific guidelines with reference to particular agreements for law enforcement officers to conduct operations, investigations and inspections, and procedures for reporting and processing information nationally and internationally;
(c) Formulation of programmes for coordinating compliance and enforcement actions including compliance promotion, with other States;

(d) Use of regional and subregional centres and workshops to provide opportunities for sharing information and experiences and for cost-effective and long-term training programmes;
(e) Participation in international meetings, courses and training programmes, as well as in regional and global networks to facilitate sharing information and access to implementation and training materials.