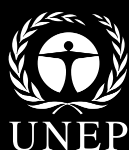
Manual on Compliance with and Enforcement of Multilateral Environmental Agreements



UNITED NATIONS ENVIRONMENT PROGRAMME

Chapter II Enforcement of MEAs

B. National Approaches to Environmental Implementation and 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.*

CH II - B

Because environmental enforcement has its foundation in action at the national level, States can and should take into account the unique nature of their legal system, as well as their culture and institutional capacity in designing and adopting enforcement measures. An effective national environmental regime will require well-developed laws and regulations, a sufficient institutional framework, national coordination, training to enhance enforcement capabilities, and public environmental awareness and education.

There are many ways to develop an effective national environmental regime, and they can include a variety of tools advancing various objectives. The following discussion:

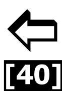
- surveys the general classes of environmental management tools that can be used to implement MEAs;
- discusses some of the objectives that these tools are designed to address; and
- examines how a State can develop an environmental regime that uses the different tools effectively and appropriately.

Environmental Management Tools To Implement MEAs

An environmental regime can use many different tools. As noted above, these can include binding laws and regulations, environmental taxes and subsidies, public awareness, and other tools. For the purposes of this Manual, these tools are classified into three broad groupings of tools: legal, economic, and voluntary tools. These are described in more detail below.

Legal Tools

Legal tools include codified laws, acts, statutes, regulations, policies, and other legal instruments. They can also include common law approaches.



[40] As discussed in Guideline 40, in order to be effective in fostering compliance, environmental requirements in laws need to be enforceable. That is, they need to be clear, feasible, offer sufficient sanctions, and implemented with adequate notice. By considering enforceability throughout the process

of developing environmental requirements, policymakers can help make the requirements as effective as possible. Involvement of both legal and technical staff is important in this process.

Within the broad class of legal tools, there are different types of legal tools. These include command-and-control approaches, responsive regulation, and liability which are discussed below. In addition, legal tools can create an enabling environment for economic tools. For example, laws can provide for green taxes, fees, and subsidies, or they can provide the legal framework for an emissions trading programme.

"Command-and-Control" Approaches. Many legal instruments follow a "command-and-control" approach. In command-and-control approaches, the Government prescribes the desired changes through detailed requirements and then promotes and enforces compliance through these requirements. In effect, the Government says "Do this, don't do that." Examples of such approaches include technology-based standards, which require an entity to use a particular type of technology, and performance-based standards, which leave the entity free to choose the method of pollution reduction but require a specific level of performance. In some cases, there may be ambient-based standards, which focus on maintaining a certain overall quality of environment. These regulations are most effective when developed in consultation with the public and regulated communities.

Responsive Regulation. In contrast with command-and-control approaches, responsive regulation is a more collaborative approach to regulations. In responsive regulation, the Government works with the private sector (including the regulated entities) and public interest groups to develop standards. Through this collaborative process, there is broader ownership of the rules. This type of regulation is more of a negotiated process between the Government and regulated entity (like a "reg-neg" in the United States or the collaborative regulatory agreements in the European Union). For more information, see *I. Ayres & J. Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press 1992)*.

Liability Approaches. Some statutes or common law provisions make individuals or businesses liable for damages they cause to another individual or business or to their property. In some instances, liability can be simply for certain actions: proof of damage and causation are not required (see the discussion below of strict liability). Liability approaches typically establish who should be liable, for what actions or impact, the standard of liability, types of damages, etc. Examples of liability-based environmental management systems include nuisance laws, laws requiring compensation for victims of environmental damage, and laws requiring correction of environmental problems caused by improper disposal of hazardous waste.

Scales of Justice.

Liability systems can reduce or prevent pollution to the extent that individuals or facilities fear the consequences of potential legal action against them. Such an effect is called "deterrence" in that it deters potentially harmful activity. If, however, the extent of the liability is minor or it can easily be internalized into the cost of doing business (e.g., by "passing" the fine along to the consumer), liability may be limited in its effectiveness.

Different approaches to liability generally include different requirements for fault, causation, equitable contribution, and joint and several liability (see discussion following Guideline 40(c)).

Fault-based liability depends on an analysis of the person's actions or inactions based upon what they know, knew, or should have known. For example, if a "reasonable person" would not leave a child alone with matches because the person would or should know that doing so might likely cause harm to someone or something, yet he does so anyway, he would be at fault. The same analysis would likely conclude that the person would not be negligent if the matches were supplied to an adult without reason to think the adult was irresponsible.

In contrast, strict liability imposes responsibility for the unfavorable consequences of an activity. These activities often relate to "inherently dangerous" activites or products. For example, if someone were to keeping a wild animal and if the animal were to do harm, the owner/keeper may be liable for all harm caused even if the owner were able to demonstrate that he/she did everything possible or all that could reasonably be expected to see that nothing bad would happen. As such, strict liability can provide as an effective deterrent, since people can be liable for any result that flows from their activity. Going back to the matches example, if the person provided dynamite (which might be deemed an "inherently dangerous" product) which caused harm, he would be at fault because the law imposes strict liability for ultra-hazardous activities.

If a person is liable for environmental harm, the question then turns to the nature and extent of liability and to whom any compensation should be paid. Is it paid to the State (and if so, is it to the general Treasury or to an environmental Agency or Ministry?), a local authority, an NGO that brought suit, individuals who can prove harm, or someone else? Cases and laws provide for all of these options, depending on the State and the circumstances.

Economic Tools

Economic or "market-based" approaches use market forces (and economic incentives and disincentives) to achieve desired behaviour changes. These approaches can be independent of or build upon and supplement command-and-control approaches. For example, introducing market forces into a command-and-control approach can encourage greater pollution prevention and more economic solutions to problems. Market-based approaches include:

- Fee systems that tax emissions, effluents, and other environmental releases.
- Subsidies.
- Tradable permits, which allow companies to trade permitted emission rights with other companies.

- Offset approaches. These approaches allow a facility to propose various approaches to meeting an environmental goal. For example, a facility may be allowed to emit greater quantities of a substance from one of its operations if the facility offsets this increase by reducing emissions at another of its operations.
- Auctions. In this approach, the Government auctions limited rights to produce or release certain environmental pollutants.
- Environmental labeling/public disclosure. In this approach, manufacturers are required to label products so that consumers can be aware of the environmental impacts or the products' environmental performance. This is both an economic and an information-based tool (see below).

Some of these market-based approaches are hybrid versions of economic tools and command-and-control tools. For example, it may be necessary to provide a regulatory limit or "ceiling" for a cap and trade system. Alternatively or in addition, a law may establish a performance standard which can be achieved either through facility changes or through trading, as decided by the facility. This type of approach is embodies in the SO2 programme of the U.S. Clean Air Act, which has a regulatory cap on emissions and a performance based standard, while allowing trading for compliance. Guideline 41(g) and the accompanying discussion provide more detail on economic instruments and how market-based approaches can be used to implement MEAs and advance environmental goals.

[41(g)]

Voluntary Tools

Voluntary approaches encourage or assist, but do not require, change. Voluntary approaches include public education, technical assistance, and the promotion of environmental leadership by industry and non-government organisations. Voluntary approaches may also include co-management of natural resources (e.g., lakes, natural areas, and groundwater) to maintain environmental quality.

Information-Based Tools

Some tools promote environmental goals through information. One key approach is collecting information. In many instances, a Government must act on limited information. Collecting further information can determine whether regulatory or other measures are necessary. This information can also help to build public awareness.

Another example of an information-based tool is the Pollutant Release and Transfer Register (PRTR) system. In a PRTR system, companies are required to report the quantities of specified chemicals that they release to the environment. Identifying and reporting these amounts has two primary effects.

First, the pollutants often highlight inefficiencies in the production process. As such, the reported releases effectively represent raw materials that the company is wasting. Accordingly, experience has shown that PRTR can lead to voluntary reductions (and savings) by facilities.

The other primary effect of a PRTR system is that making such information publicly available can bring informal but substantial public pressure to bear on the facility. Often the public does not know what is being released into the environment where they live. Simply making this

information available can empower the public to ask questions: Why is Facility X releasing so much more waste than Facility Y? Can this amount be reduced in any way without harming production? Are there non-toxic alternatives? Indeed, companies often voluntarily take measures to reduce the volume and toxicity of its releases, often due to concern for what the public might say. For more information on PRTR, see **http://www.unece.org/env/pp/prtr.htm**

Environmental performance rating is another information-based approach. For example, see the case study on "Environmental Information Disclosure and Performance Rating in China" following Guideline 41(j) and the case study on "Public Disclosure of Corporate Environmental Performance in Ghana" following Guideline 41(a)(iii).

[41(a)(iii)]
[41(j)]

Many of the information-based tools build capacity indirectly by generating environmental awareness. For example, PRTR builds awareness of the public and Government of some of the primary sources of pollution (by sector, geographic area, etc.) as well as the nature of the pollution (pollutant, media, timing, etc.).

Information-based tools also can build enforcement capacity more directly. For example, police, field officers, and other individuals charged with environmental enforcement often do not have copies of the relevant statutes, regulations, and standards. In some cases, the regulated community may also lack access to this information. Tools to put this information in the hands of the regulated community and the enforcement officers can greatly enhance self-compliance and external compliance.

Collaborative Management Tools. Collaborative management is a popular way to manage many natural resources. By engaging communities and other actors, a Government can greatly increase the resources available to it. In addition by involving these other stakeholders and by sharing benefits with them, Governments can generate broader support for the environmental initiative. Community-Based Natural Resource Management (CBNRM) and community conservation areas are two examples.

Customary Tools. Traditional authorities and customary norms remain important in many States, particularly in rural areas. Traditional leaders play a significant role in shaping the actions of their communities. Moreover, to the extent that implementing actions can be phrased in the context of customary law, implementation of MEAs can be facilitated by making use of existing norms. By using customary institutions and laws, Governments can work with traditional leaders to implement MEAs. This can be done in a largely informal way, working with the leaders and explaining why particular actions are necessary without ordering them to act or providing any direct financial incentives.

In addition to the following case study, other examples are provided in the discussion of "Educating Community and Traditional Leaders" following Guideline 44, as well as the case study on "Burkina Faso's Conference of the National Council on Environment and Sustainable Development" following Guideline 42. Moreover, Small Island Developing States (such as Samoa) have worked with traditional village councils and chiefs to enforce environmental laws in villages. Churches and mosques can also be approached.

[42]
[44]

Putting the Tools Together

A State has many options in selecting and developing an enforcement system comprised of a particular subset of these tools. Generally speaking, the "softer" voluntary approaches often supplement "harder" compliance and enforcement approaches. Moreover, these softer approaches can provide a step toward more formalized regulation; or they may provide an alternative approach to formal regulation. The specific context of the State and environmental situation will be important in deciding the most appropriate combination and role of the tools.

Focusing on the Regulated Community

Generally speaking, there are three types of actors in the regulated community. They may be termed:

- the "compliant" group,
- the "reactive" group, and
- the "resistant" group.

The compliant group believes in the rule of law and/or the importance of environmental priorities, and they will comply regardless of the actions that the Government takes. The reactive group will choose whether and how to comply based on actions by the Government (e.g., by providing incentives for compliance or enforcement actions that provide a disincentive to violate the law). The resistant group may not believe in governmental intervention in their business, and they will comply only if "forced" to do so. As such, direct enforcement is often necessary.

The specific orientation of the regulated community varies from State to State, sector to sector, and issue to issue. However, the general structure often follows a "bell curve," with most members of the regulated community falling within the reactive group and fewer in the compliant and resistant groups.

Actions by the Government can shift the orientation of the regulated community to be more compliant. This may be done, for example, by providing effective incentives to support compliance as well as credible threats of enforcement to deter violations.

C. 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.

An important part of national level enforcement of a State's obligations under multilateral environmental agreements is the incorporation of international law into national law. The Guidelines emphasise the importance of clarity, feasibility and thoroughness when it comes to the "enforceability" of national environmental laws implementing MEAs (See Guidelines 40(a-c)).

International agreements (such as MEAs) are generally incorporated into national law by either re-enactment or reference. Incorporation by re-enactment refers to the implementation of international law through the development of detailed national law. Incorporation by reference means the development of national law that requires an international agreement be complied with simply by referring to it, without "translating" all of its details in the national law.

Methods for Incorporating International Environmental Law into National Law

Incorporation by re-enactment. Incorporation by re-enactment translates institutional, administrative, regulatory and penal measures required by the MEA into domestic law at the time when the legislation is passed. This method also allows the state to translate any "soft law" (non-binding) type obligations into "hard" (binding) law if it so desires.

Incorporation by reference. Incorporation by reference has the advantage of speed and simplicity. Ratification need not be delayed for legislative considerations and the giving of "the force of law." Incorporation by reference does not necessarily create the required institutions or administrative arrangement in domestic law.

Adaptively Developing Implementing Legislation

When developing legislation and institutions to implement MEAs, States often consider the approaches of other States (particularly those in the same region and with similar legal systems). Thus, later legislative efforts are able to learn from the successes and challenges of earlier laws in other States.

For example, in the Caribbean, the first developing country to adopt legislation implementing the Montreal Protocol based the law on a UNEP manual on the topic and on Australia's law. Since then, meetings of the Ozone Officer's Network have provided an ongoing venue in which officers can discuss their difficulties and share experiences on best practices [see case study on "Regional Networks and South-South Cooperation to Assist Countries in Complying with the Montreal Protocol" following Guideline 34(c)]. UNEP also participates in these meetings, as it is the main implementing agency for developing licensing systems and customs training. Through these meetings, Caribbean nations have learned from and build upon experiences in other Caribbean nations. In doing so, they have drafted more effective laws that closed potential loopholes.

[34(c)]

The OECD's "Guiding Principles for Reform of Environmental Enforcement Authorities in EECCA" encourage countries to pursue an approach of adaptive management to enhance environmental enforcement with "an iterative regulatory process." In particular, "[a]n enforcement agency should actively promote, and rely on, feedback between inspection and permitting, and between these two and legislative development. Also, better assessment of compliance requires feedback between ambient monitoring and inspection. " To support this process, the Guiding Principles call for the development and application of environmental indicators. For more information, see **http://www.oecd.org/dataoecd/36/51/26756552.pdf**. For more information on environmental enforcement and compliance indicators, see also the case study on INECE, following Guideline 34(c).

[34(c)]
[39]

For more information on adaptive environmental management in the development of environmental legislation, see the discussion on the topic following Guideline 39.

Process for Developing Implementing Laws

There are a variety of options for scope of legislation implementing an MEA. These depend to a certain extent on the MEA, existing legislation that relates to the topic of the MEA, and the capacity of the State. Some options include:

- Developing a single implementing law for an MEA. If there is existing legislation that bears on the topic, this law could either amend or trump prior law. For clarity, it is usually preferable to amend prior legislation, rather than leaving a potentially confusing body of legislation for the regulated community and enforcement officials to try to figure out which of the various laws applies.
- Amending existing legislation. For example, when Belize implemented the Montreal Protocol, it amended its existing pollution control regulations legislation to include the new commitments.

- Where there is a substantial body of existing law, it may be necessary to amend many laws. This can be done through a single law or through more than one legislative enactment.
- Conversely, a State can develop a single law that implements a related cluster of MEAs. For example, a State could adopt a biodiversity law that implements the CBD, CITES, CMS, the Ramsar Convention, and/or other biodiversity-related MEAs. [See discussion below and following Guideline 34(h).] This process can lead to a more coherent and holistic treatment of a particular sector, but it can also entail a wider ranging review of existing legislation.

[34(h)]

In many regards, the most important issue is the process for developing the implementing laws. The process can highlight the relative merits of a law with a narrower or broader scope. Moreover, the process can profoundly influence the effectiveness of the law and the extent to which it is accepted by the regulated community, the public, and by the relevant governmental officials charged with implementing and enforcing the law.

INTER-AGENCY COOPERATION IN DRAFTING A CITES LAW FOR ST. LUCIA

In drafting its national CITES law, St. Lucia started with model legislation prepared by the CITES Secretariat. In order to engage the wide range of governmental offices who are essential to the effective implementation of CITES, St. Lucia convened a working group made up of representatives from the Fisheries Department, Forestry Department, Biodiversity Office, Customs and Excise, Department of Agriculture, Veterinary Services, Quarantine Services, and Department of Commerce to tailor the law to the specific legal, institutional, and social context of St. Lucia. The Attorney General's legal drafting office was the lead collaborating agency with the Fisheries Department.

After a long and instructive process that saw more than 10 iterations of the draft Act, St. Lucia is poised to formally adopt the legislation in 2006. Even before St. Lucia's draft Act was completed, the CITES Secretariat used it as a model for other States around the world needing assistance in drafting implementing legislation, since St. Lucia's version deals with many practical issues.

For more, contact Mrs. Dawn Pierre-Nathoniel at +758-4684141/36 or **deptfish@slumaffe.org**

Laws may be drafted by:

- a line ministry;
- Members of Parliament or the relevant Parliamentary committee (if so provided);
- a working group or inter-sectoral governmental committee (e.g., see case study on St. Lucia below); or
- members of the public (e.g., see case studies from Georgia and Brazil following Guideline 41(k)); or
- consultants (see discussion below on "Assistance in Developing Environmental laws).

To some extent, the process for drafting legislation may be dictated by how an MEA is ratified. For example, in Tajikistan and some other States, if an MEA is approved through presidential decree (rather than by Parliament), then the Government takes the lead in developing implementing legislation.

At the outset, it is important to understand why action is necessary. For example, when South Africa developed its hazardous waste management law, the Government conducted a needs assessment to identify problems with the management of hazardous waste in the State. Then, the lawyers developed draft language to address the problems. The Ministry of Environmental Affairs and Tourism, the provincial governments, and other relevant governmental institutions (e.g., those responsible for transport and agriculture) were then consulted. Following those internal consultations, the Government gazetted the draft law and invited comments from stakeholders and other members of the public. Finally, the law was revised and sent to Parliament.

Rather than reinventing the wheel in the legisltative drafting process, it helps to know what are some of the legal options. States frequently look to:

- Legislation from other States. In reviewing the laws of other States to identify legislative options, the Internet can be a powerful tool for accessing the legal texts. [See Annex VII on "Selected Internet Resources".] In addition, UNEP's Partnership for Development of Environmental Law and Institutions in Africa (PADELIA) has compiled environmental laws from throughout Africa (see **http://www.unep.org/padelia**).
- Model legislation. MEA Secretariats, regional institutions, and NGOs have prepared a variety of model laws to assist in implementing MEAs.

In both instances, States should consider these as illustrative. Some things may translate well to their State; others may not. Even if a law or model law is considered to be "good," it may need to be amended to be effective in the particular legal, social, institutional, and economic context of the State. That said, experiences from other States and model laws can help to facilitate harmonisation of legislation, particularly within a region or sub-region. [For more information on legislative harmonisation, see Guideline 46 and accompanying discussion.]

[46]

Since the effective implementation and enforcement of environmental laws and MEAs often requires many different actors, many States have found it constructive to involve a range of governmental institutions in drafting environmental laws. For example, to enhance the enforceability of environmental laws, some States include enforcement personnel on the legal drafting committees. In Saint Vincent and the Grenadines, police on the drafting committee recommended that environmental legislation specifically mention the role of police in enforcing the law. [Experience had shown that enforcement was greatly enhanced when police were expressly referenced, as they then understood that environmental enforcement was part of their responsibility.] In Jamaica, enforcement personnel have assisted in drafting legislation to implement the CBD and the regional Protocol Concerning Specially Protected Areas and Wildlife (SPAW). Similarly, in the Bahamas, the committee to draft legislation implementing the Montreal Protocol was co-chaired by an enforcement official and a person from the private sector. [The Attorney General was also there to provide legal advice, indicating the implications of one legal formulation or another.]

In most States, implementing laws are drafted by governmental ministries or agencies and discussed by Parliaments. Increasingly, though, Members of Parliament are involved in the legislative process. For example, in its transition to democracy, the Nigerian Government has worked with the Legislature to build their capacity to be involved in developing environmental laws. Now, the Senate and the House each have an environment committee and a committee on habitat.

UNEP's PADELIA has assisted many African States in developing environmental laws. In some of these States, environmental bills had stalled in Parliament because the Members of Parliament had not been properly briefed. Now, whenever there is an environmental bill to be introduced and discussed in Parliament, the Government in partnership with UNEP convenes a workshop for Parliamentarians on the bill. At this workshop, the Government briefs Members of Parliament on the rationale for the bill and explains its salient points. These workshops have facilitated the subsequent review, debate, and passage of environmental laws.

Public review and comment helps to build support for the law that is finally adopted. Public review can also help to strengthen the substantive aspects of the law. As described above, South Africa sought input from stakeholders and members of the public when drafting legislation to manage hazardous waste. Trinidad & Tobago held national-level consultations with a wide range of stakeholders when developing legislation to implement MARPOL (the law passed easily). In addition to enacted legislation and other resources, Jamaica places draft legislation on its web site and has a process for incorporating the comments that the Government receives.

For more information on public pariticpation in making environmental laws, regulations, and policies, see Guideline 41(k) and accompanying text.

[41(k)]

D. Institutional Frameworks

[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.

A State's institutional framework plays a very important role in the way the international and national environmental laws are implemented. Some States delegate responsibility to one agency that serves as the focal point for all environmental matters and cooperates with other agencies in this regard. Other States delegate different responsibilities to various agencies, such as ministries for agriculture, water resources, etc. Although the structure of the institutional frameworks will vary from State to State, some aspects are universal, such as the need for a clear mandate of authority for enforcement bodies and the establishment of policies and procedures that allow enforcement to be carried out in a fair and consistent manner.

Guideline 41, addressing institutional frameworks, focuses on the main roles, responsibilities, and authority of the agency or agencies charged with the implementation of national environmental law established by a State to meet its obligations under an MEA.

Designation of Responsibilities for Public Awareness and Education

[41] *(a) (iv) Designation of responsibilities to agencies for: Awareness raising and publicity, in particular for the regulated community, and education for the general public;*

One of the most important activities that the implementing agency can engage in is awareness raising and publicity. Often, environmental laws are not purposefully violated, but violations instead are the result of ignorance on the part of the regulated community and the general public. Environmental awareness is also useful in building the credibility of the agency and its work as well as fostering support for, and generating creativity in the design of an enforcement programme.

Identifying the Regulated Community. The first step in ensuring that the regulated community is aware of the relevant laws and regulations is identifying which groups are regulated, and determining as far as possible their sophistication, ability, motivation, and willingness to comply. An accurate profile of the regulated community helps policymakers focus the compliance strategy (including both compliance promotion and enforcement response) to optimize its effectiveness. The process of profiling the regulated communities makes the regulated community aware of the requirements, aware that the enforcement program officials know whom they are, and aware that they will be expected to comply. This contact with the regulated community is the first step in creating a perception of an effective enforcement program. The regulated community may include:

- Corporations;
- Small businesses;
- Public agencies/government-owned facilities; and
- Individuals.

Information that can be useful in designing a compliance strategy includes:

- Identifying information, e.g. name of facility;
- Geographic location, e.g. longitude and latitude, street address;
- Type of business or operation;
- Any existing license, permit, or product registration numbers;
- Types and quantities of regulated materials or emissions at the facility; and
- Risk associated with releases (if this has been calculated).

For more information on education and public awareness, see the case studies, explanatory text, and other reference materials relating to Guidelines 30, 31, 41(m), and 44.

[30]
[31]
[41(m)]
[44]

Clear Authority for Enforcement Bodies

[41] *(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.

Without a mandate to take actions necessary to enforce the laws they are charged with upholding, enforcement agencies are powerless to ensure compliance with the laws. Laws and regulations delegating authority to enforcement agencies and related bodies should clearly provide that these entities may undertake the necessary actions such as having access to the relevant facilities and imposing sanctions.

Response mechanisms imposed by enforcement authorities are designed to achieve one or more of the following:

- Return violators to compliance;
- Impose a sanction;
- Remove the economic benefit of non-compliance;
- Require that specific action be taken to test, monitor or provide information;
- Correct environmental damages; and
- Correct internal company management problems.

(Source: INECE).

Response mechanisms can either be formal (for example, civil, criminal or administrative judicial enforcement) or informal (for example, telephone calls, inspection, warning letters or notice of violation). The type of "authority" determines the "response" the enforcement agency/official sets in motion to elicit compliance with the law.

States can develop legal authorities and response mechanisms that address the specific environmental issue or media being regulated. For example, this may be the authority to inspect hazardous waste sites and authority to issue penalties for violations of hazardous waste regulations. Such authorities may provide for administrative, civil, and/or criminal sanctions. At the same time, States could also make use of more general statutory authority and sanctions that might be implicated in an environmental violation – for example, general fraud and misrepresentation statutes, or tax and customs regulations for illegal trade – as these can bolster the environmental authority.

Julian Newman/EIA

Indonesian customs officers inspect a seizure of smuggled CFC cylinders produced in China, Tangjung Priok port, Jakarta, Indonesia, 2004

[32]
[41(a)(v)]
[41(i)]
[41(o)]
[43(c)]
[43(d)]
[46]
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In addition to the case studies below, additional discussion and examples relating to judicial matters may be found following Guidelines 32, 41(a)(v), 41(i), 41(o), 43(c), 43(d), 46, and 47.

Considerations in the Hiring, Functioning, and Development of Inspectors

There are a number of ways to promote the integrity and professionalism of inspectors and other enforcement personnel, and ultimately the capacity of inspectors to conduct their duties effectively. These include legal and management measures that seek to:

- Ensure that staff are qualified to perform the necessary functions of their jobs. This can be done by establishing hiring criteria that set standards for academic qualifications, personal attributes, and general suitability (e.g., various aptitudes and psychometric profile, if appropriate);
- Protect the jobs of staff if they make politically unpopular decisions (for example by providing civil service protections for employees);
- Provide for adequate incentives, social protection, and compensation (so that inspectors are not as susceptible to bribes or other forms of corruption);
- Provide bonuses and other types of remuneration for exceptional performance;
- Establish objective criteria for staff promotion, as well as hiring and review;
- Ensure that newly hired staff have introductory training so that they understand their professional roles, the limits of their responsibilities and powers, and the basic application of their professional skills to environmental enforcement. This initial training can consist of formal courses, self-learning, and practical experience gained on-the-job particularly under supervision by a senior member of staff; and
- Provide opportunities for ongoing professional development and training

(including cross-sectoral and management training). Training courses, guidance manuals, and networking are standard approaches and are well worth pursuing. Training should be assessed to check the effectiveness of the delivery mechanism and to determine whether it has been beneficial to the person and the organisation.

As noted, these measures may be set through laws, regulations, or institutional hiring policies and employment manuals — and often are done through a combination of such approaches. For more information, see Principle 20 of the OECD's "Guiding Principles for Reform of Environmental Enforcement Authorities in EECCA" (**http://www.oecd.org/dataoecd/36/51/26756552.pdf**) or the OECD Policy Brief "Public Service as an Employer of Choice" (**http://www.oecd.org/dataoecd/37/0/1937348.pdf**). Also see the IMPEL Report on Best Practices concerning Training and Qualification for Environmental Inspectors (**http://europa.eu.int/comm/environment/impel/pdf/env_inspectors_finreport.pdf**).

☑ CHECKLIST FOR TYPES OF ENFORCEMENT AUTHORITY*

Following is a list of types of enforcement authority, which may be applied through administrative, civil, or criminal measures. This list is illustrative, and it is neither exclusive nor exhaustive.

Remedial Actions

- ❑ Authority to impose a schedule for compliance
- ❑ Authority to permanently shutdown part of an operation
- ❑ Authority to temporarily shut down certain parts of operations or practices
- ❑ Authority to permanently shut down an entire facility
- ❑ Authority to temporarily shut down an entire facility
- ❑ Authority to deny a permit
- ❑ Authority to revoke a permit
- ❑ Authority to require a facility to clean up part of the environment
- ❑ Emergency powers to enter and correct immediate dangers to the local population or environment
- ❑ Authority to seek compensation for damage caused by the violation

Other

- ❑ Authority to require specific testing and reporting
- ❑ Authority to impose specific labeling requirements
- ❑ Authority to require monitoring and reporting
- ❑ Authority to request information on industrial processes
- ❑ Authority to require specialised training (e.g. in emergency response to spills) for facility employees
- ❑ Authority to require a facility to undergo an environmental audit

Sanctions

- ❑ Authority to impose a monetary penalty with specified amounts per day per violation
- ❑ Authority to seek imprisonment (a jail term)
- ❑ Authority to seek punitive damages or fines within specified limits
- ❑ Authority to seize property
- ❑ Authority to seek reimbursement for government clean-up expenses
- ❑ Authority to bar a facility or company from government loans, guarantees, or contracts
- ❑ Authority to require service or community work to benefit the environment

For more information on sanctions, see discussion following Guideline 40(c).

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* This list of enforcement authorities is a hybrid and does not appear in any one law or State. It is an example of types of authorities that may be made available to enforcement officials through environmental laws. These authorities may be either direct authorities or the authority to seek a court order to impose the sanction. (Source: INECE)

E. International Cooperation and Coordination in Enforcement Efforts

[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.*

Enforcement of laws implementing MEAs can pose a difficult challenge for many States. Opportunities for cooperation and coordination, although many, need to be increased to improve the capacity and capability of all States to implement their laws and achieve compliance with MEAs. As with compliance-related issues, national enforcement plans, initiatives and actions can greatly benefit from cooperative efforts, whether at the bilateral, regional or global level. This is because, in spite of the national nature of many enforcement efforts, there are countless ways in which States seeking to implement and enforce the terms of an MEA can learn from one another and support one another's efforts. Areas such as consistency in laws and regulations, improved judicial coordination, strengthened institutional frameworks and capacity building all deserve special attention in this regard.

☑ CHECKLIST FOR DEVELOPING PROJECTS TO FACILITATE INTERNATIONAL COOPERATION IN ENFORCEMENT

Many of the initiatives set forth in Guidelines 45-49 may involve securing funding for capacity building, pilot projects, and other activities to strengthen international coordination and cooperation in implementing MEAs. In pursuing such activities, States may:

- ❑ Develop and retain staff with the necessary expertise in developing and managing project proposals.
- ❑ Identify potential projects that are replicable, since such projects often receive preferential funding. Replicable projects are those that can serve as a model for other nations or regions.
- ❑ Ensure that the projects respond to local priorities, and not simply priorities that are set by external bodies. Ideally, the projects will reflect priorities of both the donors and the recipients, even if those priorities are not necessarily the same.
- ❑ Identify alternative and complementary sources of funding, which may include funding from the MEA Secretariat, multilateral institutions (such as the World Bank, UNDP, and GEF), and bilateral donors.
- ❑ Ensure that the project utilises and strengthens local capacity and institutions.
- ❑ Consider working with regional institutions that provide established forums for collaboration and can provide a regional mechanism for exchanging experiences and an "institutional memory."
- ❑ If the project is (or should be) part of a long-term initiative, consider how to maintain the project can be sustained over the long term.
- ❑ Maintain complete records of the project within the territory of the State.
- ❑ Foster close coordination between the focal point of the activity and the nation technical and political focal points.
- ❑ Apprise the MEA Secretariat of the project, particularly to the extent it improves the State's compliance with the MEA.

This Checklist builds upon a similar checklist in the 1999 CARICOM Guidelines for MEA Implementation.

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.

Consistency in laws and regulations implementing an MEA, including the provisions therein that provide for penalties and sanctions, are much more effective if they are developed and applied in a consistent manner. Environmental crimes with transboundary aspects (such as the illegal movement across borders of restricted substances) are more likely to be deterred if the relevant laws contain consistent terms and if violations have clear and consistent consequences (such as confiscation of contraband and the application of civil and criminal penalties). States can work together, either independently or through an international organisation such as UNEP, to ensure that a consistent and effective approach is taken in the development and application of laws prohibiting and providing penalties for environmental violations.

For example, if two States are Parties to CITES and an individual in one of these States illegally exports an animal protected by the Convention to the other State without appropriate documentation, this unlawful action can best be prosecuted when there are consistent laws in both States. If the laws implementing CITES in both States contain consistent definitions of the relevant terms (such as "specimen" and "trade") and similar document issuance or acceptance procedures, then prosecution efforts will be bolstered by a clear-cut case. In the same vein, vagueness or inconsistency in the laws of the importing or exporting States will hinder efforts to prosecute this violation, which in turn can lead to more violations as loopholes in the laws are perceived by those who seek to profit by violating CITES.

There are a number of ways in which foster improved international collaboration to fight environmental crime or violation of national environmental laws with transboundary implications:

- Environmental laws and regulations must feature adequate and appropriate deterrent measures — correct penalties relevant to the gravity of the offence; environmental restitution and clearly defined procedures for confiscation of equipment, goods and contraband and/or disposal of confiscated material, connected with the environmental crime.
- National laws and regulations implementing an MEA, must be implemented and applied in a way that is consistent with the enacting State's international obligations under the relevant MEA which makes illegal the importation, trafficking or acquisition of goods, wastes and any other materials.
- Appropriate authority to make environmental crime punishable by criminal sanctions that take into account the nature of environmental law violation.

Criminal Sanctions for Violations of Environmental Law

The use of criminal sanctions as a deterrent against some of the more serious forms of environmental crime has gained widespread acceptance and has been central to getting more serious resources assigned to tackling environmental crime by law enforcement organisations.

The latter point is important. Penalties not only determine the deterrent effect of legislation but also serve to specify the seriousness with which offences are pursued by enforcement agencies.

Waste dumping especially with "knowing endangerment" — endangering the health of others by knowingly violating environmental laws — tends to command the most serious penalties of between ten and fifteen years in jail. Poaching charismatic animals also routinely attracts criminal penalties as severe as ten years in jail in some range states, although wild life trafficking outside range states tends to be treated more leniently.

Where there are difficulties with pursuing criminal prosecutions — for example, it may be difficult to prove intent to violate laws or to acquire evidence of guilt to the criminal standards of "beyond reasonable doubt" — strict liability procedures may prove more effective. These sanction a company or individual for failure to exercise due diligence and operate irrespective of fault or intention. (Source: Gavin Hayman & Duncan Brack, *International Environmental Crime:* The Nature and Control of Environmental Black Markets – Workshop Report (RIIA 2002), available at **http://europa.eu.int/comm/environment/crime/env_crime_workshop.pdf**

Criminalizing the Importation and Trafficking of Products in Violation of Other States' Environmental Laws

States may bolster consistency in law enforcement across borders and more effectively address transnational environmental crime and illegal trade by creating domestic laws that render illegal the importation, trafficking, or acquisition of goods, wastes, and other materials in violation of other States' environmental laws. In other words, a State may render domestic trade in a product illegal if that product were taken in violation of another State's laws.

For example, in the United States, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife already taken, possessed, transported, or sold in violation of any wildlife-related state, federal, tribal, or foreign laws or regulations. 16 U.S.C. sec. 3372(a). Lacey Act violations can be misdemeanors or felonies, depending on a number of factors, including the defendant's knowledge of the underlying legal violations. The Lacey Act serves as a powerful tool for the United States to address illegal trade in fish and wildlife, because it authorizes enforcement in the United States for violations of foreign laws when those goods enter the United States. Of course, to successfully enforce such laws, significant cooperation is needed from the State where the underlying violation is alleged to have occurred, including certification of foreign law and other types of legal assistance.

In addition to the case studies below, additional discussion and examples relating to judicial matters may be found following Guidelines 32, 41(a)(v), 41(c)(vi), 41(i), 41(o), 43(c), 43(d), and 47.

[32]
[41(a)(v)]
[41(c)(vi)]
[41(i)]
[41(0)]
[43(c)]
[43(d)]
[47]

The North American Agreement on Environmental Cooperation (NAAEC)

The North American Agreement on Environmental Cooperation (NAAEC), which was negotiated and is being implemented in parallel to the North American Free Trade Agreement (NAFTA) provides a good example of a regional effort to promote environmental law and enforcement. NAAEC requires that each Party (i.e. Canada, United States, and Mexico) ensures that its laws provide for high levels of environmental protection. Each Party agreed to effectively enforce its environmental laws through appropriate means, such as the appointment and training of inspectors, monitoring compliance, and pursuing the necessary legal means to seek appropriate remedies for violations. The Commission for Environmental Cooperation (CEC) created under the NAAEC is authorized to develop joint recommendations on approaches to environmental compliance and enforcement. The tendency therefore is that the Parties will endeavour together to foster effective environmental enforcement within the region. Each Party must also provide periodic reports on the state of its environment, develop environmental emergency preparedness measures, promote environmental education, further research and development, assess (as appropriate) environmental impacts, and promote the use of economic instruments. The CEC was created by NAAEC to enhance regional environmental cooperation, reduce potential trade and environmental conflicts, and promote the effective enforcement of environmental law.

For more information, see **http://www.cec.org** *(in English, French, and Spanish) or contact* **info@cec.org**

The European Commission Environment Directorate-General

The Environment DG is one of the 36 Directorates-General (DGs) and specialised services which make up the European Commission. Its main role is to initiate and define new environmental legislation and to ensure that measures, which have been agreed, are actually put into practice in Member States. The resulting uniformity in the approach to environmental violations by EU States greatly enhances the effectiveness of enforcement efforts in crimes with transboundary aspects.

For more information, see **http://europa.eu.int/comm/dgs/environment/index_en.htm**

National and International Points of Contact

[48] *(f) Designation of appropriate national and international points of contact to be forwarded to the UNEP enforcement database;*

Knowing who is responsible for enforcement matters at the national level can greatly facilitate enforcement cooperation efforts. Necessary information for reaching those responsible — all relevant national and international points of contact — such as full addresses, phone numbers, fax numbers, e-mail addresses, and the contact person's name, can be forwarded to the UNEP enforcement database.

UNEP has developed and is updating a database of national enforcement officials, including their full coordinates. Eventually, it will be accessible on the UNEP website at www.unep.org. In the meantime, UNEP encourage Parties to share and update the focal point contacts.

Contact information regarding CITES enforcement authorities is being collected by the Secretariat (pursuant to Notification to the Parties No. 2004/077 of 9 December 2004), and is accessible through the "National Contacts" section of the CITES Web site **http://www.cites.org**

The Web site for the International Network for Environmental Compliance and Enforcement (INECE) **(http://www.inece.org)** provides contact information for environmental enforcement officers and institutions in various States.

Many of the specific MEAs have on-line databases of their respective focal points. These are discussed, with Web links, following Guideline 24.