INECE

International Network for Environmental Compliance and Enforcement

7th International Conference on Environmental Compliance and Enforcement

9 -15 April 2005
Marrakech, Morocco

Proceedings Volume 2

7th International Conference on Environmental Compliance and Enforcement

Marrakech, Morocco
9-15 April 2005

Moroccan Ministry of the Territory Planning
Water and the Environment

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SEVENTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

CONFERENCE PROCEEDINGS
VOLUME 2

9-15 April 2005
Marrakech, Morocco

Editors:

Mr. Jo Gerardu, VROM, The Netherlands
Mr. Davis Jones, US EPA
Mr. Kenneth Markowitz, INECE Secretariat
Mr. Durwood Zaelke, INECE Secretariat

These Proceedings, Volume 2, include papers prepared by speakers, topic experts, conference participants and other interested parties for the Seventh International Conference on Environmental Compliance and Enforcement, April 9-15, 2005 in Marrakech, Morocco.

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PREFACE

These Proceedings principally contain reports from the panels and workshops of the Seventh International Conference on Environmental Compliance and Enforcement, held in Marrakech, Morocco from 9-15 April 2005. There are also some articles submitted by Conference participants and other enforcement professionals, to add to those presented in the first volume of Proceedings.

These reports and papers present empowering concepts, insights, and experiences, as well as important ideas for INECE, and are made available to enforcement practitioners throughout the world to further our common endeavor. These materials, like the first volume prepared prior to the conference, are also available through the INECE web site (www.inece.org), along with the proceedings of the previous six INECE Conferences.

The theme of the INECE Seventh Conference was MAKING LAW WORK: ENVIRONMENTAL COMPLIANCE AND SUSTAINABLE DEVELOPMENT, which built upon the premise that the integrity of our ecosystems, the conservation and wise use of our natural resources, and our progress toward sustainable development all require a strong and effective legal system, with strong and effective compliance efforts, including the right mix of enforcement and compliance assistance.

INECE's Seventh International Conference brought together enforcement officials from 63 countries and 124 organizations, representing all regions of the world – developed and developing – to share experiences and make plans to take environmental compliance and enforcement efforts to the next level. Ultimately, the success of INECE's Seventh International Conference was in the strength of the individual commitments pledged in Marrakech; the durability of the bonds forged among local, regional, and international networks and practitioners; and the powerful and innovative ideas and projects spurred at the Conference and beyond. It is our hope that these and the other results that emerged become forces for change and a call for action by governments and nongovernmental organizations alike to strengthen the rule of law for sustainable development, to enforce compliance with environmental law, and to make law work.

On behalf of the Executive Planning Committee and the Secretariat staff, we look forward to your continued and productive use of INECE's Seventh International Conference materials. Comments and suggestions should be sent to the INECE Secretariat by email at inece@inece.org, by fax to 1-202-338-1810, or by mail to 2141 Wisconsin Avenue NW, Suite D2, Washington, DC, 20007.

THE EDITORS

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OPENING KEYNOTE ADDRESS: MINISTER MOHAMED EL YAZGHI, MINISTRY OF TERRITORY PLANNING, WATER AND THE ENVIRONMENT, MOROCCO

Mr. President of INECE, Mr. Wali of the Marrakech-Tensift Region, Honorable Members of INECE, Ladies and Gentlemen,

It is an honor for me to address your prestigious assembly on the occasion of the 7th conference of your network in Marrakech. On behalf of the Government of my country, I would like to welcome you and to tell how proud we are for your having chosen Morocco, the Land of Peace, of conviviality and of a great civilization. Your presence here in Marrakech today is a message of confidence and friendship which we appreciate very much; it is a welcomed addition to other events at the international level that focus on environmental protection and on the search for ways and means to promote the good environmental cause in the world today.

Allow me, ladies and gentlemen, to mention but two international environmental events that were hosted by this charming city, Marrakech: COP7 which was held from 21 October to 9 November 2001 and the International Partnership Forum on water and energy which took place here only a couple of weeks ago. This goes to say that by choosing this venue for debating the issue of environmental law compliance and enforcement, INECE strengthens in a way the environmental vocation of Marrakech and by the same token draws the attention of the international community to the fundamental dimension of the environmental agenda, namely the need to comply and to apply the rule of law.

Ladies and Gentlemen,

It is my pleasure to take the opportunity of your conference to give you a broad idea about the environmental legislative and regulatory situation in my country. Like most other countries, the Moroccan legal arsenal consists of numerous texts with unequal legal weight: laws, decrees, as well as internal administrative circulars that contain legal stipulations of an environmental nature. Some of these texts are indeed old but they have the merit of covering the environmental field in its broad sense: classified sites, water, forests, cultural monuments, protected areas, quarries, mining, fuels, etc.

However, in 2003, environmental legislation in my country witnessed a leap forward with the adoption by parliament of three law proposals that were entirely dedicated to environment: Law 11-03 pertaining to environmental protection and improvement; it spells out the basic rules and general principles of the national policy in this area. Then there is Law 12-03 pertaining to environmental impact studies aimed at subjecting every project that is likely to harm human health, fauna, soil, climate, cultural heritage or the environment in general.

On another level and in parallel with these texts, Morocco contributes to international environmental law, particularly by participating in major international conferences dedicated to the environment (Stockholm, Rio and Johannesburg). It is worth reminding, in this regard, that the Moroccan delegation to the Johannesburg Conference was presided by His Majesty Mohamed VI, which goes to show the great interest decision makers of my country have for the environmental agenda. It is also worth reminding that my country is party to around one hundred environmental conventions and agreements and it is striving to integrate into its internal law most of the international principles and commitments.

But, like most countries, it must be admitted that Morocco encounters serious difficulties in implementing environmental regulations. Granted, these difficulties are not insurmountable; especially since there

is a real political will in my country to go forward with sustainable development strategy, natural resource protection and the fight against pollution.

Mr. President, Ladies and Gentlemen,

I would like at this stage, as a contribution to your debate, to put before your honorable assembly, some general ideas as to why environmental legislation is met with important obstacles when it comes to implementation. There are, in my view, four (4) fundamental explanations for this situation:

In the first instance, I find that one of the reasons lies precisely in the very objective pursued by environmental law in modern countries, namely the fight against pollution and the protection of scarce natural resources, which require a change in behavior not only of individuals but also of entire communities. And it is not an easy task to make people do away with their old habits and make them internalize non-harmful environmental behaviors.

Then, I think the conditions under which legal and regulatory standards are established are not alas unrelated to those standards at the level of implementation. In fact, when it comes to formulating, examining or adopting legal rules, the legislative assemblies and decision makers do not take sufficiently into consideration administrative and/or social conditions for implementation; hence this oversight is translated into a gap between what the text stipulates and the actual use made of it in reality. This observation is not the exclusive lot of developing countries; far from that, developed nations face similar difficulties in this regard as well.

The third reason lies with the deficiency of implementing tools; this deficiency is particularly due to the multitude of structures and authorities concerned and to the difficulty of coordination, for information sharing and for the means of an optimal implementation of environmental regulations. As a matter of fact, it should be noted that, if today the creation of new structures is widely justified, the lack of coherence and cooperation between those structures constitutes a real source of dysfunction which is inevitably reflected at the level of applicability and respect for environmental regulations.

Finally, one can never stress strongly enough the importance of human capacity building in the implementation of those rules. Without the men and women endowed with both legal and technical training, the texts cannot impose themselves by themselves. And yet we now know that the frontiers between the fields of knowledge and the barriers between academic branches reduce the sphere of legal teaching significantly. The legal approach to environmental issues remains poorly developed among the human resources working directly on environmental problems. It goes without saying that legal capacity building among individuals and institutions is the best way to secure a high level of applicability and compliance with environmental rules and regulations.

Mr. President, Ladies and Gentlemen,

This manifestation was an excellent occasion for the consolidation of the cooperation as regards enforcement and compliance of the environmental laws in Maghreb countries. The positive results of the conference held on this Saturday forecast well the development of a profitable partnership as regards environmental law compliance in this area of North Africa.

I am convinced that the presentations which will be made at the various panels and workshops planned within the framework of your conference will enable the participants to be updated on the general progress of the movement on environmental law in various countries belonging to other continents. Your recommendations and reports are eagerly awaited; they will be, of course, of great use for promoting the practice of good environmental governance around the world. I wish you full success in your deliberations and renew my thanks for having chosen Morocco for your 7th conference.

MARRAKECH STATEMENT

Making Law Work for People, Environment, and Sustainable Development

Co-Chair and Executive Planning Committee Final Conference Statement
7th INECE International Conference on Compliance and Enforcement
in Marrakech, Morocco

INTRODUCTION

1. At this 7th International Conference of the International Network on Environmental Compliance and Enforcement (INECE) participants from more than sixty developing and developed countries from governments, international, and non-governmental organizations gathered in Marrakech, Morocco, to affirm the role of environmental compliance and enforcement in supporting the rule of law, strengthening good governance, and securing progress towards sustainable development.

THE ROLE OF INECE

2. As the only global network of independent experts dedicated to pursuing the rule of law, good environmental governance, and sustainable development at all levels of governance, local to global, INECE links the environmental compliance and enforcement efforts of more than 4,000 practitioners – inspectors, prosecutors, regulators, parliamentarians, judges, and NGOs – from 120 countries, through training and capacity building programs, raising awareness, and enhancing enforcement cooperation.

3. INECE's goals are to raise awareness of compliance and enforcement, develop networks for enforcement cooperation, and strengthen capacity to implement and enforce environmental requirements. Founded in 1990 by the environmental agencies of the Netherlands and the United States, in partnership with UNEP, the European Commission, the World Bank, the OECD and other organizations, INECE has played a crucial role in strengthening environmental compliance and enforcement around the world.

4. At this international meeting, participants identified new opportunities for INECE to strengthen environmental compliance and enforcement by closing the "compliance gap", enhancing capacity, and implementing the laws agreed at the national and international level, to promote human well-being, ensure a competitive and viable economy, conserve and improve the environment, and help achieve sustainable development.

RECOGNIZING ACHIEVEMENTS

5. Over the past 30 years, considerable efforts have been made to improve management of human relationships with nature. Countries have created environmental agencies, negotiated multilateral agreements, and undertaken new initiatives at the local, national, and international levels to protect human health, conserve biodiversity and wildlife, and manage natural resources. These efforts have involved leaders in government, parliaments, and the judiciary, in international organizations, businesses, and civil society, and in other sectors of society. Environmental officials, in particular, have often been at the forefront of efforts to promote the rule of law and good governance.

ACKNOWLEDGING CHALLENGES

6. These achievements are significant. But also acknowledged are the growing challenges. There is a need to further

strengthen our stewardship of the Earth and of all living species and natural resources, the foundation of social and economic development and the heritage of our children and grandchildren, in accordance with the precepts of sustainable development. Human activities have changed the Earth's ecosystems and climate more in the last 50 years than in any comparable period in human history. According to the Millennium Ecosystem Assessment, the most systematic survey of the state of the planet, the deteriorating condition of the environment will, unless addressed, compromise efforts to address poverty, hunger and health, as well as other development objectives established in the Millennium Development Goals.

IMPLEMENTING THE MILLENNIUM DEVELOPMENT GOALS AND WSSD

7. These challenges can be addressed. The Millennium Development Goals and the outcomes of the World Summit on Sustainable Development can be implemented, but it will require additional efforts. Faced with growing environmental challenges and persistent poverty for billions, achieving these development goals – particularly those of integrating "the principles of sustainable development into country policies and programmes and reversing the losses of environmental resources" – will require a significant commitment to strengthen governance, the rule of law, and compliance.

STRENGTHENING GOVERNANCE AND THE RULE OF LAW

8. Sustainable development depends upon good governance, good governance depends upon the rule of law, and the rule of law depends upon effective compliance and enforcement. Good governance is characterized by institutions that are open, participatory, accountable, predictable, and transparent. The rule of law supports these characteristics by ensuring that rules are applied consistently, efficiently, and fairly by independent institutions to all, including those who govern. Securing compliance with laws is easier when there is public participation in their development, and they are founded on fundamental social values and norms. Law must also respect principles of intra- and inter-generational equity, which call for poverty alleviation, the protection of human rights, and respect for future generations. Yet, even as the number of instruments and institutions has increased, most indicators of environmental quality continue to decline. A key reason is the failure to invest in compliance and enforcement.

THE BENEFITS OF INVESTING IN COMPLIANCE AND ENFORCEMENT

9. Investing in compliance and enforcement benefits the public by securing a healthier and safer environment for themselves and their children. It benefits individuals, firms and others in the regulated community by ensuring a level playing field governed by clear rules applied in a fair and consistent manner. Economically, firms meeting or exceeding environmental standards regularly build customer loyalty, increase efficiency, and enhance their profits. Countries benefit by creating a predictable investment climate based on the rule of law thereby promoting economic development. And through strengthening compliance with international obligations, countries ensure that multilateral environmental agreements are implemented by all parties through effective domestic action.

STRENGTHENING EFFORTS AT DOMESTIC AND INTERNATIONAL LEVELS

10. The need to strengthen compliance was recognized by heads of state and government at the 1992 Rio Earth Summit. Agenda 21, the blueprint for sustainability, thus directs countries to collaborate to enhance their compliance and enforcement capacity. At the international level, countries must respect their commitments in multilateral environmental agreements. At the domestic level, efforts are required at

all stages of the regulatory cycle – design, implementation, enforcement, evaluation and feedback – to ensure regulatory systems are feasible and fair, effective and efficient.

DESIGNING RULES FOR COMPLIANCE

11. Laws and policies must be designed with compliance and enforceability in mind. For the regulated community to comply, it must be aware of the rules, willing to comply, and able to comply. Laws must therefore be no more complex than necessary, cost-effective to comply with, and consider the social, cultural and psychological profile of the regulated community. Rules running counter to cultural practices or ignoring economic incentives are likely to fail. Rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.

ENHANCING COMPLIANCE ASSISTANCE AND INCENTIVES

12. Well designed rules may still pose difficulties to those who lack technical, financial, or administrative capacity. Securing compliance therefore calls for renewed efforts to raise awareness of the law, to strengthen compliance assistance programs, and to enhance incentives for compliance. Efforts at the national level must be designed to address the needs of small- and medium-sized enterprises, and, at the international level, the needs of the least developed and developing countries. International institutions and donors have a particular role to play in supporting these efforts.

ADDRESSING NON-COMPLIANCE

13. Countries have a responsibility to protect those who comply with the law not merely by assisting those who cannot comply, but by finding and sanctioning those who do not comply. Compliance assistance and incentives are only effective if backed by a credible threat of penalties and sanctions. By communicating the outcomes of enforcement actions, penalties and sanctions also deter others from breaking the rules. Efforts to address non-compliance should be firm but fair, transparent and consistent, and proportionate to the magnitude of public risks, the seriousness of the violation, and the need for deterrence. At each stage in the regulatory process, efforts should be made to evaluate effectiveness and to feed the results back into activities to enhance the contribution of key actors in strengthening compliance and enforcement.

THE CONTRIBUTION OF KEY ACTORS IN STRENGTHENING COMPLIANCE AND ENFORCEMENT

14. Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment. Legislators play a key role in creating legislation that can be effectively enforced to achieve its goals. The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and effectively.

15. The regulated community and the public have a responsibility to comply with the letter and spirit of the law and to encourage compliance by others. Non-governmental organizations play a leading role in public education and assisting enforcement agencies. The media has a responsibility to raise public awareness by providing objective analysis and information about environmental challenges and efforts to address them. The international community, including donors and international organizations, has a responsibility to strengthen domestic efforts through capacity building, technical and financial support,

and by promoting an enabling environment for more effective compliance and enforcement.

A PROGRAM OF ACTION

16. The Co-Chairs and Executive Planning Committee of this International Conference call on regulators, legislators, courts, networks, negotiators, tribunals, development banks, the media, businesses, industry certifiers, lawyers, scientists, engineers, financial experts, NGOs, and individuals working at all levels – local, national, regional, and international – to:

a. Recognize the imperiled state of the environment and the need to build capacity to establish and strengthen the rule of law, good governance, and ecologically sustainable development in order to conserve natural resources and ensure human health, ecosystem integrity, and economic development.

b. Urge the international community and policymakers in each and every country to acknowledge the importance of compliance and enforcement with environmental laws at all levels as critical to achieving rule of law, good governance, and ecologically sustainable development.

c. Affirm the importance of providing capacity building to those countries, firms, and individuals that lack the capacity to comply, and of identifying cases of noncompliance and enforcing appropriate and equitable sanctions to punish those that violate environmental laws and to deter others.

d. Improve the ability of environmental agencies to gather and analyze information to develop effective and efficient environmental regulatory programs.

STRENGTHENING THE CONTRIBUTION OF INECE

17. INECE has a crucial role in advancing these objectives and improving the institutional capacity of, and coordination among, major actors in the field of environmental governance. INECE is pursuing these goals through a diverse array of activities including, for example, through developing accepted performance measures. To help public agencies strengthen their management and improve their effectiveness and efficiency, INECE is developing indicators that measure environmental compliance and enforcement. INECE offers teaching, training and capacity building courses, and maintains extensive internet resources, such as interactive forums, digital libraries, and searchable databases. Through international conferences, INECE presents practitioners world-wide with the opportunity to acquire the knowledge and build the long-term relationships needed to tackle the challenges of environmental compliance and enforcement. To strengthen these efforts and to deepen the contribution of INECE to its members, governments, and the public the Co-Chairs and Executive Planning Committee of INECE:

a. Call upon all INECE practitioners to share information and practices, through INECE and other channels, to promote compliance and enforcement that ensures that environmental regimes are effective and efficient.

b. Encourage INECE to continue expanding its training and capacity building initiatives, and to strengthen its partnerships with international, regional, and national organizations, as well as NGOs and academic institutions, with a view to pooling their respective comparative advantages, avoiding duplication, and optimizing the use of available resources.

c. Reaffirm INECE's commitment to strengthen and develop regional networks, especially in Latin America, Asia, Eastern Europe, Caucasus and Central Asia, and Africa, including a new network for North Africa.

d. Recognize the important role non-governmental organizations can play in enforcement and compliance, as independent actors and as supporters to government enforcement and compliance efforts, and call on INECE to support their creation and contribution to compliance and enforcement.

e. Encourage INECE to continue its efforts to collaborate with national part-

ners, academic institutions, international organizations and other partners in the research community to develop and help implement a multidisciplinary research agenda that supports the INECE mission.

f. Call upon INECE to continue to develop and pilot INECE Environmental Compliance and Enforcement Indicators, in cooperation with regional networks, with a view to improving performance, public policy decisions, and environmental governance globally, as well as the quality of the environment.

g. Call on INECE to strengthen its work in collaboration with other partners to enhance the capacity of parliamentarians in the field of international law and institutions for sustainable development.

h. Call on INECE to encourage networks of judges for the environment and to organize a forum where different networks can meet and exchange views.

i. Call on INECE to work with partner organizations to collect success stories, case law, and other practical examples of the application of the principles set out in the 1992 Rio Declaration on Environment and Development, in accordance with the INECE strategic plan's objective of analyzing "key regional and international developments of relevance to the work of INECE".

j. Call on INECE to promote best practice on citizen involvement and fundamental citizen rights, such as access to information, public participation, and access to justice.

k. Call on INECE to develop a wildlife enforcement and compliance network, inviting the participation of national and international enforcement agencies, institutions and specific networks (e.g. INTERPOL Working Group on Wildlife Crime and the Lusaka Agreement Task Force), as well as NGOs with expertise in enforcement and compliance and other relevant partners.

l. Commit INECE to build upon its accomplishments including its conferences, publications, training courses, and website, and to develop new products and services to support a growing network of experts working on compliance and enforcement world-wide.

CONCLUSION

18. The Conference's Co-Chairs and the Executive Planning Committee gratefully acknowledge the assistance and support of the Moroccan government and express our deep gratitude for the generous hospitality provided. We also thank our sponsors and partner organizations, including the US Environmental Protection Agency, the Ministry of Housing, Spatial Planning and the Environment in The Netherlands, the US Department of State, the Finnish Ministry of the Environment, the European Commission, the Environment Agency of England and Wales, the World Bank, the OECD, Environment Canada, and the International Fund for Animal Welfare, as well as the embassies of the United States and The Netherlands.

19. The challenge of our generation is to change the attitudes and actions of individuals, organizations and the regulated community and to modernize our regulatory systems to ensure sustainable development for the generations to come. History will judge us harshly if we fail to foster a stronger sense of responsibility for the Earth.

20. Key to meeting this challenge is building fair and sustainable societies based on the rule of law and principles of good governance. This is a task that many – including INECE and its partners – have taken up. As we confront this challenge, we urge new partners to join us in developing and implementing a program of action to strengthen compliance and enforcement, and to advance the broader effort of converting common principles and shared values into the meaningful action required to create a better and more sustainable future for all of the world's people.

DÉCLARATION DE MARRAKECH

Faire fonctionner le droit pour les populations, l'environnement et le développement durable

Déclaration finale du co-président et du comité exécutif de planification
7ième conférence internationale sur la conformité et l'application de la loi en environnement tenue à Marrakech

INTRODUCTION

1. A cette 7iéme conférence du Réseau international sur la conformité et l'application de la loi en environnement (INECE) tenue à Marrakech, les participants d'organismes internationaux, gouvernementaux et non gouvernementaux, provenant de plus de soixante pays développés et en développement, se sont réunis à Marrakech au Maroc pour confirmer le rôle de la conformité et de l'application de la loi, le maintien de la régle de droit, renforcer la bonne gouvernance et garantir notre progression vers le développement durable.

LE RÔLE DE INECE

2. En qualité de seul réseau global d'experts indépendants dédiés au respect de la règle de droit, de la bonne gouvernance environnementale et au développement durable à tous les niveaux de gouvernance, INECE intégre les efforts de conformité et d'application de plus de 4000 praticiens (inspecteurs, avocats de la poursuite, législateurs, parlementaires, juges, les ONGs) de 120 pays, par des programmes de formation et d'accroissement des capacités, la sensibilisation et la coopération en matière d'application de la loi.

3. Les objectifs de INECE sont de promouvoir la conformité et l'application de la loi, de développer des réseaux pour la coopération en matière d'application de la loi, et, d'accroître la capacité de mise en œuvre des exigences environnementales et d'en assurer le respect. Fondé en 1990 par le biais des agences environnementales des Pays Bas et des États-Unis, en collabaration avec le PNUE, la Commission européenne, la banque mondiale, l'OCDE et d'autres organisations, INECE a joué un rôle déterminant dans le renforcement de la conformité environnementale au niveau mondial.

4. À cette conférence internationale, les participants ont identifié une occasion pour que INECE renforce la conformité environnementale et l'application de la loi en éliminant les failles ou lacunes à la conformité, en améliorant les capacités et en mettant en œuvre les outils législatifs qui ont été établis aux niveaux nationaux et internationaux, en promouvant le mieux être des humains, en assurant une économie compétitive et viable, en conservant et en améliorant l'environnement et facilitant l'avancement du développement durable.

RECONNAÎTRE LES ACCOMPLISSEMENTS

5. Au cours des 30 dernières années, des efforts considérables ont été réalisés afin d'améliorer la relation entre les humains et la nature. Plusieurs pays ont créé des agences de protection de l'environnement, négocié des accords multilatéraux et entrepris de nouvelles initiatives aux niveaux local, national et international afin de protéger la santé humaine, conserver la biodiversité et la faune et gérer les ressources naturelles. Ces efforts ont impliqués les dirigeants de ces pays, leurs Parlements, les tribunaux, les organismes internationaux, les entreprises privées et la société civile. Les officiers d'application de

la loi ont souvent été au centre des efforts de promotion de la règle de droit et de la bonne gouvernance.

RECONNAÎTRE LES DÉFIS

6. Les réalisations sont significatives. Nous reconnaissons toutefois les défis grandissants, un centre desquels apparaît le besoin de renforcer notre bonne gérance de la Terre, des espèces vivantes et les ressources naturelles, les fondations de notre développement économique et social ainsi que l'héritage de nos enfants et petits enfants. Les activités humaines des dernières 50 années ont changé l'écosystème de la terre et le climat plus que toute autre période comparable dans l'histoire de l'humanité. Selon l'évaluation de l'écosystème du millénaire (Millenium Ecosystem Assessment) – évaluation la plus systématique de l'état de la planète, la détérioration de l'environnement compromettra les efforts investis pour favoriser la santé et lutter contre la pauvreté et la faim, ainsi que d'autres objectifs établis dans les objectifs de développement du Millénaire.

LA MISE EN ŒUVRE DES OBJECTIFS DE DÉVELOPPEMENT DU MILLÉNAIRE ET DU SOMMET MONDIAL SUR LE DÉVELOPPEMENT DURABLE

7. Nous pouvons attaquer ces défis. Les objectifs de développement du millénaire et les conclusions du Sommet Mondial sur le développement durable peuvent etre mi en œuvre mais des efforts additionnels seront requis. Face à ces défis environnementaux grandissants et la pauvreté persistante pour des milliards d'humains, la réalisation de ces objectifs de développement – particulièrement ceux qui intègrent les principes du développement durable dans les politiques nationales et les programmes ainsi que le renversement des pertes de ressources naturelles – nécessitera un engagement significatif pour le renforcement de la gouvernance, de la règle de droit et de la conformité aux lois.

RENFORCEMENT DE LA GOUVERNANCE ET DE LA RELOGE DE DROIT

8. Le développement durable repose sur la bonne gouvernance, laquelle dépend de la règle de droit qui implique la conformité et l'application des lois. La bonne gouvernance est caractérisée par des institutions ouvertes, participatives, responsables, prévisibles et transparentes. La règle de droit soutient ces caractéristiques en veillant à ce que les règles soient appliquées de manière cohérente, efficace et juste par des institutions impartiales de tous, incluant ceux qui gouvernent. Garantir la conformité aux lois est plus facile lorsqu'il y a participation du public au développement des lois et lorsque celles-ci sont fondées sur des valeurs fondamentales sociales et des normes. Le droit doit également respecter les principes d'équité intra et inter générationnelle, qui exigent l'élimination de la pauvreté, le respect des droits de la personne et le respect des générations futures. En dépit de l'augmentation des instruments juridiques et des institutions, la plupart des indicateurs environnementaux ont déclinés. L'une des raisons clés pour cet échec est le défaut d'investir suffisamment dans la conformité et l'application des lois environnementales.

LES BÉNÉFICES D'INVESTIR EN CONFORMITÉ ET EN APPLICATION DE LA LOI

9. Les investissements dans la conformité et l'application de la loi bénéficient au public en garantissant un environnement plus sécure et plus sain pour tous et les générations suivantes. Ces investissements bénéficient aux communautés réglementées en garantissant des conditions réglementaires claires et appliquées également à tous de façon cohérente et équitable. Économiquement, les firmes qui respectent les normes environnementales développent la loyauté de leur clientèle et seront plus efficientes, et verront une augmentation de leurs profits. Cela profite aux pays en assurant que les

ententes multilatérales sont mises en vigueur par toutes les parties via leurs actions nationales.

ACCROISSEMENTS DES EFFORTS INTERNATIONAUX ET DOMESTIQUES

10. Le besoin d'accroître la conformité a été reconnu par les chefs d'états et les gouvernements au Sommet de la Terre à Rio en 1992. Le Plan d'action pour le développement durable (agenda 21) enjoint les pays à améliorer la conformité et la capacité en application de la loi. Au niveau international, les pays doivent respecter leurs engagements en vertu des ententes multilatérales environnementales. Au plan domestique, des efforts sont requis à toutes les étapes du cycle réglementaire – conception, mise en ouvre, application, évaluation et rétroaction – afin d'assurer que les systèmes réglementaires sont applicables, équitables, efficaces et efficients.

CONCEPTION DES RÉGLES DE CONFORMITÉ

11. Les lois et les politiques doivent été conçues en ayant à l'esprit les objectifs de conformité et d'applicabilité. Afin d'être conforme, la communauté réglementée doit connaître les règles, les accepter et être en mesure de se conformer. Les lois ne doivent pas être plus complexe que nécessaire, être économiquement réalisables et considérer les profils sociaux, culturels et psychologiques de la communauté réglementée. Les règles contraires aux pratiques culturelles et économiques sont vouées à l'échec. Les règles qui récompensent les chefs de file environnementaux, élaborées sur les meilleurs pratiques, et assurent des chances égales pour tous, ont plus de chance de succès et pour garantir la conformité.

AMÉLIORER LE SUPPORT À LA CONFORMITÉ ET LES INCITATIFS

12. Les règles bien conçues peuvent tout de même créer des difficultés pour ceux qui ne possèdent pas les capacités techniques, financières ou administratives nécessaires. Garantir la conformité exige des efforts répétés pour augmenter la connaissance des exigences légales, pour renforcer les programmes d'assistance, et pour améliorer les incitatifs à la conformité. Les efforts au niveau national doivent être conçus afin de rencontrer les besoins des petites et moyennes entreprises et, au niveau international les besoins des pays en voie de développement. Les institutions internationales et les pourvoyeurs de fonds ont un rôle particulier à jouer pour soutenir ces efforts.

RÉPONDRE À LA NON-CONFORMITÉ

13. Les pays ont la responsabilité de protéger ceux qui se conforment à la loi pas seulement en aidant ceux qui ne peuvent se conformer, mais en identifiant et en sanctionnant ceux qui ne sont pas conformes. Les incitatifs et l'assistance à la conformité sont efficaces seulement lorsque supportés par une possibilité crédible de sanction. Les pénalités et les sanctions ont également un effet dissuasif sur d'autres règlements et soutiennent une compétition économique équitable. Les efforts en réponse à la non conformité devraient être fermes mais équitables, transparents, cohérents et proportionnels aux risques, au sérieu de l'infraction et au besoin de dissuasion. À chaque étape du processus réglementaire, des efforts devraient être faits pour évaluer l'efficacité et mieux orienter les efforts afin d'améliorer la contribution des intervenants principaux dans l'amélioration de la conformité et de l'application.

LA CONTRIBUTION DES INTERVENANTS À L'AMÉLIORATION DE LA CONFORMITÉ ET DE L'APPLICATION

14. L'amélioration de la conformité et de l'application requiert des efforts renouvellés par tous les individus et les institutions. Les fonctionnaires doivent exercer leur autorité au nom de tous les

citoyens en accord avec les normes de bonne gouvernance et dans une perspective de protection du bien être public et de conservation de l'environnement. Les législateurs jouent un rôle clef en créant des lois qui peuvent etre appliquées efficacement pour atteindre ces objectifs. Les tribunaux ont un role fondamental à jouer pour maintenir la règle de droit et faire en sorte que les lois nationales et internationales sont interprétées d'une manière juste, efficiente et efficace.

15. La communauté réglementée et le public ont la responsabilité de se conformer à la lettre et à l'esprit de la loi et d'encourager la conformité à la loi par tous. Les médias ont la responsabilité de sensibiliser en fournissant des analyses objectives et de l'information sur les défis environnementaux ainsi que les efforts consentis pour y faire face. La communauté internationale, incluant les bailleurs de fonds et les organisations internationales, ont la responsabilité de renforcer les efforts nationaux par un support technique et financier et de promouvoir un contexte favorable à une conformité et une application de la loi plus efficace.

UN PROGRAMME D'ACTION

16. Les co-présidents et le comité exécutif de planification de cette conférence internationnale enjoignent les individus, les ONG's, les médias, les entreprises privées, les organismes de certification, les avocats, les scientifiques, les ingénieurs, les experts financiers, les législateurs, les tribunaux, les négociateurs, et les banques de développement de tous les niveaux, – local, national, régional et international – de:

a) Reconnaître les périls qui menacent l'environnement et le besoin d'établir et de renforcer la règle de droit, la bonne gouvernance, le développement durable afin de conserver les ressources naturelles et d'assurer la santé humaine, l'intégrité des écosystèmes et le développement économique ;

b) Presser la communauté internationale et les concepteurs de politique dans chaque pays de reconnaître l'importance de la conformité et de l'application des lois environnementales à tous les niveaux critiques afin de respecter la règle de droit, la bonne gouvernance et le développement durable;

c) Valoriser l'importance de fournir de la formation aux pays, compagnies, et individus qui n'ont pas la capacité de se conformer, et d'identifier la non conformité et d'appliquer des sanctions appropriées et équitables pour punir ceux qui sciemment violent les lois environnementales et dissuader les autres;

d) Améliorer la capacité des agences environnementales de recueillir et analyser les informations afin de développer des régimes réglementaires efficaces et efficients.

LE RÔLE DÉTERMINANT DE INECE

17. Le réseau INECE a un rôle déterminant pour que progresse ces objectifs, pour améliorer la capacité institutionnelle, et coordonner, les intervenants principaux dans le domaine de la gouvernance environnementale. INECE poursuit ces objectifs grâce à des activités diverses pour aider les agences publiques à renforcir leur gestion et améliorer leur efficacité et leur efficience, INECE développe des indicateurs qui mesurent la conformité et l'application de normes environnementales. INECE offre des cours de formation, de l'enseignement et de renforcement de la capacité et tient a jour via Internet des forums de discussions intéractifs, des bibliothèques virtuelles et des bases de données. Par des conférences internationales, INECE offre aux praticiens du monde entier l'opportunité d'acquérir la connaissance et d'établir des relations à long terme requises pour faire face aux défis de la conformité et de la application des lois environnementales. Pour accroître ces efforts et augmenter la contribution de INECE à ses membres, aux gouvernements et au public, les co-présidents et le comité exécutif de planification:

a) Enjoignent tous les praticiens de INECE de partager les informations et les pratiques via INECE et autrement, de promouvoir la conformité et l'application qui garantissent que les régimes environnementaux sont efficaces et efficients;

b) Encourage INECE à continuer d'étendre ses initiatives de renforcement de la capacité, de renforcir ses partenariats avec les organisations internationales régionales et nationales ainsi qu'avec les ONG, les institutions académiques, en vue de profiter des avantages respectifs de chacun, éviter la duplication et optimiser l'utilisation des ressources disponibles;

c) Réaffirme l'engagement de INECE de renforcer et développer des réseaux régionaux, spécialement en Amérique latine, en Asie, en Europe de l'Est, dans les Caucase et dans l'Asie centrale, en Afrique incluant un nouveau réseau en Afrique du Nord;

d) Reconnaît le rôle important que les organisations intergouvernementales peuvent jouer en matière de conformité et d'application comme intervenant indépendant et en support des efforts gouvernementaux dans ce domaine, et enjoint INECE de supporter leur création et leur apport à la conformité et à l'application;

e) Encourage INCE à continuer ses efforts de coopération avec les partenaires nationaux, les institutions académiques, les organisations internationales et d'autres partenaires dans la communauté de la recherche pour développer et supporter la mise en place d'un agenda de recherche multidisciplinaire qui supporte la mission de INECE;

f) Enjoint INECE de continuer le développement et de diriger le projet d'indicateur de performance, en coopération avec les réseaux régionaux dans la perspective d'améliorer la performance, la prise de décision en matière de politique, et la gouvernance environnementale globale, ainsi que la qualité de l'environnement;

g) Enjoint INECE de renforcer son travail en collaboration avec d'autres partenaires pour accroître la capacité des parlementaires dans le domaine du droit international et des institutions pour le développement durable;

h) Enjoint INECE d'encourager les réseaux de juges pour l'environnement et d'organiser un forum ou les différents réseaux peuvent se rencontrer et échanger;

i) Enjoint INECE de travailler avec le PNUE, UICN, CEL, et d'autres institutions pour recueillir des cas de réussites remarquables, de la jurisprudence et des exemples concrets d'application de concepts environnementaux clefs tels que le principe de prévention, le principe de précaution, le principe du pollueur payeur, selon l'objectif du plan stratégique de INECE d'analyser les éléments clefs régionaux et internationaux pertinents au travail de INECE;

j) Enjoint INECE de promouvoir les meilleures pratiques pour l'implication du public et les droits fondamentaux du public tels que l'accès à l information, la participation du public et l'accès à la justice;

k) Enjoint INECE de développer un réseau d'application de la loi en matière faunique et d'inviter les différentes agences d'application de la loi nationales et internationales, les institutions et les réseaux spécialisés (e.g. Interpol, Working Group on Wildlife Crime et le Ousaka Agreement Task Force), tous les ONG qui ont une expertise ainsi que les autres partenaires concernés;

l) Engage INECE à bâtir sur ses réalisations incluant ses conférences, publications, formation, cours et son site Web, ainsi qu'à développer de nouveaux produits et services pour supporter un réseau grandissant d'experts travaillant en matière de conformité et d'application de la loi.

CONCLUSION

18. Les coprésidents et le comité exécutif de planification sont reconnaissant de l'apport significatif du gouvernement marocain et expriment leur grande gratitude pour la généreuse hospitalité démontrée. Nous remercions nos commanditaires ainsi que nos organismes partenaires pour leur support, notamment la USEPA (United States Environnemental Protection Agency), le Ministère de l'habitation, de l'aménagement et de l'environnement des Pays Bas, le Département d'État américain, le Ministère finlandais de l'environnement, la Commission européenne, l'Agence environnementale d'Angleterre et du Pays de Galles, la Banque mondiale, l'OCDE, Environnement Canada et le Fonds international pour le bien-être des animaux, ainsi que les ambassades des États-Unis et des Pays Bas.

19. Le défi de notre génération est de changer les attitudes et les comportements des individus, des organisations, des communautés réglementées, pour assurer un développement durable pour les prochaines générations. L'un des défis est de moderniser nos régimes réglementaires afin de rencontrer les besoins changeants de notre société. L'histoire nous jugera sévèrement si nous échouons dans la promotion de notre responsabilité pour la terre.

20. Un élément clefs dans la réalisation de ce défi est de développer des sociétés équitables et durables basées sur le respect de la règle de droit et les principes de bonne gouvernance. C'est une tache que plusieurs – incluant INECE et ses partenaires ont prise en charge. En addressant ce défi , nous pressons les nouveaux partenaires de joindre nos rangs en développant et mettant en œuvre un programme d'action pour renforcer la conformité et l'application et de transformer dans un effort global les principes communs ainsi que les valeurs partagées dans des actions significatives requises pour créer un futur plus durable pour tous les citoyens de la terre.

RECOMMENDATIONS FOR INECE

from the 7th INECE Conference on Compliance and Enforcement in Marrakech, Morocco

Conference participants spent a week in Marrakech discussing ways to promote the rule of law, good governance, and sustainable development by focusing on the three INECE goals of:

(1) raising awareness of the importance of environmental compliance and enforcement;

(2) strengthening capacity to implement and enforce environmental requirements; and

(3) developing networks for enforcement cooperation.

In a variety of instructive panels, interactive workshops, and animated discussions – all described in more detail in this volume of conference Proceedings – conference participants strongly encouraged INECE to take specific actions in furtherance of these goals. Participants specifically urged INECE to play a leading role in further developing a strategy to demonstrate that environmental compliance and enforcement can help to promote good governance, the rule of law, and sustainable development.

Participants suggested that INECE continue developing useful tools for enforcement and compliance, placing particular emphasis on INECE's efforts to assist countries in the process of identifying, developing, and using **Environmental Compliance and Enforcement (ECE) indicators**. Participants indicated strong support for INECE's ECE indicator project, recommending specific actions such as developing trainings, compiling a library of examples of basic indicators used by different countries, building a Community of Practice among ECE programs conducting indicators projects in order to compile accomplishments and lessons learned, and working with regional networks to promote the use of ECE indicators. Participants also suggested that INECE explore opportunities to use ECE indicators as a tool to communicate information on and results from ECE activities to diverse audiences – ranging from parliamentarians to financial institutions to field officers to the public – in a clear and concise manner.

Participants also pushed for INECE to further its efforts on a variety of specific issues. Participants recommended that INECE raise awareness of the importance of compliance and enforcement in **emissions trading** schemes, serve as a resource for exchanging information and data between environmental compliance and enforcement experts on emission trading activities in different countries, develop a simple document on elements of emissions trading systems, and develop a workshop in the near future for practitioners. Participants urged INECE to identify ports in countries or regions that are probably the most sensitive targets for **illegal shipments of hazardous waste**, identify specific waste streams that represent the most severe risks, and recommend focal points in each of the relevant interested countries. Participants encouraged INECE to hold a regional or international meeting of experts on forest sector enforcement to address the issue of **illegal logging** and to promote national and local enforcement capacity building. And participants asked INECE to work to build capacity for good governance practices to assist countries in meeting their **water resource management** obligations.

Conference participants further suggested a continued focus on building the capacity of certain groups and professions, such as the **judiciary** and its need

for better information on penalty calculation and other remedies. Participants urged INECE to provide training for regulators, investigators, prosecutors, and judges to perform their environmental criminal enforcement duties. Participants also suggested that INECE promote and facilitate the international exchange of information to develop and strengthen national programs for determining penalties and developing methodologies; aid in the dissemination of information regarding the importance of appropriate penalties and enforcement; promote mechanisms to share information among judges to develop specialized expertise; consider the creation of an international award for judicial excellence; seek harmonized approaches in penalties and remedies, particularly for transboundary crimes; create guidelines on how to calculate harm and demonstrate the harm to judges; and present judges and prosecutors with best practices and real examples of how legislation can be implemented.

Sincere thanks goes to all conference participants for their valuable input. The recommendations from the Marrakech Conference, which the Executive Planning Committee will be evaluating to determine priorities and to assess relevance to the INECE goals, are part of the process of revising the INECE Strategic Implementation Plan for its next three-year cycle. As demand for INECE assistance continues to grow, these recommendations from the conference participants, and the many other recommendations and ideas contained in the reports in this volume, provide important guidance and inspiration to INECE.

SUMMARY OF PANEL 1: RELATIONSHIP BETWEEN GOOD GOVERNANCE AND ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

Moderator: Sir John Harman, Chairman, Environment Agency (England & Wales)

Panelists: Jonathan Allotey, Executive Director, Environmental Protection Agency, Ghana

Ladislav Miko, Deputy Minister of the Environment, Czech Republic

Kenneth Ruffing, Deputy Environment Director, Organisation for Economic Co-operation and Development (OECD)

Pieter van Geel, State Secretary for the Environment, The Netherlands

Rapporteurs: Sandy Rowden, Environment Agency (England & Wales)

Terence Shears, Environment Agency (England & Wales)

1 INTRODUCTION

The panel demonstrated how compliance and enforcement are building blocks for the rule of law and good governance and, ultimately, for sustainable development, and emphasized the need for improving communication between lawmakers and enforcement practitioners to ensure better legislation. The panelists explored the roles of civil society, environmental ministries, parliamentarians, judges, and the press in environmental compliance and enforcement and ways to confront corruption and ensure transparency.

2 PRESENTATIONS

2.1 Presentation by Sir John Harman

Sir John Harman opened the panel by saying that he hoped the panel would be able to identify why good governance was important for compliance and enforcement (and vice versa) and why it was essential to have good cooperation between implementing authorities. Regulators are certainly accountable to ministers but also to regulated businesses and individuals. Where there is a clash of accountabilities, there is a question over which is the most important: in other words, there is a question over whether compliance and enforcement standards should be left to politicians.

Society demands high environmental standards. There is a pressing need to tackle a legacy of harm to the environment on a global scale, but protection, conservation, and good governance can only take place within a framework of good governance and respect for the rule of law.

Businesses can compete on equal terms where regulations are enforced fairly. Effective environmental compliance, compliance assurance, and enforcement, where necessary, are key tools for delivering good governance. However, if governments and regulators expect companies to respect the law and accept increasing regulatory standards, they should also recognize that regulators are accountable to the public and to the regulated community, as well as to ministers, for aspects of their regulatory practice.

Despite the global differences in legal frameworks and administrative systems, there is general agreement on the concept of good governance. Good environmental regulation is central to good governance, while regulatory regimes can also give incentives for good governance in businesses. Compliance and enforcement are powerful tools that underpin good governance.

2.2 Presentation by Secretary Pieter van Geel

Secretary Pieter van Geel said that the Dutch government is deeply concerned about the enforcement of environmental regulations, whether in the Netherlands, the European Union, or on a global scale. That is why the government supports and participates in the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) and the International Network for Environmental Compliance and Enforcement (INECE). These networks help to protect the environment for future generations and at the same time create a level playing field for companies.

Many international organizations have emphasized the importance of good governance and the rule of law. They are both essential conditions for achieving sustainable development. Weak legal and judicial systems, where non-compliance is the norm, undermine the rule of law and cause environmental degradation while slowing progress towards sustainable development. Weakness in the rule of law has serious consequences for the confidence of economic actors and hinders investment. Lack of investment in turn deprives governments of resources to invest in education, social welfare nets, and sound environmental management.

The rule of law could be strengthened in many ways. To date, most efforts have concentrated on developing new laws and creating new institutions rather than on building capacity for ensuring compliance with existing rules and making sure that these are clear and are not contradictory. A culture of compliance should be developed to replace a culture of non-compliance or corruption. International assistance for building capacity should expand efforts aimed at the deeper goal of increasing compliance with laws, and it is here that INECE has a critical role to play. There should be increased focus on compliance, but it is not possible to build a culture of compliance overnight. Often it is necessary to change long-standing practices, entrenched interests, cultural habits, social norms, and even religious norms.

2.3 Presentation by Mr. Kenneth Ruffing

Mr. Kenneth Ruffing said that there are several definitions of good governance. The Organisation for Economic Co-operation and Development (OECD) has adopted a set of six principles: rule of law, accountability, transparency, efficiency and effectiveness, responsiveness, and forward vision. There are examples to illustrate that good governance supports environmental improvement and also that lack of good governance hampers countries' efforts to maximize the benefits of environmental policies and minimize the negative impacts of sectoral policies on human health, the environment, and natural resources.

While the existence of good governance is a necessary condition to ensure better environmental management, it is not a sufficient condition on its own. Specific elements are necessary to achieving the desired objectives. For instance, policies, laws, and regulations should reflect consensus and science-based objectives. Attention should be paid to the full regulatory cycle with suitable mixes of policy instruments, sectoral policy integration, and compliance monitoring, assurance, and assessment. The institutional framework should have a clear allocation of responsibilities and powers to national and sub-national levels of government. Finally, it is necessary to ensure provision of environmental information, public participation, and access to an impartial judiciary.

Effective public administration is fundamental to good governance. In many OECD countries, environmental agencies or ministries have been at the forefront in developing good governance practices. At the same time, many environmental concerns have been championed by the general public demanding that governments protect the environment. Thus, parliamentary bodies and regulators, an independent judiciary, and an engaged citizenry each have essential roles to play in strengthening gov-

ernance for improving environmental outcomes.

The OECD has been supporting countries in the region of the former Soviet Union and in Asia in strengthening their enforcement systems. It has contributed towards developing laws and encouraging compliance with them in a number of ways. It fostered agreement on environmentally effective and economically efficient policies and on their underlying principles; it identified good practice; and it adopted legal instruments, usually establishing monitoring and "peer review" mechanisms aimed at fostering compliance. OECD wants to continue to play an active part within INECE by exchanging good practices and supporting the development of effective and efficient policies and compliance assurance based on good governance principles.

2.4 Presentation by Mr. Jonathan Allotey

Mr. Jonathan Allotey gave an African perspective on good governance and environmental compliance. Governance and environmental management are universal and involve norms and values. These are both informal (customs and practices) and formal (written rules and instructions). In Africa there are many traditions and systemic taboos and rituals. Traditional governance was responsive and delivered at a local level. With colonization, major changes in governance were imposed. It was centralized, and informal groups were no longer part of the system. Rules were now written down.

Indigenous rules were time-honored and adaptive. However, the traditional view was no longer seen as legitimate. For example, when forest reserves were established, local people were hostile because they saw their livelihood as threatened. On the other hand, there were traditional forest reserves based on traditional rules which now stood as islands in the midst of degraded lands.

A particularly good example was a monkey sanctuary in an area where monkeys were seen as sacred. They lived with people and were not seen as a threat to people, just as people were no threat to them. Local rules and traditions worked well in this situation. In an urban area, there was a period of ban on the use of drums to allow a peaceful period before farming and fishing seasons – a traditional equivalent for modern regulation for noise control. Another example was the protection of lagoons and wetlands where there were closed and open seasons for fishing. It was quite possible for traditional knowledge and concerns to co-exist with modern systems of ownership, etc. It was necessary to go back to roots and to examine enduring concepts on which systems had developed.

2.5 Presentation by Dr. Ladislav Miko

Dr. Ladislav Miko recognized that environmental compliance and enforcement are very important and effective tools in supporting good governance. However, he suggested that their use and effect could be strongly influenced by different national and international factors. In particular, he quoted some of the lessons learned by the Czech Republic in moving away from the former totalitarian regime.

In the national context, there is a tradition of non-compliance and of breaking the law because the law was often used as a tool against the demands of the general public. This behavior persists for a long time, even after the political change. Environmental goals tend to be set either very low, representing the current environmentally harmful situation in the country, or very high and unattainable. Although the public recognizes the value of the quality of the environment, low standards of living mean that they prefer cheap products to more expensive, environmentally safe ones. Environmental measures taken by the government are often seen as a burden in achieving a better standard of life.

There was a lack of trust in state bodies under totalitarian regimes, such that, when they had gone, there was a tendency to limit the size of the state as much as possible. This limited the resources

available in terms of finance and personnel for good governance. The approach taken to implementation of laws and compliance and enforcement is bureaucratic, so it is not possible to simplify the system. There is little coherence between the bodies of the state, and traditional ways of behavior are often environmentally unacceptable (for example, wastewater disposal or hunting of birds). Finally, there is no feedback, even if the legislation is in place.

In the international context, small countries with less developed economies are greatly influenced by the broader region. If some countries in the region do not follow international environmental standards, the advance towards environmental targets is very limited. Developing countries often do not have trust in the fact that they gain internationally with good environmental behavior. Environmental goals set by international bodies are seen as being too ambitious and unrealistic.

There are of ways of avoiding or solving these problems. There should be open environmental information about compliance with multilateral environmental agreements. There might be financial support for countries developing effective compliance and enforcement systems, as well as support in terms of providing experts and practitioners for direct transfer of experience. There should be support for developing national systems of environmental education, and international minimum standards of inspectors' expertise should be set. There should also be a road map of effective enforcement, defining the necessary conditions and starting points for implementing particular approaches and methods.

3 DISCUSSION

Dr. Bill Clark, Nature and National Parks Protection Authority, Israel, began the discussion session by asking how an authority or regulator can avoid liability when they publish negative data and information about companies on the internet. Mr. Kenneth Ruffing believed that if the published information is publicly available anyway, this avoids the liability and provides information that can stimulate the local community to participate in environmental compliance and enforcement. Sir John Harman provided an example from the Environment Agency (England & Wales), where company data is made widely available on the internet, allowing searches by postcode (zip code) that yield local sources of pollution and environmental risk. This process makes publicly available data publicly accessible.

Mr. Lee Paddock, Director of Environmental Law Programs, Pace University New York, highlighted the issue that many environmental compliance and enforcement staff have limited experience and training outside their own areas (for example, in economics), and asked how capacity, training, and experience of these staff can be expanded. Secretary Pieter van Geel stated that environmental compliance and enforcement inspectors could not live in isolation but must live and work in their social and economic contexts. Dr. Ladislav Miko believed that inspectors need training on issues such as economics, as well as communication skills. With this training, they are more capable of explaining the environmental compliance and enforcement and environmental goals to others. It is essential that inspectors operate in multidisciplinary teams with a wide range of skills in order to achieve their environmental compliance and enforcement aims and contribute towards sustainable development. Mr. Kenneth Ruffing proposed that capacity building is most effective at the national level, though efforts are also being made at an international level, and indicated that training courses and programs are available to assist in this capacity building.

Dr. Palamagamba Kabudi, Tanzania, in response to the key points made by Mr. Jonathan Allotey, noted that in Africa the issue of traditional versus modern styles of regulation is a problem across the continent. Modern environmental legislation in many African countries has excluded the role of the indigenous institutions, and cooperation is required between countries to restore a more holistic approach. Mr.

Allotey indicated that one way to resolve this is by bringing local authorities into environmental compliance and enforcement, as for example occurred with the Monkey Sanctuary. One method to help achieve a holistic approach, merging traditional and modern regulation, is to create an inventory of indigenous practices and to study these to identify where the conflicts between tradition and modernity occur, to allow these issues to be resolved with participation of all parts of society. One powerful example in Ghana was a nature protection measure to prevent the extinction of local animal species. Traditionally, the local cultural or ethnic groups use one species as the symbol of their authority. If these species become rare or extinct, this could be seen as the loss of that group's authority. By using this argument, groups have been persuaded of the need to protect the wildlife to preserve their traditional society customs and beliefs.

Dr. Kabudi from Tanzania also asked, in response to the comments of Dr. Ladislav Miko, how the balance between international and national demands could be found so that national priorities are not displaced. Both Mr. Kenneth Ruffing and Dr. Miko agreed that the best way to achieve this is by ensuring that all environmental compliance and enforcement proposals are subject to rigorous cost-benefit analysis. However, there is a need to overcome the problem of how to communicate complicated cost-benefit analyses to the wider community in a manner that is understandable. New, innovative ways of communicating these ideas are needed. Dr. Miko further added that while international demands provide an impetus for national action on issues, there are too many international demands at one time, and there is a need for countries to prepare road maps of the way forward for that country, to allow prioritization of action.

Mr. Chris Dekkers, Ministry of Housing, Spatial Planning and the Environment (VROM), in the Netherlands, raised the issue of emissions trading. Monitoring and reporting of emissions trading is not an issue that many find interesting or important, and there is a general reluctance to address the enforcement, compliance, and verification of emissions trading, despite these being essential activities. The Panel was asked what the role of INECE could be in resolving this problem. Secretary Pieter van Geel believed that policy makers are only interested in compliance if things go wrong: only if there is no level playing field in Europe on emissions trading will there be a focus on compliance and enforcement. Dr. Ladislav Miko added that fair and properly functioning environmental compliance and enforcement systems would have to be in place to allow trading to occur. People need to be made aware of the full costs and benefits of particular environmental proposals.

Mr. Georges Kremlis, European Commission, provided some additional points on how law can be better informed in order to contribute to good governance. He stated that there is a need for better law making, and there should not be over-regulation. All parties need to cooperate in the development of laws, which should ensure that the laws are also enforceable. In the European Union, they are undertaking Regulatory Impact Assessments, which also improve legislation. In addition, sanctions need to be fair and proportionate. With greater decentralization of power within countries, there is also a need to build capacity in local authorities to deal with environmental compliance and enforcement. The European Union's Aarhus Convention is a key way of helping with environmental compliance and enforcement and supporting good governance.

Ms. Katia Opalka, Commission for Environmental Cooperation, Canada, asked the Panel how governments should enhance the profile of the regulator with industry and the public. Ms. Linda Duncan, environmental law and policy consultant, Canada, also asked how the credibility of environmental regulators in many countries could be improved. Dr. Ladislav Miko said that the government should use top specialists and should ensure positive public presentation of the regulator to the public and industry. Secretary Pieter van Geel

explained that the roles of government and society cannot be split. He highlighted how, in the Netherlands, general society reacts when they feel that the government is not fully backing environmental enforcement. If the government does not do this, it leads to the government losing its moral integrity.

Mr. Bakary Kante, United Nations Environment Programme, raised the issue of sanctions in international environmental agreements. He stated that it is very challenging for all governments in the multilateral agreement to agree on sanctions. For example, under the Basel Convention it is virtually impossible to enforce the agreements, as there is no scheme to do this. Dr. Ladislav Miko added that the public finds it difficult to understand the system of sanctions. Mr. Kenneth Ruffing asserted that it is important to recognize the difference between national and international sanctions. Nationally, proportionate fines must be based on an estimate of the environmental damage, multiplied by a factor for punitive damage. Internationally, it is not always necessary to include sanctions at this level. However, sanctions have been included on an international basis in the Kyoto Agreement. Sir John Harman explained that, in the European Union, the ability to take issues to the European Courts of Justice and to apply sanctions on governments had been very powerful in environmental compliance and enforcement cases.

Ms. Linda Duncan asked the Panel how to overcome the tension between strict compliance and softer environmental compliance and enforcement options. Mr. Jonathan Allotey stated that a mixture of options should be used within a country depending on the context of the issue being tackled. Mr. Kenneth Ruffing highlighted an OECD study on voluntary approaches that concluded that it was useful to use voluntary approaches to complement the traditional approaches, particularly where there was little capacity for environmental compliance and enforcement. The research also provided a list of approaches that have been successfully applied in different contexts. Secretary Pieter van Geel outlined the approach taken in the Netherlands where environmental compliance and enforcement start with voluntary agreements, but at a later stage, more formal regulations are implemented if the environmental targets are not being met. This approach has delivered many positive outcomes, and therefore the Netherlands use a mix of the traditional and softer options. Sir John Harman stated that voluntary agreements can be used as the forward edge of environmental compliance and enforcement, but need to be accompanied by the understanding that if voluntary agreements are not delivering the desired environmental outcomes, then traditional regulation will be used. Reductions in pesticide use in agriculture have been achieved through voluntary agreements in the UK, as the government threatened to tax the use of pesticides if the use did not decrease. Dr. Ladislav Miko also agreed with this approach and added that regulation in the later stages helped create a level playing field for businesses by not allowing those not in the voluntary agreements to gain advantage.

Mr. Sibusiso Gamede, Basel Resource Centre, South Africa, stated that environmental compliance and enforcement include improving the knowledge of the judiciary and their ability to preside in environmental cases. He asked the Panel how the learning process for the judiciary and support for inspectors can ensure compliance and enforcement. Sir John Harman noted that the question of judicial education is not just a South African concern, and Mr. Jonathan Allotey echoed that judges' knowledge is often low (and sometimes they admit it).

4 CONCLUSION

In conclusion, Sir John Harman summarized the key points of the panel discussions on how environmental compliance and enforcement are building blocks of good governance.

The main outcomes of the discussion were as follows:

- Compliance and enforcement does not happen in isolation but in a wider political and social context.
- Regulators need to be aware of the limitations of top-down standard setting.
- Specify the end result but be flexible about the means.
- The principles of subsidiarity should apply to environmental compliance and enforcement, but how they can be applied is rarely considered.
- Enforcement is there for a purpose, and outcomes should take priority in measuring its effectiveness.
- Lawmakers and policy makers should make use of the practical experience of those responsible for enforcement.

THE RELATIONSHIP BETWEEN GOOD GOVERNANCE AND ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

HARMAN, SIR JOHN

Chairman, Environment Agency (England and Wales)

May I begin by welcoming you to this Panel on the Relationship between Good Governance and Environmental Compliance and Enforcement, key themes for the conference as a whole.

During this panel discussion I hope we will be able to identify why good governance is important for compliance and enforcement, and why cooperation between implementing authorities is essential.

To whom are we as regulators accountable for what we do? To Ministers, certainly; but also to the public, and to regulated businesses or individuals. What do these accountabilities demand of us? Who benefits from what we do?

If these accountabilities clash, which wins out? Should we put the public interest first? Or to put the question another way, are compliance and enforcement of environmental standards too important to be left to politicians? To help address these questions we have a panel of eminent speakers:

- Secretary Pieter van Geel from The Netherlands.
- Kenneth Ruffing from the Organisation for Economic Co-operation and Development (OECD).
- Jonathon Allotey, Executive Director, Environmental Protection Agency, Ghana.
- Ladislav Miko, Deputy Environment Minister, Czech Republic and Director Designate DG Environment (Directorate B: Protecting the Natural Environment).

We circulated a paper on the relationship between good governance and environmental compliance and enforcement. I expect that many of you will have had an opportunity to read the paper, but I should like to highlight some of the key points from it.

Society demands high environmental standards. The need to address a legacy of harm to the environment on a global scale is more pressing than ever but protection, conservation and improvement of the environment can only take place within a framework of good governance and respect for the rule of law.

Regulations, enforced fairly, enable business to compete on equal terms. Effective environmental compliance, compliance assurance and, if necessary, enforcement are key tools for delivering good governance. But good governance cuts both ways. If governments and regulators expect companies to respect the law and accept good regulatory standards, they also need to recognise that regulators are accountable to the public and to customers, as well as to ministers, for aspects of their regulatory practice.

In my paper for this panel, I have given examples of definitions of good governance. Despite the global differences in legal frameworks and administrative systems there is a high degree of shared understanding of what constitutes good governance. In fact the underlying principles across the world are almost the same. I have therefore taken the principles of the European Commission as the main basis of my paper, not because I consider them better than those from other regions, but because they are those by which my organisation, the Environment Agency, bases our work and modernising regulation agenda.

In this panel, we are going to dis-

cuss these issues further, and we hope to hear good examples of how compliance and enforcement activities across the world both benefit from good governance and contribute to it.

Good environmental regulation is central to good governance. Regulatory regimes can incentivise good governance in businesses. Compliance and enforcement can be powerful tools that provide support for good governance.

To help us explore these questions further I turn to our panel and invite each of them to contribute some introductory remarks before we open the session for wider debate.

THE RELATIONSHIP BETWEEN GOOD GOVERNANCE AND ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

VAN GEEL, PIETER

State Secretary for the Environment, The Netherlands

Let me take one minute of my time to make some general remarks. This year, Morocco and the Netherlands are commemorating their 400-year relationship. Although this conference is not part of the official celebrations, I am pleased and honoured to be participating in it.

The Dutch government is deeply concerned about the enforcement of environmental regulations, not only in the Netherlands but also throughout the European Union and on a global scale. That is why we support and participate in the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL) and the International Network for Environmental Compliance and Enforcement (INECE).

We feel this is necessary to protect our environment for our generation and – more importantly – for future generations. But we also need to create a level playing field for companies so they can comply on equal terms.

The need to promote enforcement and compliance was recognised by the participants in the Rio Earth Summit back in 1992. The Summit established an international mandate, in Chapter 8.21 of Agenda 21, identifying compliance and enforcement capacity as essential elements of environmental management.

We participate in activities organised by INECE, which began in 1990, fulfilling the mandate established at the Rio Earth Summit.

How do the Rule of Law and Good Governance help us achieve environmental compliance and enforcement?

Let me begin by saying that international organisations like the European Commission, the United Nations Environment Program, the World Bank, the United Nations Development Program and the Asian Development Bank have stressed the importance of Good Governance and Rule of Law.

I realise definitions may differ slightly, but in general this is what we mean when we talk about the Rule of Law and Good Governance.

- The Rule of Law means having independent, efficient and accessible judicial and legal systems, and a government that applies fair and equitable laws equally, consistently, coherently and prospectively to all its citizens.
- Good Governance is characterised by accessibility, accountability, predictability and transparency.
- Good Governance:
  - promotes accountability, openness and transparency, citizen participation, efficiency, and other aspects of the Rule of Law in public institutions at all levels;
  - includes clear decision-making procedures for all public authorities, civil society participation in decision-making processes, and the ability to enforce rights and obligations through legal mechanisms; and
  - allows for sound and efficient management of human, natural, economic and financial resources for equitable and sustainable development.

Good Governance and the Rule of Law are essential conditions for achieving sustainable development.

Weak legal and judicial systems,

where non-compliance is the norm, undermine the Rule of Law and cause environmental degradation and slow progress to sustainable development. This not only affects sustainable development, but also carries severe economic consequences. Weakness in the Rule of Law has devastating consequences for the confidence of economic actors and hinders investment. Lack of investment slows economic growth, which in turn deprives governments of resources to invest in education, social safety nets and sound environmental management.

These are the negative effects.

What can we do to strengthen the Rule of Law?

- To date, most efforts to strengthen the Rule of Law concentrate on developing new laws and creating new institutions, rather than building capacity for ensuring compliance with existing rules and making sure that they are clear and not contradictory.
- It is not enough merely to point out the elements of the Rule of Law and to invest in institutional reforms, if a culture of compliance is not developed to replace the culture of non-compliance or corruption.
- International capacity-building assistance should expand efforts aimed at the deeper goal of increasing government compliance with laws. INECE has a critical role to play here; it is the only global network of professionals dedicated to improving compliance with environmental law.
- Increased focus on compliance, along with better coordination and increased support, will improve the success of efforts to strengthen the Rule of Law, which in turn will improve the success of efforts to improve Good Governance, and help us move towards Sustainable Development.
- However, we cannot expect to build a culture of compliance overnight. The process is often a gradual one, involving changes to long-standing practices, entrenched interests, cultural habits and social and even religious norms.

We, the Dutch Government, are committed to these developments and to increasing focus on compliance and enforcement. This has to be done in a flexible way, taking advantage of the activities of government and industry to achieve our goals. Industry has to be encouraged to be part of the compliance process through compliance assistance schemes, self-regulation and voluntary environmental performance agreements.

Allow me to return to where I started. The Dutch Government is in favour of capacity-building, good governance and using networks like INECE to achieve our goals of sustainable development on a level playing field. That is why we support activities like INECE and why it is important that I am participating in this conference with so many people who are truly engaged in their work as enforcement activists. I look forward to discussing this and other points with my fellow panellists and the conference participants.Thank you.

RELATIONSHIP BETWEEN GOOD GOVERNANCE AND ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

RUFFING, KENNETH G.

Deputy Director, Environment Directorate, Organisation for Economic Co-operation and Development (OECD)

It is a pleasure and an honor for me to be able to participate in this important Conference.

To express what its 30 Members mean by good governance, the OECD, through its Public Management Committee, has adopted a set of six principles: rule of law, accountability, transparency, efficiency and effectiveness, responsiveness, and having a forward-vision. The content of most of these is similar to those in the European Commission White Paper referred to by Sir John Harman, but OECD also attaches importance to cost-effectiveness and places considerable emphasis on having a forward vision.

Evidently, good governance is likely to lead to environmental improvement; its absence certainly hampers countries' efforts to maximize the benefits of environmental policies and to minimize the potentially negative impacts of some economic sector policies on human health and the environment.

Good governance is a necessary, but insufficient, condition to ensure better environmental management. Additional specific elements which fall under the heading of environmental governance are also necessary. The most important are:

- consensus/science-based objectives (differentiated by time) appropriately reflected in policies, laws, and regulations;
- attention to the full regulatory cycle with appropriate mixes of policy instruments (regulatory, economic, social, etc.); sector policy integration; compliance monitoring, assurance, and assessment;
- an appropriate institutional framework (including a clear allocation of responsibilities and powers to national and subnational levels of government);
- provision of information, including the right of access to it as provided for, e.g., in the Aarhus Convention; public participation; and access to an impartial judiciary.

In many OECD countries, environmental agencies or ministries have been at the forefront in developing good governance practices, notably by fostering greater openness and participation in decision-making processes.

In ensuring good environmental governance, there are mutually reinforcing roles for three key actors:

- government: parliamentary bodies and regulators can help foster a culture of compliance by using the most cost-effective policy instruments (and mixes) possible, which will often be economic instruments (such as emissions trading, and environmental taxes and charges, sometimes complemented by voluntary approaches), and by providing access to information (e.g., pollution releases and transfer inventories);
- an independent and impartial judiciary to which private citizens have access as plaintiffs is essential for assisting governments in maintaining effective environmental enforcement regimes;
- citizens, individually and through non-governmental organizations, can use media outlets (and the internet) to name and shame violators; and they can make vigorous use of the courts to ensure that

laws are effectively enforced and, indeed, interpreted more broadly where citizens can appeal to such norms as environmental justice and the right of citizens to have a healthy environment (in this regard, there are important references in the draft European Union Constitution and in the Environmental Charter of France).

The OECD contributes towards developing laws (both international and national) and fostering compliance with them in a number of ways. It promotes agreements on environmentally effective and economically efficient policies and on their underlying principles (polluter pays, user pays, etc.); it identifies good policy practice; and adopts legal instruments, supported by monitoring and "peer review" mechanisms aimed at fostering compliance. Members also share experience and provide support to Non-Member countries.

The OECD has been an active partner of INECE, supporting analysis of various aspects of compliance assurance, including economic aspects and environmental compliance and enforcement (ECE) indicators. It has also been supporting countries in the region of the former Soviet Union and in Asia in strengthening their enforcement systems.

The OECD is willing to continue to play an active part within INECE by facilitating an exchange of good practice and supporting the development of effective and efficient policies and compliance assurance systems based on principles of good governance and sound environmental management.

THE RELATIONSHIP BETWEEN GOOD GOVERNANCE AND ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT: AN AFRICAN PERSPECTIVE

ALLOTEY, JONATHAN A.

Executive Director, Environmental Protection Agency – Ghana

I would like to make my contribution from the perspective of an African developing country. The concepts of governance and environmental management are universal in all societies, African countries not excluded.

GOVERNANCE involves a set of norms and values which are expressed in two (2) or more ways: informal and formal. INFORMAL polices, laws, and rules are founded on custom and practice. FORMAL polices, laws, and rules are expressed in written forms and established institutions.

In Africa there are two systems of governance in operation – traditional and modern. Traditional governance is composed of unwritten, informal, and systematic taboos (prohibitions and restrictions), rituals, and rules that regulate the interaction between individuals and the natural environment. This type of governance has its own characteristics:

- It is evolutionary, i.e., has emerged from within a societal system and grown in a cumulative way. Knowledge has passed down from generations through experimentation, learning, and application.
- It is responsive and resilient to the ecology on which they are based.
- It is localized and participatory – decisions are taken at different levels involving informal organizations (e.g., households).

The modern governance system vests planning and decision-making in centralized government agencies and denies participation of local and informal groups. The system is composed of written and formal policies, environmental plans, legal instruments and informal laws, rules of practices, and institutions.

The pre-colonial era was characterized by pure traditional governance systems. Colonialism introduced the modern or formal governance system.

The traditional governance system has indigenous roots and is time honoured and adaptive. Local people understood it well.

Conflicts have arisen when local traditional practices are no longer viewed as legitimate or consistent with national policies or when entities external to a country ignore needs and imperatives of local people.

For example, in Ghana, forest reserves were created and restrictions placed on entry by local people by introducing forest guards. Management of the resource did not permit participation by local people to serve their needs in terms of food and medicine.

However, there were traditional forest reserves – sacred groves – with rules of entry and restrictions on collection for medicines, hunting, etc. Most of them came under threat from so-called modern ways of doing things (urbanization, construction, etc.). Today, though small in size, they stand as rich islands of biodiversity in a sea of degraded lands. Currently the concept of community-based natural resource management approaches similar to traditional governance systems are been promoted.

There is one case of a monkey sanctuary – where the people regard monkeys as sacred and villagers and animals live together. A cohabitation strategy of instituting by-laws in line with the beliefs of

the people has bridged the gap between customary and formal laws and regulations to save the monkeys, and is now a tourist attraction and providing livelihood to the community.

There are many of these traditional governance and compliance systems all over Africa (e.g., rules on noise making, fishing, and farming along water bodies).

There is a need to incorporate traditional knowledge systems and principles of conservation in the overall national environmental governance structure – where basic questions about ownership distribution and control and utilization of environmental resources are integrated into the design of appropriate structures.

In Ghana, there is a saying in one of the local languages: SANKOFA – a call to traditional values. We need to go back to our roots and examine the good enduring concepts in our societies that have served our people well. In Africa, good governance and environmental compliance and enforcement would be assured by incorporating traditional governance values.

SUMMARY OF PANEL 2: THE COMPLIANCE AND ENFORCEMENT MESSAGE

Moderator: Bakary Kante, United Nations Environment Programme, Kenya

Panelists: Sheila Abed, Chair of IUCN (World Conservation Union) Commission on Environmental Law, and IDEA (Environmental Law and Economics Institute), Paraguay

Antonio Benjamin, Law for a Green Planet Institute, Brazil

Ken Cook, Environmental Working Group, United States

John C. Cruden, Deputy Assistant Attorney General, U.S. Department of Justice

Rapporteurs: Matthew Stilwell and Scott Stone, INECE Secretariat and the Institute for Governance and Sustainable Development, United States

1 INTRODUCTION

The purpose of this panel is to provide participants with the tools and messages necessary to foster a culture of compliance and enforcement in their organizations, home countries, and regions. The panelists discussed the benefits/costs of enforcement, tools for promoting success, and new approaches to compliance.

2 PRESENTATIONS

A summary of the presentations of the four presenters to the plenary follows:

2.1 Presentation by Dr. Sheila Abed

Dr. Sheila Abed spoke on challenges facing developing countries in securing better compliance and enforcement. The Millennium Ecosystem Assessment captures the significant challenges facing developing countries. It stresses that key ecosystems on which we rely are under stress, particularly in developing countries that husband the world's biodiversity. Among her main points were the following:

- Crime pays. Enforcement is inadequate in many countries and actors benefit by breaking the law. Compliance needs to be enhanced to address this problem.
- Enforcement systems are only as strong as their weakest link. A first step towards enforcement and compliance is the amendment of frameworks and the building of national capacities. Biodiversity-rich countries are often immersed in an authoritarian culture, marked by corruption and arbitrary procedures. Enforcement and compliance are thus related to good governance and the rule of law.
- Coherent and comprehensive regulatory frameworks require better coordination among institutions.
- Obstacles to compliance and enforcement include insufficient resources, poor staff development, inadequate education of staff and the public, and insufficient access to information and to justice. Addressing these obstacles requires more attention to economic, social, and political issues.
- Economic issues can also be an important vehicle for compliance. Addressing these through economic incentives can promote competitiveness, increase efficiency and level the playing field.
- Social and political issues must also be addressed, such as the essential need to enhance participation and public involvement.

In conclusion, Dr. Abed asserted that frameworks must be adapted to local conditions, where a mix of measures will usually be required, including economic instruments. She further explained that efforts to strengthen compliance should reflect that the inadequacy of financial resources is unlikely to be remedied in the short term, so incentive-based approaches should be promoted. In addition, officers must be better trained and supported, to achieve better compliance.

2.2 Presentation by Mr. Antonio Benjamin

Mr. Antonio Benjamin, a Brazilian environmental lawyer and prosecutor, spoke on shaping the compliance and enforcement message, with a focus on five main points: (1) whether there is a global message; (2) the importance of the message; (3) issues facing developing countries on environmental compliance and enforcement; (4) assessing tools for compliance and enforcement; and (5) the future of environmental compliance and enforcement.

On the first point regarding a global message, Mr. Benjamin stated that a number of elements can be combined to form a coherent and collective message on environmental compliance and enforcement. He discussed three elements in particular:

- Ecologically sustainable development has become a global paradigm and, although often lacking in clarity, provides an overarching goal to which efforts to strengthen compliance and enforcement can be linked.
- The rule of law is essential in promoting progress towards sustainable development and in achieving other important social objectives.
- Law demands compliance and enforcement. Without compliance, the law is deprived of meaning.

Mr. Benjamin asserted that these elements, taken together, could be considered as central components of a more effective global message on compliance and enforcement. They can help to address a culture of non-compliance as a global problem, which reflects not only a lack of willingness to comply, but more importantly also a lack of capacity to comply. Both civil and common law countries face these challenges.

Second, Mr. Benjamin addressed the issue of the audience for the message and why that is important. To start, we must ourselves have a clear sense of our mission, of the contribution we have made over the last few decades, and that which we will continue to make in the future. He explained that there is a message we want to pass to parliaments, to show that a good piece of legislation can be well-enforced and achieve its goals. There is also a message we want to convey to the business community about fairness in the market place and fair competition, which requires rules to be applied equally to all parties. Finally, there is also a message we want to pass to the non-governmental organizations. Mr. Benjamin further contended that, as well as policies, we need laws with which we can secure compliance. And finally, he declared that there is a message we must convey to the donor community, to ensure that the investments they make result in the objectives they seek.

Third, Mr. Benjamin discussed the main challenges facing developing countries on environmental compliance and enforcement. He addressed a number of issues:

- Regulatory systems in all parts of the world have been improved. Modernization of the regulatory process is an essential part of strengthening the rule of law and must continue.
- There is growing public demand for better environmental compliance and enforcement. The public is becoming progressively aware of the need for environmental compliance and enforcement and progressively more supportive of it.
- Drafting good laws remains a problem in all countries. The United Nations Environment Programme (UNEP), INECE,

and other actors can provide model laws and other tools to assist countries to improve their regulations.

— All developed and developing countries face financial and human resources challenges that must be addressed.

Fourth, Mr. Benjamin argued that the assessment of environmental compliance and enforcement tools should also be a priority in strengthening compliance and enforcement:

— In many cases, there is a lack of systematic environmental compliance and enforcement strategies and priorities, which can be addressed through the activities of UNEP, INECE, and others.

— There is a continuing focus on a bureaucratic model of environmental compliance and enforcement, and poor generation and management of environmental compliance and enforcement information. It is difficult to develop environmental compliance and enforcement indicators when you lack information.

— Another challenge that must be addressed is the career insecurity of environmental compliance and enforcement personnel, as well as capture of agencies.

Mr. Benjamin concluded by stating that we must strengthen environmental compliance and enforcement if we are to leave our children and future generations a world we desire.

2.3 Presentation by Mr. Ken Cook

Mr. Ken Cook spoke on how to present a message – or set of messages – that help to create a culture of compliance and enforcement. He made three main points: first, as environmental law has improved so has the message of those who oppose these developments; second, this tendency is challenging the work of compliance and enforcement officials and others; and third, we need to think about how to communicate better to address this opposition and make room for our work.

Mr. Cook first addressed how we can shape better messages. He asserted that the best messages come from culture. We are not simply trying to establish a message of compliance and enforcement. We are also thinking about how our cultures receive information about compliance and enforcement. He maintained that concepts such as "compliance and enforcement" inspire some, but cause resistance in many; therefore we need to reframe our message to connect with a broader public.

Mr. Cook also contended that culture comes from many sources, including the family. He mentioned these statements as examples: "pick up after yourselves", "stop tracking mud through the house", "if you break it, you buy it". These statements embody values – fairness, equality, opportunity, respect for nature, respect for heritage and the past. He argued that these values in many ways are at war with modernity, commerce, and ideology, but they remain fundamental. Mr. Cook further declared that when we stray from these values, we do so at our peril, and find ourselves using technocratic arguments that people do not understand or relate to. He explained that people without a specialized background (similar to the participants') may not understand the language we use. To communicate with the public, we need to use common language that connects with their core values. Mr. Cook presented some metaphors to draw on: (1) The sheriff riding into town is fair, but tough, and keeps the town orderly; (2) The cop on the beat keeps the order, knows people, and secures the peace. In contrast, describing the EPA as the Gestapo, as has been done by some in the United States, presents an unfavorable image.

Mr. Cook also contended that organized opposition stays on message to dilute technical information and present a positive and acceptable message to the public. While some of their messages are "negative", most strike a more engaging and positive tone. Some examples of these messages are: "making progress but having a long way to go", "science is not settled", and "risk reduction is probably not worth the costs". They stay positive and connect

with people's values. He stated that the regulatory community, by contrast, has a negative message that causes people to disconnect. We describe problems as overwhelming, and the solutions as long-term. We use technical language. We thus need to reframe our message. Examples of more positive messages are: we take care of the planet for our future; we are investing; and the problems are not insoluble.

Mr. Cook offered three suggestions as we move this forward:

- Keep it simple. Messages should be tested out on people who do not work in the field, to ensure that they connect.
- Teach first. We need to raise awareness as a first step towards building trust and understanding, and before securing compliance and enforcement.
- Give credit where credit is due. We need to be better at recognizing achievement and reward it as a way of expanding the circle of people who are interested in protecting the environment.

2.4 Presentation by Mr. John Cruden

Mr. John Cruden drew on his extensive experience as the person responsible for all civil environmental enforcement in the United States and presented three significant points: the concept of compliance and enforcement; lessons learned from the last few years; and next steps to communicating our ideals and passions to the public and citizens we serve.

First, Mr. Cruden stated that the concept of environmental enforcement and compliance is the engine that drives the train towards environmental improvement and success. Compliance means achieving our standards, and failing to comply lowers the real standards we are setting. He argued that we must do a better job at explaining our roles and promoting our values and messages. In particular, we must communicate that when we do not adequately enforce, companies that are complying with the law are put at a competitive disadvantage and the environment suffers.

Second, Mr. Cruden explained that over the last few years, enforcement experts in the United States have learned at least three crucial lessons. First, as enforcers, we work better when we partner with other entities – citizen groups, states, and local entities. Partnerships are an essential part of building better compliance and enforcement. Second, clarity in goals and objectives is required. Those closest to the event must feel part of the process. We must cut through our complex vocabulary to connect with real people. Setting out simple rules clearly – as is often done in children's classrooms – is essential. Third, we must use our own resources wisely in achieving the goals we are seeking. We lack resources, so we must use them effectively and efficiently.

Third, in terms of next steps, Mr. Cruden asserted that we must:

- Develop a clearer message. What are the elements of a clear and successful message? We need to send a simple message that people must "clean up their mess" and behave responsibly.
- We need to deter future misconduct. Industry players want compliance to ensure a level playing field. Like a good soccer game, the rules should be enforced fairly upon all players.
- We need to improve our communication to all actors: we must improve communication to citizens, non-governmental organizations, and the media; we need to communicate accurately to the regulated community; and we must communicate effectively to others in government that our work is important not just to the environment, but also to the economy and other sectors of society.

3 DISCUSSION

During discussion in plenary, participants in the meeting asked a number of relevant questions:

- What is the importance of international environmental agreements in shaping domestic environmental agendas and

rules? (Dr. Iwona Rummel-Bulska, Switzerland)

- Are we optimistic or pessimistic about getting the concept of compliance and enforcement across, and why? (Mr. Paul Gavrel, Canada)
- Is it possible to create a good future for future generations with our current efforts? (Mrs. Zahia Ibersienne, Algerian NGO representative)
- Do our institutional models – the establishment of formal environmental agencies and so forth- make them easy to attack and fail to connect us with more fundamental values and approaches? (Mr. Paul Gavrel, Canada)
- Do you think that implementation of multilateral environmental agreements would be improved by seeking funding for implementation before ratification?
- Does communication with those who should comply also imply cooperation? What is the appropriate balance?

Remark by Mr. Ken Cook (United States): To reconnect the environment with our values, we need to focus on how to better communicate with the public. We need to be careful about the model we pick. We should not, for instance, refer to those that government works with as "customers", such as "the customer is always right".

Remark by Mr. John Cruden (United States): People are fundamentally concerned with the air, water, and land, and are willing to sacrifice their other goals to achieve these goals. We are doing well at communicating the problems, but badly at communicating our successes. We need to be better at showing the value we create.

Remark by Dr. Sheila Abed (Paraguay): Enhancing national capacities for enforcement is crucial. We must also make simple and clear messages that address all stakeholders in society. We must do better at making our goals – the goals of securing compliance and enforcement – those of the broader political process.

Remark by Mr. Antonio Benjamin (Brazil): Legal frameworks that stress prevention and precaution must be built and strengthened. The stronger they are, the easier our job. We need therefore to work on the legislative side, but also within our community to create a culture of precaution and prevention. He expressed optimism in the area of pollution control but noted that green environmental law, biodiversity, and habitat protection are more of a challenge – the impacts are irreversible and the effects often fall further from the acts causing them. We have not yet realized the relevance of international agreements in shaping national legislation. The main role is not only that of hard international law, but also in guiding the development of other softer practices. The Stockholm Declaration, for instance, has been included into national law in many jurisdictions.

4 CONCLUSION

In conclusion, the moderator Mr. Bakary Kante summarized discussions and offered the following key points:

- Working together in achieving environmental compliance and enforcement is a crucial message – we must work together to achieve our goals.
- Clarity is essential if we are to communicate better with the public.
- The rule of law plays a critical role, as well as economic incentives, in achieving environmental compliance and enforcement.
- UNEP and other agencies have been called on to develop tools and models to support and strengthen environmental compliance and enforcement. UNEP is ready to respond to this call, which addresses one of the core areas of its mandate.

SUMMARY OF PANEL 3: ENFORCEMENT INITIATIVES: STORIES OF SUCCESS

Moderator: Kenneth Cook, Environmental Working Group, United States

Panelists: Bill Clark, Nature and National Parks Protection Authority, Israel
Antonio Oposa, Jr., Philippines
Justice Adel Omar Sherif, The Supreme Constitutional Court, Egypt
Walker B. Smith, Environmental Protection Agency, United States

Rapporteurs: Matthew Stilwell, Institute for Governance and Sustainable Development, Geneva
Matthew Cooper, Environmental Media Consultant, United States and New Zealand

1 INTRODUCTION

This panel presented successful enforcement initiatives and sought to inspire future successes. A diverse group of panelists from government, civil society, the judiciary, and a local community-based action group highlighted practical enforcement examples and success stories. INECE has helped facilitate these successes by working to: 1) raise awareness of compliance and enforcement; 2) develop networks for enforcement cooperation; and 3) strengthen capacity to implement and enforce environmental requirements. The stories and practical examples described during the panel demonstrate that enforcement initiatives are actually about protecting our collective future and preserving the environment for future generations. All participants emphasized the importance of communication, networking, and capacity building to ensure successful enforcement action. The judiciary, government agencies, nongovernmental organizations (NGOs), and communities all have special roles to play in facilitating effective enforcement and ensuring that successes and any "Eco-Hero" stories are communicated to a wider audience.

2 PRESENTATIONS

2.1 Presentation by Mr. Kenneth Cook

Mr. Kenneth Cook, President of the Environmental Working Group, opened the panel by explaining that the panelists would talk about stories of success, stories on the ground, stories of capacity building, and stories of taking action. He stressed that in the second half of the last century, and at the beginning of this century, we are "standing up for the entire future", we are standing up for the planet, and we are looking to the future to secure victory. Mr. Cook inquired as to whether we have our finger in the dyke or whether we are close to a victory for the people and the environment. He then announced that the four speakers would present a broad range of successful enforcement initiatives and the stories behind these successes.

2.2 Presentation by Dr. Bill Clark

Dr. Bill Clark, International Liaison Officer for the Nature and National Parks Protection Authority in Israel, questioned what we mean by a successful enforcement initiative. We are asked to consider the concept of success, and within the context of INECE's three overarching priorities. What do we know about each?

First, INECE seeks to raise aware-

ness of compliance and enforcement. Recent decades have witnessed an increased awareness of environmental crime. Until recently, there was a thriving trade in ivory, animal pelts, and other animal species. As a consequence, species were being depleted and driven into extinction. Countries have adopted endangered species laws, the Convention on International Trade in Endangered Species (CITES) was agreed upon, but despite these admirable efforts, the dirty business of illegal trade in contraband wildlife products continues. Most people today know about endangered species and understand that keeping species from extinction is important. But all of this success in raising awareness has been matched by increasing criminality – so we face a dilemma. Despite all of the successes and the raising of awareness, "dirty trade" continues at a disturbing rate.

INECE's second goal is to develop networks for enforcement cooperation. Dr. Clark noted that this conference is helping to create many initiatives and collaborative projects and that this is an ideal opportunity to increase communication networks. Interpol has also created enforcement networks on environmental issues. For example, Interpol's Project Noah identified one person as a key actor in trafficking in many regions. This key actor was cornered in Mexico, extradited to the United States, and sentenced to 71 months in a U.S. prison. Other networks too have had significant success stories, such as the Lusaka Agreement and Europol. Dr. Clark stressed that networking works, and that we need much more of it.

Of course, the criminals also create their own networks. They create different groups, different communication channels, and different ways of moving species. Today we think less of "organized crime" and more of "networked crime". The numerous legal and political obstacles hamper authorities' attempts to curb these criminal activities. But we must work within these obstacles and resolve them to enhance the flow of information and to secure human rights and effective law enforcement. Responsible law enforcement must be accountable; criminals can work outside formal responsibilities, but authorities cannot. We must be accountable, follow the rules, and protect the information of individuals used in relation to the enforcement and prosecution of criminal activity, even if there is no level playing field. But networking helps us to do this well, linking us across borders and around the world.

INECE's third goal is building capacity. Dr. Clark affirmed that there have been numerous successes in increasing capacity. One is Interpol's EcoMessage, which provides all officials with access to Interpol's information and network. Another is the Lusaka Agreement, which is an informal network of African officials who work together for wildlife protection and enforcement. The Lusaka Agreement Taskforce has undertaken a range of important initiatives, including the recovery of huge smuggled stocks of ivory from Singapore, in collaboration with Singaporean officials. The International Fund for Animal Welfare (IFAW) has also built capacity through a range of partnerships. IFAW built scientific capacity to undertake DNA and isotope analysis of ivory, to find the ivory's origins and the structure of the criminal organizations undertaking the smuggling. This scientific capacity building helps support enforcement capacity. Networking opens access to technical resources and capacities. These are not the traditional tools of African park rangers; things are changing as new technology and networking works to support enforcement.

What is the sense of raising awareness, building networks, and creating capacity – the three goals of INECE – if the criminals still have the upper hand? If we look into our own work, we know that for everyone we catch, there are still many getting away. If we can break the chain of criminality – break the links at any point in the chain – then the principal concerns of society are met. However, with wildlife and pollution, the first link is the problem. The conviction of wildlife criminals is often too late, as the animals are already dead or the

environment is already polluted. So we must emphasize the importance of deterrence if we are to be better in achieving the goals society has set for us.

2.3 Presentation by
Mr. Antonio Oposa Jr.

Mr. Antonio Oposa, Jr. of the Philippines told a story. Once upon a time in the Far-East, there was a group of islands called the Philippines. It was known to be the richest island of biodiversity in the world. But the real wealth of the Philippines is under the water. It has many more miles of coastline than the United States. It is the richest center of biodiversity in the world. In a small sector of their ocean, there are more species of coral than in many other parts of the world. But this biodiversity has been destroyed by blast fishing, cyanide fishing, and other activities based on exploitation of these fragile ecosystems. There were three million hectares of coral reef, now there are only eight thousand hectares left. The Visayan Sea and Philippines islands can be found in the Sulu-Salawesi Marine Triangle, an epicenter of biodiversity on Earth, but it is facing collapse. How can we respond to this? "We can curse the darkness, or we can light the candle."

In January 2003, Mr. Oposa and colleagues launched an operation with local police and convicted seven people of damaging the coral reefs through dynamite fishing. Yet instead of simply taking the convicted persons to jail, part of their punishment was to act as fish wardens to protect the sea they were previously destroying.

Mr. Oposa's group then focused on addressing the production of the blasting caps that were used for fishing. After shutting down production on their island, his group moved to address production of blasting caps on other islands. With the help of the Navy, the group organized a gunboat to shut down blasting cap operations on a neighboring island.

An ongoing challenge remained to capture not only the fishing boat crews, but also the owners who are often rich, powerful, and have links with corrupt police. With the help of local law enforcers and the Navy, his group convicted a number of owners, sending a message to criminals that illegal operations would not be tolerated. Mr. Oposa observed that in the rules of nature, there is no right or wrong, only consequences. So to promote longer-term care of the coral reefs and the marine environment, his group organized the Visayan Sea Squadron to empower and educate youth, help local governments establish marine sanctuaries, and undertake marine surveys. The purpose of the Squadron is to enlighten the youth, who must take responsibility for the future of their natural environment. The group promotes the three "E's" of environmental stewardship: Education, Engineering (social, physical, legal, and financial), and Enforcement, leading to Conservation, Protection, and Restoration (CPR). In effect, this is CPR for the environment. These successes are due to networks and inter-agency cooperation.

Mr. Oposa concluded with two thoughts:

"In the laws of nature, there is no right or wrong, only consequences."

"Though nothing can bring back the hour / of splendor in the grass and glory in the flower, / we grieve not rather find / strength in what remains behind."

This is an evolving story.

2.4 Presentation by
Justice Adel Omar Sherif

Twenty years ago, Justice Adel Omar Sherif, Deputy Chief Justice of the Supreme Constitutional Court in Egypt, became involved in protecting the environment. At this time, having an interest in the environment was questioned by many, who wondered why environmental issues would be of interest to a judge and not simply environmental officials. However, Justice Sherif argued that in order to be part of the civilized world, one must have a commitment to the environment. It was not until the global judges meeting in Johannesburg that it became evident to developing countries that to be part of the civilized world

today they must respect all human rights including the right to the environment.

Since then, collaborating with the United Nations Environment Programme (UNEP) and the Supreme Court of Egypt, a union of judges focusing on the environment has been established to support judges in the Arab Region, by creating networking and awareness and by providing databases and resources. Support for the judges has come from UNEP to establish a global center for training judges. The government of Egypt has provided the center with land and headquarters, which will cost over 15 million dollars.

These organizations are working with partner organizations in Europe and elsewhere to develop the program and its materials. The goal is to help judges in the region and in the wider developing world to understand the environmental challenges and to build a world that is cleaner, more peaceful, and more democratic.

2.5 Presentation by Ms. Walker Smith

Ms. Walker Smith, director of the Office of Civil Enforcement at the U.S. Environmental Protection Agency ("EPA"), began her presentation by explaining that initiatives are often developed to meet a different challenge than core enforcement activities. A key component of core enforcement activity is to ensure a level playing field. Thus, there is an implicit assumption that there is a basic level of compliance in the sector, and the goal is to bring those who are out of compliance to the same level as those who are complying. But what if virtually the entire sector is out of compliance? Then creating a level playing field is not the issue. The playing field is level, but it is level at the bottom. This scenario is ripe for an initiative.

This is not to say that the more traditional model of bringing one or two big enforcement cases cannot motivate a sector into compliance. One example of how this strategy can promote compliance in a sector is the EPA's recent enforcement action against DuPont. The EPA filed an administrative case against DuPont for failure to provide the Agency with information on the adverse effects of PFOA, a substance used to make Teflon. The EPA alleged that DuPont's failure was a violation of Section 8(e) of the Toxic Substances Control Act ("TSCA"), which requires companies to submit information to the EPA about chemicals that may present a substantial risk to human health or the environment. The DuPont case has gotten the industry's attention about the importance of meeting its obligations under TSCA. Even though the case is still in litigation, the industry has identified TSCA compliance as one of its biggest priorities, has invited the EPA to national conferences to speak about the importance of TSCA compliance, and has come to the Agency to discuss TSCA compliance.

However, compliance with TSCA does not require a company to invest in expensive control technology. Ms. Smith explained that it has been the EPA's experience that where compliance is expensive, the traditional model of bringing one or two cases is often not sufficient to bring a sector into compliance. Here the level playing field can operate as a disincentive for companies to come into compliance: until companies in the sector are convinced that the Agency will bring additional enforcement actions, they may be unwilling to expend funds for pollution controls when their competitors are not making similar expenditures.

That dynamic changes when the EPA announces an initiative against an entire sector. EPA sector initiatives have proven highly effective. The petroleum refining industry is an example of a successful EPA initiative that is nearing conclusion. The EPA inspected over 100 petroleum refineries for compliance with the Clean Air Act, the Clean Water Act, and hazardous waste regulations, found violations at every facility, and identified the sector as a national priority. However, the task of bringing the entire refining industry into compliance with numerous statutes proved daunting, so the EPA tasked a working group with determining which violations should be the focus of the priority and with

determining an enforcement approach.

The resulting strategy focused on the areas with the most significant environmental impacts, involving significant VOC, NOx, SO2, and toxic emissions. Thus the Agency decided to concentrate on four areas in the initiative: flaring, benzene emissions, leak detection and repair, and new source review. New source review requires installation of the best available control technology for new and modified units in refineries, including heaters, boilers, and cracking units.

EPA also decided to use an innovative approach to traditional enforcement to obtain compliance in each of these four areas. Under the more traditional approach to enforcement, the EPA develops a case using information requests, inspections, and other methods to identify violations. Once those violations are identified, the Agency engages in settlement where possible, or proceeds to litigation. Whether the parties are in settlement negotiations or litigation, they spend significant efforts attempting to prove or disprove the violations. Once the violations are established, the parties engage in discussing the appropriate remedy for the violations.

The EPA wanted to try an approach that would bring the parties to resolution more quickly and would bring an entire company into compliance at one time, rather than suing a company on a facility by facility basis. Under this alternative approach, the EPA limits the investigation of the company and does not fully develop information on all of the potential violations. In return for the EPA's agreement to limit the investigation, the company agrees that the negotiations will focus not on the violations, but rather on how to bring the company's facilities into compliance with the law, thus remedying any underlying violations.

This approach means that the parties do not have to engage in a time consuming and costly discovery process about each violation, providing obvious resource benefits to the EPA and participating companies. The companies save resources on litigation costs and can enter into system-wide settlements that allow them to incorporate business planning into the settlements, a more difficult proposition in facility by facility negotiations. Moreover, since the EPA will have less information about a company's specific violations, the penalty imposed in the consent decree can be reduced. If companies reject this alternative approach, the EPA proceeds with traditional enforcement. Most of the petroleum refining industry has agreed to the alternative approach, although the EPA has had to proceed with information gathering on some occasions when settlement discussions broke down. Following a period of traditional information gathering, the parties have generally resumed settlement discussions.

This approach has led to significant benefits. It began with a sector out of compliance, and now over half of the industry (by refining capacity) is under a consent decree, requiring system-wide emissions reductions and compliance with the Clean Air Act. Another significant percent of the industry is in settlement negotiations that are close to resolution, and EPA hopes to have 80% of the industry under national consent decrees within the year. The remaining 20% of the industry will be addressed by EPA regions and by states.

This process, Ms. Smith explained, has also allowed companies and the EPA to discuss ways to improve technology to get more effective control technology at lower cost. An unanticipated benefit of this approach has been enhanced communication and cooperation within the industry about pollution control. When the first consent decrees were signed, the settling companies created a "Consenters' Group" that meets on a regular basis to discuss pollution control, including new technologies to meet the emissions limits in the decrees. The EPA also meets with the Consenters' Group to discuss compliance issues. This communication within and with industry has proved important in enhancing compliance.

Ms. Smith concluded by stating that the EPA has built on the lessons learned in the refinery initiative and developed other national priorities to address

widespread noncompliance in sectors that have a significant environmental impact. Initiatives are challenging and require a significant commitment of time and resources, but they can turn an industry around and make a real environmental difference.

3 DISCUSSION

Participants and panelists addressed a number of issues through questions and discussions.

Question: The role of judicial networks is crucial. The European Union (EU) has established a forum of judges for the environment. It has circulated a questionnaire to the twenty-five EU countries. This technique could also be used by INECE to gather information. Different forums of judges could collaborate and exchange best practices. We could also see an academy under the auspices of INECE to promote best practices. There is, for instance, important case law on the precautionary principle applied by Supreme Courts which could be promoted among judges. (EU representative)

Answer: Collaboration among judges is important and can help to promote common language and approaches across different jurisdictions. International cooperation at national, regional, and international levels is particularly important. (Justice Adel Sherif)

Question: First, experiences in Bangladesh establishing a separate environmental court with special magistrates has proved illustrative. While much training focused on higher level judges, often cases are brought in the lower courts. How, through initiatives such as the new judges facility, can we facilitate the training of magistrates at lower levels? Second, in relation to collaborative approaches discussed by Ms. Walker Smith, is there a danger of capture when the regulated community is included in the discussion? (Ms. Linda Duncan)

Answer 1: In relation to training, the policy of the new center will be to make training available to all judges who are interested, subject to capacity. The challenge is for judges to accept the concept of training, so it is important to approach judges in the right way. (Justice Adel Sherif)

Answer 2: Collaboration on issues such as flaring in the petroleum industry has worked well. It has prevented opposition to consent degrees which might otherwise have seen challenges by the industry. (Ms. Walker Smith)

Question: Workers in a company are also part of the network that could be called on to help promote compliance. Can unions be better included in discussions about compliance?

Answer: In some cases, workers are interested in creating a cleaner industry. In others, workers are concerned about more work, additional responsibilities, and new challenges. So there is pressure on management to educate workers to adapt to new technologies and approaches. (Ms. Walker Smith)

Question: How do we achieve success stories in countries with governments that are perceived as being more anti-environment, or at least not convinced that environmental management is a priority? (Mr. Albert Kohl)

Answer 1: The president of the Philippines has not made environmental enforcement a priority at the national level. So we work together with officials and law enforcement officers at the local level. We also work with the youth, preparing them with improved environmental awareness for when they will take over. (Mr. Tony Oposa)

Answer 2: We have to be better at getting our message out and framing the message for public and political management, about why it is the right thing to do. Government has been supportive where some companies have been complying and where others have not. Concepts of the rule of law and fairness are powerful. We are not making new laws, but enforcing laws passed by Congress. This message gets through. INECE could consider identifying four or five countries to be sensitized and worked with to improve their environmental awareness. (Dr. Bill Clark)

Answer 3: Over the past four

years, the EPA has had greater successes on specific pollutant reductions than in the previous four years. No-one at a political level has prevented EPA's Office of Enforcement and Compliance Assurance (OECA) from taking these cases. (Ms. Phyllis Harris)

4 CONCLUSION

Each of these case studies illustrates success in a different category of environmental enforcement, including illegal fishing, wildlife smuggling, judicial awareness, and pollution reductions. In each example, different approaches to the problem were used to achieve success, from local to national activities. However, all these success stories shared common elements:

- Setting out with a clear goal and objective allows you to demonstrate success.
- We must be accountable for our activities and publicize our successes.
- Collaboration with other enforcers, and in some cases with the industry we are enforcing, is a crucial component for changing behavior directly and indirectly.
- Innovation and new approaches are needed to address both old and new problems.

SUMMARY OF PANEL 4: ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT INDICATORS: MEASURING PERFORMANCE, MANAGING RESOURCES

Moderator: Paula Caldwell, Environment Canada

Panelists: Myriam Linster, Organisation for Economic Co-operation and Development
Michael Stahl, Environmental Protection Agency, United States
Maria Eugenia Di Paola, Fundación Ambiente y Recursos Naturales, Argentina

Rapporteur: René Drolet, Environment Canada

1 INTRODUCTION

Presentations on environmental compliance and enforcement (ECE) indicators were delivered from three organizations (OECD, the Fundación Ambiente y Recursos Naturales (FARN) from Argentina, and the U.S. Environmental Protection Agency). The panel then opened into a group discussion involving all participants. Discussions demonstrated that there is always a need for several indicators, but there is no universal set of indicators. The appropriate set of indicators depends on the specific circumstances of a given situation and must be tailored to the purpose of the exercise. Lessons learned from various countries emphasize the need for flexibility and continuity, as well as the need for pragmatism (the need to learn from pilot projects). Exchange of information and international cooperation are therefore key elements for success. The panel also demonstrated that both developing countries and developed countries face challenges in identifying, developing, and using ECE indicators. However, the nature of these challenges may be different.

This panel culminated in various recommendations for INECE. It was recommended that a Community of Practice be built among ECE programs conducting indicators projects in order to compile accomplishments and lessons learned. Participants also identified the need for training in this area. It was suggested that the *Performance Measurement Guidance for Compliance and Enforcement Practitioners* document be used as a starting point to develop training tools.

2 PRESENTATIONS

The session started with presentations on environmental compliance and enforcement (ECE) indicators from three organizations (OECD, the U.S. EPA, and FARN).

The first presentation was given by Ms. Myriam Linster and was entitled "*Environmental Indicators: Development, Measurement, and Use*". This presentation outlined the OECD's experience with environmental indicators. The PSR model (Pressure-State-Response) is the conceptual framework used by the OECD to develop environmental indicators. In this model, ECE indicators are examples of "Response" indicators. This model has proven useful for the OECD in the development and use of environmental indicators. Since 1992, the OECD has developed a set of 40-50 core environmental indicators to review the environmental performance of 47 countries. Environmental indicators have proven their usefulness for a broad range of purposes. It has become clear that a universal set of indicators does not exist. Decision on which indicators to use must be made in accordance with the objectives

and circumstances of each situation. The development and use of environmental indicators is a dynamic process that needs flexibility, continuity, and pragmatism. The only possible way is to learn by doing. It was pointed out that there is much to learn from exchange of experiences, which emphasizes the interdependency between international and national progress and the importance of international cooperation.

Mr. Michael Stahl followed with a presentation on *"Performance Indicators for Environmental Compliance and Enforcement Programs"*. The presentation outlined a three-stage model for identifying (stage 1), developing (stage 2), and using (stage 3) performance indicators. Evidence suggests that most countries are in the identification and development stages. Best Practices for each stage of this model are identified and discussed in a report produced by the INECE Expert Working Group on ECE Indicators (*Performance Measurement Guidance for Compliance and Enforcement Practitioners).* Discussions within the international community have shown that indicators projects are tailored to the unique circumstances and settings of individual countries. It is also noted that the challenges facing developing countries in their indicators projects are different from those experienced by developed countries. Developing countries are often faced with compliance cultures in formative or very early stages, environmental laws not fully implemented, immature environmental agencies, and a system lacking data collection. For developed countries, challenges are mainly associated with the duration of implementation of projects, lack of interpretive skills, misuse and/or misinterpretation of results by external audiences, and the inherent limitations of indicators. ECE performance indicators are being used for various management purposes in certain countries. Such uses include the monitoring of performance through regular reports, review of performance of organizational units, evaluation of the effectiveness of specific programs, or the reporting of results to multiple audiences.

The last presentation was entitled *"Pilot Project on ECE Indicators in Latin America – The case of Argentina"* and was delivered by Ms. Maria Eugenia Di Paola from the Fundación Ambiente y Recursos Naturales, describing a pilot project on ECE indicators associated with air and water quality. The pilot project was developed by FARN in Argentina, in the framework of an initiative of the World Bank Institute in Latin America, with other institutions from Brazil (Lawyers for a Green Planet) and Mexico (Ceiba), with the support of the Economic Commission for Latin America and the Caribbean (ECLAC) and INECE. The project was carried out in the Municipality of Morón, Province of Buenos Aires, and involved three levels of government, with major support and involvement from the Mayor of Morón. The methodology described in the INECE Expert Group document (*Performance Measurement Guidance for Compliance and Enforcement Practitioners)* was used as a starting point for this project and was refined. A large number of indicators were identified, both for water and air quality. Overall, there were many more indicators for inputs and outputs, compared to intermediate and final outcomes. This pilot project demonstrated that NGOs have an important role to play in such projects, particularly in stimulating and increasing interest within governments. The project also clearly demonstrated that a single indicator is not enough, and that one needs an interrelated system of various indicators in order to tell a story.

3 DISCUSSION

The presentations were followed by exchanges between panelists and the audience. A summary of the discussions is presented below, by major topics.

3.1 Perception Issues

There was a discussion on the perception issues that may arise when indicators are used to provide information to the public. Panelists acknowledged that this is indeed a potential problem. Members of the public can be scared by what they see

and/or may not interpret the indicators the way they should. It was suggested that this risk may be reduced if information is given to the public using a set of various indicators, with some context to help interpretation. The choice of indicators is critical as well. Developers of indicators must always keep in mind the possibility of misinterpretation or misuse of indicators by others.

3.2 Funding Allocations Based On Indicators

A question was asked with respect to a hypothetical situation in which funding would be allocated based on benefits to the environment. Panelists were asked how they would proceed to measure such benefits. It was pointed out that such a situation would emphasize the need for the development of more indicators. It was suggested that in such situations the focus should be on the development of a set of two or three outcome measures that are readily usable. The importance of consulting with stakeholders on the choice of indicators in such cases was also emphasized.

3.3 Training

There was a suggestion that developing countries need to learn from those countries where ECE indicators have already been developed and used. It was pointed out that formal training is needed and that lessons learned need to be shared. There seemed to be consensus on this topic among the participants.

3.4 Challenges

Several questions focused on the various challenges associated with the development of ECE indicators. Those challenges may be related to the interactions of compliance and enforcement personnel with their policy development counterparts in government. Other challenges are related to the development of indicators for criminal prosecution programs. The specific challenges of developing ECE indicators in federally-oriented countries were also discussed. In the latter case, one panelist suggested that the main challenge in federal countries is related to data collection and management (the need for timely and accurate data).

4 RECOMMENDATIONS FOR INECE

This panel culminated in various recommendations for INECE:

- A Community of Practice should be built among ECE programs conducting indicators projects in order to compile accomplishments and lessons learned;
- Indicators should be used to establish a culture of performance (promote indicators as a management tool to improve performance and increase effectiveness);
- Training should be developed and made available. It was suggested that the *Performance Measurement Guidance for Compliance and Enforcement Practitioners* document be used as a starting point to develop training tools.

SUMMARY OF PANEL 5: STRENGTHENING THE IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

Moderator: Donald Kaniaru, Kaniaru & Kaniaru, Advocate and former Director of Environmental Policy Implementation, United Nations Environment Programme

Panelists: Rosalind Reeve, Chatham House and the International Fund for Animal Welfare
Elizabeth Mrema, United Nations Environment Programme
Gilbert Bankobeza, Ozone Secretariat
Iwona Rummel-Bulska, World Meteorological Organization
Sibusiso Gamede, Basel Convention Regional Centre, South Africa

Rapporteur: René Drolet, Environment Canada

1 INTRODUCTION

Mr. Donald Kaniaru opened the panel by declaring that implementation of multilateral environmental agreements (MEAs) is critical, since in the last 30 years more environmental agreements have been adopted than in any other area of international agreements except human rights. He noted that an important tool in this process is the United Nations Environment Programme's (UNEP) recently developed guidelines on MEA implementation. A key to making the process work is convincing legislatures, nongovernmental organizations (NGOs), and funding agencies of the importance of MEA implementation. Following Johannesburg, Mr. Kaniaru observed, the pivotal issue is the question of implementation: how can we get change on the ground? Mr. Kaniaru asserted that it is time to shift focus away from new legislation to how best to implement what has been adopted.

2 PRESENTATIONS

2.1 Dr. Rosalind Reeve

2.1.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)

The objective of CITES is to ensure international cooperation among parties to prevent international trade in specimens of wild animals and plants from threatening their survival. It operates through a system of mandatory licensing whereby trade in species listed on 3 appendices is controlled through permits. Commercial trade is banned for species listed on Appendix I, but under Appendices II and III, trade is permitted subject to certain controls.

Several implementation and compliance tools have evolved over the 30 years since CITES entered into force. They include voluntary export quotas, national reporting, the national legislation project, technical support and ad hoc missions, training workshops, the review of significant trade, compliance action plans, and the use of recommended CITES trade suspensions to address persistent non-compliance. Suspensions may be recommended against non-compliant countries for all listed species or individual species. They have been used against 10 countries for generalized non-compliance and have proved an effective tool to increase annual reporting of trade data and to encourage parties to enact CITES implementing legislation. Under the national legislation project, a carrot-and-stick approach is successfully addressing non-compliance with enacting

national implementing legislation. Technical assistance is backed up by legislation plans, deadlines, and threats of trade sanctions if plans are not provided and deadlines met. The threat of trade sanctions has prompted parties to request technical assistance and has led to capacity building.

2.1.2 The Convention on Biological Diversity (CBD)

The objectives of the Convention on Biological Diversity are to conserve biological diversity and to promote sustainable use of the components of biodiversity and fair and equitable sharing of benefits arising from the use of genetic resources. Prior to 2002, the focus for biodiversity was on policy development, but this emphasis changed with the adoption of the 2010 strategic plan designed to achieve significant reduction of biodiversity loss and shift focus to implementation.

Implementation tools for the Biodiversity Convention include access to the Global Environment Facility (GEF) to conduct implementation projects, country reporting mechanisms, a clearinghouse mechanism, and technology transfer programs. National reports are required every four years, but several of these reports are late and the data is often qualitative. The clearinghouse has three objectives — to promote scientific and technical cooperation, information exchange, and network development.

2.1.3 The Cartagena Protocol

The Cartagena Protocol, which regulates cross-border trade in living modified organisms (LMOs), also includes reporting requirements and a biosafety clearinghouse. Additional compliance mechanisms include a compliance committee and soft measures such as advice or assistance, capacity building, issuance of cautions, and a name and shame option.

2.1.4 CITES and CBD Compared

In comparing the strengths and weaknesses of CITES and CBD, the following results can be seen. For CITES, the strengths are its narrow focus, its robust compliance system, and the ability to recommend trade sanctions. For the CBD, the strengths are its clearinghouse mechanism, the ability to access the GEF, and NGO participation. CITES' weaknesses include lack of funds and political will, lack of information on national implementation and enforcement, lack of capacity in national authorities, exclusion of enforcement personnel from decision-making, and the legal basis for compliance mechanisms. For the CBD, weaknesses include lack of focus, complexity, multiplicity of reporting requirements, and lack of information on national implementation.

2.2 Ms. Elizabeth Mrema

The Lusaka Agreement's ultimate objective is to eliminate illegal trade in wild fauna and flora, and to set up a permanent Task Force for that purpose. All signatories must establish a national bureau to deal with CITES issues and must second an enforcement officer to the Lusaka Task Force located in Nairobi. The ministers with jurisdiction over wildlife from each party serve as the Governing Council. Although the Agreement has been in effect for 10 years, the Task Force has only been in full operation for two and a half years.

One focus of the Task Force is to create a network with other CITES-related officials worldwide. However, under the Agreement, Task Force agents are authorized to go into the field to conduct operations and make arrests (59 such operations have been conducted to date). The on-the-ground work under Lusaka is a critical aspect of the program.

One key issue is to strengthen the link between the Task Force and prosecutors to increase the likelihood of successful convictions. Another important issue is that success must be measured by something other than the number of convictions since the animals are often already dead. Instead, the Task Force must go to the root causes of poaching and try to deal with these issues to prevent the harm in the first place.

2.3 Dr. Gilbert Bankobeza

The implementation of the Montreal Protocol provides several valuable lessons for other MEAs.

Better information about successful implementation techniques, including how data is generated and collected under other MEAs, would help facilitate implementation under new MEAs. This information gathering process would be easier if there were better cooperation among convention secretariats.

At the national level, countries should compare how implementation occurs across the various MEAs to which the countries have become parties.

The compliance incentives in the Montreal Protocol are important to its success, including: the trade with notification and the trade sanctions provisions, the suspension of participation section, the financial mechanisms that can assist with capacity-building and technology transfer, and the common but differentiated obligations under the Protocol. It would have been impossible to achieve such broad participation (189 parties) without a broad range of implementation tools.

Kyoto utilizes some of the same implementation tools, including technology transfer and common but differentiated obligations, and more MEAs can follow this lead. However, for these tools to be successful there must be a strong national focal point for implementation. We do not have a common set of implementation tools in part because the MEAs were adopted at different times in different political contexts so that some of the tools were not ripe for use at the time of adoption. As a result, inter-ministerial cooperation at the national level is very important in assuring successful implementation of MEAs.

2.4 Mr. Sibusiso Gamede

The three conventions related to hazardous chemicals — Basel, Rotterdam, and Stockholm — provide an international framework for environmentally sound management of hazardous chemicals throughout their lifecycle. Synergies among the three conventions are possible at the international, regional, national, and local levels since there are a number of similar issues with each convention. Benefits of coordination among the three conventions and the various levels of government are:

- Administrative — minimizing overlaps and inconsistencies among policies and programs.
- Cost — minimizing duplicative efforts.
- Communication — improved information exchange.
- Life-cycle management — ensuring that chemicals management occurs at all stages of the chemical life cycle.
- Joint programming — leading to more attention from potential international and bilateral donors.

The obstacles to greater cooperation and synergies include, among others: Lack of awareness.

- Inter-ministerial cooperation.
- Lack of skills across program areas.
- Lack of funding.
- Lack of coherence among policies.
- Failure to link chemicals management to sustainable development.

Synergies can be created at the international level through (1) the development of international capacity in facilitating synergies, (2) improved guidance and training material, and (3) improving regional mechanisms for jointly implementing the Conventions, such as the Basel Regional Centres.

INECE could make significant contributions to MEA implementation in several areas including:

- Indicators.
- Providing examples of effective regulatory systems (a particular problem for Africa).
- Capacity building.
- Providing model framework legislation.
- Exchanging information.

— Developing model legislation that harmonizes related conventions.

— Strengthening regional cooperation.

2.5 Dr. Iwona Rummel-Bulska

The most critical problem in developing compliance and enforcement programs for MEAs is the lack of financial resources. Countries need financial assistance to build enforcement programs, and they need access to low-cost compliance technologies that can be quickly and easily adopted by businesses in developing countries.

The Montreal Protocol has been effective, in significant part, because of its access to the GEF. Climate will be much harder to deal with than ozone-depleting chemicals. Funding may come from fees, but it will be much harder to increase fees without U.S. involvement. There is also a significant difference in implementation depending on the focus of the MEA. Ozone was primarily a developed-country issue with a developed-country solution, so it was easier to implement and to fund. Other MEAs have more direct impacts on developing countries and are harder to implement and fund. For example, the GEF does not provide funding for implementation of the Basel Convention.

What is missing under all agreements is verification; there is almost no on-site monitoring for environmental MEAs. This is not the case in other areas such as treaty regimes that address nuclear facilities or weapons.

Collaboration with other organizations like customs agencies may be helpful in advancing implementation of MEAs. Corporate liability and compensation could also play an important implementation role. Although this is a sensitive issue that has not produced consensus among NGOs and other organizations, perhaps INECE can assist in exploring the role MEAs might play in establishing a standard of care for private liability.

3 DISCUSSION

Dr. Bankobeza pointed out that even when the international community is not ready to act on implementation, there are still ways to proceed. For example, the Montreal Protocol was amended four times to improve implementation provisions so that when the international community was ready to act, better tools were already in place.

Ms. Mrema suggested that there is a need to work with all convention secretariats covering similar issues to bring them together to work on enforcement in areas such as hazardous chemicals, trade in endangered species, and illegal logging.

Dr. Reeve pointed out problems with implementation of CITES and the Convention on Biological Diversity at the national level. Biodiversity-related treaties addressing specific issues are usually implemented through different national agencies than the CBD. There is a need for inter-agency cooperation at the national level and coordination of capacity building. However, harmonization needs to be mutually supportive and not dilute the effectiveness of the specific biodiversity-related treaties.

Ms. Picolotti from Argentina noted the value of "shadow reports" produced by NGOs on national implementation programs. She asked whether any of the MEA secretariats, particularly CITES, encourage these types of reports. Ms Picolotti also observed that focusing on human rights issues such as access to food might be a vehicle for raising implementation issues related to issues such as biodiversity.

Mr. Ruessink from the Netherlands said that political will is often an issue and inquired about whether INECE could work with NGOs on this issue.

Dr. Reeve responded that there has been no push for shadow reports related to CITES but that it is a good idea. She pointed out that NGOs have a capacity problem related to shadow reports since there are over 160 CITES parties. On the political will issue, she noted NGOs are a key to strengthening political will.

Dr. Rummel-Bulska observed that there is little cooperation related to human rights issues but that it should be done in areas such as chemicals. She said one way of creating a constituency for MEA implementation is to work with universities because professors often are seen as very credible people and less subject to political influence. We also need to work more closely with judges, in her opinion.

Ms. Mrema agreed with Ms. Picolotti that shadow reports can be useful and suggested that it may be helpful to have a common format for these reports to facilitate their use.

Ms. Duncan from Canada pointed out the need to carefully watch enforcement successes, because once successful, those opposed to regulation may try to change the laws that were the basis for the enforcement actions.

Ms. Melen from the Ukraine noted the value of public involvement as part of national reports under the Aarhus Convention. She pointed out that the Ukraine report changed significantly from the first to the final draft as a result of public comments on the first draft.

Dr. Rummel-Bulska observed that public involvement is critical. She noted that Article 19 of the Basel Convention allows an NGO to submit its own report on implementation, triggering a verification mission.

Dr. Bankobeza pointed out that NGOs played a crucial role in the lead-up to the Montreal Protocol. This has led to a situation where the parties fear being in non-compliance because of the public response.

Mr. Shears from England noted that the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) has been working to define the scale of illegal trade in species and that it is much higher than expected. He also noted the possibility of links between illegal trade in species with other crime networks such as illicit drugs.

4 CONCLUSION

Mr. Kaniaru closed the session by noting that there is still much to be done to improve coordination and synergies among the MEAs. He also pointed out that more MEAs need access to GEF resources to be effective. Finally, Mr. Kaniaru observed that lessons learned from implementing earlier conventions need to be taken into account in designing implementation programs for the newer conventions.

SUMMARY OF PANEL 7: THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS IN COMPLIANCE AND ENFORCEMENT

Moderator: Adriana Bianchi, World Bank Institute

Panelists: Sheng Shuo Lang, Multilateral Fund for the Montreal Protocol Secretariat
Alberto Ninio, World Bank
Dariusz Prasek, European Bank for Reconstruction and Development

Rapporteur: Melanie Nakagawa, INECE Secretariat

1 INTRODUCTION

This panel addressed the role of multilateral development banks in environmental compliance and enforcement. Panelists discussed measures to ensure internal compliance with the banks' own environmental and sustainable development policies, such as inspection panels, compliance advisors and offices, accountability mechanisms, etc. They also explored ways banks can support environmental compliance and sustainable development in countries receiving funding. This support may include indigenous policies, environmental impact assessments, and other relevant activities. Finally, panelists and conference participants brainstormed practical mechanisms to improve environmental governance and to meet sustainable development objectives.

2 PRESENTATIONS

2.1 Presentation by Mr. Sheng Shuo Lang

Mr. Sheng Shuo Lang's presentation focused on the Multilateral Fund's use of funding as leverage to help developing countries comply with the Montreal Protocol. The Fund's assistance to China to reduce and eliminate the production of chlorofluorocarbons (CFCs) exemplified the effectiveness of a performance-based funding modality. China became the largest CFC producer in the world after the developed countries terminated CFC production in 1996. China produced 45,000 tons of CFCs in 1997; since then production has been growing in double digits every year. In 1999, China agreed to close down its plants if the Fund would pay China 150 million dollars in annual installments. Funding was conditioned on achievement of agreed-upon production reductions and on independent verification. On-site verification was satisfied by reviewing plant records on level of production, consumption of raw materials, number of days of production, and other details. Any default on reduction achievement could be penalized by US$1,000 for each ton not reduced.

2.2 Presentation by Mr. Alberto Ninio

Mr. Alberto Ninio's presentation focused on the accountability and function of the World Bank Inspection Panel. The Panel, created in 1993, is the oldest accountability mechanism in the context of multilateral organizations. Mr. Ninio shared his reflections on the Panel and described what is happening on the ground. First, he explained some limitations on multilateral development banks. For instance, the government, not the Bank, is responsible for implementing projects; the Bank can only suspend disbursements and subsequently leave the project altogether. As a result, long-term sustainability of agreed measures may be compromised. This problem can be addressed if public funds are used with transparency and if regional development banks are responsible to the people and shareholders.

Mr. Ninio stressed the importance of accountability. In response to demands to finance in a socially responsible manner, the Bank adopted several policies and an independent verification and accountability mechanism – the Inspection Panel. Creation of the Panel signaled a shift in public international law giving nongovernmental organizations (NGOs) and individuals access to the highest level of the Bank, the Board of Directors. Mr. Ninio believed that the Panel has had a positive impact despite a limited number of complaints and a conservative cost estimate of about $20 million over the past 12 years. On balance, the positive change he has witnessed in the Bank's internal culture of compliance may be viewed as a considerable feat.

Mr. Ninio concluded by discussing recommendations for the future of the Inspection Panel. He recommended mandatory facilitation or mediation because he felt this process could easily dispose of some complaints. He also recommended mandatory sharing of lessons through dialogue, as this is not currently done on a systematic basis. Similarly, the Panel could have an advisory component. Mr. Ninio mentioned that stricter timeframes could apply to the investigation phase to ensure that the Panel's findings are available without major delays. Lastly, he suggested having either a fixed panel that is completely replaced after five years, or having ad hoc specialized panels for each case.

2.3 Presentation by Dr. Dariusz Prasek

Dr. Dariusz Prasek discussed environmental appraisal of investment projects and environmental compliance and enforcement from the perspective of the European Bank for Reconstruction and Development (EBRD). He began by outlining common misconceptions of EBRD's abilities, environmental safeguards, regulations, and mechanisms for enforcement. Established in 1991, the EBRD is the youngest of the regional development banks. It is owned by sixty-two countries and two supranational shareholders: the European Union and European Investment Bank. Although based in London, it has regional offices in all countries of operation, including Central/Eastern Europe and some parts of Asia.

In 1991, the EBRD became the first international organization given an environmental mandate, consisting of guiding principles for environmental and sustainable development. The EBRD mandate touches on the issues of community, involuntary resettlement, and labor standards. The EBRD handles both small- and large-scale projects, such as the Baku-Tbilisi-Ceyhan pipeline project. It is guided by environmental policy and focuses on conducting environmental projects to manage risk, disclose information, and have thorough consultation.

The EBRD also has the youngest accountability mechanism – an independent recourse mechanism – drawing on lessons learned from the Inspection Panel and the International Finance Corporation's Compliance Advisory Ombudsman.

The EBRD's classification system determines the impact of each Bank project, guided by the principle that compliance with national laws is always a must. The project must meet both national regulations and European Union standards. If there are issues to be mitigated and improved as a result of due diligence, the Bank agrees with clients on Environmental Action Plans. These plans are legal agreements conducive to achieving international good practice standards. Dr. Prasek stressed the importance of meaningful consultation and monitoring activities during project implementation. This is often where NGOs play a role because they raise the issues and conduct periodic environmental assessments.

Dr. Prasek concluded his presentation by briefly discussing the EBRD's independent recourse mechanism, stating that its two main functions are problem solving and compliance. He believed that international commitments can be met at the project level through compliance and enforcement mechanisms. He emphasized the

importance of working in partnerships because small institutions cannot solve everything.

3 DISCUSSION

After the presentations, there was a period of questions and answers. The panelists fielded a variety of questions ranging from inspection monitoring to verification procedure.

One key point raised was the different verification mechanisms used by each organization:

- In the Multilateral Fund, independent auditing firms carry out verification.
- In the World Bank, verifiers are selected by the World Bank President with the approval of the Board of Directors, and can never be hired by the Bank again as employees or consultants.
- In EBRD bank audits, there is independent verification and routine requests for corporations to achieve various certifications, including ISO 14001.

Another important issue raised was the use of EBRD's political leverage to achieve recipient country domestic compliance with EBRD standards. Similarly, Dr. Adriana Bianchi noted the private sector's use of the Equator Principles to achieve environmental safeguards in project lending and financing.

4 CONCLUSION

The final set of questions brought forth the notion that INECE can work with enforcement and compliance groups for capacity building on a variety of levels. Currently, the World Bank has worked on capacity building with INECE, with a recent presentation on indicators given at the Bank by Mr. Michael Stahl of the US Environmental Protection Agency and INECE. At a local level, there is still work to be done. Mr. Ninio pointed out that a project typically takes three to four years to prepare, and building capacity can take a lifetime. Thus, there is a need to balance the timing of forming capacity and moving the project forward. Often this process is done in parallel in accordance with public participation and by considering mitigation of offsets.

WORKSHOP SESSION 1

Exploring Current Environmental Compliance and Enforcement Topics

Conference participants explored important current topics in environmental compliance and enforcement, including broad "background" concepts (theories of compliance, design principles, and exploration of good governance and the rule of law), types of practices or approaches (economics, compliance assistance, communications policy, and public participation), and a specific example of an ongoing cooperative enforcement effort (Ecomessage).

1A Economic Aspects of Compliance and Enforcement

Facilitators: Krzysztof Michalak, Organisation for Economic Co-operation and Development

Ger H.J. Ranter, Province of Overijssel, The Netherlands

1B Compliance Incentives and Other Assistance

Facilitators: Thomas Maslany, Environmental Protection Agency, United States (retired)

René Drolet, Environment Canada

1C Ecomessage/Interpol and the Police

Facilitators: Bill Clark, Israel Nature and National Parks Protection Authority

Andrew Lauterback, Environmental Protection Agency, United States; Interpol

1D Compliance and Enforcement Theories and Design Principles

Facilitators: Lee Paddock, International Union for the Conservation of Nature; Pace Law School, United States

Marcia Mulkey, Temple University, United States

1E/F Information Management, Reporting Requirements, and Self-monitoring

Facilitators: Donna Campbell, New South Wales Department of Environment and Conservation, Australia

Markku Hietamaki, Ministry of the Environment, Finland

1G Good Governance and the Rule of Law

Facilitators: Angela Bularga, Organisation for Economic Co-operation and Development

Adriana Bianchi, World Bank Institute

Michael Stahl, Environmental Protection Agency, United States

1H Communications Policy and Practice

Facilitators: John Cruden, Environment and Natural Resources Division, Department of Justice, United States

Krystyna Panek-Gondek, Inspectorate for Environmental Protection, Poland

1I Citizen Participation in Environmental Enforcement

Facilitators: Georges Kremlis, European Commission

Katia Opalka, Commission for Environmental Cooperation

Romina Picolotti, Center for Human Rights and Environment, Argentina

Barry Hill, Environmental Protection Agency, United States

Report Out from Workshop Session 1

Moderator: Bharat Mathur, Environmental Protection Agency, United States

In the following pages, the reports of these workshops are presented.

SUMMARY OF WORKSHOP 1A: ECONOMIC ASPECTS OF COMPLIANCE AND ENFORCEMENT

Facilitators: Krzysztof Michalak, Organisation for Economic Co-operation and Development
Ger H.J. Ranter, Province of Overijssel, The Netherlands

Rapporteur: Davis Jones, Environmental Protection Agency, United States

GOALS

To discuss the reasons why companies violate environmental laws and explore both regulatory and non-regulatory solutions to this problem.

1 INTRODUCTION

The facilitators raised four key questions for consideration:

1. What are key factors that lead firms to comply or not to comply with environmental requirements?
2. What are types of regulatory approaches that are enforceable and lead to environmental improvements?
3. What is the appropriate balance between compliance monitoring and enforcement to respond to violations?
4. What are other non-regulatory schemes, such as performance ratings, public disclosure, and emissions trading, that may also encourage changes in behavior or compliance with environmental rules in a more cost-effective manner?

One of the primary reasons that companies violate environmental laws is that they are unwilling to spend the money necessary to comply. Another reason is that many permits may be too complex or overly burdensome, so companies can not comply with every detail. Finally, companies may not see the effects of their actions when pollution is dispersed or the harm is caused far from their facilities. This decreases their concern and knowledge of the importance of their compliance.

Penalties are one mechanism that may be useful to "balance the books" and increase the cost of non-compliance to motivate enterprises to invest appropriately. However, other mechanisms, including closure of the facility, criminal sanctions, pubic disclosure, and direct communication with the company may also be effective.

One way proposed to increase enforcement efficiency would be to shift the burden of proof to the industry to show they are in compliance, rather than on the inspectorate to show violations. Another effort for efficiency involved the prioritization of regulations for inspectorates to better focus their efforts on the most important rules.

Efforts are needed to focus permits on outcomes instead of detailed requirements mandating methods to achieve those outcomes. This would both increase compliance with more limited requirements and make compliance more efficient for the regulated community and enforcement more meaningful for the authorities. If the permitted limit is achieved, there would be limited oversight. However, if the emission limit is exceeded, the polluter would have to prove that they had met or exceeded the required management practices. Inspectorates would not have to prove complicated technical violations in court; instead the polluter would have to prove that they met the requirements. Subsequent penalties should take away economic incentives to

violate and make violators rethink their practices and compensate the public for any harm caused.

2 DISCUSSION SUMMARY

Mr. Kenneth Ruffing of the Organisation for Economic Co-operation and Development (OECD) opened the workshop by presenting the outcomes of the December 2004 OECD/INECE workshop on the Economic Aspects of Environmental Compliance Assurance held in Paris and distributed the background paper for that workshop. (see http://www.oecd.org/document/20/0,2340,en_2649_34339_33645652_1_1_1_1,00.html) The conclusion of the event has led the OECD to continue to work on the topic and gather more views and experiences to develop cost-effective controls and economic motivators for compliance. Compliance promotion systems that have been in place rely on many components to function effectively, including actions at the firm, compliance monitoring by the competent authorities, enforcement actions when violations are found, and the collection of penalties when appropriate. But these systems are only as strong as the weakest link, and if companies continue to fail to comply, efforts count for little. Estimates show that 60% – 80% of facilities in OECD member countries may be out of compliance at any given time, and percentages may be worse among non-member countries.

There must be an increase in the use of economic instruments to reduce the cost of compliance and provide additional economic incentives to comply. More empirical analysis on compliance rates and the causes for non-compliance is needed, as well as the most effective policy approaches. Countries need to better analyze the financing that their programs need and to better understand and utilize mechanisms such as self-implementing approaches to help reduce the costs to the government of increasing compliance. It is incumbent on all to find the most efficient means to improve compliance rates.

2.1 Are Penalties an Effective Means of Providing Economic Incentives for Compliance?

Money and profits are the biggest factors that motivate entities to not comply with environmental laws. Investments required for compliance cut into profits and investments in other areas. Penalties can be an effective way to balance these costs and eliminate the financial incentive not to comply by recouping any economic benefits derived from the violation. However, Mr. Peter Lehner commented that many times, penalties are not big enough to truly cover the savings from non-compliance. The State of New York brought several cases against coal-fired power plants for violations of the U.S. Clean Air Act. As a result of one case, a company will install pollution control devices costing over $1 billion, but these changes should have been done 10 years ago. The $8 million penalty collected doesn't come close to covering the return on their investment achieved by delaying the required expenditures. The statutory maximum for this type of continuing penalty could have been much higher, even in the hundreds of millions of dollars, but in the current climate, no one would authorize a penalty that truly recaptured the economic benefits the company gained over the years. More effort is needed to educate judges and decision makers on the true value of non-compliance and the costs of damages.

The United States Environmental Protection Agency has developed a mathematical model to calculate the economic benefit of noncompliance. The standardized method has helped increase the penalties, and ensure some national consistency, but often, in cases with very high economic benefits, the full value is seldom collected in the penalty.

Mr. Neil Davies commented that penalties may also be based on the environmental damages resulting from non-compliance. However, the value of the damage is usually very difficult to determine, and may be quite high if all factors

are considered. Mr. Daniel Geisbacher added that we can count dead fish, or other concrete effects, but not broad damages to the environment or intangible effects. Mr. Peter Lehner described some of the tools used in the United States, particularly to evaluate the loss of wetlands. However, measurable effects such as number of fish killed, while easier to calculate, only account for a fraction of the harm, and do not measure the value of the aesthetics and other intangibles. In other cases, we can calculate the number of deaths resulting from a given amount of air pollution, but ascribing the worth of a human life is extremely controversial.

2.2 Penalties as Deterrence

Mr. Neil Davies said that deterrence comes from the marginal cost of compliance compared with the risk of detection and the amount of a penalty. Damages to the environment are often caused by accidents or unforeseen events. As such, the collection of damages does not usually result in true deterrence. Mr. Ken Ruffing added that if the penalties themselves do not rise to the true benefit of non-compliance, going beyond that amount may be moot, and ineffective.

Mr. Peter Lehner stated that penalties are generally used to respond to culpability, and may determine which is more appropriate: the collection of damages caused or the economic benefit derived. Another aspect of the penalty should be punitive to help deter future violations.

In developing countries, penalties may not be feasible as a mechanism to change behavior. Dr. Warapong Tungittiplakorn explained that in Thailand, the Pollution Control Department has not been able to get any company to pay any amount of penalty. The government is trying to develop a penalty policy for judicially acceptable calculations, but have no administrative mechanism outside the court system to assess and collect a penalty. They have had some success in negotiating non-penalty solutions directly with companies, but have not taken any cases to court.

2.3 Other Types of Effective Sanctions

In the United Kingdom, Mr. Martin Murray said that, although they have the authority to close a facility, the authority is seldom if ever used. There is a fear that the company could sue the government for lost profits while they were closed. However, the statute does not allow much discretion, and if the company does not voluntarily comply, the statute mandates that they cease operation. This is seen as too extreme a response for most violations.

Mr. Mihail Dimovski explained that several industries in Eastern Europe were closed because of the risks they presented, particularly at chlorine plants. The inspectorate has the authority to cut the power to the facility, in effect forcing its closure. Both the inspectorate and the company found that it was much more expensive to close the facility than any penalty, greatly accelerating the response. Closure can be much more punitive and powerful than other means of enforcement.

Mr. Krzysztof Michalak cited examples where the government actively advertised the closure of enterprises to promote the authority of the ministry and the consequences of non-compliance. However, Mr. Peter Lehner said that in his experience, the ministry would never announce that they forced the closure of a company for environmental reasons, as it reinforces the argument that environmental protection is incompatible with job creation.

2.4 Do Different Types of Companies Respond Differently to Compliance?

Mr. Peter Lehner said that he has seen several differences in companies based on their ownership and size. Privately held companies can more effectively plan for longer terms and project future benefits compared to present costs. Public companies are often less concerned about future benefits and are forced to place more importance on short-term benefits. For this reason, more closely-held companies are generally more compliant as they

are willing to make the expenditures necessary for longer term needs. Another factor is how local the ownership of the company is. Local companies tend to have a larger stake in the community and are more concerned with environmental issues. As companies become larger and more diversified, they may tend to comply less.

Mr. Kenneth Ruffing cited some contradictions that came from a study of firms that didn't focus on compliance, but on predictions of whether environmental management systems (EMS) are in place or not. They examined factors that may make firms change processes to prevent pollution and subsequent compliance problems, instead of end-of-pipe treatment. These studies have found that widely-held, global corporations are more likely to have better EMSs due to reporting requirements and corporate social responsibility. This seems to conflict with New York's experience on compliance of different size firms.

Mr. Peter Lehner responded that big companies may be more likely to have an EMS, but are also very carefully scrutinizing and guarding their environmental budget. He admitted that he may have overstated differences between large and small companies, because many small companies are not complying due to costs. The contrast may be more appropriate for mid-size firms with a strong connection to a community compared with multinational conglomerates.

Mr. Daniel Geisbacher agreed that there are differences between large and small companies. Larger companies care more about reputation, as that may impact their stock price. Smaller companies tend to operate with smaller margins, are closer to bankruptcy, and may not be able to afford compliance.

2.5 Other Incentives for Compliance

However, there are other factors that may give larger companies a greater incentive to comply. Mr. Antero Honkasalo said that the problem with small and medium-sized enterprises is that they primarily lack the knowledge and resources to comply. In addition, the inspectors may not have the expertise necessary to verify compliance. In Finland, there are more than 400 municipalities, some with only a few thousand inhabitants, so the local inspectors may not be able to determine compliance at the more complex facilities.

The compliance situation may also differ depending on the social norms in different countries. For example, in Nordic countries, there are generally high levels of compliance due to great respect for law generally. In these situations, the concentration should not be on the penalty, but on prevention. Penalties are a reactive response after the fact, rather than proactively ensuring compliance before violations occur.

Through an OECD country assessment in Chile, Mr. Kenneth Ruffing observed that the government worked with one particular sector to provide technical assistance through the trade association. This effort ensured that all enterprises knew what the rules are, they knew that they all need to comply, and they received technical assistance and recognition for voluntary participation. Working through the trade group ensured very good participation and increased compliance. The regulated sector saw it not as an effort to set the regulatory bar higher, but raise everyone to the bar in the same time-frame.

Mr. Neil Davies described a similar approach in the United Kingdom. Trade associations signed up for agreements with the environment agency, not individual companies. If an individual enterprise then complied with the agreement, they received a rebate on their energy levy as an economic motivation.

2.6 Clear, Enforceable Permits Required

The group also acknowledged the need for permits and regulations that focus on the outcome, not necessarily the way the outcome is reached. A flexible framework for compliance allows the operator to find the most efficient way to reach an emission limit, so they are more likely to

comply. Ms. Maryna Yanush suggested that this can also make the inspectorate more efficient by freeing the inspectors to look at the outcome and result, rather than the minutia of detailed rules.

Mr. G.H.J. Ranter stated that regulators should look for middle ground so inspectors can inspect in efficient ways, but businesses can follow rules with no discussion or questions. In Holland, they are making efforts to reduce the number of rules, prioritize between more and less important rules, and focus on the most important. Regulators should focus on the goal behind the rule, not the detailed procedures needed to achieve the goal.

Mr. Peter Lehner explained that in the United States, permits must be specific so violations will be specific and complaints will stand up in court. Violations of general objectives are very difficult to enforce; the law may say that companies must not pollute the air, but it is hard to establish a violation without specific criteria. Judges tend to favor private interests, so we must be very clear about why costs are required. Courts are designed to protect private rights, not the public right to a healthy environment, so detailed permits are required to shift the burden of proof to the polluter.

2.7 Other Non-Regulatory Structures

There may be room for greater flexibility if the effluent or emission is meeting the overall objectives. Mr. Kenneth Ruffing asked whether the problems with penalties and strict compliance measures advocate for other economic tools and market sources. Emission trading schemes put the burden on companies to establish their emission volumes/types so they can participate in the market. Enforcement is on the validity of their measures, but authorities would not need as much monitoring if polluters could choose cost-effective ways of reaching outcomes so they can trade emission credits after controls are implemented. The key is to get the limit right, which applies to either a trading system or a permit-based regulatory system.

Many countries have established taxes or fees on waste or effluent to motivate pollution prevention. Mr. Ruffing stated that a large number of OECD countries have environmentally related taxes, fees, or charges. However, there are so many exemptions that the system is not effective. Studies have shown that between 1300 and 1400 exemptions to pollution taxes or fees exist in the 30 OECD countries.

While these tools may be effective to address emission or effluent problems, there are many environmental requirements designed to eliminate releases or accidents. Mr. Peter Lehner cited the situation with storage tank leak prevention systems where any discharge is prohibited. Neither pollution trading schemes or waste taxes would work to regulate those systems, so traditional mechanisms are still effective.

3 CONCLUSION

The group agreed that compliance decisions are motivated by economic and financial factors in most circumstances. Economic efficiencies must be sought that promote compliance and eliminate any incentives to violate environmental laws. The full range of tools must be used to eliminate economic disincentives to compliance, including penalties to address violations and new regulatory approaches to reach environmental goals in the most efficient manner possible.

SUMMARY OF WORKSHOP 1B: COMPLIANCE INCENTIVES AND OTHER ASSISTANCE

Facilitators: Thomas Maslany, Environmental Protection Agency, United States (retired)
René Drolet, Environment Canada

Rapporteur: Scott Stone, INECE Secretariat

GOALS

To explore the following questions:

- How can government agencies motivate those who decide to comply with or to violate the law based on the government's actions ("the Reactive Group")?
- What are some unique programs that accomplish this motivation?
- Who can the government partner with (and how) to implement these programs?
- How do you address issues associated with these programs?

1 INTRODUCTION

Compliance assistance and incentives are only effective if they are backed by a strong threat of enforcement with sanctions.

To secure compliance, the regulated community must: (1) be aware of the rule; (2) be willing to comply; and (3) be able to comply.

The regulated community may be divided into three groups, which change over time based on how the agency interacts with the community, the type of community, and the type of regulation. These three groups are: (a) compliant group; (b) reactive group; and (c) resistant group.

2 DISCUSSION SUMMARY

The regulated community divides into three groups:

- Compliant Group: complies irrespective of what the government does; believes in rule of law; believes in environmental protection; incorporates environmental regulations into their business plans (Note: government behavior can change the size of this group).
- Reactive Group: decides to comply or not comply based on the government's behavior/actions (usually the largest group).
- Resistant Group: refuses to comply with environmental laws and regulations, and enforcement actions must be taken to compel them to comply.

Government agencies can help motivate the Reactive Group by using the carrot and the stick (e.g. assistance and incentives offered against the backdrop of enforcement).

2.1 Some Types of Compliance Assistance

Some types of compliance assistance include compliance assistance centers, workshops/training, printed material, audits and inspections, skill transfer programs, and training of compliance assistance providers.

2.2 Some Types of Positive Incentives

Positive incentives include awards, green labels, tax incentives, low-cost loans or grants, tax incentives, and legal time extensions for compliance.

Legal extensions can be informal or written into the law. In the early 1980s, the United States passed the Steel Extension Compliance Act in order to encourage investment in modernization. This legislation allowed members of the steel industry to postpone their investment in pollution prevention if they agreed to a long-term compliance schedule for all their violations.

2.3 Some Types of Negative Incentives

Negative incentives include public disclosure of non-compliance, financial disclosure of environmental liabilities, and pollution fees.

2.4 Issues Associated with Compliance Assistance Programs

One issue that may arise with compliance assistance programs is that industry may fear communicating non-compliance, as facilities in violation are usually unwilling to disclose this fact to the government.

Another issue is that there can be tension between compliance assistance staff and enforcement staff within government. There is a need for good communication between compliance assistance and enforcement staffs because sometimes the enforcement staff views compliance assistance as a step backward. There is also a need to make it clear to enforcement staff that compliance assistance makes their jobs easier because they lack resources to prosecute every instance of noncompliance. Additionally, documenting attempts to offer compliance assistance to firms that refuse to accept them provides justification for enforcement actions, which can help when the decision to prosecute raises difficult political issues.

Finally, compliance assistance is not effective without enforcement.

2.5 Reducing Cost of Government Programs

Working with trade organizations and other groups to help spread government compliance assistance messages can lower the costs of compliance assistance programs.

2.6 Reliance on Government Advice

Reliance on government advice can be used as a defense for non-compliance when firms follow a detailed compliance assistance program and still fail to come into compliance.

There is a need to limit how much detail a compliance assistance program provides. The position of the United States Environmental Protection Agency (USEPA) is to point firms in the right direction, but not give professional engineering advice, etc. The USEPA will only identify types of technologies, places to acquire it, etc.

2.7 Tailoring Programs

Compliance assistance must be adapted to fit the targeted industry as different industry and corporate cultures will respond differently to forms of compliance assistance. Choosing the most effective format requires understanding a business sector's behavior regarding compliance, including at sociological and psychological levels. Each business sector has its own unique ways of receiving information, levels of resources to devote to government requirements, and interaction with the government.

For example, in the U.S. in the early 1990s, the USEPA announced regulations for the dry cleaning industry. Half of all dry cleaning facilities in the U.S. were owned by Koreans, who got most of their information from Korean trade associations. Initially, the USEPA did not have a working relationship with these trade associations, and so the new regulations did not reach large parts of the regulated community until the USEPA created such a relationship.

2.8 Key Questions & Issues

Question: Working with the private sector can lower costs of compliance assistance programs, but how can regulators

maintain their independence when working closely with industry?

Answer: Providing public information to a trade association and/or nongovernmental organizations (NGOs) opens lines of communication. Regulators are not asking the trade association or NGO to report violations to them.

Question: How should regulators respond when a firm contacts the agency because the firm wants to do something that is not required, but meets many of the same regulatory goals?

Answer: Regulators should reiterate the regulatory standard and provide the firm with advice and interpretation of the standard. The agency should have a common message that all personnel can use, such as that they are willing to work with firms, but the bottom line remains the same.

Question: If a firm accepts compliance assistance, should the regulator waive penalties for noncompliance?

Answer: The regulator should not provide government-backed guarantees regarding enforcement.

Question: How effective is the European Union's strategy of publishing all available technologies and requiring that the regulated community show that the technologies they use are the best option for them?

Answer: Regulators must be careful not to give one firm any information that provides a competitive advantage over other competing firms.

Question: How can it be made clear for inspectors and other regulators to distinguish between when they are providing advice and when they are describing the law or standard?

Answer: Some enforcement personnel have extensive training regimens, but the compliance assistance personnel do not. Compliance assistance personnel should get similarly extensive training. Clear policy on providing compliance assistance should be developed.

Question: What role does planning and cost play in compliance assistance programs?

Answer: Every agency will approach this differently, but there are a few basic guidelines:

- capacity-building and compliance assistance programs should involve all agency personnel and not just the enforcement staff;
- there can be constitutional limits to programs that involve taxes and tax funds, which require everyone to be taxed in the same manner;
- funds collected from environmental enforcement actions (via penalties and fines) can be applied to different compliance assistance programs, but this often requires special training for judges or provisions in the law;
- it can be useful to work with other government agencies when pursuing compliance assistance programs; in the U.S., the USEPA will work with state agencies because they have different constitutional and other legal limits on how they can use penalty money.

Question: Are there any unique compliance assistance programs? With whom and how can the government partner to implement these programs? How can you address issues associated with these programs?

Answer: NetRegs is a program in the UK that is geared toward small and medium-sized enterprises (SMEs). NetRegs makes environmental legal requirements accessible to SMEs via the internet, tailoring specific standards to specific industries. It has proven to be more cost-effective than inspections. Making a website useful to SMEs requires marketing research, asking SME owners and operators what they think of the website, measuring how many people use the site, and other factors such as what SMEs' needs and key issues are. For example, for developers, the key issue is time because they want to start building right away. Some programs will allow for developers with a long history of compliance to have an expedited permitting time.

Question: What types of funding

can be used for compliance assistance programs, and is it possible to get funding from the private sector?

Answer: It depends on the laws and constitution of the country. However, many non-government groups such as trade organizations or citizen groups have a similar mission (i.e., to improve the environment or to service the regulated community) and are willing to devote their resources in partnership with the government to provide compliance assistance. Also, in some situations it is possible to use collected penalties for compliance assistance.

Question: What are some controversial approaches (i.e. approaches where participants were not in universal agreement as to their effectiveness)?

Answer: (1) Allowing local/state governments to administer compliance assistance programs; (2) Amnesty programs. In the U.S. pesticide program, when widespread non-compliance was determined, the USEPA allowed a six-month period for self-reporting with significantly reduced penalties but followed it with a vigorous enforcement period. In India, firms are given an amnesty for past violations if they sign up to a compliance plan and a legal action was not already initiated against them.

Question: Where do you find money to pay for incentive programs?

Answer: The United States had a milk program where a small percentage of each sale (1-2 cents) went to a fund to promote drinking milk. The USEPA has been working to create an industry-managed tax along similar lines that can be used for compliance assistance or pollution abatement. Additionally, in the United States, some environmental laws have tax incentives programs. The United Kingdom has a series of environmental taxes, some of which are set aside for the development of alternatives.

Question: How should agencies allocate resources between enforcement and compliance assistance programs?

Answer: It depends on the politics of the day; different administrations have different trends in terms of whether they favor enforcement or compliance assistance. However, the balance between compliance assistance and enforcement is not zero-sum – the job of the agency is compliance assurance. This is a balance between enforcement and compliance assistance, not just emphasizing one or other.

The participants here made two observations: (1) if you are starting a program, it is good to emphasize both, and (2) you should not talk in terms of numbers of enforcement actions, but in terms of pollution reduction or behavior changed. A successful compliance assurance program is not based on number of cases, because if the number of cases goes up, then you are really not succeeding. Rather, the number of violations should go down.

Question: The Multilateral Fund (MLF) is providing funds for compliance assistance to comply with the Montreal Protocol. What will success depend on: incentives or deterrence? Is there a way to ensure that the money is spent for compliance assistance to ensure compliance?

Answer: Compliance assistance and incentives will not work without an enforcement program.

Question: Will rewarding firms with good track records work from the outset, or only after you have gone through ugly enforcement battles?

Answer: Some developing countries that receive compliance assistance help from foreign sources do not have success because compliance assistance usually requires the firms to spend some money up front. Without the threat of enforcement, they are not likely to spend the money.

3 RECOMMENDATIONS FOR INECE

- Develop a section of the website that links to other compliance assistance programs.
- Form a compliance assistance expert working group to produce policy guidance and papers.

- Explore ways to make more information available, but balanced against some of the risks and legal liabilities in doing so.
- Consider how a firm that has won environmental awards can be prosecuted for violations and whether the awards make it more difficult to succeed.
- Develop compliance assistance programs for green issues, as well as brown.
- Find ways to demonstrate the costs and savings of compliance assistance programs, relative to the cost of inspections and their effectiveness.
- Link compliance assistance programs to indicators projects in order to measure their effectiveness.

SUMMARY OF WORKSHOP 1C: ECOMESSAGE / INTERPOL AND THE POLICE

Facilitators: Bill Clark, Israel Nature and National Parks Protection Authority
Andrew Lauterback, Environmental Protection Agency, United States; Interpol

Rapporteur: Henk Ruessink, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

GOALS

- Assess the ways Ecomessage, to facilitate sharing of information about international environmental crimes, can foster improved enforcement coordination at the inter-agency and international levels, including the police.
- Provide participants with sufficient background on Ecomessage, so their organizations can participate in the international program at an inter-agency level.

1 INTRODUCTION

About fifteen participants with a variety of backgrounds and nationalities joined the workshop on the Ecomessage/Interpol Data Base. Two colleagues with dedicated expertise on the subject acted as moderators, Bill Clark of the Israel Nature and Parks Authority and Andrew Lauterback of US EPA. As an introduction for the discussions, the facilitators presented the background and the set-up of the Ecomessage system.

2 DISCUSSION SUMMARY

Ecomessage is one of the products initiated by Interpol's Environmental Crimes Committee. Interpol's role – in general – is to collect, compare and exchange information on international criminal activities. Connected to this function of Interpol, Ecomessage was developed by two working groups of the Environmental Crimes Committee, the Wildlife Crimes Working Group and the Pollution Crimes Working Group.

The objectives of Ecomessage are to enhance reporting and communication concerning criminal environmental offences between environmental law enforcement professionals in different countries and to develop a database to determine trends and information with regard to environmental criminal activity. The data can be used for purpose of monitoring and analyzing environmental crime. Criminal intelligence analysis of Ecomessage data is presently the most promising technique for defining the size, composition, structure and dynamics of criminal syndicates involved in environmental crime. This information is critical to any campaign seeking to suppress this type of criminality.

The Ecomessage system ideally covers all essential information with regard to serious environmental crime having international ramifications. Such crimes are, for instance, wildlife smuggling, illegal transboundary shipment of waste, vessel pollution, and ODS smuggling.

Ecomessage is centrally reposited with the Interpol General Secretariat in Lyon, France. The information on environmental/ecocrime can be submitted to the system in an efficient and standardized way by means of a simple form. The system allows cross-referencing and dedicated extraction of data. Several organizations may submit data, e.g. police, agencies, ministries and NGOs. The entrance to the

Ecomessage facilities is, however, always through the Interpol's National Central Bureaus (NCB) in each participating country.

At the moment, some 800 Ecomessages have been submitted, most of those on wildlife crime. INECE and the International Fund for Animal Welfare (IFAW) are currently working together with Interpol to stimulate an intensified use of Ecomessage. In connection to this, mailings have been sent to inform relevant stakeholders around the world about existence and potential of Ecomessage.

In the Workshop discussions, the current benefits and suggestions for improved usage of Ecomessage were addressed. The following notions were brought forward:

- Get the message out that Ecomessage exists and is having success. By this, the use of the system can be stimulated so that more data are gathered concerning environmental crime. Exchange of such data will help to further improve the international enforcement of the rules of law.
- Keep sending the message to Interpol and others that ecocrime is an important aspect. These crimes seriously threaten environmental quality, sustainability and health all over the world. So it can not be stressed enough that adequate enforcement actions have to be taken to protect the planet and its people. Since many of the environmental crimes have an international context and are not bound by national borders, the exchange of information between countries is crucial to tackle the problem. The Ecomessage facility within Interpol is therefore an important instrument that deserves full support and application.
- Keep the system simple and with low thresholds. This is of importance because potential users would be discouraged if the use of the system is made difficult. The easy approach of the system should therefore be maintained, e.g., by the use of simple entry form with a limited number of truly essential items.
- Care should be taken that the system is kept dedicated to the real major international environmental crime cases. If too many minor cases are fed into the database, the power of the instrument and the motivation to submit cases would be reduced.
- In order to retain sufficient support for working with Ecomessage, the backing of the responsible management in the contributing organizations should be sought and ascertained. If not, there is a serious risk that the use of the system would become too incidental and too dependent on the dedication of individual compliance and enforcement employees. One of the actions that therefore should be taken is that management is informed about the benefits Ecomessage does offer. Stories of success might help to get the message across here.
- It should be noted that a system like Ecomessage is for many countries in fact the first and only tool to obtain some data gathering of environmental crime at all. The accessibility and simplicity of the system is hence a very important aspect, since sophistication would hamper its use in such countries. In connection to this it is essential that due attention be paid to basic training and education in method and techniques of environmental data gathering.
- It should be realized that in some cases authorities that submit data to the system will not directly benefit from this input for their specific case. Nevertheless, it is crucial that data of important environmental crimes are continuously fed into Ecomessage. Only in that way, the result form monitoring and analysis of data can in the end serve everybody and facilitate better compliance and enforcement of the rule of law. In cases where there is a direct one-to-one result from the data entered into Ecomessage, it should be guaranteed that the workers in the field really get these results fed back to them for their specific case.

- The results from Ecomessage could also serve the purpose of building awareness and public and political pressure if used in a smart and communicative way. Good examples of this are reported from the Czech Republic. Another successful case reported was that a nongovernmental organization managed to get its expenditures refunded from an insurance company for the clean-up of an oil spill on the basis of data from the Ecomessage system.
- In an effort to stimulate the use of Ecomessage to report wildlife crime, the International Fund for Animal Welfare has budgeted a US$30,000 award for the agency which submits the most significant Ecomessage of a Convention on International Trade in Endangered Species intersessional period. The Interpol Working Group on Wildlife Crime has established criteria for selecting the awardee, and plans to apply those criteria to various candidates at its upcoming meeting. The award will not be made as cash, but rather will be made as $30,000 in law enforcement training and/or law enforcement equipment for the winning agency.

3 CONCLUSION

Ecomessage is a simple but powerful tool for reporting and communicating criminal environmental offenses of international character. The use of Ecomessage should be further promoted, as is currently being done in a joint effort by INECE, IFAW, and Interpol. The enforcement of the law will benefit from the data gathered, exchanged, and analyzed via Ecomessage.

For its effective operation, Ecomessage should be kept as a system that can be used without unnecessary thresholds. Provisions should be made that other organizations and communities with an affiliation to enforcement – apart from police forces – could easily contribute to and extract from Ecomessage.

By actively spreading stories of successful use of Ecomessage in fighting international eco-crime, the importance of enforcement of the law will be underlined. Communication about concrete environmental results that have been achieved thanks to Ecomessage is an essential instrument to stimulate public awareness and to build political pressure concerning environmental issues.

SUMMARY OF WORKSHOP 1D: COMPLIANCE AND ENFORCEMENT THEORIES AND DESIGN PRINCIPLES

Facilitators: Lee Paddock, International Union for the Conservation of Nature; Pace Law School, United States
Marcia Mulkey, Temple University, United States

Rapporteur: Dave Grossman, INECE Secretariat

GOALS

To explore ways participants can evaluate and apply in their home organization a wide variety of compliance and enforcement theories and program design principles that have emerged, considering the unique circumstances in each particular program and in each cultural setting.

1 INTRODUCTION

The workshop began with opening comments from the facilitators laying out the idea of first principles, underlying theories and beliefs, and the need to have a common system of beliefs or values in order to design effective programs and to strategically direct limited resources to raise compliance and influence the drivers of human behavior. Facilitators provided participants with two sheets of questions intended to provoke discussion. The workshop then opened up into discussion of national experiences and participant thoughts on design principles. Participants shared experiences of designing enforcement systems and discussed enforcement and compliance design problems in the Netherlands, Bahrain, Tanzania, Turkey, Italy, England & Wales, and Canada. There was frequent discussion of the need for those who write laws to consult with those who enforce them in the course of drafting environmental laws.

2 DISCUSSION SUMMARY

2.1 Asking the Key Questions and Finding Common Beliefs

Ms. Marcia Mulkey contended that a key design challenge is determining the functions to co-locate within a common reporting chain and with common personnel, as opposed to functions located elsewhere that require coordination. She explained that it is impossible to put all relevant programs together, such as the dilemma of whether to locate an environmental enforcement program in an enforcement agency or an environmental agency, and how to maintain coordination with the agency into which the program is not integrated. She also asserted the need for a common belief system and asked what the underlying theories and beliefs are that we collectively accept to be truths.

Mr. Lee Paddock presented the issue of how to raise compliance levels, such as through direct enforcement, inspections, permitting, targeting, compliance assistance, or a strategic approach combining all of the above. He also inquired about the drivers of human behavior and stated several possibilities, such as regulatory systems, economics, values, and traditions.

In response, Mr. Wout Klein asserted that it was more important that enforcement officials ask themselves these questions than that the workshop participants find "the answers." Ms. Marcia Mulkey concurred, noting that it is more important that all those working together in the same

agency share the same core set of beliefs than that the workshop participants find a common set of answers. Mr. Ryan Levitt contended, however, that it was desirable to have some global commonality as well.

Justice Amadeo Postiglione maintained that the participants also needed to clarify their own philosophy for constructing solutions. He asked if institutions were the answer or if other social or scientific solutions would be more effective, and whether states should be trusted as mediators for the environment. If not, then the alternatives and the other actors that should play a role need to be considered.

2.2 Effective Message Sending

Mr. Renzo Benocci asserted that the most important question is how to maximize the effectiveness of enforcement activities in the face of limited resources, considering the appropriate role for deterrence and message sending. He contended that you must market what you do within your own organization, getting buy-in from people in your own departments, and then must move the marketing efforts up to the agency's political masters and to the public. He asserted that this marketing must be done in a way that conveys what was done, why it was done, and why it was essential. This approach attempts to get all members of your enforcement community to share the same vision.

Ms. Marcia Mulkey responded that message sending is very important in order to achieve common buy-in, but that we must recognize that how to do the message sending differs between agencies. Mr. Lee Paddock offered that it was also important to consider how to better send this message to lawmakers and policymakers.

Mr. Renzo Benocci declared that it was also key to develop a better enforcement message, which requires gathering the information to explain why certain actions are being taken, how they are effective, how they could be improved, and what the consequences are of not improving them. Decisionmakers cannot resolve agency problems if they do not know about them. What this means is that agencies cannot have everyone on staff doing only enforcement, because then no one is doing the reporting that lets the agency and policymakers know where the gaps are.

Mr. Ryan Levitt maintained that the ongoing message should be about protecting the environment and how the regulators' actions help to do this, rather than about compliance and enforcement.

2.3 Country Experiences

Ms. Ozge Karadeniz stated that when Turkey announced multi-media inspection regulations, it was a big shock for the industry. As a result, Turkey engaged in a two-year preparation period, with training programs for industry and for inspectors. Reports were sent to industry, and real inspections began this year. She asserted that the preparation period was important.

Mr. Chris Howes explained that revisions to the Environment Agency (England & Wales) have been based around basic principles, such as risk screening. The concern is less about principles and more about resource balancing, since the agency tends to put lots of effort into creating perfect permits at the expense of implementing and verifying compliance with them.

Mr. Ebraham Ali shared that in Bahrain, a warning letter is sent first when a violation is found, and if no response is received, then the facility is shut down until it replies. He asserted that there needed to be legislation for enforcement that allows for other options.

Mr. Palamagamba Kabudi stated that Tanzania has enacted a lot of environmental acts and that the Environmental Management Act (EMA) has recently been approved to help coordinate among them all. Local authorities need to be taken into account because Tanzania is a big country, and an effective national environmental protection agency would only be effective in the main city of Dar es Salaam. The biggest difficulty is figuring out how to coordinate among all the authorities, which is

why the EMA was created and passed. Heads of the key Tanzanian governmental departments form a National Environmental Committee that meets twice a year. Now that Tanzania has all the environmental acts, enforcement is the key issue. Economic incentives are now being explored, as well as how to harmonize them with the traditional "command and control" programs that Tanzania is used to. "Command and control" programs have actually had a negative impact on forests in Tanzania, where local communities are assisting the poachers. Public cooperation is therefore key, which is why Tanzania took two years to draft a law – workshops were held throughout the country in an attempt to involve everyone in Tanzania. The goal was to attain legitimacy, seek common values, and involve the stakeholders to get common buy-in to the core principles. Tanzania has also instituted a reward system in the act that covers wildlife, and has arranged for compensation to officers and informers who are injured in the cause. There are also rewards in the Forest Act and Fisheries Act. Given the government's limited resources, the public's help is needed to enforce the laws, but systems of public involvement that involve telephones and the internet are not feasible because most people in the country do not have access. Tanzanian NGO civil society is still in an infant stage. Furthermore, Tanzania's consensus-based culture, in which people are happy to talk regardless of how long it takes to achieve consensus, can make enforcement difficult.

Justice Amadeo Postiglione noted that in Italy there were too many laws, and that the water law had 63 articles and 7 annexes. This illustrates the point that the drafting of laws is very important.

2.4 Input Into Drafting of Laws

Ms. Marcia Mulkey stated that people who write environmental standards are often not writing those standards with the issue of ease of detection in mind.

Mr. Terence Shears suggested that the "experts" writing the laws may not be the ones best-suited to designing laws that are enforceable. Mr. Renzo Benocci added that it is also important to draft the laws and regulations so they can be understood by laymen.

Mr. Albert Koehl contended that clear values and knowledge of what is meant to be achieved by the laws make it easier to create and implement standards and to communicate them to the public.

3 RECOMMENDATIONS FOR INECE

It was suggested that INECE could investigate areas of cooperation in capacity building not only in the form of exchanging ideas and sharing experiences, but also by providing human resource assistance to those now designing enforcement systems so that they do not repeat the same mistakes already made by others. In other words, INECE should investigate capacity building not just in terms of field implementation, but also in terms of strategies and design principles.

SUMMARY OF WORKSHOP 1E/F: INFORMATION MANAGEMENT, REPORTING REQUIREMENTS AND SELF-MONITORING

Facilitators: Donna Campbell, New South Wales Department of Environment and Conservation, Australia
Markku Hietamaki, Ministry of the Environment, Finland

Rapporteurs: Markku Hietamaki, Donna Campbell

GOALS

- To share experiences to identify issues that regulators face in relation to self-monitoring, the reporting of self-monitoring information and the management of that information.
- To identify any work that INECE might do in the future to assist regulators address these issues.

1 INTRODUCTION

Key questions presented by the facilitators:

- What does the term "self-monitoring" mean?
- Why do regulators require operators to monitor performance?
- Wouldn't it be better for regulators to monitor performance to ensure compliance?
- How can the quality of monitoring data be assured?
- What approaches have countries used to improve the quality of data provided by operators?

2 DISCUSSION SUMMARY

2.1 What Does the Term "Self Monitoring" Mean?

The term "self monitoring" is misleading and often misunderstood. It is sometimes interpreted as meaning the operator volunteers to carry out the monitoring when in fact there is a legal requirement imposed on the operator to both carry out the monitoring and to carry it out in a particular way.

The panel discussion in the morning on "The Compliance and Enforcement Message" highlighted the importance of sending the community the right message. A better term is needed to describe monitoring that operators are required by law to carry out. The focus of the workshop was on environmental monitoring that operators are required by law to carry out.

2.2 Why Do Regulators Require Operators to Monitor Performance?

Monitoring data is required for a variety of purposes, including inventories for policy makers and public reporting, to ensure compliance with environmental laws (e.g., emission limits on a permit), and emissions trading.

The kind of data required, and its quality, will depend on the purpose for which it is collected. Broadly speaking, aggregated data used for inventories does not need to be as precise as data used to check compliance. Good regulators recognize the cost of monitoring requirements on industry and ensure that they only require what is necessary for the purpose for which the data is being collected.

2.3 Wouldn't It Be Better for Regulators to Monitor Performance to Ensure Compliance?

Compliance monitoring required by regulators today is generally around the clock. It would be prohibitively expensive to have a government inspector at every plant 24 hours a day, 7 days a week, monitoring compliance.

It was noted by some participants that operators are generally motivated to monitor their own performance. Operators want to ensure they don't cause environmental harm that may result in legal claims for damages or adverse publicity affecting their profitability. Poor environmental performance may also be costly to the operator because it generates unnecessary waste disposal costs.

Responsibility for monitoring must rest with the operator, both in principle and from a practical viewpoint.

2.4 How Can the Quality of Monitoring Data Be Assured?

It was agreed that assurance of the quality of monitoring data is the most difficult and pressing issue facing both regulators and operators.

The complexity and significance of environmental monitoring in today's world is generally underestimated. Countries have developed their monitoring requirements and their quality assurance systems from their own starting points. However, where pollutants cross national boundaries the need for information to be measured and collected in a transparent way is vital. Efforts should be geared towards reliable monitoring as well as principles of good approaches and standards for monitoring of industrial emission.

Emissions trading is increasing in importance. The quality of monitoring data is critical to make emissions trading schemes work. The data must be both accurate and comparable. There is a need for greater uniformity in the way countries require monitoring to be done in order for emissions trading schemes to work across national boundaries. Emission charges will affect the future profits of the operator, and they will demand reliable monitoring of other operators in the trading scheme. This must drive the authorities to establish equitable measurement and reporting systems in order to create a level of playing field.

2.5 Approaches Countries Have Used to Improve the Quality of Data Provided By Operators

In Australia, the head of the company (CEO) holding a license is required each year to: 1) certify that all monitoring has been carried out in accordance with the license requirements and 2) identify all instances of non-compliance with license requirements. It is a very serious offense by the CEO personally if he or she does not certify honestly and correctly. This is consistent with the US approach that carries out inspections to ensure that operators have the necessary monitoring systems in place backed up with the threat of large fines if they are not. When the Australian scheme was introduced, there was an intensive education campaign to ensure that CEOs understood their obligations. A surprisingly large number did not. The education campaign, backed up with the threat of personal liability, resulted in a big improvement in the provision and quality of monitoring data.

In the European Union, for some industrial sectors such as large combustion plants and waste incinerators, there are very elaborate requirements for the quality control of continuous emission measurements. The directives set requirements relating to the uncertainty of the measurements and CEN standard EN 14148 stipulates how measurements and the quality control must be done. The IPPC directive stipulates that the environment permit must specify how the measurements are to be taken by operators.

Finland has implemented these requirements in national legislation and developed electronic procedures to collect and manage the operator's compliance monitoring data. The standard method is that the operator completes a report using

forms available on the Internet. There are 3 kinds of reports: 1) a report of disturbances, 2) a report of exceedance of limit values, 3) a report of compliance with permit conditions. The first two reports must be sent to the regulator immediately after the event has occurred. The third report is only required to be sent periodically. In addition, actual fuel usage and emissions to air, water and waste must be reported to the regulator.. The inspector receives an electronic message every time a new report arrives. The checking of the data is done in the server that is outside of the regulator's system and only checked data is moved inside the regulator's system.

The latest method used in Finland is for the operator to have its own system for collecting all necessary data from its process control systems. The operator's system calculates results that can be compared to limit values and an operator sends this information to the regulator periodically. The regulator must audit not only the measuring system but also the data collection and management system to ensure that the whole system is reliable. This system is so far in use in only a few installations.

The Netherlands has recently adopted a scheme for accrediting independent verifiers to check the quality of monitoring data used in emission trading schemes (CO_2 and also NOx).

It was clear from the workshop that much could be learned from the experiences of other countries.

3 RECOMMENDATIONS FOR INECE

The most pressing need is for a comparison of:

- The monitoring methodologies for pollutants that cross national boundaries.
- The effectiveness of methods or schemes used to assure the quality of the monitoring data provided by operators. These could include the examples given above and an examination of schemes for the accreditation of independent verifiers in other fields of regulation.

Also, at the inspector level, there is a need for a simple checklist to ensure monitoring for a particular purpose is done correctly by the operator. This might already exist in training materials but the INECE website might provide a simpler more direct means of accessing it.

SUMMARY OF WORKSHOP 1G: GOOD GOVERNANCE AND THE RULE OF LAW

Facilitators: Angela Bularga, Organisation for Economic Co-operation and Development
Adriana Bianchi, World Bank Institute
Michael Stahl, Environmental Protection Agency, United States

Rapporteur: Matthew Stilwell, Institute for Governance and Sustainable Development, Geneva

GOALS

To explore the role of good governance and the rule of law in promoting sustainable development.

1 INTRODUCTION

The workshop discussions commenced with a short introduction by Dr. Adriana Bianchi, and a round of introductions by participants. It continued with a brainstorming session on key issues relating to good governance, rule of law, and compliance, which developed into a deeper discussion on a range of key issues. The workshop concluded with a summary of key topics discussed during the session.

The workshop aimed at exploring concepts of good governance and rule of law, and their relationship to sustainable development. The discussion was held around the following key questions:

- How can the international community promote good governance?
- How do we move from a situation in which incentives structures promote corruption and poor governance towards one in which we have improved governance?
- How do we measure whether we are moving towards this goal?
- What kinds of indicators do we need? What is the role of indicators in helping to measure progress, and in moving us forward?

2 DISCUSSION SUMMARY

2.1 Presentations

Presentations were made to the group Ms: Angela Bularga and Mr. Michael Stahl.

2.1.1 Ms. Angela Bularga

The international community can play an important role in creating a shared vision of good governance and substantially contribute towards promotion of good governance. In this respect, the Organisation for Economic Co-operation and Development (OECD) is at the forefront of efforts to understand and help governments adopt good governance – in both its member countries and non-members.

For example, the OECD has worked for many years in the former Soviet Union to improve environmental governance and policy implementation. For a long period, the un-transparent and often corrupt nature of the governance system in this region made efforts to protect the environment difficult. In 1991, the start of a transition to democratic governance and a market economy required a rethinking of the design and functioning of the whole governance system. Unfortunately, a decade of transition did not bring spectacular

changes and often accentuated old problems: the effectiveness of environmental agencies remains limited, lobbying by powerful groups and individuals for special privileges is widespread, and rules are not adequately enforced; thus non-compliance is high. Important factors that nourished non-compliance were the slow pace of governance and economic reforms, the complicated legal framework and poor economic situation, society's failure to believe in fair regulation, and the erosion of the rule of the law.

Based on a wealth of experience accumulated internationally, the OECD provided support to the countries of Eastern Europe, Caucasus, and Central Asia (EECCA) to define direction for regulatory and institutional reform and elaborate a reference model of good governance for environmental enforcement systems. This model was reflected in a concise policy document, called "Guiding Principles for Reform of Environmental Enforcement Authorities of EECCA". The Guiding Principles were developed with active participation of experts from EECCA and OECD countries within the framework of the Regulatory Environmental Programme Implementation Network (REPIN) and were endorsed at the Kiev Conference of Environmental Ministers (May 2003) from 51 countries. The principles are wide-ranging, and emphasize, among other things, that prevention is better than cure; that the regulated community should be treated fairly; that government agencies should be accountable, transparent, and equitable; and that feasible compliance targets and objectives should be established.

By endorsing the Guiding Principles, EECCA countries recognized the need for reform. The next step was to help countries to implement the Guiding Principles. One way to do this was to promote peer reviews, i.e. systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed country adopt best practices established in the Guiding Principles. The REPIN peer review scheme is intended to serve the following purposes:

- To provide international peer support for institutional reform of enforcement authorities;
- To enhance their transparency, accountability, and visibility, at national and international levels;
- To extend opportunities for inter-government policy dialogue and support capacity building.

The Ministry of Ecology and Emergency Situations of the Kyrgyz Republic was the first environmental authority subject to this scheme. The review suggested a number of short and longer-term steps for reform of domestic compliance assurance instruments, strategies, and institutions. These steps are closely linked with, and support, the implementation of the country's strategic development objective of adopting a good governance system.

Another major issue that arose was "how to communicate a message on good governance in a simple and integrated manner". To address this issue, OECD has developed a rating framework that reflects environmental policy development, legislative framework, policy instruments and relevant implementing regulations, and the institutional framework. The rating framework offers, first of all, the benefit of measuring progress in individual countries, but also can serve to identify where they are on a scale versus their country peers. While rating is done based on expert judgment, the transparency of the criteria and supporting data enable stakeholders to verify the ratings.

2.1.2 Mr. Michael Stahl

Indicators play a key role in making progress towards good governance and the rule of law, and in demonstrating progress to others. Indicators demonstrate things like: the presence or absence of phenomena; whether they are increasing or decreasing; whether targets and goals are being met; and if not, how far away success is.

Indicators can help to strengthening public participation. Whether compli-

ance programs are working needs to be established and shared with the public. Indicators are also good at helping to manage and improve environmental compliance and enforcement programs. Yet many government bodies are not yet using them for this goal. Rather, they are mostly using them to measure progress, instead of taking the next step of systematically managing and improving programs.

As we look at what kinds of indicators to establish, we should be careful about not only measuring outcomes and results. We want indicators that speak to outcomes, but we also need to measure the kinds and levels of activity in a program. We should not simply focus on the improvements in air quality without measuring what we are doing to get there. That is, we should measure outputs and outcomes.

2.2 Brainstorming

During the brainstorming session, a diverse range of issues arose. The main points are set out below, organized around the main themes of the discussion:

2.2.1 Good governance and the rule of law

- Do we all have the same conception of the rule of law? We have different backgrounds, so do we share a common perspective?
- The rule of law includes a number of elements. Rules must be developed publicly and promulgated widely. They must be applied equally, fairly, and predictably. They must be applied to all actors including the government.
- Understanding the rule of law requires understanding what the law is. Some issues are regulated, but others are not. So the law does not cover all relevant activities. The tendency of agencies to get monies from regulation may cause them to focus more on those industries that provide them with resources than others.

2.2.2 Strengthening compliance and enforcement

- In countries where we see good environmental compliance, we may also expect to see good governance in other fields. Environmental officials have often been at the forefront of improving compliance, the rule of law, and good governance. Their experiences may be instructive for other communities.
- The OECD principles emphasis the need for independence of officials from public and political pressure, yet this may be difficult to achieve in practice. For example, the key indicator of performance for many enforcement agencies in EECCA is how many claims they make, and how much they earn from fines and penalties. Yet these incentives may cause agencies to ignore industries that do not generate fines, and, in some cases, to focus perversely on tolerating higher levels of pollution to provide more resources to the government.
- In strengthening compliance and enforcement, education is a crucial element. Public opinion, too, is often critical. Yet public opinion is not always supportive of environmental protection. Public opinion may also affect elected representatives in government, who may influence enforcement activities. To what extent should regulatory agencies be independent of political pressure and public opinion?

2.2.3 The role of indicators

- What is the role of indicators, and how can we make valid comparisons across different countries and contexts? Environmental enforcement and compliance indicators are one good tool for promoting good governance. Participation indicators are also important in securing access to information, participation, and justice.
- At the same time, major challenges arise when we pick the elements indicators will cover, and seek to compare across these different elements. We

should acknowledge problems with our institutions, and note that indicators and other tools may also give rise to renewed pressure – political and otherwise – on our agencies.

— How can Environmental Compliance and Enforcement (ECE) indicators be better used to measure and promote good governance? A presence of a robust environmental compliance and enforcement program indicates a tendency towards good governance. It is at least one factor in demonstrating a move towards the rule of law and good governance.

2.2.4 Developing a broader "tool kit"

— As well as focusing on indicators, enforcement officials also need to think of the other elements in the tool kit. One is peer review, which provides a good way to improve the management and performance of environmental agencies. Another is enforcement and compliance strategies and policies, which provide a tool for use by all members in society to evaluate government performance. A third is the extent to which laws or directives provide for sufficient delegation of authority. From experience in some developing countries, the less authority is delegated, the more likely is the consideration of inappropriate factors. Delegation protects the officer from harassment. The challenge is to build indicators to measure good governance, and how to tie these into the elements of a broader toolkit.

2.2.5 The role of the judiciary

— In Canada, environmental laws reflect the expectation that everyone will obey the law – individuals, firms, and government. National laws bind provincial governments and their officers. More broadly, independence of the bureaucracy, the judiciary, and other officers is essential. The judiciary must be seen as being able to limit the power of the state, not merely as an officer of the state. How are the courts perceived in developing countries?

— In the Philippines, the Supreme Court is seen as an honorable institution – supporting positive public perceptions of the rule of law. At the lower levels, however, there are more significant problems of corruption, deriving from the often close relationship between judges and other actors. Judicial reform, along with new programs being implemented, is enhancing the ethical standards and performance of the judiciary.

— In Argentina, the president has promulgated a degree including a system of transparency in judicial affairs. The impeachment of three members of the Supreme Court followed this decree. This has strengthened the judiciary and improved its standing in the public. Nevertheless, Argentina still lacks a tradition of judicial independence. So further work on access to justice is required. Indicators provide a good tool in this effort.

— The mandate of some international organizations is often to work with Supreme Courts, yet the level of corruption may be high, making it difficult to promote judicial reform. The need, therefore, is often to work with other more independent actors in society, including civil society and key actors in the regulated community. In one country, there is movement to develop a "green bench" to address environmental issues.

2.2.6 The situation in developing countries

— Developing countries often face particular challenges in securing compliance. Effective policy work requires communicating effectively with senior and elected officials. In developing countries, the audience is often local enforcers who would do more if they had the resources and capacity. We should support these people.

— At the same time, these people often remain in place, while the more senior officials often change. Part of our challenge then is how to change the culture of senior bureaucracies. The problems are often practical. Peer to peer work is also critical – it provides a good way of putting enforcement officials or judges from different jurisdictions together to learn and share experiences.

— Developing countries often lack a culture of accountability. But changing the culture of officials is a long task. A sounder approach, therefore, is to focus on empowering the people to know, understand, and enforce the laws. Educating people about their rights, and helping them to demand good governance, is essential. Participatory governance mechanisms may exist but are underutilized.

— The gap in resources available to officials in developed and developing countries is profound. In many developing countries, resources for compliance officials are woefully inadequate. For instance, officials may have too few resources to even visit the facilities they are supposed to regulate. We need to close this gap. We must also correct the perverse incentives that create perverse outcomes. In correcting these, at the same time, we must ensure we do not rob the agency of a key source of their income, or otherwise downgrade their status. If agencies lack resources, how do they ensure that they can apply the law fairly to all in the regulated community?

2.2.7 Other challenges

— One challenge is to focus on concrete projects to strengthen compliance, while keeping in mind broader goals such as the rule of law. The role of each of the three branches of government is important. Citizen groups can help public authorities to enforce the law. We need to think about how to develop mechanisms that will persist in time so that they preserve the rule of law over the longer term.

— There is a shift from supporting international exchanges and environment, towards "good governance". Our challenge is to show that our business is an important aspect of good governance. Our field thus provides a great test case of successes and problems. We have to play a leading role in demonstrating that we can help to promote good governance. We need to form a partnership and develop a strategy to promote this goal, and to secure the resources to showcase our work, strengthen governance, and continue our present and new activities.

3 CONCLUSION

These discussions are particularly pertinent to the goal of this conference and of INECE. The workshop covered a range of issues relating to governance, the rule of law, and compliance. The following are particularly pertinent:

— We discussed the notion of good governance, and acknowledged its main components – including cost-effectiveness, accountability, and transparency.

— Yet we do not necessarily have a clear and operational definition. The OECD guidelines provide an important step in this direction.

— Peer review provides a good vehicle for strengthening compliance, rule of law, and good governance.

— Accountability must also be better institutionalized, as it has in some cases with transparency.

— Different resource levels and the independence of officials and judiciary must also be ensured.

— Authorities' awareness of accountability must be strengthened.

— How do we educate for change? We need to strengthen efforts to raise awareness and build a group of people who support our work.

— We also had suggestions to develop broader toolkits and to see how indicators work in the context of a broader set of tools.

— Resources for enforcement and compliance must be adequate. How can we ensure adequate resources are available?

SUMMARY OF WORKSHOP 1H: COMMUNICATIONS POLICY AND PRACTICE

Facilitators: John Cruden, Environment and Natural Resources Division, Department of Justice, United States

Krystyna Panek-Gondek, Inspectorate for Environmental Protection, Poland

Rapporteur: Meredith Reeves, INECE Secretariat

GOALS

To give participants the opportunity to discuss how their organizations use effective communications to promote or advance environmental compliance and enforcement.

1 INTRODUCTION

The facilitators opened the workshop by stating that, in the context of this workshop, the term "effective communications" means communications that promote or advance environmental compliance and enforcement.

For a person working to communicate information about compliance and enforcement activities, there are three main groups of target audiences. The first is civil society, including the public, non-governmental organizations, and the media; the second is the regulated community; and the third is government agencies and related authorities.

Furthermore, regardless of the intent of your communications strategy, information is only as good as far as your audience understands it and can use it. Therefore, education and training should be an essential component of effective communications.

2 DISCUSSION SUMMARY

Ms. Krystyna Panek-Gondek began the discussion by describing Poland's experience with its innovative "List of 80" program, which makes public the names of the country's 80 worst polluting companies. The List is also used by the environment agency to target inspections and enforcement actions towards the worst polluters.

The List sent the message that the worst polluters are the focus of the Inspectorate's interest, and enterprise got the message that government and the public are in control. The List created public legitimacy for enforcement, as well as public support for the program.

Companies are included on the List based on the following criteria: (1) how many times the emitted pollutants exceed the allowed limits, (2) the degree of concentration of the pollution; and (3) the location of the plant and the range of its adverse effects. A company can be removed from the list if it meets and maintains the terms and conditions established by its ecological permit.

Mr. John Cruden brought the participants back to the three target audience groups, by pointing out that what you say depends greatly on which of the three audiences you are targeting – for each, you need a separate communications plan.

Mr. Cruden went on to describe the relationship between the United States Department of Justice (U.S. DOJ) and companies. When a company settles litigation with Justice following an environmental dispute, the company agrees to take some action, e.g., to meet environmental stan-

dards or clean up pollution. U.S. DOJ invites civil society to comment on the settlement by posting a public notice and providing a 30-day comment period.

2.1 Why Is It Necessary To Communicate With Civil Society?

The workshop participants developed a list of reasons of why it is important to communicate with civil society (the public, NGOs, and the media), including:

- — to raise public awareness;
- —to educate the public about new laws and provisions;
- —to make the public understand what enforcement agencies are doing;
- —to obtain legitimacy for enforcement actions;
- —to deliver to nongovernmental organizations (NGOs) and media information necessary to trigger supportive action;
- —to prove that enforcement agencies work efficiently and spend public funds in an appropriate way;
- —to involve people in the decisionmaking process;
- —to create public support that influences government, parliaments, and international organizations.

Ms. Brenda Brito (Imazon, a Brazilian NGO) and Mr. Kenneth Cook (Environmental Working Group, a Washington, D.C., "think tank with an attitude") both made the point that non-governmental organizations can play a key role in translating governmental records and data into useful public information.

Ms. Brito discussed Imazon's experience with researching the effectiveness of criminal law on illegal logging. Two central challenges to the project have been (1) the difficulty of obtaining data on judicial decisions and (2) the difficulty in finding alleged violators due to the length of time it takes to prosecute a case.

Ms. Brito described how dangerous the work of the NGO can be, particularly in terms of giving tips to the government about illegal logging activities. Imazon tries to work with the "help" of the loggers. The Brazilian government does not know anything about the number of loggers, where the permit boundaries are, or what is permissible to take. In many cases, it is easier to get information from the loggers. Imazon does not ask direct questions about illegal activities, and considers itself to be more of a think tank than an active participant in prosecution.

Ms. Brito described Imazon's use of "policy briefs" to communicate to policy makers and the public about illegal logging. Imazon is also exploring the use of the Internet in communicating to its target audiences; although the World Resource Institute's Global Forests Initiative posts Imazon policy briefs and news stories, Imazon is currently planning a Web site on "The State of Amazonia".

Mr. Kenneth Cook discussed Environmental Working Group's (EWG) use of information from the US government (frequently obtained through Freedom of Information Act ("FOIA") requests), along with discovery evidence from tort actions, and original laboratory tests and other research, to inform the public and the media about threats to human health and the environment. EWG is unique in that it has made an equal investment in its media staff and its research staff, and selects projects based on their appeal to the media. Mr. Cook emphasized that it is very important for NGOs to have both external and internal communications. Internal communications include sharing exciting news regularly with funders.

Mr. Jonathan Allotey (Environmental Protection Agency, Ghana) and Mr. Mohamed Ben Hassine (Tunisia) described their countries' efforts to involve the public in environmental decision-making, including through the Environmental Impact Assessment process. Both countries invite public comments and input on the scoping process, as well as on the draft impact statements. The opportunity for comments and feedback often can result in the public supporting the ultimate outcome of the impact assessment process.

2.2 Why Is It Necessary To Communicate With Regulated Communities (Both Enterprises And Authorities Responsible For Implementation Of The Law)?

Participants' suggestions on the reasons it is important to communicate with the regulated community included:

—to educate the regulated community about new provisions;

—to promote best practices;

—to involve both enterprises and responsible authorities in the regulatory chain;

—to establish cooperation among different compliance and enforcement bodies (vertically and horizontally);

—to optimize the practice and implementation of environmental policy.

2.3 Why Is It Necessary To Communicate With Government Organizations, International Bodies, And Regional Groups?

Participants' ideas on the reasons to communicate with governmental organizations, international bodies, and regional groups included:

—to prove the effectiveness of inspection work (in the scope of compliance and enforcement);

—to check if the objectives established in environmental policies are being met;

—to prove good performance among organizations.

Mr. Allotey and Mrs. Mihaela Beu (Regional Chief Commissar, Romania) described the role of training workshops in communicating with the regulated community and with government inspectors. Mr. Allotey described the training workshops held in Ghana to introduce companies to new rules and requirements. Mrs. Beu discussed how, in Romania, the government works hard to communicate with the regulated community to achieve compliance. The government shares the enforcement resource allocation plan with the regulated community, which details how many resources are involved in promoting compliance and how many resources are dedicated to enforcement activities.

2.4 How Should Communication Be Done?

Participants also described methods that resulted in effective communications. Participants agreed that the three main criteria for effective communications were that they be (1) comprehensive and comprehensible, (2) open/transparent, and (3) an honest representation of the event or activity.

The communications should also be shaped to the needs of the recipient. In describing the challenges faced by the United Nations Environment Programme's (UNEP's) regional environmental compliance and enforcement officers, Mr. Jim Curlin (an Information Officer at UNEP's Division of Technology, Industry and Economics) noted that in most developing countries, the Internet has limited reach, and that it is critical to modify communications policies in response to each country's social context, and to utilize appropriate media, including radio, television, banners in the marketplace, and other methods. Mr. Allotey commented that pamphlets and brochures (which may need to be pictorial and/or in the local language) are also appropriate communications tools. Ms. Meredith Reeves (INECE Secretariat) briefly described the role of Environmental Compliance and Enforcement Indicators as tools for communicating complex information in a straight-forward, easily-understood manner. Mr. Kenneth Cook added that it is critical to the success of the communication effort to not allow much time to pass between discovery and sharing the announcement, and to have a media plan in front of the research.

Mr. Matthew Cooper (an independent environmental media consultant) described the role of storytelling in effective communications. Mr. Cooper noted that when a message is presented in a human

context (e.g., through a story that relates directly to a real situation), it is more likely to be understood and received by the intended audience.

Mr. Allotey described the use of public award programs to companies that put in the effort to clean up their activities. Ghana's EPA uses a rating scale of Red (non-compliance), Green (operating in compliance), and Gold (achieved compliance) to share information about the environmental performance of companies in the mining and manufacturing sectors. Mr. Allotey also said that, in Ghana, the EPA communicates directly with the press and responds to press inquires on the position of the government on issues.

Ms. Francesca Di Cosmo discussed the US Environmental Protection Agency's seven rules for risk communications, noting that the rules apply to environmental compliance and enforcement communications as well. The rules are:

1. Accept and involve the public as a partner.
2. Plan carefully and evaluate your efforts.
3. Listen to the public's specific concerns.
4. Be honest, frank, and open.
5. Work with other credible sources.
6. Meet the needs of the media.
7. Speak clearly and with compassion.

Ms. Di Cosmo continued by emphasizing the importance of understanding the target audience for any communication effort, and of understanding your own message before sharing it with others. Ms. Di Cosmo noted that it was important to communicate the basic message clearly, without using confusing terminology or jargon.

Participants in the workshop agreed that there is a need for elaborating communications strategies for every target audience.

3 RECOMMENDATIONS FOR INECE

—Develop a communications strategy, which could be based on a survey of best practices from around the world. By extension, participants recommended that INECE collect and promote strategies for developing messages to the three groups of target audiences.

—Look at ways that environmental compliance and enforcement indicators can be used as a tool to communicate messages about effective enforcement activities to diverse audiences in a clear and concise manner.

SUMMARY OF WORKSHOP 1I: CITIZEN PARTICPATION IN ENVIRONMENTAL ENFORCEMENT

Facilitators: Georges Kremlis, European Commission
Katia Opalka, Commission for Environmental Cooperation
Romina Picolotti, Center for Human Rights and Environment, Argentina
Barry Hill, Environmental Protection Agency, United States

Rapporteur: Dorine Hornung, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

GOALS

- To explore citizens' access to environmental data – both public and private – from the 1966 U.S. Freedom of Information Act to the 1998 UN/ECE Aarhus Convention
- To explore the role that citizens play in the enforcement process once access to environmental data is granted

1 INTRODUCTION

The first part of the workshop is devoted to information disclosure to the public. The second part of the workshop examines how this theme is reflected in actions by citizens groups and in laws that seek to more directly involve citizens in the enforcement of environmental laws through citizen suits, reporting of alleged violations to the government, etc.

The basic questions presented by the facilitators were:

- What are the successes and the problems involving citizens' participation?
- What does "meaningful" mean when we speak about meaningful citizen involvement?
- What are the rights that the citizens and the nongovernmental organizations (NGOs) have?

2 DISCUSSION SUMMARY

Prior to the discussion, the key elements of citizen and nongovernmental organization participation were set. These are:

- Access to information
- Right to participation
- Access to justice

Katia Opalka opened the workshop discussion with an interesting presentation about citizens' involvement in Canada. She explained what routes citizens and NGOs in her country can take and what the Canadian system is for access to information for citizens and NGOs. For example, citizens can launch private prosecutions. Citizens and NGOs can ask the minister for an investigation, and if the government does not meet the request to their satisfaction, they can go to court. This allows citizens to monitor environmental issues. In addition to this, Canada has an online network – the Canadian Environmental Network – which invites people and NGOs to participate. The politicians rely on the NGOs as speakers for the citizens. There is also a system for investigation of complaints made by citizens.

Following this example of a government that really involves citizens and NGOs, the situation in Latin America was shared with the participants by Romina Picolotti. Usually, the possibility for citizens

to participate is based upon the right of information. In Latin America, this cannot be explained without mentioning the historic civil rights situation. Democracy is also the right to know what is happening. But only since a couple of years ago has there been an environmental movement that supplies information. Today, in some Latin American countries, there is a 'right to information act' but this does not apply to all. Even when an act is available, government officials are still not sharing information easily. When information is requested, it is shared as a favor rather then as a response to a right. And even when the government is willing to share, the data may not be accessible; for example, files may be on the floor, or data systems may be absent. If the government does not share the information, the NGOs would rather accuse them of violating the human rights act rather then the right to get information based on the right of access to environmental information. This is because the government is probably more willing to share information if accused of violating human rights. One problem in using this approach is that in Argentina, NGOs have no human rights.

After these two presentations, an interesting discussion was held, sharing experiences. The different remarks made or key points stated are listed below. For a good understanding of the discussion, it is noted that most of the participants were representing NGOs.

- It should be kept in mind that providing information costs the government a lot of time and effort (for example, they may not be able to afford the costs of making photocopies), and there should be a feeling that the government benefits from it, because otherwise authorities see only the risk that they will be sued constantly.
- Public participation should enable citizens to make their views known, to ensure compliance with environmental laws and the precautionary principle.
- Citizens and NGOs should have access to justice to support access to information, to participation, and to courts.
- Meaningful public participation would require all relevant environmental information to be made available and the views of the public to be taken into consideration to the extent possible.

In addition to these key points the following remarks were also made. These remarks are listed in no particular order:

- 'Meaningful information' means getting general information as well as specific information. And it should not only mean sharing information, but also giving rights to control discussions and then the right to appeal. In Austria, in the case of public participation in certain dossiers, they are handled differently, with more care, by the government.
- A participant stated that access to information is linked to access to justice. This means the government actively supplying information, not only on request, such as access via databases. When the information is shared, such as via the Internet, it will actually pay itself back.
- A participant from an NGO said that sometimes information is held back, or the opposite may occur: they give too much so it is difficult to understand. It was also stated that governments are in some cases only sharing technical information, which the public does not understand.
- Website access is not in all cases and/or for all countries enough for sharing information. This is because not all people have access.
- If the government uses the possibilities mentioned in the Aarhus Convention, it will be easier for them to reach the people. Citizens are sometimes surprised of the possibilities they have. The government's role should be more than just supplying technical data.
- Without providing information to the people, it is impossible to give people awareness. In the Ukraine, they are

encouraging people to get access to information. NGOs can go to court now, but citizens cannot do this yet. In front of the court, the government once stated that it did not want to share all the documentation because it was secret. But the court said that they had to share because otherwise they would violate the convention.

- It is very different in Africa: 'you are just lucky getting information'. A participant from an NGO said that it was sensed that the government sees NGOs only as troublemakers. It has to be said that there is not much money available to share information.
- A problem is that not all state bodies are trained properly about the possibilities of the Aarhus Convention and its implementation. It was also stated that environmental democracy cannot be built from one day to another and sometimes the NGOs want more than what the governments are ready for. It is not always a matter of willingness; it takes time, and the governments need to build this capacity.
- Governments should keep in mind that citizens' complaints are the eyes and ears that enable the effectiveness of the environmental laws.
- Governments often see industries as partners, but they should see NGOs as beneficial partners as well.

3 RECOMMENDATIONS FOR INECE

- Strengthening governmental commitments and public support for regional agreements, making them spread worldwide.
- Presenting training workshops on innovative tools for meaningful public participation, which should be for NGOs together with regulators.
- Developing a strategy for establishing guidelines for meaningful participation.
- Making an effort to develop databases and other ways of providing information to the public, e.g., by sharing best practices.
- Sharing success stories and the way that they were used.
- Promoting that human rights (e.g., to life or health) relate to environmental rights.
- Mentioning to governments that information given by NGOs and the public should be used, to get the advantage of the participation.

WORKSHOP SESSION 2A

Environmental Compliance and Enforcement Indicators: Getting Started

Representatives from Argentina, Austria, Canada, Costa Rica, the United States, and others from the INECE Expert Working Group on Indicators led a series of workshops that introduced the concept of environmental compliance and enforcement (ECE) indicators and discussed basic components of program design and implementation. Drawing from the experiences of the workshop leaders, the workshops provided guidance to practitioners for identifying, implementing, and using ECE indicators and discussed issues such as costs, lessons learned, and the values, benefits, and need for ECE indicators.

2A ECE Indicators: Getting Started

A1 Facilitators: Dave Pascoe, Environment Canada

Angela Bularga, Organisation for Economic Co-operation and Development

A2 Facilitators: Michael Stahl, Environmental Protection Agency, United States

Waltraud Petek, Federal Ministry of Environment, Austria

A3/A4 Facilitators: Maria Di Paola, Fundación Ambiente y Recursos Naturales, Argentina

José Pablo Gonzalez, Office of the Attorney General, Costa Rica

Myriam Linster, Organisation for Economic Co-operation and Development

Kenneth Markowitz, INECE Secretariat

Report Out from Workshop Session 2A

Moderator: Michael LeRoy-Dyson, Auckland Regional Council, New Zealand

In the following pages, the reports of these workshops are presented.

SUMMARY OF WORKSHOP 2A1: ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT INDICATORS: GETTING STARTED

Facilitators: Dave Pascoe, Environment Canada
Angela Bularga, Organisation for Economic Co-operation and Development

Rapporteur: Davis Jones, Environmental Protection Agency, United States

GOALS

To strengthen capacity to measure and manage the effectiveness of the participants' compliance assurance and enforcement activities by launching new environmental compliance and enforcement (ECE) indicator pilot projects.

1 INTRODUCTION

The facilitators began by raising two key questions to help focus the discussion.

1. What are the challenges to starting ECE indicator pilot projects?
2. How can INECE help?

The difficulties with result-oriented measures should not dissuade programs from beginning to measure environmental outcomes in more limited ways. Output indicators with measures such as inspection numbers or the number of regulated entities are a necessary component of indicator systems, despite their limits in showing the environmental results. However, even though the data may be difficult to collect and manage, limited outcomes measures should be sought. Agencies should not be afraid to make mistakes; they should be encouraged to be creative and to experiment with indicators. Care must be taken not to create measures that create perverse incentives, such as increasing the number of insignificant inspections or cases to show greater activity, or by indicating the lack of violations as a success rather than as an indication that compliance status is unknown. Indicators must be developed early in the management process and be used to guide resource dedication and strategies. Indicators should be examined in light of the expectations of the programs and may help explain why regulators act as they do towards the public and other stakeholders, who may have other expectations.

INECE could play a key role in the following areas:

- Working with Regional Networks to promote global use of ECE indicators and continue to promote the issue to help the networks connect with funders.
- Sharing information between countries and standardizing definitions and terminology to develop a common language on the subject.
- Develop training and guidance on the development and use of basic components, including some specific indicators with which they can begin.

2 DISCUSSION SUMMARY

Several countries have begun to measure performance and outcomes in different ways, and have different experiences in developing environmental compliance and enforcement indicator programs. Mr. Dave Pascoe began by relating his experience in Canada as they developed a performance measurement system. They began by choosing only a selected number

of indicators from a menu referenced in a larger list of measures (from the INECE publication "Performance Measurement Guidance for Compliance and Enforcement Practitioners"). The biggest lesson learned was that in a pilot, you should not discount any indicators, even if you only begin with a more limited set. If some measures do not work, it is acceptable to make mistakes and then discard a particular measure, but programs should not begin a pilot by leaving anything out of future consideration.

Many countries have advanced systems, which may rely on the internet or other tools, to collect and publish information on environmental releases and activities, such as timely and appropriate response to violations or other activities. These systems may do a great job of capturing data, but often do a poor job at measuring performance and results. Differences in performance of industry toward compliance or effluent releases are not always adequately linked to environmental performance such as stream quality.

In The Netherlands, a new law requires yearly environmental data reports for public release from the environmental authority. The decree described criteria for data and presentation of information to ensure adequacy of the data presented to the public. Information was in two parts:

1. Effect of pollution on surrounding area around plant.
2. Information about monitoring system and data management system.

For some items, such as methane, polluters can calculate the exact emissions, but for some other pollutants such as fugitive benzene, it can be much harder to directly measure. Therefore, the authorities had to establish uniform data collection methods and reporting mechanisms. They also had to get agreement on responsibilities of government and industry regarding data systems.

The development of indicators must not be done too much in isolation of other parts of the compliance monitoring. Some well-meaning indicators can create perverse incentives, if not done with a wider perspective. For example, indicators that compare the work of subnational units can create motivation for units to perform to meet the measure, rather than to perform to meet the ultimate goal of the measure, leading to inadequate or incomplete compliance.

Finland first investigated processes and how they work, and then developed measures on work outputs and schedules to show how work proceeds. The development of indicators should go hand in hand with development of work processes to improve work flow and efficiencies. Indicators should help to put work in positive light and should not be designed as a method to criticize. Program evaluation should be designed to improve programs, not to justify tearing them apart or eliminating programs that do not adequately fit the measures.

The INECE Internet forum on indicators highlighted a system to capture key data from inspection reports. The goal of the system is to take all the necessary data for the indicators from inspection reports, rather than requesting more data from the inspectors or additional forms for inspectors to complete. Inspectors already have too much work to add additional data collection or reporting demands.

The goal of indicator systems is to measure the effectiveness of compliance work. In Canada they broke the indicators into two parts. The first measure is compliance with the rules and outputs such as the amount of fines, the number of inspections, and the number of cases. It is fairly easy to report and collect information of this type, and to measure the effectiveness of industry compliance. However, it requires a small leap of faith to believe that compliance will reach the goals of the rules. But, if there are limited resources, this may be enough. The second measure is the efficacy of the rules. It can be very difficult to figure out if rules themselves are working, but we can assume that if people not following rules, it is impossible for the rules to reach the expected outcomes. Once compliance occurs, then we can measure the outcomes and ultimate results.

In one pilot, Canada first started an initiative with measurement of things like awareness of the environmental obligations. They then did one year of compliance promotion to the targeted industrial sector. Awareness went up to 70 – 80%. They then measured targeted enforcement, and subsequently found 90 – 95% compliance. The dual track measurement helped them see if they could measure the effects of compliance promotion vs. enforcement, and showed that both tools are most effective when used together. It required some trial and error on which indicator worked, but better results occurred when different indicators were tested.

Indicators should be designed and used to define compliance and enforcement strategies and allocate resources to best achieve goals. Define the baseline indicator, measure the current state, then perform the activity and see if it worked. Many countries start work before they have measures and do not know how to adequately direct the resources in the most productive way.

Indicator programs should not be created just for the measures, but they must be a planning and management tool to learn about the effectiveness of work, not just to measure.

Some of the perverse incentives are evident in Russia. Large countries do not have nearly as many inspections per facility as smaller countries. In Russia, and many other countries, inspectors can not revisit facilities unless a violation is found, so inspectors may invent a violation so they can come back to a facility later to continue to review areas they may not have completely covered the first time. Another perverse indicator is created when penalties add to the inspectorate's funding and budget, creating motivation for higher fines rather than environmental improvements. Many areas do not set objectives correctly because of other causes or influences.

An indicator is defined as an expectation for a particular result. When dealing with the public, experience has shown that the best indicators are found when everyone with expectations in that area are consulted, including governments, auditors, nongovernmental organizations (NGOs), treasuries, the public, etc. Whose expectations are being met? Information used to explain enforcement may not be the same as the information needed to evaluate the effectiveness of the enforcement, but both are important. Are indicators created by the agency or imposed from outside? It is all about "effectiveness", and effectiveness is in the eye of the beholder. That is, what governments consider a success may not be viewed as such by the public. Indicators are an important source of information on expectations of law enforcement. It is important to know what the public expects, and to understand that it does not always match what the agency is doing based on law, budget, or agency priorities. It is crucial to help define what the public wants, and whether law enforcement can deliver on those expectations.

The hierarchy of preferred indicators often depends on resources and the ability to collect measures. Activity is an important and indispensable indicator. We need activity levels to compare to results to show what we have done with our time and resources. But we also have to look at the entire compliance continuum and compliance strategy. We need to look at the full spectrum of activities and see which is effective in which parts of the continuum. When you look at what you are going to measure, you should also look at the deterrent value of "presence", even when violations are not found and there is no other direct result from an inspection or other activity. Ideally, all parts of the continuum should be measured, but this may be unrealistic.

One problem with enforcement indicators based on ambient environmental conditions comes from externalities such as transboundary pollution. Do you want to be responsible for quality of environment when some effects are beyond national control? We must "think globally, act locally". Compliance and enforcement programs can only be responsible for national law. Domestic programs can not monitor a multi-national company's activities in other countries.

Perhaps this is one way INECE can help? How can we ensure that indicators toward one company in one country are applied equally in others? Different national programs should work together to try to make multi-national corporations globally accountable. There is someone at the top of every company that is responsible, how can we get to them?

Some countries have tried to develop indicator programs, but because of the lack of funding or internal capacity, they have not finished or implemented the required indicators. Can INECE help create mechanisms where donors and requesting countries could come together? INECE can help build networks and push the ideas through regional networks. Donors may be able to help networks work regionally better than individual countries.

Countries are asking about the basic elements of indicator programs, and asking for guidance on what to do and what indicators they should use, not on how to develop measurement systems themselves. But if we create a system for them instead of helping them learn to develop their own, the efforts may not be sustainable. INECE should develop training on the benefits of indicators and why they are useful, then how to develop a system so countries are better equipped to work out their own measures in a consistent way.

There is a success story from Norway where they worked with three countries in southern Africa on how to establish an environmental department, and worked specifically on inspections and enforcement. All three new departments have been successful. This was a result not just of one or two courses, but rather a longer term engagement with back-and-forth visits and intensive capacity building. Any type of sustainable capacity building, particularly on long-term subjects such as indicators, requires a long-term commitment.

The OECD is initiating a similar project in Kazakhstan. In some cases, there may be a possible bilateral agreement for help, and environmental programs may want to cooperate under that framework. In other situations, regions may prefer to deal with an outside broker such as INECE or other international organizations.

INECE has successfully connected funders with issues in a couple of instances. In Southeast Asia, INECE has connected funders from the United States – Asia Environmental Partnership (USAEP) and the Asia Development Bank with experts in the US EPA, the OECD, and elsewhere and will be holding a regional workshop on enforcement indicators in August in Manila. Another example exists in Central America where the Central America Commission for the Environment and Development is working with funding from the US Agency for International Development (USAID) and experts through INECE to start indicator pilot projects in the region.

Russia presents an example of performance-based budgeting that is forcing them to rethink their indicators. There are requirements in the law that the government must report their results to the public, so they are working to strengthen their measurement systems. Currently, they have a great deal of data, but it is not effectively used. They have collected data for the public "State of Environment" report, but do not think about trends, visible display of data, and long-term analysis.

3 RECOMMENDATIONS FOR INECE

INECE could try to develop a tool or guidance with learning lessons on developing and using indicators, particularly on how to creatively develop and use information that already exists based on where it has already been done.

Another role for INECE could be to examine how different indicators, such as compliance rates, inspections, and outcomes are addressed or segmented by different countries. E.g., the number of inspections is not as easily defined as it seems: what is an inspection? How are different levels of inspections counted? How do you count a team vs. an individual inspection? A set of common definitions used across boundaries would help as

countries or other institutions make comparisons.

INECE could also help with defining severe nonconformities. Many different systems exist such as the US definition of "Significant Non-Compliance" or "SNC", which differentiates between violations based on their seriousness and triggers different responses which are closely tracked to ensure adequate response is taken. What are the most serious ones? What types of violations matter most? While this may differ depending on legal regimes, INECE could share how countries reach their determinations so others could apply the same logic within their regulatory system.

SUMMARY OF WORKSHOP 2A2: ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT INDICATORS: GETTING STARTED

Facilitators: Michael Stahl, Environmental Protection Agency, United States
Waltraud Petek, Federal Ministry of Environment, Austria

Rapporteur: Wout Klein, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

GOALS

The facilitators presented as goals for the workshop:

1. Hearing about issues that participants are faced with when defining, developing, and/or implementing environmental compliance and enforcement (ECE) indicators
2. Defining ways in which INECE could help with these issues.

1 INTRODUCTION

Several countries have a history of "state of the environment" indicators. The challenge is to develop a whole spectrum of indicators from input to outcome and at several intermediate stages. One should not try to make this link by one big leap. An incremental approach is the only way to do so, and focus should be given to intermediate outcome indicators.

There is not one ideal set of indicators that can be used by every country. There only seems to be a general approach or process of identifying, developing, and implementing environmental compliance and enforcement (ECE) indicators.

2 DISCUSSION SUMMARY

2.1 Experience

Experience with ECE Indicators among workshop participants ranged from practically none to fairly sophisticated. Specific situations were mentioned by members from:

- Bahrain
- USA
- New Zealand
- Austria
- Australia
- Poland
- Romania
- Ghana
- England & Wales
- IMPEL

Some of these countries are really at the beginning of an ECE Indicators scheme. Other countries have experience with "state of the environment" indicators, but not with performance indicators focused on environmental compliance and enforcement. Several countries are in the burdensome process of linking their enforcement output indicators to the state of the environment.

2.2 Observations

From these various experiences and from the work on ECE Indicators by INECE and the Organisation for Economic Co-operation and Development, several observations emerge that are stipulated by the participants and moderators.

- Several countries have a history of "state of the environment" indicators. The INECE group focused on perform-

ance indicators for compliance and enforcement that are, so far, in most countries described in terms of input or output.

- The challenge is to develop a whole spectrum of indicators from input to outcome and at several intermediate stages, like, for instance, what was done in the Chesapeake Bay water quality program.
- One should not try to make this link by one big leap. An incremental approach is the only way to do it.
- Focus should be given to the intermediate outcome indicators, because
- they are more directly related to the enforcement activities than are outcome indicators,
- they are more directly related to the efforts of the regulated community and are more readily accepted, and
- they are sooner to be obtained and attributed to the actions.
- There is no one ideal set of indicators that can be used by every country. There only seems to be a general approach or process of identifying, developing, and implementing ECE Indicators. (See: M. Stahl, "Performance Measurement Guidance for Compliance and Enforcement Practitioners, available at http://inece.org/forumsindicators.html").
- In this process, one should try to focus on only a few indicators, especially those that will be really and sensibly used by the management or by the national government; indicators that pose a burden on employees or local authorities of collecting data that will never be used will soon discourage the whole process.
- There is always a risk of perverse incentives originating from a specific indicator, so that inspectors might make the wrong choices just to get good indicator results.
- There is also a risk of misuse and misinterpretation of indicators; a decrease in incoming fines can either indicate a lower performance of the inspectors or a higher performance of the regulated community.
- Communication and education about the sense and meaning of the indicators is essential at all stages, both inside the agency and to the outside (politics, community, industries). Several of these audiences can very well be co-designers in the development stage.

3 RECOMMENDATIONS FOR INECE:

INECE could assist countries in the process of identifying, developing, and implementing performance indicators on environmental compliance and enforcement in several ways:

- By building capacity, e.g. by incorporating these notions on the ECE Indicators process into a training course or by mentoring actual processes in developing countries.
- By presenting a library of examples of basic indicators, used by different countries, preferably categorized by their type or use, in order to give direction to new schemes and a possibility of benchmarking for existing schemes.
- By exchanging information through INECE's website, not only about successes, but also about burdens and failures.
- By investigating the use of ECE Indicators in situations of cross-compliance, e.g. where the granting of agricultural subsidies is dependent on the compliance with environmental regulations.
- By continuing the E-dialogue on ECE Indicators with an exchange of experiences with intermediate outcome indicators.

SUMMARY OF WORKSHOP 2A3/A4: ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT INDICATORS: GETTING STARTED

Facilitators: Maria Di Paola, Fundación Ambiente y Recursos Naturales, Argentina
José Pablo Gonzlaez, Office of the Attorney General, Costa Rica
Myriam Linster, Organisation for Economic Co-operation and Development
Kenneth Markowitz, INECE Secretariat

Rapporteur: Melanie Nakagawa, INECE Secretariat

GOALS

To introduce the concept of environmental compliance and enforcement (ECE) indicators and discuss basic components of program design and implementation. The participants represented countries at varying stages of economic development as well as sophistication with regards to enforcement and compliance programs. This workshop helped identify how participants from countries that do not have an ECE indicator program or are in the process of establishing one would go about designing an effective ECE program. Participants shared lessons learned and raised new ideas about how to facilitate establishment of an effective ECE indicator program and, in particular, suggested ways for INECE to guide this process.

1 INTRODUCTION

The discussion focused on five key questions posed by the facilitators. These were:

1. How can we start developing ECE indicators? What are the benefits of using ECE indicators?
2. What challenges are associated with identifying, designing, and using ECE indicators?
3. What role can INECE play in developing and using ECE indicators?
4. How can we share experiences from INECE pilot projects to assist other countries in initiating projects?
5. What is the role of International Financial Institutions (IFIs) in providing financial assistance for compliance and enforcement programs? More specifically, what role can they play in countries to help them fund the information sharing and data gathering aspects?

Several ideas were suggested by members from a variety of countries ranging from those with a strong enforcement regime to those still in the nascent stages of environmental enforcement.

2 DISCUSSION SUMMARY

2.1 Key Points Attributed to Specific Individuals

1. Ms. Maria Di Paola commented that access to lessons learned from other indicator programs and sharing experiences are important for countries just beginning pilot programs. For instance, Brazil and Mexico have been good examples for Argentina to learn from by examining our shared similarities while still paying attention to our differences.

2. Mr. José Pablo Gonzalez highlighted that training, regional trends, and enforcement cooperation are critical to an effective ECE program.

3. Mr. John Chouinard added that it is important to focus on intermediate outcomes and goals and to avoid looking for proof of cause and effect.

4. Mr. Kenneth Markowitz noted that in order to get the full impact of a country's Organisation for Economic Co-operation and Development (OECD) assessment report, we should identify ways to work with OECD to integrate ECE indicators into the country assessment report process. We cannot look at these indicators in a vacuum, but rather we should pay attention to the externalities involved and other pressures. This same idea is true in other contexts such as the Millennium Challenge Corporation country selection process and the World Bank's initiative on country assessments. Both of these are exploring ways to better understand a country's ability to govern effectively. There is a significant role for compliance and enforcement indicators to contribute to the success of these efforts.

5. Ms. Maria Di Paola suggested a potential role for INECE. E-dialogues are a good way to exchange information and share different experiences useful to our pilot programs. If INECE is interested in developing pilot programs, it would be useful to think how the methodology will fit into a country's unique system. It would be interesting to review the same indicator through different perspectives, another mechanism for the promotion of exchange.

2.2 Shared Experiences from Existing Programs: Lessons Learned

Based on Costa Rica's experience, Mr. José Pablo Gonzalez discussed the importance of compiling data and resources on indicators and then organizing this data. While Costa Rica has legislation forcing officials to manage indicator data, they do not have an effective means of enforcing it. Mr. Ken Markowitz agreed with Mr. Gonzalez and added that not only is collecting, organizing, and distributing data difficult, but it is also expensive. Therefore, he questioned what the role of international finance institutions would be in fiscally supporting compliance and enforcement programs. He further questioned what roles they can play in countries to help fund aspects of information gathering. Finally, he inquired as to whether there is a role for INECE to facilitate or assist with this process.

The workshop then discussed the need to monitor and control ECE programs, the role for public participation, and how to evaluate effectiveness of a program. Types of monitoring indicators include input indicators (e.g., resources available) and output indicators (e.g., number of enforcement actions, number of inspections, and number of cases filed). But more significantly, the workshop posed the question of how we can try to understand improvement in environmental quality.

One participant, Mr. John Chouinard from Canada, suggested the need for stronger consequences for noncompliance. This goes hand in hand with making sure an inspector is vigilant in his monitoring. For instance, he suggested that inspectors should have a checklist of major activities that require compliance and then record this data. With recorded data, a business can have a picture of changes in its performance over time, and inspectors can focus their attention on those who they now know do not comply. Basically, the officer in the field needs to know the purpose, reason, and use of the information he gathers. With a data system, or a generated system, inspectors know where to go and what to check for.

The participants then discussed in greater detail input, output, and outcome indicators. Mr. René Drolet commented that we should focus attention on alternative outcomes. Based on his own experience, he found that long-term outcomes can be attractive, but can also be discouraging. He found his staff discouraged when looking at long-term indicators, but when he focused on outcome-based indicators, that translated into small wins and encouraging results. In other words, while final outcome indicators present an attractive goal, it may be premature in most countries to jump toward outcome indicators without

taking performance measurement in steps designed to provide useful information on program activities.

Mr. Fred Kok cautioned that while outcomes are important, it is also important to look at the quality of data versus the quantity. This was supported by Mr. Krysztof Michalak's suggestion that there be good monitoring of the quality data.

The workshop stressed the notion of clarifying outcome indicators and focusing on intermediate outcome indicators. One such approach is the pressure-state-response (PSR) approach. However, the participant from Australia, Ms. Maria Comino, posed the question of whether, when a country has legislation and uses the PSR approach, there is a way to piggyback ECE indicators on this type of legislation. One solution may be to look at it from a cost-effective approach.

In response, Mr. Ken Markowitz suggested looking to the Organisation for Economc Co-operation and Development (OECD) for guidance. OECD has significant expertise with the pressure-state-response model. The process at the OECD is to try to not look at this in a vacuum, but to consider the externalities involved, such as non-point sources of pollution. However, the participant from the OECD, Ms. Myriam Linster, mentioned that the OECD could use better figures and better indicators. Instead, the OECD currently uses other data, similar to what Mr. Markowitz discussed. INECE can help improve OECD indicators. For example, INECE can help figure out what information is needed to show that a project is effective. INECE could also explore voluntary approaches.

Mr. René Drolet noted that behavioral changes provide a good indication of compliance. He is interested in knowing more about which industry sectors would respond best to compliance promotion in achieving high levels of compliance. Start with a baseline and try to link change with a particular compliance response. This gives an indication of where to focus attention – in his case, the farming community. In Canada, Mr. Dave Pascoe was able to raise awareness about the fisheries act by explaining to the fishing community what constitutes a violation. However, he ran into political problems during the enforcement phase. For enforcement actions in Costa Rica, Mr. José Pablo Gonzalez was asked by the attorney general to monitor impacts and set out guidelines for prosecutors with the goals of achieving better settlements and quality of enforcement.

The participants discussed empirical data showing that there is a small percentage of the regulated community that will comply. There is also another small percentage that will not comply because there are economic disincentives to comply. However, in the middle there is a community where with some compliance assistance or a "kick in the knee" in the form of a notice of violation, they will comply. The challenge is to first determine who fits in which of these categories and then use the bag of tools we have to know what tool to apply to each group. The workshop participants then discussed what they can do with this group and how the collective INECE participants can use indicators to move this gray group into compliance.

The suggestions offered for furthering compliance within this group included several suggestions.

(1) The participants suggested looking at cost effectiveness. This entails calculating the chance that the offense will carry high fines and finding those who would pay millions versus only a few thousand dollars in fines. In addition, it requires determining which offenders take on the perspective that they would rather be fined than go under. In these situations, it is best to try to calculate the fine in the direction of compliance.

(2) The participants suggested it is important to get the sources of emissions and pollution registered. Similarly, these registries must be kept updated to facilitate effective monitoring and tracking mechanisms.

(3) The participants suggested that we pay close attention to small and medium-sized enterprises that may, if better

informed, come into compliance. For example, eighty percent of small and medium-sized firms in the United Kingdom did not know regulations applied to them.

(4) Developing good governance in countries that are just setting up environmental legislation and laws, like Bosnia Herzegovina, can help build the capacity for effective ECE indicators. Bosnia Herzegovina needs a good foundation, which includes good legal institutions, capacity, and budget, a healthy economy, and a privatization process. Perhaps then, in the long-term, they will be able to develop ECE indicators.

Dr. Roberto Rodriquez suggested that there should be regulatory plans based on a baseline for each country and a set of indicators. This would allow each country to extract a common regional approach in accordance with ECEs on an international level. These ECEs would be targeted at helping countries comply with environmental agreements at the local level through standards and permits, in accordance with Multilateral Environmental Agreements (MEAs) and national plans. Drawing from Costa Rica's experience because it is more advanced, a country would look at indicators of performance instead of looking at indicators of impacts, which are hard to measure. Perhaps the Central American Free Trade Agreement (CAFTA) could serve as an opportunity to spread the use of ECE indicators in Central America.

3 RECOMMENDATIONS FOR INECE

The final issue raised was how INECE can help. It was noted that it is important for INECE to respond to the needs of the network, while expanding the network.

Mr. José Pablo Gonzalez stressed the importance of training.

Ms. Myriam Linster suggested that in some countries with extensive financial constraints, there must be a minimum amount of resources necessary to begin an indicators and ECE program. Given the financial constraints, the recommendation agreed to by the workshop participants was to encourage creativity, which takes into account the different outcomes possible from different countries with different issues. Narrowly defined pilot projects (e.g., focusing on one law or part of a law) that lead to valuable information should not be discounted. The INECE methodology could serve as a starting point. INECE's role could be to encourage the involvement of academic institutions and non-governmental organizations (NGOs) to start the process, similar to what is being done in Argentina with the World Bank Institute (WBI) and Fundación Ambiente y Recursos Naturale (FARN).

Participants also discussed the need to provide inspectors and enforcers of environmental regulations with training and a methodology for ensuring good information collection, management, and distribution. Such practices will greatly assist in conducting a pilot project, irrespective of the scale.

The workshop participants recommended that INECE develop a standardized ECE indicator training program, dynamic and interactive in nature. This training could serve a dual function as a mechanism for encouraging partnerships with institutions and as a means of fostering comprehensive indicator development within a country. The INECE website could serve as a clearinghouse for the training and for sharing experiences among participants in the program.

Another role for INECE would be to highlight those who are the champions of in-country projects, have the vision and political capacity, and are leaders. INECE partners can do training and capacity-building, but there still needs to be movement from inside the country as well. Individual champions within an organization are critical and can make a huge difference.

Ms. Maria Di Paola highlighted the significance of the e-dialogue and the INECE website as a way to promote information exchange and the different experiences useful to our pilot programs. Feedback is especially important if used to review the same indicator through different perspectives. If countries continue to try

things and share what has been tried, this can advance the dialogue on ECE indicators as people develop and explore the linkages between ECE indicators and other indicators.

The final recommendation to INECE was in regard to the need for regional, national, and domestic cooperation as the primary means for INECE to achieve its goals. Without this domestic support system, INECE would be only able to frame an agenda, but not enforce it.

WORKSHOP SESSION 2E-2I

Other Current Environmental Compliance and Enforcement Topics

Conference participants explored other important current topics in environmental compliance and enforcement, including enforcement methods and roles (criminal law and negotiated compliance agreements), a case study of climate litigation efforts, a potential wildlife enforcement network, and an assessment of compliance and enforcement in the context of multilateral environmental agreements.

2E Criminal Law and Environment: Prosecutors, Inspectors, Police, and Nongovernmental Organizations

Facilitators: Antonio Benjamin, Law for a Green Planet Institute, Brazil
David Uhlmann, Department of Justice, United States
Peter Murtha, Environmental Protection Agency, United States

2F Role of the Courts, Nongovernmental Organizations, and the Press: Climate Litigation Case Study

Facilitators: Peter Lehner, Environmental Protection Bureau, New York Attorney General's Office, United States
Catherine Pearce, Friends of the Earth International, United Kingdom

2G Compliance with and Enforcement of Multilateral Environmental Agreements

Facilitators: Elizabeth Mrema, United Nations Environment Programme
Carl Bruch, United Nations Environment Programme

2H Wildlife Enforcement Network

Facilitators: Azzedine Downes, International Fund for Animal Welfare
Yvan Lafleur, Environment Canada
Ladislav Miko, Ministry of the Environment, Czech Republic

2I Negotiated Compliance Agreements

Facilitators: Susan Bromm, Environmental Protection Agency, United States
Ike Ndlovu, Department of Environmental Affairs and Tourism, South Africa

Report Out from Workshop Session 2E-2I

Moderator: Sibusiso Gamede, Basel Convention Regional Centre, South Africa

In the following pages, the reports of these workshops are presented.

SUMMARY OF WORKSHOP 2E: CRIMINAL LAW AND ENVIRONMENT: PROSECUTORS, INSPECTORS, POLICE, AND NONGOVERNMENTAL ORGANIZATIONS

Facilitators: Antonio Benjamin, Law for a Green Planet Institute, Brazil
David Uhlmann, Department of Justice, United States
Peter Murtha, Environmental Protection Agency, United States

Rapporteur: Andrew Lauterback, Environmental Protection Agency, United States

GOALS

— To discuss the roles of prosecutors and inspectors in enforcement and how the public and nongovernmental organizations (NGOs) can play a role in the process

— To generate a list of principles and best practices for cooperation and coordination among investigators, prosecutors, and other environmental and enforcement officials

1 INTRODUCTION

The first part of the session focused on key foundation issues to be addressed in establishing an environmental criminal enforcement program. The second half of the workshop focused on the key components of an effective environmental criminal enforcement program.

2 DISCUSSION SUMMARY

2.1 Key Foundation Issues

The first part of the session focused on key foundation issues that must be addressed in establishing an environmental criminal enforcement program. The workshop participants did not discuss individual opinions on how best to answer each issue. It was very instructive to step back from specific case work and apply a macro view to the fundamental issues of environmental criminal enforcement. The foundation issues that must be addressed in developing an environmental criminal enforcement program include:

1) The nature of the criminal offense – Is the relevant statute aimed at protecting human health or does it also include the environment?

2) Issues of scienter – What is the standard for mental state: knowing, negligence, strict liability, etc.?

3) Who is liable? – Does this include corporations, responsible corporate officers, etc.?

4) Standing to prosecute – What is the role of victims and NGOs? In some countries, victims and others with standing, possibly NGOs, can initiate a criminal prosecution, or require the government prosecutor to pursue an environmental violation by criminal process.

5) Penalties – What are the appropriate penalties? They may include imprisonment, fines, restitution, compliance orders, etc.

6) Statute of limitations – Should there be one? If so, should it start from the point of discovery by the governmental authority or the point when the violation is committed?

2.2 Key Components

The second part of the workshop addressed the key components of an effective environmental criminal enforcement program. The discussion was very lively and all members participated. The group

decided that the essential components that need to be present in order to have a successful program include:

1) Will – Underlying all of the components, there must be the will on the part of the political establishment and the executors to provide the energy and resources to do the job.
2) Statutory framework – There should be a clearly articulated statutory base complemented by an effective regulatory program.
3) Capacity building – Regulators, investigators, prosecutors, and judges all need training to perform their duties.
4) Effective communication – There needs to be trust and open communication among all members of the team, such as between investigators, regulators, prosecutors, and other stakeholders.
5) Case selection criteria – Investigative and prosecutorial decisions should be based on clearly articulated criteria and priorities.
6) Outreach and publicity – There needs to be outreach in order to inform the public of case accomplishments and initiatives. This is the only way to accomplish the objective of general deterrence.
7) International cooperation – There needs to be open communication with international organizations and counterparts. This could assist domestic programs in creating the necessary political will.
8) Truly integrated system – A goal to attain is an environmental criminal enforcement program that is truly integrated with all levels of government: federal, state or provincial, and local. Also, the criminal program should be integrated with administrative and civil enforcement programs if they exist. It was agreed that this is more accurately considered a goal than a component, and one that should be continuously sought.

SUMMARY OF WORKSHOP 2F: ROLE OF THE COURTS, NONGOVERNMENTAL ORGANIZATIONS, AND THE PRESS: CLIMATE LITIGATION CASE STUDY

Facilitators: Peter Lehner, Environmental Protection Bureau, New York Attorney General's Office, United States

Catherine Pearce, Friends of the Earth International, United Kingdom

Rapporteur: Matt Cooper, Environmental Media Consultant, United States and New Zealand

GOALS

- To discuss what elements of climate change and its causes have made litigation a possible tool to promote action, drawing on prominent climate litigation actions;
- To identify ways in which national and international laws may be used to address climate change polluters (whether nations or industries);
- To discuss and identify the important role that media & nongovernmental organizations (NGOs) play in the climate issue and in litigation strategies;
- To critically analyze the way in which the issues of global warming and climate change are framed and portrayed in the media generally.

1 INTRODUCTION

1.1 Climate Litigation

The facilitators began with opening comments generally describing some of the more prominent climate change litigation cases around the world that may be used as a possible tool to spur action on climate change. Also discussed was the way in which climate change is played out and portrayed in the media and how issues of climate change and global warming are framed generally. The three types of litigation cases identified were: 1) cases to get governments to disclose information about the climate change impacts of their actions; 2) cases to directly limit carbon emissions; and 3) cases to reduce energy use or encourage use of "greener" or renewable fuels.

Other theories and ideas discussed involved: 1) the utilization of human rights actions based on the right to a clean and healthy environment; 2) cases, actions, and communication campaigns highlighting government-backed projects that are not climate friendly; 3) tort actions based on nuisance or trespass based on property damage caused as a consequence of climate change (such as rising sea levels leading to loss or destruction of coastal property); 4) actions based around countries or institutions unfairly subsidizing industries that are accelerating climate change; 5) choices of relief sought in such actions (i.e., injunctive relief versus claims for monetary damages).

1.2 Framing and Messaging

The workshop participants agreed that any message concerning dramatic climate change effects already occurring or coming in the near future (e.g., stories of environmental catastrophes and environmental refugees created through resource scarcity, droughts, etc.), should be married with a message of hope and education based on renewable or "green" energy. It is

necessary to tell a story of climate change as it relates to human values and the effects of climate change on local communities.

The general consensus was that the message of climate change needed to be communicated in a simple, straightforward, and interesting manner to grab the attention of a skeptical or uninformed public and to answer concerted efforts to dispute the fact that climate change is a reality. A values-based message could be built around the right to clear air, clean water, and a clean environment generally, in order to preserve the health of future generations (i.e., to lessen human health effects of fossil fuel use through the use of cleaner energy). Part of this message would also be that addressing climate change will lead to substantial economic benefits and opportunities in addition to environmental benefits – an entire new area of industry built on renewable energy sources and the new technology, business developments, and job opportunities it creates.

2 DISCUSSION SUMMARY

2.1 Opening of Workshop

The facilitators introduced and gave a general overview of some of the high-profile climate change cases currently being litigated, or that have previously been litigated, around the world. These cases are set out in detail in the background paper Summary of Climate Change Cases Worldwide attached to this workshop report. Participants agreed that the scientific evidence of climate change is robust, and it is becoming more and more certain that climate change impacts can be attributed to increased carbon dioxide emissions from human activities. The three types of litigation cases introduced for discussion were:

1) Cases to get governments to disclose information about the climate change impacts of their actions and force consideration of climate emissions;
2) Cases where citizens and/or governments are trying to directly limit carbon emissions; and
3) Cases seeking to reduce energy use or encourage use of "greener" and renewable fuels.

2.2 Cases from Background Paper Discussed

2.2.1 Climate Litigation & Industry: Case 1.A – State Attorneys General in U.S. Sue Private Utilities

This case involved eight U.S. states (including New York) and the City of New York suing the five largest power companies in the U.S. in July 2004, claiming the companies, which emit nearly 10% of the nation's total carbon dioxide emissions, were substantial contributors to the public nuisance of global warming. The action seeks injunctive relief to reduce pollution; it does not seek damages.

2.2.2 Climate Litigation & Industry: Case 1.D – German NGOs Sue Government for Export Credit Support of Fossil Fuel Projects

This case involved a legal challenge by NGOs against the German government in June 2004 over its secret export credit support for fossil fuel projects since 1997 through its own agency, Euler Hermes AG. Money was expropriated into offshore fossil fuel projects, and the goal of the action taken against the German Federal Ministry of Economics and Labor was to force the government to disclose the contribution to climate change made by such government-supported projects in developing countries. The case is still pending.

2.2.3 International Law & Climate Litigation: Case 3.D – NGOs Submit Climate Change Petitions Under World Heritage Convention

This case involved a petition to the World Heritage Committee in November 2004 to place Sagarmatha National Park (Mt. Everest) on the World Heritage Danger List as a result of glacial degradation caused by climate change. This national park is a focal point of Nepal's tourism-

based economy and is rich in biodiversity, which is imperiled by melting glaciers that could destroy the park's natural and cultural value and place thousands of lives at risk. The case was also linked to two other petitions calling for the coral reefs of Belize and glaciers in Peru to be added to the Danger List as a result of climate change.

The World Heritage Committee is to meet in July this year to decide whether to pick up these cases.

2.3 Other Theories of Interest and Related Cases Discussed

2.3.1 Human Rights Cases: Case 3.A – Arctic Peoples to Frame US Inaction on Climate Change as Human Rights Violation

In the near future, the Inuit people intend to bring a petition in the Inter-American Human Rights Commission against the United States, through the Inuit Circumpolar Conference (ICC). The ICC case will highlight the link between human rights and environmental degradation, especially considering that climate change is projected to impact the Arctic regions sooner and more substantially than other parts of the Earth.

The group discussed whether there are other opportunities around the globe to bring similar actions based on "Eco-Justice" and the link between human rights and environmental damage. Are there possibilities to use World Trade Organization (WTO) mechanisms for this purpose and to bring actions against some of the world financial institutions in order to highlight and bring these human rights and environment stories to light?

2.3.2 Injunctive Relief versus Claims in Damages

The group agreed that calculating the value of damages in the area of climate change was indeed difficult, whereas injunctive relief could impose overall reduction targets. Such reductions could be achieved by various means which could include: improving the efficiency of power plants; using renewable energy sources; and investing in conservation measures (such as conversion of power plants from coal to gas).

2.3.3 Reduction Goals

The group discussed whether there was a basis or framework for what constitutes an attainable and realistic goal for emissions reduction. Based on statistics and evidence of carbon accumulation in the atmosphere, scientists have tried to determine a reasonable and realistic emission reduction goal that would put us on a trajectory toward some real results and toward avoiding the dramatic consequences of global climate change.

A possible role for network participants is to help pull together some of these emission statistics and formulate questions to focus discussions on what is a reasonable target level. The longer we wait to impose targets, the higher the emission cuts need to be. It was agreed that real cuts need to start now.

2.3.4 Sector Legal Suits

Suits against entire industrial sectors were identified as a valuable tool for creating pressure on industry to develop regulations rather than individual lawsuits against single industry players. By focusing on controls and regulation, you develop and create market mechanisms that can ultimately lead to larger changes in industry behavior and greater emission reductions.

2.3.5 Tort Actions Based in Nuisance or Trespass

The possibility of nuisance or trespass tort actions based on property damage caused as a consequence of climate change was discussed. The specific example raised was rising sea levels leading to loss or destruction of coastal property. Participants noted that proving the causal link between climate change as a consequence of carbon emissions and the property damage now occurring could at times be difficult.

The example of Pacific island nations becoming submerged due to rising

sea levels was raised. Examples such as this were not persuasive to people in countries such as the Ukraine which is not an island nation and therefore people do not see this example as relevant to them. In the context of Kyoto, the Ukraine is interested in selling carbon credits under Kyoto and in the economic advantages the agreement may bring..

Exxon's Climate Footprint: the Contribution of Exxonmobil to Climate Change since 1882, a report issued by Friends of the Earth International in January 2004, also was discussed. One of the major conclusions of the report was that Exxonmobil's emissions of carbon dioxide from 1882 to 2002 totaled approximately 5% of global carbon dioxide emissions, or one twentieth of the world's total. It was noted by participants that more such reports could assist attribution efforts.

2.3.6 Actions Based in Human Rights

The possibility of human rights actions based on the link between human rights and environmental degradation was raised for discussion again. Related concepts discussed included: environmental refugees; the possibility of a major environmental catastrophe; and the dramatic economic as well as human consequences that can occur as the result of an environmental disaster. The idea would be to promote the view that lack of clean water, lack of clean air, coastal flooding, loss of glaciers and snowmelt, etc. are human rights issues. The group discussed the question "How powerful is the human rights angle?".

Some felt that litigation of such human rights cases in local jurisdictions, rather than in the international courts, was more likely to succeed. It is difficult for a local judge to disregard a local human rights argument as opposed to international actions based solely on environmental concerns, which can be too far removed from local concerns and effects on local communities. It was suggested that international human rights bodies were not ready for a case based on environmental human rights. Another question posed was whether the Alien Tort Claims Act could be utilized as the basis for a legal action in the United States.

A human rights strategy should ideally involve a series of litigation actions that would raise global awareness of the issue of climate change and how it is affecting local communities, peoples, and cultures. Various forms of environmental media and press coverage could be used to support such a campaign.

The group suggested that this was something network participants could help support, networking with, sourcing, and supporting local lawyers around the world to make such a litigation campaign a reality.

Litigation is not as prevalent and tied into the culture of other countries as it is in the United States, but the idea of joint actions setting out the problems, connections, and similarities that exist between countries, regions, peoples, and cultures on the issue of climate change (water scarcity, drought, changing weather patterns, rising sea level, etc.) is a good idea. Such actions could also help provide a vision for the future based on cleaner energy, new technologies, and alternative transportation networks.

Any cases brought must be sound and have beneficial effects on the problem. An added benefit is that sound cases will survive challenges and thus stay in the courts long enough to enable the media to stay focused on the human rights angle as a press-worthy issue.

In the context of the United States it was pointed out that economic arguments were as compelling, if not more compelling, than an action based in human rights. There may be a real opportunity for a tort case based on property damage caused as a consequence of climate change (the example of sea levels rising was raised again). Is there evidence from an economic and industry viewpoint (such as rising insurance premiums for coastal property in high risk areas or offshore oil rigs for example) that can be drawn upon and used as evidence to support the fact that global warming is a reality rather than a disputed theory?

2.3.7 The Framing of the Climate Change Message in the Media

Public attitudes are extremely important. The group suggested that we need to focus on the goal of communicating the problems that are already occurring, or beginning to become apparent, and marry this with a message of hope for the future – suggesting solutions and renewable energy options as an alternative to the status quo. We need to set out what the problems are, in a simple and clear way, and suggest the positive solutions available. It is very difficult to sell a negative message – the doom and gloom message of global warming and hard science – in the absence of a human story and solutions that provide some hope for our collective future.

2.3.8 Other Ideas and Strategies Raised in Group Discussion

The need to address the argument that "the science of global warming is unclear" was discussed. Litigation can be used as a tool to demonstrate the real evidence that climate change and global warming is occurring and that there will be real and dramatic human consequences as a result. A related topic discussed was the fact that the media's portrayal of the "climate change debate" in the States is very unbalanced. The reality of the climate change science is that there are over 1500 scientists who attest to the fact that climate change is a reality versus a few industry-backed scientists who are suggesting that climate change either is not occurring or does not pose a problem. The media in the States needs to be encouraged and educated so that the portrayal of the issue in the media is more balanced. Alternatively, is the better approach not to even enter into a debate on the science?

Other points raised include:

- There is a real need to combine media, law, and science, to facilitate a cooperative approach to selling the message. Only by having all of the different experts in the field working together can we battle the counter-spin in an effective manner. NGOs and expert groups also need to work to educate judges and the media about the reality of climate change.
- There must be a focus on basic human values and the effects climate change is having on human communities.
- The environmental movement must get away from speaking solely about strict scientific data and evidence and reframe the message of climate change at a level of human values and how environmental change is impacting people and communities. The group discussed the idea of telling the stories of the plight of indigenous people and local communities being impacted by climate change as an indicator of the wider changes that could impact all people and their way of life.
- We may be at a "tipping point" where there will be sudden change that could have dramatic effects (such as a major environmental or humanitarian disaster).
- The media is a very visual tool that should be utilized to create video releases and tell many human stories. There is a very clear need to create media content and produce documentary pieces about the issue. Examples of human stories are the Sherpas from Tibet – whereby a human story can be told, but undercutting the local story is a wider message about climate change.
- A majority of countries have accepted that climate change is a reality but are acting on this knowledge in different ways. There must be joint action from countries in all regions of the world to address climate change.
- The group discussed the example of the Chernobyl Nuclear Reactor disaster and lessons learned. This environmental catastrophe spurred a whole environmental and democratic movement in the Ukraine, and the press arising from the disaster has created substantial political pressure to ensure that such an incident does not occur again. Unfortunately, people have now become tired of the issue because it is always portrayed in a

negative light. The press in the Ukraine has become very sensationalist whereby stories are only published if they are possible to sell to a mass audience.

- In Algeria, there are educational programs to help prevent summer fires, using theatre as the medium to educate and tell a story.
- It was agreed that renewable energy and a focus on sustainable building practices both provide a valuable opportunity to develop and promote a positive message through: education about alternatives to fossil fuel reliance; examples of green buildings; and emphasizing reduced impacts on human health (i.e., cleaner air and water) through cleaner energy.
- Other ideas discussed involved ancillary cases promoting energy efficiency and cases where deforestation is highlighted as a cause of and contributing factor to climate change.
- The group discussed the establishment of marine sanctuaries in the Philippines, the possible scientific theory that coral reefs are in fact carbon sequestration sinks, and whether anyone knew of any studies currently being undertaken that prove this theory. In the context of climate litigation cases, it was agreed that there needed to be a strategy of linking plaintiffs to defendants, as well as identifying where and in what forum (national/international) to bring an action.

3 RECOMMENDATIONS FOR INECE

The group concluded that network participants have a potential role to play in eliminating the barriers that may exist in bringing legal actions based on climate change. It was suggested that network participants could investigate areas of cooperation in capacity building, networking, and creating awareness, not only in the form of exchanging ideas and sharing experiences, but by generating material and evidence that helps educate the media, the judiciary, and the public, countering the current media spin on climate change issues. Network participants could also help in the preparation of evidence and material to support the formulation of any climate change legal actions. This could include the development of concise abstracts, for use in many languages, on the science and stories of global warming to be distributed to the public, media, and judiciary, utilizing the internet and other forms of media.

The assistance work suggested included:

- Disseminating and simplifying the background science so that laypeople (media, politicians, the public, etc.) can understand the issue of climate change and the threat it poses clearly.
- Presenting the climate change science in a way that demonstrates the causal link between human-based carbon emissions and the dramatic effects of climate change on people.
- Providing legal support and networking opportunities around prominent climate change litigation cases and ensuring that the human stories behind such cases are publicized. Translating scientific articles into simple abstracts that can support litigation cases and be used to educate media and the public. These abstracts would also be translated into other languages where needed.

4 CONCLUSIONS

- Actions based on human rights and environmental degradation are and can continue to be a very successful strategy to raise awareness of climate change. In the event that the laws of a particular jurisdiction do not allow for an action to be brought, a good fallback position may be a tort action based on property damage (so long as the defendant is large enough and has existed for long enough to meet appropriate tests of causation).
- Education of the media, public, judiciary, and lawmakers is extremely important to ensure the message of climate change

is communicated and represented in a balanced and clear manner.

— Information about climate change and stories of the effects of climate change on people must be communicated simply and effectively through media sources and the press. Media and publicity is also a valuable tool to help support and publicize a particular litigation action.

SUMMARY OF CLIMATE CHANGE CASES WORLDWIDE

GROSSMAN, DAVE,[1] AND STONE, SCOTT[2]

[1] Staff Attorney, INECE Secretariat and Institute for Governance and Sustainable Development

[2] Staff Attorney, INECE Secretariat and Institute for Governance and Sustainable Development

2141 Wisconsin Ave. NW, Suite D2, Washington, DC 20007, United States, dgrossman@inece.org, sstone@inece.org

1 CLIMATE LITIGATION & INDUSTRY

1.1 State Attorneys General in U.S. Sue Private Utilities

Eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin) and the City of New York, and three NGO land trusts, sued the five largest power companies in the United States in July 2004. These companies own or operate 174 fossil fuel burning power plants in 20 states that emit approximately 650 million tons of carbon dioxide each year. This is nearly 25% of the U.S. utility industry's annual carbon dioxide emissions and about 10% of the nation's total. The action calls on the companies to reduce their pollution and does not seek monetary damages. Plaintiffs claim that the power companies' CO_2 emissions contribute to global warming, a nuisance under the federal common law of public nuisance, or alternatively, under the state common law of public nuisance. The defendants have moved to dismiss the case for lack of personal jurisdiction and argue that federal statutes and treaties regarding climate change pre-empt common law in the area. The case is still pending.

More information:

http://www.oag.state.ny.us/press/2004/jul/jul21a_04.html

http://www.pawalaw.com/html/cases.htm

1.2 NGO Sues U.S. Government for Failing to Consider CO_2 Emissions from Federal Project

NGO sued the U.S. Department of Energy and the Bureau of Land Management for violating the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) in granting applications for permits to construct and operate power lines to connect power plants in Mexico to California's electric grid. NEPA requires that all major federal actions significantly impacting the human environment undergo an environmental assessment to determine the extent of the action's impact. In 2003, the court held that the Environmental Assessment and the Finding of No Significant Impact were inadequate under NEPA for failing to consider carbon dioxide emissions from the power plants.

More information:

http://www.earthjustice.org/urgent/display.html?ID=106

http://www.earthjustice.org/news/documents/5-03/borderdecision.pdf

1.3 U.S. Municipalities Sue Export Credit Agencies for Funding Fossil Fuel Industry

The city of Boulder in Colorado, the cities of Oakland and Arcata in California, and several NGOs brought suit in August 2002 under NEPA against U.S. export cred-

it agencies for funding fossil fuel projects. The Export-Import Bank (Exim) and the Overseas Private Investment Corporation (OPIC) provided over $32 billion in financing and insurance for oil fields, pipelines, and coal-fired power plants over the past 10 years without assessing their contribution to global warming or their impact on the U.S. environment as required under NEPA. The U.S. Government has filed motions to dismiss the case, arguing that the plaintiffs lack standing, that Exim and OPIC have not taken any action subjecting them to judicial review, and that OPIC is exempt from NEPA. The case is still pending.

More information:

http://www.climatelawsuit.org

1.4 German NGOs Sue Government for Export Credit Support of Fossil Fuel Projects

NGOs began legal action against the German government in June 2004 for its secret export credit support for fossil fuel projects since 1997, when the Kyoto Protocol was agreed to. Germanwatch and Friends of the Earth Germany (BUND) have taken action against the German Federal Ministry of Economics and Labour in the Administrative Court in Berlin to force the German government, under the freedom of environmental information law, to disclose the contribution to climate change made by projects supported by the German taxpayer through its export credit agency Euler Hermes AG. The case is still pending.

More information:

http://www.climatelaw.org/media/german.suit

http://www.foei.org/publications/link/rights/32case.html

1.5 U.S. State Sets Carbon "Shadow Price"

Minnesota approves the siting of new power plants based on analysis of the plants' social costs and benefits. In order to account for a proposed plant's carbon dioxide emissions, Minnesota's Public Utilities Commission determined that assessment of a plant's cost must include a charge of US$0.30 – $3.10 per ton of CO_2 emitted, depending on geographic location. The power industry challenged that assessment process. The court upheld the analysis in 1998.

More information:

http://www.globelaw.com/Climate/MinnCase.htm

1.6 U.S. States and NGOs Sue Department of Energy for Weakening Efficiency Standards

Seven U.S. states and NGOs sued the U.S. Department of Energy (DOE) under the Energy Policy and Conservation Act (EPCA) and the Administrative Procedure Act (APA). EPCA requires DOE to get energy efficiency standards for appliances at the maximum level that is technologically and economically feasible. DOE set standards for air conditioners (now used in 85% of U.S. homes and accounting for over one-third of U.S. peak electricity demand). In early 2001, the new U.S. presidential administration sought to replace the standards with much weaker ones. The states and NGOs sued, basing their interest on the global warming impact of the increased emissions. The court held in 2003 that the weakening of the standards violated EPCA and the APA and reinstated the standards.

More information:

http://www.commondreams.org/headlines04/0114-04.htm

1.7 Industry Sues U.S. State for Setting Vehicle Greenhouse Gas Emissions Standards

California is the only U.S. state with the authority to set vehicle emission standards (because it did so before the federal Clean Air Act was enacted). California set greenhouse gas emission standards to take effect in 2009. In December 2004, industry sued California and has submitted papers challenging the scientific link between CO_2 emissions and global warming. California has moved to dismiss on procedural grounds. The case is pending.

More information:

http://www.enn.com/today.html?id=550

http://www.autoalliance.org/archives/000163.html

2 LITIGATION AS A CONSEQUENCE OF GOVERNMENT ACTION & INACTION

2.1 States and NGOs Sue U.S. EPA to Force Regulation of Greenhouse Gases

Twelve U.S. states, several cities, and several NGOs sued the U.S. EPA in 2003 for its failure to regulate greenhouse gas emissions from vehicles. Plaintiffs claim that the EPA erred in deciding that carbon dioxide was not a "pollutant" under the Clean Air Act. The EPA asserts that the broad, inclusive language of the Act should not be read to authorize as major a program as one increasing the fuel efficiency of cars. This case is still pending; oral arguments in the U.S. Court of Appeals for the D.C. Circuit were just heard this past Friday.

More information:

http://www.nytimes.com/2005/04/09/politics/09emissions.html.

http://www.climatelaw.org/media/states.challenge.bush.

2.2 NGOs Challenges Australian Minister's Power to Preculde Consideration of Greenhouse Gases

Australian NGOs challenged a minister's power to prevent a planning body from considering greenhouse gas emissions before deciding to approve a coal mine expansion. In November 2004, the judge agreed with the NGOs and said that these emissions must be taken into account.

More information:

http://www.climatelaw.org/media/CANA.Australia

http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html.

2.3 Argentine Citizens Sue for Access to Information on Climate Change Actions

As the result of severe flooding in 2003, Argentine citizens brought legal action against their government under Argentina's Acción Informativa mechanism and Article 6 of the UN Framework Convention on Climate Change to force the government to admit to its official failure to adapt to climate change. The case revealed that changes to infrastructure to prevent flooding had been developed by governmental authorities but not implemented.

More information:

http://www.climatenetwork.org/eco/cops/cop10/en/ECOCOP1010.pdf

3 INTERNATIONAL LAW & CLIMATE LITIGATION

3.1 Arctic Peoples to Frame U.S. Inaction on Climate Change as Human Rights Violation

The Inuit Circumpolar Conference (ICC) intends to bring a petition in the near future against the United States in the Inter-American Human Rights Commission. The ICC case will highlight the link between human rights and environmental degradation, especially considering that climate change is projected to impact the Arctic regions sooner and more substantially than other parts of the Earth.

More information:

http://www.inuit.org/index.asp?lang=eng&num=244

http://www.climatelaw.org/media/inuit.

3.2 NGOs Submit Climate Change Petitions Under World Heritage Convention

NGOs and others submitted a petition to the World Heritage Committee in November 2004 to place the Sagarmatha National Park (Everest) on the World

Heritage Danger List as a result of glacial degradation caused by climate change. Sagarmatha National Park is a focal point of Nepal's tourism-based economy and is rich in biodiversity, which is imperiled by melting glaciers that could potentially destroy the park's natural and cultural value and place thousands of lives at risk. The petition was handed in along with petitions calling for coral reefs off Belize and glaciers in Peru to be added to the Danger List as a result of climate change.

More information:

http://www.climatelaw.org/media/UNESCO

SUMMARY OF WORKSHOP 2G: COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

Facilitators: Elizabeth Mrema, United Nations Environment Programme
Carl Bruch, United Nations Environment Programme

Rapporteurs: Joseph Freedman, Environmental Protection Agency, United States
Carl Bruch, United Nations Environment Programme

GOALS

This workshop had three primary goals. First, it sought to raise awareness of the UNEP Guidelines and Manual designed to facilitate implementation of multilateral environmental agreements (MEAs). Second, the workshop sought to identify additional best practices and case studies for the Manual. Finally, the workshop provided a forum in which to discuss the next steps for improving compliance with and enforcement of MEAs.

1 INTRODUCTION

In this workshop, UNEP introduced Guidelines and a draft Manual on Compliance with and Enforcement of Multilateral Environmental Agreements. The Guidelines and Manual are designed to assist countries in implementing, complying with, and enforcing multilateral environmental agreements. The workshop showed participants how to use the checklists, case studies, explanatory text, and annexes to enhance compliance and enforcement. Participants were also invited to share their own experiences of compliance with and enforcement of MEAs and provide feedback to UNEP for improving the Manual.

Following an introduction to the Manual, UNEP facilitated a discussion of the Manual. The facilitators sought specific examples and considerations relating to implementation of MEAs in the areas of:

- cost-benefit analysis on becoming a Party to an MEA;
- public-private partnerships; and
- technology transfer.

In addition, the facilitators opened the discussion for other aspects of negotiating, implementing, and enforcing MEAs.

2 DISCUSSION SUMMARY

While the workshop discussions focused on the three themes (cost-benefit analysis, partnerships, and technology transfer), participants raised a broad series of issues and experiences that addressed the entire life cycle of MEAs.

Discussions highlighted the importance of involving a broad range of sectors and interests in negotiating MEAs. Future implementation may depend on many entities in order to be effective and successful. By involving these entities in preparing for negotiations or during the actual negotiations, participants noted that it was possible to broaden the constituency supporting a particular MEA. One sector that the Manual could highlight more is the private sector. Private sector representatives have been incorporated into national delegations for various MEAs, including the Basel Convention, the Stockholm Convention, the Rotterdam Convention, and the Montreal Protocol. Involving the private sector can add technical expertise to the delegation, access additional information on production aspects (e.g., of a potentially regulated substance or commodity), highlight availability and feasibility of technology, and

build support of the regulated community for the MEA. Notwithstanding the potential benefits of including non-state actors, there is still much concern about involving them in negotiations.

Examples of involving the public in developing and implementing legislation and policies were also highlighted. For example, in 2004, Tanzania created the National Environmental Advisory Committee, which includes governmental representatives (who chair the Committee) as well as representatives from civil society, the private sector, and institutions of higher learning. It meets twice a year and provides recommendations to the government on different issues. In addition, there is a requirement to consult civil society and the private sector before submitting bills to Parliament.

If a country has a federal system, coordination between the national (federal) authorities and sub-national (state or provincial) authorities becomes much more important. Such coordination can take place in negotiations – for example by including sub-national authorities on official delegations – as well as during the implementation phase. Depending on the country, capacity building at the sub-national level might be done by federal institutions, or it might be more effective to develop approaches in which sub-national institutions train sub-national government officials.

In trying to determine whether to become a party to a particular MEA, many countries are interested in how to conduct cost-benefit analyses. Countries are particularly interested in the financial consequences of becoming a party, particularly for compliance and implementation. This has been done in specific instances following adoption of the Montreal Protocol (discussion highlighted an instance where the costs had been estimated at an erroneously high level, which may be contrasted with more objective recent examples), the UN Framework Convention on Climate Change, and the Kyoto Protocol. To meet these needs, the Basel Convention Secretariat and the Ozone Secretariat have developed cost-benefit booklets.

As cost-benefit analysis may be perceived as examining a narrower set of considerations (often those most easily given a financial value), one alternative would be to consider a risk benefit analysis, which considers a broader range of non-economic values.

The discussion noted a number of experiences in technology transfer. The Multilateral Fund of the Montreal Protocol has been particularly successful in this regard. Ozone technology highlighted one of the challenges for technology transfer: while most of the control technology for ozone depleting substances is in the public domain (and thus transfer is fairly straightforward), production technology tends to be heavily protected and controversial. The Manual could better highlight these sensitivities. Other examples of technology transfer include under the UNECE Heavy Metals Protocol, the Basel Convention, the Rotterdam Convention, the Stockholm Convention, the Climate MEAs, and technology transfer through private foundations. The Multilateral Fund and UNEP's Division of Technology, Industries and Economics, among other institutions, have sought to highlight available technologies by cataloguing the technologies and placing this information on the Internet.

Discussions also highlighted a variety of ways to improve the usability of the Manual. Participants suggested that the Manual be distributed in a CD-ROM format, as well as a print version, with a ten- to fifteen-minute tutorial on how to use the Manual. Participants also suggested that the index could be made electronically searchable by word.

3 CONCLUSIONS

In conclusion, the group applauded the development of the UNEP Guidelines and the draft Manual as useful tools. The workshop also provided considerations, approaches, and examples for developing, implementing, and enforcing MEAs. These

suggestions were offered to strengthen the Manual in discrete ways. Following the workshop, UNEP will revise the draft Manual on Compliance with and Enforcement of MEAs to take into account the suggestions from this workshop and from other sessions of the INECE Conference, as well as suggestions received through events convened by UNEP.

The group also asked UNEP to consider other, non-textual ways to enhance the usability of the Manual. Finally, some participants highlighted some specific ways that UNEP could promote compliance with and enforcement of MEAs in particular countries or contexts. UNEP is reviewing those requests and will follow up, as appropriate.

SUMMARY OF WORKSHOP 2H: WILDLIFE ENFORCEMENT NETWORK

Facilitators: Azzedine Downes, International Fund for Animal Welfare
Yvan Lafleur, Environment Canada
Ladislav Miko, Ministry of the Environment, Czech Republic

Rapporteur: Anita Sundari Akella, Consultant, United States

GOALS

(1) To identify tools to encourage information sharing among wildlife enforcement experts at the interagency and international levels.

(2) To establish a mechanism for coordination and exchange of information regarding wildlife enforcement, including input from various relevant organizations and agencies.

1 INTRODUCTION

The facilitators opened the workshop by advancing a series of questions discussed by the participants:

(1) What should the membership of a wildlife enforcement network be?

(2) What is the function of a wildlife enforcement network?

(3) How can such a network be effective across barriers arising from level of development, language, and culture?

2 DISCUSSION SUMMARY

Ms. Donna Campbell began the discussion by asserting that "wildlife protection" should include not only managing illegal trade, but also habitat protection.

Mr. Ken Ledgerwood asserted that the wildlife enforcement network's goal should be to break the links in the chain that Bill Clark discussed during Panel 3 (Enforcement Initiatives: Stories of Success) earlier in the day.

Mr. Azzedine Downes pointed out that in the past, networks have linked lawyers to lawyers and investigators to investigators only, but that this is not necessarily the best way to advance a network. Instead, the network should link disparate agencies involved in enforcement, and even people whose direct function is not necessarily enforcement should be included. Mr. Peter Pueschel elaborated on the idea by offering that such a network could also help overcome the silence on wildlife enforcement issues at the decision-making table.

Mr. Ofir Drori offered his opinion that the network should focus on two types of objectives: strategic (giving a global view of the problem so that appropriate responses can be generated) and tactical (collaborating and exchanging information on specific cases).

In response to Ms. Donna Campbell's inquiry into what the problems are with the networks that currently exist, Mr. Yvan Lafleur declared that from the enforcement official's perspective, a network like this is only useful if it helps you obtain information and contacts from other countries. For instance, if you can get information on cultural context (specific details relevant to a particular investigation, or help in identification of species), or on laws in other countries (through links to expert lawyers, etc.)

Ms. Rosalind Reeve also stated that from a non-governmental organization's (NGO's) perspective, a network like

this should provide a place to give information on wildlife trade and smuggling issues and cases because they often have information, but nowhere to report it. Accordingly, NGOs should definitely be involved in such a network, after establishing certain protocols for NGO participation to avoid compromising sensitive data, etc. She explained that wildlife enforcement networks do exist, but they tend to be closed off to anyone other than enforcement or government officials (e.g. the Tiger Enforcement working group of CITES and the Interpol working group) and/or relate to a specific region only (e.g. Lusaka, which is only in Africa, only accessible to government). Aside from this, most "networking" is happening informally, individually, and could probably benefit from greater cohesion.

Dr. Ladislav Miko, Deputy Minister for the Czech Ministry of the Environment, declared that the Interpol Working Group has been very useful to him both in finding contacts and allowing him to make use of technical capacity (e.g., experts or laboratories) in other countries. However, a major challenge he recognized is how to institute interaction and cooperation with non-enforcement bodies like NGOs. Many times, these channels are actually only accessible by the police, and not even by Ministry officials. Many of the "networks" tend to be diffuse and informal, based on personal relationships only. This lack of cohesion may be difficult to overcome – for instances, there are databases in different countries that all get their information from the same source (e.g. Ecomessage) and yet the databases containing this same information cannot be joined.

At this point, Ms. Donna Campbell asked whether much of the information would be available to NGOs if they were even included in the network. In response, Mr. Yvan Lafleur stated that the network could be sanitized so that they would be able to have access to it without any concerns about sensitivity arising. On another point, Mr. Lafleur noted that there really is no point in the existing formal/interpersonal networks operating in isolation, but acknowledged that we will never be able to change the way that the World Customs Organization, Interpol, and others conduct their business. Therefore, if those "clubs" were to be part of a larger umbrella, maybe there could be greater interaction.

Mr. Bill Clark elaborated that sensitive data should not be much of an issue anyhow, since the truly sensitive information is not transmitted via a network, but government to government. Mr. Peter Pueschel added that in many instances, sharing even nominal information can be useful, not just the sensitive information. Dr. Ladislav Miko illustrated this point by arguing that information on what you do with a seized animal – where you can send it and be assured that they are treating the animals well – could be facilitated by a network that could give this type of "vetting".

Mr. Ofir Drori emphasized that it is important to divide the objectives of the network at the different levels of operation. For instance, a network should include (a) General information (e.g., contacts in other countries), (b) Strategic information (e.g. like data found in Ecomessage), and (c) Tactical information that maximizes the availability of data for operational use. The last is the most conflicting objective because it involves ensuring confidentiality of data. Mr. Drori then questioned how a network would guarantee that information gets to the right place without spreading the data around.

Mr. Azzedine Downes further declared that a network should also contain an education component that helps to avoid repetition in training programs, organizes capacity-building efforts, addresses overlapping content, etc. It is important that the network make every effort to move beyond the management level, actually getting down to the level of practitioners in the field (not just ministry level or enforcement agency decision-maker level). Ms. Rosalind Reeve elaborated on this by stating that the fact that enforcement agents are not involved in policy and decision-making is a major problem. Because of this, policies that are developed are often impractical for applica-

tion on the ground, or ignore key real issues. We need to also work to put enforcement on the agenda of Multilateral Environmental Agreements (MEAs).

Dr. Ladislav Miko interjected that a network should be a lot of things, but perhaps at this moment we should focus on what is achievable now, rather than getting too lofty or over ambitious. What seems easily done in the short term are things like information sharing and coordination of training activities.

Mr. Bill Clark said that the ground rules for this network in the first instance should be to not engage in projects that are big or sensitive, and to stick to activities that are at the information level, but we can certainly work to assist other existing networks, engaging in do-able mini-projects. For instance CITES has no enforcement authority but countries are meant to identify and list their enforcement authorities with CITES, yet most have not – this could be a constructive project for the network to engage in. In addition, the network could make a listing of the dozen most commonly seized Appendix I/II animals and try to find the best sanctuaries where they can be sent, or identify 200 persistent offenders worldwide and make sure that if captured, there is some public record of it – like a name and shame list, so that it can be consulted by the CITES Management Authority or by local authorities before permits are given. Mr. Yvan Lafleur responded that the only problem is that this type of name-and-shame listing may increase the risk of people deciding not to bother getting a permit.

Mr. Ken Ledgerwood noted that unless networks have a "nerve center" that includes personnel and some access to funding, they do not work. Totally informal does not necessarily work.

Mr. Azzedine Downes added that the International Foundation for Animal Welfare (IFAW) and the International Network for Environmental Compliance and Assurance (INECE) are currently working on developing a Memorandum of Understanding (MOU) for joint activities over five years and will be identifying joint projects

Dr. Ladislav Miko looked at the possibility of providing support from the European Commission (EC) on green issues and identified this as a major priority for his work at the EC. Dr. Miko suggested that this network may or may not have to occur through INECE.

Mr. Peter Pueschel added that developing a system that allowed people access to information without having to go through bureaucratic channels would be an improvement. In this discussion, the prioritized objectives from the group he specifically noted are: (a) Information – new trends in wildlife trade, legislation, publicly accessible databases, and naming and shaming; (b) Special Cooperation/ Exchange – rating shelters, developing capacity-building standards, building national capacity, and legislation drafting; and (c) Advocacy/Message-Sending – this happens automatically as the network becomes a presence in congresses where policy/legislation is set.

Dr. Ladislav Miko also added that it is important to engage the NGOs by providing an address to which they can send any information on wildlife trade/smuggling that they have. Ms. Rosalind Reeve stated that the Biosafety Clearinghouse of the Convention on Biological Diversity is a really great nexus of information that could serve as a model/tool for us to learn from as we develop the network.

Mr. Yvan Lafleur pointed out that in order to get people to commit to giving information into the system, it needs to be something formal and established. Also, to avoid people not wanting to be a part of it, it should be based somewhere neutral.

Dr. Hedia Baccar added that the network should also have a sub-regional component.

3 CONCLUSION

Dr. Ladislav Miko summarized that some "outputs" or guidelines that we have discussed here include: (a) contacts, information sharing, (b) a specialists group to analyze key problems and come up with recommendations for how each should be handled, and (c) some regional structures

that are linked to an international structure. In addition, the overall points seem to be as follows: (a) Such a network is necessary and useful, (b) it should be informal, but under a formal umbrella, (c) it could be under INECE but need not necessarily be, (d) the functions of such a network would include strategic and tactical objectives, general data sharing, education/training/ capacity building, (e) it should be comprised of both regional subgroups and an international umbrella group.

SUMMARY OF WORKSHOP 2I: NEGOTIATED COMPLIANCE AGREEMENTS

Facilitators: Susan Bromm, Environmental Protection Agency, United States
Ike Ndlovu, Department of Environmental Affairs and Tourism, South Africa

Rapporteur: Thomas Maslany, Environmental Protection Agency, United States (retired)

GOALS

To explore the salient elements and usefulness of compliance agreements and the motivations of industry and government regarding entry into such agreements.

1 INTRODUCTION

Ms. Susan Bromm opened the workshop by suggesting questions that participants should consider during the discussion:

- What motivations exist to enter into negotiations regarding compliance agreements for industry and for government?
- Are there situations in which governments should not use compliance agreements?
- What are the elements of a good compliance agreement? Should some elements be non-negotiable?
- Are there examples of creative elements that your country has included in compliance agreements?

2 DISCUSSION SUMMARY

2.1 The South African Experience

Mr. Ike Ndlovu gave a presentation on the negotiated agreement experience in South Africa. The South African National Environmental Management Act and Environmental Management Cooperative Act include provisions to negotiate agreements that go beyond compliance with existing requirements, so as to establish new expectations. These provisions are intended to complement – not replace – existing legal requirements.

To facilitate negotiations with concerned parties, the government may indicate that it plans to adopt new requirements in a particular area of concern, presenting an opportunity for parties that create these environmental problems to have their input recognized and addressed. During the negotiations, the government will come to an agreement with the concerned parties on new environmental targets (discharge or emission requirements, product changes, etc.), monitoring requirements, provisions for monitoring progress towards meeting the new expectations (milestones), and periodic progress reports. As part of this process, the government developed Environmental Cooperative Agreement Guidelines to provide a framework for the process. Mr. Ndlovu presented two examples of this negotiated requirement process:

- The Plastic Bag Initiative: The use of thin plastic bags for packing purchase goods was creating a significant trash problem. The South African government negotiated an agreement with the manufacturers of the plastic bags to ban the thin plastic bags and to introduce a charge for the new plastic bags to facilitate recycling of the bags. They also agreed on an acceptable thickness and the type of ink that can be used on the bags.
- The Vesuvius Refractory Company:

This company manufactured building material and created air pollution that was a concern. The government imposed a control program on the company to reduce the emissions, but it did not comply with the program, so the government filed an action with the court. When the court ruled in favor of the company, the government threatened to shut down the facility. The company then indicated a willingness to negotiate a new schedule to reduce their emissions. The agreement resulted in full compliance with the requirements.

2.2 What Constitutes a Negotiated Agreement?

After the presentation of the South African experience and some preliminary discussion, the group recognized that a common understanding on what constitutes a negotiated agreement was needed.

The group recognized four types of negotiated agreements:

1) an agreement for a party to make improvement to the environment beyond what it is formally obligated to do,
2) an agreement for a party to meet a future compliance date,
3) an agreement for a party to go beyond a future compliance date, and
4) an agreement for a party to comply with a past compliance date where there is an established violation.

The last three fall into the category of negotiated compliance agreements.

2.3 What Motivations Exist to Enter Into Negotiations for Compliance Agreements fo Government and for Industry?

Motivations for government include:

- To secure agreements that get additional benefits beyond compliance
- To increase the likelihood of a successful resolution of the problem, since it recognizes some of the companies' needs (compared to other alternatives)
- To save money and time, since negotiated agreements may be the most cost-effective and timely way for the agency to resolve a non-compliance situation if the alternative is a potentially long and challengeable court action
- To benefit the environment, since it may provide a more timely return to compliance
- To avoid the need to shutdown the facility, especially if the facility is providing an important service
- To fill gaps in the requirements where clarity is necessary.

Motivations for industry include:

- To create goodwill and a positive environmental image
- To resolve disputes in a manner that the company can live with in its business plan
- To provide some certainty.

2.4 Are There Situations in Which Governments Should Not Use the Compliance Agreement Process?

Workshop participants concluded that negotiated agreements should not be used:

- Where the company will get an undeserved benefit
- Where the agreement is unenforceable or will not be enforced
- Where the company has a history of violating past agreements
- Where the public will not accept a negotiated agreement
- Where you have a weak legal basis or can only come up with a weak agreement
- Where other alternative mechanisms are more efficient and effective to bring about compliance.

2.5 What Are the Elements of a "Good" Compliance Agreement?

Workshop participants concluded

that to be a good agreement:

- The agreement must be enforceable
- There should be an established framework for negotiating an agreement
- The agreement should include a dispute resolution process
- All parties must have the authority to sign the agreement
- The agreement should include both milestones and a final compliance date
- The agreement should provide for periodic progress reports
- The agreement should address penalties for missing a milestone
- There should be transparency and public involvement
- The agreement should make the environment whole (such that environmental insults caused by non-compliance are fully remediated).

There was considerable discussion on the issue of "making the environment whole". It was generally felt that while this concept does not normally appear in negotiated compliance agreements, it is an important element for consideration. This concept would go beyond provisions such as cleaning up spills, to provide for reductions in emissions to the air or discharges to the water that would offset those emissions or discharges previously added to the environment that were beyond the compliance level.

2.6 Are There Examples of Creative Elements That Your Country Has Included in Compliance Agreements?

Workshop participants shared the following elements:

- Miscellaneous or collateral benefits as part of the agreement, e.g., provisions such as mandatory audits or Environmental Management Systems that help prevent future violations
- Training programs established by the violator for audiences outside the violating company
- Supplemental Environmental Programs that provide additional benefits beyond the requirements
- Programs that establish environmental management programs or other requirements in the corporate structure that is above the facility that is in violation

3 RECOMMENDATIONS FOR INECE

Workshop participants requested that INECE develop a guideline document on Negotiated Compliance Agreements.

WORKSHOP SESSION 3

Networking to Improve Enforcement Cooperation

These workshops were designed to strengthen INECE topic-specific networks, to foster enforcement cooperation activities through INECE regional networks, and to benefit from multi-disciplinary synergies to improve the implementation of, compliance with, and enforcement of environmental laws in projects in the INECE Strategic Implementation Plan.

3A Water Resource Management: Governance to Eliminate Poverty

Facilitators: Romina Picolotti, Center for Human Rights and Environment, Argentina

Barry Hill, Environmental Protection Agency, United States

Ceazar Natividad, Department of Environment and Natural Resources, Philippines

3B Vessel Pollution

Facilitators: David Uhlmann, Department of Justice, United States

Katia Opalka, Commission for Environmental Cooperation

3C Hazardous Waste at Ports

Facilitators: Robert Heiss, Environmental Protection Agency, United States

Henk Ruessink, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

3D Analyzing the Compliance and Enforcement Mechanisms of the Montreal Protocol

Facilitators: Jim Curlin, United Nations Environment Programme

Gilbert Bankobeza, United Nations Environment Programme

3E Enforcement of Emissions Trading Programs

Facilitators: Neil Davies, Environment Agency (England and Wales)

Chris Dekkers, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

Joe Kruger, Resources for the Future, United States

3F Illegal Logging: Regional Strategies for Enforcement Cooperation

Facilitators: Antonio Benjamin, Law for a Green Planet Institute, Brazil

Yvan Lafleur, Environment Canada

3G Penalties and Other Remedies

Facilitators: John Cruden, Environment and Natural Resources Division, Department of Justice, United States

Chief Justice Vladimir Passos de Freitas, Brazil
Deputy Chief Justice Adel Omar Sherif, Egypt

3H Multilateral Environmental Agreements: Synergies for Compliance

Facilitators: Carl Bruch, United Nations Environment Programme

Kenneth Markowitz, INECE Secretariat

Alberto Ninio, World Bank

Report Out from Workshop Session 3

Moderator: Wout Klein, Ministry of Housing, Spatial Planning and the Environment (VROM)

In the following pages, the reports of these workshops are presented.

SUMMARY OF WORKSHOP 3A: WATER RESOURCE MANAGEMENT: GOVERNANCE TO ELIMINATE POVERTY

Facilitators: Romina Picolotti, Center for Human Rights and Environment, Argentina
Barry Hill, Environmental Protection Agency, United States
Ceazar Natividad, Department of Environment and Natural Resources, Philippines

Rapporteur: Marcia Mulkey, Temple University, United States

GOALS

1. Evaluate and understand the special importance of water to human life and ecosystem preservation.
2. Link sustainable water management and water pollution control to environmental justice and community health
3. Evaluate opportunities for INECE to support sound water policies and practices.

1 INTRODUCTION

This workshop emphasized the vital importance of water and a general consensus of access to clean, healthy and adequate water as a basic human right, individual and collective.

In the context of this basic human rights issue, this workshop discussed the opportunity to build bridges about the importance of water with the international human rights community (such as the special rapporteurs of the Human Rights Commission), the world's religious communities, and others.

The workshop explored a number of country-specific examples of dealing with the challenges of water protection, water allocation, and water management and then discussed opportunities for INECE to advance global efforts. Specifically, the workshop felt that the core competencies of INECE should be targeted to water issues in several important ways.

2 DISCUSSION SUMMARY

2.1 Key Points from Specific People

1. Ms. Romina Picolotti, Argentina: As facilitator, Ms. Picolotti framed the discussion, introducing how water is being dealt with by law and offering an Argentine example of a poor neighborhood located next to a Coca Cola plant. The community lacked a water supply and used only shallow wells. Waste sewage from the plant routinely overflowed, directly contaminating water supplies. Following a lawsuit by CEDHA (a nongovernmental organization), the state has built a new water supply and has introduced new national legislation dictating that fees paid for a water supply will only be used to address sewage problems and imposing new limits on growth pending sewage capacity.

2. Mr. Ceazar Natividad, Philippines: The Philippines developed a new system to protect a major Philippine lake intended as a drinking water supply, based on pollution fees (wastewater charges). The system worked well in this lake, leading to major BOD (Biological Oxygen Demand) improvements. It is now being implemented nationally.

3. Mr. Barry Hill, US: As facilitator, Mr. Hill offered the example of Haiti, with its contaminated water and correspondingly high illness rates; the example of Mexico

City, with 26 million people draining the aquifer and depleting the drinking water supply; and the example of the Mattaponi Tribe in the state of Virginia, U. S., which is dependent on a river-based lifestyle but is faced with the diversion of the river to a reservoir, destroying tribal culture and lifestyle.

4. Mr. Mohamed Ben Hassine, Tunisia: Tunisia has limited rainfall and is reliant mostly on groundwater. Fresh water is allocated among domestic uses, agriculture, and industry and consists of 3,000 wells plus small wells, weirs (large and small), and small lakes. Government has developed a water allocation and conservation strategy and increased ministry resources. The focus includes increased public awareness and changes in irrigation practices.

5. Ms. Maria Comino, Australia: Australia is embarking on new efforts to set priorities among water users, including ecosystems. In this context, it is just learning how to balance the science issues, the political forces, the institutional complexity, etc.

6. Mr. Daniel Geisbacher, Slovak Republic: Use of water management plans based on desired water uses is the main strategy in Central Europe. This involves decision-making about uses and pollution standards.

2.2 Other Details of Discussions

In addition to the specific examples set forth above, the discussion covered the following points:

- Water is essential to life – there is a powerful link between water and human rights. Many states recognize a human right to a clean, healthy environment, including some that recognize it in constitutional provisions. The inclusion of environmental human rights into constitutions does not assure actual results, however.
- There is a well-recognized connection between contaminated water and human illness.
- Water is a limited resource and subject to multiple demands, e. g., agriculture, industry, domestic, and recreational uses.
- Water and security issues are closely tied. Because of the vital role played by safe, clean water in the survival of people and key economic systems, including agriculture, water may prove a tempting target for terrorists. Because water sources may be readily accessible, especially where surface water sources are critical, the vulnerability of water supplies may exacerbate this security threat.
- Water and poverty are inexorably linked. Water can be a source of disease and death or a lifeline to health and prosperity.
- Water and technology present special challenges. Lead piping, for example, can create health risks for otherwise clean drinking water sources.
- There is a clear link between climate change and water quantity (changes in water recharge rates and patterns; impact on glacial melt).
- Water is involved in all the complex considerations around "collective rights". The cultural and legal approaches to water management and water allocation are highly interdependent with a society's approach to property, individual freedoms, and collective considerations.

3 RECOMMENDATIONS FOR INECE

INECE can serve as a central depository of information about standards for water quality management and approaches to water allocation. (Workshop participants noted the availability of numerous documents on water quality and infrastructure development from the Organisation for Economic Co-operation and Development).

INECE could work with other multinational organizations (United Nations Environment Programme, The World Conservation Union) to promote the notion of

clean, safe, and adequate supplies of water as a human right (individual and collective) and, relatedly, identify global warming as a water supply disruption with the potential for significant human impact.

INECE should build bridges to the human rights international community (e.g., the special rapporteurs of the Human Rights Commission) and promote dialogue and cross-learning about water.

INECE could collect information on best practices of integrated water use and quality management systems that take into account multiple users, climate changes, and all other impacts.

INECE could feature water issues in all products and tasks: training materials, indicators, conference programs, etc. The participants felt that water is of such central importance as a cross-cutting issue that every opportunity should be taken to emphasize and enhance understanding of issues relating to water.

INECE should concentrate on its core compliance and enforcement focus in the context of water resources issues – going beyond pollution to all aspects of water management (including land management as it relates to water impacts). Current legal systems tend to separate attention to water quality and water allocation. Although integration efforts are underway, the compliance and enforcement "piece" is lagging behind. We should think about what areas related to water are best suited to INECE competencies and are not well covered by other efforts.

INECE could collect information on national experiences in the area of privatization of water management and serve as a central information source. (Workshop participants recognized that the issue of privatization is complex and potentially controversial.)

INECE could explore partnering with the world's religious communities on issues relating to water and its importance (starting, perhaps, with awareness raising).

INECE could supplement the existing work on integrated water resource planning and management to be sure that enforcement and compliance are adequately covered.

INECE should work to build capacity for good governance practices to assist countries in meeting their water resource management obligations.

SUMMARY OF WORKSHOP 3B: VESSEL POLLUTION

Facilitators: David Uhlmann, Department of Justice, United States
Katia Opalka, Commission for Environmental Cooperation

Rapporteur: Andrew Lauterback, Environmental Protection Agency, United States

GOALS

— To explore the successes and failures of existing compliance and enforcement mechanisms to limit pollution, including oil, wastes, and CFCs, from marine vessels

— To propose innovative methods to remedy current gaps in enforcement

1 INTRODUCTION

The workshop facilitators opened the session by framing the definition of vessel pollution, which includes:

1. accidental oil spills; and
2. waste generated on-board and discharged from the ship in violation of an international treaty, such as MARPOL.

2 DISCUSSION SUMMARY

Participants heard about a Canadian initiative that would build on the minimum standards provided in MARPOL. To address bird mortality caused by ocean dumping of oily bilge water, the Parliament of Canada is considering amending environmental statutes to facilitate evidence-gathering by allowing game officers, within Canada's 200 mile Exclusive Economic Zone, to detain, board, inspect, and redirect ships suspected of ocean dumping.

The workshop participants then focused their attention on what efforts are working to control vessel pollution, the challenges enforcement officials confront, and recommendations for improving the effective enforcement of vessel pollution.

2.1 What Is Working?

1. The existing treaty, MARPOL (The International Convention for the Prevention of Pollution of Ships), establishes the base for vessel pollution control.
2. In most countries, domestic laws have been passed to implement MARPOL.
3. There have been some prosecutions and appropriate penalties.
4. There is international interest, and there are international efforts, in the realm of vessel pollution control, like Interpol's Project Clean Seas.
5. There is massive public support.

2.2 Challenges for Enforcement

1. The target is a powerful worldwide industry with a long history of ineffective self-regulation.
2. There is limited or no enforcement by the flag state authority.
3. Most discharges occur on the high seas and so are difficult to detect.
4. Evidence of vessel pollution is hard to gather.
5. Investigations can be expensive, especially those involving holding ships at port.
6. Training of ships' crews on best management practices is inadequate.
7. There is a lack of adequate disposal facilities at ports.

2.3 Recommendations for Improving Enforcement

1. Strengthen domestic laws everywhere, especially concerning the extension of jurisdiction to the Exclusive Economic Zone and the strengthening of extradition treaties, whistleblowing provisions, and the criminal culpability of captains, corporate officers, directors, and agents.
2. Improve evidence gathering, for instance through the use of satellite technology and the sharing of information (including data bases and information on leads)
3. Build the capacity of investigators and regulators.
4. Develop a manual of best practices for investigations.
5. Participate in the International Maritime Organization.
6. Promote the increased availability of onshore disposal facilities.
7. Eliminate the concept of flag states of convenience.
8. Partner with NGOs concerned with wildlife and pollution to develop a strategic public relations and education campaign to alert people to the massive scope of the problem (public education, according to the workshop participants, is the most important recommendation).

3 RECOMMENDATIONS FOR INECE

INECE is in a unique position to provide significant support for international efforts to regulate and enforce against vessels discharging waste at sea . The recommendation proposed by the workshop participants that fits most neatly within INECE's mission is the development of a public relations and education campaign to alert people to the scope of the problem. INECE can also provide a forum for regulators and enforcement officials to come together to work on issues related to vessel pollution. Lastly, INECE can represent its members before other international bodies and advocate new approaches to control pollution from ships.

SUMMARY OF WORKSHOP 3C: HAZARDOUS WASTE AT PORTS

Facilitators: Robert Heiss, Environmental Protection Agency, United States
Henk Ruessink, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

Rapporteur: Fred Kok, National Board for Compliance and Enforcement, The Netherlands

GOALS

- To design a project to improve enforcement to reduce shipments of hazardous waste through ports.
- To discuss success stories (including the IMPEL-TFS project), potential new partner countries, and synergies with the Green Customs Initiative.

1 INTRODUCTION

At the start of the workshop, the facilitators gave short introductions to the subject, highlighting the fact that international transport of waste is a growing problem that needs serious attention, and noting the growing awareness about the problem.

2 DISCUSSION SUMMARY

Workshop participants offered the situation in the United States as an example of the growing awareness of the problem. As a consequence of the September 11th attacks, U.S. Customs agents are now more aware of all kinds of international transport, including transport of waste. Therefore, customs has become a natural partner in the fight against illegal waste trading, and greater attention has been paid to both import and export procedures, as well as the need for new approaches for tracing waste streams.

There are also initiatives from the United Nations Environment Programme (UNEP) to support data systems. Additionally, there is awareness that international cooperation is urgently needed to tackle the problem. Exchange of information is essential, although uniform definitions and interpretations are often difficult to achieve with many parties involved in the process.

Nevertheless, we have to realize that each of us faces similar problems. So we should work together to solve some of the difficulties and use the opportunities and strength of the INECE network to learn from good practices and to disseminate valuable information.

Some valuable experiences are available from the IMPEL-TFS project. This project, which was presented in brief, combats illegal transfrontier shipments of waste from European harbors to non-OECD (Organization for Economic Cooperation and Development) countries. Further details can be found in a separate paper, as published in Nancy Isarin's paper in Volume 1 of the 7th INECE Conference Proceedings.

In the subsequent discussion, it was stipulated that our common goal should be to stimulate and coordinate enforcement and compliance through joint projects dealing with hazardous waste at ports. Countries in both the developed and the developing world should participate in these projects, since a lot of waste is shipped from developed countries to developing countries to avoid the cost of proper recycling or disposal. In the countries receiving waste, there is often little or no legislation; enforcement is often weak or

missing; and proper treatment/storage facilities may be absent. Human health and the environment are consequently put at risk.

3 RECOMMENDATIONS FOR INECE

To stimulate proper action, INECE could take the initiative to create and coordinate an action plan with clearly defined goals, project partners, a funding strategy, and a scheme for implementation. Potential partners are: IMPEL-TFS, Green Customs, UNEP, the World Customs Organization (WCO), Interpol, the Basel Secretariat, Basel Action Network, the Chemical Legislation European Enforcement Network (CLEEN), OECD, the North American Commission for Environmental Cooperation (CEC), Silicon Valley Toxics Coalition, the Strategic Council on Security Technology, Toxics Link, and other NGOs. After adoption of the action plan, a report on the enforcement cooperation project might be expected in spring of 2006.

Based on the ideas of the workshop participants, some components of the action plan could be the following:

- INECE participants should organize a simple and effective initial means for the exchange of TFS-data. At this stage, it is not desirable to invest a lot of effort in setting up sophisticated databases since that would require too much time and too many resources; in addition, the essential underlying infrastructure is missing.
- INECE participants should recommend focal points in each of the relevant interested countries, as is done in IMPEL-TFS projects. The purpose of these focal points is to disseminate general knowledge and to exchange specific information on shipments with focal points in other countries. The ideal focal point should have good contacts with other TFS stakeholders in his/her country, such as customs, police, and NGOs.
- In conjunction with the focal points, joint inspections should be organized for training and instruction, as well as a means to share and adopt good practices in tackling TFS problems.
- INECE participants should devise a simple instrumental toolkit that interested countries can use to find out whether they have a (potential) problem with TFS through their harbors. Through the use of this toolkit, the situation with respect to TFS can be brought to some clarity in those cases where basic information on the subject is currently lacking.
- Further work on raising awareness of the problem of (hazardous) waste shipments is needed. Such work could include ensuring that media outlets pick up and spread stories of successful enforcement cases against illegal waste transports. Naming and blaming the offenders could also be considered. To get the problem on the political agenda, providing information to NGOs and the general public is essential so that political pressure can be built.
- Based on what is known from IMPEL projects and other information, INECE participants should identify harbors in countries or regions that are probably the most sensitive targets for illegal shipments, as well as specific waste streams that represent the most severe risks. An initial focus for follow-up activities can then be defined.

SUMMARY OF WORKSHOP 3D: ANALYZING THE COMPLIANCE AND ENFORCEMENT MECHANISMS OF THE MONTREAL PROTOCOL

Facilitators: Jim Curlin, United Nations Environment Programme
Gilbert Bankobeza, United Nations Environment Programme

Rapporteur: Scott Stone, INECE Secretariat

GOALS

To explore the role that INECE can play in:

— Building capacity for compliance and enforcement in developing countries with regard to the Montreal Protocol.

— Encouraging the enforcement community in developed countries to share thei compliance and enforcement expertise with developing countries so they can implement the provisions of the Montreal Protocol effectively.

1 INTRODUCTION

Mr. Jim Curlin gave an introductory presentation on the basic features of the Montreal Protocol. Adopted in 1987, the Montreal Protocol was designed to phase out the use of ozone-depleting substances (ODS) and is generally regarded as the most successful multilateral environmental agreement (MEA).

The Montreal Protocol has entered what is termed the "late stages" of implementation. This means that the developed world has largely come into full compliance with its terms and that the production and use of ODS has been virtually eradicated. However, problems remain in the developing world where ODS are still produced and used. Many of these countries contribute to a significant black market for ODS in the developed world.

In 1991, the Multilateral Fund for the Implementation of the Montreal Protocol was established to provide developing countries with the funding necessary to comply with the terms of the treaty. Managed by the United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP), United Nations Industrial Development Organization (UNIDO), and the World Bank, the fund has supported 4,600 technical capacity-building projects for 134 developing countries worth 1.75 billion U.S. dollars. It will phase out 182,690 tons of ozone depleting potential (ODP) consumption, and 62,200 tons of ODP production. Most of this has already been accomplished as of 2004.

To qualify for assistance from the Multilateral Fund, a Party must have country programs (implementation and compliance strategies) in place. Also, the data that a country submits to the fund must be timely and accurate to be considered. Regular technological assessments of each country are made every two years to monitor compliance with the treaty.

The goal, of course, is to build sufficient capacity in developing countries so that it can meet its legal obligations under the treaty. They keys to national compliance include national policies, legislation, regulations, directives for licensing and quota systems, export controls, bans on equipment using ODS, and economic instruments. Compliance and enforcement stakeholders include government agencies (foreign affairs, environment, customs, agriculture, judiciary), industry (ODS users and producers, importers), and civil society.

Compliance assistance under the

Montreal Protocol includes institutional strengthening for National Ozone Units (NOUs) (which are responsible for implementation and compliance), national and industry-sector compliance strategies, and investment and technical assistance from UNDP, UNIDO, and the World Bank. UNEP operates a compliance assistance program that consists of policy development and enforcement, data reporting, customs training, technical support, information, and communication.

There are frequent meetings among the many national NOUs to exchange experiences, ideas, and knowledge and to develop skills. These meetings are opportunities for sharing data and intelligence, and they have proven to be a cost-effective and constructive way to assist developing countries with their enforcement efforts.

Mr. Curlin pointed out, however, that there are still pressing issues unresolved. First there is a great need for developed countries, other MEAs, and non-governmental organizations to transfer real-world compliance and enforcement experiences and knowledge from developed countries to developing countries. There need to be bilateral exchanges on specific issues, both North-South and South-South, matching peer-to-peer inspectorates to address different issues. Furthermore, there should be a focus on training officials, prosecutors, and judges in all countries so they know the most effective way to adjudicate customs seizures and how to levy and enforce penalties that will further effective implementation of the Montreal Protocol.

Mr. Curlin concluded his introduction with a brief summary, noting that: (1) the Montreal Protocol is succeeding, but much work remains to be done; (2) compliance is being achieved, and treaty goals are being met, and (3) the ozone layer is on a path to recovery

2 DISCUSSION SUMMARY

2.1 Capacity Building

There is a need to establish common and realistic goals for capacity building that developing countries are able to meet. When building capacity, all efforts need to be made to create transparent national enforcement and compliance regimes. Training environmental and customs officers as well as members of the judiciary and legislature is essential, and current training programs must be maintained and expanded.

Additionally, there must be a common international program of compliance verification, and the results must be made publicly available. The resulting public input will give the Parties incentives to improve their compliance records.

2.2 Regulating Producers of CFCs

- The 1997 Montreal Amendment to the Montreal Protocol introduced a system for licensing the import and export of controlled substances. Under this regime, each manufacturer is licensed for each product it produces. A good number of parties have implemented this licensing system, and by controlling the number of licenses issued, these parties are able to identify illegal manufacturers. Though many countries adopted this system, there are often few or no supporting enforcement mechanisms; if the licensing system is not backed up by enforcement mechanisms (with both trade and use aspects), it is meaningless. This has allowed black-market production of ODS to flourish in many countries around the world. This illegal production supplies black-market consumption in Party nations that have already successfully regulated their own producers, thus undermining the goal of the licensing system to regulate and reduce the amount of ODS production.
- The Multilateral Fund (MLF) finances the closure of the CFC/Halon producers. The state government must agree with the MLF that the government will use the funds to reduce the number of these facilities and the amount of the CFC/Halon produced. The MLF will freeze the delivery of funds unless the

government delivers clear proof of progress. Mexico has gone fully out of production as of May of 2005.

- The MLF also has a complete list of every facility that produces banned substances.
- Quite often CFCs are used in fine chemical production that once occurred in developed nations. When this manufacture is moved to developing countries with weaker enforcement mechanisms and production controls, the production of CFCs can actually increase. This combined with irresponsible handling and less sophisticated facilities can work to undermine the goals of the Protocol to reduce/eliminate ODS all together. Regional programs may be a good way to help developing nations regulate these industries and enforce the terms of the Protocol. A regional program will allow local countries to pool and focus resources on the biggest problems first and will be sensitive to local needs.

2.3 Regulating International Trade of Banned Substances

- The developed countries have a great need for enforcers to gather intelligence and identify the sources of illegally imported products.
- It is relatively straightforward to develop a database for banned substances that are coming in and out of a country. Because of the size of the CFC market and the fact that the chemicals are coming in from a multitude of different sources, some countries have decided that the way to attack this problem is to focus on the importer/exporter, which are more easily targeted and which are often responsible for massive amounts of illegal traffic and commonly deal in numerous chemicals and products.
- Current MLF efforts to provide countries with the equipment and technology necessary to catch ODS at their borders are both expensive and inefficient, because the volume of trade crossing a border at any given time is so immense. Instead, environmental inspectors should be tasked with tracking the illegal products back to the importer/exporter. The tracking process should begin with the receiving market, because looking on store shelves is easier than trying to identify illegal ODS as they cross the border in the stream of commerce. Furthermore, if the investigation traces the ODS back from the store to the manufacturer, the environmental agent will discover the source of the ODS and whether that source is responsible for more than one ODS. Then the agent can verify whether the country of manufacture is allowed to produce that ODS.
- How the success of an import/export enforcement regime is measured is important. If a retailer is caught with ODS in its merchandise, busting the shopkeeper is not an efficient or judicious remedy, because a manufacturer may have a market that involves thousands of retailers and covers dozens of products. Therefore, indicators that simply measure the number of busts is not the best way to measure success; arresting a hundred shopkeepers has less of an environmental impact than stopping a single import/export operation that brings huge quantities of ODS into the country. Furthermore, it often costs the same amount to bust the shopkeeper as it does to bust the importer, and an agency may only have enough resources to bust one of them.
- Even investigating an import/export operation without a bust can cause a major upheaval in business and deter illegal activity.
- Some developing countries do not need to be in compliance until 2010 and are not currently prohibited from manufacturing CFCs. They can export legally; it is only the imports that are illegal. Therefore, the enforcement community needs to focus on the importers and not the producers. If enough importers are busted, the producers will be deterred because their market will become unstable.

- MLF is trying to promote some cooperation between importing and exporting companies. The developing country exporter can provide a list to importers in developed countries about who is authorized to produce CFCs. This is an excellent use of Montreal Protocol regional networks because it identifies bad exporters.
- MLF is trying to develop indicators to monitor laws that limit the import/export of CFCs. The first indicator should be whether a country has a list of authorized importers. If a country does not have such a list, it may show that they are not concerned about the import/export of CFCs.
- The representative from Bahrain suggested that they need assistance to avoid giving anyone an exception to import into the country if they are not known to be legal CFC importers/manufacturers. Bahrain also needs to know about aerosols/sprays, e.g. which factories legitimately manufacture them with CFCs. This is a question that could be addressed by posing it through the network to other countries.

2.4 Judges, Prosecutors, and Inspectors

- Education for judges and prosecutors is a very high priority. It is also critical that the on-the-ground enforcement community is educated on environmental policy matters including the Montreal Protocol.
- Prosecutors and judges must be able to evaluate the societal costs of environmental damage. They need to be able to understand the actual significance of each violation and to levy penalty/remediation judgments appropriately. For instance, it may seem impractical to prosecute the selling of the toy "Silly String", but if the dangers of the CFCs that may be contained in the product were understood, the importer of such a product would receive a stiff fine.
- INECE emphasizes that environmental goals should always be reflected in the regulations and requirements that embody them. Inspectors should understand the significance of these broad environmental policies. Inspectors should understand not just how many violations they need to detect, but the significance of that quantity in relation to the overarching environmental objective. This would encourage the input of inspectors and enforcers in the creation of domestic regulation which, all too often, neglects adequate enforcement mechanisms.

2.5 Legislation/Regulation

- Countries need to pass regulations that include specific instructions for industry on how to comply with the terms of the Montreal Protocol. A company simply cannot be expected to interpret the Montreal Protocol alone and bring itself into compliance without national policy and regulation. The government should identify the types of activities deemed to be illegal and communicate this information to the company clearly.

2.6 Disposal

- An example of a common disposal problem was raised: Once an old refrigerator reaches the end of its lifespan, it is often disposed of in the developing world. If the refrigerator is destroyed there, there may be a release of CFCs into the atmosphere. Often, however, the refrigerator is re-used, because it is cheaper to refurbish it and add new refrigerant than to buy a new refrigerator with non-CFC refrigerant. The recycling of refrigerators from the developed world keeps the CFC production industry alive in many developing countries where they are trying to phase out CFC use.
- Under the Basel Convention for the Transboundary Movement of Hazardous Waste, the refrigerator could be considered waste. However, the definition of waste varies depending on disposal versus re-use, so its regulatory status under Basel is unclear depending on

whether the refrigerator is shipped for disposal or for re-use.

3 RECOMMENDATIONS FOR INECE

- INECE should work with various regions on developing regional enforcement programs.
- INECE should work with the Parties to develop a mechanism for evaluating program success that is not based simply on the number of citations.
- INECE should help Parties build capacity to identify illegal importers/exporters.
- INECE should expand its educational programs to include CFC policy for judicial and enforcement communities.
- INECE should consider distributing a list of known manufacturers of CFCs. INECE needs to link up with the Montreal Protocol website that contains the list, and the outcomes of this workshop also need to link to both sites.
- INECE should create a global website for all information on CFCs, containing information relevant to enforcement and compliance promotion. It would include things such as: reasons and need for legislation, descriptions of the products, how they can be located, main countries of origin, alternate uses, substitute uses, what types of products, scales for fines, etc.
- INECE needs to work with regulation writers to make sure that the regulated community will be able to understand what they need to do to comply with legislation implementing the Montreal Protocol.

SUMMARY OF WORKSHOP 3E: ENFORCEMENT OF EMISSIONS TRADING PROGRAMS

Facilitators: Neil Davies, Environment Agency (England and Wales)
Chris Dekkers, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands
Joe Kruger, Resources for the Future, United States

Rapporteurs: Arthur Roborgh, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands
Martine Meerburg, Ministry of Housing, Spatial Planning and the Environment (VROM), The Netherlands

GOALS

To explore the role that INECE can play in developing a consistent world-wide trading scheme of greenhouse gas (GHG) emissions.

1 INTRODUCTION

To answer the aforementioned inquiry as to the role of INECE in developing and enforcing a consistent world-wide trading scheme of GHG emissions, the workshop was divided into two parts that discussed the requirements for:

1. Enabling the private sector to comply
2. Enabling the Competent Authority to ensure and enforce compliance.

The aim was to get:

— Three recommendations on part 1 for enabling compliance and three recommendations for enforcing compliance

— Three recommendations on part 2 for enabling compliance and three recommendations for enforcing compliance

Finally, it was decided to try to draw more general recommendations directly related to the main inquiry as raised above. These recommendations were presented by Mr. Joe Kruger as bullet points during the plenary meeting of INECE.

2 DISCUSSION SUMMARY

Mr. Neil Davies started by outlining the aim of the workshop: to review the design elements of an emissions trading scheme, including allocations, legislation, institutional arrangements, and regulation to ensure compliance.

Mr. Chris Dekkers then gave an overview of the European Union Emissions Trading Scheme (EU-ETS) Directive on carbon dioxide emissions trading, using a PowerPoint presentation now available on the INECE website (www.inece.org). He emphasized that compliance by the private sector depends heavily on proper monitoring (e.g., the European Commission's Monitoring & Reporting Guidelines), proper reporting, and proper verification (e.g., the European Accreditation Cooperation's guidance note and verification protocols). Furthermore, he highlighted that regulations to enforce compliance by the competent authority are aimed at the use of an electronic registry, inspection, enforcement, and sanctions.

Mr. Joe Kruger focused his presentation on compliance and enforcement in the United States concerning SO_2 and NOx emissions trading programs and gave a U.S. perspective on key similarities and dif-

ferences with the EU-ETS trading schemes, supported by a PowerPoint presentation. In this presentation, Mr. Kruger outlined the following:

1) emissions monitoring, reporting, and verification,
2) data systems concerning emissions and allowance registries,
3) penalties and enforcement provisions, and
4) public access to emissions and allowance data.

Next, there was a short question-and-answer session, after which the group tried to answer the questions outlined above. The first conclusion was that in many countries, there is a sizeable knowledge gap for environmental compliance and enforcement experts on the requirements, conditions, and costs of emissions trading. For this reason it is important to raise awareness and exchange information on the lessons learned from existing schemes.

3 RECOMMENDATIONS FOR INECE

There was agreement that INECE could develop introductory materials (e.g., Frequently Asked Questions documents) on compliance and enforcement aspects of emissions trading, and could provide a platform for exchanging information and data between environmental compliance and enforcement experts. Regarding specific activities, INECE could develop an enforcement and compliance manual for emissions trading, with best practices and basic requirements. INECE might also facilitate or sponsor an analysis that compares the practices of 'third party verification' to the traditional role of the regulator in verification. More generally, INECE could play a vital role in future initiatives to set up guidelines for compliance and enforcement of emissions trading. INECE could also be the forum for creating linkages between environmental compliance and enforcement experts and international organizations like the European Union, international accreditation bodies, the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), and the United Nations Framework Convention on Climate Change (UNFCC).

3.1 General roles for INECE

- Raise awareness, and provide information and clarification
- Serve as a resource on emission trading activities in different countries
- Establish links with other parties involved (accreditation bodies, UNFCC, IMPEL etc.)
- Aim for a balance on general consistency and flexibility in international trading schemes

3.2 Various products that INECE should develop

1. A simple document on elements of emissions trading schemes, including Frequently Asked Questions
2. Give more information on:
   a. skills
   b. training requirements
   c. data gathering and sharing
   d. monitoring requirements and standards
   e. other technical issues
   f. third party verification and regulatory input
   g. sanctions
   h. costs and financial and environmental benefits (compared to tax systems)
3. A workshop in the near future for practitioners

SUMMARY OF WORKSHOP 3F: ILLEGAL LOGGING: REGIONAL STRATEGIES FOR ENFORCEMENT COOPERATION

Facilitators: Antonio Benjamin, Law for a Green Planet Institute, Brazil
Yvan Lafleur, Environment Canada

Rapporteur: Anita Sundari Akella, Consultant, United States

GOALS

- Identify a set of common issues that will allow the international and national institutions working on deforestation issues to work together on logging sector enforcement in the context of the International Network for Environmental Compliance and Enforcement (INECE).
- Come up with a concrete proposal that will allow INECE to move into this new direction, in the 'green' sector.

1 INTRODUCTION

The facilitators opened the discussion by asking the participants to draw on their countries' experiences to define illegal logging. The facilitators then progressed the workshop by opening discussion of what the international issues are and how they should be prioritized. They then raised the question of whether the international community should be targeting a particular type of illegal logging. Finally, the discussion group talked about the proper role for INECE and the international community.

2 DISCUSSION SUMMARY

Mr. Antonio Benjamin opened the workshop by acknowledging the various definitions of illegal logging and asked the participants to give a definition based on what goes on in their respective countries.

Dr. Ladislav Miko explained that in the Czech Republic, no clearcutting of areas greater than one hectare is allowable by law, and landowners are required to leave seventy percent of the trees on their land standing. However, it is not always the owner that cuts, and often criminals come in and extract timber. Sometimes the problem is a different one – for instance, in the Caucasus, poor people were breaking the law by cutting timber for fuelwood, so that they could avoid freezing. Dr. Miko expressed the difficulty in enforcing the law in such situations.

Dr. Miko added that the Czech Ministry of the Environment has developed a system for evaluating ecological damages in the forest, based on 12 years of research. The specific system is particular to Czech forests and will not be applicable in other sites; however, the system's fundamentals can serve as a basis for those wishing to calculate damage to forests in other countries.

Picking up on Dr. Miko's observation about poor people and logging, Ms. Sheila Abed responded that in much of Latin America, illegal logging is linked to poverty issues. Deforestation happens because of land use change, often slash and burn agriculture by squatters who sometimes work with traders to sell valuable wood before clearing. However, these types of deforestation are difficult to fight because they are closely linked to social and political issues.

Ms. Brenda Brito further explained that in Brazil, there are "legal reserve" requirements – for instance, in Amazonia,

landowners are required to retain eighty percent of their land as forest. In other parts of the country, it is twenty percent. However, this law is neither complied with regularly nor enforced effectively.

Mr. Tony Oposa added that in the Philippines, no logging beyond the allowable cut is allowed, but it happens. There is also conversion of forestland to other uses by poor people. Often, selective logging opens roads that small farmers and the landless use to enter the forest, which they then convert.

Ms. Rosalind Reeve illuminated some of the transnational issues with logging regulation. In Kenya, people were allowed to cultivate among the trees in protected areas – until it was discovered that they were growing all kinds of things (including marijuana). The government then clamped down. They began requiring a permit for any cutting on private lands or for any transport of timber. The result has been that the timber coming into Kenya now is largely harvested illegally from the Congo. The Congo has a good law, but it is not implemented – in the Eastern Congo, for instance, there is no enforcement at all.

Mr. Ofir Drori explained that in Cameroon, illegal logging mainly takes the form of companies not staying within the rules of their concessions – they break regulations regarding diameter, species, and quantities. These companies control the law enforcement agencies and so there is a lot of corruption. The government is also reluctant to be too strict with the rules because they do not want the companies to leave the country and do business elsewhere instead. There is some small-holder illegal logging once the big companies have left, but this is not the major problem.

Mr. Antonio Benjamin responded that in Brazil, the problem differs according to where you are. In the developed south, deforestation and illegal logging are minor issues, and development (along the coast, in the Atlantic Forest, and in agricultural areas) is the main problem. In the north, logging is not as much of an issue as expansion of the agricultural frontier – driven by large, wealthy agro-business. Peasants are sometimes used by them to do their dirty work, but are not the main actors. If you address the big actors in this region, it could have considerable impact on the ground even if it does not stop expansion altogether. The issue is complicated because this is a region of low development, and a lot of export income comes from the soy that is being grown here. Mr. Benjamin asked how it is possible to battle this kind of deforestation.

Mr. Benjamin further noted that many compliance and enforcement issues have to do with the legal framework itself. The precautionary principle is important – if appropriate uses of the resource are prescribed in the law, it is much easier to do compliance and enforcement. For instance, Brazil's legal reserve system is established in the law and if it were complied with, eighty percent of the Amazon and twenty percent of the remainder of the country would be conserved. This is not the case, but if there is political will, it should be possible to enforce this law.

The facilitators summarized that overall, based on what everyone had said, the problem of illegal logging is widespread and caused by a number of contributing factors that legislation and enforcement will have to tackle. With this in mind, the facilitators urged participants to focus on the goal of developing concrete proposals that INECE can work on in the illegal logging realm, with a focus on enforcement.

Dr. Ladislav Miko suggested that the workshop participants should decide what the priorities within INECE relevant to this topic should be, since many issues should be handled nationally. He then suggested focusing on (a) what the international issues are and (b) how to prioritize them.

Mr. Peter Pueschel added that the working group should keep in mind what the capacities and sphere of impact of INECE are. For instance, they may be highly effective at making economic arguments that can show the links between illegal logging and demand in consumer countries. It is important to make efforts on both the consumer and producer side. Enforcement

officials need tools, and those tools should be provided.

Mr. Antonio Benjamin observed that these ideas point to building support for a project proposal on illegal logging.

Mr. Yvan Lafleur suggested that the group should consider which aspects of illegal logging they can hope to influence. He summarized by identifying the following types of illegal logging in the conversation:

(1) Social – Mr. Lafleur questioned whether INECE could really address logging that has to do with social issues.

(2) Technical – loggers are not respecting the details of cutting (diameter at breast height, etc.) in their concessions.

(3) Commercial – companies are not respecting the law, either because they do not care or because there is no enforcement. Mr. Lafluer identified this type of illegal logging as having the most impact at the international level.

(4) Criminal.

The facilitators posed the question of whether the group wanted to target its activities to any particular type of illegal logging.

Mr. Ofir Drori thought that the group should restrict itself to things that are (a) under the law (i.e. not social) and (b) international. The most logical target is the large companies, because their behavior has implications beyond their borders. One idea could be to build a network that can share information that could be helpful in criminal proceedings

Ms. Brenda Brito explained that the problem in Brazil is a bit different, as the majority of Brazil's illegal timber is consumed domestically, making it a domestic issue. Ms. Brito thought it would be useful for INECE to hold a regional meeting to discuss how to:

(a) identify major organizations/stakeholders involved in illegal logging,

(b) identify existing legal mechanisms in regional countries and test other innovative ones that might work (i.e., using negotiated compliance agreements in this sector rather than strictly focusing on command and control),

(c) provide technical assistance to companies and loggers who might log legally if they knew how and understood what the rules were, and

(d) provide capacity building and training for local agencies working on enforcement.

Ms. Rosalind Reeve suggested that the group should concentrate on what is beyond the law, what is international, and what INECE is good at (for instance, which tenets of brown-side enforcement can be translated for the green side?).

Mr. Peter Pueschel elaborated that information exchange on trade routes is important and questioned whether capacity support for enforcement agencies will be harder where there are large multinationals involved. He added that there is a need for national enforcement capacity building to help look at (a) organized criminal sector illegal logging activity (including linking to work being done by Interpol) and (b) companies that are just taking advantage of weak enforcement.

Mr. Antonio Benjamin supported the framework suggested by Brenda Brito and advocated for thinking about a global meeting of experts on forest sector enforcement – something that will help to legitimize this message by discussing it with a broader audience. He also suggested working with The World Conservation Union's (IUCN's) Commission on Environmental Law.

Dr. Ladislav Miko further suggested that if there is to be such a workshop, the topic to be discussed must be very clear and that it would be helpful to prioritize the places where there is a link between illegal logging and primary habitat/biodiversity. He explained that if they could bring key people in forest sector enforcement together and get them speaking the same language, it would be an advance.

Mr. Yvan Lafleur suggested a series of regional meetings that lead up to an international meeting, because of lan-

guage and culture barriers. However, Ms. Rosalind Reeve disagreed, suggesting instead an international meeting that would then spawn regional meetings. She also suggested including nongovernmental organizations (NGOs) active in this area (Global Witness, Environmental Investigation Agency, Chatham House) in such a meeting.

Mr. Peter Pueschel advocated for focusing on understanding who the international companies doing illegal logging are and identifying the international trade routes used by these companies and their partners on the ground. He further stated that this international meeting should have a limited number of participants.

Mr. Matthew Cooper suggested that INECE, because of its access to experts, can give advice about how to generate and share information. It can also access NGOs who do not have access to information – through appropriate messaging and sound advice.

Mr. Yvan Lafleur stated that local input would be required and that it is hard to create guidelines or messages that are global.

Ms. Anita Akella suggested incorporating conservation NGOs who are de facto "working on enforcement" as part of their conservation work on the ground. However, Mr. Peter Pueschel disagreed, stating that inclusion of such NGOs creates the potential for the discussion to become too broad, not focused on enforcement. Mr. Ofir Drori offered a solution that only NGOs working explicitly on enforcement be invited, because otherwise you get message drift and end up broadening the topic at hand beyond "real" enforcement.

Dr. Ladislav Miko interjected that foresters have meetings on these topics too, and should be kept in close contact to avoid duplication. He suggested sending an INECE emissary to European meetings of foresters and contacting them to find out what has already been done, what needs to be done, and how INECE can contribute.

Mr. Antonio Benjamin elaborated on the need for NGOs at the workshop by stating that the workshop envisioned is an enforcement stakeholders meeting to prepare something for the enforcers themselves. Therefore, the network does have to listen to what NGOs who do policy work and know that enforcement is important have to say. The majority of the participants should be people who work directly with enforcement – but we should also invite a few from the large NGOs. However, he agreed that it is important to make it clear that this is not a policy meeting, and not a science meeting – that rather, it is a meeting to decide what the next concrete steps will be in designing strategies for forest sector law enforcement.

Mr. Tony Oposa suggested a plan of having a team of 2-3 people of legal renown coming to a country, developing a good sense of what the enforcement challenge in that country is, and paying visits to national officials to create awareness of the gap between what the law says and what is happening in reality. The method could exert subtle, pressure on the political leadership to change the environmental problems.

Ms. Rosalind Reeve added that the network should include NGOs like Greenpeace who can hit the headlines and impact public awareness.

Ms. Brenda Brito recommended that each member of this group could list people and organizations from different countries that they think should participate in this meeting. Mr. Antonio Benjamin countered that membership selection should be done by INECE and the INECE Executive Planning Committee, with people sending suggestions of criteria (e.g., how to pick the countries that the participants come from: based on the size of the country or focusing on representatives of megadiversity countries).

Mr. Yvan Lafleur said that companies must also be involved. Ms. Rosalind Reeve replied that companies did not need to be involved at such an early stage. In the African context, bringing the companies in will be like inviting the fox into the henhouse and will not work.

3 FACILITATORS' RECOMMENDATIONS FOR INECE

INECE should review and analyze other activities related to the coordination of enforcement activities and enforcement training regarding the issue of illegal logging. INECE should develop a strategy based on this analysis to join in these activities or develop additional activities while avoiding duplication with the on-going ones.

The facilitators also recommend that INECE develop a proposal for capacity building programs for inspectors, public prosecutors, and judges in megadiversity countries that face widespread illegal logging. In addition, INECE should develop a proposal for a comparative global study in key countries of legislative models designed to fight illegal logging.

SUMMARY OF WORKSHOP 3G: PENALTIES AND OTHER REMEDIES

Facilitators: John Cruden, Environment and Natural Resources Division, Department of Justice, United States
Chief Justice Vladimir Passos de Freitas, Brazil
Deputy Chief Justice Adel Omar Sherif, Egypt

Rapporteur: Davis Jones, Environmental Protection Agency, United States

GOALS

To explore the following three questions regarding judicial enforcement:

1. What experiences or problems have workshop participants had in attempting to obtain penalties or remedies for illegal activity?
2. What are the most important factors a judicial officer should consider in deciding appropriate penalties or other remedies?
3. What should we recommend that INECE do to assist in informing judges about available penalties and other remedies for illegal environmental misconduct?

1 INTRODUCTION

Varied experiences demonstrate that there is frequently inadequate judicial understanding of environmental law, but the United Nations Environment Programme (UNEP) is actively helping to build world-wide capacity. South America, Finland, and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) have had seminars for judges and prosecutors, and the numbers of court cases have subsequently increased. Some agencies do not have experience in seeking criminal cases or civil penalties, while others have dedicated courts or tribunals and prosecutor units. Some innovative judgments include "publication orders" and "environmental service orders" to obtain compliance. Others have effectively utilized administrative courts.

The various aspects of environmental harm and economic benefit are important to prove, even when they are not required to prove the case. In addition, the intent of the defendant is often a key issue in criminal cases and may help the judge determine the adequacy of the penalty. We should share best practices for calculating penalties and for developing methodologies that are clear and straightforward. The international exchange of information between countries can help develop and strengthen national programs.

More judicial education and support is necessary, and UNEP's work, including the judicial training center in Cairo, helps meet this need. In some countries specialized courts may provide a mechanism for sharing information among judges and developing individual expertise. Chief Judges and trained judges should help promote the issue to their colleagues to establish credibility in the message, and INECE should help by spreading the information. Prosecutors must be included in the process, both as experts and to improve their own skills. Recognition of excellence is an outstanding motivation, and INECE should consider creating an international award for judicial excellence. Finally, we should seek harmonized approaches in penalties and remedies, particularly for transboundary crimes, so all countries can show the fairness and consistency of their penalty structures.

Mr. John Cruden introduced the

session by describing the various theories for civil penalties and asserting that despite differences in how countries obtain and calculate penalties, they ultimately have shared experiences and goals. He then asked the other facilitators for introductory remarks.

1.1 The Brazilian Experience

Judge Freitas began by citing the need for good institutions that can make improvements on resolutions beyond civil and administrative penalties. Brazil has a special law on environmental crimes, but only 2 or 3 articles of the law have penalty provisions, and those are mostly insufficient. General prosecutors are becoming more aware of environmental requirements, and some have created environmental crime units. Now, prosecutors are bringing cases against entities at different levels than in the past, including corporate presidents in some instances.

In many cases, convicted individuals or entities in Brazil can negotiate resolution involving clean-ups without mandatory jail time. For example, criminals convicted of illegal logging can appeal to the court to postpone the term for 2 years, and avoid jail altogether if the prosecutor is subsequently satisfied with their activities to solve the problem during that time. This helps achieve environmental benefits in lieu of jail time. Some judges are beginning to use this type of innovative sentencing to achieve more environmental results.

Training on environmental law has improved for judges, and some courts are starting to include environmental issues in the exam required prior to becoming a judge. They have also established a few special environmental courts. If there are not enough cases to justify a dedicated court, the newly established specialized courts can also handle other types of cases.

We must create a good knowledge base in environmental law among judges to raise their interest in addressing those problems, which can be very difficult. Judges will listen to other judges (especially senior judges), but additional motivation is useful. UNEP helped create a Congress on Environmental Law in Iguazu Falls in southern Brazil that brought carefully selected judges from other parts of Latin America to motivate and educate the judges about environmental law, with outstanding results.

Another motivational tool is to help judges publish papers and articles on the issue by providing a forum for disseminating information that other judges will recognize and respect. Another tool is to provide special recognition to particular judges who have made a difference.

1.2 The Middle Eastern Experience

Judge Sherif spoke about his experience as an environmentally-motivated judge in the Middle East. One of the problems involves judges and law enforcement officers, specifically regarding penalties. Most countries have enacted legislation that may include penalty authority, but judges have set attitudes about their discretionary power and do not like to be guided by "mandatory" penalty guidelines. They want to exercise their full discretionary authority in determining the size of penalties.

It is not enough to just provide the legislation, but it is as important to empower and educate judges. In Egypt, this is done through specialized tribunals and by promoting awareness of the international agreements and the challenges they seek to solve. There is an ongoing need to increase the judges' capacity, education, and awareness of environmental law.

1.3 The American Experience

Mr. John Cruden discussed the two sides of environmental enforcement in the United States. Criminal violations are handled with fines and prison time, while civil or administrative violations are addressed through penalties to capture any economic benefit and wrongful profits, at a minimum. In calculating penalties, environmental harm must also be taken into account, as well as the violator's ability to pay. In addi-

tion, restitution, injunctive relief or corrective action, and supplemental environmental projects are important components of settlements and consent decrees in the United States.

Mr. Cruden emphasized, however, the importance of prosecutors not only presenting evidence sufficient to prove the case, but also demonstrating the degree of environmental harm. He cited an example where a company had illegally filled in a wetland, destroying it in the process. The prosecutors charged it as a criminal case. They won the case (which was upheld on appeal), but the judge did not award a very big fine, and the sentence was probation without jail time. The low level of judicial response was probably because the prosecutors did not adequately explain the seriousness of the offense. The judge agreed that the law was violated but did not understand why the wetland was important enough to justify incarceration.

Mr. Cruden emphasized that this brings up three key problems for the prosecutor: (1) How do we present and explain the environmental harm? To be credible and deemed worthy by a judge, there must be adequate evidence of the environmental consequences of the illegal activity. (2) How do prosecutors convince a judge that they are requesting the correct penalty? At a minimum, prosecutors must explain how the penalty recoups the economic benefit or wrongful profits obtained by the misdeeds. (3) How do prosecutors demonstrate that the company has enough money to pay the penalty or complete the environmental restoration sought in the case? The evidence must adequately demonstrate the importance of the penalty and the ability of the company to pay the requested penalty and complete the necessary injunctive relief.

2 DISCUSSION SUMMARY

2.1 Canada

Mr. Albert Koehl said that in Canada each prosecutor must be able to prove violations to the judge, as well as why the response is appropriate. The judge's lack of experience may lead to inadequate penalties and remedies. The lack of capacity leads to an inefficient system and excessive appeals. A general lack of interest and motivation may lead judges to ignore environmental cases. Specialized tribunals would be very helpful and would cut inefficiencies in prosecutors explaining law and remedies in each case with a different judge.

2.2 Australia

According to Ms. Donna Campbell, Australia has a specialist court with both criminal and civil authorities for land and natural resource issues. The legislature has laid down guidelines for the determination of penalties, primarily associated with the environmental harm and the culpability of the defendant. Prosecutors have found it very difficult to determine the harm, and scientific uncertainty abounds, making judgments problematic.

Australia uses two additional types of extrajudicial remedies. The first are "publication orders", where the company must pay to publish articles or press announcements about the offense. The second are "environmental service orders" that require violators to carry out environmental work and to clean up around the facility and the community. They also have provisions in which citizens are given authority to bring cases as well.

UNEP has paid for judges to come from the Asia/Pacific region to see how the Australian EPA is enforcing. This has helped both internally (through the external examination of practices) and externally (by sharing best practices). This is part of the larger UNEP Judicial Training project. Essentially, UNEP divided the world into 10 regions and has done workshops and courses in each region. In South America, judges are working with other countries and NGOs such as Law for a Green Planet and FARN. Mr. Cruden participated in a workshop in Argentina, and was able to advise judges from across Central and South America about techniques in collecting and

presenting evidence, penalty determination, environmental harm, and environmental restoration techniques.

2.3 Costa Rica

Mr. José Pablo Gonzalez explained that Costa Rica is limited by lack of specialized judges, but does have a specialized unit of prosecutors dedicated to environmental cases. Judges and prosecutors share the judicial training academy and can share training. Judges often do not like to be trained by prosecutors, but through the impartial academy, they can train together.

Many environmental crimes fall under different statutes or laws, and judges need to know more about these laws. However, some judges think they need to come to the case completely uninformed to avoid bias, so prosecutors have to explain the law, science, technology, harm, etc., and failing at any part of that explanation jeopardizes the case. Judges merge civil and criminal authorities, so judges must combine penalties, jail time, fines, and remedies all together. The prosecutor's office has finished a manual listing the environmental crimes, how they should be proven, and what penalties/remedies should be sought, which will be a critical tool for educating judges.

In Costa Rica, judges are now using provisional probation similar to the example cited by Judge Freitas in Brazil to allow for remedial actions. They are also encouraging settlements to expedite cases. Costa Rica has the authority to settle or agree to conciliation, and now 90 - 95% of cases conclude with a settlement that is then sent to a judge for approval. Settlements, signed by judges, serve as a useful tool and an enforceable resolution. In the United States, settlements become public prior to judicial approval. Settlements are submitted to the judge, who is asked to wait to approve the settlement to give the public a chance to review and comment on it. The advantage of judicially approved settlements is that they make any subsequent violation of the settlement a violation of a court order rather than a simple agreement.

2.4 The United States

Mr. Lee Paddock explained that New York State has over 2500 judges in the state courts alone. Among the U.S. states, only Vermont has a dedicated environmental court. Pace University Law School in New York and the North American Commission for Environmental Cooperation hosted a North American judicial conference, which delineated the following two issues.: 1) We must find the right way to reach judges so they will accept training. Judges are resistant to training from one side of an argument (i.e. environmental agents or prosecutors). But when judges have been reached in a neutral way, the judges demonstrated that they really wanted the training and were surprised about how much there is to know about environmental law. 2) We should create networks of judges that other judges can turn to for support or training. Judges from one country may look to judges from other countries for advice they will accept. The International Union for the Conservation of Nature (IUCN) has worked with UNEP to develop resources for judges around the world and would be a crucial partner for INECE work in this area.

Ms. Walker Smith from the US EPA explained that judges may want to rule for government, but they will still want adequate evidence of environmental harm and proof of the underlying offenses. Prosecutors also must convince judges when an individual or company attempts to defend by arguing how difficult it is to comply with the law or how complicated environmental requirements can be. We should concentrate on the illegal activity and the environmental consequences of the conduct in presenting our case to the judge or tribunal.

Mr. Davis Jones explained that in the U.S., there are administrative courts dedicated to environmental issues. These courts can handle lower level, non-criminal violations in a very effective and efficient manner. In addition, the agency has written

penalty policies that guide prosecutors in the calculation of penalties. Judges often defer to these policies with cases often centering on the appropriate application of the policy rather than the penalty itself. He went on to explain how the U.S. calculates the economic benefit of non-compliance and demonstrated a simplified tool known as the "BEN Model" that accounts for various factors such as the time-value of money to determine the benefits of delayed and avoided compliance costs. Mr. Jones then demonstrated for all of the participants the simplified process by which economic benefit can be calculated and presented to a judge.

2.5 European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)

Mr. Antero Honkasalo referenced an IMPEL study that examined reasons why cases failed. The study showed that lack of prosecutor knowledge was a problem (as opposed to the judges'). IMPEL shared results and queried other countries to find similar problems. This convinced some countries to create special environmental units of prosecutors instead of an environmental court. They also found some countries that lacked standardized practices on how to bring cases to court, so IMPEL arranged seminars for judges and prosecutors to create standardized procedures. While it may be an incomplete indicator of success, the number of environmental court cases has increased, showing a better acceptance from prosecutors and judges and how enforcement is solving problems and repairing specific harms.

2.6 United Nations Environment Programme (UNEP)

Mr. Donald Kaniaru personally started the UNEP Judges Symposiums in 1996 and has tried to accommodate problems by successfully engaging senior judges to establish credibility. UNEP began with the belief that developing countries needed additional judicial capacity building where they did not have adequate environmental laws to rely on. At the international level there was standardized material, but not at the local or national level, which judges could actually use. UNEP started its program with the chief justices of the high courts, but the day-to-day decision makers are really judges at lower levels, who must also be addressed.

UNEP has found that starting up specific environmental tribunals is excellent, but they need to establish procedures and rules of practice for those courts that may not otherwise exist, which can be very resource-intensive and time-consuming. In addition to sensitizing judges, you must also sensitize both sides of the bar. Most courts will not take the initiative toward solving environmental problems; advocates, attorneys, and prosecutors must be convinced of the importance of environmental crimes so that they will take cases.

There is also a need for guidelines on how to calculate harm and how to demonstrate harms to judges. There must be a push for movement toward harmonization of processes regarding transnational problems. For example, crimes involving elephants migrating from Tanzania to Kenya should be treated the same in both countries' laws, and international organizations such as INECE should work to harmonize laws, prosecution, and penalties.

2.7 Belarus

Ms. Maryna Yanush suggested that published commentaries on environmental laws can be used to develop some common language for all to use and follow. Ms. Yanush emphasized that it is important to understand the point of view of judges and prosecutors, not just technical information. They can be helped by showing them best practices with real examples of how legislation can be implemented. Judges can also help inspectors understand the judicial requirements for proof, as well as how inspectors can better explain cases to judges. In Belarus, there is a forum between senior judges and ministry officials to help identify procedural and institutional problems. Judges and prosecutors

should also be involved with drafting of legislation to help identify gaps that may make the laws more difficult to enforce.

2.8 The Economic Side of Enforcement: Deterrence

Mr. Krzysztof Michalak cited the OECD's work on the economic side of enforcement and explained that deterrence is a function of the probability of detection and severity of the sanction. Environmental agencies must consider, given restraints, the balance between compliance monitoring and fines/penalties to determine the optimal level of a penalty.

This calculation will vary county to country; in Japan, the fact that an inspection occurred is considered a significant penalty by the company, so a much lower monetary fine is necessary. The amount of the fine or penalty should be commensurate with how much is actually needed to create deterrence.

Another cultural difference is how harm is assessed by judges. In Central Asia, the calculation is based on zero tolerance or no acceptable impact, which drives penalties to unreasonably high levels. In China, a campaign was carried out that shut down many polluting enterprises, but due to the nature of the campaign and the failure to carry through over the long-term, polluters merely waited and came back to their previous compliance status.

Different systems are not always understood well enough. The U.S., U.K., and other countries may have well-accepted credible tools and methodologies, but others are hampered by lack of transparency or standardization, which significantly hampers enforcement. OECD can provide information from its work in different regions to share methodologies so that standard practices can be established before the case rather than in response to an individual enforcement action, which can lead to charges of arbitrary response.

2.9 Tanzania

Mr. Palamagamba Kabudi, who drafted the new Tanzanian environmental law, has been training judges in environmental law – country-specific training for 25 senior judges, including a Supreme Court judge. But he is increasingly recognizing that Tanzania must also train prosecutors and inspectors. They are discussing development of specialized environmental courts, or one with the existing Land Court (similar to the Australian system). They want to avoid, however, developing too many specialized courts in every region, which leaves the alternative of training everyone.

The new Tanzanian law includes clear penalty provisions, including imprisonment. The law was developed in a very public, open process with public support for penalties. The legislature thought penalties were appropriate but too high in the original proposal and reduced them in the final law. The new law also allows for restoration orders, prohibition orders, and cost orders. If both parties agree, there is the possibility to settle out-of-court by paying a fine and agreeing to corrective actions. The law also provides for consent judgments and for working on Alternative Dispute Resolution.

2.10 Israel

Dr. Bill Clark said that they do not have much problem in Israel winning cases, but were told by the Ministry that they could not approach judges outside of court (such as for a training) because of ethical concerns.

Dr. Clark also explained that there is often a need for one country to work within other countries' judicial systems to help ensure consistency within the penalty framework, as became evident in an ivory seizure in Japan, when a smuggler had paid an administrative fine equivalent to $300 for an illegal consignment of ivory worth many thousands of dollars. In China, a smuggler convicted of a similar crime was sentenced to life in prison and another was sentenced to death with possible reduction to life in prison. In Kenya, a smuggler was caught with 4 suitcases of ivory and fined several thousand dollars, but his passport showed multiple trips with no consequences for the repeated violations.

3 RECOMMENDATIONS FOR INECE

- Promote and facilitate the international exchange of information between countries to develop and strengthen national programs for determining penalties and developing clear and straightforward methodologies.
- Aid in the dissemination of information regarding the importance of appropriate penalties and enforcement, and promote mechanisms to share information among judges to develop specialized expertise.
- Consider the creation of an international award for judicial excellence as an effective motivation to develop and enforce penalties for environmental law violations.
- Seek harmonized approaches in penalties and remedies, particularly for transboundary crimes, so all countries could show the fairness and consistency of their penalty structures.
- Create guidelines on how to calculate harm and demonstrate the harm to judges.
- Present judges and prosecutors with best practices and real examples of how legislation can be implemented.
- Facilitate the sharing of international organizations' work in different regions to share methodologies, so that standard practices can be established before any enforcement action as opposed to after-the-fact, which can lead to charges of arbitrary response.
- Search for a harmonized approach to seek parity within the international community.

SUMMARY OF WORKSHOP 3H: MULTILATERAL ENVIRONMENTAL AGREEMENTS: SYNERGIES FOR COMPLIANCE

Facilitators: Carl Bruch, United Nations Environment Programme
Kenneth Markowitz, INECE Secretariat
Alberto Ninio, World Bank

Rapporteur: Dave Grossman, INECE Secretariat

GOALS

To explore the following questions:

1. What types of information and what compliance and enforcement activities should we be looking at for the UNEP-INECE Multilateral Environmental Agreements (MEAs) indicator project on developing indicators?
2. What are some examples of particular input and output indicators that will be beneficial in measuring the impact of compliance and enforcement activities?
3. How should we approach identifying synergies in implementation of MEAs at the national level?

1 INTRODUCTION

The workshop began with an explanation of the UNEP-INECE indicator project, which focuses on identifying indicators to promote synergies in the implementation of two clusters of topic-related MEAs – one cluster on biodiversity conventions and one on chemical conventions. There was also a preliminary discussion of the definitions of input, output, intermediate outcome, and final outcome indicators.

2 DISCUSSION SUMMARY

2.1 Project Goals and Method

Mr. Carl Bruch explained that he saw a couple of goals for the project: (1) to develop and pilot-test a set of indicators to track progress over time, oriented largely to agency staff trying to take specific measures to implement and enforce MEAs, though also relevant to the negotiators trying to develop national positions; and (2) to develop qualitative case studies of interesting approaches of how countries have implemented MEAs synergistically, thereby allowing for an element of experience-sharing in the project.

Dr. Iwona Rummel-Bulska (World Meteorological Organization) added that these goals can be united, and that one should start by looking at one complex country and see how many focal points it has for its MEAs, how many competent authorities it has and whether they talk to each other, what legislation it has, whether the legislation is being implemented, etc. Dr. Rummel-Bulska further declared that one should start from the country side of things, checking how that country is implementing the enormous amount of MEAs.

Ms. Olya Melen (Ukraine) asserted that the issue of a synergetic approach is present in the majority of countries. Conventions are signed and put on a shelf, with no one evaluating effectiveness. Indicators are important. She suggested that there is a need for one body or commission within UNEP or INECE to collect all the data, consisting of representatives of focal points of different conventions and of people of a

high governmental level. This committee additionally can facilitate the reporting process of conventions and can serve as a clearinghouse of information.

Ms. Elizabeth Mrema (UNEP) proposed starting with the MEA itself and the Secretariat, as a process to guide us in terms of identifying stakeholders, audience, national-level contacts, and perhaps indicators.

Mr. Matthew Stilwell (Institute for Governance & Sustainable Development, Switzerland) stated that when thinking about this project, there are some key questions and issues that need to be addressed:

(1) Who is the ultimate audience for the project: frustrated negotiators? people in national ministries? on-the-ground enforcement officers?

(2) In light of the audience, what is the goal of the project? Is it to promote implementation of existing MEAs? Is it to promote future development of MEAs in a synergistic way?

(3) At what level are we looking for synergies: in the MEAs themselves (e.g., institutional arrangements, cooperative projects) or at the national level (e.g., implementation laws and measures)? At what level in the causal chain do you want to intervene most? Where is the main emphasis of the project?

(4) Overlaps among conventions are often quite different, and the secretariats themselves are often unaware they are there. The Convention on Biological Diversity (CBD) and the Ramsar Convention on Wetlands overlap on wetlands; CBD and the Convention on International Trade in Endangered Species (CITES) overlap on species; Ramsar and CITES overlap on wetlands species. But these overlaps are all in different contexts. The further down the chain you get, the harder it gets to find synergies. One suggestion is to take a sectoral approach. The UNEP economics and trade branch did a study focusing on rice, which established a single specific context across countries and provided useful data that allowed for building general models that could apply to other sectors. Every situation is quite different and complex, so it is hard to apply a one-size-fits-all approach when dealing with final outcomes. Higher up the indicators logic chain (e.g., inputs), it can be easier.

Mr. Carl Bruch agreed, noting that the higher level is what we are trying to do – looking broadly at the biodiversity sector and the waste sector. The question is: how do we do it at a high enough level that it is useful but where there still are synergies?

Mr. Matthew Stilwell explained that as one moves down the chain, it will be necessary to move from an indicators approach to an assessment approach, looking at specific projects in specific sectors. That is the only way to understand the complexities. Indicators are better for understanding inputs and intermediate outcomes. As you start moving toward ultimate environmental outcomes, you will need more tailored approaches. Also, a good starting point is to ask the secretariats about their 5 favorite delegates, and they will often give you people who are great on the ground, though not necessarily focal points. Also, look at the Economics and Trade Branch's methodologies, which may be adaptable. Mr. Stillwell said that he had written a paper on synergies between Ramsar, CBD, and CITES and that it was quite difficult to get the data. MEA secretariats themselves often had not thought about how economic instruments would apply across MEAs. Mr. Stilwell suggested that we look at the project from the national level – i.e., what data do national folks need to promote national synergies?

Mr. Alberto Ninio inquired as to whether the aim is to get national finance ministers the hard numbers they always ask for when getting a loan from the World Bank or providing funding to an environment ministry about the outcomes they can expect.

Dr. Iwona Rummel-Bulska contended that if you start with a single coun-

try, you get different indicators than if you start with the MEAs. She asserted that the number of conventions a country is part of, whether they produce CFCs and export waste, what the institutional structure is, how many focal points there are, and whether the focal points communicate with each other should all be considered. Starting from the country side, you then go through all the MEAs. She further inquired into which MEAs are being looked at, since there are many important regional agreements on these issues that should also be considered.

Mr. Sibusiso Gamede (South Africa) explained that countries, especially developing ones, ratify MEAs for a variety of reasons, many of which might not be environmentally-related. For example, some will join Kyoto because they see a financial mechanism that will facilitate foreign investment. This would make it difficult to develop a sole set of indicators for Kyoto without understanding why a country joined the Protocol in the first place. You might find that those reasons affect the institutions created to implement the MEA.

Dr. Iwona Rummel-Bulska replied that there are always different reasons, but that does not matter. Once they are in, they have to comply, and that is what we are after.

Dr. Rosalind Reeve (International Fund for Animal Welfare) asserted that it will also be necessary to actually go into the country to get the data, because you will not get the true information from the governments.

2.2 Multiple Authorities Involved in MEA Implementation

Dr. Warapong Tungittiplakorn (Thailand) suggested that the project should work from the top down. For this project to happen, Dr. Tungittiplakorn asserted that the project needs strong interest from the heads of departments and from decision-makers. Furthermore, in countries like Thailand, many departments are responsible for hazardous waste management, so the project needs support not just from the head of one department, but from the heads of many different departments. But Thailand has a hazardous waste committee, which has representatives from different departments (e.g., Agriculture, Industrial Works). He suggested that it would be best to coordinate with the committee.

Mr. Poul Byskov (Norweigan Pollution Control Authority) pointed out that Norway is like Thailand in that it has MEA authority and jurisdiction housed in many different departments. Also, Norway focuses more on industry, factories, wastewater treatment plants, etc. MEAs exist in the background, only occasionally coming to the forefront.

Mr. Sibusiso Gamede emphasized that especially with developing countries, it can be very difficult to find out "who's who in the zoo" and what is happening, because of the fragmentation. In South Africa, for example, when there is notification for a transboundary removal under the Basel Convention, that goes to the Department of Trade and Industry, then to Foreign Affairs, then to the Department of Safety and Security. Each plays a different role in the chain, but they do not speak to each other; each does its own task. The best starting point is the MEAs, which require each country to develop and submit an implementation plan. Perhaps the project should start with a review of those implementation plans.

Mr. Matthew Stillwell added that there are similar problems at the MEA secretariats themselves. Each is so involved in its own work, it is hard to talk to others about how their work is complementary.

2.3 Suggestions for Input Indicators

Mr. Ken Markowitz asked what the indicators are that we should try to look at, so when we go to the pilot project countries, we have a clear sense of what we are asking for? He suggested starting with recommendations for basic input indicators. What inputs would we want to look for to be able to get data to assess efficiencies? What types of data would be helpful?

Dr. Iwona Rummel-Bulska pro-

posed that one indicator can be the number of focal points there are – if an MEA has 10 focal points, something is clearly wrong.

Mr. Sibusiso Gamede added that the number of compliance and enforcement personnel charged with the responsibility for implementation of MEAs should be considered as an input indicator, as well as a skills and expertise assessment to try to reconcile human capital with what the enforcement and compliance agency is supposed to do.

Mr. Poul Byskov stressed stakeholder identification – defining who all the actors are (companies, etc.). and perhaps finding indicators that can help make companies accountable.

Ms. Olya Melen suggested as indicators: (1) The number of cases of non-compliance. (2) The number of complaints brought by different bodies.

Dr. Warapong Tungittiplakorn suggested exploring whether there is a strong commitment from the decision-makers and others at a high level in the implementing authority, as well as whether there is a national implementation plan.

Ms. Tamara Malkova (Ukraine) suggested as an indicator whether there are linkages between the environmental ministry and other non-environmental ministries (e.g., financial, transportation) that might be responsible for parts of a convention. So we might want to look at how often or in what papers non-environmental structures give recommendations or instructions for, or even just mention, MEAs.

Mr. Alberto Ninio proposedas an indicator financial sources, allocation, and sustainability for compliance and enforcement.

Ms. Linda Duncan (Canada) presented the following four possible indicators: (1) Have they clearly delegated responsibility to a specified authority to implement and report on the MEA? (2) Are there regular reports? (3) Has the country developed and implemented a strategic plan with an associated budget and timeline to implement the MEA? (4) Is there some sort of measure for progress from report to report? Have they set performance targets for themselves? Is there a peer-reviewed baseline against which to measure progress?

Ms. Olya Melen also recommended looking at the amount of national legislation that has been amended after ratification of the MEA.

Mr. Carl Bruch highlighted the following: (1) Regulations and standards that have been amended, not just legislation. (2) Technical resources and equipment. (3) Is there an institutional requirement for communication and coordination among agencies at the national level (horizontally) and among agencies at different levels (vertically)?

Ms. Elizabeth Mrema emphasized looking at the personnel, resources, and other aspects of the institution itself. Also, the implementation plan serves as the baseline. Other issues will come in when doing the plan, such as whether there are laws in place and whether they are effective. So, does the country have a review process?

Mr. Ken Markowitz highlighted the following: (1) Technical assistance and training., (2) The level of capacity building within the institution (e.g., the number of trainings). (3) The level of support coming from outside organizations (e.g., the World Bank) for capacity building.

Mr.Ike Ndlovu (Department of Environmental Affairs and Tourism, South Africa) expressed the need for an index of some sort between legal and permitting requirements and the staff and resources we have to meet those requirements.

Dr. Rosalind Reeve contributed the following: (1) Levels of penalties. (2) Is there an enforcement strategy?

2.4 Suggestions for Output Indicators

Dr. Iwona Rummel-Bulska suggested as an output indicator the number of permits given, taking into account the need for an Environmental Impact Assessment?

Ms. Olya Melen contributed the following: (1)The amount of information collected and disseminated by the focal point. (2) How often do the enforcement bodies

cooperate and communicate?

Ms. Tamara Malkova pointed out that the number of public outreach activities to the regulated community and the public would be a useful output indicator.

Mr. Alberto Ninio recommended the fines and penalties imposed and actually collected that remain at least in part with the environmental enforcement agency.

Dr. Carl Bruch stressed (1) The number of trainings and the number of people trained, perhaps broken down into specific units and sectors. (2) The number of prosecutions. (3) The number of convictions.

Ms. Elizabeth Mrema suggested the following: Has the review process been used, and how often?

3 RECOMMENDATIONS FOR INECE

Participants in the workshop offered a variety of comments and suggestions, including:

(1) The importance of having department heads and decision-makers with a strong interest in doing the project;

(2) Starting data collection with the MEA Secretariats, providing contacts and focal points in target countries;

(3) The implementation plan required by many MEAs could be a good source of information;

(4) Consider who the ultimate audience is for the indicators;

(5) Consider at what level of the implementation process we are looking for synergies, and how focused on a sector you want to get; and

(6) Consider creating a body or committee to coordinate collection of all the data.

Suggestions from the group for input indicators included:

(1) Number of personnel charged with implementation of MEAs,

(2) Stakeholder identification,

(3) Number of violations,

(4) Number of focal points,

(5) Whether there is support from a high level in the implementing authority,

(6) Whether and how often non-environmental agencies mention MEAs in their documentation and efforts,

(7) Financial sources, allocation, and sustainability for compliance and enforcement,

(8) Whether there is an authority with a clearly delegated responsibility to implement and also to report on the MEA;

(9) Whether the country has developed and implemented a strategic plan with an associated budget and timeline for implementation of the MEA;

(10) Whether national legislation, regulations, and/or standards were changed after MEA ratification;

(11) Amount of technical resources and equipment, and amount of technical assistance and training;

(12) Adequacy of focal points;

(13) Whether there is an institutional requirement for horizontal and vertical communication;

(14) Level of capacity building within institution, the number of trainings, and whether there is support coming from outside organizations (e.g., the World Bank) for capacity building;

(15) An index of some sort to correlate requirements to be met with staff and resources available to meet them;

(16) Whether the country has a review process.

Suggestions for output indicators included:

(1) Number of inspections, instances of violations, enforcement cases, permits, prosecutions, and convictions;

(2) Quality of inspections;

(3) Amount of information collected and disseminated by the focal point;

(4) Amount of cooperation with other stakeholders that enforce aspects of MEAs;

(5) Development of a national implementation plan and enforcement strategy;

(6) Whether there has been outreach to the regulated community and the public;

(7) Amount of fines / penalties imposed and actually collected and that remain at least in part with the environmental enforcement agency;

(8) Whether the review process is used;

(9) Whether there is a baseline against which to measure progress over time.

REGIONAL CONFERENCE, OPENING SPEECH BY JO GERARDU

On behalf of the INECE co-chairs and the Executive Planning Committee, welcome.

My colleague Davis Jones from the US Environmental Protection Agency and I, Jo Gerardu from the Netherlands Ministry of Housing, Spatial Planning and the Environment, are very honored to address you at this regional conference.

We are very pleased to see such a great turnout of our colleagues from Algeria, Tunisia, Mauritania, and our wonderful host country, Morocco.

We have worked very closely with the Moroccan ministry to develop this program to strengthen compliance and enforcement in Northern Africa.

The three goals of INECE are:

1) raising awareness of the importance of environmental compliance and enforcement;
2) developing networks; and
3) strengthening capacity.

This is the perfect opportunity to further these goals and to open up new doors and further cooperation with new partners.

We are very happy that you have all come together for this meeting.

It provides the perfect example for the international conference that begins here tomorrow.

Again, it is our pleasure to welcome you.

LA CONFÉRENCE RÉGIONALE, DISCOURS D'OUVERTURE DE JO GERARDU

Au nom des co-présidents et du Comité Executif de Planification de l'INECE, je vous souhaite la bienvenue.

Mon collègue Davis Jones de l'Agence Americaine pour la Protection de l'Environnement et moi même, Jo Gerardu du Ministère de l'Habitat, de l'Amènagement Spatial et de l'Environnement des Pays-Bas, sommes très honorés de nous addresser à vous à cette occasion.

Nous sommes très heureux de remarquer cette forte présence de la part de nos collegues Algeriens, Tunisiens, Mauritaniens, et merveilleux hôtes du Maroc.

Nous avons travaillé étroitement avec le ministère de l'environnement du Maroc afin de développer ce programme qui vise le renforcement de la mise en application et la conformité environnementales des pays de l'Afrique du Nord.

Les trios objectifs de l'INECE sont:

1) Sensibiliser sur l'importance de la mise en application et la conformité environnementales ;
2) Créer des réseaux; et
3) Renforcer les capacitiés.

C'est une meilleure opportunité pour réaliser ces objectifs et ouvrir de nouveaux horizons et promovoir la coopération avec de nouveaux partenaires.

Nous sommes trés heureux de vous avoir parmi nous dans cette rencontre.

Cette rencontre offre un bon example pour la conférence internationale qui débutera demain.

Encore une fois, merci d'avoir répondu présent a l'invitation a prendre par a cette rencontre.

SUMMARY OF THE INECE REGIONAL CONFERENCE FOR MOROCCO AND NORTH AFRICA

DI COSMO, FRANCESCA

U.S. Environmental Protection Agency Region 3, 1650 Arch St., Philadelphia PA 19103-2029, United States, dicosmo.francesca@epa.gov

In conjunction with the Moroccan Ministry of Territory Planning, Water and Environment, INECE hosted a Regional Conference for local and regional professionals on issues of particular relevance to Morocco, North Africa, and the Mediterranean region.

Over 65 participants from governments and nongovernmental organizations (NGOs) enthusiastically engaged in strategic discussions on advancing the implementation of environmental compliance and enforcement in the region. The Conference provided a unique opportunity for government-government and government-NGO collaboration. The workshop was conducted in French with limited English translation.

Participants concluded that a regional enforcement network, affiliated with and supported by INECE, was an essential tool for promoting best practices and building capacity in the region. Participants agreed that the new network should capitalize on lessons learned from existing networks, including their goals and objectives.

The following is a summary of questions, comments, and ideas from participants about the development of a regional enforcement network:

- Shall the network be managed by the Government or an NGO? The Government can make suggestions. The NGO can introduce the debate.
- What is the definition of the Region that the Network will cover? Will it be all of North Africa or will it be sub-regional (i.e. Magreb only)?
- The new network should capitalize on the goals and objectives of other existing networks, using those objectives to develop the objectives for the INECE network.
- The new network should utilize the lessons learned from other networks.
- Each country has a clear set of enforcement goals that are set by the environment ministries. What is the value-added of this network? What will be its mission? What are the expected outcomes? Will there be separate goals or outcomes for each country? For all countries? Will it protect their values? These questions should be answered to develop an appropriate network for Northern Africa.
- Starting from the assumption that the network is supported by the governments and fits into other networks, the organizers of the new network need to analyze what is happening now (the current state of affairs) relative to enforcement within each country as a basis to understand their concerns and objectives. The new organization needs to be justified. What is the need for the network? Links to economic development would be helpful and useful to show how laws and enforcement can be linked to job opportunities. Also, a list of projects that are underway would be useful (to show that capacity building is underway and the lessons learned from them).
- An understanding of who is doing what in this field would be useful to avoid overlapping with the missions, objectives, projects, etc., of other networks.

We need to define the geographic scope of this new network under INECE. The Magreb is probably a good idea. NGOs should be included. If government is included, then it can get complicated. But, the role of government needs to be considered. What will the role of government be?

- Will this be an administrative organization or an NGO organization? NGOs can get a lot of things done and can help with implementation. How will the network operate? A combination of focal points may be useful. The network should support NGOs at the local level as well as sustainable development.
- Use the lessons learned from other organizations. Also, the platforms that other organizations use may be used for this organization (e.g., the United Nations Environment Programme's program for climate change). There are other programs for international cooperation; we should think about using existing structures and add this network to it.
- An enforcement network for North Africa is needed. But, how can we tackle the issue? Developing terms of reference for the development of this network may be a good way to organize it. The organizers should know the local circumstances to make sure it will succeed. We should think about the issue of "informal", as well as look at other networks and see those as experiences and examples, especially the successful ones. The three countries of the Magreb share similar problems. We need to highlight the objectives of the project, its benefits, and the international support, both financial and technical.
- The setting up of the network for the Magreb is not the point. We need to start from what brings us together. Lots of things are common. Sustainability of the network is very important. Should the network be multi-disciplinary or mono-disciplinary? Broad projects or more specific projects? Network among jurists or lawyers? Specialized networks may have a better chance of succeeding. The Magreb as the basis for the network is probably a good start; the network can be expanded later. The field of environmental legislation should be the cornerstone. Focus on a specific area, but determining the scope of the network is important.
- The organizers of the network should look at today's program for guidance relative to what the network can achieve and issues to be covered. It is up to everyone here to take the first steps.
- Local governments should be included in the network. For example, municipalities in many countries are responsible for the management of municipal solid waste, and they are therefore responsible for compliance in this area. Involving them in the network would be a way to help educate them about enforcement and compliance issues that relate to them.
- An example of a good network that is working in Northern Africa is the North African Network of Humid Areas. They rotate the coordination of the network among the member countries. They have quarterly meetings. It may be a model to study.
- A network for the Magreb that will focus on environmental laws is a good idea. It should also focus on shared experiences and shared information. Also, rotating the secretariat, having a bi-annual conference, making national reports, having a national coordinator, and involving relevant stakeholder groups can gain the commitment of members for the program. The network can charge fees or it can be free, depending on funding. The network should be developed with local (Magreb) resources.
- The European Union (EU) supports a regional network for Northern Africa. It may be a good idea to link this new network with ongoing processes of EU standards and their networks.
- Efficient networks should also include the private sector.

FIELD VISITS

Wednesday, 13 April 2005

In conjunction with the Moroccan Ministry of Territory Planning, Water, and Environment, INECE arranged for a field trip to local sites. All participants traveled by bus to the 3 sites described below.

CIMENTS DU MAROC (CIMAR)

In 1997, the L'Association Professionnelle des Cimentiers (APC) (Professional Association of Cementers) entered an agreement with the Moroccan Ministry of the Environment. The members of the APC (including Ciments du Maroc) agreed to take all necessary measures to solidify the quality objectives of the National Strategy for Environmental Protection and Sustainable Development, to work with the Environment Ministry and other relevant departments for rational management of natural resources and energy, to comply with national regulations relating to environmental protection and rational resource management, to consider an integrated approach for protection of the air, water, and soil, and to limit as much as possible negative impacts on the environment. The APC members signed this agreement because the government created a fund to help industry clean up its pollution, highlighting the potential influence of government-provided .economic assistance. Following this agreement, CIMAR voluntarily reduced its dust pollution and gas emissions. CIMAR has also received ISO 14001 certification.

SIDI KAOUKI

Wind energy offers excellent possibilities for non-polluting electricity production for medium to high energy needs. It also offers the potential to provide an electricity supply to villages located far from the national grid, where clean energy can help improve social and economic development. In October 2000, Sidi Kaouki started supplying electricity through a hybrid wind-diesel system connected to a local grid at low voltage. Sidi Kaouki makes possible a supply of electricity to households in the Kaouki village, located in the province of Essaouira, in southern Morocco (170 km from Marrakech), which did not have electricity before. The wind turbines are a project of CDER (Centre de Développement des Energies Renouvelables), a government agency with the Office Nationale d'Electricité. CDER sited a wind turbine project here because of the high winds in the area, as it has done in other windy areas of Morocco in an effort to reduce greenhouse gas and other emissions from the process of generating electricity.

VILLAGE DES POTIERS

Village des Potiers (Potters' Village), located 6 km outside of Marrakech, is a place where local potters make and sell their wares. Pottery artisans formerly used biomass and tires, among other things, for curing their products in traditional ovens. This resulted in greenhouse gas emissions, air pollution, forest and agriculture degradation, and a poorer quality product. An NGO called CDRT (Centre de Développement de la Région de Tansift) tried to convince the pottery artisans to use gas ovens instead to address health and air pollution concerns, but the artisans were resistant to change because of the expense of changing ovens. CDRT raised funds and guaranteed loans for the artisans to change their ovens to gas. The first few artisans to use the gas ovens produced a superior product

and could work under more conditions (e.g., when it rains) and thus made more money, offsetting the costs of the new ovens. In fact, between the improved product quality and efficiency and the reduced maintenance costs, gas ovens saved the artisans money. After the success that the first few artisans had with the gas ovens, many are now following in their path, with the majority of artisans now using natural gas ovens. As a consequence, the air quality in the area has improved dramatically. Village des Potiers highlights the role that NGOs and economic assistance can play.

PRESENTATION OF THE CONFERENCE STATEMENT AND DISCUSSION OF THE FUTURE OF COMPLIANCE AND ENFORCEMENT

SUMMARY

Gerard Wolters, Inspector General of The Netherlands Ministry of Housing, Spatial Planning, and the Environment (VROM) moderated the final session of the conference. During the closing session, Mr. Wolters described the key messages that emerged from the conference and presented the final Marrakech Statement to the conference participants. The participants were then invited to share comments on the results of the conference and to share their views on the future of compliance and enforcement.

Following the participants' comments, short film of the conference was presented. The film highlighted the conference message that "environmental compliance and enforcement are the foundation for the rule of law, good governance, and sustainable development," through short interviews with participants. The film also depicted the networking opportunities provided by the conference and showcased the culture of Marrakech.

Following the film, Mr. Wolters paid a special tribute to Jo Gerardu, who has overseen INECE's dramatic evolution since its beginnings in 1990 as a bilateral exchange between the U.S. Environmental Protection Agency (U.S. EPA) and the Dutch VROM. Through Jo's hard work, dedication, vision, and leadership, INECE has grown into a broad partnership of government officials, NGOs, and international organizations from all reaches of the globe.

Mr. Gerardu delivered a brief set of remarks, emphasizing the role of each of the participants in supporting the network. Mr. Wolters concluded the conference by calling for each participant to fulfill the commitments made during the conference and embodied in the Marrakech Statement.

1 INTRODUCTION

I want to thank all of you for providing us with your comments on the Co-Chairs' Conference Statement. We think it has come together very well and presents a powerful statement about our message and about the challenges and opportunities we face.

The Conference Committee that worked on this statement included Donald Kaniaru, Antonio Benjamin, Tony Oposa, Ladislav Miko, Paula Caldwell, Krzysztof Michalak, Angela Bularga, Phyllis Harris, Durwood Zaelke, and myself, with assistance from Jo Gerardu, Davis Jones, Matthew Stilwell, and Ken Markowitz.

The Secretariat staff provided a working draft to the Executive Planning Committee and to the Conference Statement Committee. It was modified in several versions with assistance from all of you. Again, we thank you for all these contributions.

Let me recall what are in my view the substance, the message, and the most important part of the statement.

— **Strengthening governance and the rule of law**

Sustainable development depends upon good governance, good governance depends upon the rule of law, and the rule of law depends upon effective compliance and enforcement.

— **The benefits of investing in compliance and enforcement**

Investing in compliance and enforcement benefits the public by securing a

healthier and safer environment for themselves and their children. It benefits individuals, firms, and others in the regulated community by ensuring a level playing field governed by clear rules applied in a fair and consistent manner. Countries benefit by creating a predictable investment climate based on the rule of law, thereby promoting economic development.

— Strengthening efforts at the domestic and international levels

The need to strengthen compliance was recognized by heads of state and government at the 1992 Rio Earth Summit. Agenda 21 directs countries to enhance their compliance and enforcement capacity. At the international level, countries must respect their commitments in multilateral environmental agreements.

This is the important message you have to take home and communicate to your colleagues, your governments, and your organizations.

2 COMMENTS FROM PARTICIPANTS

INECE is a network and our real success is the work we are going to do together. I understand that there are some participants who would like to talk about new initiatives that have evolved out of the conference, so I would now like to open the floor for comments from people who want to make statements.

— **Alberto Ninio** (World Bank): Mr. Ninio commented on his support for the indicators project and complemented the organization of the conference as "remarkable." Mr. Ninio conlcluded by stating that the World Bank will continue to work with INECE.

— **Ada Alegre** (Ministry of Energy and Mining, Peru): "I think the success of this conference was based on the excellence of the speakers and facilitators but especially on the hard work of the INECE team. Also the origin of the participants from different regions of the world, and the different moments to meet each other, were very important. The conference had a good balance between law issues and a friendly atmosphere." Ms. Alegre concluded by stating that she will work in Peru to try to improve enforcement, based on lessons learned during the conference and experiences shared with her by other participants.

— **Elizabeth Mrema** (United Nations Environment Programme): Ms. Mrema complimented the interactive model used throughout plenary panels and workshops. Ms. Mrema also noted the need to "enhance and increase participation of enforcement personnel and agencies from developing countries in future conferences." Ms. Mrema noted that UNEP will continue to strengthen their bond with INECE.

— **Neil Davies** (Environment Agency (England and Wales)): Mr. Davies praised the conference and expressed his enthusiasm for working with INECE in the future on emissions trading, "in conjunction with other countries, including the U.K."

— **Fouad Zyadi** (Ministry of Territory Planning, Water and Environment, Morocco): Mr. Zyadi commended the conference participants for accomplishing "six months of work in one week." Mr Zyadi made a commitment to working with INECE to explore opportunities for capacity building in Morocco.

— **Ladislav Miko** (European Commission, Environment DG): Dr. Miko explained that this was his third INECE Conference, and that while it was great every time, this conference was the "best ever". He declared that he could not remember any other INECE conference where participants got so familiar with each other and had so many opportunities for official and unofficial discussions. He praised the combination of plenary panels and specific workshops, the active involvement of participants, and the social program. Overall, he described the conference as "simply a

great success." Dr. Miko concluded by confirming his commitment to identify enforcement cooperation opportunities between the European Commission and INECE.

— **Azzedine Downes** (International Fund for Animal Welfare): Mr. Downes commented that he felt "quite positive about future cooperation in developing a wildlife enforcement network."

— **Tom Maslany** (U.S. Environmental Protection Agency, Ret.): Mr. Maslany praised the conference and commented on the need to "collect empirical data" about enforcement efforts.

— **Maria Comino** (Department of Infrastructure, Planning and Natural Resources, Australia): Ms. Comino noted that INECE's message to the public is capacity building. She congratulated INECE on the very successful conference and invited the network to have the 8th International Conference "down under".

— **Warapong Tungittiplakorn** (Pollution Control Department, Thailand): Mr. Tungittiplakorn thanked the organizers for their hard work in arranging his travel to the Conference. He also noted that he had "learned a lot and met wonderful people," and announced the August 2005 meeting designed to launch a regional environmental compliance and enforcement network in Asia.

— **Gloria Ramos** (National Environmental Action Team, Philippines): Ms. Ramos noted that she appreciated the developing countries' perspectives that were presented in the workshops, and that the presence of lawyers at the conference had been important. "We leave here with bigger hopes, heavier packages from all the materials we've received, and allies in enforcement we can call upon."

— **John Cruden** (U. S. Department of Justice): Mr. Cruden complimented Conference Chairman Gerard Wolters, and commented, "This is my second conference. I've met heroes, found allies, and developed new relationships, including with representatives from South America. The most valuable item I take home from the conference is the email contact list. I very much hope to continue the friendships that have been made here."

— **Antonio Benjamin** (Law for a Green Planet Institute, Brazil): Mr. Benjamin noted that coming from a biologically mega-diverse country like Brazil, he "would like to recognize the importance of this conference's increased focus on green issues. Although INECE was founded by a group of dedicated people in the brown sector, it is critical for the network to find a balance between brown and green issues. I think it was done this year." Mr. Benjamin thanked the Executive Planning Committee on behalf of the Brazilian delegation.

— **Roberto Rodriguez** (Comisión Centroamericana de Ambiente y Desarrollo (CCAD), El Salvador): Dr. Rodriguez affirmed the commitment of CCAD to continue to work with INECE.

— **Melissa Fourie** (Department of Environmental Affairs and Tourism, South Africa): Ms. Fourie, commenting on behalf of Ike Ndlovu, noted that South Africa is starting off with enforcement and compliance for waste and air, and thanked the British High Commissioner, Clair Twelvetrees, and Sue Holland for their assistance in facilitating the travel of South African participants to this important event.

— **Sibusio Gamede** (Basel Convention Regional Centre, South Africa): Mr. Gamede described the conference as "very educative and entertaining." He noted that "optimism is needed for compliance and enforcement" and that "capacity building is taken for granted but we still struggle for it." He concluded by acknowledging that he hoped there will be more participants from Africa at the next conference.

— **Albert Koehl** (Sierra Legal Defense Fund, Canada): Mr. Koehl stated, "this

was a fabulous opportunity and I plan to keep in touch with these dedicated and passionate participants to further develop ideas from the conference."

- **Krzysztof Michalak** (Organisation for Economic Co-operation and Development): Mr. Michalak made three points in his comments: (1) as embodied in the Conference Statement, enforcement and compliance are crucial tools to build and support good governance; (2) another point that emerged from the conference was that countries have responsibilities to comply; and (3) the conference provided many valuable networking opportunities for discussing new issues and what to do. Mr. Michalak concluded, "I look forward to using these tools and to the next conference."
- **Palamagamba Kabudi** (Institutional and Legal Framework for Environmental Management Project, Tanzania): In his remarks, Mr. Kabudi expressed the sentiment that "I am because you are", appreciative of the exchange of ideas that occurred during the conference. He also said, "African optimism says 'make the eagle rise up, and see the horizons', which has optimism. Success stories say that we should be optimistic and not despondent. Capacity building is not a thing we take for granted, but something we strive for. We expect that representation of Africa will be much more prevalent in future INECE conferences."
- **Renzo Benocci** (Environment Canada): Mr. Benocci thanked Paula Caldwell for significantly expanding the Canadian delegation that attended this conference, in comparison to previous ones.
- **Hocine Benyahia** (National Federation for the Protection of the Environment, Algeria): Mr. Benyahia, who is part of a small nongovernmental organization in Algeria, described the unique learning experience that the conference provided, and hoped that this was not the last one.
- **Linda Duncan** (Consultant on Environmental Law & Policy, Canada): Ms. Duncan complimented the conference participants on stepping beyond the lines defining what groups they represent to form a true cooperative enforcement network.

Gerard Wolters concluded the remarks by thanking the participants for their comments.

3 THANKING THE CONFERENCE STAFF, HOSTS, AND PARTICIPANTS, PRESENTED BY GERARD WOLTERS

There are also several others who were critical to making this conference a success. First and foremost, I would like to thank the INECE Secretariat staff, who worked night and day this week to make this conference happen: Ken Markowitz, Marcy Markowitz, Dave Grossman, Scott Stone, Meredith Reeves, Aesah Javier, Mike Frizzell, Melanie Nakagawa, Linda Massopust, Davis Jones of the US EPA, and, of course, Durwood Zaelke.

I would also like to thank our hosts here in Morocco for all of their efforts. In particular, I would like to thank Fouad Zyadi and Naima Oumoussa and others with the Moroccan Ministry of Territory Planning, Water and the Environment.

Special thanks must be given to Mohamed Rida Derder, the North African Counsel with the INECE Secretariat and a jack-of-all-trades who arranged the substance of the regional conference and many of the logistics of this conference, and who helped many of you get your luggage back.

And, of course, I would like to extend thanks to the hotel staff. The hotel managers and staff have made our stay here very enjoyable and have gone out of their way to accommodate our requests. We appreciate all of their efforts.

Also I would like to thank all the speakers, moderators, facilitators, and rapporteurs who contributed to the success of our conference. And of course this also refers to all those who have been instrumental to the success of the Regional Conference on Saturday and those who were

facilitating the Principles of Compliance and Enforcement Executive Course.

Finally, friends and colleagues, I would like to thank all of you for participating in this conference and sharing your thoughts and insights. INECE will benefit from all your valuable input during plenary sessions and all the workshops. You all are the stars of this conference.

Of course, you are also the stars of the film by Douglas Varchol, which will capture the story of this conference and the stories of some of its participants. I thank Douglas for his efforts this week to compile a documentary film for us about the conference. Douglas is a filmmaker, not a film editor, so the edits will take place over the coming weeks. But he has kindly agreed to show a short preview, which we will now see. Enjoy.

4 JO GERARDU'S CLOSING COMMENTS, PRESENTED BY JO GERARDU

What is there to say after this draft of an Oscar nominee? I want to thank you for all the compliments that have been addressed to me for my activities as an INECE participant. I want to make three remarks but do not worry; I'm not keeping you away from your lunch for long.

In 1989, in Washington, D.C., there were three of us: Cheryl Wasserman of U.S. EPA, Bert Metz of the Royal Dutch Embassy, and myself. We met at an exchange program on compliance and enforcement between the U.S. EPA and our Ministry of VROM. At that moment, we decided to follow our idea to organize a larger exchange meeting in Utrecht in 1990 with participants of other countries and organizations. Our bosses agreed with our ideas and this was the moment INECE was conceived, and you demonstrated this week how well this idea has been growing and has matured.

INECE is a success not only due to the work we were able to do. You can be a very good photographer but if there is nothing in your picture you have no results. I feel the same about INECE; you as participants are INECE, you are the network, and I'm proud to be part of your network.

I want to thank Gerard for the possibilities he gave me to work for INECE over the years. Most of all, I want to thank my wife Marij, who never really complained when I was again abroad. She too made this happen.

I end with a phrase out of a song of the Rolling Stones: "INECE I'm gonna miss you". Thank you all and good luck.

5 FINAL REMARKS, PRESENTED BY GERARD WOLTERS

We worked hard but enjoyed ourselves. We have renewed old friendships and made new ones. I hope this conference has been as rewarding for all of you as it has been for me. But we must not allow the experiences of this week to be confined to this week only. Let this conference be a catalyst for further action. I want to recall to you the words of Phyllis Harris, one of our Co-chairs, that INECE is not the Executive Planning Committee, nor is INECE the Secretariat, but INECE is all of you.

So to all of you: LENAFTAHH ABUWAB (A)TTAA-WOON (Arabic for *"Let us open the doors of partnership"*)

Again, I thank you all and have a safe trip home. And with these words, I declare the 7th INECE International Conference on Environmental Compliance and Enforcement closed.

EVALUATION OF INECE'S 7th INTERNATIONAL CONFERENCE

1 INTRODUCTION

The 7th INECE Conference was attended by 188 participants from 63 countries and 124 organizations, representing all regions of the world. The Conference presented six plenary sessions with 25 speakers, and 24 workshops with 83 facilitators and rapporteurs. Participants represented national governments (55%), NGOs (9%), regional governments (6%), international organizations (15%), bank and development agencies (5%) and other organizations (10%).

strengthening the rule of law and good governance and, ultimately, achieving sustainable development objectives.

The Conference program achieved its best marks in encouraging ongoing international exchange and regional networking, fostering exchange of expertise and learning through active participation, number of participants, relevance of the conference to current work, and usefulness. Lowest marks (between Good and Very Good) were given to the number and types of countries represented and the site visits.

Geographic Regions Represented			Organization Types Represented		
	Participants			Participants	
	No.	%		No.	%
Africa	10	5.3	National Government	103	54.8
Asia & the Pacific	8	4.3	International Organizations	29	15.4
Central & Eastern Europe	19	10.1	Non-governmental Organization	16	8.5
Central America	2	1.1	State/Province/Regional Gov't	11	5.9
South America	8	4.3	Banks and Development Agencies	9	4.8
International	35	18.6	Municipal/Local Government	0	0.0
Middle East & North Africa	35	18.6	Unspecified	1	0.5
North America	39	20.7	Other	19	10.1
Western Europe	32	17.0			
Total	188	100	Total	188	100

2 SUMMARY OF THE EVALUATION OUTCOMES

Of the 188 participants, 103 completed conference evaluations. Participants overwhelmingly provided high marks for the Conference. The average rating for most questions ranged between Excellent and Very Good.

They expressed high satisfaction with the conference. Participants expressed their greatest approval for the conference goal of developing and communicating a strong message on the critical role of environmental compliance and enforcement in

The three conference workshop sessions and six plenary sessions were very well received, with high approval ratings. Overall, the participants were enthusiastic about the substantive sessions, the opportunities for networking, and the Conference as a whole, as indicated by the narrative comments that participants shared on the evaluation, including:

- "An excellent forum for collective learning among compliance and enforcement professionals."
- "A fine conference providing great substantive value."

— "I think the success of this conference was based on the excellence of the speakers and facilitators.... Also, the origin of the participants from different regions of the world and the different moments to meet each other were very important."

— "The conference has given me a clear picture of what needs to be done to achieve effective enforcement in South Africa."

— "I learned a lot and feel motivated to fight for the defense of the environment. Besides that, I met many people with whom I had the opportunity to exchange experiences."

— "An excellent conference. I have renewed contacts, made new contacts, and most importantly, feel energised to do more in the future for effective compliance and enforcement."

— "On Sunday, I participated in the Principles of Environmental Enforcement Training course. This course stimulated me to organize training for inspectors in my country."

— "I do not remember any other conference I attended where participants got so familiar with each other and had so many opportunities for discussion – in official and unofficial ways."

— "It has been a pleasure to be part of the 7th INECE Conference, and I'm looking forward to putting some of lessons learnt into practice."

— "I am very glad that I had the opportunity to meet so many experts from different countries and to share their experience and knowledge."

3 RESULTS

Each Conference participant received a blank evaluation form and was asked to complete it prior to their departure from the Conference. Most questions on the evaluation could be answered by assigning a number between 1 and 5 as the response, where 1=Excellent, 2=Very Good, 3=Good, 4=Fair, and 5=Poor. This section presents the original evaluation questions and shows the average rating for each evaluation question.

SECTION 1: CONFERENCE GOALS	
1.1 How did you feel about the conference's goal of developing and communicating a strong message on the critical role of environmental compliance and enforcement in strengthening the rule of law and good governance and, ultimately, achieving sustainable development objectives?	**1.51**
1.2 How successful did you feel the conference was in achieving this goal?	**1.81**
1.3 How did you feel about the conference's goal of strengthening the capacity of governments, development banks, and other institutions to measure and manage the effectiveness of their compliance assurance and enforcement activities by launching new environmental compliance and enforcement indicator pilot projects that build upon the experiences of current initiatives?	**1.97**
1.4 How successful did you feel the conference was in achieving this goal?	**1.97**

1.5	How did you feel about the conference's goal of inspiring new enforcement cooperation projects on issues of pollution, natural resources, and biodiversity, and creating plans that set forth clearly defined goals, project partners, funding strategies, and implementation?	**1.83**
1.6	How successful did you feel the conference was in achieving this goal?	**2.11**
1.7	How did you feel about the conference's goal of facilitating professional development within the compliance community and discussing the best compliance and enforcement tools, techniques, and theories from around the world, identifying key research and data collection needs?	**1.67**
1.8	How successful did you feel the conference was in achieving this goal?	**1.96**

SECTION 2: ASSESSMENT OF THE CONFERENCE		
2.1	How successful do you feel the conference was in:	
	Shaping and confirming the role that INECE will play in the future?	**1.82**
	Forming effective partnerships among those working in compliance and enforcement?	**1.74**
	Increasing institutional capacity to enhance existing and develop new environmental compliance and enforcement programs?	**2.13**
	Serving all people involved in the design of environmental compliance and enforcement programs?	**2.04**
	Encouraging ongoing international exchange and regional networking?	**1.45**
	Fostering exchange of expertise and learning through active participation?	**1.61**
2.2	Concerning the participants at the conference, how do you feel about:	
	The number of individuals in attendance?	**1.68**
	The number and types of countries represented?	**2.41**
	The number and types of organizations represented?	**2.13**
	The mix of experience?	**1.83**
2.3	Concerning the structure of the conference, how do you feel about:	
	The optional pre-conference training workshop on *Principles of Environmental Compliance and Enforcement*?	**1.74**
	The balance between Panels and Workshops?	**1.79**
	The site visits?	**2.61**
	The length of the conference?	**1.99**

2.4	Concerning the usefulness of the conference, how do you feel about:	
	The relevance of this conference to your current work or functions?	**1.60**
	The extent to which you have acquired information that is new or useful to you?	**1.74**
	The focus of this conference on what you specifically needed or wanted to learn?	**1.91**
	The overall usefulness of the conference?	**1.60**

SECTION 3: DAY ONE — SPECIFIC CONFERENCE PLENARY THEMES AND TOPICS — MONDAY MORNING		
Opening Plenary Session: Building Blocks of Good Governance		
3.1	Panel 1 – Relationship between Good Governance and Environmental Compliance and Enforcement	
	Usefulness of material?	**1.90**
	Mix of topics covered on panel?	**1.78**
	Opportunity for discussion?	**1.90**
3.2	Panel 2 – The Compliance and Enforcement Message	
	Usefulness of material?	**1.87**
	Mix of topics covered on panel?	**1.84**
	Opportunity for discussion?	**2.03**
End of Day Plenary (after workshops)		
3.3	Report out of workshop sessions	
	Usefulness of material?	**2.16**
	Opportunity for discussion?	**2.45**

SECTION 4: DAY ONE — WORKSHOPS — MONDAY AFTERNOON			
Please evaluate the workshop that you attended in Session 1:			
		Was the discussion valuable?	Were your expectations met?
1A	Economic Aspects of Compliance and Enforcement	**1.86**	**2.25**
1B	Compliance Incentives and Other Assistance	**1.67**	**1.75**
1C	Ecomessage/Interpol and the Police	**1.58**	**1.92**

1D	Compliance and Enforcement Theories and Design Principles	**2.08**	**2.92**
1E/F	Certification, Information Management, and Self-Monitoring	**2.00**	**2.00**
1G	Good Governance and the Rule of Law	**1.55**	**1.60**
1H	Communications Policy and Practice	**1.50**	**1.75**
1I	Citizen Participation in Environmental Enforcement	**1.33**	**1.67**

SECTION 5: DAY TWO — SPECIFIC CONFERENCE PLENARY THEMES AND TOPICS — TUESDAY MORNING AND AFTERNOON		
5.1	Panel 3 – Enforcement Initiatives: Stories of Success	
	Usefulness of material?	**1.75**
	Mix of topics covered on panel?	**1.65**
	Opportunity for discussion?	**1.88**
5.2	Panel 4 – Environmental Compliance and Enforcement Indicators: Measuring Performance, Managing Resources	
	Usefulness of material?	**1.89**
	Mix of topics covered on panel?	**2.03**
	Opportunity for discussion?	**1.99**
End of Day Plenary (after workshops)		
5.3	Roundtable discussion from Indicator Workshops	
	Usefulness of material?	**2.07**
	Opportunity for discussion?	**2.28**
5.4	Report out of workshop sessions 2E – 2I	
	Usefulness of material?	**2.12**
	Opportunity for discussion?	**2.37**

SECTION 6: DAY TWO — WORKSHOPS — TUESDAY AFTERNOON		
Please evaluate the workshop that you attended in Session 2:		
	Was the discussion valuable?	Were your expectations met?
2A ECE Indicators: Getting Started		
Session A-1	**2.00**	**2.40**

	Session A-2	**1.82**	**1.95**
	Session A-3/4	**1.69**	**1.64**
2B	Criminal Law and Environment: Prosecutors, Inspectors, Police, and NGOs	**1.62**	**1.85**
2C	Role of the Courts, Non-governmental Organizations, and the Press: Climate Litigation Case Study	**1.40**	**1.50**
2D	Guidance and Manual on Compliance with and Enforcement of MEAs	**1.70**	**1.80**
2E	Wildlife Enforcement Network	**2.00**	**2.13**
2F	Negotiated Compliance Agreements	**1.88**	**1.86**

SECTION 7: DAY THREE — FIELD VISITS — WEDNESDAY			
	Quality of case study?	Quality of presentation and tour?	Usefulness of field visit?
Village Des Potiers	**2.76**	**3.14**	**2.94**
Ciments du Maroc (CIMAR)	**2.77**	**2.89**	**3.15**
Sidi Kaoki (Wind Power)	**3.31**	**3.64**	**3.50**

SECTION 8: DAY FOUR — SPECIFIC CONFERENCE PLENARY THEMES AND TOPICS — THURSDAY MORNING AND AFTERNOON		
8.1	Panel 5 – Strengthening the Implementation of MEAs	
	Usefulness of material?	**1.95**
	Mix of topics covered on panel?	**1.87**
	Opportunity for discussion?	**2.05**

SECTION 9: DAY FOUR WORKSHOPS — THURSDAY AFTERNOON
Please evaluate the workshop that you attended in Session 3:

	Was the discussion valuable?	Were your expectations met?
3A Water Resource Management: Governance to Eliminate Poverty	**2.10**	**2.30**
3B Vessel Pollution	**1.17**	**1.00**
3C Hazardous Waste at Ports	**1.63**	**1.75**
3D Analyzing the Compliance and Enforcement Mechanisms of the Montreal Protocol	**1.71**	**1.50**
3E Enforcement of Emissions Trading Programs	**1.86**	**2.00**
3F Illegal Logging: Regional Strategies for Enforcement Cooperation	**1.00**	**1.33**
3G Penalties and Other Remedies	**1.25**	**1.25**
3H Multilateral Environmental Agreements: Synergies for Compliance	**1.65**	**1.88**

SECTION 10: DAY FIVE — PLENARY SESSIONS — FRIDAY		
10.1 Panel 7 – Compliance and Enforcement in the Context of Multilateral Development Banks		
	Usefulness of material?	**1.90**
	Mix of topics covered on panel?	**1.85**
	Opportunity for discussion?	**1.83**
10.2 Video		
	Usefulness of video contents?	**2.16**
	Do you feel it provided a good overview of the conference?	**2.23**
10.3 Presentation of Conference Statement		
	Appropriateness of the statement?	**1.71**
	Do you feel this reflects the purpose and goals of INECE?	**1.63**
10.4 Closing Ceremony Session		
	How do you feel about the closing session?	**1.74**

SECTION 11: EXHIBITS				
	Were the topics of interest to you?	Productive exchange of information?	Quality of the exhibit material?	Availability of materials?
UNEP	**2.16**	**2.16**	**2.04**	**2.19**
VROM	**1.84**	**1.93**	**1.61**	**1.68**
USEPA	**1.92**	**2.04**	**1.81**	**2.08**

CEC	**2.23**	**2.21**	**2.03**	**2.00**
Environment Agency	**2.00**	**2.08**	**1.95**	**1.95**
OECD	**1.91**	**2.03**	**1.81**	**1.96**
World Bank Institute	**2.42**	**2.28**	**2.13**	**2.21**
IFAW	**2.45**	**2.33**	**2.09**	**2.15**
IMAZON	**2.53**	**2.41**	**2.24**	**2.24**
Others	**2.00**	**2.00**	**1.94**	**1.96**

SECTION 12: ORGANIZATION OF THE CONFERENCE		
	City Location	**1.44**
	Schedule (workshops, free time, other)	**1.72**
	Speakers	**1.58**
	Service desk	**1.69**
	Chez Ali cultural event	**2.16**
	Comptoir Restaurant outing	**1.52**
	Contact with Executive Planning Committee	**1.82**
	Availability of Conference Staff	**1.40**

4 CONCLUSION

In conclusion, the participants expressed strong support for the organization and outcomes of the 7th International Conference on Environmental Compliance and Enforcement. Participants strongly supported the Conference goals and praised the Conference for providing many opportunities for networking between participants facing similar challenges in improving enforcement in their respective countries. Participants also complimented the organizers for bringing together an impressive group of speakers, all of whom are leading practitioners in the fields of environmental compliance and enforcement. The Executive Planning Committee will carefully study the numerical results and narrative comments from the evaluations. The lessons learned will be used to improve and shape future conferences and recommendations made by participants for INECE projects will be reviewed and incorporated into INECE's expanded Strategic Plan.

RAISING INDUSTRY'S ROLE IN THE FIELD OF ENVIRONMENTAL COMPLIANCE ASSURANCE: ELEMENTS OF REFORM IN KAZAKHSTAN

BULARGA, ANGELA,[1] KORCHEVSKY, ANDREY,[2] and SIRENDI, AARE[3]

[1] Project Manager, Environment Directorate, Non-Member Countries Division, Organisation for Economic Cooperation and Development (OECD), angela.bularga@oecd.org.

[2] Project Expert, Executive Director of the Centre for Health Protection and Environmental Projects, Kazakhstan health@nursat.kz

[3] Project Expert, former staff of the Estonian Environmental Inspectorate, Estonia aare.sirendi@kki.ee

OECD, 2 Rue Andre-Pascal, 75775 Paris Cedex 16, France

SUMMARY

Assisting transition economies in the region of Eastern Europe, Caucasus, and Central Asia to better align environmental policy development and implementation is the core objective of the Regulatory Environmental Programme Implementation Network (commonly referred to as REPIN). The Network facilitates access to best practices of environmental management and compliance assurance and implements pilot projects in individual countries of the region. Raising industry's responsiveness to the regulatory environmental compliance assurance program in Kazakhstan is one such pilot projects. Its results are presented in the current article.

1 INTRODUCTION

Over the last decade, the regulated community in the Eastern Europe, Caucasus, and Central Asia region, as in other regions, has become subject to new instruments of environmental policy that create incentives to comply with regulatory requirements or go beyond such requirements. In some cases, fervent discussions around new instruments, in particular voluntary approaches, eclipsed the need to assess the effectiveness of, and reform, more traditional instruments, including self-monitoring, self-reporting, and self-correction. To address this need, a pilot project was launched in Kazakhstan under the framework of REPIN.

DEFINITION OF "ENVIRONMENTAL SELF-SUPERVISION"

One of the first challenges within the project in Kazakhstan was to find a synthetic term that would best reflect the system of mandatory actions by the regulatees to ensure their own compliance with regulatory requirements (most often known as "self-monitoring"). The project team proposed to use the term "environmental self-supervision" and defined it as a system of organizational and technical measures, put in place and financed by regulatees, subject to environmental permitting or general binding rules in the field of environmental protection, in order to ensure their own

compliance with environmental requirements. This includes:

- monitoring of (i) operations; (ii) emissions of pollutants regulated by permits or general binding rules; (iii) ambient conditions in the vicinity of the facility concerned – with a scope that would balance environmental effectiveness with costs of monitoring;
- record-keeping of data obtained through monitoring of any unforeseen circumstances, non-compliance episodes, corrective measures, and complaints from the general public;
- providing reports to the competent authorities – in mandated cases, with a specified regularity, and in a duly aggregate form;
- undertaking other measures, such as assigning environmental responsibilities throughout the whole chain of management, providing basic environmental training, performing self-inspection, and implementing self-correction actions.

3 BENEFITS OF ENVIRONMENTAL SELF-SUPERVISION

For the regulated community, reliable data on emissions and the environmental impact of their production can have significant value from an economic viewpoint. For example, such data can help to better identify and reduce environment-related costs (that can be as high as 30 percent of operational costs in some branches), and minimize environmental liabilities. Disclosure of facility-specific data and comparison between enterprises within the same industrial sector, or with international benchmarks, can further indicate where cost-savings are possible. Furthermore, access to other companies' facility-specific data can build trust within industries that the government is targeting to ensure a level playing field.

The other primary benefits include the possibility of ensuring the earliest possible response to any environmental problem occurring because of malfunctions in production processes and, at the same time, reduce public spending on governmental compliance monitoring. Self-supervision data can provide a basis for verification of compliance with legal requirements and enforcement and for calculation of various charges. The program can also help to optimize national, regional, and local ambient monitoring systems and establish priorities for inspection.

Disclosure of facility-specific data can help citizens to take individual decisions that affect not only their health, but also economic well-being, such as where to buy property. Worldwide, the social relevance of self-supervision is growing due to higher public access to environmental information, in particular in light of establishment of national Pollutant Release and Transfer Registers.

While there are many other benefits of self-supervision, they will be harnessed only if its results are actually used by stakeholders within decision-making processes. Data collection for the sake of data will lead, most likely, to an erosion of the system's value.

4 DESIGN OF ENVIRONMENTAL SELF-SUPERVISION IN KAZAKHSTAN

In Kazakhstan, environmental self-supervision has a long history at the largest industrial facilities – some of the oldest enterprises reported establishing such programs in the mid-1970s. The design of self-supervision has many positive elements that correspond to good international practice, but some of its weaknesses and its poor links with the new economic and social context diminish its potential benefits.

4.1 Strengths

The obligation for industrial operators to conduct self-supervision is indicated in the Law on Environment Protection, which is a very positive characteristic of the Kazakh regulatory framework. Also, legal stipulations exist in the Administrative and

Penal Codes to minimize the possibility of fraud and negligence within self-supervision program implementation. The secondary legislation gives further guidance on approaches and procedures of self-supervision. In conjunction with a stronger focus on the integrity and professionalism of staff who develop secondary legislation, this model of regulating self-supervision could be very effective. It provides sufficient scope to adjust in a timely manner to any new transition challenges and to gradually develop and tighten regulatory requirements without compromising the goals of social and economic development.

The regulated community (in practice, the largest facilities) is in charge of developing individual multi-media self-supervision programs and of presenting them for approval to the competent authorities. The obligation to conduct self-supervision applies regardless of ownership; uniform self-supervision requirements are established for public and private companies. Enterprises ("natural resource users") bear full responsibility for implementing self-supervision programs and provide the necessary expertise, equipment, and analytical facilities. Sometimes services are obtained on a sub-contract basis. Results of self-supervision are communicated to competent authorities through regular statistical reports or immediately in the case of emergency situations or accidents. The costs of self-supervision are met by the enterprise.

The government of Kazakhstan regulates the functioning of these systems through certification of laboratories, annual approval of programs, inspection, etc. Competent authorities are allowed to use self-supervision data in law enforcement against violators; this approach is widely used, in particular due to scarce resources available to competent authorities to conduct compliance monitoring.

Finally, non-governmental organizations and the general public voice demands to have access to facility-specific environmental information. This is backed up by Kazakhstan's ratification of the Aarhus Convention and signature of the Kiev Protocol on Pollutant Release and Transfer Registers.

4.2 Weaknesses

While the self-supervision system has the potential to be very effective, it is undermined by a number of problems, such as:

- gaps and conflicts in laws and regulations, including a poor definition of basic concepts;
- lack of clarity in the mandated scope of self-supervision;
- insufficient attention to quality assurance and quality control;
- assessment of self-supervision performance, based on the existence of a specific organizational form, *i.e.,* of an environmental unit within an industry, rather than on the quality of self-supervision programs and outcomes of their implementation;
- continuing low mutual trust between public authorities and industry;
- poor laboratory facilities of both regulated industries and competent authorities;
- lack of mechanisms to disclose facility-specific data and take into consideration the interest of the general public while designing self-supervision programs;
- limited coordination between different departments and sub-divisions of the Ministry of Environment Protection on matters of self-supervision due to their focus on carrying out very specific functions mandated in legal acts.

The incoherence of the legal basis in allowing the existence of two similar terms with blurred definition – self-supervision and self-monitoring – creates much confusion among the regulated community. Frequently, self-monitoring is understood as the instrumental measurement of emissions or ambient quality, while self-supervision means the decision-making process following self-monitoring. In addition to this interpretation, it is also common to understand self-supervision as emission monitor-

ing and self-monitoring as ambient monitoring (*i.e.*, the monitoring of soil, air, or water quality).

Competent authorities often consider that industries have to monitor the maximum possible number of parameters without balancing the scope of self-supervision with inherent costs. At the same time, competent authorities do not have adequate resources to keep track of and analyze the information received from industry. This leads to a situation in which industries create a superficial mechanism of self-supervision disconnected from the overall management system and therefore of little value beyond mandatory reporting. Contrary to international practices, in order to verify compliance, the values of parameters monitored by operators are compared with historic (inventory) emission levels, rather than the permit conditions.

The quality of self-supervision data raises doubts for a number of reasons. There is no statutory procedure to ensure the integrity of sampling, sample preservation, transportation, and analysis. The robustness and reliability of calculation methods are often challenged due to a high level of uncertainty and absence of quality control and quality assurance. There is evidence of major discrepancies between the measurements made by the state analytical laboratories and enterprise laboratories. Quality problems with laboratory tests often lead to controversy, which sometimes has to be resolved in court. Consequently, both the industries and the competent authorities incur additional administrative costs.

5 PROPOSED ELEMENTS OF POLICY REFORM

There is a need for reforming the current system of self-supervision in Kazakhstan. Most importantly, its obsolete legal, institutional, and technical characteristics have to be addressed and the quality and use of data for decision-making should be enhanced. The need to reform the existing system is recognized by various stakeholders, including governmental authorities, industry, and the general public. It is recommended that the reform aim at the following key outcomes:

- unambiguous definition of basic concepts and improved legal basis;
- differentiated scope of self-supervision for large industries and Small and Medium-Sized Industries, and its link to permit conditions or general binding rules;
- clear requirements on the content of self-supervision programs;
- longer validity of self-supervision programs, with a possibility to amend them when necessary, and the introduction of post-closure requirements;
- combined use of various types of monitoring (direct and indirect monitoring; operational, emission, and impact monitoring) within self-supervision programs, abandoning the practice of all-encompassing impact monitoring, and acceptance of various organizational forms of self-supervision to better suit the resources available to particular categories of enterprises;
- reliable approaches to setting regimes of monitoring and optimization of self-supervision costs;
- uniform requirements for quality assurance and a strategy to ensure data quality;
- efficient data management, reporting, and a meaningful use of information in decision-making, including self-correction actions;
- regular review and use by authorities, and public scrutiny of self-supervision data;
- better use of self-supervision data for inspection and enforcement, in parallel with the development of the incentive framework for regulated industries to comply with self-supervision requirements.

6 MANAGEMENT OF THE TRANSITION

A transition period (seven to eight

years) should be envisaged for improving self-supervision, with the adoption of an intermediate model, which would facilitate the step-by-step achievement of feasible objectives and bring the system closer to international practices. This will need to be fully coordinated with the process of implementation of requirements under the Kiev Protocol on Pollutant Release and Transfer Registers (PRTR). During the transition period, internal financing of proposed measures (Ministry of Environmental Protection's (MEP) budget and budgetary programs) could be matched with external technical assistance.

6.1 Improving the Legal Basis

In the short term (one year), the MEP will need to propose amendments to the existing legal basis in order to strengthen the foundations of self-supervision. In this context, the definition of self-supervision, its elements and forms will need to be clarified, the differentiated approach towards large industry and Small and Medium-Sized Enterprises enacted, and the powers of the competent authorities stipulated more precisely. The Administrative and Penal Codes will also need to be amended. Good laboratory practice and other process-relevant requirements need to be mandated in secondary legislation. The quality of legal amendments will need to be monitored intensively, based on feedback from practice during a period of two to three years, with a view to further improving the legal basis, if necessary.

The development and approval of a thematic chapter for the Environmental Code (foreseen for 2007) should be finalised through a wide stakeholder consultation process. In this context, the MEP staff need to understand that directly mandating self-supervision and determining its elements in great detail may restrict future developments in the field concerned. It also can be a serious impediment for correcting the design of self-supervision, if the primary legislation is not exact or misleading. However, legal requirements of direct application may be more easily enforceable and have a stronger impact on compliance behaviour than requirements imposed through secondary legislation.

An important task is to link the reform of self-supervision with the reform of permitting and introduction of differentiated requirements for large industry and other members of the regulated community (see also the Guidance on Integrated Environmental Permitting for Eastern Europe, Caucasus, and Central Asia). A good step forward is the development of the List of Environmentally Hazardous Installations in Kazakhstan, although the categories of installations identified in the List need further definition, in particular as concerns production thresholds. To further develop this List, it is suggested that the MEP uses the list of categories in Annex I of the European Union's Directive on Integrated Pollution Prevention and Control and the Scope of the PRTR Protocol as a starting point.

6.2 Addressing Institutional Issues

As a matter of immediate priority, the MEP should strengthen communication and cooperation between its departments and other sub-divisions that contribute to the reform and functioning of self-supervision. This includes, first of all, the State Committee for Environmental Control, the Department for State Environmental Review and Licensing, the Department of Environmental Policy, and the Department of Legal and International Affairs. Focus should be put on developing procedures of data sharing and joint decision-making, including:

- coordination of any plans to develop secondary legislation and guidance for industry to conduct self-supervision;
- mandatory review of permit requirements (or stand-alone self-supervision programmes) by other Departments and the State Committee for Environmental Control;
- immediate feedback from inspection to permit-writers;
- establishment of a database on compliance history of facilities (including permit

applications, permit documents, reports from site visits, reports from the facility, etc.) that would be accessible for all government stakeholders and easy to use;

— regular and ad-hoc coordination meetings.

In order to facilitate the work of regulators and inspectors, the MEP should develop general and sector-specific technical guidance that would describe the mandatory and desirable elements of self-supervision within a branch. This could be based on the consultative guidance document, developed by the EAP Task Force Secretariat within the demonstration project in Kazakhstan. Such guidance should be widely available and disseminated through all means, including through the MEP's website.

Training will be necessary for various stakeholders to better understand the design of modern self-supervision systems. A training course could be included in the programme delivered by the National Training Centre under MEP, based on materials developed within the demonstration project.

Establishing a powerful information system to share data reported by operators and make them available to the general public can greatly contribute towards increasing the value added of self-supervision. This should be done within the framework of implementation by Kazakhstan of the Kiev protocol on PRTRs. Also the MEP may want to adopt electronic reporting within the framework of the e-government introduction.

6.3 Improving Laboratory Infrastructure and Practice

The government will need to promote and support the creation of reference laboratories and analytical centers, and their participation in the international inter-calibration, training, and certification of personnel. This could include the improvement of both the existing laboratories and the technical skills available with competent authorities, and at the same time, the development of independent private laboratories, this often being a more cost-effective approach. In the latter case, a legal right to sub-contract sampling and laboratory analysis should be given to competent authorities, and budgets planned for outsourcing such services.

It will be important to review and develop the monitoring capacity of pollutants that are specified in international agreements. For instance, the capacity to monitor dust particles of 10 microns (PM10) in air emissions should be developed immediately.

International experience should be used to improve laboratory practices and techniques. In this context, a very helpful tool is the OECD's Resource Centre for PRTR Release Estimation Techniques. The Resource Centre is an Internet site that has been developed by the Task Force on PRTRs of the OECD's Environment, Health, and Safety Programme. The purpose of the site is to provide a clearing-house of guidance manuals/documents of release estimation techniques for the principal pollutant release and transfer registries developed by OECD Member countries. The manuals and documents include descriptive information on the sources of pollution and the pollutants that are released, as well as information on emission factors, mass balance methods, engineering calculations, and monitoring information. The Resource Centre will be updated on a regular basis to include additional and new documents available. See http://206.191.48.253/

6.4 Implementing Facility-Specific Pilot Projects

Pilot projects aiming to establish a comprehensive self-supervision programs in selected enterprises can be a useful tool to assess, among other things, the benefits and costs of implementation of self-supervision, in particular as part of the transition to integrated permitting. Such pilot projects can be recommended particularly for large new investments where enterprises have sufficient capacity. Criteria for selecting

installations for such pilot projects include, most importantly: the environmental impact, compliance costs, and financial performance.

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USING PEER REVIEWS TO PROMOTE ENVIRONMENTAL IMPROVEMENTS AND GOOD GOVERNANCE: THE CASE OF THE KYRGYZ REPUBLIC

BULARGA, ANGELA,[1] and MICHALAK, KRZYSZTOF[2]

[1] Project Manager, Environment Directorate, Non-Member Countries Division, Organisation for Economic Cooperation and Development (OECD), angela.bularga@oecd.org

[2] Administrator, Non-Member Countries Division, Environment Directorate, OECD, krzysztof.michalak@oecd.org

OECD, 2 Rue Andre-Pascal, 75775 Paris Cedex 16, France

SUMMARY

The Kiev Conference of the Ministers of Environment (May 2003) recommended that countries of Eastern Europe, Caucasus, and Central Asia (EECCA) implement the "Guiding Principles for the Reform of Environmental Enforcement Authorities in Transition Economies". The Guiding Principles, which build on good governance practices, provide a reference model for an effective and efficient system of environmental compliance assurance. To help countries of the region to implement the Guiding Principles a Peer Review programme has been launched in the framework of EECCA REPIN Network. The current article presents the experience of the first pilot application of a Peer Review Scheme in Kyrgyzstan.

1 INTRODUCTION

The members of the Regulatory Environmental Programme Implementation Network (REPIN) agreed, at their 5th annual meeting in October 2003 in Kiev, to launch a pilot Peer Review Scheme intended to facilitate reforms of compliance assurance in Eastern Europe, Caucasus, and Central Asia (EECCA). REPIN endorsed the objectives and methodology of peer reviews and welcomed the initiative of the Kyrgyz Republic to be the first country subject to this mechanism of inter-governmental dialogue and support. The "Guiding Principles for the Reform of Environmental Enforcement Authorities in Transition Economies of EECCA", recommended for implementation by the Kiev Ministerial Declaration (May 2003), provided a reference framework for the review.

The benefits and high policy profile of peer reviews have been demonstrated due to a vast practical experience, including regular (economic, regulatory, and environmental performance) reviews undertaken by the OECD, Environmental performance reviews carried out in the EECCA region by the United Nations Economic Commission for Europe (UNECE), as well as the reviews of environmental funds carried out by the Task Force for the Implementation of Environmental Action Programme (EAP Task Force) in Central Europe and lately in EECCA. The IMPEL Review Initiative, established in 2001 by the Member Countries of the European Union (EU), provided another example of a

successful application of the peer review concept.

BOX 1: PEER REVIEWS AT OECD

A peer review involves a systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed country adopt best prac-tices and comply with established standards and principles.

The peer review mechanism is free of any threat of non-compliance sanctions arising from the findings of the review: its impact relies on the influence and persuasion exercised by "peers" (equal partners in the review process). The Peer Review Scheme serves the following purposes:

- To provide international peer support for institutional reform.
- To enhance government's transparency, accountability, and visibility, at national and international level.
- To extend opportunities for intergovernment policy dialogue and support capacity building.

2 THE PRACTICAL APPLICATION OF THE SCHEME IN KYRGYZSTAN

The review was carried out at the request of the Ministry of Ecology and Emergency Situations (Ministry) of the Kyrgyz Republic by an international team of experts. The preparatory phase of the Kyrgyz Peer Review consisted of preliminary analysis carried out in the period November 2003 to February 2004. The analysis was based on available background reports, national policy and legal framework, and a self-assessment report prepared by Kyrgyz counterparts. Prior to the review mission, the Ministry disseminated the Guiding Principles among all stakeholders at the national level, which contributed to a better understanding of the reference framework for the review among stakeholders.

The review mission was carried out from 15-20 March 2004 by a team of seven experts from OECD, Central European and EECCA countries, and the OECD Secretariat. The mission included a series of interviews with political leaders, managers and experts representing the Ministry's headquarters and regional departments, other governmental organisations, as well as NGOs and the regulated community. In total, more than 70 people were consulted during these meetings. At the end of their mission, the review team members presented and discussed initial findings at a meeting with Ministry staff. A press conference was held jointly by the Secretariat and high-level officials from the Ministry on the objectives, outcomes, and follow-up of the review mission.

Subsequently, the draft review report was prepared by the Secretariat. This report was discussed during the REPIN annual meeting in Yerevan (26-29 September 2004). The final set of conclusions and recommendations were adopted by consensus.

A round-table with key stakeholders was conducted on the outcomes of the review of environmental enforcement system in Kyrgyzstan (9 February 2005, Bishkek). More than 50 people attended the round-table, including representatives of the Council of Ministers, Ministry of Economy and Industry, Ministry of Finance, Ministry of Health, the NGO community, major industrial enterprises, as well as national and regional level officials and staff members of the Ministry.

The participants of the round-table concluded that the peer review revealed "real" problems and challenges of the environmental enforcement system in Kyrgyzstan. The Ministry will work to reform the environmental enforcement system following the review recommendations, and all partner organisations (including the Ministry of Finance) agreed to provide support to the reform process. The participant from the Ministry of Health pointed out that the recommendations were also valid for their

inspection unit (Sanitary Epidemiological Service) and these would be taken on board during the reform of that service.

3 OUTCOMES OF THE PEER REVIEW IN KYRGYZSTAN

3.1 Country Context

Since achieving independence in 1991, the Kyrgyz Republic has implemented broad reforms aimed at attaining macroeconomic stability, improving the regulatory system and creating the foundations of a democratic society and market economy. The economy of Kyrgyzstan is relatively open: The country was the first former Soviet republic to be accepted in 1998 into the World Trade Organization.

Market reforms have not yet been completed. This includes unfinished public sector reforms and a lack of favourable framework conditions for private entrepreneurship and the promotion of investment activity. The domestic situation has been exacerbated by external obstacles to growth, of which the main ones are remoteness from – and dependence upon – major international commodity and financial markets, as well difficulties in preserving traditional economic relations with the neighbouring countries. Although economic recession has been stopped and production is recovering the past few years, Kyrgyzstan remains among the poorest in the world and 44% of the population still lives below the poverty line .

Strategic priorities of Kyrgyzstan have been outlined in the Comprehensive Development Framework, adopted in 2000 for the ten years to 2010. The overall development goal is the political, social and economic well being of the people of the Kyrgyz Republic, with freedom, human dignity and equal opportunity for all. This has been broken down into three basic goals:

- Effective and transparent governance system;
- A fair and secure society to ensure that all members of society share equitably in the nation's political, social and economic development
- Sustainable economic growth and development.

Although the adverse impact on the environment decreasing over the last decade because of the generally depressed situation in industrial and agricultural production, this trend was compensated by environmentally malign practices and resource-intensive processes used to attain short-term economic goals. There is an overall degradation of environmental infrastructure, accompanied by a reduced spending for environment protection needs. This resulted in considerable threats to human health: more than 16% of the total number of diseases in Kyrgyzstan are caused by air pollution, 10% – from polluted water, 9% – from the contaminated soil.

3.2 Environmental Management System in a Nutshell

The Republic of Kyrgyzstan has developed an extensive environmental management system with particular instruments, working methods, institutions, and communication interfaces in place to implement environmental policy objectives. Command-and-control instruments, including permitting, compliance monitoring and non-compliance response, were introduced in the late 1970s. In the mid-1990s, they were complemented by economic instruments. These were mainly pollution charges, and to a lesser extent non-regulatory, information-based instruments, such as environmental information provision and awareness-raising activities.

It is important to mention that the country's economic and social context is not favourable for better environmental management, although the Country Development Framework targets more effective state governance and secure conditions of life for all members of society. Unfortunately, the political support for environmental improvements was so far largely declarative. The government emphasised the economic recovery of the country without taking due account of external environmental costs imposed by current production pat-

terns. For instance, the air permit system has been suppressed for some time as part of a wider process to encourage entrepreneurship and foreign investment. A very low percentage of the Gross Domestic Product is devoted to environmental purposes: in the Kyrgyz Republic, only 0.03% of the Gross Domestic Product is allocated to the environment compared with one to 1.5% in OECD countries.

3.3 Institutional Capacity for Environmental Enforcement

The main environmental authority was established in 1989 and went through several structural reforms, particularly frequent after 1999. Presently, the Ministry has full executive authority in Environmental protection. The Ministry is the successor of the former Ministry of Environment Protection but, unfortunately, has so far been unable to keep as high an institutional profile for environmental protection as it has for emergency response.

Compliance with, and administrative enforcement of, regulatory requirements is ensured by 185 environmental inspectors employed by the Ministry and its regional branches. Their scope of activity covers mainly industrial pollution control with around 2,200 large installations under national and sub-national jurisdiction. Other members of the regulated community are not yet well identified, especially among Small and Medium-sized Enterprises, whose number has now reached 30 thousand. Given the absence of Small and Medium-sized Enterprises in the centrally planned economy, this is rather an impressive growth of the regulated community.

Over the last few years the attention of environmental inspectors has been placed primarily on enforcing the payments of pollution charges as the way to compensate for the limited funding of Environmental authorities. This focus has reached the point of distorting the very mission and integrity of compliance assurance system and eroding the self-confidence and public credibility of enforcement officers.

There are other serious problems in the design and operation of the environmental compliance assurance system in the Kyrgyz Republic. Inter alia, these include:

- A regulatory framework that favours companies' short-term interests, while disregarding potential negative environmental impacts and the costs of environmental pollution to society, for example, the suppression of air permit systems and restrictions on inspectors' authority to conduct on-site visits;
- Frequent reforms of the organisational structure of the environmental authority without a clear vision of how these reforms will help achieve priority environmental objectives. Similarly, working methods are currently applied that lead to inefficient use of resources;
- Confrontational relations with the regulated community due to lack of dialogue between stakeholders, low understanding of compliance problems, unfeasible regulatory requirements, and outdated instruments of compliance assurace and promotion;
- Limited human, financial, and material resources to carry out inspections. In particular, very low operational budgets and no capital investment for monitoring and inspection facilities.

3.4 Key Recommendations of the Review

The major challenge for environmental enforcement authorities in the Kyrgyz Republic is to shift their operation away from pursuing revenue-raising goals towards focusing on ensuring compliance with environmental requirements in order to achieve environmental results. Preventative actions should be used more systematically and frequently and the regulated community should be treated with consistency, in a transparent and proportionate manner.

The credibility of enforcement actions should be ensured by establishing feasible and enforceable compliance

objectives and working in a transparent, accountable manner. Also the value of the enforcement authorities will be elevated if policy makers and the general public are better acquainted with the potential benefits of a fair and firm enforcement, including decreased social and economic costs of environmental pollution and degradation, enhanced rule of law and a guaranteed level playing field for industry.

The review concluded that fulfilment of the core mission of the enforcement authority in the Kyrgyz Republic which is to ensure compliance thus protecting the environment and human health will require:

- improving the environmental regulatory framework;
- Acquiring adequate powers and raise the institutional status of the enforcement agency;
- Adopting risk-based and performance-oriented working methods;
- Embracing higher professional standards and foster international co-operation;
- Interacting with stakeholders openly and constructively.

Specific recommendations were provided under each of these objectives. Also the review suggests a number of short- and longer-term steps for reform of domestic compliance assurance instruments, strategies, and institutions in light of good international practice. These steps are closely linked with, and support, the implementation of the country's strategic development objective of adopting a good governance system.

4 CONCLUSIONS

The peer review process confirmed to be an effective mechanism for distilling achievements and bottlenecks in environmental enforcement, identifying direction for reform and concrete actions. It helps also to build in-country partnerships for improving the effectiveness of environmental compliance assurance. The OECD/EAP Task Force Secretariat will continue using this mechanism in EECCA: Armenia is the next country to be reviewed under the scheme.

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STRATEGY FOR THE SUPERVISION OF CARBON DIOXIDE AND NITROGEN OXIDES EMISSIONS TRADING

DE GELDER, THEO

Netherlands Emission Authority, Prinses Beatrixlaan 2, 2595 AL, Den Haag, The Netherlands, Theo.degelder@minvrom.nl

SUMMARY

This paper presents a summary of a discussion paper of the same title, which was distributed at the 7th INECE Conference. The summary describes the problems that need to be addressed and of the strategy's limitations, as well as a discussion of the planned approach and an introduction to carbon dioxide and nitrogen oxides emission trading in The Netherlands.

1 BACKGROUND AND QUANTITATIVE CHARACTERISTICS

On 13 October 2003, the European Parliament and the Council passed a directive (2003/87/EC) to introduce a system of emission trading in greenhouse gasses in the European Union as of 1 January 2005. The directive is instrumental to the realisation of the Kyoto targets and must ensure that the industry and energy sectors deliver he emission reductions implied by the Kyoto Protocol. The directive requires that Member States enact the legal structure to implement the directive obliging Member States to issue emission permits to the larger industrial companies enabling them to participate in the emission trading scheme. All member states must draw up an allocation plan that determines the emission allowances to be issues to participating companies. All companies have to monitor their emissions in accordance with the permit requirements at the end of the year draft an emission report stipulating and specifying their total carbon dioxide emissions and hand over sufficient allowances to cover their total emissions.

Included in the Carbon Dioxide Emission Trading Scheme will be those plants that are covered by the definitions in Annex 1 of the European Carbon Dioxide directive. These concern energy activities in which the installed thermal capacity of the combustion plants in the installation (facility) is above 20 MWth,[1] but also a number of other designated categories with or without a threshold as listed in the annex. Member States are obliged to submit national allocation plans (NAPs) for approval by the European Commission. According to Annex A of the Dutch national allocation plan 355 establishments in the Netherlands fall under the directive. However, this also includes 150 establishments with an annual emission of less than 25 kilotons of carbon dioxide. Early on, the Netherlands has flagged that the cost of participation of these installations in the trading scheme far outweighed the benefits, and with the approval of the Commission an out-out provision for these installations was created. Some 26 of these 150 establishments have opted to participate in the emission trading. A total of 206 establishments have been provided with an emission permit and have been issued with allowances in accordance with the approved national allocation plan.

In October 2001, the European

[1]MWth signifes "Megawatt thermal," and is a measure of energy production.

parliament and the Council decided on the National Emission Ceilings directive (2001/81/EC), which imposes on each Member State ceilings for the national emissions of nitrogen oxides, sulphur dioxide, and particulates. The ceiling for the nitrogen oxides emissions in the Netherlands for 2010 is 260 kilotons. The Dutch government has decided to introduce a system of emission trading for nitrogen oxides emissions of the industrial installations as a cost effective instrument to realise the required emission reductions. In this context a target of 55 kilotons of nitrogen oxides has been set for the industrial installations to which the legislation on nitrogen oxides emissions apply. In general it means all industrial installations with a total thermal capacity of more than 20 MWth and installations with process emissions of the steel and other metal industry, cement and glass production, chemical industries etc. For each category of nitrogen oxides emitting industry, a performance standard rate has been defined that applies to all the establishments in the same way. The performance standard rate is expressed in grams per gigajoule (g/GJ) of energy used and for process emissions in gram or kilograms nitrogen oxides per ton produced in that process. The starting value is 68 g/GJ in 2005, decreasing with 5 or 6 gram annually to 40 g/GJ in 2010.

2 THE NETHERLANDS EMISSIONS AUTHORITY

Early during the first discussions in 1999 on the introduction of nitrogen oxides emissions trading it was learned that the aspects of proper monitoring, inspection and enforcement to comply with the legal requirements are most critical elements of any emissions trading programme, and that thereto the Dutch Government would have to set high standards and develop ambitious targets high.

From the very beginning, this ambition has been focused on setting up an effective structure and organisation that would be able to manage the application and issuance of emission permit most efficiently and effectively, and would be equipped with sufficient staff and expertise to inspect, enforce and correct deviations from the permit conditions or between actual emissions and those reported by the establishments.

The Netherlands Emission Authority's ambition is to achieve a situation with a high compliance rate. The Netherlands Emission Authority has been set up as an independent administrative organisation that will act as the competent authority charged with the permitting, inspection and enforcement of emissions trading at the above mentioned establishments. During the last two years this authority has prepared itself for the tasks and responsibilities in respect of the implementation and execution of new legislation. One of the steps taken to prepare the Netherlands Emission Authority for its tasks and responsibilities concerned the formulation of the inspection and enforcement strategy to ensure that companies actually comply with the legal requirements. The inspection and enforcement strategy has been developed in a consultancy assignment whereby as much as possible knowledge and experiences from the UK and the USA has been taken on board. This strategy defines the tools that the Netherlands Emission Authority intends to use in order to achieve the high rate of compliance that is needed in an emissions trading environment.

2.1 Legislation For The Implementation Of Emission Trading And The Role Of The Netherlands Emission Authority

To be able to implement emission trading in the Netherlands the framework Environmental Management Act has been amended on the following elements.

A new chapter (Chapter 16), dealing specifically with emissions trading of carbon dioxide and nitrogen oxides has been added to the Environmental Management Act and two existing chapters have been amended.

Chapter 2 (Advisory bodies) allows for establishing of the Netherlands Emissions Authority as the legal body charged

with the issuing of emission permits, inspection and enforcement of emissions trading.

Chapter 18 (Enforcement) has been amended to provide for the penalties and other instruments to enforce effectively the various emissions trading requirements. The two schemes of emissions trading, i.e. nitrogen oxides and carbon dioxide require similar provisions for the monitoring, permitting, verification and inspection. The requirements in

Chapter 16 in the Act provides for one emission permit for nitrogen oxides and carbon dioxide, and for a monitoring protocol as an integral part of the emissions permit covering the equipment, management of data and the internal procedures to safeguard the proper monitoring of both emissions. The Netherlands Emission Authority is responsible for the issuance of the permit and the approval of the monitoring protocol. In the new set-up, the operator is to prepare just one emission report and to have it verified and hand it in according to the same procedures. In order to facilitate and to ensure a fully equal treatment and procedure for the implementation and enforcement of both trading schemes the Netherlands Emission Authority will supervise the legal requirements, the permitting, the inspection and the enforcement of the new legislative requirements.

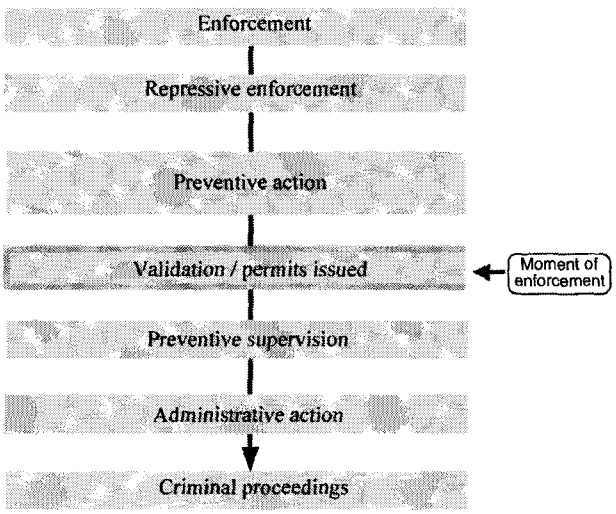
2.2 The Principal Tasks

The principal tasks of the Netherlands Emission Authority include:

- Validation of monitoring protocols.
- Issuance of permits.
- Carrying out supervision and enforcing compliance.
- Keeping records of trading transactions.
- Publication of emission totals and outcomes.
- Imposing administrative sanctions.

In performing these tasks, the Netherlands Emission Authority will cooperate closely with the provincial authorities as the competent authorities for the Environmental Management Act (Wm-BG), in particular on the validation and issuing of permits and supervising and enforcement of compliance. Furthermore, the Netherlands Emission Authority has established close working relationships with the Public Prosecutor to achieve effective coordination between criminal and administrative proceedings. To be able to guarantee reliable and accurate monitoring and reporting emission data a compliance and assurance system has been set up in cooperation with the industry and government and provincial authorities. It is set out in figure 1.

Figure 1:



System for guaranteeing monitoring and reporting in context of emission trading

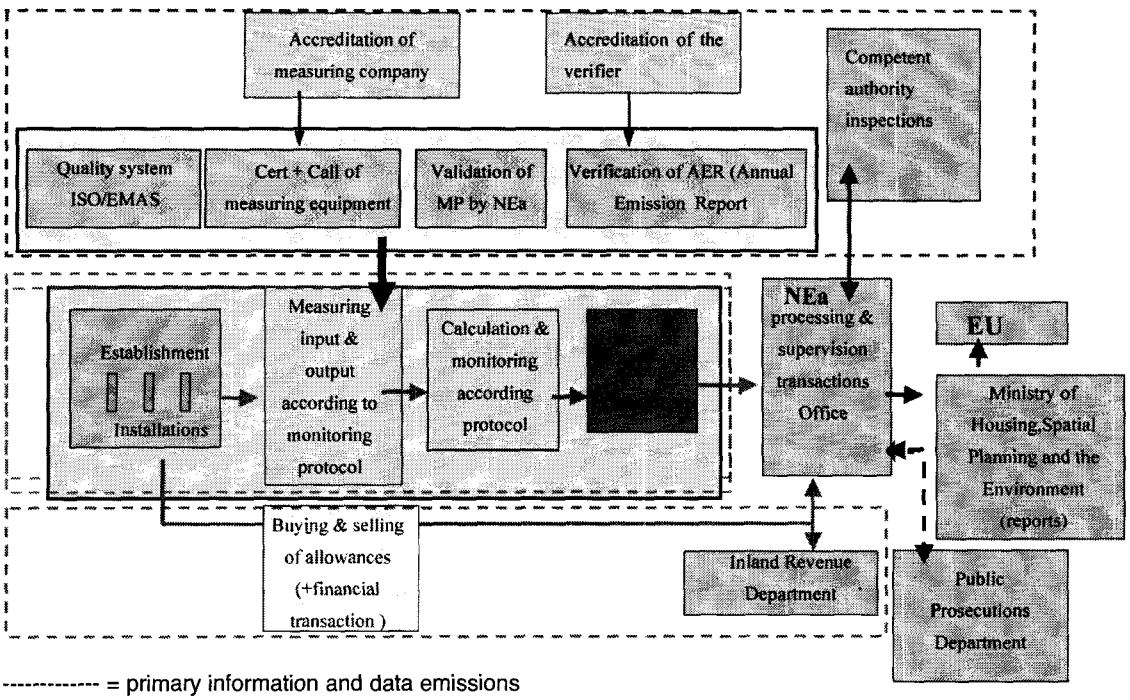
(Source: report "Strategy for the supervision of CO_2 – and NOx – emission trading. Dutch Ministry of Environment, 29 April 2004)

In order to assist the industry at an early stage in their preparations for drafting their monitoring protocols, a Programme of Requirements for the monitoring of carbon dioxide and nitrogen oxides emissions was being developed before the legislative requirements were in place. This Programme of Monitoring Requirements, which in the meantime has been translated into the ministerial order on monitoring for carbon dioxide and nitrogen oxides, sets out the monitoring and reporting requirements the companies must comply with.

The companies themselves must draw up a monitoring protocol based on the requirements laid down in this Programme of Requirements. The monitoring protocol is the main element of the permit application by the company. The Netherlands Emission Authority then validates the monitoring protocol by assessing whether it meets the relevant requirements and whether the description of the installation is a true reflection of the actual situation as covered by the Integrated Pollution Prevention and Control (IPPC) permit to the company.

On the basis of the validated monitoring protocol the emission permit is then issued. The company subsequently carries out its monitoring process in accordance with the monitoring protocol. In case changes occur in the monitoring or other relevant changes in the permitted situation, these must be reported and in certain cases also Netherlands Emission Authority's approval of the changes in the monitoring protocol must be solicited. At the end of each year the company is to draw up an emission report that is to be verified by an independent verification body that is accredited to verify emission report under the emissions trading scheme. The verified emission report is then sent to the Netherlands Emission Authority. The Netherlands Emission Authority will accept the verified emission report and the emissions contained therein, but as her task and responsibility as competent authority the Netherlands Emission Authority will carry out independently various inspection and control activities to assess whether the emissions reported in the annual reports are indeed monitored and reported in conformity with the permit conditions. To that end, the Netherlands Emission Authority will carry out regular visits at the establishment aimed at auditing the emissions reported by the companies and carry out in-depth inspections to assess that the process of

Figure 2: Information Flows



---------- = primary information and data emissions

---------- = secundiary information needed for the verification of quality and reliability primary information

- - - - - - - = tertiary data and information transactions

(Source: report "Strategy for the supervision of CO_2 – and NOx – emission trading. Dutch Ministry of Environment, 29 April 2004)

monitoring, reporting and verification functions in line with the intentions of the legislator.

2.2.1 Information Flows

The reliability and correctness of the emission data provided in the emissions reports are Netherlands Emission Authority's central concern. The supervision strategy distinguishes therefore two levels on which emission data are generated usually.

On a secondary level the strategy is directed to information related to the measuring and production data cycle, the calculation and processing of these data and the resulting reports. On what is probably the highest level it concerns the processes aimed at quality assurance and quality control (QA/QC). The figure 2 below sets out the relevant information flows as far as the supervision is concerned.

As indicated above, the strategy for supervision focuses particularly on the primary and secondary information flows.

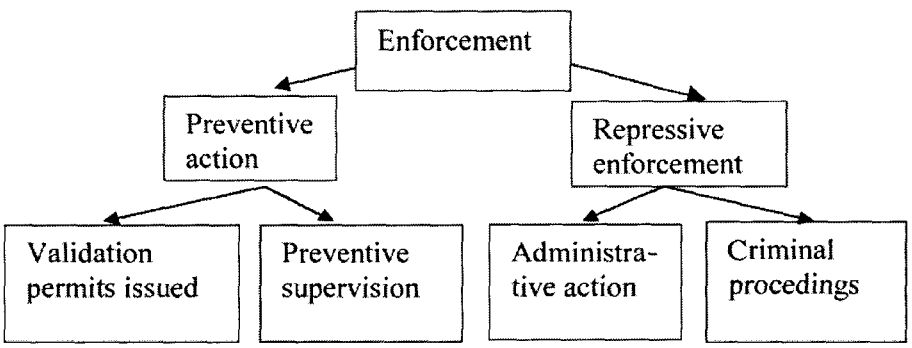
2.2.2 Limitations

The strategy for supervision is directly concerned with the inspection and enforcement of compliance with the regulations, in order to ensure the reliability and accuracy of the reported emission data. There is also the relationship with associated tasks such as validation, the issuing of

Figure 3: Concepts used in the context of supervision and enforcement

(Source: report "Strategy for the supervision of CO_2 - and NOx – emission trading. Dutch Ministry of Environment, 29 April 2004)

Enforcement of the rules is intended to ensure compliance with the applicable regulations (regulations imposed by law as well as those that are part of a permit). It concerns activities carried out by the competent authority that are intended to achieve a certain degree of compliance or enforce it. These activities can be of a preventive or repressive nature and usually include general supervision and taking action in the case of infringements (see the diagram below).



The term 'enforcement' includes both the concept of preventive and repressive action.

Preventive activity on the part of the Netherlands Emissions authority (NEa) means the validation of the monitoring protocol, the issuing of permits and **preventive supervision**. *By preventive supervision is meant checking whether (permit) regulations are being complied with and whether the permit is adequate. If infringements are discovered this is followed by consultation and the NEa will indicate the nature and degree of the shortcomings. In this strategy for supervision preventive supervision will simply be referred to by the term supervision.*

In addition to consultation, the repressive phase of the enforcement may be started with the initiation of administrative steps (in the form of a penalty, an administrative fine) or criminal proceedings (charge, criminal prosecution). In this strategy for supervision the term **repressive enforcement** will be used to refer to the application of (administrative) sanctions.

When the supervision is aimed at uncovering offences, it takes on the form of an investigation. This requires prosecuting or **investigative** powers. This phase falls outside the scope of this strategy for supervision.

the permits and the evaluation of annual emission reports. The step involving action taken to correct infringements (repressive enforcement) is not part of this strategy. The action can consist of imposing or warning for legal sanctions, either of an administrative or penal nature. The strategy for punitive action and penalties will be developed by Netherlands Emission Authority as a separate line of enforcement . This strategy however does deal with the relationship between inspection and repressive enforcement.

3 COMPLIANCE FACTORS FOR DETERMINING THE STRATEGY: THE TABLE OF ELEVEN

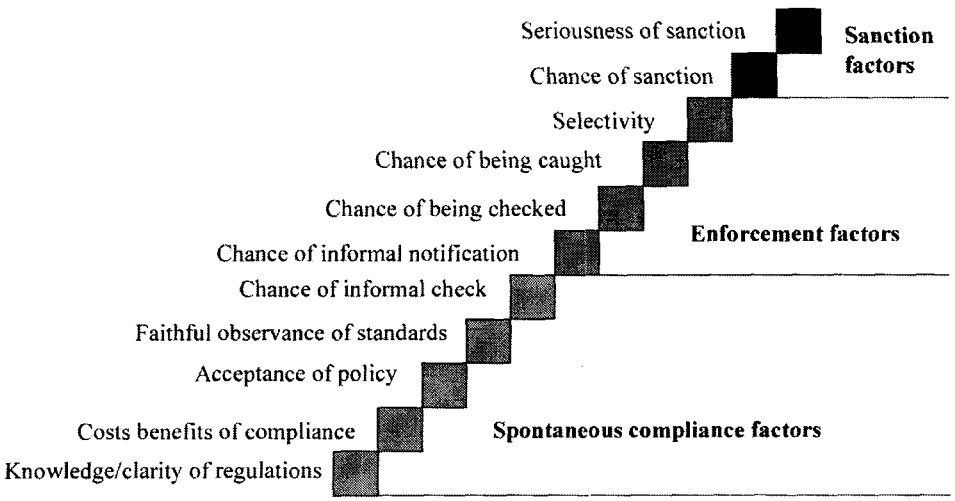
One of the tools which has been developed as a "thinking framework" is the so-called Table of Eleven. This Table of Eleven offers eleven factors from the target group's perspective that influence the causes of infringement or the motives for compliance with the regulations. A distinction has been made between spontaneous compliance factors and enforcement factors. At various levels, tools can be used that take into consideration and reflect the factors in spontaneous compliance as well as the enforcement factors. The following figure illustrates the Table of Eleven.

Another tool that is emphasized in the discussion paper is communication. Interviews held with experts from the USA showed that a proper communication is very important for encouraging spontaneous compliance. Making sure the parties concerned are well informed applies to increasing knowledge and the clarity of the regulation but also the degree of acceptance of the policy.

4 SANCTION STRATEGY

Netherlands Emission Authority has developed a sanction strategy to remedy in the situation that shortcomings are found during audits or depth-inspections. The sanction strategy sets out in detail how inspectors must act when different types of deviations are noticed. The strategy includes a "how to act" model. In this model there are four categories of various deviations classified and ranked by urgency and seriousness. By following a process-diagram inspectors know precisely which steps in response should be taken.

Figure 4: Compliance, enforcement and sanction factors.



(Source: report "Strategy for the supervision of CO_2 – and NOx – emission trading. Dutch Ministry of Environment, 29 April 2004)

5 GUIDE TO THE DISCUSSION PAPER

The most important conclusions regarding the strategy for supervision can be found in **Chapter 2**. Continuing on this, the background, justification and further elaboration of these conclusions are set out in a further four chapters. **Chapter 3** provides an elaboration of the objectives and the preconditions of this strategy for inspection. This chapter discusses the basic premises of the strategy and also deals with the impact of the time aspect on a changing strategy for supervision. **Chapter 4** provides a further elaboration of the strategy and the approach to the supervision. A description is given of the sources drawn on for determining the strategy and the instruments for the execution of the strategy (communication and two types of inspections), possible reasons why supervision is required and the relationship of the supervision with other steps in the process such as validation, the issuing of permits and assessment of emission reports. **Chapter 5** focuses on the various aspects of carrying out inspection. These include the required capacity and expertise for the various instruments as well as the inherent risks of deviations. An indication is also given of what form the collaboration between the competent authority for the Environmental Management Act and the collaboration on an international level might take as part of the supervision. Finally, **Chapter 6** looks at the role evaluation and feedback play as part of the supervision. It also explains the role of building up dossiers and generating management information as part of the evaluation, as well as international possibilities for further fine-tuning and evaluation.

Note:

Participants of the conference who would like to receive a hard copy of the paper or the electronic version are invited to sent a request by mail to:

Theo.deGelder@minvrom.nl
Netherlands Emission Authority
Address: Prinses Beatrixlaan 2
2595 AL, Den Haag
The Netherlands
Tel: 0031(0)70391361

THE EMERGENCE OF CITIZEN ENFORCEMENT IN INTERNATIONAL ORGANIZATIONS

HUNTER, DAVID B.

Professor, Washington College of Law, 4801 Massachusetts Avenue, NW, Washington, DC 20016, United States, dhunter@wcl.american.edu

SUMMARY

In recent years, the nation-state's monopoly over international law and institutions has been eroding. The rise of an effective and active global civil society on the one hand and that of increasingly powerful international institutions on the other have created a powerful dynamic that is reshaping the way international law is made and enforced. This paper describes the emergence of influential environmental and social standards at international financial institutions and the parallel emergence of citizen-based mechanisms to enforce those standards.

1 INTRODUCTION

Since the 1980s, international financial institutions led by the World Bank Group have been developing environmental and social policies that are oriented towards protecting certain rights and interests of affected communities. These policies address, for example, issues relating to environmental assessment,[1] involuntary resettlement[2] and indigenous peoples.[3] The influence of these standards extend well beyond the substantial sphere of World Bank Group operations, however, as they have become the models for regional development banks and national laws in some countries.

More recently and importantly, the standards of the International Finance Corporation, the private sector arm of the World Bank Group, have emerged as the predominant standards for all international project finance in developing countries.[4] Export Credit Agencies from the OECD countries have agreed to benchmark their environmental and social standards against those of the International Finance Corporation.[5] In addition, the world's largest commercial banks, who collectively are responsible for arranging more than 80% of all foreign project finance in developing countries, have agreed to follow International Finance Corporation standards.[6]

The development and strengthening of these standards, and their application to the full range of financial institutions, has resulted in large part from pressure brought by international civil society in collaboration with local affected communities. These stakeholders recognize, however, that standards without any enforcement or oversight mechanism will not result in improved practice on the ground. For that reason, the call for enhanced environmental and social standards has been met by a parallel call for effective, transparent and independent enforcement mechanisms.

Beginning with the 1993 creation of the World Bank Inspection Panel, affected citizens have been given new rights to hold international institutions accountable for compliance with their policies and procedures. Today citizens enjoy enforcement mechanisms at five multilateral financial institutions[7] and three bilateral financial

institutions[8] where they can seek to enforce the environmental and social policies of the institutions. Each of these enforcement mechanisms differs to some degree, but they share one thing: they all provide local people with an opportunity to seek the institution's compliance with applicable environmental and social policies. The original conception for these mechanisms emanated from civil society organizations and academics outside of the traditional international legal order who recognized the need for enhanced citizen involvement in international institutions.[9] These mechanisms were viewed both as a response to the international organizations' immunity and as a way to ensure that those people most affected by the organization's activities have some sort of mechanism to ensure their rights and interests under the policies were met.

Generally speaking, the citizen enforcement mechanisms at international financial mechanisms can be categorized as reflecting a "compliance model" exemplified by the World Bank Inspection Panel, a "problem-solving" model exemplified by the International Finance Corporation's Compliance Advisor and Ombudsman office, or a hybrid of both systems exemplified by both the Compliance Advisor and Ombudsman office and the Asian Development Bank's Accountability Mechanism. Brief descriptions of the Inspection Panel and the Compliance Advisor and Ombudsman office's processes are provided below.

2 HOW THE WORLD BANK INSPECTION PANEL WORKS[10]

The World Bank Panel was created "for the purpose of providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures."[11] The Panel evaluates the Bank's performance against the standards set forth in the Bank's operational policies and procedures. It is comprised of three permanent members, each of whom serves for five years. To ensure independence, Panel members cannot have served the Bank in any capacity for the two years preceding their selection. More importantly, Panel members can never work for the Bank again. The Panel also has a permanent Secretariat with five staff.[12]

Claims can be filed by any affected party or parties (other than a single individual) in the borrower's territory.[13] The affected parties' local representative, the Bank's Board of Executive Directors, or, in some cases, any one Executive Director, is also eligible to file claims. In a deliberate attempt to limit the role of NGOs and their lawyers, non-local representatives can represent affected parties only in "exceptional cases" where "appropriate representation is not locally available."[14]

Claims must be in writing and must explain how the affected parties' interests have been, or are likely to be, directly affected by "a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank."[15] The claimant must demonstrate that it has exhausted other remedies by first providing Bank staff a reasonable opportunity to respond to the allegations. Upon receiving a complete request for inspection that is not clearly outside the scope of the Panel's authority,[16] the Panel registers the claim, notifies the claimant and the Board of Executive Directors, and forwards a copy of the claim to Bank Management, which has twenty-one days to respond.[17] The Panel then has twenty-one days to review Management's response and to make a recommendation to the Board of Executive Directors regarding whether the claim warrants a full investigation.[18]

The Board of Executive Directors has exclusive authority to authorize or deny a full investigation. Although this led to significant politicization of the Panel process in the first few years, since changes made in 1999 the Board has supported every Panel recommendation for an investigation.[19] Once an investigation is authorized, the Panel enjoys broad investigatory powers including access to all Bank staff. Mem-

bers of the public may also provide the Panel with supplemental information relevant to the claim. After the investigation, the Panel issues a report evaluating the Bank's compliance with its policies. Within six weeks, Management must submit to the Board of Executive Directors a report and recommendations in response to the Panel's findings. The Panel's Report, Management's recommendations, and the Board's decision are released two weeks after Board consideration.

As of January 1, 2005, the Inspection Panel had received thirty-three formal requests for inspection and registered thirty of them.[20] The Panel has found the eligibility requirements have been met and recommended an investigation in seventeen claims, and the Board has approved investigations in thirteen of those requests.[20] The Board has approved every investigation recommended by the Panel since a clarification of the eligibility procedures was made in 2000.

3 HOW THE INTERNATIONAL FINANCE CORPORATION OMBUDSMAN'S OFFICE WORKS

The President of the World Bank Group created the Office of the Compliance Advisor/Ombudsman (CAO) in 1999 to address complaints relating to the Group's private sector arms – the International Finance Corporation and the Multilateral Investment Guarantee Agency – neither of which were covered by the Inspection Panel. Although the Office of the Compliance Advisor/Ombudsman's office has both an advisory and compliance function, it considers its ombudsman function as its primary and most important responsibility. The ombudsman function was designed to respond "to complaints by persons who are affected by projects by attempting to resolve the issues raised using a flexible, problem-solving approach."[22] Any individual, group, community, entity or other party affected or likely to be affected by the social or environmental impacts of an International Finance Corporation or Multilateral Investment Guarantee Agency project may make a complaint to the ombudsman. Representatives of those affected by a project may also file a complaint, with appropriate proof of the representation.

The Office of the Compliance Advisor/Ombudsman acknowledges receipt of all complaints, typically within five days of receipt. The Office of the Compliance Advisor/Ombudsman then evaluates whether the complaint falls within its mandate, and, if it does, whether to accept or reject the complaint. Complaints must demonstrate that the complainant has been, or is likely to be, affected by actual or potential social or environmental impacts on the ground. The complaint must relate to an aspect of the planning, implementation or impact of an International Finance Corporation or Multilateral Investment Guarantee Agency project. Complaints that are "malicious, trivial or which have been generated to gain competitive advantage" are not accepted.[23] The Office of the Compliance Advisor/Ombudsman also determines whether it thinks a problem-solving approach – for example facilitated dialogue, consultation or mediation – could be effective in addressing the complainant's concerns.

Once a complaint is accepted, the Office of the Compliance Advisor/Ombudsman immediately notifies the complainant, registers the complaint, refers the complaint to the relevant International Finance Corporation or Multilateral Investment Guarantee Agency personnel with a request for information, and informs the project sponsor of the complaint. Management has 20 working days to respond to the request for information.

The Office of the Compliance Advisor/Ombudsman then undertakes a preliminary assessment to determine how it proposes to handle the complaint. This process is not time-bound but normally takes 30 working days after the decision to accept the complaint. After the preliminary assessment, the Office of the Compliance Advisor/Ombudsman provides to the claimant a specific proposal for how it proposes to address their complaint.

The Office of the Compliance Advisor/Ombudsman's proposal may include anything from convening informal consultations with International Finance Corporation/Multilateral Investment Guarantee Agency or the project sponsor to organizing a more formal mediation process. One of the options outlined will also be a compliance audit in complaints that raise any issue of compliance with the International Finance Corporation/Multilateral Investment Guarantee Agency policies. Overall, the ombudsman's office seeks to take a proactive and flexible approach where the "aim is to identify problems, recommend practical remedial action and address systemic issues that have contributed to the problems, rather than to find fault."[24]

The Office of the Compliance Advisor/Ombudsman has broad investigatory powers, including authority to review International Finance Corporation or Multilateral Investment Guarantee Agency files; meet with the affected people, International Finance Corporation or Multilateral Investment Guarantee Agency staff, project sponsors, and host country government officials; conduct project site visits; hold public meetings in the project area; request written submissions from any source; and engage expert consultants to research or address specific issues.[25] The Office of the Compliance Advisor/Ombudsman concludes the complaint process either when a settlement agreement has been reached or when further investigation or problem-solving efforts are unlikely to be productive. At that point, the Office of the Compliance Advisor/ Ombudsman informs the complainant of its decision and provides a report to the President of the World Bank Group, which may include specific recommendations regarding issues raised by the complaint. The Office of the Compliance Advisor/Ombudsman may also conduct a compliance audit to address non-compliance issues identified in the course of responding to the complaint or may refer any policy issues to the advisory role of Office of the Compliance Advisor/Ombudsman.

As of January 2005, the Office of the Compliance Advisor/Ombudsman's function has received approximately 40 claims, 20 of which had come from one project – the Baku-Tbilisi-Ceyhan pipeline. Some of these claims have resulted in long and complex involvements by the Office of the Compliance Advisor/ Ombudsman's, for example complaints relating to the Newmont Corporation's Yanacocha gold mine in Peru, and others have involved relatively short interventions, for example a case involving one family's inadequate compensation for land lost to the construction of Chile's Pangue Dam. The Office of the Compliance Advisor/ Ombudsman is still too new to evaluate its ultimate effectiveness in meeting the aspirations of the claimants, but it is pioneering the use of alternative dispute resolution methodologies for civil society complaints in the international context. The compliance side of the Office of the Compliance Advisor/ Ombudsman has had less experience thus far (with only its first two compliance reviews in process), but may yet provide citizen-based compliance oversight similar to that of the Inspection Panel.

4 ASIA DEVELOPMENT BANK

In theory at least, the two approaches – of an ombudsman and a compliance mechanism – can coexist in one accountability system. That theory is now being tested by the Asian Development Bank's new mechanism created in 2004.[26] The Asian Development Bank accountability mechanism requires complainants to go first to a "special project facilitator," which despite the name is intended to raise the affected persons' concerns with the project to the project sponsor and Asian Development Bank staff and seek a mutually acceptable solution through flexible dispute resolution processes. If the claimant is unsatisfied with the process, the claimant can at any time request a compliance review from an independent "compliance review panel" patterned closely after the World Bank Inspection Panel. The Asian Development Bank mechanism has already received several complaints in just its first year of operation.

5 CONCLUDING REFLECTIONS

Innovations like the Inspection Panel, the International Finance Corporation's Office of the Compliance Advisor/Ombudsman and the other citizen-based enforcement mechanisms reflect major shifts in the paradigm of how environmental and social policies are enforced, and who enforces them, at the international level. This shift reflects civil society's demands for a greater and more direct role in decisions that profoundly affect the quality of their lives and environment. It extends to the international sphere the important role citizen enforcement played in securing environmental protection at the national level. It also reflects the increasingly outward orientation of international organizations in their efforts to interact directly with civil society.

Less clear yet is whether these citizen enforcement mechanisms will ultimately be sufficiently robust to provide positive results for the affected people who bring the claims. An evaluation of the Inspection Panel showed that about half of the claimants who brought cases felt that the process resulted in some important benefits for them.[27] Others saw initial advantages from the press and pressure that was created by filing the claims, but those advantages disappeared as the spotlight from the Panel process faded. These findings argue for more monitoring authority and for more commitment from the underlying institutions to implement the findings of these enforcement mechanisms.

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[8] The three bilateral financial institutions are (1) the Japan Bank for Investment Cooperation's Compliance Examiners; (2) the Environment Development Canada's Compliance Officer; and (3) the US Overseas Private Investment Corporation's ombudsman.

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[12] For more information, see Inspection Panel website, available online at http://worldbank.org/ipn/ipnweb.nsf (visited Jan 27, 2003).

[13] Inspection Panel Procedures, supra note 11.

[14] Id.

[15] Id.

[16] Several types of complaints are explicitly beyond the Panel's jurisdiction, including complaints (i) addressing actions that are the responsibility of parties other than the Bank, (ii) relating to procurement decisions, (iii) filed after a loan's closing date or after 95 percent of the loan has been disbursed, or (iv) matters already heard by the Panel unless justified by new evidence.

[17] Id at 522.

[18] Id.

[19] See World Bank, *Conclusions of the Second Review of the World Bank Inspection Panel*, 39 ILM 249, 250 (2000). Prior to the 1999 clarification, the Executive Directors frequently rejected the Panel's recommendations for an investigation, typically deciding instead to adopt 'action plans' that Bank Management had prepared in response to the claims. Although in some cases these action plans were responsive to the claimants' concerns, the Board's preemptive approval of the action plans meant that the claims were never fully evaluated nor was implementation of the action plans adequately monitored. The claimants also never received their 'day in court' to have their allegations formally validated.

[20] See Inspection Panel, Summary of Requests for Inspection, available online at http:// wbln0018.worldbank.org/IPN/SummaryofRequests (visited Feb. 17, 2005).

[21] Id. Although the *Summary of Requests for Inspection* indicates that only nine of the recommended investigations were approved, the World Bank Board has approved an additional investigation since the document was updated. See Press Release, Inspection Panel, World Bank Board Approves the Inspection Panel's Recommendation: The Panel to Investigate whether the Bank has Observed its Policies and Procedures in the Cameroon Pipeline Project (Dec 18, 2002), available online at http://wbln0018.worldbank.org/ipn/ipnweb.nsf//pressrelease12182002/$FILE/press+release+12+18+2002.pdf (visited Jan 27, 2003).

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DESIGNING MANDATORY DISCLOSURE TO PROMOTE SYNERGIES BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

KILLMER, ANNETTE B.

Environment and Natural Resource Specialist, Inter-American Development Bank
1300 New York Avenue, N.W., Washington, DC 20577, United States, akillmer@mac.com

SUMMARY

This article describes the role of mandatory information disclosure approaches as a remedy to limitations of traditional command-and-control regulation.

1 INTRODUCTION

The task of reducing process pollution in a community setting, where emissions from the manufacture of products negatively affect the larger community, presents a particular challenge to environmental practitioners, since there tends to be a lack of formal relationships between the polluter and those affected by the pollution (Tietenberg & Wheeler, 1998). This is especially true when industrial activity affects larger segments of society or even the global environment, as is, for example, the case with the emissions of greenhouse gases. Yet, even under a 'sustainable development scenario' of the future, it is likely that the global level of industrial production will increase relative to current levels. As the World Development Report 2003 points out, improving the quality of life for current and future generations in developing countries will require a "substantial growth in income and productivity" (World Bank, 2003, p. xiii). This growth is desirable, because industrial production has a valuable, positive impact on society through the manufacture of consumable goods and the provision of employment. However, pollution intensity has to decline at a rate commensurate with the growth of industrial output to prevent a net increase in pollution (World Bank, 2000). Thus, environmental practitioners are faced with the challenge of reducing the negative impacts of industrial production – to the point of altogether preventing the most harmful emissions and wastes – so that they do not entirely offset the positive impacts.

The traditional approach to controlling pollution is through command-and-control regulation that stipulates a fixed, uniformly applicable environmental target, as well as rules for monitoring and, if necessary, enforcing[1] compliance with this requirement (U.S. Congress, 1995). Command-and-control regulation can be very powerful and is often employed when strict adherence to a standard is required to prevent deleterious consequences to human health. Yet, as several scholars have pointed out, in both developed and developing countries, regulatory agencies charged with monitoring and enforcing these policies frequently operate under the constraints of limited budgets and restricted maximum financial penalties, which limits the effectiveness of command-and-control regulation (Dasgupta, Laplante, & Mamingi, 2001; Foulon, Lanoie, & Laplante, 2002; Gunningham, Philipson, & Grabosky, 1999; Harrington, 1988; Hentschel & Randall, 2000; Heyes, 2000; Laplante & Rilstone, 1996; World Bank, 2000). Moreover, from an economic development perspective, uniform standards are considered inefficient if abatement cost functions differ

between the regulated firms (Lübbe-Wolff, 2001; Office of Technology Assessment, 1995). To remedy these limitations, environmental practitioners and scholars have explored a variety of court-based and market-based instruments, as well as – more recently – information-disclosure approaches.[2] This last type of approach, as a supplement to traditional command-and-control regulation, is the focus of the current paper.

Mandatory information disclosure approaches to pollution prevention have acquired the reputation of a promising policy instrument in developed and developing countries (Stephan, 2002; Tietenberg, 1998; World Bank, 2000, and references therein). In contrast to other environmental policy instruments, information disclosure approaches are not designed to influence pollution levels directly, but rather require firms to regularly disclose certain environmentally relevant information about their processes or products to the general public (Anderson & Lohof, 1997). This disclosure can have considerable negative or positive consequences for the disclosing firms, because civil society may choose against or in favor of a firm's products based on the information provided. Similarly, the disclosure may change a firm's market valuation if it gives rise to concerns over future liabilities or indicates precautions against such liabilities through good environmental management (Anderson & Lohof, 1997; Barth & McNichols, 1994; Blacconiere & Northcut, 1997; Garber & Hammitt, 1998; Konar & Cohen, 1997, 2001; World Bank, 2000). Empirical evidence from the U.S. Toxic Release Inventory (TRI), Indonesia's Program for Pollution Control, Evaluation and Rating (PROPER) and other disclosure programs reveals significant improvements in the participating firms' environmental performances, in some cases beyond compliance requirements, and the U.S. Toxic Release Inventory has even resulted in proactive initiatives by heavily polluting industries (Afsah & Vincent, 1997; Arora & Cason, 1995; Kappas, 1998; Khanna & Damon, 1999; Konar & Cohen, 1997; Tietenberg & Wheeler, 1998; World Bank, 2000). Judging by these examples, mandatory information disclosures, or more specifically the private efforts to enforce pollution reductions that result from this disclosure, hold the promise of reducing the need for costly regulatory enforcement – which is clearly an appealing prospect given the aforementioned restricted regulatory budgets.

The challenge at this point, though, is that the empirical evidence on mandatory information disclosure in the reduction of process pollution comes primarily from two cases (the U.S. Toxic Release Inventory and Indonesia's PROPER), and the dynamics introduced by the involvement of civil society have received only limited analytic attention (Gunningham et al., 1999; Heyes, 2000; Stephan, 2002). As such, our understanding of the circumstances in which public and private efforts to reduce pollution are indeed complementary, or "additive" (Heyes, 1998, p. 59), is insufficient to confidently generalize from the experiences of Toxic Release Inventory and PROPER. To improve our understanding of these dynamics, a recent research study considers the conditions under which the regulator's and civil society's efforts to enforce pollution reductions are complementary, and how the regulator can foster this positive interplay (Killmer, 2004). The present paper draws on the key arguments and findings from this larger study to derive a set of recommendations that are pivotal to designing mandatory disclosure approaches in ways that promote synergies between public and private enforcement.

Specifically, a systematic analysis of the dynamics introduced by the involvement of civil society in pollution prevention enforcement suggests that the design and implementation of a mandatory disclosure policy should:

- Involve careful consideration of (a) what information is presented, (b) how it is presented and distributed, (c) how civil society can be assisted in its use of the information through capacity building and other education initiatives, and (d) whether the existing legal and institu-

tional context permits the level of civil society involvement that the disclosure policy is supposed to encourage.

- Take into account that the effectiveness of different avenues for civil society involvement varies with the regulatory context as well as with the nature and number of polluting firms.
- Make provisions to allow for a greater flexibility in the regulator's behavior than is generally accommodated by traditional command-and-control regulations.

The next section introduces the analytical model that was developed by Killmer (2004) to investigate the dynamics of interest here. Section 3 presents the key insights provided by the model with respect to conditions that promote or hinder the effective involvement of civil society in the enforcement process. The final section of this paper discusses the policy implications that follow from these insights – particularly those that reveal counter-productive dynamics – and thereby arrives at the recommendations listed above.

2 AN ANALYTICAL MODEL OF CIVIL SOCIETY INVOLVEMENT

The standard theory with respect to imperfectly enforceable regulations is one of choice under uncertainty (Heyes, 1998). Much of the literature in environmental enforcement traces its roots to the classic economic analysis of crime by Becker (1968), which suggests that an individual or entity will weigh the certain cost of compliance against the expected penalty for non-compliance (Cohen, 1998; Heyes, 1998, 2000). A corollary of this theory is the principle of marginal deterrence (Shavell, 1992; Stigler, 1970), according to which the decision to comply or not depends on the *absolute* expected penalty, whereas the decision about the extent of non-compliance depends on the *marginal* expected penalty. In the context of reducing process pollution, these two theories predict that a rational firm will comply with a performance standard if and only if its cost of reducing emissions to the level of the standard is equal to or less than the expected penalty.

The theories further predict that non-compliant firms will emit at the level where the increase in the expected penalty associated with emitting one more unit of pollution equals the abatement costs foregone by emitting that extra unit. Under this traditional economic model of compliance and enforcement, the firm's objective with respect to a particular pollutant can be

$$\min_x \underset{\text{Cost}}{\text{Total}} = \underset{\text{Cost}[x]}{\text{Abatement}} + p(\textit{monitor}) \cdot p(\textit{enforce}) \cdot \text{Penalty}[x-s] \qquad \textbf{(Eq.1)}$$

generically expressed as shown in Eq. 1, where *Abatement Cost[x]* is the expense incurred to achieve pollution level x, the Penalty is a function of the difference between actual emissions, x, and the legal pollution standard, s, and the likelihood of having to pay the penalty is dependent on the probabilities of monitoring and enforcement (which, in more complex models, are often specified to depend on x and/or s).

The theories do not specify the source of the penalty, but the theoretic models in the pollution control literature have largely focused on regulatory fines associated with command-and-control regulation and on taxes or permit costs associated with economic incentive instruments (see overview by Cohen, 1998 and reference cited therein). In these models, the regulator chooses certain parameters (e.g. the amount of the fine or tax), and these choices influence the level of compliance and hence the level of system-wide pollution abatement.

However, over the past decade, civil society has noticeably entered into the picture – though by and large not into the equation of analytical enforcement models – as a second source of pressure toward pollution reductions. The systematic publication of environmental data in a readily accessible format (such as the internet-accessible Toxic Release Inventory database in the U.S.) has greatly assisted public participation in the enforcement process by virtually eliminating the direct cost to civil society of collecting the necessary information. As such, public disclosure provides the victims of process pollution with the

$$\min_x \underset{\text{Cost}}{\text{Total}} = \underset{\text{Cost}[x]}{\text{Abatement}} + p(\textit{monitor})\{\, p(\textit{enforce}) * \text{Penalty}[x-s] + p(\text{levyfine}) * \text{Fine}[x-d]\} + \{1 - p(\text{monitor})\} * \text{Penalty}[d-s] + p(\text{target}) * \text{CivilFine}[d] \quad \textbf{(Eq.2)}$$

data needed to create incentives for polluters to control their emissions (Tietenberg & Wheeler, 1998), and hence considerably lowers the transaction costs of achieving a more efficient outcome (Coase, 1960). In short, mandatory information disclosure introduces civil society as a third party into the traditional firm-regulator dyad – a change that alters the firm's cost function in several important ways, as shown in the generic objective function for firms given by Eq. 2.

The first alteration compared to Eq. 1 is that the regulator is now monitoring two aspects of a firm's performance, namely compliance with the pollution standard (as before) and accurate disclosure. If, during monitoring, the regulator finds that disclosed emissions, d, are below actual emissions, x, the firm would be fined for under-disclosure with a certain probability[3], which translates into an additional expected cost of p(*monitor*)*p(*levyfine*)*Fine[x-d] for the firm. Second, a firm can choose to self-disclose a violation of magnitude [d-s] and incur the associated penalty for non-compliance. This behavior has an expected cost of {1 – p(*monitor*)}*Penalty[d-s]. The third additional cost is any financial pressure brought directly by civil society (CivilFine) against polluting firms. The expected cost from such pressure is a function of disclosed emissions, d, since that is the information civil society acts on, and of p(target), the probability of civil society being successful in targeting a certain firm and bringing direct financial pressure to bear. Thus, combining a traditional pollution standard with a mandatory disclosure requirement can result in three additional sources for increasing costs of non-compliance to firms and hence for inducing them to abate their levels of pollution.

In making their decision, it is also crucial that firms take into account the behavioral flexibility of civil society. Unlike the regulator, whose actions are circumscribed by statutes and rules, civil society can exert pressure toward pollution reductions through various behaviors. For the purpose of this discussion, six common types of intervention are considered:

i. *No Action:* Civil society receives information, but does not act on it.
ii. *Market Pressure:* Civil society exerts direct pressure on firms through markets.
iii. *Suits Against Firms:* Civil society brings suits against certain non-compliant firms.
iv. *Suit Against Agency:* Civil society brings legal actions against the regulator to increase the agency's monitoring and enforcement efforts.
v. *Suit Against Agency & Market Pressure:* A combination of interventions (i) and (iv).
vi. Suits Against Agency & Firms: A combination of interventions (ii) and (iv).

The No Action case is included here not only because it provides the comparison case to traditional models that do not include civil society, but also because it serves as a reminder that the mere widespread publication of data does not automatically translate into private actions. For the other intervention behaviors, it is assumed that they are carried out with the intention to have an overall positive effect on pollution reductions.

Depending on which intervention behavior civil society chooses, the firm will face a slightly different objective function. For example, the CivilFine term is likely to be significant when civil society exerts market pressure or brings suits against firms (either alone or in combination with a judicial action against the regulator), but is equal to zero in the 'No Action' case and in the pure 'Suit Against Agency' case. The latter case differs from the No Action case, in that civil society can influence the firm indirectly through a successful judicial action by inducing the regulator to increase p(*monitor*), p(enforce) or p(*levyfine*). Thus, firms face different objective functions depending on the behavior of civil society. Moreover, firms have only limited ability to

foretell how civil society will intervene in the process, unless civil society is a priori restricted in its choices (for example, a country's legislation may not give its citizens the necessary legal standing to bring judiciary actions). In this way, private involvement in the enforcement process reduces the predictability of interactions within the system compared to the traditional, highly codified interactions between firms and the enforcement agency.

An important question from the perspective of environmental decision makers is whether – despite or because of this reduced predictability – civil society's involvement in the enforcement process is ultimately effective[4] in achieving pollution reductions beyond those that could be achieved by the regulator alone. This question has been addressed in some detail by Killmer (2004) through analytically solving the particular objective functions firms would face under various sets of enforcement conditions, whereby the sets of conditions differ from each other in the type of intervention chosen by civil society, the regulator's enforcement strategy, and the financial constraints imposed on the regulator and/or civil society. Comparing the solutions across the various sets of conditions reveals a number of important dynamics that policy makers should take into consideration when designing mandatory disclosure policies.

3 KEY FINDINGS REVEAL POTENTIAL CONFLICTS AND SYNERGIES

With regard to the effectiveness of civil society involvement in enforcing pollution prevention policies, the comparison of environmental outcomes under various enforcement conditions offers four key insights.

> **Finding 1:** Under certain conditions, excluding civil society from the enforcement process through enforcing solely the performance standard (and expending no resources on enforcing the disclosure policy) leads to the most effective environmental outcome.

The dynamic described by Finding 1 can be observed when civil society exerts pressure directly on firms, through the market or legal suits, but has only limited resources at its disposal to do so. The finding is even more clearly illustrated in the No Action case, where an exclusive enforcement of the performance standard is the most effective and cost-effective[5] strategy for a budget-constrained regulator. Thus, if civil society does not have or chooses not to expend the resources to participate meaningfully in the enforcement process, excluding civil society by not enforcing the disclosure requirement allows the regulator to focus all its resources on achieving lower pollution levels.

It is important to note, however, that Finding 1 refers to reducing pollution in an effective manner. Foregoing the monitoring and enforcement of an existing disclosure requirement is clearly not the most desirable strategy from a public access perspective. Thus, Finding 1 also serves to illustrate that achieving the most effective pollution reduction and the best public access to information are not invariably compatible objectives, even though both are generally considered socially desirable.

The dynamics just described indicate that the effectiveness of civil society's involvement depends on its resources for such an involvement. In addition, civil society's effectiveness depends either directly or indirectly on the regulator's resources. The direct link is apparent in the dynamics associated with legal actions against the regulatory agency:

> **Finding 2:** Suits brought by civil society against a social-cost-minimizing regulator, either solely or in combination with direct pressure on polluting firms, will increase the effectiveness of enforcement if and only if the regulator is not bound by a budget constraint.

Finding 2 emphasizes that civil society actions against a social-cost-minimizing regulator do not have a positive effect unless the regulator is able to increase enforcement efforts in response to those actions[6]. In this latter case, civil soci-

ety intervention can lead to more effective pollution control because judicial actions can induce the regulator to enforce pollution abatement beyond the social-cost minimizing level. (It is worth noting that, while abating pollution beyond the social-cost minimizing level may be effective, it is not, economically speaking, efficient.) On the other hand, if the regulator is unable to increase its enforcement effort due to a binding budget constraint, judicial actions that prescribe a change in regulatory behavior invariably mean that the available resources have to be reallocated, for example to an increase in enforcement at the expense of monitoring. Yet, a social-cost-minimizing regulator would be expected to choose the highest level of pollution control feasible within the binding budget constraint, and hence a reallocation of resources would not lead to a more effective outcome. Moreover, bringing legal actions against a budget-constraint regulator is likely to reduce overall cost-effectiveness compared to the No Action alternative, since the same amount or less pollution is reduced but at a higher cost, due to the cost incurred by civil society.

An indirect link between civil society's effectiveness and the regulator's budget resources is illustrated by the third finding:

> **Finding 3:** Private enforcement through market pressure creates a disincentive for firms to disclose, particularly for firms with high levels of emissions.

Under a combined performance standard/disclosure policy, the firm is faced not only with penalties from the regulator for non-compliance with the policy requirements, but also with the possibility that civil society will penalize it for any disclosed emissions. Firms can evade the pressure from civil society to some extent by under-reporting their emissions.[7] As modeled for the purposes of the present analysis, the mandatory disclosure policy anticipates this behavior and includes a regulatory fine on under-reporting, but (consistent with reality) this fine is not levied with certainty. Thus, in making their disclosure decision, firms have to weigh the expected cost of inaccurate disclosure against the cost of revealing their true emissions, which consist of the regulatory fine for non-compliance with the standard and the penalty from civil society. Since this combined penalty from regulator and civil society tends to increase with a greater extent of non-compliance, firms that know themselves to emit above the standard have an increasing incentive to under-report the higher their levels of emissions.

At the same time, civil society's interventions are based on the disclosed information, and it is reasonable to assume that civil society is particularly interested in reducing pollution from firms that are emitting considerably above the standard. Hence, by creating incentives for firms to under-disclose, civil society inadvertently limits its own involvement in the enforcement process – unless the regulator counteracts the deterioration in data quality through more stringent enforcement of the disclosure requirement[8]. This in turn requires the availability of regulatory resources and hence establishes an indirect link between civil society's effectiveness and the regulator's budget.

It is important to note that an increasing demand on regulatory resources as a result of civil society involvement is diametrically opposed to one of the commonly cited benefits of involving civil society in the enforcement process, namely that it reduces the need for costly regulatory enforcement. Finding 3 illustrates that mandatory disclosure requires some form of enforcement to ensure that the requested information is disclosed – and disclosed accurately. Yet, it is in large part the paucity of good information about actual emissions that limits the regulator's ability to enforce pollution standards and other traditional command-and-control regulations that demand continuous compliance. Moreover, it is similarly difficult for the regulator to gain access to complete and accurate pollution data, regardless of whether the data are used to satisfy a per-

formance standard or a disclosure requirement. Thus, mandatory information disclosure does not circumvent the acquisition of reliable information on which to act – and hence does not resolve one of the fundamental problems the regulator faces in enforcing pollution control.

Yet, despite the countervailing dynamics mentioned in conjunction with the first three findings, the regulator's and civil society's enforcement efforts can work synergistically under certain conditions and lead to more effective pollution control than could be achieved by the regulator alone.

Finding 4: Public and private enforcement is most likely to be complementary when the regulatory budget is binding and civil society exerts a reasonable level of direct pressure on firms, either through markets or through citizen suits.

Given a binding regulatory budget, the enforcement agency by itself is not in a position to induce firms to reduce pollution to the social-cost-minimizing level. However, if civil society has the necessary resources to create incentives for firms to reduce pollution (see also Finding 1), the regulator's best strategy is to focus on enforcing the disclosure requirement and hence provide civil society with good-quality information about actual emissions, which are then best used to exert direct pressure on firms through the market or through citizen suits (see also Finding 2). The regulator's task of obtaining reliable information will be slightly complicated by the fact that civil society levies a penalty on disclosing information about pollution, rather than on the pollution itself, when it exerts pressure on the disclosing firms (see also Finding 3). Nevertheless, under these conditions, the positive effects of civil society's involvement can be sufficiently large to outweigh any counter-productive changes in firms' behaviors as well as the constraints imposed on the regulator through its budget. Judging by the empirical evidence available, this situation is in fact given in the context of both the U.S. Toxic Release Inventory and Indonesia's PROPER, and it is presumably the situation envisioned for similar programs, such as the ones in Canada, Mexico, the European Union, and the Philippines (Environment Canada, 2005; European Commission, 2004; Nauman, 2003; Presencia Ciudadana, 2004; World Bank, 2000).

4 RECOMMENDATIONS FOR EFFECTIVE DISCLOSURE POLICIES REVISITED

The analysis of the economic model reveals three countervailing dynamics that suggest, at least in theory, that the success of the Toxic Release Inventory and Indonesia's Program for Pollution Control, Evaulation and Rating may be the exception rather than the rule. However, as revealed by the fourth finding, these countervailing dynamics do not occur invariably – indeed, they can be largely avoided by paying due attention to their possible occurrence during policy design and implementation.

As such, the findings presented here have three major policy implications. First, it is important to establish that there is a demand from civil society for the information provided, and that civil society has the ability to become meaningfully involved in the enforcement process. (Establishing demand accurately is unlikely to be feasible, but already active participation by the intended target audience in the design and implementation of the policy will be very helpful in gauging demand.) While nongovernmental organizations, shareholders and competing firms in various countries are adept at leveraging funds and taking advantage of legal provisions that grant them access to the environmental policy process, neither the demand for information, nor the skills or legal provisions necessary to act on it can be taken for granted. Therefore, the design and implementation of a mandatory disclosure policy should involve careful consideration of (a) what information is presented, (b) how it is presented and distributed, (c) how civil society can be assisted in its use of the information through capacity building and other education initiatives, and (d) whether the existing

legal and institutional context permits the level of civil society involvement that the disclosure policy is supposed to encourage.

Second, not all avenues for civil society involvement are equally effective in a given context. For example, while judicial actions against the regulatory can certainly be effective to achieve certain goals, Finding 2 illustrates that they can also be ineffective or even counter-productive in some contexts. Similarly, citizen suits against firms tend to be limited by the existing pollution standard, since they usually require evidence that a firm is out of compliance with an existing regulation. Nor can it be presumed that it is always feasible for shareholders, consumers or competitors to exert effective market pressure; a small number of polluters, publicly-traded firms, and those that produce products or services which are directly traded to consumers are more easily targeted effectively through stock markets or consumer boycotts then large numbers of polluters, privately-held firms, or those that produce raw materials or intermediate goods. Therefore, the design and implementation of a mandatory disclosure policy should take into account that the effectiveness of different avenues for civil society involvement varies with the regulatory context as well as with the nature and number of polluting firms.

Third, introducing a mandatory disclosure approach (and hence civil society as a third party to the traditional regulator-firm dyad) fundamentally changes the role of the regulator. In this new context, the regulator is not only charged with maximizing compliance by the polluting firms within the usual budget and maximum-penalty constraints. The regulator also has to strategically respond to changes in firms' behaviors arising from civil society's involvement (which itself may vary in type and intensity), as well as operate under any constraints imposed through legal actions against the enforcement agency. Therefore, the design and implementation of a mandatory disclosure policy should make provisions to allow for a certain flexibility in the regulator's behavior. Given such flexibility, the regulator will be in a better position to effectively adapt its behavior to these new demands.

Thus, systematic analysis of the dynamics introduced by civil society involvement in the enforcement of pollution prevention polices reveals important countervailing dynamics. Yet, these dynamics can be forestalled through circumspect policy design and implementation, and environmental practitioners can thereby foster a positive interplay between the regulator's and civil society's efforts to enforce pollution reductions.

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[1] Monitoring is here defined as the process of verifying a firm's emission data and compliance with the standard, and enforcement as the undertaking of actions (e.g. imposing a penalty) to compel a non-compliant firm into reducing its emissions. Both public and private actors can enforce compliance, yet governmental regulatory agencies are bound by any enforcement rules specified in the associated regulations for the standard.

[2] As used in this paper, *court-based instruments* include tort law cases, citizen suits and statutory liability claims, *market-based instruments* include pollution charges and taxes, as well as tradable permits and pollution credits, *and information disclosure approaches* refer to policies that require the systematic disclosure of information by firms. Thus, the latter term does not include voluntary or ad hoc publications of information, such as may occur through participation in voluntary eco-labeling schemes, corporate reports, court cases or 'leaks' to the press.

[3] Small infractions are unlikely to be pursued, but, for example, the U.S. EPA can levy up to US$27,500 per violation for failure to report the mandated information for the Toxic Release Inventory on time.

[4] *Effectiveness* in the current context refers

to the amount of pollution reduced, specifically the difference between the total amount of pollution in the absence of the policy (counter-factual case) and the total amount of pollution actually emitted by the firms in the system under a certain set of enforcement conditions.

[5] *Cost-effectiveness* is here defined as the amount of financial resources expended per unit of pollution reduced.

[6] This finding applies in the short- to medium-term. In the medium- to long-term, successful judiciary actions may be used by the regulator to make its enforcement processes more efficient, to lobby for an increase in its budget or to leverage the pressure from civil society into obtaining other additional resources.

[7] Incidentally, the model used in this analysis assumes that civil society can exert some market pressure on targeted firms even in the absence of information, mirroring, for example, reputational effects on firms in 'dirty industries'.

[8] In the United States, the regulator often has access to self-reporting or monitoring-based data through other sources, but this situation is atypical, particularly in developing countries.

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MEASURABLE TARGETS FOR ENFORCEMENT PERFORMANCE

KLEIN, WOUT

Project Manager, Inspectorate of Housing, Spatial Planning and the Environment
P.O. Box 16191, 2500 BD The Hague, The Netherlands, wout.klein@minvrom.nl

SUMMARY

One of the minimum criteria for a professional environmental enforcement process in the Netherlands[1] is having a set of measurable targets for enforcement performance. It is a subject of continuous, but useless, debate whether these targets should be in terms of input (time, money), throughput (projects, procedures), output (inspections, enforcement actions) or outcome (compliance, environmental results). All these types of target have their own field of application. Quite what is the best type of target depends on the sort of activity and on the stakeholder, so in practice an inspectorate will combine all (four) types of target. Whatever target is set, it should be monitored in the performance phase, and it should be evaluated and improved so that new actions, priorities and targets can be set in the next planning phase.

1 INTRODUCTION

The minimum criteria for a professional enforcement process that have been agreed in the Netherlands require, amongst other things, that measurable targets be set for enforcement performance.

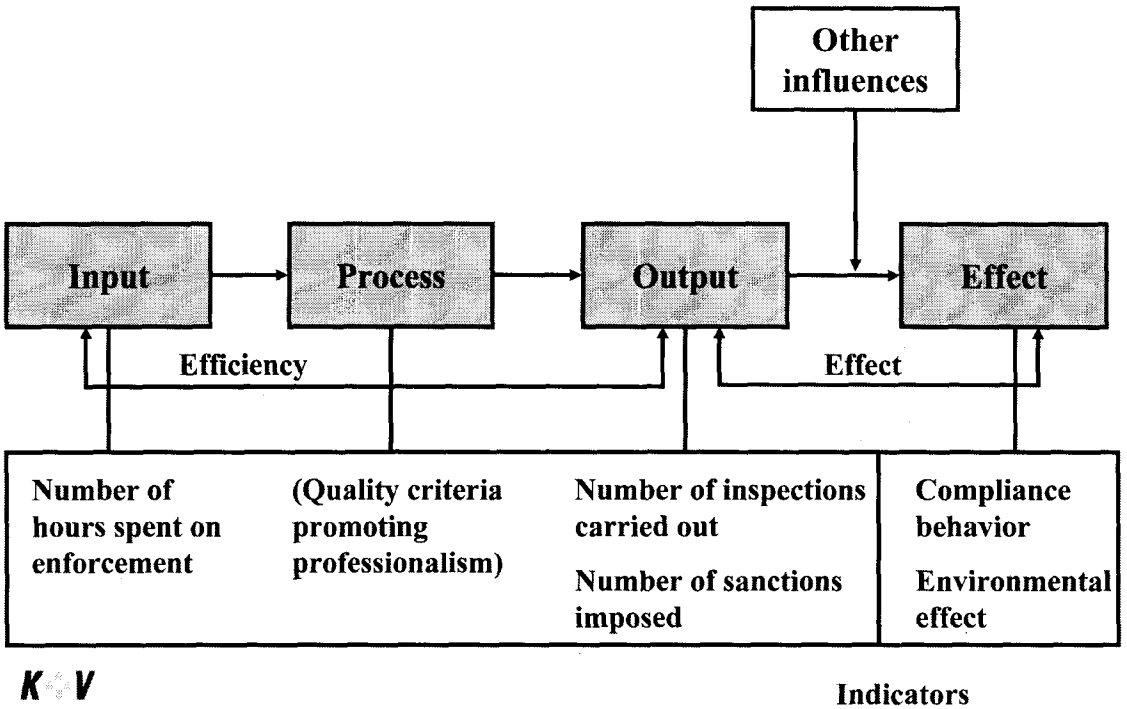
There are several different types of target and they are generally classified as either input, throughput, output or outcome targets. Often there is discussion about which type of target is best. Whilst politicians and the public are often only interested in the outcome, inspectorate managers feel they can only influence their own input and performance and so believe they should be judged on these criteria alone. How should this discussion be handled? This paper sketches a general approach to this issue. It is based on the report (available in Dutch only) "Meetbare doelstellingen" (Measurable targets) (L. Rings and M. Scholten).

2 THE FUNCTION OF TARGETS

Targets do not exist in isolation. They are part of the management process or management cycle of a professional organisation. That process of professional environmental enforcement is described in detail and set out in terms of minimum criteria in the Dutch project bearing the same name. See W. Klein, "Minimum criteria for a professional environmental enforcement process". This control process is also described in clear terms in the sub-report entitled "Besturen met kengetallen" (Management by indicators) (J. Tholen and J. Wijnker).

Before an enforcement target can be formulated, the problem must first be defined (on the basis of an environmental analysis and risk analysis). Next, the corresponding enforcement task and activity should be identified. Depending on the type of enforcement task and the preciseness with which it is defined, an input, output, compliance or environmental target can then be formulated. Generally speaking, the more precisely the problem that is the subject of enforcement has been defined, the more precisely the enforcement task can be formulated and, consequently, the

Figure 1: *Location of targets in the management process*



more precise the target.

3 TYPES OF TARGET

The general classification of targets ranging from input to outcome can be specified as follows in relation to environmental enforcement:

- input targets;
- performance targets;
- compliance targets;
- environmental targets.

The first two types of target tell us something about the organisation itself: the effort made (number of hours) and the performance delivered (number of inspections carried out or number of sanctions imposed) by an enforcement organisation. With the aid of these targets, it is possible to measure an enforcement organisation's efficiency. These targets fit in perfectly with the existing planning and control practice of the government.

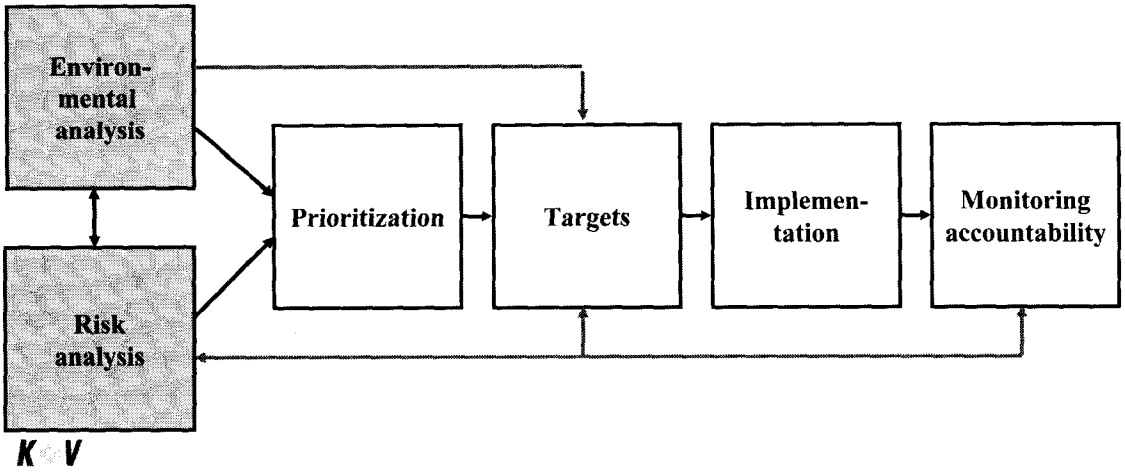
The last two types of target tell us something about the effect of the enforcement actions on the target group (compliance behaviour) and on the environment (environmental effect). These targets are an indicator of the effectiveness of the enforcement actions (see Figure 2).

4 TARGET, ENFORCEMENT TASK AND STAKEHOLDER

No single type of target is either more or less important than any other. What is important is that a particular type of target is applied to a particular type of enforcement task and the manner of accountability (most) appropriate to that type of target. It is also important to know for which actor the target is formulated.

- The enforcement body wants to be able to do its work without interference and to a high level of accuracy and quality. This is best achieved by means of an input target specifying how much time and other resources are available.

Figure 2: *Types of target and their interrelationship*



- The manager wants to manage his responsibilities well and as fully as possible with the resources available. This is best achieved with a performance target indicating what needs to be done.
- The inspector, the judicial authorities and the minister responsible want to see conformity with standards and do not wish to be confronted with unexpected disasters or breaches of standards. This is best achieved with a compliance target indicating the risk in the event of non-compliance.
- The citizens and government want the highest possible quality of living environment. This is best achieved with an effect target indicating the type and level of quality to be achieved.

5 SMART FORMULATION

In order to be effective, every form of (enforcement) target must be formulated in unambiguous terms and only capable of a single interpretation. In order to achieve this, enforcement targets should formulated in "SMART" terms. This means that the targets must be:

- Specific: The target must relate to a specific enforcement task, target group and/or regulation or (selection of) regulations.
- Measurable: The target must be measurable. This means that the target must be formulated in quantitative terms and that it is clear which elements are to be measured.
- Acceptable: The result set out in the target should be sufficiently acceptable to the organisation.
- Realistic: The organisation must be realistically able to meet the target.
- Timed: The target should have a set period within which the effort or performance is to be delivered, or within which the effect (compliance behaviour or environmental effect) is to be achieved.

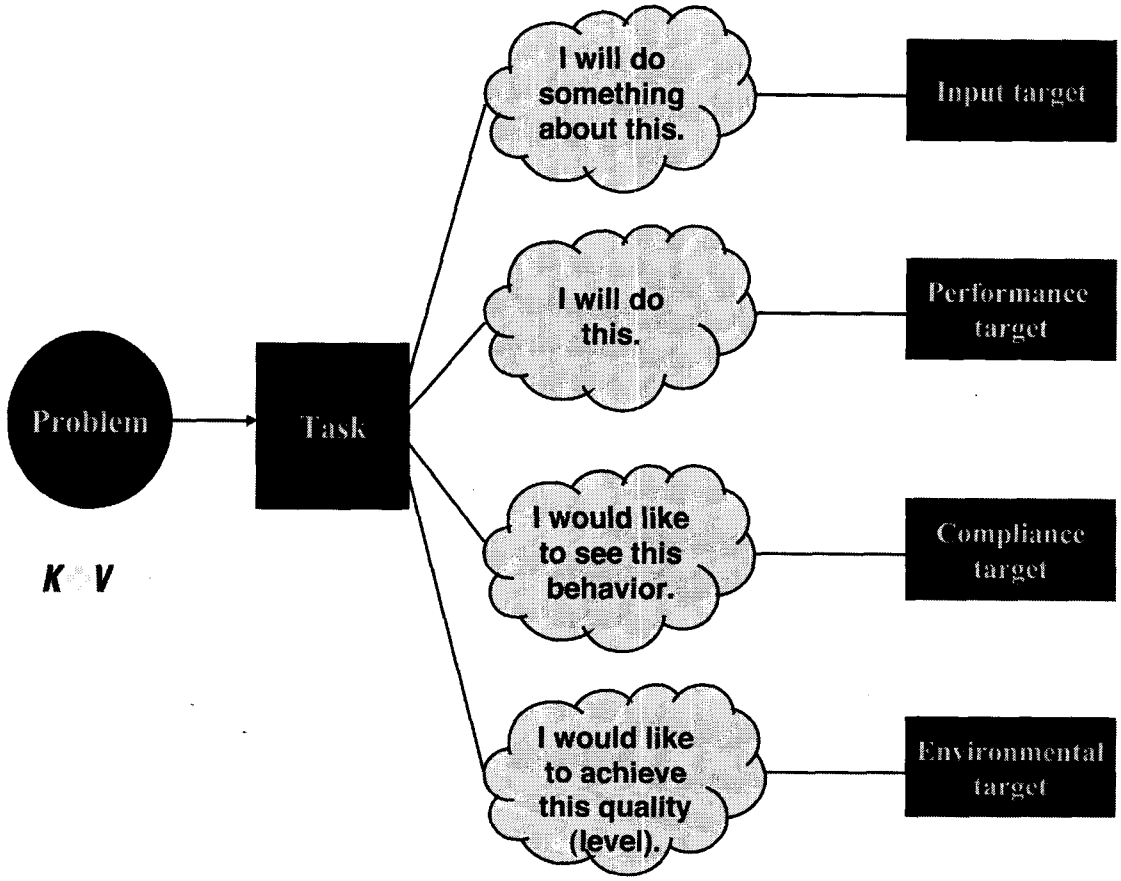
6 CHOICE OF ENFORCEMENT TARGET

The choice of a particular enforcement target depends on the type of enforcement task and the preciseness with which that task is described. Generally speaking, the more precisely the problem that is the subject of enforcement is described, the more precisely the enforcement task can be formulated and, as a consequence, the more precise the target.

Enforcement tasks include, for instance:

- exploratory survey of current compliance behaviour, or of ways of influenc-

Figure 3: *Overview of choice of target type*



ing that behaviour or performing inspections;

- enforcement of specific laws and regulations, possibly further specified for certain target groups and topics;
- implementation of enforcement projects focusing on sectors, target groups, areas, topics or collaborative projects;
- comprehensive enforcement.

Each task may have a different object, and that object also determines the character of the measurable target. See Figure 3.

The tasks can be identified and specified according to the particular context in each country. In the case of the Netherlands, for example, a card entitled "Measurable enforcement targets" is used. This card provides the following details for each type of target:

- definition of the target;
- practical examples of the target;
- possibilities for use;
- parameters (user requirements) that apply to the definition of that target;
- examples of how the type of target in question can be formulated;
- overview of possible indicators used with the target.

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MINIMUM CRITERIA FOR A PROFESSIONAL ENVIRONMENTAL ENFORCEMENT PROCESS, PART II

KLEIN, WOUT

Project Manager, Inspectorate of Housing, Spatial Planning and the Environment, P.O. Box 16191, 2500 BD The Hague, The Netherlands, wout.klein@minvrom.nl

SUMMARY

Environmental enforcement agencies (inspectorates) in the Netherlands have adopted a set of minimum criteria or quality standards that should be met by any Inspectorate in order to ensure a professional enforcement process. In an orchestrated campaign from 2002 through 2005, the Inspectorates made an enormous leap forward to accomplish this objective.

1 INTRODUCTION

From 2002 through 2005, a national project was carried out in the Netherlands by all Inspectorates of the local, provincial, and national governments to improve, or rather ensure, a "professional environmental enforcement process" within all these agencies.

This project started by designating the minimum criteria for such a professional process. Consequently, all agencies in the Netherlands went through a self-evaluation process to determine the extent to which they satisfied these criteria on 1 January 2003. As was to be expected, not one of the approximately 550 agencies was completely professional. On the contrary, the vast majority of the Inspectorates could not satisfy more than half of the minimum criteria. This was no surprise, but it was a perfect starting point for a collective improvement activity.

All agencies committed themselves to fulfillment of the criteria by 1 January 2005. Again they conducted a self-evaluation; its results are presented in this paper.

2 THE PROJECT

The project aiming at a "professional environmental enforcement process" in the Netherlands was initiated in 2001 by the then Minister of Housing, Spatial Planning and the Environment, Mr. Jan Pronk. Mr. Pronk proposed a rearrangement of inspecting authorities, in particular to reduce the number of inspecting bodies from 500 to no more than 50.

The competent authorities responsible for the existing Inspectorates successfully opposed this policy by arguing that the main focus should not be the organization of the Inspectorates but rather the quality of their performance. They proposed the development of a set of minimum criteria for a professional environmental enforcement process, thereby ensuring:

- Professional people.
- Professional policies.
- Professional procedures.
- Professional performance.
- Professional products.

The Minister agreed that if the existing Inspectorates could prove that they

satisfied the elaborated set of minimum criteria by January 2005, then the reduction of the number of Inspectorates would become unnecessary. The elaborated set of minimum criteria was developed during the spring and summer of 2002 and was finally adopted on 1 November 2002. To establish a reference for improvements, all Inspectorates conducted a self-evaluation on how they fulfilled the minimum criteria on 1 January 2003. An independent consultant verified all of these self-evaluations. A report was published with the national results of this "zero measurement" and all Inspectorates and authorities had a clear insight into what had to be improved.

The years 2003 and 2004 were used for improvement activities. In the Inspectorates, teams were appointed to develop strategies or protocols. Inspectorates from neighboring municipalities or with similar tasks, such as the 10 bodies of "Rijkswaterstaat" (the Department of Waterways and Public Works), came together to develop methods and policies. On the national level, a group of participants from all kinds of authorities organized the communication on these initiatives, facilitated the dissemination of good practices, conducted several studies, and proposed several good practices of general use.

The "final measurement" of the situation on 1 January 2005 was conducted in exactly the same way as the zero measurement.

3 RESULTS

The results can be seen from the percentage of criteria that were fulfilled by the Inspectorates. As there are roughly 50 minimum criteria, each criterion that is not fulfilled reduces the score by 2%. This means that an Inspectorate that scores 90% did not satisfy 5 of the minimum criteria.

3.1 A Great Leap Forward, But...

Given the results of the final measurement, it can be concluded that the enforcement agencies have made a great leap forward in professionalizing their environmental enforcement.

The following table shows the degree to which all enforcement agencies satisfy the minimum criteria in 2005, and the extent to which they satisfied those criteria in 2003. The table shows that in 2003 no single agency or organization fulfilled more than 90% of the minimum criteria. In 2005, 32.9% of the agencies satisfied 100% of the minimum criteria and 40.6% fulfill 90% to 100% of the criteria. This means that in 2005, 73.5% of all enforcement agencies satisfy more than 90% of all minimum criteria. This great majority of the

Table 1: *Extent to which the enforcement agencies satisfied the minimum criteria during the zero measurement in 2003 and the final measurement in 2005*

% minimum criteria	Absolute numbers and (%) Enforcement agencies Zero measurement 2003 (Out of 542 agencies)	Absolute numbers and (%) Enforcement agencies Final measurement 2005 (Out of 517 agencies)
100	-	170 (32,9%)
90 – 100	-	210 (40,6%)
80 – 90	8 (2%)	56 (10,8%)
60 – 80	122 (22%)	65 (12,6%)
40 – 60	145 (27%)	8 (1,5%)
20 – 40	212 (39%)	6 (1,2%)
< 20	55 (10%)	2 (0,4%)

Table 2: *Number of enforcement agencies that satisfy all minimum elements*

Enforcement Agencies	Number meeting all minimum elements (Out of 517 agencies)
Local government	141 (30%)
Provincial government	7 (58%)
VenW Inspectorate	1 (100%)
Rijkswaterstaat-diensten (Agencies of the Ministry of Waterways and Public Works)	10 (100%)
VROM-Inspectie (Inspectorate for Housing, Spatial Planning and the Environment)	-
Waterschappen (District Water Boards)	11 (42%)
Total	**170 (32.9%)**

agencies have turned in a tremendous performance during this time, mainly thanks to the hard work and dedication of the civil servants and managers.

3.2 Final Target Not Achieved

The objective and the administrative commitment at the start of the project were aimed at getting all enforcement agencies in the Netherlands to satisfy all the minimum elements of the quality criteria by 1 January 2005. This would mean that 100% of the agencies would satisfy 100% of the minimum quality criteria.

That target was not achieved. Of the 517 agencies, 170 now satisfy 100% of the minimum elements and 210 satisfy between 90% and 100% of those elements. Together, this is over 73% of all agencies. The other 27% therefore satisfy less than 90% of the quality criteria and have thus professionally organized their enforcement process in an unsatisfactory way. For 16 agencies, in the two years or more that were available to them, they could not satisfy more than a maximum of 60% of the agreed quality criteria. Furthermore, during the verification process, it was noticeable that the attention of the enforcement agencies was mainly directed at the elements and criteria and to a lesser extent on their mutual relationship.

At present, almost 33% of all enforcement agencies satisfy all the minimum criteria. Compared to the original objective, this result is quite disappointing.

It should be noted here, however, that cases where criteria are "not satisfied" sometimes involve minimal deviations. For example, the VROM Inspectorate does not score 100% but 98% because it does not satisfy the criterion "Supervision strategy". The VROM Inspectorate does indeed have supervision strategies for all of its varied and different tasks, but it has no comprehensive supervision strategy.

In practice, the main focus is on the 137 (26.5%) agencies that satisfy less than 90% of the minimum criteria.

3.3 Use of the Statutory Instruments

While making the agreements in 2002, a statutory regulation was designed for those cases in which the criteria would not be satisfied after 1 January 2005. The Provincial Governments are playing an important role in this area as directors and prime movers. If considered necessary, the State can also take on its responsibility – for example, by reducing the overall number of Inspectorates. These statutory instruments, which have since been implemented, will now be used to nonetheless bring stragglers to a professional enforcement level. That can have far-reaching consequences for those stragglers.

It basically means the following:

- Agencies which satisfy 100% of the criteria in the final measurement. These will receive the compliments of the Provincial director and will be urged to vigorously continue with the implementation of further professionalization. These agencies will also be highlighted as best practice and in that way will help to achieve a further dissemination of professional enforcement in the Province.
- Agencies which do not satisfy 100% of the criteria in the final measurement but which the Provincial director believes can still satisfy those criteria under their own steam and in the short term (in any case before 1 October 2005). These agencies will receive notification from the Provincial director about which missing elements they will be expected to have within which period of time, including notification that if they do not satisfy the criteria on time the provincial government will issue an instruction ('pre-announcement' instruction).
- Agencies which do not satisfy 100% of the criteria in the final measurement and which the Provincial director believes still cannot satisfy them under their own steam or in the short term, a strict timetable will apply. In those cases, the Provincial Executive should instigate the instruction procedure on or shortly after 1 October 2005 at the latest. That also applies to those situations for which it is clear on 1 October 2005 that the identified deficiencies have not been resolved.

This further handling of the process will still be coordinated and monitored nationally. In 2007, there will be an evaluation of how the statutory system and the quality criteria are functioning.

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[2] Id.

[3] Klein, W. "Minimum Criteria for a Professional Environmental Enforcement Process" (in English), 2002, available at http://www.lim-info.nl/professionalisation

[4] More material (in Dutch) on the Dutch project is available at http://www.lim-info.nl/professionalisation

STRENGTHENING IMPLEMENTATION OF MEAS: THE INNOVATIVE AARHUS COMPLIANCE MECHANISM

KRAVCHENKO, SVITLANA

Vice-Chair of the Compliance Committee under the Aarhus Convention; Professor of Law, J.D., Ph.D., LL.D., University of Oregon School of Law, 1515 Agate St., Eugene, OR, slana@icmp.lviv.ua

SUMMARY

International compliance mechanisms vary greatly from one multilateral environmental agreement (MEA) to another. The compliance mechanism established under the Aarhus Public Participation Convention[1] is unique in some respects. This article will provide a brief look at its innovations.

1 INTRODUCTION

The United States made an appearance at the First Meeting of the Parties under the Convention in Lucca, Italy, in 2002, apparently for the primary purpose of criticizing the compliance mechanism. In a prepared statement, delivered forcefully, it noted a "variety of unusual procedural roles that may be performed by non-State, non-Party actors, including the nomination of members of the Committee and the ability to trigger certain communication requirements by Parties under these provisions." The United States stated further that "the United States will not recognize this regime as precedent."[2] The Western European nations participating in the Meeting of the Parties[3] responded with vigor from the floor[4] and proceeded to adopt the compliance mechanism by a unanimous vote.[5]

What sparked such debate? What were the innovations adopted in this compliance mechanism? How is the mechanism actually being implemented? And is it likely that this mechanism will be successful in improving compliance by Parties, as compared to compliance mechanisms used under other MEAs?

2 AARHUS AND PUBLIC PARTICIPATION: LAYING THE GROUNDWORK FOR DEMOCRATIC "REVOLUTIONS"

After the fall of the Berlin Wall in 1989 and the breakup of the Soviet Union in 1991, Western Europeans were determined to bring democracy and wisdom from the West to the East. The Aarhus Convention became a key part of the democratization process of Central Europe, Eastern Europe, the Caucasus region, and Central Asia.[6]

Democratization – both in the voting booth and in the halls of bureaucratic decisionmaking – is surely succeeding. After several years of debilitating civil war in former Yugoslavia, we all witnessed the inspiring protest against government vote fraud that became a democratic revolution in Serbia in 2000. Then, 12 years after the fall of the Soviet Union, we marveled at the seemingly swift "Rose Revolution" in the Republic of Georgia in 2003, as citizens again took to the streets to demand that those who had falsified the election resign. Finally, the cliff hanging weeks of demonstrations and legal actions of the Ukraine's Orange Revolution, after yet another exam-

ple of massive vote fraud on the part of the authorities, resulted in the January 2005 inauguration of the first President of Ukraine after a re-run of the election that became truly free and fair.

These events did not "drop from the Moon," as we say in Ukraine. Rather, they grew from the soil of local grassroots democratic activism, watered by international efforts to broaden public participation in government decisionmaking, and fertilized by both local and international support for the steady growth of civil society.

Two particular international efforts to broaden public participation between election days deserve special recognition. The Regional Environmental Center for Central and Eastern Europe (REC) in Hungary provided funding, guidance, and inspiration for a whole generation of local advocates for environmental democracy (public participation in environmental decisionmaking) through projects including the seminal publication of a four-volume series of books titled Doors to Democracy.[7]

The second event combined international diplomacy with grassroots activism. Negotiations throughout the 1990s culminated in the signing of the Aarhus Public Participation Convention in Denmark in 1998 by 35 countries. Efforts to obtain the required minimum number of 16 ratifications of the Convention resulted in its entry into force just three years later in October 2001.[8]

During the negotiation of the Convention between 1996 and 1998, the governments of Western, Central, and Eastern Europe and the Caucasus and Central Asia broke new ground in the involvement of civil society in international diplomatic negotiations. Early on, the participants decided that because the goal of this Convention was to provide new avenues for transparency and public participation in government decisionmaking, it made sense to apply those principles in the very process being used to create the Convention. As a consequence, nongovernmental organizations were invited to form an NGO coalition and take seats at the negotiating table. To an extent apparently unprecedented in the negotiations of MEAs, the NGO "observers" were given their own "flag" of identification at the table and the right to request the floor and offer the views of civil society at each stage of the negotiating process. They were able to lobby governmental delegates in the corridors and coffee shops, and they offered specific language for the Convention, some of which was accepted by the delegates from participating countries.[9]

In the period between signing the Convention in 1998, entry into force in 2001, and the first Meeting of the Parties in 2002, a great deal of preparatory work had to take place. Under the auspices of the United Nations Economic Commission for Europe (UNECE) in Geneva, the countries that negotiated the Convention worked in task forces and intergovernmental working groups to design various measures necessary for the smooth functioning of a new MEA. These included holding Meetings of the Signatories in Moldova and Croatia, drafting proposed Rules of Procedure, preparing proposals for a Bureau of the Convention and Working Groups of the Parties to function between Meetings of the Parties, and designing a Compliance Mechanism required by the Convention. As before, NGO representatives were constant participant-observers in all these processes.[10]

3 INNOVATIVE NATURE OF THE AARHUS COMPLIANCE COMMITTEE

One of the most significant and interesting innovations for MEAs is the compliance mechanism that was created to help ensure that countries comply with the commitments that they have made to one another in the Aarhus Convention. The compliance mechanism is now working. Ten cases have been brought to the Compliance Committee by NGOs and, in one case, by a government. The Aarhus compliance mechanism has several innovative features.

First, pursuant to Decision I/7 of the Meeting of the Parties (2002)[11] the Compliance Committee consists of eight

independent experts who have recognized competence in the field and who serve in their personal capacity. In comparison with other conventions, which have compliance mechanisms consisting of representatives of governments,[12] this structure is more dynamic and flexible because members can express their own opinions and do not have obligations to check with their governments. One example of the effect of a compliance committee consisting of Parties instead of independent experts occurred at a conference where a member of the Espoo Convention's Implementation Committee encountered an NGO representative who had filed a complaint with the Committee. She said to him, "How can you oppose your own government? Shame on you!"[13]

Furthermore, while serving as independent experts, they are expected to give their best professional judgment in the matters brought before them, and not compromise that judgment in order to achieve diplomatic or political goals. The committee's recommendations go to the Meetings of the Parties, where governments have the opportunity to bring diplomatic and political concerns to bear in reaching a decision.

Second, members of the Committee were nominated not only by Parties and Signatories (which is the general rule), but also by non-governmental organizations promoting environmental protection and falling within the scope of article 10, paragraph 5, of the Convention. This was one of the features that drew the ire of the representative of the United States at the first Meeting of the Parties in Lucca, Italy, in 2002.

Third, the Compliance Committee accepts not only the submissions of Parties and referrals from the Secretariat about non-compliance with the Convention (which is a rule in other conventions)[14] but also communications from the public. Article 15 of the Convention provides:

> The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.[15] This was followed by adoption of the compliance mechanism, which provides that "communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention."[16]

This openness to public participation by civil society has already produced remarkable results in the functioning of the committee. Eleven cases have been initiated by communications from NGOs.[17]

4 TRANSPARENCY OF THE COMPLIANCE COMMITTEE PROCEDURE

According to the Committee's Modus Operandi, in order to facilitate public access to information related to compliance issues, the Committee agreed that communications that had, on a preliminary basis, been determined to be admissible should be posted on the UNECE website after they had been forwarded to the Parties concerned.[18]

Almost all information in the Compliance Committee is open. No information held by the Committee is to be kept confidential unless it falls under the narrow grounds for exemption in Article 4, paragraphs 3 and 4 of the Convention. In addition, information is to be kept confidential if the person who submitted information to the Committee has asked to keep it confidential because of concern that she or he may be penalized, persecuted or harassed.

The Committee requested the Secretariat to publicize all official documentation and new aspects of modus operandi through the website to enable the public to track the processing of submissions, referrals and communications.

The Compliance Committee meetings are open for the public, except for the deliberations and decision-making. Non-governmental organizations such as

Earthjustice and the Center of International Environmental Law participate regularly in the Committee meetings as observers, offering their comments on each case. The Committee invites parties to a dispute – the Party (state) concerned or the Party making a submission, and the member of the public making a communication to the Committee – to Committee meetings in order to participate in the discussion. They can participate in the entire meeting except during closed deliberations involving adoption of findings, and measures and recommendations of the Meeting of the Parties.

5 THE POWER OF THE COMMITTEE

The Compliance Committee began to address the merits of the communications at its sixth meeting, in December 2004 in Geneva. The Committee's Chairman, Prof. Veit Koester (Denmark), a distinguished veteran of negotiations on many international environmental treaties, has stated that: "If and when the Committee does reach some conclusions, these will be referred to the Meeting of the Parties, which will be the final arbiter as to whether or not there is a case of non-compliance."[19]

The Committee makes recommendations to the Meeting of the Parties. In addition, the compliance mechanism adopted by the First Meeting of the Parties provides that, with a goal of addressing compliance issues without delay prior to a Meeting of the Parties, the Compliance Committee may, in consultation with the Party concerned, "provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention."[20]

Furthermore, with the agreement of the Party concerned, the Committee can (prior to a Meeting of the Parties) take the measures listed in paragraph 37(b), (c) and (d) of the compliance mechanism, namely:

> [M]ake recommendations to the Party concerned; request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; in cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.[21]

6 NATIONAL REPORTS

In addition to the complaint procedure, the required submission of a National Report by each Party has the potential to become an important tool, especially if NGOs are allowed to participate. The Compliance Committee will make a report and the Secretariat will make a synthesis report to the 2005 Meeting of the Parties based on the National Reports. On the invitation of the Secretariat the Compliance Committee plays a consultative role in preparation of a synthesis report. However, it is already obvious that some Parties do not treat this duty to report seriously.[22] Only 16 out of 33 Parties sent their National Reports on time, plus another 4 submitted them with a small delay. In addition, the quality of National Reports differed greatly. For example, Turkmenistan wrote a report just two pages long and did not provide any information, and it was of low quality. Ukraine's report was too long and repetitive. The Reports of Norway and Belarus, on the other hand, were excellent.

Almost all National Reports were made in a transparent and participatory process. Governments sent draft reports to NGOs or put them on a website, and held consultations or public hearings. The public had a chance to submit comments. In some National Reports public comments were taken into account or even included in the addendum (Armenia, Kyrgystan). Many other countries, however, provided no indication in their National Reports of whether the public participation made any difference or whether public comments were taken into account.

The 2005 National Reports show that many countries changed their legislation to comply with the Aarhus Convention.

Western European countries, according to their legal traditions, made legislative changes before ratification. EECCA countries, on the other hand, continue to change their domestic laws after ratification. The Constitutions in several countries declare that international treaties and conventions have direct effect on the legal system, but without clear transposition of Convention provisions into national legislation there is little hope that real change will occur as a mere result of ratification.

The National Reports do show that a great deal of progress has been made by EECCA countries in terms of making environmental information available on the Internet, which was only a dream a few years ago. Furthermore, Aarhus Convention information centers have been created in many countries. Trainings have been organized for NGOs and decision makers. Still, problems exist. Countries in transition identified obstacles in their 2005 National Reports such as lack of capacity to implement the Aarhus Convention, financial difficulties, and a low level of public awareness.

7 FIRST CASES BEFORE THE AARHUS COMPLIANCE COMMITTEE

All EECCA countries (except Russia and Uzbekistan) signed the Convention and ratified it, but this does not necessarily mean that they will comply with it. There is a longstanding tradition to have international conventions and domestic laws on paper but with inadequate enforcement. Of the eleven cases under consideration by the Committee, eight are about alleged non-compliance of EECCA countries. Three cases of alleged non-compliance by Parties, which were considered by the Compliance Committee at its 7th meeting on February 16-18, 2005, will illustrate the range of issues that face the Parties and the public.

Kazakhstan ratified the Convention in 2001, which as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. Kazakhstan's Law on Ecological Expertise (adopted in 1997) contains general provisions on public participation, but it was not implemented in the case of construction of the Gornyi Gigant power line[23] because regulations for public participation were not adopted until 2004.

Turkmenistan deposited its instrument of accession to the Convention on June 21, 1999. The Convention entered into force for Turkmenistan on October 30, 2001. On October 21, 2003, a new law "On Public Associations" was adopted. This Law does not comply with the Convention, according to the decision of the Compliance Committee at its 7th meeting. The Law introduced a new regime for registration, operation, and liquidation of non-governmental organizations. This appears to be in breach of the provisions of article 3, paragraph 4, of the Convention, which require a country to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system incorporates this obligation. It also does not comply with article 3, paragraph 9, which requires countries to provide the possibility for the public to exercise their rights under the Convention without discrimination as to citizenship, nationality, domicile, or location of an entity's registered seat.[24]

The Committee received a submission by the Government of Romania concerning compliance by the Government of Ukraine with the treaty.

The submission, made on June 7, 2004, alleged a violation by Ukraine of the provision that ensures that the public affected or likely to be affected by the Bystroe deep-water navigation canal project in the Danube Delta was informed early in the decision-making procedure about the fact that the project was subject to a national and transboundary environmental impact assessment procedure. The Committee agreed to consider the issues side-by-side with a communication on the Bystroe canal made by the Ukrainian NGO Ecopravo-Lviv on May 5, 2004.

The Committee determined that Ukraine failed to provide for proper notifica-

tion and participation of civil society in its decision-making, in particular, the organizations that indicated their interest in the procedure, as required under article 6. Ukraine also failed to allow the public to study the information on the project and prepare and submit its comments. The Party did not allow the public officials responsible for making the decision sufficient time to take any comments into account in a meaningful way, as required under article 6, paragraph 8.

The Committee found that the lack of clarity with regard to the public participation requirement in EIA and environmental decision-making procedure on projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making information available in the context of article 6, indicates the absence of a transparent and consistent framework for implementation of the Convention and constitutes non-compliance with article 3, paragraph 1 of the Convention.[25]

8 PROSPECTS FOR SUCCESS

The first attempts to evaluate implementation of the Aarhus Convention show both difficulties and successes in building an environmental democracy, improving transparency, and enhancing the quality of decision-making. The Convention gives citizens the possibility to control their governments and to make an increased contribution to the protection of the environment. The Convention is an important international instrument for the protection of the right to a healthy environment. Most importantly, the Convention's novel compliance mechanism is an ambitious effort to bring democracy and participation to the very heart of compliance itself. Whether this will be successful will depend on the Committee itself, the Meeting of the Parties, and whether citizens will continue to be vigilant in demanding compliance with their Convention.

9 REFERENCES

1 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on June 25, 1998 (in force from October 30, 2001).

2 Statement By The Delegation Of The United States With Respect To The Establishment Of The Compliance Mechanism, Annex to REPORT OF THE FIRST MEETING OF THE PARTIES, page 19, available at http://www.unece.org/env/documents/2002/pp/ece.mp.pp.2.e.pdf.

3 The vast majority of Western European nations had not ratified the Aarhus Convention by the time of the First Meeting of the Parties, but participated fully as Signatories.

4 REPORT OF THE FIRST MEETING OF THE PARTIES, paragraph 46, page 8, available at http://www.unece.org/env/documents/2002/pp/ece.mp.pp.2.e.pdf.

5 Id. at paragraph 47, page 9.

6 I use "Central Europe" for the Visigrad states of the Czech Republic, Hungary, Poland, and Slovakia. As for those states further east, "Eastern Europe, Caucasus, and Central Asia" (EECCA) is the term now widely used in international meetings to replace the former appellations "former Soviet Union" and the "Newly Independent States of the former Soviet Union" (NIS).

7 The present author was project leader and editor for the volume covering several states of the former Soviet Union. S. Kravchenko, DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN THE NEWLY INDEPENDENT STATES (Regional Environmental Center, Budapest, Hungary, 1998) (with co-authors) (English), available at http://www.rec.org/REC/Publications/PPDoors/NIS/PPDoorsNIS.pdf.

[8] Two-thirds of the countries providing these early ratifications came from the EECCA, (the former Soviet Union). The author was hired by the European Union to organize "open parliamentary meetings" in the countries of the EECCA in order to promote ratification by their parliaments. Her title was Director, Parliamentary Component, EU-TACIS Environmental Awareness Raising Program for Newly Independent States and Mongolia (1998-1999). See http://www.hcg.helsinki.fi/projects/TEAP2.html.

[9] The most thorough study of NGO involvement in the negotiation of the Aarhus Convention, by Magdi Toth-Nagy of REC, has not been published but is in the present author's files. The present author participated in most of the negotiations.

[10] The present author served as a nongovernmental expert on the Task Force for Rules of Procedure and Compliance Mechanism, and as a nongovernmental representative on the subsequent Intergovernmental Working Group on the same matters.

[10] See http://www.unece.org/env/pp/documents/1/ece.mp.pp.2.add.8.e.pdf.

[12] For example, the Espoo Convention on Environmental Impact Assessment in Transboundary Context provides that the Implementation Committee consists of eight Parties to the Convention, each of which appoints a member of the Committee. See http://www.unece.org/env/eia.

[13] Incident relayed to the author by the NGO representative.

[14] For example, see http://www.unece.org/env/eia.

[15] See http://www.unece.org/env/pp/treaty-text.htm.

[16] Decision I/7, Review of Compliance, VI, Communications from the Public, paragraph 18, available at http://www.unece.org/env/pp/documents/1/ece.mp.pp.2.add.8.e.pdf.

[17] An additional complaint was lodged by the Government of Romania against the Government of Ukraine.

[18] Guidance Document on Aarhus Convention Compliance Mechanism, "Modus Operandi," page 8, available at http://www.unece.org/env/pp/compliance/manualv2.doc.

[19] UNECE press release, May 14, 2004, available at http://www.unece.org/press/pr2004/ 04env_p08e.htm.

[20] Decision I/7, Review of Compliance, VI, Consideration By The Compliance Committee, paragraph 36, available at http://www.unece.org/env/pp/documents/1/ ece.mp.pp.2.add.8.e.pdf.

[21] Id.

[22] National Reports will be available on the UNECE website prior to the Second Meeting of the Parties in May 2005.

[23] ACCC/C/2004/02.

[24] AACC/C/2004/05.

[25] ACCC/S/2004/1; ACCC/C/2004/04.

THE CHALLENGE OF THE IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS COMMUNAUTAIRE* IN THE NEW MEMBER STATES

KREMLIS, GEORGES[1] and DUSÍK, JAN[2]

[1] Head of the Legal Implementation and Enforcement Unit, Environment Directorate General, European Commission, Georges.Kremlis@cec.eu.int

[2] Director of the EU Department, Ministry of Environment, Czech Republic

SUMMARY

The greatest ever enlargement of the European Union has taken place on 1 May 2004, with the accession of ten new Member States, the extension of the EU territory by twenty-three percent and the increase of population by twenty per cent. Moreover, the accession of eight of the new Member States consolidated the fall of the iron curtain between Eastern and Western Europe which lasted for over 40 years after the Second World War. This article describes the possible difficulties that the new Member States will very likely face to comply with their obligations under EC environmental legislation.

1 INTRODUCTION

A strong emphasis has been put on compliance by the applicants for EU membership with the *acquis communautaire*...

As a result, all new Member States are now presumed to have harmonized their legislation to the EU standards and to comply with the membership obligations. Of course, similarly to previous EU enlargements, a number of unilateral transitional periods have been granted to the new Members (including in the field of environment), and the EU has also "benefited" from a number of multilateral transitional periods (e.g. in free movement of workers or concerning the Schengen *acquis*); and it will take several years before the new countries meet the Maastricht criteria allowing them to participate in the Monetary Union. Another unique feature was the provision of pre-accession financing through ISPA, Phare and SAPARD; indeed around Ř3.5 billion are expected to be spent in the new Member States, Bulgaria and Romania for environment during 2000-6. However, all in all, this biggest ever EU enlargement is also believed to be the most carefully and timely prepared one...

2 THE DEFICIT OF IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS* IN THE EU-15

The EU environmental policy and legislation has been gradually adopted since the 1970s and is traditionally fighting "for the place in the sun" with the economic policies, in particular with the single market ("growth and competitiveness versus environmental protection"). A number of important judgments of the European Court of Justice helped to identify the mutual position of the two streams of the EU policy: the most recent examples include the *Commission v. United Kingdom* case C-30/01 (judgment of 23 September 2003) on the application of single market legislation with environmental components for Gibraltar or the ongoing litigation in the case *Commission v. Austria* (C-320/03) concerning environmentally driven restrictions of

transport over the Alps. Nevertheless, the environmental *acquis*[1] at present counts for 561 pieces of binding legislation[2], most importantly Directives, which the Member States are obliged to transpose, implement and enforce. And the field of environmental legislation is a dynamic one, with few new pieces of legislation adopted every year to review existing legislation or to cover new areas (e.g. the "Ārhus package"). ...

2.1 Specificity of EC Environmental Legislation

There are some peculiarities embodied in environmental directives which distinguish these from other areas of Community law and which are important for realising the causes of the implementation deficit in the Member States.

First of all, EC environmental directives are characterised by a number of secondary obligations (i.e. obligations that have to be complied with at a later stage after the entry into application of a directive). Therefore, ensuring compliance is not limited to a straightforward exercise of transposition, as might be the case in some areas, but it is necessary to ensure at a later stage, e.g. adoption of plans and programmes, designations or establishment of protected zones and areas etc. Some of the secondary obligations also imply establishment of infrastructure and major investments (urban wastewater treatment, drinking water, landfills etc.).

Secondly, compliance with EC environmental law is often related to the use of EC funding (namely LIFE, Structural Funds, Cohesion Fund, TENs and the pre-accession funds) or to funding from loans of the European Investment Bank. When it is required to be informed of projects, the Commission carries out a scrutiny of the utilisation of EC funds to ensure that projects conform with Community legislation especially for environment, competition and public procurement – see Article 12 of Council Regulation (EC) No. 1260/99 laying down general provisions on Structural Funds[3], Article 8.1 of Council Regulation (EC) No 1164/94 establishing a Cohesion Fund[4], as amended, and for the TENs Article 7 on Compatibility of Council Regulation 2236/95 as amended[5]).

However, the cohesion policy is implemented in a decentralised way, and therefore the Commission is only made aware of the largest projects (Cohesion Fund and Large European Regional Development Fund (ERDF) projects).

Finally, many pieces of EC environmental legislation have a strong public participation component. This is now emphasized by the forthcoming ratification by the EC of the so-called Ārhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Ārhus, Denmark, on 25 June 1998), whose three pillars require not only access of public to environmental information and public participation in decision-making involving environmental matters, but also access of the public to justice in this domain. Directives corresponding to the three pillars have been adopted or are expected to be adopted to implement the Ārhus Convention within the European Union legal order.

2.2 The Extent and Types of Problems in Application of EC Environmental Legislation

There are a number of sectors of the environmental legislation which cause more implementation problems than others[8]: nature protection, water and air quality, waste management and environmental impact assessment. In nature protection, the main problems include non conformity of transposing legislation, insufficient designation of Natura 2000 sites, incorrect assessment of plans and projects affecting the protected sites and breaches of requirements for strict protection of species. The water quality issues mainly relate to secondary obligations, such as designations of protected zones, adoption of pollution reduction programmes or construction of sewerage and wastewater treatment systems, while drinking water problems occur in few areas of the EU. Most problems with the air quality, on the contrary, concern lack of transposition or

reporting to the Commission. Non-conformity of legislation and lack of adoption of management plans are the most typical issues in the waste sector, together with the operation of illegal landfills in several Member States. Finally, concerns about environmental impact assessment stem mainly from complaints and are largely procedural, since Directive 85/337/EEC[9] is a procedural one; the material aspects would refer to obligations from the legislation in other sectors, such as the two major nature protection Directives[10]...

The available statistics demonstrate that compliance with EC environmental legislation still proves to be difficult in the EU-15 and the number of infringements per year does not seem to diminish. The Commission tries to take proactive measures to avoid starting full-bloodied infringement procedures, such as: package meetings, during which complaints or infringement cases are discussed with the authorities of the Member States; bilateral or multilateral proactive meetings to explain how Member States should comply with their obligations; various guidance documents; or reminder letters on adoption of new directives and deadlines for their transposition. The work of IMPEL, the informal network of Member States and the Commission for the implementation and enforcement of environmental law, has been also beneficial for ensuring consistent implementation and enforcement of the *acquis* throughout the Community, mainly through exchange of information, training of inspectors and development of best practice. Of course, the different breaches vary in gravity – and the aim of the Commission is to focus its attention in pursuing the infringements on serious breaches of a systematic character rather than on individual procedural omissions or isolated individual cases of bad application, which are often at centre of complaints from the citizens. An upstream approach which identifies the systemic shortcomings is preferred to a downstream one which tackles the symptoms. But in any case the deficit of implementation of the environmental *acquis* already in the EU of 15 Members is obvious and has to be tackled through a combination of both proactive and enforcement means.

3 CHALLENGES OF IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS* IN THE NEW MEMBERM STATES

We mentioned in the beginning of this article that this enlargement is argued to be the best prepared one ever, since the preparation for membership was monitored by the Commission some seven years prior to accession (starting with the Opinions on Application for Membership of the European Union of the candidate countries on July 1997). Publication of annual reports of the Commission on progress of individual applicant countries in harmonising legislation and practice with the EU was always high on the political agenda and criticisms of slow progress appeared on front pages of newspapers. The monitoring continued even after the signature of the Accession Treaty, with the possibility for the EU to impose safeguard measures should the pace of harmonisation not be maintained.

However, given the rather unsatisfactory record of compliance with EC environmental law by the EU-15, it can be expected that the new Member States will face similar problems. A number of factors, specific for these new countries, confirm such forecasts.

Even more than in the old EU Members, environment is low on the political agenda. This was apparent already in the pre-accession period when various political and economic lobbies were trying to bypass or at least delay adoption of legislation transposing EC environmental directives and budgetary allocations for environmental protection were decreasing. A major challenge is obviously the financing of approximation. The costs of implementing the environmental *acquis* in the ten new Member States were estimated at € 50-80 billion and investments required from these countries were estimated at 2 to 3 per cent of GDP, higher than what is at present being allocated.[11]

The EU will significantly contribute

to financing implementation by provision of resources from EU funds. € 21.7 billion will be made available to the new Member States from the Structural Funds and the Cohesion Fund until the end of the current budgetary period (31.12.2006), out of which € 3 billion in the Cohesion Fund is earmarked for the environment, while other environmental projects can be supported from the main Structural Funds. These contributions, together with the pre-accession funding from Phare, ISPA and SAPARD instruments, should significantly contribute to financing implementation measures. The experience in the EU15 also shows that national budgets must also be set aside, and indeed should be more substantial.

Apart from finding sufficient financial resources to cover remaining investment needs and co-financing of EC-funded projects, two other challenges emerge in relation to EC funding. The first is the so-called conditionality, i.e. compliance of co-financed projects with EC environmental legislation and policy. Another issue, which is specific for the new Member States, is the establishment of adequate administrative capacity to prepare 'pipelines' of projects of sufficient quality and to properly manage the use of EC funds[12]. High attention to these issues has proven essential for maximising the utilisation of the EC funds by the beneficiary Member States and should be seen as a priority also by the new Members.

Well performing administrative structures will be necessary not only for administering EC funding, but also in ensuring correct implementation of the EC environmental law in general. Many environmental Directives require issuing of permits, monitoring of pollution and fulfilment of secondary obligations. A number of institutions, both horizontally and vertically, are typically involved in implementing these obligations and they need to be adequately staffed and well coordinated. A number of twinning projects under Phare have been carried out in the Central and Eastern Europe candidate countries prior to accession to strengthen their administrative capacity and to provide relevant training. Preparedness of administration to cope with obligations arising from EU membership has also been checked through peer reviews in 2002 and 2003, as part of the monitoring of accession preparations.

Other possible drawbacks are deficiencies in law enforcement and a lack of legal culture in the countries in transition. The disobedience of legislation is not primarily seen by the society as a negative feature, especially when it does not affect private individuals or property. Harm to the state property or to a public interest is generally better accepted by the people. This may be particularly relevant for compliance with nature protection obligations, since it is more difficult to carry out monetary valuation of the damage caused to natural features. It is however fair to say that there are positive trends in these countries, and people start to discover the importance of non-material assets, such as clean rivers or biological wealth.

Finally, only slow progress is being made by the new Member States towards ensuring effective public participation in environmental decision-making. Of course the EC legislation (such as on the environmental impact assessment or access to information) directly related to participative democracy has been transposed into national legislation, but experience shows that practical application lags behind. Assaults on the basic principles of public participation were experienced when transposing legislation containing such provisions in the legislative process (such as the transposition of the nature directives in the Czech Republic's parliament). We may therefore expect a number of complaints by the citizens of the new Member States concerning access to environmental information and public participation in decision making.

4 MEASURES TO FACE THE CHALLENGES POSED BY ENLARGEMENT

From 1 May 2004, the ten new Member States are subject to the same obligations as the EU-15. They have to

comply with EC legislation, the national legislation transposing directives in force must be notified by that date and practical compliance must be ensured as well. Specific arrangements apply only in accordance with the transitional periods as agreed during the accession negotiations and spelled out in the Act of Accession[13]. Should the new Member States fail to comply with their obligations, the Commission may initiate the infringement procedure pursuant to Article 226 of the EC Treaty. Similarly, the Commission has a duty to investigate complaints lodged by EU citizens or NGOs against the new Member States.

The Act of Accession of the ten new Member States also foresees a number of intermediate targets within the agreed transitional periods. This is the first enlargement where such an arrangement has been made with the new Member States, with the aim to gradually fulfil the EC legal obligations rather than waiting until the (sometimes extensive) transitional periods elapse. The fulfilment of intermediate targets will be monitored as a matter of priority; non-compliance with these targets may trigger an infringement procedure.

A number of measures to eliminate possible opening of infringements immediately after accession have been undertaken both generally and in the environmental field. As concerns transposing legislation, the acceding countries were invited to use the pre-notification database for gradual storage of transposing legislation in an electronic version, aimed at avoiding a backlog of notifications on the date of accession. Most of the transposing legislation has been notified in this way and is now considered officially notified to the Commission.

Two systematic approaches have been undertaken as concerns ensuring compliance with environmental legislation by the Directorate-General for the Environment of the Commission. Shortly before the accession a series of environmental proactive meetings have been carried out in the new Member States, with the aim to explain to their national authorities responsible for compliance and enforcement how complaint and infringement procedures work in practice, how to prevent escalation of infringements and how to communicate effectively on these matters with the relevant Commission services. Those meetings have been highly appreciated by all new Member States, as they provided first-hand practical information and enabled contact with the Commission counterpart in the matters of compliance with EC environmental law. Such meetings can provide a solid basis not only for bringing infringements to an end in the most effective way, but can also be followed by package meetings and other specific meetings as currently organised with the existing Member States.

DG Environment of the Commission has also launched a systematic conformity check for the ten new Member States, building on a similar experience with the EU-15. The objective is to analyse, within the next two years, transposing legislation for the main Directives and remove any non-compliance in an early stage, in close collaboration between the Commission and the Member States concerned.

Concerning complaint and infringement procedures, the same priorities as the ones for the EU-15 will apply, in line with the White Paper on European Governance[14] and the Commission Communication on Better Monitoring of Community Law[15]. The first priority will be the non-communication cases (in the absence of notification of transposing measures), followed by the cases of non-conformity (based on the conformity checking exercise) and horizontal bad application cases (secondary obligations, transitional periods contained in the Act of Accession including intermediate targets to be met and conditionality of EC funding). Of course this will not exclude handling of all received complaints, as required by the EC Treaty and by the Commission Communication to the European Parliament and the European Ombudsman on the Relations with the complainant in respect of infringements of Community law[16]. Such non-priority complaints can be handled through alternative means (e.g. package meetings) and the

complainants should be encouraged to use the available national means of redress.

5 CONCLUSIONS

In this article, the possible difficulties that the new Member States will very likely face to comply with their obligations under EC environmental legislation were tentatively addressed. The key messages could be summarized as follows.

1. During the period prior to accession, the maximum possible was done, under close surveillance of the Commission. Therefore all obligations should in theory have been formally fulfilled by 1 May 2004. However, we can however expect that there will be failures, gaps and omissions.
2. It is natural that there will be infringements and that the Commission will receive complaints from citizens from the new Member States; this has been the case for all previous EU enlargements. It is also likely that the number of cases will be growing gradually rather than in a single step. Experience with the EU-15 shows that the more public awareness you raise the more complaints are triggered by the citizens who know better their rights.
3. The spectrum of problems, complaints and infringement cases against the new Member States is not expected to significantly differ from the situation in EU-15. It is also likely that they will concern similar issues, although there may be some specific aspects, such as the requirements to implement the investment heavy environmental *acquis*, inadequate administrative capacity or the lack of legal culture, which might cause some variations compared to the business-as-usual in the EU-15.
4. Limiting escalation of infringements will require effective use of proactive measures as described above, including bilateral meetings with the national authorities to discuss complaints, infringement cases or difficulties in implementation. The same is of course valid for the existing Member States.
5. The EC funding should be to the maximum possible extent prioritised for co-financing of measures bringing about compliance with obligations of the environmental *acquis*. Good project preparation will have to be ensured. In turn the acquis itself must also be respected for the construction and financing of infrastructure projects.
6. Finally, the performance of countries which just acceded to the European Union will be under strong scrutiny, since this is the biggest ever enlargement and the new Members are less developed compared to the EU-15 average. The success or failure of this enlargement will be crucial for deciding about potential future enlargements of the EU and it would also be the most suitable response to the recent escalation of anti-European trends both in the old and the new Member States.

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COMPLIANCE PROMOTION IN THE UNITED KINGDOM

LEINSTER, PAUL,[1] GRAY, JIM,[2] HOWES, CHRIS,[3] and CLARK, ROSIE[4]

[1] Director of Operations, Environment Agency (England and Wales), paul.leinster@environment-agency.gov.uk

[2] Head of Regulatory Development, Environment Agency (England and Wales), jim.gray@environment-agency.gov.uk

[3] Enforcement Policy Manager, Environment Agency (England and Wales), chris.howes@environment-agency.gov.uk

[4] Policy Adviser, Modern Regulation, Environment Agency (England and Wales), rosie.clark@environment-agency.gov.uk

SUMMARY

Society demands high environmental standards and expects companies, and individuals, to behave responsibly. The Environment Agency is the leading public body protecting and improving the environment in England and Wales.

Traditional regulatory approaches have achieved much to reduce environmental impacts. However, the nature of regulation has to change to keep pace with changes in the economy and society. The Environment Agency has responded to this challenge through its "Modernising Regulation Change Programme".

This article describes some of the approaches adopted by the Environment Agency to promote compliance with legal requirements and to encourage the environment to be at the centre of business thinking.

1 PRINCIPLES OF MODERN REGULATION

The Agency believes modern regulation focuses on outcomes and is risk based. Modern regulatory systems should encourage businesses and individuals to improve, rewarding good performers, while remaining tough on those who do not meet acceptable standards. In order to achieve this, modern regulation must be:

- proportionate, allocating resources and implementing systems according to the risks involved;
- transparent, with clear rules and processes for industry and local communities;
- consistent, within and between sectors, and over time;
- targeted on the environmental outcome to be achieved, taking into account environmental needs, best practice, sector specific and geographical circumstances;
- cost effective.

This means that we will concentrate our resources where the risks to the environment are highest, including the highest hazards or the poorest performing operators. We will focus on systems to improve environmental quality. Consistent with this principle, we will adopt a proportionate approach where we see good performance. We have developed a screening method to assess risks to the environment in a quantitative fashion.

Transparency and trust are also vital aspects of our relationship with com-

munities and society as a whole, and we must at all times be seen to maintain a neutral, open and fair stance. Accordingly, we make information on the environmental performance of business and our performance as a regulator widely available.

2 TOOLS FOR MODERN REGULATION

Adopting a risk-based approach to regulation, matching intervention measures to environmental performance, has implications for all involved in the regulatory process. ...

Direct regulation is the traditional approach to controlling emissions or abstractions, with permits specifying what a company can and cannot do at a particular site. As a modern regulator we are also developing risk based assessment methods and actively promote voluntary schemes. A number of these approaches are described below. ...

3 OPERATOR POLLUTION AND RISK APPRAISAL

The Agency aims to target its resources on those companies that pose the greatest risks to the environment. Two schemes for Operator and Pollution Risk Appraisal (OPRA) have been developed to assist the Agency in its regulation of the Integrated Pollution Control (IPC) regimes for major process industry and the Waste Management Licensing regime. With the implementation of two new European Community Directives in England and Wales,[1] elements of the waste industry and the large manufacturing sectors are brought under one regulatory regime for the first time.

In keeping with our aim to introduce common approaches to regulation across a range of regulatory regimes, the new Environmental Protection Operator and Pollution Risk Appraisal (EP OPRA) methodology has been developed as an important step in developing a unified approach to risk assessment across our regulatory regimes. The EP OPRA scheme fits within a recognised national framework for environmental risk assessment and management.[2] It incorporates an element of professional judgement, but the method itself is simple to apply and objective in nature and a public consultation on the scheme was held in 2002. Details of responses are on the Agency's web site.[3]

EP OPRA will help the Agency target its regulatory effort on those activities that present the greatest risk to the environment. Outputs from this scheme are being built into the proposed charging scheme for the PPC regulatory regime. As noted previously, charges for regulation are set to reflect the level of regulatory action required. EP OPRA has four attributes. Three reflect the environmental hazard of the operation and the fourth measures Operator performance. In general, the higher the score, the greater the regulatory level of activity required. ...

4 HOW THE AGENCY PROMOTES COMPLIANCE

Companies need to accept responsibility for their actions and this should be reflected in business culture as well as in their operational targets. The principle of 'polluter pays' is now well accepted, whereby businesses should be held to be accountable for their actions. As noted previously, the Agency's Operator and Pollution Risk Appraisal system supports the polluter pays principle through a cost recovery charging framework which can provide a financial incentive to operators to reduce their environmental risks and impacts. By identifying, managing and reducing key risk areas, businesses can reduce their Operator and Pollution Risk Appraisal (risk) profile, which will then be reflected in lower compliance activities and, consequently, charges. In addition, businesses can benefit, in some circumstances, from cost savings in reduced waste and minimisation of resource use, and avoid costs associated with pollution incidents. Promoting corporate responsibility can improve corporate image with an associated positive impact on shareholder value, as well as impacting

for example on a Company's credit rating or insurance premium.

4.1 Optimising environmental improvement

The Environment Agency is developing sector plans and guidance, which address the specific issues associated with particular sectors. Sector plans relate to a coherent, recognisable, target group and define the national and local outcomes and risks that we believe should be addressed for that group. The sector may be a particular industry (such as nuclear or agriculture), or a recreational area (such as angling). This approach allows us to prioritise the regulatory workload between and within sectors. The overall objective is to optimise achieving environmental improvements.

Key to optimising environmental performance is to identify current good practice relevant to the sector, to educate and advise businesses and individuals and to communicate information to the public.

4.2 Identifying Good Practice

Good Practice includes reviewing techniques and experience from within the sector and across other sectors where similar environmental problems and processes may be encountered. Such reviews are not restricted to England and Wales and the Environment Agency is keen to learn from the experience of other countries. Good practice also includes the reduction of unnecessary bureaucracy which may inhibit the introduction of innovative solutions to poor environmental performance. In addition, we encourage full life cycle ('cradle to grave') analysis of processes to promote good environmental management throughout the whole supply chain.

4.3 Education

Businesses and individuals need to be more aware of how their actions impact on the environment and human health. Education and advice can help raise awareness of the issues by providing clear information relevant to specific audiences, demonstrating potential improvements (including cost savings) through case studies, and highlighting national, regional or sector initiatives. We also seek to raise awareness of regulatory requirements, so that businesses and individuals understand fully their responsibilities.

Education campaigns can be more resource effective than traditional regulation in situations of high volume low environmental risk. For example, the Agency runs targeted educational initiatives such as the "national tyres campaign" to promote recycling and minimise illegal tipping.

4.4 Information

We regularly publish environmental performance information for England and Wales, making use of communication tools such as our *Pollution Inventory, What's in Your Backyard* and *Spotlight on business environmental performance* to provide information about environmental performance to a wide audience. These publications are updated annually and are available on our website.[4] *"Spotlight"* both publicly praises good performers and names and shames poor performers. This we believe helps companies internalise their environmental performance. *What's in Your Backyard* publishes details of Integrated Pollution Control OPRA and Waste OPRA scores for local facilities.

We also encourage individual businesses to make information on their environmental performance accessible to stakeholders, including local communities and investors, and we know that this information is used to guide investment decisions.

4.5 Compliance assessment

The Environment Agency has developed a range of tools which are being progressively implemented to help to assess risks. These include Compliance Assessment Plans (CAPs) and the Compliance Classification Scheme (CCS).

Compliance Assessment Plans are used to ensure that compliance against all requirements of permits and other regulatory instruments are checked within a defined

period. The Compliance Classification Scheme assesses the performance of a site against the conditions set in Agency issued permits. It is recognised that some non-compliances will present a greater environmental risk than others. The Compliance Classification Scheme is used to classify non-compliance with permit conditions according to potential impact on the environment and provides information to support consistent and proportionate responses to non-compliances. This also allows national profiling of sectors and companies. The potential risk categories used within the Compliance Classification Scheme are ranked from 1 (the highest potential risk arising from a non-compliance) to category 4 (where no immediate risk of harm to the environment is likely). These categories are then used to inform our enforcement activities, and are linked clearly to our Enforcement and Prosecution Policy.

4.6 Stakeholder involvement

Stakeholder involvement can take many forms, and embraces many types of stakeholders. Consultation at the outset of introducing new regulatory tools is perhaps the most obvious form of stakeholder involvement. Typically, we seek to identify affected businesses and local communities and other interested parties (industry or sector representative groups, non-governmental organisations, local liaison bodies, etc) and approach each of these individually. We also publish an invitation to provide comment on our web-site, with provision of a clear route to seek further information. For more broad ranging consultations we publish documents for national distribution.

The use of environmental information to guide investment decisions is also a form of stakeholder involvement and feedback suggests that companies, as well as environmental groups, respond positively to the opportunity to discuss issues with the regulators.

4.7 Performance review

Activities which potentially impact on the environment require monitoring so that the risk of adverse effects can be evaluated and appropriate action taken. The development of minimum criteria for environmental inspection is a Recommendation from the European Parliament which the UK has agreed to implement. This requires environmental inspections to be planned in advance and the Agency sees its policy of developing Compliance Assessment Plans as a means of fulfilling this obligation.

The role of the operator is to:

- carry out monitoring and analysis to suitable standards;
- assess and act upon the results within their own EMS;
- make information available.

The role of the regulator is to:

- specify the standards for monitoring and analysis;
- ensure the operator complies with monitoring requirements;
- act upon the results in a proportionate manner;
- publish information on performance and response.

Through internal review, businesses should be encouraged to take responsibility for ensuring that they are not having an adverse impact on the environment, or on people.

4.8 Enforcement

Regulatory regimes need to be backed up by penalties or disincentives to non-compliance. Where businesses do not comply with legislation, the Environment Agency will use its enforcement powers firmly and fairly to prevent pollution or environmental damage, or to require remedial action.

5 REFERENCES

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UNEP GUIDELINES, MANUAL, AND PILOT ACTIVITIES ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

MREMA, ELIZABETH[1] and BRUCH, CARL[2]

[1] Senior Legal Officer, United Nations Environment Programme, Division of Environmental Policy Implementation, Elizabeth.Mrema@unep.org

[2] Legal Officer, United Nations Environment Programme, Division of Environmental Policy Implementation, Carl.Bruch@unep.org

P.O. Box 47074, Nairobi 00100, Kenya

SUMMARY

After decades of developing international environmental agreements, norms, and institutions, there is a paradigm shift from normative development toward implementation. The United Nations Environment Programme (UNEP) has undertaken many measures to assist countries and other stakeholders in improving compliance with and enforcement of multilateral environmental agreements (MEAs). In 2002, the UNEP Governing Council adopted Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements. Since then, UNEP has promoted the use of the Guidelines to improve implementation of MEAs around the world. UNEP has developed a Manual that expands upon the Guidelines and provides practical examples of how governments, NGOs, MEA Secretariats, and others have applied the approaches set forth in the Guidelines to implement MEAs. This Manual has been refined iteratively through a series of regional capacity building workshops convened by UNEP. Building upon the Guidelines, Manual, and lessons learned from the regional workshops, UNEP has also launched a series of pilot projects on compliance and enforcement, including a project with INECE to develop and test indicators of compliance with and enforcement of MEAs. This chapter provides an overview of the Guidelines, Manual and regional workshops, and pilot projects that UNEP has undertaken to improve compliance with and enforcement of MEAs.

1 INTRODUCTION

1.1 Background to the Guidelines

UNEP developed the Guidelines through an evolving and participatory process. Recognizing the growing interest in compliance and enforcement of environmental law including MEAs, UNEP developed elements of draft Guidelines in 1999 and convened a Working Group of Experts on Compliance and Enforcement of Environmental Conventions. The experts recommended that the Guidelines be divided into two sections, one that addressed compliance issues and the other that addressed enforcement and environmental crimes. UNEP submitted the draft Guidelines to Governments for their review and comment. In 2000 and 2001, UNEP convened two advisory group meetings (one in Nairobi and one in Geneva), in which MEA Secretariats also participated. Based on the feedback from these meetings, UNEP refined the Guidelines.

On 22-26 October 2001, UNEP

convened an intergovernmental meeting of experts. All governments were invited, and ultimately 78 governments participated in finalizing the Guidelines at this meeting. The UNEP Governing Council ultimately reviewed, considered, and adopted the Guidelines in February 2002.[1]

1.2 Nature of the Guidelines

The Guidelines seek to promote implementation of a broad range of MEAs, present and future. This includes agreements on everything from hazardous wastes and chemicals, to desertification and land degradation, to biodiversity and wildlife, to climate change and depletion of the ozone layer.

The Guidelines are necessarily non-binding and advisory, and they do not affect MEA obligations in any way. In order to be relevant to a broad range of MEAs, the Guidelines set forth a "tool box" of actions, approaches, and measures to strengthen the international and national implementation of MEAs. As such, the Guidelines seek to inform and improve the manner in which Parties implement their MEA commitments. Thus, the selection and application of specific tools in the Guidelines to the specific context of a particular MEA will depend on the characteristics of that MEA, as well as the context of the country, countries, or organization seeking to apply the tools.

1.3 Scope and Content of the Guidelines

The Guidelines include an introduction and two chapters, one on compliance and the other on enforcement. The substantive division of the Guidelines into compliance and enforcement reflects the conceptual framework articulated by the experts and refined by the Government representatives participating in the development of the Guidelines. The experts divided implementation measures into two broad categories: those actions that relate to whether a Party (i.e., a nation) is in compliance with an MEA, and those on-the-ground actions that a Party takes to implement an MEA. Consequently, the former set of actions relates primarily to the international context and whether a nation is in good standing with the other Parties (i.e., the Compliance chapter), and the latter set of actions relates primarily to the national context and the actual application of the agreement at the national level (i.e., the Enforcement chapter). As will become readily apparent, though, while these generalities hold, there is some overlap.

The compliance guidance addresses the entire process of developing and implementing MEAs. Accordingly, these Guidelines promote effective preparation for and participation in negotiations through a variety of tools such as exchange of information, consultations, intra- and inter-governmental coordination, assessment of domestic capacities, and the need to promote synergies and avoid overlaps. The Compliance Guidelines also set forth a range of institutional mechanisms and approaches to promote compliance. Some of these may be included in the text of an MEA, while others may be adopted by the MEA Conference of the Parties, Secretariat, or other competent body. Such mechanisms include: reviews of implementation and effectiveness; national implementation plans; reporting, monitoring, and verification; non-compliance mechanisms and procedures; and dispute settlement. There are also some relatively brief Guidelines addressing national measures to implement MEAs, and most of these measures are expanded upon in the following chapter, dealing with enforcement. The Compliance chapter concludes with a discussion of measures to promote capacity building, technology transfer, and international cooperation.

In contrast to the Compliance chapter, which emphasizes the international context, the Enforcement chapter focuses on specific measures to implement MEAs at the national level. In this context, "enforcement" encompasses a broad range of actions, starting with effective laws, regulations, and institutional frameworks, but also entailing concerted capacity building,

public awareness and education, and international cooperation and coordination. While the specific legal, social, economic, and cultural contexts of a nation affect compliance, the Enforcement chapter recognizes that national implementation and enforcement measures are most effective when they take into account the particular national context. The Enforcement chapter provides a variety of considerations (e.g., clarity, feasibility, coordination, and authority) and a long list of approaches, tools, and arrangements.

The measures enumerated in the Guidelines have proven to be relatively comprehensive: in more than three years of intense review and discussion following the adoption of the Guidelines, few (if any) practices or considerations have been raised that are not already provided for in the Guidelines. This is due in large part to the broad range of experts, countries, and perspectives involved in elaborating the Guidelines. It is also due to the general nature of the Guidelines. In short, the Guidelines adopt a "tool box" approach, but they do not provide much guidance on how to use these tools, individually or in concert with other tools.

2 THE UNEP MANUAL AND REGIONAL WORKSHOPS

When it adopted the Guidelines, the UNEP Governing Council (GC) sought to disseminate them widely to Governments, MEA Secretariats, international organizations, and other institutions involved in implementing MEAs. The GC also sought to promote use of the Guidelines through the UNEP work program, in collaboration with States and international organizations. Thus, GC asked UNEP to strengthen capacity of developing countries, particularly the least developed countries and countries with economies in transition, to implement and enforce MEAs using, inter alia, the Guidelines.[2] In strengthening capacity of countries to implement and enforce MEAs, UNEP has pursued a three-pronged approach, pursuant to its work plan, that involves (1) developing and refining a Manual, (2) convening regional workshops to disseminate the Guidelines and test the Manual, and (3) conducting pilot activities.

UNEP has developed a Manual that expands upon the tools set forth in the Guidelines. If the Guidelines are a "tool box," then the Manual is a sort of "user's guide" for those tools. Structured as an annotated commentary on the Guidelines and using clear simple language, the Manual provides explanatory text, case studies, checklists, references to additional resources, and annexes with supplementary information. UNEP initially developed the Manual as a desk study, and UNEP has revised the Manual following each regional workshop to take into account substantive, editorial, and formatting comments, as well as new case studies of national, regional, and international experiences highlighted in the workshops. UNEP has also updated the Manual on a rolling basis to incorporate feedback from other events and reviewers.

UNEP also has convened a series of regional workshops on compliance with and enforcement of MEAs. At the time of writing, six regional workshops had been concluded for Asia and the Pacific, English-Speaking Caribbean, South East Europe, English-Speaking Africa, the EECCA (Eastern Europe, Caucasus, and Central Asia) Region, and Spanish-speaking Latin American and Caribbean countries. In addition, UNEP has disseminated the Guidelines and Manual to developed countries around the world and sought their feedback through a number of meetings organized by them, such as the North American Commission for Environmental Cooperation and IMPEL. The final two workshops – for Francophone Africa and Arabic-speaking West Asia – will be held in the first half of 2005. Following these two workshops, UNEP will finalize the Manual, translate it into the UN languages, and disseminate it widely for use by Governments, MEA Secretariats, and other stakeholders.[3]

These workshops have two primary goals. The workshops seek to build capacity of developing countries and countries with economies in transition to use the

resources in the Guidelines and the Manual to improve compliance with and enforcement of MEAs. In this capacity, UNEP familiarizes participants with use of the Guidelines and Manual. In addition, MEA Secretariats play a key role in educating participants about best practices in implementing and enforcing their respective agreements. The workshops also facilitate an exchange of experiences within a region regarding how to develop, comply with, implement, and enforce MEAs, as well as challenges faced. In this context, participants are able to learn from the experiences of countries with similar legal, social, cultural, and economic contexts. Through this exchange of experiences as well as specific discussions regarding the Manual, UNEP identifies new case studies, explanatory text, and other ways to improve the Manual. As such, the workshops have facilitated the iterative revision and refinement of the Manual and helped to ensure regional balance and relevance.

3 PILOT ACTIVITIES

The regional workshops have also provided a sustained dialogue regarding the challenges that countries face in complying with and enforcing MEAs, as well as ways that countries can (and do) meet those challenges. It is not surprising that limited technical, financial, and personnel resources are a significant concern for many countries. Nevertheless, the vast majority of countries participating in the workshops have had at least a few – and in some cases, many – innovative experiences in developing, implementing, and enforcing MEAs. While resources remain a chronic and sometimes severe challenge, countries are developing a variety of creative mechanisms and institutions for the implementation and enforcement of MEAs.

Due to the limited resources that many developing countries face, the workshops have seen recurrent, widespread interest in a few general themes and approaches. These areas of priority include strengthening the skills of their MEA negotiators, development of legislation implementing MEAs, and strengthening capacity of institutions to implement and enforce MEAs. The countries have also expressed the importance of a few cross-cutting themes, including synergies, cost-benefit analysis, and public participation. For example, there is particular interest in taking advantage of synergies among related MEAs as a means to more efficiently implement MEA commitments.

UNEP is undertaking a suite of pilot projects that respond to the needs and priorities that countries have expressed in complying with and enforcing MEAs. These pilot projects utilize the Guidelines and Manual in various ways, but they generally seek to build capacity and develop innovative approaches in three areas: the negotiation of MEAs, the implementation of MEAs through national legislation and regulations, and the practical implementation and enforcement of MEAs. Many of these activities emphasize synergies, particularly in developing laws and training customs officers and judges, but also in developing indicators of MEA implementation. A number of activities also highlight the importance of public participation in implementation of MEAs, for example in MEA negotiations, in the development of national reports, and in conducting transboundary environmental impact assessments. The current activities are scheduled to be completed by the end of 2005, with subsequent activities building upon the experiences of the pilot activities.

As noted above, there is particular interest in implementing related MEAs through synergistic approaches. These synergies may be thematic, so that a country may implement a cluster of related MEAs through a single, holistic law. For example, UNEP is working with the Organization of Eastern Caribbean States to develop frame harmonized legislation to implement the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species (CITES), the Ramsar Convention on Wetlands, the World Heritage Convention, and other regional and international agreements relating to biological diversity.

Rather than undertake five (or more) separate legislative reforms that could yield a patchwork of overlapping legislation, a country can pursue a single process that yields a more effective law that addresses potential synergies and overlaps in a deliberate fashion. Moreover, the length of time necessary to produce the larger law is generally perceived to be less than that necessary to develop a series of separate implementing legislation. Similar thematic clusters may occur in the context of hazardous substances and wastes, regional seas, and atmosphere, and other UNEP pilot projects seek to provide innovative models for synergistic implementation of MEAs in national legislation. For example, UNEP is collaborating with INECE to develop and pilot test national compliance and enforcement indicators for two clusters of MEAs: biodiversity and hazardous waste/chemicals MEAs.

Operational synergies are also possible, particularly in capacity building. For example, customs officers are at the front lines in regulating trade in endangered species, ozone-depleting substances, hazardous waste, and certain chemicals. While expert knowledge and comprehensive training are often necessary to discern legal from illegal trade, basic training and awareness raising of customs officers can go a long way in helping to identify potentially illegal trade. Accordingly, UNEP, INTERPOL, the World Customs Organization, and the Secretariats of five (and perhaps six) MEAs have launched the Green Customs Initiative to build capacity of customs officers on trade-related MEAs. Other operational synergies may be seen in capacity building of the prosecutors and judges, who are charged with prosecuting and deciding cases dealing with potential violations of national laws implementing MEAs. As such, a general awareness of and sensitivity to MEAs can be essential to effective enforcement; and general training on MEAs may be more appropriate and cost-effective than MEA-specific training. Ongoing UNEP pilot projects address all of these operational synergies.

4 CONCLUSIONS

The UNEP Guidelines have proven to be an important and timely set of tools to assist in the implementation of MEAs. The Guidelines have inspired initiatives to develop other international and regional guidelines on MEA compliance, implementation, and enforcement. Moreover, MEA Secretariats, international and regional institutions, NGOs, and other organizations have undertaken a variety of measures to promote compliance and enforcement in recent years. For example, MEA Secretariats are developing and strengthening compliance mechanisms, as well as other approaches to promote effective implementation. Countries are developing new and innovative approaches to implementation. The Manual captures many of these experiences, within the broader framework of the UNEP Guidelines.

There is still much work to be done in building capacity and in developing the specific modalities for implementing MEAs more efficiently. Nevertheless, there are grounds for optimism. As UNEP's regional workshops have highlighted, developing countries around the world have been creatively meeting the challenges with innovative approaches. These innovations need to be cultivated and supported, and the lessons of these experiences need to be examined for their potential relevance in other countries and contexts.

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ARGENTINE CASE STUDY: USING HUMAN RIGHTS AS AN ENFORCEMENT TOOL TO ENSURE THE RIGHTS TO SAFE DRINKING WATER

PICOLOTTI, ROMINA

Executive Director, Center for Human Rights and Environment, Argentina, romina@cedha.org.ar

SUMMARY

This article exemplifies with a real case how linking environment and human rights can be used to promote enforcement of environmental law. We start from the basis that human rights law provides substantive and procedural elements as well as institutional mechanisms that can be incorporated by environmental law with a view to achieving effective environmental protection.

1 INTRODUCTION

Even though the protection of the environment has been consecrated in a number of international instruments and universal recognition has been achieved concerning the need to act in certain areas to prevent the destruction of the Earth, this protection has been based more on rhetoric and good will rather than on enforceability. International environmental law has not provided the mechanisms necessary for individuals to legally claim the fulfillment of the obligations assumed by States in environmental treaties. We understand by environmental enforcement, the ability to claim before a judge the fulfillment of obligations and the realization of rights that concern the protection of the environment.

For its part, international human rights law has been able to advance significantly with respect to enforcement. International justice forums have been created to which individuals can resort in order to demand that States fulfill their obligations and achieve the realization of rights that are included in human rights treaties. Likewise, international human rights law has succeeded in penetrating into the States' domestic legislation through legislative reforms that recognize and promote its application by local tribunals.

Environmental and human rights law have essential points in common that enable the creation of a field of cooperation between the two[1]:

- Both disciplines have deep social roots; even though human rights law is more rooted within the collective consciousness, the accelerated process of environmental degradation is generating a new "environmental consciousness".
- Both are purposeful legal systems with objectives of universal consent and of variable content, open to reality and social changes. The contents of both disciplines need be adapted to dynamic social processes, their normative corpus must meet the needs of each social era, with the objective of fulfilling its protective ends.[2]
- Internationalization. The international community has assumed the commitment to observe the realization of human rights and respect for the environment. From the Second World War[3] onwards, the relationship State-individual is of pertinence to the international community. On the other hand, the phe-

nomena brought on by environmental degradation transcend political boundaries and is of critical importance to the preservation of world peace and security. The protection of the environment is internationalized, while the State-Planet Earth relationship becomes a concern of the international community.

— Universalization. Both areas of law tend to universalize their object of protection. Human Rights are presented as universal and the protection of the environment appears as everyone's responsibility.

The advancement of the relationship between human rights and the environment would enable the incorporation of human rights principles within an environmental scope, such as anti-discrimination standards, the need for social participation, protection of vulnerable groups, etc. At the same time, the human rights system would be strengthened by the incorporation of environmental concerns, enabling the expansion of the scope of human rights protection and generation of concrete solutions for cases of abuses.[4] Finally, one of the most important consequences, is to provide victims of environmental degradation the possibility to access to justice. Given the present situation of absolute helplessness suffered by victims of environmental degradation, linking human rights and the environment brings such victims closer to the mechanisms of protection that are provided for by human rights law.

The linkage between human rights and the environment reveals itself clearly and irrefutably. Environmental degradation severely affects the use and enjoyment of most internationally recognized human rights. Thus, for example, the right to life and to health, are critically affected by problems of environmental degradation,[5] the right to equality before the law is affected by the disproportionate way in which certain sectors of the population bear environmental burden (environmental discrimination), the right to work is affected by environmental conditions in the work place, the right to property is affected by environmental degradation, etc.[6]

Experience in the human rights arena has shown that the way to make rights effective is to promote their enforcement. It is timely to consider which are the elements that made possible advances on the enforcement of human rights and whether these can be applied to environmental law.

The first element stems from the recognition that human rights are fundamental rights: the possibility of social cohabitation is given by the existence of norms and principles that imply the conception of immutable values, of limits that cannot be transgressed, of norms that are internalized within the collective consciousness as unyielding pillars not subject to controversies. Human rights are the trustees of this solid normative nucleus.

The second is the general consent as regards these rights, which implies their legal crystallization at an international scale through treaties and declarations with universal vocation and their hierarchical constitutional incorporation into the domestic judicial systems of States.

The third element resides in the possibility given to individuals to access justice in order to claim for the enforceability of these norms and the application of specific substantive and procedural human rights principles in concrete cases. This access to justice is in itself a human right, of which people cannot be deprived.

When these elements of enforcement are applied to the scope of environmental law, it is possible to sustain, as regards the first of these elements, that the environmental crisis threatens the viability and quality of life on the planet. The fundamental nature of this problem is irrefutable. This has generated the universal consent necessary to elevate the protection of the environment before international public law. Hence, the right to a healthy environment is beginning to be recognized as a human right.[7]

The second element pertaining to enforcement in human rights appears in environmental law in the sense that, most constitutions that have been recently

reformed incorporate the protection of the environment, hence, assigning this protection constitutional hierarchy.[8]

It is the third element, dealing with access to justice that has not yet been completed in the area of environmental law; it prevents its enforcement, and thus, the full force and effectiveness of environmental law. In the case that follows we used a human rights strategy to strengthen the access to justice of environmental victims and to ensure environmental law enforcement.

In a research program studying the dimensions of poverty, human rights and environment, [Center for Human Rights and Environment] (CEDHA) [identified] the lack of access to safe drinking water in outlying poor neighborhoods as a critical problem of the city of Cordoba, Argentina. Local research took place over a two year period, targeting specific geographical areas around Cordoba, characterized by high levels of poverty. The study disclosed that the lack of access to safe drinking water is a common and recurring problem in the poorest communities of the local population.

The problem has four principal dimensions:

1. The lack of access to the local water distribution gridmap;
2. The contamination of water distributed by the existing local network, principally due to lacking state control over the contracted cooperative providers who are charged with providing water to poor communities;
3. The contamination of subterranean waters, principally due to lacking sanitation infrastructure, and contaminated water spillover from homemade sanitation systems (household water pits);
4. Contamination of home water storage tanks, principally caused by inadequate covers, poor maintenance and hygiene, lacking regular controls, atmospheric contamination due to the nearby use of agro-pesticides and chemicals in high population density areas, the presence and use of nearby incinerators of pathogenic waste, crematories, or other industrial pollution.

Considering that we have a favorable judicial system and framework that recognizes human rights as having constitutional hierarchy on health, an adequate standard of living, the right to food, and the right to a healthy environment,[9] and the great need for the State to perceive the problem of access to safe drinking water as a human rights problem, Center for Human Rights and Environment, Argentina decided to begin to litigate leading cases addressing the various dimensions of the problem in the city of Cordoba.

The criteria Center for Human Rights and Environment, Argentina uses to select cases are: population density, the degree of poverty; existing lack of access to safe drinking water; proximity to the distribution public water gridmap; social organization of the affected community; judicial viability of the case.

The principal obstacles encountered were: the lack of tradition in the court system to enforce these rights, the limited capacity of the judicial sector to believe in, or feel they can influence public policy decisions, the economic crisis of the country, as well as of the provincial and municipal government.

2 FACTS OF THE CASE

The present case addresses the lack of access to safe drinking water in three poor neighborhoods in the city of Cordoba, which are not included in the public water gridmap, and whose subterranean home water pits are highly contaminated with fecal matter, nitrates and nitrites.

The affected neighborhoods are: *Chacras de la Merced,* Villa la Merced, and *Cooperativa Unidos* with a population of approximately 4,500. Of these, 49% are women, and 51% men. Average female age is 27, male, 25. Approximately 43% are minors of less then 17, and nearly 5% are persons above the age of 64. Approximately 30% of the neighborhoods population is actively employed, while unemployment surpasses 23%. The average household

monthly income (in families with at least one employed member) is US$175. The level of illiteracy is nearly 3%.[10]

Towards the end of the 1960s, the city built a Sewer-Water Treatment Facility[11] (called the *EDAR Bajo Grande*) on the coasts of the Suquia River, two kilometers upstream from *Chacras de la Merced com - munity*, which predates construction of the facility some 30 years. *Chacras de la Merced* borders with *Villa la Merced* and *Cooperativa Unidos* communities. The EDAR facility was inaugurated in 1987, under municipal control, with the capacity to treat 120 thousand cubic meters/hour of sewer water.

Due to the continued growth of the city of Cordoba, the municipality continued authorizing new sewage connections, increasing the volume of sewer water going into the plant. As a consequence, the plant today, has two extremely urgent problems: the first has to do with the lack of basic product supplies to treat the sewer water and the lack of maintenance. The plant is currently operating at 70% of capacity, due to these limitations; the second problem, has to do with the quantity of flow of sewer water into the plant. Assuming the plant were functioning at 100% capacity, it can only treat 120,000 m3/hr, and at present, the plant receives on average between 140,000 and150,000 m3/hr. *This suggests that the plant is receiving between 600,000 and 800,000 liters of sewage water that it cannot treat, not even if it were to operate at 100% capacity.*

The large gap between the quantity of incoming liquid and the ability of the facility to treat it, results in direct daily spills of untreated sewerage water into the Suquía River.

In July of 2003, a representative from CEQUIMAP laboratory[12], arrived at Chacras de la Merced, by invitation of Center for Human Rights and Environment, Argentina, to take five water samples from the community. The fecal bacterial content (*coliformes fecales*) of the river downstream from the plant, shows a 40-fold increase with respect to the river water sample taken upstream from the plant.

The tests taken from homes in the community are also testimony of severe contamination with fecal mater, with increasing contamination directly proportional to the proximity of the home to the plant. Some of the tests show up to 2000 fecal *coliformes.* The World Health Organizaiton (WHO) establishes that there should be no presence of fecal *coliformes* in water destined for human consumption.

3 LEGAL STRATEGY

The legal strategy chosen in the case parallels Center for Human Rights and Environment, Argentina's general legal strategy, grounded in the objective of enforcing Economic, Social and Cultural Rights (ESCRs). Center for Human Rights and Environment, Argentina is working to create the relevant favorable environmental jurisprudence that would permit the continuous advancement towards the complete enforcement of all ESCRs. In this manner, we distinguish violated rights from rights chosen for their enforcement. At present, while the contamination of the water source resulted in the violation of multiple human rights, we chose only certain rights upon which to claim for judicial enforcement, including, the right to safe drinking water, the right to a healthy environment, the right to health, and the right to an adequate standard of living.

Center for Human Rights and Environment, Argentina chose to present an injunction (*in Spanish, amparo*) based on two main criteria and with a view to expedite the process as much as possible.[13] The case was limited mainly to secure safe drinking water for the affected parties, as well as to immediately cease contamination of the Suquía River.

The action was filed against the Provincial State, as well as against the Municipality of Cordoba. The action against the State was based on its obligation to ensure that the water of the River Suquía be suitable for human and industrial consumption, and for its obligation to provide direct or indirect access to safe drinking water to the public and in conformity with

internal legislation. The action against the municipality centered on the injurious and treacherous nature of the environmental degradation and its consequences on people. This strategy permitted us to broaden the range of potentially responsible parties for the violation of rights, holding these accountable in differentiated but collective terms. The State, we argued, is the guarantor of human rights, irrespective of the internal structure it might chose to adopt.

Likewise, this approach permitted us to capitalize on existing and ongoing internal conflict between the municipality and the province. Instead of the two political levels claming innocence in the matter, they proceeded to fingerpoint responsibilities at one another. Nevertheless, this duality and conflict between political levels which at one state of the case was favorable, became problematic at the moment of executing the court order, as the political differences created significant barriers to carrying out the sentence.

As part of the judicial strategy, Center for Human Rights and Environment, Argentina requested the presence of the affected communities at multiple stages of the process, an unusual practice in injunction filings which exerted strong political pressure on all of the parties involved. The filing was made by Center for Human Rights and Environment, Argentina jointly with four community residents, which also lent their homes for the mentioned water sampling.[14]

The strategy involved utilizing the action as a political pressure mechanism, with the objective of opening a Pandora's box of subsequent thousand+ filings from other affected community members, in the case that the first action did not result in a permanent solution to the access to safe drinking water problem.

In the end, the case was sustained with evidence coming primarily from the State's own reports on the functioning of the Treatment Facility and the levels of contamination of the Suquía River.

The following international human rights legislation were evoked in the case filing: The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights[15], and the Convention of the Rights of the Child.

3.1 The Sentence

The case was resolved in the first instance. The judge decided: to accept the standing of the NGO (CEDHA) and the 4 affected residents; that the State was responsible in violating the rights to a healthy environment, to an adequate living standard, to access safe drinking water, and the right to health. It also recognized the human right to safe drinking water, implied by the right to health. The judge explicitly cited the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and General Observation Number 15. He also recognized the immediacy with which the State must address the environmental situation, and that this requires the utmost diligence with a view to avoid irreversible damage to the ecosystem and as a consequence, to those individuals who inhabit the mentioned environment. He also recognize[d] that "the environment is not only a collective good, without requisite sine qua non for [the existence of people], due to which it is an individual patrimony and at the same time, a collective one, with implications for present and future generations, for which not only must we act in defense of present values, but in the name of future persons and environmental values".

With respect to the judicial enforcement of these rights, he stated that "while it is good that in a State of rule of law...that a Judicial entity not conduct activities of the responsibility of the Parliament or Presidency, the discretionary and privative competence of an organ of the State have limits, and that the action of the Judiciary power, faced with the degeneration of those responsibilities, does not imply an invasion of one power over another, but rather the framing of public authority to uphold the Constitution and the law.

Finally, the sentence order[ed]: "that the municipality of Cordoba adopt all

of the measures necessary relative to the functioning of the *EDAR Bajo Grande*, in order to minimize the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the injunction filers a provision of 200 daily liters of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94." Case costs are awarded to the plaintiff.

3.2 Execution of the Sentence

We achieved, within the process, that the municipality present an "integral sewage plan" in which US$1.75 million shall be invested for rehabilitation of the existing infrastructure, and US$6 million to increase plant capacity. We requested formal clarification of the sentence so that the Judge precisely orders the measures necessary relative to the functioning of the plant, in order to minimize the environmental impact produced by it, until a permanent solution is reached, specifying activities and their implementation timeframe.

In December 2004, the Province of Córdoba commenced public works on the perforation of new water pits, construction of new water storage facilities, the installation of a new hydro-powered tank, as well as the necessary piping to channel water to the neighborhoods, which will eventually provide permanent access to safe drinking water to *Chacras de la Merced, Cooperativas Unidos*, and *Villa la Merced.* The municipality has promised to provide the necessary pipes for home connections.[16] Construction work is expected to end in March 2005.

4 CONCLUSION

The request for the provision of permanent access to safe drinking water is not merely the simple request of the provision of a public service. It is rather, founded in the will to assure the full realization of human rights to health, food, an adequate standard of living, and a healthy environment. The judge of the case, wisely, poised himself as the guarantor of the human rights of the residents of these neighborhoods. We believe that this sentence makes an important step towards the judicial enforcement of these rights.

5 REFERENCES

1 See A.A. Cancado Trindade, "The Parallel Evolutions of International Human Rights Protection and Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights", in the Inter-American Institute of Human Rights Magazine, No. 13, January-June 1991.

2 *Alexandre Kiss, Définition et nature juridique d'un droit de l'homme ą l'environnement, en Environnement et droits de l'homme*, Pascal Kromarek, directrice de publication, 1987

3 Michael J. Kane, *Promoting Political Rights to protect the Environment*, THE YALE JOURNAL OF INTERNATIONAL LAW, Volume 18, Number 1, pgs.389-390

4 Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview in Alan E. Boyle & Michael R. Anderson, Eds.*, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1-4, 21-23 (1996).

5 It has been estimated that roughly 60 per cent of the global burden of disease from acute respiratory infections, 90 per cent from diarrhea disease, 50 per cent from chronic respiratory conditions and 90 per cent from malaria could be avoided by simple environmental interventions. World Health Organization. 1997. *Health and Environment in Sustainable Development: Five Years after the Earth Summit.* Geneva: World Health Organization

6 Judge Weeremantry from the International Court of Justice makes a reflection in this vein: The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life

itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. Gabcikovo-Nagymaros Case (Hungary-Slovakia), ICJ, Judgment of Sept. 25, 1997 (Sep. Op. Judge Weermantry) at 4.

[7] The Additional Protocol to the American Convention on the matter of Economic, Social, and Cultural Rights "Protocol of San Salvador "in force since December 16th of 1999, in its article 11 recognizes:

"1. Every person has the right to live in a healthy environment and to be provided with basic public services.

2. The State parties will promote the protection, preservation, and improvement of the environment."

The African Charter of Human Rights, in force since 1986, in its article 24 recognizes: "every person has the right to a satisfactory and favourable environment for his development" la traducción nos pertenece]

[8] This is reflected in most of the constitutions in the region that recognize the importance of the environment: constitution of Bolivia of 1967 (article 137), constitution of Brazil of 1988 (article 225), constitution of Chile of 1980 (article 19), constitution of Colombia of 1991 (articles 8,49, 79,80,86, and 88), constitution of Cuba of 1992 (articles 11 and 27), constitution of El Salvador of 1983 (article 69), constitution of Ecuador of 1983 (article 19), constitution of Guatemala of 1985 (article 97), constitution of Guyana of 1980 (articles 25 and 36), constitution of Haiti of 1987 (articles 253 and 258), constitution of Honduras of 1982 (article 145), constitution of Mexico of 19178 (article 25), constitution of Nicaragua of 1987 (articles 60 and 102), constitution of Panama of 1980 (article 110), constitution of Paraguay of 1967 (article 132), constitution of Peru of 1993 (article 2 inc. 22), constitution of Uruguay of 1997 (article 47), constitution of Costa Rica (articles 468 and 508).

[9] The National Constitution incorporates 11 human rights treaties with Constitutional hierarchy, including: the Covenant on Economic, Social and Cultural Rights, the Universal Declaration on Human Rights, and The Convention on the Rights of the Child.

[10] Stats from "Perfil de la Pobreza en Córdoba", SEHAS.

[11] Henceforth "plant" or "facility".

[12] A laboratory of the National University of Córdoba.

[13] No more expedient judicial remedy exists.

[14] We carefully chose those sites where we could clearly construct solid evidence of the contamination of the Suquía River by the plant and the high degree of contamination of the home water pits. For exam-

ple, we took samples from the River before and after the plant, and in one of the local schools of one of the neighborhoods, where approximately 300 children attend school, eat and drink water daily from a local water pit.

[15] Henceforth the ESCR Covenant

ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE AND ITS ROLE IN ENHANCING COMPETITIVENESS IN DEVELOPING COUNTRIES

PRATT, LAWRENCE[1] and MAURI, CAROLINA[2]

[1] Associate Director, Latin American Center for Competitiveness and Sustainable Development, INCAE, Costa Rica, Lawrence.Pratt@incae.edu

[2] President, EcoConsulta, Costa Rica, caromauri@racsa.co.cr

SUMMARY

There is strong evidence that improved environmental performance is positively correlated with increased competitiveness. The article explores the implications of this relationship to emerging policy frameworks in developing countries and describes the role of enforcement and compliance in promoting competitiveness. The article concludes by presenting a "laundry list" of attributes of an environmental regime capable of enhancing competitiveness.

...

1 PERCEPTIONS OF ENVIRONMENT AND COMPETITIVENESS

Historically, in developing regions such as Latin America, many in the private sector (as well as in government) have believed that improving environmental performance has only negative effects on the countries' ability to improve competitiveness. The traditional view argues that: increased costs to firms to upgrade technology and treat externalities hurt firm level cost-competitiveness in the international marketplace, stringent national environmental standards encourage companies to invest in countries with less stringent standards, the costs to governments of enforcing environmental legislation could be better used elsewhere, and, improved environmental performance is a "luxury" for wealthier countries that poor countries cannot afford.

While there is a certain logic to the arguments, and in certain cases all can be true, the experience of firms and countries over the past decade has led to deeper understanding of how environmental performance relates to the more traditional economic policy goals of nations – such as furthering trade relationships and improving firm competitiveness. This new experience has shown that the issues are much more complex than we had imagined, and that the traditional view is, at a minimum, overly simplistic, and at the limit largely incorrect in the context of most developing countries.

We now know that there are strong positive relationships between good environmental performance and increased country and firm competitiveness. These newly understood relations have important implications for integrating environmental policy (and its effective implementation and enforcement) across many aspects of national policy-making and programs. The following three sections of the paper attempt to articulate the arguments for the positive relationships. The two following sections examine in more detail the potential role of

E&C [enforcement and compliance] strategies and programs and considerations for developing country policy-makers.

2 FIRM LEVEL COMPETITIVENESS

At the firm level, there are clear links between higher levels of environmental performance and improved competitiveness. Many are well known and well-documented, others are anecdotal or simply believed by business people and researchers to be relevant, pending more empirical research.

First, the cost differential between environmentally "sound" and environmentally "unsound" products is a relatively small component of the cost structure for most companies. In the United States, arguably the country with the most expensive environmental regulatory system with which to comply, the average costs of compliance with all environmental regulation has been estimated at less than one percent of total costs.

Second, producing with less waste is usually more profitable. Waste products are, by definition, raw materials that enter into a process which are not used in the final product. Eliminating the waste streams by incorporating them into the product, reusing them or recycling them are always more profitable alternatives to treating the product for disposal (and usually more profitable than throwing the product away untreated)....

2.1 New Understanding of Opportunities

The other manner in which the traditional view of environmental costs is being challenged is through increasing opportunities for realizing market value from improved environmental performance. Globalization, increased connectivity, and changes in stakeholder expectations of firm's behavior are creating opportunities for firms to increase value for consumers, business customers and investors. (Pratt 2000, SustainAbility 2002).

2.1.1 Relating to Firm Business Opportunities

2.1.1.1 Efficiency

As discussed above, there are very good opportunities for firms to invest in making their production processes more efficient, and their products more valuable per unit of energy and raw materials usage. Investments in energy and material efficiency can be highly profitable and can increase long-term competitiveness for many firms. In developing countries, particularly those of Latin America, there are outstanding opportunities for investment. High costs of capital (due to macroeconomic factors), a historic scarcity of investment capital and a tradition of relatively closed economies (limiting much cost competition) have led to underinvestment in new technology and allowed processes to be considerably less efficient than global competitors. As these economies open there will be increasing need to improve efficiency and ample opportunities to move to cleaner, more-efficient production technology. Fortunately, greater macroeconomic stability should allow investment costs to be more manageable permitting increased investment.

Enforcement and Compliance programs can play an important role in improving efficiency in a number of circumstances. Where regulatory systems push firms toward higher levels of performance (such as more stringent effluent standards), Enforcement and Compliance programs can be structured to allow companies to pursue a variety of options for achieving the regulatory goals. For example, gains in process efficiency are almost always competitiveness enhancing while investments in pollution control technology rarely are. Another important area is in advancing environmental goals in sectors that are highly competitive locally. There are many cases where many actors in a given industry all want to pursue more environmentally-sound production paths, but no single actor is willing to go first for fear of the others gaining an advantage by not following the same path.[1]

2.1.1.2 Adapting to trends toward more environmentally sound products

Trends in consumer markets and "business to business" markets are rewarding firms with environmentally superior products and services and increasingly rejecting products that are lacking in certain attributes. For example, in markets for foodstuffs, organic and other "sustainable" agricultural products are growing rapidly as market segments. Organic sales alone represent over $20 billion of sales in each the US and Europe, and now account for about 2% of the total food market. While still relatively small, historic growth rates of around 20% per year (versus less than 2% for conventional foodstuffs) make it a very interesting market. Developing countries have outstanding potential to take advantage of these opportunities (due to lower labor costs, and frequently favorable climatic conditions).

In business to business relations, entire industries are moving to ensure that their products incorporate environmental aspects. The ISO14001 environmental management systems standard has proven to be the preferred vehicle for "B to B" environmental relationships. ISO14001 is now a "de facto" requirement for most of the value chains supplying the electronics and automobile industries and will likely take on similar importance in other industries.

Trends in forestry products (for sustainably managed timber sources) and fisheries (for more responsible capturing practices) and a number of other industries are indicative of the strength of these trends.

2.1.1.3 Innovation

There is strong evidence from a number of industries of increased product and process innovation emerging as a result of stringent environmental standards.

There is little doubt that the success of industries such as the air emissions reduction industry that emerged in California was a direct result of a "home-grown" response to that state's stringent air emissions standards. Similarly, it is clear that Sweden's domination of the cellulose pulp processing industry is due to the extremely efficient production machinery developed in Sweden to meet that country's demanding air, water and waste standards.

The relevant point for Enforcement and Compliance programs in this area is that compliance, per se, does not stifle innovation. However, it is clear that regulatory regimes can either stifle [or] encourage innovation depending on a number of characteristics discussed later in the paper.

2.1.2 Relating to Stakeholder Issues

Perhaps the greatest change in the environment-competitiveness relationship has been the increasing number of different stakeholders taking an interest in firm-level performance. Increased awareness of the negative consequences of poor environmental performance, increased speed of communications, and increased empowerment of communities and civil society in general have led to greater interest and involvement, and have increased the risks of weak environmental performance. Much of the risk is tied to the effectiveness of a country's regulatory system and its Enforcement and Compliance mechanisms.

2.1.2.1 Social license to operate/ Avoidance of direct action

Enforcement and Compliance play a critical role in this sphere. Fair and conscientious application of environmental standards strengthens the legitimacy of a regulatory regime. If rules are unclear or not clearly understood, Enforcement and Compliance can "save the day" by stepping in to clarify the conflict. Conversely, where rules are clear failure of an Enforcement and Compliance effort to lead to a just outcome (or a perceived just outcome) can undermine confidence and negate the effectiveness of the regulatory system.

2.1.2.2 Regulatory risk

Without clear and clearly enforced standards (particularly regarding emissions parameters), firms face a great deal of risk.

Citizen complaints or arbitrary or capricious action by officials can lead to sanctions (in Latin America temporary closure is the most common sanction). A more sophisticated and stable system increases predictability and transparency and greatly reduces the risk of regulatory action. Enforcement and Compliance is the interface between the rules themselves and the firms that are obliged to implement them. If this function is fulfilled in a consistent and transparent way, firms benefit from lower costs (they understand what is expected of them and focus on that) and lower risk (of misunderstandings or arbitrary actions).

2.1.2.3 Risk for financiers

Enforcement and Compliance professionals should consider strategies for working with the financial sector to help finance practitioners understand the obligations their clients face and determine strategies for ensuring that risks to the company (and by extension their financiers) are managed effectively.

2.1.3 Evidence

The most compelling support for positive links between environmental performance and firm level competitiveness come from changes evident in the financial markets. Today, roughly one seventh of all globally invested funds include specific exclusions (called "filters" or "screens") for a number of sectors seen as objectionable or "unethical" (such as arms, nuclear energy, tobacco, gambling). This is in response to demand from individual and institutional investors (such as pension funds) who prefer not to have their savings and investments used to finance those industries. From 1996 to 1999 total assets in "screened" funds grew 80% during the past three years, compared to just over 40% for the rest of the market. (Social Investment Forum 1999)

A number of financial organizations are testing the theory that sound environmental performers are also superior financial performers by building mutual funds that include only companies that pass relatively high "filters" for environmental and social performance. Because these funds are new and relatively small (total market capitalization of all the funds is only US$1 to US$2 billion), it is too early to draw conclusions, but results thus far are encouraging. A 1998 comprehensive review of these funds showed that they were performing well against established benchmark indexes. (Ganzi 1998) Most of the funds also showed a much faster rebound from the stock market crash of 2000 and 2001 (author's review). A detailed study by ABN/AMRO, a leading Dutch financial institution concluded that while the case cannot yet be made for superior performance of sustainability-based investment funds, performance is at a minimum as good for ethically oriented portfolios including environmental ones. (ABN/AMRO 2001)

As noted previously, most of the data to support links between superior environmental performance and improved competitiveness are based on industry observations and case studies. However, empirical research on environmental performance and capital markets shows that the most successful and valuable multinational firms are those that adhere to the highest environmental standards.(Dowell and Hart 1998) The authors researched the relationship between firm value creation and the stringency of internal company environmental standards for over 500 publicly traded, U.S.-based multinationals in non service sectors. The study found that multinationals that have internal worldwide standards higher than any individual countries' standards are those with the highest levels of value creation. In contrast, firms that adhere to the lowest standards in the countries in which they operate are those with the lowest value.

3 TRADE AND ENVIRONMENT

Nearly every developing country in the world is pursuing economic strategies that feature export-led economic growth. Environmental performance is critical in at least two dimensions of these economic strategies.

3.1 Import Requirements and restrictions

Most industrialized countries already have in place stringent rules regarding the environmental attributes of products entering their borders (limitations on chemical residues, types of plastics used, even packaging materials). In addition, international trade rules allow countries to restrict imports of products that are produced using certain processes that are deemed harmful (such as those that harm endangered species). To realize the potential from export-led growth, countries (and companies operating in them) must ensure that their products meet both the standards required by the destination market as well as those conditions established by exporting country. In addition, they must pay increasing attention to the manner in which export products are harvested and produced to ensure adherence to more stringent process-based requirements.

For the natural resource-based economies of most developing countries, this issue underlines the importance of regulatory programs and sound Enforcement and Compliance initiatives in areas such as agricultural chemicals and pesticides, marine and coastal resources (particularly marine mammals, turtles, wetlands and mangroves), and endangered species protection. A limited number of "problems" identified in industrialized countries can ruin an entire industry, even if the failures are from only one firm. For example, Guatemala's berry industry has been destroyed twice in the past ten years due to an embargo on exports to the United States (imposed by the U.S. due to Guatemala's failure to adequately manage chemical and biological risks affecting the berries' quality). In both cases, more serious attention to chemical use and biological contamination would have eliminated the problem. A small number of containers of Chilean grapes found to have unacceptably high levels of pesticide for the U.S. market led to an embargo of all Chilean grapes for a lengthy period.

Other cases can be found, and trade rules at an international level are moving toward allowing countries greater latitude to restrict imports based on undesirable environmental criteria. (IISD 2002) Tropical timber is an interesting example. Due to an agreement of the International Tropical Timber Organization, international trade rules now allow any WTO member country to prohibit the importation of wood or wood products that are not certified as coming from sustainable sources. While it is not yet in any country's interest to exercise this right, WTO rules allow the restriction to be implemented at any time. The key for developing countries to protect their timber exports is to put in place programs (with appropriate compliance assurance mechanisms) that promote sustainable forest management and reduce the likelihood of any of their exports being rejected for lack of certification.

3.2 Trade Policy and Strategy

Most developing countries are pursuing closer trading relationships with the U.S. and Europe, primarily in the form of free trade agreements. In the case of the United States in particular it is clear that environmental issues are a critical component of reaching the agreement. Concerns in the United States regarding trading partners' environmental and labor performance are considered to be the most serious political obstacles to furthering trade agreements.

The North American Free Trade Agreement (NAFTA, between the U.S., Canada and Mexico) included an entire parallel agreement obliging the countries to undertake a wide variety of activities to strengthen environmental performance, resource management, and cooperation. This agreement is largely responsible for a wholesale change in Mexico's environmental laws, regulations and approach toward more sound environmental management. Both the obligations of the agreement and a sophisticated understanding of the competitive implications of environmental performance for Mexican exporters have led to dramatic improvements in many areas.

Responsible environmental standards and the ability and will to enforce them are part of the "price of admission" to closer trading ties with the U.S. It is clear in all of the post-NAFTA trade agreement processes (with Chile, Singapore, Jordan and the Central American nations) that the U.S. expects all of its trading partners to have in place laws, rules, administrative structure and Enforcement and Compliance programs necessary to ensure responsible environmental performance, and that it will sanction its trading partners if their enforcement and compliance systems do not ensure that the rules are followed.

Enforcement and Compliance's role is critical. The United States in particular looks frequently to Enforcement and Compliance indicators to assess whether or not countries are taking appropriate action to ensure compliance with the environmental laws and regulations. For this reason, Latin American countries' Enforcement and Compliance programs will likely be in the "spotlight" of any potential disagreements or disputes.

4 BUSINESS CLIMATE

Each year since 1992, the World Economic Forum has published annual assessments of countries' competitiveness including rankings. In 1997, the WEF began including a number of environmental variables in recognition of an emerging understanding of the relationship between environmental performance and the development path of countries.

Today, the WEF environmental determinants of business climate and the subsequent rankings comprise one of the 11 "chapters" of the analysis and rankings. The issues assessed, analyzed and ranked are:

- Stringency of air, water, waste disposal, chemical and overall environmental regulation.
- Speed of adoption and enacting of environmental rules.
- Level of government priority to enacting international environmental regulations.
- Flexibility offered by system and authorities to meet required obligations.
- Consistency and fairness of environmental enforcement.
- Perceptions of effect of compliance on firm competitiveness.
- Extent of public-private cooperation to reach environmental gains.
- Prevalence of environmental management systems.

The critical issue for policy-makers is that a very "mainstream" business policy organization is completely convinced of the positive linkages between environmental performance and a healthy competitive business climate. Countries seeking to improve their ranking (which is seen internationally as an important barometer of economic development potential) will need to take these criteria into account when working to strengthen their business climate.

A 2001 analysis of the results of the indicators reached an important conclusion:

"the quality of a nation's environmental regulatory regime is strongly and positively correlated with its competitiveness.." (page 95) and continues:

"The analysis provides considerable empirical evidence that cross-country differences in environmental performance are associated with the quality of the environmental regime in place. We find that the rigor and structure of the environmental regulations have particular impact, as does emphasis on enforcement."

For developing countries, this provides a very strong competitiveness and business-climate case for advancing more stringent regulatory structures, and for developing much greater capacity to ensure compliance with established laws and regulations.

It is important to note that Enforcement and Compliance plays a direct or indirect role in nearly every one of the key environmental business climate factors. Some

are direct – such as perceived consistency and fairness, and the level of public and private cooperation. Others are indirect – for example, the stringency of regimes (in particular in developing countries stringency is very much related to actions taken by Enforcement and Compliance programs), flexibility, and perceived benefits on competitiveness.

5 THE ROLE OF ENFORCEMENT AND COMPLIANCE IN PROMOTING COMPETITIVENESS

There is strong evidence that improved environmental performance is positively correlated with increased competitiveness. Further, we understand from experience in both rich countries and developing countries that environmental performance in the economy in general is largely a function of stringency of the environmental regulatory regime and of the seriousness of Enforcement and Compliance efforts and programs. At the firm level, companies are frequently rewarded in the market place by improved environmental performance.

Experience in developing countries has shown that without effective Enforcement and Compliance, progress toward national environmental goals will be limited. There is evidence that effective environmental Enforcement and Compliance systems (based on fundamentally sound regulatory structures) can play an important role in encouraging firms to improve environmental performance, which can strengthen broader competitiveness-related goals at the national level.

One of the challenges in using Enforcement and Compliance as a tool to strengthen competitiveness is that Enforcement and Compliance, by virtue of its role in an overall environmental regime, is a function of the policies and rules set out by the country. It is hard for Enforcement and Compliance efforts alone to compensate for deficiencies in the laws and regulations. If the overall regulatory regime is misguided in this regard, then Enforcement and Compliance will likely have little or no positive competitive impact.

Compliance and enforcement can also have neutral or even negative effects on competitiveness. Enforcement of rules that do not assist local companies in realizing environmental benefits will not improve competitiveness (though it may not harm it either). In some cases, countries must enforce rules to achieve social and environmental goals that may harm the competitiveness of companies. Also, uneven, unpredictable or inconsistent compliance and enforcement sends mixed signals, allowing firms to gain short term advantages over local competitors through non-compliance.

6 CONSIDERATIONS FOR DEVELOPING COUNTRIES

As in many areas of environmental policy, implementation in developing countries implies a great number of challenges. Among the most relevant ones to be considered include:

- Relatively immature regulatory systems
- Limited national budgets leading to weak (underfunded, understaffed) institutions.
- Lack of understanding of how environmental performance relates to competitiveness.
- Predominance of traditional views among private sector and government officials emphasizing "costs" of environmental performance.
- Unique natural resource bases that present different challenges and reduce the possibility of "cut and paste" strategies from the U.S. and E.U.

A consensus "laundry list" of attributes of an overall environmental regime capable of enhancing competitiveness would include:

- Clear and stable rules based on a sound legislative mandate.
- Clear and clearly delineated obligations for regulated community and other societal actors.

- Clear performance parameters for regulated community (numeric, unequivocal).
- Mechanisms that drive and support the development of related industries and infrastructure (this allows for cost-effective waste management, a deep market for production equipment and control technologies, and other items).
- Rules designed to force companies to internalize the costs of low levels of environmental performance and which reward companies that reduce their externalities on the society.
- Long-term goals that avoid technological "lock-in" (permitting technological revolution, rather than just evolution to meet increasingly stringent standards).
- That allow the regulated community certain flexibility in choice of solution to reach regulatory goals.
- Emphasis on solutions that reduce waste (materials, water and energy) rather than seek to treat it.
- Goals that push firms toward global product and process standards and the expectations of international trading partners.
- Structures that permit cost-effective Enforcement and Compliance (burdens of proof, standards).
- Clear and simple legal procedures for the regulated community which reduce paperwork and time and effort interacting with authorities.

One particular advantage in most developing countries at this time is that their regulatory systems are still relatively immature. The immature systems may permit greater latitude to improve them through regulation or decree, and more specifically they may allow Enforcement and Compliance professionals to "simulate" more ideal attributes through their policies, strategies and programs.

The most pressing question for Enforcement and Compliance planners in a given country is to what extent the current systems and rules grant the degrees of freedom necessary to engage in competitiveness-enhancing activities? Only detailed country-by-country analysis can answer this question and develop recommendations for expanding the space in which Enforcement and Compliance programs can engage in these issues.

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[1] A well known case is the Costa Rican coffee processing sector. A voluntary agreement among all firms and the Environment Ministry permitted all companies to simultaneously pursue very large reductions in biological oxygen demand without risk.

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COMPLIANCE WITH THE MONTREAL PROTOCOL

SARMA, K. MADHAVA

Former Executive Secretary, Ozone Secretariat, United Nations Environment Programme

SUMMARY

This article presents an overview of the compliance provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer framers of the Montreal Protocol. The article describes experience with the non-compliance procedure and details the impact of compliance activities on consumption of ozone depleting substances.

1 VIENNA CONVENTION FOR THE PROTECTION OF THE OZONE LAYER AND THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER

Scientists first postulated, in the early 1970s, that emissions of nitrogen oxides, from fertilizers or from large fleets of supersonic airplanes like the European Concorde, for example, could reach the stratosphere, 10 to 15 kilometers above the earth's surface, and damage the thin layer of stratospheric ozone. This layer protects the earth from excessive UV-B radiation that could damage human health, plant productivity and materials. Mario Molina and Sherwood Roland demonstrated in 1974 that the emissions of human made halocarbons would reach the stratosphere and deplete the ozone layer. These halocarbons, first invented and commercialized in 1928, were considered "wonder chemicals" because of their long life, and were used in many industries and processes such as refrigeration, air conditioning, metal cleaning, and fire fighting.

The United Nations Environment Programme established, in 1977, a Coordinating Committee on the Ozone layer, consisting of the world's leading experts, to study the issue and suggest scientific solutions to the problem. At the same time, the UNEP initiated international diplomatic discussions to take steps to solve the problem. The continuing scientific studies identified halocarbons as the main cause of ozone depletion.[2] Prolonged diplomatic discussions over the next eight years resulted in the Vienna Convention for the Protection of the Ozone Layer in 1985. It was only a framework convention, providing for the Parties to the Convention to study, research, and report on various aspects of the ozone depletion. The Convention provided for further Protocols as needed to deal with the ozone depletion.

In 1985, British and Japanese scientists discovered complete destruction of ozone over the Antarctic in the spring season (an "ozone hole") and further experiments confirmed the role of halocarbons in ozone depletion. Continuing diplomatic negotiations piloted by UNEP resulted, in 1987, in the Montreal Protocol on Substances that Deplete the Ozone Layer under the Convention. The Protocol listed eight ozone-depleting substances (ODS) but prescribed only mild control measures for each Party to the Protocol to freeze/reduce its production and consumption of these ozone-depleting substances. The Protocol, however, provided for adjusting or amending the Protocol after periodical scientific and technological assessments at least once every four years. Since

then, following such assessments, the Protocol was strengthened by the Governments five times through adjustments and amendments (in 1990, 1992, 1995, 1997 and 1999). The Protocol now mandates total phase out of production and consumption of 96 listed ozone-depleting substances by all the Parties in a specified time frame.[3] The list of controlled substances was annexed to the Protocol in four Annexes (A, B, C and E), and within these Annexes, in nine groups. The control measures were applicable group-wise. Five groups of substances were to be gradually phased out by 1996, one by 1994, one by 2002, one by 2005, and one group by 2030 (of HCFCs, which are ozone depleting but with a low Ozone Depletion Potential and used as substitutes for CFC). The developing countries were given a grace period to implement the control measures. The Protocol established, through Article 12, a Secretariat with duties as defined in that Article. UNEP provides the Secretariat ("the Ozone Secretariat").

2 LEGAL PROVISIONS IN THE CONVENTION AND THE PROTOCOL ON COMPLIANCE

The Vienna Convention, in Article 11 and in Decision 7 of the First Conference of the Parties (COP) in 1989,[4] provided for an elaborate procedure for settlement of disputes between Parties. This procedure applies to any Protocol unless the Protocol provides otherwise. The Convention prescribed reporting on many substances but these reporting obligations were waived by the Decision VCIII/4 of the third COP[5] as reporting on ozone-depleting substances under the Montreal Protocol was considered sufficient.

Article 8 of the Protocol specified that the Parties should approve procedures and institutions for determining non-compliance by Parties and for treatment of Parties found to be in non-compliance. An interim procedure was first approved by Decision II/5 of the second Meeting of the Parties in 1990 and annexed to the report of the meeting as Annex III. It was finalized by Decision IV/5 of the fourth Meeting of the Parties in 1992 and annexed to the report of the meeting as Annex IV. It was reviewed with minor changes by Decision X/10 of the tenth Meeting of the Parties in 1998 and annexed to the report of the meeting. The procedure will apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention. It is reproduced below.

Non-Compliance Procedure of the Montreal Protocol

"1. If one or more Parties have reservations regarding another Party's implementation of its obligations under the Protocol, those concerns may be addressed in writing to the Secretariat. Such a submission shall be supported by corroborating information.

2. The Secretariat shall, within two weeks of its receiving a submission, send a copy of that submission to the Party whose implementation of a particular provision of the Protocol is at issue. Any reply and information in support thereof are to be submitted to the Secretariat and to the Parties involved within three months of the date of the dispatch or such longer period as the circumstances of any particular case may require. If the Secretariat has not received a reply from the Party three months after sending it the original submission, the Secretariat shall send a reminder to the Party that it has yet to provide its reply. The Secretariat shall, as soon as the reply and information from the Party are available, but not later than six months after receiving the submission, transmit the submission, the reply and the information, if any, provided by the Parties to the Implementation Committee referred to in paragraph 5, which shall consider the matter as soon as practicable.

3. Where the Secretariat, during the course of preparing its report, becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the

Party concerned within three months or such longer period as the circumstances of the matter may require or the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat shall include the matter in its report to the Meeting of the Parties pursuant to Article 12 (c) of the Protocol and inform the Implementation Committee, which shall consider the matter as soon as practicable.

4. Where a Party concludes that, despite having made its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the Implementation Committee, which shall consider it as soon as practicable.

5. An Implementation Committee is hereby established. It shall consist of 10 Parties elected by the Meeting of the Parties for two years, based on equitable geographical distribution. Each Party so elected to the Committee shall be requested to notify the Secretariat, within two months of its election, of who is to represent it and shall endeavour to ensure that such representation remains throughout the entire term of office. Outgoing Parties may be re-elected for one immediate consecutive term. A Party that has completed a second consecutive two-year term as a Committee member shall be eligible for election again only after an absence of one year from the Committee. The Committee shall elect its own President and Vice-President. Each shall serve for one year at a time. The Vice-President shall, in addition, serve as the rapporteur of the Committee.

6. The Implementation Committee shall, unless it decides otherwise, meet twice a year. The Secretariat shall arrange for and service its meetings.

7. The functions of the Implementation Committee shall be:

   (a) To receive, consider and report on any submission in accordance with paragraphs 1, 2 and 4;

   (b) To receive, consider and report on any information or observations forwarded by the Secretariat in connection with the preparation of the reports referred to in Article 12(c) of the Protocol and on any other information received and forwarded by the Secretariat concerning compliance with the provisions of the Protocol;

   (c) To request, where it considers necessary, through the Secretariat, further information on matters under its consideration;

   (d) To identify the facts and possible causes relating to individual cases of noncompliance referred to the Committee, as best it can, and make appropriate recommendations to the Meeting of the Parties;

   (e) To undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party for fulfilling the functions of the Committee;

   (f) To maintain, in particular for the purposes of drawing up its recommendations, an exchange of information with the Executive Committee of the Multilateral Fund related to the provision of financial and technical co-operation, including the transfer of technologies to Parties operating under Article 5, paragraph 1, of the Protocol.

8. The Implementation Committee shall consider the submissions, information and observations referred to in paragraph 7 with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol.

9. The Implementation Committee shall report to the Meeting of the Parties, including any recommendations it considers appropriate. The report shall be made available to the Parties not later

than six weeks before their meeting. After receiving a report by the Committee the Parties may, taking into consideration the circumstances of the matter, decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives.

10. Where a Party that is not a member of the Implementation Committee is identified in a submission under paragraph 1, or itself makes such a submission, it shall be entitled to participate in the consideration by the Committee of that submission.

11. No Party, whether or not a member of the Implementation Committee, involved in a matter under consideration by the Implementation Committee, shall take part in the elaboration and adoption of recommendations on that matter to be included in the report of the Committee.

12. The Parties involved in a matter referred to in paragraphs 1, 3 or 4 shall inform, through the Secretariat, the Meeting of the Parties of the results of proceedings taken under Article 11 of the Convention regarding possible non-compliance, about implementation of those results and about implementation of any decision of the Parties pursuant to paragraph 9.

13. The Meeting of the Parties may, pending completion of proceedings initiated under Article 11 of the Convention, issue an interim call and/or recommendations.

14. The Meeting of the Parties may request the Implementation Committee to make recommendations to assist the Meeting's consideration of matters of possible non-compliance.

15. The members of the Implementation Committee and any Party involved in its deliberations shall protect the confidentiality of information they receive in confidence.

16. The report, which shall not contain any information received in confidence, shall be made available to any person upon request. All information exchanged by or with the Committee that is related to any recommendation by the Committee to the Meeting of the Parties shall be made available by the Secretariat to any Party upon its request; that Party shall ensure the confidentiality of the information it has received in confidence."

2.1 Responses to Non-compliance:

The fourth Meeting of the Parties in 1992, by Decision IV/18, finalized, in Annex V of its report, the "Indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol:"

A. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.

B. Issuing warnings.

C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism, and institutional arrangements.

2.2 Implications of the Responses and Circumstances Giving Rise to Their Application

Response A:

The Protocol established a Financial Mechanism, including a Multilateral Fund, under Article 10, to meet all the agreed incremental costs for Article 5 Parties. Decision IV/18, in Annex VIII to the report of the fourth Meeting of the Parties, finalized a list of incremental costs and per-

mitted the Executive Committee of the MF to interpret the costs and to add to the list, if appropriate. The permissible costs cover all the facets of assistance mentioned in A of Paragraph 14 above. The Global Environment Facility (GEF), established in 1991, has the mandate of assisting all eligible countries to implement measures to solve the global environmental problems of ozone depletion, climate change, bio-diversity and pollution of international waters. The list of Parties recognized by GEF as eligible for assistance includes many in the list of Article 5 Parties that are eligible for assistance by MF. It also includes many countries of Eastern Europe and of the former USSR (Countries with their Economies in Transition ())[6] that have not been classified as developing countries (and hence not eligible for assistance by the Multilateral Fund). By the time GEF came into existence the Protocol had already established the Multilateral Fund, and the GEF assistance for the protection of the ozone layer is only for the Parties not eligible for assistance by the MF.

Response B:

Warnings have been administered by Meeting of the Parties to non-compliant Parties in some cases, as elaborated later in this Article, when the Implementation Committee noted that the Parties in non-compliance have not put in adequate efforts. The warnings contained a threat that the Parties will be deprived of assistance or that response C would be applied if they do not return to the path of compliance.

Response C:

Suspension of rights and privileges. The rights and privileges could include:

- Industrial rationalization: Non-Article 5 Parties have the right to transfer their production rights for ozone-depleting substances to each other and consumption rights for HCFCs (Article 2, Paragraphs 5 and 5bis).
- Trade: If a party's rights under Article 4 are suspended, other Parties cannot trade in ozone-depleting substances with that Party (Article 4, Paragraphs 1-1 sex. Paragraphs. 2-2 sex). That Party cannot export products containing CFCs (air conditioners, etc.) to Parties (Article 4, Paragraph 3, read with Decision III/5 of the Third).
- Assistance from MF or GEF (Articles 10 and 10A).

3 REPORTING AND VERIFICATION

All the Parties have to send detailed reports to the Secretariat under Articles 4B, 7, and 9. Under Article 7, each Party ratifying the Protocol shall report, within three months of becoming a Party, its data of production, imports and exports of each of the ozone-depleting substances for the base year of that ozone-depleting substances and, thereafter, every year, before September 30th of the succeeding year. Each Party shall also submit data on ozone-depleting substances destroyed, used as feed stock, exported to or imported from Parties and non-Parties, and imports and exports of recycled substances. Regional economic integration organizations are allowed to report consumption figures for all of their members together, and the members of such organizations need not report the consumption figures, though they have to report their production figures individually. Currently, the European Union is the only organization recognized as a Regional Economic Integration Organization for this purpose. Article 9 mandates that each Party cooperate in research, development, public awareness and exchange of information regarding technologies to reduce emissions, alternatives to ozone-depleting substances, and costs and benefits of control strategies. In addition, Article 9 requires that each Party submit a biannual report with a summary of its activities. Article 4B prescribes that each Party to the Montreal Amendment to the Montreal Protocol implement licensing systems for import and export of ozone-depleting substances within the time prescribed

and report after implementation.

In addition to the data to be reported under Article 7, the s have made many decisions requesting Parties to submit more data to enable the s to verify compliance with the control measures and the decisions of the Protocol. Those applying for essential use exemptions have to report in the format approved by Decision VIII/ 9 of the Eighth . Decision VI/19 of the sixth mandated an annual report from the Parties on their list of reclamation facilities for ozone-depleting substances. Other decisions include Decision VIII/32, Decision IV/17a, Decision X/7, Decision X/11, and Decision V/15.

The Parties send their reports to the Ozone Secretariat. The Ozone Secretariat analyses the data received and identifies those parties that have not reported fully and those who have not fulfilled the control measures applicable to them. The Implementation committee considers the report of the Secretariat at its meetings, usually held in conjunction with s and the meetings of the Working Groups of Parties.

The Secretariat checks the data reported by the Parties for internal consistency and requests clarification from the Parties when necessary. However, the Secretariat has no right to reject the data submitted. Based on a recommendation by the Implementation committee, the Seventh decided in DecisionVII/20 that while the Secretariat could seek clarifications from a Party regarding its data, the data provided by a Party should be used.

The Non-Compliance Procedure, in paragraph 7(e) (please see paragraph 6 above) provided that the committee can undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party to carry out the functions of the Committee. However, such information-gathering has not been carried out anywhere at this time, and the committee relies solely on the data supplied by a Party.

The highly detailed data to be reported for all of the 96 controlled ozone-depleting substances has proved to be very difficult for all the countries, particularly for developing countries. The chemicals have uses in thousands of industries and were not controlled in any way prior to the Protocol. Hence every Party had to introduce new regulations and train many professionals, including customs officers, to report on the imports and exports of the ozone-depleting substances.[7] Where a party has many points of entry into its country, the data collection was delayed and, at times, incomplete. The Parties also relied on data given by traders, which is inherently biased to some extent. Occasionally, doubts have been expressed regarding the reliability of data, most recently by the Technology and Economic Assessment Panel,[8] which found some inconsistencies when it tried to use the data for calculating the projected future demand for ozone-depleting substances by Article 5 Parties. The data, however, gives a good idea of the degree of compliance by individual Parties.

Status of Reporting: Initially, the number of Parties reporting was low, but it has improved over the years. Decision VII/14 of the Seventh held in 1995, for example, lamented that only 82 of the 126 Parties reported the 1993 data and only 60 reported the 1994 data by December 1995. The report of the Secretariat on data for the Sixteenth in November 2004 noted the steady improvement in reporting under Article 7 over time. By October 2004, all of the Parties have reported for 2002 and more than eighty percent have reported for 2003. While the reporting under Article 9 was regular in the initial years, it was sporadic in later years, probably due to the repetitive nature of the reports and because the activities of the Multilateral Fund have fulfilled the needs of the Article 5 Parties for information. Sporadic decisions[9] up to the 12th , until the year 2000, reminded the Parties for reports.

4 EXPERIENCE WITH THE NON-COMPLIANCE PROCEDURE

4.1 Identifying Non-compliance:

To date, no Party has submitted, under paragraph 1 of the Non-compliance Procedure, any representation regarding

non-compliance by another Party. The non-compliance cases noted so far, with a single exception, are all under paragraph 3 of the Procedure from the Secretariat reports on annual data submitted under Article 7. An exception was when, in 1994, the Russian Federation and some Parties of Eastern Europe and the former USSR, which are classified as non-Article 5 Parties, submitted a statement to the , to the effect that they might not meet compliance requirements for the phase out of halons by 1994, and CFCs by 1996, due in part to their domestic conditions. This submission was treated by the Secretariat as a submission under Paragraph 4 of the Non-compliance procedure and referred to the Implementation Committee.

4.2 Decisions by s on Reporting and Non-compliance[10]

4.2.1 Non-compliance with Reporting

As noted in Paragraph 15 above, many Parties, in the initial years, found it difficult to report all of the details required annually under Article 7 of the Protocol, particularly in the initial years after ratification. The situation improved gradually .The Article 5 Parties and Countries with their Economies in Transition improved their performance on reporting after receiving technical assistance from MF or GEF. The Implementation Committees and s took a sympathetic view of this problem, with respect to the Article 5 Parties in the initial years, because compliance with the control measures only started in 1999 for these Parties. On the recommendation of the Committee, the s made decisions urging the Parties to report expeditiously and giving advise on how to improve reporting. With regard to non-reporting under Articles 4B and 9, the Parties, in their decisions, merely urged the Parties to report.

4.2.2 Procedure for Dealing with Non-compliance with the Control Measures

In cases of non-compliance with the control measures, the Implementation Committee and adopted the procedure of requesting that the concerned Parties submit benchmarks and annual targets for a return to compliance. The performance of the Party was reviewed every year with reference to these benchmarks. The decisions of the s, based on a close scrutiny and recommendation by the implementation committee, were based on the circumstances of each situation.

Article 5 Parties: From 2001 (13th) onwards, thirty Article 5 Parties were identified as in non-compliance status based on the data submitted. The s noted their non-compliance, asked them to submit their plan of action and benchmarks to return to compliance, and decided that to the degree that a Party "is working towards and meeting specific Protocol control measures, it should continue to be treated in the same manner as a Party in good standing and should continue to receive international assistance." They were also cautioned, in accordance with item B of the indicative measures approved by the Procedure, that "in the event it fails to return to compliance in a timely manner, the Parties shall consider measures, consistent with item C of the indicative list of measures," including actions available under Article 4, such as ensuring that the supply of the ozone-depleting substances, the subject of non-compliance, is ceased and the trading Parties are not contributing to a continuing situation of non-compliance.[11] 13 Article 5 Parties were considered to be in "potential non-compliance" since they offered no explanation for exceeding the levels of consumption mandated under the control measures and were cautioned under the same terms as (a) above.[12] The s noted the benchmarks submitted by eighteen Parties and issued the warning as described in (a) above.[13]

To date, no Article 5 Party, has been deprived of assistance or had rights and privileges suspended, as provided by item C of the indicative measures.

Non-compliance by the Countries with their Economies in Transition Parties: As mentioned already, the Russian Federation and three other Parties made a state-

ment to the sixth in 1994 about their inability to comply with the control measures within the prescribed time. In the seventh 's meeting in 1995, its Decisions VII/14-19 noted the potential non-compliance mentioned by the Parties. It recommended international assistance to the Parties. Through Decision VII/18, it "allowed" the Russian Federation to export to the non-Article 5 Parties of the former USSR, which traditionally depended on Russia for all of its supply of ozone-depleting substances. This implicitly suspended the right of the Russian Federation to export to other non-Article 5 Parties, or to Article 5 Parties, to meet their basic domestic needs as provided in Articles 2A-2F and 2H. The Countries with their Economies in Transition Parties that came to notice as non-compliant were Azerbaijan, Bulgaria, Estonia, Czech Republic, Estonia, Kazakhstan, Latvia, Lithuania, Poland, Russian Federation, Ukraine, Tajikistan, Turkmenistan, Uzbekistan, and Armenia (subsequently reclassified as operating under Article 5).

For each of these Parties, the implementation Committee pursued its course of obtaining data, identifying actual or potential non-compliance, obtained plans of action and benchmarks to return to compliance, and monitored their performance in relation to the benchmarks every year. The s recommended assistance by the GEF in each case.[14] Furthermore, they called for explanations when the benchmarks were not met.[15] Almost all the Parties returned to a state of compliance with the control measures. The only Party noticed for non-compliance by the 16th in 2004 was Azerbaijan. The 15th in the year 2003 recognized and appreciated the return to full compliance by the Russian Federation in the year 2002, the largest Party (XIV/35).

4.2.3 Non-compliance by the Industrialized Countries

There were no instances of non-compliance by the industrialized countries. Decision XV/24 noticed potential non-compliance by Israel due to excess consumption of Methyl Bromide in 2002, and requested an explanation. The representative of Israel explained[16] the figures showing compliance to the 32nd meeting of the implementation Committee, resolving the matter.

5 RESULTS OF COMPLIANCE

Of the 188 Parties to the Montreal Protocol, 143 are classified as operating under Article 5. The average of consumption (and production) in the years 1995, 1996, and 1997, was treated as their base figure for their control measures for CFCs, the most consumed ozone-depleting substances. Their base figure for CFCs was about 162,500 tonnes in 1995-97. This consumption came down to 90,800 tonnes in 2002, a forty-five percent decrease, while only a freeze is mandated until 2005. While about 35 Article 5 Parties came to notice for non-compliance, some of them more than once, their excess consumption of CFCs noticed for the year 2001[17] by the Secretariat was only about 1200 tonnes, while for the year 2003,[18] it was about 410 tonnes. Most of the non-complying states are low volume consuming countries. Some of the non-complying Parties ratified the Protocol very late and the MF assistance to survey their ozone-depleting substances consumption and implement solutions to shift to alternatives is taking time. Some use ozone-depleting substances only for maintenance of the existing equipment, and drop-in substitutes or CFCs from recycling, are not available. Many were tiny countries yet to establish the capacity to implement.

The consumption of the was 146,000 tonnes of CFCs in 1986 (about fifteen percent of world consumption). The non-compliance noticed in 1996 was for 9 Parties with a consumption of CFCs of 18,000 tonnes, while a total phase out is mandated for them. Their consumption came down to about 500 tonnes in 2002.

The overall consumption of CFCs in the world came down from about 1.1 million tonnes in 1986 to 92,000 tonnes in

2002, a reduction of more than ninety percent and is continuously declining. The performance of the Protocol is now hailed as one of outstanding success.

Scientific Assessment has verified the success. The Scientific Assessment Panel Report of 2002, as reflected in the Synthesis Report of all the Assessment Panels, noted:

The Montreal Protocol is working, and the ozone-layer depletion from the Protocol's controlled substances is expected to begin to ameliorate within the next decade or so. The total combined effective abundances of anthropogenic chlorine containing and bromine-containing ozone-depleting gases in the lower atmosphere (troposphere) peaked in the 1992-1994 time period and are continuing to decline. Furthermore, the stratospheric abundances of ozone-depleting gases are now at or near a peak. Thereafter, the level of stratospheric ozone should increase, all other influences assumed constant, but ozone variability will make detection of the onset of the long-term recovery difficult. Future ozone levels will also be influenced by other changes in atmospheric composition and by climate change. Based on assumed compliance with the amended and adjusted Protocol by all Parties, the Antarctic ozone "hole" is expected to disappear by the middle of this century-again, with all other influences assumed constant.[19]

6 FACTORS FOR PROMOTING COMPLIANCE

6.1 Protocol Designed for Universal Ratification

The framers of the Protocol recognized that over eighty-five percent of the world's consumption of ozone-depleting substances is by industrialized countries and the large number of developing countries bore only a small part of the responsibility for the ozone depletion. The limited capacity of the developing countries to phase out ozone-depleting substances expeditiously through alternative technologies was acknowledged. The Governments also quickly realized that the cooperation of all of the countries in the world is essential to repair the ozone layer, as countries staying out of the Protocol and increasing their consumption of ozone-depleting substances could counteract the reduction by the Parties to the Protocol. The principle of "common but differentiated responsibility" for global environmental problems was given a practical shape in the Protocol. It was also felt that no punitive measures would succeed in forcing countries to ratify and implement the Protocol. Hence, many important features of the Protocol are designed to encourage universal ratification.

- The Protocol provided for periodic assessment of the control measures based on available scientific, environmental, technical, and economic information by panels of experts (Article 6).
- Parties may decide on adjustments and amendments to the Protocol based on such assessments (Article 2, Paragraphs 9 and 10).
- To assuage worries about lack of alternatives to particular uses of ozone-depleting substances, it was provided in the Articles 2A-2I relating to control measures on the ozone-depleting substances, that a can periodically exempt "essential" or "critical" uses of ozone-depleting substances from a total phase out.
- Developing countries[20] satisfying the conditions in Article 5 were allowed to implement the control measures some years after other countries implemented those measures, under a "grace period" (Article 5).
- Article 9 mandated that the Parties shall cooperate in promoting research, development, and exchange of information on technologies to reduce emissions of ozone-depleting substances, alternatives to ozone-depleting substances and products using ozone-depleting substances, and costs and benefits of control strategies, and in promoting public awareness of environmental effects of

the ozone-depleting substances.

- A Financial Mechanism, including the Multilateral Fund, subscribed to by Parties that are not Article 5 Parties (non-Article 5 Parties), was established to meet all the agreed incremental costs of the Article 5 Parties (Article 10). The Multilateral Fund has the United Nations Development Programme, The United Nations Environment Programme, the United Nations Industrial Development Organization and the World Bank as its implementing agencies.
- Every Party is mandated to take every practicable step to transfer the best available substitutes and technologies to Article 5 Parties (Article 10A).
- The Protocol recognizes that the capacity of Article 5 Parties to implement the control measures will depend on the effective implementation of Articles 10 and 10A (Article 5, Paragraph 5).
- Any Article 5 Party may at any time notify that it is unable to implement its control measures due to inadequate implementation of Articles 10 and 10A and the non-compliance procedure shall not be invoked against it till a Meeting of Parties () decides on an appropriate action (Article 5, Paragraph 6).

Whenever there was a strong difference of opinion between countries during Meetings of Parties, a compromise was arrived at rather than a majority imposing its will. As a result of these inclusive measures and attitude, almost all the governments of the world, 188 so far, have ratified the Convention and the Protocol. The only seven countries that did not ratify the Protocol so far are very small countries- Andorra, Equatorial Guinea, Eritrea, East Timor, Iraq, San Marino, and the Vatican.

6.2 Flexible Responses to Non-compliance

The Non-Compliance procedure does not define non-compliance with the Protocol. An Ad-hoc Working Group of legal experts discussed the issues in 1991 but there was no consensus.[21] We have to infer, from the provisions of the Protocol, situations of non-compliance.

The crux of the Protocol is reduction and phase out of production and consumption of ozone-depleting substances according to the prescribed time schedules. Non-observance of the control measures is, obviously, non-compliance. Reporting under Articles 4B, 7, and 9, is mandatory and enables the Meetings of the Parties to verify compliance. Non-reporting will be non-compliance.

Article 10 establishes a Financial Mechanism including a Multilateral Fund (MF) to assist Article 5 Parties. The MF shall be financed by contributions from Parties not operating under Article 5. If a non-Article 5 Party does not contribute, is it non-compliance? Discussions in the legal working group of the Parties in 1991[22] revealed totally different interpretations by the members. Some argued that non-payment is obviously non-compliance. Others felt that it is not non-compliance since the Protocol does not mention that the contributions are "assessed" as in the United Nations. Until now, no Party cared to test the interpretation by complaining about non-payment, even though a number of Parties, including the Russian Federation and countries of the former USSR, never paid any contribution to the Multilateral Fund. Perhaps all of the Parties realized, without formally recognizing it, that these Parties were unable to pay. The dues from these Parties are still in the books of the MF as arrears to be collected.

6.3 Capacity Building and Technology Transfer

The Multilateral Fund is assisting the 143 Parties classified as Article 5 Parties, and the Global Environmental Facility is assisting the 19 Parties, in implementing control measures. The assistance is very comprehensive and includes institutional strengthening in the Governments of the Parties, training, information exchange, and meeting the incremental costs of technology transfer and conversion of indus-

tries and processes to ozone-friendly technologies. During the years 1991-2004, the non-Article 5 Parties have pledged nearly US$1.89 billion and paid nearly US$1.63 billion to the Multilateral Fund. The arrears of US$257 million are almost wholly from the Parties that were a part of the former USSR, which expressed their inability to pay the Fund. In fact, they themselves are receiving funds from the GEF. The Fund has, during 1991-2004, financed nearly 4,600 projects for Article 5 Parties, to assist them in implementing the control measures.[23] The GEF has spent nearly US$150 million in the for the same purpose.[24]

7 A NON-CONFRONTATIONIST PROCESS

The Parties to the Protocol realized that non-compliance with the control measures of the Protocol by a Party might not only lead to disputes between Parties but also, will more importantly, delay the recovery of the ozone layer and affect the global environment. Also, it decreases the consumption of alternatives to ozone-depleting substances and thus has an economic impact on the alternatives' industry. The Parties also realized that non-compliance may be mostly due to lack of capacity of that Party to create awareness of the ozone depletion problem and to inform and educate their citizenry and industry on the need and methozone-depleting substances for adopting alternatives. Occasionally, there is a lack of political will, particularly when the country is facing other severe problems, such as civil strife, and the Montreal Protocol is of a very low priority in comparison. No country benefits from non-compliance. In fact, it loses the advantages of new technologies. Hence s concentrated on assistance and on warnings to promote political will, rather than on the suspension of rights.

The Parties also decided early on that a punitive approach would have to be applied with discrimination in order to promote compliance. Every country needs ozone-depleting substances for maintenance and trade measures, and to deprive them of ozone-depleting substances may lead to illegal trade. Declaring a Party to be in non-compliance, and taking harsh measures, may drive it away and increase ozone-depleting substances consumption, undermining the Protocol. The Parties realized, that while all Parties are to be treated equally, each Party has a different capacity to implement measures. The Implementation Committee and the Meetings of the Parties studied each case proactively and implemented different solutions depending on the causes for failure to implement.

The framers of the Montreal Protocol realized that the objective of the Protocol may be defeated if any significant number of countries, particularly those with capacity to produce ozone-depleting substances, refrains from joining the Protocol, and that there are no punitive measures available to force a country to join the global effort to protect the ozone layer.

8 REFERENCES

1 The Decisions of the Meetings of the Parties () quoted in this paper are numbered as Roman numerals in capitals, slash, Arabic numbers. X/21, for example, means decision 21 of the tenth . The Convention, the Protocol, and all the decisions of meetings of the Parties up to the end of the year 2002 (Sixth Conference of the Parties to the Convention (COP) and 14th Meeting Of the Parties to the Montreal Protocol ()) are contained in the Handbook for the International Treaties for the Protection of the Ozone Layer, 2003 edition, Ozone Secretariat. The decisions of the 15th and 16th s are contained in UNEP/ OZL.PRO/15/9 of November 11, 2003 and UNEP/OZL.PRO/1/17 of November 2004 respectively. No notes are given in this paper, except for the decision number, when quoting decisions of the s. Where other documents are quoted, notes have been given as footnotes giving the number or name of the document.

2 Paragraphs 1 and 2 based on Chapter 1 of S. O. Andersen and K. Madhava Sarma, *"Protecting the Ozone Layer: The United Nations History,"* 2002.

[3] Paragraphs 3 and 4 based on Andersen and Madhava Sarma, *supra* note 2.

[4] UNEP/OZL.CONV/1/5 Dated 28 April 1989.

[5] UNEP/OZL.CONV/3/6 Dated 23 November 1993.

[6] Evaluation Report #1-00 of the Global Environment Facility, Study of Impacts of GEF Activities on Phase-out of Ozone Depleting Substances, 2003.

[7] See Andersen and Madhava Sarma, Chapter 7, pgs. 274-278, supra note 2.

[8] Report of the TEAP Basic Domestic Needs Task Force (October 2004) available from the Ozone Secretariat.

[9] I/4, II/14, VI/2, IX/1, X/2,XII/6.

[10] Handbook on the International Treaties to Protect the Ozone Layer, 2003,

[11] Decisions XIII/21-25, XIV/18-25, 29, 32, XV/24, 25, 33, 41, 42, 45, XVI/22,26.

[12] Decisions XIII/16, XV/21,22.

[13] XIV/26-44.

[14] VII/25, IX/29, 31, X/27, XIII/17, 18, XIV/31.

[15] XIV/28, XV/28, XVI/21.

[16] UNEP/OzL.Pro/ImpCom/32/6 dated August 11, 2004.

[17] UNEP/OZL.PRO/15/4, dated October 14, 2003.

[18] UNEP/OZL.PRO.16/4, dated October 18, 2004.

[19] UNEP/OZL.PRO/WG1/23/3, dated February 25, 2003.

[20] Decision I/12E of the first decided on the list of developing countries. Later s added Turkey (III/8), Georgia (VII/29), Moldova (IX/6), South Africa (IX/27), Kirgyzstan (XII/11), Armenia (XIV/2) and Turkmenistan (XVI/39). Slovenia, a break-away country of former Yugoslavia, recognized as a developing country and Malta were taken out of the list at their own request (XII/12

[21] UNEP/OZL.PRO/WG3/3 Dated 9 November 1991

[22] Id.

[23] UNEP/OZL.PRO/16/10,Report of the Executive Committee to the 16th .

[24] *Supra* note 6.

FIXING A CRITICAL PROBLEM: USED OIL FILTERS

SHKALIM, ZOHAR

Director of the Enforcement Coordination Division, Ministry of the Environment,
PO Box 34033 Jerusalem, Israel, 95464, zoharsh@sviva.gov.il

SUMMARY

This paper presents a brief overview of the environmental problem solving approach that helped Israel address the problem of water and soil contamination from used oil.

1 INTRODUCTION

In 2002, the Ministry of the Environment of Israel (in cooperation with the Israel Garage Association) initiated a unique pioneer project for the collection of used oil from the country's garages. Today, there is no question that the project worked.

The project is a product of cooperation – among divisions within the Ministry of the Environment and relevant stakeholders outside the ministry, including the Israel Garage Association, the country's major bus companies, the Israel Police and vehicle import companies. Utilizing the Environmental Problem Solving model, which was developed in the United States by Dr. Malcolm Sparrow, all of the stakeholders came together to "fix" a critical problem – the contamination of water sources and soil from used oil originating in garages throughout the country.

2 PROJECT OVERVIEW

2.1 Collection of Used Oil Filters for Recycling

While the project included three components – collection of used oil filters for recycling, collection of used oil for reuse, and installation of oil/fuel separators – the greatest progress was achieved in the collection of used oil filters.

It is estimated that used oil filters include up to 0.5 liters of used oil each. Yet until recently, most of this oil made its way to the municipal waste system. Of some 2000 garages that produce about 3 million used oil filters per year, only a few dozen collected about 14,000 used filters on a voluntary basis prior to the initiation of the project. Today, as a result of increased enforcement, education and cooperation with the Israel Garage Association, the number of garages which have contractually committed to collect used oil filters has increased to 1,300 – some 65% of the total. And even more impressive – the number of filters collected from these garages has skyrocketed, reaching 1.26 million in 2003.

And finally, the market forces which helped catalyze this revolution also brought about the purchase and operation of an oil filter recycling machine in Ramat Hovav which separates the used filters into their components: the metal and used oil are transferred for recycling and the oil-saturated paper is transferred for incineration.

2.2 Collection of Used Oil for Reuse

In 2003, some 15,922 tons of used oil were collected, nearly a quarter of the total quantity of mineral oil sold per year and 56% of the quantity of used oil available for collection from garages. This rep-

resents a 12% increase in comparison to 2002. Moreover, the establishment of an additional plant for used oil recycling led to a doubling in the quantity recycled and a two-thirds reduction in the quantity exported for recycling in comparison to 2002.

2.3 Installation of Oil/Fuel Separators

At the beginning of the used oil collection project, nearly no garages in Israel had installed oil/fuel separators. Today, some 210 oil separators have been installed and enforcement measures have been stepped up. Dozens of warnings have been issued to garages concerning requirements for oil/fuel separators.

3 CONCLUSION: A WIN-WIN APPROACH

The Environmental Problem Solving approach calls for picking important problems and fixing them. This is exactly what Israel did. Utilizing a well-structured procedure, the Ministry of the Environment set about to clearly define a critical problem, establish a steering committee with the participation of relevant stakeholders, determine indicators for problem solving, and formulate a detailed action plan. The initial goal called for the collection of 350,000 used oil filters per year. The results far exceeded expectations. Using carrot and stick methozone-depleting substances, the method worked so well that used filter collection companies were set up, contracts were signed, a recycling machine was purchased – and most important of all – 1.5 million filters were collected.

The initiators of the project in the Ministry of the Environment, Dr. Motti Sela, director of the Industry and Business Licensing Division, and Adv. Zohar Shkalim, director of the Enforcement Coordination Division, are more than pleased with the results. Yet both are determined to keep fingers on pulse. Both are convinced that market forces, education, and stringent enforcement have made a difference.

USING INDICATORS TO LEAD ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT PROGRAMS

STAHL, MICHAEL M.

Director, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency, stahl.michael@epa.gov

SUMMARY

Many environmental compliance and enforcement (ECE) programs around the world are making good progress in identifying and implementing performance indicators. But at present, very few countries have moved into the next stage of actually using performance indicators to: 1) monitor and manage operations; 2) improve program effectiveness; and 3) enhance accountability to political overseers and the public. This article explains why ECE programs need to develop and use performance indicators, describes patterns emerging from the progress being made by many countries toward identifying and implementing ECE indicators, discusses how indicators can be used to manage and improve ECE programs, and suggests ways to ensure continued progress for ECE indicators and programs.

1 WHY DO ECE PROGRAMS NEED PERFORMANCE INDICATORS

For many years, international organizations, environmental protection agencies of national and provincial governments, and various non-governmental organizations (NGOs) interested in environmental matters have used indicators to characterize environmental conditions. These indicators provide a sense of the current condition of the air, land, and water and help identify whether their quality is improving or deteriorating.[1]

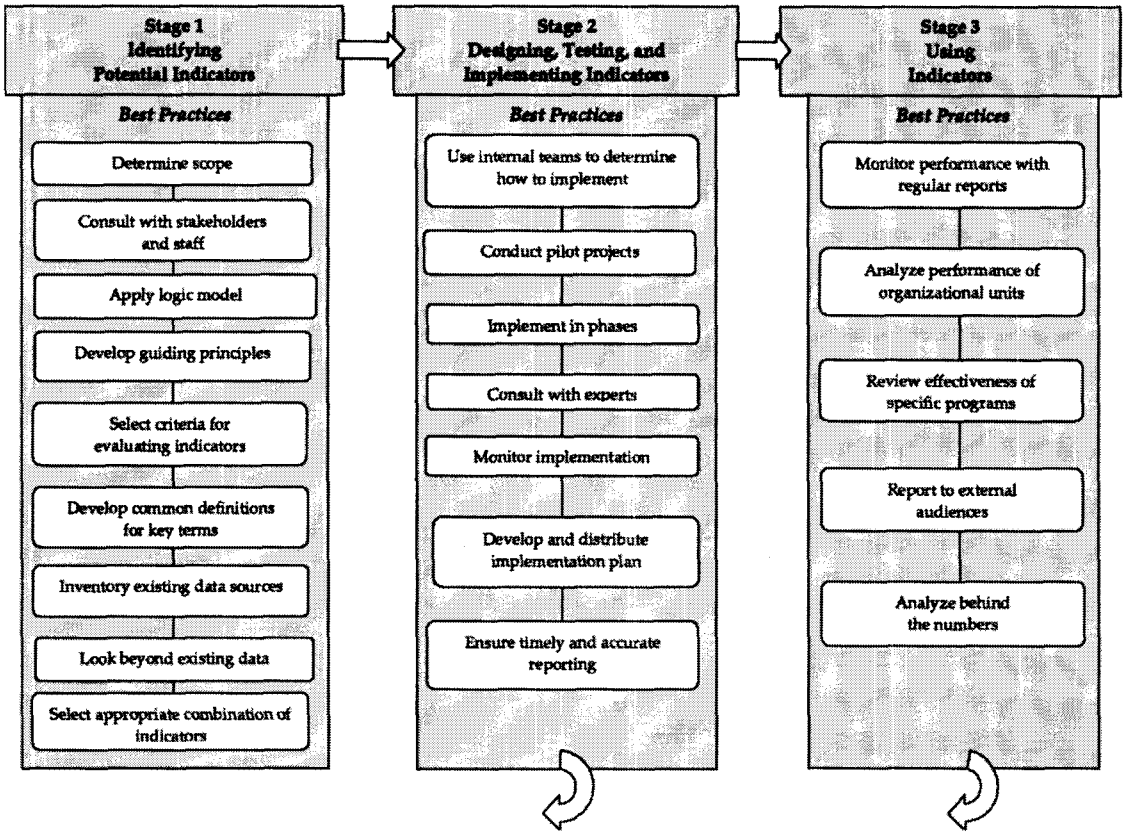
Many forces contribute to the state of environmental conditions. In the "pressure/state/response" model used by the Organization for Economic Cooperation and Development (OECD), various human activities (often involving energy, transport, industry, agriculture, and others) put direct and indirect pressure on the air, water, land, and other living resources, and these pressures are mitigated by various societal responses, including economic forces and actions by government agencies and programs.[2]

Among the responses of government are programs designed specifically to protect the environment by setting standards and regulating behavior and industrial practices that have an adverse impact on the environment. A fundamental element of environmental protection programs at the local, provincial, national, and international level is to ensure compliance with environmental laws and regulations.

1.1 The Special Mission and Obligation of ECE Programs

A premise of this article is that programs to ensure compliance with environmental laws deserve and need their own distinct effort to develop and use performance indicators. There are three arguments in support of this premise. The first argument is that environmental protection systems cannot be effective in improving environmental conditions if the laws and regulations designed to protect the environment are not known, respected, and obeyed. ECE programs play a crucial role in ensuring compliance with environmental laws, it

FIGURE 1. Three-Stage Model for Developing and Using Indicators



is their primary mission to bring about such compliance. Second, the absence of a credible environmental compliance program will mean that a major incentive for voluntary efforts to go beyond compliance will also be absent if no one is even bothering to comply, why even consider going beyond compliance? Thus, programs designed to ensure compliance are not just a building block in an environmental protection system, they provide the foundation on which the system is built. The third and less recognized argument is that ECE programs often use tools (e.g., enforcement actions) that impose penalties and/or obligations. These programs are, in turn, obligated to use these authorities fairly and wisely. Performance indicators, especially when shared with the public, can help determine whether authorities and resources are being used appropriately.

For all of the above reasons, it is crucial for environmental ministers, staff and managers of ECE programs, regulated industries and facilities, legislative overseers, and the public to know if environmental compliance efforts are succeeding, and if they are not, how they can be improved. ECE indicators can help provide this knowledge.

A well-designed set or system of performance indicators can be a powerful tool to direct ECE programs toward the most important results. Indicators can be used to:

1. Monitor and manage day-to-day operations of ECE programs;
2. Identify and correct performance issues and problems in ECE programs;

3. Adjust strategies and resource allocation to improve the effectiveness of ECE programs;
4. Provide an account of program performance to political overseers and the public.

Each of these uses will be described further in this article under Section 3, "Using Indicators to Manage and Improve ECE Programs."

2 PROGRESS TOWARDS IDENTIFYING AND IMPLEMENTING ECE INDICATORS

Under the auspices of organizations such as the International Network for Environmental Compliance and Enforcement (INECE), the World Bank Institute, and the OECD, good progress is being made by many countries in developing performance indicators for their ECE programs. While one uniform set of indicators is not emerging from these efforts, some of these countries are being guided by a three-stage framework which suggests: 1) identifying indicators; 2) designing and implementing indicators; and 3) using indicators as three steps on a path to follow for developing ECE indicators.[3] For each of these three stages a set of best practices has begun to emerge to help countries manage their ECE indicators projects. Figure 1 lists the best practices for each of the three stages of the indicators framework.[4]

2.1 Emerging Patterns

As more countries make progress along the path of developing ECE indicators, there are some patterns that can now be identified:

1. Most Participating Countries in Identification and Implementation Stages. In addition to providing a path for countries to follow, the framework also serves as a set of basic milestones for assessing the progress of countries currently developing ECE indicators. Many countries are now on this path and have progressed to the first milestone (i.e., they are identifying indicators) or even to the second (i.e., they are designing and implementing indicators). Projects in Brazil, Mexico, Argentina, and Costa Rica, among others, are currently involved in identifying and implementing indicators. Only a few countries have taken the path all the way to the point of using indicators to manage their programs, and these countries are only in the early stages of using indicators as a management tool. Projects in the United States and Canada are beginning to use indicators to manage all or part of their ECE programs.[5]
2. Indicators Tailored to Unique Circumstances. Most countries in the identification and implementation stage are developing indicators that are tailored for their unique circumstances. While many ECE programs are learning from examples used by other countries, indicators are being selected for implementation based on institutional needs and conditions of individual agencies or programs. This means that there is not one universal set of ECE indicators being adopted, but varying sets with some common indicators or characteristics.
3. Four Types of Indicators Projects. The ECE indicators projects going on around the world fit into one of four categories, depending on whether they are comprehensive or focused with respect to the laws and requirements they include, and whether they are national or sub-national in terms of the jurisdiction they cover. The four categories are:
   a) Comprehensive national indicators – These are used to assess effectiveness of national ECE programs' efforts to ensure compliance with all national statutes and regulations. Developing a set of comprehensive national indicators is very complex, since it involves many persons, multiple agencies, collection of data from many sources, and may necessitate development of a national data system.
   b) Comprehensive sub-national indica-

tors – These are used to assess effectiveness of an ECE program of a regional or district office of a national agency, a state/provincial environmental agency, or a local or municipal agency. This type of effort has the advantage of being a more manageable size than a comprehensive national effort, and can often provide a means of testing a system of indicators that can later be applied to the national program.

c) Focused national indicators – These are used when a national environmental agency wants to assess the effectiveness of a focused national initiative to address a specific non-compliance pattern or environmental risk. For example, focused national indicators might be developed for an inspection and enforcement initiative to improve compliance among the petroleum refining industry, a targeted enforcement initiative to improve compliance with all air pollution requirements, or a strategy that integrates incentives and enforcement to reduce emissions of a specific pollutant into water bodies.

d) Focused sub-national indicators – These are used when a regional, provincial/state, or local/municipal agency wants to assess the effectiveness of a focused initiative to address a specific non-compliance pattern or environmental risk. For example, this type of indicator system might be developed for a regional or state effort to use inspections and enforcement to control deforestation, or a municipal initiative to combine assistance followed by enforcement actions to limit illegal dumping of waste on the land.

4. Common Set of Barriers. Another pattern that can be identified from the indicators projects going on around the world is a set of barriers that many ECE programs confront as they try to develop indicators. Those barriers are:

a) Compliance culture in formative stages – In some countries, the obligation to comply with environmental (and other) laws is not yet ingrained deeply and the rule of law is not yet embraced fully by citizens, businesses and institutions of government.

b) Environmental laws not fully implemented – Environmental laws may be relatively new, they may have been changed significantly, and there may be impediments to implementation of specific sections of a law.

c) Environmental agencies not mature – The operation of environmental agencies may not be very sophisticated, they may possess limited capabilities, or they may have resource shortages.

d) Systematic data collection lacking – Some countries may lack data systems or may be only beginning to develop them.

e) Duration of implementation – Identifying and implementing a useful set of performance indicators takes a significant amount of time and commitment of personnel, and the effort required may sometimes seem disproportionate to the value to be gained from developing and using performance indicators.

f) Lack of analytical skills – Agencies often lack the ability to interpret the meaning of indicators, i.e., to determine what's behind the numbers, as this requires a sophisticated understanding of program operations and a skill for diagnosing problems.

g) Misuse by external audiences – The prospect of performance indicators being inadvertently or knowingly misused by advocacy groups or legislative overseers sometimes discourages program managers from developing and using indicators.

3 USING INDICATORS TO MANAGE AND IMPROVE ECE PROGRAMS

Public management literature sug-

gests that performance indicators can be used for a wide range of purposes in public sector programs and organizations. In his article entitled, "Why Measure Performance? Different Purposes Require Different Measures," Robert Behn of Harvard University[6] identifies eight specific managerial purposes that can be served by performance indicators. According to Behn, the eight purposes are to evaluate, control, budget, motivate, promote, celebrate, learn, and improve. Behn asserts that no single indicator is appropriate for all eight purposes, and that each purpose addresses a different management question and requires specific input, output, or outcome indicators. A very similar list of uses of performance indicators was previously offered by Harry Hatry of the Urban Institute.[7]

3.1 Four Uses of ECE Indicators

These purposes are relevant (in varying degrees) to any public program or organization, not just ECE programs. Building on these eight broad purposes, it would be useful to adapt them to describe the specific uses that ECE practitioners are making of performance indicators. For ECE practitioners, four distinct but related uses seem appropriate.

The first use of performance indicators for ECE practitioners is to monitor and manage program operations. Monthly or quarterly reports to program managers and staff about key outputs and outcomes can be a very useful management tool to ensure that resources are being used appropriately to produce specific activities or results. Such reports can be organized to break out data for a program as a whole (e.g., the national enforcement program), for specific program components (e.g., the enforcement of air pollution laws), and for particular organizational units (e.g., a regional or provincial office of a national program).

The second use of performance indicators for ECE practitioners is to identify and correct performance issues and problems. Data from input, output, and outcome indicators can be organized to compare the current year to the previous year, illustrate a trend over a longer period of years, compare the performance of one program component or organizational unit to another during the same period, and to assess performance in achieving a particular goal or target. Indicators can highlight deficiencies and anomalies, allowing staff and managers to further analyze the cause of performance which deviates from past trends or current targets.

A third use of indicators by ECE practitioners is to evaluate and adjust program strategies and resource allocation to improve effectiveness. By analyzing patterns between inputs, outputs, and outcomes, ECE practitioners can learn more about what combination of activities produces the most important results. Such analysis can build a chain that improves the effectiveness of the ECE program B resources are shifted to produce more of the right combination of activities, which increases the contribution of the ECE program to important outcomes that protect the environment.

A fourth use of indicators by ECE practitioners is to report to political overseers and the public about program performance. ECE programs can be well-served by providing to external audiences an annual (or more frequent) account of activities performed and results achieved. Reports that emphasize results and outcomes achieved through activities and outputs of the program can enhance support for the compliance and enforcement mission. By describing accomplishments in terms that emphasize results – pounds of pollution reduced through enforcement actions, improved environmental management practices at facilities from compliance assistance, improved rates of compliance in an industry sector – an account of performance is provided that is meaningful to multiple audiences.

3.2 Lessons that Inform Use of ECE Indicators

As ECE practitioners use performance indicators for these purposes, they

should be informed by two lessons from the experience of countries that have begun using indicators to manage their ECE programs. The first lesson is that the limitations of indicators need to be understood. Indicators that show the amount of an output or outcome produced do not tell program personnel all they need to know about that output or outcome. For example, an indicator can tell ECE program managers that the number of inspections conducted in 2004 is fifteen percent lower than the number conducted in 2003, but it cannot explain why the number is lower. To learn that, more analysis is needed of program operations, sometimes using qualitative information to understand the reasons for the reduction in inspections. Thus, indicators provide a kind of warning light that signals a need for deeper analysis or further investigation of the forces and influences that shape program performance.

A second lesson learned from the use of ECE indicators is that intermediate outcomes provide very valuable management information. Efforts to develop indicators often attempt to leap from measuring basic outputs (e.g., the number of enforcement actions taken) to measuring complex end outcomes (e.g., improvements in ambient air quality), ignoring many valuable results that are produced between activities and ultimate outcomes. Hatry defines intermediate outcomes as events, occurrences, or changes in conditions, behavior, or attitudes "expected to lead to the ends desired but are not the ends themselves."[8] Thus, in the context of ECE programs, examples of intermediate outcomes might be investment in pollution control equipment or implementation of improved environmental management practices resulting from enforcement actions taken at facilities. These outcomes will contribute to the end outcome (e.g., an improvement in ambient air quality) but they are not the end themselves.

Hatry points out two advantages of intermediate outcomes that are relevant and important for ECE practitioners and programs.[9] Intermediate outcomes, by definition, occur before B and are expected to help lead to B the end outcomes. As a result, intermediate outcomes usually provide more timely information than end outcomes. A second advantage is that programs almost always have more influence over intermediate outcomes than they do over end outcomes. Stated another way, there is often a direct causal link between a program activity (e.g., an enforcement action) and an intermediate outcome (e.g., an investment in pollution control equipment required as a condition of the enforcement settlement). This direct causal link allows ECE programs to make a clear and credible claim that they have produced outcomes that would not have occurred in the absence of the program.

3.3 Benefits of Using ECE Indicators

When used appropriately, indicators have been able to provide a variety of benefits to ECE practitioners.

1. Improved Control of Program Operations. Even a very basic set of outcome indicators will increase understanding about what is being accomplished, and when combined with data about inputs, judgments can be made about whether resources are being used efficiently. At a minimum, basic output indicators can help determine whether program staff are performing fundamental program activities.
2. Improved Goal-setting and Strategy Development. By using indicators as a management tool, goals can be set regarding the amount of activities or results that should be produced over a period of time. Indicators can also be used to identify needed adjustments in the mix of activities or results the program is producing.
3. Improved Resource Allocation Decisions. Output and outcome indicators can be analyzed to determine whether resources need to be increased, shifted, or altered in some way to meet goals and achieve desired results. Indicators provide an understanding of the relationship between outputs and outcomes,

thereby enhancing the ability of program managers to increase resource investments in preferred outcomes.

4. Improved Identification and Correction of Performance Problems. Indicators that can be organized by type of output or outcome, by organizational unit, and by program area increase program managers' ability to identify performance problems and investigate them further to design solutions.
5. Improved Ability to Motivate Employees. There is much truth to the oft-repeated statement, "What gets measured gets done." Performance indicators send a clear signal to program personnel about what needs to be accomplished. Setting a goal to achieve a certain amount of a specific output tends to organize and focus some portion of resources on achieving the goal.
6. Improved Ability to Communicate with the Public. Performance indicators help external audiences understand and support program activities. Output indicators can convey to the public that funds are producing some amount of inspections, enforcement actions, or other activities. Outcome indicators can convey that these activities are resulting in important outcomes such as reduced pollution, increased compliance, and improved environmental management at facilities.

Although the challenges and barriers associated with identifying and implementing ECE indicators are formidable, the benefits derived from using the indicators to manage and improve programs are significant. Countries that have made it to the third milestone on the path – i.e., using indicators – have recognized that the benefits of using indicators outweigh the costs of implementing.

4 ENSURING FURTHER PROGRESS FOR ECE INDICATORS AND PROGRAMS

ECE practitioners using indicators as a management tool need to form a community of practice to learn from each others' experience and to show the way for other practitioners who are on the path of identifying, implementing, and using indicators. Such a community is necessary if ECE programs want to receive the maximum benefit from performance indicators.

4.1 The Need for a Community of Practice

While the creation of sets or systems of indicators is an important step toward making ECE programs more effective, systems of indicators by themselves cannot bring about improved performance in ECE programs. Setting up a system of indicators can be seen as acquiring a tool, but the tool needs to be used continuously by program managers and staff. Over time, program personnel gain more experience and skill in using the tool, they hone and sharpen the tool to make it more useful, and ultimately the program to which they apply the tool becomes more effective.

There is not much accumulated experience in using ECE indicators for program management and improvement, since most countries are still in the identification and implementation stages of their ECE indicators projects. But a community of practice for ECE indicators could make a significant contribution to creating a cadre of experienced, thoughtful program leaders who document their knowledge, report it to interested colleagues around the world, and advance the collective learning of ECE practitioners. This community of practice should encourage its members to report periodically to a central repository about the progress or challenges associated with their indicators projects. Members should also be encouraged to post "indicator bulletins" to provide examples of how indicators are being used to manage and improve ECE programs, and e-dialogues about specific topics can be used to promote more frequent communication among members about ideas and developments in performance measurement.[10]

4.2 Toward Performance-Based Management for ECE Programs

Ultimately, if ECE programs are to make their maximum contribution to environmental protection, they will need to join other government programs in moving toward performance-based management. This movement toward performance-based management is global, as described in various books and articles about global trends in public management reform.[11] In his article entitled "Performance-Based Management: Responding to the Challenges," Joseph Wholey defines performance-based management as "the purposeful use of resources and information to achieve and demonstrate measurable progress toward agency and program goals."[12] The United States Government Accountability Office (GAO) describes three key steps in performance-based management: (a) developing a reasonable level of agreement on mission, goals, and strategies for achieving the goals; (b) implementing performance measurement systems of sufficient quality to document performance and support decision making; and (c) using performance information as a basis for decision making at various organizational levels.[13] Wholey suggests that in coming years there will be a premium on managers and staff with the knowledge, skills, and abilities to apply performance-based management to their programs. This will require training on how to use performance information: in agency and program management systems; to provide accountability to key stakeholders and the public; to demonstrate effective or improved performance; and to support resource allocation and other policy decision making.[14]

ECE practitioners, through their work on indicators, have established a steady pace of progress toward "implementing performance measurement systems of sufficient quality" and applying performance-based management to their programs. Managers and staff of ECE programs can determine whether they have succeeded in becoming performance-based programs by watching for specific changes. (Perhaps these are best viewed as five indicators of program improvement.) ECE programs have reached the threshold for high performance when they are: addressing significant environmental, public health, and compliance problems; using data to make strategic decisions for better utilization of resources; using the most appropriate tool to achieve the best outcome; assessing the effectiveness of program activities to ensure desired program performance; and effectively communicating the environmental, public health and compliance outcomes to the public. When this threshold is reached, the hard work of identifying, implementing, and using performance indicators will have paid off and the effectiveness of ECE programs can be fully realized.

5 REFERENCES

[1] A relatively recent example of indicators pertaining to environmental conditions can be found in, EPA, "Draft Report on the Environment 2003,"EPA-260-R-02-006, June 2003, also available at http://www.epa.gov/indicators/.

[2] Linster, Myriam, "OECD Work on Environmental Indicators," in Measuring What Matters, Proceedings from the INECE-OECD Workshop on Environmental Compliance and Enforcement Indicators, November 3 – 4, 2003, pg. 168.

[3] Stahl, Michael, "Performance Indicators for Environmental Compliance and Enforcement Programs: The U.S. EPA Experience," in *Measuring What Matters*, Proceedings from the INECE-OECD Workshop on Environmental Compliance and Enforcement Indicators, November 3 – 4, 2003, pg. 150 - 157.

[4] These best practices are described in an upcoming INECE publication entitled, "Performance Measurement Guidance for Compliance and Enforcement Practitioners," written by Michael Stahl in consultation with the INECE Indicators Expert Working Group.

[5] Descriptions of many of these projects

can be found at the INECE web site, http://www.inece.org/forumsindicators.html.

[6] Behn, Robert D., "Why Measure Performance? Different Purposes Require Different Measures," Public Administration Review, Vol. 63, No.5., September/October 2003, pg. 586 - 606.

[7] Hatry, Harry, *Performance Measurement: Getting Results*, The Urban Institute Press, Washington, D.C., 1999, p.158

[8] Hatry, Harry, IBID, p.16.

[9] Hatry, Harry, IBID, p.19.

[10] The INECE web site currently provides many useful features for practitioners interested in ECE indicators, and could easily be adapted to provide a visible forum for "indicators bulletins." INECE has also conducted e-dialogues on indicators topics on their web site.

[11] See, for example, Kettl, Donald F., *The Global Public Management Revolution*, Brookings Institution Press, Washington, D.C., 2000, pg. 2. Kettl describes "accountability for results," and a "focus on outputs and outcomes instead of processes and structures "as a core characteristic of the global movemen ttoward reform of public management.

[12] Wholey, Joseph S., "Performance-Based Management: Responding to the Challenges," *Public Productivity and Management Review*, Vol. 22, No. 3., pg. 288.

[13] Wholey, Joseph S., IBID, pg. 289.

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LIST OF PARTICIPANTS

Dr. Sheila Abed
Chair
IUCN Commission on
Environmental Law
Bonn
Paraguay
sheila.abed@idea.org.py;
sheila.abed@iucn.org

Ms. Anita Akella
Consultant
Flora International Environmental
Consulting
2667 Chateau Way
Livermore, CA 94550
United States
1-323-868-2762
anita@flora-consulting.com

Ms. Ada Alegre Chang
Ministry of Energy and Mines
Peru
aalegre@minem.gob.pe

Ms. Nawzat Ali
Member
IUCN Commission on
Environmental Law
Jordan
nawzat@hotmail.com

Mr. Ebrahim Ali
Environmental Specialist, Director
Environmental Assessment and Planning
Directorate
PO Box 32657
Salmabad 32657
Kingdom of Bahrain
973-17-875154
973-17-874615
ali_ebrahim72@hotmail.com

Mr. Jonathan Allotey
Acting Executive Director
Environmental Protection Agency
P.O. Box M-326
91 Sralets Road
Accra, Ghana
23-32-166-2693
23-32-166-2690
JAllotey@epaghana.org, epaed@
africaonline.com.gh

Mr. Mohammed Altoraif
National Comission for Wildlife
Conservation and Development
P.O. Box 61681
Riyadh
Saudi Arabia
966-1-4415590

Mr. Yousef Al-Wetaid
General Manager
National Comission for Wildlife
Conservation and Development
P.O. Box 61681
Riyadh
Saudi Arabia
966-1-4415590
yousef@conserv-train.org.sa

Dr. Hedia Baccar
Consultant
International Fund for Animal Welfare
9 rue Mohamid Ali Tahir
1082 Mutuelleville
Tunis, Tunisia
216-22-302959
216-71 -282929
hbaccar2000@yahoo.fr

Dr. Gilbert Bankobeza
Legal Officer
United Nations Environment Programme —
Ozone Secretariat
P.O. Box 30552
Nairobi, Kenya
254-2-623854
254-2-623913
gilly.bankobeza@unep.org

Mr. Abdelkader Baouendi
Expert en Environment
L'Audit Environmental
130 Avenue Habib Bougatfa
La Bardo 200
Tunisia
216-71 586.217
216-71 504.176
baouendi@planet.tn

Mr. Mohamed Ben Hassine
Chief of Service
Ministere de l'Environnement et du Developpement Durable
12 Rue Cameroun
Belvedere 1002
Tunisia
bhassinegr@yahoo.fr

Mr. Hassane Bendahmane
National Coordinator
L'autoevaluation Nationale des Capacités à Renforcer en Matière de l'Environnement
Morocco
212-37-77-21-66
212-37-77-21-66
bendahmane@ancre.ma

Mr. Antonio Benjamin
Public Prosecutor for Sao Paulo
Law for a Green Planet Institute
R. Cons. Rodrigues Alves 948/92
Rua Bage, 139/194
Sao Paulo 04012-140
Brazil
55-11-3119-9700
planetaverde@planetaverde.org

Mr Renzo Benocci
Director
Pollution Enforcement
Environment Canada
351 St-Joseph
17th Floor PVM
Gatineau ON K1A 0H3
Canada
1-819-953-1523
1-819-953-3459
Renzo.Benocci@ec.gc.ca

Mr. Hocine Benyahia
Treasurer and Project Manager
National Federation for the Protection of the Environment
Algeria
fnpe_algerie@yahoo.fr; benhoc@caramail.com

Mrs. Mihaela Beu
Regional Chief Commissar
National Environmental Guard
str. Dorobantilor, 99
Cluj-Napoca 400609
Romania
40-264-410719
40-264-410719
gmcj@cluj.astral.ro

Dr. Adriana Bianchi
Senior Policy and Development Specialist
The World Bank Institute
1818 H Street, NW
Room J4-085
Washington DC 20433
United States
1-202-473-6371
1-202-676-0977
abianchi@worldbank.org

Mr. Cees Jan Bloemendaal
Province of Overijssel
PO Box 10078
Zwolle 8000 GB
The Netherlands
31-38-4252135
31-38-4254855
CJP.Bloemendaal@prv-overijssel.nl

Ms. Anna Bobo-Remijn
Legal Coordinator
European Commission
Belgium
32-2-799-0334
32-2-299-4123
anna.bobo-remijn@cec.eu.int

Mr. El Walid Boulekroune
213-70-51-35-90
walid@djazair-connect.com

Ms. Brenda Brito Carmo
Vice Executive Director and Researcher
IMAZON – Amazon Institute of People and Environment
Rd Mario Covas km 01, Pass Pau D'arco, Conj Village Pau D'arco, n 09
Ananindeua Para
Brazil
55-91-235-4214
brendabrito@imazon.org.br

Ms. Susan Bromm
Director
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
MC2271A
Washington DC 20460
United States
1-202-564-5110
1-202-564-0094
bromm.susan@epa.gov

Mr. Carl Bruch
Legal Officer
United Nations Environment Programme
1707 H Street, NW, Suite 300
Washington DC 20006
United States
1-202-974-1303
1-202-785-2096
carl.bruch@rona.unep.org

Ms. Angela Bularga
Coordinator
NIS Environmental Compliance and Enforcement Network
Organization for Economic Cooperation and Development
2, rue Andre Pascal
Paris, Cedex 16 75775
France
33-14-524-9863
33-14-524-9671
Angela.Bularga@oecd.org

Mr. Poul Byskov
Senior Engineer
Norwegian Pollution Control Authority
PO Box 8100 Dep.
Olso NO-0032
Norway
poul.byskov@sft.no

Ms. Paula Caldwell St-Onge
Director General
Environment Canada
351 St. Joseph Boulevard
17th Floor, Place Vincent Massey
Gatineau Quebec K1A0H3
Canada
1-819-997-2019
1-819-997-0086
paula.caldwell@ec.gc.ca

Ms. Deb Callahan
President
League of Conservation Voters
1920 L Street NW
Washington DC
deb_callahan@lcv.org

Ms. Donna Campbell
Executive Director
Legal Services
New South Wales Department of Environment and Conservation
59-61 Goulbourn Street
Sydney South NSW 1232 2000
Australia
61-29-99-56103
61-29-99-55951
donna.campbell@environment.nsw.gov.au

Mr. Hassan Chouaouta
Conseiller
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)
B.P. 433
10 000
Rabat
Morocco
212-37-680710
212-37-680711
chouaouta@gtz-pgpe.ma

Mr. John Chouinard
Director
Conservation & Protection
Department of Fisheries and Oceans
104 Dalhousie Street
Québec G1K 7Y7
Canada
ChouinardJo@dfo-mpo.gc.ca

Dr. Bill Clark
International Liasion Officer
Nature and National Parks Protection Authority
3 Rehov Am Veolamo
Givat Shaul
Jerusalem 95463
Israel
97-22-566-5214
97-22-561-1871
clarkb@netvision.net.il

Ms. Maria Comino
Team Leader – Reforms
Department of Infrastructure, Planning and Natural Resources
GPO Box 3927
Sydney 2002
Australia
61-2-9762-8392
61-2-9762-8716
maria.comino@dipnr.nsw.gov.au

Mr. Kenneth Cook
President
Environmental Working Group
1436 U Street NW
Suite 100
Washington DC 20009
United States
ken@ewg.org

Mr. Matthew Cooper
Environmental Media Consultant
3001 4th Street
Santa Monica CA 90405
United States
1-310-612-6844
1-310-450-2350
arda@earthlink.net; arda@paradise.net.nz

Mr. Yves Corriveau
Legal Counsel
Environment Canada
351 St. Joseph Blvd.
17th Floor
Hull Quebec
Canada
1-514-861-4022
1-514-861-8949
Yves.Corriveau@ec.gc.ca

Mr. Victor Cotruta
Executive Director
Regional Environmental Centre (REC) – Moldova
57/1, B. Bodoni Street
Office 107-111
Chisinau MD 2005
Moldova
373-2-23-86-85
373-2-23-86-86
vcotruta@moldova.md, victor.cotruta@rec.md

Mr. John Cruden
Deputy Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 2718
Washington DC 20530-0001
United States
1-202-514-2718
1-202-514-0557
john.cruden@usdoj.gov

Mr. Jim Curlin
Information Manager
United Nations Environment Programme
Tour Mirabeau
39-43 quai André CitroĎn
Paris Cedex 15 75739
France
33-1-44-37-1455
33-1-4437-1474
jcurlin@unep.fr

Mr. Neil Davies
Environment Agency (England and Wales)
Rio House, Waterside Drive, Aztec West
Almondsbury Bristol BS32 4UD
United Kingdom
neil.davies@environment-agency.gov.uk

Mohamed Rida Derder
Special Consultant
INECE Secretariat
2141 Wisconsin Avenue, Suite D2
Washington, DC 20007
1-202-338-1300
ridaderder@juno.com

Ms. Francesca DiCosmo
U.S. Environmental Protection Agency
1650 Arch St.
Philadelphia PA 19103-2029
United States
dicosmo.francesca@epa.gov

Mr. Mihail Dimovski
Programme Manager
Regional Environment Center for Central and Eastern Europe & BERCEN
Ady Endre 9-11
Szentendre 2000
Hungary
36-26-504-052
36-26-311-294
mdimovski@rec.org

Mr. Zoran Dimovski
State Environmental Inspector
Ministry of Environment and Phisycal Planning
ul.Drezdenska 52
Skopje 1000
Republic of Macedonia
38-92-306-6930
38-92-36-6931
zdimovski61@mt.net.mk

Ms. Maria Di Paola
Director on Research and Training
Fundación Ambiente y Recursos Naturales
Buenos Aires 1428
Argentina
54-11-4783-7032
+54-11-4783-7032 #223
medipaola@farn.org.ar

Mr. Azzedine Downes
Vice President
International Fund for Animal Welfare
PO Box 193
Yarmouth Port MA 02675
United States
adownes@ifaw.org

Mr. Rene Drolet
Director
Compliance Assurance
Environment Canada
351 St Joseph Boulevard
17th Floor PVM
Gatineau Quebec K1A 0H3
Canada
1-819-994-0738
1-819-997-0086
Rene.Drolet@ec.gc.ca

Mr. Ofir Drori
Director
The Last Great Ape Organization (LAGA)
Valley Nlongkak
POB 4916
Yaounde
Cameroon
lastgreatape@yahoo.com

Ms. Linda Duncan
Consultant on Environmental Law & Policy
9816-90 Avenue
Edmonton AB T6E 2T1
Canada
1-780-433-8806
1-780-433-6099

Mr. Driss El Harrhouri
Gendarmerie Royale
Marrakech
Morocco
212-061-954-480

Mr. El Hassan El Izary
Ministry of the Interior
Morocco
212-044-308-439

Mr. Nor El Yakine
Gendarmerie Royale
Marrakech
Morocco
212-061-954-480

Mr. Abdallah Elyacoubi
Ministry of the Environment
Morocco
elyabdou@yahoo.fr

Mr. Mohamed Elyazghi
Minister
Ministry of Territory Planning, Environment and Water
Rabat
Morocco

Mr. Mohamed Fdrissi
Ministry of the Interior
Morocco
212-044-308-439

Ms. Melissa Fourie
Project Manager
Department of Environmental Affairs & Tourism
Pretoria
South Africa
27-012-310-3583
27-012 320 4431
mfourie@deat.gov.za

Ms. Dadouch Fouzia
Ministere de l'Interieur
36, Angle Avenue El-Abtal et Rue Oum Errabia
Agdal – Rabat
Morocco
212-7-766-658
dadouchf@yahoo.fr; dądouch.f@menara.ma

Mr. Joe Freedman
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Mail Code: 2313A
Washington DC 20460
United States
1-202-564-5406
freedman.joseph@epa.gov

Mr. Mike Frizzel
2141 Wisconsin Ave, NW, Suite D2
Washington DC 20007
United States
1-202-338-1300
1-202-338-1810
inece@inece.org

Mr. Sibusiso Gamede
Consultant on Legal Issues
Basel Convention Regional Centre
c/o CSIR, Meiring Naude Road Block 4, Room 130
P.O. BOX 109
Silverton Pretoria 0127
South Africa
27-12-349-1130
27-12-349-1043
gamede@sjp.co.za

Mr. Paul Gavrel
Office of Enforcement
Environment Canada
351 St. Joseph Boulevard
Place Vincent Massey – 17th Floor
Hull Quebec
Canada
1-819-953-0762
Paul.Gavrel@ec.gc.ca

Mr. Daniel Geisbacher
Head Inspector and National IMPEL Coordinator
Slovak Inspectorate of the Environment
Karloveska 2
Bratislava 84222
Slovak Republic
42-126-542-6950
42-126-542-3181
geisbacher@sizp.sk

Mr. Jo Gerardu
Inspector for International Affairs
Inspectorate of Housing, Spatial Planning and the Environment (VROM-Inspectorate)
VI/AL IPC 500
PO Box 16191
The Hague 2500 BD
The Netherlands
31-70-339-2536
31-70-339-1985
Jo.Gerardu@minvrom.nl

Mr. Theo de Gelder
Senior Inspector
Netherlands Emission Authority
The Netherlands
tdgelder@zeelandnet.nl

Mr. Jose Pablo Gonzalez
Adjunct Attorney General
Chief Environmental Prosecutor
P.O. Box 586-2070
San Jose
Costa Rica
506-295-3401
506-295-3541
jpgonzalez@poder-judicial.go.cr

Mr. Dave Gorman
Better Regulation Manager
Scottish Environment Protection Agency
Erskine Court
Castle Business Park
Stirling Scotland FK9 4TR
United Kingdom
44-1786-457-700
44-1786-446885
dave.gorman@sepa.org.uk

Mr. Jim Gray
Head of Regulatory Development
Environment Agency (England and Wales)
Rio House
Aztec West, Almondsbury
Bristol South Gloucestershire BS32 4UD
United Kingdom
44-1454-624400
44-1454-624032
jim.gray@environment-agency.gov.uk

Mr. David Grossman
Staff Attorney
INECE Secretariat
2141 Wisconsin Avenue, NW
Washington DC 20007
United States
dgrossman@inece.org

Ms. Violeta Gustale
Communication Specialist
Instituto de Derecho y Economía Ambiental (IDEA)
Nicanor Torales 150
Asuncion 1851
Paraguay
595-21-614620
595-21-662543
violeta.gustale@idea.org.py

Ms. Christine Hanson
General Counsel, Legal Services Branch
Department of Infrastructure Planning and Natural Resources
GPO Box 3927
Sydney NSW 2001
Australia
61-2-9762-8010
61-2-9762-8716
christine.hanson@dipnr.nsw.gov.au

Sir John Harman
Chairman
Environment Agency (England and Wales)
Millbank Tower 25th Floor
21/24 Millbank
London SW1P 4XL
United Kingdom
john.harman@environment-agency.gov.uk

Ms. Phyllis Harris
Principal Deputy Assistant Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW, MC 2201A
Washington DC 20460
United States
1-202-564-2450
1-202 501 3842
harris.phyllis@epa.gov

Mr. Robert Heiss
Director
International Compliance Assurance Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Ariel Rios Building, Mail Code #2222A
Washington DC 20460
United States
heiss.robert@epa.gov

Mr. Markku Hietamaki
Environmental Counsellor
Ministry of the Environment
P.O. Box 35 GOVERNMENT
Helsinki FIN-00023
Finland
358-9-1603-9703
358-9-1603-9453
markku.hietamaki@ymparisto.fi, Markku.Hietamaki@vyh.fi

Mr. Barry Hill
Director
Office of Environmental Justice
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington DC 20460
United States
hill.barry@epa.gov

Mr. Harvey Himberg
Sr. Environmental Specialist
Environmentally and Socially Sustainable Development Network
The World Bank
MC 5-128
Washington, DC
1-202-458-9099
hhimberg@worldbank.org

Mr. Antero Honkasalo
Director
Department for Environmental Proection in Trade and Industry
Ministry of the Environment
P.O. Box 380
Helsinki 00131
Finland
358-9-1991-9345
358-9-1991-9453
antero.honkasalo@ymparisto.fi

Mrs. Dorine Hornung
Inspectorate of Housing, Spatial Planning and the Environment (VROM-Inspectorate)
P.O. Box 850
Eindhoven 5600 AW
The Netherlands
dorine.hornung@minvrom.nl

Mr. Chris Howes
Enforcement Policy Manager
Environment Agency (England and Wales)
Rio House Waterside Drive
Aztec West
Almondsbury Bristol BS32 4UD
United Kingdom
44-14-5462-4029
chris.howes@environment-agency.gov.uk

Mrs. Zahia Ibersienne
ANPE
Algeria
213-72-33-43-80
iber-zahia@hotmail.com

Ms. Aesah Javier
Administrative Assistant
INECE Secretariat
United States
1-202-338-1300
1-202-338-1810
ajavier@inece.org

Mr. Davis Jones
Environmental Scientist
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 2254A
Washington DC 20460
United States
1-202-564-6035
1-202-564-0073
Jones.Davis@epa.gov

Dr. Palamagamba Kabudi
Institutional and Legal Framework for Environmental Management Project, Vice President's Office
PO Box 75335
Dar es Salaam
Tanzania
255-22-211-8416
255-22-211-9355
pjkabudi@udsm.ac.tz

Mr. Donald Kaniaru
Kaniaru & Kaniaru Advocates
ABC Bank House, 1st Floor, Woodvale Groove, Westlands
P.O. Box 1038
Sarit Centre Nairobi 00606
Kenya
254-20-4455-1275
254-20-445-1276
wkaniaru@africaonline.co.ke

Mr. Bakary Kante
Director
Division of Policy Development & Law
United Nations Environment Programme
PO Box 30552
Nairobi
Kenya
bakary.kante@unep.org

Ms. Ayse Karadeniz
Asst. Environmental Expert Turkish
Ministry of Env. and Forestry
Turkey
90-312-2879963
90-312-2855875
ozgekaradeniz@hotmail.com

Mr. Nikolay Kenanov
Director
Ministry of Environment and Water
67 William Gladstone Str
Sofia 1000
Bulgaria
359-2-9406387
359-2-9813384

Mr. Wout Klein
Project Manager
Inspectorate of Housing, Spatial Planning and the Environment (VROM-Inspectorate)
PO Box 16191 IPC 500
The Hague 2500 BD
The Netherlands
31-573-401756
31-573-401675
wout.klein@minvrom.nl

Mr. Albert Koehl
Lawyer
Sierra Legal Defence Fund
30 St. Patrick St.
Suite 900
Toronto ON M5T 3A3
Canada
1-416-368-7533
1-416-363-2746
akoehl@sierralegal.org

Mr. Fred Kok
Secretary
Landelijk Overleg Milieuhandhaving
Koningskade 40-2596 AA
The Hague
The Netherlands
31-703-519701
31-705-3519707
fkok@lomsecretariaat.nl

Mr. George Kremlis
Head of Unit
European Commission
200 Rue de la Loi
BU 9 1/185
Brussels B-1049
Belgium
32-22-966-526
32-22-991-070
Georges.Kremlis@cec.eu.int

Mr. Joe Kruger
Visiting Scholar
Resources for the Future
1616 P St. NW
Washington DC 20036
United States
1-202-328-5052
1-202-328-5137
Kruger@rff.org

Mr. Mohammed Lididi
Secretary General
Ministry of Justice
Ministere de la Justice
Place de la Mamounia
Rabat 10000
Morocco
212-37-73-22-74
212-37-73-47-25
lididi@justice.gov.ma

Mr. Yvan Lafleur
Director
Wildlife Enforcement
Environment Canada
351 St. Joseph Blvd.
16th Floor PVM
Gatineau Québec K1A 0H3
Canada
1-819-953-4383
1-819-994-5836
Yvan.Lafleur@ec.gc.ca

Mr. Sheng Shuo Lang
Deputy Chief Officer
Multilateral Fund for the Montreal Protocol Secretariat
1800 McGill College Avenue
27 Floor
Montreal Quebec H3A 3J6
Canada
1-514-282-1122
slang@unmfs.org

Mr. Andrew Lauterback
Senior Criminal Enforcement Counsel
U.S. Environmental Protection Agency
One Congress Street
Boston MA 02114
United States
1-617-918-1724
1-617-918-0724
lauterback.andrew@epa.gov

Mr. Kenneth Ledgerwood
Environment and Heritage Service
Calvert House, Castle Place Belfast BTI IFY
Northern Ireland BT1 1FY
United Kingdom
44-28-254-716
44-28-254-700
ken.ledgerwood@doeni.gov.uk

Ms. Ghizlane Legsai
Ministry of the Territory Planning, Water and Environment
Rabat
Morocco
legsaighizlane@yahoo.fr

Mr. Peter Lehner
Chief
Environmental Protection Bureau
New York Attorney General
120 Broadway
26th Floor
New York NY 10028
United States
1-212-416-8450
1-212-416-6007
peter.lehner@oag.state.ny.us

Mr. Pierre Lemieux
Director
Conservation and Protection – Enforcement
Department of Fisheries and Oceans
200 Kent Street
Ottawa ON K1A 0E6
Canada
lemieuxpie@dfo-mpo.gc.ca

Mr. Michael LeRoy-Dyson
Senior Operator
Ministry for the Environment
45 Tower Center
Auckland City
New Zealand
649-366-2000 x 7184
649-366-2155
Michael.LeRoy-Dyson@MfE.govt.nz

Mr. Ryan Levitt
Enforcement Officer, EPB, Prairies and Northern Region
Environment Canada
#200, 4999-98
Edmonton AB T6B2X3
Canada
780-951-8631
ryan.levitt@ec.gc.ca

Ms. Myriam Linster
Principal Administrator
Organisation for Economic Co-operation and Development (OECD)
2, rue André Pascal
Paris Cédex 16 75775
France
33-1-45-24-97-44
33-1-45-24-78-76
myriam.linster@oecd.org

Ms. Tamara Malkova
Director
Charity Information Center, Green Dossier
Kiev
Ukraine
tamara@bg.net.ua

Mr. Himot Maran
IMPEL Coordinator
Estonian Environmental Inspectorate
Kopli 76, EE-10416 Tallinn
Estonia
himot.maran@kki.ee

Mr. Kenneth Markowitz
President, Earthpace LLC
Consultant to IGSD/INECE Secretariat
2141 Wisconsin Ave, NW, Suite D2
Washington DC 20007
United States
1-202-338-1300
1-202-338-1810
kjm@earthpace.com; ken@inece.org

Mr. Thomas Maslany
U.S. Environmental Protection Agency
(Retired)
1405 Perkiomenville Road
Perkiomenville PA 18074
United States
tmaslany@nni.com

Ms. Linda Massopust
2141 Wisconsin Ave, NW, Suite D2
Washington DC 20007
United States
1-202-338-1300
1-202-338-1810
inece@inece.org

Mr. Bharat Mathur
Acting Regional Administrator
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago IL 60604-3507
United States
mathur.bharat@epa.gov

Mr. George Matovu
Natural Resources Management Specialist
(Aquatics)
National Environment Management Authority
(NEMA)
P.O. Box 22255
Kampala
Uganda
256-77- 615222
256-41-257521
glubega@nemaug.org

Ms. Martine Meerburg
Inspector
Ministry of Housing, Spatial Planning
Environment (VROM)
PO Box 20061
2500 EB Den Haag
The Netherlands
martine.meerburg@minvrom.nl

Mr. Mohamed Mehdi
Administrator
Department of Environment
Ministry of Territory Planning, Water,
and Environment
Morocco
037 68 1500
mehdi.env@caramail.com

Ms. Olya Melen
Attorney
Ecopravo-Lviv
Krushelnytska str. 2
Lviv 79000
Ukraine
380-322-72-2746
380-322-97-1446
molya@darkwing.uoregon.edu;
epac@mail.lviv.ua

Mr. Krzysztof Michalak
Administrator
Organisation for Economic Co-operation and
Development (OECD)
2, rue Andre Pascal
Paris, Cedex 16 75775
France
33-14-524-9600
33-14-430-6399
krzysztof.michalak@oecd.org

Dr. Ladislav Miko
Director
Directorate DG.ENV.B: Protecting the Natural Environment
European Commission
Brussels
Belgium
32-2-2987237
32-2-2953892
Ladislav.Miko@cec.eu.int

Ms. Sladana Miocic
Advisor
Management Board
Koturaska 43
Zagreb 10 000
Croatia
385-1-6304-892
385-1-6128-089
sladana.miocic@fina.hr

Mr. Jassim Moh'd Ali Nasser
Environmental Inspector
Environmental Assessment and Planning Directorate
PO Box 32657
Kingdom of Bahrain
973-17-875154
973-17-874615

Mr. Wolfgang Morbach
Chef de Programme
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)
B.P. 753
Tunis 1080
Tunisia
216-71 233677
216-71 234 722
wolfgang.morbach@gtz.de

Ms. Elizabeth Maruma Mrema
Senior Legal Officer & Acting Chief
United Nations Environment Programme
P.O. Box 30552
Nairobi Kenya
Kenya
25-42-624-252
25-42-623-859
Elizabeth.Mrema@unep.org

Ms. Marcia Mulkey
Visiting Professor of Law
Temple University
1719 N. Broad Street
Philadelphia PA 19122-6098
United States
1-215-204-8006
Marcia.mulkey@temple.edu

Mr. Martin Murray
Policy Manager
Environment Agency (England and Wales)
Rio House Waterside Drive
Aztec West
Bristol
United Kingdom
44-14-54205501
44-14-54624032
martin.murray@environment-agency.gov.uk

Mr. Peter Murtha
Director
Office of Criminal Enforcement, Forensics, and Training
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Mail Code 2231-A
Washington DC 20460
United States
murtha.peter@epa.gov

Ms. Melanie Nakagawa
INECE Secretariat
2141 Wisconsin Ave, NW
Suite D2
Washington DC 20007
United States
1-202-338-1300
1-202-338-1810
inece@inece.org

Dr. Felix Näscher
Director General
Ministry of Environment
Dr. Grass-Strasse 10
FL-9490
Vaduz
Liechtenstein
423-236-6400
423-236-6411
felix.nascher@awnl.liv.li

Mr. Ceazar Natividad
Engineer IV
Laguna Lake Development Authority, DENR
Capitol Compound
Shaw Blvd.
Pasig City Metro Manila 1100
Philippines
632-631-4157
632-635-6683
czar_natividad@yahoo.com

Mr. Ike Ndlovu
Compliance Monitoring
Department of Environmental Affairs and Tourism (DEAT)
South Africa
27-012-310-3710
indlovu@deat.gov.za

Mr. Georgi Nedev
Expert
Ministry of Environment and Water
67 William Gladstone Str
Sofia
Sofia City 1000
Bulgaria
359-2-980-60-23
359-2-981-33-84
nedev@moew.government.bg

Mr. Alberto Ninio
Senior Counsel
The World Bank
1818 H Street, NW
Washington DC 20433
United States
1-202-458-1750
aninio@worldbank.org

Ms. Cristina Nogues
Public Relations Specialist
Instituto de Derecho y Economía Ambiental (IDEA)
Nicanor Torales 150
Asuncion
Paraguay
595-21-614620
595-21-662543
cristina.nogues@idea.org.py

Mr. Axel Olearius
Junior Expert
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)
Rabat
Morocco
212-023-303791
axel.olearius@gtz.de

Ms. Katia Opalka
Legal Officer
Commission for Environmental Cooperation
393 St-Jacques Street West
Suite 200
Montreal QC H2Y 1N9
Canada
kopalka@cec.org

Mr. Antonio Oposa Jr.
Lawyer
Suite 6-J Westgate Tower
Investment Drive
1780 Alabang
Muntinlupa City
Philippines
632-809-6122
632-809-3176
tonyoposajr@yahoo.com

Ms. Naima Oumoussa
Ministry of Territory Planning, Water and Environment
Morocco
212-62-517330
dpcc@minenv.gov.ma

Mr. Lee Paddock
Director of Environmental Law Programs
Pace University
78 North Broadway
White Plains NY 10603
United States
1-914-422-4209
lpaddock@law.pace.edu

Ms. Krystyna Panek-Gondek
Director
Chief Inspectorate for Environmental Protection
Wawelska ul. 52/54
Warsaw 00922
Poland
k.panek@gios.gov.pl

Mr. Bradley Parks
Development Policy Officer
Millenium Challenge Corporation
1000 Wilson Blvd. 14th Floor
Arlington VA
United States
1-202-521-3613
1-202-521-3700
parksbc@mcc.gov

Mr. Dave Pascoe
Manager
Emergencies and Enforcement Division
Environment Canada
4905 Dufferin Street
Downsview Ontario M3H 5T4
Canada
1-416-739-5897
1-416-739-4903
dave.pascoe@ec.gc.ca

Judge Vladimir Passos de Freitas
Chief Justice
Tribunal Regional Federal – 4a. Regičo
R. Otávio Francisco Caruso da Rocha, 300
Porto Alegre
Brazil
55-51-3213-3003
55-51-3330-4762
vladimir.freitas@terra.com.br

Ms. Anita Patekar
Head Inspector for Environmental Protection
Ministry of Environmental Protection and
Physical Planning
Gajeva 30a
Zagreb 10000
Croatia
385-1-37-12797
385-1-37-12713
anita.pokrovac.patekar@mzopu.hr

Ms. Catherine Pearce
Climate Change Campaign Coordinator
Friends of the Earth International
26-28 Underwood Street
London N1 7JQ
United Kingdom
44-20-7566-1723
44-20-7490-0881
catp@foe.co.uk

Ms. Waltraud Petek
Head of Department
Federal Ministry of Environment
Austria
43-1-51522-2123
43-1-51522-7122
waltraud.petek@bmlfuw.gv.at

Ms. Romina Picolotti
Directora Del Programa De Acce
Fundación Centro de Derechos Humanos y
Ambiente (CEDHA)
General Paz 186 10l' A
Córdoba CORDOBA 5000
Argentina
54-0351-4256278
romina@cedha.org.ar

Dr. Peter Pluschke
Program Director
Deutsche Gesellschaft für Technische
Zusammenarbeit (GTZ)
Rabat
Morocco
peter.pluschke@gtz.de

Justice Amadeo Postiglione
President
International Court of the Environment
Foundation (ICEF)
Corte Suprema di Cassazione
Piazza Cavour
Rome 00193
Italy
39-06-663-2490
39-06-688-3403
icef.postiglione@tiscali.it

Mr. Dariusz Prasek
Head, Operation Supoort
European Bank for Reconstruction and
Development (EBRD)
One Exchange Square
London EC2A 2JN
United Kingdom
44-207-338-6873
44-207-338-6848
prasekd@ebrd.com

Mr. Peter Pueschel
Head
Wildlife Trade Program
International Fund for Animal Welfare
Yarmouth Port MA
United States
ppueschel@ifaw.org

Ms. Gloria Ramos
Lawyer
National Environmental Action Team
2/F S. Estenzo Bldng., M.L. Quezon Avenue
Cabancalan
Mandaue City Cebu
Philippines
63-32-343-9464
63-32-420-7400
gollyramos@yahoo.com

Dr. Moshibudi Rampedi
General Manager
Department of Finance and Economic
Development, Limpopo Province South Africa
46 Hans van Rensburg Street
Polokwane 0700
South Africa
27-015-298-7073
27-015-291-5480
rampedimp@finptb.norprov.gov.za

Mr. G.H.J Ranter
Gedeputeerde Staten van Overijssel
Postbus 10078
8000 GB Zwolle
The Netherlands
pj.v.zanten@prv-overijssel.nl

Dr. Rosalind Reeve
Consultant
International Fund for Animal Welfare
P.O. Box 47074
Nairobi
Kenya
254-733-616869
254-20-375-0943
ros@africaonline.co.ke

Ms. Meredith Reeves
Senior Reseacher, Earthpace LLC
Consultant to IGSD/INECE Secretariat
2141 Wisconsin Ave NW, Suite D-2
Washington DC 20007
United States
1-202-338-4400
1-202-338-4401
mreeves@earthpace.com

Mr. Jan Rinzema
Trade Secretarty
Royal Netherlands Embassy
40 Rue de Tunis
Rabat
Morocco
212-64-163208
212-37-705085
jan.rinzema@minbuza.nl

Mr. Arthur Roborgh
Ministry of Housing, Spatial Planning and the
Environment
Postbus 30945
2500 GX The Hague
The Netherlands
31-70-3395375
31-70-3391306
arthur.roborgh@minvrom.nl

Dr. Roberto Rodriguez Rojas
Director
Environmental Law Program
Comisión Centroamericana de Ambiente y
Desarrollo (CCAD)
rrodriguez@ccad.ws

Ms. Sandy Rowden
Environment Agency (England & Wales)
Rio House, Waterside Drive
Aztec West
Almondsbury Bristol BS32 4UD
United Kingdom
sandy.rowden@environment-agency.gov.uk

Mr. Mladen Rudez
Head of Department
Federal Ministry of Physical Planning and Environment
Titova 9a
Sarajevo 71000
Bosnia-Herzegowina
387-33-445-031
387-33-445-031
m.rudez@bih.net.ba

Dr. Henk Ruessink
Head of Department
Inspectorate of Housing, Spatial Planning and the Environment (VROM-Inspectorate)
PO Box 30020
9700 RM Groningen
The Netherlands
31-50-599-2700
31-50-599-2699
henk.ruessink@minvrom.nl

Mr. Kenneth Ruffing
Deputy Director
Organisation for Economic Co-operation and Development (OECD)
rue 2 Andre Pascal
Cedex 16 Paris 75775
France
33-14-524-9310
33-14-524-7876
kenneth.ruffing@oecd.org

Dr. Iwona Rummel-Bulska
Senior Legal Advisor
World Meteorological Organization
7 bis, avenue de la Paix
Case postale No. 2300
Geneva CH 1211
Switzerland
41-22-730-8111
41-22-730-8181
irummel-bulska@wmo.int; rummel_I@gateway.wmo.ch

Dr. Ketevan Samadashvili
Regional Environment Center — Caucasus
74, Chavchavadze Ave., office 901
Tbilisi 0162
Georgia
995-32-253649
995-32-253648
keti.samadashvili@rec-caucasus.org

Mr. V.D. Sapronov
Division Chief
Federal Environmental, Industrial and Nuclear Supervision Service of Russia
Taganskaya st., 34
Moscow
Russia
platonov@gan.ru

Mr. Terence Shears
EU and International Relations Adviser
Environment Agency for England and Wales
Rio House
Waterside Drive, Aztec West
Almondsbury Bristol BS32 4UD
United Kingdom
44-14-54-205743
44-14-54-205533
terence.shears@environment-agency.gov.uk

Justice Adel Omar Sherif
Deputy Chief Justice
The Supreme Constitutional Court
Cornish el-Nile, Maadi
Cairo
Egypt
20-2526-7080
20-2525-6979
sccourt@idsc.net.eg

Adv. (Mrs.) Zohar Shkalim
Director
Ministry of the Environment
POB 34033
Jerusalem 95464
Israel
972-2-655-3808
972-2-655-3823
zoharsh@sviva.gov.il

Ms. Walker Smith
Director
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Mail Code 2241-A
Washington DC 20406
United States
smith.walker@epa.gov

Mr. Noah Smith
Editor
BNA's International Environment Reporter
1231 25th St. N.W.
Washington DC 20037
United States
1-202-452-6366
1-202-452-5331
nsmith@bna.com

Mr. Dmitri Smyslov
Deputy Director
Federal Environmental, Industrial and Nuclear Supervision Service of Russia
Taganskaya st., 34
Moscow
Russia
platonov@gan.ru

Ms. Sabine Sommer
Desk Officer
Ministry for the Environment – Lower Saxony
32-22-994-383
32-22-991-070
sab.som@gmx.net

Mr. Pavel Sremer
Deputy Director
Czech Environmental Inspectorate
267 Na brehu, Prague 9
Prague
Czech Republic
42-28-389-1564
42-28-389-2662
sremer@cizp.cz

Mr. Michael Stahl
Director
Office of Compliance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (2221A)
Washington DC 20460
United States
1-202-564-2280
1-202-564-0027
stahl.michael@epa.gov

Ms. Ljiljana Stanojevic
Chief
Ministry for Science and Environmental Protection of Serbia
Gospodar Jevremova 6/3
Sabac 15 000
Serbia and Montenegro
381-153-46912
381-153-46912
ekosabac@ptt.yu

Mr. Matthew Stilwell
Institute for Governance and Sustainable Development (Geneva)
Geneva
Switzerland
41-22-917-8695
41-22-917-8076
stilwell@bluewin.ch

Mr. Scott Stone
Staff Attorney
INECE Secretariat
2141 Wisconsin Avenue NW
Washington DC 20007
United States
sstone@inece.org

Mr. Ahmed Tarawneh
Police Officer
Jordan

Ms. Makhiba Tjela
Principal Environment Officer (Legal)
Ministry of Tourism, Environment, and Culture
PO Box 10993
Maseru 100
Lesotho
266-2231-1767
266-22-310194
mtjela@ananzi.co.za, lea@lea.org.ls

Dr. Warapong Tungittiplakorn
Environmental Official
Pollution Control Department
Paholyothin Road
Sam Sen Nai
Payathahi Bangkok 10400
Thailand
662-298-2623
662-298-2596
warapong.t@pcd.go.th

Ms. Clare Twelvetrees
International Relations Advisor
Environment Agency
Millbank Tower
25th Floor, 21-24 Millbank
London SW1P 4XL
United Kingdom
44-020-78 63 8670
44-020 7863 8753
clare.twelvetrees@environment-agency.gov.uk

Mr. David Uhlmann
Chief
Environmental Crimes Section
U.S. Department of Justice
P.O. Box 23985
Washington DC
United States
1-202-305-0337
1-202-305-0396
david.uhlmann@usdoj.gov

Mr. Pieter Van Geel
State Secretary for the Environment
PO Box 20951
2500 EZ Den Haag
The Netherlands
publiekvoorlichting@minvrom.nl

Mr. Doug Varchol
Environmental Film Maker
dvarchol@bren.ucsb.edu

Mr. Thomas Voltaggio
Deputy Regional Administrator
U.S. Environmental Protection Agency
1650 Arch St.
Philadelphia PA 19103-2029
United States
voltaggio.tom@epa.gov

Mr. Gerard Wolters
Inspector General
Inspectorate for Housing, Spatial Planning and the Environment (VROM)
VI/AL IPC 500
P.O. Box 16191
The Hague 2500 BD
The Netherlands
31-70-339-4620
31-70-339-1905
gerard.wolters@minvrom.nl

Ms. Maryna Yanush
Vice Director
Ministry of Natural Resources and Environmental Protection
10, Kollektornaya str.
Minsk
Belarus
375-17-2209473
375-17-2204571
yanush-marina@tut.by

Mr. Durwood Zaelke
Director, INECE Secretariat
President, Intitute for Governance & Sustainable Development (IGSD)
2141 Wisconsin Avenue NW, Suite D2
Washington DC 20007
United States
1-202-338-1300
1-202-338-1810
zaelke@inece.org

Mr. Zehar Athmane
Advisor
Ministry of Land Management and Environment
Algeria
213-21-4328 89
zehar_althmane@hotmail.com

Ms. Maria Christina Zucca
Associate Legal Officer
United Nations Environment Programme
PO Box 30552
Room T-313
Nairobi
Kenya
254-20-624573
254-20-624324
cristina.zucca@unep.org

Mr. Fouad Zyadi
Head
Monitoring and Conflict Division
Ministry of Territory Planning, Water and Environment
36, Avenue Al Abtal
Agdal, Rabat
Morocco
212-37-77-26-44
dcont@minenv.gov.ma

Mr. Brahim Zyani
Director
Regulation and Control Division
Ministry of Territory Planning, Water and Environment
36, Avenue Al Abtal
Agdal, Rabat
Morocco
212-37-77-25-73
drc@minenv.gov.ma

COUNTRY	NAME	TITLE	ORGANIZATION
AFRICA			
Cameroon	Mr. Ofir Drori	Director	The Last Great Ape Organization
Egypt	Justice Adel Omar Sherif	Deputy Chief Justice	The Supreme Constitutional Court
Ghana	Mr. Jonathan Allotey	Acting Executive Director	Environmental Protection Agency
Kenya	Mrs. Elizabeth Maruma Mrema	Senior Legal Officer & Acting Chief, Implementation of Environmental Law Branch, Division of Environmental Policy Implementation	United Nations Environment Programme
South Africa	Ms. Melissa Fourie	Project Manager	Department of Environmental Affairs and Tourism
South Africa	Mr. Ike Ndlovu	Compliance Monitoring	Department of Environmental Affairs and Tourism
South Africa	Dr. Moshibudi Rampedi	General Manager, Regulatory and Environmental Impact Management	Department of Finance and Economic Development, Limpopo Province
South Africa	Mr. Sibusiso Gamede	Lawyer	Smit, Jones & Pratt
Tanzania	Dr. Palamagamba Kabudi	Vice President's Office	Institutional and Legal Framework for Environmental Management Project of the Vice President's Office
Uganda	Mr. George Matovu	Natural Resources Management Specialist (Aquatics)	National Environment Management Authority (NEMA)
ASIA & THE PACIFIC			
Australia	Ms. Christine Hanson	General Counsel, Legal Services Branch	Department of Infrastructure Planning and Natural Resources
Australia	Ms. Donna Campbell	Executive Director, Legal Services	New South Wales Department of Environment and Conservation
Australia	Ms. Maria Comino	Team Leader - Reforms	Department of Infrastructure, Planning and Natural Resources
New Zealand	Mr. Michael LeRoy-Dyson	Senior Operator, Sustainable Industries and Climate Change Group	Ministry for the Environment
Philippines	Mr. Antonio Oposa Jr.	Lawyer	Philippines
Philippines	Mr. Ceazar Natividad	Engineer IV	Laguna Lake Development Authority, Department of Environment and Natural Resources
Philippines	Ms. Gloria Ramos	Lawyer	National Environmental Action Team
Thailand	Dr. Warapong Tungittiplakorn	Environmental Official	Pollution Control Department

CENTRAL & EASTERN EUROPE

Bosnia and Herzegovina	Mr. Mladen Rudez	Head of Department	Federal Ministry of Physical Planning and Environment
Bulgaria	Mr. Georgi Nedev	Expert	Ministry of Environment and Water
Bulgaria	Mr. Nikolay Kenanov	Director	Ministry of Environment and Water
Croatia	Ms. Sladana Miocic	Advisor	Management Board
Croatia	Ms. Anita Patekar	Head Inspector for Environmental Protection	Ministry of Environmental Protection and Physical Planning
Czech Republic	Mr. Pavel Sremer	Deputy Director	International Co-operation
Estonia	Mr. Himot Maran	Coordinator, EU Implementation and Enforcement of Environmental Law (IMPEL) Network	Estonian Environmental Inspectorate
Georgia	Dr. Ketevan Samadashvili		Regional Environment Center – Caucasus
Hungary	Mr. Mihail Dimovski	Programme Manager	Regional Environment Center for Central and Eastern Europe; Balkan Environmental Regulatory Compliance and Enforcement Network (BERCEN)
Macedonia	Mr. Zoran Dimovski	State Environmental Inspector	Ministry of Environment and Physical Planning
Moldova	Mr. Victor Cotruta	Executive Director	Regional Environmental Centre - Moldova
Poland	Ms. Krystyna Panek-Gondek	Director	Chief Inspectorate for Environmental Protection
Romania	Mrs. Mihaela Beu	Regional Chief Commissar	National Environmental Guard
Russia	Mr. V.D. Sapronov	Division Chief	Federal Environmental, Industrial and Nuclear Supervision Service of Russia
Russia	Mr. Dmitri Smyslov	Deputy Director	Federal Environmental, Industrial and Nuclear Supervision Service of Russia
Serbia	Ms. Ljiljana Stanojevic	Chief	Ministry for Science and Environmental Protection of Serbia
Slovak Republic	Mr. Daniel Geisbacher	Head Inspector and National Coordinator for the EU Implementation and Enforcement of Environmental Law (IMPEL) Network	Slovak Inspectorate of the Environment
Ukraine	Mrs. Tamara Malkova	Director	Charity Information Center, Green Dossier
Ukraine	Ms. Olya Melen	Attourney	Ecopravo-Lviv

CENTRAL AMERICA

Costa Rica	Mr. Jose Pablo Gonzalez	Adjunct Attorney General	Chief Environmental Prosecutor
El Salvador	Dr. Roberto Rodriguez Rojas	Director, Environmental Law Program	Comisión Centroamericana de Ambiente y Desarrollo (CCAD)

SOUTH AMERICA

Argentina	Ms. Romina Picolotti	President and Founder	Centro de Derechos Humanos y Ambiente (CEDHA)
Argentina	Ms. Maria Di Paola	Director on Research and Training	Fundación Ambiente y Recursos Naturales (FARN)
Brazil	Judge Vladimir Passos de Freitas	Chief Justice	Tribunal Regional Federal - 4a. Região
Brazil	Mr. Antonio Benjamin	Public Prosecutor for Sao Paulo	Law for a Green Planet Institute
Brazil	Ms. Brenda Brito Carmo	Vice Executive Director and Researcher	IMAZON - Amazon Institute of People and Environment
Paraguay	Ms. Christina Nogues	Public Relations Specialist	Instituto de Derecho y Economia Ambiental (IDEA)
Paraguay	Ms. Violeta Gustale	Communication Specialist	Instituto de Derecho y Economia Ambiental (IDEA)
Peru	Ms. Ada Alegre Chang		Ministry of Energy and Mining

INTERNATIONAL

	Ms. Katia Opalka	Legal Officer	Commission for Environmental Cooperation
	Mr. Harvey Himberg	Sr. Environmental Specialist	Environmentally and Socially Sustainable Development Network
	Mr. Dariusz Prasek	Head, Operation Support	European Bank for Reconstruction & Development
	Ms. Sabine Sommer	Desk Officer	European Commission
	Dr. Ladislav Miko	Director, Directorate DG.ENV.B: Protecting the Natural Environment	European Commission
	Mr. George Kremlis	EU Implementation and Enforcement of Environmental Law (IMPEL) Network Coordinator	European Commission

	Ms. Ana Bobo-Remijn	Legal Coordinator	European Commission
	Mr. Durwood Zaelke	Director	INECE Secretariat
	Mr. Kenneth Markowitz	President, Earthpace LLC Consultant, IGSD/INECE	INECE Secretariat
	Mr. David Grossman	Staff Attorney	INECE Secretariat
	Ms. Melanie Nakagawa		INECE Secretariat
	Ms. Meredith Reeves	Senior Researcher, Earthpace LLC Consltant, IGSD/INECE	INECE Secretariat
	Mr. Scott Stone	Staff Attorney	INECE Secretariat
	Ms. Aesah Javier	Administrative Assistant	INECE Secretariat
	Ms. Linda Massapouts		INECE Secretariat
	Mr. Mike Frizzel		INECE Secretariat
	Mr. Matthew Stilwell		Institute for Governance & Sustainable Development (Geneva)
	Mr. Azzedine Downes	Vice President	International Fund for Animal Welfare
	Mr. Peter Pueschel	Head, Wildlife Trade Program	International Fund for Animal Welfare
	Dr. Rosalind Reeve	Consultant	International Fund for Animal Welfare
	Dr. Sheila Abed	Chair	IUCN Commission on Environmental Law
	Ms. Nawzat Ali	Member	IUCN Commission on Environmental Law
	Mr. Donald Kaniaru		Kaniaru & Kaniaru Advocates
	Mr. Sheng Shou Lang	Deputy Chief Officer	Multilateral Fund for the Montreal Protocol Secretariat
	Mr. Kenneth Ruffing	Deputy Director, Environment Directorate	Organisation for Economic Co-operation and Development
	Ms. Angela Bularga	Coordinator, NIS Environmental Compliance and Enforcement Network	Organisation for Economic Co-operation and Development
	Mr. Krzysztof Michalak	Administrator, Eastern Europe/Central Asia and China Programmes Non-Member Countries Division	Organisation for Economic Co-operation and Development

	Ms. Myriam Linster	Principal Administrator, Environment Directorate	Organisation for Economic Co-operation and Development
	Mr. Bakary Kante	Director, Division of Policy Development and Law	United Nations Environment Programme
	Dr. Gilbert Bankobeza	Legal Officer	United Nations Environment Programme Ozone Secretariat
	Mr. Carl Bruch	Legal Officer	United Nations Environment Programme
	Ms. Maria Christina Zucca	Associate Legal Officer	United Nations Environment Programme
	Mr. Jim Curlin	Information Manager, Division of Technology, Industry, and Economics	United Nations Environment Programme
	Mr. Alberto Ninio	Senior Counsel	World Bank
	Dr. Adriana Bianchi	Senior Policy and Development Specialist	World Bank Institute

MIDDLE EAST & NORTH AFRICA

Algeria	Ms. Zahia Ibersienne		Agence National Pour la Protection de l'Environment (ANPE)
Algeria	Mr. El Walid Boulekroune		Ministère de l'Amenagement du Territoire et de l'Environnement
Algeria	Mr. Athmane Zehar	Advisor	Ministery of Land Management and Environment
Algeria	Mr. Hocine Benyahia	Treasurer and Project Manager	National Federation for the Protection of the Environment
Bahrain	Mr. Jassim Ali Nasser	Environmental Inspector	Director, Environmental Assessment and Planning Directorate
Bahrain	Mr. Ebrahim Ali	Environmental Specialist, Director	Environmental Assessment and Planning Directorate
Israel	Mrs. Zohar Shkalim	Director	Ministry of the Environment
Israel	Dr. Bill Clark	International Liasion Officer	Nature and National Parks Protection Authority
Jordan	Mr. Ahmed Tarawneh	Police Officer	Jordan
Morocco	Mr. Hassan Chouaouta	Conseiller	Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)
Morocco	Mr. Axel Olearius	Junior Expert	Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)

Morocco	Dr. Peter Pluschke	Program Director	Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)
Morocco	Mr. Wolfgang Morbach	Program Director	Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)
Morocco	Mr. Nor El Yakine		Gendarmerie Royale
Morocco	Mr. Driss El Harrhouri		Gendarmerie Royale
Morocco	Mr. Mohamed Rida Derder	Special Consultant	INECE Secretariat
Morocco	Mr. Hassane Bendahmane	National Coordinator	L'Autoevaluation Nationale des Capacites a Renforcer en Matiere de l'Environnement (ANCRE)
Morocco	Ms. Dadouch Fouzia		Ministere de l'Interieur
Morocco	Mr. Mohamed Lididi	Secretary General	Ministry of Justice
Morocco	Ms. Naima Oumoussa		Ministry of Territory Planning, Water and Environment
Morocco	Mr. Mohamed Mehdi		Ministry of Territory Planning, Water and Environment
Morocco	Mr. Brahim Zyani	Director, Regulation and Control Division	Ministry of Territory Planning, Water and Environment
Morocco	Mr. Fouad Zyadi	Head, Monitoring and Conflict Division	Ministry of Territory Planning, Water and Environment
Morocco	Mr. Mohamed EL Yazghi	Minister	Ministry of Territory Planning, Water, and the Environment
Morocco	Mr. Abdallah Elyacoubi		Ministry of the Environment
Morocco	Mr. Mohamed Fdrissi		Ministry of the Interior
Morocco	Mr. El Hassan El Izary		Ministry of the Interior
Morocco	Ms. Ghizlane Legsai		Ministry of the Territory Planning, Water and Environment
Morocco	Mr. Jan Rinzema	Trade Secretary, Economic Section	Royal Netherlands Embassy
Saudi Arabia	Mr. Yousef Al-Wetaid	General Manager	National Comission for Wildlife Conservation and Development
Saudi Arabia	Mr. Mohammed Altoraif		National Comission for Wildlife Conservation and Development
Tunisia	Dr. Hedia Baccar	Consultant	International Fund for Animal Welfare
Tunisia	Mr. Abdelkader Baouendi	Expert on Environment	L'Audit Environmental

Tunisia	Mr. Mohamed Ben Hassine	Chief of Service	Ministere de l'Environnement et du Developpement Durable
Turkey	Ms. Ayse Karadeniz	Assistant Environmental Expert	Ministry of Environment and Forestry

NORTH AMERICA

Canada	Ms. Linda Duncan	Consultant on Environmental Law & Policy	
Canada	Mr. Pierre Lemieux	Director, Conservation and Protection - Enforcement	Department of Fisheries and Oceans
Canada	Mr. John Chouinard	Director, Conservation & Protection	Department of Fisheries and Oceans
Canada	Ms. Paula Caldwell St-Onge	Director General, National Programs Directorate	Environment Canada
Canada	Mr. Ryan Levitt	Enforcement Officer	Environment Canada
Canada	Mr. Rene Drolet	Director, Compliance Assurance	Environment Canada
Canada	Mr. Dave Pascoe	Manager, Emergencies and Enforcement Division	Environment Canada
Canada	Mr Renzo Benocci	Director, Pollution Enforcement	Environment Canada
Canada	Mr. Yvan Lafleur	Director, Wildlife Enforcement	Environment Canada
Canada	Mr. Paul Gavrel	Office of Enforcement	Environment Canada
Canada	Mr. Yves Corriveau	Legal Counsel	Environment Canada
Canada	Mr. Albert Koehl	Lawyer	Sierra Legal Defence Fund
United States	Mr. Doug Varchol	Environmental Film Maker	
United States	Mr. Noah Smith	Editor	BNA's International Environment Reporter
United States	Mr. Kenneth Cook	President	Environmental Working Group
United States	Ms. Anita Akella	Consultant	Flora International Environmental Consulting
United States	Ms. Deb Callahan	President	League of Conservation Voters
United States	Mr. Bradley Parks	Development Policy Officer	Millenium Challenge Corporation
United States	Mr. Peter Lehner	Chief, Environmental Protection Bureau	New York Attorney General's Office
United States	Mr. Lee Paddock	Director of Environmental Law Programs	Pace University
United States	Mr. Joe Kruger	Visiting Scholar	Resources for the Future
United States	Ms. Marcia Mulkey	Visiting Professor of Law	Temple University

United States	Mr. John Cruden	Deputy Assistant Attorney General, Environment and Natural Resources Division	U.S. Department of Justice
United States	Mr. David Uhlmann	Chief, Environmental Crimes Section	U.S. Department of Justice
United States	Ms. Susan Bromm	Director, Office of Site Remediation Enforcement	U.S. Environmental Protection Agency
United States	Mr. Bharat Mathur	Acting Regional Administrator, Region 5	U.S. Environmental Protection Agency
United States	Ms. Francesca DiCosmo	US EPA Region 3	U.S. Environmental Protection Agency
United States	Ms. Walker Smith	Director, Office of Civil Enforcement	U.S. Environmental Protection Agency
United States	Mr. Michael Stahl	Director, Office of Compliance	U.S. Environmental Protection Agency
United States	Mr. Peter Murtha	Director, Office of Criminal Enforcement, Forensics, and Training	U.S. Environmental Protection Agency
United States	Ms. Phyllis Harris	Principal Deputy Assistant Administrator, Office of Enforcement and Compliance	U.S. Environmental Protection Agency
United States	Mr. Davis Jones	Office of Enforcement & Compliance Assurance	U.S. Environmental Protection Agency
United States	Mr. Andrew Lauterback	Senior Criminal Enforcement Counsel	U.S. Environmental Protection Agency
United States	Mr. Barry Hill	Director, Office of Environmental Justice	U.S. Environmental Protection Agency
United States	Mr. Thomas Maslany		U.S. Environmental Protection Agency (Retired)
United States	Mr. Robert Heiss	Director, International Compliance Assurance Division	U.S. Environmental Protection Agency
United States	Mr. Joe Freedman	Office of General Counsel	U.S. Environmental Protection Agency
United States	Mr. Thomas Voltaggio	Deputy Regional Administrator, Region 3	U.S. Environmental Protection Agency
United States	Mr. Matthew Cooper		Environmental Media Consultant

WESTERN EUROPE

Austria	Ms. Waltraud Petek	Head of Department	Federal Ministry of Environment
Cyprus	Ms. Maryna Yanush	Vice Director	Ministry of Natural Resources and Environmental Protection of the Republic of Belarus

Finland	Mr. Markku Hietamaki	Environmental Counsellor, Department for Environmental Protection	Ministry of the Environment
Finland	Mr. Antero Honkasalo	Director, Department for Environmental Protection in Trade and Industry	Ministry of the Environment
Italy	Justice Amadeo Postiglione	President	International Court of the Environment Foundation (ICEF)
Liechtenstein	Dr. Felix Näscher	Director General, National Office of Forests, Nature and Landscape	Ministry of Environment
Malta	Ms. 'Makhiba Tjela	Principal Environment Officer (Legal)	Ministry of Tourism, Environment, and Culture
Norway	Mr. Poul Byskov	Senior Engineer	Norwegian Pollution Control Authority
Switzerland	Dr. Iwona Rummel-Bulska	Senior Legal Advisor	World Meteorological Organization
The Netherlands	Mr. G. H. J. Ranter		Gedeputeerde Staten van Overijssel
The Netherlands	Ms. Martine Meerburg	Inspector	Inspectorate of Housing, Spatial Planning and the Environment of the Ministry
The Netherlands	Mr. Gerard Wolters	Inspector General	Inspectorate of Housing, Spatial Planning and the Environment of the Ministry
The Netherlands	Dr. Henk Ruessink	Head of Department	Inspectorate of Housing, Spatial Planning and the Environment of the Ministry
The Netherlands	Mr. Jo Gerardu	Inspector for International Affairs	Inspectorate of Housing, Spatial Planning and the Environment of the Ministry
The Netherlands	Mrs. Dorine Hornung		Inspectorate of Housing, Spatial Planning and the Environment of the Ministry
The Netherlands	Mr. Wout Klein	Project Manager	Inspectorate of Housing, Spatial Planning and the Environment of the Ministry
The Netherlands	Mr. Fred Kok	Secretary	Landelijk Overleg Milieuhandhaving
The Netherlands	Mr. Arthur Roborgh		Ministry of Housing, Spatial Planning and the Environment (VROM)
The Netherlands	Mr. Theo de Gelder	Senior Inspector.	Netherlands Emission Authority

The Netherlands	Mr. Cees Jan Bloemendaal		Province of Overijssel
The Netherlands	Mr. Pieter Van Geel	State Secretary, Environnment	The Netherlands
United Kingdom	Sir John Harman	Chairman	Environment Agency (England and Wales)
United Kingdom	Mr. Martin Murray	Policy Manager	Environment Agency (England and Wales)
United Kingdom	Mr. Neil Davies		Environment Agency (England and Wales)
United Kingdom	Ms. Clare Twelvetrees	International Relations Advisor	Environment Agency (England and Wales)
United Kingdom	Mr. Terence Shears	EU and Int'l Relations Adviser	Environment Agency (England and Wales)
United Kingdom	Mr. Jim Gray	Head of Regulatory Development	Environment Agency (England and Wales)
United Kingdom	Ms. Sandy Rowden		Environment Agency (England and Wales)
United Kingdom	Mr. Chris Howes	Enforcement Policy Manager	Environment Agency (England and Wales)
United Kingdom	Mr. Kenneth Ledgerwood		Environment and Heritage Service
United Kingdom	Ms. Catherine Pearce	Coordinator, International Climate Change Programme	Friends of the Earth
United Kingdom	Mr. Dave Gorman	Better Regulation Manager	Scottish Environment Protection Agency

PROJECT MANAGEMENT AND CONFERENCE SUPPORT

Durwood Zaelke
Director
INECE Secretariat
2141 Wisconsin Ave NW Suite D2
Washington DC 20007
phone: 202.338.1300
fax: 202.338.1810
email: dzaelke@inece.org

Jo Gerardu
Inspectorate of Housing, Spatial Planning and the Environment
VI/AL IPC 500, P.O. Box 16191
2500 BD The Hague, Netherlands
phone: +31-70-3392536
fax: +31-70-3391985
email: jo.gerardu@minvrom.nl

Dave Grossman
Staff Attorney
INECE Secretariat
email: dgrossman@inece.org

Aesah Javier
Administrative Assistant
INECE Secretariat
email: ajavier@inece.org

Davis Jones
US Environmental Protection Agency
Mail Code: 2254A
1200 Pennsylvania Ave NW
Washington DC 20460
phone: 202.564.6035
fax: 202.564.0073
email: jones.davis@epa.gov

Scott Stone
Staff Attorney
INECE Secretariat
email: sstone@inece.org

CONSULTANTS

Kenneth Markowitz
President
Earthpace LLC
2141 Wisconsin Ave NW Suite D2
Washington DC 20007
phone: 202.338.4400
fax: 202.338.4401
email: kjm@earthpace.com

Marcy Markowitz
Chief Executive Officer
Earthpace LLC
email: mjm@earthpace.com

Meredith Reeves
Senior Research Associate
Earthpace LLC
email: mreeves@earthpace.com

Mohamed Rida Derder
Special Consultant for North Africa
INECE Secretariat
email: ridaderder@juno.com

Linda Massopust
INECE Secretariat
email: inece@inece.org

Mike Frizzell
INECE Secretariat
email: inece@inece.org

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