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Improving National Enforcement for Better Governance Implementing Multilateral Environmental Agreements

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**IMPROVING NATIONAL ENFORCEMENT FOR
BETTER GOVERNANCE IMPLEMENTING
MULTILATERAL ENVIRONMENTAL AGREEMENTS**

*Recommendations for Meeting of Experts Called by the Division of Environmental
Conventions of the United Nations Environment Programme
Sri Lanka, January 21 – 22, 2006*

*Presented at the International Law Students Association Fall Conference
University of Denver Sturm College of Law
October 11 – 13, 2007*

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On the topic of improving national enforcement as a key tool to better governance under multilateral environmental agreements (MEAs), I have the honor to offer this short paper of recommendations. The views expressed here are entirely my own and do not represent those of United States Environmental Protection Agency (USEPA) or the U.S. Government. While I regret that I am unable to attend the meeting, I hope that this paper will contribute to useful discussion and outcomes.

Here I address “enforcement” by national governments applying national law against regulated enterprises (including “persons” of any type) to achieve compliance with national law to implement MEA obligations. More specifically, I recommend steps by which (1) Conferences of the Parties (COPs) to MEAs and (2) MEA Secretariats may support and strengthen “enforcement” by national governments to this end. (I do not address related topics such as assuring

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“compliance” by national governments with their MEA obligations, the role of the WTO, international law, or trade measures.)

In what follows, sections I-III describe structural and institutional measures to enable MEAs to better support national enforcement. In addition, for the topic of import/export control, section IV offers a number of solutions addressing mostly systems, process, and operations.

I. ESTABLISH AN ENFORCEMENT COMMITTEE OF THE PARTIES

If the Parties to a MEA have the vision or goal that as national governments they want more MEA enforcement, the Parties should form an Enforcement Committee of the Parties. National representatives to Enforcement Committees of the Parties should be persons who have had hands-on, on-duty enforcement experience. This means that their expertise and identities should not or will not be the same as that of:

- The high-level policy makers who are the National Focal Points for MEAs,
- Persons who serve on chemical-selection, wildlife-listing, and other such committees where scientific research, environmental monitoring, and standard setting are done, or
- Persons, often with diplomatic or trade expertise, who serve on Compliance Committees and address on a state-to-state basis questions of national compliance and the application of MEA compliance-assurance mechanisms to other nations.

While an Implementation Committee of the Parties may address enforcement, “implementation” is a very broad word, and Implementation Committees have not produced sufficient progress in enforcement. The most undiluted, immediate, and effective enforcement results will be obtained by forming Enforcement Committees of the Parties.

II. HIRE MORE STAFF WITH ENFORCEMENT EXPERIENCE

If the secretariat of a MEA has the vision or goal that, as an international civil servant, he or she wants to support more MEA enforcement, hire staff with the relevant experience. Such personnel would not enforce. They would credibly interact with and support national authorities actually doing the enforcement. MEA secretariats staffed with more enforcement experience should proactively propose and (within their authority) take supportive actions, and raise issues of enforcement policy for decisions by Enforcement Committees of the Parties and by COPs.

III. DESIGNATE AND EMPOWER ONE UNIT OF UNEP TO BE THE COORDINATING LEAD INTERNATIONAL AGENCY FOR SUPPORT TO NATIONAL ENFORCEMENT

If the United Nations (UN) system and the COPs of the MEAs have the vision or the goal that MEA enforcement should be more synergized, collectively designate one unit of UNEP to be the coordinating lead agency for cross-cutting enforcement issues affecting all or many MEAs. The unit that is “UNEP Lead for

MEA Enforcement Support” will need some new (but limited) powers and duties, including:

- Institutional responsibility for ongoing work to address and offer synergistic solutions to improve national enforcement and international cooperation supporting it for MEAs,”
- Authority to convene and to present for consideration new, systematic approaches, and some new means to encourage integration as may be needed among currently quite autonomous individual MEA secretariats, and
- Representational authority to meet regularly with InterPol, the World Customs Organization (WCO), the U.N. Centre for Trade Facilitation and Electronic Business (CEFACT), and other public (and non-governmental, as appropriate) international organizations, to coordinate on behalf of all MEA secretariats on cross-cutting issues.

IV. SOLUTIONS TO ILLEGAL INTERNATIONAL TRADE

The remaining solutions are focused on import/export control (I do not address the many aspects of national enforcement that are domestic or internal). To combat international trafficking that undercuts MEAs, there is enormous potential for improved measures that are simple and effective. An ultimate goal should be comprehensive data management with automated inter-ministerial data linkages to assure real-time approvals and interdictions. Where today national regulatory action is failing, it can become quick and accurate.

For constructive change to occur, directors of MEA secretariats and concerned Parties should provide more vision and leadership. First, develop a comprehensive vision of the prerequisites needed to enable effective *national* enforcement – such as a more uniform and integrated *international* system and the other steps or solutions offered in this paper – and a vision of what constitutes effective national enforcement (some indicators or measures of enforcement success). Second, establish more leadership to implement the steps to the vision—leadership to cause steady, regular action on solutions offered in this paper. Implementation of the following solutions usually would follow the same process,

1. Propose to all Parties,
2. Pilot among willing Parties, and
3. Prescribe by decisions of COPs that successful measures become treaty obligations.

A. Designate and Empower One Unit among each Nation’s MEA Focal Points to be “National Lead for MEA Enforcement Coordination”

MEA secretariats individually and the “UNEP Lead for MEA Enforcement Support” should encourage each Party to designate one unit among the MEA Focal Points of a national government to be the lead agency for coordinating with the national customs ministry on common (or “cross-cutting”) enforcement issues affecting all or many of the MEAs to which the nation is a Party. The Party’s unit

that is "National Lead for MEA Enforcement Coordination" will be responsible at the national level for moving toward integration and uniformity, to reduce the fragmentation and confusion within and among national ministries that multiple MEA Focal Points have created for customs officers.

Below the level of MEA Focal Points, in most countries the operational national programs for approving and monitoring international trade are complex, varied, and dispersed among and within ministries. It is essential that these national programs organize themselves both to streamline operations and present one window to front-line customs officers who need to know where to request quick environmental assistance to implement MEAs at borders. National ministries that are responsible for MEAs yet unable or unwilling to reform may need a presidential order or legislation.

B. Link each Nation's Customs Ministry with the Nation's Environmental (and other MEA Focal-Point) Ministries

MEA secretariats should suggest to or encourage Parties to focus on linking customs ministries with environmental (and other MEA Focal-Point) ministries in each Party nation. For example, to integrate and channel all trade-data communications in the U.S., Customs and Border Protection and each U.S. national ministry wanting its help for trade control must create what is called the "single-window." This data linkage will be a good foundation to enable full-scope cooperation in all aspects of the inter-ministerial working relationship.

For delivery to each "National Lead for MEA Enforcement Coordination" of a Party, the UNEP unit that is the "UNEP Lead for MEA Enforcement Support" should develop a Model National Inter-Ministerial MEA Cooperation Agreement. This document would provide a framework and offer generic details of effective intra-governmental, domestic working relationships. Within any Party, its "National Lead for MEA Enforcement Coordination" would negotiate such an agreement with the national customs ministry. Such agreements should make arrangements for routine inter-ministerial information sharing, and should organize these diverse ministries around the shared goals of permitting and tracking (i.e., monitoring compliance of) international shipments effectively (with speed and accuracy).

Arrangements for inter-ministerial information sharing must be appropriate to the state of development of any Party. A Model National Inter-Ministerial MEA Cooperation Agreement should arrange for information to move by paper and fax. As for Parties to an MEA (at least those that are advanced countries) that have the vision or goal to use computers to achieve speed and accuracy in permitting and tracking of international shipments, a Model National Inter-Ministerial MEA Cooperation Agreement will establish the means for comprehensive data management with automated inter-ministerial data linkages to assure real-time approvals and interdictions.

C. Require Product-Specific Codes so that Modern Methods Including Computers can be Used

If the Parties to an MEA have the vision or goal that modern methods including computers should be usable to achieve speed and accuracy in permitting

and tracking of international shipments, with the assistance of MEA secretariats, Parties should move to develop and, by decisions of the COPs, to require as MEA obligations that Parties use chemical-specific and other-product-specific codes. In addition, codes should be explored and as soon as feasible required both for business entities and “persons” of any type, and for physical plants or facilities subject to regulation to implement MEAs.

As the WCO’s HTS codes often are too broad or general to assure accurate compliance monitoring, they can be supplemented by more detailed codes sometimes called “qualifiers”. For example, for chemicals the required coding could well be the HTS code hyphenated to the CAS code. The WCO may facilitate and accommodate such product-specific qualifiers, but it is not likely to require them for environmental (non-customs) purposes. This is likely to be the responsibility of MEAs. Achieving this overdue measure is a prerequisite to using computers to manage MEA data needed for national approvals and interdictions.

D. Propose/Pilot/Prescribe More Standardized Licensing Schemes and Movement Documents

Within MEA secretariats, design and propose to the Parties systematic approaches to compliance monitoring for imports and exports. Presently, most MEAs allow and (where lacking detailed models or standards) do little to discourage a plethora of discordant national approaches. The burden on customs officers to comprehend and recognize MEA requirements and covered trade is too great. As examples:

- Even where licensing is required as a treaty obligation, the details of any scheme may be whatever a nation imagines – or fails to imagine properly.
- It is worse for shipping documents. For example, a customs officer, instead of just one or perhaps 5 or 10 movement-documents formats, may be faced with hundreds or a thousand or more (e.g., 5 MEAs X 200 countries = 1,000 different movement documents).

To customs officers, MEAs may be analogized to satellites in space. Both seem unreal – impossibly remote, mysterious, and disconnected. Let us compare to MEA secretariats the operators of television satellites in relation to their customers, television owners wanting satellite programming. Like front-line customs posts, individual television sets will fail to operate without having essential and highly complex connections that their individual operators can scarcely imagine or create for themselves. For this reason, satellite signal providers carefully design and offer one system with the best means to make all linkages (see para. IV(B) above on linkages), including dishes and cables all properly coded (see para. IV(C) above on codes) to connect with end users.

Customs officers should enjoy an MEA system presenting a comprehensible uniformity and connectedness from top to bottom, from MEA secretariat to customs post. An MEA compliance-monitoring system would include an international model or standardized (1) notification/application form, (2) licensing/approval process, and (3) accompanying documentation form. In addition to a paper process, there would be a parallel paperless process available

for advanced countries. The result of good MEA systems design for any customs officer also could be a seamless “plug-in-and-play” experience, almost as ordinary and simple as switching on a television properly connected to a satellite!

The system of passports (for humans exporting and importing themselves) also is ordinary, routine, and unremarkable. It is a useful vision for what may be achieved for shipments controlled by MEAs. For human travelers, Parties have agreed to prescribe national passports that are highly standardized. Customs officers instantly recognize human passports, and – because of their commonality and compatibility—they know exactly what they mean and how to read them. The shipment (a human) is recognized by two unique identifiers (the individual’s picture and file number or code), and for immediate verification usually there is an automated inter-ministerial data linkage (a bar code) by which the customs officer can check instantly with the approving ministry. At national option, visas can be required to document prior informed consent to import a traveler.

For chemicals and other products, MEA secretariats could well move to offer more detailed legal elements and programs for national compliance monitoring for imports and exports, both for notification/approval/licensing schemes and for movement documents. At least for electronic messaging, CEFACCT provides an existing forum bringing together industry (see para. IV(G) below), customs, and environmental professionals. This work is similar to and may encompass standardization for MEA import/export messaging processes. The “UNEP Lead for MEA Enforcement Support” (see para. III above) could well join in the CEFACCT work. As models or proposed standards are developed for MEAs, during any piloting or testing phase, Parties may chose to take up (plug in to) a proposed model or standard. As these are refined and proven successful in testing, COPs should convert them to become required elements of national law within increasingly standardized international systems. As Parties adopt international standards, they would reduce the confusion of discordant national schemes.

As with human passports and CEFACCT, for chemicals (and other products regulated by MEAs) the purpose of adopting an international system for compliance monitoring would not be to diminish but to bolster national sovereignty to deal with violations. These occur mostly in international travel and trade between nations, when only briefly may violators (whether human passengers or chemicals) be within the grasp of a nation’s jurisdiction. Good systems design will enable any nation – during the moment when a violator is present at the national port or border – to enforce effectively. More international standardization will not mean supra-national “world government.” It will mean that MEA secretariats and leading Parties will have done more to enable all Parties to fulfill their treaty obligations to effective national enforcement.

E. Develop an Intelligence Capability to Anticipate Illegality and Assess Threats

The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) failed to anticipate illegality, assess threats, and foresee that its implementation would give rise to black markets and rampant smuggling by organized and entrepreneurial criminals. This failure now should not be repeated.

For example, while probably there will be little trade for most chemicals covered by the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), for this and the Rotterdam Convention, each chemical and its market should be studied. Analysts first would look domestically or internally for black markets. If a black market is found, the analysis would extend to possible foreign sources and users. If there are any, this finding would implicate international trade. Some seaports or transit nations that are suspected smuggling *entrepots* should be studied and be the subjects of intelligence threat assessments. This work could be undertaken by key Parties on behalf of all, or perhaps by the unit of UNEP designated to be the coordinating lead agency for cross-cutting enforcement issues.

The resulting MEA risk assessments and inspection targeting criteria will be welcomed by customs ministries. With this information, they will be able to expedite apparently legitimate trade and have a rational basis for focusing their scarce inspectional resources only on shipments most deserving close scrutiny. For customs ministries, success will be finding more environmental violators by better applying front-line resources that are not increasing.

F. Require that Criminal Penalties be Available

If the Parties to a MEA want to maximize deterrence (“voluntary” compliance) and (where there are serious violations) to interest prosecutors and judges, they should enact explicit *criminal* penalties, including prison time. (It is not enough to use “illegal,” a word that at least includes minor infractions but does not necessarily extend to what is “criminal.”) The most serious punishments are appropriate for many import/export violations, where usually there will be criminal intent and culpability, for several reasons:

- Persons involved will have great sophistication (knowledge) to be in the business of shipping in commercial quantities internationally,
- Groups of smugglers often are organized as criminal enterprises,
- The large risk of harm and therefore wrongfulness, such as contributing to species extinction, or mishandling of chemicals globally recognized as most environmentally hazardous, it is or should be obvious to persons involved, and
- The illegality of the conduct is known and intended, as proven by evasive or clandestine behavior.

COPs should require as an MEA obligation that national law provide available criminal penalties for appropriate cases.

To maintain balance, MEA secretariats and Parties should not speak only of concern for investigating illegal trafficking and crime fighting. Of equal concern should be promoting and monitoring compliance for all shipments, and for expediting clearance of the majority of shipments that are legitimate. Front-line, uniformed customs inspectors first must be enabled to succeed (in the routine compliance monitoring and detection of suspect shipments) before there will be many cases for law-enforcement officers who are criminal investigators. For

routine infractions that do not rise to criminality, Parties should be encouraged to provide administrative processes and penalties.

G. Engage Legitimate Industry as Partners

Here and in other import-export measures, when designing national regulatory programs, MEA secretariats and Parties should engage legitimate industry (*e.g.*, trade associations of importers and exporters). The leading stakeholders will:

- Know much (have useful intelligence) about their unlawful competitors who are undercutting the stakeholders' legitimate businesses,
- Use modern methods, including computers [available] commercially, to achieve speed and accuracy in tracking of their international shipments,
- Understand and apply systems design to their production and transportation processes,
- Engage in international standardization efforts and organizations, and
- Cooperate with governments to combat illegal enterprises and to assist governments to develop information technology systems to achieve on-line (computerized) notifications, applications, and tracking of international shipments.

For example, to support the implementation of the Montreal Protocol by the U.S. government in the enforcement of the U.S. Clean Air Act, the private sector provided key assistance including intelligence and sampling equipment. The result was the detection and criminal conviction of many smugglers of ozone-depleting substances. This fruitful collaboration can be repeated. With outreach to private stakeholders, secretariats and national governments can join with legitimate industry to achieve as shared goals expedited clearance of proper shipments and real-time detection and investigation of suspect shipments.

V. CONCLUSION

In conclusion, this paper has described solutions by which MEA secretariats and concerned Parties may support and strengthen "enforcement" by national governments. Paragraphs I III described U.N. structural and institutional measures to this end. For the key *international* topic import/export control, this paper offered a vision of a more integrated system. To realize the improvements described, MEA secretariats and concerned Parties should exercise more leadership in a regular course of action to:

1. *Propose* models and possible standards to all Parties,
2. *Pilot* these measures among willing Parties, and
3. *Prescribe* by decisions of COPs that successful measures become international standards and MEA (treaty) obligations.