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### Gaps in the Implementation of Environmental Law at the National, Regional and Global Level

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# Gaps in the Implementation of Environmental Law at the National, Regional and Global Level

## Abstract

Networked integrated and adaptive approaches to implementation and compliance may be the signature of the emerging generation of environmental law.

The first generation of environmental law saw the creation of specialist environmental administrations and the introduction of a suite of laws for them to administer on environmental impact assessment, pollution control, wilderness conservation and threatened species conservation. This was the generation of the 1972 Stockholm Conference on the Human Environment.

The second generation of environmental law saw a shift in focus to sustainable development, reflecting the increased participation of developing countries in international diplomatic initiatives on the environment. It signified attention to its ecosystemic problems, such as climate, biodiversity, and desertification, and to international trade of harmful substances into developing countries, such as chemicals and hazardous waste. This was the generation of the 1992 Rio Conference on Environment and Development.

## Keywords

global, regional, national, level, law, gaps, environmental, implementation

## Disciplines

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# Gaps in the Implementation of Environmental Law at the National, Regional and Global Level<sup>1</sup>

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<sup>1</sup> The paper reflects the views of the author and not the views of the United Nations Environment Programme or the co-sponsors to the World Congress

## Executive Summary

Networked integrated and adaptive approaches to implementation and compliance may be the signature of the emerging generation of environmental law.

The first generation of environmental law saw the creation of specialist environmental administrations and the introduction of a suite of laws for them to administer on environmental impact assessment, pollution control, wilderness conservation and threatened species conservation. This was the generation of the 1972 Stockholm Conference on the Human Environment.

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The objectives established around these two global milestones in environmental protection are still in the process of implementation. The last 40 years has seen an impressive number of agreements and undertakings that many, if not most, countries have signed up to and have committed to implementing nationally. There are many challenges and gaps in implementation that remain and a growing gap between ambition and action on the ground. While these commitments remain the responsibility of the sovereign nations, there is the question of how the international system can assist countries to address what has become known as the 'implementation gap'.

This paper suggests that improved integration and networking, within governments, between governments and with economic and community institutions outside governments, in particular, with business and with environmental non-governmental organisations, offers a way forward for the current generation of environmental law. In a globalised, networked world, smarter regulation requires co-administration with partners across government and beyond. This approach also offers more comprehensive coverage of environmental challenges, as closer partnerships across a wider range of networks collaborating for compliance will enable more implementation opportunities to be taken up successfully. It also presents opportunities to consult and reflect on the successes and failures in implementation so as to revise existing approaches through adaptive management. Its examination of how implementation can be improved upon through international co-operation and assistance, and of the links between implementation, compliance and enforcement, yields a series of suggestions for consideration.

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## Abbreviations

Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989
Biosafety Protocol	Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 5 June 1992, 2000
CBD	Convention on Biological Diversity 1992
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
CMS	Convention on the Conservation of Migratory Species of Wild Animals 1979
COP	Conference of Parties
EIA	Environmental Investigation Agency
GEF	Global Environment Facility
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997
MARPOL	International Convention for the Prevention of Pollution from Ships 1973
MEA	Multilateral Environmental Agreement
Montreal Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer 1987
MOP	Meeting of Parties
MOU	Memorandum of Understanding
NCP	Non-Compliance Procedure
ODS	Ozone Depleting Substances
PIC	Prior Informed Consent
PIC Convention	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998
POPs	Persistent Organic Pollutants
POPs Convention	Stockholm Convention on Persistent Organic Pollutants 2001
Ramsar Convention	Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971
TRAFFIC	Trade Records Analysis of Flora and Fauna in International Commerce
UNCCD	United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa 1994
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention of the Law of the Sea 1982
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change 1992
UNODC	United Nations Office on Drugs and Crime
Vienna Convention	Vienna Convention for the Protection of the Ozone Layer 1985
WCMC	World Conservation Monitoring Centre
WCO	World Customs Organisation Organisation
World Heritage Convention	Convention for the Protection of World Cultural and Natural Heritage 1972
WWF	World Wildlife Fund

## 1. Implementation Progress and Gaps

Environmental agreements articulate international approaches to address environmental challenges. There are estimated to be over 700 different international environmental agreements, at bilateral, regional and multilateral levels. As environmental treaties proliferate, so do the challenges of implementing them. Most importantly, many national administrations, especially in developing economies, lack the capacity necessary to effectively implement. 'Implementation' in this legal context refers to all relevant laws, regulations, policies, and other measures and initiatives, adopted or taken to meet obligations under an environmental agreement. (UNEP Guidelines Part I)).

### Institutions

The 1992 Rio Declaration on Environment and Development and Agenda 21 emphasised the need to develop endogenous capacity in the legal and institutional areas, which is critical for sustainable development. In the past two decades, developing countries have taken remarkable steps towards developing sustainable legal institutional frameworks for improved environmental management. A multitude of legislative and institutional building activities resulted in the creation of ministries of environment and their executing arms and the enactment of a new generation of legislation. Consequently, almost every country now has a ministry or agency empowered to implement a wide range of activities for the protection of the environment, conservation and sustainable use of natural resources.

Environmental ministries are usually established at Cabinet level and are responsible for implementing the frameworks for environmental laws and for formulating environmental policies. Environmental agencies have also been set up at some provincial levels to assist in the implementation of national strategies and to improve the assessment and monitoring of resource use. Municipalities and local councils provide assistance in the execution of national environmental policies, as well as by initiating their own resource protection measures.

Some other ministries have incorporated environmental concerns into their economic decision-making process through multi-year Plans. Often there are specific environmental sub-sections within a planning ministry. These provide environmental inputs into the national plan following organised consultations with working groups from other sectoral ministries, including the environment ministry, as well as experts.

The past failure of development planning processes to take adequate account of the detrimental impacts of economic development activities, led to the advent of environmental impact assessment (EIA) processes. The purpose of these processes is to provide information to decision makers and the public about the environmental implications of proposed actions before decisions are made. EIA was first employed by industrialised countries in the early 1970s. Since that time, most countries have adopted EIA processes to examine the social and environmental consequences of projects prior to their execution.

The environment minister may also oversee an executive agency, such as a statutory organisation that monitors the activities of the other institutions and sectors that impact on the natural environment. These departments or agencies are typically responsible for standard setting. In addition, they have the crucial function of coordinating and controlling environment pollution



through the issuing of licenses and control orders, carrying out environmental inspections, monitoring verification and data collection and analysis as well as a public complaints and dispute settlement schemes.

Initially, environment ministries and agencies were viewed with apprehension and suspected of usurping the traditional functions of other line ministries and agencies. Centuries old administrative culture founded on the unchallenged authority of “line-ministries”, created difficult challenges for the attempted implementation of an over-arching and cross-sectoral institutional approach. This atmosphere of distrust made interaction and partnership difficult and led to the proliferation of environmental cells in various other ministries and agencies. These problems are sometimes exacerbated by ambiguous demarcation of overlapping powers and functions, dispersed competencies and procedural complexity. In federal systems of government, these challenges and complexities are exacerbated by the constitutional separation of legislative and executive powers.

National apex advisory institutions to integrate environment and development have in practice been largely inactive, sometimes meeting very infrequently. Perhaps the reasons for not activating these consultative agencies lies in their size and constitution of these bodies, and in financial constraints, as well as the readily available use of the alternative and more informal consultative mechanisms.

The most successful measures taken have strengthened the synergy and coordination among various institutions for promoting a coherent and holistic approach to the management of the environment. There has been a continuing drive towards consolidation of the institutional structure, both conceptually and functionally, from the management of sectoral uses of the environment to the management and protection of environment in its own right. Central to the responsibilities of such agencies is an underlying concern to promote the integration of environmental considerations in development decision making. The legal system, and particularly the judiciary, has been a crucial partner in this process.

### Legislation

The need to integrate environmental considerations into national socio-economic planning is now widely recognised. It has the capacity to minimise potential environmental damage or even prevent the occurrence of environmental problems at the preliminary stage of project formulation. The EIA process has become the most common tool in guiding policy choices and has helped to create an environmental awareness amongst agencies involved in project implementation.

The need to ensure consultation and active partnership among interested governmental institutions is imperative, as many bodies have relevant expertise and practical experience to contribute to the EIA process. A critical issue for EIA development is consistency in application, which can only be obtained through centralised management, decentralised implementation and access to independent expertise. Although good progress has been made in the development of legislative regimes, the actual implementation of these provisions remains problematic. Unfortunately, reviews of large development projects have sometimes been poorly implemented and even subject to considerable corruption in some countries.

Environmental quality and anti-pollution regulations remain the most widely utilised legislative technique for pollution control, though several new approaches are evident in contemporary State practice. These laws have a wide ranging scope, as they typically canvass issues related to air quality,

water, marine pollution, solid waste disposal and toxic materials management. Furthermore, this legislation establishes quality criteria, defines pollutants, sets permissible limits and regulates the suitability and effectiveness of compliance and enforcement methods. One of the most widely utilised techniques for environmental control is the system of authorisation (by permit, certification, licence) administered by government institutions.

Resource conservation legislation incorporates a wide range of environmental management concerns, including water resources protection and conservation, forest laws, marine resources management, land use management, preservation of natural habitats and conservation of heritage. In forested countries, the management of forests and forest resources has been given considerable priority. Most countries have enacted laws specific to these issues and introduced innovations to make their enforcement more effective. However, existing defects in legislation make the administration of conflicting demands on resources difficult to manage.

Framework environmental laws are enacted to address the cross-sectoral spectrum of environmental issues. This “umbrella” approach establishes the basic legal principles without detailed codification. It entails the declaration of environmental objectives and policies, the establishment of the necessary and relevant environmental institutions, and the definition of the common procedural principles for environmental decision-making applicable to all sectors. In this latter respect, the legislation often covers such cross-sectoral issues as environmental impact assessment, environmental quality criteria and public participation in decision-making and implementation. The implementation of its principles inevitably requires further enabling legislation. The basic framework can remain intact while the implementing legislation is reformulated in response to changes in socio-economic and ecological factors.

Framework legislation can serve to implement MEA obligations in a co-ordinated and cohesive way. To allow for the necessary flexibility, it usually specifies the principal concepts, obligations, rights and duties in regard to each Convention and leaves the detailed institutional arrangements to be specified in regulations. However, at the national level, there is still a need for better scientific assessment of the ecological linkages between the conventions, identification of programs that have multiple benefits and enhanced public awareness raising for the conventions.

### **Enforcement**

A State implements an international norm at the domestic level in three phases: first, by adopting national legal measures; second, by enforcing them; and third, by reporting on the implementation measures. National legal measures might include enacting legislation, formulating policies or administering resources.

The domestic implementation measures adopted need to be appropriate for the purpose of meeting obligations under the international treaty, so as to achieve ‘compliance’ with treaty obligations. The mere fact that an implementation measure is taken does not mean that it is adequate to meet a treaty obligation nor that the State is necessarily compliant with its obligation.

The term 'compliance' is part of a range of terminology used to describe patterns of conformity with legal norms. Compliance is defined here as 'the fulfilment by the contracting Parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement'. However, it should be observed that compliance is not an ‘all or

nothing' game. The fact that a Party is not fully compliant does not mean that it is fully non-compliant. Despite the binary nature of the language used, compliance occurs across a scale of shades of grey.

Enforcement is 'the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organisations or persons, potentially failing to comply with environmental laws or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and/or punished through civil administrative or criminal action'.

Environmental treaties often articulate specific obligations that are negotiated without a clear plan for their national implementation, due to the difficulty of making concrete assessments of the financial, human, technical and social requirements of implementation. Therefore, the anticipated requirements for national implementation by a particular country might be only loosely approximated at the time of negotiation. Some agreements may even seem to be aspirational or educative, lacking in specific commitments or ways of forming concrete assessments of the requirements for their practical implementability.

Novel approaches to promoting public participation in implementation include the defining of "citizen rights" to enforce legislation, particularly where public agencies otherwise lack accountability. Access to justice has been largely facilitated by providing wider standing for aggrieved parties to seek redress and the expansion of substantive and procedural opportunities for public interest inputs.

The judiciary has, in recent years, enhanced enforcement efforts by governments to implement environmental laws. It plays a crucial role by interpreting legislation relating to environmental issues, integrating emerging principles of law within the holistic paradigms of sustainable development, providing a coherent and comprehensive strategy for integrating diverse sectoral laws into a cross-sectoral approach and for ensuring effective implementation of legislation. This extensive scope of influence has been extended in recent years, as the judiciary articulates fundamental rights to a satisfactory environment. Some supreme courts have broadly interpreted elements contained in their constitutions to entrench the rights of the public to a healthy and protected environment. In some states, courts have given consideration to the concept of inter-generational and intra-generational equity and have applied the public trust doctrine in regard to the management of natural resources and the environment. The responsibility and liability of the industry has also been emphasised by the judicial support for the polluter pays principle. Further, the public's access to information in regard to the functioning of the Government, founded on the and the right to know and of free speech, and the public's access to the courts for the purpose of environmental litigation, have been considerably enhanced. Some jurisdictions have established specialist courts and tribunals to hear environmental matters.

### Coordination

An additional layer of complexity for implementation results from duplication or overlap in environmental treaty obligations, requiring coordination between those responsible to promote efficiency and avoid waste across implementation efforts. Competition for prominence and funding between bureaucratic administrations can inhibit cooperation between administrative them, resulting in suboptimal outcomes.

Effective enforcement of environmental legislation is contingent upon the availability of adequate staff and financial resources, the administrative and political will of the enforcement agencies and the level of awareness of environmental laws. It is common, however, to find situations where responsibility for enforcement of laws is divided amongst a number of government agencies that pursue conflicting interests, thereby delaying or forestalling the implementation of these laws.

The sectoral approach to environmental management has had the effect of diffusing power and responsibility across diverse government departments (and in certain cases, local authorities) without any mechanisms for coordination. Jurisdictional overlaps and conflicts have inevitably arisen, inhibiting not only the effective implementation of sustainable development policies, but also law enforcement. These major practical problems result from the difficulties in establishing an effective system of control and mechanisms to enforce the law.

## **2. What Can the International System Do to Assist MEA Implementation?**

The international system here refers to the complex of United Nations bodies at the global and regional levels. At the global level, this includes United Nations charter bodies, specialized agencies, programs and environmental treaty bodies, while at the regional level, it includes United Nations regional economic commissions, regional environmental programs and regional environmental treaty bodies.

Opportunities within this international system to assist implementation of environmental laws can be taken up at the global or regional levels, as appropriate according to the environmental, political, economic and social circumstances applicable in each particular case. Fundamentally, there are two ways in which the international system can assist implementation of environmental agreements. Opportunities for the international system to assist in the implementation of environmental treaties arise through enabling it to coordinate implementation and by its facilitating international cooperation to build national capacity. These are the paths of coordination and of cooperation.

### **Coordination**

International coordination requires the aligning of efforts to implement environmental treaties so that they work together in harmony, achieving optimal results, and avoiding conflict take approaches, duplication and wasted effort. Coordination occurs at the international level and requires consultation between bodies with international legal personality. These parties liaise with each other and choose to reorganize their internal affairs so as to optimize their efforts to achieve common goals.

### **Cooperation**

International cooperation, in contrast, involves the provision of assistance by one party to another. The party with a greater capability to implement an environmental agreement provides financial support, access to its technical information and expertise and specialist services to facilitate an improvement in the capacity of a less capable party. Thus, the international system can assist national governments to implement environmental laws by capacity building in developing countries.

## **UNEP Role in Implementation Coordination and Cooperation**

Among United Nations system organizations, UNEP has traditionally had a catalytic role in initiating the development of new international environmental norms, by negotiation of new multilateral environmental agreements (MEAs). The organisation's mandate and demonstrated international leadership in environmental law places it strategically to spearhead international efforts also to improve coordination and cooperation in the implementation of environmental law.

### **Montevideo Environmental Law Programs**

In the legal sphere, priorities for the implementation of environmental law have been periodically elaborated by UNEP within its sequential 10 year plans of action entitled the Montevideo Programs for the Development and Periodic Review of Environmental Law. The first Montevideo program was initiated as a long-term, strategic guidance plan for UNEP in the field of environmental law and was adopted by the UNEP Governing Council in 1982. It outlined a program of activities in regard to the conclusion of international agreements and the development of international principles, guidelines and standards. The second program (Montevideo II) was adopted in 1993 and was based upon the requirements outlined in Agenda 21, as adopted at the United Nations Conference on Environment and Development in 1992. The third program (Montevideo III), adopted in 2001, comprised 20 components organized under three major themes: effectiveness of environmental law; conservation and management; and relationship with other fields. Montevideo IV, adopted in 2009, carries forward the third program, now organized under four major themes: effectiveness of environmental law; conservation and management; new challenges; and relationship with other fields. The addition of new challenges incorporated issues flowing from the Millennium Ecosystem Assessment process, such as poverty, drinking water and sanitation needs.

Overall, the main focus of the Montevideo programs has become implementation of environmental laws, as is evident in the themes on effectiveness and on relationships with other legal fields. Under the effectiveness theme, the 10 areas listed for action are:

- (1) implementation, compliance and enforcement of environmental law;
- (2) capacity building to develop and implement environmental law in developing economies;
- (3) prevention, mitigation and compensation of environmental damage;
- (4) avoidance and settlement of international disputes relating to the environment;
- (5) strengthening and development of international environmental law;
- (6) harmonization, coordination and synergies between environmental institutions;
- (7) public participation in environmental decision-making and access to information;
- (8) use of information technology in decision-making to enhance its content and effectiveness;
- (9) other innovative approaches to increase the effectiveness of environmental law; and
- (10) governance structures to optimize processes and practices at international and national levels.

The approach adopted in the Montevideo programs is comprehensive. However, actions taken under it necessarily reflect the priorities of the actioning institutions and of the particular donors providing project funding.

### **Division on Environmental Law and Conventions**

Within its internal institutional arrangements, UNEP has demonstrated a shift in focus, particularly during the first decade of the 21st century, from formulating new international environmental law to also strengthening implementation of environmental law. Its Division on Environmental Law and Conventions (DELIC) is structured into four programs: Policy and Interlinkages; Climate Change and Energy Law; Biodiversity and Land Law; and Chemicals. The program on Policy and Interlinkages is designed to support the effective and efficient implementation of multilateral environmental agreements by addressing cross-cutting issues that affect all MEAs. The cross-cutting issues addressed in DELIC programs include:

- provision of training for government negotiators, customs officials and judges;
- support for national environmental legislation to implement environmental treaties;
- facilitation of the development of public participation at national level;
- promotion of compliance and enforcement mechanisms and institutions;
- building synergies and interlinkages between environmental institutions at international and national levels;
- environmental economic modeling for ecosystem services in poor markets;
- promoting linkages between multilateral environmental agreements and millennium development goals through ecosystem services; and
- information services concerning multilateral environmental agreements..

Among these cross-cutting issues, UNEP's development of guidance materials on promotion of compliance and enforcement mechanisms warrant special mention, as set out below.

### **New Law Enforcement Initiatives**

UNEP's role in environmental law capacity building includes the area of law enforcement although it has not worked extensively in building international law enforcement cooperation outside of the development the Lusaka Agreement (see discussion in relation to transnational law enforcement below).

UNEP could work in collaboration with other relevant agencies in addressing transnational environmental crime. The directly relevant mission and expertise portfolio of the United Nations Office on Drugs and Crime (UNODC), in particular, would make it an essential partner. The UNODC acts as Secretariat to both the United Nations Convention against Transnational Organized Crime (CTOC) Conference of Parties and to the Commission on Crime Prevention and Criminal Justice (CCPCJ). Reports of the CTOC Conference of Parties have suggested that the CTOC could be engaged to combat transnational environmental crime and the Executive Director of UNODC has suggested that a 4<sup>th</sup> Protocol to the CTOC specifically addressing environmental crime might be considered. The CCPCJ is currently engaged in research and recommendations to combat forest crimes and will consider transnational environmental crime more broadly in 2012 at its 21<sup>st</sup> session. At that time, the CCPCJ might mandate the development of a new fourth protocol to the Convention on Transnational Organised Crime to deal with the subject of transnational environmental crime.

*UNEP's capacity building work in the enforcement area could be targeted to provide targeted support related to specifically environmental aspects of law enforcement cooperation, such as the application of regional enforcement cooperation mechanisms familiar to environmental protection*

*(e.g. databases, blacklists, hot pursuits) or environmental monitoring technologies (e.g. emissions gauges, remote earth sensing, digitally stamped products) and to focus on organised transnational environmental crime.*



### 3. Opportunities for MEA Implementation: International Coordination & Cooperation

#### International Sharing of Information

Many MEAs require their Parties to exchange information as part of their primary operational obligations. For example, they might be required to provide information on proposed environmentally sensitive trade transactions or industrial developments, on ambient environmental conditions or on environmental technologies. Although scientific and technical data concerning environmental baselines and quality changes can feed into performance review information, it does not in itself assess national responses to international obligations. (Environmental changes may occur despite, or irrespective of, national environmental measures.) Similarly, data concerning operational information exchanges can be fed into performance review information, but such exchanges do not in themselves review performance. (The collection of this information in the form of State of the Environment reports is discussed below in relation to Performance Reviews.)

#### Information on National Implementation

Information on MEA implementation is not always required at the international level, or made available or transparent. In relation to their performance, Parties are often required to report on the measures they have taken to implement a particular MEA, usually by submitting annual reports on their relevant laws or policies. Some MEAs provide for a third Party, such as a Secretariat, to monitor or verify the performance and require the Parties to cooperate with such monitoring or verification of their performance. Often, operational and performance information are inter-related, as data from operational information exchanges are fed into performance review.

Performance review information is gathered primarily through national self-reporting but a few MEAs also provide for supplementary third-party verification or monitoring. Almost all MEAs require Parties to self-report on their national performance. The majority of those MEAs provide guidelines or templates for this purpose. Just less than a third of those provide for verification of data in national reports or for third-party monitoring of national reporting systems.

There are opportunities to engage environmental NGOs and the private sector in this exercise. Some, such as WWF TRAFFIC, the Environmental Investigation Agency (EIA) and Global Witness, have established reputations with links to MEA Secretariats.

*It would be useful if information on national compliance status might be made available progressively, on an ongoing basis, rather than periodically, so as to increase transparency concerning national implementation. Programs of third party verification missions to complement self-reporting of MEA implementation could be developed to improve understanding of the quality of MEA compliance information.*

#### Sharing Information on Lessons Learned

International networking to exchange experiences concerning the implementation of MEAs can occur at the global, regional and subregional levels (as well as nationally and sub-nationally). Clearing houses established by some MEA Secretariats, such as the UNCCD Information Network

Database and the Biosafety Clearinghouse for the Cartagena Protocol on Biosafety serve this function. The Clearinghouse Mechanism of the Global Plan of Action for the Protection of the Marine Environment from Land-Based Activities provides this service in the absence of an MEA. Many information sharing initiatives also occur in the international NGO sector, including the International Network for Environmental Compliance and Enforcement (INECE) and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL).

*Opportunities to increase the availability of information on implementation through more clearing houses across a wider range of MEAs should be considered.*

### **Guidance Materials on Implementing MEAs**

Guidance materials have been prepared for the implementation of particular MEAs by their respective Secretariats. These include guidance materials for the: Basel Convention; CITES; Convention on Biological Diversity; Montréal Protocol on ODS and Vienna Convention on the Ozone Layer; PIC Convention; POPs Convention; Climate Change Convention and Kyoto Protocol; Desertification Convention; World Heritage Convention; and Ramsar Convention.

At a more generic level, *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements* were adopted by the Governing Council of the United Nations Environment Program in 2002. The UNEP Guidelines are complemented by a *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, published in 2006, described as the handbook to facilitate use of the tools set out in the UNEP Guidelines.

The UNEP Guidelines and Manual are each divided into two parts: In essence, Part I of each addresses compliance primarily from an international perspective. In contrast, Part II addresses the strengthening of national implementation and enforcement capacity. The manual sets out a wide range of national measures that might be adopted to implement multilateral environment for agreements and illustrates them with case study examples. Similarly, it provides a wide range of examples of international cooperation and coordination to implement environmental treaties.

*The UNEP Guidelines and Manual project could be extended upon by uploading them online, updating the various case studies provided in the Manual and linking them with further information online.*

### **International Direct Assistance**

All MEAs provide some measure of basic implementation assistance to parties as technical assistance and usually also as financial assistance. Some MEAs independently provide for capacity building and technology transfer, while others rely on externally sourced substantial multilateral funds or bilateral assistance. Often such funds when provided independently under MEA regimes are modest. A minority of MEAs also set out specific assistance as a non-compliance response measure. Where they do so, they may provide that it is conditional on demonstration of the party's adopting a national compliance action plan.

### **Technical Assistance and Funding Reviews**

Regular reviews are important in relation to implementation assistance programs, so as to ensure their effectiveness and efficiency. For example, The Sixth Conference of Parties of the Convention on Biological Diversity called for an assessment of mechanisms for transfer of technology and financial

resources. Similarly, the Parties to the Montréal Protocol on Substances that Deplete the Ozone Layer regularly review the effectiveness of the Protocol's measures and of projects initiated under the multilateral fund.

*The introduction of a harmonised approach across MEAs to review of effectiveness presents itself as an opportunity to regularly and consistently review effectiveness and efficiency.*

### **Innovative Financing, Technology Transfer, Concessional Lending**

Additional funding may be made available through schemes for special targeted funding, innovative financing, concessional lending or technology transfer. For example, national offset requirements require investors to offset carbon emissions from an intended new facility by, for example, providing funds for carbon sequestration or modifications to existing plant. As another example, where a polluting facility generates revenue, environmental bonds may be issued by governments or private sector organisations to raise funds for facilities to have required pollution control measures installed. A specialised small grant fund for wetland conservation and wise use in Africa has been made available by the Swiss government and, at a much larger scale, the Norwegian government has established a \$1 million fund for Indonesian reduction of carbon emissions from deforestation and forest degradation.

*It may be useful to initiate a program of consultations to develop innovative financing and invite special targeted funding for MEA implementation outside of the regular UN scale of contributions made to an MEA fund or Secretariat.*

### **Non-Compliance Response Measures**

MEA compliance mechanisms set out Non-Compliance Response procedures (NCPs) to address situations where implementation difficulties place a party to the agreement in a situation of non-compliance. The purpose of such non-compliance procedures is to identify parties' compliance difficulties and to facilitate better compliance in a non-adversarial manner. Although most of NCPs established set up an elected Implementation Committee or Compliance Committee to make recommendations, the final output is usually a decision by the Conference of Parties. A suggestion that a party is non-compliant can usually be brought to the attention of an NCP administering body by the MEA secretariat, by the party itself experiencing compliance difficulties or by other parties, or, under a few MEAs, by a third party body performing a monitoring role.

Many MEAs have established or are in the process of developing a formal NCP. They occur frequently under MEAs in the hazardous materials and biodiversity sectors and are most common for those concerning the atmospheric commons. In stark contrast, there are none in the marine sector. Disincentives to continued non-compliance can be imposed in less than a quarter of MEAs. The disincentives include requirements for additional 'non-compliance response information' or the imposition of warnings or penalties. The latter comprise additional obligations, suspension of privileges, trade sanctions and liabilities. Trade sanctions occur under only three of the MEAs. Liabilities to undertake more onerous burdens in meeting the MEA obligations can be imposed under the Kyoto Protocol. Such liability must be distinguished from compensation liability that is determined between parties bilaterally through an arbitral process, such as a dispute resolution procedure. Only the Basel Convention Liability Protocol defines liability to compensate and this is not truly part of a multilateral NCP in any MEA.

*There are significant opportunities to introduce compliance mechanisms into existing MEAs that do not have any and to strengthen the independence of procedures and of the availability of disincentives in existing non-compliance procedures.*

## **International Regime Coordination**

The UNEP Governing Council has sought to promote the inherent coordination of the functioning of environmental conventions, to improve the effectiveness of MEA implementation, as directed by the UNEP governing Council in 1993 (decision 17/25) and chapter 38 of agenda 21. Since 1994, UNEP has convened meetings of representatives of MEA Secretariats to facilitate exchanges of experience and opportunities for synergies between them. Four key thematic clusters of MEAs are identified here: atmosphere; biodiversity; chemicals; and marine.

## **Comparative Review of Regime Effectiveness**

Concerning review of a regime's performance overall, rather than individual Party performance, statistical data processed from sources including the Parties' operational information exchanges and their performance information can help the Secretariat and the Conference of Parties to assess whether targets have been met and to identify future priorities. Similarly, a comparison of their approaches to monitoring and assisting national implementation might enable lessons to be learnt across MEA regimes.

*A comparative exercise in reviewing the performance of MEA regimes could be undertaken to identify their relative strengths and weaknesses and to identify cross cutting systematic opportunities for improving effectiveness.*

## **Efficiencies among MEA Secretariats**

The Secretariats of several biodiversity-related MEAs engage in regular meetings to examine opportunities for coordination and have the most advanced collaboration among the clusters of MEAs. The Secretariats for the chemicals cluster of MEAs also collaborate through the Strategic Approach to International Chemicals Management (SAICM policy framework).

*Generic opportunities for interlinkages that create synergies across MEA Secretariats include: exchange of information, through informal and formal frameworks;*

- *Joint project and work plans in areas of common concern;*
- *Harmonisation of approaches for engaging civil society in the implementation of MEAs;*
- *Holding of back-to-back Conferences of Parties and other meetings with other related MEAs;*
- *Coordination of policy making through involvement of Conferences of Parties of related MEAs; and*
- *Enhancement of cooperation between the subsidiary and technical bodies and included working groups of related MEAs*

## **Information Reporting**

In relation to the biodiversity-related cluster of MEAs, research work on harmonization of performance self-reporting formats has been undertaken by international organisations for over a decade, particularly by the World Conservation Monitoring Centre and by the United Nations University. It has produced proposals for harmonisation that include the development of information system models that would explore synergies during the various steps in the data

collection and dissemination process, particularly through modular or consolidated reporting for the biodiversity-related MEAs. Also suggested to enhance performance review information delivery in relation to the biodiversity-related MEAs are: harmonising document cover sheets; adopting standard definitions; harmonising web sites; developing a meta-database to indicate the information that is available and its location; and developing an inter-convention web site and search engine, as well as a lessons-learned network to encourage the sharing of experience.

*Specific opportunities for interlinkages in reporting across MEA Secretariats include:*

- *Harmonisation of definitions of common terms;*
- *Harmonisation of reporting formats and schedules for national implementation performance reporting; and*
- *Development of common indicators to assess progress in implementation.*

### **Implementation and Compliance**

The coordination of implementation assistance across MEAs to address non-compliance caused by a systemic lack of a particular environmental management capacity would be more effective than piecemeal or duplicative implementation assistance. Non-compliance response assistance measures could be easier to coordinate across MEAs than general implementation assistance measures because they are nominated as priorities through NCPs and are fewer in number than general requests for assistance. For example, evidence of corruption of customs authorities indicating a party's non-compliance concerning its trade-related obligations might implicate that party in similar non-compliance under more than one MEA.

*Specific opportunities for interlinkages that create synergies in implementation and compliance across MEA Secretariats include:*

- *Joint regional centres to provide technical advice and capacity building for implementation of thematically related MEAs;*
- *Coordinated national legislation guidelines that implement thematically related MEAs;*
- *Coordination with other MEA Secretariats in the delivery of implementation and non-compliance response assistance;*
- *Development of protocols for sharing of performance information between MEA Secretariats to enable more effective triggering of non-compliance procedures; and*
- *Development of a single financing mechanism for activities that simultaneously implement provisions of related MEAs.*

### **Regional Approaches**

Regional approaches to environmental law implementation are appropriate in situations where countries share the same regional seawaters or regional terrestrial ecosystem. In those circumstances, threats of pollution, species extinction and habitat destruction will often be shared in common among neighbours. For example, contamination of a regional river system may threaten the habitats and species of all riparian states. Similarly, the opportunities to prevent and combat such contamination may be shared, and mutually inform. Regional approaches are particularly preferred as a joint response under the Convention on the Conservation of Migratory Species of Wild Animals and the Convention to Combat Desertification and under regional seas agreements.

### **Regional Coordination and Cooperation**

Latin American states have been active in adopting sub-regional strategies and agreements for environmental protection. This is evident for the Central American States (agreements on biodiversity, climate change, hazardous wastes and forests adopted under the auspices of the Central American Commission on Environment and Development (CCAD)); South American States (Mercosur specialised working group on environmental and sustainable development, Ramsar implementation strategy), and Andean States (regional biodiversity strategy). Other examples include Pacific Island countries, which have adopted a regional strategy for the implementation of the Montréal protocol, Caribbean countries which have adopted a common strategy for implementation of the Climate Change Convention.

General guidelines for the implementation of environmental law at national level have been adopted in some regions. The 1999 Caribbean Guidelines for National Implementation and the 2002 Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus and Central Asia were intended to promote the effective implementation of environmental law. Other such regional guidelines have been adopted by the Economic Commission for Europe in 2003 and by the North American Commission on Environmental Cooperation (Working Group on Environmental Enforcement and Compliance Cooperation) in 2000.

Under the Regional Memoranda of Understanding for Port State Control that have been adopted to coordinate the activities of ports authorities enforcing international safety standards and environmental standards for maritime commercial vessels, six-month rolling action plans are adopted that target specific safety and environmental compliance risks. Maritime regions that coordinate the activities of their port state authorities include those for North Sea, Pacific, Indian, Caribbean, Mediterranean, and West African waters.

*Geographic areas where regionally coordinated approaches to MEA implementation might improve the effectiveness of national implementation should be identified and consideration then given to developing those opportunities into concrete regional action.*

### **Transnational Enforcement Cooperation**

Generic international mechanisms are in place to facilitate general cross border police and judicial cooperation in law enforcement. For example, the United Nations General Assembly, on the recommendation of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, has adopted a Model Treaty on Extradition (UNGA resolutions 45/116, annex, and 52/88, annex), a Model Treaty on Mutual Assistance in Criminal Matters (UNGA resolutions 45/117, annex, and 53/112, annex I), a Model Treaty on the Transfer of Proceedings in Criminal Matters (resolution 45/118, annex) and a Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (UNGA resolution 45/119, annex). International cooperation mechanisms could go a substantial distance further to promote the combination of these new environmental law enforcement technologies with cross border cooperation.

### **Combating Transnational Environmental Crime**

Cooperative mechanisms for wildlife and pollution law enforcement established by INTERPOL are in the early stages of development. As yet, they do not provide specific cooperation to address illegal harvesting of or trade in fisheries, timber, biological resources or genetically modified or pest



species. Law enforcement cooperation facilitated through mutual recognition of the certification of legality of environmentally sensitive products when they are moved across borders could be instituted in a transnational environmental crime regime. Schemes as are already in place under the Basel Convention, Montreal Protocol, CITES and chemicals treaties and several regional fisheries regimes would then come within a generic scheme for such other environmentally sensitive products as are nominated by sending or receiving States through this multilateral platform. The role of the judiciary, prosecutors and specialized agencies as well as civil society in applying the law and combating crime could be articulated, strengthened and promoted through guidelines and supporting model national legislation and capacity building assistance programmes.

Mechanisms for deeper cooperation in law enforcement might also be fostered at regional levels to address the specific circumstances of regional law enforcement cooperation. Regional arrangements might include cooperative mechanisms to create common environmental law enforcement data bases, pursuit zones, and to designate joint investigative teams. For example, the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora can be considered as an agreement to implement the CITES. The Lusaka Agreement was adopted on 9 September 1994 under the auspices of UNEP and entered into force on 10 December 1996. It is open to all African states, although only six have become Parties. The principal function of the Agreement is to establish the Lusaka Agreement Task Force, comprised of wildlife law enforcement officers seconded from relevant national agencies, such as police, customs, national parks and army. Each of the Parties to the Lusaka Agreement commits to seconding at least one officer to the Lusaka Agreement Task Force, which is to conduct cross-border investigations into illegal wildlife trade. It not only facilitates the exchange of information, including criminal intelligence, but also conducts operations, including undercover operations within the territories of its parties, subject to party consent.

*MEA governing bodies might consider adopting coordinated complementary resolutions under which their Parties agree to develop a harmonised legal template to implement each MEA through criminal legislation and to establish a collaborative law enforcement coordination mechanism that is common to their MEAs, supported by a manual and technical assistance programme. Geographic areas should be identified where regionally coordinated approaches to enforcement against transnational crimes that breach MEA implementation measures could be useful. Consideration should then be given to developing special applicable environmental law enforcement cooperation norms for that region.*

### **Universal Enforcement Jurisdiction**

Universal jurisdiction has grown from the realm of maritime piracy. Under international law, all countries have long had jurisdiction to arrest any vessel engaged in piracy on the high seas. There are analogous forms of universal enforcement jurisdiction in the maritime domain against vessels engaged in slave trading, drug trafficking or proliferation of weapons of mass destruction. The notion is also well-developed in the area of humanitarian law, in which individual states can exercise universal jurisdiction for crimes such as genocide, grave war crimes and crimes against humanity.

Transnational law enforcement has similarities with and differences from universal enforcement jurisdiction. A fundamental difference is the requirement for cooperation through national law enforcement officers in transnational criminal law enforcement, as compared to the power to act

unilaterally when exercising universal jurisdiction. Universal jurisdiction enables prosecution by authorities of a country with indirect connections to the offender.

International law crystallised in the Rome Statute of the International Criminal Court and the statutes and jurisprudence of the international criminal tribunals for Yugoslavia and Rwanda, has delegated a universal jurisdiction to enforce international law against humanitarian crimes to those international courts and tribunals.

*Commonalities should be explored between universal jurisdiction over maritime and humanitarian crimes and jurisdiction over environmental crimes. Consideration could be given to the establishment of an international environmental court with universal jurisdiction.*



## 4. Opportunities to Enhance National Implementation of Environmental Laws

### National Law, Policy and Administration Frameworks

#### Environmental Plans

Such plans can set out frameworks for scientific research, adoption of legislation, policy development, action programs, funding schemes, performance feedback, adaptive management and implementation reviews.

*National environmental plans that set out objectives, mechanisms and means, and performance and policy setting reviews can be useful to further the development of national law, policy and administrative frameworks.*

#### MEA Compliance Plans

Formally adopted National Plans for implementation of international obligations are required under some MEAs. For example, The Convention on Biological Diversity requires the parties to it adopt national implementation plans. In addition, an implementation plan may be required to be formulated by non-compliant party under the provisions of an MEA compliance procedure, such as is required under the Cartagena Biosafety Protocol. Even where they are not required, National Plans for implementation of MEAs may assist a country to ensure that it is in compliance with its international obligations.

*National MEA Compliance Plans can be useful for the implementation of MEAs and reduce the risk of falling into non-compliance.*

#### National MEA Focal Points and Coordination

For implementation of MEAs, the precise locations of responsibility for particular environmental laws and policies should be specifically identified to promote effective responsibility and accountability. It may be necessary to designate a political focal point as well as a technical focal point. In some cases, the technical focal point is the responsibility for implementing the MEA at the national level, whereas the political focal point carries responsibility for international negotiation processes.

For implementation across a range of MEAs, similar mechanisms and operational procedures may be required. For example, similar vetting procedures to check for illicit imports or exports of environmentally sensitive products may be required to survey all shipments of hazardous wastes, dangerous chemicals, invasive pest organisms, genetically modified organisms, and endangered species. Coordination of these operations may improve their efficiency where interlinkages and synergies are possible, such as in appointing and training customs officials who will inspect import and export related paperwork for illicit shipments of environmentally sensitive goods. In addition, coordination with national tax authorities and financial intelligence units (which gather information

to combat money laundering) may ensure that actionable criminal intelligence is made available to environmental prosecutors.

*To promote effective MEA implementation, the designation of national implementation focal points is necessary. Effectiveness and efficiency gains may be achieved by promoting coordination between national focal points and other law enforcement authorities.*

## Engaging Non-Governmental Sectors

### National Advisory Council or Stakeholder Consultation

A holistic national approach to implementation of environmental laws will involve a wide range of interested sectors of society. Mechanisms for involving such stakeholders include ad hoc consultations, appointment to advisory councils, and involvement in community project programs.

Consultations with relevant stakeholders, established as necessary on a situational basis, can offer an efficient and effective way to inform environmental law, policy and administration in relation to particular programmes and projects. Efficiency in consultations can be facilitated by establishing relationships with key stakeholders who provide pathways through networks to others with whom consultations may be useful.

Mass media outlets including newspapers, journals, radio, television and the Internet, offer huge opportunities to improve public awareness of environmental laws, policies and administration. The advent of the new social media, such as Facebook, provide unprecedented opportunities to engage stakeholders and the public in general in the implementation of environmental norms. These may feed into educational programs in addition to publicity campaigns. As well as positive messages, negative publicity about environmental malfeasance, corruption and crime may discourage individuals and institutions from breaching environmental laws or engaging in corrupt practices that damage the environment.

A National Advisory Council equipped with the necessary technical expertise (i.e. scientific and ecological, economic and financial, community and political expertise) and with appropriate representation of stakeholder interests (i.e. business, community, and environmental interests) might assist a national government to chart its initial course for sustainable development. As national management of environmental law becomes more sophisticated, however, the role of a National Sustainable Development Advisory Council in informing governmental environmental priorities will likely become more attenuated.

*Public consultation mechanisms should be undertaken through a range of mechanisms, such as through an advisory council, ad hoc consultations or internet based social media, to inform governmental decision-making.*

### Partnerships with Business and Environmental NGOs

Environmental taxes and levies to discourage environmentally harmful actions and to encourage improvements in environmental performance can guide business towards the internalisation of environmental costs. The use of economic instruments, such as subsidies, can motivate business to improve environmental performance for its own economic advantage and, therefore, offer overall cost savings for governmental environmental regulators. Similarly, if a polluting facility is charged a fee based on the characteristics of its pollution (e.g. amount, rate or toxicity of its effluent, emissions

or wastes), pollution reductions will equate with fee reductions. For this system to work, subsidies or fees should be high enough to deter pollution. As another example, tax incentives allowed for the installation of pollution control equipment or for changing an industrial process to a less polluting one, give a facility an incentive to reduce its own pollution.

Personnel working in environmental NGOs often carry significant expertise in relation to the implementation of environmental laws. NGOs may function in helpful cooperation with governmental authorities in the role of unofficial monitors or watchdogs for environmental non-compliance. These functions may include mapping biological resources, recording the harvesting of natural resources and, in particular, illegal logging and fishing.

*Partnerships with business and environmental NGOs can complement traditional command and control methods of regulation, leading to internalisation of environmental costs and efficiencies in regulatory design.*

### **Performance Reviews**

A relatively mature system of environmental governance may require reflective monitoring and administrative review. As a systematic independent check on the capability of the environmental management and the performance of public authorities, a review can identify gaps or shortcomings and facilitate improvement in the quality of the environmental management.

### **State of the Environment Reporting**

Measurement of environmental performance requires preliminary baseline data in order to identify whether environmental management efforts are successful or having an impact. A Commission with powers to review the efficiency of the existing environmental management system or aspects of it might need to undertake regular State of the Environment reports and measure changes in environmental conditions and identify their causes. On the basis of the information gathered, it might then make considered recommendations concerning opportunities for improvement in environmental law, policy and administration.

*Cyclical governmental assessments of the state of the environment can provide useful information to guide the development and adaptation of environmental management mechanisms.*

### **Performance Auditing**

Environmental compliance auditing is a separate function from State of the Environment assessment. It determines whether an organisation is operating in compliance with all relevant legal obligations, usually set out in legislation and regulations. An audit may also be designed to ensure the exercise of due diligence in fulfilling those legal obligations and to assess the risk of noncompliance and to institute appropriate risk control measures. The International Standards Organisation defines an environmental audit as a “systematic, documented verification process of objectively obtaining and evaluating evidence to determine whether specific environmental activities, events, conditions, management systems, or information about these matters conform with audit criteria, and communicating the results of this process to the client”. In the case of a public sector environmental audit, the client is the government and an environmental audit report can be submitted to either its executive or legislative arms.

It is now usual for most arms of government to be bound to comply with environmental laws in the same way as private sector entities. However, although responsibility of government for natural resources management is typically managed by setting policy, it is not always the case that the government considers itself bound by its policies. Performance auditing is a method for monitoring public sector compliance audit with laws and policies. An environmental performance audit might, however, determine whether an organisation is achieving its environmental policy objectives.

The 3 “E”s of public sector performance auditing are to determine whether an organisation is achieving its objectives effectively, efficiently and economically. These are defined qualities:

- “Economy” is ‘the acquisition of the appropriate quality and quantity of financial, human and physical resources at the appropriate times and at the lowest cost (that is, spending less);
- “Efficiency” is making sure that the maximum useful output is gained for any given set of financial, human or physical resource inputs, or is minimised for any given quantity and quality of output provided (that is, spending well);
- “Effectiveness” is the achievement of the objectives or other intended results of programs, operations or activities (that is, spending wisely).<sup>8</sup>

*Government environmental policy compliance audits should be undertaken to assess governmental compliance with environmental policy objectives and administrative processes.*

### **Environmental Ombudsman**

The primary role of an ombudsman is to enquire into particular complaints as to administration by the executive government. An ombudsman reports to the Parliament or the legislative assembly. In the case of an environmental ombudsman, the mandate given is to enquire specifically into environmental administration.

Persons with the title of Environmental Ombudsman may carry out a variety of enquiries and reviews into the quality of environmental administration. These always include investigations made in response to private complaints. In addition, it is usual for the ombudsman's office to be empowered to initiate investigations of its own accord. Such investigations as are initiated by the ombudsman office itself usually relate to more systemic administrative problems and may be undertaken in response to concerns raised by a concentration of private complaints, or as part of a cyclical review. As guardian of the national system of environmental management, the Environmental Ombudsman acts as adviser to the legislature on aspects of government environmental management.

*Opportunities to improve and assure quality and integrity in the field of environmental administration may be fulfilled through the role of an Environmental Ombudsman.*

### **Public Access to Information**

Public scrutiny of environmental performance access is premised upon the public availability of information concerning environmental performance and compliance. This requires that the public be given access to environmental information held by the government and relevant agencies, as appropriately qualified for confidential or protected information. Principle 10 of the Rio Declaration articulated this requirement is an international soft law obligation. In addition, processes for public

participation in enforcement may be facilitated by allowing formally recognising public reports of violations and by the receiving of public information in investigations.

*Good environmental governance can be promoted by administrative transparency, provided in the form of freely available public access to information concerning governmental environmental management.*

## **Law Enforcement**

### **Enacting against Environmental Crime**

Any framework for the enforcement of environmental law commences with enactment of legal standards that are expressed in precise and mandatory language and that specify sanctions for breaches. Therefore, the first requirement of an environmental law enforcement program is the enactment of environmental crimes enabling a range of legal actions to be taken in response to breaches of environmental laws.

Liability for environmental crimes might be imposed upon both natural persons (i.e. individuals) and juridical persons (i.e. corporations, government entities). Strict liability may be imposed for particular acts, including acts performed by subordinates within a responsible institution. Public officials and employees who violate environmental laws may be made criminally liable. Sanctions may be escalated in accordance with criteria such as intentionality, repeat offending or significance of harm caused.

A relatively new area for consideration is the enacting against transnational environmental crime. This could provide a basis for enhanced environmental law enforcement cooperation, including the sharing of criminal intelligence by police, designation of national contact officers, cooperative gathering and exchange of information, protocols for prioritisation of investigations, production of witnesses, arrest and extradition of accused, and recognition of judgments.

The harmonised legal cognisance of environmental crimes as predicate offences for anti-money laundering action would be a useful complementary step. Recognition of a foreign environmental crime as a predicate offence that can form the basis for domestic prosecutions against money laundering requires that the foreign environmental crime has an equivalent crime under domestic laws (i.e. has dual criminality). Such provisions would suppress the laundering of proceeds of environmental crimes and could provide the basis for cooperation to combat transnational environmental crime by tracing its beneficiaries.

*The field of environmental crime enforcement is of increasing complexity and national platforms of enactments of environmental crimes may need revision and extension.*

### **Compliance Institutions and Programs**

An institutional home capable of carrying out a law enforcement program will usually be located within the environmental ministry or agency entrusted with operational functions. A compliance and enforcement unit within that ministry or agency should be designated with responsibilities for enforcement. The enforcement unit may be empowered to investigate breaches and conduct prosecutions. To function effectively, an enforcement framework requires skilled investigation officers, capable prosecutors and informed judges. (Further information on environmental prosecutors officers and environment courts is given below in relation to prosecutions.)

A compliance and enforcement program situated within the executive is premised on adequate resources and execution of responsibilities to monitor and evaluate compliance. This requires collection of data on environmental conditions, surveillance of environmentally impacting operations, and inspections of the sites of operations, investigations as warranted by those inspections, and the collection of evidence for the further enforcement action as required. In addition, government authorities engaged in information collection need to be clearly authorised to do so, even in circumstances where the information may be commercially sensitive or given reluctantly.

In order to utilise scarce resources efficiently, these information collection activities will usually be combined with information gathered through self reporting by facilities at risk of non-compliance, as well as through automated data collection. In addition, targeting of monitoring activities should be informed by enforcement priorities. These priorities may include the identification of activities at significant risk of causing environmental harm, identification of repeat offenders, strategic example, and pragmatic resource limitations.

*Environmental compliance monitoring programs should draw upon a range of information sources and be structured to efficiently manage resources to reduce non-compliance risks.*

### **Prosecution Offices and Investigation Guidelines**

It is often the case that a separate prosecutor's office will be located within the Ministry of Justice, Attorney Generals Department or Director of Public Prosecutions Office. However, independent specialist environmental prosecutor's offices have been established within environmental agencies in some instances.

Guidelines to help in ensuring compliance with and enforcement of environmental laws can provide direction, general information and practical guidance for the benefit of investigators and other prosecutorial organisations on matters related to the conduct, management and control of the investigation and prosecution of offences under environmental laws. Guidelines give generic expected procedures that may be followed during investigations and prosecution. They can also include the details of how each natural resources or environmental sector will conduct its investigations, taking into account the powers given to inspectors under the different environment sectoral legislation.

*Consideration should be given to establishing specialist environmental prosecutor's offices and to the development of guidelines for environmental prosecutions.*

### **Specialist Courts and Sentencing Guidelines**

Specialist environmental courts have also established in some jurisdictions to ensure that judges have the expertise and resources necessary to consider environmental cases. For example, the Supreme Court of India has established specialised High Court benches known as "Green Benches" to deal specifically with environmental management issues. Often, these courts are combined with specialist administrative bodies, such as an environmental tribunal. The administrative body can hear the matter at first instance and, for some offences, apply administrative sanctions. The specialist environment courts and tribunals may reduce the number of cases brought before the Supreme Courts and High Courts, facilitate more consistent and expeditious environmental decision-making and be less expensive.

Sanctions may range from administrative penalties (e.g. change of licence conditions, suspension of licence, denial of funding, fines, closures), to civil penalties (e.g. injunctions, suspension of trading, negative advertising, compensation, cleanup, fines), to criminal penalties (e.g. closures, fines, probations or jail sentences). Fines can be structured to accumulate on a daily basis and might be defined within a range set out as a number of penal units. Criteria useful to determine the number of penal units to be posed in a fine may include: the economic benefit derived from the crime, the extent of the damage, the cost of repairing the damage, the violator's history of prior violations, economic impact of the penalty on the violator, the violator's good-faith efforts to comply, and the violator's culpability or wilfulness. Liability can be allocated among defendants. Gathering and cataloguing the type and severity of penalties awarded on conviction for environmental crime would enable the creation of a resource for prosecutors and judges engaged in cases of environmental crimes. These may be especially useful in courts of general jurisdiction where there is limited expertise in environmental matters.

*Consideration should be given to establishing specialist environmental courts or tribunals and to the development of sentencing databases and guidelines.*

### **Transnational Enforcement Cooperation**

Generic national mechanisms are in place to facilitate general cross border police and judicial cooperation in law enforcement. These include extradition treaties and mutual legal assistance arrangements. Although these instruments already facilitate generic forms of law enforcement cooperation, they could be supplemented by cooperative provisions to accommodate treatment of evidence based in new technologies relevant to environmental law enforcement, such as satellite-based electronic data and tagging of natural resources. In addition, countries might put in place laws for the seizure of the proceeds of environmental crimes and to share forfeited assets with foreign countries that have collaborated in the investigation and seizure.

National measures could also address the specific circumstances of regional law enforcement cooperation. Regional arrangements might include cooperative mechanisms to create common environmental law enforcement data bases, pursuit zones, and to designate joint investigative teams, and to ensure dual criminality and common penalty structures under their respective legal systems.

*Consideration should be given to improving transnational law enforcement cooperation through enactment of laws providing for new information technologies, seizure of environmental contraband and anti-money laundering, as well as by enhancing regional cooperation law enforcement mechanisms.*



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