
UNEP GOVERNING COUNCIL ADOPTS GUIDELINES ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

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SUMMARY

This paper focuses on the recently adopted guidelines on compliance and enforcement of multilateral environmental agreements (MEAs). This is an important response of the international community to the urgent need for enhancing compliance with MEAs through institutional improvements, enhanced organizational co-ordination, strengthened national environmental implementation and enforcement mechanisms, capacity building and training. The guidelines, a pragmatic outcome of experience-sharing, and based on the views of governments and MEA secretariats, seek to engage countries through a menu of options for strengthening implementation of MEAs and enforcement of national laws, regulations and policies.

1 INTRODUCTION

Since the 1970s, MEAs were developed quickly, many duplicating each other in several respects including personnel and institutions at national level that would backup implementation, follow up, reporting and coordination. It was thus apparent that coherent implementation was lacking. There were loopholes too undermining the very measures that were intended to be curbed. It became clear too that funding had to be made available for developing countries to be enabled to participate in negotiations of new instruments, and thereafter in their implementation.

The international context of compliance and enforcement is provided by MEAs and the felt need to increase their efficacy for delivering on environmental objectives. The last thirty years or so have seen the rapid development of MEAs. Over 200 already exist, and several more are currently under negotiation at global and regional levels. During this period,

UNEP's primary focus too has been in the development of international environmental law and it has facilitated, inspired, spear-headed and played a catalytic role in the development of several soft law and hard law instruments. Now the international community's important task is to advance and enhance the implementation of agreed international norms and policies, to monitor and foster compliance with environmental principles and international agreements. However, as international environmental law and its accompanying national legislation for environmental protection increase in number, complexity and sophistication, so do opportunities and determination to evade such laws through orchestrated criminal activities.

Shortcomings were noted not only globally but also at regional and national levels. UNECE, for their region, moved into action and are developing guidelines for environmental compliance and enforcement building upon the UNEP Guidelines to be adopted in 2003. INECE embraced

action including regional initiatives through its informal partnership to promote and strengthen environmental compliance and enforcement. Other regional initiatives were also taken, such as:

- The Latin America and Caribbean convened in November 1999 a workshop for English speaking Caribbean and adopted a set of Guidelines on MEAs implementation in the Caribbean.
- The ASEAN too are developing mechanisms to promote compliance and enforcement of MEAs. The Guidelines propose options for more effective MEAs implementation in the countries. They also draw upon selective elements in the implementation strategies adopted with success in individual countries of the region.
- Furthermore, in the 1990s UNEP facilitated and coordinated the development of, and served as an interim secretariat for the implementation of a regional wildlife enforcement agreement called the *Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora*. UNEP, still a partner in the implementation of this treaty, coordinated its negotiation process until its adoption in 1994 as a regional wildlife law enforcement treaty. The Lusaka Agreement, enforcing CITES in Africa, aims at reducing but ultimately to eliminate illegal trade in wild fauna and flora.

Convention secretariats and UNEP moved to promote adherence of countries to bring MEAs to force. They also showed concerns on compliance and, besides Montreal Protocol; other instruments have, or are taking steps, to move into compliance and enforcement. For instance: Parties to the UNFCCC are developing procedures and mechanisms for compliance under the Kyoto Protocol. The same is also true for the parties to the Basel Convention that are developing ele-

ments for monitoring the implementation of and compliance with obligations under the Convention. The parties to the CBD are developing procedures and mechanisms to promote compliance and to address cases of non-compliance within the framework of the Biosafety Protocol. The parties to the CITES are equally developing a comprehensive plan to concretely address, *inter alia*, compliance and enforcement issues. CITES secretariat regularly reviews and analyzes national laws of Parties to determine whether such laws meet CITES implementation requirements. Consequently, collaboration with and support from the Convention Secretariats, including Interpol and World Customs Organization in this process is, *sine quo non*, for the successful implementation of the guidelines on compliance and enforcement of MEAs.

In view of all these parallel efforts initiated by the MEAs secretariats and other regional groupings, it was in deed time to address, in a focused and coordinated way, such efforts which would provide much needed tools and approaches to negotiations and measures to ensure developing countries and countries whose economies are in transition have the fullest appreciation of their overall interest in becoming party to, and the means to implement, the different instruments.

Notwithstanding the increase of international agreements and enabling national legislation, there have been shortcomings in compliance, along with increasing incidence of evasion of laws and rules. In this backdrop, the guidelines for compliance and enforcement of MEAs were prepared consequent to intense consultations. These guidelines, first mooted in 1999, were reviewed in October 2001 by a meeting of an intergovernmental group of experts to which all countries were invited. The guidelines were adopted by the Seventh Special Session of the

Governing Council (GC) of the United Nations Environment Programme (UNEP) in February 2002 and are now broadly available to governments, Convention Secretariats and all those interested.

2 LEGISLATIVE AUTHORITY AND IMPETUS FOR THE GUIDELINES

The guidelines are drawn from decision 17/25 of the UNEP GC (May 1993), which adopted the Programme for the Development and Periodic Review of Environmental Law, also referred to as Montevideo II Programme. This had emphasized the need for promoting effective implementation of international legal instruments related to the environment. This priority was reinforced during a mid-term review meeting in December 1996 and endorsed by UNEP's GC decision 19/20 of 1997. UNEP had the legislative basis to undertake work on guidelines but financial resources were wanting.

In April 1998, G-8 Environment Ministers, at their meeting in Leeds, U.K., recognized that there were serious environmental effects of MEA violations, and the need also to combat organized crime in this area. A number of those governments, including the United Kingdom, Canada, Germany were ready to provide funding for initiation of concerted action with selected MEAs, namely CITES, the Montreal Protocol and the Basel Convention on Hazardous Wastes. Thus UNEP, along with the three Secretariats of MEAs, World Customs Organization, Interpol, and a number of experts, held the first meeting in Geneva in July 1999. Important lessons were available from studies about the three MEAs in question and the extent of illegal trade. Similar problems may be envisaged in other areas, such as chemicals. In the G-8 Environment Ministers meeting, in Otsu, Shiga in Japan in April 2000, the commitment was reiterated for supporting compli-

ance, implementation and enforcement. The Ministers further acknowledged that developing countries and countries with economies in transition needed external assistance in this regard.

To maintain momentum, compliance and enforcement was accorded a high degree of attention in the 2000-2001 programme of activities at UNEP in the field of environmental law. It is notable that the Ministerial Declaration from the first Global Ministerial Environment Forum held at Malmö, Sweden in May 2000 also identified compliance and enforcement of MEAs as a crucial issue. Subsequently, the Nairobi meeting (October 2000) of government experts prepared a new Programme for the Development and Periodic Review of Environmental Law for the first decade of the twenty-first century. The Programme, which included implementation, compliance and enforcement of environmental law, both international and national as a key priority, was reviewed and endorsed by the UNEP GC in February 2001 in decisions 21/23 and 21/27, pursuant to which the draft guidelines were given their final shape.

3 FORMULATION OF THE GUIDELINES

Preliminary elements of the draft guidelines were prepared by UNEP in 1999. These were reviewed by a Working Group of Experts on Compliance and Enforcement of Environmental Conventions at Geneva from 13-15 December 1999. The experts decided that the guidelines be split into two sets, one related to compliance, and the other related to enforcement and environmental crime. The drafts were submitted to governments for review and comments, wherein governments recognized the need for continuous work on issues of compliance, enforcement and environmental crime.

Governments emphasized that the

guidelines be non-binding and of voluntary nature. The need for transparency and information flow was underlined. The establishment of mechanisms such as common reporting formats, timely reporting and public access to information was emphasized. The value and importance of international co-operation and co-ordination in combating environmental crime was recognized and different ways of achieving results in this area were suggested.

Further exchange of views on the draft text of the Guidelines was accomplished through two geo-politically balanced advisory group meetings held in Nairobi from November 13-15, 2000 and in Geneva from August 27-29, 2001. Also represented were relevant MEA secretariats. Inputs from these meetings were used to prepare the final text of the guidelines. An intergovernmental working group of experts was subsequently constituted in which the participation of all governments was invited. 78 governments were represented at the meeting, which took place at Nairobi from October 22 to 26, 2001. This meeting finalized the guidelines, which were adopted by the UNEP GC in February 2002.

4 NATURE AND SCOPE

The guidelines provide approaches to enhancing compliance, recognizing that each MEA has been negotiated in a unique way and has its own independent legal status. The guidelines acknowledge that compliance mechanisms and procedures should take account of the particular characteristics of the MEA in question. Enforcement is essential for securing the benefit of laws, protect the environment, public health and safety, deter violations, and encourage improved performance. The guidelines are relevant to present and future MEAs, and anticipate a broad range of environmental issues, including global and regional environmental protection,

management of hazardous substances and chemicals, prevention and control of pollution, desertification, conservation of natural resources, biodiversity, wildlife, and environmental safety and health.

The purpose of these guidelines is to assist governments and MEA secretariats, relevant international, regional and sub regional organizations, national enforcement agencies, NGOs, the private sector and relevant stakeholders in enhancing and supporting compliance with MEAs. The guidelines outline actions, initiatives and measures for States to consider for strengthening national enforcement and international cooperation in combating violations of laws implementing MEAs. The guidelines are intended to facilitate consideration of compliance issues at the design and negotiation stage and also after the entry into force of the MEAs, at conferences and meetings of the parties.

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

5 BROAD DIRECTION OF THE GUIDELINES

Though the terms 'compliance' and 'enforcement' are often used loosely and interchangeably, as far as the guidelines are concerned, 'compliance' refers to the situation in which a State is, with regard to

its obligations under an MEA; i.e., whether it is in compliance or not. 'Enforcement' refers to a set of actions, i.e., adopting laws and regulations, monitoring outcomes, etc., including various enabling activities and steps, which a State may take within its national territory to ensure implementation of an MEA. In other words, 'compliance' is used in an international context, and 'enforcement' in a national one. A term that was problematic throughout the process was "environmental crime" because it is understood differently in different jurisdictions. The guidelines therefore opted for the term violations as discussed in paragraph 21 below.

Overall, the guidelines seek solutions for addressing shortcomings in compliance and enforcement which otherwise undermine the effectiveness of an MEA regime, or a party's ability to live up to its obligations. Such shortcomings may include:

- Lack of national legislation.
- Lack of awareness of the relevant regulations, including among industry and consumers or enforcement authorities.
- Lack of financial resources.
- Costs of compliance, creating a financial incentive for evasion.
- Inadequate penalties.
- Problems with detection.
- Dearth of human resources, institutional and technical capability.
- Lack of information and economic intelligence.
- Shortcomings in transboundary co-operation and monitoring.

6 STRUCTURE OF THE GUIDELINES

The guidelines, divided in three parts, are intended to inform and affect how parties implement their obligations under MEAs. The opening part, the introduction, recalls the basis of preparing the guide-

lines. It acknowledges that the guidelines are advisory in nature and that parties to the agreements are best situated to choose and determine useful approaches for carrying out MEA obligations. The guidelines are non-binding and in no way affect or alter the obligations in MEAs. Following the introductory part, chapter I of the guidelines deals with enhancing compliance with MEAs.

Chapter I comprises 29 paragraphs, wherein "compliance" has been defined as the fulfillment by the contracting parties of their obligations under an MEA. "Implementation" covers all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under an MEA. The guidelines touch upon the preparatory work required for negotiations, effective participation in any debate, assessment of domestic capabilities during negotiations, review of effectiveness, compliance mechanisms after an MEA comes into effect and dispute settlements provisions. Other issues in this chapter include national implementation, detailed to include a variety of possible national measures. Capacity building and technology transfer are also emphasized as important components without which effectiveness of MEAs is undermined.

After chapter I on compliance, chapter II of the guidelines deals with national enforcement of laws implementing MEAs. It comprises 15 paragraphs. Like the compliance chapter, it contains paragraphs dealing with definitions of the terms used. "Enforcement" refers to the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations implementing MEAs, can be brought or returned into compliance and/or punished through civil, administrative or criminal action. "En-

vironmental crime” refers to the violations or breaches of national environmental laws and regulations that a State determines to be subject to criminal penalties under its national laws and regulations. This flexible approach is intended to accommodate practices under different systems of law.

The subjects handled within the chapter on enforcement include national laws and regulations, institutional framework, national coordination, training for enhancing enforcement capabilities and public environmental awareness. The strengthening of the institutional framework includes the designation of responsibilities to agencies and clear authority for carrying out enforcement activities. The need for consistency in laws and regulations is emphasized, as well as cooperation in judicial proceedings. Capacity building and strengthening includes coordinated, technical and financial assistance to develop and maintain institutions, programmes and action plans for enforcement.

7 COMPLIANCE

The guidelines on compliance underline:

- Significance of preparatory work, including: (a) regular exchange of information among States, (b) consultations, (c) experience-sharing, (d) coordination at national level, (e) synergies with existing MEAs.
- Effective participation in negotiations, including: (a) assessment of the geographical scope of the environmental problem being addressed, (b) identification of countries for which the environmental problem may be particularly relevant; (c) establishment of special funds and other appropriate mechanisms to facilitate participation, (d) approaches, e.g., common but differentiated responsibilities, framework agreements, or limiting the scope of MEA to subject areas with relatively more likelihood of agreement.
- Assessment of domestic capabilities during negotiations, as well as regular review of the overall implementation of obligations under an MEA, and examination of specific difficulties in compliance and consideration of measures aimed at improving compliance.
- The need to enhance compliance through: (a) clarity in stating obligations in MEAs, (b) national implementation plans, including monitoring and evaluation of environmental improvement; (c) reporting, monitoring and verification, (d) establishment of compliance committee with appropriate expertise, (e) inclusion of non-compliance provisions and mechanisms.
- Regular review of MEA effectiveness in meeting objectives.
- Introduction of compliance mechanisms after coming into effect of MEA.
- Dispute settlement provisions.
- National implementation measures, to include: (a) compliance assessment, (b) compliance plan, (c) appropriate laws and regulatory framework, (d) national implementation plans, (e) enforcement frameworks and programmes, (f) economic instruments, (g) identification of national focal points, (h) coordination among national departments, (i) enhancing efficacy of national institutions, (j) cooperation of major stakeholders, (k) dialogue with local communities, (l) role of women and youth, (m) media, (n) public awareness, (o) access to administrative and judicial proceedings.
- Capacity building and strengthening, including financial and technical assistance for environmental management.
- Technology transfer, which should be consistent with the needs, strategies and priorities of the country concerned and which can build upon similar activities already undertaken by national institutions or with support from multilateral or bilateral organizations.

- International cooperation generally, and in particular at regional and sub-regional levels.

8 ENFORCEMENT

The guidelines on enforcement underline:

- National laws and regulations, which are: (a) clearly stated with well-defined objectives, (b) technically, economically and socially feasible to implement, capable of being monitored effectively, with objectively quantifiable standards to ensure consistency, transparency and fairness in enforcement, (c) comprehensive with appropriate penalties for environmental law violations.
- Conducive institutional framework, which promotes: (a) designation of responsibilities to agencies for enforcing laws and regulations, monitoring and evaluation of implementation; collection, reporting and analysis of data, including its qualitative and quantitative verification and provision of information about investigations, (b) assistance to courts, tribunals and other related agencies, (c) coordination among agencies, (d) strengthening of national environmental crime units, (e) certification systems, (f) public access to administrative and judicial procedures, and environmental information, (g) review of adequacy of laws and regulations.
- National co-ordination among relevant authorities and agencies, environmental authorities, tax, customs and other relevant officials at different levels of government, linkages at field level among cross-agency task forces and liaison points, as well as coordination among authorities for promoting licensing systems to regulate the import and export of illicit substances and hazardous materials.
- Training for enhancing enforcement capabilities, including for public prosecutors, magistrates, environmental enforcement personnel, customs officials and others pertaining to civil, criminal and administrative matters, including training that promotes common understanding among regulators, enforcement personnel and other agencies, as well as development of capabilities to coordinate action among agencies domestically and internationally.
- Environmental awareness and education, particularly among targeted groups, about relevant laws and regulations, rights, interests and duties, as well as the social, environmental and economic consequences of non-compliance, and encouragement of public involvement in monitoring of compliance.
- Consistency in laws and regulations that provide appropriate deterrent measures, including penalties, environmental restitution and procedures for confiscation of equipment, goods and contraband, and for disposal of confiscated materials, and the setting up of appropriate authorities to make environmental crime punishable by criminal sanction.
- Cooperation in judicial proceedings related to testimony and evidence, including exchange of information, mutual legal assistance and other cooperative arrangements agreed between the concerned countries, and developing appropriate channels of communication.
- International cooperation and coordination by establishment of communication channels and information exchange among UNEP, MEA secretariats and relevant organizations, as well as for developing infrastructure to control borders and protect against illegal trade, including tracking and information systems, as well as measures that could lead to identification of illegal shipments and prosecutions. (Thus regional networks spurred by the INECE could play an invaluable role).

- Capacity-building and strengthening to formulate effective laws and regulations and develop institutions, programmes and action plans for enforcement, monitoring and evaluation of national laws implementing MEAs.

9 IMPLEMENTATION OF THE GUIDELINES

The UNEP GC adopted the guidelines in February 2002. The GC sought dissemination of the guidelines to governments, MEA secretariats and relevant international organizations. The GC further sought implementation of the guidelines through the UNEP work programme, in close collaboration with States and international organizations. UNEP has been asked to take steps for advancing capacity building and strengthening of developing countries, particularly the least developed countries and countries with economies in transition.

UNEP GC has requested UNEP to seek additional extra-budgetary resources to facilitate the implementation of the guidelines. So far Belgium is providing some funds for this, and we hope that other interested governments will similarly make some funds available. The Council further requests that a report be submitted to it at its next session on the implementation of the decision. Consequent to the GC decision, work has already been initiated for the preparation of a compliance and enforcement manual. Three workshops to test the draft manual shall be held, during

the course of the year, in Africa, Asia and Latin America, for capacity building and strengthening.

10 CONCLUDING REMARKS

The guidelines on compliance and enforcement of MEAs are an important development in international environmental governance. During the inter-governmental consultative process promoted by the UNEP, the MEA secretariats and governments were fully involved; their input was very relevant and was built into the guidelines. Capacity building and strengthening was emphasized by the UNEP GC, and the guidelines, give due weight to this. International co-operation and coordination is also underlined. The guidelines acknowledge the importance of the preparatory stage of MEAs. They, in large measure due to detailed consultations with governments and MEA secretariats, elaborate comprehensively on the requirements for effective compliance and enforcement. Do the guidelines go far enough? This may be debatable. However they only go as far as the governments were prepared to at that stage of negotiation. They make a clear beginning and constitute an enabling framework. At UNEP, we feel satisfied that all the pertinent international and national aspects were touched upon in the guidelines which may be refined in future as more lessons are learnt in the process of their implementation.