

Strengthening Environmental Law and Enforcement in the Americas
December 3, 2006
Santa Cruz de la Sierra
Hotel LosTajibos
Salon Taborochi

Meeting Overview:

Participants in this meeting discussed priorities for action in the area of environmental law and enforcement in the context of emerging trade and economic integration. The objective was to provide input to the Organization of American States (OAS) in this area.

The meeting consisted of three sections. The first section looked at progress and challenges in the area of environmental law and enforcement, focusing on key economic sectors and their response to different institutional and enforcement models. The second section examined the interaction between international trade and global ecosystem changes in the context of various trade agreements. Finally, the third section explored a variety of public participation and alternative dispute resolution mechanisms in Regional Trade Agreements (RTA's) and Investment treaties. Participants discussed how these mechanisms support enforcement of environmental laws and increase accountability in this area.

Section I: Environmental Law in the Region: Efficient Models of Enforcement and Compliance

Effective enforcement of environmental law is a key aspect of economic reform and increased trade related production. Participants in this section analyzed the state of environmental law in the Americas and considered a number of different models that have rendered positive results in the enforcement and compliance of environmental law. Different experiences within the region were presented by looking at key economic sectors such as agriculture and forestry.

There are sound reasons to comply with and enforce environmental laws and standards. First, from an economic perspective, efficiencies can be gained from compliance with environmental programs. For example, decreasing environmental waste, such as natural resource consumption, results in long-run cost savings. Second, from a social perspective, there is inherent value in protecting the environment, as such, and respecting the rule of law. Third, there are important inter-personal grounds, such as establishing harmonious relations by avoiding legal proceedings for non-compliance.

However, there are also a number of general explanations for why environmental laws and standards are not complied with or enforced. For example, economic incentives are often insufficiently spelled-out, perhaps due to a lack of funds available to regulators, and as a result the economic benefits of environmental recklessness mistakenly appear to dominate over the benefits of environmental responsibility. Moreover, although cutting-edge environmentally-friendly technologies may be economically superior to older technologies, these technologies often are not available to certain producer groups or are difficult to use. In addition, altruistic concerns are often subordinated to other (i.e. economic) concerns. Finally, there can be a general tendency towards inertia that encourages non-compliance.

Therefore, in order for enforcement programs to be effective, regulators ought to use a *carrot and stick* approach, combining incentives for compliance and penalties for non-compliance. A successful program will do the following: clearly set out environmental requirements, objectives and priorities; introduces a set of appropriate and enticing economic incentives (i.e. environmental credits); and feature a system of indicators to evaluate the performance of the program.

The first presentation during this session, by Sheila Abed, President of the Environmental Law Commission of the IUCN, provided an overview of different models for environmental enforcement and compliance. The objective was to present a broad picture of enforcement of environmental laws in the Americas. This picture was provided through discussion of a number of projects and initiatives.

Ms. Abed began by highlighting Operation Soberanía, a Paraguayan forestry protection project managed by the Secretariat of the Environment (SEAM). As part of the initiative, SEAM requires parties who destroy forestry areas to replenish areas of forestry commensurate to what was destroyed. Thus, a person who destroys a hectare of land must purchase a hectare of land from the government. In this way, there is a stringent cost associated with resource depletion. However, in the end, the chief failure of this initiative is money: groups do not have the resources to buy the additional pieces of land and therefore cannot comply with the program. This example indicates that a lack of resources inhibits compliance with environmental programs.

Ms. Abed also described the enforcement mechanism used in Paraná, Brazil, where the state government has developed a coordinated effort to protect the region's watersheds. She mentioned that the government has established a committee, which includes community participation, to consider the environmental interests in the region. In addition, the government uses a stringent penal plan which focuses upon environmental conflicts and has created a set of compliance agreements, which are applied to remedy environmental infractions. Finally, the government monitors the performance of the program through a series of evaluations. One of the difficult issues associated with the project is its transboundary dimension, in that the environmental offenses affecting watersheds affect neighboring countries such as Paraguay. It is therefore important to collaborate with officials in neighboring countries to mitigate these transboundary effects.

Finally, Ms. Abed reviewed the case of Bolivia where municipal government units are charged with enforcing domestic environmental laws. There are advantages to this decentralization, principally that local governments are well poised to work with local producers to ensure compliance. However, local governments suffer from a host of problems, such as lack of resources that impede their ability to enforce the laws.

Building upon Ms. Abed's presentation, specific examples related to enforcement in key economic trade related sectors were addressed. First, Isabel Calle, of the Sociedad Peruana de Derecho Ambiental, provided a detailed account of environmental compliance and enforcement in the Peruvian forestry sector. In particular, Ms. Calle explained how enforcement of environmental laws is related to trade in that sector. Historically, one of the difficult problems in Peru was conceptual not normative: there was sufficient interest in designing a system of environmental laws but there was a lack of knowledge regarding how laws should be designed and implemented. In the end, a number of laws and norms were developed including the Forestry and Wild Fauna Law (2000), which covers a number of environmental concerns such as over-exploitation of forest resources, diminishing biodiversity, contamination of water, deterioration of air quality, and adverse effects experienced by endemic flora and fauna.

Ms. Calle stated that some argue that compliance with forestry laws was very poor and despite stringent laws and norms, illegal trade in lumber thrived. Non-compliance and lack of enforcement were caused by a number of factors: first, there was an overwhelming lack of human resource to enforce the laws and norms; second, incentives—both economic and social—to engage in illegal trade were extremely high; and third, there was poor coordination among various government authorities. Particularly problematic was that inspection checkpoints were often manned by only one or two officers and it was therefore easy to evade their inspection: it simply was not possible for one or two people to inspect all of the cargo that moved.

Ms. Calle explained that in order to increase enforcement and compliance, a number of measures have been introduced. First, economic incentives are now employed. For example, through a newly created Voluntary Forestry Certification program, producers are encouraged to abide by environmental guidelines. The economic incentives are clear: a producer who has adopted the program and is properly certified receives a 25% production discount; a producer who is in the process of getting certified and who engages in particular contracts which abide by the program's guidelines receives a 5% production discount for those contracts; a producer who does not abide by the program's guidelines gets no such discount. Thus, there are strong economic incentives to adopt the Voluntary Forestry Certification program. This is but one example of the use of economic incentives for the purposes of improving environmental compliance.

Second, enforcement infrastructure has been increased. Various judicial, quasi-judicial and administrative processes have been created. Administrative and penal sanctions have been strengthened, a set of institutional marks have been established to help identify illegally traded lumber, and checkpoints have been bolstered. Lastly, specific mechanisms have been enacted to deal with corruption in the forestry industry. Taken together this mix of economic incentives and enforcement mechanisms has increased compliance and enforcement in the forestry sector.

Amplifying many of the insights offered by Ms. Calle, María Amparo Albán, of the Centro Ecuatoriano de Derecho Ambiental, discussed the case of compliance with and enforcement of environmental laws in the Ecuadorian agriculture sector. In general, there is a comprehensive and detailed set of environmental laws applying to Ecuador's agricultural sector. For example, in the African palm sector, the Ecuadorian Ministry of Environment requires producers to complete environmental impact assessments and environmental management plans. This type of regulation provides a solid legal foundation that serves to protect fundamental environmental interests.

However, more work by regulators in Ecuador must be done in order to strengthen this legal foundation. First, there is a need to create consistent environmental standards that apply across agricultural industries. So, for example, the requirements placed on the African palm industry must be placed on all industries in the agricultural sector. Second, there is a particularly important need to coordinate efforts of central and municipal governments. Currently, the central government calls upon municipal governments to engage in enforcement of environmental laws; however, municipal governments often lack requisite resources to enforce such laws and do not receive adequate support from the central government. As a result municipalities do not have the capacity to enforce environmental laws on a local level. In the end, many laws go completely unenforced. Improved coordination between these levels of government is required.

Ms. Albán explained that environmental awareness is increasing in Ecuador, largely thanks to the influence of trade agreements, in which environmental matters have become central. Nevertheless, increased awareness has not translated into increased enforcement of or compliance with environmental laws. There is now a changing perception in Ecuador that economic incentives have a huge role to play in increasing awareness and interest in environmental

protection. Indeed, if economic sectors increase levels of capital and investment in environmental aspects and agents, environmental awareness can have a substantially positive effect on the industry. This is evident from the experience of other countries and initiatives as described above.

The presentations in this section reflect a number of important common themes. First, there is a need to view regional and transboundary issues in a holistic manner, where economic, social and environmental issues are analyzed in concert. As part of this holistic approach, it is essential to discuss environmental concerns in economic terms and to establish synergies among industries for the purposes of establishing efficiencies associated with environmental protection.

Second, central and local governments must share the responsibility of environmental enforcement and compliance. Central governments must develop laws in a coherent and logical fashion. They must also provide sufficient resources to local governments so that laws may be enforced effectively.

Third, there is a lack of dialogue between government and affected sectors with respect to how environmental concerns affect stakeholders and how best to ensure effective enforcement and compliance.

Finally, there is no single model of enforcement or compliance that has been universally effective. However, in order to succeed, certain characteristics are required, including: well-defined objectives; effective incentives; sufficient resources; voluntary political will; mechanisms for warding-off corruption; and methods for evaluating program performance.

Section II: Environmental Law and Regional Trade Agreements in an Era of Global Change

This section focused on the relationship between international trade and environment in the context of future global ecosystem changes. Participants discussed how environmental matters are incorporated into trade agreements that have been signed or are being negotiated by countries in the Americas.

Ecosystem changes have contributed to human welfare and to economic development. However, in the past 50 years, human-beings have altered ecosystems more rapidly and extensively than in any comparable period in history, principally in order to obtain food, water, and fuel. These alterations in ecosystems have caused abrupt and significant changes, including climate change. Nicolás Lucas, of the Centro Fueguino para el Desarrollo Sustentable, explained that the confluence of a number of factors is leading to increased concerns about the trajectory of climate change and its effects. Worldwide population is increasing rapidly, from approximately 6 billion people worldwide in 2000 to 8 billion by 2020 and potentially 10-12 billion by 2060. In addition, total economic output is increasing from US\$29 trillion in 1995 to upwards of US\$100 or even to US\$180 trillion by 2050, depending on the extent of economic integration experienced over the next 50 years. The simultaneous increase in population and economic production is putting tremendous strain on the environment.

The combination of increases in demography and per capita consumption is accelerating the demanding for ecosystem services. For example, demand for cultivated food will increase by 70-85% by 2050. This increased demand is causing a significant deterioration of natural habitats

such as forestry areas discussed in Section I above. Increasing demand for fish and fish products increases the risk of a monumental collapse of regional fisheries. Consumption of water will increase by up to 85% depending on the extent of economic integration. Finally, the flow of chemicals into coastal systems will increase by 10-20% by 2030. Nitrogen expelled into rivers in developed countries will increase by 20-30%. All of these impacts will materialize without a profound change in our relationship with ecosystems.

Mr. Lucas explained that international trade has a pronounced effect on climate change. In particular, countries are trading ecosystem services at massive scales and making large tradeoffs among ecosystem services (especially in poorer regions), with significant implications for socioecological resilience. Trade in this area includes the exchange of basic goods such as water, agricultural products, fuels and minerals, as well as cultural ecosystem services. In addition, tourism has increased the utilizations of ecosystems for economic purposes. Taken together, it is evident that international trade has a strong environmental effect.

Given the relationship between international trade and climate change, the international community must work to reconcile economic and environmental interests. There are a variety of ways that this can be accomplished. First, through domestic legislation and international systems, environmental matters can be incorporated into trade agreements. Second, a transformation in markets is required so that the economic value of ecosystems is engaged. This requires conscientious consideration of the externalities associated with ecosystem degradation: once these externalities can be internalized so that the costs of degradation are apportioned to the appropriate stakeholders, the value of ecosystems will be recognized.

Many countries in the Americas have developed legal strategies for reconciling economic and environmental interests. One country that has been particularly active in this regard is Chile. Alvaro Sapag, Head of International Affairs at the Chilean Comisión Nacional de Medio Ambiente, explained that increasingly Chile has engaged in trade agreements that coordinate economic, environmental, and social matters. Two issues are always prevalent: first, emphasizing cooperation among trade partners with respect to environmental matters; and second, determining the consequences for non-compliance with environmental obligations.

With respect to Chile's experience, a number of different institutional and legal approaches have been taken to ensure that environmental matters are prevalent in trade agreements, for instance. In the Chile-Canada trade agreement there are strong consequences for failure to adhere to environmental obligations, including the overall cessation of economic relations between the two countries or the cessation of economic relations with respect to *certain* economic sectors. This second consequence has had an extremely high deterring effect.

In other trade agreements, Chile has been less successful at integrating environmental obligations. In the Chile-US agreement, environmental matters were contained in a dedicated chapter rather than having environmental obligations embedded in various sections throughout the agreement. In the Chile-Japan agreement, Mr. Sapag stated that Japan would not accept a chapter or agreement specifically dedicated to environmental matters and instead opted for a Presidential Declaration respecting environmental obligations. Given their declarative rather than binding nature, these institutional arrangements are useful but not as strong as the measures in the Chile-Canada pact.

Mr. Sapag closed by stating that negotiating environmental obligations faces two intriguing obstacles. One can be described as cultural. For example, a variety of negotiations with Pacific countries have been extremely complex because the respective environmental landscapes in the

countries are very different and, indeed, the idea of environment differs greatly among the partners to the potential agreement. As a result, it is difficult to arrive at a collective vision with respect to the environment.

The second obstacle is technical: it is essential to engage technical experts to determine *how* environmental obligations will be discharged. It is inadequate to determine environmental goals without giving thoughtful consideration to how those goals might be achieved. Thus, in every negotiation in which Chile is engaged, there is coordination among technical, economic and environmental negotiators to ensure that all issues are addressed in a cooperative fashion. For example, with Canada there will be training sessions on technical implementation of environmental obligations. This is an important part of every agreement.

The Chilean experience provides a suitable context to consider Mr. Lucas's general remarks on ecosystem change and international trade. It is evident that in order to ensure that environmental objectives are met in a trade scenario, a number of steps must be taken. First, the quality of environmental norms must be improved. This can be achieved by increasing rigorousness in the design of environmental management systems and in the development of requirements and standards that support those systems. Second, there is a need to improve the understanding of the economic costs and benefits of an environmental norm. This includes considering the aggregate social costs of these norms. In order to implement these steps, it is essential for governments to prioritize environmental matters and to regulate in a methodical fashion. In addition, though, certainly the legitimacy of such initiatives depends on public support. An approach to trade and environment that emphasizes well-constructed norms is likely to be supported by the public.

Section III: The Role of Public Participation in the Enforcement of Environment Laws

This section addressed different public participation mechanisms and alternative dispute resolution mechanisms included in trade agreements and investment treaties. Participants compared existing mechanisms, emphasizing their relative strengths and weaknesses. This discussion provided a picture of the lessons learned and highlighted the features of public participation mechanisms that are best suited to promote the enforcement of environmental laws and accountability in the area of environmental law.

A number of different institutional frameworks are used to encourage public participation in the enforcement of environmental laws and programs. To begin, Geoffrey Garver, Director of the Submission on Enforcement Matters Unit at the Commission for Environmental Cooperation (CEC), discussed the public participation and citizen submission processes within the CEC, which was created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) and which complements the environmental provisions of the North American Free Trade Agreement (NAFTA). The CEC addresses regional environmental concerns, helps prevent potential trade and environmental conflicts, and promotes the effective enforcement of environmental law.

Under the NAAEC, countries have a number of environmental obligations including establishing tri-lateral environmental cooperation and ensuring the enforcement of environmental law. In particular, under Article 6 of the NAAEC, the countries are required to ensure that private parties have appropriate access to remedies such as administrative, quasi-judicial or judicial proceedings for the enforcement of the country's environmental laws and regulations. This provision provides a robust set of remedies in the face of environmental offences that occur within the countries.

Mr. Garver explained that under the purview of the NAAEC, the CEC has provided information to help make environmental decisions and examine the relationship between trade and environmental, and has developed capacity-building initiatives in this area.

In addition, Mr. Garver explained that the CEC runs a critical citizen submission process, the goal of which is to empower the public to report violations of the NAAEC. Under Articles 14 and 15 of the NAAEC, citizens advance submissions claiming that one (or more) countries are not effectively enforcing their environmental laws. Once a citizen raises a complaint, the CEC is charged with evaluating the merits of the complaint and determining whether a factual record is warranted. To date, 58 such submissions have been advanced: 18 against Canada, 30 against Mexico, 9 against the United States, and 1 against Canada and the United States jointly.

In order to ensure that the CEC has upheld its mandate, the CEC performed a 10-year review of its operations. Top marks were given to the CEC with respect to public participation in general; however, it was noted that CEC had worked better with environmental organizations than with indigenous groups and trade organizations. Furthermore, the review indicated that some groups have become disillusioned, thinking that CEC does not have substantial relevance.

Gustavo Alanís, President of Centro Mexicano de Derecho Ambiental (CEMDA), provided interesting insights into the CEC submission process from a civil society and academic perspective. Through his work at CEMDA, Mr. Alanís is engaged with the Mexican public attempting to ensure that the Mexican government enforces its environmental laws. One of the avenues used most commonly by CEMDA is the CEC citizen submission process, but Mr. Alanís stated that in his view the process has certain flaws. For example, although there is a requirement for a country to respond to a submission within 30 days (or 60 days in unusual circumstances), there is nothing stating the consequence of *never* responding. Furthermore, citizens have little legal recourse in the event that responses from government are inadequate or that recommendations of independent bodies are not implemented. In addition, governments often serve as advocates *and* adjudicators. This inherent conflict of interest compromises the effectiveness and fairness of the process. Because of some of these institutional failings, Mr. Alanís suggested that in the scheme of NAFTA and the NAAEC the most important sanction affecting changing attitudes in Mexico with respect to environmental management are *moral sanctions*, for example Mexico getting singled out by the media for environmental irresponsibility.

In the context of the presentations of Mr. Garver and Mr. Alanís, other public participation models were considered with the objective of further understanding which mechanisms are most effective at promoting accountability with respect to enforcement of environmental laws. Jean Aden, Director of the Office of Accountability at the Overseas Private Investment Corporation (OPIC), discussed the model that OPIC uses to engage the public in enforcement of environmental requirements. Ms. Aden explained that OPIC is a United States government development agency that engages in sustainable private sector investment in emerging markets. The Accountability Office is a recently created entity that performs ombudsman and compliance review services in order to assess complaints about OPIC-supported projects. The Office is transparent, accessible to local communities and, very importantly, it is wholly independent from the other departments in OIPC.

As an ombudsman, the Office is responsible for hearing and investigating complaints alleging that OPIC projects adversely impact the environment and local communities. By working with investors and local communities, the Office resolves disputes and creates a more harmonious co-existence between the two groups. The benefits of this process are shared by local communities

whose interests are protected and investors who realize improved project outcomes thanks to improved relations with local communities. The Office's approach is modeled after other similar mechanisms. For example, ombudsman services were used in Peru when local communities complained that the Yanacocha mining company caused mercury to be leaked into the water supply. After investigation, a determination was made that leaks had occurred. The company has since spent more than US\$10 million to ensure that the elemental mercury was quickly and effectively cleaned up, retrieved, and removed from the environment. Subsequent studies have shown that those efforts were successful. The successful resolution of the conflict was largely due to the ombudsman services, which provided a forum for local communities to express their concerns and through which environmental norms and standards were upheld.

Ms. Aden explained that the Office also performs compliance reviews to evaluate whether OPIC projects comply with internal policies related to environment, social impacts, worker rights and human rights under an OPIC-supported project. These reviews, like ombudsman services, empower local communities to monitor the impacts of OPIC projects. Furthermore, OPIC gets feedback on its own activities and project outcomes improve. This mechanism is another means of involving public actors as partners in enforcement of environmental standards and norms. It is a sort of process embraced by other international organizations such as the World Bank, the International Finance Committee, and the Inter-American Development Bank.

Mr. Alanís pointed out that one of the disadvantages with both the CEC and OPIC public participation processes is that often the public lacks the means to advance a claim. In addition, in order to advance a claim, the public might rely on funding from intervenors but in doing so, the public risks losing its independence and carriage of the claim. Mr. Garver explained that there are ways to avoid this problem. For example in the CEC system the public is responsible only for submitting a complaint to the CEC. Then the CEC is charged with carriage of the submission, which includes an investigation of the facts. To this extent, the public does not need to expend substantial resources. Of course, it is demonstrably true that the CEC is then in charge of the petition, not the public itself.

In addition, Ms. Aden stated that the problem of resources has two aspects: first, because of a lack of resources, the public might not even be aware of the existence of the OPIC ombudsman and compliance review services; second, the public might not be able to advance a claim. For now, OPIC is focusing on this first aspect and Ms. Aden is engaged in a broad education campaign, informing the public in countries that OPIC operates of these important mechanisms. Ms. Aden is currently working on such educational campaigns in various countries in the Americas with the hopes that she can alleviate some of the obstacles caused by a lack of resources. Certainly, though, there is no easy answer to the concern of the public's lack of resources.

In this vein, Mr. Alanís agreed that in order to increase public participation in the enforcement of environmental laws, norms and policies, grassroots efforts must be strengthened. In this area, international organizations such as the OAS could provide needed capacity-building support to increase the engagement of government and public actors in environmental issues. In particular, perhaps the OAS could have a role in addressing the transboundary dimensions of environmental matters.

One important approach is to use public opinion, as motivated by media in particular, to get the public onside for the purposes of getting governments and companies to change their habits with respect to environmental management. However, it is a constant challenge to generate public interest in environmental issues, much as it is a challenge to generate public interest in matters of public importance in general. A large problem is that communities are not sufficiently organized

to determine how or by whom their views should be represented. Nevertheless, it is critical to engage the public because they can alter government and corporate practices: through democratic institutions or by affecting the reputation of a company that ultimately affects its economic bottom-line.

Recommendations

The following recommendations resulted from the presentations and dialogue during the meeting:

- Analyze regional and transboundary issues in a holistic manner where economic, environmental, and social issues are viewed as inter-related and inter-dependant. In particular, this requires acknowledging the economic effects of environmental degradation and developing market-based approaches to environmental protection.
- Acknowledge that environmental protection requires hemispheric, regional, sub-regional, national and local coordination and commitment. In pursuit of this objective, systems that monitor enforcement and compliance with environmental laws are useful.
- Prevent and anticipate environmental conflicts in the hemisphere using available tools and mechanisms such as strategic plans and environmental impact assessments.
- Develop strategies and guidelines for the management of shared ecosystems to address transboundary and cross-territorial environmental issues.
- Use scientific information in order to make policy decisions and design norms. In particular, scientific information is necessary when determining the value of ecosystems, the services provided by ecosystems, and the impact and damage to ecosystems.
- Investigate the increasingly inextricable link between climate change and international trade agreements and ratify trade agreements that contain stringent environmental obligations.
- Strengthen the development of environmental laws by promoting effective enforcement and compliance, allocating necessary resources, and establishing mechanisms to ensure transparency, accountability and to combat all forms of corruption.
- Develop systems to monitor environmental enforcement and compliance. Evaluate the programs that are already in place to determine the quality of their performance and how they might be improved. Assign sufficient resources to environmental enforcement and compliance programs and capacity-building initiatives.
- Engage technical experts to determine how environmental obligations in trade agreements will be met. To this end, initiate and strengthen capacity-building with respect to environmental training and practices.
- Recognize that government and private actors have an important role to play in environmental enforcement and compliance. Increase the dialogue on environmental matters among all relevant stakeholders: central and local governments, civil society,

corporations, and the general public, to maximize synergies existing among these stakeholders.

- Promote the construction of sustainable development policies, taking into account the leading role of local governments in management of natural resources, and equipping local governments with requisite capacity and resources.
- Develop enforcement mechanisms that feature well-constructed objectives and appropriate processes. This requires investment of time, energy and financial resources.
- Use international organizations, such as the OAS, non-governmental organizations and the media to engage the public in environmental enforcement and compliance. Through these groups, increase the accessibility of information available to the public.
- Develop public participation processes that are independent, accessible, and transparent. This involves ensuring access to information, improving access to justice, and reinforcing existing public participation mechanisms. In addition, this requires dedicating sufficient resources to invite such participation and creating adequate conditions to maintain participation.