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THE NEED FOR AN INDEPENDENT ENTITY TO MANAGE GLOBAL CHEMICALS AGREEMENTS

by Kelly Rain*

INTRODUCTION

Protecting human health and the environment from pollution by chemicals and hazardous materials has become a global concern. Over thirteen key international chemicals/waste agreements and initiatives exist.¹ The United Nations Environment Programme (“UNEP”) supports a majority of these agreements, but some are under the auspices of other UN bodies or governments, such as the UN Food and Agriculture Organization and the UN Commission for Europe.² As the need for chemicals regulation increases, managing the intricacies of these multilateral chemicals/waste agreements (“MC/WAs”) to take advantage of their linkages and coordinate implementation continues to grow more complex.

This article explores the need for an independent governing structure for all MC/WAs. Inevitably, chemical agreements and initiatives inter-relate, and should not be completely separated. For example, there are common themes in many of the chemicals agreements such as dealing with import/export controls and developing strategies for waste management. The global chemicals community should consider the possibility of creating an independent entity to increase the effectiveness and promote the synergies of existing MC/WAs.

The goal of this article is to promote discussion on whether creating an independent governing structure will help harmonize existing and future MC/WAs, or just add bureaucracy to the institutions.

IS “CLUSTERING” ENOUGH?

The need for integrating MC/WAs is apparent through UNEP’s current efforts to explore clustering multilateral environmental agreements (“MEAs”) with similar focus areas.³ Clustering tries to enhance synergies and linkages between MEAs by increasing collaboration among their secretariats in areas where common issues arise and the agreements have comparable areas of focus.⁴ Clustering considerations take into account the need to promote capacity building, science and technology, reporting and monitoring, and more.⁵

The UNEP Open-ended Intergovernmental Group on International Environmental Governance has debated the concept of clustering certain MC/WAs since its creation in February 2001.⁶ The three conventions widely considered for clustering

include the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal,⁷ the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,⁸ and the Stockholm Convention on Persistent Organic Pollutants.⁹ Together these conventions cover elements of “cradle-to-grave,” or more optimistically, “cradle-to-cradle.” In other words, combined these three conventions regulate new chemicals, existing chemicals, the import/export of chemicals, waste management, and environmental releases. Therefore, under these conventions chemicals are regulated through production, use, and disposal. Clustering them may thus facilitate a life-cycle approach to chemicals management.¹⁰

Clustering will likely increase the comprehensiveness and cooperation of similar MC/WAs. However, cooperation within clusters may be hindered by different stages of implementation, variances in development, and dissimilar memberships.¹¹ For example, different priorities exist during each stage of implementation, which may lead a convention’s parties to decide cooperation is not in the convention’s best interest.¹² Likewise, some conventions are more mature than others, result-

ing in a variance in their development needs. While clustering serves an important purpose in improving the chemicals/waste regime, an independent governing entity may allow better coordination for non-cluster concerns and crosscutting issues.

THE FAILURE OF SAICM TO FULFILL THIS GOAL

The Strategic Approach to International Chemicals Management (“SAICM”) is one example of an attempt by UNEP, governments, and multi-sectoral stakeholders to increase coordination among MC/WAs. In February 2002, the UNEP Governing Council adopted a decision that there was a need to further develop SAICM.¹³ In September 2002, the World Summit on Sustainable Development in Johannesburg called for the completion of SAICM by 2005.¹⁴ The aim of SAICM is to achieve, by 2020, the production and use of chemicals in ways that leads to the minimization of significant adverse effects on human health and the environment.¹⁵ The International Conference on

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Chemicals Management (“ICCM”) adopted SAICM in Dubai, United Arab Emirates, from February 4-6, 2006.¹⁶

The original aim of SAICM, a voluntary agreement, was to provide a basic blueprint for the global management of chemicals. This included covering risk assessments of chemicals, harmonizing labeling, tackling obsolete and stockpiled products, and helping the developing world safely manage chemicals.¹⁷ However, many participants at the ICCM felt that SAICM fell short of these goals, especially regarding perception of the global plan of action.¹⁸ It is widely agreed that the tools for implementation of the SAICM are a key to its success. From the point of view of most developing countries, the main tool of implementation is money; however, at the ICCM new and additional funds did not come forth, with the exception of the “Quick Start” fund to provide seed money to start programs in the developing world.¹⁹

It is questionable whether meaningful chemical safety will be able to result from the implementation of SAICM. The main issue is whether another MEA will be able to promote the synergies of existing agreements. Each multilateral agreement comes with bureaucracy and its own internal mechanisms. As such, SAICM may just exacerbate the issue of lack of harmonization among MC/WAs by adding another secretariat to the existing group. An umbrella organization, without its own mission and agenda, would be better equipped to increase coordination amongst MEAs. The key feature of an independent entity is that it would not have any personal incentives; the impetus for its existence should be to promote coordination in the global chemicals/waste community.

The probability that SAICM will be able to reform international chemicals management appears unlikely; thus, there remains a strong need for an independent governing structure for all MC/WAs.

CURRENT SHORTCOMINGS

Evaluation of some of the current shortcomings in the MC/WAs regime helps distinguish necessary steps to increase effectiveness; however, this discussion is far from conclusive. Still, motivation can be drawn from this limited critique towards creating a more effective organizational structure of all MC/WAs.

Current fragmentation between the various MC/WAs has led to numerous inefficiencies. For example, these agreements are not under the auspice of one governing body, and the secretariats of these Conventions are located throughout the globe.²⁰ This fragmentation, coupled with the increase in MC/WAs, has led to a diversified body of rules for each MEA. Likewise, a degree of “sovereignty” exists that some conventions are unwilling to give away, resulting in their disinclination to coop-

erate with other MEAs.²¹ Such fragmentation places stress on States considering ratification because of their limited ability to handle the responsibility of complying with each MEA.

Inadequate compliance and enforcement have also plagued the MC/WAs. While the Montreal Protocol on Substances that Deplete the Ozone Layer²² developed one of the first compliance regimes in the 1980s that focused on assisting parties in non-compliance, many of these regimes have only recently been formed.²³ For example, the Basel Convention Implementation Committee was adopted after three years of negotiations in 2002.²⁴ Moreover, numerous MEAs lack or have weak verification procedures.²⁵ Additionally, a successful compliance committee needs to be able to evolve based on experiences of the convention and must be adequately monitored.²⁶ The current structure of MC/WAs has mainly failed to provide sufficient compliance and supervising structures. A lack of compliance systems within MC/WAs makes these agreements defective – what is the point of an agreement if there are no provisions for enforcement?

Established in 1972, UNEP acts as the coordinator of environmental action and management within the United Nations.²⁷ While UNEP lacks formal powers, it is supposed to be the nucle-

us of the international environmental regime.²⁸ However, UNEP has not been given, or has not used, the complete authority necessary to fulfill its task as a catalyst for MEAs.²⁹ Limited membership in the governing council and lack of resources are other factors that hinder the authority of UNEP.³⁰

MC/WAs utilize different financial mechanisms, some of which struggle with inadequate funding. Insufficient funds may

hamper the implementation of agreements and prevent the development of synergies and cooperation among conventions.³¹ A recent study by the Rotterdam Convention found that MEAs experience serious financial hardship when they rely solely on “(1) voluntary contributions for their financial mechanism, or (2) coordinating mechanisms instead of true financing mechanisms.”³² For example, the Montreal Protocol’s “stand alone” financial mechanism has been attributed with this MEA’s success.³³ Conversely, the voluntary mechanism of the Basel Convention has led to a non-dependable stream of discretionary financial resources for the Convention.³⁴

AN INDEPENDENT GOVERNING ENTITY SHOULD BE JUDGED ON HOW IT RESOLVES THESE ISSUES

The creation of an independent governing entity for the expanding number of MC/WAs would likely help harmonize the conventions and increase effectiveness. The threshold question is whether the creation of such a body would alleviate some of the complications that currently plague the MC/WAs, or just create another administrative burden.

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All chemicals/waste agreements would be altered to exist under the auspice of this independent entity, which would be under the United Nations umbrella. Each MEA would retain its secretariat and most of its other internal machinery. The chemicals/waste governing entity would have advising power, but no executive authority. Some of the functions of this organization would be to monitor compliance, encourage coordination, assist with dissemination of information, provide recommendations to individual MEAs, and serve as a resource of information. A major alteration would be the creation of a financing mechanism under this entity for all MC/WAs.

POSSIBLE STRENGTHS OF AN INDEPENDENT GOVERNING ENTITY

Numerous strengths can be identified for uniting all MC/WAs under one roof. For example, when decision-making is integrated, it reduces the risk of repetition, inconsistencies, and conflict.³⁵ A greater chance of collaboration and identifying gaps in the research would also exist.

The pooling of scientific and technical knowledge and the avoidance of duplication would be one of the benefits of an independent governing entity. Increased dissemination of science and technology has always been an attraction to clustering conventions that are directly related.³⁶ An independent umbrella organization would allow the creation of a technical body that would facilitate the pooling of information on health and environmental impacts of chemicals. This body would serve as a library equipped with the information to help promote meaningful chemicals safety. Additionally, gaps in research would be identified more quickly.

An independent governing structure would reduce fragmentation and increase communication between the conventions. Instead of having numerous UN bodies responsible for implementing MC/WAs, they would all be under the auspice of one entity. Thus, a degree of conformity would exist among all the MC/WAs, even if the secretariats are still located in different regions. Additionally, overarching committees for compliance, information, and financing will inspire the MEAs to work together to instill full authority into the governing entity, giving them the foundation that UNEP has not been able to provide.

Another strength would be the ability of the governing entity to try to establish an effective implementation and compliance committee. While this will prove to be challenging, the governing entity will be able to monitor the execution of each convention at a national level, and search for non-compliance. Additionally, there is a current need for a judicial instrument to help settle compliance disputes.³⁷ The governing entity could provide this venue, allowing a much needed arena for dispute resolution leading to greater compliance within the chemicals regime.

An independent entity would also lead to a more stable financing mechanism. Combining the financing mechanisms of all MC/WAs would increase the success of these agreements. The Global Environment Facility (“GEF”) provides an example of a successful multipurpose operational entity. As the sole financing facility that serves more than one convention, the GEF provides insight into the possible establishment of a similar financial structure for chemicals.³⁸ The GEF also provides a sound model of sustainability since its donors have provided between \$2 to \$3 billion of financing for each of its first three replenishment periods.³⁹ The possibility of creating a separate entity, similar to GEF, with a focal area to support all MC/WAs has promise to help accelerate the progress of these agreements by assuaging financial problems.

There is also the consideration of expanding the mandate of GEF to include chemicals conventions that focus on more than

persistent organic pollutants, ozone depletion, climate change, and international waters.⁴⁰ In other words, creating a “GEF Chemicals.” The 2005 study to find lasting financial mechanisms for the Rotterdam Convention identified the option of “[e]xpanding the GEF focal area to serve a cluster of chemicals conventions and processes, including the Rotterdam Convention.”⁴¹ A study of financial considerations for implementation of the SAICM conducted in July 2005 also explored

the possibility of funding SAICM under the GEF.⁴²

POSSIBLE WEAKNESSES OF AN INDEPENDENT GOVERNING ENTITY

The possibility exists that creating a governing entity responsible for implementing all of the MC/WAs will not improve the current troubles experience by the agreements but will merely transfer them to a new entity.

While an independent governing body may be able to decrease external fragmentation among MC/WAs, it does not mean that the individual conventions will be willing to give up their autonomous nature. Each MEA has its own structure consisting of the secretariat, a conference of the parties, advisory bodies, technical experts, and more. An independent governing body does not impact the organization of each individual agreement. Thus, the people responsible for running each MEA may still be unwilling to cooperate even if there is an increase in external coordination.

While it is undisputable that there is much overlap between these agreements, it may be difficult to create effective machinery that provides technical bodies and committees for MEAs with different members and focal areas. For example, differing research needs of the convention may result in disputes of the allocation of research funding by the scientific and technical knowledge technical body. The administrative backlog from trying to coordinate the various chemicals/waste agreements may negate the purpose

An independent governing structure would reduce fragmentation and increase communication. . .


of collaboration. Additionally, an MEA is not a stagnant agreement. Most MEAs evolve over time, with their needs and goals altering. The task of trying to create an implementation and compliance committee that is able to monitor and regulate all the MC/WAs may prove extremely difficult, if not impossible.

An important goal of many MC/WAs is to assist developing countries in protecting human health and the environment. It is possible that the balance of power may become skewed within an administrative structure trying to coordinate all of these important MEAs. In the end, developed nations, industry, and better funded organizations may end up with more control than is in the best interest of the parties of the Conventions.

Moreover, the creation of an independent financial mechanism for MC/WAs might experience a similar imbalance of power. The triumph of an MEA can be directly attributed to its financial resources, and developing countries are in dire need of

money in order to have the tools to implement the sound management of chemicals. However, wealthy developed countries that contribute more financial resources tend to have a louder voice on the allocation of funds than developing countries. Pooling the resources of the MEAs into either a “GEF Chemicals” or an independent financial mechanism leads to issues of having to deal with a large amount of bureaucracy to accomplish the fair distribution of funds.

CONCLUSION

The creation of an independent structure to govern all MC/WAs would allow the greatest chance for successful international chemicals management. It can be debated whether creating this governing body to house all MC/WAs will help coordinate existing and future agreements, or just add another layer of complications. However, the global environmental community is running out of alternative options to help harmonize sound chemicals management. 

[P]eople responsible for running each MEA may still be unwilling to cooperation even if there is an increase in external coordination.

ENDNOTES: Independent Chemicals Entity

¹ See Paul E. Hagen & Mateo Davis, *Key International Agreements and Initiatives Addressing Chemicals, Wastes, and Heavy Metals*, SK046 ALI-ABA 19 (2005).

² See Hagen & Davis, *id.*

³ UNITED NATIONS ENVIRONMENT PROGRAMME, *The Hazardous Chemicals and Waste Conventions*, September 2003, available at <http://www.pops.int/documents/background/hcwc.pdf> (last visited Mar. 18, 2006) [hereinafter *Hazardous Chemicals*].

⁴ See UNITED NATIONS ENVIRONMENT PROGRAMME, *Clustering of chemicals/wastes multilateral environmental agreements*, UNEP/POPS/INC.6/INF/18, 2 April 2002, available at <http://www.pops.int/documents/meetings/inc6/englishonly/INC6INF18.doc> (last visited Mar. 18, 2006) [hereinafter *Clustering*].

⁵ *Clustering, id.*

⁶ *Clustering, id.*

⁷ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted in 1989 and entered into force in 1992, <http://www.basel.int>.

⁸ The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was adopted in 1998 and entered into force 24 February 2004, <http://www.pic.int>.

⁹ The Stockholm Convention on Persistent Organic Pollutants was adopted in 2001 and entered into force 17 May 2004, <http://www.pops.int>.

¹⁰ *Hazardous Chemicals, supra* note 3.

¹¹ UNITED NATIONS ENVIRONMENT PROGRAMME, *International Environmental Governance: Multilateral Environmental Agreements (MEAs)*, UNEP/IGM/1/INF/3, 6 April 2001, at 28, available at www.unep.org/dpdl/IEG/docs/working%20documents/MEA_full/INF3_MEA_Add.doc (last visited Mar. 18, 2006) [hereinafter *MEA Governance*].

¹² *MEA Governance, id.* at iii.

¹³ UNITED NATIONS ENVIRONMENT PROGRAMME, *Decision Adopted by the Governing Council at its Seventh Special Session/Global Ministerial Environment Forum, SS.VII/3*, 15 February 2002, available at <http://www.chem.unep.ch/saicm/ssvii3en.pdf> (last visited Mar. 18, 2006).

¹⁴ *Governing Council Decision, id.*

¹⁵ *Governing Council Decision, id.*

¹⁶ *New Global Chemicals Strategy Given Green Light by Governments*, Press Release, February 7, 2006, available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=469&ArticleID=5137&l=en> (last visited Mar. 18, 2006).

¹⁷ See *New Global Chemicals Strategy, id.*

¹⁸ See *American University Panel Discussion on the Future of Chemicals Management*, <http://www.wcl.american.edu/secle/video.cfm#> (last visited Mar. 18, 2006).

¹⁹ *AU Panel Discussion, id.*

²⁰ See Hagen & Davis, *supra* note 1.

²¹ *MEA Governance, supra* note 11, at 28.

²² The Montreal Protocol on Substances that Deplete the Ozone Layer was adopted in 1987 and entered into force 1 January 1989, http://ozone.unep.org/Treaties_and_Ratification/2B_montreal_protocol.asp.

²³ Patrick Széll, *Introduction to the Discussion on Compliance*, 31 August 2004, available at <http://www.joensuu.fi/unep/envlaw/review2004/2004ReviewPartIII.pdf> (last visited Mar. 18, 2006).

²⁴ Secretariat of the Basel Convention, <http://www.basel.int/legalmatters/compcommittee/index.html> (last visited Mar. 18, 2006).

²⁵ International Institute for Sustainable Development (“IISD”), *MEA Enforcement and Compliance Meeting Bulletin*, available at <http://www.iisd.ca/download/pdf/sd/ymbvol121num1e.pdf> (last visited Mar. 18, 2006).

²⁶ *IISD, id.*

²⁷ Dena Marshall, *An Organization for the World Environment: Three*

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Models and Analysis, 15 Geo. Int'l Env'tl. L. Rev. 79, 81 (2002).

²⁸ Marshall, *id.* at 82.

²⁹ Philippe Roch & Franz Xaver Perrez, *International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient International Environmental Regime*, 16 Colo. J. Int'l Env'tl. L. & Pol'y 1, 16 (2005).

³⁰ Roch & Perrez, *id.*

³¹ MEA Governance, *supra* note 11, at 9.

³² UNITED NATIONS ENVIRONMENT PROGRAMME AND FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Study of Possible Options for Lasting and Sustainable Financial Mechanisms*, UNEP/FAO/RC/COP.2/10, 25 May 2005, at iv [hereinafter *Financial Mechanisms*].

³³ *Financial Mechanisms*, *id.* at 18.

³⁴ *Financial Mechanisms*, *id.* at 10-11.

³⁵ Clustering, *supra* note 4.

³⁶ Clustering, *supra* note 4.

³⁷ IISD, *supra* note 25.

³⁸ Global Environment Facility Assembly, *Second Overall Performance Study of GEF*, GEF/A.2/4 at 46 (2002), available at http://www.gefweb.org/participants/Assembly/2nd_Assembly/OPS2_English-final-9602.pdf (last visited Mar. 18, 2006); *Financial Mechanisms*, *supra* note 32 at 20.

³⁹ SAICM, *Study on financial considerations pertaining to a strategic approach to international chemicals management*, SAICM/PREP-COM.3/INF/28, 20 July 2005, available at <http://www.chem.unep.ch/saicm/meeting/prepcom3/en/INF28.doc>, page 22 (last visited Mar. 18, 2006)

⁴⁰ SAICM, *supra* note 39; *Financial Mechanisms*, *supra* note 32, at 27.

⁴¹ *Financial Mechanisms*, *supra* note 32, at 27.

⁴² SAICM, *supra* note 39.
