



FACT SHEET No. 11

Necessary steps and issues to address during conviction trials of illegal ODS trade

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Introduction

Legislation, deciding on the appropriate legal forum and proof required for any legal forum are the main issues and steps to safeguard a possible conviction of illegal ODS trade.

Step One: Enacting Legislation

- Enacting domestic legislation that implements the Montreal Protocol is the basic step towards enforcement of the ODS policies in the country.
- Ensuring that the legislation has penalty provisions is essential. Without penalty provisions, it may be impossible to secure conviction of offenders in a court of law.
- Domestic legislation should include a quota system and an ODS import and export licensing system. The legislation should include penalties for violations of the licensing system including revocation of the license, fine and jail sentence. Without penalty provisions, it may be impossible to take enforcement action in a court of law. (Also see Fact Sheet No. 2 "Steps in Preventing Illegal Trade of ODS").

Step Two: Deciding on the Legislation on which to take action

Identify legislation that could be used to prosecute a case of illegal ODS trade. The legislation chosen must have some penalty provisions to be effective. Potential options include:

- An Environmental Protection Act that includes provisions for violations of ODS regulations or ODS licensing systems.
- A Customs or Trade legislation that includes provisions for importing or exporting goods in violation of domestic law (i.e. a smuggling violation), for making false declaration on customs documents or for failure to pay the requisite duty.
- A general criminal legislation that prohibits making false declaration or presenting false documents or includes provisions for money laundering (if monetary transactions are involved) or general fraud against the government.

Choice of the appropriate law on which to base an enforcement action depends on the facts of the case and the objectives of the prosecution. In general, it is better to choose the offense that can easily be proved, although for more serious violations, the offenses with the strongest penalty provision should be used.

Step Three: Deciding on the Appropriate Legal Forum: Administrative - Civil Judicial - Criminal Judicial

Administrative Action

Administrative action is a quasi-judicial action that can be taken by a Customs agency or an Environmental Agency. Lawyers for the agency will bring an action on behalf of the agency in an administrative court that handles matters solely pertaining to customs law or environmental law (such as an environmental court). This option may not be available in every country. An administrative court may have limited authority and may only be able to rule on seizure and forfeiture of goods, revocation of licenses and imposition of fines up to a certain amount. Most administrative courts do not have jurisdiction to impose a jail term. An advantage of an administrative court is that because it specializes in either customs or environmental proceedings, judges will be knowledgeable about the types of violations being considered and can expedite the proceedings. Rules of evidence may be more relaxed although the standard of proof is likely to be the same as in courts of general jurisdiction.

Civil Judicial Action

Civil Judicial Actions are brought in courts of general jurisdiction. Civil actions allow for monetary damages, which are usually higher than those for administrative actions. They may also allow for forfeiture of goods, revocation of licenses, or the issuance of orders that require a violating party to cease and desist certain behavior. Civil Judicial action usually requires involvement of a prosecuting authority and cannot be instituted by attorneys for customs agency or environmental agency. The burden of proof for civil violations is described variously as "more reasonable than not" or "on balance of probabilities". The probability of offence to have occurred is at least 51 per cent.

Criminal Judicial Action

Criminal Judicial Actions are also brought in courts of general jurisdiction. Criminal actions are distinguished from civil actions in that penalties for criminal violations involve depriving an individual of his civil liberties by subjecting him or her to violations that include jail term. Criminal actions are designed to be punitive and to deter others similarly situated from committing violations. Criminal convictions require the highest burden of proof, that is proof beyond a reasonable doubt and require involvement of a prosecuting authority to institute the charges, although the agency still plays a vital and important role in collecting evidence and preparing the case for court.

Advantages of Different Legal Proceedings

- Administrative action is more streamlined, but penalties are less stringent and may be seen as the "cost of doing business". When the offense is a minor violation or when proof beyond reasonable doubt may be lacking, administrative action may be the best alternative.
- Criminal Judicial Action requires a higher degree of proof. It will take longer for the court case to be heard, but penalties can be much higher. This action is taken for the most serious cases.
- Civil Judicial Action is somewhere in between. If proof beyond reasonable doubt may be lacking or a stiff civil fine is thought to be the most appropriate remedy, then civil judicial action may be the appropriate forum.

Step Four: Proof Required

Proof of offence will be required for each one of the legal fora, meaning one has to prove the elements of the offense. The burden of proof will vary as to administrative, civil or criminal violations. Elements of an offense will vary considerably from statute to statute and from country to country. An example of a potential violation under an environmental or customs statute would be:

1. the accused intentionally imported or exported
2. a controlled ozone depleting substance
3. without possessing an import/export license

The Prosecutor or agency counsel must have sufficient proof on all three elements in order to sustain a conviction. If the action is being brought before an administrative court or civil court, the evidence collection will usually be accomplished through civil inspectors with the customs agency or environmental agency. When an action is brought before a criminal court, a trained criminal investigator will likely accomplish evidence collection with substantial assistance from civil inspectors. The value of a criminal investigator is that he/she is trained in conducting large-scale investigations and can devote time to the investigation.

First Element: proof that the accused acted intentionally

Proof that the accused acted intentionally may not be required if the statute is of "strict liability". Strict Liability requires no proof of bad intent, but even then it is always helpful to have evidence of intentional conduct, as it will help explain the seriousness of the offense to the Court. If proof of intentional conduct is lacking, proof of negligent conduct may be helpful to present to the court.

Second Element: proof that the substance was an Annex A ODS

Many enforcement officers make use of the Refrigerant Identifier to determine whether a seized substance is CFC-12 or not. However, whether this test can provide proof of the substance in question will depend on Legal Forum that will be used. It might be sufficient to take administrative action. However, in a criminal case, it is unlikely to be accepted as sufficient proof by the court.

In a criminal case, it is recommended to use the refrigerant identifier as field testing equipment only, giving a first indicator of the criminal act. If the field test indicates a banned substance, then a sample should be collected. To be representative, the sample should be collected in a stainless steel gas canister if it is a gas. For liquids, a different type of equipment may be used. Sampling requires the proper chain of custody. Also, staff that received specific training can only do sampling. Testing through use of a gas chromatogram is suggested for definitive identification of ODS gases and liquids.

Third Element: proof of import/export without possessing an import/export license

A person at the National Ozone Unit or the environmental agency that keeps track of licenses issued or consumption allowances can provide proof. This will include testimony that they searched agencies' records and found no evidence of a license awarded to the accused.

Step Five: Judicial Decision

For determining the sentence, proof of harm may also be an issue. However, since it will be very difficult to link harm done to the specific offence, this should be avoided.

The question then arises of what type of sentence to ask for. Following are the factors that will be taken into account when deciding on the sentence:

- Proven Harm and Intent
- The number of cylinders or drums containing ODS involved
- Whether it is a repeat offense or a first-time offense

A sliding scale will be applied depending on these factors. Educating the Judiciary on importance of ODS laws and strong enforcement will also be crucial in determining the scale of the sentence.

Note 1: Special Considerations for Refrigerant Identifier Certification

As mentioned above, the test results obtained by a refrigerant identifier may be sufficient to take administrative action, but should only be used as field-testing result for other legal actions.

In any case, if possible, the refrigerant identifier should be sent back to the manufacturer periodically for servicing and calibration. As alternative, an Air Conditioning Company may be identified in country that can service and calibrate the equipment.

The supplier of the identifier equipment should have received independent laboratory confirmation showing that they meet certain standards.

In any case, legislation should be adopted approving the use of ODS field testing equipment as meeting national standards.

Note 2: Sample Analysis

Sample analysis to be used as evidence in court has to fulfill certain conditions.

Gas chromatography is the main analysis technique for identification of ODS gases. The analysis has to be done by a certified laboratory. In some countries, the National environmental agency may have a laboratory that allow for gas chromatography analysis. In that case, one should check with the environmental agency about third party laboratory certification. One also has to ensure that the laboratory has proper security provisions and chain of custody.

Sources used

This fact sheet was compiled by UNEP, CAP-ROAP based on presentations made by resource persons at the 3rd Joint SA-SEAP Customs & Ozone Officers Cooperation Workshop, Beijing, 20-23 April 2005

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Useful Web sites

- UNEP DTIE OzonAction Programme: www.uneptie.org/ozonaction
- WCO: <http://www.wcoomd.org>
- Ozone Secretariat: <http://www.unep.ch/ozone>
- SEI: <http://www.sei.se/atmosphere>
- Interpol: <http://www.interpol.int/>