

SUMMARY OF PANEL 3: ENFORCEMENT INITIATIVES: STORIES OF SUCCESS

- Moderator:** Kenneth Cook, Environmental Working Group, United States
- Panelists:** Bill Clark, Nature and National Parks Protection Authority, Israel
Antonio Oposa, Jr., Philippines
Justice Adel Omar Sherif, The Supreme Constitutional Court, Egypt
Walker B. Smith, Environmental Protection Agency, United States
- Rapporteurs:** Matthew Stilwell, Institute for Governance and Sustainable Development, Geneva
Matthew Cooper, Environmental Media Consultant, United States and New Zealand

1 INTRODUCTION

This panel presented successful enforcement initiatives and sought to inspire future successes. A diverse group of panelists from government, civil society, the judiciary, and a local community-based action group highlighted practical enforcement examples and success stories. INECE has helped facilitate these successes by working to: 1) raise awareness of compliance and enforcement; 2) develop networks for enforcement cooperation; and 3) strengthen capacity to implement and enforce environmental requirements. The stories and practical examples described during the panel demonstrate that enforcement initiatives are actually about protecting our collective future and preserving the environment for future generations. All participants emphasized the importance of communication, networking, and capacity building to ensure successful enforcement action. The judiciary, government agencies, nongovernmental organizations (NGOs), and communities all have special roles to play in facilitating effective enforcement and ensuring that successes and any “Eco-Hero” stories are communicated to a wider audience.

2 PRESENTATIONS

2.1 Presentation by Mr. Kenneth Cook

Mr. Kenneth Cook, President of the Environmental Working Group, opened the panel by explaining that the panelists would talk about stories of success, stories on the ground, stories of capacity building, and stories of taking action. He stressed that in the second half of the last century, and at the beginning of this century, we are “standing up for the entire future”, we are standing up for the planet, and we are looking to the future to secure victory. Mr. Cook inquired as to whether we have our finger in the dyke or whether we are close to a victory for the people and the environment. He then announced that the four speakers would present a broad range of successful enforcement initiatives and the stories behind these successes.

2.2 Presentation by Dr. Bill Clark

Dr. Bill Clark, International Liaison Officer for the Nature and National Parks Protection Authority in Israel, questioned what we mean by a successful enforcement initiative. We are asked to consider the concept of success, and within the context of INECE's three overarching priorities. What do we know about each?

First, INECE seeks to raise aware-

ness of compliance and enforcement. Recent decades have witnessed an increased awareness of environmental crime. Until recently, there was a thriving trade in ivory, animal pelts, and other animal species. As a consequence, species were being depleted and driven into extinction. Countries have adopted endangered species laws, the Convention on International Trade in Endangered Species (CITES) was agreed upon, but despite these admirable efforts, the dirty business of illegal trade in contraband wildlife products continues. Most people today know about endangered species and understand that keeping species from extinction is important. But all of this success in raising awareness has been matched by increasing criminality – so we face a dilemma. Despite all of the successes and the raising of awareness, “dirty trade” continues at a disturbing rate.

INECE's second goal is to develop networks for enforcement cooperation. Dr. Clark noted that this conference is helping to create many initiatives and collaborative projects and that this is an ideal opportunity to increase communication networks. Interpol has also created enforcement networks on environmental issues. For example, Interpol's Project Noah identified one person as a key actor in trafficking in many regions. This key actor was cornered in Mexico, extradited to the United States, and sentenced to 71 months in a U.S. prison. Other networks too have had significant success stories, such as the Lusaka Agreement and Europol. Dr. Clark stressed that networking works, and that we need much more of it.

Of course, the criminals also create their own networks. They create different groups, different communication channels, and different ways of moving species. Today we think less of “organized crime” and more of “networked crime”. The numerous legal and political obstacles hamper authorities' attempts to curb these criminal activities. But we must work within these obstacles and resolve them to enhance the flow of information and to secure human rights and effective law

enforcement. Responsible law enforcement must be accountable; criminals can work outside formal responsibilities, but authorities cannot. We must be accountable, follow the rules, and protect the information of individuals used in relation to the enforcement and prosecution of criminal activity, even if there is no level playing field. But networking helps us to do this well, linking us across borders and around the world.

INECE's third goal is building capacity. Dr. Clark affirmed that there have been numerous successes in increasing capacity. One is Interpol's EcoMessage, which provides all officials with access to Interpol's information and network. Another is the Lusaka Agreement, which is an informal network of African officials who work together for wildlife protection and enforcement. The Lusaka Agreement Taskforce has undertaken a range of important initiatives, including the recovery of huge smuggled stocks of ivory from Singapore, in collaboration with Singaporean officials. The International Fund for Animal Welfare (IFAW) has also built capacity through a range of partnerships. IFAW built scientific capacity to undertake DNA and isotope analysis of ivory, to find the ivory's origins and the structure of the criminal organizations undertaking the smuggling. This scientific capacity building helps support enforcement capacity. Networking opens access to technical resources and capacities. These are not the traditional tools of African park rangers; things are changing as new technology and networking works to support enforcement.

What is the sense of raising awareness, building networks, and creating capacity – the three goals of INECE – if the criminals still have the upper hand? If we look into our own work, we know that for everyone we catch, there are still many getting away. If we can break the chain of criminality – break the links at any point in the chain – then the principal concerns of society are met. However, with wildlife and pollution, the first link is the problem. The conviction of wildlife criminals is often too late, as the animals are already dead or the

environment is already polluted. So we must emphasize the importance of deterrence if we are to be better in achieving the goals society has set for us.

2.3 Presentation by Mr. Antonio Oposa Jr.

Mr. Antonio Oposa, Jr. of the Philippines told a story. Once upon a time in the Far-East, there was a group of islands called the Philippines. It was known to be the richest island of biodiversity in the world. But the real wealth of the Philippines is under the water. It has many more miles of coastline than the United States. It is the richest center of biodiversity in the world. In a small sector of their ocean, there are more species of coral than in many other parts of the world. But this biodiversity has been destroyed by blast fishing, cyanide fishing, and other activities based on exploitation of these fragile ecosystems. There were three million hectares of coral reef, now there are only eight thousand hectares left. The Visayan Sea and Philippines islands can be found in the Sulu-Salawesi Marine Triangle, an epicenter of biodiversity on Earth, but it is facing collapse. How can we respond to this? "We can curse the darkness, or we can light the candle."

In January 2003, Mr. Oposa and colleagues launched an operation with local police and convicted seven people of damaging the coral reefs through dynamite fishing. Yet instead of simply taking the convicted persons to jail, part of their punishment was to act as fish wardens to protect the sea they were previously destroying.

Mr. Oposa's group then focused on addressing the production of the blasting caps that were used for fishing. After shutting down production on their island, his group moved to address production of blasting caps on other islands. With the help of the Navy, the group organized a gunboat to shut down blasting cap operations on a neighboring island.

An ongoing challenge remained to capture not only the fishing boat crews, but also the owners who are often rich, power-

ful, and have links with corrupt police. With the help of local law enforcers and the Navy, his group convicted a number of owners, sending a message to criminals that illegal operations would not be tolerated. Mr. Oposa observed that in the rules of nature, there is no right or wrong, only consequences. So to promote longer-term care of the coral reefs and the marine environment, his group organized the Visayan Sea Squadron to empower and educate youth, help local governments establish marine sanctuaries, and undertake marine surveys. The purpose of the Squadron is to enlighten the youth, who must take responsibility for the future of their natural environment. The group promotes the three "E's" of environmental stewardship: Education, Engineering (social, physical, legal, and financial), and Enforcement, leading to Conservation, Protection, and Restoration (CPR). In effect, this is CPR for the environment. These successes are due to networks and inter-agency cooperation.

Mr. Oposa concluded with two thoughts:

"In the laws of nature, there is no right or wrong, only consequences."

"Though nothing can bring back the hour / of splendor in the grass and glory in the flower, / we grieve not rather find / strength in what remains behind."

This is an evolving story.

2.4 Presentation by Justice Adel Omar Sherif

Twenty years ago, Justice Adel Omar Sherif, Deputy Chief Justice of the Supreme Constitutional Court in Egypt, became involved in protecting the environment. At this time, having an interest in the environment was questioned by many, who wondered why environmental issues would be of interest to a judge and not simply environmental officials. However, Justice Sherif argued that in order to be part of the civilized world, one must have a commitment to the environment. It was not until the global judges meeting in Johannesburg that it became evident to developing countries that to be part of the civilized world

today they must respect all human rights including the right to the environment.

Since then, collaborating with the United Nations Environment Programme (UNEP) and the Supreme Court of Egypt, a union of judges focusing on the environment has been established to support judges in the Arab Region, by creating networking and awareness and by providing databases and resources. Support for the judges has come from UNEP to establish a global center for training judges. The government of Egypt has provided the center with land and headquarters, which will cost over 15 million dollars.

These organizations are working with partner organizations in Europe and elsewhere to develop the program and its materials. The goal is to help judges in the region and in the wider developing world to understand the environmental challenges and to build a world that is cleaner, more peaceful, and more democratic.

2.5 Presentation by Ms. Walker Smith

Ms. Walker Smith, director of the Office of Civil Enforcement at the U.S. Environmental Protection Agency ("EPA"), began her presentation by explaining that initiatives are often developed to meet a different challenge than core enforcement activities. A key component of core enforcement activity is to ensure a level playing field. Thus, there is an implicit assumption that there is a basic level of compliance in the sector, and the goal is to bring those who are out of compliance to the same level as those who are complying. But what if virtually the entire sector is out of compliance? Then creating a level playing field is not the issue. The playing field is level, but it is level at the bottom. This scenario is ripe for an initiative.

This is not to say that the more traditional model of bringing one or two big enforcement cases cannot motivate a sector into compliance. One example of how this strategy can promote compliance in a sector is the EPA's recent enforcement action against DuPont. The EPA filed an administrative case against DuPont for fail-

ure to provide the Agency with information on the adverse effects of PFOA, a substance used to make Teflon. The EPA alleged that DuPont's failure was a violation of Section 8(e) of the Toxic Substances Control Act ("TSCA"), which requires companies to submit information to the EPA about chemicals that may present a substantial risk to human health or the environment. The DuPont case has gotten the industry's attention about the importance of meeting its obligations under TSCA. Even though the case is still in litigation, the industry has identified TSCA compliance as one of its biggest priorities, has invited the EPA to national conferences to speak about the importance of TSCA compliance, and has come to the Agency to discuss TSCA compliance.

However, compliance with TSCA does not require a company to invest in expensive control technology. Ms. Smith explained that it has been the EPA's experience that where compliance is expensive, the traditional model of bringing one or two cases is often not sufficient to bring a sector into compliance. Here the level playing field can operate as a disincentive for companies to come into compliance: until companies in the sector are convinced that the Agency will bring additional enforcement actions, they may be unwilling to expend funds for pollution controls when their competitors are not making similar expenditures.

That dynamic changes when the EPA announces an initiative against an entire sector. EPA sector initiatives have proven highly effective. The petroleum refining industry is an example of a successful EPA initiative that is nearing conclusion. The EPA inspected over 100 petroleum refineries for compliance with the Clean Air Act, the Clean Water Act, and hazardous waste regulations, found violations at every facility, and identified the sector as a national priority. However, the task of bringing the entire refining industry into compliance with numerous statutes proved daunting, so the EPA tasked a working group with determining which violations should be the focus of the priority and with

determining an enforcement approach.

The resulting strategy focused on the areas with the most significant environmental impacts, involving significant VOC, NO_x, SO₂, and toxic emissions. Thus the Agency decided to concentrate on four areas in the initiative: flaring, benzene emissions, leak detection and repair, and new source review. New source review requires installation of the best available control technology for new and modified units in refineries, including heaters, boilers, and cracking units.

EPA also decided to use an innovative approach to traditional enforcement to obtain compliance in each of these four areas. Under the more traditional approach to enforcement, the EPA develops a case using information requests, inspections, and other methods to identify violations. Once those violations are identified, the Agency engages in settlement where possible, or proceeds to litigation. Whether the parties are in settlement negotiations or litigation, they spend significant efforts attempting to prove or disprove the violations. Once the violations are established, the parties engage in discussing the appropriate remedy for the violations.

The EPA wanted to try an approach that would bring the parties to resolution more quickly and would bring an entire company into compliance at one time, rather than suing a company on a facility by facility basis. Under this alternative approach, the EPA limits the investigation of the company and does not fully develop information on all of the potential violations. In return for the EPA's agreement to limit the investigation, the company agrees that the negotiations will focus not on the violations, but rather on how to bring the company's facilities into compliance with the law, thus remedying any underlying violations.

This approach means that the parties do not have to engage in a time consuming and costly discovery process about each violation, providing obvious resource benefits to the EPA and participating companies. The companies save resources on litigation costs and can enter into system-

wide settlements that allow them to incorporate business planning into the settlements, a more difficult proposition in facility by facility negotiations. Moreover, since the EPA will have less information about a company's specific violations, the penalty imposed in the consent decree can be reduced. If companies reject this alternative approach, the EPA proceeds with traditional enforcement. Most of the petroleum refining industry has agreed to the alternative approach, although the EPA has had to proceed with information gathering on some occasions when settlement discussions broke down. Following a period of traditional information gathering, the parties have generally resumed settlement discussions.

This approach has led to significant benefits. It began with a sector out of compliance, and now over half of the industry (by refining capacity) is under a consent decree, requiring system-wide emissions reductions and compliance with the Clean Air Act. Another significant percent of the industry is in settlement negotiations that are close to resolution, and EPA hopes to have 80% of the industry under national consent decrees within the year. The remaining 20% of the industry will be addressed by EPA regions and by states.

This process, Ms. Smith explained, has also allowed companies and the EPA to discuss ways to improve technology to get more effective control technology at lower cost. An unanticipated benefit of this approach has been enhanced communication and cooperation within the industry about pollution control. When the first consent decrees were signed, the settling companies created a "Consenters' Group" that meets on a regular basis to discuss pollution control, including new technologies to meet the emissions limits in the decrees. The EPA also meets with the Consenters' Group to discuss compliance issues. This communication within and with industry has proved important in enhancing compliance.

Ms. Smith concluded by stating that the EPA has built on the lessons learned in the refinery initiative and developed other national priorities to address

widespread noncompliance in sectors that have a significant environmental impact. Initiatives are challenging and require a significant commitment of time and resources, but they can turn an industry around and make a real environmental difference.

3 DISCUSSION

Participants and panelists addressed a number of issues through questions and discussions.

Question: The role of judicial networks is crucial. The European Union (EU) has established a forum of judges for the environment. It has circulated a questionnaire to the twenty-five EU countries. This technique could also be used by INECE to gather information. Different forums of judges could collaborate and exchange best practices. We could also see an academy under the auspices of INECE to promote best practices. There is, for instance, important case law on the precautionary principle applied by Supreme Courts which could be promoted among judges. (EU representative)

Answer: Collaboration among judges is important and can help to promote common language and approaches across different jurisdictions. International cooperation at national, regional, and international levels is particularly important. (Justice Adel Sherif)

Question: First, experiences in Bangladesh establishing a separate environmental court with special magistrates has proved illustrative. While much training focused on higher level judges, often cases are brought in the lower courts. How, through initiatives such as the new judges facility, can we facilitate the training of magistrates at lower levels? Second, in relation to collaborative approaches discussed by Ms. Walker Smith, is there a danger of capture when the regulated community is included in the discussion? (Ms. Linda Duncan)

Answer 1: In relation to training, the policy of the new center will be to make training available to all judges who are interested, subject to capacity. The chal-

lenge is for judges to accept the concept of training, so it is important to approach judges in the right way. (Justice Adel Sherif)

Answer 2: Collaboration on issues such as flaring in the petroleum industry has worked well. It has prevented opposition to consent degrees which might otherwise have seen challenges by the industry. (Ms. Walker Smith)

Question: Workers in a company are also part of the network that could be called on to help promote compliance. Can unions be better included in discussions about compliance?

Answer: In some cases, workers are interested in creating a cleaner industry. In others, workers are concerned about more work, additional responsibilities, and new challenges. So there is pressure on management to educate workers to adapt to new technologies and approaches. (Ms. Walker Smith)

Question: How do we achieve success stories in countries with governments that are perceived as being more anti-environment, or at least not convinced that environmental management is a priority? (Mr. Albert Kohl)

Answer 1: The president of the Philippines has not made environmental enforcement a priority at the national level. So we work together with officials and law enforcement officers at the local level. We also work with the youth, preparing them with improved environmental awareness for when they will take over. (Mr. Tony Oposa)

Answer 2: We have to be better at getting our message out and framing the message for public and political management, about why it is the right thing to do. Government has been supportive where some companies have been complying and where others have not. Concepts of the rule of law and fairness are powerful. We are not making new laws, but enforcing laws passed by Congress. This message gets through. INECE could consider identifying four or five countries to be sensitized and worked with to improve their environmental awareness. (Dr. Bill Clark)

Answer 3: Over the past four

years, the EPA has had greater successes on specific pollutant reductions than in the previous four years. No-one at a political level has prevented EPA's Office of Enforcement and Compliance Assurance (OECA) from taking these cases. (Ms. Phyllis Harris)

4 CONCLUSION

Each of these case studies illustrates success in a different category of environmental enforcement, including illegal fishing, wildlife smuggling, judicial awareness, and pollution reductions. In each example, different approaches to the

problem were used to achieve success, from local to national activities. However, all these success stories shared common elements:

- Setting out with a clear goal and objective allows you to demonstrate success.
- We must be accountable for our activities and publicize our successes.
- Collaboration with other enforcers, and in some cases with the industry we are enforcing, is a crucial component for changing behavior directly and indirectly.
- Innovation and new approaches are needed to address both old and new problems.