

SUMMARY OF WORKSHOP 1G: GOOD GOVERNANCE AND THE RULE OF LAW

Facilitators: Angela Bularga, Organisation for Economic Co-operation and Development
Adriana Bianchi, World Bank Institute
Michael Stahl, Environmental Protection Agency, United States

Rapporteur: Matthew Stilwell, Institute for Governance and Sustainable Development, Geneva

GOALS

To explore the role of good governance and the rule of law in promoting sustainable development.

1 INTRODUCTION

The workshop discussions commenced with a short introduction by Dr. Adriana Bianchi, and a round of introductions by participants. It continued with a brainstorming session on key issues relating to good governance, rule of law, and compliance, which developed into a deeper discussion on a range of key issues. The workshop concluded with a summary of key topics discussed during the session.

The workshop aimed at exploring concepts of good governance and rule of law, and their relationship to sustainable development. The discussion was held around the following key questions:

- How can the international community promote good governance?
- How do we move from a situation in which incentives structures promote corruption and poor governance towards one in which we have improved governance?
- How do we measure whether we are moving towards this goal?
- What kinds of indicators do we need? What is the role of indicators in helping to measure progress, and in moving us forward?

2 DISCUSSION SUMMARY

2.1 Presentations

Presentations were made to the group Ms. Angela Bularga and Mr. Michael Stahl.

2.1.1 Ms. Angela Bularga

The international community can play an important role in creating a shared vision of good governance and substantially contribute towards promotion of good governance. In this respect, the Organisation for Economic Co-operation and Development (OECD) is at the forefront of efforts to understand and help governments adopt good governance – in both its member countries and non-members.

For example, the OECD has worked for many years in the former Soviet Union to improve environmental governance and policy implementation. For a long period, the un-transparent and often corrupt nature of the governance system in this region made efforts to protect the environment difficult. In 1991, the start of a transition to democratic governance and a market economy required a rethinking of the design and functioning of the whole governance system. Unfortunately, a decade of transition did not bring spectacular

changes and often accentuated old problems: the effectiveness of environmental agencies remains limited, lobbying by powerful groups and individuals for special privileges is widespread, and rules are not adequately enforced; thus non-compliance is high. Important factors that nourished non-compliance were the slow pace of governance and economic reforms, the complicated legal framework and poor economic situation, society's failure to believe in fair regulation, and the erosion of the rule of the law.

Based on a wealth of experience accumulated internationally, the OECD provided support to the countries of Eastern Europe, Caucasus, and Central Asia (EECCA) to define direction for regulatory and institutional reform and elaborate a reference model of good governance for environmental enforcement systems. This model was reflected in a concise policy document, called "Guiding Principles for Reform of Environmental Enforcement Authorities of EECCA". The Guiding Principles were developed with active participation of experts from EECCA and OECD countries within the framework of the Regulatory Environmental Programme Implementation Network (REPIN) and were endorsed at the Kiev Conference of Environmental Ministers (May 2003) from 51 countries. The principles are wide-ranging, and emphasize, among other things, that prevention is better than cure; that the regulated community should be treated fairly; that government agencies should be accountable, transparent, and equitable; and that feasible compliance targets and objectives should be established.

By endorsing the Guiding Principles, EECCA countries recognized the need for reform. The next step was to help countries to implement the Guiding Principles. One way to do this was to promote peer reviews, i.e. systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed country adopt best practices established in the Guiding Principles. The REPIN peer review scheme is intended to serve the following purposes:

- To provide international peer support for institutional reform of enforcement authorities;
- To enhance their transparency, accountability, and visibility, at national and international levels;
- To extend opportunities for inter-government policy dialogue and support capacity building.

The Ministry of Ecology and Emergency Situations of the Kyrgyz Republic was the first environmental authority subject to this scheme. The review suggested a number of short and longer-term steps for reform of domestic compliance assurance instruments, strategies, and institutions. These steps are closely linked with, and support, the implementation of the country's strategic development objective of adopting a good governance system.

Another major issue that arose was "how to communicate a message on good governance in a simple and integrated manner". To address this issue, OECD has developed a rating framework that reflects environmental policy development, legislative framework, policy instruments and relevant implementing regulations, and the institutional framework. The rating framework offers, first of all, the benefit of measuring progress in individual countries, but also can serve to identify where they are on a scale versus their country peers. While rating is done based on expert judgment, the transparency of the criteria and supporting data enable stakeholders to verify the ratings.

2.1.2 Mr. Michael Stahl

Indicators play a key role in making progress towards good governance and the rule of law, and in demonstrating progress to others. Indicators demonstrate things like: the presence or absence of phenomena; whether they are increasing or decreasing; whether targets and goals are being met; and if not, how far away success is.

Indicators can help to strengthening public participation. Whether compli-

ance programs are working needs to be established and shared with the public. Indicators are also good at helping to manage and improve environmental compliance and enforcement programs. Yet many government bodies are not yet using them for this goal. Rather, they are mostly using them to measure progress, instead of taking the next step of systematically managing and improving programs.

As we look at what kinds of indicators to establish, we should be careful about not only measuring outcomes and results. We want indicators that speak to outcomes, but we also need to measure the kinds and levels of activity in a program. We should not simply focus on the improvements in air quality without measuring what we are doing to get there. That is, we should measure outputs and outcomes.

2.2 Brainstorming

During the brainstorming session, a diverse range of issues arose. The main points are set out below, organized around the main themes of the discussion:

2.2.1 Good governance and the rule of law

- Do we all have the same conception of the rule of law? We have different backgrounds, so do we share a common perspective?
- The rule of law includes a number of elements. Rules must be developed publicly and promulgated widely. They must be applied equally, fairly, and predictably. They must be applied to all actors including the government.
- Understanding the rule of law requires understanding what the law is. Some issues are regulated, but others are not. So the law does not cover all relevant activities. The tendency of agencies to get monies from regulation may cause them to focus more on those industries that provide them with resources than others.

2.2.2 Strengthening compliance and enforcement

- In countries where we see good environmental compliance, we may also expect to see good governance in other fields. Environmental officials have often been at the forefront of improving compliance, the rule of law, and good governance. Their experiences may be instructive for other communities.
- The OECD principles emphasize the need for independence of officials from public and political pressure, yet this may be difficult to achieve in practice. For example, the key indicator of performance for many enforcement agencies in EECCA is how many claims they make, and how much they earn from fines and penalties. Yet these incentives may cause agencies to ignore industries that do not generate fines, and, in some cases, to focus perversely on tolerating higher levels of pollution to provide more resources to the government.
- In strengthening compliance and enforcement, education is a crucial element. Public opinion, too, is often critical. Yet public opinion is not always supportive of environmental protection. Public opinion may also affect elected representatives in government, who may influence enforcement activities. To what extent should regulatory agencies be independent of political pressure and public opinion?

2.2.3 The role of indicators

- What is the role of indicators, and how can we make valid comparisons across different countries and contexts? Environmental enforcement and compliance indicators are one good tool for promoting good governance. Participation indicators are also important in securing access to information, participation, and justice.
- At the same time, major challenges arise when we pick the elements indicators will cover, and seek to compare across these different elements. We

should acknowledge problems with our institutions, and note that indicators and other tools may also give rise to renewed pressure – political and otherwise – on our agencies.

- How can Environmental Compliance and Enforcement (ECE) indicators be better used to measure and promote good governance? A presence of a robust environmental compliance and enforcement program indicates a tendency towards good governance. It is at least one factor in demonstrating a move towards the rule of law and good governance.

2.2.4 Developing a broader “tool kit”

- As well as focusing on indicators, enforcement officials also need to think of the other elements in the tool kit. One is peer review, which provides a good way to improve the management and performance of environmental agencies. Another is enforcement and compliance strategies and policies, which provide a tool for use by all members in society to evaluate government performance. A third is the extent to which laws or directives provide for sufficient delegation of authority. From experience in some developing countries, the less authority is delegated, the more likely is the consideration of inappropriate factors. Delegation protects the officer from harassment. The challenge is to build indicators to measure good governance, and how to tie these into the elements of a broader toolkit.

2.2.5 The role of the judiciary

- In Canada, environmental laws reflect the expectation that everyone will obey the law – individuals, firms, and government. National laws bind provincial governments and their officers. More broadly, independence of the bureaucracy, the judiciary, and other officers is essential. The judiciary must be seen as being able to limit the power of the state, not merely as an officer of the state. How

are the courts perceived in developing countries?

- In the Philippines, the Supreme Court is seen as an honorable institution – supporting positive public perceptions of the rule of law. At the lower levels, however, there are more significant problems of corruption, deriving from the often close relationship between judges and other actors. Judicial reform, along with new programs being implemented, is enhancing the ethical standards and performance of the judiciary.
- In Argentina, the president has promulgated a decree including a system of transparency in judicial affairs. The impeachment of three members of the Supreme Court followed this decree. This has strengthened the judiciary and improved its standing in the public. Nevertheless, Argentina still lacks a tradition of judicial independence. So further work on access to justice is required. Indicators provide a good tool in this effort.
- The mandate of some international organizations is often to work with Supreme Courts, yet the level of corruption may be high, making it difficult to promote judicial reform. The need, therefore, is often to work with other more independent actors in society, including civil society and key actors in the regulated community. In one country, there is movement to develop a “green bench” to address environmental issues.

2.2.6 The situation in developing countries

- Developing countries often face particular challenges in securing compliance. Effective policy work requires communicating effectively with senior and elected officials. In developing countries, the audience is often local enforcers who would do more if they had the resources and capacity. We should support these people.

- At the same time, these people often remain in place, while the more senior officials often change. Part of our challenge then is how to change the culture of senior bureaucracies. The problems are often practical. Peer to peer work is also critical – it provides a good way of putting enforcement officials or judges from different jurisdictions together to learn and share experiences.
- Developing countries often lack a culture of accountability. But changing the culture of officials is a long task. A sounder approach, therefore, is to focus on empowering the people to know, understand, and enforce the laws. Educating people about their rights, and helping them to demand good governance, is essential. Participatory governance mechanisms may exist but are underutilized.
- The gap in resources available to officials in developed and developing countries is profound. In many developing countries, resources for compliance officials are woefully inadequate. For instance, officials may have too few resources to even visit the facilities they are supposed to regulate. We need to close this gap. We must also correct the perverse incentives that create perverse outcomes. In correcting these, at the same time, we must ensure we do not rob the agency of a key source of their income, or otherwise downgrade their status. If agencies lack resources, how do they ensure that they can apply the law fairly to all in the regulated community?

2.2.7 Other challenges

- One challenge is to focus on concrete projects to strengthen compliance, while keeping in mind broader goals such as the rule of law. The role of each of the three branches of government is important. Citizen groups can help public authorities to enforce the law. We need to think about how to develop mechanisms that will persist in time so that

they preserve the rule of law over the longer term.

- There is a shift from supporting international exchanges and environment, towards “good governance”. Our challenge is to show that our business is an important aspect of good governance. Our field thus provides a great test case of successes and problems. We have to play a leading role in demonstrating that we can help to promote good governance. We need to form a partnership and develop a strategy to promote this goal, and to secure the resources to showcase our work, strengthen governance, and continue our present and new activities.

3 CONCLUSION

These discussions are particularly pertinent to the goal of this conference and of INECE. The workshop covered a range of issues relating to governance, the rule of law, and compliance. The following are particularly pertinent:

- We discussed the notion of good governance, and acknowledged its main components – including cost-effectiveness, accountability, and transparency.
- Yet we do not necessarily have a clear and operational definition. The OECD guidelines provide an important step in this direction.
- Peer review provides a good vehicle for strengthening compliance, rule of law, and good governance.
- Accountability must also be better institutionalized, as it has in some cases with transparency.
- Different resource levels and the independence of officials and judiciary must also be ensured.
- Authorities' awareness of accountability must be strengthened.
- How do we educate for change? We need to strengthen efforts to raise awareness and build a group of people who support our work.

- We also had suggestions to develop broader toolkits and to see how indicators work in the context of a broader set of tools.
- Resources for enforcement and compliance must be adequate. How can we ensure adequate resources are available?