

## SUMMARY OF WORKSHOP 3G: PENALTIES AND OTHER REMEDIES

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Department of Justice, United States  
Chief Justice Vladimir Passos de Freitas, Brazil  
Deputy Chief Justice Adel Omar Sherif, Egypt

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### GOALS

To explore the following three questions regarding judicial enforcement:

1. What experiences or problems have workshop participants had in attempting to obtain penalties or remedies for illegal activity?
2. What are the most important factors a judicial officer should consider in deciding appropriate penalties or other remedies?
3. What should we recommend that INECE do to assist in informing judges about available penalties and other remedies for illegal environmental misconduct?

### 1 INTRODUCTION

Varied experiences demonstrate that there is frequently inadequate judicial understanding of environmental law, but the United Nations Environment Programme (UNEP) is actively helping to build world-wide capacity. South America, Finland, and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) have had seminars for judges and prosecutors, and the numbers of court cases have subsequently increased. Some agencies do not have experience in seeking criminal cases or civil penalties, while others have dedicated courts or tribunals and prosecutor units. Some innovative judgments include “publication orders” and “environmental service orders” to obtain compliance. Others have effectively utilized administrative courts.

The various aspects of environmental harm and economic benefit are important to prove, even when they are not required to prove the case. In addition, the intent of the defendant is often a key issue in criminal cases and may help the judge determine the adequacy of the penalty. We should share best practices for calculating

penalties and for developing methodologies that are clear and straightforward. The international exchange of information between countries can help develop and strengthen national programs.

More judicial education and support is necessary, and UNEP's work, including the judicial training center in Cairo, helps meet this need. In some countries specialized courts may provide a mechanism for sharing information among judges and developing individual expertise. Chief Judges and trained judges should help promote the issue to their colleagues to establish credibility in the message, and INECE should help by spreading the information. Prosecutors must be included in the process, both as experts and to improve their own skills. Recognition of excellence is an outstanding motivation, and INECE should consider creating an international award for judicial excellence. Finally, we should seek harmonized approaches in penalties and remedies, particularly for transboundary crimes, so all countries can show the fairness and consistency of their penalty structures.

Mr. John Cruden introduced the

session by describing the various theories for civil penalties and asserting that despite differences in how countries obtain and calculate penalties, they ultimately have shared experiences and goals. He then asked the other facilitators for introductory remarks.

### 1.1 The Brazilian Experience

Judge Freitas began by citing the need for good institutions that can make improvements on resolutions beyond civil and administrative penalties. Brazil has a special law on environmental crimes, but only 2 or 3 articles of the law have penalty provisions, and those are mostly insufficient. General prosecutors are becoming more aware of environmental requirements, and some have created environmental crime units. Now, prosecutors are bringing cases against entities at different levels than in the past, including corporate presidents in some instances.

In many cases, convicted individuals or entities in Brazil can negotiate resolution involving clean-ups without mandatory jail time. For example, criminals convicted of illegal logging can appeal to the court to postpone the term for 2 years, and avoid jail altogether if the prosecutor is subsequently satisfied with their activities to solve the problem during that time. This helps achieve environmental benefits in lieu of jail time. Some judges are beginning to use this type of innovative sentencing to achieve more environmental results.

Training on environmental law has improved for judges, and some courts are starting to include environmental issues in the exam required prior to becoming a judge. They have also established a few special environmental courts. If there are not enough cases to justify a dedicated court, the newly established specialized courts can also handle other types of cases.

We must create a good knowledge base in environmental law among judges to raise their interest in addressing those problems, which can be very difficult. Judges will listen to other judges (especial-

ly senior judges), but additional motivation is useful. UNEP helped create a Congress on Environmental Law in Iguazu Falls in southern Brazil that brought carefully selected judges from other parts of Latin America to motivate and educate the judges about environmental law, with outstanding results.

Another motivational tool is to help judges publish papers and articles on the issue by providing a forum for disseminating information that other judges will recognize and respect. Another tool is to provide special recognition to particular judges who have made a difference.

### 1.2 The Middle Eastern Experience

Judge Sherif spoke about his experience as an environmentally-motivated judge in the Middle East. One of the problems involves judges and law enforcement officers, specifically regarding penalties. Most countries have enacted legislation that may include penalty authority, but judges have set attitudes about their discretionary power and do not like to be guided by "mandatory" penalty guidelines. They want to exercise their full discretionary authority in determining the size of penalties.

It is not enough to just provide the legislation, but it is as important to empower and educate judges. In Egypt, this is done through specialized tribunals and by promoting awareness of the international agreements and the challenges they seek to solve. There is an ongoing need to increase the judges' capacity, education, and awareness of environmental law.

### 1.3 The American Experience

Mr. John Cruden discussed the two sides of environmental enforcement in the United States. Criminal violations are handled with fines and prison time, while civil or administrative violations are addressed through penalties to capture any economic benefit and wrongful profits, at a minimum. In calculating penalties, environmental harm must also be taken into account, as well as the violator's ability to pay. In addi-

tion, restitution, injunctive relief or corrective action, and supplemental environmental projects are important components of settlements and consent decrees in the United States.

Mr. Cruden emphasized, however, the importance of prosecutors not only presenting evidence sufficient to prove the case, but also demonstrating the degree of environmental harm. He cited an example where a company had illegally filled in a wetland, destroying it in the process. The prosecutors charged it as a criminal case. They won the case (which was upheld on appeal), but the judge did not award a very big fine, and the sentence was probation without jail time. The low level of judicial response was probably because the prosecutors did not adequately explain the seriousness of the offense. The judge agreed that the law was violated but did not understand why the wetland was important enough to justify incarceration.

Mr. Cruden emphasized that this brings up three key problems for the prosecutor: (1) How do we present and explain the environmental harm? To be credible and deemed worthy by a judge, there must be adequate evidence of the environmental consequences of the illegal activity. (2) How do prosecutors convince a judge that they are requesting the correct penalty? At a minimum, prosecutors must explain how the penalty recoups the economic benefit or wrongful profits obtained by the misdeeds. (3) How do prosecutors demonstrate that the company has enough money to pay the penalty or complete the environmental restoration sought in the case? The evidence must adequately demonstrate the importance of the penalty and the ability of the company to pay the requested penalty and complete the necessary injunctive relief.

## 2 DISCUSSION SUMMARY

### 2.1 Canada

Mr. Albert Koehl said that in Canada each prosecutor must be able to prove violations to the judge, as well as why the

response is appropriate. The judge's lack of experience may lead to inadequate penalties and remedies. The lack of capacity leads to an inefficient system and excessive appeals. A general lack of interest and motivation may lead judges to ignore environmental cases. Specialized tribunals would be very helpful and would cut inefficiencies in prosecutors explaining law and remedies in each case with a different judge.

### 2.2 Australia

According to Ms. Donna Campbell, Australia has a specialist court with both criminal and civil authorities for land and natural resource issues. The legislature has laid down guidelines for the determination of penalties, primarily associated with the environmental harm and the culpability of the defendant. Prosecutors have found it very difficult to determine the harm, and scientific uncertainty abounds, making judgments problematic.

Australia uses two additional types of extrajudicial remedies. The first are "publication orders", where the company must pay to publish articles or press announcements about the offense. The second are "environmental service orders" that require violators to carry out environmental work and to clean up around the facility and the community. They also have provisions in which citizens are given authority to bring cases as well.

UNEP has paid for judges to come from the Asia/Pacific region to see how the Australian EPA is enforcing. This has helped both internally (through the external examination of practices) and externally (by sharing best practices). This is part of the larger UNEP Judicial Training project. Essentially, UNEP divided the world into 10 regions and has done workshops and courses in each region. In South America, judges are working with other countries and NGOs such as Law for a Green Planet and FARN. Mr. Cruden participated in a workshop in Argentina, and was able to advise judges from across Central and South America about techniques in collecting and

presenting evidence, penalty determination, environmental harm, and environmental restoration techniques.

### 2.3 Costa Rica

Mr. José Pablo Gonzalez explained that Costa Rica is limited by lack of specialized judges, but does have a specialized unit of prosecutors dedicated to environmental cases. Judges and prosecutors share the judicial training academy and can share training. Judges often do not like to be trained by prosecutors, but through the impartial academy, they can train together.

Many environmental crimes fall under different statutes or laws, and judges need to know more about these laws. However, some judges think they need to come to the case completely uninformed to avoid bias, so prosecutors have to explain the law, science, technology, harm, etc., and failing at any part of that explanation jeopardizes the case. Judges merge civil and criminal authorities, so judges must combine penalties, jail time, fines, and remedies all together. The prosecutor's office has finished a manual listing the environmental crimes, how they should be proven, and what penalties/remedies should be sought, which will be a critical tool for educating judges.

In Costa Rica, judges are now using provisional probation similar to the example cited by Judge Freitas in Brazil to allow for remedial actions. They are also encouraging settlements to expedite cases. Costa Rica has the authority to settle or agree to conciliation, and now 90 - 95% of cases conclude with a settlement that is then sent to a judge for approval. Settlements, signed by judges, serve as a useful tool and an enforceable resolution. In the United States, settlements become public prior to judicial approval. Settlements are submitted to the judge, who is asked to wait to approve the settlement to give the public a chance to review and comment on it. The advantage of judicially approved settlements is that they make any subsequent violation of the settlement a

violation of a court order rather than a simple agreement.

### 2.4 The United States

Mr. Lee Paddock explained that New York State has over 2500 judges in the state courts alone. Among the U.S. states, only Vermont has a dedicated environmental court. Pace University Law School in New York and the North American Commission for Environmental Cooperation hosted a North American judicial conference, which delineated the following two issues.: 1) We must find the right way to reach judges so they will accept training. Judges are resistant to training from one side of an argument (i.e. environmental agents or prosecutors). But when judges have been reached in a neutral way, the judges demonstrated that they really wanted the training and were surprised about how much there is to know about environmental law. 2) We should create networks of judges that other judges can turn to for support or training. Judges from one country may look to judges from other countries for advice they will accept. The International Union for the Conservation of Nature (IUCN) has worked with UNEP to develop resources for judges around the world and would be a crucial partner for INECE work in this area.

Ms. Walker Smith from the US EPA explained that judges may want to rule for government, but they will still want adequate evidence of environmental harm and proof of the underlying offenses. Prosecutors also must convince judges when an individual or company attempts to defend by arguing how difficult it is to comply with the law or how complicated environmental requirements can be. We should concentrate on the illegal activity and the environmental consequences of the conduct in presenting our case to the judge or tribunal.

Mr. Davis Jones explained that in the U.S., there are administrative courts dedicated to environmental issues. These courts can handle lower level, non-criminal violations in a very effective and efficient manner. In addition, the agency has written

penalty policies that guide prosecutors in the calculation of penalties. Judges often defer to these policies with cases often centering on the appropriate application of the policy rather than the penalty itself. He went on to explain how the U.S. calculates the economic benefit of non-compliance and demonstrated a simplified tool known as the "BEN Model" that accounts for various factors such as the time-value of money to determine the benefits of delayed and avoided compliance costs. Mr. Jones then demonstrated for all of the participants the simplified process by which economic benefit can be calculated and presented to a judge.

#### 2.5 European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)

Mr. Antero Honkasalo referenced an IMPEL study that examined reasons why cases failed. The study showed that lack of prosecutor knowledge was a problem (as opposed to the judges'). IMPEL shared results and queried other countries to find similar problems. This convinced some countries to create special environmental units of prosecutors instead of an environmental court. They also found some countries that lacked standardized practices on how to bring cases to court, so IMPEL arranged seminars for judges and prosecutors to create standardized procedures. While it may be an incomplete indicator of success, the number of environmental court cases has increased, showing a better acceptance from prosecutors and judges and how enforcement is solving problems and repairing specific harms.

#### 2.6 United Nations Environment Programme (UNEP)

Mr. Donald Kaniaru personally started the UNEP Judges Symposiums in 1996 and has tried to accommodate problems by successfully engaging senior judges to establish credibility. UNEP began with the belief that developing countries needed additional judicial capacity building where they did not have adequate environ-

mental laws to rely on. At the international level there was standardized material, but not at the local or national level, which judges could actually use. UNEP started its program with the chief justices of the high courts, but the day-to-day decision makers are really judges at lower levels, who must also be addressed.

UNEP has found that starting up specific environmental tribunals is excellent, but they need to establish procedures and rules of practice for those courts that may not otherwise exist, which can be very resource-intensive and time-consuming. In addition to sensitizing judges, you must also sensitize both sides of the bar. Most courts will not take the initiative toward solving environmental problems; advocates, attorneys, and prosecutors must be convinced of the importance of environmental crimes so that they will take cases.

There is also a need for guidelines on how to calculate harm and how to demonstrate harms to judges. There must be a push for movement toward harmonization of processes regarding transnational problems. For example, crimes involving elephants migrating from Tanzania to Kenya should be treated the same in both countries' laws, and international organizations such as INECE should work to harmonize laws, prosecution, and penalties.

#### 2.7 Belarus

Ms. Maryna Yanush suggested that published commentaries on environmental laws can be used to develop some common language for all to use and follow. Ms. Yanush emphasized that it is important to understand the point of view of judges and prosecutors, not just technical information. They can be helped by showing them best practices with real examples of how legislation can be implemented. Judges can also help inspectors understand the judicial requirements for proof, as well as how inspectors can better explain cases to judges. In Belarus, there is a forum between senior judges and ministry officials to help identify procedural and institutional problems. Judges and prosecutors

should also be involved with drafting of legislation to help identify gaps that may make the laws more difficult to enforce.

## 2.8 The Economic Side of Enforcement: Deterrence

Mr. Krzysztof Michalak cited the OECD's work on the economic side of enforcement and explained that deterrence is a function of the probability of detection and severity of the sanction. Environmental agencies must consider, given restraints, the balance between compliance monitoring and fines/penalties to determine the optimal level of a penalty.

This calculation will vary county to country; in Japan, the fact that an inspection occurred is considered a significant penalty by the company, so a much lower monetary fine is necessary. The amount of the fine or penalty should be commensurate with how much is actually needed to create deterrence.

Another cultural difference is how harm is assessed by judges. In Central Asia, the calculation is based on zero tolerance or no acceptable impact, which drives penalties to unreasonably high levels. In China, a campaign was carried out that shut down many polluting enterprises, but due to the nature of the campaign and the failure to carry through over the long-term, polluters merely waited and came back to their previous compliance status.

Different systems are not always understood well enough. The U.S., U.K., and other countries may have well-accepted credible tools and methodologies, but others are hampered by lack of transparency or standardization, which significantly hampers enforcement. OECD can provide information from its work in different regions to share methodologies so that standard practices can be established before the case rather than in response to an individual enforcement action, which can lead to charges of arbitrary response.

## 2.9 Tanzania

Mr. Palamagamba Kabudi, who drafted the new Tanzanian environmental

law, has been training judges in environmental law – country-specific training for 25 senior judges, including a Supreme Court judge. But he is increasingly recognizing that Tanzania must also train prosecutors and inspectors. They are discussing development of specialized environmental courts, or one with the existing Land Court (similar to the Australian system). They want to avoid, however, developing too many specialized courts in every region, which leaves the alternative of training everyone.

The new Tanzanian law includes clear penalty provisions, including imprisonment. The law was developed in a very public, open process with public support for penalties. The legislature thought penalties were appropriate but too high in the original proposal and reduced them in the final law. The new law also allows for restoration orders, prohibition orders, and cost orders. If both parties agree, there is the possibility to settle out-of-court by paying a fine and agreeing to corrective actions. The law also provides for consent judgments and for working on Alternative Dispute Resolution.

## 2.10 Israel

Dr. Bill Clark said that they do not have much problem in Israel winning cases, but were told by the Ministry that they could not approach judges outside of court (such as for a training) because of ethical concerns.

Dr. Clark also explained that there is often a need for one country to work within other countries' judicial systems to help ensure consistency within the penalty framework, as became evident in an ivory seizure in Japan, when a smuggler had paid an administrative fine equivalent to \$300 for an illegal consignment of ivory worth many thousands of dollars. In China, a smuggler convicted of a similar crime was sentenced to life in prison and another was sentenced to death with possible reduction to life in prison. In Kenya, a smuggler was caught with 4 suitcases of ivory and fined several thousand dollars, but his passport showed multiple trips with no consequences for the repeated violations.

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### 3 RECOMMENDATIONS FOR INECE

- Promote and facilitate the international exchange of information between countries to develop and strengthen national programs for determining penalties and developing clear and straightforward methodologies.
- Aid in the dissemination of information regarding the importance of appropriate penalties and enforcement, and promote mechanisms to share information among judges to develop specialized expertise.
- Consider the creation of an international award for judicial excellence as an effective motivation to develop and enforce penalties for environmental law violations.
- Seek harmonized approaches in penalties and remedies, particularly for transboundary crimes, so all countries could show the fairness and consistency of their penalty structures.
- Create guidelines on how to calculate harm and demonstrate the harm to judges.
- Present judges and prosecutors with best practices and real examples of how legislation can be implemented.
- Facilitate the sharing of international organizations' work in different regions to share methodologies, so that standard practices can be established before any enforcement action as opposed to after-the-fact, which can lead to charges of arbitrary response.
- Search for a harmonized approach to seek parity within the international community.