

September 2002

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Recommended Citation

Wade, Jeffrey S. (2002) "Environmental Damages and Crimes," *Florida Journal of International Law*: Vol. 15: Iss. 1, Article 3.

Available at: <https://scholarship.law.ufl.edu/fjil/vol15/iss1/3>

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III. ENVIRONMENTAL DAMAGES AND CRIMES

A. Introduction

*Jeffry S. Wade**

First, I will make some introductory comments and then I will pass the presentations and discussions on to our panelists. Rafael Gonzalez Ballar is one of our panelists. He is professor and dean of the College of Law at the University of Costa Rica, where he is an attorney in law and a notariat. He received the *Diplome d'Etudes Approfondies* in economy and environmental law at the University of Bordeaux, and the Third Cycle Doctorate in public law at the University of Bordeaux. He has been a visiting professor at the University of Florida and is an international researcher, consultant, and lecturer. He is a member of the National Academy of Public Law; a member of the Agrarian Law Association and an associate founder of Justice for Nature. He is an adviser to the Latin American U.N. Institute for Crime and to the Arias Foundation for its Citizen Participation Project. He is an attorney with emphasis in environmental and administrative law.

Our second panelist is José Rubens Morato Leite. He is a professor of environmental law at the Federal University of Santa Catarina in Brazil. He received his doctorate from the Federal University of Santa Catarina and his diploma in law from the University of London. He serves on the steering committee of the Commission on Environmental Law of the World Conservation Union and is vice president of the South Region of Lawyers for a Green Planet Institute in Brazil, which is a very well respected NGO of environmental lawyers.

Fernando Walcacer is a professor in the College of Law at the Pontifical Catholic University of Rio de Janeiro in Brazil, where he also serves as environmental law coordinator of the Interdisciplinary Center for the Environment. He is also graduate professor in the program for environmental planning, coordination of postgraduate programs in engineering at the Federal University of Rio de Janeiro. He has served as Sub-Secretary for the Environment and Sustainable Development for the state of Rio de Janeiro; as head attorney in the Center for Legal Studies, Rio de Janeiro State Attorney General's office; and was head attorney of

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urban planning and environmental law office and environmental superintendency for the municipality of Rio de Janeiro.

B. *United States and Environmental Law*

Jeffry S. Wade

In the effort to achieve environmental goals, policymakers have a number of tools available, including environmental and urban planning, regulatory and permitting programs, various types of incentives, purchasing programs, monitoring requirements, and the establishment of administrative, civil, and criminal sanctions. The applicability and effectiveness of these tools are of course dependent on the particular cultural, economic, and governmental context.

Though criminal enforcement of environmental laws is sometimes perceived as a reactive measure, representing the failure of other approaches, it can serve an important function in deterring environmental abuses; promoting respect for environmental policies; sanctioning persons who violate the law; and reducing or eliminating the competitive advantage and the economic incentive to violate environmental regulations.

Today, the massive scale of production activities undertaken by corporations around the world, and the competitive emphasis on maximizing profits, means that corporations may be inclined to cut corners when it comes to environmental compliance. Under these conditions, they can subject themselves to criminal liability when their behavior reveals a sufficient level of disregard for public safety and environmental integrity.

The threat of criminal sanctions can get the attention of the regulated community much more quickly than the threat of civil fines or injunctions. Criminal conviction and punitive fines can provide a much greater deterrent effect than civil penalties. The potential for imprisonment and probation, with an accompanying criminal record, are also greater deterrents than civil fines. Thus, particularly where they are limited, as in many developing countries, an investment of available resources into criminal prosecutions can have a larger deterrent effect than putting those same resources into civil enforcement.

1. Generally

Today in the United States, it is well established that through the acts of its agents or employees, a corporation may be convicted of crimes requiring criminal negligence, knowledge, recklessness, or willfulness. Generally, the courts have held corporations liable for the acts of their employees in two situations. One is where the corporation directly

supervises the criminal act of an employee. The other is where, although the corporation is not directly supervising the criminal act, it could have prevented the violation through a reasonable effort. In addition to the potential criminal liability of corporate entities under environmental laws, individual corporate officers may also be prosecuted under such laws. The criminal provisions in all of the federal environmental statutes apply to any person including responsible corporate officers.

The first criminalization of polluting activity in the United States was codified in the Rivers and Harbors Act of 1899 which prohibited refuse in navigable waterways. Contemporary environmental laws, beginning with the Clean Water Act 1972 (CWA), have always contained criminal sanctions, though often misdemeanor penalties, for negligent and willful violations. It was not until the late 1970s, however, that law enforcement officials seriously began to address the application of criminal sanctions to environmental violations.

Currently, ten statutes provide the primary basis for enforcement of federal environmental standards through criminal prosecution. In addition to the Rivers and Harbors Act and the Clean Water Act, these include: Clean Air Act (CAA); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); the Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund Act); the Safe Drinking Water Act; Toxic Substances Control Act; Solid Waste Disposal Act; and Endangered Species Act.

The majority of these statutes contain overlapping civil, criminal, and administrative penalty provisions. Over the years, Congress has raised some violations from misdemeanors to felonies and has increased potential jail sentences and fines for those convicted. The Environmental Protection Agency (EPA) enforces the criminal provisions of nearly all of these statutes in conjunction with the Department of Justice (DOJ); the exception is the ESA, which is enforced by the Department of Interior (DOI). In recent years, RCRA, CERCLA and the CWA have represented about seventy-five percent of all environmental criminal prosecutions. Most of the remainder of the prosecutions have been pursued under provisions of the CAA and FIFRA.

2. The Clean Water Act

The Clean Water Act, which establishes programs for controlling discharges of pollutants into the navigable waters of the United States, includes many of the elements contained in other environmental statutes with criminal provisions. The core sections of the enforcement of the

CWA scheme establish effluent limitations and water quality standards, establish permit programs regulating discharges of pollutants, impose discharge reporting and monitoring requirements, mandate the cleanup of oil and other hazardous substances, and prohibit certain forms of dredging or filling and the discharge of sewage sludge.

Failure to comply with any of these sections may lead to criminal and civil penalties. Violations generally involve either a failure to comply with regulations that prohibit or regulate the discharge of pollutants; a failure to obtain a permit or abide by the terms and conditions of a permit; or a failure to adhere to record keeping, monitoring or notification requirements.

Federal, state, and local authorities are authorized to pursue both criminal and civil enforcement of the provisions of the CWA. The CWA also gives private citizens the right to bring civil suits against polluters in order to force compliance with certain provisions of the CWA. Criminal penalties may be assessed against any person who fails to comply with the statutory requirements of the CWA sections. Falsifying or misrepresenting material information required by the CWA is a criminal violation. Tampering with monitoring equipment is also a criminal violation.

The CWA establishes four levels of criminal penalties based on whether a violation was negligent, knowing, involved knowing endangerment, or involved knowing falsification of information or tampering with monitoring equipment. Each level establishes two penalty ranges, one for first time violators, and a second, higher level for persons previously convicted of a CWA violation. Generally, courts have rejected arguments that the government must prove a defendant knew that the CWA or a permit requirement was being violated in order to obtain a criminal conviction. Knowledge of a violation may be inferred on the basis of circumstantial evidence.

Criminal fines for first time negligent violations range from \$2,500 to \$25,000 per day, per violation. Alternatively, or in addition to a fine, a violator may be imprisoned for up to one year. The CWA provides for a higher level of penalties for knowing violations. Fines fall between \$5,000 and \$50,000 per day, per violation, and a prison term of up to three years may be imposed. Subsequent offenses carry double penalties. In addition, a company convicted of a criminal offense under the CWA may not provide contract services for the government.

An individual convicted of knowing endangerment is subject to a fine of up to \$250,000, imprisonment of fifteen years, or both, while an organization may be assessed a fine of up to \$1,000,000. Double penalties may be assessed for subsequent violations. A maximum fine of \$10,000 and maximum prison sentence of two years may be imposed for

knowingly making false statements, representations, certifications, or tampering with monitoring equipment required by the CWA. Second convictions are punishable by double penalties. Failure to notify an appropriate federal agency of a discharge of oil or other hazardous may result in a \$10,000 fine and/or a five-year prison term.

In assessing penalties, courts consider factors such as the economic benefit realized by the violator, severity of the violation, history of violations by the offender, economic impact of a penalty on the violator, and any good faith efforts to comply with applicable requirements.

3. Liability

Most criminal sanctions under the environmental statutes apply to any person who violates a regulation, including corporations. Corporate liability for environmental crimes is based on the imputation of the conduct of employees to the corporation, usually through the doctrine of respondeat superior. In the corporate arena, the responsible corporate officer doctrine generally also imposes individual liability upon those with the responsibility or authority to prevent or correct the violation, rather than those who actually commit the act.

Thus, a corporation generally will be held liable for criminal acts committed by an employee acting within the scope of his employment for the benefit of the corporation. Corporations also may incur liability under certain statutes for directly or indirectly supervising illegal dumping conducted by high level employees. Other statutes impose liability on corporations or corporate officials as operators if the corporation could have prevented the violation with reasonable measures.

The degree to which the responsible corporate officer doctrine eliminates the mens rea requirement of various environmental statutes is not well settled. However, in recent years, the EPA and the DOJ increasingly have targeted individual corporate officers, as well as corporations, for criminal enforcement actions.

4. Issues Related to Voluntary Compliance and Sentencing

The EPA and the DOJ attempt to encourage voluntary compliance efforts, including self-audits. Thus, although compliance is not a defense, the EPA has implemented a policy which makes penalty reductions contingent upon self-auditing. The policy addresses infractions found in the course of an objective self-audit not otherwise required by permit. An organization must disclose any violation discovered within twenty-one days to qualify for penalty reduction.

Normally, the EPA will not make criminal referrals to the DOJ if an entity acts in good faith to identify, disclose, and correct violations except in situations where: violations involve criminal acts of individual managers or employees; the management philosophy condones environmental violations; or there is conscious participation in, or willful blindness to, the violations by high-level corporate employees.

In its efforts to encourage self-auditing and self-policing, the DOJ has indicated that its exercise of criminal enforcement discretion will consider factors such as: (1) voluntary disclosure; (2) the degree and timeliness of cooperation; (3) preventive measures and compliance programs; (4) pervasive noncompliance; (5) disciplinary systems to punish employees who violate compliance policies; and (6) subsequent compliance efforts.

This voluntary disclosure and audit policy establishes no formal program for voluntary disclosure, and many prosecutorial decisions appear to be made in the local U.S. attorney offices. This means that companies may not have a high comfort level that they will not be prosecuted if they disclose. There is no guarantee that a disclosing company will not be prosecuted.

The long list of requirements that must be satisfied means that the policy is not easy to invoke, though voluntary disclosure that even partially satisfies the criteria generally receives at least partial credit from the Justice Department. The ability of a company to obtain recognition under the EPA policy may mean that a case is not referred to Justice Department prosecutors in the first place.

Self-audits can work for or against a corporation. A complete audit may actually become a guide to the prosecutor, since the DOJ retains full discretion to use voluntary compliance audits for criminal prosecution. The EPA will not request voluntary environmental audits in order to trigger enforcement actions unless the EPA has independent reason to suspect a violation.

The EPA and DOJ do not treat the environmental audit as privileged information protected from public disclosure. However, despite this controversial EPA policy, some safeguards, such as the attorney-client privilege, work product privilege, and critical self-analysis privilege, do exist to ensure confidentiality of a self-audit by a corporation.

5. Conclusion

The use of criminal prosecution as a deterrent to environmental violations has great potential, particularly in situations where enforcement resources are limited. In the United States, this tool has been incorporated into several environmental statutes, and has taken a larger role in the

federal approach over the past twenty years. Corporate entities and high level corporate employees have both been found liable for criminal violations under applicable doctrines. Though the use of criminal prosecution is important in preventing environmental infractions, corollary policies that encourage self-auditing must be carefully written and applied in order not to work against the achievement of environmental goals.

C. Costa Rica and Environmental Law

*Rafael González Ballar**

Criminal law in Costa Rica has not worked as we wanted it to. We do not know why. We are trying to analyze this problem. Higher penalties have not worked. I would like to analyze, first of all, what could be the macroeconomic aspects and micropolitical aspects that have more incidence in the problem. That is where we have the source of what we have found. I will analyze the case of an oil company. The analysis will show how a country such as ours with its prestige begins to break down caused by the macroeconomic policies and by the macropolitic. All these macroeconomic policies and the decisions that are taken at the macropolitical level have to do with the legal system of Costa Rica and the environmental crimes section is concerned.

Costa Rica has done many efforts initially to define the relationship between what could be poverty and the environment. I think we have begun to have successes in the environmental protection policy and the developing system of parks that was quite interesting at the international level. The first aspect one notices is the 1987 proposal that was done for the Brundtland Commission. Costa Rica realized that they had to have within this developing process the analysis of what is poverty and specifically when it impacts the environment. Because of this, Costa Rica began to introduce these policies in all of the legal frameworks.

The second aspect was the Rio Conference in 1992. Costa Rica signed all of the documents that were provided in Rio and also acquired the commitment to implement policies at all levels and to pass legislation for what had to be done concerning poverty and the environment. Initially, Costa Rica tried to do the implementation and to continue with this tradition in order not to lose the relationship between poverty and the environment. However, from 1990 to 1992 Costa Rica has an important

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contradiction based on the analysis that was done. In the investigations that were carried out, we realized that Costa Rica, the same as many other countries that were pressured by the International Monetary Fund and by the World Bank, began to connect itself to the structural plans and begins to have distortions and have contradictions in its environmental policies and its economic policies.

These distortions and contradictions will produce a number of internal pressures at the government level to adopt to economic policies which leads the legal system to respond to these necessities. There is first a distortion, a first contradiction which occurs. Even though it is true that our country reformed, our country through the 1994 organic law of the environment made a big reform and a great effort to give a legal framework concerned with the environment. When law introduces an article where it gives the judge and the public administration a guide, this gives them an obligation to do an analysis of the environmental crimes, no matter what the code or which way it can go, and hence, the legal entity has been protected. It obligates them to analyze the environmental crimes from the economic, cultural, and ethical point of views. It also gives the judge the tools he needs for the analysis of the crimes he will be obligated to interpret law for.

Costa Rica continues having a problem being at the forefront of development of a free trade agreement. Therefore, Costa Rica is signing possible free trade agreements. It is hoped that these free trade agreements will make investment more interesting in our country. However, we see these macroeconomic aspects, the cases that we will be analyzing begin to produce what I call nameless crimes. Were the crimes specifically because they produce themselves within an economic legitimacy of the free trade agreement, based on the policies or the pressures that the country had to attract foreign capital, and therefore, causing omissions and acts committed in favor of different foreign countries, transnational companies, and national companies who also violate the environmental laws?

The attractiveness that it could have for foreign investors, i.e., oil companies, puts our country at high risk. We need the criminal legislation reforms which it has been difficult for congress to pass.

The forestry law is another example that we wish to reform with the intention that penalties could be sufficiently high in order to dissuade any kind of illegal activity. If too many trees are cut down, then this leads to the secondary effects of deforestation on biodiversity occurring within our national parks. The forestry law did not pass. The pressure is not only in not reforming the laws but also the government does not want to take into account some aspect that we constantly have requested from them. Even with these studies and recommendations that we have done, Congress and

the executive power of our country have not agreed. We think that there is an omission from the government to let things go by so that the free trade agreements are the ones to optimize themselves, and not maintain the policy of poverty and environment like we would like. One of the most important things that we think could have happened is that the GNP of our country take into consideration that extracting natural resources not only creates wealth and income, it also creates a simultaneous loss of wealth and resources. If we had done this, we would have been more connected to the logical consequences of having signed all the different free trade agreements in 1992. The GNP in Costa Rica depends on a living, based on the future, and therefore, if we talk about a GNP it has grown at the expense of our natural resources. The last three presidents that we have had in Costa Rica, have sold our natural resources. The attractiveness of coming to Costa Rica to invest has not been created, they have put aside the criteria from the beginning to try to protect our natural resources. With all of these instances it is easy to understand the interest that could be produced by utilizing national and transnational companies.

The 1990s was the decade in which Costa Rica, as I explained to you before, decided to go into signing free trade agreements and also decided to separate itself from its basic criteria. This is the first contradiction. To separate itself from the criteria of having a strong policy in the relationship between poverty and the environment, instead they choose the investment of foreign capital relationship. I would not say that more laws implies more protection, but yes, the policies that we had in Costa Rica, based on the signature of up to forty laws started to culminate in 1985 to 1990. In 1990, however, they began to drop again. Here we find all kinds of regulations passed by a directive to have a strong program for the relationship between the environment, protection of the measures that were taken in the free trade agreement, and the investment of foreign capital. When this begins to drop, a number of deregulation commissions take place.

Deregulations for the environment in Costa Rica concerns us because specifically there is a possibility that Congress will pass laws that perhaps will regulate criminally some of the crimes that are being committed in our country. This specific case and the only one perhaps that I will be explaining to you has to do with a company called Harkin. The company has assets from Chile, Peru, and Ecuador.

The government of Costa Rica and Harkin have signed a contract to begin to do seismic investigation to see if there is any oil potential within our country. The government does that based on the legislation, based on a law for hydrocarbons that our constitutional chamber had declared, in a consult that was done by Congress to the constitutional hall, as

unconstitutional. One article in which they were thinking of the possibility of bringing this up to bid and all the pressure to have the hydrocarbons law ready was specifically to allow that we could have the development of more foreign capital coming in and the supposedly economic development in certain areas of our country. When the law reaches Congress, because of the economic pressure that we were facing, the commitment to free trade agreements we made through three different presidents has already committed our natural resources.

Harkin arrives in Costa Rica, and finds at that moment that by just applying the hydrocarbon law they are able to carry out all of the bids and sign all of the contracts. Harkin begins announcing on its web site that they have signed a contract with Costa Rica, and that is the case. When the constitutional hall says that the entire procedure was wrong and pointed this out at the consultation, the law was not law of the republic yet. At that time, we could still have reformed the law based on what the constitutional hall said. This is the process that was being followed. This was the position of this faculty.

Even so, because of the amount of money involved and because it is a foreign country that comes to Costa Rica to invest, we are talking about economics. This ecological process is what I call a crime without a name. We see then that the government requests Harkin to exploit our country, especially in the area on the Caribbean coast of Costa Rica. This is where the contradiction begins from the pressure of needing to attract foreign capital to produce wealth.

The Caribbean cost of Costa Rica is a region that is very diverse, and is what we could call our natural resources or national wealth. I do not know why they chose an area in which the Ramsar Commission has designated as a protected national area.

The government began to request that Harkin carry out their search in this area. What is it that the government does then? What did the government do? This is Costa Rica, the whole country. You can see the government takes foreign capital from foreign investors of a national company, and gives them Costa Rica. The government divides Costa Rica in blocks and assigns these blocks out to bid so that companies can search for oil, gas, or whatever. We are analyzing a specific case here.

The first problem in dividing up Costa Rica is that the constitutional hall said that the law was unconstitutional. One hundred and sixty-nine of our organizations obligated Harkin to respect the indigenous reserves and requested where they should begin to do their exploitation. However, the areas were over indigenous reserves which protected forest area. The law was not reformed, and they presented to Harkin the possibility to do the search and the exploitation, in the indigenous reserves, where our forest

reserves are supposedly protected. You can imagine the result that this could have produced.

It is interesting in a way, because this law came out without the constitutional reform. It is signed. They put it out to bid. They sign the contract immediately. The company begins to work in those areas. The damage is produced in the flora and fauna, and in the turtles that come to nest in this area. There is damage to the environment, more than can be imagined, because the government basically used that law that allowed them to search for oil.

After the oil was produced, the turtles began to leave the area. In other words, the seismic explosions were causing the turtles to leave. Remember this exploration is the very kind that in the United States, California had prohibited.

Costa Rica had given protection to these areas, where now prospecting was taking place. It requires a very strong wave to find within the sea, the areas in which the deposits may be. That amount of noise, that a seismic wave will produce has a great effect on the environment where the turtles nest, and there is a great number of biodiversity issues affected.

Harkin, however, carries out at least their first seismic prospecting, and this is when public opinion starts to kick in. Different NGOs and small companies were also being impacted, and they were perturbed by what was happening. When Harkin begins to be questioned, they realized they had violated the environmental study that was done before the bid was carried out. They should have consulted based on agreement No. 169. The indigenous people should have been consulted about the exploitation, about the possibility that they should intervene in this exploitation. This was not done.

The government of Costa Rica itself was more interested in having the economic development to attract the foreign capital to invest that capital in our country, to put it to spend millions of dollars in our country, they did not first do the consultation in the different communities. They did not carry out the environmental impact study. They just signed the contract and then did the study afterwards. As you can see at this moment, the government of Costa Rica was questioned for these types of policies. This is just one example.

There is also the red macaw, the scarlet macaw and other types of macaws that nest in this region of Costa Rica. The reserves are the only place in the world that they have to live. Before, the scarlet macaw existed all the way from Mexico down to Ecuador. Now its area has been reduced more and more. For example, the government of Costa Rica has not said anything concerning illegal trafficking of scarlet macaws. However, the deforestation is the same process of the oil companies, but with the illegal

cutting of trees affecting the scarlet macaw. The main interest was the oil exploration when there was nothing wrong within its criteria for development of the possibilities of doing the exploitation. But you can see how the government using the free trade agreement combating poverty, would push an oil company to do all these things. Harkin, on the other hand, is thinking how to sue the government of Costa Rica for having put this project out for bid in which specifically it was causing so much damage to the environment and also in my criteria it was creating environmental crime without a name based on an environmental problem.

As I mentioned before, our judges, the administrative operative, the public administration, and the public official of Costa Rica have to deal with the analysis of the environmental studies and with administrative processes before granting a bid; they have to analyze these procedures. They have to do it with economic criteria based on the ethical criteria, but this is like an imposition to be analyzed. Something that may be affected has to be analyzed and has to be analyzed in this way.

Analyses are very important for the success of the government of Costa Rica. Especially since there is a tremendous amount of national and foreign capital interested in the exploitation of these areas. However, this type of procedure and this type of mission is causing the government of Costa Rica to question its previous policy for general development of the environmental policies based on the pressures imposed on them by the free trade agreements.

I wanted to point out this aspect in the general sense, because of the study that we recently carried out at the law school. We wanted to connect it also to some of the analysis that has been done in the summer course at the University of Florida and which had been given out in Costa Rica on environmental policies.

We analyzed it in one of the investigations. We were analyzing specific aspects of what is implicated when the Costa Rican government allows things like this to occur. This has produced for us crimes that at this moment, have no name.

In other words, the relationships sometimes do not have any criteria from the government or the transnational company. The company tries to reduce its investment in order to have a good yield, and they give us something that we have to try to deal with which is a new environmental crime framework that does not have a name. I think that unfortunately in Costa Rica the biggest penalties were to prioritize the development of a criminal system which never worked and has never been successful.

Specifically, we need to analyze the problem of our policies within our country in the sense that the branch executives and congress do not believe that the process should be done that way. We believe that it is

important to give emphasis to this problem and to develop an infrastructure of all the legal instruments that are necessary to allow us to combat this crime.

D. Brazil and Environmental Law

*Fernando C. Walcacer**

Before the adoption of the 1988 Federal Constitution, the Brazilian legislation addressing environmental crimes was contradictory and of little or no practical use. There was criminal liability for pollution of water, as provided for in the 1940 Criminal Code. But for many years, according to the prevailing jurisprudence, in order to characterize a polluting act as a crime, the affected water had to be physically and biologically pure. Air pollution was a misdemeanor addressed by the Criminal Offense Act of 1941, but the enforcement of this provision depended on a previous definition of the acceptable pollution levels, which was never completed.

In 1979, Law No. 6.766 considered as a crime the unlicensed sale of land tracts and the consequent unauthorized urban development. But this was a late answer to a practice imposed for decades on all large Brazilian cities, which absorbed large numbers of migrants and grew almost solely at the whim of real estate interests.

The Fauna Crime Act, amended in 1988, provided such stiff penalties for violators (up to five-years imprisonment), that most often the judges refused to enforce them, claiming the principle of insignificance of damages. In 1989, a law was enacted assigning criminal responsibility to those responsible for pollution which endangered human, animal or vegetable health. But similarly to all preceding laws in this area, its actual enforcement was practically nonexistent.

Furthermore, the legal provisions of criminal punishment for the production, sale or employment of pesticides in noncompliance with the relevant legislation also had very little or no enforcement at all. A 1989 act that provided punishment for the use of chain saws without a license from environmental authorities did not stop forest exploitation that was occurring at a startling pace.

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The issue started shifting course with the 1988 Federal Constitution and its comprehensive chapter on environmental protection. Slowly but surely, the country has become aware of the seriousness of its environmental problems, and public opinion, primarily in the larger cities, has been demanding from the authorities more effective actions against polluters.

One very significant development was that the Office of the Public Attorney was greatly empowered by the Federal Constitution, which assigned to it new and greater responsibilities in the defense of diffuse interests, including environmental provisions.

The Environmental Crime Act of 1998 (No. 9.605/98) represented the end of a long proceeding in the National Congress of a bill which characterized actions against fauna and flora as crimes. During the legislative proceeding, new criminal aspects were added to the bill, which resulted in a much more comprehensive text than the original.

During this process, pressure from religious sectors forced the President to veto the crime of sound pollution (the use of powerful sound equipment to attract the flock is a common practice in religious temples in Brazil, especially those located in low income areas and suburbs). Likewise, rural sectors managed to prevent the creation of the crime of queimada (clearing of land by burning it), which usually precedes the sugarcane crop, and whose polluting effects reach large populated areas.

Despite these specific exceptions, Law No. 9.605/98 unquestionably represented a remarkable step towards the appropriate management of Brazilian natural resources and pollution control. Specialists point out the criminal responsibility assigned to corporations as the most innovative item in the law. In fact, as of its effective date, corporations may answer for the damages caused, provided that the crime was committed for their benefit, and by determination of their officers.

Among the penalties to which companies are now subject, the so called right depriving penalties include fines, the compulsory rendering of community services, and a prohibition on contracting with public agencies.

Such criminal responsibility does not exclude the individual principals or co-principals of the crime. Responding to a recent massive oil spill and the resulting contamination of public waterways, the Public Prosecutor's Office brought criminal charges against the Brazilian giant PETROBRAS, its directors, including its Chief Executive Officer, and the technical staff directly responsible for the spill. These charges were highly publicized in the media. The new law allows for the application of the disregarded doctrine of piercing the corporate veil, whenever the legal entity is used as a cover for the criminal action.

The new Brazilian environmental crime law innovated in the matter of crimes against fauna by criminalizing fishing activity during closed

seasons (particularly spawning season) or in closed areas, as well as the use of explosive or toxic substances. The powerful fishing industry has been pulling a lot of strings in the Congress in attempts to decriminalize these practices.

Another innovation in this Chapter addresses the abuse of wild, domestic or domesticated animals, previously considered simple misdemeanors. This provision has had strong opposition from those who stage rodeos, which are an important source of income for many cities in the country, and most likely, exactly for this reason, still occur quite often. But cockfighting and other pet fights, also very popular in some Brazilian states, are definitively considered clandestine activities.

In the Chapter addressing crimes against flora, the first observation is that the new law deemed as crimes what before were simple misdemeanors, the so-called forest crimes, such as destruction of those forests considered to be under permanent preservation by the legislation (those located on the edges of waterways, hilltops, in very steep areas, etc.). Causing damage in any form to Conservation Units (biological reserves, ecological stations, parks, etc.) also became a criminal activity, as well as using fire in woods or forests. It is important to mention that the new law also imputed criminal responsibility to those transporting, selling, storing wood and other vegetable products without proper licensing, as well as those trading or using unlicensed chainsaws.

One of the crimes punished with the stiffest penalties is pollution of any nature, in such levels that result or may result in damages to human health, or cause death of animals or significant destruction of flora. This provision is at the heart of a remarkable change in attitude by various corporations, which, in response to the new law, have attempted to adapt their conduct to the strictness of the new legislation. The penalty for this crime can be up to three years of imprisonment, and the law admits the responsibility of fault without malice. The law also provides for several aggravating factors, such as, pollution which renders an area unfit for human occupancy, causes indirect damages to public health, prevents or stops the public use of beaches, or occurs by discharge of waste in noncompliance with the requirements set forth by the law or regulations. In such cases, the penalty may be increased to five years imprisonment.

In a country like Brazil, the exploitation of mineral resources is carried out with no significant environmental control, the most dramatic example of that being the extraction of gold in many rivers of the Amazon, using mercury. This region sees constant confrontations between prospectors and Indians, in whose lands the criminalized mineral exploitation is often carried out. But what we know, without question, is that any solution to this problem will have to come from a deep and permanent involvement

by the Brazilian government, something that as yet, regrettably, has not happened, at least not as intensely and vigorously as it should.

The new Act started punishing, with a penalty of up to four years imprisonment, the production, sale, transport and storage of products or substances which are toxic, noxious, or hazardous to human health or the environment, when such actions are in noncompliance with legal requirements. In Brazil, this type of cargo is usually transported in improper vehicles, with no signaling or notice to highway authorities. The Office of the Public Prosecutor has been very attentive lately, and the first accusations have been made against the companies carrying out such practices.

Also in the Chapter addressing pollution, one provision which triggered controversy was that which criminalized the operation of potentially polluting activities with no proper licensing from the environmental agencies. Although Brazilian legislation has required the licensing of these activities since 1981, the fact is that when the Environmental Crime Act appeared in 1998, it was estimated that about eighty percent of those activities had no environmental licensing. The situation led to strong pressure on the Federal Government, resulting in the enactment of a Provisional Measure which allowed environmental agencies to grant three-year grace periods (with potential three-year extensions) to companies in violation of the requirement, in order to arrange for the environmental licensing. It is important to note that in many Brazilian states the environmental licensing proceeding may take more than two years, since public agencies very often do not have sufficient specialized staff or resources to satisfactorily perform these functions.

Another innovative aspect of the law was its Chapter dedicated to crimes against the urban and cultural heritage. Under its provisions, the destruction of assets especially protected due to their cultural value, the alteration of the character of historic structures, and unauthorized construction in those areas are considered crimes. These provisions may become critically important in preventing the destruction of the splendid Brazilian cultural heritage, which is constantly threatened by individual owners who do not accept the need for its preservation. Just before the Environmental Crime Act went into effect, the simple piece of news that public authorities were studying the possibility of decreeing the preservation of an avenue in the city of São Paulo, where, during the height of the coffee cycle, in the 1920s and 30s, farmers built wonderful manors, led scores of proprietors to destroy them practically overnight.

Last, but not least, the Environmental Crime Act brought forth an extremely important new point: the criminal responsibility of civil servants who, in the process of environmental licensing, would give false

information or omit data and information, as well as those responsible for granting irregular licenses. Unfortunately, this has been a recurrent practice in Brazil, since the governmental authorities tend to favor the economic aspects of the activities, disregarding their impacts on the environment. This happens when the project is developed by the government itself. One of the first effective enforcements of these legal provisions recently occurred in the State of Rio de Janeiro, where environmental agency officers were charged by criminal courts because they granted the license to a large housing project of the interest of the State, which would cause the destruction of wetlands protected by environmental legislation.

As the new Act is very recent, it is still too early to evaluate conclusively its impacts on social conduct. We should not forget that Brazil is a country where there exists the stereotype that prisons are for deprived and Afro-Brazilian populations, and those responsible for environmental crimes do not exactly fit within such profiles. But Brazilian society has become increasingly aware of the importance of law enforcement in preventing crimes committed against the environment, and without a doubt, in spite of its many critics, the Environmental Crime Act represents a huge breakthrough for the guarantee of rights for our future generations.

E. Brazil and Environmental Damage

José Rubens Morato Leite¹ and Marcelo Buzaglo Dantas²

1. Understanding the Environment

In approaching this topic, it is first necessary to know the main goals in protecting the environment. This brings us to a consideration of the basic fundamentals of policy or judicial protection of the environment. The following arguments can be pinpointed as a basis for environmental protection:

The first of these approaches is that the environment should only be protected as a basic condition for human quality of life (the anthropocentric view). The second is that the environment should be protected in order to save natural resources for human use only (the conservative anthropocentric view or an economic centered perspective). The third is that the environment should be protected in and of itself, as an important value for ecosystems and for life on earth (both human and nonhuman). And finally, there is the argument that the environment should be protected to avoid human interference. In this case the environment should remain untouched (the perspective of deep ecology).

Whatever one's personal opinion on this matter, it has to be acknowledged that environmental change is already taking place. It is certain today that the strictly anthropocentric view is losing ground. Worldwide environmental legislation has changed to reflect this. With the greening of environmental legislation, the environment is protected not only for the present generation, but also for those in the future (both human and nonhuman). Thus, there is no ground for the anthropocentric view, but a new perspective that includes an understanding of the intrinsic value of natural resources.

2. Environmental Crises and Judicial Legislation

There is general consensus that we are presently living during a time of environmental crisis. Climatic changes, the Greenhouse Effect and acid rain are just some of the environmental difficulties the planet is now

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facing. Ulrich Beck stated that we presently live in a risk society. However, the risks of development are not being analyzed and their potential danger is not being scientifically measured. As a result of this process, the environment and all society live in potential risk of new catastrophes. Most new technologies do not respond to environmental needs. Moreover, the processes of production and the management of the economy are not in accord with principles of sustainable development, and will eventually cause damage to the environment.

From 1970 to the present, environmental awareness has continued to grow, and people worldwide have become increasingly concerned about their future. As a result, the environment has become a part of political discourse. The U.S. National Environmental Policy Act (NEPA), enacted in 1970, was the first legislation that treated environmental protection as a national policy. A second important document that stimulated political discussion of environmental matters was the Stockholm Declaration of 1972, enacted by the United Nations. Subsequent to the Stockholm Summit, the United Nations published an international report called "Our Common Future" in 1987. This report was among the first internationally recognized documents to describe the state of the environment worldwide, and to pinpoint the areas of environmental degradation.

Moreover, in 1992, twenty years after Stockholm, the United Nations sponsored the ECO 92 Summit or Rio 92, that established the Rio Declaration, subscribed to by most U.N. member states. The Convention on Biodiversity and Climatic Change was also established during the Rio Summit. Nevertheless, both Conventions are still awaiting ratification from many member states. These international meetings and documents helped to spread the awareness of environmental concerns, and consequently, several countries started greening their legislation. As a result of this international influence, a large number of environmental laws were also enacted in Brazil. Though the Brazilian legislation is formally modern, it has not yet been well enforced.

3. The Brazilian Environmental Legal System: An Overview

In 1982, a statute (Law 6.938/81) was established that created the National Environmental System in Brazil. The aim of the statute was to create a type of environmental control which was to be enforced by public regulated agencies. With the greening of the Brazilian environmental law in 1985, an additional statute was enacted that provided the opportunity to bring environmental claims to justice through the Ação Civil Pública (class action suit in the public interest). This legislatively-created procedure

allowed the environment to be judicially represented by nongovernmental organizations, public entities and public prosecutors.

The most important and significant rule concerning environmental issues was established in 1988 by the new Brazilian Constitution, which devoted an entire chapter to the environment. This chapter was influenced by the "Our Common Future" report and includes the concept of intergenerational equity in preserving the environment. Article 225 states: "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."

There is no doubt that this constitutional article emphasizes the dual responsibilities of citizens and government in preserving the environment and bringing a modern protective view. It is difficult to enforce this shared responsibility in a population with no proper education, which is not sensitive to the needs of the environment. However, the environmental problem is just the tip of the iceberg within the social needs of the country. By prescribing a less anthropocentric view, Article 225 makes positive steps towards preserving the environment by pressing both the government and citizens to share responsibility towards the environment.

4. Criminal Legislation

Besides civil and administrative liability, the Brazilian Federal Constitution also established the possibility of criminal liability for those who pollute or degrade the environment. As stated in paragraph 3 of Article 225, "Procedures and activities considered as harmful to the environment shall subject the offenders, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused." The Legislature regulated this article by adopting statutes that protect the environment in administrative and civil terms (Laws 6.938/81 and 7.347/85), as well as in criminal terms (Law 9.605/98). Obviously, a system of penal sanctions is not the best for environmental matters. As the next section demonstrates, Brazilian criminal law is very positive in establishing a strong link between penalties and restoration of environmental damages.

It is common knowledge that legal entities are principally responsible for environmental damages. Perfectly aware of this fact, our legislature established, in Article 3 of the new law (9.605/98), the following statement: "A legal entity will be sanctioned administratively, civilly and criminally in accordance with this law, in cases where the infraction is

caused by a decision of its legal or contractual agent, or at its direction, in the interest or benefit of the entity.”

Considered by some as a violation of the principle that penal sanctions cannot be applied to anyone other than the person of the offender, the new Brazilian criminal system for liability of legal entities has been applied by Courts of Justice throughout the country. It is also significant that the Federal Constitution treats this matter formally and supports it, allowing legal entities to be charged with environmental crimes.

5. Interesting Aspects of the Environmental Criminal Law

From an overall perspective, Law 9.605/98 is very important and has already been transformed into a key instrument of environmental protection in this country. According to Articles 21 and 22, those legal entities which cause harm to the environment, may be subject to the following sanctions: fines, restriction of rights, community service, partial or complete suspension of activities, temporary prohibition of construction or activity, ban on contracts with any public power, or on obtaining subsidies, grants, or donations.

Let us also look at some acts which are now prohibited by the statute:

Article 32: Practice acts of abuse or maltreatment, hit or mutilate wild, domestic or domesticated animals, native or exotic.

Article 38: Destroy or damage forests in protected areas, even in formation, or use them without accordance with protective regulations.

Article 39: Cut trees in forests with permanent protection status, without a permit from the competent authority.

Article 54: Cause pollution of any kind at a level which may harm human health, or cause the killing of any animal or the significant destruction of the flora.

Article 55: Execute research, plow or extract mineral resources without the competent authorization, permit, license, concession of the public power in charge.

Article 64: Build on any protected land or in its vicinity, considered as such because of its geographical, ecological, historical, cultural, religious, archeological, ethnographical or monumental value, without the authorization of the competent authority or not in accordance with the permit conceded.

Article 66: Allow any civil servant to give a license, authorization or permission not in accordance with the environmental rules, for activities, construction or services for

which the development depends on authorization from the Public Power.

6. Environmental Damages in Criminal Law

Since its very beginning, the new law has demonstrated a deep concern for the restoration of environmental damages. In fact, in Chapter II, concerning the Application of Penalty, it is established that “the final criminal decision, whenever possible, will determine the minimum value to repair the damages caused by the offender, considering the harm suffered by the offended or by the environment” (Article 20). This tendency to give a slightly greater importance to the civil liability even though it is a criminal law can be noticed throughout the statute. The most important aspects of this matter, however, are certainly those included in Chapter IV on The Criminal Action and Process.

Articles 27 and 28 talk about the institutes of transaction and process suspension, expressly determined by the Law of the Special Courts (Law 9.099/95). According to this act, potential minor crimes (charged with a penalty of under one year) give the offender the right to transact the crime. In these cases, the offender must previously state his intention to restore the environmental damage, after which the offender will be charged with a fine instead of being arrested.

Almost the same mechanism is adopted in terms of the suspension process. According to Law 9.099/95,

for crimes in which the minimum penalty imposed is equal to or lower than 1 (one) year, included or not in this Law, the Public Prosecutor, when offering disclosure, may propose the process suspension, from 2 (two) to 4 (four) years, if the accused is not being prosecuted or has not been condemned for any other crime

(Article 28).

Paragraph 5 of this same article states that the punishment will be revoked depending on a report of total environmental restoration. Moreover, Article 28, paragraph 2 states that “in the case that the report proves that the restoration is incomplete, the length of the postponement will be extended to the maximum period established.” Paragraph 5 then states that “after the maximum postponement, the declaration will depend on the final report.” Thus, as can clearly be seen, the law demonstrates a link between the penalty and the reparation of the damage, instead of establishing strict criminal penalties.

7. Case Examples

Now I will pinpoint some cases in Brazil that give us an idea of the complexity of enforcing criminal environmental law. In the past we can see, in the judicial literature, a few cases where the judge imposed penalties on animals. In Brazilian jurisprudence, we have a canonical decision that imposed a penalty on ants, because the insects destroyed the foundations of a monastery. The decision of the canonical court was to oblige the ants to stay in a specified area. There is also the famous French case in which a cow was arrested for threatening a man. These are cases of the past, but they are not so distant.

Another complex issue could be that involving the killing of wild animals, which sometimes results in a severe penalty being given, when it could in fact be ignored. There are also some examples of two important constitutional rights in conflict for the judge to decide. In a recent case, the Brazilian High Court prohibited cruelty towards cows. This decision was complex because there was a conflict between protection of cultural rights of heritage and the prohibition of cruelty towards animals. In another case, a man was arrested and put into jail for killing a worm. This large worm, which is found in Brazil, is called minhocosul and is protected by law because it is an endangered species. The man who killed it wanted to use it for bait. As a result, he remained in jail for one year without bail. Afterwards, the High Court decided that the crime was insignificant and released him.

Finally, there is the interesting Butterfly Case. Here, the Brazilian court did not impose any penalty against an offender who commercialized seventeen butterflies. The fundamental holding of the decision was that this was an insignificant crime, thus the offender was not charged. Two negative aspects of this decision can be stressed. First, commercialization of butterflies is a crime. Second, the number of butterflies is not important because it potentially only takes the loss of one butterfly to extinguish the entire species.

8. Final Considerations

Criminal law in Brazil is still under development. Judges and citizens must learn how to deal with these new kinds of sanctions. We should concentrate more on the prevention of environmental crimes than the application of criminal sanctions.

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F. Questions and Answers

QUESTION:

I would like to ask the panelists if this is an encouraging picture or if this is a picture that shows some hope or are we getting further behind in catching up with the problem?

JEFFRY S. WADE:

I can speak from the U.S. perspective. I think that we are making strides. I think that they are slow strides. But the concept of environmental crime at the corporate level is one that had a rocky start. We got going in the early 1970s and it was not until the mid-1980s that they actually geared up with enforcement personnel and attorneys to start pushing the issues in a real way. It is slowly filtering down to the state level.

RAFAEL GONZÁLEZ BALLAR:

In Costa Rica, we are trying to see what has happened with the problem of environmental crimes. We have not had much luck in trying to implement an environmental policy concerning criminal aspects in environment and also the damages. I have to say this because nothing in Congress has passed as we would have desired it. I know there are a lot of interests in all this because, just to give you an example, of the three law projects we had in Costa Rica concerning forestry protection, of those three, one of them came from NGOs, the other came from the lumber companies, and I do not remember where the other one came from. If you make a guess, which law do you think passed? Lumber companies. So, what happened with the other ones? What happened with all the lobbying you have to make and all this? Now if you have that law, if you see that law, on the criminal section, it is a piece of cake for them. In the way it is conceived and everything for the judge, it is just — no criminal matter is desired. And so it has happened with a lot of things that we are doing now. To us it is just a matter of policies, economic policies stressed over the environmental policies and we have seen this in all the laws that are passing and deregulation processes that we are having. We have to give attention to this. To us, everything is not so black — you would say, the future is not so black. It is not so negative. We think we have to keep on fighting for all this. I mean not trying to force the criminal policies or criminal instruments. We have been doing a lot of work in preventing problems, and we think this is better than just stressing or putting government to work on continuing law projects that are not going to pass into Congress. We prefer to put that into some of our laws and try to see

if, with prevention, it is not better than the pathology of all of this at the end, taking this to court or fighting at the administrative level in procedures and trying to see who wins — lumber companies or NGOs or communities.

JOSÉ RUBENS MORATO LEITE:

Let me say something about the Brazilian legislation. As Fernando mentioned, we have modern legislation in Brazil. But it is still the case that we do not have enough knowledge about environmental questions so all lawyers, public prosecutors, and environmental agencies have to learn how to deal with this problem. I think that we are still learning how to deal with environmental questions. After all, as I said during my talk, we live in a risk society. So it is difficult to deal with these questions. But as my colleague Rafael said, we have to take action, precautionary action, against the environmental damage or preventing the environmental damage. I think nowadays we are learning that we have to impose a certain kind of control on the environment. That is the main goal of this new Brazilian legislation. We will see what happens in the future.

JEFFRY S. WADE:

My experience in Brazil has also indicated to me that they have, as in any other developing country, this conflict between the urge to increase the standard of living for the population and the understanding that you cannot exploit your resource base without regard. So the question of political will is a very relevant one there, but educational efforts are going on. The strength of NGOs, the maturity of NGOs addressing environment and social rights in Brazil, are also increasing. And they do have a legal institution there that has a major role in enforcing environmental laws including the criminal laws and that is the public ministry, in which the public prosecutors have tenure. It is an extremely difficult exam that they have to pass in order to become prosecutors. They are responsible for enforcing environmental laws, along with NGOs. There is actually a provision by which an NGO can begin the process of suing for environmental damage and then, if they are unable to continue the process, they can start working with the prosecutor who is obligated to take that case on. So there are cultural and institutional factors that are working in their favor and my perception is that the future is not a black one, but there is a slow progression.

