International Environmental Norms and Standards

Compliance and Enforcement

Second AIDP World Conference | Bucharest | 18 May 2016

Protection of the Environment through Criminal Law

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international and European criminal law

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“Exploring the potential of criminal law in enforcing UN and international environmental law”

• March 2010 reflection paper for AIDP/ISISC expert meeting Siracusa
  • much broader than compliance and enforcement
• input for AIDP/ISISC report to 2010 UN crime congress (Salvador, Brazil)

compliance on the level of MNE’s/TNC’s in various sectors

• labour exploitation & THB, ethics in private military and security complex
• corporate social responsibility, self-regulation, chain responsibility, demand-supply and market mechanisms
not: merely domestic compliance and enforcement
environmental norms and standards vary across countries/regions
• sometimes different standards have been deliberately agreed
  • e.g. climate & carbon dioxide emission
  • legitimate interests developing countries
• minimum standards (even if uniformly agreed) never rule out differences
economic interests of states, industries and companies at stake
• market competition, free trade, protectionism
• environment-friendly production = cost
delocalization to low cost (developing) states or zones
• especially popular with MNE’s
• disrupts developing-developed country differential approach
• unethical since polluting there
[administrative law]
• fairly punitive and effective
non-legal compliance monitoring
criminal law
• sanctions and liability
• jurisdiction to prescribe and to enforce
  • international jurisdiction
  • territorial jurisdiction
  • extraterritorial jurisdiction
health & consumer law | trade law
• WTO & TTIP barriers to externalized environmental policy?
self-regulation by industries
• role for state & consumer?
Environmental Action Task Force (EATF)?

- complementing the traditional compelling (criminal) jurisdiction for environmental offences with compliance-focused mechanism like the Financial Action Task Force (FATF)
- acceptance int’l quality standards (incl for licensing) and best practices
- which not only states, but also individuals and industries would need to comply with
- monitoring, peer review and follow-up
- due diligence promotion within production/supply chain
require states to ensure appropriate sanctions
• better: effective, proportionate and dissuasive sanctions

potential liability of legal persons
• international liability: “command responsibility”-like liability
  • power to represent, authority to take decisions on behalf or to exercise control over the legal person
• national liability: traditional liability (leave to national discretion whether the liability has criminal, administrative, civil character) + “command responsibility”-like liability

potential liability of public entities and states
• typical “state” offences: e.g. cause acid rain due to use of chemical weapons
• state surpassing international standards in issuing licenses (e.g. relating to carbon dioxide emission)
• state acting as a “private actor” (state enterprises)
International jurisdiction: multiple forums

ICC
• natural persons + “command responsibility”-like liability for heads of businesses
• extension mandate to ‘grave crimes against the environment’

ICJ: state responsibility

[PM: war crimes]
• warfare intended/expected to cause widespread, long-term and severe damage to the natural environment

permanent compensation committee
• take example from 1991 Iraq-Kuweit Committee

caveats
• ne bis in idem and conflicting truths issues
• nation-state defenses
Territorial jurisdiction

traditional territorial jurisdiction extended via effect theory legitimate for certain enviromental offences
• e.g. ship pollution, trans-border radiation, etc.
consultation necessary to coordinate actions in case of positive conflict of jurisdiction to enforce
caution: ne bis in idem
when beneficial to legal persons having their **head office** in the territory

- cfr most EU criminal law framework decisions (not in 2009 directive)
- especially relevant to prevent or tackle deliberate delocalization to evade compliance with higher norms and standards
  - delocalization to more lenient zone: stricter regime head office country applies
  - delocalization to stricter zone: stricter local regime applies

when beneficial to legal persons having an ‘**establishment**’ on the territory

- in the sense of the Google Spain case before the CJEU or the Facebook Belgium case before the Belgian court

when committed by (subconstr)actors in the production/supply chain of a domestic company or an MNE having its head office or an establishment on the territory | **chain responsibility**, based on

- based on participation, dolus eventualis or lack of due diligence (in selecting subcontractors and monitoring the production/supply chain)
- cfr several liability for social fraud, knowing use of services offered by a THB victim
health and consumer law
• prohibition to sell/purchase certain products
• likely for industries (also abroad) to adapt to changed demand side

trade law
• import bans/restrictions or prohibitions to place certain products on market?
• cfr Timber Regulation, Asbestos
• likely for industries (also abroad) to adapt, unless counter to GATT (WTO), TTIP (investment-state dispute settlement mechanism)
• GATT (1994) Article XX: General Exceptions
  Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
  (a) necessary to protect public morals
  (b) necessary to protect human, animal or plant life or health
  (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption
common in various sectoral spheres (wood, diamonds, ...)
• corporate social responsibility – codes of conduct – self-regulation & compliance monitoring
doubtful whether mere self-regulation will suffice
environmental ‘change’ triggered by consumer pressure?
• only limited effects likely; cfr fair phone
state-induced?
• cfr California Act (labour exploitation and THB)
helped by consumer criminalisation in case of ‘guilty knowledge’?
• ‘should have known’
• prosection avoided by transparency mechanisms & certification of environment-friendly production?
example setting by public authorities?
• cfr Hamburg city administration (banned aluminium coffee pads)
• environment-friendly requirements in public tender procedures?
example setting by private industries themselves?
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