

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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Relevant research background | Building blocks

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international and European criminal law

corporate liability research

“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

research

publications

consultancy

conferences

Compliance & enforcement | Challenges

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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

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Compliance & enforcement | Options

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[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?

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Non-legal compliance monitoring

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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

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Criminal law | Sanctions and liability

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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)

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International jurisdiction: multiple forums

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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]

- grave breach of 1st Protocol Geneva Convention | Draft Code of Offences against the Peace and the Security of Mankind
- 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

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Territorial jurisdiction

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traditional territorial jurisdiction

extended via effect theory legitimate for certain environmental offences

- e.g. ship pollution, trans-border radiation, etc.

consultation necessary to coordinate actions in case of positive conflict of jurisdiction to enforce

caveat: ne bis in idem

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Extraterritorial jurisdiction | offence attribution

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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 (subcontr)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

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health & consumer law | trade law

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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 (investor-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

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Self-regulation by industries

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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’
- prosecution 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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