TOPIC 2013: Environmental pollution: is Criminal Law a good instrument?

Last year at the successful conference in Washington DC (November 11 – November 15) we discussed at the US Patent and Trade Office: “Violation of copyrights and other intellectual property rights, especially through the use of internet.”

This year we will focus on a subject which has been on our minds since 2011: pollution.

It will give the study commission the possibility to examine if our legal penal systems are able to cope with all aspects of the many forms of pollution that not only exist in our own countries but also all over the world. There are forms of transborder pollution and export of radioactive waste. Is criminal law the best option to handle the problems involved, or should we look more into the instruments given by international law, private law or administrative law?

Is global warming a problem? Do we have to worry or is it perhaps best to leave it to organisations as Greenpeace or the Club of Rome.

Questionnaire.

Question 1.

Has your country special legislation for:
1.1. the violation of laws concerning environment in general?
A: Yes, Brazil has special legislation to protect the environment, such as the Forest Code; the National Policy for Hydric Ressources; the Mining Code; the Prohibition of Fishing during Procreation Period, The Genetical Engineering Act, etc.
1.2. Are there special rules for criminal investigation?
A: Yes, Brazil has a special statute for crimes against the environment: The 9.605 Act, of February 12th, 1998.
1.3. If no, is there any such legislation under consideration? - It doesn’t apply.
Question 2.
2.1. Do the laws which deal with environment include specific punitive measures? Yes, they do.
2.2. What are the possible sentences? Could you give an example?
The possible sentences are: prison; fine; and alternative punishments which range from a verbal warning to working in community service.

Question 3.
3.1. Is “restitution “ possible.
Is it for instance possible that the sentence is suspended in that sense that the sentence will be executed only if the offender does not fulfill certain conditions; for example a condition to repair all damages and take measures to prevent new damages in the future.
A: Yes, this can happens with crimes of lower offensive potential.
3.2. Is it possible in your country that the Public Prosecutor decides to impose a fine instead of taking the case to Court ( out of Court settlement). No, it’s not.
3.3. Is it possible for the Public Proescutor to take coersive measures?, i.e. measures the public prosecutor may take in criminal proceedings (like temporarily closing of a factory)
A: No, those are measures which only a judge can take.

Question 4.
Has your country set up one or more specialised agencies to investigate and indentify violation of environmental laws ?
A: Yes, Brazil has a special agency for that called IBAMA.

Question 5.
5.1. Has your country signed and ratified Agreements, Treaties or other forms of international cooperation regarding protecting environment ? Yes. To mention a few: ECO-92 and Kyoto Protocol (1997).
*The HongKong International Convention for the safe and environmentally sound recycling of ships 2009; No.
* The UN Treaty on the Law of the Sea; ( Monetgo Bay, november 16/1994) See f.i. artciles 207 etc on the pollution of the marine World; Yes.
* The international Convention for the prevention of Pollution from ships 1973 (Marpol and its annexes); Yes.
5.3. The European Union (EU) has set up a system for the supervision and control of shipments of waste within its borders and with the countries of the European Free Trade Organisation (EFTA), the organisation for Economic Cooperation and Development (OESO) and third countries which are party to the Basel Convention (Act 7.15.2006; amendig acts 6.25.2009, 4.20.2009 and 1.1.2010); Have you had any experience with this system? No.

Question 6.
6.1. Could your country be more active in the field? Yes, specially in the protection of Amazonia and also avoiding the pollution of the rivers in the biggest cities of Brazil.
6.2. Is there pressure from companies or governemental organisations to be more lenient when environment is concerned based on economical reasons (or f.i. employment)? Yes, recently there was big pressure from some sectors of the society to approve a new Forest Code, which was considered more lenient than the prior one.

6.3.

Question 7.
7.1. Could you as Judge be more active in the field? I don’t believe so.
7.2. Are you as an individual active in the protection of the environment (f.i. by being member of a society which has a goal to protect the environment?) Does that raise questions in the Court were you are working? It doesn’t apply.
7.3. Do you think that you have enough instruments and qualifications to handle these type of violations in Court? Yes, I believe the statutes related to environment violations give me enough instruments to handle with this issues in Court.
7.4. Is it considered to be a specialisation to handle these cases in Court? Yes, there are special pannels to decide environment violations in the State Supreme Court of São Paulo for instance.

Question 8.
8.1. Do you think there should rules to govern the situation in which a pollution is discovered long after the company involved has disappeared or changed ownership?
A: I certainly do. I believe the best way to handle with this problem is to accept the theory of ‘disregard of legal entity’, in order to catch the precedent owners of the company responsable for the pollution.
Question 9.
9.1. Is there any other comment on the subject that you would like to make? Brazilian legislation on crimes against the environment also permits to prosecute legal entities.

The Presidency of the Third Study Commission looks forward to receive your answers not later than the beginning of September 2013. That will give us time to present the answers in a proper way.

On behalf of the commission,

Frans G. Bauduin, president of commission III.
Amsterdam, April 2013.