

Due Diligence in Supply Chain: An Environmental Law Perspective

Umweltrechtliche Aspekte der Sorgfalt in der Lieferkette

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Contents

- I Introduction
- II Legislation on environmental DD in a supply chain
- III Judicial decision on environmental DD in a supply chain

I Introduction

- Why is environmental consideration in the supply chain necessary?
- up to 80-90% of the environmental harm of EU products occurs in value chains outside the EU (Jungmichel et al. (2017))
- ☞ It is not enough to regulate the environmental impact of products during manufacture and use
- ☞ It is not enough to regulate industrial activity in EU

I Introduction

- Some scenes of environmental requirements in the supply chain
1. PPM (Processes and Production Methods) regulation versus Free trade Mexico etc versus US: 'tuna-dolphin'
India etc versus US: 'shrimp-turtle'

I Introduction

- Some scenes of Environmental requirements in the supply chain

2. Chlorofluorocarbon Tax (USA)

levied on the production and import of ozone-depleting substances (ODS) and on the goods produced using ODS.

☞ Border tax adjustments for imports of ODS and goods produced using ODS.

☞ This tax indirectly regulates the production process both in the US and outside the country.

I Introduction

- Some scenes of Environmental requirements in the supply chain

3. Carbon Tax (Emission Trading) and Border Tax Adjustment

Environmental policy approaches that indirectly regulate manufacturing activities that emit CO₂

☞ They encourage to reduce CO₂ emission in the supply chain.

☞ Border adjustments for imported products, such as CBAM, can be viewed as a kind of extraterritorial application.

II Legislation on environmental DD in a supply chain

1. Guidance/Principle : soft law

UN, 2011	Guiding Principles on Business and Human Rights
OECD, 2011ed.	Guidelines for Multinational Enterprises, 2011 ed.
OECD, 2018	Due Diligence Guidance for Responsible Business Conduct

II Legislation on environmental DD

2. Domestic Law, European Law

USA, Lacey Act, 2008 Amendments	Prohibition of illegal timber imports Importer obligation of due care
France, la loi n° 2017-399 relative au devoir de vigilance	Mandatory human rights and environmental DD
Switzerland, 2020 Änderung des Obligationenrechts	Mandatory disclosure of non-financial information (incl. DD policy)
Germany, 2021 Lieferkettensorgfaltspflichtengesetz	Mandatory human rights and environmental DD and disclosure
UK, Environmental Act 2021	Prohibit importation of agricultural products (palm oil, etc.) produced with illegal deforestation , DD obligation of importers

II Legislation on environmental DD

2. Domestic Law, European Law

EU, Timber Regulation (EUTR), 2010	Prohibit importation of illegally harvested timber Due diligence obligation of importers
EU, Corporate Sustainability Reporting Directive (CSRD), 2023	Expand reporting requirements on sustainability, incl. environmental, social, and governance matters
EU, Batterie regulation, 2023	DD obligation of manufacturers and importers
EU, Regulation on deforestation-free products, 2023	Prohibit importation of agricultural products (palm oil, etc.) produced with illegal deforestation DD obligation of importers
EU, Draft of Corporate Sustainability DD Directive, 2023	Mandatory human rights and environmental DD, Civil liability

II Legislation on environmental DD

3. EU Law and “Brussels Effect”

- Japanese gov. , 2022

“Guidelines on Respecting Human Rights in Responsible Supply Chains”

- Brussels Effect

eg. RoHS (Restriction of Hazardous Substances) directive, 2002

factual & normative Brussels Effect on Japanese producers and legislation

II Legislation on environmental DD

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II Legislation on environmental DD

4. Deepening the Brussels Effect

(a) Deforestation Countermeasures

Prohibit importation of agricultural products (palm oil, etc.) produced with illegal deforestation
DD obligation of importers



	Requirement
UK, Environmental Act 2021	Compliance with regulations of the country of production
EU, Regulation on deforestation-free products, 2023	Proof that deforestation is not associated with deforestation after the end of 2020

II Legislation on environmental DD

4. Deepening the Brussels Effect

(b) Batterie Regulation, 2023

- Purpose:

 - Sustainability throughout the entire life cycle

 - Securing key raw materials for batteries through recycling

- Regulation related to the Supply Chain

 - Calculation of Carbon footprint (CFP) and Compliance with the maximum limit on the CFP (Art.7)

 - Batterie DD incl. Supply Chain (Art. 47-53)

 - Batterie Passport (Art.77)

II Legislation on environmental DD

4. Deepening the Brussels Effect

(b) Batterie Regulation, 2023

- **quasi-extraterritorial application** for Japanese manufacturers or suppliers

- Obligation to disclose environmental impacts in the supply chain

 - Obligation to reduce environmental impact in the whole supply chain, eg. CO₂

 - ☞ Need a mechanism to manage the generation and distribution of information and to share the cost burden of reducing environmental impact.

II Legislation on environmental DD

4. Deepening the Brussels Effect

(b) Batterie Regulation, 2023

☞ Raised legal issues

Who is responsible for the correctness of the information?

Is adequate consideration given to business confidentiality?

eg. Annex 13 (batterie passport) : persons with a legitimate interest and the commission may access to the information on detailed composition, including materials used in the cathode, anode and electrolyte

II Legislation on environmental DD

4. Deepening the Brussels Effect

(c) EU, Draft of Corporate Sustainability DD Directive, 2023

• The environmental DD obligations of businesses extend to environmental impacts arising from the activities of business partners in the value chain.

• Extraterritorial effect

☞ DD obligations are also imposed on non-EU companies with sales above a certain amount in the EU.

☞ Cascading effect on extraterritorial firms in the value chain

II Legislation on environmental DD

5. A structural change of environmental law?

- Difficulties in managing a worldwide supply chain
- Hold manufacturers at the most downstream end of the value chain accountable for env. DD
- A digital architecture to accurately record and distribute information on environmental impacts throughout the value chain.
- Maintain business confidentiality and distributing environmental information at the same time
- How to ensure the accuracy of information?
- Polluters Pay Principle, Extended Producer Responsibility
→ “The Final Product Manufacturer” DD Responsibility?

III Judicial decision on environmental DD in a supply chain

1. Milieudefensie et al. v. Royal Dutch Shell plc. (Shell Case)



- Environmental groups and citizens called on Shell to reduce GHG emissions from all group companies
- Judgment of the District Court of The Hague, May 26 2021
Court ordered Shell Group as a whole to reduce GHGs by 45% from 2019 levels by 2030.

III Judicial decision on environmental DD in a supply chain

1. Milieudefensie et al. v. Royal Dutch Shell plc.

Scope1 are direct GHG emissions occurring from sources that are owned or controlled by the company

Scope2 emissions are indirect GHG emissions associated with the purchase of electricity, steam, heat, or cooling.

Scope3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the company. Some examples of scope 3 activities are extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services. ☞ emissions from the whole value chain (85% of Shell's emissions)

The Greenhouse Gas Protocol

III Judicial decision on environmental DD in a supply chain

2. "Netherlands Effect" on global climate litigation

(a) Urgenda Foundation v. State of the Netherlands (Urgenda Case)

the Supreme Court, December 20. 2019

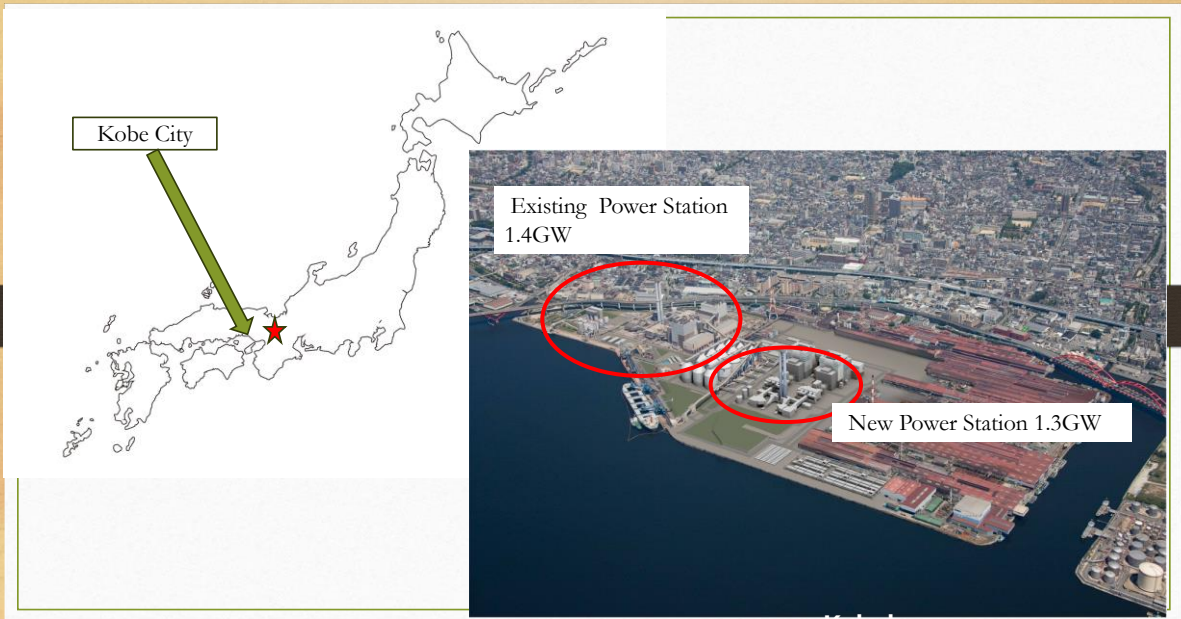
(b) Neubauer, et al. v. Germany,

BverfG, March 24. 2021

(c) Shell Case May 26. 2021

(d) Japanese Climate Litigation





III Judicial decision on environmental DD in a supply chain

3. Addendum: Kobe Climate Case

- Citizens call for an injunction against the construction and operation of new coal-fired power plant.
- Plaintiffs partly rely on the theory of Urgenda decision and Shell decision, and submit amicus brief from litigation attorney of Urgenda case to the Japanese court.
- The plaintiffs lost in the first instance and appealed to the Osaka High Court.

• Significance of the case

Fossil fuel-fired thermal power: Obstacles to
De-Carbonization of the Value Chain in Japan

☞ Will EU law and global soft law influence Japanese energy policy?



Thank you for your attention!

Vielen Dank für Ihre Aufmerksamkeit!

ご清聴ありがとうございました。

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