

REGULATORY COMPLIANCE AND ENFORCEMENT: AN ANNOTATED BIBLIOGRAPHY

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1. INTRODUCTION

B. Hutter, *Compliance: Regulation and Enforcement* (Oxford: Clarendon Press, 1997)

Regulatory compliance and enforcement as a discrete area of interdisciplinary study has been the subject of considerable empirical research and socio-legal analysis in the past 20 years. This Annotated Bibliography summarizes the major research in this area since the early 1980's, based upon a comprehensive literature search conducted from January to April 2002.

Hutter presents a detailed discussion of the relevant terminology [ibid. at 67-103]. She notes that the term "compliance", which is defined in the dictionary as "a desired state of conformity with the law or a regulation or a demand", has a much broader meaning in the regulatory context. Regulatory compliance is a "complex, flexible, dynamic and interactive" process that can include various states of affairs, from ongoing efforts to achieve and maintain regulatory requirements, to phased-in progress toward compliance in the future, and even to justifiable temporary non-compliance. Similarly, "enforcement" involves more than prosecutions. It also includes mandatory reporting requirements, site inspections, and administrative remedial orders/penalties, and so on.

2. TRADITIONAL MODEL OF COMPLIANCE AND ENFORCEMENT

K. Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Oxford: Oxford University Press, 1984)

A. Reiss, Jr. "Selecting Strategies of Social Control Over Organizational Life" in K. Hawkins et al., *Enforcing Regulation* (The Hague: Kluwer-Nijhoff Publishing, 1984)

C. Rechtschaffen, "Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement" (1998) 71 S. Cal. L. Rev. 1181

The early literature describes two strategies of regulatory compliance and enforcement. Hawkins calls them the "compliance" and "sanctioning" strategies; Reiss, the "compliance" and "deterrence" strategies. Reiss' nomenclature has become the accepted usage. "Compliance" strategies describe a cooperative, problem-solving approach in an ongoing working relationship between the regulator and regulatees. The objective is to achieve (or approximate) conformity with regulatory requirements, with penal sanctions used only as a last resort because they are viewed as a failure of the regulatory system to achieve compliance. "Deterrence" strategies, on the other hand, describe an arm's length regulatory style in which regulatees are obliged to meet

regulatory requirements or face punitive sanctions, typically prosecution. The objectives are retribution for breach of prescribed regulatory requirements, and specific/general deterrence against future violations, with punitive sanctions viewed as the success of the regulatory system to enforce legal requirements. Rechtschaffen provides an informative overview of the debate about the role of punitive sanctions in regulation, often called the “penalties are necessary” vs. “penalties are counterproductive” debate.

Both Hawkins and Reiss recognize that real-world regulation involves a mix of the two strategies. Their work is interesting in its own right and has provided a solid foundation for subsequent research. However, the binary model is not very instructive or useful in the design of real-world regulatory tools and techniques.

Variations on the Basic “Compliance vs. Deterrence” Models:

R. A. Kagan and J. T. Scholz, “The ‘Criminology of the Corporation’ and Regulatory Enforcement Strategies” in K. Hawkins et al., *Enforcing Regulation* (The Hague: Kluwer-Nijhoff Publishing, 1984) at 67 - 96

P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford: Oxford University Press, 1986)

B. Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (Oxford: Clarendon Press, 1988)

J. T. Scholz, “Managing Regulatory Enforcement in the United States” in D. Rosenbloom & R. Schwartz, eds., *Handbook of Regulation and Administrative Law* (New York: Mark Dekker Inc., 1994) at 423 - 463

R. A. Kagan, “Regulatory Enforcement”, D. Rosenbloom & Schwartz *ibid.* at 383 - 421

Considered in the Canadian Context:

P. Nemetz, “Federal Environmental Regulation in Canada” (1986) 26 *Nat. Res. J.* 551

D. Campbell, *From Sawdust to Toxic Blobs: A Consideration of Sanctioning Strategies To Combat Pollution in Canada* (Ottawa: Minister of Supply and Services, 1989)

U.S.A. Traditional ‘Deterrence’ Approach:

E. Bardach and R. Kagan, *Going By The Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982)

Current U.S.A Approaches to Environmental Regulation:

E. Orts, “Reflexive Environmental Law” (1995) 89 *Nw. U. L. Rev.* 1227.

D. Sinclair, “Self-Regulation vs. Command and Control? Beyond False Dichotomies” (1997) 19 *Law & Pol.* 529

R. Steinzor, “Reinventing Environmental Regulation: The Dangerous Journey from Command to

Self-Control" (1998) 22 Harv. Envtl. L. Rev. 103

R. Stewart, "A New Generation of Environmental Regulation?" (2001) 29 Cap. U. L. Rev. 21

3. RESPONSIVE REGULATION, EARLY 1990's

J. Scholz, "Cooperation, Deterrence and the Ecology of Regulatory Enforcement" (1984) 18 Law & Soc. Rev.179

~~~ , "Voluntary Compliance and Regulatory Enforcement" (1984) 6 Law & Pol. 385

J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University of New York Press, 1985)

I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992)

B. Hutter, *Compliance: Regulation and Enforcement* (Oxford: Clarendon Press, 1997)

J. Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford: Oxford University Press, 2002) esp. c. 2 "Responsive Regulation" at 29 - 44

Responsive Regulation is a paradigm shift from the "Compliance" and "Deterrence" strategies. It posits that regulators should have a range of compliance and enforcement tools, so that they may respond contingently to a regulatee's most recent regulatory conduct, responding cooperatively to cooperative regulatees, and punitively to recalcitrant ones.

The earliest model of Responsive Regulation is Scholz' 1984 "Tit-for-Tat" strategy. Using game theory, Scholz established that, assuming a rational economic actor in an ongoing regulatory relationship motivated solely by profit maximization, the regulatee optimizes its long-term benefits by foregoing short-term opportunities to default in favour of consistent cooperation with the regulator. Similarly, the regulator can optimize long-term cooperation by setting a minimal level of compliance, using cooperative strategies with regulatees that comply, rigorous punitive sanctions against those that do not comply, and returning promptly to a cooperative approach with any defaulting regulatee that signals a willingness to comply. Ayres and Braithwaite's empirical research demonstrates that sociological considerations also support the "Tit-for-Tat" strategy. Their analysis indicates that initial regulatory cooperation is always the preferred approach, until a regulatee fails to comply, and that a regulatee's efforts to comply should be met with prompt "regulatory forgiveness".

Ayres and Braithwaite's most enduring contribution is their Enforcement Pyramid. In this model, regulatory tools include a broad base of cooperative measures such as persuasion, regulatory advice and technical consultations. Ongoing noncompliance is met with a range of increasingly punitive measures, from warning letters, to civil and criminal sanctions, and ultimately to the "regulatory capital punishment" of licence revocation for serious long-term non-compliance. Regulatee efforts to comply are met with regulatory de-escalation down the pyramid, back to cooperative strategies such as persuasion. Ayres and Braithwaite's major insight is that the more punitive the ultimate sanctions available to the regulator, the more likely that regulation will occur at the base of the Enforcement Pyramid, through a cooperative working relationship between the regulator and regulatees. Hutter's 1997 study applies this analysis, using a range of compliance and enforcement tools that are familiar to Canadian regulators, suggesting that her iteration of the

Enforcement Pyramid may be useful in analyzing environmental regulation in Alberta.

Responsive Regulation's principal drawback is its focus on two-party regulation involving only the regulator and regulatees. To inform real-world regulatory design, compliance and enforcement theory must accommodate the significant and legitimate roles of other regulatory stakeholders, such as public participation by private citizens and NGO's, and the inevitable influences of commercial actors, such as industry associations, suppliers, competitors and so on. Smart Regulation presents such a model.

#### 4. SMART REGULATION, LATE 1990's

N. Gunningham, P. Grabosky & D. Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998), c. 6 reprinted B. Hutter, *A Reader in Environmental Law* (Oxford: Oxford University Press, 1999)

Smart Regulation is the state-of-the-art regulatory theory as of April 2002. It presents a comprehensive approach to the design, implementation and enforcement of environmental regulatory requirements. Smart Regulation describes the range of available regulatory instruments and their potential for concurrent or sequential implementation, and presents a set of regulatory design principles, one of which is a Tripartite and Interactive Enforcement Pyramid. This Pyramid is structured to ensure that both Commercial and Non-commercial Third Parties can participate meaningfully in regulatory compliance and enforcement activities. With the exception of follow-up work by the original authors, no critique or application of Smart Regulation has been published to May 2002.

#### Journal Articles Reflecting the Development of Smart Regulation:

P. Grabosky, "Green Markets: Environmental Regulation by the Private Sector" (1994) 16 *Law & Pol.* 419.

~~~, "Regulation by Reward: On the Use of Incentives as Regulatory Instruments" (1995) 17 *Law & Policy* 257

N. Gunningham, "Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care" (1995) 17 *Law & Pol.* 57

N. Gunningham & J. Rees, "Industry Self-Regulation: An Institutional Perspective" (1997) 19 *Law & Pol.* 363

N. Gunningham & M. Young, "Toward Optimal Environmental Policy: The Case of Biodiversity Conservation" (1997) 24 *Ecol. L. Q.* 243

N. Gunningham & D. Sinclair, "Integrative Regulation: A Principle-Based Approach to Environmental Policy" (1999) 24 *Law & Social Inq.* 853

~~~, "Regulatory Pluralism: Designing Policy Mixes for Environmental Protection" (1999) 21 *Law & Pol.* 49

# ANNOTATED BIBLIOGRAPHY

ON

## Building a Comprehensive Legal Regime in the Nile Basin: The Relationship Between the Principles of Equitable Utilization and No Significant Harm.

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### Introduction

This annotated bibliography is arranged based on the organization of my LL.M. thesis on “Building a Comprehensive Legal Regime in the Nile Basin: The Relationship Between the Principles of Equitable Utilization and No Significant Harm.” In the first part of my thesis, I plan to discuss the physical and socio-economic features of the Nile Basin, the content, validity and adequacy of the existing Nile legal framework and the efforts that are going on in the basin to build a new legal regime. The second part of the thesis aims at analysing how the relationship between the principles of equitable utilization and no significant harm is dealt with under international law and assessing the relevance and impact of international water law in determining the relationship between these principles in the Nile Basin. In the third part, I evaluate the fairness of giving precedence to either one of these principles by using John Rawls’ Theory of Justice as a standard.

### The Physical features and the Existing Legal Regime of the Nile Basin.

Okidi, C.O. “Review of Treaties on Consumptive Utilization of Waters of Lake Victoria and Nile Drainage System” (1982) 22 Nat. Res. J. 161.

Howell, P. & Allen, A., eds., *The Nile: Sharing A Scarce Resource* (1994).

Dellapenna, J. W., “The Nile as a Legal and Political Structure” in E.H.P. Brans et al eds., *The Scarcity of Water: Emerging Legal and Policy Responses* (London: Kluwer Law International, 1997) 260.

These authors describe the geographical and hydrological features of the Nile basin. They also discuss the content, validity and adequacy of the treaties signed in connection to the utilization of the Nile waters. According to these authors, the existing legal framework of the Nile basin is mainly dictated by the colonial history of the region. They question the validity of most of the treaties on the Nile and argue that the existing Nile legal regime is inadequate to meet the exigencies of the present Nile situation.

### Current Efforts to Establish a New Nile Legal Framework.

Brunnee, J. & Toope, S. J., “The Changing Nile Basin Regime: Does Law Matter?” (2002) 43 *Harvard Int’l L. J.* 105.

Nile Basin Initiative at <http://www.nilebasin.org>

Brunnee and Toope discuss the changes that are taking place toward cooperation in the Nile legal regime. After evaluating the role law has played, they conclude that legal norms and evolving legal

regimes have assisted the political change toward cooperation in the Nile basin. The NBI website also describes the programs and activities that are undergoing in the Nile basin.

International Water Law: The Relationship Between the Principles of Equitable Utilization and No Significant Harm.

Bourne, C. B., "The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention" (1997) 35 *The Canadian Yearbook of International Law* 215.

Garretson, H., Hayton, R. D. and Olmstead, C. J., eds., *The Law of International Drainage Basin* (New York: Oceana Publications, 1967)

ILA, Report of the Fifty-Second Conference, Helsinki 1966.

Lammers, J. G., *Pollution of International Watercourses* (The Hague: Martinus Nijhoff, 1984).

McCaffrey, S. C., "An Overview of the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses" (2000) 20 *J. Land Res. & Envtl. L.* 57.

Tanzi, A. & Arcari, M., *The United Nations Convention on the Law of International Watercourses* (The Hague; Boston: Kluwer Law International, 2001).

Wouters, P ed., *International Water Law: Selected Writings of Professor Charles B. Bourne* (London: Kluwer Law International, 1997).

Wouters, P., "Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and United States." (1992) 30 *The Canadian Yearbook of International Law* 43.

*Yearbook of the International Law Commission, U.N. Doc. A/CN.4/SER.A/1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1994/.*

Zacklin, R. & Caflisch, L., eds., *The Legal Regime of International Rivers and Lakes* (The Hague: Martinus Nijhoff, 1981).

The works of the above authors show that the principles of equitable utilization and no significant harm are the two cornerstone principles of international water law. However, these principles may sometime conflict and the question of which principle should prevail in such situations has been the main controversy in international water law. The above authors address this issue by analysing state practices, decisions of domestic and international tribunals, treaties and other sources of international law.

John Rawls' Theory of Justice.

Rawls, J., *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999).

Freeman, S., ed., *John Rawls: Collected Papers* (Cambridge, Mass.: Harvard University Press, 1999).

Franck, T. M., *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995).

Blocker, H. G. & Smith, E. H., eds., *John Rawls' Theory of Social Justice: An Introduction* (Athens: Ohio University Press, 1980).

In *A Theory of Justice*, Rawls discusses his conception of justice. Based on contractarian theory, Rawls developed a theory of justice which he termed as "justice as fairness." He asserts that just social rules are those which would be accepted by free and rational persons in an initial situation of

equality. Concerning resource distribution, Rawls' theory allows inequalities as long as they are to the greatest benefit of the least advantaged. In *Fairness in International Law and Institutions*, Franck argues that Rawls Theory of Justice is the most appropriate standard to evaluate substantive fairness. *John Rawls' Theory of Social Justice: An Introduction* contains articles by different writers commenting on various aspects of Rawls' theory.

#### Other Links

<http://www.thewaterpage.com>

<http://www.internationalwaterlaw.org/>

<http://www.nilebasin.com/discuss/>

<http://www.egroups.com/group/NileRiver>