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Greenpeace concerning dumping

I have been commissioned to evaluate legal risk takings in connection to a presumed action including dumping of big stone blocks to prevent bottom trawling of fish of pray in a maritime (water) area worth preserving. There are no similarities to other actions realized in Sweden. The legal state is not uncomplicated. This means that a risk evaluation involves uncertainty. Governments put out by an action would...

The following evaluation is made from the given condition that the dumping will take place off Swedish territory but within Swedish economic zone.

A. Which sections of the law could this action come in conflict with?

1. *The Environmental Code:*

Penalty regulation concerning environmental crime is found in the Environmental Code 29 section 1 §:

Any person who deliberately or by negligence

1. pollutes land, water or air in a manner which involves or is liable to involve risks for a) human health or detriment to flora and fauna that are not inconsiderable or b) other significant detriment to the environment,

2. stores waste or other matter which may give rise to health risks, damage or other detriment referred to in point 1 as a result of pollution,

3. causes substantial detriment to the environment as a result of noise, vibration or radiation; or

4. operates or takes action which will change the surface or ground water level which may give rise to health risks, damage or other detriment referred to in point 1 (as a result of pollution) shall be liable to a fine or a term of imprisonment not exceeding two years for *environmental offence*.

If the offence is serious, the penalty shall be a term of imprisonment of not less than six months nor more than six years. When the seriousness is considered, special attention should be paid to whether it caused, or might have caused, lasting damage on a large scale or whether the act was otherwise of particularly dangerous nature. (If the act is deemed to be justifiable in view of the circumstances, no penalty shall be imposed pursuant to this section.)

When judging if an environmental crime has been committed the assessment is based on the general provisions of this law.

In 2 section 3 § of Environmental Code there are some general rules of consideration with which this action could come in conflict.

Persons who pursue an activity or take a measure, or intend to do so, shall implement protective measures, comply with restrictions and take any other precautions that are necessary to prevent, hinder or combat damage or detriment to human health or the environment as a result of the activity or measure.

The action can not to my judgement be a detriment to human health or to the environment. Dumping of stone blocks could mean an environmental problem, this could be claimed but not conducted as evidence. It is up to the party responsible for the action to give burden of proof that the action is not harmful to nature. Predominant arguments should state that the action is good for the ecological system of the sea and that it is not destructive.

In Environmental code 3 section 5 § there are basic rules for economizing water areas:

Land and water areas, that are important for reindeer husbandry, commercial fishing or aquaculture shall, to the extent possible, be protected against measures that may significantly interfere with the operations of these industries.

Dumping of stones is something that palpably obstruct commercial fishing.

To my judgement, this dumping could not be considered harmful to the environment according to 9 section 1 §:

“Environmentally hazardous activities” shall mean:

1. The discharge of waste water, solid matter or gas from land, buildings or structures onto land or into water areas or ground water;
2. any use of land, buildings or structures that entails a risk of detriment to human health or the environment due to discharges or emissions other than those referred to in point 1 or to pollution of land, air, water areas or ground water; or
3. any use of land, buildings or structures that may cause a detriment to surroundings due to noise, vibration, light, ionizing or non-ionizing radiation or similar impact.

This section of the law is limited to activities connected with land, buildings and structures. Discharges from vessels are regulated in another legislation. Therefor obligation to ask for permission is not found in this part.

Neither is dumping found under rules about environmental damages in 10 section 1 §:

This chapter shall be applicable to land and water areas, buildings and structures that are so polluted that they may cause damage and detriment to human health or the environment.

In this section grave environmental damage means an environmental damage grave enough to:

1. by pollution mean a significant risk to human health,
2. through an effect on water area or groundwater have a significant negative effect on the quality of the water environment, or
3. a significant extent damaging or preventing preservation of an animal or plant species or the environment for these species, if the damage concern
 - a) a nature area registered in accordance to 7 section 27 § first paragraph 1 or 2,
 - b) the reproduction area of an animal or resting place protected in accordance with regulations supported by 8 section 1 §, or
 - c) a species protected in accordance with regulations supported by 8 section 1 or 2 §.

The dumping does not endanger human health or the environment. The possible damage is limited to commercial fishing.

It is not to be regarded as water operations according to 11 section 2 since the action does not have an effect on the water area:

“Water operations” shall mean:

1. the construction, alteration, repair and removal of dams or other water structures in water areas, filling and piling in water areas, the removal of water or digging, blasting and cleansing in water areas, as well as other measures in water areas whose purpose is to change the depth or position of the water;
2. the diversion of groundwater and the erection of structures for this purpose;
3. recharging in order to increase the volume of the groundwater, as well as the erection of structures and other measures for this purpose; and
4. measures undertaken to drain land, except for the purpose of diverting wastewater or measures to lower or empty a water area or to provide a protection against water where the purpose is to increase permanently the suitability for a property for a certain purpose (land drainage).

According to 15 section 31 § in the Environmental Code the prohibition to dump waste is valid in the Swedish economical zone:

“Waste, whether in the form of solid matter, liquids or gas, must not be dumped in Sweden’s territorial waters or economic zones. Waste must not be dumped from Swedish vessels or aircraft in the open sea. Waste intended for dumping into the open sea must not be taken out from the country or Sweden’s economic zone.”

Sweden is a member of several international conventions who forbid dumping of waste and other stuff at sea. Definitions of dumping does not exist in Swedish (court) but it is defined in UN’s convention about law at sea. Here dumping is deliberate riddance (kvittblivning) in the sea or waste or other matter from vessels et c.

The prohibition in 15 section 31 § (above) concerns dumping of waste. The regulations (according to prework) refer to all kinds of waste: “any object, matter or substance that is included in a waste category and that the owner disposes of or intends or is obliged to get rid of.”

There are two qualifications to fulfill if something is to be classified as waste. On the one hand the object, matter or substance has to be a part of a waste category, on the other hand the owner is to get rid of, intend or be obliged to get rid of the object, matter or substance. In reality these waste categories do not give any directions in deciding whether an object, matter or substance can be classified as waste ‘cause they are all included by the waste categories. What is decisive for an object, matter or substance to be classified as waste is if the owner intends, is obliged or wants to get rid of it. This question has been discussed in EU court in several (decisive) cases. As an example masses of mud has been included in the prohibition. I have not found anything that indicates that stone blocks, placed on the ground, in another purpose than riddance, could be judged as waste.

Environmental effects judgeable as a crime against the Environmental code should be limited to actions that obstruct commercial fishing.

2. The Swedish Penal Code:

In Swedish Penal Code ch. 12 the following is prescribed:

1 § A person who destroys or damages property, real or moveable, to the detriment of another’s right thereto, shall be sentenced for *inflicting damage* to a fine or imprisonment for at most six months.

2 § If, having regard to the insignificance of the damage to the property and other circumstances, the crime mentioned in section 1 is considered to be petty, a fine shall be imposed for *trespass*. A person who in a forest unlawfully takes growing trees or grass or from growing trees takes twigs, branches, bark, leaves, bast, acorns, nuts or resin, or takes windfall trees, stone, gravel, sod or similar things not prepared for use, shall be sentenced for trespass if the crime is considered to be petty having regard to the value of what is taken and other circumstances.

3 § If the crime defined in section 1 is regarded as gross, imprisonment for at most four years shall be imposed for gross infliction of damage.

In assessing whether the crime is gross, special attention shall be paid to whether the action gave rise to an extreme risk to anyone’s life or health or the damage was to something of a cultural or financial importance or was otherwise a particularly keenly felt loss.

5 § Attempt or preparation to commit the crime of gross infliction of damage and failure to reveal such a crime is punishable in accordance with the provisions of chapter 23.

The action could be seen as preparation or attempt for to damage, though I consider this as not very likely.

The regulations in 5a in ch. 13 could be referred to concerning dangerous crimes (of negligence):

A person who, by means of unlawful coercion, seizes or interferes with the operation of an aircraft or a vessel used in civil commercial maritime traffic for the transport of goods or passengers, towing, salvaging, fish or other catch, shall be sentenced for *hijacking* to imprisonment for at most four years. The same shall apply to a person who by unlawful coercion seizes a platform in the sea which is intended for activities in connection with the exploration or exploitation of natural resources or for some other financial purpose.

A person who in other cases:

1. destroys or seriously damages such a vessel or such a platform as is mentioned in the first paragraph or an aircraft in traffic, or
2. undertakes an action of a nature to present a danger to the safety of such a vessel or such a platform as is mentioned in the first paragraph or the safety of such an aircraft during flight, shall be sentenced for maritime or traffic sabotage to imprisonment for at most four years.

If the crime described in the first or second paragraph is considered to be gross, a sentence for a fixed term, for at least two and most ten years, or for life shall be imposed. In assessing whether the crime is gross, special attention shall be given to whether danger was thereby caused by a number of persons or whether the act was otherwise of a particularly dangerous nature. (Law 1990:416)

If there was to be a legal intervention I look upon attempt to damage as the most probable alternative.

3. Other special legislation

I have not discovered any specialized legislation which would constitute a ground for criminal justice intervention. Thus for example the Sea Law is not applicable for dumping.

B. Criminal justice jurisdiction.

That an activity constitutes a crime according to national law, does not mean that the state has the jurisdiction to prosecute.

Thus, if there is a risk that dumping could be viewed by Swedish court as a criminal act, still it will be a question whether the crime could be prosecuted by a Swedish court, since the crime occurred outside of the Swedish territory.

According to Chap 2, para 1 of the Criminal Code, the Swedish court has jurisdiction over crime committed in Sweden. Swedish territory is defined as the country's land territory and Swedish marine territory as well as air space above the land territory. Marine territory in principle extends to 12 nautical miles.

In addition to this main rule, the Swedish court has certain right to judge in cases of crimes committed outside of Sweden. According to Article 2, paragraph 3.1 of the Criminal Code, the Swedish Court may judge in case of crime that has been committed on board a Swedish vessel or aircraft. According to the law, also, this extends not only to the crime committed on board of such a vessel or aircraft, but also crime committed by the officers or crew of such a vessel while on duty. The law that regulates limitation of application of the Swedish law, as far as the crimes committed on board a foreign vessel, based on UNCLOS requires that a breaching of Swedish law regarding prevention, limitation and control of marine pollution conducted on board a vessel

registered abroad, when the vessel is outside of Swedish waters will not receive a more stringent punishment than fines. Limitations however do not apply to serious or purposeful action that cause contamination in territorial waters.

The fundamental jurisdiction rules from chapter 2 of the Criminal Code gives Swedish courts a formal broad authority to judge in cases of crimes committed outside of Sweden. In order to prosecute for crimes committed abroad, however, -- as is expressed in our directives—there needs to be a clear and justified interest for bringing to justice in Sweden. As a main rule, thus, prosecution may only be started after a decision by a government or a government appointed authority.

Environmental justice application in the economic zone.

The law on Sweden's EEZ contains in part a general rule of caution, and a regulation of activities requiring permission.

Precautary rule in Para 2 states:

He who conducts such activity that is presented in 15th paragraph shall apply the requirements of paragraph 2 of the Environmental Code. Also others who enter the EEZ or conduct activities there shall apply necessary measures in order to avoid damage to marine environment.

Permission regulation in paragraph 5 states:

With respect to other natural resources in the EEZ, and which refer to fisheries and other natural resources, there is a requirement for a permission from the government or a government appointed authority.

- 1. Study, extraction and other use of such natural resources,*
- 2. Construction of artificial islands,*
- 3. Construction or use for commercial purposes of other installations or constructions.*

The only permission requirement purpose that may be applicable may be the construction and use for commercial purposes of installations or other constructions. This will not be applicable since the GP action lacks a commercial purpose. According to my understanding, the action is not in contravention of the regulation in the law.

One Environmental Code regulation however is directly applicable in the EEZ. According to Chap 15, para 31, there is a ban on dumping waste applicable also in Sweden's EEZ.

In particular regarding Natura 2000.

According to the main rule, Swedish law does not apply in the EEZ, with the exception of some few special cases. Today there are no rules that would clearly make the Environmental Code based decision on declaring an area a Natura 2000 area applicable in the EEZ. Since the legislation today does not contain any expressed decision that Natura 2000 rules in chap 7 of the Code applies in the EEZ, there is no possibility to require that an activity that is conducted on Sweden's territory but which has an effect on an area with protection values in the EEZ shall have a permission in accordance with chap 7, para 28A of the Environmental code. The indirect point in today's law regarding Sweden's EEZ, via chapter 4 of the Code which refers to Natura 2000 rules does not fill this function, when it comes to making requirements for activities conducted on Swedish territory. The Government thus found that there is a need for an expressed decision that the Natura 2000 rules also apply in the EEZ, and in Law Bill 2007/08:154 proposed that such a regulation is introduced from January 1 2009.

The risk that the regulation of Environmental Code could be a foundation for legal action are thus today limited.

Summary regarding criminal legal consequences.:

According to my judgement the risk for a legal punitive consequence is quite low, less than 20 percent. If prosecution were to be initiated the risk for a conviction would be limited. I also judge that risk for a prison sentence would be low.

C. Risk for security measures against the ship.

According to the criminal code, article 33, para 2 can property used for commitment of crime be confiscated:

Property that was used to aid commitment of crime according to this code may be declared confiscated if it is needed in order to prevent crime or if there are other special reasons. The same applies to property that was intended to be used for commitment of crime, according to this code, if the crime was committed, or if the accused conducted an attempt to commit such crime, or criminally punishable preparation.

Thus first it must be demonstrated that a crime had been committed, which in this case ought to be difficult. Then the question of confiscation the so called proportionality principle, be applied. Interference in individual's sphere has to be reasonable. No comparable measure, as far as I know, as ever been applied in Sweden, and the risk for permanent confiscation, is negligible.

Summary opinion

The risk for a initiation of a criminal process, I judge to be small.

There is naturally risk that fishermen may make claims for damages, if their equipment is damaged. In any case there is a possibility of success in such a case. Damage sums then could be very high. On the other hand I think the risk itself is quite low.

Damage demands can also cover loss of income due to decreased catches/catch areas. I judge the risk to be low.

Risk for confiscation of vessel I judge to be small.