

# Global Environmental Law

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## Abstract

Globalization is profoundly changing environmental law. As a consequence, environmental legal scholarship and the teaching of environmental law are changing as well. This article shows that these changes, in general, have to be evaluated as promising and exciting.

## Keywords

environmental legal scholarship; teaching environmental law; globalization; self-regulation

I am writing this contribution while attending a conference for environmental law professors from around the world in Baltimore, entitled ‘Global Environmental Law at a Crossroad’.<sup>1</sup> While this fact does not deliver a whole lot of empirical proof, it is at least an indication that the ‘global’ is very much present in the work of environmental law scholarship. Why is that so?

To make that clear, I am afraid I have to start by conveying some bad news. We have run against the limits of environmental law. Environmental law, in its traditional sense of domestic law instruments - mainly command-and-control and financial instruments, applied by public authorities to improve and protect the natural environment, partly orchestrated, or at least influenced by international and regional law - works pretty well with regard to localised or regional environmental issues, but does not seem to be effective in addressing the global environmental problems that we face today. Global climate change, the global loss of biodiversity and the pollution and over-harvesting of the oceans are environmental problems of

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<sup>1</sup> IUCN Academy of Environmental Law 2012 Colloquium, see <<http://www.iucnael.org/en/iucnaelorg-academy-events/220-the-10th-annual-colloquium-of-the-iucn-academy-of-environmental-law.html>> accessed 30 July 2012.

an alarming magnitude. There is no doubt about the existence of these environmental problems, and even no disagreement about the fact that they indeed are very serious.

At the international level, all of these issues were already recognised more than 20 years ago (with such conventions as the 1992 UN Framework Convention on Climate Change, the 1992 Convention on Biological Diversity and the 1982 UN Convention on the Law of the Sea). Unfortunately, now, there are no signs of improvement whatsoever. On the contrary, loss of biodiversity is increasing at an alarming rate and global greenhouse gas emissions have risen by 36% between 1992 and 2008.<sup>2</sup>

The reasons for the ineffectiveness of environmental law in addressing these global issues are manifold and diverse. There are the more legal issues, such as fragmentation of the law. International biodiversity law, for example, not only has been codified in the Convention on Biological Diversity, but also in such conventions as the Ramsar Convention (on wetlands), the Convention on Migratory Species, the European Wildlife Convention, the World Heritage Convention, the Convention on Trade in Endangered Species, and more. Command-and-control instruments, in general, have their limitations, as they require much government intervention and monitoring which, in times of a call for deregulation and a smaller public service, is not available. Much of the legal wording in these conventions is very weak, leaving plenty of room for manoeuvre for states at the domestic level. This indicates, probably, the main reason for the ineffectiveness of international environmental law: a lack of political will to really do something about global environmental problems. The examples are well-known.

Eventhough, since the drafting of the Kyoto Protocol to the UN Framework Convention on Climate Change in 2007, everybody knew that the Protocol would expire in 2012, the international community was not able to come up with a successor. During a Conference of the Parties in Durban in 2011, it was only agreed that there should be new rules in place as of 2020. The Rio+20 conference on sustainable development and the green economy that took place in 2012 in Rio de Janeiro, with more than 100 world leaders and many more government delegates from nearly all countries in the world present,

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<sup>2</sup> Secretariat CBD, *Global Biodiversity Outlook 3*, Montreal (2010) <http://www.cbd.int/gbo> accessed 14 August 2012; UNEP, *Keeping Track of Our Changing Environment. From Rio to Rio+20 (1992-2012)*, Nairobi (2011) 21 <[http://www.unep.org/geo/pdfs/keeping\\_track.pdf](http://www.unep.org/geo/pdfs/keeping_track.pdf)>. accessed 14 August 2012

only produced a 49 page document that did not do anything else, but to reaffirm the agreements that had been reached in a similar conference in 1992.

Such a standstill on the major issues that the world has been facing for the past decades basically means that developments are driven by the world economy. Having regard to environmental impacts is not automatically done in economic processes (to put it mildly). Increasing globalization of the world economy makes it even more difficult for states to act upon environmental degradation. Although production and consumption chains run across the globe, domestic law usually only applies to activities within the borders of a specific nation.

Interestingly, however, globalization also offers opportunities for environmental protection. The Rio+20 conference makes that very clear. Whereas the official governmental talks did not amount to much, the real action took place in all these other meetings during the conference: meetings of NGOs, business organizations, large multinationals, and other stakeholders. Of the 40,000 delegates at the conference, only a small number was involved in the unsuccessful negotiations among states. The vast majority was involved in these other meetings, achieving remarkable results.

Just a few examples. A group of multinational corporations agreed to ensure that by 2020 there would be no net loss of forests for the production of soy, palm oil, beef and paper, involving such major global players such as Unilever and Walmart. 39 internationally operating banks, investors and insurers committed to integrating 'natural capital considerations', i.e., the value that is connected to ecosystem services such as clean water, clean air, biological resources etc., into their assessments of bonds and equities and into their credit and insurance policies. NGOs, like the WWF, and international governmental organizations, such as UNEP and the World Health Organization, turned to such initiatives by private actors, rather than to governments because they knew that these business corporations could be powerful drivers of global change.

It is precisely because of globalization and the associated interconnectivity within the world economy that actions of a few big companies can make a difference. First and foremost, they are concerned about their reputation. Reputations can be squashed within weeks through the use of Facebook, Twitter and Youtube, as Unilever, for instance, experienced when Greenpeace published a report on the company's use of unsustainable palm oil, together with an impressive 80 second video targeting Dove products. Unilever immediately used its power within a business led growers and supply chain certification scheme, which involved all major global traders and processors of palm oil, to strengthen the rules of that scheme. They also suspended trade with a number of suppliers, which then led to

significant changes among these and other suppliers because suppliers did not want to miss out on major buyers. Companies increasingly impose supply chain requirements on the actors within their supply chains because they want to be certain that their end-product cannot harm their reputation. Since supply chains, more often than not, are global, the impact of such measures is global as well.

Self-regulatory systems, usually centred around a certification scheme, obviously have the huge benefit of not being bound by any domestic legal system, neither by WTO-rules that hamper national legislatures in extraterritorial application of environmental protection laws. That does not mean, however, that these systems, from a legal point of view, are simple. They require a lot of law: rules on the substantive requirements that have to be met, rules on the certification process, rules on monitoring and enforcement, rules on dispute settlement.

It gets even more interesting for the legal scholar when states or international governmental organizations step in. The EU, for instance, applies a similar approach to the import of wood and wood products into the EU. An example is the so called FLEGT Regulation.<sup>3</sup> FLEGT stands for 'Forest Law Enforcement, Governance and Trade'. The FLEGT Regulation establishes a licensing scheme for imports of timber into the EU in order to combat illegal logging, through halting the import of illegally and unsustainably logged timber into the EU. The licensing scheme under the FLEGT Regulation is a binding scheme: no timber can be imported in the EU without a FLEGT license. The licensing scheme, however, only applies to imports from countries with which the EU has concluded a Voluntary Partnership Agreement (VPA). Such agreements have been concluded with three African countries (Ghana, Cameroon, Republic of Congo), while negotiations are underway with seven others, including big exporters of timber like Malaysia and Indonesia. The substantive criteria that have to be met for a shipment to obtain a FLEGT license are laid down in these agreements.

Taking the Cameroon agreement as an example, it is obvious that much of these criteria are aimed at sustainable forest management in general and at protecting biodiversity in particular.<sup>4</sup> The 122 page long agreement

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<sup>3</sup> Regulation 2173/2005/EC, [2005] OJ L 347/1 and implementing regulation 1024/2008, [2008] OJ 277/23. In the areas of fisheries, the EU also follows an extraterritorial approach with the Regulation 2005/2008/EC on Illegal, Unreported and Unregulated Fishing, [2008] OJ L 286/1.

<sup>4</sup> Voluntary Partnership Agreement between the European Union and the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), [2011] OJ L 92/4.

regulates the species of trees from which wood and wood products can and cannot be imported into the EU. It sets up a very comprehensive certification scheme in Cameroon; it applies a series of national laws aimed at sustainable forest management, as well as the rules laid down in the Convention on Biological Diversity and in the Convention of International Trade in Endangered Species and it sets criteria aimed, not only at environmental protection and biodiversity preservation, but at the protection of human rights as well. One of these criteria, for instance, reads as follows:

The forestry entity has made the necessary arrangements to prohibit the involvement of its staff in poaching, commercial hunting and the transportation or trade in hunting equipment and means. It encourages, supports and/or initiates all campaigns seeking to ensure application of the regulations in relation to hunting and to the protection of the fauna on its sites.<sup>5</sup>

This example shows how far the arm of the EU is stretching. Through its external trade in tropical timber, the EU even tries to combat poaching in Cameroon's forests.

Under the EU's policy, aimed at concluding bilateral agreements with each specific country involved, the EU does influence national biodiversity policy and law in the targeted country quite substantially, as the Cameroon example shows. Interestingly enough, the same goes the other way around: the norms that are agreed upon have to be applied in the licensing process in the EU. So an EU Member State cannot impose other norms than those that have been put into place in the exporting country, in the above example, norms laid down in Cameroon legislation.

The EU provides another very interesting example of how globalization helps to protect the global environment. The centerpiece of the chemicals legislation in the EU is the REACH Regulation.<sup>6</sup> There are numerous law journal articles that show that the impact of this regulation is felt throughout the world.<sup>7</sup> Sachs states:

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<sup>5</sup> *Ibid*, Annex II, criterion 5 [Dick Kraaij says:

<sup>6</sup> Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals, [2006] OJ L 396/1.

<sup>7</sup> For instance, NM Sachs, 'Jumping the Pond: Transnational Law and the Future of Chemical Regulation' (2009) 62(6) *Vanderbilt Law Review* 1817; DA Wirth, 'The EU's New Impact on U.S. Environmental Regulation' (2007) *Boston College Law School Research Paper No. 144* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1028733](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028733)> accessed 30 July 2012; LE Kersey, 'Trans-Atlantic Reach: the Potential Impact of the European Union's New Chemical Regulations on Proof of Causation in U.S. Federal Courts' (2009) 36(2) *Boston College Environmental Affairs Law Review* 535.

The extraterritorial impact of REACH is just one example of a larger trend in which the EU is increasingly setting *de facto* global standards through its internal environmental legislation. The EU is the world's largest economy, and decisions in Brussels, applicable throughout the twenty-seven Member States of the EU, are affecting how products are designed and manufactured from Boston to Beijing. Since 2000, the EU has embarked on ambitious environmental lawmaking in areas such as chemical regulation, energy efficiency, hazardous waste, and climate change. Europe has in many cases supplanted the United States as the leading originator and exporter of environmental law innovation.<sup>8</sup>

Since the EU's norms in the field of the environment are the strictest, manufacturers prefer to follow these, so that they can sell their products anywhere. Globalization, therefore, does not necessarily lead to a race to the bottom, as was often predicted. Instead, globalization might very well lead to a race to the top.

All of the above developments show the huge impact of globalization on environmental law. They are changing environmental law altogether and making environmental legal scholarship and the teaching of environmental law much more exciting and interesting. They require us to have a much wider view on the law than the simple domestic perspective. To understand what is going on in the field of environmental law, a transnational approach is required, focusing on the interplay between domestic, regional and international law, as well as on the interplay between state and non-state law. Polycentric governance raises complex questions on legitimacy, as the normal rule of law and democratic principles no longer (fully) apply. Multiple nodes of government are involved, applying multiple legal norm systems, multiple courts, tribunals and dispute resolution bodies are involved. Although, as a consequence, the legal situation gets somewhat blurred and messy, the legal approaches through which Earth can be protected are multiplied as well, with much greater chances of success.

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<sup>8</sup> Sachs, *ibid* 1819-1820.