CHAPTER 1

The Globalization of Environmental Law

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Globalization is profoundly affecting the development of environmental law throughout the world. As countries increasingly borrow law and regulatory innovations from one another, there is growing convergence around a few principal approaches to environmental regulation. Although this is not an entirely new phenomenon, it is occurring at an unprecedented pace as the growth of global trade and multinational enterprises has increased pressure on nations to harmonize regulatory standards. Increased cross-border collaboration between governments, non-governmental organizations (NGOs), and multinational corporations also is significantly influencing the development of environmental law. Private actors are helping to expose environmental problems, to coordinate responses to them, and to mobilize informed consumers to harness market forces on behalf of environmental protection. These developments are blurring traditional distinctions between public and private law and domestic and international law.

These trends are resulting in the emergence of what I have called "global environmental law"—a field of law that is international, national, and transnational in character all at once. This chapter begins by explaining the concept of global environmental law. It then explores the principal forces that are contributing to its development. After discussing several examples of this phenomenon, the chapter concludes by examining its implications for the practice of environmental law.

I. The Concept of Global Environmental Law

Global environmental law is a term used to describe the reality of how transplantation, convergence, integration, and harmonization are influencing the development of environmental law today throughout the world. It includes

(1) public international environmental law, commonly used to refer to the set of treaties and customary international legal principles governing the relations between nations;

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(2) national environmental law, which describes the principles used by national governments to regulate the behavior of private individuals, organizations, and subnational governmental entities within their borders; and

(3) transnational law, which describes the set of legal principles used to regulate the cross-border relationships between private individuals and organizations.\(^2\)

Public international environmental law governs relations between nations. It includes treaties and other agreements between states and norms governing their conduct that have become so universal as to be considered customary international law. But so much of the law that shapes environmental policy around the world today no longer is a direct product of these sources of international law.

As the forces of globalization bind the world more closely together than ever before, environmental law is developing throughout the world in important new ways. Increased scientific understanding of the health effects of pollution and other threats to the planet are contributing to a surge of global environmental concern. People and their governments are seeking whatever works to protect them against environmental harm and nations are borrowing law from one another, even from countries with very different legal or political traditions.

Some of the most important innovations in U.S. environmental law, including environmental impact assessment and the creation of national parks, have now been almost universally adopted throughout the world. But in other areas of environmental law, such as chemical regulation, the rest of the world is now following the lead of the European Union (EU) in requiring extensive pre-market testing of chemicals, a concept the United States has eschewed to date.

Environmental law is not the only field in which “global law” is developing. A similar phenomenon is occurring in fields such as patent law, antitrust, and securities regulation as authorities recognize the need for global coordination of regulatory policy toward multinational enterprises.\(^3\) Regulators from different countries are cooperating with one another as never before. NGOs are forming global networks as civil society throughout the world becomes increasingly interconnected. Today no company can damage the environment in a remote corner of the world without fear that its actions will be exposed to the public in its home country. As a result, norms concerning what is acceptable corporate behavior are converging even in jurisdictions that have not formally updated their regulatory standards.

Transnational regulatory norms to protect the environment are no longer being developed primarily in a top-down manner through multilateral consensus agreements. This is reflected in global efforts to respond to climate change. The United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1992, contemplated a regime of international law to require countries to control their greenhouse gas (GHG) emissions.\(^4\) This approach was embodied in the 1997 Kyoto Protocol to the UNFCCC, which
entered into force in 2005. But the world’s leading emitter of GHGs—China—was not required by the Kyoto Protocol to control its emissions, and the second-leading emitter—the United States—refused to ratify it. Both countries instead have endorsed the Copenhagen Accord, negotiated at the 15th Conference of the Parties (COP-15) to the Kyoto Protocol, which commits countries only to make their own voluntary commitments to control emissions of GHGs.

To be sure, multilateral environmental agreements are not entirely a thing of the past. In January 2013, 140 nations reached agreement on the Minamata Convention to control emissions of mercury. The International Civil Aviation Organization (ICAO) is considering a global regime to control GHG emissions from aviation. This was spurred by the EU requiring airlines flying to or from its member nations to pay a fee based on all the GHG emissions these flights generate. After vehement opposition from non-EU nations, the EU agreed temporarily to suspend enforcement of its emissions fees on foreign airlines to give the ICAO time to make meaningful progress on a global regime.

II. Forces Driving the Rise of Global Environmental Law

Several forces are driving the emergence of global environmental law. One is the growth of global trade and multinational corporate enterprises, which is increasing pressure for harmonization of environmental standards. Another is the tremendous global growth of public concern for the environment. A third is the increased global collaboration between NGOs, environmental officials, and multinational enterprises.

Companies who want to sell their products throughout the world have a natural incentive to push for greater harmonization of environmental standards. To simplify compliance some companies even are deciding to adhere to the highest standards applicable to them in the various countries where they operate. Trade liberalization has not been the one-way street to relaxed environmental standards that some environmentalists once feared. Some countries are upgrading their environmental laws to ensure that lax standards will not be used as an excuse to eschew trade with them. The fact that U.S. automakers already were selling cars in other countries that require automakers to meet much higher fuel efficiency standards helped ease the way for substantial increases in fuel economy standards in the United States.

Another force contributing to the emergence of global environmental law is the globalization of environmental concerns. Virtually every country that has revised its constitution in the last few decades has written into the constitution some provision for protection of the environment. According to a count by Professor James May, about 130 countries now have constitutions with environmental provisions.

Another factor contributing to the development of global environmental law is increased global collaboration among and between NGOs and
government officials. Several informal global networks have formed to help improve the implementation and enforcement of environmental law. In the past when developed countries would ban or restrict particular toxic substances, the companies manufacturing such products would redouble their efforts to sell them to the developing world. That happened with respect to both tobacco products and asbestos. But now most countries are banning asbestos with the blessing of the World Trade Organization. The World Health Organization has negotiated its first treaty ever, the Framework Convention on Tobacco Control, to educate all countries about the dangers of tobacco use. Even in countries where large portions of the population smoke, restrictions on tobacco use are inexorably growing.

Greenpeace, one of the first and best-known international NGOs, helped expose incidents where developed countries sought to surreptitiously dump toxic waste in the developing world. Due to the work of such global NGOs, we now live in a world where companies from the developed world no longer can engage in environmentally damaging practices in remote areas of the developing world without fear of discovery. Environmental NGOs are now opening offices around the world.

An important example of informal global collaboration among government officials is the International Network of Environmental Compliance and Enforcement (INECE). This organization regularly sponsors conferences where environmental enforcement officials from all over the world share strategies for improving enforcement of the environmental laws. As regulators increasingly coordinate their policies, multinational corporations no longer can play off countries against each other, reducing any “race to the bottom.”

Government environmental agencies from different countries also are engaging in regular dialogue concerning common environmental concerns. The U.S. Environmental Protection Agency (EPA) has been collaborating with China’s Ministry of Environmental Protection on a variety of projects, and the EPA maintains a website to provide information about the state of environmental law in China.

III. Examples of the Evolution of Global Environmental Law

A. Transnational Environmental Regulatory Reforms

Countries increasingly are learning from one another and borrowing regulatory standards. This is illustrated by the global growth of bans on unreasonably dangerous products such as asbestos and gasoline lead additives. Even in the absence of a comprehensive international treaty, 175 countries in the world have now banned gasoline lead additives, and the enormous benefits of such action to public health and the environment are now widely acknowledged. Most developed countries also have banned asbestos, though its use unfortunately is increasing in China and India. As countries
learn from the experience of others, regulatory innovations with diffuse pedi-
grams are spreading more rapidly around the globe.

In addition to transplantation of legal norms, disparate legal systems are
evolving toward similar regulatory standards through increased dialogue
among regulatory officials in different countries, mutual recognition or regu-
latory equivalence agreements, and formal and informal efforts to harmonize
regulatory standards. Regional approaches also are being pursued to
address significant transboundary pollution problems. When the Interna-
tional Maritime Organization failed to adopt global standards to control pol-
lution from ocean vessels, the United States and Canada were allowed to
promulgate standards to protect the west coast of North America. These
standards require ships to reduce the air pollution they generate by more
than 80 percent.14 Outside of the environmental arena, an unusual example
of regulatory harmonization is the Cooperative Patent Classification project
between the European Patent Office and the U.S. Patent and Trademark
Office. This project seeks to harmonize disparate patent classification sys-
tems to reduce search costs and to harmonize recognition of intellectual
property rights.15

B. Transnational Liability Litigation

The growth of transnational liability litigation is another source of emerging
global environmental law. For decades litigation has been underway between
residents of the oil-polluted Oriente region of Ecuador and the Chevron Cor-
poration. In February 2011 this litigation, which initially had been filed in the
United States during the early 1990s, ultimately produced the largest envi-
rionmental judgment in history—an $18 billion judgment against Chevron
issued by a court in Ecuador. Chevron has challenged this decision in U.S.
 federal district court and international fora. Transnational liability litigation
also was brought by workers in Central American banana plantations who
allegedly were rendered sterile by exposure to Dibromo-3-Chloropropane, a
pesticide banned in the United States because of its reproductive toxicity. A
lawsuit brought in London by those harmed from the British trading firm
Traficura’s dumping of toxic waste on a beach in the Ivory Coast resulted in
a $48.7 million settlement.16 Each of these cases reflects a new global legal
landscape where poor plaintiffs from developing countries are seeking to
hold accountable corporate wealth and power that previously would have
been immune from challenge.

C. Private Transnational Transparency Initiatives

Emerging quasi-public/quasi-private global transparency and disclosure ini-
tiatives are being championed by NGOs and private enterprises in collabo-
reration with regulatory authorities. These include the Equator Principles,
which govern funding of development projects by multinational banks;17 the
Roundtable on Sustainable Palm Oil;18 and the Sustainable Apparel Coalition.19
These initiatives, as well as the Dodd-Frank Wall Street Financial Reform legislation’s disclosure provisions concerning conflict minerals and payments to foreign governments, are promoting a new corporate ethic for assessing the environmental implications of development projects and greening the supply chains of multinational enterprises.

Companies that adhere to high environmental and worker safety standards while operating in the developed world may not be as scrupulous when operating in developing countries. In some cases large companies claim to be unaware of environmental or worker safety problems in the companies that are part of their supply chain. In recent years NGOs have worked to highlight these problems in an effort to encourage companies to “green” their supply chains. These efforts have the potential to improve environmental and working conditions in developed countries even when regulatory standards do not require such improvements.

In January 2011, a coalition of 23 Chinese NGOs led by the Beijing-based Institute of Public and Environmental Affairs released a report assessing the environmental health and safety records of Chinese companies that supply 29 multinational technology companies. The suppliers of Apple Corporation placed last because of industrial pollution and exposure of workers to health risks. In response to this pressure from Chinese NGOs, Apple agreed to become the first technology company to join the Fair Labor Standards Association and to have independent auditors conduct annual audits of its suppliers’ labor and environmental practices. Apple also joined the Public-Private Alliance for Responsible Minerals Trade to ensure that it was not using conflict minerals. Apple now publishes an annual supplier responsibility report disclosing the results of these audits and the actions it has taken to improve compliance by its suppliers.

In March 2011, a group of clothing manufacturers, retailers, and environmental groups formed the Sustainable Apparel Coalition to assess the environmental impact of every element of apparel production in order to provide consumers with “sustainability scores” for each product. The 30 founding members of the coalition include major retailers such as Wal-Mart and J.C. Penney, the Environmental Defense Fund, and the EPA. The chairman of the new coalition is former mountain climber Rick Ridgeway, who runs Patagonia’s sustainability efforts. The focus of the coalition is on assisting companies in “greening” their supply chains.

Some large retailers, such as Wal-Mart, have pioneered their own form of “retail regulation” by refusing to carry products that do not meet various environmental criteria, for example, by containing certain toxic substances. But the latest initiatives go a significant step further by requiring companies to make affirmative inquiries concerning conditions at their suppliers in developing countries. These efforts could be bolstered by provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 1502 of the Act added a subsection to the Securities Exchange Act of 1934 regarding conflict minerals. The new provision requires disclosure to the U.S. Securities and Exchange Commission (SEC) of whether minerals used
by companies originated in the Democratic Republic of Congo or an adjoining country.\textsuperscript{31}

In addition to privately led initiatives, new laws increasingly are taking into account transnational environmental considerations. For example, on December 15, 2010, the SEC proposed regulations regarding conflict mineral disclosures.\textsuperscript{32} The four primary metals covered by the legislation that are widely used by electronics manufacturers are tin, tungsten, tantalum, and gold.\textsuperscript{33} It is hoped that these regulations will help mobilize companies to pay more attention to the sources of the raw materials they use.\textsuperscript{34} Section 1504 of the Dodd-Frank Act requires companies in extractive industries to disclose to the SEC payments made to foreign governments for the purpose of commercial development of oil, natural gas, or minerals. This provision is designed to help make it harder for corrupt foreign government officials to seek bribes because they would have to be publicly disclosed by the company paying them.

IV. Conclusion

Globalization is having a profound impact on legal systems throughout the world and environmental law is a field in which this impact is most prominent. International law traditionally governs only relations between states, but relations between states and private multinational enterprises are becoming of central importance in a globalized world. In an effort to control more effectively risks generated by multinational enterprises, countries are borrowing regulatory innovations from one another at a rapid rate and increasing efforts to coordinate regulatory policy. Distinctions between domestic and international law and between private and public law are diminishing in force.

The traditional top-down approach of negotiating multilateral international agreements is giving way to a variety of bottom-up initiatives that often involve greater participation by NGOs. The result is the emergence of global environmental law, which is not a set of globally harmonized regulatory standards, but rather a more complex set of phenomena also occurring in other fields of law.

The path by which global environmental norms are emerging is changing. Even as efforts to achieve global consensus on a successor to the Kyoto Protocol have faltered, regional responses to climate change are alive and well. The movement to ban leaded gasoline and the remaining uses of asbestos has made global strides, and regional efforts to control air pollution from ships are progressing.

In response to perceived harm caused by the operations of multinational corporations, plaintiffs are bringing transnational liability litigation both in their own countries and in countries where such corporations have their headquarters. Even when transnational litigation fails to win a judgment, it can shine a global spotlight on environmentally destructive practices that companies would be wise to abandon.
Finally, transparency initiatives promoted by coalitions of NGOs and corporations also are a new and vibrant part of the complex architecture of global environmental law. In an interconnected world, multinational enterprises no longer can claim ignorance of occupational and environmental conditions in their supply chains even in remote parts of the world. Transparency can work precisely because of the emergence of global environmental norms against exposing the residents of developing countries to risks no longer tolerated in the developed world. The clear implication of these trends is that today’s savvy lawyer cannot be content to master purely domestic or purely international law. He or she must be prepared to venture into the complexities of the brave new world of global environmental law.

Notes


2. Yang & Percival, supra note 1, at 617.


16. G. Chazen, Firm to Pay $48.7 Million in Ivory Coast Pollution Case, WALL ST. J. (Sept. 21, 2009).


23. Id. at 27.


28. Id.


31. Dodd-Frank Act § 1502(b).


34. D. Meyer, Using Materiality Analysis to Drive Corporate Social Responsibility & Sustainability in the Supply Chain, DAVE MEYER’S GREEN SUPPLY CHAIN BLOG COMMUNITY (Jan. 18, 2011), https://community.kinaxis.com/people/DRMeyer/blog/2011/01/18/using-materiality-analysis-to-drive-corporate-social-responsibility-sustainability-in-the-supply-chain. Meyer is a Consultant at EORM, an environmental, health, safety, and sustainability consulting firm out of Portland, Oregon, and was formerly an Adjunct Professor at the University of California San Diego teaching Business Accounting and Management.