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The Impact of Economic Globalization On Compliance

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International Environmental Law and Policy Series

Economic Globalization and Compliance with International Environmental Agreements

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3. The Impact of Economic Globalization on Compliance

Dinah Shelton

The degree to which states comply with international environmental commitments is not known. Nonetheless, studies suggest that first, not all countries comply with the same legal instruments; second, that a single country may vary in its compliance with different legal instruments; and, third, that such patterns change over time.¹ If compliance is a matter of state choice, as scholar Peter Haas has claimed,² then some choices may be more difficult than others because the state must commit varying amounts of scarce resources to discipline state agents or civil society. In fact, it appears that the political costs of enforcing compliance on the private sector may be higher than if the state is regulating its own activities. States have various direct sanctions available to control the behaviour of state agents, from disciplinary measures to dismissal. The regulation of non-state behaviour is likely to require legislation that may be difficult when the non-state actors play a powerful role in the domestic political arena. This is a key factor in the environmental field, where most activities that cause harm to the environment are conducted by the private sector. Where there are high costs imposed on industries that have a high degree of political representation, the state may find it difficult to ensure compliance. Both the will and capacity of the state to comply can become compromised.

Globalization is a new factor affecting compliance, as it directly concerns the conduct of non-state actors and the increasing role they play in a globalized world. A key issue is the impact of globalization on compliance with international environmental commitments.

I. GLOBALIZATION

Globalization is often characterized as 'the intensification of economic, political, social and cultural relations across borders'.³ It is thus a multidimensional

1 See, e.g., H. Jacobson and E. Brown Weiss, *Compliance with International Environmental Accords*.

2 P. Haas, in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2000).

3 J.J. Holm and G. Sorensen, *Whose World Order? Uneven Globalization and the End of The Cold War* (1995) 4.

phenomenon that has many aspects and meanings,⁴ 'comprising numerous complex and interrelated processes that have a dynamism of their own'.⁵ It involves a deepening and broadening of rapid transboundary exchanges due to developments in technology, communications and media.⁶ Such exchanges and interactions occur at all levels of governance⁷ and among non-state actors,⁸ creating a more interdependent world.

Globalization is not new,⁹ although its forms and the technology that spurs it have changed. Today, globalization is most often associated with economic interdependence, deregulation and a dominance of the marketplace that shifts responsibilities from state to non-state actors.¹⁰ Economic globalization has been accompanied by a marked increase in the influence of international financial markets and transnational institutions, including corporations, in determining national policies and priorities.¹¹ In addition, information and communications technology has emerged as a dominant force in the global system of production, with trade in goods, services and financial instruments more prevalent than any time in history.¹²

4 On the various meanings of globalization see, e.g., W.H. Reinicke and J. Martin Witte, 'Interdependence, Globalization and Sovereignty: The Role of Non-binding International Legal Accords', in Shelton (ed.), n. 2 above 75; J.N. Rosenau, 'The Dynamics of Globalization: Toward and Operational Fonnulation', 27 *Sec. Dialogue* (1996) 247; R. Boyer and D. Drache (eds), *States against Markets: The Limits of Globalization* (1996); A.G. McGrew et al., *Globalization and the Nation States* (1992).

5 U.N. General Assembly, *Globalization and its impact on the full enjoyment of all human rights*, Preliminary report of the Secretary-General, A/55/342, 31 August 2000, para. 5.

6 The U.N. General Assembly calls globalization 'not merely an economic process but one that has social, political, environmental, cultural and legal dimensions which have an impact on the full enjoyment of all human rights', G.A. Res. 55/102, 'Globalization and its impact on the full enjoyment of all human rights', adopted 4 December 2000, A/RES/55/102, 2 March 2001. See also G.A. Res. 54/165, 'Globalization and its impact on the full enjoyment of all human rights', 24 February 2000. Both resolutions recognize that globalization affects all countries differently and makes them more exposed to external developments, positive as well as negative, including in the field of human rights. Id.

7 Examples include the memoranda of understanding of port state authorities, judicial co-operation, and border city agreements. See, generally, D.M. Johnston, *Consent and Commitment in the World Community* (1997).

8 Non-state actors include individuals, scientific and academic associations, international criminal syndicates, corporations, religious bodies, human rights organizations, and international organizations. The United Nations estimates that there were some 35,000 non-governmental organizations in 1995. H. Steiner and P. Alston, *International Human Rights in Context* (2nd edn, 2000) 940.

9 Some see globalization as beginning around the end of the fifteenth century, with Europe's expansion through mercantile capitalism into America and Asia. Statement of Rubens Ricuperio, Secretary-General, UNCTAD, 'Financial globalization and human rights', written statement submitted by the International Organization for the Development of Freedom of Education to the Commission on Human Rights, FJCN.4/1998/NGO/76, 27 March 1998. Others consider it to be a phenomenon with even longer roots, beginning with the invention of money and the emergence of trade links around the Mediterranean. See G.W. Kolodko, *Globalization and Transformation: Illusions and Reality*, OECD Development Centre, Technical Paper No. 176 (2001), available at <<http://www.oecd.ordev/publication/tla.htm>>.

10 See W.H. Reinicke, *Global Public Policy: Governing without Government* (1998).

11 See P. Alston, 'The Universal Declaration in an Era of Globalization', in B. van der Heijden and B. Tahzi-Lie (eds), *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (1998) 29.

12 See e.g., J.O. McGinnis, 'The Decline of the Western Nation State and the Rise of the Regime of International Federalism', (1996) 18 *Cardozo L. Rev.* 903, 918. The rate of information exchange has drastically reduced transaction costs, enabling expansion of transboundary communications.

Some see this emergence of cross-border networks of production, finance and communications as posing profound challenges to traditional concepts of state sovereignty and thus to compliance with international obligations.¹³ Richard Falk has spoken of the 'disabling of the state as guardian of the global public good',¹⁴ in the face of a shift of power and autonomy from the state to markets. Kenichi Ohmae refers to a 'borderless world' in which '[m]ore than anything else, the burgeoning flow of information directly to consumers is eroding the ability of governments to pretend that their national economic interests are synonymous with those of their people'.¹⁵ He adds that '[i]n today's world there is no such thing as a purely national economic interest'.¹⁶ Other authors refer to the 'decline of the western nation state'.¹⁷

Clearly, globalization is resulting in unprecedented power for non-state actors. New and cheaper technologies, especially information technologies, coupled with deregulation and liberalization of international economic activities, have permitted companies to operate globally and create a cross-border web of relationships and networks. Foreign direct investment, mergers and acquisitions, corporate alliances and collaborative agreements, place the non-state sector in a place of enormous influence. As described by Wolfgang Reinicke, 'globalization thus represents the emergence of a single integrated economic space cutting across political spaces and driven by the organizational logic of corporate industrial networks and their financial relationships'.¹⁸ Or, as Mary Ellen O'Connell states, '[i]t is not just the presence of an issue in more than one state, it is the existence of the issue regardless of states'.¹⁹

The internal organization of state authority is also affected by globalization. One aspect is the disaggregation of state authority, with functional units co-operating with their counterparts in other states, 'creating a dense web of relations that constitutes a new transgovernmental order'.²⁰ An example of this can be found in the memoranda of understanding on Port State Control concluded by the maritime administrative authorities of different countries to eliminate maritime transportation by substandard vessels. By the end of 1996 four MoUs on Port State Control were adopted for different areas of the world. These are not international treaties,²¹ but

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In 1860, sending two words across the Atlantic cost the equivalent of \$40 in current money; today this amount would be enough to transmit the contents of the entire Library of Congress.

13 See, e.g., K. Ohmae, *The End of the Nation State* (1995); J.-M. Guchunno, *The End of the Nation-state* (1995); M. Horsman and A. Marshall, *After the Nation State* (1994); J. Camilleri and J. Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992).

14 R. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (1998); see also, E. Colomatto and J.R. Macey, 'A Public Choice Model of International Economic Cooperation and the Decline of the Nation State' (1996) 18 *Cardozo L. Rev.* 925.

15 K. Ohmae, *The Borderless World* (1991) 185.

16 *Id.* at 197.

17 McGinnis, *supra* n. 12; K. Ohmae, *supra* n. 13.

18 *Id.* at 80.

19 M.E. O'Connell, 'The Role of Soft Law in a Global Order', in Shelton (ed.), *supra* n. 2 at 100, 103.

20 A.M. Slaughter, 'The Real New World Order', (1997) 76 *Foreign Affairs* 183, 197.

21 According to one author, 'the form of a memorandum of understanding, the non-mandatory style of its wording, its conclusion between maritime authorities and not states, the absence of registration with the UN, and the apparent absence of a disagreement between its participants about the status of the instrument give a strong presumption of something less than a treaty.' E. Molenaar, 'The EC Directive on Port State Control in Context', (1996) 11 *Int'l Marine & Coastal L.* 241, 246.

their objective is the enforcement of international treaties such as the 1973 MARPOL Convention.²² Two agreements adopted under the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, dealing with the Siberian crane and the slender-billed curlew, are also memoranda of understanding or administrative arrangements. They have been concluded by high-level government representatives in order to initiate and co-ordinate short-term administrative and scientific measures to be taken by Range States in collaboration with specialized NGOs. Notably, they have been signed by states that are not parties to the main Convention, as well as by intergovernmental and non-governmental bodies.

II. THE IMPACT OF GLOBALIZATION ON COMPLIANCE

Globalization has a clear impact on environmental protection. It allows technological developments in one country to quickly migrate throughout the world, introducing not only beneficial new products but, inter alia, ozone-depleting chemicals and hazardous wastes. Technological 'advances' in ship-building and equipment increase catches and lead to depletion of fisheries. More automobiles and other industrial products are sold, increasing their impact on the environment. Tourism, usually by air-polluting air transport, increases pressures on habitats and biodiversity.

Globalization is linked to compliance in several ways. First, in a positive way, globalization is creating a global consciousness and awareness of the common links of all persons in facing problems related to the biosphere. Because of information technology, international non-governmental organizations dedicated to environmental protection now have enhanced abilities to gather and disseminate information about environmental problems and violations of environmental treaties, allowing rapid marshalling of public opinion in order to pressure states for compliance.

Globalized civil society can further compliance through any of several actions. Direct action includes consumer boycotts, support for voluntary labelling, or media exposure of non-compliance. Environmental activists may also lobby companies, pressing for corporate codes of conduct or other corporate policies to protect the environment, or they may lobby governments for corporate regulation to ensure compliance with international environmental law. Third, environmental NGOs may participate in international fora to strengthen standards and seek their application in respect of non-state actors: for example, the role of NGOs concerned with environmental protection and human rights was significant in defeating the projected multinational agreement on investment. Finally, globalized civil society facilitates corporate accountability by linking victims of environmental harm with legal representation, allowing the victims to sue multinational corporations for their conduct

22 As a consequence of the 1982 Paris memorandum of understanding, maritime authorities have undertaken to inspect at least 25% of ships entering their ports for compliance with international marine pollution treaties. In recent years, Norwegian authorities controlled some 33% of ships in national ports, the Netherlands more than 25%, and the British authorities 30%. Altogether, 85% of ships operating in European waters were inspected by European authorities in at least one port. OECD, *Environmental Performance in OECD Countries, Progress in the 1990s*.

abroad. The UNDP *Human Development Report 2000* calls for such accountability, pointing out that 'global corporations can have enormous impact on human rights – in their employment practices, in their environmental impact, in their support for corrupt regimes or in their advocacy for policy changes'.²³

A second aspect of globalization and its relation to compliance, one that can be either positive or negative in the future, is the growing role of intergovernmental organizations in monitoring and enforcing compliance. If globalization is a process mostly structured by private actors,²⁴ then states must co-operate to exercise public power. It is largely through intergovernmental organizations that this co-operation takes place. Globalization thus turns attention to the issue of developing a system of global governance that is effective and legitimate. If globalization brings all stake-holders into the intergovernmental arena in order to develop and implement sound environmental policies, it will be a positive development.

On the negative side, globalization is creating a system in which non-state actors have unprecedented power to harm the environment and escape the consequences. It is weakening the operational sovereignty of many governments, i.e., their ability to independently conduct their public policy internally. This implies a threat to democratic governance because governments are unable to direct the policies of the state and enforce its laws. The loss of sovereign power affects the state's capacity to regulate a private sector that is not only powerful but mobile.

III. POTENTIAL RESPONSES TO ENHANCE THE WILL AND CAPACITY OF STATES

Several responses may enhance compliance with environmental obligations in the face of globalization, strengthening the positive aspects of globalization and mitigating or eliminating the negative consequences.

First, new processes of law-making and compliance mechanisms should be fostered to involve the participation of all key stakeholders (states, industry, environmental groups, local communities), while avoiding the agenda being captured by a single interest group or single regional set of actors. It is likely to be easier to obtain compliance if all actors are represented in the norm-creating process. Stakeholders who participate in drafting the norms that govern their behaviour are more likely to feel a commitment to the norms adopted. Indeed, some scholars have expressed doubt about the continued utility of traditional methods of international law-making by states only in the new global environment.²⁵ Since compliance is usually better when the rules are perceived as legitimate and arrived at in a transparent manner, what Harold Koh calls the 'transnational legal process' must be

23 UNDP, *Human Development Report 2000*, 10.

24 W.R. Reinicke and J.M. Witte 'Interdependence, Globalization and Sovereignty', in Shelton (ed.), *supra* n. 2, 75.

25 See A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); S.R. Ratner 'International Law: The Trials of Global Norms', [1998] *Foreign Policy* 65–80; P.M. Haas *et al.*, *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993).

developed to enable international co-operation and the creation of international norms that are crucial to resolve global problems.²⁶

Second, issue linkage strengthens compliance in the face of disincentives. Trade should be linked to environmental protection and respect for human rights. The experience of the Helsinki process, linking human rights and security, demonstrated the power of issue linkage. In fact, a more integrated international legal system, with clear hierarchies and choices among competing values, will be necessary for the future. The unresolved problem for the future, one that has emerged with globalization, is how to integrate the various subject areas of international regulation. The question of balancing competing interests is a major problem. Some international institutions are increasingly pressing the notion of a hierarchy of norms to mitigate the impact of trade and finance policies on human rights and the environment. Human rights advocates, in particular, have begun to claim a priority for human rights, including environmental rights, over other international legal regimes. According to this view, international economic policies cannot be exempt from conformity to fundamental values of international law. States and international organizations are thus directly obliged to comply with those principles and to ensure that private economic actors within their jurisdictions do not violate those rights.²⁷ In a 1998 statement on globalization and economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights expressed its concerns over the negative impact of globalization on the enjoyment of economic, social and cultural rights, and called on states and multilateral institutions to pay enhanced attention to taking a rights-based approach to economic policy-making.²⁸ The Committee declared that the realms of trade, finance and investment are in no way exempt from human rights obligations.²⁹ The Committee asserted that competitiveness, efficiency and economic rationalism must not be permitted to become the primary or exclusive criteria against which governmental and intergovernmental policies are evaluated.³⁰ Those concerns were raised again in the statement the

26 Several advantages adhere to a system that integrates the private sector in global governance. First, non-state participation allows these actors to contribute to and influence norms and institutions, reducing transaction costs by simplifying the system; second, the process should be more rapid by providing full information to the regulators and the regulated from the beginning; third, better information and understanding produce a more efficient and effective system; fourth, participation enhances legitimacy; and fifth, this process allows further development of a global society.

27 According to Diller and Levy, referring specifically to the issue of coercive forms of child labour, where fundamental human rights norms are implicated, 'international law requires that treaty obligations, such as trade undertakings, be maintained only to the extent of consistency with these norms.' See Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Toward the Harmonization of International Law', (1997) 91 *Am. J. Int'l L.* 678.

28 Statement of the Committee on Economic, Social and Cultural Rights on globalization, issued in May 1998, repr. in (1999) 6 *Int'l Hum. Rts Rep.* 1176. Note that several regional human rights instruments contain a right to environment. See, e.g., the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

29 UN Committee on Economic, Social and Cultural Rights, Statement on Globalization and Economic, Social and Cultural Rights, May 1998, para. 5.

30 *Id.* para. 4.

Committee addressed to the WTO Third Ministerial Conference in Seattle in November 1999. The Committee urged WTO members to adopt a human rights approach at the conference, recognizing the fact that 'promotion and protection of human rights is the first responsibility of Governments'.³¹

The Committee's language echoes that of the Vienna Declaration and Programme of Action³² which affirmed that 'the promotion and protection of human rights and fundamental freedoms is the first responsibility of government' and that 'the human person is the central subject of development'. Similarly, the Copenhagen Declaration and Programme of Action³³ recommended to states the need to intervene in markets to prevent or counteract market failure, promote stability and long-term investment, ensure fair competition and ethical conduct and harmonize economic and social development. The Sub-Commission on Promotion and Protection of Human Rights has expressly asserted the 'centrality and primacy' of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreements and practices.³⁴ The Commission on Human Rights, for its part, has affirmed 'that the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies and economic reforms arising from the debt'.³⁵ The special rapporteurs on globalization and its impact on the full enjoyment of human rights flatly assert that 'the primacy of human rights law of all other regimes of international law is a basic and fundamental principle that should not be departed from'.³⁶ A similar argument can be made for the primacy of environmental protection as a fundamental value of international society. This would lead to further insisting that the WTO and other trade institutions incorporate and address environmental issues.

Third, more monitoring and better verification of performance is needed. Effective monitoring and surveillance deters violations by providing accurate data necessary to publicize violations. It also strengthens states interested in improving compliance by giving them more and better information with which to act.

31 Statement of the United Nations Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization (Seattle, 30 November to 3 December 1999), UN Doc. FJC.12/1999/9 of 26 November 1999, para. 6.

32 A/CONF.157/23. See also the Commission on Human Rights, 'Globalization and its impact on the full enjoyment of all human rights', E/CN.4/RES/1999/59, 28 April 1999 ('While globalization by its impact on, inter alia, the role of the State, may affect human rights, the promotion and protection of all human rights is first and foremost the responsibility of the State').

33 A/CONF.166/9.

34 Sub-Commission on Promotion and Protection of Human Rights, 'Human rights as the primary objective of trade, investment and financial policy', E/CN.4/Sub.2/RES/1998/12, 20 August 1998.

35 Commission on Human Rights, 'Effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights', E/CN.4/RES/2000/82, 27 April 2000.

36 Sub-Commission on the Promotion and Protection of Human Rights, 'Globalization and its impact on the full enjoyment of human rights', preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, E/CN.4/Sub.2/2000/13, 15 June 2000.

Fourth, it could be useful to study the potential for civil litigation against companies for damage caused by their activities, wherever located. The experience of the Alien Tort Claims Act in the United States is that litigation against companies that are violating human rights and environmental protection standards is a method of inducing behavioural changes in the company. Using the Alien Tort Claims Act, plaintiffs have sought to hold multinational companies liable for human rights violations and environmental harm in Burma, Nigeria, Ecuador and India. In England, too, the House of Lords has upheld an action brought against an English-based multinational company by South African mineworkers suffering from asbestos-related diseases. The result of some of these actions has been to encourage companies to draft and implement codes of conduct.

Finally, direct regulation of multinational companies by intergovernmental organizations may respond to the negative consequences of globalization. Several examples of such efforts can be cited. First, the United Nations Declaration against Corruption and Bribery in International Commercial Transactions encourages social responsibility and ethical behaviour, calling on partners to international transactions to observe the laws of the host countries, and take into account the impact of their activities on economic and social development and protection of the environment and human rights. Second, the United Nations Security Council expressed its concern about the role of the illicit diamond trade in supporting the conflict in Sierra Leone and called upon the international diamond industry to co-operate on a ban on all rough diamonds from Sierra Leone.³⁷ The Council requested the UN Secretary-General to appoint a panel of experts to monitor implementation of the ban. Finally, the resolution calls upon states, international organizations, the diamond industry and other relevant entities to assist the government of Sierra Leone to develop a well-structured and well-regulated diamond industry. The World Diamond Congress, meeting in 2000 in Antwerp, proposed the creation of an International Diamond Council made up of producers, manufacturers, traders, governments and international organizations to oversee a new system to verify the provenance of rough diamonds.

Other examples of direct efforts by intergovernmental organizations to regulate or monitor the conduct of non-state actors include the appointment by the UN Human Rights Commission of a special rapporteur to investigate the international movement of toxic and hazardous wastes and the development by the World Bank of operational directives on environmental assessment, involuntary resettlement and the impact of large dams. Such regulation of non-state actors is based upon recognition that an international minimum standard is necessary for all those whose activities impact fundamental values. In particular, it sees environmental protection as a necessity, not an optional corporate policy, because it is a common concern of humanity.

In conclusion, the process of globalization is likely to be irreversible. The task for the future is to develop legal and policy tools to mitigate the negative aspects of globalization and strengthen the positive elements in order to further global public policy favouring environmental protection and compliance with environmental norms. In this, all sectors of society will be important partners and all strategies and tools will be worth considering.

37 37 S.C. Res. 1306.