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REVIEW

European investment projects in the third countries:
LEGALLY GREEN?

Daria Ratsiborinskaya

Market-based Mechanisms as Climate Policies:
Insights for Brazil

Natascha Trennepohl

Public participation in decisions on specific activities
in environmental matters in Croatia

Lana Ofak

Nouveautés constitutionnelles, juridiques et de politique
générale relatives au Droit de l'Environnement
et du Développement Durable dans le Royaume du Maroc

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Recent developments

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Editorial

This issue of *elni Review* deals with the interdependence between European law and environmental law in non-European countries. On the one hand environmental law developments in a number of countries are initiated by adaptation processes as they seek to implement the European model into their national context. But there are also on the other hand further driving forces like investment policies.

The current issue of *elni Review* contains several contributions by legal scholars and practitioners that highlight different aspects of the interdependence between European law and environmental law.

In her article "European investment projects in the third countries: LEGALLY GREEN?" *Daria Ratsiborinskaya* analyses how European environmental standards are applied outside of Europe in the case of foreign direct investments.

"Market-based Mechanisms as Climate Policies: Insights for Brazil" is the title of *Natascha Trennepohl's* contribution, which highlights the basic elements of a trading scheme by focussing on the model of the European Union Emissions Trading Scheme and the development of the carbon market in Brazil.

The adoption of the European *acquis* in Croatia is discussed by *Lana Ofak* in her article "Public participation in decisions on specific activities in environmental matters in Croatia". The article provides a general overview of the legal framework for public participation in decisions on specific activities in Croatia and highlights specific problems in exercising the right to participate in environmental impact assessment procedures.

Brahim Zyani gives a valuable overview of the current environmental law situation in Morocco by tracing the developments in recent decades in his article "Nouveautés constitutionnelles, juridiques et de politique générale relatives au Droit de l'Environnement et du Développement Durable dans le Royaume du Maroc". Since the article is written in French a summary is provided in English.

Additionally, the current issue of *elni Review* makes available new information about recent developments, e.g. the revision of the Brazilian Forest Code, which has received critical press in recent media; and the environmental regulatory developments after the 'Arab Spring' in Tunisia. The relevant article is also written in French and briefly summarized in English.

We hope you enjoy this issue! The next issue of *elni Review* will focus on water. Please send contributions on this topic as well as other interesting articles to the editors by mid-September 2012.

Nicolas Below/Gerhard Roller
May 2012

International conference on the European Habitats Directive

**from 12-13 December 2012
in Antwerp, The Netherlands**

"20 years of Habitats Directive: European Wildlife's Best Hope?"

The conference aims at assessing the strengths and weaknesses of the Habitats Directive in the light of the European 'no net loss' approach. In this respect focus will not only rest on the existing threats to biodiversity (e.g. nitrogen deposit) but also on new challenges, such as climate change and invasive alien species. Is the Habitats Directive robust enough to tackle these new and existing threats or do we need other or better legal instruments?

Although the conference will mainly be dedicated to legal issues, it will not lose sight of the broader, more multidisciplinary ecological context.

This conference is co-organised by the Université Catholique de Louvain (Séminaire de droit de l'urbanisme et de l'environnement (SERES) and Biodiversity Research Centre (BDIV)), Ghent University (Centrum voor Milieu- en Energierecht (CMR) of the Department of Public Law and the Department of Public International Law), Facultés Universitaires Saint-Louis (Centre d'Etude du Droit de l'Environnement (CEDRE)), The Flemish Environmental Law Association (VVOR) and ARGUS-het milieupunt van KBC en CERA.

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European investment projects in third countries: LEGALLY GREEN?

Daria Ratsiborinskaya

1 Introduction

Recent decades have shown a drastic change in the world's economic policy, with the creation of new regional trading blocs, removal of trade barriers and a remarkable increase in private investment flows. Despite widespread economic turmoil, global inflows of foreign direct investment (FDI)¹ rose by 17% in 2011. It has become an increasingly important ingredient of economic growth, with the EU taking the lead in terms of investment volumes.²

The growing importance of FDI as an engine for economic development has caused considerable debate about its adverse effects on environment, particularly as FDI often is directed at resource extraction, infrastructure and manufacturing operations.³ Yet investment can be an important tool to stimulate the use of advanced process methods or cleaner technologies.

This article provides an overview of the corporate self-regulation by five European-based multilateral financial institutions where European environmental *acquis* is applied in investment projects in the third countries.⁴ Academic research on environmental standards suffers from a certain imbalance. While scientific studies of European ambient standards and standards regulating environmental performance and its consequences are ample, little has been written so far about their application by the European players outside the European Union. This gap in the literature is, however, critical, considering the leading role the Union seeks to play in the proliferation of high environmental standards worldwide.

To provide background, Part II describes existing international incentives to stimulate the 'greening' of investment, in particular focusing on the launch of European Principles for Environment by some in-

vestment banks, which has led to their voluntary application of legal European environmental standards outside of the EU.

Part III elaborates on the nature and character of standards being applied in the framework of the investment projects. It considers the possibility of a certain mutual influence between the 'exported' European and national environmental standards of host countries,⁵ leading to an approximation effect.

In Part IV attention is paid to the driving forces behind the voluntary environmental self-regulation. It is argued that homogenous introduction of high legal standards causes a positive effect on general FDI patterns, with investment becoming a stimulus of proper environmental regulation in the host countries.

Part V addresses the academic debate around the role of European Union as a normative (green) power, extending its 'legal space' beyond its geographical borders. It stands still by the Common Investment Policy that currently takes shape at the Union level.

Finally, in Part VI concluding remarks will be presented on the positive role of investment banks in promoting European environmental standards worldwide. It also calls for the comprehensive EU investment regime to stay ahead of international developments.

2 'Greening' the European investments

The failed negotiations between OECD members on the Multilateral Agreement on Investment (MAI)⁶ in 1998 left states without any agreed mechanisms to regulate FDI.⁷ Over the past two decades, the increasing speed of economic liberalization and globalization has shown that the multinational financial institutions are becoming increasingly involved in the business of regulation.⁸ With the new actors come the new forms of standard setting: the classic division between state regulation, on the one hand, and self-regulation, on the other hand, is giving way

¹ Foreign Direct Investment (FDI) is a category of international investment which applies when at least 10 per cent of the capital of the target enterprise is acquired. FDI involves forging long-term relationships with enterprises in foreign countries. It can be made in several ways. Firstly, and most likely, it may involve parent enterprises injecting capital by purchasing shares in foreign affiliates. Secondly, it may take the form of reinvesting the affiliate's earnings. Thirdly, it may entail short- or long-term lending between parents and affiliates. For definition of FDI under the Treaty of Lisbon, see Wenhua S., Sheng Z. (2011) The Treaty of Lisbon: Half Way toward a Common Investment Policy. *European Journal of International Law*, Vol. 21(4), p. 1059.

² Economic and Financial Indicators, *The Economist*, 28.01.2012, p. 77.

³ Mabey N., McNally R. (1998) Foreign Direct Investment and the environment. From pollution havens to sustainable development. WWF-UK Report. p. 9.

⁴ The term 'third country' is used in the Treaty of Lisbon, where it means a country that is not a member of the Union. Here this meaning is further limited by excluding EU-accession countries, which are legally bound by the obligation to approximate their national legislation with that of the EU.

⁵ Country-recipients of the investment are named 'host countries', contrary to the 'source countries', where the investment comes from.

⁶ More on MAI negotiations: Neumayer E. (1999) Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations. *Wirtschaftspolitische Blätter* 46 (6), 618-628.

⁷ Gray K. (2002) Foreign Direct Investment and Environmental Impacts – Is the Debate Over? *RECIEL* 11(3), 306-313. p. 312.

⁸ Pieth M. (2009) Preface. In Peters A. et al (eds.) *Non-State Actors as Standard Setters*, Cambridge University Press. p. xix.

to hybrid forms of co-regulation.⁹ Even before the European Union took the lead, calls for ‘greening’ the FDI have been coming from international arena, although mostly representing developed countries.

To manage the environmental and social risks, The Equator Principles (EP) were launched in 2003 by ten global private financial institutions¹⁰ and International Finance Corporation. Subsequently more than 60 other European and non-European financial institutions adhered to the Principles, which had been revised for the third time by 2012. Starting from the EP launch it has become possible to talk about the ‘sustainable banking’, comprising not only financial, but also environmental (and social) dimensions.¹¹

Another significant trend takes place within the World Bank, which is currently in the process of updating and consolidating its fifteen-year-old environmental and social safeguard policies into an integrated environmental and social policy framework.¹²

Also, in 2011 OECD published the revised Guidelines for Multinational Enterprises, which encourage investors to harmonize their environmental practices across the source and the host countries by adopting technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise. These are recommendations that provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.¹³

Consequently, in the European Union the necessity of addressing the investment-environment dilemma was felt as well. ‘Greening’ of European investment has become one of the objectives of the EU 6th Environment Action Programme, which had already mentioned the need of ‘*promoting sustainable environmental practices in foreign investment and export credits*’ in 2002.¹⁴

European financial institutions were quick to follow the ‘green’ trend. In 2006 five EU-based investment

banks¹⁵ have bound themselves by an obligation to adhere to a comparable approach to environmental management in the financing of projects. They have signed the Declaration on ‘European Principles for the Environment’ (EPE), with the aim of promoting sustainable development and protecting and improving the environment. The EPE is based on the Equator principles and on the European Union environmental *acquis*, including principles, practices and standards shaped by the case-law and the secondary legislation. The ambition of the so-called ‘EPE-Banks’ was, however, to apply these standards not only to projects in the EU, but to projects in all countries within their respective mandates, as part of corporate self-regulation. The geographical territory covered by their mandates is rather impressive: for example, the European Bank for Reconstruction and Development (EBRD) is a multilateral financial institution that supports projects in 29 countries from Eastern Europe to Central Asia.¹⁶

3 Legal environmental standards in FDI projects

When discussing the European Principles for Environment, their nature and their voluntary character should be highlighted.

Firstly, the legal environmental standards adopted by EPE Banks in the framework of corporate self-regulation are not really conventional. From the legal point of view these are ‘non-state standards’¹⁷, in other words, standards which are not set by a state and are not enforceable by ordinary legal mechanisms, i.e. by courts. As Peters points out, in the continuum view which accepts that there may be a grey zone between law and non-law, the non-state standards mostly lie on the ‘soft’ or less law-like end of the scale.¹⁸ Yet, these ‘unconventional’ standards play an increasingly important role in the development of a conventional environmental regulatory regime. Considering this, it is fascinating from a legal perspective how the domestic and the ‘exported’ European environmental standards find their way next to each other in a particular third country. This issue will be addressed further on in this article.

⁹ Ibid.

¹⁰ ABN AMRO Bank, N.V., Barclays plc, Citi, Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, The Royal Bank of Scotland, WestLB AG, and Westpac Banking Corporation.

¹¹ Yeoh P. (2009) Sustainable banking: The Commercial and Legal Impacts of Private Self-Regulatory Initiatives, *European Energy and Environmental Law Review* 12, 274-288. p. 274.

¹² See World Bank’s website, <http://go.worldbank.org/00E973V3B0>. Accessed 20.02.2012.

¹³ OECD (2011), *OECD Guidelines for Multinational Enterprises*. OECD Publishing.

¹⁴ Decision No. 1600/2002/EC, Art. 9(2)(e).

¹⁵ The Council of Europe Bank (CEB), the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the Nordic Environment Finance Corporation (NEFCO), and the Nordic Investment Bank (NIB), sometimes addressed together as ‘EPE banks’.

¹⁶ EBRD 2012, www.ebrd.com/pages/homepage.shtml. Accessed 02.02.2012.

¹⁷ The term is used by Marcus Schaper in Schaper M. (2009) Non-State Environmental Standards as a Substitute for State Regulation? In Peters a. et al. (eds.). *Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide*. Cambridge University Press.

¹⁸ Peters A., Forter T., Koechlin L. (2009) Towards non-state actors as effective, legitimate, and accountable standard setters. In Peters A. et al. (eds.) *Non-State Actors as Standard Setters*, Cambridge University Press, 492-562.

Secondly, in the absence of a comprehensive European regime regulating foreign direct investment, the application of European environmental standards in projects outside the EU takes place (only) on a voluntary basis. However, EPE banks, bound by a mutual commitment, made this application in the third countries essential among themselves, attributing to it a certain element of a compulsory requirement.

It can be argued that agreed standards also have a 'compulsory' effect on investor and a client in the framework of a certain investment project. Clients in the host countries are expected to meet EPE banks' commitment to EU environmental standards as well as European Principles for Environment. The Banks explicitly mention the necessary application of precaution, prevention, polluter pays principles and the principle that environmental damage shall be rectified at source; EU environmental standards, in particular those related to industrial pollution, water and waste management, air and soil pollution, occupational health and safety and the protection of nature.¹⁹

At the same time, the national environmental requirements of the host country are impossible to disregard. The environmental and social policy of one of the EPE banks, EBRD, states that *'the projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements'*.²⁰

The Policy also clarifies that *'When host country regulations differ from the levels and measures presented in EU environmental requirements, projects will be expected to meet whichever is more stringent... For each project, the Bank will identify and agree with the client the relevant applicable environmental requirements and guidelines.'*²¹

The conclusion which can be drawn from these provisions is obvious: the actual level of environmental protection that could potentially be achieved in European FDI projects abroad cannot be exactly similar to that of the EU. Despite the EPE banks' adherence to the EU principles and standards, the set of applicable standards in a particular investment project depends on the local situation, conditions, domestic legal requirements – and even (possibly) the cost of application.

It is worth mentioning that there are other regional and political factors that have a positive effect on the extension of European legal influence to the third countries. Environmental standards tend not to be significantly different among developed countries. In environmental matters, many states face similar to

EU problems due to comparable domestic developments like industrialization, consumption patterns and lifestyles. Many are interested to learn from European experience. EPE banks, successfully applying EU standards in investment projects, provide a powerful argument for a host country legislator in favour of doing likewise: particular investment projects may be a demonstration of beneficial application of EU standards, thus providing a good example for local authorities. Following the logic of Biedenkopf, with a growing number of projects applying EU standards uncertainties about their impact (on domestic legislation) and efficiency decrease.²²

The 'export' of EU legal standards inevitably causes certain effects, to mention but a few. Firstly, in the third countries, which unlike accession countries do not have an explicit obligation to harmonize its legislation with that of the EU, European legal standards can indirectly lead to a gradual approximation of a third-country environmental (soft) legislation, caused not by political but by economical incentives. Given their voluntary character and their process orientation, European standards and best practices used in investment projects serve as an example for other similar projects in a given country.²³ Of course, it must be mentioned hereby that the type of regulatory structure of the host country makes the domestic environmental legislation more or less sensitive to the European influence. As expected, EU rules are more likely to be selected, adopted or applied if they are comparable with domestic practices, rules and traditions.

Secondly, such 'natural' approximation process is not limited to only one country. Considering the broad geographical mandate of EPE banks in Eastern Europe and Central Asia, the common approach may create, in the long run, the regional legal standard level for environmental requirements used in investment projects. This would enhance economic predictability and legal certainty, a positive effect for all parties involved.

A third effect implies that environmental standards inevitably influence each other, making the domestic legal norms not of less importance for the environmental standard-setting. As investment practice demonstrates, when domestic standards are in place and when these are higher than EU standards, these are the domestic standards that can and must be

¹⁹ See, for example, EBRD Environmental and Social Policy (2008), p. 2.

²⁰ Ibid., p. 26.

²¹ EBRD Environmental and Social Policy (2008), p. 27.

²² Biedenkopf K. (2009) Policy Diffusion and Environmental Pioneership: Insights for Transatlantic Cooperation fostering Biodiversity and Biosafety? Institute of International Studies Research Programme. p. 6.

²³ This effect was referred to as *'lesson-drawing'*, see Schimmelfennig F., Sedelmeier U. (2005) The Europeanisation of Central and Eastern Europe, Cornell University Press.

applied.²⁴ It is possible to imagine a certain ‘soft’ influence, a certain reverse impact a domestic standard may in theory have in such situation - via legal practice in a given investment project, via managerial experience and simply via project’s staff that get acquainted with host country domestic legislation.

It is recognized that more legal research is needed in this area.²⁵ For example, such specific regulation instruments as incorporation of environmental standards into investment agreements and thus channeling investment flows towards more sustainable development remain largely unaddressed in the current literature.²⁶ To date, no independent assessment of legal European standards and their application in foreign direct investment projects actually took place. Yet standards are not static - they are changeable by nature, due to alterations in environment, in adopted practices, updates in legislation. European and non-European legal environmental standards mutually influence each other, causing an evolutionary effect, which is of crucial importance to the creation of predictable and stable investment regulation.

4 Motivating ‘race to the top’

The last two decades have seen a considerable amount of attention from academics, lawyers, economists and social scientists in terms of the environmental regulatory competition for FDI.²⁷ The increase of FDI flows to developing countries in the last twenty years has stimulated a debate on the link between FDI and environment. There has been speculation that there is a connection between FDI and environmental policies, i.e. that polluting industries relocate from developed to developing countries where environmental standards are lower.²⁸ Much was written about the FDI (hypothetically) causing ‘race to the bottom’ or ‘pollution havens’ effects, whereby host countries competing with each other to attract more FDI, would lower their environmental standards.²⁹ A similar negative effect

addressed in the literature is referred to as ‘regulatory chill’, where countries refrain from introducing stricter environmental standards due to fear of becoming less attractive for investment.³⁰ Both theories support the economic theory point of view on investors who do not wait for even more restrictions in view of environmental protection.

The two effects seem to have been projected from the host country perspective. However, situation changes when the FDI come into the host country while already bound by high standards, *regardless* of the domestic regulatory level. The third effect is known as the ‘race to the top’ effect, or ‘Porter hypothesis’, where stronger environmental policies can improve a country’s competitiveness by fostering innovation and efficiency.³¹

Although all three theories are lacking in empirical support and are only justified with selective case studies, the recent empirical study by OECD, based on newly developed econometric techniques and a very broad sample, nevertheless demonstrates support ‘for the positive effect of relative environmental policy stringency on foreign direct investment patterns’.³²

What was the driving force behind the voluntary environmental self-regulation by European-based investment banks? Was it the result of *external* pressure of international legal developments or an *internal* urge to stay competitive on the investment market? It can be assumed that, as with many standard-setting procedures, EPE banks originally moved towards voluntary standards without any real intention of having any effect, ‘but purely for the sake of window-dressing’.³³ Faced with public pressure and demands of their stakeholders, they needed to be seen to be doing ‘something about environment’.³⁴ However effects seem to be positive for all sides. Investment banks are seen as pioneers in corporate self-regulation, staying open to public pressure and taking on board concerns communicated by NGOs and intergovernmental organizations like OECD. Next to a ‘green’ image and increased corporate competitiveness, they are getting engaged in a very promising legal exercise, reviewing the traditional

²⁴ Douma W.(2010) The EBRD and Russia: Stimulating European Principles for the Environment. In Mucklow F., Douma W. (eds.) *Environmental Finance and Socially Responsible Business in Russia*, T.M.C. Asser Press. p. 185.

²⁵ Cordonnier Segger M., Gehring M. et al. (eds.) (2011) *Sustainable Development in World Investment Law*, Kluwer Law International, p. 679.

²⁶ *Ibid.*, p. 679.

²⁷ See Knill C., Tosun J., Heichel S. (2008) Balancing competitiveness and conditionality: environmental policymaking in low-regulating countries, *Journal of European Public Policy* 15 (7), 1001-1018; Gray K. (2002) Foreign Direct Investment and Environmental Impacts – Is the Debate Over? *RECIEL* 11(3), 306-313.

²⁸ Spatareanu M. (2007) Searching for pollution havens: the impact of environmental regulations on foreign direct investment. *Journal of environment and development* 16 (2), 161-182. p. 181.

²⁹ See Levinson A., Taylor M. (2008) Unmasking The Pollution Haven Effect, *International Economic Review*, University of Pennsylvania and

Osaka University Institute of Social and Economic Research Association, 49 (1), 223-254.

³⁰ Nordström H., Vaughan S.(1999) Trade and Environment, Special studies 4.World Trade Organization Report.

³¹ See Porter M. (1990) *The Competitive Advantage of Nations*, Free Press.

³² Kalamova M., Johnstone N. (2011) Environmental Policy Stringency and Foreign Direct Investment, *OECD Environment Working Papers*, No. 33, OECD Publishing. p. 25.

³³ Peters A., Forter T., Koechlin L. (2009) Towards non-state actors as effective, legitimate, and accountable standard setters, *supra* note 18, p. 509.

³⁴ As example, see the critical review by CIEL: ‘The European Bank for Reconstruction and Development: An Environmental Progress Report’, www.ciel.org/Publications/summary1.html. Accessed 2.02.2012.

‘polarity’ between economic profit and environmental concerns.

Considering the above, it can be argued that if the new type of investment, integrating corporate social responsibility initiatives like EPE banks does not cause a ‘race to the top’, it *at least* acts as a positive example for national investors and other multinational financial institutions alike. It generates the *common level playing field* in applicable environmental standards, much aspired to by the EU. Moreover, it offers a new vision on ‘greening’ the FDI, moving from the conflicting interests of the ‘environment vs. investment’ approach to recognition of investment being the stimulus of proper environmental regulation, and of corporate environmental responsibility becoming an obvious, natural part of any investment projects. In any case, as Grey writes, ‘investment may be the most judicious and effective way to prevent states from deliberately disregarding their commitments to environmental protection (in order to lure foreign investors) by providing the legal basis to challenge governments who do this’.³⁵

5 The European Union and the FDI regulation

In the general framework of EU law the efficient protection and application of environmental standards *within the EU* first and foremost is ensured. Also when acting externally, the gradual ‘Europeanisation’ process is visibly taking place: according to the Treaty of Lisbon, the EU ‘shall define and pursue common policies and actions... to preserve and improve the quality of the environment...’³⁶ *In its relationship ‘with the wider world, the Union shall contribute to... the sustainable development of the Earth’.*³⁷

By this, the Union has created one of the most explicit legal commitments to a sustainable future anywhere in the world, elevating environmental protection over economic and social concerns.³⁸ The EU has been praised for its leadership role in climate change negotiations and for the sustainable development promotion in the UN framework.³⁹ Developing on the concept of EU as a normative power,⁴⁰ Lazowski states that the ‘Europeanisation of third

countries’ legal orders is a fact, and that ‘for one reason or another EU law has become an exportable product of European integration’.⁴¹ Some scholars have questioned whether there is a *green normative power*⁴² of the Union, which exercises a *magnetic influence*⁴³ on environmental regulation of other international actors. While this article takes a general look at the influence of European investments at the environmental standards in the third countries, a separate study is needed to reflect on the EU phenomenal success as a trend-setter in global environmental governance, despite of it often ‘fall[ing] short of its self-proclaimed leadership role’.⁴⁴

One way in which the Union has been giving an external dimension to its environmental policy is by supporting the inclusion of environmental standards (as a voluntary condition) in foreign direct investment agreements with third countries. The EU possesses ‘the strictest, most ambitious environmental legislation in the world.’⁴⁵ Given that strict standards were being put in place across Europe, and the fact that the EU is the world's largest investor abroad,⁴⁶ it is in the interests of the European industry and European governments to see similar standards apply in other parts of the world. As Kelemen puts it, ‘by consistently positioning itself as an environmental leader, the EU has spread a number of its environmental standards to other jurisdictions and has built up a reservoir of credibility in this policy domain, which it may draw upon in defending new measures against accusations that they constitute veiled protectionism.’⁴⁷

In this way the European environmental laws, principles and best practices have become an ‘export commodity’ and inevitably cause certain influence on the legal practices of those countries.

The private sector initiative of making the European investment ‘legally green’ witnesses its codification on the EU level. The Treaty of Lisbon explicitly mentions foreign direct investment as forming part

³⁵ Gray K. (2002) ‘Foreign Direct Investment and Environmental Impacts – Is the Debate Over?’, *supra* note 7, p. 313.

³⁶ Art. 21(2)(f) TEU.

³⁷ Art. 3 (5) TEU.

³⁸ Aldson F. (2011) *EU Law and Sustainability in Focus: Will the Lisbon Treaty Lead to ‘The Sustainable Development of Europe?’* Dissertation, Academia.edu. p. 1.

³⁹ See for example Vogler J. (2005) *The European Contribution to Global Environmental Governance*. *International Affairs* 81 (4), 835-850. p. 844.

⁴⁰ The concept was first introduced in Manners I. (2002) *Normative Power Europe: A Contradiction in Terms?* *Journal of Common Market Studies* 40 (2).

⁴¹ Lazowski A. (2009) *With but without you...The Europeanisation of Legal Orders of the Neighbouring Countries*. In A. Ott and E. Vos (Eds.), *50 Years of European Integration: Foundations and Perspectives*. T.M.C. Asser Press & Cambridge University Press, The Hague, 247-270. p. 269.

⁴² Falkner R. (2006) *The European Union as a ‘Green Normative Power?’ EU Leadership in International Biotechnology Regulation*. Centre for European Studies Working Paper Series No. 140. p. 2.

⁴³ Vogler J. (2005) *The European Contribution to Global Environmental Governance*, *supra* note 39, p. 841.

⁴⁴ Vogler J., Stephan H. (2007) *The European Union in global environmental governance: Leadership in the making?* *International Environmental Agreements: Politics, Law and Economics*. 7(4), 389-413. p. 389.

⁴⁵ Kelemen, R. (2010) *Globalizing European Union Environmental Policy*. *Journal of European Public Policy*, 17(3), 335-349. p.336.

⁴⁶ Foreign Direct Investment. European Commission webpage. http://ec.europa.eu/economy_finance/eu/globalisation/fdi/index_en.htm, accessed 3.02.2012

⁴⁷ Kelemen, R. (2010) *Globalizing European Union Environmental Policy*. *Journal of European Public Policy*, 17(3), 335-349. p.346.

of the common commercial policy.⁴⁸ The Treaty thus broadened the list of EU's exclusive competences by extending it to the FDI.⁴⁹ As a result, the Commission announced a proposal on new investment regime, taking into account the revised OECD Guidelines for Multinational Enterprises and the existing initiatives undertaken by investment banks on corporate social responsibility.⁵⁰ In September 2011, the General Affairs Council of the European Union officially approved a negotiating mandate for investment protection measures under the proposed free trade agreements with India, Singapore and Canada, the first one since the transfer of competence on international agreements concerning FDI from individual member-states to the EU.⁵¹ The mandate provides that the future investment agreement '*shall be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner*'.⁵²

The Union is currently going through a cumbersome process of shaping the new investment policy. It is important to bear in mind that, according to the principle of integration⁵³, environmental protection requirements *must be integrated* into the definition and implementation of the Union policies and activities. In relation to FDI-regulation at EU level it has not yet been realized. Next to the existing bilateral agreements on investment, concluded by Member States prior to Lisbon Treaty, the world may witness a gradual introduction of an 'umbrella' guidelines regulating European FDI, enriched with minimum homogeneous environmental protection requirements for all EU investors establishing its presence in the third countries. Until that time, the actual 'export' of EU environmental standards takes place on the basis of investment banks' good will.

6 Conclusions

This article considered the possible effects of EU standards' application in FDI projects. The knowledge of the extraterritorial application of European

environmental standards is important for at least two reasons. First, in the absence of the European regulation on foreign direct investment, some European investors, such as EPE banks, voluntarily put the application of legal environmental standards as project requirements. Firstly, there is a growing need to develop towards homogeneous legal standards, or in other words, to create a common level playing field: despite extra initial costs, investors are ready to 'green' their projects.

Secondly, for the safeguard of the environment it is of great importance to have high legal standards across the globe. Through diligent application, the European standards will be promoted and increasingly used, guaranteeing the EU its leadership role internationally.

There are lessons to be learned from the implementation of the European Principles for Environment by the Europe-based investment Banks since the introduction of Principles in 2006. It shows the increasing role of financial institutions as international standard-setters, promoting European environmental standards world-wide. Without a doubt, there is still room to improve the legal framework for FDI. As a result, homogeneous application of minimum legal environmental standards with regard to the third countries could become a part of a new investment policy on the EU level, thus involving not only several investment banks, but all EU investors. Consistent 'channelling' of European standards abroad via investment projects would create a level playing field and facilitate trade between countries, strengthen the legal protection of environment and, eventually, foster the rule of law.⁵⁴

The European Union is deeply involved in the process of environmental regulation and standard-setting, which Cordonnier Seger called to be 'one of the most innovative areas of international cooperation'.⁵⁵ The EU should not miss this opportunity to lead the way and stay ahead of international developments. In the meantime, pioneers among EU-based investment banks are attempting to make their investments 'legally green'.

⁴⁸ Art. 207(1) TFEU.

⁴⁹ The EU has exclusive competence in the area of common commercial policy, see Art. 3 (1)(e) TFEU.

⁵⁰ Commission Proposal COM(2010)344 for a Regulation Establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

⁵¹ Although highly secretive, the text of the mandate was 'leaked' and has become accessible to general public. See text published by NGO's Global Research and Seattle to Brussels Network, www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html. Accessed 1.02.2012.

⁵² Ibid.

⁵³ Art. 11 TFEU.

⁵⁴ Possibly creating a new branch of investment law focusing on environmental regulation.

⁵⁵ Cordonnier Segger M., Gehring M. et al. (eds) (2011) Sustainable Development in World Investment Law, *supra* note 25, p. 679.

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If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

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- Land use strategies
- Role of standardization bodies
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- Water and energy management
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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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