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US-CHINA LAW REVIEW

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TRADE V. ENVIRONMENT LAW IN THE EU

*Nicolas de Sadeleer**

With a number of innovative measures ranging from green certificates with a view to boosting green electricity production to the circular economy aiming at reducing waste, the European Union (EU) environmental policy has been gathering momentum. What is more, the recent Dieseltgate scandal shed the light on the discrepancies between the US and the EU fuel and car standards. A central feature of EU environmental law is its multi-level character. Another feature is its uncanny relationship with the internal market. Given that the core of the EU integration process lies the internal market which is underpinned by free movement principles removing obstacles to free trade and free competition, the relationship between economic integration and environmental protection has always been fraught with controversy. This paper is attempting to set the scene to explain how economic growth and environmental protection could be reconciled in the EU.

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INTRODUCTION

The relationship between economic integration and environmental protection has always been fraught with controversy. It has been argued that, trade liberalization and free competition increase the wealth of trading nations so they are able to afford to implement environmental policies. On the other hand, economic growth at all costs may result in greater pressures on ecosystems.

One of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualized in terms of economic integration. At the core of economic integration lies, the internal market that is based on the free movement provisions promoting access to the different national markets and on the absence of distortions of competition. It is the aim of this article to explore some of the key issues arising in this discussion.

I. THE CHALLENGE OF AN EU ENVIRONMENT POLICY

It must ought to be remembered that the EU is a union of twenty-eight independent member states. It follows that the EU is neither a state¹ nor a typical international organization. As the Court of Justice of the EU (CJEU) has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established ‘a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals’.² Accordingly, the EU is deemed to be a unique international organization that is endowed with its own system of government (reckoning upon seven supranational institutions and a swathe of organs and agencies), that has been allocated by its 28 Member States a constellation of competences ranging from international trade to energy, and that has developed its own legal system that differs from both domestic and international law. The powers and responsibilities conferred to the EU institutions are laid down in the Treaties, which are the constitutional foundations of the EU. Care should be taken to distinguishing the different sources of EU law. Traditionally, academics distinguish two key sources of law within the EU legal order:

- primary law, in the shape of the Treaties such as the Treaty on

¹ Opinion 2/13, paragraph 156.

² See, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65.

European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights (EUCFR). These treaties are carving out a specific constitutional framework.

- secondary law made up of different binding instruments—regulations, directives and decisions—and non binding instruments—opinions and recommendations—(Article 288 TFEU).

Primary law originates from the 28 Member States in their role of *Masters of the Treaty* whereas secondary law is the product of the EU institutions (European Commission, Council, European Parliament). What is more, the fact that both primary and secondary law of this autonomous legal order take precedence over 28 national legal orders³ emphasizes the key role played by the EU in Europe regarding an array of subject-matters. Besides, the CJEU plays a key role in ensuring that EU law is observed ‘in the interpretation and application’ of the Treaties (Article 19(1) TEU). The Court reviews the legality of the acts of the institutions of the EU, ensures that the Member States comply with their obligations under treaty law, and interprets EU law at the request of the national courts and tribunals.

Although it was not mentioned in the 1957 Treaty of Rome, a European environmental policy has gradually emerged in treaty law. It has even become a core objective of the EU, given that it has been placed on equal footing with economic growth and the internal market (Article 3(3) TEU). In addition, a broad range of objectives and obligations—sustainable development, high level of protection, integration clauses, policy principles, and fundamental rights—are enshrined in the TEU, the TFEU, the EUCFR and thus occupy a high place in the hierarchy of EU norms. What is more, entirely devoted to the environment, Title XX of the TFEU confers the EU a specific competence in environmental matters: it sets out goals (prudent and rational use of natural resources, fight against climate change, etc.), states principles (high level of protection, precautionary principle, prevention, rectification at source of the environmental damage, the polluter-pays)⁴, and establishes criteria (available scientific and technical data, environmental conditions in the various regions of the Union, cost benefit analysis, etc.). Given the protean nature of the concept of environment, it is difficult to define exactly its boundaries. A specific EU environmental policy does not preclude that other measures aiming at protection the environment may be adopted under the auspices of the internal market policy, the Common Commercial Policy (CCP), the Common Agricultural Policy (CAP),

³ *Costa v. Enel* 6/64 [1964] ECR 585.

⁴ N. DE SADELEER, ENVIRONMENTAL PRINCIPLES (Oxford: OUP 2002).

criminal law, and nuclear law (the European Atomic Energy Community).⁵

Given that the EU is endowed with a shared competence for protecting the environment, it has the power to legislate and to adopt legally binding acts in the environmental area. Starting from a range of action programmes, EU environmental law has progressively grown from a sparse set of directives to a vast body of regulatory measures aiming both to regulate the main forms of pollution (waste, water and air emissions, chemicals, etc.) as well as to protect the main ecosystems (air, water and soil) along with some of their composite elements (habitats, wildlife, etc.). Today it is possible to count more than three hundred regulatory measures, that is around 8% of EU law. Several EU agencies, twenty eight Member States, hundreds of Regions and Länder, thousands of municipalities now implement EU secondary environmental law through a complex web of regulations that affect virtually every aspect of our life's.

Two key factors explain the success of this policy.

Firstly, given the Member States' inability to solve environmental issues having a transboundary nature, such as ozone depletion, climate change, biodiversity, air and water pollution, etc., the EU has been better placed to regulate these issues than the 28 Member States.

Secondly, given the significant discrepancies among the Member States regarding the stringency of their environmental policies, EU harmonization ensures that a common playing field will apply in all Member States in a way ensuring a high level of environmental protection. In the absence of such a common regulatory approach, the efforts made by the most zealous Member States would easily be frustrated by the passivity of the others. This common playing field makes sense on the account that environmental policy entails significant costs. Accordingly, as a matter of solidarity, each Member State should commit itself to invest in environmental infrastructures (water treatment plants, recycling plants, etc.) and to set up environmental agencies that do monitor, control and sanction environmental risks. The absence of common standards is a serious economic mistake. Tougher harmonized regulations on products, renewables, nature conservation, and energy efficiency are not only good for the environment but also for the competitiveness of the Member States economies. By way of illustration, air pollutants are responsible in the EU for more than 400,000 premature deaths⁶ and up to Euro 940 billion in health costs per year. Accordingly, tougher regulations on air pollution

⁵ N. de Sadeleer, *Environmental Governance and the Legal Bases Conundrum*, OXFORD YEARBOOK OF EUROPEAN LAW 1-29 (2012).

⁶ EEA, EUROPE'S ENVIRONMENT 73 (Copenhagen 2007).

would not only save life but would also boost the EU economy.

However, environmental policy is not vested exclusively in the EU. The EU institutions are empowered to harmonize in as much as they comply with the principle of subsidiarity. Accordingly, all environment issues cannot be regulated at EU level. In addition, insofar as the EU has not taken action (eg brownfields), the Member States maintain their competences, provided that they act in accordance with EU law. As a result, both the EU and Member States may act in order to protect the environment (eg GMOs).

Thanks to this EU policy, much has been achieved over these last thirty years: ban on lead in petroleum products, phasing out ozone depleting substances, reduction of Nitrogen oxide emissions from road transport, improvement of waste water treatment and water quality, reduction of acidification, and improvement of some aspects of air quality.⁷ These significant progresses demonstrate that environmental policy and law work provided the Member States are committed to enforce the harmonized rules.

However, despite these progresses that were made in the course of these last decades, the results of the environmental policy have at the very least been muted.⁸

Sad to say, environmental degradation is manifest everywhere given that the European continent is transformed by industrial, urban, agricultural, transport, mining activities. But the less visible but potentially drastic threats are manifold (climate change, health impairment resulting from exposure to chemical substances, radiations, etc.). The Member States are still facing a daunting agenda of unfinished business as well as a swathe of new challenges. By way of illustration, air pollution still reduces significantly life expectancy,⁹ major rivers are still heavily polluted, the 2010 biodiversity conservation targets have not been met, and the amount of waste increases.¹⁰ As regard new challenges, the most pressing one is climate change whose impacts are becoming ever more frequent. Indeed, the overarching target to limit climate change to temperature increases below 2 °C globally during this century¹¹ is unlikely to be met, in part because of

⁷ EEA, THE EUROPEAN ENVIRONMENT. STATE AND OUTLOOK 19 (Copenhagen 2005).

⁸ EEA, EUROPE'S ENVIRONMENT. THE DOBRIS ASSESSMENT 599-611 (Copenhagen 1995); EEA, THE EUROPEAN ENVIRONMENT. STATE AND OUTLOOK 18, 20, 30 (Copenhagen 2005); EEA, EUROPE'S ENVIRONMENT. THE FOURTH ASSESSMENT 22 (Copenhagen 2007); European Commission, *Environment Policy Review 2008*, COM 304 (2009); EEA, PROGRESS TOWARDS THE EUROPEAN 2010 BIODIVERSITY TARGET 17-21 (Copenhagen 2009); EEA, THE EUROPEAN ENVIRONMENT 2010. STATE AND OUTLOOK 15 (Copenhagen 2010); OECD, ENVIRONMENTAL OUTLOOK TO 2050 (Paris 2012).

⁹ EEA, THE FOURTH ASSESSMENT 73 (Copenhagen 2007).

¹⁰ EEA, THE EUROPEAN ENVIRONMENT 2010, above, 71-5.

¹¹ Communication from the Commission, *2020 by 2020, Europe's Climate Change Opportunity*, COM 30 (2008) final.

greenhouse gas emissions from other parts of the world.¹² A closer look at greenhouse gas emissions within EU reveals mixed trends: whereas emissions from large point sources have been reduced, at the same time emissions from some mobile and diffuse sources, especially those transport-related, have increased substantially.¹³

Of particular importance in this respect is the resilience of the ecosystems. Increasingly fragmented by transport infrastructures, subject to intensive urbanisation, cultivation or cattle grazing, polluted and eutrophised, the ecosystems in Europe are sinking to the lowest common denominator, losing their cultural and natural specificity.¹⁴ For animal and plant species, this results in a fragmentation and isolation of their habitats, constituting one of the most serious threats to their long-term survival. As a result of this, they are suffering an unprecedented rate of extinction on account of the degradation of their habitats, which is only exacerbated by additional threats (poaching, excessive hunting, damage inflicted by tourism). To make matters worse, global warming and the depletion of the ozone layer are likely to precipitate much more profound changes to the distribution, structure and functions of European ecosystems. The European Environment Agency is of the view that Europe points towards a number of systemic environmental risks ‘which can be triggered by sudden events or built up over time, with the impact often being large and possibly catastrophic’.¹⁵ Whatever the causes, the environmental crisis is perceived as a serious problem in Europe, because ecosystems provide a wide array of services that are usually taken for granted until they have gone missing.

Every step forward—such as reductions in industrial pollution—appears to be cancelled out by the appearance of new phenomena—mass consumption, more diffuse source of pollution proving more difficult to control—or unforeseen risks—biotechnology, nanotechnology, endocrine disruptors, etc.

Last but not least, the environmental impacts are closely linked to other challenges, such as unsustainable consumption patterns, economic growth, etc. As environmental challenges become more complex in a more populated and wealthy Europe, the uncertainties and the risks associated with them have increased.¹⁶

¹² EEA, *THE EUROPEAN ENVIRONMENT 2010*, above, 27.

¹³ EEA, *THE EUROPEAN ENVIRONMENT 2010*, above, 34.

¹⁴ N. de Sadeleer, *The State of Biodiversity in Europe*, in Michael I. Jeffery & Karen Bubna-Litic, eds., *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide*, 181-92 (IUCN Academy of Environmental Law Research Studies 2007).

¹⁵ EEA, *THE EUROPEAN ENVIRONMENT, STATE AND OUTLOOK 2010*, p. 20.

¹⁶ EEA, *THE EUROPEAN ENVIRONMENT, STATE AND OUTLOOK 2010*, p. 20.

II. THE CLASHES BETWEEN ENVIRONMENTAL LAW AND THE INTERNAL MARKET

The relationship between trade and environmental issues are somewhat different at EU level than in the World Trade Organisation (WTO). At the core of EU integration lies, the internal market (Article 26 TFEU) that is based on the free movement provisions promoting access to the different national markets and on the absence of distortion of competition.

The internal market and environmental policy have traditionally focused on apposite, albeit entangled, objectives: deregulation of national measures hindering free trade, in the case of internal market, and protection of vulnerable resources through regulation, in the case of environmental policy. In other words, whereas the internal market is concerned with liberalizing trade flows, environmental policy encourages the adoption of regulatory measures that are likely to impact on free trade (eco-labels, product standards, restrictions on the use of hazardous substances, etc.). In addition, the internal market favours economic integration through total harmonization (setting up a common playing field) whilst environmental law allows for differentiation. Given that environmental protection levels still vary significantly from one Member State to another, there is a risk that the most stringent national regulation would hinder free trade in goods and services. Yet, if legislation in the recipient State is less permissive than that of the exporting State, the former will hinder free circulation of goods and services even if it does not provide for any difference of treatment between domestic and imported products and services. In such case, the courts are called on to review the justification and the proportionality of the domestic measures at issue.

Needless to say, these differences play themselves out in concrete disputes ranging from the use of safeguard clauses in order to ban genetically modified organisms (GMOs)¹⁷ to restrictions placed on additives in fuels.¹⁸ In these clashes, internal market has an advantage based on its seniority. Freedoms in trading in services and goods are ingrained in the EU DNA. By way of illustration, the principle of free movement of goods flowing from Articles 34 and 35 TFEU—provisions prohibiting obstacles to the trade in goods—has been proclaimed by the CJEU as a fundamental principle of EU law. It follows that the environmental and health exceptions

¹⁷ N. de Sadeleer, *Marketing and Cultivation of GMOs in the EU. An Uncertain Balance between Centrifugal and Centripetal Forces*, 4 EJRR 532-58 (2015).

¹⁸ N. de Sadeleer, *Harmonizing Car Emissions, Air Quality, and Fuel Quality Standards in the Wake of the VW Scandal: How to Square the Circle?*, 1 EJRR (2016).

to this fundamental principle must be interpreted restrictively. What is more, traders can invoke the economic rights enshrined in the EU Treaties before their domestic courts whereas the victims of pollutions are deprived of a right to environmental protection stemming from the EU Treaties. The relationship is thus asymmetrical.

In addition, internal market law empowers the European Commission—the executive agency of the EU—to control the Member States wishing to adopt specific or more stringent environmental standards (prior notification and authorisation procedures under Article 114 TFEU). By contrast, national authorities are known to be reluctant to implement genuine environmental EU instruments (directives aiming at nature, water, soil and air protection; directives on climate change and listed installations, etc.). Here it is necessary to face hard facts: the main weakness of EU rules is, as recognized by the European Commission, their lack of efficacy, with directives appearing as paper tigers due to the hesitancy, criminal activities, or even bad faith, on the part of certain national authorities and the difficulties encountered by the Commission in pursuing infringements before the CJEU.

To conclude with, the relationship between the internal market law backed by a powerful business constituency and the environmental policy supported by a diffuse public is somewhat asymmetrical.

III. THE RISE OF PRODUCT STANDARDS AND THE RISK OF HINDERING FREE TRADE

Though environmental issues encompass a broad range of measures ranging from regulation of fisheries, marine pollution, climate change, cross-compliance in agriculture, waste management, control of hazardous substances, listed installations, or wildlife conservancy¹⁹, the tensions with trading interests are likely to become more severe where the public authorities, be it at international, be it at municipal level, are laying down product standards, energy production and distribution requirements, and waste management requirements.

In spite of the fact that industrial and energy production still remains an important source of pollution in the EU, the rise in consumption of products and services by European consumers has increased pressure on the environment. Throughout their life cycle, all products cause environmental degradation in some way: depending on their composition, their production

¹⁹ N. DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 175-224 (Oxford: OUP 2014).

method, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution. The environmental impacts of products have thus been progressively regulated at a national level, although many of these standards (chemicals, pesticides, biocides, etc.) are derived from EU secondary law. For instance, EU regulations set out the sulphur or lead content of petrol, the list of chemical substances which may not be placed on the market, as well as imposing restrictions relating to the composition of packaging, the phosphate content of detergents, and the maximum noise level for some types of appliance. Were the EU institutions unable to develop a genuine product policy, the Member States will have to do the job with the aim of boosting energy efficiency, renewables, recycling, reuse of discarded products, etc. Accordingly, by virtue of their cross-cutting nature, these national environmental standards constantly interact with the internal market.

Given the different product regulatory approaches being developed across the EU, there has been fear of the emergence of new barriers to free trade. For some, a neo-protectionist policy underlies EU, national and regional measures regulating products and services for the protection of the environment. Indeed, better protection of the environment through limiting the placing on the market or the use of hazardous products and substances could constitute a plausible motive for reinforcing the competitiveness of national undertakings. Additionally, such a strategy can become all the more insidious with the use of measures that make no distinction between domestic and imported goods. National measures can become all the more insidious where no distinction is made between domestic and imported goods.

Should such domestic rules be swept aside by the fundamental principles of free movement of goods and services? Given that the Treaty provisions on free movement have to be construed broadly, is the CJEU called upon to interpret narrowly those environmental measures caught by the TFEU provisions on free movement of goods and services? Does internal market law hang a Damoclean sword over every genuine national environmental measure?

Given the sheer complexity of the EU integration process, the answer to these questions is rather nuanced. As a matter of law, there are two ways in which to ascertain the compatibility of environmental measures taken by Member States with fundamental economic freedoms enshrined in the EU Treaties: negative and positive harmonization. However, before commenting upon these two categories of harmonization, attention should be drawn to the improvements brought by the Treaty of Lisbon, which

amended in 2009 the former EU Treaties.

IV. TREATY OF LISBON, THE PATH TOWARD RECONCILIATION

Given that the EU started off as a markedly economic project, it enshrined expressly an environmental protection policy only in 1987.

Today, thanks to the changes brought to the original treaties, a broad range of environmental objectives and obligations occupy a high place in the hierarchy of EU norms.

Sustainable development is enshrined in Article 3(3) TEU as one of the key objective of the EU legal order.²⁰ From the perspective of sustainable development, the concept of the environment has, in addition to its hard core, an economic dimension as well as a social dimension. In particular, in view of Article 3(3) TEU, sustainable development, and hence the objective of environmental protection, cannot be dissociated from the internal market. Paragraph 3 of this provision places these objectives on an equal footing. Consequently, they must be analysed more in terms of reconciliation than of opposition.

Moreover, while Article 191 TFEU instructs the Union to aim at a high level of environmental protection and lists the main principles of EU environmental law (such as the precautionary principle and the polluter-pays principle). These different Treaty provisions empower EU institutions to adopt harmonised rules with a view to protecting the environment.

Furthermore, environmental policy is not locked into clinical isolation on the grounds that Article 11 TFEU provides that environmental protection requirements be integrated into the definition and implementation of the Union's policies and activities. Therefore, environmental concerns are not isolated; they do overlap with other economic policies.

To conclude with, the recognition of the obligation to protect the environment as a key objective has not been neutral.

V. NEGATIVE HARMONIZATION

In granting greater importance to the environmental values, the CJEU could be influential in reconciling trade and environmental interests. In the absence of harmonization through directives or regulations (eg risks stemming from nanotechnologies are not regulated at EU level), or if harmonization by EU measures is not deemed to be complete (eg trade in

²⁰ N. de Sadeleer, *Sustainable Development in EU Law. Still a Long Way to Go*, 6(1) JINDAL GLOBAL LAW REVIEW. SPECIAL ISSUE ON ENVIRONMENTAL LAW AND GOVERNANCE 39-60 (2015).

wildlife), the provisions of the TFEU on free movement of goods and of services are directly applicable (*negative harmonization*). These provisions prohibit Member States from restricting free movement of goods (Arts. 28, 30, 34, 35 and 110 TFEU) or services (Art. 56 TFEU). Accordingly, domestic environmental measures must ensure that the economic freedoms enshrined in Treaty law are not breached. The scope of these rules tends to differ according to the legal category to which they belong: to each barrier to the free movement of goods and services there is a corresponding prohibition governed by specific rules.²¹

However, the TFEU and the case law allow Member States to maintain or adopt domestic restrictive measures that differ from those of other Member States in as much as they are deemed to be justified and proportional. With respect to the free movement of goods, for instance, Article 36 TFEU expressly allows national measures aiming at the protection of plants and animals or the protection of the life and the health of human beings against environmental risks (pollution, exposure to chemical substances, radiation, etc.).

That being said, attempts by EU as well as national courts to reconcile the conflicts between these fundamental freedoms and environmental protection have not always been characterized by coherence.²² The overall impression generated by the heterogeneity of cases adjudicated so far, ranging from green certificates, public procurements, renewables, recycling, pesticides, to the conservation of biodiversity, is thus one of confusion. Moreover, the case law has thrown up more questions than it resolves on issues such as the validity of eco-taxes, measures having an extra-territorial dimension, measures restricting the use of products, and the scope of mandatory requirements²³.

Nonetheless, lawyers have been noticing that a change of emphasis within the case law of the CJEU is underway. To the convenience of representation, we have chosen but a few examples related to measures enacted by the Danish and the Swedish authorities.

Consider, for the sake of illustration, the judgment of the CJEU in *Bhlume*. Regarding the prohibition laid down by the Danish nature conservancy authorities to import bees on the island of Laesø, the Court considered that ‘measures to preserve an indigenous animal population with

²¹ As to the manner in which environmental measures are caught by these economic freedoms, see N. DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 229-469 (Oxford: OUP 2014).

²² For a comprehensive of the EU case law on environment and trade disputes. Available at <http://www.tradeenvironment.eu/documents-case-law/>.

²³ N. DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 284-320.

distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population'.²⁴ The judgment has thrown into relief the importance of biodiversity given that the Court considered that, 'the establishment ... of a protection area within which the keeping of bees other than Laesø brown bees is prohibited', by reason of the recessive character of the latter's genes, constitutes an appropriate measure in relation to the aim' of biodiversity conservation. In addition, the population of bees at risk must not face an immediate danger of extinction for the exception to be justified.

Another case in point is *Swedish Watercraft*. A reference was made to the Court in the course of criminal proceedings brought by the Swedish Prosecutor's Office, against two boatmen for failure to comply with a prohibition on use of personal watercraft. The challenged measure concerned a general prohibition, mitigated by a regime of exceptions, on using watercraft in Sweden outwith specially designated waterways. The possibilities for use of the watercraft were extremely marginal at the time the questions were referred to the Court.²⁵ As regards the justification of regulations on the use of watercraft in Sweden, the Court reached the conclusion that the measure under review was justified by the objective of environmental protection as well as the protection of health and life of humans, animals, and plants. However, the parties argued that the Swedish authorities could have chosen a less severe regime which would in principle permit the use of such craft, provided that they were not used in areas considered to be sensitive, such as a limited number of nature sanctuaries and bathing areas. Nonetheless, the Court held that this alternative was not as effective as the prohibition ultimately put in place. In other words, restricting the use of watercraft to a limited number of designated waters is adequate for the purpose of protecting the environment.²⁶

More recently, in both *Alands Vindkraft* and *Essent Belgium*²⁷, the CJEU was called on to assess whether regional support schemes providing for the issuance of tradable green certificates for facilities situated in the region, concerned producing electricity from renewable energy sources could be compatible with the free movement of goods. At the outset, these schemes were running counter the internal market given that they were precluding the competent authorities to take account of guarantees of origin

²⁴ Case C-67/97 *Bluhme* ('Laesø bees') [1998] ECR I-8033, para. 33.

²⁵ Case C-142/05 *Mickelsson and Roos* ('*Swedish Watercraft*') [2009] ECR I-4273.

²⁶ *Swedish Watercraft*, para. 34.

²⁷ Case C-573/12, *Alands Vindkraft* (2014); Joined cases C-204/12 to C-208/12 (2014), *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*.

originating from other Member States. Accordingly green certificates awarded in Finland to green electricity producers are worthless in Sweden. The Court took the view that, these territorial limitation requirements limiting the foreign green certificates for the electricity produced abroad were necessary in order to attain the objective promoting the use of renewable energy sources. In particular, the Court highlighted the difficulty to determine the nature of electricity once it has been allowed into the transmission or distribution system. Accordingly, the national schemes were deemed to be compatible with the internal market rules.

These developments in the case law have come about due to the fact that the EU Treaties, as discussed above, have struck a better balance under Article 3(3) TEU between the internal market and sustainable development; two objectives that have been placed on an equal footing. Given that the EU's goals are no longer solely economic, but also environmental, the proper functioning of the internal market must be accommodated with non-market values.

VI. POSITIVE HARMONIZATION

Second, instead of being at odds with one another, the two policies can also support each other through the adoption of harmonized EU standards integrating the environmental dimension. Accordingly, regulation of products and services impairing the environment is often governed by directives or regulations adopted by the EU institutions, within the framework provided for in the TFEU (*positive harmonization*). For instance, harmonization on the basis of the internal market competences of national rules on the marketing of many products—such as dangerous substances, fertilizers, insecticides, biocides, GMOs, cars, trucks, aircraft, watercraft, or electric and electronic equipment—creates a precise legal framework limiting Member States' ability to lay down their own product standards. The free discretion of national authorities will be limited as harmonization deepens.

By way of illustration, REACH has become the hallmark of the EU chemical policy. The regulation aims at improving the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry.²⁸ REACH applies to all chemical substances; not only those used in industrial processes but also in our day-to-day lives (substances in cleaning products,

²⁸ Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

paints as well as in articles such as clothes, furniture and electrical appliances). In particular, the companies producing or importing chemical substances bear the burden of proof of the safety of their substances. They have to demonstrate to European Chemical Agency how the substance can be safely used, and they must communicate the risk management measures to the users. If the risks cannot be managed, the EU institutions can restrict the use of substances in different ways. In accordance with the principle of substitution, the most hazardous substances should be substituted with less dangerous ones.

Regulation (EC) No 1107/2009 of October 21, 2009 concerning the placing of plant protection products on the market provides also a striking evidence of the conciliation between health and environmental protection and the internal market. It aims amongst other things to ensure a high level of human, animal and environmental protection as well as to provide clearer rules to make the approval process for plant protection products more effective. On the one hand, the risks entailed by active substances of each plant protection product must be assessed by an EU country called Rapporteur Member State and the European Food Safety Agency. Subsequently, in accordance with the opinion of the Committee for Food Chain and Animal Health, the substance must be approved by the European Commission in order to be used in the EU. On the other hand, before any plant protection products—that are likely to contain at least one active substance—can be placed on the market or used, it must be authorised in the Member State concerned. Whenever it has been authorised by a single Member State, the product can be freely trade within the internal market.

Provided that the EU institutions are committed to achieve a high level of environmental protection, the advantages entailed by the positive harmonization through the adoption of regulations such as the ones discussed above are undeniable.

Firstly, for producers and distributors, it allows the setting, on the scale of the internal market, of environmental standards which then govern the marketing of products and services as well as their free circulation within that market. Given that positive harmonization determines more precisely the room for manoeuvre left to the Member States than a changeable adjudicatory approach, it is preferred to negative harmonization.

Secondly, as far as environmental product standards are concerned, harmonization by the EU lawmaker appears to be preferable than a changeable adjudicatory approach where the courts have to review the justification and the proportionality of an array of domestic measures.

Thirdly, harmonization is likely to reconcile the environmental

concerns with the internal market imperatives. For instance, environmental measures may benefit from the objective to harmonizing 28 different legal systems with a view to guaranteeing the free movement of goods and services as well as a high level of protection; the global level of environmental protection should be reinforced as a result.

Fourthly, paragraph 3 of Article 114 TFEU obliges EU institutions, for the purposes of establishing of the internal market, to pursue a higher level of protection ‘concerning health, safety, environmental protection and consumer protection’. While the level of protection guaranteed under EU law does not necessarily have to be the highest possible, this does not mean that it is non-existent, weak, feeble, or even intermediate. This obligation is additionally subject to judicial review.

However, despite the efforts of the EU institutions, the harmonization of standards is far from being perfect. Harmonization measures have been piled one on top of the other with any global vision. The instruments are subject to constant adjustment not only to scientific and technical progress, but also to decisions taken on an international level. Many product categories have not been harmonized so far. Therefore, the structuring of EU legislation is inspired less by the model of the symmetrical arrangement of French-style gardens familiar to the seventeenth-century landscape gardener André Le Nôtre, and rather more by the composition of a typical English park. This heterogeneity can end up leaving national authorities, businesses, and civil society utterly nonplussed.

VII. CHALLENGES AHEAD: ROLLING BACK ENVIRONMENTAL LEGISLATIONS WITH A VIEW TO CUTTING RED TAPE

One has to be aware that the EU is less likely in a near future to commit itself to foster ambitious environmental policies. In effect, it is when the legal principles underlying this branch of law are enunciated by the CJEU when ruling on hard cases and when the values are most clearly proclaimed in both the TEU and TFEU that the EU legislative output in environmental protection matters falters.

First, since the early 1990s, there has been a marked reduction of proposed environmental legislation. Second, the reduction in quantity of legislation went in parallel with a reduction of the binding character of new EU secondary law obligations. Third, there has been a marked tendency not to set out common environmental standards, such as emission values. In particular, there has been no willingness to fix limit values for discharges of hazardous substances into waters.

Lately, environmental law appears to be the sacrificial victim to recent political developments—Better Regulation, Smart Regulation, REFIT,²⁹ etc.—under which, according to the logic of deregulation, the law was called upon to climb down from its pedestal in order to engage with market requirements. The creed is to get rid of ‘burdensome regulation and red tape’.³⁰ Environmental and health regulations amount to regulatory burdens jeopardizing ‘the competitiveness and innovativeness of European industries’.

Accordingly, environmental law should no longer take the form of a system of unilateral constraints which impose on social actors a definition of the common good or the general interest. It should be merely soft law. Public law constraints are simply one of many instruments, the role of which is in any event called into question.

To make matters worse, with the new Juncker Commission, deregulating appears to be more fashionable in Brussels than ever. The European Environmental Bureau President stressed recently that the ‘biggest reorientation away from environmental priorities in decades’ is actually taking place. ‘The audacity of the attack on environment through the set-up of the new Commission has been breathtaking.’³¹ With a striking rise in temperatures, this picture is somewhat bleak to say the least.

Along the same lines, in the proposed inter institutional agreement on better regulation that was hammered out at the end of 2015, the European Parliament, the Council and the Commission (the three institutions taking part in the lawmaking process) commit themselves to promoting the most efficient regulatory instruments, such as harmonisation and mutual recognition, to avoid overregulation and administrative burdens (34b).

Furthermore, with respect to Brexit, in order to assuage the fears of the UK, the chief of State and governments adopted in February 2016 a decision regarding a new settlement for the UK within the EU. That decision calls on the relevant EU institutions and the Member States to ‘take concrete steps towards better regulation, This means lowering administrative burdens and compliance costs on economic operators, especially small and medium enterprises, and repealing unnecessary legislation ...’³²

Needless to say, this far-reaching (smart) policy calls into question of the traditional functions of the State. The simplification process envisioned

²⁹ COMMUNICATION FROM THE COMMISSION ON THE REGULATORY FITNESS AND PERFORMANCE PROGRAMME, COM 368 (2014) final.

³⁰ EUROPEAN COMMISSION, BETTER REGULATION SIMPLY EXPLAINED (Brussels 2006).

³¹ J. Wates, *Regulatory Rollback Rampage*, METAMORPHOSIS 1 (Nov. 2014).

³² European Council, Conclusions of February 18 and 19, 2016, EUCO 1/16, 15.

by the EU institutions and the Member States leads to a genuine deregulatory trend, it is also a serious economic mistake. However, tougher harmonized regulations on products, renewables, nature conservation, and energy efficiency are not only good for the environment but also for the competitiveness of the Member States economies.

Last but not least, the trade and environment issue is already gathering momentum on both sides of the Atlantic given that environmental issues are likely to become one of the stumbling block in the negotiation of the *Transatlantic Trade and Investment Partnership* (TTIP) Agreement, that is likely to entail the harmonization or the mutual recognition of a broad range of product standards.³³ As a result, this forthcoming trade agreement might affect the balance struck down hitherto by the EU Treaties and the CJEU. However, the future agreement cannot undermine the balance struck in the EU Treaties. Environmental protection is not only a core objective of the EU but has also been placed in the founding Treaties of the EU on an equal footing with economic growth and the internal market.

CONCLUSION

The EU internal market is by its very nature not particularly susceptible to strong State regulation, which generally calls for the implementation of policies with the goal of protecting vulnerable environmental media such as aquatic ecosystems undergoing radical changes due to eutrophication, or species threatened with extinction. Although the Lisbon Treaty called for a more nuanced approach, Treaty law remains strongly wedded to a hierarchy of values favouring economic integration. In addition, whether the EU institutions are able to reconcile trade and environmental interests in secondary legislation remains to be seen.

³³ Directives of June 17, 2013 for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, ST 11103/13 Restreint UE/EU Restricted.

INTERNATIONAL ENVIRONMENTAL CRIME: A GROWING CONCERN OF INTERNATIONAL ENVIRONMENTAL GOVERNANCE

*Puneet Pathak**

Despite much development of the soft as well as hard laws in the field of international environmental governance, the response to environmental crimes has remained focused on non-criminal solutions. At the domestic level, laws addressing environmental crimes are traditionally seen as extension of public and administrative laws protecting the environment, rather than as a fully developed separate branch of criminal law. Various activities resulting in environmental degradation including the threat to global warming creates a sense of urgency, and also poses questions about the proper scope of international offences against the environment. Few international environmental instruments recognized environmental degradation as an offence such as illegal trade in wildlife, ozone depleting substances, dumping and illegal transport of various kinds of hazardous waste, illegal fishing, illegal logging and the associated trade in stolen timber. Recently there is a growing concern all over the world, regarding the fast growing criminal activities severely affecting the environment and the biodiversity. It poses a serious challenge to the international environmental governance which is already vulnerable mostly being soft law. The paper begins by looking at the conceptual limitations on the emergence of a mature international criminal law of the environment. It further discusses the issue by discussing the status of international environmental crime based on secondary data resource, and concludes by describing the future of the development of international criminal law to protect the environment.

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INTRODUCTION

International Environmental Crime (IEC) is one of the fastest growing areas of criminal activity globally, worth billions of dollars in profit to criminal groups around the world. According to INTERPOL, International Environmental Crime may be defined as “a breach of a national or international environmental law or treaty that exists to ensure the conservation and sustainability of the world’s environment, biodiversity or natural resources.”¹ Such crimes takes place in several forms—illegal trade in protected species, smuggling of ozone depleting substances, illicit trade in hazardous waste, illegal fishing and illegal logging and trade in timber. Apart from their serious environmental consequences, environmental crimes may involve corruption, loss of tax revenue and parallel trading with other forms of criminal activity. Due to the nature of environmental crimes, it affects the society at large and undermines prosperity, security and human rights. According to the World Economic Forum, environmental risks is to be of high concern in its 2012 Global Risk Assessment, from natural disasters such as irremediable pollution to species over exploitation.² Most importantly, International Environmental Crime constitutes a serious threat not only to sustainable development, but also to international peace and security. Such illegal activities pose challenges to the effective implementation of compliance with and enforcement of environmental law including multilateral environmental agreements (MEAs). UN Office of Drugs and Crime (UNODC) in its 2010 report included a chapter on the illegal trade in environmental resources as a fast growing international crime.³ In March 2012, INTERPOL convened its first meeting confirmed the scale of environmental crime and the connection with organized crime, including issues of smuggling, corruption, fraud, tax evasion, money laundering and murder.⁴ Most of these crimes often fail to prompt the required response from governments and the law enforcement agencies, as

¹ INTERPOL, *Environmental Crime Programme*, STRATEGIC PLAN (2009-2010).

² WORLD ECONOMIC FORUM, GLOBAL RISK REPORT (2012). Available at http://www3.weforum.org/docs/WEF_GlobalRisk_Report_2012.pdf (last visited January 04, 2016).

³ UN Office of Drugs and Crime (UNODC), *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, (Vienna: UNODC 2010). Available at http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf (last visited December 12, 2015).

⁴ INTERPOL, INTERNATIONAL CHIEFS OF ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT: SUMMIT REPORT 2 (Lyon, France: INTERPOL 2012).

they are often perceived as ‘victimless’ crimes. For most countries, combating environmental crime is currently not a priority and the issue often remains overlooked and poorly understood, despite the actual and potential scale and consequences.⁵ The present paper first describes various impediments in the emergence of International Environmental Crime (IEC) due to its unique nature. Further, it focuses on the magnitude of the problem of IEC describing five types of international environmental crimes which are currently considered to be the major importance. It also discusses the various initiatives taken at international level in response to IEC through policies and programmes and institutional mechanism involve to deal with such type of crimes. Lastly the paper concludes the discussion with suggestions.

I. IMPEDIMENTS IN THE EMERGENCE OF IEC

The edifice of public international law has long been seen as an impediment to the growth of both international criminal law and international environmental law. States will quickly raise the principal of sovereignty when they perceive that, the relevant acts occurred within their territorial jurisdiction. The principal of state sovereignty may be reinforced in international environmental debate, because of the close association between the environment and development as well as the principal of the control over natural resources. The dominant mode of regulating environmental matters is dependent on the traditional international mechanisms such as international instruments, international institutions and international conferences. States are more concerned about their sovereignty and upgrading the international environmental law through criminal sanctions to the extent to which it is in their national interest.

The international community in practice has experimented with three broad areas of criminalization, none of which wholly capture the particular characteristics of offences relating to the environment. The first category of international criminal law has developed to address the cross-border wrongs of private actors, such as trafficking offenses (e.g., of persons, drugs, works of art, protected species).⁶ In case of environmental crime, it involves legal

⁵ NIMUN:14, UNEP, DELEGATE STUDY GUIDE. Available at http://www.nimun.com.pk/study_guides/undp.pdf (last visited December 20, 2015).

⁶ There are some international instruments to deal with the international crime such as UN Convention against Transnational Organized Crime, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Person specially Women and Children 2000; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

entity such as companies and sometime state itself involved and it occurs either domestically or transnational. The second category of international crimes deal mainly with the international or inter-state relations and offenses that obstruct the proper functioning of the international system. Environmental crimes do not fall in this category of crime. A third category of international criminal law highlights its fundamental role as part of global projects related to protecting human beings themselves, rather than states such as genocide and crimes against humanity. The theoretical basis for this category is that, the offense is considered to “shock the conscience of mankind” and thus mandates a response based in international criminal law. However, it is hard to understand how environmental crimes could fit into the existing categories of crimes against humanity. The idea that an international crime arises if the act “shocks the conscience of mankind” is ambiguous. Environmental crimes do not necessarily shock the conscience of mankind.⁷ All the three categories of international criminal law are not conducive to the crime against the natural environment.

Numerous features of criminal law confine the development of a strong international criminal law regime for the protection of environment. *Firstly*, the distinctiveness of environmental damage as compared to other types of damage traditionally prescribed by the criminal law is problematic. This is because environmental interests and values do not enjoy an absolute protection under the law. Unlike traditional crime such as theft or homicide which may cause personal benefits only to the criminal, most polluting activities generate substantial societal benefits as well as environmental costs.⁸ This stands in clear contrast to existing international criminal offenses. At the same time, it is very difficult to distinguish between the legal and illegal destruction when much of the economy is based on the destruction of natural environment. *Secondly*, the diffused character of much of the harm inflicted on the environment may complicate any effort to reconcile environmental damage. Environmental harm is typically multi-layered; it exists at the global, regional and local levels. Indeed, environmental crime often lacks the single-event character typical of ordinary localized crime, and consequently may be much more about process than a one-time occurrence. In some cases, the existence of harm may only be ascertainable with a substantial passage of time, and might only

⁷ Frédéric Mégret, *The Problem of an International Criminal Law of the Environment*, 195-257, 505. Available at <http://www.columbiaenvironmentallaw.org/assets/pdfs/36.2/megret.pdf> (last visited January 12, 2014).

⁸ Susan F. Mandiberg, & Michael G. Faure, *A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe*, 34(2) COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 448.

affect future generations.⁹

Thirdly, the common culpability involved in some crime against the environment is also problematic for the establishment of an international criminal law of the environment. When it comes to major global environmental damage, liability may be so multifarious that criminal law may struggle with the delimitation of its scope. If the scope of responsibility is extended to all who have contributed in producing a certain result (e.g., global warming), there may be an infinite number of guilty parties. *Fourthly*, much of the environmental damage may result from negligence rather than intentional behaviour. Criminal liability for negligence in the act which causes environmental damage raises issues of substantive fairness to the accused, since the act having been in good faith, should not attract strong punishment. *Fifthly*, many environmental law obligations (the precautionary principle, general duties of care, etc.) are vague and broad. Typically, these principles are designed for broad domestic regulation or inter-state relations rather than the acting standards of criminal justice. Indeed, the criminal law may not seem a very appropriate tool for complex environmental risk management given the uncertainties involved.¹⁰ *Sixthly*, international environmental criminal liability will inevitably raise questions about the limitations of individual liability that must be addressed if any progress is to be made. At the Rome Conference that adopted the ICC Statute, attempts were made to include a regime of criminal liability for legal entities (particularly corporations), but were rejected.¹¹ This failure was not a problem for aggression or war crimes in international armed conflicts, which are largely committed by states, or even crimes against humanity and genocide, which are characteristically committed by individuals. However, it may be particularly problematic in the context of efforts to protect against global environmental degradation, where corporations play a significant role.¹²

II. ASSESSMENT OF THE SCOPE OF IEC

Five types of International Environmental Crimes are currently considered to be of major importance: illegal trade in wildlife; illegal

⁹ Mégret, *Supra* n. 07, at 506-507.

¹⁰ *Ibid.*, at 508

¹¹ Joanna Kyriakakis, *Corporate Criminal Liability and The ICC Statute: The Comparative Law Challenge 348 NILR*, (2009). Available at <http://mongolianmind.com/wp-content/uploads/2012/10/CORPORATE-CRIMINAL-LIABILITY-AND-THE-ICC-STATUTE-the-comparative-law-challenge-2009.pdf> (last visited January 02, 2016).

¹² Mégret, *Supra* n. 07, at 228.

logging and its associated timber trade; illegal, unreported and unregulated (IUU) fishing; illegal trade in controlled chemicals (including ozone-depleting substances); and illegal disposal of hazardous waste. However, new types of environmental crimes are emerging, for example in the carbon trade and other crimes related to water.¹³ Brief description regarding the status of these crimes is pertinent to discuss.

A. *Illegal Trade in Wildlife*

Illegal trade in wildlife is a severe transnational organized crime. Apart from the loss of the endangered species, the communities that live around them are also deprived from their livelihood and the potential source of income through wildlife tourism. According to the report (2002) of the Secretary-General, “In the absence of an exhaustive and reliable register of wildlife trafficking, together with indicators of the number of undetected cases, an assessment of the scope and nature of the problem becomes difficult. Worldwide, legal as well as illegal trade in wild animals (dead or alive) and plants, and in by-products such as ivory, skins, coral and medicines, is thought to represent an annual turnover of several billion dollars. The World Wildlife Fund estimates the total at \$20 billion.”¹⁴

Further, the report states that, “Available statistics on the world trade in animals, plants and their products indicate that, there are countries that are virtually exclusively exporters (or producers), and others that are essentially importers (or consumers). The latter are often re-exporters of finished products. The exporting countries are in Africa, Asia, Central and South America and Eastern Europe; the consumers are in East Asia (China (Hong Kong Special Administrative Region), Japan, Republic of Korea and Singapore), Western Asia, North America and Western Europe. Some countries (Canada, Australia and South Africa) are both consumers and producers.”¹⁵

Although, Elephant ivory has been banned since 1989, it is one the most demanded items in international illegal trade related to wildlife. However, in June 2002, 532 elephant tusks and over 40,000 traditional Japanese name seals, weighing in at over 6.2 tonnes, were seized from a ship arriving in Singapore from South Africa routed through Japan. It proves that, those involved in international ivory syndicates are rarely

¹³ *INTERPOL-UNEP Bulletin*, 216(1) 1 (Nov. 2013).

¹⁴ Progress made in the implementation of Economic and Social Council resolution 2001/12 on illicit trafficking in protected species of wild flora and fauna, Report of the Secretary-General, Feb. 2002 (E/CN.15/2002/7), *para.* 14.

¹⁵ E/CN.15/2002/7, *para.* 15.

brought in to justice, reinforcing perceptions of the illegal trade as a low risk-high return enterprise.¹⁶ According to UNEP report, the systematic monitoring of large-scale seizures of ivory destined for Asia is indicative of the involvement of criminal network, which are increasingly active and entrenched in the trafficking of ivory between Africa and Asia. At sites monitored through the CITES-led Monitoring Illegal Killing of Elephants (MIKE) programme alone, which hold approximately 40 per cent of the total elephant population in Africa, an estimated 17,000 elephants were illegally killed in 2011.¹⁷ Poaching is spreading primarily as a result of weak governance and rising demand for illegal ivory in the rapidly growing economies of Asia, particularly China, which is the world's largest destination market.¹⁸

In 2013, an INTERPOL led operation targeting criminal organizations responsible for illegal trafficking of ivory in West and Central Africa, resulted in some 66 arrest and the seizure of nearly 4,000 ivory products and 50 elephant tusks in addition to military grade weapons and cash. Intervention across five countries—Central African Republic, Cote d'Ivoire, Congo, Guinea and Liberia—also resulted in the seizure of 148 animal parts and 222 live animals, including crocodiles and parrots, which were released back into the wild.¹⁹ The international trade in Asian big cat skins (tiger and leopard) is largely driven by the market of China. Most of the tiger and leopard skins for sale across the Tibetan plateau and western China have been sourced from India and Nepal.²⁰ This is corroborated by information

¹⁶ *Environmental Crime: A Threat to Our Future*, Report of Environmental Investigation Agency (EIA), (2008). Available at http://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf (last visited December 20, 2015).

¹⁷ UNEP, CITES, IUCN, TRAFFIC, *Elephants in the Dust—The African Elephant Crisis. A Rapid Response Assessment*. United Nations Environment Programme, GRID-Arendal, (2013). Available at http://www.cites.org/sites/default/files/common/resources/pub/elephants_in_the_dust.pdf (last visited October 10, 2015).

¹⁸ Matti Joutsen, *Emerging Crime That Have an Effect on the Environment: Scope, Trends and Links to Corruption and Organized Crime*, WORKSHOP ON “EMERGING FORMS OF CRIME THAT HAVE AN IMPACT ON THE ENVIRONMENT: LESSONS LEARNED” 7 (UN Commission on Crime Prevention and Criminal Justice, April 22, 2013). Available at http://www.unodc.org/documents/commissions/CCPCJ_session22/PNI/2013_04_21_PNI_workshop_HEUNI.pdf (last visited October 12, 2015).

¹⁹ UNEP and INTERPOL, *Assess Impacts of Environmental Crime on Security and Development*, (UNEP News Centre). Available at <http://www.unep.org/newscentre/Default.aspx?DocumentId=2755&ArticleId=9686> (last visited November 20, 2015).

²⁰ *Hidden in Plain Sight: China's Clandestine Tiger Trade*, REPORT OF ENVIRONMENTAL INVESTIGATION AGENCY (2013).

from seizures in India and Nepal.²¹ The WWF estimated that, the value of illegal trafficking in wildlife is between US \$7.8 and 10 billion.²² United Nations in 2013 also estimated the annual cost of the illegal trafficking in endangered species range between US \$8 and 10 billion.²³

B. Illegal Logging & Its Associated Timber Trade

Serious organized crime in the forestry and timber industries is one of the most pressing environmental issues facing the global community. Driven by the low risks and high profits of a largely unregulated international market for cheap timber and wood products, illegal logging is threatening precious forests from the Amazon, through West and Central Asia, to East Asia. The timber trade involves major crimes not only in the illegal harvesting of forest but in the illegal acquisition of logging rights, illegal transportation, transshipment, use of forged documents, misrepresentation at customs, failure to pay relevant taxes, bribery and corruption of officials and a host of other financial and social crimes. During the trade of stolen timber Intimidation, human rights abuses, violence and even murder have all occurred which poses a serious threat to peace and security. Illegal logging threatens biodiversity, contributes to environmental catastrophes like flooding and forest fires, and is directly linked to the problem of climate change as around one fifth of global greenhouse gas emissions are linked to forest loss.²⁴

Between 50 and 90 per cent of logging in key tropical countries of the Amazon basin, Central Africa and South East Asia—is being carried out by organized crime, threatening efforts to combat climate change, deforestation, conserve wildlife and eradicate poverty. According to UNEP-INTERPOL report, globally illegal logging is worth between US \$30-100 billion

²¹ Kotwali (Rajasthan, India) seizure, 1992 where tiger bones were recovered; Ghaziabad (Uttar Pradesh, India) seizure, Dec. 1999 where 3 tiger skins, 50 leopard and 5 other skins were seized; Khaga (Uttar Pradesh, India) seizure, January 2000 where 4 tiger skins, 70 leopard skins, 221 other skins, 1,800 leopard claws, 132 tiger claws and 175 kg tiger bones were seized; Kanpur (Uttar Pradesh, India) seizure, April 2001 where 1 tiger skin, 19 leopard skins were seized; Lucknow (Uttar Pradesh, India) seizure, January 2003 where 12 leopard skins were seized; Allahabad (Uttar Pradesh, India) seizure, December 2007 where 3 tiger skins and 3 tiger skeletons were seized.

²² WWF, 2012: *Fighting Illicit Wildlife Trafficking: A Consultation with Governments*. Available at http://awsassets.panda.org/downloads/wwffightingillicitwildlifetrafficking_lr_1.pdf (last visited November 23, 2015).

²³ *Discussion Guide for the Thematic Discussion on the Challenge Posed by Emerging Forms of Crime, That Have a Significant Impact on the Environment and Ways to Deal with It Effectively*, E/CN.15/2013/2. Available at <http://www.unodc.org/unodc/en/commissions/CCPCJ/session/22.html> (last visited November 23, 2015).

²⁴ ENVIRONMENTAL INVESTIGATION AGENCY REPORT (2008).

annually—account for between 15 and 30 per cent of the overall global trade.²⁵ In 2013, an INTERPOL operation targeting large scale illegal logging and forest crime resulted in almost 200 arrests as well as in the seizure of millions of dollars' worth of timber and some 150 vehicles across Latin America. The operation carried out under Project Leaf, an INTERPOL-UNEP initiative, was undertaken in 12 countries in Central and South America resulting seizures of wood and related products, during the operation are equivalent to some 2,000 truckloads of timber estimated at around USD 8 million. The illegal trade hampers the Reducing Emissions from Deforestation and Forest Degradation (REDD) initiative—one of the principal tools for catalyzing positive environmental change, sustainable development, job creation and reducing emission.²⁶

Indonesia's rainforests have been the victim of one of the biggest environmental crimes the world has ever witnessed. UNEP report (2007) estimated that, 73-88 percent of timbers logged in Indonesia are illegally sourced.²⁷ In terms of a monetary valuation of illegal logging, estimates range from US\$600 million to US\$8.7 billion per year.²⁸ Both supply and demand-side companies contribute to unlawful, inequitable and destructive illegal logging practices. Consumer's appetite for pulp, paper and furniture in developed nations like the United States, the European Union and Japan, coupled with growing demand in developing countries like China and India, have fueled further exploitation of already depleted forests. Current models of globalization have encouraged the flourish of trade of products made in countries with poorly enforced labor and environmental standards.²⁹ It is estimated that, the European Union imports around US\$4 billion worth of illegally—sourced wood products annually, but has failed to put in place any form of legislation to exclude illegally-sourced timber from the market.

²⁵ UNEP-INTERPOL REPORT, *Green Curb on Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests*, (2012). Available at http://www.unep.org/pdf/RRALogging_english_scr.pdf (last visited November 08, 2015).

²⁶ UNEP and INTERPOL, *Assess Impact of Environmental Crime on Security and Development*, (Press Release, December 06, 2013). Available at <http://www.unep.org/environmentalgovernance/News/PressRelease/tabid/427/language/en-US/Default.aspx?DocumentID=2755&ArticleID=9686&Lang=en> (last visited December 18, 2015).

²⁷ Christian Nellman, *The Last Stand of the Orangutan—State of Emergency: Illegal Logging, Fire and Palm Oil in Indonesia's National Parks*, 43 (United Nations Environment Program and United Nations Economic, Social and Cultural Office, February 2007). Available at <http://www.grida.no/files/publications/orangutan-full.pdf> (last visited December 11, 2015).

²⁸ Cecilia Luttrell, *Lessons for REDD+ from Measures to Control Illegal Logging in Indonesia*, WORKING PAPER 74 4 (UNODC 2011).

²⁹ ALDA CHAN, *ILLEGAL LOGGING IN INDONESIA: THE ENVIRONMENTAL ECONOMICS AND SOCIAL COSTS* (2010). Available at http://www.unece.lsu.edu/responsible_trade/documents/2010/rt10_01.pdf (last visited December 18, 2015).

C. *Illegal Unreported and Unregulated Fishing*

Illegal, unreported and unregulated (IUU)³⁰ fishing in various forms is a significant threat to achieving biological sustainable fisheries and a serious management problem for a large number of fisheries on which industries and coastal communities depend. IUU fishing contributes to overexploitation of fish stocks and is a hindrance to the recovery of fish populations and ecosystems. It damages the marine environment, distorts competition and puts those fishers who operate legally at a disadvantage. It also adversely affects the economic and social well-being of fishing communities, especially in third world countries where coastal communities may rely heavily on fish resources.³¹ Common forms of IUU fishing include fishing without permission, catching protected species, breach of gear restrictions, disregarding catch quotas, high grading catches and deliberate under-reporting and misreporting.³²

It is estimated that, the total value of current illegal and unreported fishing losses worldwide are between \$10 billion and \$23.5 billion annually, representing between 11 and 26 million tonnes. Developing countries are most at risk from illegal fishing, with total estimated catches in West Africa being 40% higher than reported catches. Such levels of exploitation severely hamper the sustainable management of marine ecosystems. Although there have been some amount of success in reducing the level of illegal fishing in some areas, these developments are relatively recent and follows growing international focus on the problem.³³ World fisheries deliver annual profits

³⁰ Illegal fishing violates the laws of a fishery. It includes fishing out of season; harvesting prohibited species; using banned gear or techniques; catching more than a set quota and fishing without a license; unreported fishing is that which is not declared (or is misreported) to the relevant authority or regional fisheries management organization; unregulated fishing is conducted by vessels without nationality; flying a flag of convenience; or flying the flag of a State not party to the regional organization which governs that particular fishing region or species. It also relates to fishing in places—or for fish stocks—where there is a lack of detailed knowledge, conservation or management measures in place. (SEAFISH 2012).

³¹ SEAFISH, THE SEAFISH GUIDE TO ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING 2 (Nov. 2012). Available at http://www.seafish.org/media/742176/seafishguidetoiuu_201211.pdf (last visited October 12, 2015)

³² EFTEC, COSTS OF ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING IN EU FISHERIES 6 (2008). Available at

http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/eftec_Costs_IUU_Fishing.pdf (last visited October 14, 2015).

³³ AGNEW, D. J., WALMSLEY, S. F., LEOTTE, F., BARNES, C., WHITE, C., & GOOD, S., WEST AFRICA REGIONAL FISHERIES PROJECT, ESTIMATION OF THE COST OF ILLEGAL FISHING IN WEST AFRICA: FINAL REPORT (Marine Resources Assessment Group Ltd. 2010). Available at http://www.mrag.co.uk/Documents/Estimation_of_The_Cost_of_Illegal_Fishing_in_West_Africa_Final_report_20100513.pdf (last visited December 18, 2015).

enterprises worldwide of about US\$8 billion and support directly and indirectly 170 million jobs, providing some US\$35 billion in household income annually. When the total direct and indirect economic effects arising from marine fish population in the world economy amounts to some US\$235 billion annually. At the same time, according to WWF estimates, pirate fishing accounts for an estimated 20 per cent of the world's catch and as much as 50 per cent in some fisheries with the value of pirate fish product estimated at between US\$10-23.5 billion per year. Food and Agricultural Organization (FAO) reports that, 52 per cent of the world's marine fish stocks are fully exploited, 16 per cent are overexploited and 7 per cent are depleted.

D. Illegal Trade in Controlled Chemicals (Including ODS)

The smuggling of ozone-depleting substances is directly connected to the Montreal Protocol on Substances that Deplete the Ozone Layer. The treaty entered into force in 1989, and has been amended several times. It calls for the gradual phasing out of the use and production of, first, chlorofluorocarbons (CFCs) by 2010 and then hydrochlorofluorocarbons (HCFCs) by 2030. These substances are used in particular as solvents and refrigerating agents. Illegal trade in Ozone Depleting Substances (ODS) as well as equipments containing or relying on ODS has been and continued to be a serious concern for many parties to Montreal Protocol. There are number of reasons for continued illegal trade in ODS and ODS equipments.³⁴ Since CFCs and HCFCs are markedly cheaper than the substances required replacing them, the illegal smuggling and use of CFCs increased during the 1990s.³⁵ Illegal trade of ODS began flourishing soon after the phase-out of CFCs production began in the European Union (EU) and the United States (US) in 1995. The first target for the smugglers was the lucrative US market, where a high import tax on CFCs designed to dampen down consumption, meant high profit to smugglers. Most of the smugglers used a gaping loophole in the Montreal Protocol allowing free trade in recycled CFCs. The production of CFCs continued in EU, Russia and China to fulfill the need of domestic market as well as shifting the target to developing countries by illegal trade of CFCs.³⁶

³⁴ OZONNEWS, XIII, 4 (UNEP, Dec. 30, 2013).

³⁵ Joutsen, *Supra* n. 18, at 8.

³⁶ *Environmental Crime: A Threat to our Future*, REPORT OF ENVIRONMENTAL INVESTIGATION AGENCY (EIA) (2008). Available at http://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf (last visited December 18, 2015).

According to a report³⁷ issued in September 2011 by the Environmental Investigation Agency (EIA) and the UNEP, 22 global consumption of CFC peaked during the mid-1990s (at 189,000 metric tons), and then decreased to the full phase-out of CFCs in 2010. The illegal trade in CFCs was estimated to have had its own peak of about 20% of the legal trade. However, the report expressed concern that, along with the phase-out of HCFCs in developing countries, smuggling will increase sharply. This assumption was based on the observation, that consumption of HCFCs grew twice as fast in the decade leading up to the establishment of the baseline than had occurred previously during CFC phase out over the corresponding length of time, and that the market size for HCFCs is much larger. Since 2004, most production of HCFCs has been in developing countries, particularly in Asia, and the smuggling of HCFCs is increasingly directed at the United States and Europe. This can be explained readily by the price differential: for example the cost of HCFC22 in the European Union ranges from €18 to 30 (ca. US \$24-40) per kilogram, the price in developing countries was only about €2 per kilogram.³⁸

E. Illegal Disposal of Hazardous Waste

Crime relating to the dumping of illegal wastes is the fastest growing waste stream in the world, a consequence of rapid turnover of electronic devices, particularly in the developed countries. In case of crime relating to the dumping of illegal wastes, the question of assessment of harm is particularly difficult. It is also difficult to specify the harm caused by the dumping of illegal wastes to individuals and to the community, since there are both direct and indirect effects on health and the economy. Most illegal wastes are dumped in developing countries, particularly in Asia and Africa. Indeed, given the enormous consumption in Europe and North America as well as the tightening of environmental laws in these same regions, a clear pattern of exporting wastes—illegally—from the developed “north” to the developing “south” has emerged. Already about ten years ago, it was suggested that, about a fifth of the containers of waste plastic and paper sent from Europe to Southeast Asia for recycling may be illegal. More recent estimates have been as high as 70%.³⁹ An increasing portion of these wastes

³⁷ *Joint Report by UNEP, European Commission DG Climate Action, Environmental Investigation Agency, Risk Assessment of Illegal Trade in HCFCs*, (2011).

³⁸ Joutsen, *Supra* n. 18, at 8-9.

³⁹ ELIZABETH HANFMAN, A COMPREHENSIVE ASSESSMENT OF ILLEGAL WASTE DUMPING. Available at <http://waterhealtheducator.com/upload/Illegal%20Waste%20dumping%Article.pdf> (last visited January 12, 2016).

are e-waste. Some 50 million tons of e-waste are produced annually, and for example in Europe only about 25 percent of this is recycled. The rest is usually shipped to developing countries for recycling—where the concern is that much of it is dumped illegally.⁴⁰

III. RESPONSE TO THE IEC

As a response of the transnational environmental crime, there are few initiatives taken at the international level. In 1994, United Nations in its resolution⁴¹ considered the role of criminal law in the protection of environment. In the resolution, the member states were urged to consider acknowledging the most serious forms of environmental crimes in an international convention. There are some international agreements that seek to protect the environment from the severe form of degradation. Protocol I of Geneva Convention 1977 relating to the victims of international armed conflict in its Article 35(3) include the prohibition on means of warfare which are intended or may be expected to cause widespread, long term and severe damage to the natural environment.⁴² This provision of the Protocol of Geneva Convention has been raised in the case of use of Agent Orange by US military in Vietnam⁴³ and the setting ablaze of oil wells in Iraq following the first Gulf War.⁴⁴ Though none has been convicted in these cases, it leads to the insertion of a provision under the statute of International Criminal Court which brings about international criminal responsibility in case of severe damage to natural environment. According to the statute of ICC (Rome), the act of “launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated is a war crime.”⁴⁵

Besides the direct international offence relating to environmental

⁴⁰ *Ibid.*

⁴¹ E/RES/1994/15 of July 15, 1994, (The resolution contains various recommendations regarding the Role of Criminal Law in Protecting the Environment).

⁴² *Article 35(3) of Protocol Additional to the Geneva Convention of 1949 Relating to the Victims of International Armed Conflict*, (1977). (Article 35(3), it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment).

⁴³ *Agent Orange and The Vietnam War: Magnitude And Consequences*. Available at http://www.nlinternational.or/g/report/Agent_Orange_Flyer.pdf (last visited November 12, 2015).

⁴⁴ Jessica E. Seacor, *Environmental Terrorism: Lessons from the Oil Fires of Kuwait*, 2(1), AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1994.

⁴⁵ Rome Statute of International Criminal Court Art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

degradation, there is an indirect criminal law emanating from the criminal sanctions for the violation of certain environmental norms under certain Multilateral Environmental Agreements (MEAs) for example, the Marpol Convention⁴⁶ and London Convention⁴⁷ along with various regional agreements relating to marine pollution. The Convention on International Trade in Endangered Species (CITES)⁴⁸ and the Basel Convention on the Control of Transboundary Movement of Hazardous Waste, and their Disposal⁴⁹ also contain some criminal implementation provisions. Some animal protection⁵⁰ and ocean protection⁵¹ treaties include penal provisions both in terms of criminal conduct and the reporting requirement. International efforts have also been devoted to the role of criminal law in protecting the environment in the context of fighting organized crime. The UN Convention against Transnational Organized Crime, 2000 (UNTOC)⁵² and the UN Convention against Corruption, 2003 (UNCAC),⁵³ consists of detailed provisions to support international cooperation in criminal matters, such as extradition and mutual legal assistance, and provide for specific and innovative forms of cooperation that can be applied in the field of wildlife and forest crime.

The United Nations General Assembly (UNGA) in its resolution⁵⁴ affirmed the relevance of the UNTOC to fight illicit trafficking in natural resources, in which it stated that, the Convention “constitutes an effective tool and the necessary legal framework for international cooperation in combating such criminal activities as illicit trafficking of protected species of wild flora and fauna, in furtherance of the principles of the CITES.” In this connection, the UN Office on Drugs and Crime (UNODC) has an important role to play in terms of strengthening the capacity of Governments to investigate, prosecute and adjudicate crimes against

⁴⁶ International Convention for the Prevention of Pollution from Ships, 1973, 1340 U.N.T.S. 60.

⁴⁷ Convention for the Prevention of Marine Pollution by dumping of Waste and other Matters, 1972, 1046 U.N.T.S. 120.

⁴⁸ Art. 8(1) (1) of Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES) 993 U.N.T.S. 243.

⁴⁹ Art. 4 of Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal 1989, 1673 U.N.T.S. 125.

⁵⁰ INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING (1931).

⁵¹ International Convention for the Protection of Pollution of the Sea by Oil, 327 U.N.T.S., 3.

⁵² UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (2000). Available at <http://www.unosc.org/documents/treaties/UNTOC/publication/TOCCConvention/TOCebook-epdf> (last visited January 14, 2016).

⁵³ UN CONVENTION AGAINST CORRUPTION (2003). Available at http://www.unosc.org/documents/treaties/UNCAC/publication/Convention/08-50026_E.pdf (last visited December 18, 2015).

⁵⁴ UNGA Res.55/25 of 15 November 2000.

protected species of wild flora and fauna, complementing other international legal frameworks that are relevant for the protection of the environment, as for instance the Convention on Biological Diversity (CBD) and the CITES. Economic and Social Council of United Nations (ECOSOC) in its resolution⁵⁵ urged Member States to adopt “the legislative or other measures necessary for establishing illicit trafficking in protected species of wild fauna and flora as a criminal offence in their domestic legislation.” In a subsequent resolution⁵⁶, the ECOSOC urged Member States to cooperate with UNODC as well as with the secretariats of CITES and the CBD with a view to preventing, combating and eradicating trafficking in protected species of wild fauna and flora.

In 2007, the Commission on Crime Prevention and Criminal Justice (CCPCJ) adopted a resolution on “International cooperation in preventing and combating illicit international trafficking in forest products, including timber, wildlife and other forest biological resources”.⁵⁷ In 2008, the ECOSOC, in its resolution⁵⁸, reiterated the need for international cooperation and called for “holistic and comprehensive national multi-sectoral approaches to preventing and combating illicit international trafficking in forest products, including timber wildlife, and other forest biological resources.” At the International Tiger Forum held in Saint Petersburg, Russian Federation, in November 2010, UNODC Executive Director Mr. Yury Fedotov addressed the representatives of the 13 Tiger Range Countries regarding the importance of an effective response to the challenges posed by wildlife, and forest crime and stressed UNODC’s commitment to combat illicit trade in endangered wildlife.⁵⁹

In July 2011, national governments, international organizations and non-governmental organizations met to discuss critical issues related to the illicit trade of commodities such as wildlife, timber, fish and waste at the 11th Asian Regional Partners Forum on Combating Environmental Crime

⁵⁵ *Illicit Trafficking in Protected Species of Wild Flora and Fauna*, ECOSOC Res. 2001/12, 40TH PLENARY MEETING (July 24, 2001). Available at https://www.unodc.org/documents/WilflifeandFC/ECOSOC_resolution_2001-12.pdf (last visited December 14, 2015).

⁵⁶ ECOSOC Res. 2003/27.

⁵⁷ CCPCJ Res. 16/1 of 2007.

⁵⁸ ECOSOC Res. 2008/25 of 2008, *International Cooperation in Preventing and Combating Illicit International Trafficking in Forest Products, Including Timber, Wildlife and Other Forest Biological Resources* ECOSOC, 42ND PLENARY MEETING (July 24, 2008). Available at http://www.unodc.org/documents/WilflifeandFC/resolution_2008-25.pdf (last visited January 18, 2016).

⁵⁹ UNODC. Available at <http://www.unodc.org/unodc/en/frontpage/2010/November/tackle-organised-crime-to-save-the-tiger-says-unodc-executive-directer.html> (last visited January 04, 2016).

(ARPEC).⁶⁰ In 2012, ECOSOC adopted a resolution,⁶¹ on the recommendation of the Commission on Crime Prevention and Criminal Justice, on strengthening international cooperation in combating transnational organized crime in all its forms and manifestation. In this resolution, the Council recognized the involvement of transnational criminal organizations in all aspects of crimes, that have a significant impact on the environment and urged Member States to consider addressing different forms and manifestations of such crime. Cooperation is taking place between intergovernmental organizations such as UNEP, UNODC, INTERPOL, WCO, CITES and the World Bank, and through the International Consortium on Combating Wildlife Crime (ICWC). Other partners and environmental Non-Governmental Organizations (NGOs) such as the International Network for Environmental Compliance and Enforcement (INECE), the Environmental Investigation Agency (EIA) and TRAFFIC are also assisting governments in combating environmental crime.

CONCLUSION

Despite various efforts to respond the issue of transnational environmental crime, it is evident by the incessant rise of environmental crimes that, the issue of the development of international environmental criminal law remains episodic and quite limited in scope. The prohibition under Protocol-I of Geneva Convention is less concerned with protecting the environment than it is with regulating war. Though during the armed conflict attack on environment can certainly occur, but it is not the only context where they might cause sufficient damage to justify criminal sanctions. Most of the efforts to use criminal sanctions to protect the environment have originated at the regional level which is limited in its scope.⁶² UN efforts have never produced strong results and UNTOC ultimately omitted all reference to the environment.⁶³ Further none of such initiatives has intended to deal with perhaps the gravest dangers and global environmental threats but these initiatives have sought to target particular forms of harm to the environment. The paucity of international criminal

⁶⁰ ARPEC. Available at <http://www.unodc.org/eastasiaandpacific/en/2011/07/arpec/story.html> (last visited January 04, 2016).

⁶¹ ECOSOC Res. 2012/19.

⁶² CONVENTION ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW (1998).

⁶³ The Convention against Transnational Organized Crime makes no reference to the environment. In comparison, trafficking in person, smuggling of migrants, and illicit manufacturing and trafficking in firearms were subsequently made into protocols to the Convention against Transnational Organized Crime (UNGA Res. 55/25 Jan 08, 2001; UNGA Res. 55/255 June 08, 2001).

environmental legislation perhaps reflects the relatively recent and secondary status of environmental crimes in domestic legal systems. Laws relating to environmental crimes are traditionally seen as an extension of public and administrative laws protecting the environment at domestic level, rather than as a fully developed separate branch of criminal law to deal with environmental crime. In most of the cases, laws dealing with environmental crime developed after some incident occurred and aimed at remedying the particular causes of that disaster rather than creating a more comprehensive system of criminal law of the environment. Both international environmental law and international criminal law are booming disciplines in their own right, but their interaction remains curiously under-explored. Considering the distinct nature of transnational environmental crime, there is a need to have a comprehensive policy and institutional framework in response to the growing activities of transnational environmental crime. Being considered the nature of environmental crime and its potential impact as well as the reluctance of the states to punish those involved in such criminal activities, require a tribunal having super-national jurisdiction to deal with this category of criminal activities. Agencies such as INTERPOL, UNEP, WCO and the UNODC along with the secretariat of key MEAs and NGOs working in the field, should enhance cooperation with national agencies to strengthen enforcement of criminal law to prevent, suppress and punish transnational environmental crimes.

A COMPARATIVE ANALYSIS OF THE SPECIAL LIMITATIONS TO PARTY AUTONOMY IN NON-CONTRACTUAL OBLIGATION IN EU AND CHINA

Jianhua Sun*

This paper will offer a comparative analysis of the special Limitations to party autonomy in non-contractual obligation in European Union (EU) and China. There are a number of aspects that will be researched such as the type provisions which are providing from both legislations. The study will analyze the legislative provisions, the range of the non-contractual obligation and the type of limitations faced. For a while now, party autonomy has been viewed as the most important principle in conflict laws, and party autonomy could mirror the substantive principle of freedom in many areas of private international law. Furthermore, the recent scope extension from contracts to torts, succession has made significant contributions to this research. The above mentioned is very important and will be discussed in great detail, so the study can make noteworthy contribution to this line of research. The latter part of the paper will look into the provisions which are made focusing on the objectives of Rome II, the inadequacies of lex loci delicti and also the decline in dominance of lex loci delicti; thereafter an analysis of benefits and shortcomings will be given.

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INTRODUCTION

It is no exaggeration to claim that, party autonomy has become the most important principle in conflict of laws.¹ It is widely believed that, on the conflicts level, party autonomy could mirror the substantive principle of freedom in many areas of private law,² particularly in contractual terms, but in recent years, its scope has been extended from contracts to torts, succession,³ matrimonial property, and, in some jurisdictions, even divorce and maintenance.⁴ In 2007, at the European Union, the Regulation 864/2007 on the law applicable to non-contractual obligations (Hereinafter Rome II) was passed. At the same time, the Law on the Application of Law for Foreign-Related Civil Legal Relationships of the People's Republic of China (Hereinafter LAL) was adopted by the Standing Committee of the National People's Congress on October 28, 2010, and entered into force on April 1, 2011. The LAL also stipulate the principle of party autonomy but is not same as the applicable conditions of some of the limitations in the contract. Even though the principle of part autonomy is provided in the non-contractual obligations, both these legislative provisions do not have the same restrictions and are not applied in the same field.

This article will firstly analyze two specific provisions of legislations, namely, Rome II Article 14 and LAL Articles 44 and 47. This is to clarify how the principles make provisions for the special limitations. Include the provision of legislation, the range of the non-contractual obligation, what are the limitations. Secondly, the author will interpret why the provision is made for that principle and what the principles and the limitation currently provides. Include the objectives of Rome II, the inadequacies of *lex loci delicti* and the decline in its dominance. Thirdly, the article will also analyze what the advantages and disadvantages are, but also determine what the limitations are. Fourth, the current legislations may have omissions and/or inadequacies that this article will take a look at. Lastly, the author will give recommendations on how China should improve the legislation on the specific issues discussed. For example, with reference to the limitations in

¹ Matthias Lehmann, *Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 389 (2008).

² Friedrich K. Juenger, *Appendix A: Letter from Friedrich Juenger to Harry C. Sigman, Esq., June 23, 1994*, 28 VAN. J. TRANSNAT'L L. 445, 449 (1995).

³ Cf. Art. 5 Hague Convention of August 1, 1989 on the law Applicable to Succession to the Estates of Deceased Persons; Arts. 90(2) and 91(2) Swiss Bundesgesetz uber das International Privatrecht (IPRG); Art. 79 Belgian Wetboek van International Privaatrecht.

⁴ A limited freedom of choice already exists in several EC Member State, and is also endorsed in the various drafts of the so-called 'Rome III Regulation' (more properly: the 'Brussels II-ter Regulation') and in the drafts of a Regulation on international maintenance obligations.

contract and non-contractual obligations, one has to determine what the differences are with specific mention of time, explicit or implied, the choice of law is subject to public order and mandatory rules and other traditional restrictions. The restriction does not need formal requirements in China neither does the nature of the relationship between the parties. Requirements are only necessary for the tort, unjust enrichment and negotiorum gestio. The article also points out that, China did not bring these limitations and insufficiencies.

I. WHAT ARE THE PROVISIONS OF BOTH LEGISLATIONS

A. *Legislative Provisions*

In Rome II, the principle of party autonomy made provisions for limits in Art. 14⁵, whereas in China, provisions were mainly made in Arts. 44⁶ and 47⁷ of the LAL and is thus discussed below.

Art. 14 of Rome II from the time of infringement and to draw a distinction formulated from the past and projections for the future.

From the Article 14 of Rome II, we can see several limitations⁸, which may result in an application stricter than the national rules. To be more specific would be to consider from a time perspective, the difference between pre-dispute and post-dispute choice-of-law agreements for non-

⁵ Rome II Art. 14:

(1) The parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

(2) Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

(3) Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

⁶ LAL Article 44 Liability for violations of the laws, but often the parties have a common residence, and apply the common law of habitual residence. Violations occur, the parties agree to choose the applicable law, in accordance with their agreement.

⁷ LAL Article 47 of unjust enrichment, and without a suitable agreement between the parties choose the applicable law. The parties do not select the applicable law of the habitual residence of the parties together; no common habitual residence places for unjust enrichment, and without a place in the law.

⁸ See for an overview Th. M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 YEARBOOK OF PRIVATE INTERNATIONAL LAW 22-29 (2007).

contractual claims and allows enforcement of both, but subject to different restrictions⁹. Post-dispute agreements are enforced regardless of the identity of the parties,¹⁰ but pre-dispute agreements are enforced only if: (a) the parties are “pursuing a commercial activity”;¹¹ (b) the agreement is “freely negotiated”;¹² and (c) the choice of law is “expressed or demonstrated with reasonable certainty by the circumstances of the case.”¹³

There were distinctions made in the above paragraphs concerning the Rome II dispute discussing the post-tort disputes and pre-tort disputes. From these limitations, we can see a big difference between pre-dispute and post-dispute agreements under Rome II is that, pre-dispute agreements are enforceable only if the parties are engaging in ‘commercial activity’. In all other respects, the two agreements are subject to the same restrictions, which are delineated by (a) the mandatory rules of a state in which “all the elements relevant to the situation ... are located” in fully-domestic cases;¹⁴ (b) the mandatory rules of Community law, in multistate intra-EU cases,¹⁵ Article 3(4) Rome I contains the same exception; and (c) the ‘overriding’ mandatory rules¹⁶ and the *ordre public* of the forum state in all cases.¹⁷

This difference leads to a pre-selection and choice of the parties after the different interests, but also shows the inadequacy of post-selection, but not a lot of pre-selection ban.

Post-tort agreements do have disadvantages, because after the occurrence of the tort, the parties are in a position to know of their rights and obligations, and have the opportunity to weigh the pros and cons of a choice-of-law agreement. This limitation aims at protecting the weaker party in relation to a future tort. Through Article 4(3), the law applicable to the connected contract may also with regard to weaker parties re-enter the scene, but in relation to this provision, the Explanatory Memorandum clarifies that, it may not harm weaker parties.¹⁸

⁹ Rome II Art. 14 applies to all non-contractual claims other than those arising from unfair competition, restrictions to competition, and infringement of intellectual property rights. *See* Rome II, Arts. 6(4) and 8(3). These exclusions mean that, choice-of-law agreements on these two subjects are unenforceable, regardless of whether they are entered into before or after the dispute. For discussions of Article 14, *see* T. De Boer, *supra* note 6; M. Zhang, *Party Autonomy in Non-contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861 (2009).

¹⁰ Rome II, Art. 14(1)(a).

¹¹ Rome II, Art. 14(1)(b).

¹² *Ibid.*

¹³ *Ibid.* Another requirement is that, the agreement “shall not prejudice the rights of third parties.”

¹⁴ Rome II, Art. 14(2).

¹⁵ Rome II, Art. 14(3).

¹⁶ Rome II, Art. 16.

¹⁷ Rome II, Art. 26.

¹⁸ *Explanatory Memorandum to the 2003 Proposal*, 13.

Therefore, these agreements need little policing by the legal system.¹⁹ In fact, the system benefits from these agreements insofar as they promote judicial economy. This is why many codifications such as the German and Belgian expressly sanction post-tort choice-of-law clauses.²⁰ Similar restrictions can be found in, e.g., the Swiss statutes on private international law.²¹

Nonetheless, there are choice-of-law agreements that are of a more serious nature. Pre-tort choice-of-law agreements have more serious problems. Parties do and should not contemplate a future tort unless they have the relevant information, that will clarify details of the severity the injuries and they do not know who will injure them, or what will be the nature or severity of the injury. Moreover, a weak or unsophisticated party may uncritically sign such an agreement, even when the odds of him being the victim are much higher than the odds of his being the tortfeasor.²² For these and other reasons, most systems do not sanction pre tort agreements.²³ For example, China did not provide pre-tort agreement.

Even though there are restrictions, there is still enough room for expanding the scope. The principle of party autonomy is far from being applicable to all fields of the law. Yet, its scope is increasingly extended and it is now applied in areas where it was unthinkable before.²⁴ For example, there is the lack of negotiorum gestio and unjust enrichment etc.

However, in China, the provision can only be applied post-tort, which is then firstly followed by the application of an agreement choice, and secondly the law of common habitual residence and lastly the place of tort (unjust enrichment and negotiorum gestio).

B. *The Range of the Non-contractual Obligation*

As seen from the legislation, the scope is not the same specifically

¹⁹ Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, ELECTRONIC COPY 25. Available at <http://ssrn.com/abstract=1104284>.

²⁰ See, e.g., Egbgb Art. 42; Belgian Pil Code Art. 101; cf. Austrian Pil Act, § 35.

²¹ Switzerland: Art. 132 IPRG. See also Th. M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 YEARBOOK OF PRIVATE INTERNATIONAL LAW 27 (2007).

²² Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, ELECTRONIC COPY 25-26. Available at <http://ssrn.com/abstract=1104284>.

²³ See, e.g., Egbgb, Art. 42 (“After the event giving rise to a non-contractual obligation has occurred, the parties may choose the law that shall apply to the obligation.”) (emphasis added); Belgian Pil Code, accord. But see Dutch Pil Act, Art. 6 (“Where the parties have chosen the law applicable to any matter relating to tort, ... that law shall apply between them ...”).

²⁴ See generally Symeon C. Symeonides, *General Report, in Private International Law at the End of the 20th Century: Progress or Regress?*, 1, 56-57 (1999) (giving examples of areas of law where party autonomy has not been previously applied).

when compared to the Rome II, China has a more narrow scope. It did not provide pre-tort disputes and delict.

However, in Rome II, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.²⁵ This article points out the scope of Rome II and non-contract obligation. The principle of party autonomy in China, its scope of application compared to previous legislation has significantly expanded.

Nevertheless, if one studies the LAL, one discovers that, the doctrine of party autonomy has been widely applied, and is often the first resort for determining the applicable law in areas such as agency,²⁶ trust,²⁷ arbitral agreements,²⁸ matrimonial property relationships,²⁹ divorce by mutual consent,³⁰ movables,³¹ general contracts,³² consumer contracts,³³ post-tort disputes,³⁴ unjust enrichment and negotiorum gestio,³⁵ the transfer and licensing of IP rights,³⁶ and post-infringement disputes arising out of IP rights.³⁷ So we can see from the provisions that, China make its scope of the principle of party autonomy in non-contractual obligation: post-tort disputes, unjust enrichment and negotiorum gestio.

C. What are the Limitations

Just as seen in the law above, both legislations are subject to public order and mandatory rules, but there are differences. Firstly, with reference to time, China only make post-tort, but Rome II choice has also pre-tort. Secondly, the different applicable order of the various provisions in the absence of agreement, China opted to apply the law of common domicile, if there is no common domicile, the law of *lex loci delicti* (or the place of unjust enrichment and negotiorum gestio) will be applied.

²⁵ Rome II Art. 2(1).

²⁶ Article 16.

²⁷ Article 17.

²⁸ Article 18.

²⁹ Article 24.

³⁰ Article 26.

³¹ Article 37.

³² Article 41.

³³ Article 42.

³⁴ Article 44.

³⁵ Article 47.

³⁶ Article 49.

³⁷ Article 50.

II. WHY SUCH PROVISIONS ARE MADE

The principle of party autonomy in the contract and effective implementation fields are widely accepted principles of the conflict of law, that forms an important method of the choice of law, however, the field of traditional tort law in the selection is first applied to the *lex loci delicti*, this method of practice in the past that there are many problems and deficiencies which are often uncertain and cannot properly protect vulnerable parties, especially the rights of a party and the party's vulnerability can not always be protected. In 2007 at the European Union, the principle of party autonomy was introduced in the non-contractual obligation so that the principle applies to a broader scope. In 2010 in China, the LAL set the similar provisions and recognizes the application of the principle. The acceptance of such a legislation implied that, the legislation can make up for past deficiencies, balanced the relations of certainty, predictability and uniformity to promote the harmonious choice of applicable law. Recent legislation is mainly based on the following reasons.

A. *The Requirements of the Goal of Rome II*

Rome II is purposed to enhance the "compatibility of the rules applicable in the member states concerning the conflict of law(s)."³⁸ But Rome II has a stated focus on the "harmonization of conflict-of-law rules" with respect to non-contractual obligations.³⁹ Aimed at helping attain legal certainty regarding the applicable law in non-contractual obligations,⁴⁰ Rome II sets forth the choice of law rules that are required to be uniformly applied in the whole European Community "irrespective of the nature of the court or tribunal seized."⁴¹ But in this case, the harmony does not require uniformity. The lack of unity created a fair amount of uncertainty and therefore encouraged the so called "Forum Shopping".

One other reason, Most EU member states have long applied Seignie's approach to choice of law and have codified these principles during the twentieth century in an effort to influence EU choice of law.⁴² Party autonomy is no longer merely a tool to determine the applicable law but an

³⁸ Rome II, at para. 2.

³⁹ *Id.* at para. 4.

⁴⁰ *Id.* at para. 6.

⁴¹ *Id.* at para. 8.

⁴² Ralf Michaels, *The New European Choice-of-Law Revolution: Lessons for the United States?*, 82 TUL. L. REV. 1621 (2008).

instrument toward a competition among legal orders.⁴³

In addition, the Regulation is an essential part of the EU's larger project on private international law, which also includes recognition and enforcement of judgments and choice of law for contractual obligations, to promote the functioning of the internal market and stem forum shopping.⁴⁴

Rome II is bound to place such a premium on certainty because certainty is necessary to ensure uniformity.⁴⁵ Uniform rules can increase predictability. In Recital 16, it is said that, uniform rules are expected to enhance the 'foreseeable of court decisions'.⁴⁶ This can ensure a reasonable balance between the interests of the person claimed to be liable and the person who sustained damage.⁴⁷

Uniform conflicts rules ensure the stability of cross-border legal relationships, they reduce the attraction of forum shopping, and they enable prospective litigants to predict the outcome of choice-of-law lawsuit. Not surprisingly decisional harmony is viewed as an ideal worth striving for, even on the level of national conflicts law.

B. The Inadequacies of Lex Loci Delicti

Defects in the previous method can be used for the following inadequate choice of law. Mounting criticism of the prevailing choice-of-law method and its rigid, mechanical rules has led to innovations characterized by increased flexibility on the one hand, and a fresh orientation towards the policies of substantive law on the other. Naturally, these changes detract from the traditional ideal of decisional harmony: The achievement of uniform results is jeopardized both by flexible rules allowing a discretionary choice, and by rules inspired by substantive policies that may vary from state to state.⁴⁸

It argues that, in past decades, choice of law in tort cases has experienced more dramatic change than any other areas in the conflict-of-law area, but the transition from the single and territorially-based "place of

⁴³ Ralf Michaels, *The New European Choice-of-Law Revolution: Lessons for the United States?*, 82 TUL. L. REV. 1635 (2008).

⁴⁴ Rome II, Recital (7); at 6-7, COM (2003) 427 final (July 22, 2003).

⁴⁵ Clay H. Kaminsky, *The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law*, 85 TUL. L. REV. 81 (2010).

⁴⁶ Th. M. de Boer, *The Purpose of Uniform Choice of Law Rules: The Rome II Regulation*, NETHERLANDS INTERNATIONAL LAW REVIEW 300 (LVI 2009).

⁴⁷ Th. M. de Boer, *The Purpose of Uniform Choice of Law Rules: The Rome II Regulation*, NETHERLANDS INTERNATIONAL LAW REVIEW 301 (LVI 2009).

⁴⁸ Th. M. de Boer, *The Purpose of Uniform Choice of Law Rules: The Rome II Regulation*, NETHERLANDS INTERNATIONAL LAW REVIEW 330 (LVI 2009).

wrong” rule to the multiple, as well as flexible, approaches posed great challenges to the certainty and predictability that, the modern conflict of law is driven to achieve.⁴⁹

C. *The Decline in Dominance of Lex Loci Delicti*

It was widely recognized that, the *lex loci delicti* was applied to the tort and other fields concerning the tort for a long time. In the past decades, however, choice of law in non-contractual obligations has witnessed sweeping changes, particularly in the torts context.⁵⁰ Since the 1960’s, the principle has undergone profound changes. In *Babcock v. Jackson*⁵¹, case of tort law was criticized a lot. Scholars have pointed out that, this principle is too mechanical, because without distinction to all violations by the dominance of tort law, it is not necessarily a reasonable result. This is because with the rapid development of modern transportation and communication, the place of tort and the place of conclusion in contract have a great chance.

For example, a citizen from country A travels by car to country B and has a car accident in country B. The accident was caused by a citizen of Country B. Therefore, the law of country B should be applicable to the accident that occurred and thus cannot be assumed as reasonable. In addition, some countries have linked cases and found that, the *lex loci delicti* are very difficult to determine. Furthermore, the tort implementation of the high sea or un-inhabitant place applying the *lex loci delicti* has no meaning. So scholars have put forward the law of tort , it’s not only for the applicable law, you can also apply it to other laws such as the *lex fori*, the parties or the domicile of the nationality law of the land law, and the law of the place of the most significant relationship. To apply the law chosen by the parties is an option for a solution. As a result, territoriality still plays a role in shaping the choice-of-law rules for non-contractual obligations, but the dominance of territorially-based, traditional rules has become less and less of a phenomenon.⁵²

⁴⁹ Mo Zhang, *Party Autonomy in Non-contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 866 (2009).

⁵⁰ RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 371 (5th ed. 2006) (“A territorial rule is one that selects a state’s law without regard to the law’s content but based on some contact that state has with the parties or the transaction.”).

⁵¹ 12 N.Y. 2d 473, 483 (1963).

⁵² Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1744-53 (2008).

III. WHAT THE BENEFITS AND SHORTCOMINGS OF SUCH REQUIREMENTS WOULD BE

A. *Benefits*

In EU, extensive party autonomy (expressed in Rome II Art. 14) show the European legislature made judgments on the value of different rules and policies that may be characterized as liberal, progressive and open-minded.⁵³ The LAL in China has been widely applied in the principles involved in more traditional areas, which also shows that, China's open attitude to face the world, face modernization is future oriented. Party autonomy thus helps overcome the adverse effects for private relationships that are caused by the division of the world into multiple legal systems.⁵⁴

The author thinks that, this principle is helpful to the application of non-contractual obligation. The argument is that of certainty and cost-avoidance. There are three aspects. First, it enables contracting parties to plan their transactions and conduct with reference to a single legal system. Secondly, it reduces the cost of dispute resolution in having all connected disputes resolved by a single system of law. Thirdly, it increases the probability of amicable settlements of disputes, if the disputants only need to bargain with reference to a single system of law which they had chosen in the first place.⁵⁵ Specifically speaking, the reasons are as follows.

a. Helping resolve the dispute efficiently.

This is mainly reflected in: Firstly, the parties to negotiate options that dominate the tort law, the parties can expect tort cases dealing with the results. In the infringement occurred, the law chosen by the parties for more than one possible party, which is if the party has no choice, the court will give a comprehensive analysis of various factors to determine how the law should be applied to the case at hand. The parties have great uncertainty nature if allowed parties choose the law in the tort law applied. In tort law, it is applicable to a large extent. Secondly, the judges should be facilitated. The judge should not be involved in the infringement of each objective connection point, so the judge can directly allow the parties to choose the applicable law, and also to improve work efficiency so that the case can be resolved quickly.

b. Special restrictions would be needed to achieve the legislative policy

⁵³ Rome II, Arts. 7, 14.

⁵⁴ Matthias Lehmann, *Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 408 (2008).

⁵⁵ YEO Tiong Min, *The Effective Reach of Choice of Law Agreements*, 20 SAJLJ 734 (2008).

to protect the weaker.

For curtailed stability of the weaker and consumers, Rome II should also consider the rights of the beneficiaries, the manager and the profits in the unjust enrichment and *negotiorum gestio* made.

In EU and China, however, the critical question is whether this rule provides sufficient safeguards that, this newly-granted freedom will not be abused by the strong contracting parties. By limiting pre-dispute choice-of-law agreements to situations in which all the parties are “pursuing a commercial activity”, Rome II seeks to protect certain presumptively weak parties, such as consumers, employees, and certain—but not all—individual insured’s. This limitation, however, leaves exposed a whole host of small commercial actors, such as small businesses.⁵⁶

Subsequently, Article 14 does not live up to the statement in Recital 32 that “protection should be given to weaker parties by imposing certain conditions on the choice.”⁵⁷ As with some other freedom-laden ideas, Article 14 may well become the vehicle for taking advantage of weak parties many of whom are parties to “commercial” relationships.⁵⁸ China’s legislation also reflects the interest of certain policies that protect the weaker.⁵⁹

c. In line with the principle of economic efficiency, reduce costs, promote judicial economy.

The principle of party autonomy in the application of non-contractual obligation have some benefits and convenience, but it must be emphasized that, the core values underlying the Shawinigan approach, in particular the reduction of transaction costs for the parties, coincide with the goal of efficiency promoted by economic analysis of law.⁶⁰ Amongst other things, In the United States, Erin O’Hara and Larry Ribstein have made the case for an *ex ante* choice of law in torts based on considerations of efficiency.⁶¹ These arguments also support Article 14 of Rome II.

⁵⁶ Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, LIBER AMICORUM KURT SIEHR 546 (2010).

⁵⁷ Rome II, Recital (31).

⁵⁸ Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, ELECTRONIC COPY 28. Available at <http://ssrn.com/abstract=1104284>.

⁵⁹ LAL Art. 42.

⁶⁰ Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383, 387 n. 25 (2003) (arguing that, “[i] many cases ... economic analysis appears to reinvent the wheel, through insufficient attention to traditional conflicts theory”); Wiegand, *supra* note 179, at 25-26; see also Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 807-15, 818-25 (2006) (supporting the above hypothesis). On tort conflicts in particular, see Ralf Michaels,

⁶¹ See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1210 (2000).

d. The principles in the process of using them under certain restrictions will be more conducive to achieving the original goals and objectives, so that the parties in the limited choice may resolve disputes in an effective and orderly, timely and reasonable expectation of the parties to protect the legitimate rights and interests. A very common theory holds that, the principle of party autonomy protects the reasonable expectations of the parties.⁶²

e. The principle of party autonomy can also reduce the parties to limit the selection of the court, and can thus help the court make a reasonably fair decision. Generally speaking, there are three principal ways for the international community to reduce forum shopping: (i) harmonization of the applicable substantive rules; (ii) through rules on jurisdiction; and (iii) harmonization of the applicable PIL.⁶³ Therefore, uniform rules of the choice of law in Rome II can promote harmony and strongly to avoid forum shopping.

B. Shortcomings

Uniform rules of the choice of law in promoting the harmony, but also bringing some negative factors to the party, mainly from the following aspects.

a. Uniform rules of the choice of law have shortcomings, as there were bound to be, both in coverage (e.g., defamation, media delicts) and in drafting that may lead to interpretative difficulties (e.g., with respect to quantification of damages and review of punitive damages).⁶⁴ In fact, the victim's habitual residence connection opens a door to the "forum shopping", as it is easier for individuals to move or may be its change their habitual residence than for companies. In addition, most law-and-economics scholars find modern approaches to choice of law unpredictable, chaotic,⁶⁵

⁶² Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471 (1989); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 283 (1966); Amos Shapira, *Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?*, 26 BROOK. J. INT'L L. 199, 203 (2000); see also Restatement (Second) of Conflict of Laws § 187 cmt. e (stressing the need for predictability); Weintraub, *supra* note 4, at 449 (same).

⁶³ Patrick L. Krauskopf & Andrea Tkacikova, *Competition Law Violations and Private Enforcement: Forum Shopping Strategies*, 4(1) G.C.L.R. 35 (2011).

⁶⁴ Perter Hay, *Contemporary Approaches to Non-contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation*, 4 THE EUROPEAN LEGAL FORUM (E) 151 (2007).

⁶⁵ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 430 (1990) (decrying "the destruction of certainty in the field of conflict of laws as a result of the replacement of the mechanical common law rules by 'interest analysis'"); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002); See Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1164 (2000) ("[P]ublic policy inquiries thwart certainty and predictability.").

and prejudiced in favor of plaintiffs and forum law.⁶⁶ Therefore, in China and the EU, the uniformed rules of choice of law are limited, and limit forum shopping is not completely restricted to the practice of the courts and the party's choose to circumvent the law.

b. It is regrettable that, Article 14 requires only minimal scrutiny. The only restriction it imposes on pre-tort agreements (that it does not impose on post-tort agreements) is that, it must be "freely negotiated" and that, the parties must be "pursuing a commercial activity". This is neither sufficient nor free of problems.⁶⁷

However, that party cannot always predict the precise issue with regard to which a dispute may arise and thus cannot guarantee a favorable result under the chosen law. Even if that party is fortunate to obtain such a result, that result will of necessity disfavor the other party.⁶⁸

c. Last but not the least, uniform rules of the choice of law opted to limit the time in the in specific areas and only in substantive law, while there was no limit on the other issues. So it should be pointed out that, the harmonization of choice of law rules will only stop forum shopping for substantive law advantages, not for procedural advantages.⁶⁹

IV. OMITTED ITEMS

China and the EU's principle of party autonomy are applied to extensive fields and expand the scope of application at the same time. There are appropriate restrictions that can be made, but these restrictions have not taken all the issues into account or made any relevant provisions. This was reflected in the following aspects:

(1) From a formal perspective, the principle of party autonomy when used in the contract is formal requirements, e.g., expressed or implied. But what appears unclear in Article 14(1) of Rome II is whether the choice must be made in writing or whether it could be made orally. LAL has also not made provision. However, given the importance of the choice of law, an

⁶⁶ Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992) (stating that modern approaches favor forum law, recovery, and less clearly, residents); But cf. Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291 (2000).

⁶⁷ Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 216 (Winter 2008).

⁶⁸ Symeon C. Symeonides, ed., *Private International Law at the End of the 20th Century: Progress or Regress?*, KLUWER LAW INTERNATIONAL 39 (1999).

⁶⁹ James J. Fawcett, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law*, ATHENS 22 (Oxford: Clarendon Press, August 1994).

agreement in this regard would normally be made in writing.⁷⁰

(2) The issues of the residence requirement are omitted. In view of this problem, it is unfortunate that, Rome II and LAL do not contain a provision stating that, if the parties are resident in different countries, but the law of those countries is the same as regards the point in issue, they will be treated as if they were resident in the same country. The Louisiana Civil Code has such a provision.⁷¹

(3) Whether the infringement of general rules can be ignored when the common rules of residence are forced in LAL Art. 44.

In addition, there is one other problem that is unclear when the law of the parties' common habitual residence applies, can one disregard the mandatory rules in the law of the place of the commission of the tort, or the law of the place where damage was sustained?⁷² It is important to note that, the common-residence rule is most questionable when the rights of third parties are affected.⁷³

(4) In adjusting the scope of legal relationship, should the party autonomy be taken a step further, and effect given to parties' choice of a law to govern non-contractual obligations connected to their contractual relationship?⁷⁴ This is not clearly defined in relevant provisions of the EU and China, so it was not conducive to appropriately and effectively solve the non-contractual choice of law issues, because it is not comprehensive and systematic enough.

(5) No researcher has argued why party autonomy is respected in the field of non-contract obligation, or why a choice by the Regulations uniform conflicts rules. At any rate, the preamble does not explain why the parties should be allowed to choose the law of a country, that is not in any way connected with the non-contractual obligation at issue. Such freedom of choice can only be understood if it is viewed as a transposition of the parties' power to dispose of their rights under substantive law to the level of conflicts law.⁷⁵

⁷⁰ Mo Zhang, *Party Autonomy in Non-contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 893 (2009).

⁷¹ Trevor C. Hartley, *Choice of Law for Non-contractual Liability: Selected Problems under the Rome II Regulation*, 57(4) I.C.L.Q. 901 (2008).

⁷² Guangjian Tu, *China's New Conflicts Code: General Issues and Selected Topics*, 59 AM. J. COMP. L. 583 (Spring 2011).

⁷³ Russell J. Weintraub, *The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-contractual Obligations: Simple and Predictable, Consequences Based, or Neither?*, 43 TEX. INT'L L.J. 408 (Summer 2008).

⁷⁴ YEO Tiong Min, *The Effective Reach of Choice of Law Agreements*, 20 SACLJ 733 (2008).

⁷⁵ Th. M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 YEARBOOK OF PRIVATE INTERNATIONAL LAW 22 (2007).

(6) Occurring issue in the contract and tort, we should how to apply this principle and make its limitation?

CONCLUSION

It's been 11 years since China's accession into the WTO. Since then, China's profound reform, active effort to adapt to the trend of economic globalization and also opening up the Chinese economy has put China in a good position. With this in mind and that China have had more frequent international exchanges and agreements; as well as close contacts in the field of international contracts, the cross-border transactions disputes then occurred more in a variety of non-contractual disputes. For China to actively respond to this situation, the timely development of the LAL was crucial. The relationship for many foreign-related civil legal applications has to be set to make it clear that, the relationship between China in the civil law on foreign attitudes and strategies are shown, to effectively protect the legitimate interests of the Chinese natural persons and legal persons. This will ensure that, the relationship between China and the international community stays friendly and is maintained. However, when the China passed the LAL, there were some problems that were discovered. Some of these problems are not mature enough to consider the development of legal norms and can not all be effectively solved, including some of the missing issues, discrepancies, and so provided is not comprehensive enough. Therefore, from the above analysis, we can reach the following conclusions.

First of all, In the future, the legislation or changes in the process of China's choice of law when the non-contract obligation is allowed to make a clear choice in advance, so you can clearly apply the law and increase the predictability. Party autonomy has the potential to reduce legal risk by enabling parties to specify in advance the scope of their liability.⁷⁶ In addition, China should make a clear requirement in the formal, which shall express the form and the parties will facilitate the application of the law. Thirdly, when applying the law of common residence, should avoid the conflict of mandatory rules in third party country, because the same requirements are found in the Rome II and should not infringe the rights of the third party. Last but not the least, in China, the principle of party autonomy will be applied to extend the scope of the non-contract obligation, but should deal with the difference of contract and non-contract obligation and define the limitations of different relationships within their respective legal relations.

⁷⁶ Tolek Petch, *The Rome II Regulation: An Update*, 21(8) J.I.B.L.R. 453 (2006).

REPRODUCTION OF WORKS FOR PRIVATE USE

*Ingrida Veiksa**

Access to the works on Internet is subject to the same general conditions for the use of copyright protected works—the use without permission is not allowed! However, this provision is “not working”, because in so called “information society” where anyone can easy access to the works placed on the world wide web (music, literature, sound recordings, films, television and radio programs etc.) and use them in different ways: view, download (reproduce) on computer, print, send to friend etc. Nowadays, the environment where authors’ works are used has significantly changed, and it would be appropriate to change the copyright system so that it would suit better to interests and concepts of modern people. That way the copyright protection would be updated taking into consideration both the authors’ interests and the information society’s right to access the scientific and art accomplishments.

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INTRODUCTION

Access to the works on Internet is subject to the same general conditions for the use of copyright protected works—the use without permission is not allowed! However, this provision is “not working”, because in so called “information society” where anyone can easy access to the works placed on the world wide web (music, literature, sound recordings, films, television and radio programs etc.) and use them in different ways: view, download (reproduce) on computer, print, send to friend etc. In today’s society, almost everyone has once “taken” from the Internet (you tube, torrents, google, e-library, etc.) a lovely song, a new movie, a photograph or a book, downloaded it to the computer, shared with others or used in any other way. In society, it is considered to be quite normal behavior, and hardly anyone condemns it. But according to law—use of

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copyright protected work without the permission of the author is infringement of rights!

If the author himself has posted his work on Internet, it is considered that, he himself has made it available to the public, so—allowed its use. However, the vast majority of cases it is not the author himself, but the other person who does not have any rights in particular work. Consequently we—the society, who effortlessly find these works on the Internet, are not entitled to use them.

In the fight against this kind of unauthorized, use of copyright protected works are involved a number of law enforcement institutions, which catch, investigate, accuse, judge, enforce the sentence, it has been a number of convictions, but the situation has not improved!

I. EXISTING INFRINGEMENT OF AUTHOR'S REPRODUCTION RIGHT

Nowadays, according to the law of many countries, individuals (consumers¹) are allowed to make one copy of work from legally acquired tangible medium to create their own copy for personal needs by paying so called “blank type levy”. However, by the fast development of technologies, the Internet offers the growing variety of copyright protected content—which is placed there not always legally. This content is very rich, and members of society would love to read, listen, watch and download (reproduce) it on the self-owned recording media—computer hard drives, flash drives, phones, etc.

Every minute people upload around 72 hours of video to YouTube, and over 150,000 photos to Facebook. Sometimes this user-generated content “re-uses” existing material (such as re-mixes, mashups and home-made videos with a soundtrack added) and so is often covered by some form of licensing by rights holders, in partnership with certain platforms, but this is not transparent to the end user².

The precondition for the legality of private copying is requirement to copy only from a legal source. When work is uploaded on Internet without consent of author, consequently—it cannot be legally downloaded, as source is not legal. It is difficult to imagine that, any exception that countenances copying works which have acquired or accessed illegally, would pass the

¹ *2000 Latvia Copyright Law*, LATVIJAS VĒSTNESIS (2000), No. 148/150. Section 34. Blank Tape Levy.

² *European Commission Urges Industry to Deliver Innovative Solutions for Greater Access to Online Content*, (Brussels: December 18, 2012). Available at http://europa.eu/rapid/press-release_IP-12-1394_en.htm (last visited April 24, 2016).

three step test³. So—reproduction, paying a “blank type levy” is not recognized as a legal action, if the material has been made available to the public without permission of the rights holders (authors, performers, film and phonogram producers, broadcasting organizations). Consequently—one of the areas not covered by the exceptions and limitations, is limitation to make copies from the source which is not always legal.

But first has to be explored what is the existing legal framework at the international, European Union and national level, and then to search for ways how this framework can be further developed.

II. AUTHOR’S RIGHT TO GET REMUNERATION FOR REPRODUCTION OF WORK

According to the Copyright Law of all civilized countries, author has the right to allow or prohibit use of his work, and is entitled to receive a remuneration.

According to the Peter Groves—reproduction is an act restricted by copyright, dealt with Article 8 of the Berne convention, which does not clarify the meaning of the word save to say that any manner or form is covered.⁴

It was pointed as well by Dr. Francis Gurry (Director General of WIPO)—in future the two hitherto known funding models of authors (ancient patronage or modern copyright) will change, and new model must be invented, since digital era has brought too much new developments⁵. Professor Lawrence Lessig (Stanford University) believes the assumption that, intellectual property needs maximum protection leads us along the wrong path. No doubt intellectual property rights is the best way to further innovation; however it is permissible with the condition that, there is a balance between the public area and private property. When the Internet was first born, its initial architecture effectively tilted in the “no rights reserved” direction. Content could be copied perfectly and cheaply; rights could not easily be controlled. Any rights were effectively unprotected. This initial character produced a reaction (opposite, but not quite equal) by copyright owners. Through legislation, litigation, and changes to the network’s design, copyright holders have been able to change the essential character of the environment of the original Internet. If the original architecture made the effective default “no rights reserved”, the future architecture will make the

³ B. LINDNER AND T. SHAPIRO, *COPYRIGHT IN THE INFORMATION SOCIETY* 328 (Edward Elgar Publishing 2011).

⁴ GROVES P., *A DICTIONARY OF INTELLECTUAL PROPERTY LAW* 268 (Cheltenham, UK: Edward Elgar 2011).

⁵ CONFERENCE “INTELLECTUAL PROPERTY RIGHTS MANAGEMENT” (Riga, Latvia: May 8-9, 2012).

effective default “all rights reserved”. The architecture and law that surround the Internet’s design will increasingly produce an environment where all use of content requires permission⁶.

European Commission already in year 2009 initiated discussion of creating in Europe a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online, in particular by:

(1) protection of rights of authors (by creating a favorable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market);

(2) strengthening the competition in business (by promoting a level playing field for new business models and innovative solutions for the distribution of creative content);

(3) ensuring the interests of society (by encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users’ access to a wide range of content through digital networks anywhere and at any time).⁷

Intellectual property researcher from Germany Mr. Tim Kreutzer in his lecture in Goethe Institute in Riga, Latvia on February 24, 2010 pointed out that, one of the basic principles in copyright law is the legal protection of the author: the composer of a song, the filmmaker or software programmer is protected from unauthorized use of their created products. This involves, firstly, to his personal relationship to the respective work, but then also to its economic interests in their use. The author should benefit from any commercial exploitation of his/her work⁸.

Professor James Boyle (Duke Law School) holds a view that, intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years, and the fundamental principle of balance between the public domain and the realm of property seems to have been lost. In the professor’s opinion, the copyright term limits are now absurdly long—the most recent retrospective extensions, to a term which already offered 99% of the value of a perpetual copyright, had the practical

⁶ L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity*, 276-277 (New York: The Penguin Press 2004).

⁷ *Creative Content in a European Digital Single Market: Challenges for the Future*, A REFLECTION DOCUMENT OF DG INFSO AND DG MARKT 3 (October 22, 2009). Available at http://ec.europa.eu/archives/information_society/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf (last visited October 10, 2014).

⁸ T. KREUTZER, THE ORIGIN, STATUS AND FUTURE OF COPYRIGHT (Riga, Latvia: Lecture in Goethe Institute, February 24, 2010).

effect of helping a tiny number of works that are still in print, or in circulation, and it is between 1% and 4%.⁹ Professor Yoav Mazeh (Wolfson College, Oxford) observes that, copyright law has always tried to balance the need for incentives for creativity, on the one hand, and the need to enable society to access works which have been created, on the other. Broadening the protection provided by copyright provides greater incentives for authors, but narrows the public domain, that is, the common cultural resources to which the public has access. Finding the right balance between sufficient incentives for creativity and over-restricting the public domain has always been, and still is, one of the main challenges of copyright law¹⁰.

Writer Marjorie Heins (founder of the Free Expression Policy Project) holds a view that, copyright law is a tricky balancing act. The problem with this is that, it ignores the critical pivot on which copyright law is built—the balance between monopoly control and free expression, and fair use is especially important in enriching our culture because it encourages new works¹¹. Professor Michael Geist (*University of Ottawa Law School*) emphasizes the dangers of copyright that veers too far toward copyright creators at the expense of the public. He notes that, excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization¹².

Till Kreutzer considers that, copyright system is removed from the protection of creative works supporting to the protection of economic interests of the industry exploiting the work. Reforms at the political level have often stated that, they wanted to strengthen the rights of copyright holders, but in many cases, it is only to interests of the industry exploiting the work. In the past, copyright was a law for professionals—for authors and publishers of books, record and film industry. Today, there are legal amateurs on the Internet who are in contact with copyright issues almost every day. Therefore copyright has become a law regulating the general behavior of the society. However, it is much too complex to use for this

⁹ J. Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, DUKE LAW SCHOOL & TECHNOLOGY REVIEW (2004), Nr. 9. Available at <http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html> (last visited September 22, 2008).

¹⁰ Y. MAZEH, PRESENT AND FUTURE PRIORITIES IN COPYRIGHT LAW. Available at <http://www.ip-institute.org.uk/ipacreport1.doc> (last visited February 16, 2011).

¹¹ M. HEINS, TRASHING THE COPYRIGHT BALANCE (September 21, 2004). Available at <http://www.fepproject.org/commentaries/bridgeport.html> (last visited February 16, 2016).

¹² M. GEIST, KEY CASE RESTORES COPYRIGHT BALANCE. Available at <http://www.michaelgeist.ca/content/view/181/77> (last visited February 16, 2016).

purpose and difficult to enforce because of its outdated conception¹³. The librarian David Gee (University of London) with more than eighteen years experience working in academic law libraries considers that, there are still many copyright “hot topics” to be addressed before this “copyright balance” is achieved, and it remains to be seen whether the current UK government will be minded to support the alterations to national copyright legislation that, librarians are lobbying for both in UK and in other jurisdictions¹⁴. Nowadays we see that, UK has adopted a number of amendments in its *Copyright, Designs and Patents Act*¹⁵, which among other things makes much easier public’s access to information, including that containing copyrighted works. But the question remained open—whether authors’ and other rights holders’ interests and the right to fair compensation has been respected?

As can be seen from the cited fragments of well-known copyright researchers—a balance should be established among right holders and the society—copyright cannot be furthered as a limitation of the freedom of acquiring the information, but authors has right of compensation for limitation of their rights.

III. TRENDS OF DEVELOPMENT OF LIMITATION TO REPRODUCTION RIGHTS

A. *Opinion of European Commission*

The issue of exceptions in the digital environment continues to be the subject of extensive discussion in Brussels and across the EU. There are even those that think that by artificially inseminating their laws with the US fair use defense, they can give birth to European Google¹⁶.

The European Commission points out, in the Memo distributed in Brussels on May 24, 2011: Reproduction fees have to be reconciled with free circulation of goods to achieve proper operation of the internal market, in order to enable undisturbed cross-border trading in goods subject to reproduction levies. Levies mean payments to be made in respect of recording devices and blank media in certain Member States, that have introduced an exception provided for in legal acts in respect of reproduction.

¹³ T. KREUTZER, COPYRIGHT IS OBSOLETE—TILL KREUTZER TALKS. Available at <http://www.goethe.de/ins/lv/rig/wis/sbi/bid/lv5122599.htm> (last visited February 16, 2011).

¹⁴ D. Gee, *A Copyright Balance? An Overview for Librarians of Current UK Copyright Law*, 35(1) THE OFFICIAL JOURNAL OF THE INTERNATIONAL ASSOCIATION OF LAW LIBRARIES 47-61 (Spring 2007).

¹⁵ COPYRIGHT, DESIGNS AND PATENTS ACT. (United Kingdom 1988). Available at <http://www.legislation.gov.uk/ukpga/1988/48/contents> (last visited March 28, 2016).

¹⁶ B. LINDNER AND T. SHAPIRO, COPYRIGHT IN THE INFORMATION SOCIETY (Edward Elgar Publishing 2011).

Appointment of a high level independent mediator was promised in 2011 who should explore all possible approaches to approximate the methodology applicable to the fixation of levies, improve the administration of levies, in particular related to the type of devices subject to levies; fix the tariff rates, and interoperability of systems operating in different countries, taking into account the cross-border impact of different system of levies on the internal market. Coordinated efforts of all parties to resolve the still pending issues should become the fundament of comprehensive legislation measures on the EU level in 2012¹⁷.

Such comprehensive measures would include an initiative to amplify notably the concept of reproduction levy or royalty to include other forms of non-commercial use of authors' works, and such levy should be renamed to private culture-access fee. The Commission points out to the need for determining whether or not the presently applicable exceptions and restrictions imposed on copyright, in accordance with the Directive 2001/29/EC (EC, 2001) should be renewed or coordinated on the EU level. At present, according to Article 3 of the Directive, Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that, members of the public may access them from a place and at a time individually chosen by them (the Internet right). Similar to international Treaties, this Directive also provides for the possibility to impose restrictions and exceptions on the right of authors, however, unlike in case of conventions, the list presented in the Directive is exhaustive.

European Commission has already understood the need to modernize the concept of copyright in the digital environment of the information society. Development of digital media and cross-border online services opened and highlighted a number of gaps in copyright legislation and its practical application, which prevention plays an important role in establishing of a knowledge-based economy and a single digital market across the EU. European Commission has launched a number of initiatives for revision and modernization of EU copyright¹⁸. The Commission's

¹⁷ Common market of intellectual property rights. Fostering of creativity and innovation to provide growth of economy, qualitative working places and high quality products and services in Europe. Commission Memo to the European Parliament, the Council, European Economic and Social Committee and Region Committee. (Brussels: May 24, 2011).¹⁸ R. Gulbis, *Finding a Balance of Interests in the Digital Environment: Review of EU Copyright Rules*, 2(804), 18-21 (Jurista Vārds: January 14, 2014).

¹⁸ R. Gulbis, *Finding a Balance of Interests in the Digital Environment: Review of EU Copyright Rules*, 2(804), 18-21 (Jurista Vārds: January 14, 2014).

objective is to foster transparency and ensure that end-users have greater clarity on uses of protected material. This work should identify relevant forms of licensing and how to improve information for end-users¹⁹.

European Commission has launched a public consultation as part of its on-going efforts to review and modernize EU copyright rules. The consultation invites stakeholders to share their views on following areas: territoriality in the Single Market, harmonization, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform²⁰. An independent set of questions in the Public Consultation questionnaire consists from questions relating to the civil liability regime on copyright infringement in activities for commercial purposes. Questions are asked about the liability of intermediaries such as Internet service provider liability, as well as ensuring a balance between the need for copyright protection and the right to privacy and protection of personal data²¹. Internal Market and Services Commissioner Michel Barnier said: “My vision of copyright is of a modern and effective tool that supports creation and innovation, enables access to quality content, including across borders, encourages investment and strengthens cultural diversity. Our EU copyright policy must keep up with the times”²².

It means that, Commission understand the need of establishing balance among different groups of rightholders and information society, and very soon new conception of copyright should come. In some countries outside European Union, legislators have already started to modernize the copyright concept for better its compliance with needs of the information society in the digital environment.

New media offer rightholders an unprecedented opportunity for disseminating their works or other protected subject matter across different platforms and for reaching out to a larger audience. In this view, easier access to creative content will have to be combined with adequate protection of rightholders in order to furnish a growing and more diverse content

¹⁹ *European Commission Urges Industry to Deliver Innovative Solutions for Greater Access to Online Content*, (Brussels: December 18, 2012). Available at http://europa.eu/rapid/press-release_ip-12-1394_en.htm?locale=en (last visited April 24, 2014).

²⁰ Public Consultation on the Review of the EU Copyright Rules. Available at http://ec.europa.eu/internal_market/copyright/initiatives/index_en.htm (last visited April 24, 2014).

²¹ R. Gulbis, *Finding a Balance of Interests in the Digital Environment: Review of EU Copyright Rules*, 2(804), 18-21 (Jurista Vārds: January 14, 2014).

²² B. MICHEL, COMMISSION LAUNCHES PUBLIC CONSULTATION. Available at http://europa.eu/rapid/press-release_IP-13-1213_en.htm?locale=en (last visited March 24, 2016).

market. Wider access to content, with more attractive business models for tackling piracy and creating new revenue streams, can only be achieved with more effective licensing mechanisms and financial incentives. More collaboration with ISPs and other companies providing access technologies would provide more options for rightholders. New business models based on access subscription rather than payment for every single work, together with advertising-supported or feelslike—free services, could become more beneficial for rightholders and ISPs.²³

In the discussion on the Copyright Directive, a specific mention of Article 5.2.b should have been made, and also there should be discussion of the debate as to the scope of lawful private use in light of the recent CJEU cases. The UK could have been specifically mentioned in light of the recent legislative developments. There is also a section in the Latvian copyright act covering instances of lawful private use.

B. Findings of European Union Court of Justice

The award made by the European Union Court of Justice (EUCJ) in case of *Padawan* confirms that, rightholders have to receive compensation for restriction of their rights and, where such compensation is ensured by means of royalty, compensation has to be paid by those who provide reproduction devices and media to users; it is also pointed out, however, that people who make no copies cannot be expected to pay royalties. The award proves that, a rightholder has to receive compensation for restriction of rights and, where such compensation is ensured by means of royalty, compensation has to be paid by those who provide reproduction devices and media to users (in Latvia the compensation is paid by importers of blank media and reproduction devices). The possibility to make a back-up copy by means of such device or medium is treated as sufficient grounds for imposing royalty on them²⁴.

The author of paper would share the above opinion because efforts are being taken presently to support authors in receiving compensation for use of their works for personal needs.

With regard to the legal sources for private copying the EUCJ has held

²³ *Creative Content in a European Digital Single Market: Challenges for the Future*, A REFLECTION DOCUMENT OF DG INFSO AND DG MARKT 20 (October 22, 2009). Available at http://ec.europa.eu/archives/information_society/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf.²⁴ Judgment of the Court (Third Chamber) from October 21, 2010 in Case C-467/08, *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*.

²⁴ Judgment of the Court (Third Chamber) from October 21, 2010 in Case C-467/08, *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*.

in a number of its judgments. For example, *Copydan* judgment has established that, the private copying permitted only from legal source. Court found that, Directive 2001/29 precludes national legislation which provides for fair compensation, in accordance with the exception to the reproduction right, in respect of reproductions made using unlawful sources, namely from protected works which are made available to the public without the rightholder's consent.²⁵

The same is ruled in the *ACI Adam*²⁶ case: EU law must be interpreted as precluding national legislation, which does not distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful.

CONCLUSION

Nowadays, the environment where authors' works are used has significantly changed, and it would be appropriate to change the copyright system so that it would suit better to interests and concepts of modern people. That way the copyright protection would be updated taking into consideration both the authors' interests and the information society's right to access the scientific and art accomplishments.

Copying of copyrighted work from any site on the Internet in a single copy for personal use without ensuring for the legality of the source, could be recognized as on this special occasion, when the rights of authors, performers and phonogram producers' could be legally restricted.

To achieve this, the *Copyright Directive* (2001/29/EC) should be amended with ability for Member States to restrict the author's exclusive making available rights, lowering them to the rights of receiving remuneration. Once the Copyright Directive had been amended, Member States' national legislation might impose additional restrictions on the rights of authors and additional duties for society to pay fair compensation.

The national legislations could be incorporated with provisions envisaging an obligation on part of Internet service providers to charge a fair fee from each user, that would allow him/her to reproduce (copy) the work for personal use, without ensuring the legality of source, but instead paying an additional "blank tape levy".

The balancing of author and neighboring rights subjects is to the

²⁵ Judgment of the Court (Fourth Chamber) of March 5, 2015, Case C-463/12. *Copydan Båndkopi v. Nokia Danmark A/S*.

²⁶ Judgment of the Court (Fourth Chamber) of April 10, 2014, Case C-435/12, *ACI Adam BV and Others v. Stichting de ThuisKopie*.

benefit of all society—it provides the right for gifted people to receive the deserved remuneration and to pay taxes from it, as well as it lessens the possibilities of dishonest copyists of making shadow economics from illegally acquired resources.

Establishing balance among groups of rights holders make possible to secure observance of rights and circulation of funds which would allow, first of all, the rightholders to receive remuneration for their created intellectual product and the economy in general would benefit both in terms of taxes and GNP increase.

Piracy or the illegal use of intellectual property should be countered in all its forms of expression. However in the fight against piracy, one should not forget the individual's fundamental rights and the interests of the society in the information era.



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