

Dismantling the Dichotomy Between Business and Environmental law

Lunch Seminar of the Companies,
Markets and Sustainability Group,
University of Oslo Faculty of Law,
April 7, 2022



Aude-Solveig Epstein

Paris Nanterre University / NYU Abu Dhabi

ae88@nyu.edu



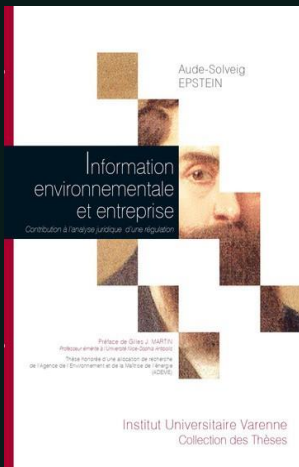
My background



Nice School of Economic Law (Gérard Farjat, Laurence Boy, etc.)

- Economic law : organization of corporations and markets by not just Governments but also private economic powers
- Subjecting economic law to fundamental principles of fairness
- Interdisciplinary approach, including internal analysis and critic of economic theory

2015



Rise of Informational environmental governance

- **Theoretical**: why not using more direct regulatory means ?
- **Critical** : spurring reflection among business circles, but without guaranteeing changing preferences and decisions
- **Prospective**: beyond corporate disclosure, towards a public right to know including environmental information hold by private companies ?, etc.

The sustainability transition of business law (2021-2023)

Research Project co-financed by the French Environmental Agency (ADEME) & Ministry of Justice (IHEJ)

Why is business law increasingly called upon to advance the ecological transition?

What are the main legal techniques and institutions of business law that can be used as levers to advance the ecological transition?

What are the main obstacles and limits to the sustainability transition of business law?

A- A functional differentiation, supported by legal scholarship



Environmental law : protection of the environment (internalization of environmental externalities)

VS.

Business law : protection of well-functioning companies and markets (organization of transactions)

The Power of the Narrative in Corporate Lawmaking

Harvard Public Law Working Paper No. 20-21

European Corporate Governance Institute - Law Working Paper 554/2020

Harvard Business Law Review, Vol. 11, No. 2, 2021

52 Pages • Posted: 6 Oct 2020 • Last revised: 28 Mar 2022

[Mark J. Roe](#)

Harvard Law School

[Roy Shapira](#)

Stigler Center, University of Chicago Booth School of Business; Interdisciplinary Center (IDC)

Date Written: August 24, 2020

« Corporate pollution burns up societal resources in the short-term at the expense of societal well-being in the longer-term. The firm that over-consumes hydrocarbons for today's profit at the expense of future civilization-threatening global warming benefits itself while society suffers in the long-term. But the operative mechanism is that the polluter does not pay most of the pollution's cost while it profits from overusing hydrocarbons.⁶⁷ The proper remedy is not to alter the firms' time horizons, but to alter their (and our individual) incentives to internalize the externalities, via, say, a carbon tax. »

« We do not regularly observe executives secretly damaging the environment and the corporation later paying up in the long-run; getting caught in the long-term makes for a good story but, as far as we can tell, it is too rare. The DuPont scenario had the firm polluting for the long-term while not expecting to be discovered. Even though eventually caught, DuPont seems nevertheless to have profited. Rewarding whistleblowing and facilitating liability are plausible cures; aligning the executives' time horizons with those of long-term shareholders would not have been a cure: DuPont's pollution was profitable in both the long- and the short-run. »

« Short-termism is the myopic, inefficient focus on short-term gains at the expense of larger losses in the longer term. Negative externalities are costs borne by people other than those who make the decision, which may create incentives to take actions that are harmful overall but that benefit the decision-maker. »

Frequent assumption: Environmental impacts should resonate in business law only when they may indirectly harm the company or the market



B- Justifications underpinning the claimed dichotomy between environmental law and business law

1. Protecting the economic system from political interference

2. Reducing transaction costs in a market economy

F. A. Hayek. 'The Use of Knowledge in Society'. The American Economic Review, Vol. 35, No. 4. (Sep., 1945), pp. 519-530.

We must look at the price system as such a mechanism for communicating information if we want to understand its real function—a function which, of course, it fulfills less perfectly as prices grow more rigid. (Even when quoted prices have become quite rigid, however, the forces which would operate through changes in price still operate to a considerable extent through changes in the other terms of the contract.) The most significant fact about this system is the economy of knowledge

with which it operates, or how little the individual participants need to know in order to be able to take the right action. In abbreviated form, by a kind of symbol, only the most essential information is passed on, and passed on only to those concerned. It is more than a metaphor to describe the price system as a kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust their activities to changes of which they may never know more than is reflected in the price movement.

SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors

FOR IMMEDIATE RELEASE

2022-46

Washington D.C., March 21, 2022 — The Securities and Exchange Commission today proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements. The required information about climate-related risks also would include disclosure of a registrant's greenhouse gas emissions, which have become a commonly used metric to assess a registrant's exposure to such risks.

3. Facilitate accountability of decision-makers

4. Lack of competence

BUT...

State's capacity to enact ambitious environmental regulations is jeopardized by large companies empowered by business law

Honest accounts of positive law do not support the existence of such a dichotomy



II- A false dichotomy, but a strong asymmetry



A- The Increasing Ecologization of Business law

- Prevalence of reflexive / enabling instruments:



Corporate environmental reporting (no specific sanctions)

Voluntary corporate purpose (optional)

Duty to take into consideration environmental stakes (e.g. French Civil Code, art. 1833) (no specific sanctions / exclusion of many sanctions applicable by default)

International Trade Law

1947



Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;



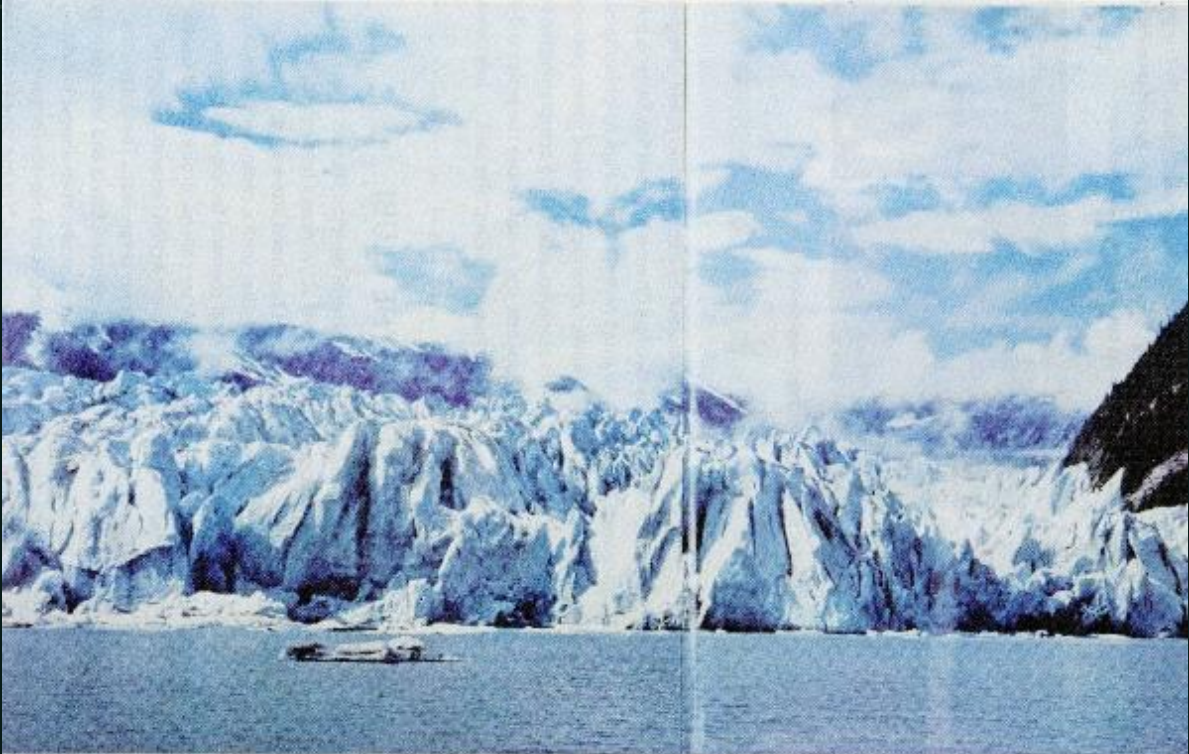
« Each Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment. » (FTA EU/Singapore, 2019, Art. 9.9)



« Each Party reaffirms its commitment to effectively implement in its law and practices, in its whole territory, the multilateral environmental agreements to which it is party. » (CETA, art. 24.4)

B- Economic interests deeply embedded in environmental law

A RECENT body of law,
strongly connected to
SCIENTIFIC progress



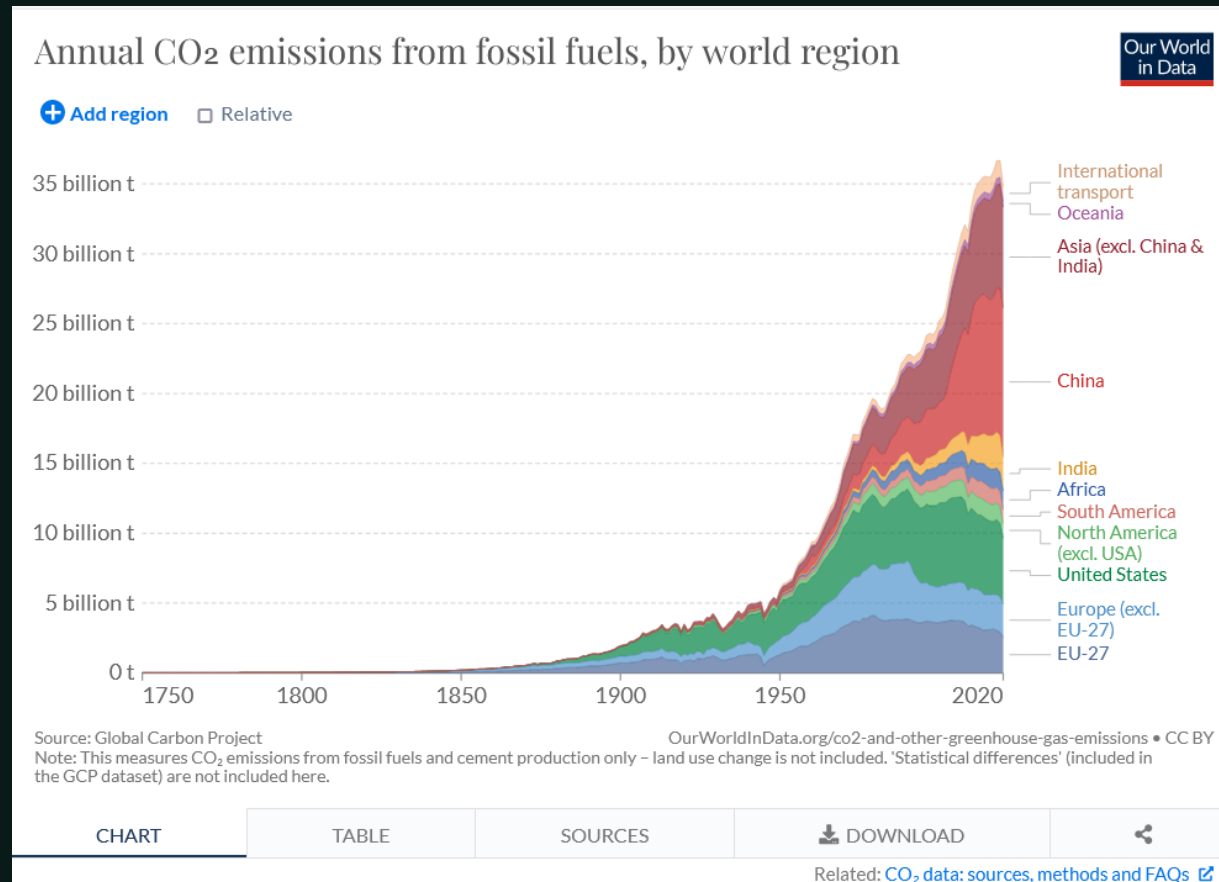
EACH DAY HUMBLE SUPPLIES ENOUGH ENERGY TO MELT 7 MILLION TONS OF GLACIER

This giant glacier has remained unmelted for centuries. Yet, the petroleum energy Humble supplies—if converted into heat—could melt it at the rate of 80 tons each second! To meet the nation's growing need for energy, Humble has applied science to nature's resources to become America's Leading Energy Company. Working wonders with oil through research, Humble provides energy in many forms—to help heat our homes, power our transportation, and to furnish industry with a great variety of versatile chemicals. Stop at a Humble station for famous Esso Extra gasoline, and see why the "Happy Motoring" Sign is the World's First Choice!

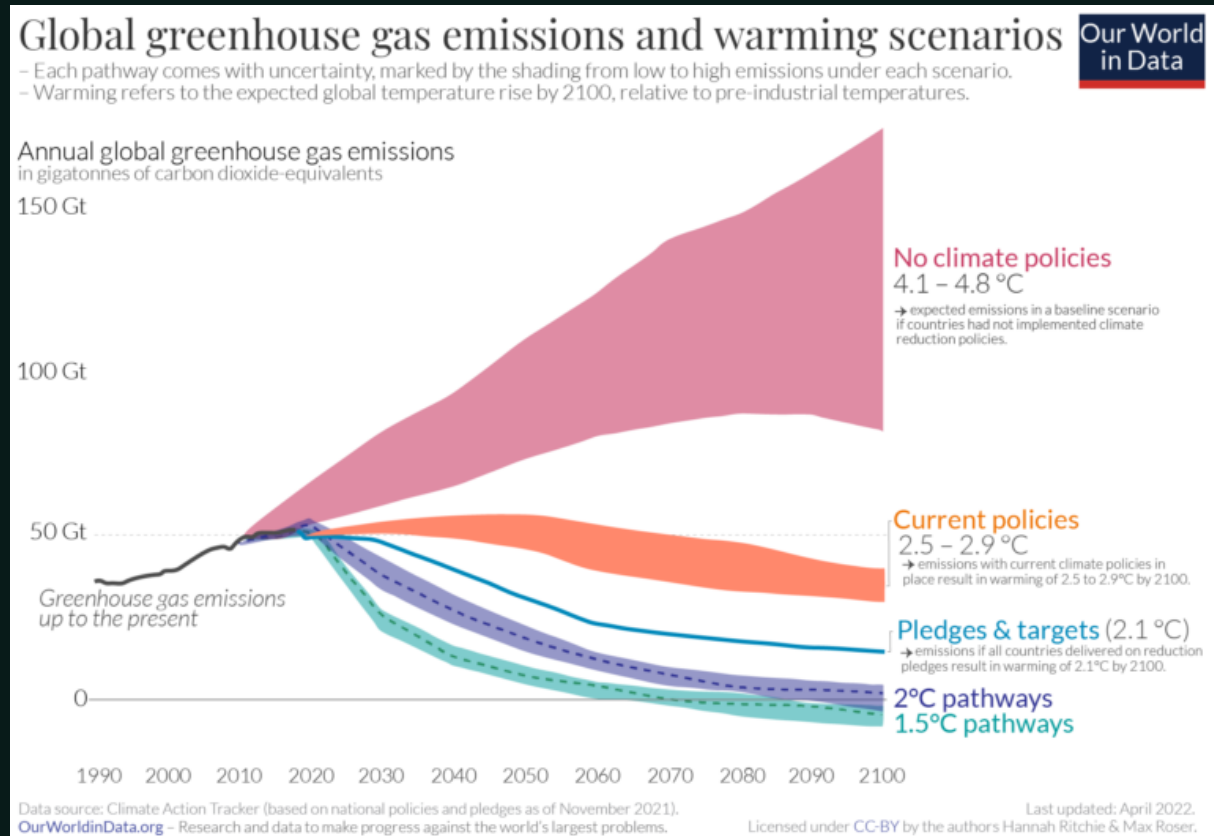
HUMBLE
OIL & REFINING COMPANY
America's Leading Energy Company

Advertisement in Life magazine, February 2, 1962, 10 years before Humble

An overall
INEFFICIENT
and
INEFFECTIVE
body of law



A well-
documented lack
of ambition



A constant lack of
enforcement means

Proposal for an amended Directive 99/2008/EC of the European Parliament and of the Council Directive on the protection of the Environment through criminal law (Dec. 15, 2021) :

« (...) These conducts have a potential high risk to human health and the environment and can lead to particularly serious negative impacts on the environment and the society. Despite the actually occurring and potentially possible detrimental consequences, **currently the enforcement of the relevant rules is not sufficiently effective.** The adoption of and reliance on administrative sanctions by Member States has, to date, proven to be **insufficient to ensure compliance with the rules on protection of the environment** which calls for stronger measures on preventing and fighting environmental crime. »

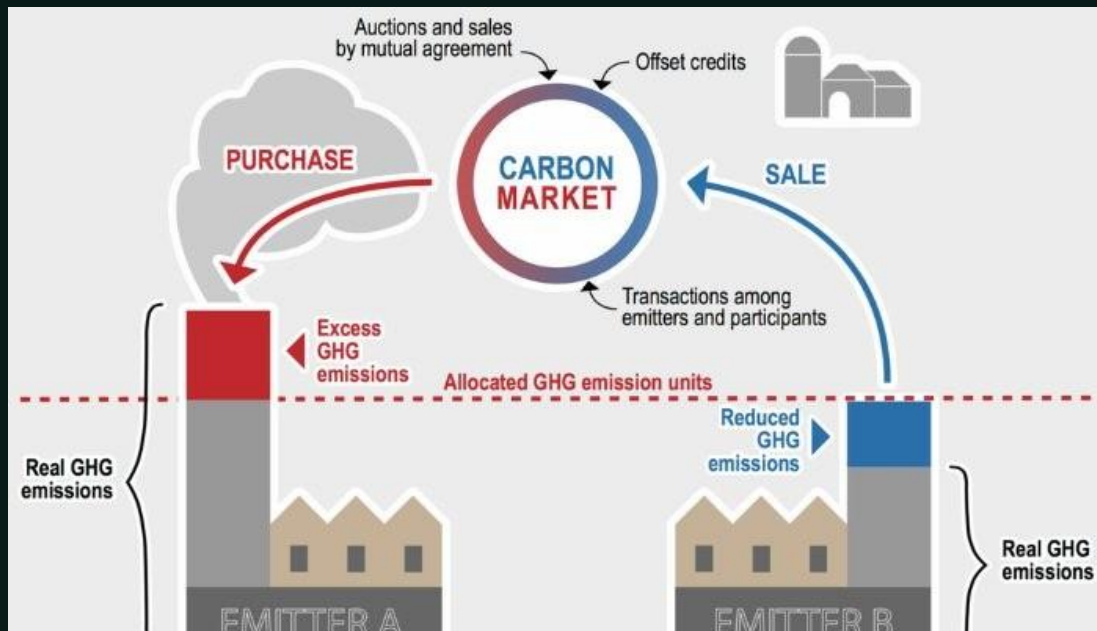


- A body of law that has historically **accompanied the destruction of nature without stymieing it**
- A law that **handles disputes about conflicting aspirations regarding the use of natural elements**, rather than a law that protects the environment (Todd S. Aagaard. 'Environmental harms, use conflicts, and neutral baselines in environmental law'. Duke Law Journal, Vol. 60, No. 7 (April 2011), pp. 1505-1564)
- **A balance of interest generally favourable to business interests**

Economic instruments of environmental law accommodating business interests both structurally and because of the way they have been implemented

The example of the European ETS

A cap and trade system



A longlasting oversupply of (free) allowances leading to very low prices

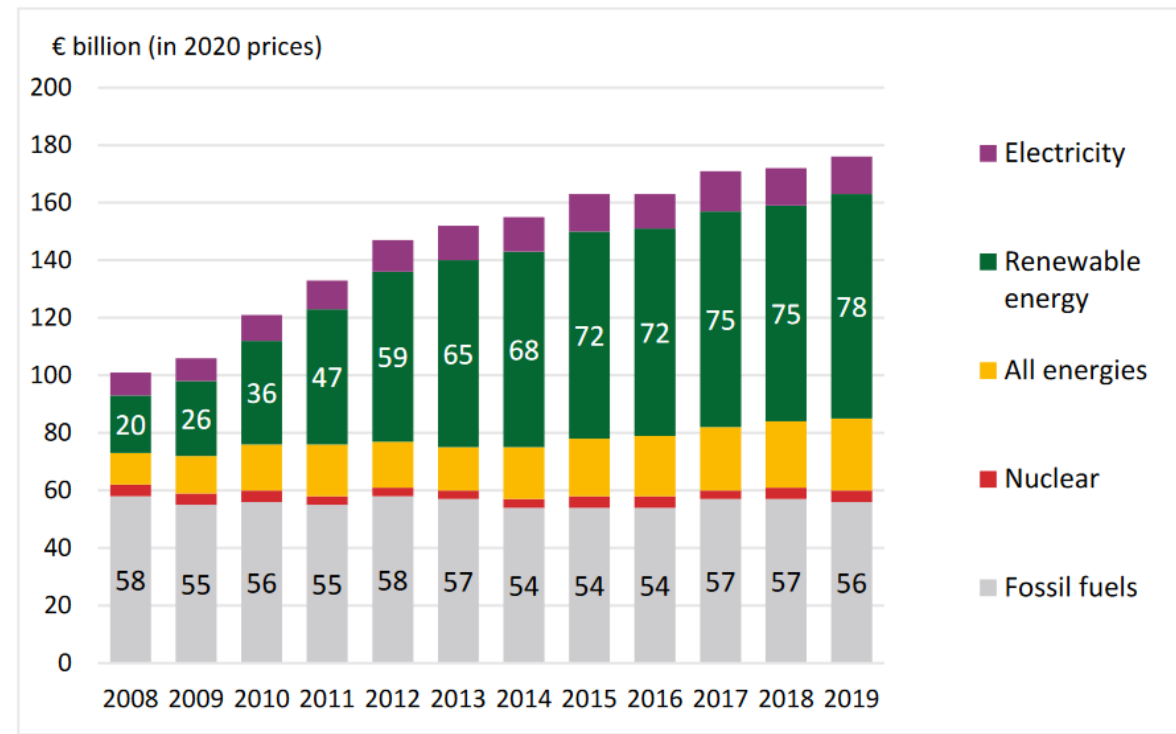


A general trend to offset environmental taxes through Government subsidies

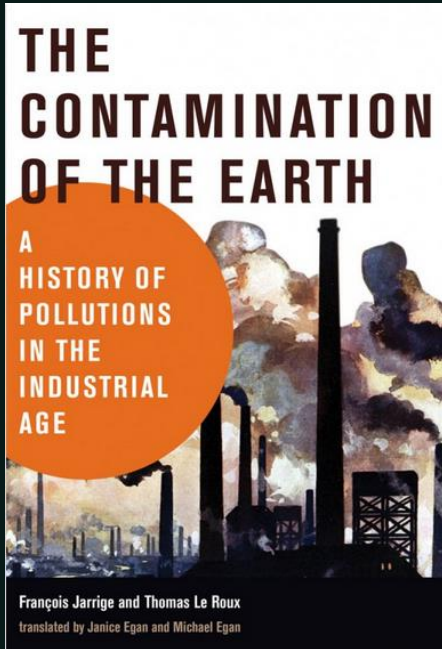
- European Court of Auditors, Energy taxation, carbon pricing and energy subsidies, 2022 :

‘Fossil fuel subsidies represent an obstacle in reaching climate goals because they hinder the green energy transition. Overall, Member States’ subsidies for fossil fuels amount to over €55 billion per year. They have been relatively stable over the last decade, despite calls to phase them out. Some Member States spend more on fossil fuel subsidies than on green subsidies.’

Figure 10 – Energy subsidies by category between 2008 and 2019



Relativizing so-called « command-and-control » instruments



« In analyzing enforcement of New York State's environmental laws, an assistant attorney general put the matter this way:

"Enforcement [has become] a process of whittling down the obligations of the polluter to the point where he can meet them.

" » (Lawrence Susskind and Joseph F. DiMento. *Environmental Law and American Business : Dilemmas of Compliance*, p. 28)

Environmental law functions as “*a law of negative externalities or, in other words, a law focusing on the mitigation of otherwise lawful and often encouraged production and consumption processes (...).*” (J. E. Vinuales & J.-F. Mercure. ‘Pathway to Reframing Environmental Law.’ *Environmental Policy and Law* 50 (2020) 509–517



Conclusion : Beyond the dichotomy :
Towards a strong sustainability agenda for
global environmental law

- Towards a unified approach of global environmental law, engulfing traditional environmental law instruments and business law instruments pursuing environmental objectives
-
- Reframing global environmental law as being targeted not at limiting externalities, but at « steering socio-economic processes in directions that are more likely to avoid an irreversible change in Earth System dynamics » (Vinuales & Mercure, 2020)...
 - Institutional changes: independent environmental administrative authorities, embedding environmental regulation within the mandate of every Ministry, etc.
 - Methodological changes: assuming the exposition of every economic agent to the risk of financial and economic losses caused by environmental degradation, despite uncertainty on future risks and their distribution
 - Interpretative changes: a voluntarist definition of behavioral standards underpinning business law
 - ... while avoiding the green tyranny thanks to:
 - A democratization agenda for global environmental governance
 - The pursuit of a more voluntarist agenda of valorization of environmental impacts

Thank you

Aude-Solveig Epstein

ae88@nyu.edu

