	Essential Readings in Environmental Law **IUCN Academy of Environmental Law (www.iucnael.org)**

VOLUNTARY MEASURES AND ENVIRONMENTAL LAW

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OVERVIEW OF KEY SCHOLARSHIPS

Historical and theoretical background

1. Sparrow, M., *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*, (The Brookings Institute, 2000)
2. Reeson, A., "Institutions, Motivations and Public Goods: theory, evidence and implications for environmental policy" (2008) SEED (Socio-Economic and the Environment in Discussion) CSIRO Working Paper Series, http://www.csiro.au/files/files/pjki.pdf
3. Ayres, I., and J. Braithwaite, *Responsive Regulation: Transcending the Derregulation Debate* (Oxford University Press, 1992)
4. Gunningham, N. and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998)

Classification

5. Khanna, M., "Non-mandatory Approaches to Environmental Protection" (2002) 15:3 Journal of Economic Surveys 291,
6. Cave, J., C. Marsden, and S. Simmons, Technical Report - options for and effectiveness of internet self- and co-regulation (2008) Rand Corporation, Europe, http://www.rand.org/pubs/technical_reports/2008/RAND_TR566.pdf

Examples

7. Rousso, S. A., and S. P. Shah, "Packaging taxes and recycling incentives: the German Green Dot program: introduction" (1994) 47:3 National Tax Journal 689, http://ntj.tax.org/wwtax/ntjrec.nsf/29514F99FAF917EE8525686C00686D3E/$FILE/v47n3689.pdf
8. Midttun, A., "Partnered governance: Aligning corporate responsibility and public policy in the global economy" (2008) 8:4 Corporate Governance 406, http://www.emeraldinsight.com/journals.htm?articleid=1740723
9. Nikoloyuk, J., T. R. Burns, and D. M. Reinier, "The promise and limitations of partnered governance: The case of sustainable palm oil" (2010) 10:10 Corporate Governance 59

Evaluation

10. Morgenstern, R. D., and W. A. Pizer, (eds), *Reality Check – The Nature and Performance of Voluntary Environmental Programs in the United States, Europe, and Japan* (Resources for the Future, 2007)
11. De Clercq, M., (ed), *Negotiating environmental agreements in Europe: critical factors for success* (Edward Elgar, (2002))

How to guide

12. OECD (2003) Voluntary Approaches for Environmental Policy: effectiveness, efficiency and usage in policy mixes, http://www.oecd-ilibrary.org/docserver/download/9703091e.pdf?expires=1378268619&id=id&accname=ocid195193&checksum=AB24A87DDC4819C5693FCD65DDEBC27C

1. **M. Sparrow's *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*** outlines the constellation of pressures on regulators at the time of writing, from the inexorable increase in rules, accountability and complexity, to downward pressure on available resources, all coupled with the impact of management theory changes, fashions, cynicism and resistance: "As a result of these dominant pressures and prescriptions, most regulatory agencies now recognize and to differing degrees embrace, a much broader range of compliance-producing tools ... Pick a regulator at random and ask which way regulatory practice is moving; the chances are that he or she will say 'From enforcement to voluntary compliance'". He outlines a wide variety of innovations and examples of creative regulation from all levels of government, including some co-regulatory arrangements. Sparrow advocates a problem-solving approach to regulation, but notes the many barriers to its adoption including time and resource availability, culture, lack of novelty, and the limitations of measurement systems. He highlights that the reductionism that forces focus on technique rather than capability and creativity, is a significant barrier to more effective regulatory crafting.

2. **A. Reeson's *Institutions, Motivations and Public Goods: theory, evidence and implications for environmental policy*** considers regulation and legal sanctions as mechanisms for moderating behaviour. A key question is whether they are the best mechanism or whether they damage the motivations of citizens to moderate their own behaviour. This reading is an overview of academic literature on the unforeseen impacts of law-making and other policy instruments: "Poorly considered policy interventions may cause 'collateral damage' to existing motivations or norms, resulting in perverse outcomes which can have considerable social and economic costs, and be difficult to reverse". The author summarizes the various "crowding-out" theories, such as regulation crowding-out intrinsic motivation.

3. **I. Ayres** and **J. Braithwaite's** ***Responsive Regulation: Transcending the Derregulation Debate*** is a seminal work setting out a theoretical basis for law interacting with voluntary measures. "Responsive" regulation responds to the amenability of firms or citizens to meet regulatory objectives by whatever means. Where the people or firms are so amenable (e.g. through voluntary programs), then governments should refrain from heavy-handed intervention. As the tendency to ignore regulatory objectives increases, the response of the regulator should become commensurately more forceful (the authors are famous for the "enforcement pyramid" metaphor to describe this approach). Other concepts discussed include the "Benign Big Gun", whereby a government deliberately withholds intervention and uses its bargaining position to persuade firms and industries to regulate themselves. The authors discuss the importance of tripartism (amongst government, business, and third party interest groups) because "empowering Public Interest Groups with standing to enforce agency regulations can serve as a powerful deterrent to the various forms of capture …" The authors provide definitions for command-and-control regulation, enforced self-regulation (contrasted with co-regulation), and self-regulation.

4. In the publication, entitled ***Smart Regulation: designing environmental policy***, **N. Gunningham** and **P. Grabosky** chart two broad phases in modern environmental governance: the enthusiasm for direct regulation in the 1960s and 70s; and the anti-regulatory phase in the 1980s and 90s in which voluntary measures became popular. (In later works, **Gunningham** and others outline a third phase of New Environmental Governance). "Smart" regulation builds on **Ayres** and **Braithwaite**'s concept of "responsive" regulation by proposing that policymakers seek an optimal mix of policy strategies rather than relying on regulation alone. The authors call for a broader range of instruments and actors to "allow the implementation of complementary combinations of instruments and participants tailored to meet the imperatives of specific environmental issues". Definitions of command-and-control, self-regulation, voluntarism, and education and information instruments are also put forward. They also comment on policy mixes and interactions between instruments.

5. **M. Khanna's** ***Non-mandatory Approaches to Environmental Protection*: *Classification*** is included to provide an introduction to common modes of classifying voluntary initiatives. **Khanna** uses four broad categories but this is by no means an exhaustive scheme for classification: unilateral initiatives—internal programs of individual firms, with three sub-categories (wholly in-house plans and management systems, codes and guidelines developed by trade associations, and recognized environmental standards e.g. ISO 14001 standards); negotiated agreements—between government and firms (or even whole industries); public voluntary programs—with

protocols developed by public agencies; and information disclosure initiatives. They provide some examples taken from emerging economies such as Mexico and China.

6. In the publication ***Technical Report - options for and effectiveness of internet self- and co-regulation,*** **J. Cave, C. Marsden,** and **S. Simmons** outline an 11-point "Beaufort Scale" of self- and co-regulatory arrangements based on the strength of government intervention. The paper provides a perspective from outside the environmental field; i.e. internet governance. The authors summarize the pros and cons of various approaches (regulatory, voluntary and hybrids). They point out that one of the challenges for voluntary schemes is that the schemes themselves may not have been established initially as self-regulatory or co-regulatory. The authors provide a framework for design and evaluation of self- and co-regulatory measures based around five principles: transparency, accountability, targeting, proportionality, and consistency.

7. **S. A. Rousso,** and **S. P. Shah's** publication, entitled ***Packaging taxes and recycling incentives: the German Green Dot program: introduction,*** is a classic example of the interaction between voluntary measures and law. The authors summarize the evolution of the German "Green Dot" waste packaging program, the regulatory impetus behind it, as well as an overview of policy in various European countries and the USA in the 1990s. The publication shows an instance of self-regulatory measures operating in the "shadow of the law" (i.e. The German Government's threat of alternative legislation).

8. **A. Midttun's** ***Partnered governance: Aligning corporate responsibility and public policy in the global economy*** focuses on the challenges of governance in the globalized economy. The author discusses three case studies in globalized sectors where governance "partnerships" between government and industry have emerged: (i) forests, paper and pulp, contrasting the voluntary approaches in the Forest Stewardship Council (FSC), Sustainable Forest Initiative, and the Program for the Endorsement of Forest Certification (PEFC); (ii) petroleum, focussing on the Extractive Industries' Transparency Initiative; and (iii) retailing and industrial value chains, focussing on the Ethical Trading Initiative. "A central precondition [for self-regulatory styles of governance] is the ability of civil society organizations to establish 'moral rights' as credible voices for 'just causes' in a media-driven communicative society, and thereby put pressure on brand sensitive industry."

9. **J. Nikoloyuk, T. R. Burns** and **R. de Man**, in ***The promise and limitations of partnered governance: The case of sustainable palm oil,*** using the Roundtable on Sustainable Palm Oil (RSPO) as a case study, review partnered governance in the context of "an extremely weak or uninterested government in countries where many commodities such as palm oil are being produced, and there is in effect a 'regulatory vacuum'". The

Roundtable was established through a partnership of businesses (including palm oil producers) and civil society organizations (led by WWF). “Had there been stronger laws and regulations in palm oil producing countries and had these been implemented, then there would have been little need for the RSPO.” The authors suggest the RSPO was overly process driven, slow, technocratic, diplomatic (rather than problem-solving), and concentrated power.

10. **D. R. Morgenstern** and **W. A. Pizer’**s ***Reality Check – The Nature and Performance of Voluntary Environmental Programs in the United States, Europe, and Japan*** provides a detailed evaluation of large, industry-scale voluntary environmental programs across several developed economies, including: the USA (33/50 – a toxic chemical reduction program, Climate Wise, and demand-side electricity use in California); Japan (initiatives by the Kaidanren – Japan’s large industry associations); and the EU (a cement industry initiative in Germany, industrial energy efficiency in Denmark, and climate policy in the UK). The authors note that protagonists and antagonists often draw opposite conclusions about the same program being evaluated — protagonists see a program as practical and flexible and antagonists see it as a distraction from more substantial environmental protection. The authors tentatively conclude that voluntary programs have real but limited quantitative effect, though there may be important “soft” effects that are harder to quantify, such as changes in attitude or management practices that are regarded as important steps in a longer-term sustainability ethic.

    The authors comment on the potential for regulatory capture, free-riding, and reduced impetus for actual environmental improvements by staving off stakeholder pressure. They suggest that actual environmental performance under a partnered governance regime depends on a combination of factors, including: whether the regime leads to lower abatement costs than regulation alone; the shadow of the law; the willingness of the regulator to subsidize environmental protection; and the willingness of consumers to pay for environmentally focused products

11. **M. De Clercq,** in ***Negotiating environmental agreements in Europe: critical factors for success,*** provides a detailed analysis of twelve European “negotiated agreements” (i.e. “agreements between public … authorities and industry, wherein both parties commit themselves to realise the environmental goals stated in the negotiated agreement”). The case studies include battery recycling, waste packaging, CFCs, energy efficiency, and air pollution. Generally the authors found mixed results against a series of five evaluation hypotheses. Commentaries are included on the pros and cons from the perspective of key actors (public authorities, industry, civil society). The authors propose four preconditions of success for a negotiated agreement: a policy tradition of consensus building; a regulatory “stick behind the door”; potential for a sector to collectively negotiate; and potential for market successes (e.g. price premiums for differentiation). The authors also

make recommendations about performance indicators, monitoring, implementation, preventing free-riding, creating a learning environment, and burden-sharing.

12. The ***OECD (2003) Voluntary Approaches for Environmental Policy: effectiveness, efficiency and usage in policy mixes*** provides guidance for policymakers. The recommendations include: the participation of third parties in the process of setting the objectives; clear characterization of the business-as-usual case as a baseline; and linking the voluntary program with regulatory requirements. It contains an outline of about a dozen cases from across the OECD.

Further recommended readings:

1. Alberini, A., and K. Segerson, "Assessing Voluntary Programs to Improve Environmental Quality" (2002) 22 Environmental and Resource Economics 157
2. Annandale, D., A. Morrison-Saunders, and G. Bouma, "The impact of voluntary environmental protection instruments on company environmental performance" (2004) 13 Business Strategy and the Environment 1
3. Bertoldi, P., and S. Rezessy, "Voluntary Agreements in the Field of Energy Efficiency and Emission Reduction: Review and Analysis of the Experience in Member States of the European Union - Report prepared by the Joint Research Centre of the European Commission" (2010), http://ec.europa.eu/energy/efficiency/studies/doc/2010_05_jrc_va_study.pdf
4. Calcott, P. "Mandated self-regulation: the danger of cosmetic compliance" (2010) 38 J Regul Econ 167
5. Carraro, C., and F. Lévêque, (eds), *Voluntary Approaches in Environmental Policy* (Kluwer Academic Publishers, 1999)
6. Glasbergen, P., F. Biermann, and A.P.J. Mol (eds), *Partnerships, governance and sustainable development: reflections on theory and practice* (Edward Elgar, 2007)
7. Howard, J., J. Nash, and J. Ehrenfeld, "Industry codes as agents of change: responsible care adoption by US chemical companies" (1999) 8 Business Strategy and the Environment 281
8. King, A., and M. Lenox, "Industry Self-regulation without Sanctions: The Chemical Industry's Responsible Care Program" (2000) 43 Academy of Management Journal 698
9. Labatt, S., and V. M. Maclaren, "Voluntary corporate environmental initiatives: a typology and preliminary investigation" (1998) 16:2 Environment and Planning C: Government and Policy 191
10. Moffet, J. and F. Bregha, "An overview of issues with respect to voluntary environmental agreements" (1998) 8:1 Journal of environmental law and practice 63
11. Paton, B., "Voluntary environmental initiatives and sustainable industry" (2000) 9 Business Strategy and the Environment 328