

## EU Law qua Global Governance Law? Deciphering Regulatory and Constitutional Competence Between EU Environmental Law and Global Governance

By Elaine Fahey & Ester Herlin-Karnell\*

This special issue looks at the normative implications of EU global regulatory efforts in the area of environmental policy. The EU Environmental Emissions Trading System (EU-ETS) represents an example of successful application of EU environmental standards where global standards harmonization had failed.<sup>1</sup> The intersection between EU law and global law, however, seems increasingly porous and difficult to decipher. Post-Lisbon, the EU increasingly functions like a State in its actions with the world. Nonetheless, the operation of international law internally within the EU legal order has been the subject of many distinctive constitutional periods, both prior to and after the Treaty of Lisbon.<sup>2</sup> In the recent judgment of the Grand Chamber of the Court of Justice on the EU-Emissions Trading System,<sup>3</sup> the Court rejected claims that the application of the EU-ETS scheme to the aviation sector, specifically US airlines, was unlawful under EU and international law. In the realm of the environment, EU environmental protection is both a value and normative aspiration.<sup>4</sup> Yet what is a successful legal outcome of the adoption of ambitious and aggressive global legal regulatory frameworks in this domain? How should contemporary EU global policy and value ambitions be adjudicated in law? The case raises broader issues

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\* Dr. Elaine Fahey is a Postdoctoral Researcher (Senior Research Fellow) and Lecturer at the Amsterdam Centre for European Law and Governance (ACELG), University of Amsterdam. For the 2012–13 academic year, Dr. Fahey is a Visiting Postdoctoral Researcher at the University of Michigan, Ann Arbor Law School. Dr Ester Herlin-Karnell is the Co-director of the Center for European Legal Studies and an assistant professor of transnational legal studies at Free University Amsterdam (VU).

<sup>1</sup> Directive 2008/101, of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 O.J. (L 8/3). See also *Analysis of Options to Move Beyond 20% Greenhouse Gas Emission Reductions and Assessing the Risk of Carbon Leakage*, COM (2010) 265 final (May 26, 2010); *International Climate Policy Post-Copenhagen: Acting Now to Reinvigorate Global Action on Climate Change*, COM (2010) 86 final (Mar. 9, 2010).

<sup>2</sup> See PIET ECKHOUT, *EU EXTERNAL RELATIONS LAW* 338 (2d ed. 2011); see also Daniel Thym, *Foreign Affairs*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 309 (Armin Von Bogdandy & Jürgen Bast eds., 2d ed. 2009).

<sup>3</sup> Case C-366/10, *Air Transp. Ass'n of America v. Sec'y of State for Energy and Climate Change*, 2011 E.C.R. I-000.

<sup>4</sup> See Treaty on the Functioning of the European Union art. 3, 13 Dec. 2007, 2010 O.J. (C083).

about the legitimacy of EU law and externalities arising from extended EU competences to positively promote EU constitutional values beyond Europe. While using this case as its starting point, this special issue sets out to look at the wider constitutional questions asked by it.

Notably, there has been an absence of constitutional dialogue regarding EU External Relations law and its interrelationship with the global forum, which arises from its technical nature.<sup>5</sup> The promotion of EU external values is subject to variable—even weak—enforcement, and a lack of global consensus.<sup>6</sup> While it has been suggested that the character of pluralism in EU constitutional law scholarship is so contested and uncertain as to be fruitlessly explored or, at best, represents a balancing test of legal orders,<sup>7</sup> the fact remains that in any consideration of post-national constitutionalism, or law beyond the nation state, the EU continues to loom large.<sup>8</sup> The relationship between pluralism and constitutionalism is highly embryonic, and yet in the context of the European Union, Weiler argues, it is to be obsessively pursued by the current generation of scholars.<sup>9</sup> While acknowledging the importance of a debate on pluralism in contemporary EU constitutional law, this special issue takes a step back by asking the more fundamental question of what it means to apply the pluralism template not only to the environment but also to trade policy and security matters in the EU as representing important areas where the EU is currently very active and where there is a clear external dimension. These questions are largely unexplored. This special issue aims to fill that gap by scrutinizing the normative foundations for EU constitutionalism and pluralism on the global stage.

This special volume comprises an edited collection based on selected articles presented at a symposium jointly organized by the Centre for European Law and Governance (ACELG) and by the Centre for European Legal Studies (CELS) held at the University of Amsterdam on 2 May 2012. The articles in this special issue will consider the impact of the decision in the EU-ETS case and its broader repercussions for the EU. The special issue is divided into distinct conceptual elements, focusing on the direct implications of the judgment in the

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<sup>5</sup> See Bruno De Witte, *Too Much Constitutional Law in the European Union's Foreign Relations?*, in *EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS* 1, 11 (Bruno De Witte & Marise Cremona eds., 2008).

<sup>6</sup> See Marise Cremona, *Values in EU Foreign Policy*, in *BEYOND THE ESTABLISHED LEGAL ORDERS: POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD* 275 (Malcolm Evans & Panos Koutrakos eds., 2011).

<sup>7</sup> Joseph H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism—Some Doubts*, in *WORLDS OF EUROPEAN CONSTITUTIONALISM* 8 (Gráinne de Búrca & Joseph H.H. Weiler eds., 2011); Gareth Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, in *CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND* 269 (Matej Avbelj & Jan Komarek eds., 2012).

<sup>8</sup> Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 326 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

<sup>9</sup> Weiler, *supra* note 7.

EU-ETS case—such as the issue of competence allocation in environmental matters—and the relationship between EU Environmental and EU global regulatory law. Further articles reflect on the theoretical foundations of EU law values, the issue of normativity in EU constitutional law, transatlantic litigation, and the “added value” of EU action in these matters. The common thread running through these articles is that they investigate EU global regulation through law. The Grand Chamber ETS judgment provides a novel and unique case study of constitutional questions relating to the EU and global regulation of the environment in aviation.

**Christina Eckes** considers the shaping of EU environmental law from an outside-in approach and what this means from the perspective of constitutional law and the EU as an international actor. While the prevailing perspective of most scholarly contributions in the field concerns how the EU exports values for the public good, including policies for the protection of the environment, she explores the opposite perspective: The outside-in effect. The specific focus of her article is on the choice of legal basis and national procedural autonomy as two specific aspects of how international environmental law has shifted power from the national to the EU context and how it has influenced the understanding of individual rights within the EU legal order. In particular, she examines how the EU’s participation in the Aarhus Convention has made an impact on the procedural autonomy of the Member States and role of the Court of Justice with regard to adequate protection of fundamental individual rights.

**Theodore Konstandinides** investigates the broader issue of competence allocation and the legitimacy question of the EU’s presence on the global environmental law scene. The article assesses the constitutional role of customary international law within the EU legal order, by focusing on the CJEU’s relevant jurisprudence. It examines the interconnectivity between EU and customary international law and its applicability to EU external action. The article explores the ways in which international custom can be invoked by private parties in order to review the legality of EU secondary law and, therefore, escape their EU law obligations. He considers the new conditions under which reliance may be placed on customary international law for private parties to be able to invoke it, in light of the EU-ETS decision of the Court. The article argues that the EU competence in external action has not been curtailed by the Court’s jurisprudence. New adjudicative mechanisms will not resolve the constitutional ambiguity in EU law, namely the vague hierarchy that customary international law enjoys in the EU legal order.

**Gareth Davies** assesses the extraterritorial claims in EU trade policy and the ETS case through the lens of pluralism and compares the dynamics of competing claims to non-subordination, both when these occur within the European constitutional spectrum, and when they occur in the EU’s relations with external legal orders. In doing so, he explores the theoretical question of how to understand externalities in EU trade policy by examining it in the context of not only regulatory and constitutional pluralism, but also in terms of a global governance solution. In addition, he discusses the accountability gap and the lack of

individual representation when extraterritorial claims are at stake. He concludes by asking to what extent constitutional pluralism, as applied to regulatory pluralism, becomes global constitutionalism, and why this matters to the EU.

**Ester Herlin-Karnell** looks at the wider constitutional issue of the EU as a promoter of values in the context of global law. In doing so, she sets out to scan the normative framework for how to understand EU legal values in the global arena. She does this by asking the difficult question about how meaningful it is to distinguish sharply between the different strands of constitutional pluralism in the global scale, and how those strands are related to the EU constitutionalization process. She applies her findings to two concrete areas by looking at security and the environment as representing two divergent fields with different approaches, with the EU as either a norm importer or a norm exporter. It will be argued that while protection of the environment offers legitimate application of EU externalities as part of the global common good, the security mission offers a more dangerous example of the EU as a norm importer. Moreover, the article explores to what extent these areas represent elements of global constitutionalism in the EU context.

**Elaine Fahey** assesses the indirect contribution of the Court of Justice to the promotion of global standards in the EU-ETS decision. Her article explores the effects of the EU-ETS directive, the decision of the Court, and the actions of the House of Representatives to prohibit the application of EU law in the United States. She focuses in particular on the EU-ETS litigation insofar as it provides insights as to powers of the post-Lisbon Court of Justice. She explores the “actorness” of the Court of Justice in global affairs. The Court of Justice is perceived as a very powerful judicial entity, so much so as to distinguish the EU from typical international organizations. She argues accordingly that the response of the Court of Justice in the EU-ETS decision is a particularly timid one with respect to the “high politics” of the dispute and the objectives of the EU policies.

In short, this special issue draws together reflections from legal scholars working in the area of EU constitutional and institutional law, global governance, and EU External relations. It aims to critically examine an EU global regulatory strategy and its dynamics from within. The EU-ETS saga in context is a dynamic and vibrant case study demonstrating the uncertainty and challenges of global governance by and through law.