

Workshop Series:

International Corporate Liability for Environmental Harm

The Problem

The growing globalization and interconnectedness of the international economy has increased the relevance of laws regarding cross-border and extraterritorial environmental harm. Serious risks to the environment and human rights frequently materialize within global value chains and emissions do not stop at borders. Currently, national governments only have limited instruments at their disposal to deal effectively with the still relatively new reality of a flexible and borderless world economy. Environmental liability law is often attributed with the potential to fill these gaps as it offers the means to obtain compensation for those whose rights have been violated by negative environmental impacts. In addition to this, environmental liability law can also have a preventive effect in that it creates financial risks, and thus incentives, for corporations to prevent environmental damage.

The Aim of the Research Project

The Research Project started in September 2019. The aim is to critically review the regulatory structure of international liability law, in particular the existing legal framework surrounding cross-border environmental harm caused by corporations. Numerous fundamental questions have been addressed: How can liability law create better incentives to modify (potentially) damaging behavior in today's complex global economy? What is the relationship between state and private responsibility for the environment? To what extent do international agreements foresee liability for environmental harm? How can regulations on the national and international level better complement each other in a constructive way? What is the potential of using national law to regulate civil liability for transboundary damage? What are the regulatory options for anchoring environmental due diligence obligations in national laws which are effective across borders? In addition to such overarching issues, the project also has focused on two specific areas: climate change litigation and the increasingly important problem of geo-engineering.

The Workshop series seeks to discuss the preliminary results of the Research Project.

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Day One: 22. April 2021

Workshop 1

Environmental protection through value chain due diligence legislation (organization

RA David Krebs, Kanzlei Geulen und Klinger)

Date and time: 22 April 2021, 9:30-12:45

The workshop aims at discussing the legislative approach of stipulating environmental due diligence obligations regarding transnational value chains in home state law (Chapter 5 of the final report). This debate is particularly timely, because the two most recent drafts for due diligence legislation – the Federal Government's and the European Parliament's – include at least some elements of environmental due diligence.

9:30 – 10:50:

Part I: How can corporate environmental due diligence obligations with regard to transnational value chains be designed and established in national home state law?

At least four different legislative approaches of designing an environmental due diligence standard can be identified (general provisions; reference to international hard or soft law; reference to host state law, reference to home state law). We want to examine and discuss these approaches in order to identify some of their advantages and possible shortcomings.

- **Presentation of basic ideas from the report (15 min): David Krebs**

Statements (5 min each):

- **Lise Smit, British Institute of International and Comparative Law**
- **Paul Mougeolle, Global Legal Action Network (GLAN), Notre Affaire à Tous**
- **Mirina Grosz, University of Basel**
- **Lena Walker, University of Münster**

Open discussion (45 min)

Break (10 min)

11:00 – 12:45

Part II: Potential objections related to an extraterritorial reach or impact of due diligence legislation

11:00 – 11:40

Jurisdiction/Public International Law

Supply chain due diligence legislation aims at having (indirect) impacts in third countries. To what extent does this pose a problem from public international law's angle of jurisdiction?

- **Presentation (15 min): Jannika Jahn, MPI for Comparative Public Law and International Law/Elisabeth Henn, Helmholtz Centre for Environmental Research**
- **Comment (5 min): Daniel Augenstein, Tilburg University**

Open Discussion (20 min)

11:45 – 12:45

WTO law

Could (environmental) value chain due diligence legislation infringe WTO law?

What are critical elements of environmental due diligence legislation that avoid conflicts with the WTO regime?

- **Presentation I (15 min): Environmental due diligence obligations and WTO Law, Jelena Bäumler, Leuphana University Lüneburg**
- **Presentation II (15 min): Tackling Deforestation in global value chains and WTO law, Enrico Partiti, Tilburg University**

Open discussion (30 Min)

Workshop 2:

International standards for national environmental liability norms – obstacles and potential for the development of a transnational environmental standard of care (responsibility: Kirsten Schmalenbach, Peter Gailhofer,).

Date and time: 22.4.2021, 14.00 – 17.30

The underlying thesis of our workshop is that the greatest potential for development in international environmental liability currently does not lie in international treaty law but in the mutually reinforcing dynamics of international principles on the one hand and in the extraterritorial legal practice of states on the other hand. To address explore this potential we want to discuss a range of issues and options in two subsequent segments of the workshop, the first will approach the topic from the perspective of international environmental law while the second segment will be centred on national tort laws.

14.00-15.30

Part I. International standards for national environmental liability laws; developments in international law which stipulate effective state measures to implement the liability of private actors for transboundary environmental damage – Can we substantiate specific obligations?

In contrast to the already well accepted duty to prevent transboundary environmental harm, any breach of which triggers a state's international responsibility, rules on state liability for environmental harm are literally non-existent. This void throws the focus to civil liability conventions – many of which are unratified – and the polluter pays principle, both of which can be used to 'track and trace' international standards for national environmental liability laws. Part I of the workshop strives to explore methodologically sound avenues to establish feasible standards for environmental liability approaches under national law.

- **Presentation of the report: Kirsten Schmalenbach (15 Min)**

Comments and discussion:

- **Heike Krieger, Freie Universität Berlin (confirmed)**
- **Oliver Ruppel, Stellenbosch University (confirmed)**
- **Christina Voigt, University of Oslo (confirmed)**
- **Ludovica Chiussi, University of Bologna (confirmed)**

We plan to discuss the following issues:

1) What is the legal value of the PPP? Can it be construed as a benchmark for the effectiveness of national environmental liability laws and their "usability" for (foreign) claimants?

In view of the multitude of existent environmental liability laws and approaches at the national level (civil environmental liability law, tort law, various administrative approaches to liability, the government pays approach) it is the aim of this discussion

to specify viable international requirements for national legislators to employ, e.g., regarding cross-border *environmental* claims or complaints.

Comments: Oliver Ruppel (followed by open discussion)

2) Has the procedural arm of the no-harm rule any worthwhile potential to impose on states an obligation to establish an overarching and accommodating international environmental liability framework that facilitates transborder-litigation? Is it viable to combine already established and functional principles of environmental law to achieve this aim?

Comments: Christina Voigt (followed by open discussion)

3) Does a state's duty to protect human rights require access to a state's civil courts if the forum state's nationals infringed environmental human rights abroad?

Comments: Ludovica Chiussi (followed by open discussion)

4) Due diligence is central to the no-harm rule and its obligations of conduct. Is international law moving towards a uniform and ambitious environmental due diligence standard for states that can serve as a benchmark in other transnational contexts (e.g. for national courts)?

Comments: Heike Krieger (followed by open discussion)

Break (30 minutes)

16.00- 17.30

Part II: National tort/delict law as a horizontal instrument to strengthen environmental rights and duties.

National courts and national legislation increasingly refer to international law or transnational standards to establish violations of environmental due diligence and thus, under certain circumstances, civil liability for environmental damage. As current decisions, such as the prominent Urgenda Case illustrate, such norms or decisions substantiate elements of a transnational environmental standard of care, which may concretize both state and private obligations. However, there are still many obstacles for such lawsuits in national laws. For example, environmental damage can only be pursued under most national tort laws, if traditional tort rights are affected. The compensation for transboundary damage to environmental rights and public interests is made difficult by International Private Law doctrines.

If the assumptions are correct that the Polluter Pays Principle on the one hand and the increasing "greening" of human rights on the other hand require the creation of effective domestic instruments for restitution or compensation of environmental damage caused or contributed to by private nationals abroad – is it adequate to assume, that the states need to improve their legal framework for claiming transboundary environmental damage against their citizens, especially transnational companies? What are the pathways to strengthen horizontal means of pursuing claims as resulting from environmental damage?

- **Presentation of the report: Peter Gailhofer (15 min)**

Comments and discussion:

- **Tilmann Altwicker, University of Zürich;**
- **Carola Glinski, University of Copenhagen;**
- **Moritz Renner, University of Mannheim;**
- **Leonhard Hübner, Osnabrück University**

We want to discuss the following issues:

- 1) Is a nascent environmental standard of care discernible in transnational liability cases and is it plausible to assume, that in accordance with cases like Urgenda, national civil courts will increasingly help to further develop international standards as yardsticks for environmental due diligence?

Is this perspective, in the long run, attractive? Should we think about establishing “universal civil jurisdiction”?

Comments: Tilmann Altwicker (followed by open discussion)

- 2) Is it plausible to assume, in light of the ongoing “greening” of international human rights and intensifying international duties to make the polluter pay, that national tort laws will have to become increasingly “greener” as well – specifically regarding transboundary civil litigation? How could this “greening” of national tort laws come about?
 - Could the debate about broadening the substantive scope of environment-related tort rights be reopened?
 - Are there other perspectives to extend the legal basis for action in transnational lawsuits to assert claims as a consequence of environmental damage? E.g. is there a legal basis to argue for extended rights of action for representatives of general/environmental interests?
 - According to many, the IPR principle of ubiquity in transboundary environmental claims (Art. 7 Rome II Regulation) applies only in cases, in which the damaging action or omission has directly caused the violation of rights. Preliminary causal contributions to environmental damage, e.g. violations of due diligence of customers or the parent companies in transnational value chains thus would not be relevant for the choice of law. Typical constellations of environmental damage of European corporations thus frequently could not be decided based on European tort laws and standards. Does an understanding of which takes the polluter pays principle seriously require to go beyond such an understanding of Art. 7 Rome II and give the claimant the option to choose the lex fori?

Comments: Carola Glinski (followed by open discussion)

Day Two: 23. April 2021

Workshop 3

Liability for Climate Damage and Geoengineering Activities (responsibility: Roda Verheyen, Alexander Proelß)

Date and time: Friday, 23 April 2021, 10:00 – 12:00 and 16:00 - 18:00

The workshop will address selected issues dealt with in chapters 6 (climate litigation) and 7 (liability for geoengineering activities) of the project. Even though the legal issues addressed in the two chapters have different objectives, climate litigation and geoengineering are both reactions to the 'climate crisis'. It is thus proposed to discuss the two sets of questions in two sessions of one workshop. Invited guests are recognized experts of the specific areas of liability law and will be provided with the Draft Report in advance for preparation.

10:00 – 12:00

Part I: Climate Litigation / Private Actors

Aim: Discussion of critical elements of emerging civil liability /nuisance and tort principles and standards of care.

Facing the overlap of public and private liability: Will climate litigation be focussing on private actors in the future? Does fault play a role? How can a standard of care be defined?

- **Presentation of the main results of the study: Roda Verheyen**

Discussants' Comments and observations (ca. 15 min each):

- **Monika Hinteregger, Universität Graz**
- **Margareta Wewerinke Univ. Leiden**

Open Floor Discussion for all participants

Invited Participants: (inter alia)

- **Dennis van Berkel (Urgenda Foundation)**
- **Annalisa Savaresi (University of Sterling)**
- **Lodewijk Smeehuijzen (Vrije Universitat Amsterdam)**
- **Jan-Erik Schirmer (HU Berlin)**
- **Wolfgang Kahl (University of Heidelberg)**

16:00 – 18:00

Part II: Liability for Geoengineering Activities

Aim: Discussion of critical elements of a State and liability regime for environmental damage resulting from geoengineering activities

- **Presentation of the report: Alexander Proelss**
- **Comment 1: Tracy D. Hester, University of Houston Law Center (confirmed)**
- **Comment 2: Wil Burns, American University, Washington, DC.**

Invited Participants:

- **Jesse L. Reynolds, University of California, Los Angeles (tbc.)**
- **Tuomas Kuokkanen, University of Eastern Finland (tbc.)**
- **Haomiao Du, University of Utrecht (tbc)**
