

ENVIRONMENTAL LOSS AND DAMAGE IN
A COMPARATIVE LAW PERSPECTIVE

ENVIRONMENTAL LOSS AND
DAMAGE IN A COMPARATIVE
LAW PERSPECTIVE

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Environmental Loss and Damage in a Comparative Law Perspective

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PREFACE

1. THE CONFERENCE IN COMO

The sixth EELF Annual Conference was held at the University of Insubria in Como in September 2018. Attendance at the conference was high, as there were more the 140 participants and around 90 speakers and chairpersons.

The conference took a slightly different pattern from the previous European Environmental Law Forum conferences, which were devoted to more general topics, focusing on a more specific but at the same time crosscutting issue: environmental loss and damage.

As announced in the original call for papers, the book that we present here is a collection of peer-reviewed contributions of the speakers at the conference. The book reflects the structure of the conference and has the aim of analysing and comparing the regulation of environmental loss and damage in a comparative, interdisciplinary and both public- and private-law perspective. It delves into conceptual and specific legal issues related to liability, compensation and restoration of damage in different sectors and jurisdictions, also taking into account the contributions of economic analysis in this field of regulation. Specific attention has been devoted to the role that liability and insurance may play in terms of mitigation and adaptation to climate change, as well as the prevention of damage from natural hazards. The scope of analysis encompasses national as well as supranational and international regimes, also in view of possible legal transplants and “cross-fertilisation”.¹ The book includes 30 contributions that are subdivided into eight parts: (i) liability for environmental harm in the EU; (ii) private and corporate environmental liability; (iii) the role of criminal liability; (iv) legal transplants in the environmental field: the case of environmental liability; (v) state and international environmental liability; (vi) climate change liability; (vii) liability, climate change and natural hazards: the role of insurance; and (viii) real compensation and offset regimes: the strategy of “no net loss”.

¹ On this point, the bibliography is now boundless. To underline the relevance of the theme, the International Academy of Comparative Law dedicated a whole session to the theme of “Legal Cultures and Legal Transplants”, published in the *Isaidat Law Review* (2011) Volume 1 – Special Issue 1.

2. THE DIALECTIC BETWEEN GLOBAL LAW AND LOCAL LAW

One of the aspects that the conference aimed at underlining was the different keys to understanding the current dialectic between global and local law in the environmental field.

In recent decades, in fact, we have been witnessing the development of a body of rules that tends towards a progressive approach to the development of common operational choices in addressing environmental problems. This global environmental law has emerged because of several factors. First, the environmental problem, in addition to having affected all legal systems in an almost contemporary way, is suitable to involve by its very nature multiple countries at the same time.² Secondly, legal problems in the environmental field are closely intertwined with aspects of the natural sciences, which present themselves as universal, and with economic problems that appear to be common in the globalised world,³ whereas the link to a particular cultural, social or legal background seems to fade away.

As a consequence, in the field of environmental law, the fact that the problems to be addressed are – in more than one respect – intimately linked to scientific knowledge and cover, for this reason, a certain degree of technicality will lead, in a greater number of cases, to new phenomena of legal transplants. On the other hand, legal transplants of environmental protection models have been strongly characterised and – consequently – influenced by the globalised perception of the environmental phenomenon, and by that of its protection.⁴ In particular, with the Rio Conference of 1992,⁵ a new era of international environmental law began:⁶ international cooperation no longer refers only to the prevention of

² *P.H. Sand*, The evolution of international environmental law, in D. Bodansky, J. Brunnée & E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007; *B. Pozzo*, Tutela dell'ambiente (diritto internazionale), *Enciclopedia del Diritto*, Annali, III, p. 1156, 1161 et seq.

³ *J.B. Wiener*, Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law, *Ecology L.Q.* 2001 (27), pp. 1295 et seq.

⁴ *T. Yang & R.V. Percival*, The Emergence of Global Environmental Law, *Ecology L.Q.* 2009 (36), pp. 615 et seq.; *R.V. Percival*, Fifteenth Annual: Lloyd K. Garrison Lectures on Environmental Law: The Globalization of Environmental Law, *Pace Env'tl. L. Rev.* 2009 (26), pp. 451 et seq.; *R.V. Percival*, Environmental Law in the Twenty-First Century, *Va. Env'tl. L.J.* 2007 (25), pp. 1 et seq.; *R.V. Percival*, Global Law and the Environment, *Wash. L. Rev.* 2011 (86), pp. 579 et seq.; *Wiener*, *supra*, note 3.

⁵ *M. Pallemmaerts*, International environmental law from Stockholm to Rio: back to the future?, *Review of European Community & International Environmental Law* 1992 (1), pp. 254–266, *E. Brown Weiss*, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, *Geo. L.J.* 1992 (81), pp. 675 et seq.

⁶ *P. Birnie*, The Development of International Environmental Law, *British Journal of International Studies* 1977 (3), pp. 169–190.

transboundary pollution issues, but concerns global issues that can jeopardise natural balances essential for the maintenance of the conditions of life on earth.⁷

3. LEGAL TRANSPLANTS IN THE ENVIRONMENTAL FIELD AND THE NEED FOR A COMPARATIVE LAW APPROACH

A special session of the conference was devoted to legal transplants, taking advantage of the various and different backgrounds and origins of the participants and the speakers. The study of this phenomenon seems in fact very promising for all those scholars who are interested in the dynamic of environmental law evolution.

Today the reasons that drive the circulation of models can be very heterogeneous, traditional concepts of “prestige” and “imposition” as drivers of legal transplants need to be re-interpreted in the light of current circumstances, and new methods of analysing the phenomenon have been suggested.⁸

With the drafting of large international conventions, homogeneous rules and standards are developed. It is not therefore difficult to find a rule formulated in a similar way in the European Union, the United States, Russia or China. This cannot come as a surprise: to similar and common problems, not included in the casts of the different legal traditions, the different legal systems have developed similar answers.

In addition, an important role is played today by international cooperation, which in recent decades has affected many aspects of the legislation of emerging economies.⁹ As the European experience can teach us, environmental cooperation has become one of the leading instruments in inducing legal transplants, as “environmental integration clauses are included in most EU agreement of a general nature”.¹⁰ A vast literature points out how Europe has become in this sector a *normative power*, able to impose its own perspective and regulation on

⁷ G. Palmer, New ways to make international environmental law, *American Journal of International Law* 1992, pp. 259–283.

⁸ M. Graziadei, Comparative Law as the Study of Transplants and Receptions, in M. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2007, pp. 441–475.

⁹ J. Delisle, *Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in Post-Communist World and Beyond*, U. Pa. J. Int'l Econ. L. 1999 (20), pp. 179 et seq.; N. Wheeler, *The role of American NGOs in China's modernization, invited influence*, Routledge, 2013.

¹⁰ G. Marín Durán & E. Morgera, *Environmental Integration in the EU's External Relations, Beyond Multilateral Dimensions*, Hart Publishing, 2012, p. 57.

how environmental protection should be taken into consideration,¹¹ becoming a global producer of norms in this as in other important fields.¹² On the other hand, we can also observe the willingness, by countries that have undergone a rapid process of democratisation, to refer to authoritative models, mostly arising from Western or international models, in the field of the protection of human rights and of the environment. In addition, even the practices of large multinational companies can have an impact on facilitating the circulation of Western models in emerging economies by private contracting.¹³

With regard to the EU, other factors that might drive legal transplants in the environmental field can also be linked to the formation of regulations at the regional supranational level. In this case, legal transplants might be induced by the imposition of harmonised supranational legislation, which finds its roots in one or more advanced legal systems and aims at creating common conditions in all Member States.¹⁴

Given the complexity of the questions at stake, however, even if today environmental law can be considered at least partially a global law where it is possible to identify common trends, one should not overlook the fact that environmental law has uneven application around the world, partly because environmental law is quite new and growing rapidly and partly because its application is *local* and depends on the differentiated conditions of each legal system.

In fact, the globalisation process that we are witnessing should not lead us into the temptation to believe that global environmental rules will lead everywhere to the same results. Indeed, rules and institutions borrowed in the environmental field will also have to deal with the particular *legal process* of the target system and with a particular *path dependence* that will vary from context to context, as well as with factors that will surely affect the efficacy of

¹¹ I. Manners, Normative power Europe: a contradiction in terms?, JCMS: Journal of Common Market Studies 2002 (40), pp. 235–258; S. Lightfoot & J. Burchell, The European Union and the World Summit on Sustainable Development: Normative Power Europe in Action?, JCMS: Journal of Common Market Studies 2005 (43), pp. 75–95; M. Braun, EU Climate Norms in East-Central Europe, JCMS: Journal of Common Market Studies 2014 (52), pp. 445–460.

¹² M. De Morpurgo, The European Union as a Global Producer of Transnational Law of Risk Regulation: A Case Study on Chemical Regulation, European Law Journal 2013 (19), pp. 779–798.

¹³ Li-Wen Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, Am. J. Comp. L. 2009 (57), pp. 711–744.

¹⁴ The environmental competences enter the Treaty of Rome with the Single European Act of 1987, which inserts a new Title VII, dedicated to the “Environment”, consisting of three articles: 130R, 130S and 130T. The Single European Act states that action by the Community relating to the environment shall be based on the principles that preventive action should be taken that environmental damage should as priority be rectified at source and that the polluter should pay. It further provides that environmental protection requirements shall be component of the Community’s other policies.

the transplanted rule or instrument. In this perspective, not only the letter of the law counts, but also and above all the existence of tools to make it effective, and therefore the legal system as a whole in which it will be imbedded.

It is therefore necessary to promote a comparative law approach in the study of the spreading of environmental rules, which will help us in understanding the profound reasons for legal transplants and the true effectiveness of the available remedies.

As the judges of the Indian Supreme Court have masterfully reminded us: “If the mere enactment of laws relating to the protection of environment was to ensure a clean and pollution-free environment, then India would, perhaps, be the least polluted country in the world. But this is not so. There are stated to be over 200 Central and State statutes which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years.”¹⁵

Barbara Pozzo and Valentina Jacometti
Como, August 2020

¹⁵ Supreme Court of India, *Indian Council for Enviro-Legal Action v. Union of India* 1996 (5) SCC 281, 293.

CONTENTS

<i>Preface</i>	v
<i>List of Authors</i>	xxv

PART I. LIABILITY FOR ENVIRONMENTAL HARM IN THE EU

The EU and the System of Environmental Loss and Damage: Liability, Restoration and Compensation

Ludwig KRÄMER	3
1. Specificity of Environmental Loss and Damage	3
2. The EU Environmental Liability Provisions	4
2.1. Air Pollution	6
2.2. Dieselgate	7
2.3. Climate Change	8
2.4. Ocean Pollution	8
3. Restoration of the Impaired Environment	9
4. Environmental Protection through Criminal Law	12
5. Better Implementation	16
6. Holding Member States Liable	19
7. What Can be Done to Improve the Present Situation?	22
7.1. Improving Transparency	22
7.2. Investigation Powers	24
7.3. Environmental Liability	26
7.4. More Effective Protection of the Environment?	27
8. Conclusion	28

Towards a Better Environmental Liability Directive?

Anna VANHELLEMONT	29
1. Introduction	29
2. Evaluating the Environmental Liability Directive	30
3. The Multi-Annual Work Programme: Challenges and Opportunities	33
4. Unlocking the Directive's Full Potential	34
5. Conclusion: Towards a Better Environmental Liability Directive?	37

The Permit Defence between the EU Environmental Liability Directive and National Private Law: Some Comparative Law Remarks	
Carlo MASIERI	39
1. Introduction: Aim and Some Vocabulary	39
2. Some Drafting History	40
3. The Effects of the Permit Defence.	42
4. Some Comparative Law Questions Arising from the EU “Permit Defence”	44
4.1. The German System	44
4.2. The French System	47
4.3. The Italian System	49
5. Conclusion.	50
The Jurisprudential Configuration of the “Polluter Pays” Principle: A Critical Assessment	
Theodoros G. ILIOPOULOS.	53
1. Introduction	53
2. The PPP, a Law and Economics Principle Translated into EU Law	54
3. The PPP through Case Law	56
4. The PPP and the Extension of Liability to Owners of Contaminated Sites	60
5. Deconstructing <i>TTK</i> : Problems Associated with a Derogation from the PPP under the ELD	64
6. Deconstructing <i>TTK</i> : Problems Associated with the Application of the PPP.	67
7. Conclusion.	70
“Causal Link” as a Condition of Liability in the Environmental Law: The Example of the Liability Mechanism in Directive 2004/35/EC	
Mariusz BARAN.	71
1. Introduction	71
2. “Causal Link” as the Necessary Condition of Liability?	72
3. Consequences of the Absence of a Causal Link for the Liability Mechanism.	75
4. Causal Link and Presumption of its Existence – Does it Mean Presumption of Liability?.	77
5. Causal Link as the Condition of Liability and More Stringent National Provisions.	79
6. Conclusions	83

Accumulation of Potentially Toxic Elements in Agricultural Soils

Iain GREEN, Tilak GINIGE, Merve DEMIR and Patrick Van CALSTER 87

1. Introduction 87
2. Soil Biodiversity and the Threats to it 89
 - 2.1. Soil Biodiversity 89
 - 2.2. Potentially Toxic Elements Threatening Soil Biodiversity 91
 - 2.3. Soils and Potentially Toxic Elements 92
3. Controls on Potentially Toxic Elements. 94
 - 3.1. Organic By-Products 94
 - 3.2. Legislation and Organic Fertilisers 98
 - 3.3. Inorganic Fertilisers 99
 - 3.4. The Potential for Organic Fertilisers to Harm Soils 100
4. Ecosystem Services 103
5. Conclusion 107

PART II. PRIVATE AND CORPORATE ENVIRONMENTAL LIABILITY

**Corporate Social Responsibility and Corporate Liability
for Environmental Damage**

Carola GLINSKI 111

1. Introduction 111
2. Corporate Social Responsibility Instruments 112
 - 2.1. Background 112
 - 2.2. Public International Law 113
 - 2.3. Private CSR Initiatives 114
3. Tort Law and the Duty of Care of Parent Companies 115
 - 3.1. Direct Orders of the Parent or Core Company 116
 - 3.2. Assumption of Responsibility 116
 - 3.2.1. The General Doctrine 116
 - 3.2.2. *Vedanta* and *Okpabi*: CSR Self-Commitments and Assumption of Responsibility 120
 - 3.2.2.1. *Vedanta* 120
 - 3.2.2.2. *Okpabi* 121
 - 3.2.2.3. The Position of the UK Supreme Court 124
 - 3.3. Corporation-Wide (or Supply-Chain-Wide) Duties of Care in Line with CSR Standards? 125
 - 3.3.1. UN Guiding Principles on Business and Human Rights . . . 126
 - 3.3.2. Tort Law Doctrine 127
 - 3.3.3. German Case Law 128
 - 3.3.4. English Case Law 129
 - 3.3.5. CSR Instruments and the Standard of Care 131
4. Conclusion 132

Extended Producer Responsibility in the EU: Achievements and Future Prospects

Susanna PALEARI 133

1. Introduction 133
2. EPR Systems in the EU: An Overview 134
3. Results Achieved by EPR Systems 136
 - 3.1. The Impact of EPR Systems on Waste Collection and Management 137
 - 3.2. The Impact of EPR Systems on Design for the Environment 140
4. Future Prospects for EPR: Financial Issues and Mechanisms to Improve Effectiveness 142
5. Conclusions 144

Financing Sustainable Growth in Europe: The Key Role of Sustainable Finance in Preventing Environmental Damage and Implementing Adaptation Strategies

Letizia CASERTANO 147

1. Introduction 147
2. New Business Models Rooted in Fact-Based Priorities and Related Legal Issues 149
3. ESG Finance as the New “Eligible” Finance 150
4. The Transition to Low-Carbon Economies as a Public Order Issue 151
5. Sustainable Development and Sustainable Finance as Public Collective Issues of Global Concern 152
6. Some General Remarks Concerning the Current Situation 156
7. Towards More Transparent Financial Markets: The New Disclosure Obligations 158
 - 7.1. Taxonomy 159
 - 7.2. Disclosure and Duties 160
 - 7.3. Financial Benchmarks 161
 - 7.4. Sustainability Preferences (Consultation) 161
8. The Shareholders’ Rights Directive and the Long-Term Shareholder Engagement Directive 162
9. Cooperation and Sharing in Order to Ensure Better Governance 162
10. The “Ontological” Need for Cross-Sectoral Implementation and the Need for a Strategy 163
11. Financial Globalisation and Financial Sustainability from the ILO Perspective: Microfinance 164
12. Some Preliminary Conclusions 165

The Burden of Proof in Proceedings for Corrective and Preventive Actions in Polish and Italian Law	
Bartosz RAKOCZY	167
1. The Burden of Proof: Definition and Importance in Proceedings.....	167
2. Conclusions.....	177
PART III. THE ROLE OF CRIMINAL LIABILITY	
The Protection of the Environment through Criminal Law: Preliminary Remarks	
Chiara PERINI	181
1. Environment as a “Worthy” and “Needy” Good for Criminal Protection.....	181
2. Directive 2008/99/EC and the Criminal Law Legality Principle.....	186
3. Environment as a Changing Concept in a Comparative Perspective.....	189
The Legal Framework against Planned Obsolescence: What Role (If Any) for Criminal Law?	
Emanuele LA ROSA.....	191
1. Introduction	191
2. “Planned Obsolescence”: Concept, Historical Evolution and Harmful Effects.....	191
3. The Role of European Institutions in Combating the Phenomenon.....	195
4. The Alternatives to Criminal Law: The Recent Italian Experience	197
5. The French Solution: The Crime of Planned Obsolescence	199
5.1. Planned Obsolescence and the Principle of Offensiveness/Harm Principle.....	200
5.2. Planned Obsolescence and the Principle of Legality.....	204
5.3. Is the Criminal Repression of Planned Obsolescence Effective?....	206
6. Conclusions.....	208
Confiscation of Assets and Proceeds of Crime in Environmental Criminal Law: New Approaches by the German Legislator	
Robert ESSER.....	209
1. Introduction	209
2. Type and Character of Sanctions for Environmental Crimes.....	210
2.1. Which Criminal Law Sanctions Does Directive 2008/99/EC Generally Require?.....	210

2.2.	Conformity of Current German Criminal Law on Confiscation of Assets and Proceeds of Crime with Directive 2008/99/EC	213
2.2.1.	Introduction to the Current Provisions for Confiscation of Assets	214
2.2.2.	Compliance with Requirements of Directive 2008/99/EC	215
2.2.2.1.	Criminal Sanctions	215
2.2.2.2.	Effectiveness	217
2.2.2.3.	Proportionality	220
2.2.2.4.	Dissuasion	220
2.3.	Intermediary Result	221
3.	Corporate Liability	222
3.1.	What is Required by Directive 2008/99/EC?	222
3.2.	Does German Law Fulfil Those Requirements?	223
3.2.1.	What is the Current Position in German Law on Corporate Liability?	223
3.2.2.	Does the Current German Law Comply with Directive 2008/99/EC?	225
4.	Conclusion	226

Environmental Criminal Liability of Enterprises and Compliance Programmes in Spain

	Miriam RUIZ ARIAS	229
1.	Introduction	229
2.	Article 31bis SCC and Specifications of Criminal Compliance Programmes	231
3.	General Remarks on the Spanish Criminal Code Regarding Environmental Crimes	233
4.	Environmental Administrative Law versus Criminal Law	235
5.	Regulated Self-Rule in Environmental Law and Environmental Rights	238
6.	Conclusion	240

PART IV. LEGAL TRANSPLANTS IN THE ENVIRONMENTAL FIELD: THE CASE OF ENVIRONMENTAL LIABILITY

The CERCLA Model: Past, Present and Future

	Marta CENINI	245
1.	Introduction: CERCLA as a Point of Reference for Directive 2004/35	245
2.	The EPA's Authority to Remediate and Notion of "Potentially Responsible Parties"	248

3. Strict, Joint and Several, and Retroactive Liability	252
4. “Landowner Defences”	254
5. Natural Resources Damages: The Role of Public Trust Doctrine.	258
6. Conclusions	261

Compensation for Environmental Damage in the CIS Countries:

A Comparative Legal Analysis

Alena KODOLOVA	263
1. Introduction	263
2. Analysis of the Current Legislation on Compensation for Environmental Damage in CIS Countries	264
2.1. Russian Federation	264
2.2. Belarus	265
2.3. Kazakhstan	266
2.4. Moldova.	267
2.5. Kyrgyzstan.	267
2.6. Armenia.	268
2.7. Azerbaijan	269
2.8. Tajikistan	270
2.9. Uzbekistan.	271
3. Special Liability Regimes for Environmental Damage in the CIS Countries	271
4. Conclusion.	274

**Compensation of Lawful Environmental Damage in the Russian
Legal System**

Nikolay KICHIGIN	275
1. Introduction	275
2. “Damage to the Environment” as a Category of Legal Liability for Environmental Offences	275
3. The Concept and Features of Legal Damage to the Environment, the Procedure of its Compensation	276
4. Differences between Lawful and Unlawful Damage to the Environment	278
5. Features of the Compensation of Lawful Damage to Aquatic Biological Resources.	286
6. Directive 2004/35/CE and Russian Legislation: Comparison of Approaches	288
7. Conclusion.	288

Ecological Environmental Damage Liability Rules in the Light of the Private Law Regime: Problems and Experience in China	
Yu CHENG, Congwen YAO and Wenhong REN	291
1. Introduction	291
2. <i>Locus Standi</i> : Conflicts of the Right to Sue Among Multiple Claimants	293
2.1. Legal Rules and Judicial Practice for Ecological Damage Claimants	294
2.2. Positive Conflicts of the Right to Sue Among Multiple Claimants	297
2.3. Solutions to Conflicts of Rights to Sue	300
3. Liable Parties: Expanded Liable Parties to be Confirmed by Law	302
3.1. Legal Rules Concerning the Scope of Persons Liable for Ecological Environmental Damage	303
3.2. Challenges Caused by Expanding the Scope of Liable Parties	305
3.3. Legislative Recommendations	308
4. Remedies Including Restoration and Compensation for Losses	309
4.1. Rules on “Restoration” and “Compensation for Losses” in EDL	310
4.2. Problems with Remedies in EDL Cases	315
4.3. Legislative Suggestions	317
5. Implementation Procedure for EDL Judgments	319
5.1. Rules of the Implementation Regime for EDL Judgments	319
5.1.1. Settlement or Mediation Procedures	319
5.1.2. Enforcement of Judgments	321
5.2. Problems with the Claim Procedure for EDL Cases	324
5.2.1. Weak Public Participation in the Settlement/Consultation Procedure	324
5.2.2. Problem-Solving-Oriented Judicial Innovation Weakening Judicial Rationality	325
5.2.3. Questionable Content of the Judgment Enforcement Rules	326
5.3. Possible Solutions to these Problems	327
6. Conclusion	328
Transplanting Civil Law Models in China: Compensation of Personal Damages Caused by Environmental Pollution	
Nadia COGGIOLA	331
1. Introduction	331
2. The Theoretical Context	333

3. The Tort Law Reform in China and Compensation of Environmental Damages	337
4. Application of the Rules on the Compensation of Environmental Damage.....	344
5. Final Remarks	351

PART V. STATE AND INTERNATIONAL ENVIRONMENTAL LIABILITY

The Myth of Plurality of Regimes in the Law of State Responsibility

Khazar MASOUMI	357
1. Introduction	357
2. The International Liability of States: A Civil Law Misunderstanding.....	359
2.1. The Inexistence of the Term: How Do You Say Liability?.....	359
2.2. The International Liability of States: From the Domestic Law's Objective Responsibility to the ILC's States' (Non-)Liability	360
2.2.1. An Equivalent for the Domestic Law's Objective Responsibility?.....	360
2.2.2. The Art of (Non-)Liability of the States in International Law	362
3. The Common Regime: Roberto Ago's Self-Sufficient Fortress.....	364
3.1. The Objectivity of the Common Regime	364
3.2. It is about the Secondary Obligations	366
4. Conclusions	369

The Right to a Healthy Environment and its Consequences for Other Human Rights: A Challenging Approach

Laura STĂNILĂ and Sergiu STĂNILĂ	371
1. Introductory Considerations on the Right to a Healthy Environment	371
2. Interference of the Right to a Healthy Environment with Other Human Rights in the Light of ECtHR Case Law	373
2.1. The Right to Life (Article 2 ECHR)	375
2.2. Prohibition of Inhuman or Degrading Treatment (Article 3 ECHR)	376
2.2.1. <i>Florea v. Romania</i>	376
2.2.2. <i>Elefteriadis v. Romania</i>	376
2.3. The Right to Respect for Private and Family Life and the Home (Article 8 ECHR)	377
3. <i>Brândușe v. Romania</i> and its Subtleties	379
4. Concluding Remarks	381

PART VI. CLIMATE CHANGE LIABILITY

Climate Change Liability: Some General Remarks in a Comparative Law Perspective

Valentina JACOMETTI 385

1. Introduction: Setting the Scene 385
2. The Emergence of Climate Change Litigation 386
3. Potentials and Difficulties of Climate Change Litigation 388
4. The Evolution of the Judicial Approach to Climate Change Claims 390

Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a “Judicial Governance” of Climate Change?

Carlo Vittorio GIABARDO 393

1. Introduction: The “Subversive” Nature of Climate Change and the Need for a New Legal Grammar 393
2. Climate Change Litigation as a Failure and as an Opportunity 397
3. The Ambiguity of the Role of Court in Establishing State Responsibility for Climate Change 400
4. Some Pushback (and Some Reasons for Being Pessimistic): Two Case Studies 403

Liability of States in Climate Change Migration and Compensation for Environmental Migrants

Francesco MARTINES 407

1. Introduction 407
2. The Right to Migrate (*Ius Migrandi*) 409
3. The Different Categories of Migration 409
 - 3.1. Economic Migration 410
 - 3.2. Migration Due to Vulnerability 410
 - 3.3. Environmental Migration 410
4. Climate Change as a Cause of Migration 411
5. European Protection Law 413
6. Conclusions 415
 - 6.1. Humanitarian Protection for Climate Migrants 416
 - 6.2. Italian Rules about Climate Migration 417

Reusing Offshore Hydrocarbon Infrastructure for the Permanent Storage of Carbon Dioxide

Joris GAZENDAM 421

1. Introduction 421

2.	CCS Technology and Associated Liability Risks	422
2.1.	Technical Basics of CCS Technology.	422
2.2.	The EU Regulatory Framework for CCS	424
2.3.	Liability Risks for CCS.	426
3.	Reuse Potential of Existing Hydrocarbon Infrastructure	428
3.1.	Reuse Potential of Hydrocarbon Infrastructure and Reservoirs	428
3.2.	Decommissioning Obligations for Hydrocarbon Infrastructure.	430
4.	Liability Risks Associated with Reusing Hydrocarbon Infrastructure	432
5.	Conclusion.	434

**PART VII. LIABILITY, CLIMATE CHANGE AND NATURAL HAZARDS:
THE ROLE OF INSURANCE**

**Insurance Instruments for Adapting to Climate Change: A Comparative
Perspective**

	Stefano FANETTI	437
1.	Introduction: Problems and Weaknesses of <i>Ex Post</i> Compensation Mechanisms for Natural Disasters	437
2.	Role of Disaster Insurance and Obstacles to its Spread.	439
3.	Possible Solution to the Low Penetration of Disaster Insurance: Compulsory or Semi-Compulsory Schemes.	440
4.	An Example of Compulsory Insurance: The Romanian Catastrophe Insurance Scheme.	441
5.	A Well-Known Semi-Compulsory Scheme: The French CatNat System.	443
6.	Italy: Low Penetration of Disaster Insurance and Opposition to Mandatory Insurance.	449
7.	Concluding Remarks	453

**Multi-Country Pooling Schemes for the Financing and Transfer
of Climate-Related Disaster Risk: A Comparative Overview**

	Alberto MONTI	455
1.	Introduction	455
2.	Financial Vulnerability and Financial Resilience to Climate Change	456
3.	Policy Options in Disaster Risk Financing	458
4.	Innovations in Risk Transfer Markets	459
5.	A Comparative Overview of Multi-Country Pooling Schemes	460
5.1.	African Risk Capacity	460
5.2.	Caribbean Catastrophe Risk Insurance Facility.	462
5.3.	Pacific Catastrophe Risk Insurance Company	464
6.	Conclusions	465

**Environmental Liability, Catastrophic Risk Mitigation and Sustainability:
The Role of Insurers Beyond the Insurance Coverage**

Anna Teresa MEMOLA 467

1. Risk Assessment: The Main Risk Factors Deriving from Natural
Catastrophes in the Global Context 467
2. The Role of Insurers Beyond the Insurance Coverage: Risk Awareness,
Risk Prevention 470
3. Approach of Insurers and Reinsurers: Solutions and Impacts
on the Lines of Insurance 475
4. Conclusion 479

**PART VIII. REAL COMPENSATION AND OFFSET REGIMES:
THE STRATEGY OF “NO NET LOSS”**

No Net Loss in Recovery: The Overall End-of-Waste Impact Assessment

Topi TURUNEN 483

1. Introduction 483
 - 1.1. Circular Economy and End-of-Waste Status 483
 - 1.2. Research Question 484
2. Environmental Acceptability at the End-of-Waste Stage 485
 - 2.1. Interpreting the Fourth Criterion 485
 - 2.1.1. Basic Aspects 485
 - 2.1.2. Using a Comparator 488
 - 2.2. The Ideology of No Net Loss in Recovery 489
3. No Net Loss in the Impact Assessment 491
 - 3.1. No Net Loss and Lifecycle Assessment 491
 - 3.2. Impacts of Ceasing to be Waste 493
 - 3.2.1. Negative Impacts of Ceasing to be Waste 493
 - 3.2.2. Positive Impacts of Ceasing to be Waste 495
4. Shortcomings in the Assessment of the Fourth Criterion 497

**No Net Loss and Forest Offsets in the Flemish Region: A Cautionary
Tale of How Not to Reconcile Science-Based Conservation Policies
with Economic Interests and Vested Rights?**

Hendrik SCHOUKENS and Geert Van HOORICK 499

1. Introduction 499
2. The Genesis of the Legal Framework on Forest Offsetting
and Nature Protection 504
 - 2.1. The Steep Road Towards a Moratorium on Deforestation 505
 - 2.2. A New, Greener Horizon with the Adoption of the *Ruimtelijk
Structuurplan Vlaanderen* Back in ... 1997 508

2.3.	Other Protection Regimes Relevant for Forests and Woodlands.	509
2.4.	The Increasing Relevance of Natura 2000 for Forests	510
3.	Analysis of the Continued Net Loss: Why is the Flemish Region Still Losing Forest Cover?	512
3.1.	The Poor Articulation between Forest Protection and Urban and Spatial Planning Law	514
3.2.	The Mitigation Hierarchy in Theory and in Practice: The Complexity of Saying No.	516
3.3.	The Limited Material Scope of the Compensation Scheme: Not All Losses are Compensated	520
3.4.	Financial Compensation as the Default Option: The “Polluter Pays” Principle?	521
3.5.	Additionality, Time Gaps and Interim Losses: How Can Degrading Baselines be Avoided?	523
3.6.	Faltering Enforcement: Who is Controlling the Enforcer and Avoids Further Abuses?	527
4.	Discussion and Outlook.	530

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