Chapter 1
Introduction

Peter Gailhofer, David Krebs, Alexander Proelss, Roda Verheyen, and Kirsten Schmalenbach

To date, international and transboundary liability has been an underutilised tool for international environmental protection. This book seeks to address this shortcoming by exploring what is needed in terms of legislative action and by identifying options for judicial discretion. This has been done to provide a legal contribution that furthers the development of an effective international and transnational environmental liability law regime. To this end, the book takes a broad view of the law of corporate liability for transboundary environmental damage. **1**

This focus on the liability of private parties for transboundary damage is not entirely new. Environmental liability law has always had to deal with the environmental damage caused by private parties for the simple reason that they, rather than States, cause the vast majority of environmental damage. The transnational aspect of environmental damage has also become a perennial topic in discussions on environmental liability with the now acute awareness that emissions do not stop at borders and the fact that the degradation of existential ecosystems and ecological resources **2**

P. Gailhofer
Öko-Insitut e.V., Berlin, Germany
e-mail: p.gailhofer@oeko.de

D. Krebs
Rechtsanwälte Geulen und Klinger, Berlin, Germany
e-mail: krebs@geulen.com

A. Proelss
University of Hamburg, Hamburg, Germany
e-mail: alexander.proelss@uni-hamburg.de

R. Verheyen
Rechtsanwälte Günther Partnerschaft, Hamburg, Germany
e-mail: Verheyen@rae-guenther.de

K. Schmalenbach (✉)
Paris-Lodron University of Salzburg, Salzburg, Austria
e-mail: Kirsten.Schmalenbach@plus.ac.at

© The Author(s) 2023

P. Gailhofer et al. (eds.), *Corporate Liability for Transboundary Environmental Harm*, https://doi.org/10.1007/978-3-031-13264-3_1

necessarily affects all of humanity. Even though the problems are well-known, the questions raised in this book could not be more relevant as effective solutions have remained elusive.

3 The last few years, however, have witnessed an increased pace in the legal developments regarding environmental liability. Some of these developments and decisions have been surprising and many have been disruptive in some way. As such, the rapid evolution taking place in this legal sphere demonstrates the current need for the renewed and intensified focus on the law of international and transnational corporate liability for environmental damage presented here. Of note, there have been intensifying efforts in recent years to address environmental damage and rights violations that result from the global, or at least internationally interconnected, business activities of companies. Specific regulations in many States aim at addressing the consequences of economic globalisation by regulating matters that are more or less closely linked to the value chains of companies in industrialised countries (e.g. French Duty of Vigilance Act, German Supply Chain Due Diligence Act, EU Timber Regulation, Norwegian Transparency Act, Dutch Act against Child Labour). New standards, norms and regulations deal with transboundary environmental and human rights impacts that, due to the interconnectedness of the global economy, are more or less strongly related to domestic actions, being linked, for example, to management decisions of companies or the decisions of consumers. This is a strong indication that legal ideas about the scope of corporate responsibility for harm occurring in their value chains are changing. A growing number of private standards that seek to provide guidance on what this responsibility actually consists of, coupled with the trend of governmental emphasis on the importance of these standards, fit into this picture. Indeed, the density of norms and standards that are supposed to align the globally interconnected economy with sustainability and human rights is ever-increasing and has now moved beyond the means of traditional international law.

4 Recent court rulings also demonstrate a new legal awareness of global interdependencies regarding the environment and climate and a broad responsibility to avoid damaging either one. Important decisions of domestic, regional and international judicial bodies, such as the ‘Climate Ruling’ of the German Federal Constitutional Court, the Dutch *Urgenda* and *Shell* decisions as well as the Advisory Opinion of the Inter-American Court of Human Rights on the Environment and Human Rights, reflect a revised understanding of the relationship of environmental and climate problems to fundamental and human rights. These decisions emphasise the intergenerational dimensions of these rights and strengthen the legal significance of the precautionary principle. In doing so, they develop stricter obligations to protect Earth’s climate and environment that must be taken into account, particularly by parties with short-term economic interests. Furthermore, such decisions often lend new legal relevance to scientific findings on what must be done to meet these obligations and give those affected the opportunity to contest environmental damage and its consequences in court in an unprecedented way.

5 The chapters of this book assess, from different angles, how environmental liability law fits into this overall dynamic, elucidating how the specific instruments

of liability law further the purposes of international environmental law and contribute to advancing legal doctrine. *De lege lata,* this book analyses the conditions and limits in national and international liability law; d*e lege ferenda*, it explores how domestic State regulation can contribute to leveraging the potential of liability law. More concretely, the present research examines whether current developments and recent case law have resulted in an observable emerging transnational standard of care. Such a standard may concretise obligations to avoid damage to existential environmental goods and corresponding rights which enable (potential) victims to make claims for mitigating action, restitution and/or compensation for the damage suffered.

6 Chapter 2 argues, from a rather general perspective, that the functions traditionally attributed to liability law seem particularly well suited for the task of concretising and implementing obligations to avoid environmental risks in transboundary constellations. This traditional approach focuses on an economic mechanism of liability that induces utility-maximising actors to calculate the risks of liability and thereby 'internalise' the detrimental external consequences of their behaviour. Whereas the economic deterrent effects bound to risk-prone practices may be relevant to transnational constellations characterised by a lack of binding standards and effective enforcement, the potential function of transboundary liability goes beyond just economic dynamics. Liability law should also be seen as an instrument of rights-based environmental protection. Disputes about rights violations arising from environmental damage have been rightly considered to work as catalysts for the development of environmental norms from the bottom up. Liability cases could thus trigger dynamics that strengthen the legal weight of individual rights and improve both climate and environmental protection. In addition, tortfeasors and injured parties argue before the courts about what specifically should be expected from companies to avoid violations of the law may serve as developmental points of reference for those designing environmental and climate standards and norms applicable to global value chains.

7 Chapter 3 examines liability at the level of public international law. It is a deplorable fact that all too often there is inadequate enforcement of international environmental laws that themselves already struggle to effectively address modern environmental challenges. The lack of incentives for environmental compliance only serves to heighten the need to promote the rule of law in environmental matters. This was emphasised by the UNEP in 2019 when it highlighted the value of the environmental rule of law as a concept that integrates critical environmental needs with the traditional components of the rule of law. The UNEP went on to note that this requires that environmental laws be consistent with human rights, fairly effectuated and evenly enforced. Accordingly, Chap. 3 addresses the question of whether, and if so to what extent, existing liability and responsibility rules in international environmental law contribute to the international environmental rule of law. It analyses the fragmented environmental liability landscape and places it within the wider rule-of-law context. It does so not only to highlight the shortcomings and gaps of the current liability regime but also to demonstrate what is needed for it to coalesce into a more

meaningful building block that contributes to the international environmental rule of law.

8 The question of environmental rights and environmental obligations of private parties at the level of international law is discussed in Chap. 4. This chapter assesses recent efforts to introduce direct obligations on business in international law and looks at important developments concerning the relationship between environmental and human rights in international law. In this regard, the chapter particularly examines to what extent affected parties can assert that environmental damage also constitutes a violation of their human rights. The chapter then describes and illustrates current developments that support the idea of a growing legal link between the environment and human rights. It considers, *inter alia,* to what extend these developments regarding environmental human rights could also strengthen environmental norms, even if these do not yet directly impose obligations on private parties at the level of international law.

9 Chapter 5 takes the strengths and weaknesses identified in previous chapters as a starting point to detail how international instruments may help to better align national liability law with the various constellations of transboundary harm. As will be seen, international civil liability conventions offer distinct possibilities for this. The chapter compares the provisions of existing civil liability conventions and their implications and draws conclusions concerning conceivable obligations of States under customary international law to adapt their national liability systems.

10 Chapter 6 changes the perspective and discusses the potential of national tort law to deal with transboundary environmental damage. It examines the general prerequisites for bringing claims involving environmental damage that occurred abroad before national courts based on domestic law and, with a view to recent court decisions, discusses the substantive prerequisites for establishing transboundary and value chain-wide corporate liability on the grounds of national liability norms.

11 Chapter 7 addressses the question of whether and how environmental due diligence obligations in transnational value chains can be anchored in the laws of the home States of transnational corporations. It takes the internationally influential concept of human rights due diligence as a point of departure and seeks to explore to what extent it can be adopted for designing environmental due diligence obligations. The chapter also argues that enshrining an environmental due diligence obligation in home State regulation is a feasible option to enhance environmental protection in global value chains. To this end, however, the approaches developed and discussed for human-rights due diligence obligations can be transferred to the environmental field only after a certain amount of customisation. With regard to the potential enforcement mechanisms of an environmental due diligence obligation in home State law, the chapter focuses on civil liability. Finally, it explores the legal objections that may be triggered by the potentially extraterritorial character of such legislation; however, the chapter demonstrates that due diligence obligations enforced by means of civil liability appear to be rather immune to these legal objections.

12 Chapter 8 examines climate change litigation as a reference area for international environmental liability, focusing on cases with a horizontal character, i.e. involving

companies as defendants in a civil law context. Based on an analysis of U.S. and European cases, the chapter discusses neuralgic points of climate change liability. This analysis includes the issue of justiciability and the relationship between State duties to regulate emissions and the tort law duties of private entities. The analysis then turns to questions pertaining to standing and compensable damage as well as causation and attribution to individual emitters, showing that the associated legal and forensic problems strongly depend on the type of action and remedy sought, neither of which preempt or exclude liability. The chapter ends with the substantive obligations of companies, discussing an emerging duty of care requiring corporations to align their business models with the goals of the Paris Agreement as well as some *de lege ferenda* ideas linked to defining and enforcing this duty.

13 Chapter 9 assesses the legal regime governing liability for damage occurring from running or even simply deploying, large-scale geoengineering experiments. Following a brief introduction to the scientific background, various geoengineering techniques and their associated major environmental and other risks are detailed. The chapter then analyses the international legal rules and principles currently, or potentially, relevant in the context of large-scale geoengineering activities. It details the key regimes that may be called on to govern geoengineering endeavours, including the London Convention/London Protocol, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the outer space treaty system as well as customary international law rules associated with the prevention of harm from activities that may have significant and adverse impacts on the environment. Referring to liability regimes identified and examined in other chapters, the chapter highlights international responsibility and liability for damage caused by geoengineering activities. It includes an in-depth discussion of the challenges in attributing responsibility and liability associated with geoengineering before presenting what a potential geoengineering liability regime may feasibly contain. Finally, the chapter offers some recommendations and conclusions concerning the future development of existent and pertinent liability regimes.

14 Chapter 10 rounds out this book and takes stock of what was discussed in the previous chapters. Although it is certainly too early to describe in black and white terms the trends and trajectories of international and transboundary liability law, one thing is certain, there is a groundswell of change. Dogmatic paradigms about environmental rights and obligations are now being broken down at a surprising pace in the face of increasing evidence of the existential threats of environmental hazards. This growing awareness has seemingly triggered a sense of urgency in many quarters to find new legal approaches to resolving these issues and these approaches are now being actively explored. This book, of course, cannot conclusively describe and answer the myriad of complex questions raised by current developments, however, it serves to meaningfully contribute to a better understanding of the potential and limitations of environmental liability law to facilitate transboundary environmental protection.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (http://creativecommons.org/licenses/by/4.0/), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.