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International and European Environmental Law with Reference to German Environmental Law

A Guide for International Study Programs

2nd edition 2019



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Foreword to the First Edition

The implementation of the Bologna Process is changing the German university landscape. Soon it will be difficult to conceive of an academic world without Bachelor and Master's degrees. International aspects will have to play a more important role in academic education and developing new study programs if Germany is to hold its ground in competition with European and international academic institutions. This also involves establishing more international study programs, which give students from abroad the opportunity to study in Germany. To be attractive, such programs must be designed to prepare students for professional careers in their home countries and also worldwide.

Without any doubt, basic knowledge in technology and management must also include law, which gives shape to procedures, production processes, and actually to all areas of life by providing rules and, in this sense, order to the course of events. Environmental law belongs to those areas of law that have moved to the center stage of political, academic, and practical attention due to increasing global environmental problems (e.g. climate change and its consequences). Today, European and international law largely determine environmental law at the national level. Basic knowledge of these legal domains is of great relevance especially for students from abroad in interdisciplinary study programs, in order to gain a better grasp on technical, economic, and ecological matters. Such legal knowledge must thus be viewed as an essential element of any academic program of this type that lays claim to being fit for the future. Against this background, this guide is intended to provide a reliable study companion. The author [Knopp] is a professor in the field of environmental law, who commands many years of teaching experience and, at the same time, has intimate knowledge of environmental law in practice. With this guide, he has created a well-structured study aid, which covers all significant aspects of environmental law and allows accessing this complex subject matter irrespective of prior legal knowledge. May it find many readers! After all this has been said, it should come at no surprise that the text as a matter of course has been published in English.

Cottbus, June 2007

Prof. Dr. rer. nat. habil. Gerhard Wiegleb
Dean of the Faculty of Environmental Sciences and Process Engineering
of Brandenburg University of Technology Cottbus

Foreword to the Second Edition

Twelve years have passed since the first edition of this Guide was published. During this time, environmental law has evolved and an update is therefore offered with a second edition. This edition is published by another publishing house (Logos, Berlin) and with an enhanced team of authors. However, the target reader has not changed. The Guide is written for students of environmental law in Cottbus or elsewhere in Germany.

Cottbus, April 2019

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Part I

Introduction

A. The Aim of the Guide

This guide has been conceived as a companion to students of international study programs, who are required to take courses in environmental law, to help them navigate their way through the subject matter, especially in the area of international and European environmental law. The target group is not limited to students with previous legal knowledge; it especially includes those who are not law students but are studying law as a complementary subject in the context of international and interdisciplinary study programs with some interest in environmental law. In a condensed manner, the guide provides an overview of the fundamentals and most significant developments of environmental law, focusing on international environmental law, European environmental law, and other areas of Union law with environmental effects. EU law is increasingly affecting national legislation since the EU Member States are required to implement directives enacted by the European legislative bodies into national law.

The guide does not claim to give a complete and comprehensive account of international and European environmental law. Its purpose is to introduce students to these areas of environmental law, to provide an overview and a basic understanding. This is done by deliberately making connections to German environmental law in order to illustrate and make comprehensible the interplay between international environmental law, European environmental law, and – in referring to the German case – national environmental law. Drawing on climate protection as an example of global significance, the relations between these three levels are explored in-depth and their foundations and development are discussed. At the end of each main section (Part II, Chapters A–E), questions are listed that give readers an opportunity to test their grasp of the subject matter. Answers are provided in a condensed form at the end of the guide in Chapter F. References in footnotes have been added only sparingly – in cases considered necessary – since the book is not primarily intended as a scholarly exposition. Instead, Chapter B (Part II) provides a selection of literature, including relevant scholarly journals, allowing readers to further pursue issues of interest on their own. Necessary references to legal decisions are either given in the text or in footnotes.

Finally, the guide is meant to provide a resource to all those who deal with environmental issues professionally but are not familiar with legal matters and are interested in gaining a quick overview of the different legal levels involved in environmental law.

B. Pointers for Use

I. Official publications

At the outset, preceding the main body of the text, the guide gives a complete list of abbreviations, which also includes those abbreviations that are later explained in the text.

In the following, abbreviations of the most common sources of information on *European environmental law* are additionally provided:

Primary EU law is contained in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Together, these treaties have subsumed many of the provisions previously introduced by the Treaty of European Community (EC) and the Treaty of the European Economic Communities (EEC). As part of this evolution, treaty provisions have been renumbered, rewritten and repealed several times and it is important for the reader to be aware of these changes. References to Treaty law are thus primarily made to provisions under the current numbering system (introduced by the Treaty of Lisbon) and, where necessary, references to older provisions are specified accordingly.

The European Union publishes the so-called *Official Journals* cited as “*OJ*”. Since 1967, the journal has been divided into two parts: Part L – “*Lois*” or “*leges*” – comprises legal acts requiring publication (such as directives) and Part C – “*Communications*” – all other texts published.

EU jurisprudence is developed by the Court of Justice of the European Union (CJEU) and the General Court (formerly known as the Court of First Instance). Case law cited in the handbook, together with all reported judgements, Advocate General’s opinions and orders of the EU courts are published (in all official EU languages) on their official website at: <https://curia.europa.eu>.

The Commission issues documents of its own, which are cited as *COM*[year], number. They include, for instance, reports to the Council and/or European Parliament.

Part II

International, European, and National – German – Environmental Law

A. Environmental Protection as a State Responsibility

I. Environmental protection as a global challenge

As has been consistently manifested throughout human history, environmental problems do not stop at borders. This has perhaps never been more evident than over the course of the past decades, during which the scale and complexity of environmental challenges have reached unprecedented heights due to continuous industrialisation, technological advancement and economic development. Indeed, much like a reflection of the increasingly globalised context in which contemporary societies exist and operate, so too have many environmental issues developed into global problems. For instance, in the case of climate change, the pervasiveness of its current and projected impacts undoubtedly poses complex transnational environmental challenges that are expected to affect all regions of the world, to one extent or another.¹ 1

A key concern and underlying rationale of environmental protection is therefore to preserve the natural environment and its life-sustaining functions for the benefit of present, as well as future generations. This is closely linked to the principles of inter – and intra – generational equity, which require (inter alia) current generations to meaningfully consider, and act to minimise, the potential ecological implications of their actions for humans now and in the future. Meeting these obligations is primarily a state responsibility, but undoubtedly also requires much wider societal engagement and participation to ensure that the objectives of environmental protection are both formulated and realized.² 2

Failure to take the necessary steps to protect the environment by one country, frequently has negative impacts upon neighboring ones, as, for instance, in the case of transboundary air or water pollution. Thus, as the guardian of the public interest, the state bears an inescapable responsibility to protect the environment by implementing adequate measures to remedy such situations, while respecting individual rights. Environmental degradation also has direct implications for people and may impair human health and emotional well-being. However, while human beings are inextricably tied to the natural environment, there is compelling evidence that the “self-healing powers” of nature are subsiding and that ecological systems are being pushed to their limits.³ In many instances, the damage inflicted will be irreversible, as in the case of species decline and the loss of biodiversity.⁴ And, increasingly, the transboundary and often global dimensions of environmental challenges entail that action confined to the state level will be insufficient to adequately address these issues. This requires, more than ever, that political decisions at the national level take international interests in environmental protection into account. 3

1 IPCC, Fifth Assessment Report, 2014.

2 Kloepfer, Umweltrecht, § 1 marginal no. 1. Also consult the most recent IPCC Fifth Assessment Report, 2014 as well as Chapter E.

3 Steffen et al., Planetary boundaries: Guiding human development on a changing planet, Science 2015; Rocktröm et al., Planetary Boundaries: Exploring the Safe Operating Space for Humanity, Ecology and Society 2009.

4 Kloepfer, Umweltrecht, § 1 marginal no. 3, with further references.

Moreover, in adopting such an international perspective, incorporating environmental concerns into international economic and financial systems is of utmost significance.

- 4 Adequate state action to protect the environment must be guided by the pursuit of the following goals:
- Avoiding environmental hazards – now and in the future – by employing preventative and precautionary measures, and;
 - Taking steps to remedy environmental damages that have already occurred.

Since human existence without using and affecting the environment is impossible (any production of raw materials, goods, food and energy has potentially negative environmental impact) and environmental resources are at the same time limited, it is necessary to reconcile conflicting economic, social, and environmental interests and needs – in relation to the environment – to the best possible extent for the benefit of both the environment and humans. State action must be guided by this maxim and depending on the area in question, environmental protection may be sector-specific, integrated, source-oriented, or substance-oriented. Importantly, an increasingly comprehensive (i.e., considering the interrelations among environmental media) and integrative approach to environmental protection has gradually been adopted over the course of the past decades. This process has primarily been pursued at the international level, with European environmental law being a particularly driving force of this development.

II. The concept of “environment”

- 5 Given the fundamental duty of the state to protect the environment, the question arises as to what is meant by the term “environment”. There is no commonly accepted definition of the term. The lines drawn to delineate the concept in everyday speech are certainly different to those of juristic terminology. An extensive concept of environment would comprise a person’s entire surroundings including fellow human beings and all social, cultural, and political entities. In legal reasoning, on the other hand, environment most commonly pertains to a more limited concept centered on the natural environment of human beings. This conception, however, has proven too restrictive. For this reason, more recent environmental legislation has adopted a medium range conception of environment, which comprises the natural foundations of human life – that is, the environmental media of soil, air, and water, as well as plant life, animal life, and microorganisms in their natural habitat and in their relations among one another and to human beings – and climate, landscapes, and cultural and tangible goods. The “environment” is, in this sense, equivalent to the biosphere as the system encompassing all ecological systems.⁵ Consequently, state action must be geared towards protecting the integrity of these systems (see Part I above).
- 6 In recent decades, legal action aimed at environmental protection has been extensively guided by the principle of sustainable development, which was first formulated in the so-called “*Brundtland Report*” of 1987.⁶ The authors of the report, the *Brundtland Commission*, argued (inter alia)

5 Hoffmann, The meaning of ‘environment’ in the German legal order, WRLAE 2014, 54 ff.

6 World Commission on environment and development, our common future, Oxford 1987. The final report was named after the head of the commission, the Norwegian Prime Minister *Gro Harlem Brundtland*.

that continued social and economic development could no longer be pursued at the expense of the environment and the global poor, as had consistently been the case since the dawn of industrialization. Rather, sustainable development should be pursued by balancing the economic, social, and environmental needs of current and future generations (as highlighted above), as well as considering the different needs that exist between industrialized and developing nations. The *Brundtland Commission* applied the principle of sustainable development to all public goods – including water and air – (which the report refers to as “resources”), the safeguarding of which was claimed to require the protection of the environment as a system.

Following its formal adoption at the *United Nations Conference on Environment and Development* (UNCED) in Rio de Janeiro in 1992, this concept has been established as a guiding principle in international environmental policy and international law and is found in the “Rio Declaration” and “Agenda 21”,⁷ as well as the 2015 UN Sustainable Development Goals. 7

The principle of sustainable development was adopted at the European level by the Treaty of Amsterdam and is currently referred to in both the Preamble to the *Treaty on the European Union* (TEU) and in Article 3 TEU. As such, it has been established as a fundamental tenet of EU law and is generally informed by the three following guidelines⁸: 8

- Renewable resources may not be used at a rate exceeding the capacity to regenerate them.
- Non-renewable resources and energy sources may not be used at a rate exceeding the capacity to provide physically or functionally equivalent renewable substitutes.
- And finally, pollutant emissions may not exceed the capacity of environmental media and ecosystems to absorb them.

For these objectives to be realized and translated into appropriate levels of environmental protection, industrial countries must not only lower their own resource consumption but also provide practical assistance in implementing them in developing countries as well. This has also been highlighted by the UN’s 2030 agenda for sustainable development, which provides a non-binding international framework for pursuing sustainable development.⁹ The need for significant readjustments and action is especially obvious in the case of climate protection, given that climatic changes are expected to impact disproportionately upon developing nations. Many of these would have contributed the least to these changes, while also benefiting the least from the process of economic development that served to create them. The industrialized world, bearing the main responsibility for climate change, is therefore obliged to take necessary action to reduce pollution in order to give the developing world, via economic compensation projects, an opportunity to participate, for instance, in a cautious use of resources. 9

7 The Agenda 21, which was also adopted at the 1992 Rio conference, consists of 40 chapters and is conceived as an environmental policy action program for implementing the principle of sustainable development at the international level and (above all) in the context of the environmental policies of the signatory states.

8 Klopfer, *Umweltrecht*, § 4 marginal no. 67.

9 UN, *Transforming our World: The 2030 Agenda for Sustainable Development*, 2015.

III. Environmental protection elevated to constitutional status

- 10 The prospects of impending environmental destruction, as well as the recognition of environmental protection as a state responsibility demanding appropriate action, has led many EU Member States to incorporate “environmental protection” in their constitutions. The Federal Republic of Germany, for instance, has added environmental protection to its constitution as a so-called *Staatszielbestimmung*, which defines the pertinent objectives of the State under Article 20a of the German constitution (*Grundgesetz*, GG), enacted as law on Oct. 27, 1994. This article has since been complemented by adding a provision pertaining to the protection of animals, enacted as law on July 26, 2002. Environmental protection is thus afforded almost the same constitutional status as other constitutionally defined objectives (*Staatszielbestimmungen*), such as the rule of law (*Rechtsstaatsprinzip*) and the principle of social justice and the welfare state (*Sozialstaatsprinzip*) laid down in Art. 20 GG.
- 11 Art. 20a GG commits the state to protect, for future generations, the natural means of subsistence of human and also of animal life within the framework of the constitutional order by means of its legislation, its executive authorities – in accordance with principles laid down by statute and general law (*Gesetz und Recht*) – and their adjudicature. In this respect, the state and its bodies are vested with responsibility for the future of the environment as a direct reflection of the principle of sustainable development. The protection mandate assigned to the state in Art. 20a GG essentially comprises the following specific obligations:¹⁰
- The duty to respect and protect (*Achtungs- und Schutzpflicht*) the natural means of subsistence of human and animal life. This involves averting damage inflicted by third parties, as well as remedying damage after it has occurred and maintaining the natural environment;
 - The duty to prohibit action encouraging environmental impairment;
 - The duty to prevent damage from occurring. This involves avoiding activities that will likely lead to environmental damage and includes preventive measures, precautionary measures, and provisions for controlling risk before the threshold to danger is reached;
 - With regards to animals, the state bears a duty to prevent pain, suffering, or damage from being inflicted upon individuals (in this respect cf. also *TierSchG* [*German Animal Protection Act*]);
 - The duty to manage common resources in a sustainable and responsible manner. In this context, the sustainable use of renewable resources entails that, in the long-term, the rate of exploitation or impairment may not exceed the natural rate of growth or regeneration.¹¹
 - *Non-renewable* resources, especially mineral resources (such as oil and coal) are to be used sparingly¹² so that the generations to come may also benefit from these goods (principle of economical use).
- 12 Notwithstanding the growing importance of environmental protection, the adoption of an explicitly stated fundamental right to a sound environment, which could be enforced by individual

¹⁰ Murswiek, in: Sachs, *Grundgesetz*, 8. Aufl. 2018, Article 20a marginal nos. 33 ff. with further references.

¹¹ Cf. Stockholm Declaration, Principle 3.

¹² Cf. Stockholm Declaration, Principle 5.