

## **SAMFUNN: Preventing environmental effects of products through producer responsibility**

*Producers' and importers' responsibility for hazardous environmental effects of products during use and as waste.*

### **1. Relevance**

This project aims to get new insight and build general academic competence in the increasingly important field of producers' and importers' responsibility for the environmental effects of their products. This is a wide research field internationally within both environmental law and trade law, as well as environmental economics. The project will have a broad perspective and develop close links with international research in the field. In particular it will take up certain topics of a transnational character and the relationship between Norwegian law and international rules.

To a large extent, and increasingly, national and global pollution problems are caused by "diffuse pollution": pollution from a range of 'daily life' activities and consumption. The innumerable sources may be individually insignificant but have unacceptable cumulative effects due to both the amount involved and the interaction between various types of sources.

One important cause of 'diffuse pollution' is the mass production and consumption of products with negative environmental effects during use and/or when they are disposed of as waste. Environmental effects of products represent an important type of 'market failure' in the economic sense, and it is a major challenge to correct this failure. One strategy is to attack the problem 'at the source' by making the producers, and also the importers, in various ways responsible for the environmental effects of their products. The topic raises issues of both national and international law. Since a large amount of products on the market are exported and imported, the transnational aspect of producer and importer responsibility is important but difficult. In a globalized economy, product regulation is almost by definition a field which is situated between the international and national legal orders. The project aims to describe, clarify and analyze national and international rules in this regard, and the interface between them. It also intends to identify problems and weaknesses in the legal regime as a basis for improvements.

The call for project proposals under SAMFUNN lists strategies to reduce pollution as a priority area, and assessment and development of instruments is one example of relevant research. Under the title "Global perspectives on environmental problems" the call mentions in particular "importance of the global economy and global markets" and "legal systems and legal practice, including EEA law" and "environmentally friendly choices and adaptations including in transnational production chains". This project will address a significant and cross-cutting topic under these general issues.

## **2. Aspects relating to the research project**

### **2.1 Background and status of knowledge**

#### *2.1.1 General background*

Environmental problems created by the use and waste disposal of products have been high on the international and national agenda over the last couple of decades. Many countries have introduced *a broad range of instruments* to this effect: prohibition of the most hazardous products, detailed regulation on the use of the product combined with mandatory information about the product, labeling requirements, taxes on products as an incentive to reduce the consumption of the product, as well as a broad set of rules and economic instruments to reduce the amount of waste and the negative environmental effects of waste disposal. There are also instruments to encourage consumption of 'environmentally friendly' product alternatives, such as different types of 'eco-labeling' and other incentives to promote consumption and daily life behaviour with less negative environmental effects.

This is also a rapidly increasing field of *international environmental policy and law*. Regulation of the trade, use and disposal of hazardous products and waste has been an important

part of the environmental policy and law in the *European Community* since the 1970s. Clearly, this is a crossroads between the objectives of free trade and environmental protection, but at the same time an area where the European Union may promote both objectives through the harmonization of national rules. Producer responsibility is a central element of the directives on special types of waste<sup>1</sup> and is also essential in the Framework Waste Directive.<sup>2</sup> These directives have the double purpose of both preventing hazardous substances to become waste and limiting the amount of waste through return, reuse and recycling systems. A far-reaching system of producer responsibility is also found in the EU regulation and directive on REACH. - Through the EEA Agreement all product-related environmental legislation adopted by EU law will apply to Norway.

*At the global level*, several major treaties aiming at reducing pollution from products have been negotiated and come into force during the last couple of decades. The most important are the 1985 Vienna Treaty for the Protection of the Ozone Layer with the 1987 Montreal Protocol, the 1989 Basel Treaty on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the 1998 Rotterdam Treaty on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the 2001 Stockholm Convention on Persistent Organic Pollutants. These agreements have in turn influenced the development of both regional and national – including Norwegian - rules and regulations. – In addition various soft law-instruments such as the ISO 14000 series and international certification schemes play a role in international standard-setting. - It is significant that the issue of producer responsibility has been for some time, and still is, on the agenda of many international organizations, including UNEP and the OECD.

Regional and national regulation of products with an environmental objective may create problems in relation to *international trade law*. One such problem is the issue of national rules related to the environmental aspects of the production and environmental characteristics of the traded product. Several well known environmental cases in the WTO dispute settlement bodies are a witness thereof.

In essence, product-related environmental regulation today represents a wide, dynamic and increasingly diverse and complex legal field at the national as well as the international level. It is essential for national environmental authorities to have knowledge and competence in this area of environmental law. In Norway such competence is today mainly found, on the one hand, among civil servants in the Ministry of the Environment and the national Climate and Pollution Agency and, on the other hand, within the relevant branches of trade and industry. The field is rather technical and – the EU law in particular – dominated by very detailed technical rules and regulations. This may to some extent have ‘hidden’ important underlying legal issues of principles, distribution of responsibilities, which are the topic of this project.

### 2.1.2 *The concept of producer responsibility*

‘Producer responsibility’ is a broad concept. To make legal sense, it must be broken down into more specific obligations for specific actors. As a start, the concept ‘producer’ must be clarified. In EU product law it has been defined as follows:

‘Producer’ means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.”<sup>3</sup>

<sup>1</sup> Such as the directives 94/62/EC on packaging and packaging waste, 2000/53/EC on end-of-life vehicles, 2002/96/EC on waste electric and electronic equipment, and 2006/66/EC on batteries and accumulators and waste batteries and accumulators.

<sup>2</sup> Directive 2008/98/EC.

<sup>3</sup> Directive 85/374/EEC concerning liability for defect products, article 3, 1.

‘Producer’ may refer to several producers in the production chain. As a consequence, who is the “producer” in a given situation may in itself be unclear.

“Responsibility” also has several meanings, and includes a range of obligations. Taken “chronologically” the most important are

- obligation to assess and know the environmental properties and effects of the products,
- duty to inform about the product’s possible environmental effects and resource use, and inform users about how to avoid negative environmental effects, etc.
- duty to inform correctly about a product’s environmental qualities if a product by eco-labeling or other types of certification schemes or accepted criteria is marketed as particularly ‘environmentally friendly’,
- economic or “practical” responsibility for certain activities related to the treatment of the product as waste, including so called “take back-obligation”,
- liability for environmental damage caused by the product in use or disposed of as waste.

“Producer responsibility” can be understood both as primarily an economic concept as duty to pay for waste treatment or damage, or in a more ‘substantial’ sense as well: as an obligation to develop less polluting products, to carry out life cycle assessments, to facilitate reuse, recycling, etc. Anyway, it does not necessarily mean *exclusive* responsibility in all these aspects. There may also be other important actors in a system such as central and local public agencies, private organizations and the consumers themselves. Responsibility may well be shared, and the “producer” may be responsible for only a part of a system.

An often used term is “*extended producer responsibility*” (EPR). In the international discussion this seems to have a double meaning. It is often understood in a general sense as producer’s responsibility for the product during its whole life cycle, including during use and disposal of the product as waste. However, OECD defines it more narrowly as an environmental policy approach in which a producer’s responsibility for a product is extended to the post-consumer stage of a product’s life cycle – the disposal of the product as waste.

### 2.1.3 Underlying objectives and principles

There is a variety of arguments in favour of producer responsibility, among others promoting a *more sustainable use of natural resources* by reducing resource consumption through increased energy-efficiency, recycling and re-use, or reducing *environmental problems* in the stricter sense, in particular pollution from the use and waste treatment of product.

In an economic perspective, the question is discussed whether producer responsibility will increase *economic efficiency* in the development of products and in environmental policy. In particular, the argument is that this is a way of internalizing external environmental effects of products with positive environmental results. The theory is that the producer will be interested in adapting the product’s design, chemical content, etc. in such a way that the social cost of waste treatment is reduced. To what extent this is actually achieved, is itself a matter of discussion. Whether it is efficient in the economic sense depends on a variety of factors, such as the information needed by the producer about the possible effects, the handling and transaction costs of various types of design and take-back obligations and at various stages of the product chain, etc. A further concern from an economic point of view is that EPR in reality may be a mix of instruments with various objectives and effects. – Producer responsibility rules may also have perverse effects. For example, they may be an incentive to export waste products to countries without take back- or similar obligations. This is a difficult issue in the implementation of the Basel Convention, in particular with regard to waste electronic products.<sup>4</sup>

The principle of producer responsibility is also to be seen in the perspective of the *polluter pays principle*; the producer may be defined as one of the polluters in the chain of causes of pollution from products. Which actor or actors in the chain that should be held responsible,

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<sup>4</sup> It is also an underlying aspect of the dispute within WTO between Brazil and the EU known as the Retired Tyres case. **Sjekk**

whether responsibility should be channeled to one actor, and the relationship between the various actors, are important general issues in pollution control law. The answer depends on both fairness, environmental effectiveness and economic efficiency considerations (Bugge 1996, Bugge 1999, Eide and Stavang 2008).

Still another perspective, which is complementary to the two just mentioned, is to raise the question whether, in addition to initial ownership of the *good* produced, also should “own” some initial liability for possible “*bads*” produced, i.e. harm which the product might give rise to later in its lifetime. In this perspective, the underlying problem is one of delineating a property rights structure, while remembering that obligations also can be a stick in the the bundle of rights.

#### *2.1.4 Status of knowledge*

As is clear from the above, product-related law is a vast area. Since most of the positive law relates partly to international rules on specific products, or on waste treatment, these areas have been subject to quite extensive research and legal literature internationally. This also includes EU legislation. However, less legal research work seems to have been done lately on more general issues of producer responsibility (although some examples are mentioned in the bibliography). The work on this project proposal in contact with the partners indicates that this field needs fresh research, and that the project may provide an international contribution.

In Norway, while major parts of issues like the pollution permit system for important point sources have been subject to research, there has until now been little work done on product-related environmental law. This is in spite of the fact that product regulation and other incentives to improve environmental efficiency of products has been an important element in Norway’s environmental policy and law. This project is meant to put product-related environmental law on the agenda of national environmental law research. It is intended to provide an opening to further work on an important and complex field of national and international environmental law.

## **2.2 Approaches, hypotheses and choices of method**

### *2.2.1 Approaches*

As the background and introduction to the issue clearly illustrates, there are numerous themes for research in the field of ‘product-oriented environmental law’. The aim of academic competence building in the field may be achieved through a range of different research topics and approaches.

One possibility is to describe and analyze one of the global treaty regimes mentioned above and extended to the corresponding rules in the EU/EEA law and further to its application in Norwegian law. Within EC law in particular, several regulations and directives, and their national application could be the subject of research. However, since many of the relevant international conventions and EU/EEA directives and regulations have been subject to research internationally this will not be the approach in this project. For example, it will not deal with legal issues related to producer responsibilities for chemicals as laid down in the very complex REACH regulation and directive. An in-depth analysis of this regulation, with its special and very elaborated rules on producer responsibility, would be a major project in itself. However, this project may study elements of the REACH regulation i.a. for illustration and comparison purposes.

Instead, the *project approach* will be to look at various aspects of what could be coined as *the general responsibility of producers and importers to prevent negative environmental effects of products*. By “the general responsibility” is meant the responsibility that applies generally to producers and importers, independently or in addition to the special rules for certain groups of products.

Importers are included in the project because the majority of products on the Norwegian market with possible environmental effects are today produced outside Norway. Also, the relevant rules in Norwegian and EC law apply to a large extent similarly to producers and importers. This raises important and difficult questions of transnational application of national rules: what should and can importers require from their suppliers, and how to control the information given?

The research will treat Norwegian law and analyze *whether there are rules in international law that frames Norwegian law either as a positive obligation or a limitation*. It follows from this that the project also will study general international rules regarding environmental obligations for producers and importers, such as international trade law.

### 2.2.2 Hypothesis and method

It is usually difficult to present a particular ‘*hypothesis*’ in legal research. However, at the level of theory, the theory of functional property and its evolution (Demsetz 1967, cf Eide & Stavang 2008 and Stavang 2005) seems relevant. The basic tenet of this theory is that changes in relative costs and prices over time tends to shift the property rights structure and the embedded liability rules so that overall wealth (aggregated over all relevant stakeholders) in a broad sense tends to be maximized. By Demsetzian implication, we could expect to observe a real shift towards new responsibilities for owners of goods that might produce also “bads” as by-products, and also towards a strengthening by means of various legal techniques of existing responsibilities. If this *positive* theory “fits” the facts in the broad sense, it might also serve a principled *normative* approach and serve to prevent the legislator from doing too little to channel liability to the party in a chain who most ably can carry the risk.

This being said, the task in this project is first to clarify the legal content as well of the Norwegian rules as that of the relevant international rules in order to better understand the possibilities and limitations for national law. Second the aim is to analyze the rules and identify challenges and problems connected to reducing environmental effects of products.

*The method* will in the first place be a description of the national and relevant international law based on the usual legal sources: the texts, court practice, the application of the law, and legal theory. Although the focus of the project will be Norwegian law, it will have important international elements since many global and EU rules both directly define and limit Norwegian law, and will serve as factors of interpretation. In the analytical part, Norwegian law will be analyzed against the international rules, and – to the extent possible and relevant - compared to similar rules in other countries. *Comparative studies* may be particularly useful in order to assess the quality and effectiveness of Norway’s law, and identify possible ambiguities and weaknesses.

Section 2.2.4 below will give more detailed information on method related to the different issues to be studied.

### 2.2.3 Issues to be studied

At the outset, the project seeks to identify the various aspects of producer and importer responsibility in national and international law, and the main legal issues this involves.

On this basis the project will touch a handful of questions, which may be grouped as follows:

- Producer responsibility: theoretical discussion and framework
- Producers’ and importers’ duty to assess and have adequate knowledge of the environmental effects of their products, when used and as waste.
- Producers’ and importers’ duty to inform about these effects,
- Legal issues related to eco-labeling; in particular eco-labeling under WTO law.
- The use of good environmental qualities as an element in the marketing of products, and the corresponding responsibility for producers and importers in relation to both customers and public marketing legislation.
- Legal issues related to “extended producer responsibility” and so called “take back-obligations” for producers/importers.

Among these, 1-3 questions will be chosen as the core topic for a PhD thesis, based on further consideration and discussion in the research group and with the PhD student. At the outset, topics related to the *transnational problems* and relations between national law and international law, will have a priority. Within this, obligations to assess, know and provide information about the

characteristics and effects of products seem particularly relevant. Other issues will be taken up in more limited studies carried out by the members of the research group including research assistants. The project plan includes at least one master thesis on a selected topic each year.

#### *2.2.4 A closer look at some selected topics.*

##### *a) Producer responsibility: theoretical discussion and framework*

The initial part of the project will look into the general discussion of producer responsibility and its various legal aspects. It will familiarize itself with the various arguments for and against extensive producer responsibility and aim at identifying the main legal problems related to the various elements of such responsibility. As part of this, producer responsibility will be looked into in the perspective of economic efficiency and environmental economics, based on recognized methods of law-and-economics.

This part of the project will mainly be based on literature studies and serve both as an introduction to the project and as a theoretical basis for later analyses.

##### *b) Producers' and importers' duty to assess and have adequate knowledge of the environmental effects of their products, when used and as waste.*

In Norway, the Act Relating to the Control of Products and Consumer Services (Product Control Act)<sup>5</sup> is the central statute in this area. Its objective is to prevent i.a. 'environmental disturbance', for example in the form of 'disturbance of ecosystems, pollution, waste, noise and the like' (section 1). Its section 6 states that producers and importers "shall exercise due care and take reasonable steps to prevent or limit" such effects. It also explicitly states that every producer and importer 'has a duty to obtain such knowledge as is necessary to evaluate whether the products can cause' such effects. This raises the question of the extent of the obligation to require information from producers in other countries, in particular when this is not required pursuant to the law in the producer's own country.

The project will analyze and discuss the extent of these obligations *de lege lata*. The study will look into the concept of 'producer' in this regard. It will be based on legal sources in Norway and in international and EU law, including soft law. Empirical studies of how the rule is understood and applied by the product control authority will be carried out, as well as comparisons with similar rules in other countries.

##### *c) Producers' and importers' duty to inform about these effects,*

Here again, the Product Control Act is a starting point in Norwegian law. Its section 10 lays down a general right for the public ("any person") to information about products from the producer and importer (as well as from the processor, distributor or user). Such information includes

- whether a product contains components or has characteristics that may result in negative environmental effects,
- how the product must be handled to prevent such effects, and
- significant injury to health or environmental disturbance caused by production and distribution of the product.

This right to information also applies to information concerning the environmental impact of production or distribution of a product outside Norway's borders "insofar as such information is available". The importer shall request such information from the previous link in the supply chain if this is necessary to enable it to answer the request for information. This raises issues of trade law and – indirectly - of extraterritorial effects of national legislation.

The right to information is, however, not without limitation. In particular, a request may be refused if the information requested concerns matters "which for competition reasons

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<sup>5</sup> Act no. 79/1976.

it is important to keep secret in the interests of the person whom the information concerns". The balancing between the interests of the producer/importer on the one hand, and that of the public on the other hand is a crucial issue. It is important to explore various international sources on this issue in order to get a clearer picture of how this is solved outside Norway.

*d) The use of good environmental qualities as an element in the marketing of products.*

When environmental qualities are used in the marketing of products, it puts responsibility for producers and importers in relation to both customers and public marketing legislation. It is required that the information is correct. However, this raises issues of the quality and relevance of various criteria, how to assess key factors, the grade of flexibility, etc. It also raises the issue of possible liability for effects of missing or misleading information.

*e) Legal issues related to take back-obligations for producers/importers.*

As mentioned, a practical application of the principle of producer responsibility is the obligation for the producer/importer to "take back" the product when it has reached the waste stage. As mentioned, take back-obligations are applied, with nuances, in EC waste law, for such products as batteries, end of life cars and waste electrical and electronic equipment. Norway has implemented the EC rules, and even gone somewhat further, partly on the basis of regulations pursuant to the Product Control Act and partly through *voluntary agreements* with producers and/or the branch associations. The regulations as well as the agreements raise several legal issues of both private and public law which have not been subject to systematic studies.

## **2.3. The project plan, project management, organisation and cooperation**

### *2.3.1 Project plan*

The core element of the project will be a *PhD thesis* on one to three of the above mentioned issues. The topic of the thesis will be chosen on the basis of the initial research and discussion within the research group, as indicated above. The PhD student will be recruited as soon as possible and is expected to start early autumn 2011.

Other topics will be taken up in more *limited studies* carried out by members of the research group. Budget is also allocated for one research assistant work, and for procurement of contributions by external partners.

Throughout the project period, it will organize national and international seminars, invite guest researchers and lecturers, etc. More precisely, a meeting with the international partners will be held annually. In 2013, around halfway in the project, this event will be expanded to a broader international symposium.

It is foreseen that the PhD student and other members of the research group will attend international seminars and conferences in the field throughout the project period.

### *2.3.2 Project management and organisation*

The project will be carried out by the Natural Resources Law Group at the Faculty of Law, University of Oslo. This is an interdisciplinary research group comprising 7 full professors, 1 associate professor, 1 post doc., 6 PhD students, and research assistants, in the fields of property law, environmental and climate law, energy law, and law-and-economics. Its objective is to develop new research and research methods concerning management of natural resources and the environment, across traditional legal disciplines.

The group is chaired by professor in environmental law dr. juris Hans Chr. Bugge (CV attached), who will be project leader. Other professors who will be actively involved are professor dr. juris Inge Lorange *Backer* (jurisprudence, environmental law), professor dr. oecon Erling *Eide* (law-and-economics), associate professor dr. juris Endre *Stavang* (property law theory, law-and-economics), and associate professor dr. juris Christina *Voigt* (environmental law and trade law).

The group is administered by *Scandinavian Institute in Maritime Law*, Faculty of Law.

The group runs several projects which are partly funded by Norway's Research Council and with topics that are connected to the present project proposal. One major project is "*Consistency in Environmental Law*" which is funded by the Miljø 2015/SAMFUNN programme. The present project also raises issues of legal consistency and will have close connection with that project, and may even be seen as an extension of it.

There is also a link to the project *Sustainable Companies* at the Department of Private Law of the Law faculty, also funded by Miljø 2015. This project approaches responsibility for sustainable development and environmental protection from the perspective of company law.

### 2.3.2 National cooperation

The Research Group has for years had close and current cooperation and contact with relevant authorities and organizations in Norway, in particular the Ministry of the Environment and the Climate and Pollution Agency. This will be further developed in this project, together with cooperation with relevant organizations within trade and industry. The project will seek cooperation with other disciplines at the university, i.a. through the interfaculty programme Environmental Change and Sustainable Energy (MILEN) where the research group is a partner. The need for a formal *reference group* for the project will be considered.

In particular, the project will draw on external competence in environmental economics. Head of Research Mads Greker, Statistics Norway (Statistisk sentralbyrå) (CV attached) will join the project. In addition, professor Karine Nyborg, Institute of Economics at the University of Oslo will be invited to take part in seminar discussions etc.

### 2.3.3 International cooperation

Through its many projects the Natural Resources Law Group has a considerable network of international contacts and partners which will be useful for the project.

In the context of other projects the group has cooperation agreements with environmental law researchers at the University of Helsinki and the University of Juensuu, Finland, Stockholm University, Sweden, University of Bremen, Germany, the Catholic University of Leuven, Belgium, Pace University Law School, New York, and University of Arizona, USA, and the University of Calgary and the Institute for International Sustainable Development Law in Canada. We will benefit from these contacts in the project. There is close contact among environmental law scholars in the Nordic countries through the Nordic Environmental Law, Governance and Science Network.

This project has four formal international partners, all particularly competent in the field of producer responsibility:

- Professor Nicolas de Sadeleer, Facultés universitaires Saint-Louis, Brussels, Belgium
- Research Associate dr. jur. Olaf Dilling, Faculty of Law, University of Bremen,
- Associate professor, PhD Naoko Tojo, International Institute of Industrial Environmental Economic, University of Lund, Sweden
- Prof. Dr. Hans H. B. Vedder, Faculty of Law, University of Groningen, the Netherlands (Letters of confirmation and CVs attached)

## 2.4. Budget

The total budget for the 4 year period is NOK 4,1 mill., of which NOK 3,675.000 will be covered by the Research Council. (For details, see the application form.)

## 3. Perspectives and compliance with strategic documents

### 3.1. Compliance with strategic documents



The project fits well into the strategy of the University of Oslo, the Faculty of Law and the Natural Resources Law Group.

The new Strategy 2020 of the *University of Oslo* defines social responsibility, solidarity and the environment as among its “core values”. Teaching and research in environmental issues is one of its priorities, and it will become a “green university” through its efforts in the field of environment.

The *Faculty of Law* has defined “Law and the Environment” as one of four topics of priority for its research activity.

As far as the *Natural Resources Law Group* is concerned, the project is well related to its strategy and other ongoing projects and will be a good supplement to them.

### 3.2. Relevance to society

The topic of the research project is clearly relevant to society. It addresses an important cause of global pollution and environmental degradation, namely the problems coming from the use of products and disposal of products as waste. It aims at describing and clarifying the rules related to producers and importers responsibility.

### 3.3. Environmental perspectives

The project deals with effects of climate change. Its aim is to reduce the risk of serious damage to both property and the environment. Hence, it is presumed that it will have a positive environmental effect. However, a more precise assessment of this will depend on the outcome of the research.

The project does not raise particular *ethical* aspects or issues related to *gender perspectives*.

## 4. Communication with users and dissemination of results

### 4.1 Communication with users

There are several relevant user groups, such as the responsible ministries, and other responsible state authorities such as the Climate and Pollution Agency. Important national organizations are also very interested and active in the field, such as the Confederation of Norwegian Enterprise (NHO).

The project will organize at least one major seminar each year with participants from relevant authorities, organisations and research institutions. Here, results from the project will be presented and discussed. These will be combined with the annual meetings with the international partners.

### 4.2. Dissemination plan

It is a goal to publish articles from the project in national and international law journals with referees. The main outcome of the project will be the PhD thesis, which most likely will be published as a book (monograph). During the project period, it is expected that the PhD student will publish several articles, as a minimum as required by the PhD programme. Also the master theses will be published. Other members of the group are expected to present articles in international peer reviewed journals. Presentations at national and international seminars may also result in articles, and will in any case be presented at the website of the Natural Resources Law Group. At least one book based on such papers and master theses will be edited.

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