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"Unlocking Legal Gridlock in High-Income Countries:

How Excessive Litigation Hampers Growth and Harms Democracy"

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Abstract

The paper focuses on rules of standing in the context of environmental law. With the implementation of the Aarhus Convention in European law, environmental lobby groups have become a major driver of environmental regulations enforcement. While such interest groups can help to reduce enforcement deficits, there is the risk of regulative gridlock, when excessive litigation lengthens approval procedures, wastes resources, and discourages investments in public and private infrastructure. The paper discusses the implementation of the rules of the Aarhus Convention in Germany and highlights several aspects how administrative gridlock can be overcome and approval procedures facilitated in order to maintain a competitive economy that is the base for Germany's high standard of living and large welfare state.

1. Introduction

Some high-income countries face significant trouble with administrative processes such as the granting of building and operating permissions for various types of investment activities. Both public and private undertakings require legal certainty to incentivize investments and spur innovation. Such legal certainty does not only concern material rules regarding the precondition of the granting of a permission, but also the reliability and predictability of the approval process itself. If such approval processes take too much time and are burdened with too much uncertainty, highways, railroads, and wind parks remain unbuilt, and factories are built elsewhere[2]. Hence, a smooth approval process for planning and construction permissions is crucial for a solid infrastructure and innovative companies, both of which are the basis for the high standard of living in high-income countries.

Germany currently faces gridlock with many activities related to large scale industrial and infrastructure planning permissions. The causes are manifold: Administrative authorities are understaffed, often lack specific knowledge, and are bound to legal rules that often fail to provide enough legal certainty. Besides that, a growing influence of European environmental law on national legislation affects basic principles of German administrative law and challenges both national legislators and authorities. Especially the introduction of rights of standing for environmental lobby groups following the Aarhus Convention has increased the uncertainty regarding public and private investments, as lobby groups may interfere based on environmental concerns. Hence, when requesting a building permission for larger investments, there is a significant likelihood that such process will drag on for years, involving large spending on expert opinions and litigation, while being exposed to extensive media coverage with a strong effect on public opinion.

This article deals with the effect of excessive litigation on large-scale infrastructure and industrial projects in high-income countries with a particular focus on Germany. During the last decades, environmental litigation has witnessed a growing influence of environmental lobby groups, as there are several procedural ways for these interest groups to challenge construction and operating permissions regarding private investments and infrastructure projects. Especially the national implementation of the EU directive 2003/35/EC that was an implementation of the Aarhus Convention into European law created various remedies and encouraged popular action of environmental groups against industrial and infrastructure projects. As a result, barely any

[2] With environmental protection regulations most likely being on a significantly lower level.

highway, railroad or waterway has been built without severe litigation in the run-up.[3] The same applies for the construction of wind farms and power lines, which are essential to support the transition into a carbon-emission-free economy.

This paper will focus on the issue of excessive stakeholder involvement in the administrative proceedings and the problem of gridlock that arises, when third parties have a 'veto position' due to rights of standing. Undoubtedly, it is important to take stakeholder interests into consideration when planning and implementing (infrastructure) projects. However, litigious lobbying groups should not be able to impede Kaldor-Hicks-superior projects to the extent that they are substantially delayed or not realized at all. Therefore, I will pay particular attention to the legal and institutional framework in Germany regarding the question how administrative law may be reformed to enable sustainable growth, speed up administrative processes, and reduce excessive litigation.

2. The legal setting

Every jurisdiction grants legal standing to protect legal positions. In the field of administrative law, the protection of legal positions is usually limited to cases, where a person is actually affected by government activity.[4] A person needs to be affected in her 'individual rights'.[5] Such a requirement is based on the idea that administrative law does not provide for a general review of legality, but only for the legal protection of subjective rights of a private party vis-à-vis public authorities. There is no 'popular action', where an individual can soar himself 'as an advocate of the people'.[6] This implies that there is no general claim that laws are properly executed. The limitation of standing to affected parties narrows the number of potential plaintiffs and prevents popular actions and litigation on another's behalf. The general principle that there shall be no legal remedy if a person is not directly and individually affected also holds in European law[7] and can be seen as a general legal principle.

[3] 56.25% of all completed motorway constructions or expansions with a value exceeding 75 m. €, 80.6% of all completed federal road constructions or expansions with a value exceeding 75 m. €, 40% of all completed federal railroad constructions or expansions with a value exceeding 75 m. € and 57.14% of all completed federal waterway constructions or expansions with a value exceeding 75 m. € have been challenged in court, cf. Bundesdrucksache 19/20328 from 23 June 2020.

[4] Or omission, if the state has a duty to act.

[5] Cf. sec. 42 para. 2 of the German Administrative Procedure Code (VwGO): 'Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission.'

[6] Cf. BeckOK VwGO/Schmidt-Kötters, 55. Ed. 1.10.2019, sec. 42 VwGO, para. 109.

[7] Cf. Art. 263 para. 4 TFEU: 'which is of direct and individual concern to them'.

Therefore, what is deemed to be an 'individual right' is of great importance for administrative litigation. Persons are affected in their individual rights if they are addressees of administrative acts such as speeding tickets, penalty notices or requests to do or to refrain from doing something. As addressees of public acts, such persons are directly subject to a negative effect and have legal standing according to the so-called 'addressee-doctrine'.[8]

Persons that are not addressees of administrative acts may only be affected in their individual rights if a particular legal norm is deemed to (also) have a protective effect on them.[9] If legal norms have a protective effect on third parties has to be determined by interpretation. Classic examples of such norms are zoning regulations. For example, a factory that emits smoke is supposed to be built on a field adjacent to a neighborhood. In this case, the inhabitants of the neighborhood may proceed against such construction when there are legal norms that have such protecting 'third-party effects'. However, a person that is not affected at all, for example, because she lives in another state, generally has no legal remedy against such construction activity, as she is obviously not affected in her individual rights.

This system of the protection of individual rights is based on the idea that third parties shall not interfere when an individual affected by public authority refrains from taking action against public charges. However, in situations without persons that have standing, there can be no legal review of public authority and/or the law[10]. This is particularly bad if somebody pollutes the environment, but there are no potential plaintiffs. Environment has no voice. Broader standing can overcome this problem by expanding the group of potential plaintiffs by law.[11] During the last decades, legal standing has been extended to better enforce environmental law. While initially legal standing was only granted in the field of nature and landscape conservation in Germany[12], universal rights of standing for environmental lobby groups have gained significant importance with the implementation of the Aarhus Convention into national law. The Aarhus Convention is an international treaty that deals with access to information, public participation in decision-making and access to justice in environmental matters and entered into force in 2001. Its three-pillar approach intends to strengthen civil society and democratic participation and is based on the notion that environmental concerns can best be served if there is broad access to environmental information and sufficient room for comprehensive legal review. The

[8] This doctrine is most likely equivalent to the 'Something to lose'-doctrine in Common law, which grants legal standing to anyone being harmed by statute and public actions.
[9] The so-called 'Schutznormtheorie'.
[10] This problem has led Christopher D. Stone (1972) to ask, whether 'trees should have standing'.
[11] We may refer to these cases as 'legal standing by act of law'.
[12] Cf. sec. 65 of the Federal Act for the Preservation of Nature (BNatSchG).

Aarhus Convention was implemented into a European Directive [13], which was then implemented into German law. The Environmental Information Act, the Public Participation Act and the Environmental Legal Appeals Act (ELAA) now contain various provisions stipulated by the Aarhus Convention.

The ELAA allows environmental lobby groups that fulfil certain criteria[14] to appeal various kinds of permits, operating allowances and other types of approvals that allow the construction, extension or modification of infrastructure projects and (industrial) investments. This can include approvals for power stations, wind parks, various types of industrial sites including waste and recycling facilities, chemical plants, metal processing industries, mines, and livestock farming, but also planning permissions, e.g. for landfills or highways.[15] The plaintive lobby group has to set out that such approvals either don't comply with material law or that procedural rules have been violated, for example that an environmental impact assessment has been left out or that there was no satisfactory participation of the public and that such defect negatively affects the lobby group's activities to protect the environment.[16]

There has been a long way from the enactment of the first ELAA to the third and latest amendment in 2017. The standards set forth in the European directive 2003/35/EC, which contained the provisions of the Aarhus Convention, had to be implemented into national law by 25 June 2005. Germany has been in default of implementation and could only ward off the infringement proceedings pressed by the European Commission by passing the ELAA in December 2006. The law entered into force on 15 December 2006. Since then, the code has been amended several times, with the last amendment in 2017.[17] Of significant importance was the judgement of the European Court of Justice (ECJ) from 15 October 2015[18] which ruled that the provision of German administrative law, according to which only those objections can be

[13] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[14] According to sec. 3 para. 1 ELAA, environmental lobby groups are entitled to bring legal action under the code upon request, if they have been engaged in environmental protection activities for a minimum of three years and can provide for sufficient resources to participate in public consultations. At present, 125 environmental lobby groups are recognized pursuant to sec. 3 of the ELAA and sec. 6 BNatSchG, https://www.umweltbundesamt.de/sites/default/files/medien/2378/dokumente/anerkannte_umwelt-_und_naturschutzvereinigungen.pdf, accessed 30 November 2020.

[15] Cf. sec. 1 ELAA.

[16] Sec. 4 ELAA.

[17] Amendments were necessary, because the European Court of Justice and the Aarhus Convention Compliance Committee (ACCC) have found the ELAA was repeatedly not complying with European provisions, cf. C-115/2009 (Trianel), 12 May 2011, ECLI:EU:C:2011:289; C-240/09 (Slovak brown bear), 8 March 2011; ECLI:EU:C:2011:125; C-137/14 (Preclusion), 15 October 2015, ECLI:EU:C: 2015:683; ACCCP decision from 20 December 2013 (ACCC/C/2008/31).

[18] C-137/14, ECLI:EU:C: 2015:683.

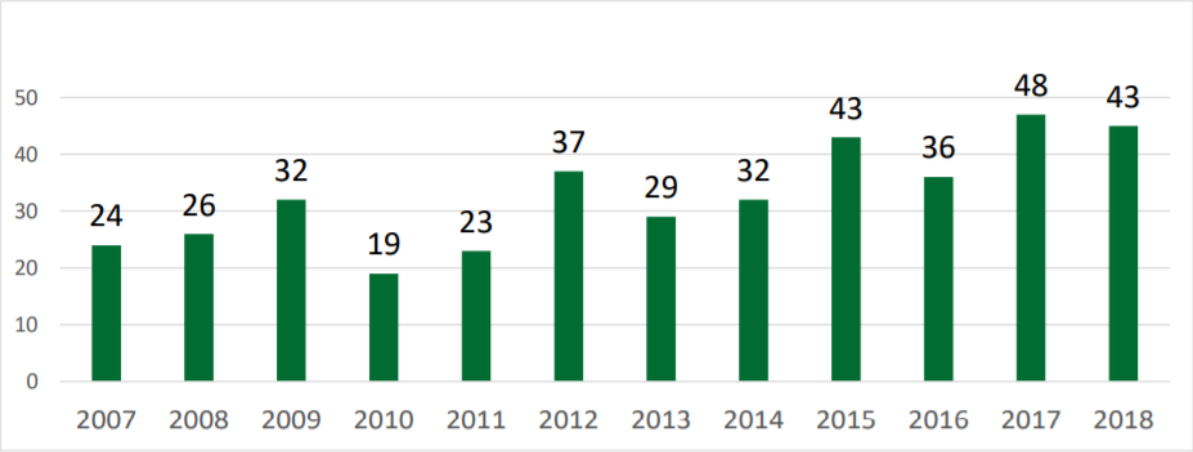
brought in court that have already been brought at the preliminary proceedings, was contrary to European law.[19] As a consequence, the third amended ELAA lifted some material preclusion rules[20]. Despite being the third amendment of the ELAA, there is still debate among scholars, whether the provisions of the Aarhus Convention now were fully implemented.[21]

3. Empirical Evidence

With the provision of standing to lobby groups in environmental matters, it has become significantly easier to appeal construction and operation permits. Whereas environmental lobby groups have had a very limited possibility for litigation unless directly affected, the ELAA allows to proceed against a broad range of approvals. As a result, environmental lobby groups have started to make use of such means, which lead to the emergence of corresponding litigation. However, aggregation of case numbers is difficult, as there is no central data collection, not all administrative courts publish their case numbers and online data bases[22] are incomplete. Hence, the aggregation of case numbers is a difficult task, and a group of scientists aggregates the numbers on behalf of the German Advisory Council for environmental issues. The case numbers, where one 'case' stands for all final judgements and interim reliefs in a specific matter, are being published in studies covering periods ranging from 4 to 6 years.

The number of cases doubled within the last 10 years following the enactment of the ELAA in 2006.[23] While 24 cases were decided in 2007, it was 48 in 2017. To date, there are no comprehensive studies for all years following the 2017 legislative change of the ELAA yet, which removed strict preclusion rules and thus further facilitated litigation. However, comparing the period 2013-2016 with the period 2007-2012, there has been an increase in litigation of about 22%. For 2017 and 2018 the numbers of class actions of environmental lobby associations have also risen.[24]

[19] Normally, permits once being issued cannot be challenged based on objections that have not been brought during the official consultation process, cf. sec. 73 para. 4 VwGO.
[20] Cf. Kment, NVwZ 2018, p. 921.
[21] Cf. the discussion on whether Art. 9 para. 3 of the Aarhus Convention is properly implemented: Bunge, UmwRG, 2nd ed. 2019, Introduction, p. 39.
[22] Such as Beck-online or Juris.
[23] Cf. the law concerning supplementary provisions to legal remedies in environmental matters according to EC-directive 2003/35/EC dated December 7th 2006, German Federal Law Gazette I, p. 2816.
[24] Numbers presented at the "Forum Umweltrechtsschutz 2019" in Berlin on 3 December 2019 by Prof. Dr. Alexander Schmidt, https://www.ufu.de/wp-content/uploads/2016/10/praesentation_schmidt_korr.pdf, accessed 30 November 2020.



Class Actions of Environmental Lobby Groups from 2007-2018 (Schmidt 2019).

Given the two-digit numbers, it doesn't look like actions based on the ELAA were playing a big role in environmental litigation. In 2015, only 0.04% of all cases in the field of administrative law were based on the ELAA.[25] Looking at mere numbers, one can thus barely speak of a 'flood of complaints' that were caused by the provision of legal standing to environmental lobby groups.

However, upon a closer look into the matter, things seem different. First of all, the ELAA is only applicable to fairly large infrastructural and industrial projects, which are naturally smaller in number and only account for a very low fraction of administrative litigation. Besides that, the numbers don't include cases that have been settled out of court. According to market participants, 4 out of 5 cases are settled out of court, as firms try to avoid litigation, which is costly, delays the implementation of a project and is detrimental for reputation.

Besides that, another, even more powerful effect the ELAA has on investors and developers is not captured by the litigation numbers: the deterring effect it has on the incentive to undertake investments and infrastructure projects. Official numbers don't show which projects are not put into practice, because politicians and investors fear litigation and thus refrain from even launching a project.

It is difficult to estimate the number of prevented projects, as both investors and politicians are not inclined to speak openly about their motivation not to pursue a certain project. Industry associations have identified the litigious environmental lobby associations as problematic for the legal certainty of allowances and hence as detrimental for investment decisions.[26] Approval

[25] Cases based on asylum law left out, cf. Schmidt et al. (2018).
[26] Cf. Position paper of the Federation of German Industries 'Genehmigungsverfahren vereinfachen', Berlin 2020.

procedures have become increasingly complicated due to the high control density of German courts. Planning procedures nowadays require the preparation of many expert opinions to make a building permit incontestable. While 15 years ago, approval procedures required two expert opinions on average, nowadays 5-10 expert opinions are necessary, generating costs of 3-5% of the total construction costs.[27]

The removal of strict preclusion rules in 2017, which was carried out with the last amendment of the ELAA in order to comply with ECJ ruling from 15 October 2015[28] and the resolution of the 5th Conference of the member states of the Aarhus Convention from 2 July 2014[29] has further facilitated litigation. While case numbers following the 2017 amendment initially didn't show a significant increase[30], the number has risen since then, especially due to increasing actions against wind farms[31], nitrous oxide emissions and development plans.

4. The Gridlock-Problem

The small litigation numbers are being brought forward by some scholars and activists, who claim that there was no negative influence of the ELAA on the modernization of infrastructure and private investments. However, as mentioned above, already the danger of getting involved in long-lasting litigation, starting with temporary injunctions being followed by court decisions that may go through several instances, which are likely to take several years up to a decade, is reason enough for decision makers to reconsider both private and public investments. While there are no numbers which express which projects have not been undertaken, we can find prominent examples of large infrastructure projects, that are either far beyond schedule or have not been approached at all. Such qualitative examples refute the claim, that the ELAA had no impact on private and public investments.

On 3 November 2020, the Federal Administrative Court has found the long-planned Fehmarn Belt tunnel to be compliant with environmental law[32]. The 18 km long tunnel is supposed to connect the Danish island Lolland with the German island Fehmarn while passing underneath the Baltic Sea, and allows to cut rail travel time from Copenhagen to Hamburg by 2.5 hours and shortening the route for freight transport by 160 km.[33] The European Commission considers

[27] Position paper of the Federation of German Industries (2020).
[28] Judgement of the Court of Justice of 15 October 2015, Commission (C-137/14), ECLI:EU:C:2015:683.
[29] Resolution (V/9h) to confirm the decision of the Aarhus Convention Compliance Committee from 20 December 2013 (ACCC/C/2008/31).
[30] Schmidt (2019) at the "Forum Umweltrechtsschutz 2019" in Berlin on 3 December 2019, slide 6.
[31] Only temporarily though.
[32] Judgement of the Federal Administrative Court from 3 November 2020 (9 A 7.19 among others).
[33] https://bauprojekte.deutschebahn.com/p/anbindung-fbq, accessed 29 November 2020.

the tunnel to be among the most important projects to strengthen the trans-European network.[34] The benefits of better connecting Denmark to the central European mainland are deemed so immense that the Danish government will cover all costs for the tunnel with Germany just providing for highway and railroad access to the tunnel on its side. While litigation in Denmark was little and construction works were allowed to start in 2015, Germany eventually authorized final construction with the judgement from late 2020, even though the Aarhus Convention and corresponding European environmental regulations stipulate the same obligations for Germany and Denmark. Among other plaintiffs, two German environmental lobby groups have brought action against the tunnel, claiming inter alia that the project had a negative impact on porpoises, common mussels, and eider duck.[35]

The finalization of the German highway A1 in the Eifel region has also been targeted by environmental lobby groups, who announced to bring action against any attempt to close the remaining gap of 26 kilometers that are missing to finalize the 774 km long highway that connects the German south-west with the Baltic sea.[36] For more than 20 years, it has not been possible to finalize the construction of the highway, exposing residents to immense traffic on local roads.

And already 10 years ago, the long-planned modernization of Stuttgart's central station, better known as 'Stuttgart 21', which includes measures to cut travel time to Munich by almost 30 minutes and hence to provide incentives to use public transport has been targeted by activists. The intervention of environmental lobby groups has delayed the project by multiple years and produced tens of millions of extra costs, with the environmental benefit being marginal if not zero.[37]

But it's not always large-scale infrastructure projects of national importance that are tackled by litigious environmental groups. They also proceed on small infrastructure projects on a regional level. For example, the plan to build a ring road around medium-sized Freiberg in rural Saxony, which would prevent the daily transit of more than 10,000 cars and numerous trucks through

[34] https://ec.europa.eu/transport/themes/infrastructure/scandinavian-mediterranean_en, accessed 30 November 2020.

[35] https://www.lto.de/recht/nachrichten/n/bverwg-9a7-19-fehmarnbelttunnel-klagen-abgewiesen-kein-verstoss-naturschutz/, accessed 30 November 2020.

[36] https://www.bund-rlp.de/service/presse/detail/news/a1-lueckenschluss-ist-da-in-der-klagebereitschaft-der-umweltverbaende-von-nordrhein-westfalen-und-rheinland-pfalz/, accessed 29 November 2020.

[37] https://www.augsburger-allgemeine.de/panorama/So-macht-der-Juchtenkaefer-Stuttgart-21-zu-schaffen-id55668286.html#:~:text=Stuttgart%2021%3A%2020%20Millionen%20Euro,%22%2C%20wie%20Heer%20es%20formuliert, accessed 29 November 2020.

the historic city center, has successfully been put on ice due to a legal action from an environmental lobby group with local politicians having given up the project.

The same applies to private investment in industrial plants. Germany is a high-income country with a sophisticated industrial sector. The construction of new plants that allow for a more efficient production is essential for technological progress, introducing greener and eco-friendlier production facilities and thus guaranteeing the high standard of living and the large welfare state that German citizen enjoy today. However, investments in various industrial sites are targeted by environmental lobby groups, which use means such as public consultations and legal standing to impede industrial construction activity.

For example, the new Tesla factory at the outskirts of Berlin ('Giga Berlin') has been challenged by two environmental lobby associations who, among other things, criticized the cutting of monoculture spruce trees. A temporary injunction stopped Tesla's construction works for several months, even though the business plan to build electric cars and batteries serves Germany's intention to become independent of fossil fuels. Meanwhile, even opponents of renewable energies use the means of environmental law to impede the construction of wind farms and high-voltage power lines, which are necessary for transporting wind power from the seas to southern Germany.

These diverse examples show that environmental lobby groups are very active on a wide scale. While, as being said, there are no precise numbers regarding the actual deterring effect on investments, we can be certain that it's large. When calculating investments, investors will internalize the risks of long-lasting litigation and refrain from projects, whose expected net return would be significantly reduced. Hence, the argument that the small numbers of actual litigation based on the ELAA show that there is no significant effect on infrastructure and industrial projects does not convince.[38]

The inability to realize large-scale infrastructure projects and private investments is a serious threat to innovation and progress, since much investment in essential infrastructure and new technologies simply falls by the wayside. Long implementation processes of public (infrastructure) projects and lengthy legal proceedings hamper growth, discourage public and private investment and put the competitiveness of high-income countries at risk. The federal government has also recognized that long-lasting approval procedures provide a significant

[38] This conclusion obviously not supersedes a representative qualitative survey among politicians and investors, in how far their investment decisions have been influenced by litigious environmental activists.

threat for the modernization of infrastructure and investment climate, which is of detrimental effect on German competitiveness.[39]

A long-term and even more dangerous threat is that democratic states seem helpless in coping with some challenges of the 21st century and lose ground to populists who point towards autocratic states that are purportedly faster adapting. High-income countries are being challenged by state capitalistic activism of autocratic countries, whose top-down approach bears fewer transaction costs (at the costs of many affected people), whereas overly complex decision making processes and excessive stakeholder involvement in democratic societies can be serious obstacles to innovation.

5. The Political Economy of Environmental Lobby Groups

Much has been written about the advantages and disadvantages of providing legal standing to environmental lobby groups.[40] The preservation of nature is a right which is legally protected by the German constitution (GG), cf. Art. 20a GG and hence, the state shall take environmental concerns into account when making laws[41]. From an economic perspective, negative externalities on the environment are not efficient, as they impose costs on third parties and lead to inefficiently high production levels. Hence, the state must take proper measures to ensure the protection of the environment.

The involvement of environmental lobby groups as stakeholders in approval procedures of planning and operating permissions is based on the idea that this helps to enforce environmental protection standards and reduce enforcement deficits.[42] The argument goes that German administrative law was hampering the enforcement of environmental standards when there were no personally affected parties to a specific undertaking.[43] When environmental lobby groups were provided with legal standing, in such cases, they could function as advocates of the environment.[44] Besides that, some fear that local administration may be apt to make concessions regarding environmental regulations when competing for investments in a globalized world.[45] For these reasons, the ECJ counts on environmental lobby groups to support the enforcement of European environmental law, who would ideally function as guardians of

[39] Cf. recital 2905 et seq. of the coalition agreement of the current German federal government.
[40] Early advocates were Rehbinder/Burgbacher/Knieper (1972) with their seminal work 'Bürgerklage im Umweltrech'. For an overview of literature, see: Sachverständigenrat (2016), p. 4.
[41] BeckOK GG/Huster/Rux, 44. Ed. 15.8.2020, Art. 20a GG.
[42] Sachverständigenrat (2016), p. 5.
[43] This ignores the fact that administrative authorities are obliged to check compliance with environmental provision ex proprio motu.
[44] Koch, NVwZ 2007, p. 369.
[45] Koch, NVwZ 2007, p. 370.

the environment and help the state to identify cases, where environmental concerns are not properly taken into account.

However, thinking of environmental lobby groups as altruistic entities that were 'advocates of nature'[46] seems rather naïve and cannot be confirmed by looking at current litigation practices. Environmental lobby groups pursue their self-interests, just like any other interest group. Their target function includes financial resources, political impact, ideological beliefs and personal sensitivities of their management. They usually finance themselves through membership fees, donations and government transfers and a significant share of resources is spent on acquiring funds. When deciding on whether to challenge planning and operating permissions, lobby groups consider whether such activity is likely to improve their standing in public opinion, which has a direct impact on their financial resources. Hence we may see a certain bias towards activism in large and prestigious projects, which results in an unequal treatment of cases.

Furthermore, environmental lobby groups are often motivated by ideological beliefs. Many of them oppose globalization and are skeptical of market principles.[47] This may lead to biased activism, which disfavors foreign investment and measures to enhance the division of labor. Hence, when installing environmental lobby groups as guardians of the environment and providing them with the very sharp sword of legal standing[48], we need to be aware, that each lobby group also pursues its special interests, which may differ from the public interest.

6. Consequences for the ELAA and Environmental Law Making in general

On the one hand, much criticism regarding the provision of standing for environmental lobby groups seems inconsistent. When incorporating lobby groups into the enforcement regime of environmental law, one should not wonder when they perform such role and act accordingly. For example, there has been great public outrage when environmental lobby groups enforced bans on vehicles due to high concentrations of nitrous oxide in German cities.[49] However, from the intention of the law maker, enforcing driving bans was exactly what the lobby groups were supposed to do in order to enforce environmental norms, while local authorities remained passive. Hence, one should not be surprised about such results. Instead, if such momentum is unwanted, the legislator should carefully consider which standard of environmental protection

[46] Cf. Heß (2018), ZUR 12/2018, p. 686.
[47] Cf. https://www.bundjugend.de/postwachstum-suffizienz-transformation-degrowth/, accessed 30 November 2020.
[48] Legal action typically has suspensory effect on construction and operating permissions, cf. sec. 80 VwGO.
[49] Cf. https://www.bbc.com/news/business-43211946, accessed 30 November 2020.

is chosen, before providing standing to environmental lobby groups and creating enforcement mechanisms that are beyond the control of the executive.[50]

The ECJ ruling of 2015[51], according to which it is still possible to bring new objections during legal proceedings cause immense uncertainty for investors and courts. The principle that a permit cannot be challenged based on 'new' objections that have not been introduced in the public consultation during the approval process helps to create legal certainty and makes court procedures more efficient. It creates incentives to properly assess all possible objections at an early stage and shields project sponsors from new objections that arise after a permit has been issued. Instead, the ECJ ruling according to which these preclusion rules cannot be applied in proceedings concerning specific fields of environmental law creates considerable legal uncertainty. Now, project sponsors have to anticipate various kinds of potential objections that could be brought by environmental lobby groups to appeal a permit. Therefore, investors devote substantial amounts of resources to the preparation of expert opinions to make their permits incontestable. Regulations regarding water, environmental and species protection often require the preparation of environmental studies covering tens of thousands of pages.[52] This often includes profound scientific research on remote environmental impacts. The preparation of such expert opinions is expensive and prevents investments on productive means, while still not providing full certainty. Besides that, the preparation of such expert opinions is very time consuming. Especially during long approval procedures, expert opinions often have to be updated, since the project has to comply with environmental norms at the time of the issuance of the permit and not at the time of application.[53] Dissenting expert opinions may further enhance uncertainty and wasteful expenses. Therefore, the elimination of preclusion rules should be reversed, as such burdens both investors as well as courts with incalculable risks.[54]

Project sponsors often engage in negotiations with environmental lobby groups at an early state of planning to prevent litigation. Many investors are willing to provide significant financial resources to appease environmental lobby groups. This includes both, direct payments to lobby groups, as well as funding for precaution measures for the project in question or other

[50] Looking at the ECJ judgements concerning Germany's implementation of the Aarhus Convention and corresponding European directives into national law, one can get the impression that the legislator only half-heartedly intended to provide such comprehensive rules of standing.
[51] See supra note 17.
[52] Cf. https://www.faz.net/aktuell/wirtschaft/sauber-geplant-fehmarnbeltquerung-17057369.html?premium, accessed 2 December 2020.
[53] https://www.faz.net/aktuell/wirtschaft/sauber-geplant-fehmarnbeltquerung-17057369.html?premium, accessed 2 December 2020.
[54] Obviously, this requires consent on a European level.

environmental ends. Naturally, to reduce the risk of abuse, it should be forbidden that environmental lobby groups exploit their standing granted by the ELAA to squeeze funds from investor to enrich themselves. However, the financing of environmental projects also comes at a cost. Since many project sponsors are risk averse, they will often provide for an even higher standard of environmental protection as would be required by law. This bears the risk of a gradual increase of standards, which ends up being unnecessarily high. Besides that, such measures purely depend on the preferences of the specific environmental lobby group involved and do not guarantee that resources are spent on the measure that generates the highest marginal ecological benefit.

Furthermore, the recognition requirements for environmental lobby groups that can bring action according to the ELAA[55] are very low. Pursuant to sec. 3 of the code, the specific lobby group has to engage in environmental lobbying activities for only three subsequent years. Often, required expertise and statutory purpose are lacking with the internal democratic structure being questionable. At the same time, as some lobby groups have been solely formed to prevent a specific (infrastructure) project[56], they may lack the necessary legal expertise that is required by law. While lobby groups on average act increasingly professional, it should be ensured that all lobby groups can provide for an adequate standard, especially given the sharp sword the ELAA provides them with. A limitation on the number of registered lobby groups that can bring action according to the ELAA could help to make environmental lobby groups more accountable, as they have larger incentives to cooperate when they know that legal encounters are no one-shot game.

Moreover, the duration of the litigation procedure is problematic. A complex approval procedure easily lasts several years. Litigating first instance may take another 2.5-3 years, not to speak about second or even third instance. When taking all proceedings into account, the entire duration of the process can easily last 6-8 years, if not longer. Given the short production cycles of a globalized economy, there have been cases where there was no need for a specific product any more after going through the lengthy application process. Such circumstances are carefully considered when companies take investment decisions. Especially for multinational companies, there is a competition of sites in different countries. Good infrastructure and an educated workforce cannot always compensate for planning risks and long implementation periods. To keep up the high standard of living, it is essential for high-income countries to

[55] And BNatSchG accordingly.
[56] E.g. the 'Aktionsbündnis gegen eine feste Fehmarnbeltquerung e. V.'.

provide the necessary conditions for private investments in industrial sites. The same accounts for investments in public infrastructure. Planning horizons often last for several decades, which can lead to situations where a specific project, once finalized, does not properly meet the society's demand anymore. At the same time, perceived democratic legitimization and public acceptance of an infrastructure investment fades the longer it takes to be put into practice (cf. Stuttgart 21). Hence, litigation proceedings need to be shortened in a way that makes risks predictable and minimizes the risk of investment failure.[57] This includes the provision of sufficient staff at administrative authorities and courts and possibly the creation of specialized chambers.

The fact that most disputes among environmental lobby groups and project sponsors are settled out of court reveals a further weaknesses of the current legal regime. The ELAA intends to have courts decide whether construction and operation permits are compliant with the provisions of environmental law. Environmental lobby groups should merely function as initiators of such litigation. However, the fact that approximately 4 out of 5 cases are settled out of court, shows that the ELAA leads to significantly more bilateral negotiations between project sponsors and environmental lobby groups than cases in court. This is questionable, because in such negotiations, it is not the courts who decide which precautions to take for a specific project - based upon environmental laws, but environmental lobby groups and investors in a non-transparent, non-public bargaining process. The result of such bargaining is strongly predetermined by the individual preferences of the environmental lobby group, which may focus on a specific field of environmental concerns and is likely to demand changes that help the group to improve their standing in public opinion rather than determining the appropriate level of protection.

Besides that, environmental regulations should be proportionate. The principle of proportionality is a concept of German public law according to which restrictions on civil liberties need to be suitable, necessary and adequate to pursue another protected interest. The state shall 'not use sledgehammers to crack nuts'. The principle has also found its way into the Treaty on European Union (TEU), Art. 5 para. 2 TEU. Accordingly, European environmental protection regulations have to be proportionate in a way that the protection of environmental concerns does not bar legitimate investment activity. As pointed out, there is always a residual risk involved when building highways, railroads, and industrial sites. Wiping out the

[57] This can also include measures to extend the hearing period of public and environmental lobby groups during approval procedures, if this effectively reduces the number of subsequent complaints.

furthermost risk is very costly, as marginal costs of risk reduction are increasing. Even though environmental lobby groups are inclined to demand that all environmental risks of an undertaking shall be eliminated, such request is not proportionate. The expenses of excluding the last 1% of environmental risk certainly is prohibitively high. Hence, costs of precaution and marginal return in safety should be weighted up against each other.[58]

Furthermore, the standardization of environmental standards on a European level would make things easier.[59] Even though the requirements resulting from international and European law are the same, Germany obviously faces more administrative gridlock than other European countries.

Finally, people should reconsider their attitude towards change and new technologies. One cannot avert progress and expect to maintain a high standard of living when industries have left and public infrastructure crumbles away. Instead, technology needs to be understood as a major tool to modernize the economy and the ELAA should not be used to categorically condemn any construction and industrial activity.[60]

7. Conclusion

The paper has depicted the role of environmental lobby groups for environmental law enforcement. While environmental lobby groups can help to overcome enforcement deficits, there is the danger of regulative gridlock, when excessive litigious activity creates uncertainty and jeopardizes the realization of public and private investments. Since environmental lobby groups are likely to make use their standing once assigned, the legislator should carefully consider the impact on public and private investment activity. Intact infrastructure and a steady level of investment are the precondition for the high standard of living in high-income countries. Administrative proceedings need to be streamlined to guarantee investment security and encourage investments in the economy's capital stock. Even though there is no high number of cases pursuant to the ELAA, the impact on public and private investment activity is significant. The legislator needs to provide sufficient resources at administrative authorities and courts[61] to

[58] An efficient solution would be to equate the costs of precaution with the probability of environmental harm multiplied by the potential environmental damage according to the so-called 'Learned Hand Formula', cf. Parisi (2013), p. 168. However, even if we assume risk aversion and hold environmental protection in high regard, the relationship should not be completely disproportionate.

[59] https://www.faz.net/aktuell/wirtschaft/sauber-geplant-fehmarnbeltquerung-17057369.html?premium, accessed 2 December 2020.

[60] Cf. the comment of an environmental lobby group that has appealed Tesla's provisional construction permit for 'Giga Berlin' and claims that the production plant for batteries was 'not approvable in its entirety', despite the urgent need for research and investment in this field, cf. Handelsblatt from 1 December 2020, p. 22.

[61] The possibilities to efficiently expand court capacities is limited, cf. Schönfelder (2012), p. 239ff.

accelerate litigation. At the same time, the legal framework must be adjusted in a way that minimizes planning risks for public and private undertakings. This can include, but is not limited to the reintroduction of material preclusion rules, rules to improve transparency among the bargaining process between environmental lobby groups and project sponsors to prevent abuse of power, stricter recognition requirements for lobby groups that can take legal action according to the ELAA, measures to accelerate the litigation process, setting fixed dates at which environmental regulations have to be complied with, measures to strengthen the principle of proportionality and the harmonization of environmental standards on a European level.

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