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主　論　文　の　要　旨

論文題目	PRIVATE INTERNATIONAL LAW AND GLOBAL POLLUTION: REALIZING THE UNIVERSAL VALUE OF ENVIRONMENTAL PROTECTION IN TRANSNATIONAL ENVIRONMENTAL LIABILITY LITIGATION （国際私法と地球汚染:国際環境責任訴訟における環境保護についての普遍的価値の実現）
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論　文　内　容　の　要　旨

Since the late 1960s, environmental pollution has become the shared concerns of both states and non-state actors. These actors have made considerable efforts to develop a framework to govern global environmental risks. This framework consists of ex-ante governmental and private regulations and ex-post measures like cross-border environmental liability litigation in domestic courts. Nevertheless, the effectiveness of the global environmental law and governance framework in combatting transboundary pollution remains limited. In such a context, many scholars have adopted the constitutional lens, which assesses the regulatory authority in terms of legitimacy and justice, to view and seek solutions to remedy the current global environmental governance framework to protect the natural ecosystem.

By adopting the constitutional perspective, this thesis investigates the limitations of the current global environmental law and governance framework in preventing natural ecosystem degradation. Moreover, this thesis considers the potential of private international law, a neutral and apolitical system of coordination of national private laws, in framing the response to global ecological issues. This thesis also

investigates the desired path that the discipline should follow to realize its potential. Based on the desired path, this thesis proposes adjustments to private international law rules to create a framework to realize the universal value of environmental protection in transnational environmental liability litigation and examines its applicability in the context of Vietnam.

After reviewing environmental regulations and institutions developed by states, this thesis finds that governmental regulations fails to generate complete solutions to prevent environmental degradation as the international community expects. More concretely, chapter II of this research reveals that unilateral governmental regulations have limited effectiveness in addressing global environmental pollution. On the one hand, environmental regulations in developing countries and least developed countries are relatively weak to prevent and tackle environmental hazards. The inadequacy and weakness of the environmental regulatory framework in the Socialist Republic of Vietnam, a developing country in Southeast Asia, could support this finding. Even though Vietnam has devoted significant efforts to develop a sophisticated regulatory framework to tackle ecological harm, environmental regulations in Vietnam are still outdated or lax. Additionally, the enforcement of environmental regulations in Vietnam is relatively weak due to the limited capacity of the governmental authorities, the lack of incentive of the polluters and public authorities and the inadequate involvement of private actors in the enforcement process. On the other hand, examining environmental regulations in the United States (the U.S.), the European Union (EU) and its member states (EUMS), this thesis finds that extraterritorial regulations authored by advanced industrialized states have limited effectiveness in tackling transboundary ecological harm for several reasons. First, developed states like the U.S or EUMS rarely assert

direct extraterritorial jurisdiction to regulate environmental matters beyond their territorial jurisdiction due to the concerns over international conflicts, environmental imperialism, or international democracy. Second, indirect extraterritorial regulations, including trade-related regulations or corporate environmental responsibility regulations, have limited impacts on environmental behaviors of private actors abroad or environmental policies of other states.

In light of the limitations of unilateral governmental regulations, this thesis investigates the multilateral environmental regulatory framework to examine whether it generates complete solutions to global ecological challenges in chapter III. This chapter discloses that international instruments and institutions do not adequately prevent and tackle global environmental degradation due to several reasons. First, the multilateral environmental regulatory framework lacks precise and articulable norms to guide state environmental behaviors and policies. This is evidenced by the ambiguity of general principles of international environmental law, environmental rights and standards, and the absence of binding norms on corporate environmental responsibility. Second, the implementation of international environmental norms is inadequate due to the limited capacity of developing states and the weakness of international institution. Third, industrializing countries and non-state actors have limited meaningful opportunities to participate in the development and implementation of international environmental norms to raise their voices and concerns.

The failure to act of the states due to political or economic reasons has induced non-state actors to take the role of “global rule-makers” to develop environmental norms and standards in order to influence private environmental behaviors and promote global ecological sustainability. Chapter IV of this thesis assesses the effectiveness and

desirability of these private environmental regulations in protecting the natural ecosystem. According to this analysis, this chapter concludes that without the involvement of the governments, private governance of global environmental risks is neither an effective nor globally desirable solution. On the one hand, non-state actors, including business firms, associations, and standardization organizations, fail to create precise and stringent substantive standards to influence environmental behaviors of other actors, in particular transnational corporations, or increase global standards on the natural safeguards. The lack of substantive environmental standards has several reasons, including the consensus approach in rule-making and the competition between private regulators. Additionally, the weakness of private monitoring mechanisms, including the internal monitoring and third-party monitoring, significantly reduces the effectiveness of environmental regulations authored by non-state actors in minimizing the detrimental impacts of the undertakings' operation on the natural ecosystem. Finally, the limited participation of concerned stakeholders, in particular those from the Global South, in the private environmental norms-making and implementation process casts doubt on the desirability and acceptability of these norms.

The limitations of ex-ante environmental regulations lead to the frequent occurrence of numerous environmental incidents worldwide. Notably, international community has witnessed many environmental tragedies caused by subsidiaries of transnational corporations in developing countries. For example, the oil pollution in Nigeria was caused by a subsidiary of the Shell group, or the marine pollution in Vietnam resulted from the activities of a Formosa group subsidiary. Against this background, transnational environmental liability litigation has emerged as a potential ex-post measure to address and deter harmful conducts to the natural

ecosystem. However, the effectiveness and feasibility of cross-border liability litigation depend, to a considerable extent, on the court hearing the dispute, the law governing the liability of the polluter, and the enforceability of the final judgment. All of which are typically private international law issues, namely international jurisdiction, choice of laws, and recognition and enforcement of foreign judgments. Thus, private international law rules may either facilitate or restrain transnational liability litigation in tackling and preventing global environmental pollution. This thesis analyzes the rules and jurisprudence in Vietnam, the U.S, and EUMS as the representatives of developing host state and developed states to examine the contribution of private international law in the fight against global environmental pollution. This analysis provides that the fragmented private international law rules constitute significant barriers restraining environmental plaintiffs from developing countries from accessing justice. More concretely, rules on international jurisdiction, which overemphasizes the public/private division, the proximity between the dispute, and procedural efficiency and convenience, bar plaintiffs from having the court hear their claim against transnational corporations for environmental damage that occurred in developing countries. Meanwhile, the choice of law rules that stress the public/private division and mix justice with balance of interests fail to designate strict rule on environmental liability to compel transnational corporations to adequately compensate for the victims and the ecosystem. Moreover, in the absence of a global framework for the liberal movement of judgments, the lack of openness and cooperation between states in recognition and enforcement of foreign judgments limits the enforceability of judgment rendered by one state court in another state. Consequently, regardless of obtaining a favored judgment, environmental plaintiffs may be unable to receive the remedies granted by a state court.

Given the limitations of the current global environmental law and governance framework and the urgent need to safeguard the natural ecosystem, this thesis investigates global environmental constitutionalism as one among several strategies to prioritize ecological sustainability in chapter VI. There are two main approaches to global environmental constitutionalism. The first approach relies on Hart's conception of a legal system as a complex union of primary and secondary rules and argues for global environmental constitutionalism as the movement towards a global constitutional order. Within this global order, international environmental treaties could perform the constitutional function of allocating regulatory authority. Meanwhile, general principles of international environmental law and global environmental rights could limit the allocated regulatory authority. Other scholars rely on Habermas's idea of constitutionalism as a communicative process and contend for global environmental constitutionalism as a global dialogue on the universal value of environmental protection. Adopting the constitutional lens to assess private international law, this thesis examines the analogy between the discipline and global environmental constitutionalism to uncover its potential in framing the response to ecological challenges. Accordingly, private international law could serve the constitutional function of allocating environmental regulatory authority against private actors between states and protect global environmental rights in a global constitutional order. Otherwise, private international law could constitute an ideal venue for different actors to communicate and seek the desired universal value of environmental protection. Acknowledging that ecological sustainability is a prerequisite for human existence and prosperity and there is no perfect instrument to preserve the natural ecosystem, this thesis argues that regulatory authorities should consider seriously the potential of

private international law in framing the response to global environmental challenges. To realize the full potential of private international law, this thesis argues that rather than moving towards an unrealistic global constitutional order, the international community should utilize the available doctrines and instruments of private international law to constitute a global dialogue to realize the universal value of environmental protection. Additionally, each state should remedy its national private international law rules to constitute a decentralized network and work collectively to promote the attainment of the universal value of environmental protection as much as possible. Moreover, states should develop a judicial cooperation framework to ensure the proper function of the decentralized private international law network.

In perceiving that private international law could help to generate solutions to global ecological challenges, this thesis proposes a framework to realize the universal value of environmental protection in transnational environmental liability litigation in chapter VI. As a value is universal only when it is accepted by “everyone, or nearly everyone”, this thesis frames the universal value of environmental protection as a test consisting of two requirements. The first requirement is the procedural requirement of participation of “everyone, or nearly everyone”. The remaining is the substantive requirement of moving towards an “absolute universal” result. This author calls this test a “universal value test”. Meanwhile, transnational environmental liability litigation could arguably serve as a process for the realization of the universal value of environmental protection because it could allow various actors to access, participate in, and co-decide the final solution to environmental issues. Therefore, this thesis proposes adjustments to private international law rules to create a framework for the realization of universal value of environmental protection in transnational environmental liability litigation by

weighing the fundamental principles of private international law against the two requirements of the universal value test. More specifically, this thesis suggests that states should adopt a rule on *forum of neccessity* jurisdiction for the environment beyond traditional rules on international jurisdiction relying on proximity principle. Additionally, this thesis also recommends revising rules on declining jurisdiction. Accordingly, developed state court should limit the circumstances to refuse exercising jurisdiction over a cross-border environmental liability claim. Meanwhile, the developing state court should consider its capacity and may stay the proceedings and cooperate with the developed state court in adjudicating a liability dispute involving environmental damage occurred in its territory even though this court could be the court first seize the dispute or more convenient. Regarding the choice of law rules, this thesis suggests that states should consider general principles of international environmental law as the *law of neccessity of the environment* and adopts multilateral choice of law rules which allow the court to designate the rules among several potentially applicable laws which advance the universal value of environmental protection. The potentially applicable laws could include *lex loci damni, lex loci actus, lex fori,* or the *law of neccessity for the environment.* Concerning the third pillar of private international law, this thesis proposes to limit the reciprocity requirement and public policy exception in recognition and enforcement of foreign judgments to facilitate the liberal movement of judgments.

Examining the proposed private international law framework in the context of Vietnam, this thesis proposes concrete adjustments to Vietnamese private international rules to promote its contribution to global environmental protection. First, this thesis recommends Vietnam to adopt a rule on international jurisdiction for joint tort in

environmental matters and confer *locus standi* for ecological damages to the victims and non-governmental organizations. Second, this thesis proposes to replace the unilateral choice of law rule by a multilateral choice of law rule on environmental damage. This proposed rule allows Vietnamese courts to choose the rules which advance the universal value of environmental protection among several potentially applicable laws, including the law of the country where environmental damage occurred, the law of the country in which the event giving rise to the damage occurred, the law of the country where the defendant is domiciled and the law of necessity for the environment. Additionally, this thesis suggests the Vietnamese court to consider the rules of safety and conduct of the place of the defendant's domicile when assessing their liability. Moreover, to ensure the effectiveness of the proposed rule, this thesis argues for abandoning the time limitation in ascertaining foreign law and utilizing expert opinions as a method to prove the content of foreign law in transnational litigation. For recognition and enforcement of foreign judgments, this author suggests limiting the reciprocity requirement in granting res judicata effect to foreign judgments in cross-border liability litigation. Finally, to liberalize foreign judgments, this thesis recommends Vietnam to consider recognizing and enforcing foreign judgments which rendered punitive damages or resulted from class-action mechanisms, given that they meet the conditions for recognition and enforcement of foreign judgments in Vietnam.

The findings of this thesis may contribute to the debate on the continuing relevance of private international law in contemporary society. In particular, this thesis clarifies the potential of private international law in the governance of global environmental risks and the desired path the discipline may follow to realize its potential.