

1+2/2015

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REVIEW

Land degradation neutrality under the SDGs: National and international implementation of the land degradation neutral world target

Elizabeth Dooley, Ennid Roberts and Stephanie Wunder

Perspectives and actions to improve water quality in European Union Member States

Giuseppe Sgorbati and Nicoletta Dotti

Enforcement of the EU ETS in the Member States

Jonathan Verschuuren and Floor Fleurke

Access to the transposition of EU environmental law by Member States: Only if no infringement proceedings initiated

Anaïs Berthier

Recent Developments

Investor-to-state dispute settlement mechanisms: Five new questions and one old problem

Innovations for sustainability: The perception of chances and risks (Conference report)

Governing environmental impact assessment in Turkey

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Editorial

On 25 September 2015, in New York, 193 Heads of State and Government adopted a resolution entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’ in the United Nations General Assembly. This Resolution defines 17 Sustainable Development Goals as well as 169 targets and can be considered the final integration of ecological, economic and social Sustainable Development objectives, supported by a separately established financing framework, the Addis Ababa Action Agenda, as well as a transparent and inclusive reporting system to observe progress as to the achievement of its goals and targets.

elni Review puts the spotlight on the current state of play as regards legal arrangements and implementation in respect to some of the Resolution’s major objectives. Among these is the target to, “by 2030, combat desertification, restore degraded land and soil, including land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world”. Measured by this benchmark, and having in mind that 2015 was the “International Year of Soils”, researchers from the *Ecologic Institut* (Berlin) analyse the national and international implementation of the “land degradation neutral world” target.

The impact of water quality, as well as quantity of quality water, on Sustainability Development is inter

alia reflected in Goals 6 and 14 of the Agenda 2030. In addition, according to certain EU Water Framework Directive objectives, European waters have to achieve “good ecological and chemical status” by 2015. Against this background, experts from the *EU Network for Implementation and Enforcement of Environmental Law (IMPEL)* assess perspectives and actions to improve water quality in Europe.

Another sustainable development hotspot is the climate, which is addressed inter alia in the Resolution’s 13th Goal. Amongst the most prominent instruments to combat climate change are emissions trading systems (ETS). *Jonathan Verschuuren* and *Floor Fleurke* examine the enforcement of the EU ETS in the Member States.

Furthermore, *Anaïs Berthier* questions access to the transposition of EU environmental law by Member States by analysing a ruling of the EU General Court in case C-612/13P (*ClientEarth v Commission*).

This issue’s *Recent developments* section provides an update on the TTIP-related ISDS discussions, a conference report on how the perception of chances and risks affect innovations for sustainability as well as a statement on environmental impact assessment law in Turkey.

Julian Schenten/Gerhard Roller

October 2015

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Investor-to-state dispute settlement mechanisms: The Commission's "new EU approach", the European Parliament's "new system", five new questions and one old problem

Andrea Carta

1 Commissioner Malmström's "new EU approach"

On 5 May 2015, Trade Commissioner Cecilia Malmström announced on her blog¹ the publication of a concept paper on "*Investment in TTIP and beyond – the path for reform*".² The concept paper, which was discussed one day later with Members of the European Parliament in the INTA Committee and the following day within EU Trade Ministers Council³, has the objective of describing the Trade Commissioner's "*new approach*" to international investment law.

The concept paper highlights the differences between, on the one hand, the investment chapters in the agreements negotiated by the EU with Singapore and Canada and, on the other hand, the investment agreements already in place on international level. The concept paper also discusses and analyses the need for further reform of investment law (including of the dispute settlement system between investors and States, known as ISDS) to be implemented in the context of the TTIP.

With specific regard to ISDS, Commissioner Malmström's document suggests "*steps that can be taken to transform the system towards one which functions more like traditional courts systems, by making their appointment to serve as arbitrators permanent, to move towards assimilating their qualifications to those of national judges, and to introduce an appeal system.*"⁴

Most significantly, in the Commissioner's view, "*the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization. Work has already begun on how to start this process, in particular on aspects such*

as architecture, organisation, costs and participation of other partners."⁵

2 The Parliament resolution of 8 July 2015

On 8 July 2015, the European Parliament adopted a resolution containing "*recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*".⁶

In relation to investment protection, the resolution recommends the Commission, among others, "*to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.*"⁷

3 Comment

Commissioner Malmström's "New Approach" and the European Parliament resolution of 8 July 2015 would require an extensive and in-depth analysis that is not possible within the scope of this article.

However, both documents have an important common element: they acknowledge that ISDS is, for technical and political reasons, no longer acceptable and should be substantially reformed in order to ensure that it meets adequate judicial standards and to protect the EU and Member States' right to regulate.

Commissioner Malmström's document points out the improvements (in comparison with existing ISDS mechanisms) made by the Commission through the negotiation of CETA and the EU-Singapore agreement. However, these improvements fall short of the European Parliament's recommendation that a dispute

1 https://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en. TTIP - which stands for Transatlantic Trade and Investment Partnership - is a trade agreement that is currently being negotiated between the European Union and the United States.

2 See http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

3 See

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1303&title=Commissioner-Malmstr%C3%B6m-consulted-the-European-Parliament-on-reforms-of-investment-dispute-resolution-in-TTIP-and-beyond>.

4 Concept Paper, p. 4.

5 *Idem*, p. 11.

6 European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)).

7 Resolution, Recommendation (d)(xv).

settlement system be established, featuring independent professional judges, including an appellate mechanism and respecting the jurisdiction of the EU and national courts.

It seems clear, therefore, that if the Parliament's requests are to be met, investors' dispute settlement in the TTIP will need to be negotiated on an entirely different basis. This raises a number of new critical issues:

1. Will the US accept to depart from the current ISDS model (based on the ICSID rules) and to move towards a quasi-judicial system?
2. If so, will the EU and the US be able, in a reasonable time framework, to address and resolve all the technical/legal problems that are inherently linked to the creation of an international court for investment disputes?
3. If they succeed, what will happen to the ISDS mechanism in CETA? Should the EU ratify it without negotiating changes, thus leaving US investors who have a business presence in Canada the choice between the "new" or the "old" system? Or, alternatively, should the negotiations with Canada and Singapore be re-opened in view of ensuring coherence of the system?
4. What will happen with ISDS in the Energy Charter Treaty, which is used more and more by EU and foreign investors to file ISDS cases against Members States (see the ICSID cases against Germany⁸ and the seven new cases started against Spain in the first half 2015⁹).
5. Will the existing 1,400 bilateral investment treaties binding EU Members States, and which as Commissioner Malmström states "will not disappear", be brought in line with the Commission's new approach?¹⁰

In addition, a fundamental question has still not been answered: i.e. whether the creation of an investor-to-state dispute settlement mechanism (be it an arbitration panel or an international court) is at all admissible under EU law.¹¹

This problem is linked to the possibility that investment arbitrators (or a new investment court) may be required to interpret EU law in the context of a dispute between an investor and a Member State (or the EU), without having the possibility of referring to a preliminary question to the EU Court of Justice. The arbitra-

tors' interpretation, outside the scope of the EU Court of Justice's "supervision", could undermine the autonomy of EU law and the coherence of the EU legal system.

In this regard, Commissioner Malmström's paper initially notes that "*Since ISDS tribunals only interpret the international agreement in question and would examine EU law only as a matter of fact, one may argue that concerns related to the autonomy of EU law are unfounded.*"¹²

However, it subsequently concedes that "*The EU proposal [on the TTIP investment dispute settlement mechanism] should also clarify that, whenever a question of interpretation of domestic law of a Party arises, the Tribunal must base itself on the relevant case law of the domestic courts of that Party.*"¹³

Thus, the eventuality that investment arbitrators (or judges) may have to interpret EU law (albeit incidentally) is not excluded. However, the "new approach" doesn't put in place any system to ensure that arbitrators (or judges) interpret EU law consistently with the EU Court of Justice's case law (except for a "clarification" that investment judges must be deferent towards domestic courts' jurisprudence).

It is unclear whether the EU Court of Justice itself would consider this a suitable solution in view of protecting the autonomy and coherence of EU Law. Thus, for legal certainty, the Institutions should consider asking the Court for an opinion, pursuant to Article 218 TFEU on the compatibility of investment arbitrations (or of a special investment court) with the treaties.

⁸ See <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rsprndnt=Federal%20Republic%20of%20Germany>.

⁹ See <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rsprndnt=Spain>.

¹⁰ http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153430.pdf.

¹¹ For an explanation of the issue, and references to the literature which analyses it, see A. Carta "Do investor-to-state dispute settlement mechanisms fit in the EU legal system?" in elni Review, 2/2014, p. 35.

¹² Concept Paper, p. 10.

¹³ Concept Paper, p. 11.

elni membership

If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the elni Coordinating Bureau, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

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The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the *elni Review*.

We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed once or twice a year at the following prices: commercial users (consultants, law firms, government administrations): €52; private users, students, libraries: €30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

The *elni Review* is published with financial and organisational support from Öko-Institut e.V., and the Universities of Applied Sciences in Darmstadt and Bingen.

The views expressed in the articles are those of the authors and do not necessarily reflect those of elni

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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- Economic opportunities deriving from environmental legislation
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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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