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# elni

## REVIEW

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'Better Regulation' with 'Make it Work': An assessment of the Make it Work's Drafting Principles on Compliance Assurance

*Lorenzo Squintani*

Environmental modernization and administrative simplification in Portugal

*Alexandra Aragão*

The Non-Regression Principle under EU and German Water Law 'on the Ground'

*Eckard Rehbinder*

Evidence based legislation? Adequate protection of EU citizens against aircraft noise

*Franziska Heß and Martin Führ*

Statement on the Circular Economy concept

*Franz Fiala and Michela Vuerich (ANEC)*

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## Editorial

The aim of simplifying environmental law persists; it rekindled with the European Commission 2015 update of the Better Regulation Strategy and the related ‘Regulatory Fitness and Performance programme’ (REFIT) striving for “making EU law lighter, simpler and less costly”. At the same time, the ‘Make it Work’ initiative launched by several EU Member States adds some dynamics to the debate by providing first implementation experiences.

Against this background, *elni Review 1/2016* throws a spotlight on the simplification of environmental law. *Lorenzo Squintani* analyses the first ‘Make it Work’ Drafting Principles on compliance assurance with particular attention given to simplification matters, but also taking into account regulatory burdens and the EU’s objective of a high level of environmental protection. Subsequently, *Alexandra Aragão* reports on environmental modernization and administrative simplification experiences in Portugal and gives critical analysis of recent legal changes that took place in 2015.

Besides, *Eckard Reh binder* assesses the landmark 1<sup>st</sup> July 2015 decision of the European Court of Justice on the Non-Regression Principle and specifically addresses remaining open questions not answered by the court. *Franziska Heß* and *Martin Führ* discuss the current body of scientific knowledge on aircraft and based on this evidence derive legal implications with respect to EU legislation aiming at adequate protection of EU citizens against aircraft noise.

Furthermore, in a *Statement* contribution *Franz Fiala* and *Michela Vuerich* articulate *ANEC*’s perspective on the circular economy concept presented by the European Commission in December 2015. Finally, in the recent developments section *Miriam Dross* sums up highlights from a recent statement by the *German Advisory Council on the Environment* as regards the impacts that the planned TTIP agreement could have on German and European environmental protection standards.

We hope you enjoy reading of *elni Review 1/2016*.

Contributions for the next issue, in particular with respect to CETA’s impact on environmental law (see the ELNI Forum announcement), are very welcome. Please send contributions to the editors by mid-September 2016.

*Julian Schenten/ Martin Führ*

June 2016

### ELNI Forum:

**8 September 2016**

**Brussels, Belgium**

### **“Assessing CETA’s Impact on Environmental Law”**

ELNI in cooperation with the Centre d’Etude du Droit de l’Environnement (CEDRE) is organising the 2016 ELNI Forum on “Assessing CETA’s impact on Environmental Law”. The Forum will take place at the **Saint-Louis University** in Brussels, Belgium between 2pm and 5.30pm.

The following topics, among others, will be discussed between law scholars and practitioners as well as representatives from the NGO and political/administrative scenes:

- The nature (a mixed agreement?) and validity of CETA
- The impact of CETA on existing environmental legislation and application
- The impact of CETA on future environmental legislation

Further details will soon be available on [www.elni.org](http://www.elni.org) and on <http://www.usaintlouis.be> (CEDRE)

## Environment and free trade: Environmentally sound design of TTIP

*Miriam Dross (German Advisory Council on the Environment)*

### 1 Introduction

The German Advisory Council on the Environment (SRU) advocates an environmentally sound foundation for the planned Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA. In a statement published recently, the Council has presented concrete proposals. The SRU has been advising the German Federal Government on environmental policy issues for nearly 45 years and its recommendations are considered when decisions on environmental matters are taken.

Since June 2013, the EU and the USA have been engaged in negotiations on a free-trade and investment agreement. TTIP has sparked off a broad discussion in society about the advantages and disadvantages of (transatlantic) free trade. The present public debate about TTIP shows that the general public is now becoming aware of the tensions between trade liberalisation and environmental protection that have long been under discussion in expert circles. In its statement, the German Advisory Council on the Environment assesses the impacts that the planned TTIP agreement could have on German and European environmental protection standards. For this purpose the SRU is examining more closely the proposed regulatory cooperation and investor-state-dispute settlement (ISDS).

### 2 Regulatory cooperation

By means of regulatory cooperation, TTIP is to increase the depth of cooperation between the EU and the USA on regulatory issues. Whereas the advocates of TTIP hope that this will bring considerable economic benefits, critics of the agreement do not expect the economic benefits to be very great. While studies have come to the conclusion that greater transatlantic trade can, on the whole, be expected to yield moderate positive welfare effects, the study findings depend heavily on the choice of model and basic assumptions. Since it is not clear what depth of liberalisation can be achieved in the various sectors, the scale of the effects is highly uncertain. An adequate analysis of distribution effects has not yet been conducted. There are indications that bilateral liberalisation would result in both winners and losers, not only in the USA and the EU but also in third countries.

The extent to which TTIP will in fact result in a harmonisation of regulations is still an open question. There are differences in the stringency of regulation of sectors of environmental relevance (e.g. food, chemi-

cals and cosmetics) in the USA and the EU. As a result, adverse environmental impacts can only be avoided if harmonisation takes place at a high level. This is particularly true in cases in which the introduction of new laws or measures to protect the environment which run contrary to individual economic interests has been proposed. Sub-statutory regulations and private sector standardisation such as ISO standards may also be of considerable environmental relevance. The example of manipulated vehicle emissions of nitrogen oxides shows how important even the apparently technical issue of effective verification of exhaust emissions can be for environmental protection.

Also relevant from an environmental point of view are the criteria used to assess risks and deal with scientific uncertainties. The precautionary principle embodied in German and European law is not found in this form, either in US or international trade law, in which precautionary measures are only permitted to a limited extent. Furthermore, the planned sustainability chapter ignores important areas such as climate change mitigation. In the opinion of the European Commission the provisions of this chapter should not – as opposed to the rest of the agreement – be subject to state-to-state arbitration, which would make their legal enforcement impossible.

Since it is assumed that TTIP will be a “mixed agreement”, it will have to be ratified not only by the European Parliament but also by the great majority of national parliaments. However, the parliaments and the public have no opportunity to gain a comprehensive and timely understanding of the complexities of the extremely extensive agreement and hence arrive at a reasonably reliable assessment of the risks involved. This lack of transparency is a democratic deficit.

The SRU makes the following recommendations with regard to safeguarding public interests in the design of regulatory cooperation:

- The precautionary principle should be embodied in the text of the agreement and defined in detail. The exception, formulated in general terms in the Commission proposal for the regulatory chapter, which declares measures for the protection of certain public interests to be admissible, should be designed so that regulations based on the precautionary principle count as limits to trade liberalisation or investor protection.

- The right to regulate should, as envisaged in the Commission draft, be emphasised at a suitable place in the agreement, and not merely in the preamble.
- The explicit possibility of a one-sided increase in protection of public interests in the context of harmonisation and mutual recognition, as envisaged in the Commission draft, is to be welcomed.

To ensure adequate democratic legitimation of regulatory cooperation, the SRU recommends the following:

- The European Parliament should only agree to ratify TTIP on the condition that principal measures of regulatory cooperation, which fall within the sphere of competence of the European Union and for which a formal legislative process at EU level exists, do not depend solely on a decision in the Council of Ministers, but also on the assent of the European Parliament.
- The nature of the activities of European Commission bodies in member state fields of competence relating to regulatory cooperation should be explicitly regulated by a separate agreement between the EU institutions and the member states. Such an agreement should cater adequately for united external representation of the EU, and also for the legitimate interests of the member states.

In view of the fact that TTIP seeks to raise regulatory cooperation between the USA and the EU to a new level, the participation of civil society is of special significance. The SRU therefore recommends the following:

- The participation of civil society should cover the entire field of regulatory cooperation and should not be restricted from the outset to the general chapter on regulatory cooperation. For this reason, an ongoing organisational framework for the participation of civil society should also be created for those areas in which it has not yet been provided for. A regular (not merely annual) exchange of information between the committees and civil society should be ensured.
- The stated aim should be a balanced and representative composition of the civil society bodies. Provisions in the agreement should set out in detail the meaning of the terms “balanced” and “representative”, for example in the form of non-exhaustive criteria or examples of rules. Definitive specification should be avoided in the interests of maintaining flexibility. Steps should be taken to ensure that even actors with limited resources have an opportunity to state their position adequately.

In the last 20 years, sustainability chapters have been incorporated in newly negotiated free-trade agreements. TTIP should therefore seize the opportunity to create an ambitious set of rules. With regard to the sustainability chapter, the SRU therefore recommends the following:

- In the TTIP sustainability chapter, the parties should clearly state their pursuit of the aim of a high level of protection, and should not confine themselves to making reference to existing multi-lateral and international agreements in the fields of environment and social affairs.
- The means of enforcing the sustainability chapter should be improved, and its provisions should not be excluded from the general dispute settlement mechanism. Furthermore, the agreement should not – as is usual in US agreements – rule out the possibility of imposing trade sanctions in cases of infringement of the sustainability chapter.

### 3 Investor-state dispute settlement

Investor-state arbitration under an investment protection agreement offers private individuals a litigation option, which is fairly unusual in international law and which favours foreign investors compared with domestic investors. In the last 15 years investors have increasingly used this method to take action against changes in the statutory legal framework by national legislatures. This also applies to environmental regulations. Experts largely agree that arbitration tribunals have so far not been very successful in taking adequate account of public interests when interpreting provisions in investment protection agreements.

Against this background, the European Commission has presented an innovative proposal for a TTIP tribunal in the negotiations with the USA. Such a tribunal would dispel some of the misgivings about investor-state arbitration that are cited from a public interest point of view. It could also serve as a model for comparable agreements and should be incorporated in the European-Canadian agreement CETA. The fundamental question remains as to whether such private arbitration tribunals are in fact necessary between industrial countries covered by the rule of law.

The SRU makes the following recommendations with regard to investor-state dispute settlement:

The European Commission’s proposal on investment protection is innovative and to a large extent to be welcomed. Above all, the clearer definition of substantive investment protection makes sense to ensure effective enshrinement of the right to regulate. With the proposal to establish a TTIP court with an appeal instance, the European Commission is indeed break-

ing new ground. If the Commission proposal proves to be unacceptable, complete abandonment of investor-state arbitration in TTIP would be in line with the mandate of the European Council. The latter explicitly made the inclusion of investment protection and investor-state dispute settlement dependent on the provisions of the agreement, ensuring that the right of the EU and its member states to take measures in the interests of, for example, the environment remains unaffected.

Even if the procedural aspects – especially the proposal for an investment court with an appeal instance – are of great importance for TTIP, the substantive investment protection rules remain crucial for the decisions that are taken in future by such a court. With regard to the substantive investment protection regulations, the SRU therefore recommends the following:

The Commission's proposal for fair and equitable treatment of investors has a high level of differentiation. The handling of the concept of expropriation and the right to regulate in the draft is very comprehensive and ambitious. However, the term "*legitimate expectations*" should be defined more clearly in the sense that the investor should only be able to rely on promises that are also legally binding under the national law of the state in which the investment is made.

With respect to the procedural investment protection regulations, the SRU recommends the following:

- A permanent TTIP court and a court of appeal on the lines of WTO dispute settlement are a far-reaching innovation that is welcomed by the SRU. Its development should be given constructive support.
- Unlike the European Commission's proposal, there are good reasons from a rule-of-law perspective for not allowing access to the TTIP court until the relevant national legal process is exhausted, even if this does not appear absolutely necessary for following the WTO model.
- If a permanent TTIP court proves to be politically unacceptable, the field of investment protection should be excluded from TTIP. After all, it is basically inappropriate whether an investor-state arbitration system under which private foreign investors are privileged compared with domestic companies is necessary at all between democratic constitutional states that are bound by the rule of law and are, from an economic point of view, capital exporting industrial countries.

TTIP sets out to intensify trade relations between the EU and the USA. It thus offers opportunities and per-

spectives for joint action in a globalised world. However, this presupposes that standards of protection enjoy the same importance as trade interests.

## Imprint

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We invite authors to submit manuscripts to the Editors by email.

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

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**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](mailto:Roller@fh-bingen.de).

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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.

#### The Environmental Law Division of the Öko-Institut:

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.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

#### Main areas of research

- **European environmental policy**
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- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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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.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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## elni

*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 researches, 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](http://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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