

No 2/2016

ENVIRONMENTAL  
LAW NETWORK  
INTERNATIONAL

RÉSEAU  
INTERNATIONAL  
DE DROIT DE  
L'ENVIRONNEMENT

INTERNATIONALES  
NETZWERK  
UMWELTRECHT

# elni

## REVIEW

---

Exploring CETA's Relation to Environment Law

*Delphine Misonne*

Belgium Requests an Opinion on Investment Court System  
in CETA

*Laurens Ankersmit*

Sustainability and Precautionary Aspects of CETA Dissected

*Wybe Th. Douma*

The Volkswagen Scandal - Air Pollution and Administrative Inertia

*Ludwig Krämer*

Access to Justice: Environmental Non-Governmental  
Organisations According to the Aarhus Regulation

*Thirza Moolenaar and Sandra Nóbrega*

Recent Developments

## CONTENTS

Editorial .....	45
<b>Articles</b>	
Exploring CETA' s Relation to Environment Law .....	46
<i>Delphine Misonne</i>	
Belgium Requests an Opinion on Investment Court System in CETA .....	54
<i>Laurens Ankersmit</i>	
Sustainability and Precautionary Aspects of CETA Dissected .....	58
<i>Wybe Th. Douma</i>	
The Volkswagen Scandal - Air Pollution and Administrative Inertia .....	64
<i>Ludwig Krämer</i>	
Access to Justice: Environmental Non-Governmental Organisations according to the Aarhus Regulation .....	76
<i>Thirza Moolenaar and Sandra Nóbrega</i>	
<b>Recent Developments</b>	
Report of Case C-673/13 Commission v Greenpeace and PAN Europe .....	85
<i>Bondine Kloostra</i>	
Environmental Law in Morocco: Opportunities and Challenges .....	86
<i>Elhoucine Chougrani</i>	
Conference report: 5th Lucerne Law and Economics Conference .....	90
<i>Lynn Gummow</i>	
Imprint .....	91
Authors of this issue .....	91
elni Membership .....	92

## Editorial

The current issue of elni Review is inter alia dedicated to a subject that has been on the Top Agenda in 2016: The Comprehensive Free Trade Agreement between the EU and Canada.

On 8 September 2016 an ELNI Forum on CETA took place at the St. Louis Faculty of Law in Brussels. A small group of environmental lawyers debated intensively different aspects of this far-reaching agreement and its impact on environmental law in Europe in particular. Delphine Misonne gives an introduction on the potential impact of CETA on environmental law, Laurens Ankersmit and Wybe Th. Douma analyse the dispute settlement schemes under CETA and shortcomings of the agreement concerning sustainability and precautionary aspects. Nicolas de Sadeleer then explains the sophisticated ratification process for CETA and the legal uncertainty surrounding it. Details of these analyses can be found in the articles of *Delphine Misonne*, *Laurens Ankersmit* and *Wybe Th. Douma*.

Besides a number of legal details, the interesting general aspect of *who should negotiate* such types of agreements arose during the discussion in the Forum. Given that CETA claims to be a progressive environmental agreement (which it is obviously not), it must be criticised that it has been negotiated only by trade experts and not by environmental experts. Whatever the outcome of this dossier is in the end, it has to be noted that public pressure and the scientific debate improved the Agreement considerably, even though it is still not sufficient from an environmental point of view.

Another persistent environmental issue in 2016 – and foreseeably also well beyond – is the so-called ‘Volkswagen Scandal’; a symbol for a confidence crisis caused by and affecting not only the VW AG but also other major car manufacturers. A contribution by *Ludwig Krämer*, ‘The Volkswagen Scandal – Air Pollution and Administrative Inertia’ deals with the manipulation of NO<sub>x</sub> emissions from Volkswagen diesel cars on the one hand, and the manipulation of CO<sub>2</sub> emissions from its diesel and petrol cars on the other. Not all details of the manipulations have been made public until now. A number of conclusions may nevertheless already be drawn.

In this context, the editors would also like to draw the readers’ attention to the related analysis by *Défense Terre* (‘Strengthening the regulation of defeat devices in the European Union’, Legal Note, June 2016) as well as to the expert opinion by *Martin Führ* for the German Bundestag’s Committee of Inquiry with respect to the car emissions affair.

A further article addresses the Aarhus Regulation which provides an opportunity for environmental non-governmental organisations (NGOs) to request an internal review of an EU institution or body that has adopted an administrative act under environmental law, or should have done so in the case of an alleged administrative omission. *Thirza Moolenaar* and *Sandra Nóbrega* investigate whether the criteria that have to be met for an NGO to be entitled to make such a motion are sufficiently clear, and whether they contribute to the objective of providing wide access for NGOs to the internal review procedure.

This elni Review’s *Recent Developments* section starts off with a report of C-673/13 *Commission v. Greenpeace and PAN Europe* by *Bondine Kloostra*, the representative of the two NGOs involved. In its Judgment of 23 November 2016 the CJEU rules that the concept of ‘emissions into the environment’ is not limited to emissions from industrial installations. Rather it includes the release into the environment of substances such as pesticides and biocides. This landmark decision will most likely influence future access to information practice – not limited to the context of pesticides. Lastly, *Elhoucine Chougrani* examines the opportunities and the challenges in applying environmental law and enforcing the sustainable development goals in Morocco and *Lynn Gummow* reports on the 5th Lucerne Law and Economics Conference.

The editors welcome submissions of contributions to the next elni Review until 1 April 2017. Please refer to [www.elni.org](http://www.elni.org) for further detail on the call and for the author guidelines.

*Gerhard Roller/ Julian Schenten*  
December 2016

## Conference report: 5<sup>th</sup> Lucerne Law and Economics Conference

*Lynn Gummow*

On the 15th and 16th of April, 2016 the 5th annual Law and Economics Conference took place at the University of Lucerne, Switzerland. The conference, on the topic of “Environmental Law and Economics”, was organized by Prof. Dr. Klaus Mathis, in partnership with Prof. Bruce Huber from Notre Dame University Law School. With the ever-increasing pressure to tackle environmental challenges, the interest in this conference was substantial, with participants from all over Europe and the United States.

The participants were welcomed to the University of Lucerne by Prof. Dr. Paul Richli, President of the University and by Prof. Dr. Bernhard Rütscbe, the Dean of the Faculty of Law. In his introductory speech, Prof. Dr. Sebastian Heselhaus, the chairing director of the Center for Law and Sustainability (CLS), outlined environmental law and economics from a European perspective and argued that comparative law acts as a bridge to the economic analysis of law.

In his introduction, Prof. Mathis drew attention to Nobel laureate Ronald Coase’s seminal essay “The Problem of Social Cost” where he offered a paradigmatic shift in how externalities could be viewed and addressed. In a world with defined property rights and no transaction costs, parties will bargain and the most valuable activity will prevail. The role of law, it followed, was to clearly define property rights and reduce transaction costs. However, such environmental externalities in Coase’s era were mostly local issues. But today’s most salient environmental problems are global in scale. Interrelated problems of climate change, exploitation of resources, species extinction and pollution of waterways all threaten irreversible harm to future generations. Understanding this, the United Nations and other international organizations have held various conferences on sustainable development, such as the Rio World Summits, and released numerous reports, attempting to spur change in domestic and international policy.

Prof. Bruce Huber delivered the first keynote speech on temporal spillovers, drawing attention to the challenge that pollution poses not only spatially but also temporally. This raises a problem for the allocation of the transactions costs with regards to the clean up costs. Furthermore, the simple allocation of property rights can only internalise the problem if the owner is aware of the damage. But as much of the harm is latent or invisible this is impossible.

Following the discussion on temporal spillovers, Prof. Dr. Renate Schubert from the Institute for Environmental Decisions at ETH Zurich presented the online

study she and her team conducted in Switzerland looking at how different energy efficient labels influence the purchasing habits of consumers. For this purpose, they created a new label to show the energy efficiency rating of household products, showing the actual lifetime running costs of the item. This new label was alternated with the standard EU energy efficiency label. She concluded that monetary labels increase the incentive to buy energy efficient products but that the EU label was trusted more by consumers. From this, she argued that nudging and regulation approaches should be part of the solution.

The final keynote speech was delivered by PD Dr. Malte Gruber. While the Paris UN Conference on Climate Change resulted in a revolutionary agreement, this alone still does not provide a legal basis for redress by the courts for damages suffered. Citing examples such as the struggle faced by the inhabitants of Kivalina. Due to the rising water levels resulting from global warming their island may soon be uninhabitable. They brought a case to the US Supreme Court against Exxon Mobile for damages, claiming that Exxon had withheld knowledge regarding the damages resulting from the greenhouse gases. However, this case was dismissed due to a lack of standing.

The afternoon was divided into two panels featuring presentations from a great number of established researchers on a range of environmental issues including climate change, water pollution, as well as environmental criminal law. The evening concluded with a raclette boat cruise, a typical Swiss experience much appreciated by all participants. The conference continued on Saturday with further presentations on topics presenting possible approaches to governing environmental issues.

## Imprint

**Editors:** Martin Führ, Andreas Hermann, Gerhard Roller, Julian Schenten and Claudia Schreider (née Fricke)

**Editors in charge of the current issue:**  
Gerhard Roller and Julian Schenten

**Editor in charge of the forthcoming issue:**  
Martin Führ (fuehr@sofia-darmstadt.de)

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

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

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*

## Authors of this issue

**Laurens Ankersmit**, EU Trade & Environment Lawyer at ClientEarth, Brussels, teacher at the Brussels School of International Studies in Brussels of the University of Kent;  
lankersmit@clientearth.org.

**ElHoucine Chougrani**, Director of the Moroccan Observatory for the Future Generations, Cadi Ayyad University, Faculty of Law, Daoudiate, Marrakesh,  
observermorofuge@gmail.com.

**Wybe Th. Douma**, Lawyer and senior researcher at the T.M.C. Asser Institute, the Hague;  
w.t.douma@asser.nl.

**Lynn Gummow**, Doctoral student at Lucerne University Faculty of Law;  
lynn.gummow@unilu.ch.

**Bondine Kloostra**, Lawyer specialised in environmental and nature conservation law, Van den Biesen Kloostra Advocaten, Amsterdam;  
bondinekloostra@vdbkadvocaten.eu.

**Ludwig Krämer**, Senior environmental lawyer at ClientEarth, Brussels;  
lkramer@clientearth.org.

**Delphine Misonne**, Professor at Université Saint-Louis Bruxelles, FNRS Research Associate;  
delphine.misonne@usaintlouis.be.

**Thirza Moolenaar**, Bachelor Student, Law Faculty, European Law School, Maastricht University;  
thirza.moolenaar@maastrichtuniversity.nl.

**Sandra Nóbrega**, PhD Candidate at Law Faculty, Maastricht University;  
sandra.nobrega@maastrichtuniversity.nl.

**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).

**DECLARATION OF MEMBERSHIP**

“Yes, I hereby wish to join the Environmental Law Network International.”

There is no membership fee. The PDF-version of elni Review is included.

If you want to receive the print version of the elni Review the fee is €2 per annum for commercial users and €1 per annum for private users and libraries.

Please indicate, whether you want to receive the elni Review as print version or PDF-version.

Please transfer the amount to our account at Nassauische Sparkasse – Account no.: 146 060 611, BLZ 510 500 15, IBAN: DE50 5105 0015 0146 0606 11; SWIFT NASSDE55.

Name: \_\_\_\_\_

Organisation: \_\_\_\_\_

Profession: \_\_\_\_\_

Street: \_\_\_\_\_

City: \_\_\_\_\_

Country: \_\_\_\_\_

Email: \_\_\_\_\_

Date: \_\_\_\_\_

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.

#### Contact

##### Freiburg Head Office:

P.O. Box 17 71  
D-79017 Freiburg  
Phone +49 (0)761-4 52 95-0  
Fax +49 (0)761-4 52 95 88

##### Darmstadt Office:

Rheinstrasse 95  
D-64295 Darmstadt  
Phone +49 (0)6151-81 91-0  
Fax +49 (0)6151-81 91 33

##### Berlin Office:

Schicklerstraße 5-7  
D-10179 Berlin  
Phone +49(0)30-40 50 85-0  
Fax +49(0)30-40 50 85-388

[www.oeko.de](http://www.oeko.de)

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**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

#### Contact

Prof. Dr. jur. Gerhard Roller  
University of Applied Sciences  
Berlinstrasse 109  
D-55411 Bingen/Germany  
Phone +49(0)6721-409-363  
Fax +49(0)6721-409-110  
[roller@fh-bingen.de](mailto:roller@fh-bingen.de)

[www.fh-bingen.de](http://www.fh-bingen.de)

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

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

#### Contact

##### Darmstadt Office:

Prof. Dr. Martin Führ - sofia  
University of Applied Sciences  
Haardtring 100  
D-64295 Darmstadt/Germany  
Phone +49(0)6151-16-8734/35/31  
Fax +49(0)6151-16-8925  
[fuehr@sofia-darmstadt.de](mailto:fuehr@sofia-darmstadt.de)

[www.h-da.de](http://www.h-da.de)

##### Göttingen Office:

Prof. Dr. Kilian Bizer - sofia  
University of Göttingen  
Platz der Göttinger Sieben 3  
D-37073 Göttingen/Germany  
Phone +49(0)551-39-4602  
Fax +49(0)551-39-19558  
[bizer@sofia-darmstadt.de](mailto:bizer@sofia-darmstadt.de)

[www.sofia-research.com](http://www.sofia-research.com)



sofia



NATUUR  
& MILIEU



## 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 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](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.

### elni Board of Directors

- Martin Führ - Society for Institutional Analysis (sofia), Darmstadt, Germany;
- Jerzy Jendroska - Centrum Prawa Ekologicznego (CPE), Wrocław, Poland;
- Isabelle Larmuseau - Vlaamse Vereniging voor Omgevingsrecht (VVOR), Ghent, Belgium;
- Marga Robesin - Stichting Natuur en Milieu, Utrecht, The Netherlands;
- Gerhard Roller - Institute for Environmental Studies and Applied Research (I.E.S.A.R.), Bingen, Germany.

elni, c/o Institute for Environmental Studies and Applied Research  
FH Bingen, Berliner Straße 109, 55411 Bingen/Germany

[www.elni.org](http://www.elni.org)