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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

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The Volkswagen Scandal - Air Pollution and Administrative Inertia

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Organisations According to the Aarhus Regulation

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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_x emissions from Volkswagen diesel cars on the one hand, and the manipulation of CO₂ 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 Klooststra*, 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 for further detail on the call and for the author guidelines.

Gerhard Roller/ Julian Schenten
December 2016

Report of Case C-673/13 Commission v. Greenpeace and PAN Europe

Bondine Kloostra

In 2010 Greenpeace and PAN Europe asked the European Commission to disclose the so-called Draft Assessment Report (DAR), studies and technical information, underlying the inclusion of the active substance glyphosate in Annex I of Directive 91/414, the first approval of glyphosate in the European Union in 2001. The Commission granted access to parts of the DAR, but not to its Volume IV, which includes information on the impurities contained in glyphosate, on the composition of the glyphosate used in testing and the composition of the glyphosate manufactured by each of the operators which notified the active substance. Greenpeace and PAN Europe asked for this information because it is crucial for assessing whether the evaluation of the risks of glyphosate for human health and the environment was carried out correctly. After their confirmatory application was rejected by the Commission, Greenpeace and PAN Europe appealed the Commission's confirmatory decision to not disclose the requested information.

The General Court ruled in October 2013 (Case T-545/11) that the information requested, as described above, was to be disclosed. The General Court annulled the Commission's decision refusing access to Volume IV of the DAR, because in the General Court's view the documents requested contain information relating to emissions into the environment in the sense of Article 6(1) of the Aarhus Regulation, Regulation 1367/2006: the identity and quantity of the impurities in the active substance notified by each operator, the impurities present in the various batches and the composition of the plant protection products developed by the operators.

The Commission appealed the General Court's ruling before the Court of Justice of the European Union (CJEU). Greenpeace and PAN Europe participated as Parties to the appeal proceedings. The main arguments of the Commission in appeal correspond to what the industry in general is advancing with regard to environmental information relating to emissions into the environment: that information on emissions can only concern information on emissions from industrial installations and that the word emissions has to be interpreted strictly and has to be distinguished from discharges and releases into the environment.

In its Judgment of 23 November 2016 (C-673/13) the CJEU rules that the concept of 'emissions into the environment' is not limited to emissions from industrial installations. It includes releases into the environment of substances such as pesticides and biocides. The CJEU also rules that the term 'emissions' is not to be distinguished from 'releases' and 'discharges.'

Further the CJEU rejects the Commission's claim that the emissions rule should be interpreted strictly. This follows according to the CJEU from the principle of giving the fullest possible effect to the right of public access to documents of the institutions. This leads to a restrictive interpretation of any exception to that principle and by the establishing in Article 6(1) of the Aarhus Regulation of a presumption that the disclosure of "*information ... [which] relates to emissions into the environment,*" is deemed to be in the overriding public interest, compared with the necessity of protecting the commercial interests of a particular natural or legal person.

According to the CJEU, Article 6(1) of the Aarhus Regulation does not only concern "*information on emissions as such*" but also information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct. It is also entitled to data relating to the medium or long-term effects of those emissions on the environment. This is indeed a broad interpretation.

Furthermore, the CJEU rules that the concept of information on emissions into the environment does not include information relating to purely hypothetical emissions, such as, for example, data from tests on the effects of the use of a dose of a product which is significantly above the maximum dose for which the marketing authorisation was granted and which is used in practice.

The CJEU has referred the case back to the General Court to decide whether the technical information that Greenpeace and PAN Europe requested on – in short – the composition of the glyphosate of the divers producers, on the composition of the batches used in testing for the inclusion of glyphosate as an active substance and on the impurities in glyphosate falls under the emissions rule of Article 6(1) of the Aarhus Regulation, as defined by the CJEU (Case T-545/11 RENV).

Imprint

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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.

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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.

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.

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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

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 - Effectiveness of legal and economic instruments
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- **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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- 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

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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 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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