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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 NOx emissions from Volkswagen diesel cars on the one hand, and the manipulation of CO_2 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 (ENGOs) 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 ENGO to be entitled to make such a motion are sufficiently clear, and whether they contribute to the objective of providing wide access for ENGOs 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 for further detail on the call and for the author guidelines.

Gerhard Roller/ Julian Schenten

December 2016

Exploring CETA' s Relation to Environment Law

Delphine Misonne

1 Introduction: How to assemble the puzzle?

CETA – The Comprehensive Economic and Trade Agreement negotiated between Canada, the European Union and its 28 Member States, still awaiting ratification – is likely to have an impact on environmental law, even if it cannot be categorized as an environmental treaty.

CETA provides a definition of what environmental law means,[1] it mentions that "*it is inappropriate to encourage trade or investment by weakening the levels of protection afforded in their environmental law,*"[2] it establishes a panel of experts which must have specialized knowledge or expertise in environmental law,[3] it reaffirms "*the rights of the Parties to regulate to achieve legitimate policy objectives, such as the protection of public health and the environment,*"[4] it mentions that "*Parties are committed to high levels of protection for the environment"* but also adds that this is *"in accordance to the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS and this Agreement,*"[5] it contains a whole chapter on 'Trade and Sustainable Development'[6] and a whole chapter on 'Trade and Environment.'[7] As to the implicit dimensions, environmental law looms on other parts of the Treaty, such as the Preamble,[8] Chapter Four on technical barriers to trade,[9] Chapter Eight on investment,[10] Chapter Nineteen on government procurement,[11] Chapter Twenty-one on regulatory cooperation, or even the annexes, such as Annex 8.a. on indirect expropriation.

Yet, CETA's content and possible implications remain a puzzle and even a sort of OVNI for the lay-environmental lawyer, while it sounds much more familiar – even if not totally 'business as usual' – to trade-and-environment specialists. CETA's Chapter 24 is like a digest of anti-dumping provisions, typical of post-NAFTA[12] agreements, together with specific trade-and-environment best effort promises which can already be found in all recent bilateral trade agreements the EU has entered into with southern countries, like Peru or Singapore. Still, such a treaty is not supposed to remain the preserve of a discipline, especially when it starts having a possible impact on the adoption and implementation of environmental regulation at large, in a way quite different from what we already got used to within WTO-style requirements. CETA is a sort of junction point between different worlds – or legal orders: the trade and investment law sphere v. the environmental law sphere – that for a long time evolved in a compartmentalized manner but find here a fresh opportunity to intersect with each other.

There are many reasons why a Treaty on Trade and Investment might contain so many references to environmental law and environmental standards of protection. One of them is an acknowledgement of the fact that such an inclusion corresponds to a coherent trend, albeit with varying starting points (in the early 1990s in North America, from 2006 onwards in EU free trade agreements[13]), according to which trade and investment treaties must indeed defragment their approach to economic issues by addressing and, even more, facilitating sustainable development. It is broadly accepted that these disciplines must henceforth contribute to furthering a "*global conversation*"[14] around qualitative issues, not the least with the intention to dismantle growing public criticism of trade liberalisation.

Still, if CETA can be considered as one of these much acclaimed new-generation agreements, all-embracing with an elaborated sustainable development touch, there is no escape from the fact it was negotiated as a 'trade-thing', under the rule of the exclusive competence[15] (even though it has been requalified as a mixed agreement under EU law, but only weeks before the final signature and at the eve of the ratification pro-

1 Art. 24.1.
2 Art. 24.5.
3 Art .24.15.7.
4 Art. 8.9.1. on Investment.
5 Art. 21.2.2. on Regulatory Cooperation.
6 Chapter 22.
7 Chapter 24.
8 "Recognizing that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity" and "Implementing this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters", p.3.
9 Art. 4.1. to 4.7.
10 Art. 8.9, 8.12 and the whole Section F.
11 The environment is the missing dimension in Art. 19.3. "Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures: (a) necessary to protect public morals, order or safety; (b) necessary to protect human, animal or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of persons with disabilities, of philanthropic institutions or of prison labour".
12 The North-American Agreement on Environmental Cooperation.
13 R. Svelc, Environmental integration in EU trade policy, in The External Environmental Policy of the European Union (E. Morgera, Ed.), Cambridge University Press, 2012, p. 193.
14 H. Kong & L. K. Wroth, Nafta and Sustainable Development, Cambridge University Press, 2015, p. 414.
15 According to the TFEU, Treaty on the Functioning of the European Union.

cess), and within a very 'trade-characteristic perspective.'

It encapsulates a vision in which environmental law is not on an equal footing with trade and investment disciplines, but remains subordinate to them, both with regard to values and hierarchy. There is a change in the rhetoric, but not yet in mind set. Environmental measures and regulations are still being approached in an 'odd-and-old style way,' as a technical barrier to trade, as a suspicious move that could hide a protectionist intent or as a risk to investors, all of which need to be at most eliminated, or at least better framed, hence the insistence on regulatory cooperation and on investor-state dispute settlement.

The question must also be asked of whether it sufficiently captures and accommodates the possible confrontation between a trade vision and an investment-protection vision. In that regard, scholarship and UNEP[16] have been long quite clear that the transition towards a greener economy, even if fully WTO-consistent, could include considerable drawbacks from the application of investment disciplines.[17] – through the possible award of substantial amounts in damages. CETA seeks definitely to carve out more space for environmental regulation within investment disciplines, but does it go far enough?[18]

2 Chapter 24 on trade and the environment

2.1 Inside a sustainable development package

Entering CETA's text via Chapter 24 on trade and the environment is entering the Treaty through one of its small doors, as the chapter did not raise much attention in the fierce recent debates around CETA's signature, nor did it appear to be worth much explanation on behalf of the negotiators.[19] This is quite intriguing, for the content of that chapter might sound quite promising and could have led, at first sight, to a stronger public relations campaign. It is a vast chapter with substantial and procedural provisions. On the substantial side, the provisions sound like a profession of faith in the value of international environmental governance,[20] in the need to enforce environmental law,[21] in encouraging public debate on environmental law,[22] in the need to pay special attention to facilitating the removal of obstacles to trade or investment in renewable energy goods and related services,[23] in encouraging trade in forest products from sustainably managed forests in accordance with the law of the country of harvest,[24] on the need to combat illegal fishing,[25] etc. Procedural aspects include some strong provisions, such as when Parties *commit* to cooperating on trade-related environmental issues of common interest such as "*trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation,*"[26] when a panel of experts is to be convened "*for any matter that is not satisfactorily addressed through consultations,*"[27] which shall deliver interim and final reports on whether a Party has conformed with its obligations,[28] and ending with a provision on 'dispute resolution'.[29]

That chapter is part of a package or a small intra-CETA system on 'sustainable development', together with Chapters 22 on trade and sustainable development and 23 on trade and labour protection. The importance and functioning of that inter-chapter-connection will need to be clarified. For example, the exact role of the specialised committee on trade and sustainable development, which "*shall oversee the implementation of those Chapters, including cooperative activities*", "*and address in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection*" is unclear. The Parties also agree to *facilitate* a joint Civil Society Forum composed of civil society organisations established in their territories, "*in order to conduct a dialogue on the sustainable development aspects of this Agreement.*" They commit themselves to a dialogue but also to consult on "*trade-related sustainable development issues of common interest,*" and "*to strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection.*"

2.2 Anti-dumping provisions: the pollution haven hypothesis

In order to better understand what the new Chapter 24 on Trade and Environment might mean, in theory and practice, it is worth searching for some explanation of its possible content in other pre-existing agreements.

CETA offers striking similarities to provisions of another international agreement, the so-called NAFTA side-agreement, the North-American Agreement on Environmental Cooperation (NAAEC, which came into effect in 1994) which was negotiated in order to

16 UNEP, Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication, 2011, 16.
17 Quoting here J. Vinuales, The environmental regulation of foreign investment schemes under international law, in Harnessing Foreign Investment to Promote Environmental Protection (P. M. Dupuy & J. Vinuales, eds, 2013), Cambridge, pp. 273-274.
18 J. Vinuales, *id.*, p. 283; K. Gordon & J. Pohl, Environmental Concerns in International Investment Agreements: A Survey, OECD Working Papers on International Investment n°2011/1.
19 As appearing on http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm (last accessed 30 November 2016).
20 Art. 24.4.
21 Art. 24.6.
22 Art. 24.7.
23 Art. 24.9.
24 Art. 24.10.
25 Art. 24.11.
26 Art. 24.12.
27 Art. 24.15.1.
28 Art. 24.15.11.
29 Art. 24.16.

ease the ratifications of the North American Free Trade Agreement (NAFTA, which also took effect in 1994). The following table shows a sample of the similarities between CETA and NAAEC.

	CETA	NAAEC
Environmental law (definition)	*Art. 24.1.* For the purpose of this Chapter: Environmental law means a law, including a statutory or regulatory provision, or other legally binding measure of a Party, the purpose of which is the protection of the environment, including the prevention of a danger to human life or health from environmental impacts, such as those that aim at: (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, (b) the management of chemicals and waste or the dissemination of information related thereto, or (c) the conservation and protection of wild flora or fauna, including endangered species and their habitats, as well as protected areas, but does not include a measure of a Party solely related to worker health and safety, which is subject to Chapter Twenty-Three (Trade and Labour), or a measure of a Party the purpose of which is to manage the subsistence or aboriginal harvesting of natural resources.	*Art. 45.2* For purposes of Article 14(l) and Part Five: (a) "environmental law"[30] means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health. (b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
Levels of protection	*Art. 24.3 - Right to regulate and levels of protection* The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection.	*Art. 3: Levels of Protection* Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.
Access to remedies	*Art. 24.6: Access to remedies and procedural guarantees* 1. Pursuant to the obligations in Article 24.5: (a) each Party shall, in accordance with its law, ensure that its authorities competent to enforce environmental law give due consideration to alleged violations of environmental law brought to its attention by any interested persons residing or established in its territory; and (b) each Party shall ensure that administrative or judicial proceedings are available to persons with a legally recognised interest in a particular matter or who maintain that a right is infringed under its law, in order to permit effective action against infringements of its environmental law, including appropriate remedies for violations of such law.	*Art.6: Private Access to Remedies* 1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law. 2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations.

30 That definition has been disputed on multiple occasions by the Party responding to a submission under NAAEC, the constant search for a narrow interpretation being clearly motivated, on the side of the Parties, by a wish to restrict the scope of potential investigation on enforcement practices. Important issues were noted, for example whether that definition encompasses international law or the management of natural resources. S. Lavallée, L'accord nord-américain de coopération dans le domaine de l'environnement: entre un 'vécu fantasmé et un vécu réel', in Pour un droit économique de l'environnement, Frison-Roche, Paris, 2013, p.287; P. Solano, Choosing the Right Whistle – The Development of the Concept of Environmental Law under the Citizen Submissions Process, in Nafta and Sustainable Development, *supra* note 14, p. 76; P. M. Johnson & A. Beaulieu, The environment and Nafta. Understanding and Implementing the New Continental Law, Island Press, Washington, 1996, p.191.

As explained by L.K. Wroth and H.L. Kong, "*the impact of NAFTA on the environment became a critical issue when it was proposed for ratification in the United States. Fears were expressed that NAFTA would lead the participating governments to weaken environmental policy and regulation in order to encourage trade, in effect engaging a race to the bottom that would result in significant environmental degradation in North-America.*"[31] NAFTA was ratified by the United States only after the adoption and acceptance of two side-agreements, one on labour, the other on the environment. Those treaties were negotiated and adopted in boiling times where the issue of sustainable development became central, in the aftermath of the 1992 Rio Earth Summit. Still, the content of NAFTA was almost exclusively trade-and-investment related,[32] even if it did include some provisions on the environment.[33] It provided that a selection of existing multilateral environmental agreements prevail over it in case of inconsistency,[34] affirmed the Parties' rights to adopt environmental standards according to their desired levels of protection[35] and contained an explicit provision that prohibits backsliding in levels of environmental protection.[36] The NAAEC expanded on that 'green touch' and imposed obligations on the three Parties to maintain high levels of protection, to effectively enforce their environmental laws and to ensure due process in the treatment of environmental claims in domestic proceedings.[37] It also contains provisions on the facilitation of cooperation on environmental issues between the Parties and, most importantly, various mechanisms to ensure the governments effectively enforce their environmental laws, with an innovative citizen-driven accountability mechanism and a Party dispute consultation process. Still, NAAEC is not considered as an 'environmental treaty' either, but more as an anti-dumping and an anti-distortion complement, even if it contains that innovative mechanism resting on the participation of the public.[38]

Scholarship is severe about the lessons learned from the application of NAAEC. "*The results, in short, have been disappointing,*" says G. Garver, commenting upon what he calls the "*neglected instruments*" of both NAFTA and NAAEC, even if some interesting results were noticeable in the early years.[39] The mandate not to weaken existing protections was completely ignored; significant rollbacks of environmental laws occurred in all three Parties[40]. The Party-to-Party dispute resolution process, which aimed to remedy persistent patterns of weak enforcement, never came into life.[41] Cooperation on furthering transboundary environmental impact assessment led to a dead end. Still, these provisions have come to appear in any subsequent trade deal that the US and Canada entered into, with the result that "*such empty provisions take up policy space that might otherwise be occupied by effective innovations able to address the aggregate ecological effects of an increasingly globalized economy*".[42] Their imbalance, outdated and unambitious approach[43] comes at odds with the urgency of the worldwide ecological challenge, and urgent calls for reforms have repeatedly been made. As for the promising citizens submission process, it has been used by citizens of all three countries, but his meagre results led to fierce criticism of the efficiency of the mechanism.[44] Among the critiques, too many procedural hurdles and difficult access to information are said to have resulted in limiting the ability of the public to hold the Parties accountable for enforcing their environmental laws.[45] But authors also mention how strong the potential of such citizen-led mechanisms could be, if they were significantly improved, through a modification of the NAAEC.

It remains to be analysed, if CETA truly paves the way towards a modernization of these anti-dumping

31 H. Kong & L.K. Wroth, *supra* note 14, p. 1.

32 *Id*., p. 2.

33 J. Knox, Neglected lessons of the NAFTA Environmental Regime, (2010) 45 Wake Forest L. Rev., p. 292: "*The idea of including environmental elements in a trade agreement was innovative when NAFTA was negotiated in the early 1990s, but it has since become a cornerstone of U.S. trade policy. Each of the twelve U.S. free trade agreements negotiated since NAFTA includes environmental provisions*".

34 NAFTA, Art. 104: "*(a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979, (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990, (c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or (d) the agreements set out in Annex 104.1*".

35 NAFTA, Art. 904.

36 NAFTA, Art. 1114: "*1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*
2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor." […].

37 G. Garver, Forgotten Promises – Neglected Environmental Provisions of the NAFTA and the NAAEC, in Nafta and Sustainable Development, *supra* note 14, p. 16.

38 S. Lavallée, *supra* note 30, p. 277-297.

39 I. Studer, The Nafta Side Agreements: Towards a More Cooperative Approach?, 45 Wake Forest Law Review 469-490 (2010).

40 On recent rollbacks in Canadian environmental law, see L. Collins & D. Boyd, Non-Regression and the Charter Right to a Healthy Environment, JELP.

41 But it has been argued that the mere existence of such dispute settlement mechanisms was considered to give additional weight to the commitments and help ensure that trade officials take environmental provisions seriously; OECD, Environment and Regional Trade Agreements, Paris, 2007, mentioned by R. Svelc, *supra* note 13, p. 201.

42 G. GARVER, *supra* note 37, p. 35.

43 *id*., p. 35.

44 J. Knox, *supra* note 33, p. 411.

45 L. Welts, Form over Substance – Procedural Hurdles to the NAAEC Citizen Submission Process, in Nafta and Sustainable Development, *supra* note 14, p.123.

provisions and, more fundamentally, if this is an appropriate entry into the subject matter. Do we really have a possible problem of 'pollution haven' (and consequent race-to-the-bottom) in our relation with Canada?[46]

Although CETA's Chapter 24 is to some extent modelled on some of these NAAEC provisions, it does adopt a different and apparently less detailed approach to monitoring and does not create the same institutions. There is for instance no 'Commission for Environmental Cooperation' in CETA,[47] but rather only two different contact points, and possibly 'consultative mechanisms', that shall be under the tutorship of a 'Committee on Trade and Sustainable Development.'[48] A panel of experts shall be convened "*for any matter that is not satisfactorily addressed through consultations.*"[49] There is no direct possibility for the citizens to bring claims on enforcement problems, except if they concern the territory in which they reside or are established, which, in no way, could be considered as an improvement. At most, it can be seen as a repetition of very evident existing guarantees.[50] There is actually no proper submission process that could be mentioned as being an improvement over the NAAEC; the lessons learned seem to lead to the mere suppression of such a process.

The dispute settlement provision of Chapter 24 also makes clear, that "*any dispute arising under this Chapter*" shall be dealt with within "*the rules and procedures provided for in this Chapter*" (a sort of consultation process with a possibility to request a final report from a panel of experts, which can lead to the identification of an 'appropriate measure' or 'a mutually satisfactory action plan.')[51] There is, as a consequence, a difference in treatment in comparison with the mechanisms applicable to other parts of the Treaty (and to NAAEC's provisions). Discussions are ongoing, in scholarship but also at the request of the European Parliament, as to whether or not the 'sustainable development package' should shift towards a more adversarial and sanction-based system.[52]

2.3 Promises of greener trade

CETA's Chapter 24 goes beyond a sole anti-dumping preoccupation and contains other sections on trade (*"favouring environmental protection," "in forest products," "in fisheries and aquaculture"*) which are actually already very common in other recent EU bilateral trade agreements – with South Korea, Central America, Peru, Columbia, and Singapore, except that, strangely enough, specific sections devoted to 'Climate Change'[53] and 'Biological Diversity'[54] have been omitted. However, calls are made to enhance cooperation, including on *trade-related* aspects of climate change or on carbon accounting,[55] with no other details that "*it shall take place through actions and instruments that may include technical exchanges, exchanges of information and best practices, research projects, studies, reports, conferences and workshops.*"[56] Art. 24.9 on trade favouring environmental protection echoes the 2001 Doha Declaration, according to which there is a need to negotiate the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services. However it only specifies that the Parties are resolved to make efforts in that regard. The notion of 'environmental goods' is not defined, although this definition is a very contentious issue in international trade negotiations.[57] It is however worth noting that the same Article does mention that Parties shall pay special attention to "*facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related service.*"

2.4 An implicit precautionary principle

The insufficient anchorage of the precautionary principle, as understood under EU law, is and remains one of the crucial weaknesses of CETA, despite a few interesting attempts to fix this. This aspect is thoroughly dealt with in W. Douma's contribution to the present elni review, to which we refer. In regard to Chapter 24, it is worth mentioning that Art. 24.8 copies – from the bilateral agreement with Peru – a provision on 'scientific and technical information', that actually implicitly refers to the precautionary principle ("*[t]he Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*"),[58] generally acknowledging that it shall be taken into account "*when preparing and implementing measures aimed at environmental protection that may affect trade or investment between Parties,*" without other restrictions.

46 "*Stop focusing on the nonexistent threat of pollution havens*", was already one of the recommendations of J. Knox on post-Nafta agreements, *supra* note 33, p. 395.
47 In contrast to Art. 8, NAAC.
48 Art. 24.13.
49 Art. 24.15.
50 Art. 24.6.
51 Art. 25.15.
52 R. Svelc, *supra* note 13, p. 201. European Parliament, 'Report on human rights and social and environmental standards in international trade agreements, 2010, para 22(a) and (b).
53 See Art. 275 of the EU-Peru Agreement.
54 See Art. 272 of the EU-Peru Agreement.
55 Art. 24.12.
56 Art. 24.12 (2).
57 K. Athanasakou, Trade-related incentives: the international negotiations over environmental goods and services, in Harnessing Foreign Investment to Promote Environmental Protection (P.M. Dupuy & J. Vinuales), Cambridge, 2013, pp. 254-270.
58 Art. 24.8.

3 The main points of encroachment with environmental law

The most important potential impact of CETA on environmental law lies elsewhere than in the quite nebulous Chapter 24. Chapter 21 on Regulatory Cooperation and Chapter 8 on Investment seem theoretically much more relevant, with a potential to install new long term dynamics. Depending on how they will be effectively tested and applied, they could indeed change approaches to decisions leading to the adoption of environmental measures having an impact on trade or investment. The following developments present a very short introduction to these critical provisions.

3.1 Regulatory cooperation

In order to prevent and eliminate barriers to trade and investment and to reduce "*unnecessary*" differences, in regulation, between Canada and the EU, CETA endorses and establishes a dialogue on the issue of regulation – whatever it means. The term is not defined, except that cooperation shall concern "*regulatory measures of the Parties*".[59] While the text was clearly negotiated as encompassing EU-level regulation only, as suggested by the contact points mentioned in Art. 21,[60] the interpretative declaration seems to suggest that such cooperation could go beyond that dual approach.[61]

In CETA, according to Chapter 21, regulatory cooperation is an option; it is not compulsory. However, if a Party refuses to initiate regulatory cooperation or withdraws from cooperation, "*it should be prepared to explain the reasons for its decision to the other Party*".[62] Why did the negotiators deem it necessary to add such a precision, which sounds quite like a threat?

The cooperation activities can address a whole list of items, among which one can find: "*explore, if appropriate, alternatives to regulation,*" "*conducting a concurrent or joint risk assessment,*" "*considering mutual recognition,*" "*exchanging information on enforcement,*" etc. However sensitive that dialogue might be on environmental (and science-related) issues, the principles on which environmental regulation are based, in the EU and in Canada, are not recalled – except for the mention, in Art. 21.5, that a Party shall not be "*prevented*" from choosing its own regulatory path.

This is a worrying point, especially when one considers that the whole chapter is to be understood in light of WTO law,[63] which does not support the EU approach to precaution and risk assessment. It is well known that the WTO approach to precaution is very narrow, leading to many disputes which have notably involved Canada.[64] In that regard, the precision obtained in the interpretative declaration is not sufficient, as it confirms a restrictive approach to precaution, suggesting that "*the European Union and its Member States and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements*",[65] thus not limiting it to the clear meaning of precaution in environmental agreements or under EU law. This will surely raise some interpretation difficulties.

The possible impact of such regulatory cooperation will be closely observed. It is not yet clear where this could lead, even if one must not be naïve. Canada, for instance, is known for having some problems with REACH, as demonstrated in recent complaints to the WTO TBT Committee, and could seize the opportunity to influence future regulatory governance.[66]

The worst scenario would be regulatory chill, because of a sort of excess in procedural requisites that could have a deterrent effect – especially when one knows that such a dialogue could need to be duplicated, triplicated, quadrupled, as many times as the EU will include such 'model provisions' into new bilateral trade commitments with other regions of the world in the future. Cooperation, if entered into, will likely require a large amount of bureaucracy, with a necessity to answer many possible requests and allow sufficient time for comment in writing – at the opposite end of the 'cutting red tape' policy that is promoted for the sake of business itself. Various new obligations could further slow the regulatory process and create new bases for attack through dispute resolution.[67] In contrast, the best scenario would be a better informed regulation and enhanced enforcement dynamics, provided crucial prevention and precautionary principles are not neglected, and our European understanding of what a high level of protection means is being taken into consideration. It would be interesting to know, in that regard, what a 'high level of environmental protection' means on both sides of the Atlantic[68], includ-

59 Art. 21.1.

60 The contact points only foresee two Parties, The EU and Canada, Art. 21.9.

61 Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, (3): "*CETA provides Canada and the European Union and its Member States with a platform to facilitate cooperation between their regulatory authorities, with the objective of achieving better quality of regulation and more efficient use of administrative resources. This cooperation will be voluntary: regulatory authorities can cooperate on a voluntary basis but do not have an obligation to do so, or to apply the outcome of their cooperation*".

62 Art. 21.2.

63 Art. 21.2.

64 See D. Vogel, The Politics of Precaution, Princeton, 2012, 317 p.; P.T. Stoll, W. Douma, N. de Sadeleer, P. Abel, CETA, TTIP and the Precautionary Principle, study commissioned by Foodwatch, June 2016; W. Douma in this issue of elni Review.

65 Point (1).

66 Minutes of the Committee on Technical Barriers to Trade Meeting, 21 March 2007, G/TBT/M/41, published on 12 June 2007, pp. 10-11.

67 See CIEL (Center for International Environmental Law), Letter to Mr. P. Magnette, 19 October 2016.

68 As mentioned in Art. 24.3, for instance.

ing the possible relation of that topical concept to the non-regression issue[69].

There is also a potential problem of transparency in Chapter 21, and it is worth recalling that the Aarhus Convention has not (yet) been ratified by Canada. This imbalance might perhaps explain why the regulatory cooperation process, however crucial, does not include strong provisions on public participation and access to information (aside from a general Chapter 27 on transparency). Consultation with (some) stakeholders is only an option in the specific Chapter 21,[70] "*in order to gain non-governmental perspectives on matters that relate to the implementation of the Chapter*". There might be an input from the civil society forum mentioned in the trade and sustainable development chapter (22), but there is no clear precision as to how such a connection could happen.

3.2 Investment

Another important issue is Chapter 8 on investment, with its very contentious but not yet fully definitive new type of investor-state dispute settlement scheme.[71] In that chapter, the negotiators demonstrate that they knew lessons needed to be drawn from bitter past experiences with trade-and-investment agreements, when investors seized on the need to respect the investment treaty by claiming substantial damages in compensation to regulatory measures frustrating their own interests. This even if these measures were motivated by genuine public interest motives, including environmental protection. In order to prevent such possible conflicts, the Parties insert a guarantee, in Art. 8.9.1., that they, for the purpose of that chapter only, "*reaffirm their right to regulate within their territories*". Furthermore, Art. 8.9.2 states that, for the purpose of the section on investment protection only, that "*the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation*".

That "*right to regulate*" is waved in many communications on CETA as the ultimate guarantee against possible excesses. This is typical jargon of investment treaties.[72] A jargon which is not easy to understand, from an environmental law point of view, and which which crystallises the quintessence of fragmentation between these different spheres.[73] In environmental law and from a European point of view indeed, we are more used to the opposite expression, the 'duty to regulate,' in coherence with the positive obligations a State owes to its citizens, as clearly established in human-rights-related discourse, where a right to a healthy environment is recognized, either explicitly or implicitly..

As explained by L. Wandahl Mouyal, the determination of the scope of that right to regulate is concerned with establishing a distinction between compensable and non-compensable regulation,[74] which has always been assessed on a case-by-case basis, in a way that, again, is very different to the approach to compensation in human right discourses.[75] On the crucial issue of expropriation, very much interlinked indeed with the possibility for an investor to claim compensation from the State, one must go as far as p. 331, in Annex 8-a and not in the main part of the Treaty, to read that "*for greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations*". Needless to say, the elasticity of these 'rare circumstances' shall promptly be tested before the arbitrators, whoever they shall be, with a large interrogation point as to who has legally the power to assess the proportionality of a EU or national measure, in relation to environmental protection. The same Annex also mentions that "*the determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations*; *and (d) the character of the measure or series of measures, notably their object, context and intent"*. Again, it remains to be seen what a reasonable investment-backed expectation shall mean,[76] through a Treaty that lacks a very strong

69 D. Misonne, 'The Importance of Setting a Target : The EU Ambition of a High Level of Protection', Transnational Environmental Law, vol. 4, April 2015, pp. 11-36; D. Misonne & Isabelle Hachez Simplifier Le droit européen de l'environnement : un processus liberé de toute exigence de non-régression ? In: Isabelle Doussan, Les futurs du droit de l'environnement, Bruylant: Bruxelles, 2016.

70 Art. 21.8.

71 A important dimension that shall not be developed here. We refer to the contribution of Laurens Ankersmit to the present elni review.

72 OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, Working Papers on International Investment, 2004/4, 22 p.

73 According to the expression chosen by L. Wandahl Mouyal, International Investment Law and the Right to Regulate, Routledge, 2016, 1-264, p. 231.

74 L. Wandahl Mouyal, *id.*, p. 169.

75 D. Misonne, Payer ou renoncer, les investisseurs à l'assaut de la protection de l'environnement, D'urbanisme et d'environnement - Liber amicorum Francis Haumont, Bruylant, 2015, p. 719-731

76 On the importance of the notion of legitimate expectation, see L. Wandahl Mouyal, *supra* note 73, p. 193.

commitment on both sides, except for a few scattered provisions, to combat climate change and promote a transition towards a decarbonized economy.

3.3 Others

There are other possible points of encroachment with environmental law but we will not cover them all in the present contribution. Among them, there is for instance Chapter 25, 'Bilateral dialogues and cooperation,' which contains different promises that could interact with environmental law concerns, without being explicitly enshrined or related to the 'sustainable development' part of the Treaty (Chapter 22). In that Chapter 25, one can note specific mentions on the importance "*to promote efficient science-based approval processes for biotechnology products*", and "*to minimise adverse trade impacts of regulatory practices related to biotechnology products*"[77] or, in relation to raw materials, "*the importance of an open, non-discriminatory and transparent trading environment based on rules and science*".[78] Here again, the precautionary principle, crucial in relation to GMO regulation, is not mentioned, nor is the Cartagena Protocol on Biosafety, which has not been ratified by Canada but contains an explicit safeguard for the principle.[79]

4 Conclusion

CETA stands out like a crucible in which the maturity of an encounter between quite different approaches to environmental law and policy is still to be tested, should it be ratified. But it bears the heavy marks of its negotiation, far away from public scrutiny – in contrast to the interesting modifications that have regularly been proposed under the TTIP process, once the discussions grew more open. Negotiated as a 'trade-thing,' under the rule of the exclusive competence and within a very 'trade-and-investment characteristic perspective,' CETA augurs ill for what is to follow, if one focuses soley on the field of environmental law. Stronger provisions are missing, which would have better clarified what the common expectations should be, legally, in such sensitive fields like chemicals, biotechnology or the transition towards renewable energy and the decarbonisation of the economy. A decarbonisation that has now been given a very strong international legal basis under the Paris Agreement on Climate Change, by the way. One must not underestimate the fact that, on legal issues pertaining to environmental protection, Canada and the European Union do not share precisely the same values, as they are not (yet) committed to the same multilateral environmental agreements. Canada did not join the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters; it opted out of the 1997 Kyoto Protocol; it also withdrew from the 1994 Convention on desertification; it never ratified the 2000 Cartagena Protocol on biotechnology, nor the 1999 Gothenburg Protocol to abate acidification, eutrophication and ground-level Ozone. It is even known as having difficulties with negotiations related to asbestos, within the Rotterdam Convention on trade in hazardous substances, or related to the reinforcement of CITES, the Convention on international trade in endangered species[80].

CETA will only become what governments, administrations, arbitrators and investors will make of it, with not much weight given so far to the possible participation of civil society. The specific anti-dumping provisions of Chapter 24 appear for instance extremely weak in their potential left to citizens to boost enforcement policies. The most sensitive aspects in CETA, in relation to environmental law, both on substance and processes, are the cooperation on future regulatory developments, but also the protection offered to investors as to the possibility to test what a disproportion in the 'right to regulate' shall mean under the definition of indirect expropriation, even if that definition has been modernized. There is another model in which that issue of proportion is already set aside, stating that indirect expropriation and related claims to compensation "do not in any circumstances apply *to a measure or a series of measures, other than nationalizing or expropriating, by a Party that are designed and applied to safeguard public interests, such as measures to meet health, human rights, resource management, safety or environmental concerns*".[81] Some further food for thought?

77 Art. 25.2.
78 Art. 25.4.
79 See the references in note 64.
80 L.Collins & D.Boyd, *supra* note 40, p. 289.
81 The so-called Norvegian BIT model, Art. 6, 2015.

Belgium Requests an Opinion on Investment Court System in CETA

Laurens Ankersmit

1 Introduction

On 29 of October the leaders of the Belgian federal government and the regional and community governments reached a compromise deal over the EU-Canada Comprehensive Economic and Trade Agreement (CETA).[*1] One of the key outcomes is that the Belgian federal government will seek the Opinion of the European Court of Justice on the compatibility of the Investment Court System (ICS) in Chapter Eight of CETA with the EU Treaties. As soon as the Belgian federal government makes the request for an Opinion, the Court will be able to express itself on this contentious legal issue. This article provides some background on the origins of the Walloon request before explaining why ICS could potentially pose a legal problem for the EU.

2 Wallonia's longstanding resistance against CETA and the resolution of 25 April of 2016

To insiders, the resistance put up by Wallonia in particular should have been no surprise. Over the past few years, the Walloon and Brussels parliaments have had extensive debates on the merits of CETA and have been increasingly critical of the deal. One of the main and more principled cause for opposition was the inclusion of ICS in CETA, a judicial mechanism that allows foreign investors to sue governments over a breach of investor rights contained in the agreement.

In the Parliament of Wallonia this resulted in the adoption of a resolution on the 25th of April 2016 (6 months before the compromise deal mentioned above) listing the key concerns Wallonia has about CETA.[2] In that resolution the very first request by the Walloon government was to ask the Belgian federal government: *"de solliciter l'avis de la Cour de justice européenne (CJE) sur la compatibilité de l'accord avec les Traités européens sur la base de l'article 218 (11) du TFUE pour éviter qu'un accord incompatible avec les Traités européens soit conclu et de ne pas procéder à la ratification de cet accord tant que la CJE ne s'est pas prononcée"*.

In other words, the Walloon Parliament wanted to know whether ICS is compatible with the EU Treaties, and asked the Belgian federal government to make use of the procedure of Article 218 (11) TFEU to request the CJEU's opinion on the issue. In the words of the Court, that procedure *"has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the European Union*".[3] In particular, the advantage of the procedure is to avoid "*serious difficulties*" for both the EU internally and for third parties that would result from a successful challenge of the agreement after its entry into force.[4]

Wallonia could not make this request itself, as this power is reserved for the federal level of the Belgian Government. However, Belgium is in many ways a 'little Europe', as its regional governments need to authorize federal action at the international level in a number of fields, including trade. As a result, Wallonia had to broker a deal with the federal government of Belgium in exchange for authorising Belgium's signature on CETA.

3 Is ICS compatible with the Treaties?

The Walloon request did not come out of the blue. The issue of the compatibility of Investor-State Dispute Settlement (ISDS) and ICS (a form of ISDS) with the Treaties has been contentious among EU law insiders for a while. Recently, 101 law professors objected to ICS in an open letter because ICS is *"in strong tension with the rule of law and democratic principles enshrined in national constitutions and European law. Additionally, [ICS is] likely to affect the autonomy of the European Union's legal order, as the investment tribunals' binding and enforceable decisions on state liability threaten the effective and uniform application of EU law"*.[5]

An increasing number of academic contributions have also raised this issue.[6] Moreover, the European Asso-

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* An earlier version of this article appeared on the European Law Blog and on Investment Treaty News.

1 See the statement of Belgium in the Statements to the Council minutes of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States ST 13463 2016 REV 1 available at http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf.

2 Resolution of the Parliament of Wallonia of 25 April 2016 on the Comprehensive Economic and Trade Agreement (CETA), available at http://nautilus.parlement-wallon.be/Archives/2015_2016/RES/212_4.pdf.

3 Opinion 1/09, the European and Community Patents Court EU:C:2011:123, para. 47.

4 *Ibid*, para. 48.

5 Legal statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA (October 2016) available at https://stop-ttip.org/wp-content/uploads/2016/10/28.10.16-Updated-Legal-Statement_EN.pdf.

6 L. Ankersmit, The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System, Journal for European Environmental & Planning Law 13 (2016) p. 46-63; M. Cremona, Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP), Common Market Law Review 52 (2015) 52, p. 351–362, at 360; I. Govaere, TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order, College of Europe Research Paper in Law 1/2016 (July 2016); J. Kokott and C. Sobotta, Investment Arbitration and EU law, Cambridge Yearbook of European Legal Studies 18 (2016), p. 3-19; G. Uwera, Investor-

ciation of Judges (representing 44 national associations of judges) and the German Association of Judges (representing 16,000 German judges and public prosecutors) have opposed ICS *inter alia* on the ground that the system might not be compatible with EU law.[7]

Within the EU institutions and bodies, the compatibility of ISDS/ICS has clearly also been an issue. The European Parliament in its TTIP Resolution of 8 July 2015 called upon the Commission to ensure that the "jurisdiction of courts of the EU and of the Member States is respected".[8] In a praiseworthy feat of transparency, the opinion of the Legal Service of the European Parliament on the issue of compatibility was published this summer.[9]

The European Economic and Social Committee in an Opinion adopted on 27 May 2015 also stated that *"[there] are considerable EU treaty-related and constitutional law concerns regarding the relations of ISDS ruling with the EU legal order. Private arbitration courts have the capacity to make rulings which do not comply with EU law or infringe the CFR [Charter of Fundamental Rights]. For this reason, the EESC feels that it is absolutely vital for compliance of ISDS with EU law to be checked by the ECJ in a formal procedure for requesting an opinion, before the competent institutions reach a decision and before the provisional entry into force of any IIAs [International Investment Agreements], negotiated by the EC".*[10]

The legal service of the European Commission has itself been busy fighting intra-EU bilateral investment treaties containing ISDS. In addition to a number of ongoing infringement proceedings, the legal service also wrote several *amicus curiae* briefs contesting the jurisdiction of the investment tribunals.[11] In the *Achmea* case, for instance, the Commission wrote: "*There are some provisions of the Dutch-Slovak BIT that raise fundamental questions regarding compatibility with EU law. Most prominent among these are the provisions of the BIT providing for an investor-State arbitral mechanism (set out in Art. 8), and the provisions of the BIT providing for an inter-State arbitral mechanism (set out in Art. 10). These provisions conflict with EU law on the exclusive competence of the EU court[s] for claims which involve EU law, even for claims where EU law would only partially be affected. The European Commission must therefore [...] express its reservation with respect to the Arbitral Tribunal's competence to arbitrate the claim brought before it by Eureko B.V".* [12]

4 The autonomy of the EU legal order and the preliminary reference procedure as the keystone of Europe's judicial system

So what are the main legal issues when assessing the compatibility of ICS with EU law? It is clear that the Treaties in principle permit international agreements providing for state-to-state dispute settlement between the EU and third countries (such as the WTO's dispute settlement body). Such state-to-state dispute settlement mechanisms do not encroach on the powers of the ECJ, because TFEU Part Six, Title 1, Chapter 1, Section 5 does not grant the EU courts the power to hear such disputes.

However, when it comes to claims by individuals involving questions of EU law, the situation is radically different. The preliminary reference procedure in Article 267 TFEU gives the courts of the Member States and the European Court of Justice important powers to resolve such cases. In fact, the ECJ itself refers to this procedure as the "keystone" of the EU's judicial system.[13] It is perhaps important to recall that Article 267 TFEU was central to the ECJ's reasoning when it found that the Treaties constituted "a new legal order" that gives *individuals*, not just the Member States, rights and obligations, and whose uniform interpretation the European Court of Justice oversees.[14]

State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?, The Law & Practice of International Courts and Tribunals 15 (2016), p. 102-151; H. Lenk, Investor-state arbitration under TTIP: Resolving investment disputes in an (autonomous) EU legal order, Report for Swedish Institute for European Policy Studies (SIEPS) (2015) 2; A. Dimopoulos, The Compatibility of Future EU Investment Agreements with EU Law, Legal Issues of Economic Integration 39 (2012), p. 447–471; A. Dimopoulos, The involvement of the EU in investor-state dispute settlement: A question of responsibilities, Common Market Law Review 51 (2014), p. 1671–1720; A. Carta, Do investor-to-state dispute settlement mechanisms fit in the EU legal system? elni (2014), p. 30; J. Kleinheisterkamp, Investment Protection and EU Law: The Intra- and Extra-E Dimension of The Energy Charter Treaty, Journal of International Economic Law 15 (2012), p. 85–109; S. Hindelang, Repellent Forces: The CJEU and Investor-State Dispute Settlement, Archiv des Völkerrechts 53 (2015), p. 68–89; N. Lavranos, Designing an International Investor-to-State Arbitration System after Opinion 1/09, in M. Bungenberg and C. Herrmann (eds.), Common Commercial Policy after Lisbon 2013.

7 Deutscher Richterbund, Stellungnahme zur Errichtung eines Investitionsgerichts für ttip – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015, February 2016; European Association of Judges, Statement from the European Association of Judges (EAJ) on the proposal from the European Commission on a new investment court system, 9 November 2015.

8 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)).

9 Legal opinion of 1 June 2016 "Investment dispute settlement provisions in the EU's trade agreements" available at http://www.europarl.europa.eu/committees/en/inta/publications.html?tab=Other. See for a critical assessement ClientEarth, 'Legal Briefing EP Legal Service Opinion in CETA' 5 September 2016 available at http://www.documents.clientearth.org/wp-content/uploads/library/2016-09-05-legal-briefing-ep-legal-service-opinion-on-ics-in-ceta-ce-en.pdf.

10 European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries' (27 May 2015) *(emphasis added).*

11 See European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' IP/15/5198 18 June 2015.

12 European Commission Amicus Curiae submission as quoted by the arbitration tribunal in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (award on jurisdiction 7 December 2012), para. 193.

13 Opinion 2/13, Accession to the ECHR EU:C:2014:2454, para. 176.

14 Case 26/62, Van Gend & Loos EU:C:1963:1.

The ECJ has made clear in no uncertain terms that it has the *exclusive* power to give definitive interpretations of EU law and therefore ensure the uniform interpretation of EU law across Europe.[15] However, as a fundamental purpose of ICS in CETA is to enable investors to challenge not only EU acts and decisions based on these acts, but also national acts which might involve EU law somehow, an ICS tribunal would have to interpret and give meaning to EU law. Similarly to the context of human rights law, ICS will therefore encroach on the powers of the EU courts to rule on questions of EU law. Furthermore, ICS in CETA does not require the exhaustion of domestic remedies, which would soften the risk of divergent interpretation as well as respect the powers of the courts of the Member States to hear claims by individuals involving questions of EU law. ICS in CETA also does not require prior involvement of the ECJ for questions of EU law faced by these ICS tribunals.

5 CETA's safeguards

To be sure, the Commission has implicitly admitted and sought to address this problem in CETA. In contrast to the EU – Singapore Free Trade Agreement (FTA), Article 8.31 (2) of CETA states that its tribunals "*may consider*" domestic law "*as a matter of fact*".[16] The provision continues by stating that in "*doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*".

The question is whether these provisions are sufficient. For one, it is hard to see how law can be considered 'as a matter of fact' since law is a social construction. This approach is likely derived from international law circles to make international law more acceptable to domestic legal systems.[17] However, as CETA will become an integral part of the EU legal order, this concept will find its way into EU law with potentially problematic consequences.[18] What if the highest courts in the Member States no longer feel required to make preliminary references because they can consider EU law as a matter of fact, as these tribunals are allowed to do?

For another, following the prevailing interpretation given to EU law, it begs the question of what happens if no such interpretation exists. CILFIT makes clear that this is anything but an exceptional situation.[19] In that case, the ECJ found that the highest courts in the Member States may only refrain from the obligation to make a preliminary reference when the "*correct application of* [EU] *law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved*".[20]

Lastly, one may wonder whether stipulating that the interpretation of domestic law is not binding is sufficient. This is considering the substantial financial consequences of the awards that are themselves binding, and the fact that ICS contains an appeal mechanism, in which the appeal tribunal can further solidify a particular interpretation of EU law.

6 Article 340 TFEU: Suing the European Union

Another problem related to the EU courts powers is that under EU law the EU courts have exclusive jurisdiction to hear and determine actions seeking compensation for damage brought under the second paragraph of Article 340 TFEU, which covers non-contractual liability of the European Union.[21] In other words, when looking to sue the European Union for damages, one must go to the ECJ.

ICS in CETA introduces an alternative to such suits for foreign investors, undermining the exclusive nature of the EU courts' powers in claims for damages.[22] Under EU law a claim for damages is an autonomous remedy, but the ECJ limits its use.[23]https://www.iisd.org/itn/2016/02/29/is-isds-in-eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/ - _ftn11 In particular, actions for damages are inadmissible if they are used improperly as a disguised action for annulment or action for failure to act. An example would be to use an action for damages to nullify the effects of a measure that has become definitive, such as a fine. It is also very difficult, if not impossible, to claim damages for lawful acts.[24]

Moreover, the Court is very wary of the potential of a 'regulatory chill if it were to accept damages claims too easily. The Court has held that the "*exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual ests*".[25]https://www.iisd.org/itn/2016/02/29/is-isds-in-

15 Opinion 2/13 Accession to the ECHR EU:C:2014:2454, para. 244-248.
16 Article 9.19 of the EU-Singapore FTA does not contain such clauses. It merely provides that the investment tribunal shall decide whether the treatment that is the subject of the claim is in breach of an obligation under the investment protection section in accordance with the Vienna Convention on the Law of Treaties.
17 See for a discussion J. Hepburn, CETA's New Domestic Law Clause, EJIL: Talk! Accessed at http://www.ejiltalk.org/cetas-new-domestic-law-clause/ (accessed 5 December 2016).
18 Case 181/73, Haegeman EU:C:1974:41, para. 5.
19 Case 283/81, CILFIT EU:C:1982:335.
20 *Ibid*, para. 16.
21 Case C-377/09 Hanssens_Ensch v. European Community EU:C:2010:459, para. 17.
22 See also A. Carta, *supra* note 6, p. 30.
23 K. Lenaerts, I. Maselis, and K. Gutman, *EU procedural law (*Oxford: Oxford University Press, 2015), p. 490.
24 Joined cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and others v Council and Commission* EU:C:2008:476, paras. 164–169.
25 *Ibid*., para 174.

eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/ - _ftn13 Bringing a claim under ICS, therefore, has clear advantages for investors over bringing claims before the EU courts, putting a perverse competitive pressure on those EU courts. ICS tribunals may be less wary of regulatory risk and, therefore, may be more inclined than the EU courts to decide cases that could potentially chill regulation.[26]

7 Potential negative consequences for the EU's internal market

ICS in CETA also poses challenges for the proper functioning of the EU's internal market rules. CETA's ICS provides for a discriminatory remedy contrary to Articles 45, 54, and 56 TFEU, because Canadian investors can bring claims on behalf of their EU incorporated companies. For example, a Canadian-owned Slovak company could be privileged over a Dutch company operating in Slovakia, because the Canadian-owned Slovak company would have recourse to an alternative form of dispute settlement not available to the Dutch company.

Moreover, ICS awards can counteract national and EU provisions imposing financial burdens on individuals and corporations (including provisions on fees, taxes, penalties, fines and environmental liability). While the Commission's view seems to differ, the problem goes beyond mere questions of paying back unlawfully granted state-aid.[27]

An undertaking such as Intel could opt to challenge the Commission's 1 billion Euro fine for its abuse of a dominant position on the microprocessors market, because it considers the Commission to have violated several good governance principles and therefore argue a breach of due process under the 'fair and equitable treatment' standard.[28] That standard is understood as protecting basic forms of good governance.[29] It is to be recalled that Intel not only challenged the Commission's decision before the General Court arguing a violation of the principle of presumption of innocence and inadequate proof of unlawful conduct, Intel also complained to the European Ombudsman for maladministration by the Commission. The General Court dismissed Intel's application for annulment, but the European Ombudsman partially sided with Intel.[30]

8 Conclusion

One of the most astounding aspects of this story is that it took the defiance of the Walloons to initiate a preliminary check by the ECJ on the legality of ICS. The Commission could have easily added the question of compatibility of ISDS in the EU-Singapore FTA to its request for an Opinion in Opinion 2/15.[31] That opinion was requested in July 2015, *after* the ECJ delivered its Opinion 2/13. It was obvious to informed Court watchers at the time that Opinion 2/13 raised serious questions regarding the compatibility of ISDS and ICS with the Treaties. Indeed, it is quite clear based on an access-to-documents request made by ClientEarth that the Commission's legal service was well aware of the potential negative implications.[32]

Instead of going for a 'better safe than sorry' approach (the explicit purpose of the 218 (11) TFEU procedure), the Commission took the political risk of negotiating and concluding an agreement that could potentially be annulled afterwards. That would have not only embarrassed the EU internationally, it could have resulted in serious constitutional law issues, because the EU and its Member States might have faced ICS awards that were internationally binding yet in conflict with EU law (not least because of the CETA Article 30.9 (2) so-called 'sunset clause' allowing for claims up to 20 years after termination of the agreement). In that sense, it appears that Wallonia did Europe and its trade partners a huge favour by seeking clarity on this issue before the EU entered into binding commitments in international agreements containing investor-state dispute settlement.

26 J. Kleinheisterkamp, Financial Responsibility in European International Investment Policy, International and Comparative Law Quarterly 63 (2014), pp. 449-476.

27 European Commission, 'Concept paper: Investment in TTIP and beyond - the path for reform', p. 5-6. The Commission only addresses the issue of ISDS claims that resulted out of investors' obligation to pay back unlawfully granted state aid in violation of the fair and equitable treatment standard contained in several BITs. The Commission does not consider in the concept paper similar problems resulting from paying fines, penalties or other financial obligations that the investor might incur when investing in the host state.

28 R. Wish, Intel v Commission: Keep Calm and Carry on! Journal of European Competition Law & Practice (2014), p. 1-2.

29 M. Jacob and S. Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in: M. Bungenberg, J. Griebel, S. Hobe (eds.), International Investment Law, 2015, pp. 700-763.

30 See Case T-286/09, Intel Corp. v Commission EU:T:2014:547, para. 61; European Ombudsman, Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission (14 July 2009) available at http://www.ombudsman.europa.eu/en/cases/decision.faces/en/4164/html.bookmark (accessed 7 December 2016).

31 Opinion 2/15: Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, OJ 2015 C363, p. 18–19.

32 All documents available upon request with the author, for a sample please see http://www.documents.clientearth.org/wp-content/uploads/library/2016-02-24-redacted-document-on-isds-and-the-principle-of-autonomy-of-eu-law-following-opinion-2-13-ext-en.pdf.

Sustainability and precautionary aspects of CETA dissected

Wybe Th. Douma

1 Introduction: remaining points of concern

The Comprehensive Economic and Trade Agreement (CETA) between the EU, its Member States and Canada has been presented as "*the best trade agreement the EU has ever negotiated*".[1] While there are certainly many advantages compared to older trade treaties, two remaining points of concern are investigated in this contribution.

The first one relates to the manner in which the EU utilises its own system for ensuring that sustainability concerns are integrated into trade agreements. In the first part of this contribution, it will be investigated whether the manner in which the integration instrument is employed in the case of CETA, notably where the inclusion of an investor state dispute settlement (ISDS) mechanism is concerned, is in line with consistent, evidence-based policy choices and with the self-imposed guidelines as laid down in the so-called Trade Sustainability Impact Assessment (TSIA) Handbook.

The second part of this contribution investigates whether the continued implementation of the precautionary principle on the side of the EU is properly secured in view of the various rules, procedures and institutional arrangements contained in the CETA text. In that respect, the findings of a detailed study on this topic are summarised first, after which some of the critique from the side of the Dutch Minister of Foreign Trade and Development Cooperation and from the EU Commissioner for Trade will be examined and commented upon.

2 Integration principle and sustainable development

The European Union committed itself to integrating environmental concerns into all of its policies – so including its trade policy – in 1987,[2] with the goal of promoting sustainable development.[3] The integration principle is nowadays laid down in Art. 11 TFEU and reads as follows: "*[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*" On top of this, since the Treaty of Lisbon entered into force in 2009, it is specified that in its relations with the wider world, the Union is to contribute to the sustainable development of the Earth,[4] and it is to ensure sustainable development through its external policy.[5] In light of these treaty obligations, the EU is under the constitutional obligation to ensure that trade agreements promote protection of the environment and sustainable development inside and outside the European Union.

Over time, several policy instruments were developed that should help in achieving these goals. Where trade agreements are concerned, notably the so-called Trade Sustainability Impact Assessments (TSIAs) were introduced in 1999 to this end. The TSIAs are carried out by independent consultants during the negotiations of trade agreements, and also encompass possibilities for interested parties to react to draft texts and stakeholder meetings. In the end, the TSIAs should set out what the economic, social and environmental effects of the agreement under negotiation will have, and issue recommendations to remedy negative effects. The Commission is to react to the TSIAs and explain which of the recommendations it agrees with, and which not. The EU negotiators are to take these findings into account. The details of this process are laid down in an internal Handbook with guidelines.[6]

3 The case for ISDS

Soon after the entry into force of the Treaty of Lisbon, the European Commission stated that ISDS forms "*a key part of the inheritance that the Union receives from Member State BITs*", and that it "*is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others*". For those reasons the future EU agreements with an investment protection component should include ISDS.[7] These claims were not substantiated, contrary to the Com-

1 Cecilia Malmström, *CETA - An Effective, Progressive Deal for Europe*, speech at Civil Society Dialogue Meeting, 19 September 2016.

2 Through the Single European Act.

3 Through the Treaty of Amsterdam. For a more extensive discussion of this topic, see W.Th. Douma, *The promotion of sustainable development in EU Trade Policy*, in: Luca Pantaleo and Mads Andenas (eds.), The European Union as a Global Model for Trade and Investment, University of Oslo Faculty of Law Research Paper No. 2016-02, pp. 86-103, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731085, last accessed 12 December 2016.

4 Art. 3(5) TEU.

5 Art. 21 TEU and 205 TFEU.

6 *Handbook for Trade Sustainability Impact Assessment*, 1st edition, 2006. A second edition was adopted in 2016, see trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF, last accessed 12 December 2016. It has added human rights to the issues to be assessed.

7 Commission, 'Towards a comprehensive European international investment policy' (Communication) COM (2010) 342 final, 9 and 10. Available at trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf, last accessed 12 December 2016. It was noted that challenges exist where transparency, consistency and predictability and rules for the conduct of arbitration are concerned. BITs is the abbreviation of Bilateral Investment Treaties.

mission's assertions regarding more evidence-based, smarter policy making.[8]

In spite of the lack of evidence on the need for proportionality and conformity of ISDS in EU agreements, and the critical reactions of legal experts, the Council agreed with the Commission's proposals. The European Parliament (EP) was more critical, and called for significant ISDS reforms, notably in order to ensure transparency, appeals, prevention of 'double hatting' and the exhaustion of local judicial remedies where they are reliable enough to guarantee due process.[9] The EP also reacted to the Council's request that the new European legal framework should not negatively affect investor protection.[10] This puts the right to regulate at risk, and "*may contradict the meaning and spirit of Article 207 TFEU*", the EP stated. That is putting it mildly, considering that this provision demands that the "*common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*" – which include protection of the environment and ensuring sustainable development.[11] The resolution also expresses "*deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations*", and calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new agreements.

4 The making of CETA

The negotiations between the EU and Canada started in May 2009. The original negotiation directives of the Council for CETA did not mention ISDS. They did dictate that 'sustainable development' be mentioned in the preamble, and argue the contribution that international trade can bring to sustainable development. Furthermore, they stated that sustainable development is an overarching objective of both parties, and that trade is not to be encouraged by lowering standards. As for the Trade Sustainability Impact Assessment (TSIA), it was explained that it is to identify potential effects on sustainable development and that findings are to be taken into account by negotiators. This is at odds with the treaty provisions mentioned above, since they demand that trade policies promote and support sustainable development, which goes beyond merely minimising negative effects on sustainable development.

In June 2011, the TSIA for CETA was presented. It explained that "*the conflicting costs and benefits of [an ISDS] mechanism make it doubtful that its inclusion in CETA would create a net/overall (economic, social and environmental) sustainability benefit for the EU and/or Canada*". It was added that "*the policy space reductions caused by ISDS allowances in CETA, while less significant than foreseen by some parties, would be enough to cast doubt on its contribution to net sustainability benefits*".[12] The independent advisors concluded that instead of an ISDS mechanism, a state-to-state system forms a more appropriate enforcement mechanism in the agreement. Still, in July 2011 the Council agreed to amended negotiation directives that aimed at providing for an "*effective and state-of-the-art*" ISDS mechanism.[13] CETA with ISDS was negotiated and made public in 2014. During the 'legal scrubbing' phase, and hidden from the outside world, the EU and Canada re-opened negotiations and agreed on replacing the ISDS system with an Investment Court System (ICS).[14] This version of CETA was presented on 29 February 2016.[15]

The Commission's own guidelines[16] prescribe a reaction to the TSIA findings in the form of a position paper to be presented during the negotiations, which the EU negotiators are to take into account. The reaction should explain for instance why ISDS nevertheless should be included, but it remains unclear whether it was drafted at all. As of November 2016, the required position paper regarding CETA's TSIA has not been published.

8 See for instance Commission Communication 'Smart Regulation in the European Union', COM(2010)543 final of 8.10.2010, in which it is claimed that "*regulation must promote the interests of citizens, and deliver on the full range of public policy objectives from ensuring financial stability to tackling climate change*".

9 EP, 'Resolution on the future European international investment policy' 2 October 2012, 2010/2203(INI) www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN, last accessed 12 December 2016. It noted a number of ISDS problems because of vague language, the possibility of conflict between private interests and the regulatory tasks of public authorities (for example where the adoption of legitimate legislation led to states being condemned for breaches of the 'fair and equitable treatment' (FET) principle), and asked the Commission to "*better address the right to protect the public capacity to regulate and meet the EU's obligation to exercise policy coherence for development*".

10 Council, 'Conclusions on a comprehensive European international investment policy', 3041st Foreign Affairs Council meeting, Luxembourg (25 October 2010), at 2.

11 Articles 21 TEU and 11 TFEU.

12 Development Solutions, 'A Trade SIA relating to the negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada', Final Report (June 2011) 19, 20. Available at trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf, last accessed 12 December 2016. The report also notes that there "*is no solid evidence to suggest that ISDS will maximise economic benefits in CETA beyond simply serving as one form of an enforcement mechanism, just as state-state dispute settlement is also an enforcement mechanism. […] As such, the study's assessment suggests that a well-crafted state-state dispute settlement mechanism might be a more appropriate enforcement mechanism in CETA than ISDS.*"

13 The original 2009 negotiating directives, as well as a 2011 modification to allow for talks on investment protection, were partially made public only on 15 December 2015. See http://www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/, last accessed 12 December 2016.

14 European Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement' (29 February 2016) *European Commission Press Release* europa.eu/rapid/press-release_IP-16-399_en.htm, last accessed 12 December 2016.

15 See trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, last accessed 12 December 2016.

16 See *supra* note 6.

Several MEPs did ask the Commission why it disregarded the TSIA advice on leaving ISDS out. One answer they got was that the advice does not represent the views of the Commission, and that the EP and the Council had endorsed the inclusion of ISDS in CETA. Instead of refuting the cost/benefit analysis on ISDS of the TSIA, the Commission stated that it considers ISDS more appropriate than a state-to-state mechanism for the settlement of disputes between an investor and the host state. It was added that the state-to-state dispute settlement mechanisms in Free Trade Agreements (FTAs) had not been used, that those mechanisms do not provide for compensation for the investor, and that securing adequate compensation, where an illegal action has been taken, is the core purpose of the ISDS mechanism. "*For these and other reasons"*, the Commission continued, "*it is appropriate to include an ISDS mechanism in CETA, and not rely on the state-to-state dispute settlement mechanism alone*".[17] These answers did not clarify what was wrong with the analysis of the consulted experts that underpinned their conclusions, nor do they offer evidence supporting the Commission's preference for ISDS.

MEPs had also asked about a statement that ISDS in CETA was only of "*some economic value"*.[18] In reply, several motives for including ISDS in CETA were indicated. European investors in Canada need protection against being expropriated and denied compensation and access to the Canadian courts. This happened several times in the past, according to the Commission, but how often, when or which companies this concerned was not mentioned – so it might concern two decades-old cases. To top the answers off, it was submitted that offering more legal certainty through ISDS helps securing trade and investment flows, which is "*of significant economic value and importance*".[19] Interestingly enough, on another occasion Commissioner Malmström admitted that most studies do not show a "*direct and exclusive causal relationship*" between international investment agreements and foreign direct investment.[20]

The political importance of ISDS in CETA was also stressed. Investment protection without an ISDS procedure "*would be of little value*".[21] To provide adequate protection to investors, the agreement should also include a mechanism for enforcement of the commitments ensuring effective implementation of the provisions. The lack of consistency with the provisions on sustainability in CETA – excluding the possibility to invoke regular dispute settlement mechanisms – is striking. Furthermore, it was explained that the CETA negotiations are the first in a series of negotiations that will take place between the EU and third countries addressing investment issues. Along with EU-Singapore Agreement, CETA is likely to be one of the first EU agreements including investment protection and ISDS, it was explained. Hence, it is "*politically important for the Union to exercise this competence, and in the future to pursue this policy with other key partners […] as […] the first agreements will be important in setting the path for this policy*".[22]

The conclusion that can be drawn from this brief look at the CETA negotiation process is that in several instances, the internal guidelines on the manner in which the sustainability aspects of trade agreements are supposed to be assured were ignored, and that the Commission did not follow a consistent, evidence-based approach where the inclusion of ISDS/ICS in CETA is concerned. Considering the questions that still exist on the need for and legality of ISDS/ICS mechanisms in EU trade agreements with nations with mature law systems, and the potential regulatory chill effect such a system might have on environmental and other public policy measures, the manner in which the Commission makes the integration principle operational leaves much to be desired.

5 CETA and precaution

5.1 Study

In June 2016 a detailed study was presented in which it was explained why CETA insufficiently warrants that the EU could continue to regulate in accordance with the precautionary principle in the future.[23] The study was written by experts from different legal backgrounds that dealt with aspects of the precautionary principle extensively throughout their careers, including the author of this contribution. After setting out the broad scope of the precautionary principle under EU law, covering not only the protection of the environment, but also the protection of workers, human health and consumers, the fact that CETA limits

17 Answer given by Mr De Gucht on behalf of the Commission of 5 February 2013, OJ C 321 E of 7 November 2013.

18 Question for written answer E-011230/12 to the Commission of 7 December 2012, OJ C 321 E of 7 November 2013.

19 Answer given by Mr De Gucht on behalf of the Commission of 29 January 2013, OJ C 321 E of 7 November 2013.

20 EurActiv 16 September 2015, 'Positive effects of TTIP tribunals for investment unclear,' www.euractiv.com/section/trade-society/news/positive-effects-of-ttip-tribunals-for-investment-unclearunclear', http://www.euractiv.com/section/trade-society/news/positive-effects-of-ttip-tribunals-for-investment-unclear/, last accessed 12 December 2016.

21 See *supra* note 19.

22 *Idem*.

23 P-T. Stoll, W.Th. Douma, N. De Sadeleer and P. Abel, *CETA, TTIP und das europäische Vorsorgeprinzip. Eine Untersuchung zu den Regelungen zu sanitären und phytosanitären Maßnahmen, technischen Handelshemmnissen und der regulatorischen Kooperation in dem CETA-Abkommen und nach den EU-Vorschlägen für TTIP* (German original), foodwatch, June 2016, http://www.foodwatch.org/uploads/media/2016-06-21-_Studie_Vorsorgeprinzip_TTIP_CETA_01.pdf, last accessed 12 December 2016; *CETA, TTIP and the precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals* (English condensed version), foodwatch, June 2016, http://www.foodwatch.org/fileadmin/foodwatch.nl/Onze_campagnes/Politiek_en_Lobby/Images/CETA/CETA_TTIP_precautionary_principle_study_EN.pdf, last accessed 12 December 2016.

the scope of the two provisions that cover the protection of the environment and workers was identified as a reason for concern.

Moreover, where sanitary and phytosanitary (SPS) issues are concerned, we demonstrated that CETA also limits the possibilities to adopt precautionary measures under EU law. Two transatlantic disputes serve to illustrate this. Both in the dispute over beef produced from hormone-treated cattle, that over European regulation on genetically-modified organisms, the EU tried unsuccessfully to justify its measures with reference to the precautionary principle. The study set out that, in light of these WTO disputes and the EU's lack of success in invoking the precautionary principle there, CETA implies that the EU conceded its position on the admissibility of the precautionary principle as a general principle of international law. The EU failed to sufficiently add provisions and language in CETA that point to the EU's obligation to adhere to the precautionary principle, and make use of existing margins for the precautionary principle in WTO jurisprudence.

The study also argues that by merely referring to the WTO Agreement on technical barriers to trade (TBT) measures, CETA does not protect the possibility to adopt precautionary measures. The reason for this is that the WTO TBT Agreement does not contain a provision allowing for the adoption of precautionary measures, nor is there any WTO jurisprudence showing that in spite of the lack of such a provision precautionary measures can be adopted. The reference in CETA to the WTO's TBT Agreement thus transfers the existing legal uncertainty on this matter in WTO law into CETA, without clarifying the EU's position and making use of existing margins in WTO law for the application of the precautionary principle.

The study also touched on the chilling effect that future EU trade agreements seem to already have. Where maximum residue levels of pesticides are concerned, it was identified as problematic that CETA is orientated towards Codex-Alimentarius-standards, which are lower than the EU's. We added that it is particularly surprising that the European Commission, apparently in anticipation of the conclusion of CETA, has offered to lower the stricter EU standards towards Codex-Alimentarius-Standards. This contradicts statements in which it was assured that transatlantic trade agreements would not lead to the lowering of any EU standards of protection. Furthermore, we explained that the regulation of endocrine disruptors forms another field that seems to be affected already. In anticipation of the conclusion of the transatlantic trade agreements, the European Commission postponed establishing the criteria necessary to give effect to European laws on endocrine disruptors based on the precautionary principle. As was explained in the German original version of our study,[24] US concerns about the potential non-tariff trade barrier effect of such criteria might have been among the reasons for the Commission disregarding the deadline laid down in EU legislation by which it was to propose such criteria.[25] The CJEU found this omission to be in violation of European law.[26] Draft criteria were eventually proposed in July 2016, 2.5 years after the deadline. However, by focusing on causality between adverse hormonal effect in humans and an endocrine mode of action, the proposed criteria do not seem to reflect the precautionary principle.[27] The delays and the content of the criteria that were proposed in the end could reflect a possible pattern of how the precautionary principle might be undermined by CETA.

5.2 Dutch response

In response to the study, the Dutch Minister for Foreign Trade and Development Cooperation, Ms. Ploumen, issued a reaction in August 2016.[28] She stated that CETA expressly mentions the precautionary principle in Chapter 24 on trade and environment, while adding that CETA confirms the precautionary principle when recognising existing legislation in, *inter alia*, the preamble. It dictates that the parties resolve to implementing the Agreement "*in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters*".

While it is true that Article 24.8 of CETA states that precautionary measures can be adopted to prevent environmental degradation, our study stressed that this provision does not do justice to the principle, because under EU law it has a much broader scope of application and also covers food security, human health protection, etc. The fact that precaution in the European Union does not only apply to protection of the environment is actually confirmed in a case that the Dutch minister brings up herself in an effort to demonstrate that our worries are unfounded.

The judgement she referred to is a CJEU decision from 10 April 2014 on medical products from India. The Court affirmed the right of European authorities to adopt precautionary measures aimed at the protec-

24 At p. 29.

25 See Stéphane Horel/Corporate Europe Observatory, *A Toxic Affair*, 2015, p. 14 et seq.; and United States Trade Representative, *2014 Report on Technical Barriers to Trade*, 2014, p. 68 et seq.

26 Case C-243/13, *Sweden* v *Commission*, 4 December 2014 (published in French and Swedish only).

27 See Corporate Europe Observatory, Worse than expected: Commission criteria for endocrine disruptors won't protect human health, 16 June 2016; and Alyssa Alfonso, What's More Hazardous – Endocrine Disruptors or the EU's Proposed Criteria?, Centre for International Environmental Law (CIEL) blogpost. For a different view, see Scientists for Scientific European Commission Regulation, *Endocrine disruptors: science is more potent than politics*, EurActiv 14 September 2016.

28 Letter of 17 August 2016 to foodwatch Nederland, on file with the author.

tion of human health in cases where potential risks of a product or production process are demonstrated, but scientific evidence to determine the exact risk is lacking. "*This remains the same under CETA,*" she states, because "*all the laws, treaties and judgements of the Court of Justice of the EU will remain valid*" and because "*[e]veryone in the EU remains bound by these rules, and thus by the provisions that include the precautionary principle*".[29] In reality, however, the fact that the EU judges allowed for a precautionary measure does not guarantee that it will be allowed under CETA and/or under WTO law as well. A clear example in this respect is the European ban on beef hormones. The ECJ found that the European directive prohibiting the use of certain substances in livestock farming having a hormonal action was valid under European law,[30] yet the WTO dispute settlement body found that it violated WTO law.

5.3 Commission response

Trade commissioner Malmström also responded to our findings. In a letter dated 16 November 2016,[31] she set out that our claim that CETA, by merely reaffirming WTO law, does not sufficiently recognise the precautionary principle, does not reflect the reality. Her first argument in this respect is that the principle is laid down in the EU treaties, and EU trade agreements must respect those treaties. This is of course exactly what we are also stressing. The Commissioner then sets out that "*[t]he Union ensures that all of its trade negotiations fully respect the right to regulate on the basis of this principle*" and that "*the Commission ensures that its trade agreements are in line with existing food safety regulations and other so-called secondary legislation in which the precautionary principle is also enshrined*". Here, our views differ because of the differences we observed between this duty and the actual text of CETA, and because of the manner in which the sustainable development integration process was carried out (see above). Like D. Misonne concluded in her contribution to this elni-review, the change in rhetoric did not yet lead to a different mindset.

The second argument from Commissioner Malmström is that WTO law as interpreted by the WTO Appellate Body, is consistent with the precautionary principle. This is supposedly confirmed by the fact that "*the precautionary principle finds expression, for example, in Article 5.7 of the Sanitary and Phytosanitary (SPS) Agreement*". The letter also stresses that it "*would be incorrect to deduce from the outcome of the dispute mentioned in the paper ("hormones") that the WTO does not recognise the precautionary principle – it does*". Indeed, that would be incorrect and more importantly, this is not what our study claims. Instead, we admit that the decisions "*imply some margin for the application of the precautionary principle*" but added that "*WTO practice has so far proven to provide only for a rather small room for SPS-measures based on the precautionary principle*".[32] That is what the beef hormones case illustrates. The EU lost that case, which has cost European exporters millions of euros as a result, in spite of the existence of Article 5.7 SPS.[33] Instead of trying to rely on that provision, the EU sought in vain to invoke the precautionary principle as a norm of international law, precisely because Article 5.7 SPS is more restrictive than EU law where precautionary measures are concerned. The Appellate Body decided against this request. It did admit that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating damage to human health are concerned.[34] However, in the following sentence it found that the precautionary principle does not relieve a panel from "*the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement*".[35] Precisely this line of reasoning is the reason why the authors of the study found that CETA should have done more to carve out possibilities to keep the option to adopt precautionary measures, and were not satisfied with the timid opening of a door when it is slammed immediately afterwards.

Furthermore, we stressed that "*apart from SPS-measures, due to the absence of explicit provisions on regulatory methodology in other WTO-agreements, including the WTO TBT-Agreement and the GATT, it is unclear whether other EU-measures could validly be based on the precautionary principle in the areas of regulatory policies outside the realm of sanitary and phytosanitary protection*".[36] In other words, we do not claim that the WTO does not recognise the principle, but rather that the WTO limits the possibili-

29 The case referred to is C-269/13 P *Acino* v *Commission*, and concerns an EU decision that ordered the withdrawal from the European market of consignments of medical products containing a substance manufactured at a factory in India that did not comply with rules on good practice. The Indian factory had been inspected by the German authority for the supervision of medicinal products, who established numerous critical and some serious breaches of the rules on good practice, but in the end concluded that the withdrawal of medicinal products supplied was unnecessary in the absence of any evidence that the products at issue were harmful to patients.

30 Case C-331/88, *The Queen and The Minister for Agriculture, Fisheries and Food and The Secretary of State for Health*, ex parte Fédération européenne de la santé animale (Fedesa) a.o., ECR 1990 Page I-4023.

31 On file with the author.

32 English version of the report, p. 11.

33 The USA and Canada were entitled to nullification or impairment measures amounting to US$ 116.8 million and CND$ 11.3 million per year (WT/DS/ARB of 12 July 1999). The yearly amounts were reduced from 2009 onwards through a Memorandum of Understanding between the EU and the USA allowing for increased imports of (hormones free) high quality beef.

34 This point was also picked up by Maxime Vaudano, *Les traités transatlantiques menacent-ils le principe de précaution européen?,* Le Monde blog, 29 June 2016, who claimed that this showed the WTO was opening up to the precautionary principle.

35 DS26 and DS48, Appellate Body report, para 124.

36 *Idem.*

ties for the European Union to use it in the SPS area (as is demonstrated by the beef hormones dispute). Furthermore, we explain that in other areas a provision like Article 5.7 SPS is missing – and warn that it is not certain that in those areas the principle could be invoked at all.

A third argument put forward by Commissioner Malmström is that our study confirms that there is nothing in the CETA text which would threaten the precautionary principle, and that where the study argued that CETA is not sufficiently explicit about the precautionary principle, this only reflects the subjective judgement of the authors "*as opposed to an objective assessment based on the terms of the treaties, interpreted in accordance with the customary rules of interpretation of public international law*". In fact, as just explained, the study did examine the terms of the agreement in accordance with the customary rules of interpretation of public international law, which stood in the way of applying a broader precautionary approach under the SPS Agreement. From these facts, it was derived that CETA limits the possibilities to invoke the principle and can be perceived as a threat in that respect.

Ms. Malmström's fourth argument is that CETA does contain clear legal safeguards to fully protect the precautionary principle. Besides Article 24.8 in the chapter on trade and environment, she quotes Article 23.3 from the trade and labour chapter, Article 4.2.1.a TBT chapter, Article 5.4 SPS chapter and Article 28.3 as exceptions.

As explained above, the problem with the provision in the trade and environment chapter of CETA is that it only applies to environmental measures. Similarly, the provision in the trade and labour chapter only applies to the protection of workers. In the EU, the precautionary principle has a broader scope that also includes the protection of consumers and public health.

As for Article 4.2.1.a, it incorporates Article 2 of the TBT Agreement (Preparation, Adoption and Application of Technical Regulations by Central Government Bodies) into CETA. As was set out in our study, the WTO's TBT Agreement lacks any reference to the possibility of adopting precautionary measures. A reference to a provision such as Article 2 of the TBT Agreement in CETA does not change this. Article 2 of TBT states that members are to ensure that technical regulations are not prepared, adopted or applied with a view to, or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. Protection of human health or safety, animal or plant life or health, or the environment are mentioned as examples of such legitimate objectives; in assessing risks, relevant elements of consideration are, *inter alia*, "*available scientific and technical information*". In light of customary rules of interpretation of treaty provisions, this provision does not guarantee that in the absence of scientific evidence precautionary measures will be justified.

In Article 5.4 of CETA, the Parties affirm their rights and obligations under the SPS Agreement. As explained above, the SPS Agreement incorporates a narrower version of the precautionary principle than EU law prescribes. Hence our criticism that agreeing with the unsatisfactory status quo does not do justice to the principle.

6 Concluding remarks

The manner in which environmental, sustainable development and ISDS concerns were dealt with in the CETA negotiation process does not form an example to follow. Having independent experts write an extensive Trade Sustainability Impact Assessment should be promptly followed by a reaction from the side of the European Commission in which it is explained which recommendations are to be adopted, and which rejected, and for which reasons. In the case of CETA, the absence of such an official reaction given the clear TSIA recommendation not to introduce an investor-state dispute settlement mechanism, instead opting for state-to-state dispute settlement, is worrying. It is not in line with the Commission's own guidelines, and not in conformity with the promised increased transparency.

Where the precautionary principle is concerned, in some respects CETA does embrace the principle in certain sectors (environment, labour). However, the agreement lacks provisions that clearly ensure that the European Union can adopt precautionary measures in areas covered by other parts of CETA, in line with a broad interpretation of the principle.

The statements and declarations added to CETA do not change this conclusion.

The Volkswagen Scandal - Air Pollution and Administrative Inertia

Ludwig Krämer

1 Introduction

This contribution* deals with the manipulation of NOx emissions from Volkswagen diesel cars on the one hand, and with the manipulation of CO_2 emissions from diesel and petrol cars by Volkswagen on the other. The scandal became public in 2015. Volkswagen is a German car manufacturer; to the company also belong Porsche, Audi, Skoda, Scania, Ducati, Seat, Bentley, Bugatti, Lamborghini and Quattro.

It might be pre-emptive to already write a contribution about this scandal. Indeed, the first information on it was published in September 2015. Since then, Volkswagen has tried, largely with success at least in Europe, to maintain its sovereignty over the information flow concerning the details of the scandal. Practically every piece of information that was and is being published in Europe, stems directly or indirectly from Volkswagen and is, of course, all too often apologetic. No Government, public agency or the European Commission has sought to inform the public on the details of the scandal, retrace past suspicions, publish studies or other findings, or bring complementary information into the public debate which would confirm or refute the statements by Volkswagen. Accusations by environmental organisations - there are very few in Europe which are specialised on technical/car issues - were not commented on by public authorities and immediately rejected by car-friendly media. Overall, the atmosphere in Europe is marked by the tendency to be lenient with Volkswagen, as it is an important car producer, taxpayer and job-creator.

The situation is different in the United States, where the scandal and its follow-up are being handled by the Environmental Protection Agency (EPA) and the Californian Air Resources Board (CARB). Neither agency appears to show any inclination of being as indulgent to Volkswagen as public authorities in Europe. This might also be due to the fact that both agencies have the statutory task to protect the environment, among other areas also with regard to the pollution by cars. No such body exists in Europe. Furthermore, any passivity by the US authorities, which have the task of ensuring compliance with air pollution standards, could be used by citizen suits (class actions) against Volkswagen; public handling of such lawsuits would then indirectly blame the passivity of EPA or CARB. And generally, public opinion as a watchdog over the activities of private companies and public authorities is much more alert and attentive in the US than in Europe.

2 The history of the scandal

It seems that around 2005-2006, Volkswagen began using software in order to manipulate the nitrogen oxide (NOx) emissions of diesel cars, beginning with the model year 2009. Volkswagen was apparently of the opinion that only with such manipulated software would it be able to comply with the NOx emission standards not only in the United States, but also in other parts of the world.

Who exactly gave the order within Volkswagen to use the software is not known. Volkswagen itself has maintained until now that this was the initiative of some (subordinate) engineers and that the higher management did not know of the manipulation. This position becomes more understandable, if one realises that under German criminal law, a legal person cannot be held criminally liable. Only physical persons can be held criminally responsible. If it cannot be proven that the Volkswagen Chief Executive Officer (CEO) at the time the manipulation began or later ordered its use or accepted that it was used, he cannot be held criminally responsible. This could have implications not only for the criminal, but also for the administrative or civil liability of Volkswagen.

The software used was able to identify when a car was being tested in a car laboratory versus on the road. During the laboratory testing, the software was able to recognize that only two wheels of the cars were moving, while the steering was not.[1] In such a case, an additive (Adblue) was added to the diesel liquid which partly dissolved the NOx, so that the NOx emissions were reduced. During the use of the car on a road, the additive only was added to the fuel in specific, exceptional circumstances. This had the consequence that the recharging of the additive was less frequently necessary.

The software was supplied to Volkswagen by Bosch, a German supply company. There is information published that Bosch warned Volkswagen in 2007 that the use of the software in cars was not allowed; however, officially, this information has not yet been confirmed.

On 23 September 2015, Volkswagen publicly admitted that it had installed the software in question in some

* An earlier French version of this article is published in Revue du droit de l'Union Européenne 2016, pp. 265-290.

1 In its 'Notice of Violation' letter of 18 September 2015, the EPA stated: "*VW manufactured and installed software in the electronic control module (ECM) of these vehicles that sensed when the vehicle was being tested for compliance with EPA emission standards. For ease of reference, the EPA is calling this the 'switch'. The 'switch' senses whether the vehicle is being tested or not based on various inputs including the position of the steering wheel, vehicle speed, the duration of the engine's operation and barometric pressure*".

11.5 million diesel cars worldwide. For some countries, the precise figures of manipulated cars were made public.[2] Volkswagen also admitted to the EPA that its diesel cars with 2.0 litre engines had been equipped with a defeat device since 2009.

The scandal was starting to come to light in the United States. In 2014, private environmental organisations informed the EPA and CARB that for Volkswagen diesel cars the NOx emissions during normal road use differed significantly from the officially registered emissions. The authorities had started an investigation and discussed the matter with Volkswagen. Volkswagen had argued that technical issues were the cause of the differences, and even recalled a number of cars. As, however, the differences remained, US authorities pursued the matter further. In the autumn of 2015, they threatened to withhold a type approval for Volkswagen diesel vehicles for 2016, unless the differences were eliminated. It was at that point, on 3 September 2015, that Volkswagen admitted to US authorities that it had used software to influence NOx emissions during laboratory tests.

On 18 September 2015, the EPA and CARB sent a formal 'Notice of Violation' to Volkswagen and made that letter public.[3] On 20 September 2015, Volkswagen admitted to the manipulation; on 23 September, it admitted that the software had been installed in some 11.5 million cars worldwide. Since then Volkswagen has negotiated with US authorities, and also with the authorities of other countries, over the refitting, restoration, repair, compensation and take-back of cars. These negotiations have not been made public.

In Germany, Volkswagen reached an agreement with the Federal Motor Transport Authority (KBA) about ways to re-equip the affected cars. The details of the agreement were not made public. It is to be noted, though, that legally, once a car has received a type approval in one EU Member State – by the KBA or by another equivalent body – it is valid in all other EU Member States. As the KBA issues type approvals for cars, but does not deal with conformity certificates,[4] it must be assumed that the KBA issued a new type approval for the affected Volkswagen cars. How many types are affected remains unclear, as the type was equipped with a supplementary device to bring NOx emissions to the legally prescribed levels.[5] The re-equipment of the individual car is now in the hands of Volkswagen, which started this re-equipment action in Germany in early 2016.

On 2 November 2015, the EPA also accused Volkswagen of having manipulated approximately 10.000 3.0 litre engines cars in the US to indicate falsely low NOx and carbon dioxide (CO_2) emissions. Volkswagen contested the accusation, but on 19 November 2015 officially admitted that the defeat device had also existed in all of its 3.0 litre diesel models in the US (Volkswagen and Audi) since 2009.

On 3 November 2015, Volkswagen published a declaration according to which "*irregularities had been found*" in about 800.000 cars worldwide, which showed deceptively low fuel consumption and CO_2 emissions.[6] Some 100.000 of these cars ran on petrol fuel. The manipulation was declared to have taken place during the type-approval of the cars; no software was involved. On 8 December 2015, Volkswagen declared that the CO_2 values had not, or only for few cars, been manipulated; no precise figure for the number of cars affected was given, though the media reported it at around 36.000 cars. During this time no information came from any European or national authority on the issue. They appeared to be waiting to see whether and when Volkswagen would be willing to provide further information.

3 The legal provisions of placing cars on the EU market

European legislation on cars is largely harmonised at the EU level, in order to guarantee the free circulation of cars within the EU. National legislation continues to exist in almost all Member States. This mainly deals with competent authorities and sanctions and refers, for the rest, largely to EU legislation. This EU legislation was established in 1970 and was successively elaborated and adapted; following the progressive integration of the EU, it went from directives on optional harmonisation[7] via directives on total harmonisation[8] to regulations. Such EU regulations are of general application. They are binding in their entirety and directly applicable in all Member States.[9]

The approval of cars is regulated by Directive 2007/46.[10] When a manufacturer wants to put a new car on the market, he must first produce a model ('type'). This type must conform in all aspects to the existing EU legislation. The manufacturer must hand over to the competent national authority an infor-

2 2.4 million cars in Germany, 683.626 cars in Spain, 482.000 cars in the United States.

3 EPA letter of 18 September 2015, signed by P. A. Brooks and addressed to Volkswagen AG; CARB letter of 18 September 2015, signed by A. Hebert, Ref. IUC-2015-007.

4 See below for more on these aspects.

5 These levels are laid down in EU Regulation 715/2007, OJ 2007, L 171 p. 1.

6 Frankfurter Allgemeine Zeitung, 21 November 2015, p. 21: "*Irregularities have been found in the determination of CO_2-levels for the type approval of cars. About 800.000 cars may be affected. The economic risks are calculated, according to a first estimation, to be about two billion euro*" (own translation).

7 An EU directive on optional harmonisation leaves the national legislation on cars untouched. However, it applies to all cars which cross the border to another Member State.

8 An EU directive on total harmonisation requires the Member States to align their national legislation to all requirements of the EU directive.

9 Article 288 Treaty on the Functioning of the European Union (TFEU).

10 Directive 2007/46 establishing a framework for the approval of motor vehicles and their trailer, and of system components and separate technical units intended for such vehicles, OJ 2007, L 263 p. 1.

mation folder in which it is laid down evidence – test results etc. – that the type meets all of the relevant regulatory acts of EU law which are listed in Annex XI. Compliance with EU legislation is to be demonstrated by means of appropriate tests performed by designated technical services (Article 11). This means that the car manufacturer may choose certified technical bodies to conduct the necessary laboratory tests; it may even conduct these tests in its own laboratories. In any case, it is not the public authority which conducts the tests.

The EU provisions on tests are general and vague as regards the formal conditions of conducting the tests. The following is a list of examples, assembled from specialised and general media publications, of practices used to influence the test results:[11] The test area is in light decline; the asphalt is extremely soft; at the front of the car all openings are taped; the tires are over-inflated; the average speed during the test is 34 km/h; all electrical instruments (air conditioning, day lights, etc.) are switched off; the temperature in the laboratory is warmed up; the battery is fully charged before the beginning of the test; the light machine is switched off; the side mirrors are folded; special lubricants are used.

It is true that Article 6(8) of Directive 2007/46 provides that the car manufacturer make available to the approval authority as many vehicles as are necessary to enable the type approval procedure to be conducted satisfactorily. However, this provision is of a theoretical nature. Mostly, the approval authorities do not possess the technical equipment to perform the tests. Also, the car manufacturer may choose any authority within the EU, to submit its type approval application. As the approval authorities depend, as regards their budget, largely on the fees of the car manufacturers,[12] there is competition, and an authority might be prudent to being too critical with its requirements for type approval tests.

Finally, it should be mentioned that Annex I to Directive 2007/46 contains the following general remark: "*If the systems, components or separate technical units have electronic controls, information concerning their performance must be supplied.*" Therefore, the information folder for the approval authority must also contain information on the software which is used for a given car. Car manufacturers normally invoke intellectual property rules and commercial secrecy grounds to keep that information confidential and do not inform the authorities of defeat devices in electronic form.[13]

Once a type approval is given for a specific prototype, the manufacturer may produce cars identical to that type. For each car it must issue a conformity certificate, in which it ensures that the car is in all parts identical to the approved type.[14]

The payment of taxes for the car is the responsibility of the EU Member States. In many EU Member States, tax amounts vary for diesel and petrol cars. For about a decade, Member States have oriented their legislation for the car tax according to the CO_2 emissions of the car; the higher the emissions, the higher the tax.

When a car has the certificate of conformity, it may be used on the road. There are no further tests by public authorities on whether the emissions of the car during its lifetime – which is between 12 to 15 years on average – correspond to the emissions of the type-approved car.[15] However, the roadworthiness of cars is regularly tested, on the basis of an EU directive.[16] The testing programme is a minimum programme which allows Member States to provide for more stringent requirements. Exhaust emissions are to be measured according to Annex I no. 8.2 to the Directive. Measurement instruments are used which probably allow the measuring of all air pollutants.[17] However, according to the Directive, a negative result on the test is only given when the carbon monoxide (CO) values are exceeded.[18]

CO_2 emissions of passenger cars are regulated under Regulation 443/2009.[19] This Regulation fixes average emission limit values for the car fleet of a manufacturer, such that an individual person cannot claim that his car emits too much CO_2.[20]

4 The prohibition of the use of defeat devices and its enforcement

As regards the emissions from cars, Regulation 715/2007 lays down the emission limit for light passenger and commercial vehicles.[21]

11 See also European Parliament, Resolution of 27 October 2015 on emission measurements in the automotive sector (2015/2865(RSP)) no 22.

12 The UK and German authorities are said to have their budget dependent up to 70 percent on car manufacturers' fees.

13 I am grateful to Professor Martin Führ for having drawn my attention to this provision.

14 Directive 2007/46, Article 5 and 12 and Annex IX.

15 This is a marked difference to the situation in the United States, where cars are regularly tested, by the EPA and CARB, when they are used on roads. The present scandal broke out, when private environmental organisations found out that the NOx emissions of the Volkswagen diesel cars were up to 40 percent higher than indicated in the approval papers.

16 Directive 2014/45 on periodic roadworthiness tests for motor vehicles and their trailers, OJ 2014, L 127 p. 51.

17 Directive 2014/45, Annex I, no. 8.2 "*measurement using an exhaust gas analyser in accordance with [EU legislation]*".

18 UNECE Regulation 83 provides in no. 5.3.1 which emissions shall have to be tested. However that Regulation has not yet entered into effect at the EU level.

19 Regulation 443/2009, OJ 2009, L 140 p. 1. CO_2 emission limit values for light commercial vehicles are fixed in Regulation 510/2011, OJ 2011, L 145 p. 1. For heavy duty vehicles, there is no limitation of CO_2 emissions, see Regulation 595/2009, OJ 2009, L 188 p. 1.

20 This is further complicated by the fact that car manufacturers may together form a group, which has the consequence that the average emission of the group is calculated.

21 Regulation 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro

Article 5(2) of Regulation 715/2007 states: "*The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited*". A defeat device is defined, in Article 3 no. 10 of the Regulation, as "*any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use*".

Article 13 of the Regulation requires Member States to "*lay down provisions on penalties applicable for infringements by manufacturers of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 January 2009. [...] The types of infringements which are subject to a penalty shall include: [...] (d) use of defeat devices*".

This prohibition of defeat devices was not the first laid down in EU law. Already in 1999, a directive laid down "*[T]he use of defeat devices and/or irrational emission control strategy is forbidden*"[22]. In 2000, the European Commission became aware that some lorries had been manipulated with defeat devices.[23] It thus introduced an amendment to an earlier Directive including a definition of defeat devices and repeating the prohibition of the use of defeat devices.[24] The provisions of Regulation 715/2007 did thus not constitute an innovation at all.

The Commission does not publish which Member States comply with the obligations under Article 13 of Regulation 715/2007. On a request for information by this author, it stated that the United Kingdom, Germany, France, Italy and Spain had not sent information.[25] On 1 October 2015, after the Volkswagen scandal became public, it sent a letter to Member States, compelling the implementation and application of the provision of Article 13 of Regulation 715/2007.

Germany answered that cars in Germany were required to comply with the requirements of Regulation 715/2007.[26] The German KBA, the type approval agency, was entitled to withdraw the type approval in full or in part, in particular when it was found that vehicles with a conformity certificate did not conform to the approved type.[27] No prohibition of defeat devices was laid down and no sanction for the use of defeat devices was established. In order to explain this deficiency, Germany further pointed out that an explanatory note to the Vehicle Approval Regulation had stated: "*Certain infringements during the approval procedure, such as the submission of falsified test results or technical specifications or incomplete statements, (are) usually committed intentionally and are thus subject to the special provisions of the Penal Code (fraud, forgery of documents)*"[28].

It remains, though, that Germany has not provided any specific penalty for the use of defeat devices, contrary to the requirement of Article 13 of Regulation 715/2007. Furthermore, the Volkswagen scandal clearly shows that criminal law might not be a sufficient deterrent: at least in Germany, the physical person who ordered the use of defeat devices must be identified in order to be held criminally liable. Finally, the threat of the withdrawal of the type approval is purely theoretical: nobody would dare to withdraw the type approvals on the basis of which 11.5 million cars were put into circulation. Moreover, the position of Volkswagen in the German and European economy (jobs, tax revenue) is much too important to even consider such withdrawals.

French legislation neither includes a prohibition of defeat devices nor a sanction for using such devices. In a letter to the Commission from 2013,[29] the French authorities referred generally to the sanctions provided in the Code de la Route, in the Code de la Consommation, in the Code Pénal and in the Code du Commerce. The type approval of a car may be withdrawn, when cars are circulating with a conformity certificate but without conforming to the type approval. The legislation is silent on the question of what happens when the approved type of a car does not comply with EU law.

Italian[30] and Spanish[31] legislation contain neither prohibitions of defeat devices nor sanctions for using them. There is no specific provision on sanctions in the case of a type approved car which does not comply with EU legislation.

6) and on access to vehicle repair and maintenance information, OJ 2007, L 171 p. 1.

22 Directive 1999/96 on air emissions from vehicles, OJ 1999, L 44 p.1, Annex 6.1.1.

23 See Written Question 0460/03 Lange, OJ 2003, C 192 p.189; Written Question Caveri 0104/03, OJ 2003, C 242E p.95; Written Question Lange and Swoboda, 0530/04, OJ 2004, C 84E p. 422.

24 Commission Directive 2001/27, amending Directive 88/77, OJ 2001 L 107 p.10, Annex 6.1.21.

25 Commission, letter of 27 November 2015, GROW/C4/SP/Ares(2015)5738971.

26 Article 47(1)(a) Strassenverkehrszulassungsordnung of 26 April 2012, BGBl.2012, I p. 679.

27 See Article 25(3) of the Verordnung über die EG-Genehmigung für Kraftfahrzeuge und ihre Anhänger (EC Vehicle Approval Regulation), of 3 February 2011 (BGBL 2011, I p.126): „*Das Kraftfahrt-Bundesamt kann die Typengenehmigung ganz oder teilweise widerrufen, insbesondere wenn festgestellt wird, dass Fahrzeuge mit einer Übereinstimmungsbescheinigung [...] nicht mit dem genehmigten Typ übereinstimmen*".

28 Germany indicated that this note was published in the Federal Ministry of Transport Gazette 2009, no 9, p.340.

29 Ministère de l'Écologie, du Développement Durable et de l'Énergie, Letter of 27 February 2013, entitled: "*Arsenal juridique francais, permettant de sanctionner les infractions visées par l'article 46 de la directive-cadre 2007/46 et par certains de ses règlements d'application*".

30 Decreto Ministeriale of 28 April 2008, Gazz.Uff. 162, Supplemento Ord. n.167 of 17 July 2008.

31 Real Decreto 750/2010 de 4 de junio, por el que se regula los procedimientos de homologación de veiculos de motor, BOE 2010, no. 153, p.55026.

Under United Kingdom law, it is an offence to have the wrong type approval - i.e. a type approval which does not comply with the relevant EU law - issued, when this was done deliberately.[32] The sanction is an unlimited fine.[33]

A short comparison with US law might be useful. Under the US Clean Air Act the sale, offer for sale or import of a motor vehicle is not allowed, when this vehicle is not covered by a valid certificate of conformity; the sanction is 37, 500 US dollars.[34] There is no corresponding provision which sanctions the seller (importer, manufacturer) in Europe. Apparently, it did not strike the minds of the national or EU legislators that a manufacturer could sell cars which did not have a valid certificate of conformity, because the underlying type approval had been - as in the case of Volkswagen - falsified by the seller (manufacturer).

In the US, a car may not be put into circulation when it has a defeat device which was knowingly added; the maximum sanction is 3,730 US dollars.[35] In Germany, the maximum sanction in the case that a car does not have a valid certificate of conformity is 2,000 euros,[36] in France 1,500 euros[37] and in Italy 335 euros.[38] There is no specific sanction in Spanish law. The fine is of an unlimited amount in the United Kingdom.

In the US, the actual sanction must take into consideration the gravity of the action, the economic benefit, the size of the business, the history of compliance, remedial actions which were undertaken and the capacity to pay.[39] A corresponding provision does not appear to exist in EU law or in any national legislation of a Member State.

As regards Article 13 of Regulation 715/2007, this provision must be understood as requiring Member States to provide in their national legislation a specific sanction for the use of defeat devices and to inform the Commission thereof. EU legislators apparently considered that general sanctions for criminal action or for administrative offences were not sufficient, because Article 13 explicitly enumerates the different cases for which sanctions had to be established at the national level.

When the Commission did not receive the information on such penalties, it should have asked Member States for it. Instead, between 2009 and the end of 2015, the Commission remained passive and accepted the non-compliance of (some) Member States with Article 13.

There is another provision in Regulation 715/2007 which is relevant for the present case: Article 14(3) provides: "*The Commission shall keep under review the procedures, tests and requirements referred to in Article 5(3)* [tailpipe emissions, including test cycles, temperature emissions, emissions at idling speed, evaporative emissions and crankcase emissions measurement of greenhouse gas emissions and fuel consumption; author's note] *as well as the test cycles used to measure emissions. If the review finds that these are no longer adequate or no longer reflect real world emissions, they shall be adapted so as to adequately reflect the emissions generated by real driving on the road*".

This provision means that the tests on the emissions of cars were to reflect the situation of "*real driving on the road*". However, there were numerous complaints by individuals and organisations that the air emissions and the fuel consumption of cars in practice differed considerably from the indications in the type approval of the car and the certificate of conformity.[40] Between 2007 and the end of 2015, the Commission remained passive in this regard. It neither published data nor comparisons of laboratory test results with real driving results. Only at the end of 2015 did it initiate procedures to have a new test cycle for car emissions adopted, which oriented itself on real driving emissions (RDE).[41] No explanation was given for why the Commission was passive between 2007 and 2015. Unconfirmed reports contend, that the Commission was informed already in 2011 by its Joint Research Centre that there were considerable discrepancies between the fuel consumption and air emission test results from laboratory tests and the real driving conditions on road.

At present, diesel cars in the EU may legally emit 80 mg/km of NOx.[42] The Commission's proposal suggests that the RDE test for cars should signal 'compliance,' when the NOx levels do not exceed 168 mg/km, as of 2021 onwards 120 mg/km. Despite some controversial discussions among Member States[43] and in particular in the European Parliament,[44] this proposal was not objected to and will thus become applicable as of 1 January 2017.

32 Road Vehicles (Approval) Regulations 2009.
33 Legal Aid, Sentencing and Punishment of Offences Act 2012 (Fines on Summary Conviction) Regulations 2015.
34 US Clean Air Act, §7522(a)(1) and § 7524.
35 US Clean Air Act § 7522(a)(3)(B).
36 Article 37 Type Approval Act (*supra* note 26).
37 Article R-321-4 Code de la Route.
38 Article 71(6) Italian Highway Code.
39 US Clean Air Act § 7524(b).
40 See EPA letter to Volkswagen (*supra* note 1), p. 4: "*emissions of NOx increased by a factor of 10 to 40 times above the EPA compliant levels, depending on the type of drive cycle (e.g. city, highway)*". No public authority in Europe issued a similar a statement, though the difference may be equally high.
41 The procedure for adopting such new test method is that of the comitology procedure: the Commission submits a proposal to a group, where Member States are represented. If the group agrees, the European Parliament has up to three months to object to the proposal. When the European Parliament agrees, the Commission adopts the corresponding text. In the case of the new test cycle, the Member States' committee and the European Parliament agreed to the proposed text which will be published in the first months of 2016.
42 Regulation 715/2007.
43 See El Pais, 23 October 2015, p. 46: "*Alemania presiona para rebajar los controles de contaminación en los coches*".
44 See El Pais, 4 February 2016, p. 49: "*La Eurocámera permite doblar las emisiones en el test de carretera*".

5 Damage caused by Volkswagen

The public discussion centers around the question of how much compensation Volkswagen should have to pay to the different damaged persons and bodies. Very little attention is paid to the question of what should be considered damage, and how it may be claimed from Volkswagen. A distinction appears appropriate.

5.1 Damage to car buyers and users

Volkswagen sold some 11.5 million cars with the indication that a specific amount of NOx and CO_2 emissions would not be exceeded and, where a State had fixed emission limit values, that these values would be respected. In practically all cases, it used local traders and salesmen to contract the sale of the cars.

It is national law which decides whether deceptive information on NOx and CO_2 emissions entitles the purchaser to a reduction of the purchase price, that Volkswagen purchases back the car, a car refit free of cost for the purchaser or other remedies. EU rules do not exist on this matter.

In Europe, Volkswagen offered the installation of a supplementary device which would bring the NOx emissions of the car into line with the legal requirements. The details of such a refitting were agreed on by the German Federal Motor Transport Authority (KBA). They are not known to the public, nor do we know about the durability and reliability of the refitting device; it is not even known whether the incriminating software is taken out of the car, deactivated or otherwise treated. While the refitting is to take place free of costs for the car owner, the time expense of bringing the car to the repair garage is to be borne by the 11.5 million buyers. Nothing is known about whether a substitute car will be made available (free of cost) during the repair-refit time.

It is also not known, whether the additive which Volkswagen had added to the emissions during the laboratory test of its cars, will need to be added more frequently in the future to the combustion of diesel fuel, in order to reduce the NOx emissions. This would mean a more frequent replacement of the additive in the car, the costs of which are to be borne by the car owner.

In the US, there is not yet an agreement between the EPA, CARB and Volkswagen on how the call-back and the refitting of the cars shall take place and how car owners shall be compensated. According to media reports, Volkswagen intends to generously compensate owners - with cash payment, the re-purchase of cars, repair and a substitute car - though these are just promises so far.

The possibility for individuals to bring a court action against Volkswagen is extremely small in Europe. The individual person would have to bring an action against Volkswagen, demonstrating that the fraudulent information on the NOx (and CO_2) emissions caused him damage. Procedural difficulties, such as the place of action, the proof of damage, the causality, preemption, etc. make such a claim difficult.

Class actions - several car buyers collectively bringing a claim against Volkswagen - only exist in a rudimentary form in Europe; no information is available on whether a class action has been introduced in a Member State against Volkswagen. Class actions are not allowed in Germany. In the United Kingdom, Rules 19 and 19.6 of the Civil Procedure Rules offer some possibilities for bringing a case collectively, but such an action must be authorised by the court. The group (class) depends on the opt-in of the individual buyer. Overall, the procedure is not popular in the United Kingdom and not often used.

Spanish law offers some possibilities for class action.[45] Registered consumer associations and affected individual groups are entitled to bring such an action. Individually affected groups must represent the majority of victims. They may only bring a case when the affected persons are either clearly identified or easily identifiable; the court decides whether this is the case. If this is not the case, only consumer associations may bring a case. The whole procedure is not very popular with courts and is rarely used.

Article 31 of Ley 21/1992[46] provides that it is a serious infringement to deliberately sell a product which does not comply with the applicable regulation, when this causes a serious danger (peligro) for the environment. However, it is unlikely that a Spanish judge would accept that the excessively high NOx emissions of Volkswagen diesel cars constitute a serious danger for the environment.

Italy introduced class actions in 2005.[47] The action may be introduced by an individual consumer, and there is an opt-in requirement. Little experience exists as to the application of the provision.

France introduced a form of class action in 2014:[48] national consumer organisations may bring an action for the compensation of consumers who have suffered damage from the purchase of a product. The provisions appear to have thus far been hardly applied.

Class actions in the US are widespread, also because the lawyer of the group may obtain between 10 and 40 percent of the compensation awarded (contingent fee system which is considered unethical in most parts of the EU); it is thus often the lawyer who assembles the group. According to media reports, there are some 500 class actions against Volkswagen pending, to which some 200 class actions in Canada and some 500 class actions in Australia may be added.

45 Ley 1/2000 de 7 de enero, de Enjuicamiento Civil, Article 11.
46 Ley 21/1992, de 16 de julio,de Industria, BOE A-1992 p.17363.
47 Decreto Leggislativo of 6 September 2005, n.206 (Codice del Consumo), Article 140.
48 Code de la Consommation, consolidated version of 16 January 2016, Article 423-1ss.

About 20 of these class actions are also directed against Bosch, the supplier of the incriminated software.[49] Bosch's defence that it had warned Volkswagen already in 2007 that the use of the software would be illegal - if that fact is finally confirmed - is rejected by these class actions with the argument that Bosch should not have ignored the intended application of the more than 11 million instances of the 'illegal' software purchased by Volkswagen.

5.2 Damage to the environment

NOx is a powerful pollutant and responsible for a considerable part of air pollution, in particular in urban agglomerations.[50] Emissions of NOx from passenger cars are regulated in Annex I to Regulation 715/2007. According to Article 13 of that Regulation, Member States shall impose sanctions for the exceeding of the emission limit values.

At first glance, this appears to be a clear solution. However, several aspects should be taken into consideration: first, only new cars must comply with the requirements of Regulation 715/2007. This leads back to the conformity certificate of each car which is based on its type approval. Moreover, the measuring of the air emissions at this stage follows the test method laid down by the Commission according to Article 5(3) of Regulation 715/2015, which allows the emission limit values to be exceeded by 110 percent until 2019 and thereafter by 50 percent.

Second, the emissions during the ordinary use of a car are not controlled. The regular roadworthiness checks according to Directive 2014/45[51] measure perhaps NOx emissions. However, the controlled car is only considered defective when CO_2 emissions limits are exceeded; NOx emissions are not taken into consideration. Once again, there is neither a body in Europe nor in the Member States which would take a number of cars which are in use and test whether they respect the legal emission limit values. The conclusion is that there is no mechanism to control NOx emissions once a car has been put into circulation.

The concentration of NOx as well as of other pollutants in the air is regulated by EU Directive 2008/50.[52] Member States must not, on their territory, exceed the concentration values fixed. Where this happens nevertheless, they must take measures to bring the pollution level back within the legal limits as soon as possible. The EU Court of Justice stated that the concentration limits also aim at protecting human health. For that reason, individual persons may demand in court that measures be taken in order to reach compliance.[53] However, some Member States interpret the term 'as soon as possible' very loosely.[54]

Air quality within the EU is appallingly poor. The EU Commission has officially indicated that there are more than 400,000 premature deaths per year within the EU due to air pollution; it estimated the economic damage at 23 billion euros per year.[55] The main source of air pollution is traffic and, within the traffic, the emission of NOx by diesel cars. Because of this situation, Paris and a number of other European cities are considering restricting diesel car use within city limits. EU measures to restrict the use of diesel cars do not exist.

It is extremely difficult to draw a causal relationship between the excessive emissions of NOx by Volkswagen diesel cars and their contribution to premature deaths and serious illness. No authority in Europe exists for such undertakings. In the US, researchers from Harvard University and of the Massachusetts Institute for Technology extrapolated that the excessive, illegal emissions by the Volkswagen diesel cars have led to some 60 premature deaths, 30 cases of chronic bronchitis and a number of other diseases.

Even if this figure were multiplied by only 10 in order to cover the damage caused by excessive NOx emissions by the 11.5 million diesel cars from Volkswagen, the damage caused is considerable. No legal mechanism appears to exist anywhere in Europe - or indeed in parts of the world other than the Anglo-Saxon world (USA, Canada, Australia) to make Volkswagen compensate for this damage to the environment. Rather, that damage is taken as an Act of God (force majeure), which society has to suffer.

As regards the damage caused by excessive emissions of CO_2 which Volkswagen had admitted to on 3 November 2015, no provision in EU law on compensation exists either. Regulation 443/2009[56] provides that car manufacturers in the EU are obliged to respect certain CO_2 emission limit values. However, these values are average values for the whole car fleet of a manufacturer. The values are sent to the Commission by the Member States; the Commission then gives manufacturers the opportunity to correct errors and publishes annually the values per car manufacturer.

49 Frankfurter Allgemeine Zeitung, 13 January 2016, p.19: „*Eine Frage der Ethik.*"

50 See European Parliament, Resolution of 27 October 2015 (*supra* note 11) Recital B: "*air pollution causes over 430.000 premature deaths in the EU yearly and costs up to an estimated EUR 940 billion annually as a result of its health impacts; [...] NOx is a major air pollutant which causes, inter alia, lung cancer, asthma and many respiratory diseases, as well as environmental degradation such as eutrophication and acidification; [...] diesel vehicle exhausts are a principal source of NOx in urban areas in Europe; [...] up to a third of the EU's urban population continues to be exposed to levels above the limits or target values set by the EU; [...] transport continues to be a main contributor to poor air quality levels in cities, and to the related health impacts; [...] over 20 Member States are currently failing to meet the EU air quality limits in particular because of urban pollution*".

51 Directive 2014/45.

52 Directive 2008/50 on ambient air quality and clean air for Europe, OJ 2008, L 152 p. 1.

53 EU Court of Justice, case C-237/07, Janecek, ECLI:EU:C:2008:447.

54 See the facts of Court of Justice, case C-404/13 ClientEarth v. United Kingdom, ECLI:EU:C:2014:2382, where the United Kingdom tried to apply a period of time of more than 13 years.

55 Commission, A clean air programme for Europe COM(2013) 718 p. 2.

56 Regulation 443/2009.

As regards the values for 2014 of Volkswagen, the Commission declared:[57] "*Following a statement by the Volkswagen Group on 3 November 2015 that irregularities were found when determining type approval CO_2 levels of some of their vehicles, the average specific emissions of CO_2 and the specific emission targets should not be confirmed for the Volkswagen pool and its members until further clarification is provided by the Volkswagen Group. As a consequence, the Volkswagen pool and its members [...] should not be subject to this decision*".

Regulation 443/2009 does not contain any sanction for manufacturers. Consequently, Volkswagen successfully avoided being listed in the Commission decision. And nothing is, of course, said about CO_2 emission values of Volkswagen in previous years; it is not clear, whether the Commission is trying at all to obtain correct data for the past.

5.3 Damage by paying increased taxes

In numerous European (and probably non-European) countries, diesel fuel is less highly taxed than petrol fuel. The main underlying reason for this is probably that in this way, a hidden subvention is paid to the agricultural and transport industries. This tax differentiation constitutes a promotion of the sale of diesel cars, with consequences for air pollution, human health and economic damage. The Volkswagen scandal has not yet led to changes in the tax policy of EU governments – which are very slowly, though, becoming attentive to the ecological impact of diesel cars.

Buyers of a Volkswagen car which indicated specific CO_2 emissions, were grouped in classes in those Member States which differentiated the car tax according to the CO_2 emissions. When the CO_2 emissions are in fact higher, these buyers will be classed in another group and will have to pay higher car taxes. In a letter from November 2015 to the 28 EU Ministers of Finance, Volkswagen declared itself ready to pay retroactively the higher taxes which were due for these cars. However, nothing is known about the higher taxes which the car owner will have to pay in the future, over the remaining lifetime of the car which might be ten years or even more.

In some countries another 'tax' problem exists which might be illustrated by the situation in Spain. In order to promote the purchase of cars, the Spanish Government granted state aid to Volkswagen, which then lowered the purchase price of cars with low CO_2 emissions.[58] When the VW scandal broke out, the Spanish Government threatened to ask for the return of this state aid. Volkswagen declared itself ready to pay the higher car taxes for the some 50.000 cars which had benefitted from the PIVE programme, because the cars emitted in fact more CO_2 than foreseen in the PIVE programme. However, again, this Volkswagen commitment concerned the higher taxes in the past. Nothing was said about future higher taxes which the car owner will have to pay. Whether Spain will claim back the PIVE state aid from Volkswagen remains unclear.

5.4 Damage to the financial operators

According to Article 6(1) of Directive 2003/6[59] the issuer of financial instruments shall inform the public as soon as possible of inside information which directly concerns the said issuer. Inside information is defined as "*information of a precise nature which has not been made public [...] and which, if it were made public, would be likely to have a significant effect on the prices of these financial instruments [...]*".[60] The Member States shall impose sanctions for the violation of the Directive.[61]

Shares are financial instruments. As Volkswagen is a shareholder company, these provisions are fully applicable to it. The admission towards the US authority from 3 September 2015 that Volkswagen had used a prohibited defeat device in some 500.000 cars in the United States should certainly qualify as inside information. This information was not made public by Volkswagen until 23 September 2015. Persons who bought Volkswagen shares between 3 and 23 September 2015 are thus entitled to claim damages, as the real value of the shares was less than their stock exchange value at that time; indeed, after 23 September 2015, the value of Volkswagen shares fell by 20 to 30 percent.

One might wonder, though, whether the withholding of inside information did not take place over a much longer period of time. It must not be forgotten that since 2009, Volkswagen intentionally inserted a defeat device into its diesel cars. Thus, it had information on those cars which was not publicly available and which means that in legal terms, the diesel cars were not respecting the legal requirements in the US, in Europe and elsewhere. Such information would have significantly influenced the price of the Volkswagen shares. If this assessment is correct, Volkswagen is liable for damages for the breach of its obligation to disclose inside information since 2009.

6 Criminal and administrative sanctions

EU law does not provide for criminal sanctions and normally does not even oblige the EU Member States to provide for sanctions of a criminal nature. Directive 2008/99 on the protection of the environment through criminal law requires Member States to consider as a criminal offence the emission of a quantity of material

57 Commission Decision 2015/2251, OJ 2015, L 318 p. 39, Recital 11.

58 So-called PIVE programme (Programa de Incentivos al Veiculo Eficiente).

59 Directive 2003/6 on insider dealing and market manipulation (market abuse) OJ 2003, L 96 p. 16.

60 Directive 2003/6, Article 1(1).

61 Directive 2003/6, Article 14. As regards Germany, see Wertpapierhandelsgesetz of 9 September 1998, BGBl.1998, I, p. 2708, Article 37b, which gives a right to damages, without prejudice to criminal or other liability.

into the air which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air.[62] As this provision is part of a directive, it has to be transposed into national legislation. German legislation provides in this regard that:[63] "*A person who, infringing administrative obligations, emits during the functioning of a machine, pollutants in a considerable quantity into the air outside the site of an industrial installation, shall be punished with imprisonment up to five years or with a pecuniary sanction*"[64]. The application of this provision will not further be examined, as German law does not provide for the criminal liability of legal persons.

As a sort of substitute for the absence of criminal liability of legal persons, German law contains a provision on corporate pecuniary penalties in its Act on Regulatory Offences (Ordnungswidrigkeitengesetz). The difference to the criminal law is that sanctions which concern offences committed under the Ordnungswidrigkeitengesetz do not carry with them the moral-ethical blame which is typical for a criminal offence.

Article 30 of the Ordnungswidrigkeitengesetz states: "*Where someone [...]* [in a responsible position within a legal person; author's note] *has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person have been violated [...] a regulatory fine may be imposed on such a legal person […]*". The penalty ranges from one to 10 million euros, if the offence was found to have been committed intentionally.

According to Article 17(2), the penalty shall be proportional to the relevance of the administrative offence and the blame against the acting person. Also the economic situation of the person shall be taken into consideration. Article 17(4) provides that the penalty shall exceed the economic benefit which was obtained from the administrative offence. When the maximum legal amount is insufficient in this regard, it may be disregarded. Article 130 finally indicates that neglecting the surveillance and control obligation within a company constitutes an administrative offence, when it made possible the committing of an offence or at least made it considerably easier.

In German practice, these provisions are fully applied to legal persons and in particular to companies. For example, some years ago, Siemens was asked to pay 600 million euros in a bribery case, MAN 150 million euros and Eurostaal 149 million euros in two other corruption cases. If and to what extent German public prosecutors will recur to these provisions in the Volkswagen case is, of course, still unknown.

In other EU Member States- with the exception of Austria - legal persons may be held criminally liable, though the main sanction in such cases is of a financial nature. Criminal offences may exist on the basis of national law. This national law is not harmonised. Therefore, the precise content of the criminal offence depends on the content of the national law. Generally, one might consider that Volkswagen committed fraud against the approval authority by applying for the type approval of a car that was equipped with a prohibited defeat device. Such fraud was also committed against the individual car purchaser, whereby Volkswagen used the car trader – who probably did not know of the existence of the defeat device - as a means to commit the fraud.

Further criminal activities include the false certification of the type-approval document and of the 11.5 million certificates of conformity which were issued for the individual cars. Furthermore, national law might consider it to have been a crime to disadvantage the public budget (tax crime), or to fraudulently obtain subventions.

According to media reports, public prosecutors are investigating criminal offences committed by Volkswagen in the United States, Spain and Sweden, though this might not be a complete picture.

7 Administrative inertia

There are more than one billion cars registered worldwide, more than 200 million cars in the EU. Cars have an average lifetime of 12 to 15 years. They are without doubt the biggest polluting product which exists on the market (raw material for production, air pollution, traffic congestion, transformation of inner cities, waste). This applies in particular to the post-marketing period: once a car is on the market, it is regulated as regards car safety, but its environmental behaviour is poorly monitored. In its EU road accidents database CARE, the Commission indicates that in 2014 25,900 persons died in car accidents; in 2013 it indicated that the total number of persons who died prematurely due to air pollution is more than 400,000 per year,[65] thus ten times higher.

In light of these figures, the legislation in Europe on cars is amazingly incomplete. That a car manufacturer is allowed to self-test its vehicles and then provide the results to the type approval authority is not serious. Other lacunae of existing legislation are: fuel consumption and pollutant emissions are measured in a laboratory, and not in real driving tests. The income of the approval authorities depends largely on the fees paid by the car manufacturer, thus providing it limited independence. Pollution emissions are tested before a car is first put on the market and shall apply through-

62 Directive 2008/99, OJ 2008, L 328 p. 28, Article 3(a).

63 Article 325 al. 2 Strafgesetzbuch. The English translation was shortened to its parts which apply to cars.

64 Own translation. The full German text of Article 325(2) Strafgesetzbuch reads: „*Wer beim Betrieb einer Anlage, insbesondere einer Betriebsstätte oder Maschine, unter Verletzung verwaltungsrechtlicher Pflichten Schadstoffe in bedeutendem Umfang in die Luft außerhalb des Betriebsgeländes freisetzt, wird mit Freiheitsstrafe bis zu 5 Jahren oder mit Geldstrafe bestraft*".

65 Commission COM(2013) 718.

out the lifetime of the car. Roadworthiness tests which are made at regular intervals, do not monitor excessive NOx, CO_2 or other polluting emissions.

The monitoring of the implementation and application of existing provisions is poor, in all Member States and at the EU level. The European Commission has been aware for about fifteen years that defeat devices have been in use within the EU. Furthermore, although it provided for corresponding legislation at the EU level which it strengthened in 2007, the EC did not monitor Member State compliance in the years following. It also failed to confront Member States by requesting information or taking formal legal action under Article 258 TFEU against those Member States which did not provide for sanctions with regard to the use of defeat devices.[66] The Commission also was aware or should have been aware that the emission of pollutants indicated in the type approval and certificate of origin of cars did not correspond to the actual fuel consumption and air emissions during the road use of the cars, but were up to 40 times higher; yet, the Commission remained passive for more than half a dozen years.

Member State authorities did not care much about EU law. Defeat devices were prohibited under EU law and that was sufficient; they did not see the need to adopt sanctions for the use of defeat devices and examine, whether defeat devices were actually in use. It was left to the car industry to align. Any market observation, controls or spot checks were not undertaken.

This administrative inertia has continued even after September 2015. Examination of the Volkswagen measures is being conducted in the US and by Volkswagen itself. In contrast, European and national public authorities in Europe have remained largely passive. Historically, the use of defeat devices in Europe first occurred with lorries (heavy duty vehicles).[67] However, the European Commission decided in Regulation 595/2009 that the use of defeat devices in lorries should be prohibited.[68] The Regulation does not take up the provisions of Regulation 715/2007 on passenger cars, which states that Member States must impose sanctions for the use of defeat devices and report on it to the Commission. Furthermore, since 2009 and in particular after September 2015, no examination by the Commission was conducted to check whether lorries in the EU actually use defeat devices.

66 In other cases, the Commission was less hesitant: in the Court of Justice, C-184/08, Commission v. Luxemburg, ECLI:EU:C:2009:184, a case was brought because Luxemburg had not adopted national sanctions. InC-390/08, Commission v. Luxemburg, ECLI:EU:C:2009:313, case C-198/06, Commission v. Luxemburg, ECLI:EU:C:2006/95 and case C-191/04, Commission v. France, ECLI:EU:C:2005:393, the Member States were found to have infringed upon EU law, because they had not sent information to the Commission which they were obliged to send.

67 S*upra* note 22.

68 Regulation 595/2009, Article 5(3).

8 Conclusion: Ten lessons learnt - or not?

Not all details of the manipulations which Volkswagen committed have been brought to public knowledge until now. There might thus be a change in the assessment of relevant acts due to new information. Yet, a number of conclusions may already be drawn.

(1) The first involves the investigation into the scandal itself. Volkswagen is a multinational company which operates worldwide and committed its manipulations in numerous countries. Yet, criminal and administrative investigations into what exactly happened, how many cars are affected, how many pollutants more than officially recognised were emitted, and other questions are lacking. Action here depends largely, if not entirely, on the initiative of national authorities.

(2) The European Commission has very limited resources. It is true that it is not itself in charge of applying EU law in practice. However, it has the obligation to "*ensure the application of the treaties and of measures adopted by the institutions pursuant to them*" and to "*oversee the application of Union law*"[69]. It failed to comply with this obligation as regards both the prohibition of defeat devices and the ensuring that car emission tests reflect real driving conditions. Moreover, it has yet to initiate a systematic investigation into whether defeat devices were used by other car manufacturers or in lorries. On 6 October 2015, the industry commissioner, Mrs. E. Bienkowska, declared in the European Parliament that the Commission did not have the competence to conduct its own investigation in the car sector. However, this statement is false: nobody and nothing can prevent the Commission from testing the compliance of a random sampling of cars against the legal standards, confronting the car industry and Member States with the findings and starting a discussion on how to improve things. The Commission does not need a 'mandate' here. Its passivity in the present case is rather due to the fact that it did not wish to know too precisely, what was going on.

It is of no consolation that the United Kingdom, French, German or Spanish authorities are also not conducting such an investigation, individually or jointly.

(3) This led to the absurd situation that Volkswagen announced in November 2015, that it had, since 2013, manipulated the CO_2 emissions of cars such that they indicated lower fuel consumption and lower CO_2 emissions than occurred in practice. Volkswagen mentioned that about 800,000 cars had been affected by such manipulations. However, on 8 December 2015, Volkswagen announced that the actual number of cars which were affected by this CO_2-manipulation was much smaller. The fact that Volkswagen has tried to minimize the impact of its manipulations is not surprising. However, what is scandalous is the fact that

69 Treaty on European Union, Article 17.

the Volkswagen statement has not been verified by any public authority: the message of the private company is taken to be correct, and when there is another figure given by that company within less than a month, this is again accepted as correct.

(4) Cars, it was mentioned, are the biggest and most substantial consumer product on the market. Cars have a disastrous ecological footprint. Within the EU, legislation is largely uniform. And yet, there is no EU authority - or a group of national authorities acting together - that monitors the environmental performance of cars during their time in circulation. In the EU, it is the general opinion that the standards of environmental protection in the US are considerably below the standards in Europe. However, in the Volkswagen scandal, it was US stubbornness and initiative which brought the scandal to light. It was the EPA and CARB which examined, whether cars on the market complied with existing pollution requirements or whether data collected during real driving conditions deviated from the reported data. Europeans can learn a lot of this exemplary role of the US authorities. It is more likely, though, that it is easier for European authorities to continue to collude with the car industry - to the detriment of European consumers and the European environment.

(5) It is also absurd, that car manufacturers must only submit an 'information folder' to the type approval authority, and may keep confidential the software which they use for the car. No producer of pharmaceuticals or of pesticides can successfully argue that part of the data concerning his product are his intellectual property and therefore need not be submitted to the permitting authorities. Why should this be different for car producers? The present legislation can only be understood by an excess of indulgence to the car industry.

(6) The emission of regulated pollutants - for the car industry carbon monoxide (CO), hydrocarbons (HC), nitrogen oxides (NOx), particulates (PT) and carbon dioxide (CO_2) - should be regularly measured during the lifetime of a car. Where the values measured deviate from the measures indicated in the type approval/certificate of conformity, refitting should be required.

(7) That car owners depend on the grace of Volkswagen, if and when their car is refitted and with which devices, is another element which shows the weak European enforcement system. As class actions are not frequent in Europe - neither judges nor solicitors like them - Volkswagen has nothing to fear from the bargaining power of European car owners. It is time to improve EU buyers' rights in cases such as the present Volkswagen case.

(8) Diesel fuel is carcinogenic[70] and is, in European urban agglomerations, a very strong contributor to the appalling situation of air pollution. The fact that diesel fuel continues to be less taxed than petrol fuel can only be explained by the fact that the negative environmental and health effects of diesel fuel are ignored. It is time to consider the suppression of the tax privilege for diesel cars, even if the transport and agricultural sectors as well as the (German and French) car industry would strongly oppose such a measure.

(9) With all the imperfections of public authorities: it must not be forgotten that the Volkswagen scandal is an environmental scandal. A private company falsifies official documents which allow it to pollute the environment more than accepted by the legislation in force. This increased environmental pollution will not be compensated. Nobody suggests that Volkswagen pays more than the refit, etc. of cars plus some sort of criminal or administrative penalty. The environment remains without compensation. It would be possible to ask Volkswagen to pay for each quantity of NOx or CO_2, emitted in excess of existing provisions into an environmental fund which could then be used to finance environmental projects. However, no such fund exists and everybody appears to accept that environmental pollution should not be compensated. The polluter shall pay? Volkswagen probably can only laugh at this idea.

(10) A big European car manufacturer falsifies test results and markets, over seven years, about 11.5 million cars which emit more pollutants than legally allowed. Can a repetition of such action be avoided? The clear answer is no, as criminal activity is always possible and will always find a way to be exercised. It would already be progress, if European and national public authorities were willing to learn from the Volkswagen scandal and introduce a number of legal and practical improvements in order to make such criminal manipulations less easy. A first step in this direction may be the proposal of the Commission from the end of January 2016 to review the approval and market surveillance system for cars which is intended to replace Directive 2007/46.[71] The Commission proposed to establish national market surveillance authorities, but to be entitled to itself conduct compliance verification tests and inspections. The Commission should be entitled to fix administrative fines of up to 30.000 euros per car, when the car emission data are found to be falsified. It remains to be seen, whether this proposal will find a majority in the European Parliament and in the Council.

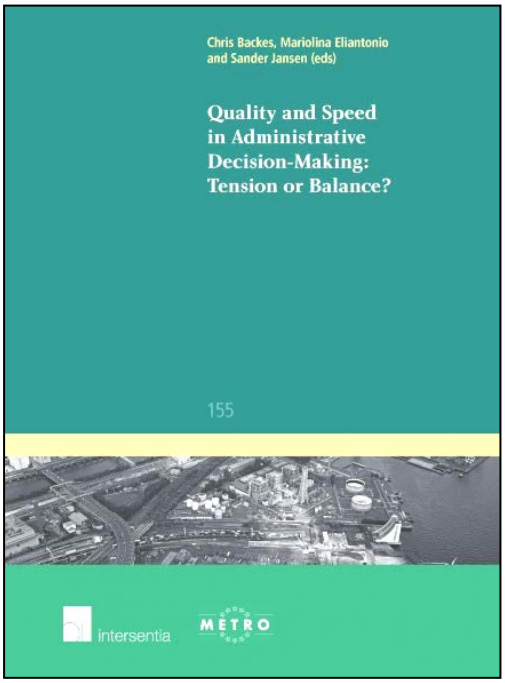
70 See European Parliament (*supra* note 11), Recital C: "*since 2012 the WHO International Agency for Research on Cancer (IARC) has classified diesel engine exhaust as a carcinogen, and has advised that given the additional health impacts of diesel particulates, exposure to the mixture of chemicals emitted should be reduced worldwide*".

71 Commission, Proposal for a regulation on the approval and market surveillance of motor vehicles and their trailers, COM(2016) 31.

Quality and Speed in Administrative Decision-making: Tension or Balance?

Editors:
Chris Backes, Mariolina Eliantonio, Sander Jansen

Quality and Speed in Administrative Decision-Making: Tension or Balance? presents six national perspectives on the issues surrounding legislation brought in to deal with the consequences of the economic crisis. It also includes a comparative overview comparing and contrasting national approaches with regards to finding a balance between the pace of proceedings and the quality of administrative and judicial decisions



In various European countries such as France, Italy, and the Netherlands, lawmakers have adopted legislation in order to deal with the consequences of the economic crisis. These laws contain provisions aimed at speeding up administrative decision making and judicial proceedings which have an impact on various provisions of general administrative law. Alongside the aim of facing the economic crisis, these measures aim to make administrative law more up-to-date and ensure it meets the needs of contemporary society.

However, acceleration measures concerning decision-making and judicial proceedings may clash with the need to preserve the quality of these proceedings. On the one hand, swift procedures can be considered to be one aspect of high-quality decision making. On the other hand, other aspects of quality such as public participation and the thorough consideration of all relevant aspects and interests, may be at risk when the speed of decision-making is the only focus of reforms.

Quality and Speed in Administrative Decision-Making: Tension or Balance? presents six national perspectives on these issues, together with a comparative overview comparing and contrasting national approaches with regards to finding a balance between the pace of proceedings and the quality of administrative and judicial decisions.

The book will be of interest to academics of European and comparative administrative law, as well as policy-makers at the national and European level.

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

Thirza Moolenaar and Sandra Nóbrega

1 Introduction

Article[1] 10 of the Aarhus Regulation[2] provides an opportunity for environmental non-governmental organisations (hereafter ENGOs) to request an internal review to 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. The criteria that have to be met for an ENGO to be entitled to make this request are defined in Article 11 of the Regulation.[3] Together, these criteria can be regarded as the criteria which define an ENGO at the European Union level.

The internal review procedure has been critically addressed in literature.[4] It has been remarked that the internal review procedure *"does not function adequately"* as the "*vast majority of the launched requests has been declared inadmissible"*.[5] This is mainly due to the narrow definition of 'administrative act' in Article 10 of the Regulation.[6] These analyses are therefore related to the subject of an internal review, not the standing criteria.[7] Specifically regarding Article 11, Darpö briefly stresses that the time criterion laid down in the Article constitutes a barrier to access to justice for ad hoc organisations.[8] However, there is no substantial review of the Article 11 criteria. The aim of this article is therefore to investigate whether these criteria are sufficiently clear and whether they contribute to the objective of providing wide access for ENGOs to the internal review procedure. After all, the criteria in Article 11 directly delineate the scope of access to the internal review procedure for ENGOs.

In order to understand the aim the EU institutions had in mind when they decided on the standing criteria, section two examines how these criteria were selected by analysing the legislative documents that resulted in the adoption of the Aarhus Regulation. It will help to identify whether the Commission is currently interpreting these criteria in line with the spirit with which they have been defined. In section three, internal review requests which provide insights into the scope of the Article 11 criteria have been selected in order to understand how the European Commission currently interprets the standing criteria. In the final section, a conclusion is provided on the questions raised, together with recommendations for improvement and further research.

2 From proposal to adoption

The Aarhus Regulation was adopted on 6 September 2006 and was part of the proposed 'Aarhus Package', consisting also of a proposal for a Directive on Access to Justice in Environmental Matters[9] and the proposal to ratify the Aarhus Convention.[10] The objective of the Regulation is to contribute to the implementation of

1 The authors wish to thank Prof. Dr. Marjan Peeters and Dr. Mariolina Eliantonio for their valuable guidance on previous versions of this article.

2 Regulation No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies, [2006] OJ L264/13.

3 a) It is an independent non-profit-making legal person in accordance with a Member State's national law or practice; b) it has the primary stated objective of promoting environmental protection in the context of environmental law; c) it has existed for more than two years and is actively pursuing the objective referred to under b); d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

4 M. Pallemaerts, 'Environmental human rights: Is the EU a Leader, a Follower, or a Laggard?', 15 Oregon Review of International Law 1, 2013, pp. 7-41.

5 G. J. Harryvan and J. H. Jans, 'Internal Review of EU Environmental Measures. It's True: Baron van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation', 3 Review of European Administrative Law 2, 2010, pp. 53-65, 53.

6 *Id.*, p. 55.

7 This definition is not further discussed within the scope of this article since the aim of this paper is the analysis of Article 11. For an overview of all the internal review requests and the reply letters, see: http://ec.europa.eu/environment/aarhus/requests.htm. More has been written about the possible broadening locus standi for ENGOs before the Court of Justice of the European Union (CJEU) as a result of the internal review procedure, which is made possible under Article 12 of the Aarhus Regulation. See *e.g.*: Jans, J. H., & Vedder, H. H. B. (2012), *European Environmental Law*. Groningen: Europa Law Publishing, pp. 560, 246-247; Kiss & Černý, 'The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases', 2008; G. J. Harryvan and J. H. Jans, 3 Review of European Administrative Law 2, *supra* note 5, pp. 53-65; M. Schaap, 'Access to Environmental Justice for NGOs: Reviewing the EU Legal Standing Criteria in Light of the Aarhus Convention', Newsletter Nr. 8/13 AJV, pp. 1-8;
ACCC, communication ACCC/C/2008/32 (part I) concerning compliance by the European Union, ECE/MP.PP/C.1/2011/4/add.1(24 August 2011); A.M. Keessen, European Administrative Decisions; How the EU Regulates Products on the Internal Market, European Administrative Law Series (2), Groningen 2009, pp.151-153;
S. Marsden, 'Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee', 81 Nordic Journal of international Law 2, 2012, pp. 175-204, 189;
T. Crossen, V. Niessen, 'NGO Standing in the European Court of Justice-Does the Aarhus Regulation open the door?', 16 Review of European, Comparative & International Environmental Law 3, 2007, pp. 332- 340, 332.

8 J. Darpö, 'Article 9.2 of the Aarhus Convention and EU Law', 11 Journal for European Environmental & Planning Law 4, 2014, pp. 367-391, 383.

9 Proposal for a Directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters (presented by the Commission), COM(2003) 624 final. The European Commission has withdrawn this proposal in 2014. Withdrawal of obsolete commission proposals (2014/C 153/03) OJ C 153/3.

10 Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters, COM/2003/625 final.

the obligations arising under the Aarhus Convention[11] by laying down rules to apply the provisions of the Convention to Community institutions and bodies.[12] Art. 9(3) of the Aarhus Convention lays down the obligation for each Party to the Convention to ensure that when they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[13] It is thus a provision creating access to justice for members of the public[14] which is intended to ensure effective environmental protection.[15] At the European level Article 10 of the Aarhus Regulation provides for the internal review procedure and is limited to ENGOs which fulfil the Article 11 criteria:[16] establishing a similar right of access to justice for every natural or legal person was not considered to be a reasonable option.[17] Further, Article 12 of the Aarhus Regulation states that ENGOs which made a request for internal review may initiate proceedings before the Court of Justice of the European Union (CJEU) 'in accordance with the relevant provisions of the Treaty'. Starting a procedure for an ENGO following this provision will not pose additional standing problems for ENGOs, since they are the addressee of the challenged decision.[18] The Aarhus Regulation however does not widen locus standi for ENGOs before EU courts.[19] Since the focus of this paper is on Article 11 criteria, the procedure for appeal to the Court of Justice will not be further discussed.

2.1 First proposal of the Regulation

In the first proposal for the Aarhus Regulation[20], the proposed criteria for the organisations that would give access to the internal review procedure (first defined as qualified entity) to meet in order to request internal review were the following:

a) It must have legal personality. It must operate on a non-profit basis and in the general interest of the environment: it may not pursue economic activities other than those that relate to the principal objective of the organisation.
b) It must be active at Community level. Where it acts in the form of several coordinated associations, those must cover at least three Member States.
c) It must have been legally constituted since more than two years and during that period have been actively pursuing objectives concerning the protection of the environment according to its statutes.
d) It must have its annual statement of accounts for the two preceding years certified by a registered auditor.

The aim of the Commission was to "*include groups, associations or organisations whose main statutory objective is the protection of the environment.*"[21] The proposal explained that a right of access to justice for these entities is justified by "*the increasingly important role in national and international environmental protection played by them.*"[22] The Commission proposal stipulated that these entities would not have to prove a sufficient interest in the subject matter or to maintain the impairment of a right, in order to have access to the internal review procedure.[23]

2.2 The opinion of the EESC

The European Economic and Social Committee (EESC) welcomed the inclusion of the term qualified entity, which, it stated, would facilitate access to justice, "*especially as such entities are not required to*

11 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998; in force 30 October 2001) ('Aarhus Convention').
12 See Aarhus Regulation, Preamble, Recital 17.
13 The CJEU that it is "*for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation […] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law*." See Case 240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (2011), para. 52.
14 In this regard, Recital 18 of the Preamble of the Aarhus Convention states that "*effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced*".
15 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, *supra* note 13, para. 46.
16 See Aarhus Regulation, *supra* note. 2, Preamble, Recital 17 and Article 1(1). Berthier, A. Rulings in Joined Cases C-401/12P to C-403/12P and Joined Cases C-404/12P and C-405/12P: The Lack of Proper Implementation of Article 9(3) of the Aarhus Convention, Journal of European Environmental Law & Planning Law 12 (2015), pp. 207-213, 208.
17 The proposal mentions the following: "*One group of interested parties in particular considered it was not justified to limit access to justice to 'qualified entities', arguing that the introduction of an 'actio popularis' was not likely to have the effect of over-burdening European courts*." The Commission did consider this limitation to be in line with Article 9(3), as this provision gives the possibility to the Contracting Parties to lay down criteria for the members of the public to be granted legal standing. Furthermore, the Commission explained, "*establishing a similar right for every natural and legal person has not been considered a reasonable option. This would imply an amendment of Articles 230 and 232 of the EC-Treaty and could hence not be introduced by secondary legislation*''. See: COM (2003) 622, pp. 7, 16.
18 Jans, J. H., & Vedder, H. H. B. (2012), European Environmental Law. Groningen: Europa Law Publishing, pp. 560, 250.
19 Backes, C. & Eliantonio, M. (2013), 'Access to Courts for Environmental NGOs at European and National Level: What Improvements and What Room for Improvement since Maastricht?', in: Visser, M. de; Mei, A.P. van der; and Visser, M. (eds.), Twenty Years Treaty on European Union 1993-2013: Reflections from Maastricht. Cambridge, Antwerp, Portland: Intersentia, 2013, pp. 557-580, 567.
20 Proposal for a Regulation of the European Parliament and of the Council of the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies (presented by the Commission), COM(2003) 622.
21 *Id*., p. 17.
22 *Id*., p. 17.
23 *Id*., p. 17.

have a sufficient interest or maintain the impairment of a right".[24] The EESC put forward that the concept of qualified entity is not found in the Aarhus Convention.[25] Further, the EESC proposed that it would be more appropriate in the European context to also recognize organisations that have social and economic objectives as admissible to request an internal review, alongside environmental organisations.[26]

Secondly, the EESC did not believe the field of activity of an ENGO should cover several countries, thus disagreeing with criterion b) of the proposed article.[27]

Lastly, the EESC stressed that criterion d) was in conflict with the principle of subsidiarity: it should be left to the Member States to control compliance of the accounting requirements applicable to such organisations.[28]

In the agreement and later with the adoption of the common position of the Council[29], the term 'qualified entity' was not used.[30] Furthermore, the criterion for an ENGO to be active at Community level was removed. Later, the Commission confirmed the common position of the Council by stating that an organisation was no longer specifically required to be active at Community level. Yet it was considered that any requests for internal review have to address Community level issues and be consistent with the definition of 'environmental law'.[31] Furthermore, the common position no longer required the organisation to have its annual statement of accounts by a registered auditor.[32]

The Commission highlighted that they were satisfied with maintaining that organisations must have as its primary objective the promotion of environmental protection in the context of Community environmental policy.[33] The term 'qualified entity' was removed from the proposal.[34]

2.3 Second reading

For the second reading on the Council common position, the Committee on the Environment, Public Health and Food Safety suggested an inclusion of the phrase "*and/or of promoting sustainable development*" next to the objective of the promotion of environmental protection.[35] In this regard, the Committee considered that given the wide definition of 'Environmental Law', administrative acts and omissions do not only affect NGOs active in the field of environment, but a much broader range of organisations, such as trade unions.[36] Therefore, a broader range of organisations should be entitled to request an internal review.[37]

At the second reading, the European Parliament proposed a new criterion: it adopted the view that NGOs active in the field of environmental protection should be law-abiding organisations. Moreover, the European Parliament confirmed the view of the Committee on the Environment, Public Health and Food Safety that NGOs that promote sustainable development should be equally entitled to request an internal review.[38] In the second reading, the following criteria were proposed[39],

a) it is an independent, law-abiding, non-profit-making legal person in accordance with a Member State's national law or practice;
b) it has the primary stated objective of promoting environmental protection in the context of environmental law and/or of promoting sustainable development; (emphasis added)
c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

24 Opinion of the European Economic and Social Committee [EESC] on the Proposal for a Regulation, CESE/2004/666.
25 *Id*., note 3.4.1.1.
26 *Id*.
27 *Id*. note 4.1.5. The EESC did not however clarify this statement.
28 *Id*. note 4.1.6.
29 See the Agreement of the Council common position on the adoption of a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, CS/2005/5172. Article 11 reads: Conditions liées à l'habilitation au niveau communautaire
1. Une organisation non gouvernementale est habilitée à introduire une demande de réexamen interne conformément à l'article 9, à condition que:
a) cette organisation soit une personne morale indépendante et sans but lucratif en vertu du droit ou de la pratique d'un État membre;
b) cette organisation ait pour objectif premier explicite de promouvoir la protection de l'environnement dans le cadre du droit de l'environnement;
c) cette organisation existe depuis plus de deux ans et qu'elle poursuive activement son objectif visé au point b);
d) l'objet de la demande de réexamen interne introduite par cette organisation s'inscrive dans le champ de son objectif et de ses activités;
30 The text solely spoke about "*toute organisation non gouvernementale satisfaisant aux critères […]*".
31 Adoption of common position by the Council on 18 July 2005 with a view to the adoption of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, 6273/2/05, REV 2 ADD 1, note 3.2.2.
32 See the Agreement of the Council common position, *supra* note 29; resp. The adoption by the Commission of declaration on the common position, COM (2005) 410 Final.
33 See Adoption by the Commission of declaration on the common position, *id*, p. 6.
34 *Id*., p. 4, note 3.2.3.
35 Recommendation for Second Reading on the Council common position for adopting a regulation (Presented by the Committee on the Environment, Public Health and Food Safety), A6-0381/2005.
36 *Id*.
37 *Id.*, p. 22.
38 In the recitals of this proposal, the element of sustainable development was not included: "*Non-governmental organisations active in the field of environmental protection which meet certain criteria, in particular in order to ensure that they are independent, law-abiding organisations whose primary objective is to promote environmental protection, should be entitled to request internal review at Community level of acts adopted or of omissions under environmental law by a Community institution or body, with a view to their reconsideration by the institution or body in question.*"
39 Position of the European Parliament adopted at second reading on 18 January 2006 with a view to the adoption of a Regulation, P6_TC2-COD(2003)0242.

The European Parliament did not motivate the proposed inclusion of the requirement for an organisation to be 'law-abiding', nor did it explain what the term 'law-abiding' would entail.

In the adoption by the Commission of the European Parliament amendments at the second reading, the Commission considered it could not accept the proposed amendments.[40] The requirement for ENGOs to be 'law-abiding' would prove difficult for a Community institution or body to verify. Moreover, it did not appear justified in the light of the objectives of the Regulation.[41] Furthermore, the Commission did not accept the inclusion of organisations promoting sustainable development to be entitled to request internal review. It considered this criterion to be potentially very wide.[42]

As a result of the above discontentment, a Conciliation Committee was convened.[43] The Committee took the view that the term 'sustainable development' referred to a broad range of activities, not directly related to the protection of the environment, but also related to globalization and employment. Moreover, it considered the primary objective of the Regulation to assure access to justice for ENGOs, and not for all kind of NGOs. Finally, the inclusion of the term 'law abiding' was to be removed. A reference in the recitals to 'accountable' NGOs were to be sufficient.[44]

2.4 Current criteria

Finally, after a legislative procedure of three years, the Aarhus Regulation was adopted.

Article 11 reads:

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:
   a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
   b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
   c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
   d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.
2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria mentioned in paragraph 1.

In light of Article 11(2), the Commission Decision 2008/50/EC has been adopted. Article 3 of this Decision states that an organization needs to give evidence that it satisfies the criteria in Article 11 of the Aarhus Regulation by providing the EU institution or body to which the request is addressed with the documents in the Annex of the decision.[45]

The analysis of the legislative documents demonstrates that on the one hand there was controversy with respect to the criteria regarding the objective of ENGO to be entitled to request an internal review, and for an ENGO to have legal personality; on the other hand very little considerations were dedicated to the requirements laid down in the final Article 11(1)(c) and (d) Aarhus Regulation. These documents therefore did not provide a thorough understanding as to the aim with which the criteria have been selected.

3 The criteria in the internal review procedure and case law

This section analyses the standing criteria in accordance with the order in which they are enumerated in Article 11.[46] The analysis is supported by the reply letters from the Commission in three internal review requests that thus far have provided insights into the scope of the Article 11 criteria; and the subsequent CJEU cases which shed light on the scope of the standing criteria of Art. 11 Aarhus Regulation.

3.1 Independent non-profit-making legal person

On 8 July 2012, the European Platform Against Windfarms (EPAW) requested the Commission to carry out

40 Adoption by the Commission of the Opinion on EP amendments on second reading, COM (2006) 81 final.

41 *Id*., p. 6. The Commission equally omitted to further elaborate on the term 'law-abiding', and to explain why this inclusion would not be justified in light of the objectives of the Regulation.

42 *Id*. In this regard, the Commission had already highlighted that the Aarhus Convention granted non-governmental organisations promoting environmental protection a privileged status. This status should thus not be shared with organisations promoting sustainable development. See: The adoption by the Commission of declaration on the common position, *supra* note 32.

43 Report on the joint text approved by the Conciliation Committee for a Regulation (presented by the European Parliament delegation to the Conciliation Committee), A6-0230/2006.

44 The term 'accountable' does not, therefore, constitute a separate criterion for organisations to satisfy. The reasoning for this replacement is lacking in the report document of the Conciliation Committee. Nor is it specified in the report what the consequence of the inclusion in the recitals of the term 'accountable' may be for environmental organisations. See the recitals of the Regulation, no. 20.

45 See for the requested documents that ENGOs should provide according to Article 3 (1) of Commission Decision 2008/50/EC, the Annex of that Decision:
1. Statute or by-laws of the non-governmental organisation, or any other document fulfilling the same role under national practice, in respect of those countries where national law does not require or provide for a non-governmental organisation to adopt statute or by-laws.
2. Annual activity reports of the non-governmental organisation of the last two years.
3. In respect of non-governmental organisations established in countries where the fulfilment of such procedures is a prerequisite for a non-governmental organisation to obtain legal personality, copy of the legal registration with the national authorities (public registry, official publication, or any other relevant document).
4. Where relevant, documentation that the non-governmental organisation has previously been acknowledged by a Community institution or body as being entitled to make a request for internal review.

46 See *supra* note 3.

an internal review.[47] The request for internal review concerned a Communication from the European Commission to the Council, the EESC and the Committee of the Regions, on renewable energy.[48] In the reply letter, the Commission confirmed EPAW to be an organisation with an independent, non-profit-making character.[49] It was considered a legal person registered in France with the primary objective of promoting environmental protection in the context of environmental law.[50] Furthermore, the Commission regarded EPAW to be actively pursuing the objective of environmental protection as described in their e-mail that came with the request.

The challenged Communication was, however, not seen as an act of individual scope within the meaning of Art. 10 Aarhus Regulation, and it was therefore declared inadmissible.

On 21 January 2013, the General Court (GC) ruled on an action for annulment launched by EPAW which challenged the same act as in the internal review.[51] The GC stated that the admissibility of an action for annulment brought by a body under the fourth paragraph of Art. 263 TFEU depends, first and foremost, on that body's status as a legal person.[52] However, the applicant did not provide the Court with the requested instruments constituting and regulating it, or any other proof of its existence in law.[53]

As a first argument, EPAW brought forward that as it is mainly based in Ireland[54], it must be recognized as having legal personality under Irish law; Irish law does not contain an obligation to be registered with the national authorities.[55] In this regard, EPAW referred to the provisions of section 37(4)(c) to (e) of the Planning and Development Act 2000. Yet, the GC stressed that this section of Irish Law provided a limited right to bring an action before a body of which the judicial nature has not been fully demonstrated.[56] Therefore, together with the absence of any proof of EPAW's existence in law, the argument was found unsatisfactory to bring an action before the European Union Courts on the basis of the fourth paragraph of Art. 263 TFEU.[57] Equally insufficient was the inclusion of EPAW on the Transparency Register of the European Union.[58] The Court recalled that, 'networks, platforms or other forms of collective activity which have no legal status or legal personality but which constitute de facto a source of organized influence and which are engaged in activities falling within the scope of the register are expected to register'.[59] EPAW's inclusion did not, therefore, constitute a valid argument for its legal existence.

Secondly, EPAW stated that the Commission had recognized EPAW as an ENGO meeting the requirements set out in Art. 11 Aarhus Regulation. In this regard, the GC rebutted by stressing that Art. 11(1)(a) Aarhus Regulation states that an ENGO is admissible when it is an independent legal person in accordance with a Member State (MS)'s national law or practice. However, as the GC already pointed out, EPAW had not established that its legal personality was recognized in accordance with any MS' national law or practice.[60]

Thereupon, the GC referred to settled case law of the CJEU addressing the puzzle of legal personality[61]: "*an applicant is a legal person if, at the latest by the expiry of the period prescribed for proceedings to be instituted, it has acquired legal personality in accordance with the law governing its constitution or if it has been treated as an independent legal entity by the European Union institutions.*" As the GC had already contended that EPAW could not fulfil the first criterion embedded in this phrase, it proceeded to evaluate the second. Following the invoked case law, three factors need to be taken into consideration for the purpose of determining whether an applicant has been treated as an independent legal entity by an institution[62]: "*first, the representative character of the entity in question, second, its independence, necessary in order to act as a responsible body in legal matters, as ensured by its constitutional structure under its rules, and, third, the fact that a European Union institution recognised the entity in question as a negotiating body*".[63] The GC stated that in absence of notification by EPAW of its constitutive instruments or of any other document

47 Request from the European Platform Against Windfarms (EPAW) and other NGOs, 8 July 2012.

48 Commission Communication Renewable Energy: A Major Player in the European Energy Market – COM (2012) 271.

49 Reply letter from the Commission to EPAW, 21 January 2013. Available at: http://ec.europa.eu/environment/aarhus/pdf/requests/13.Reply.letter.to.EPAW.Jan.2013.pdf

50 In France a voluntary registration procedure for the recognition of organisations exists. This procedure gives an association standing before a French Court (thus in the context of the participation rights at a Member State level) but does not preclude other NGOs if they can prove an 'interest to act'. See: 'L'association agréée': http://www.associations.gouv.fr/630-l-association-agreee.html. Last accessed on 7.7.2015.

51 Case T-168/13, European Platform Against Windfarms (EPAW) v European Commission (2014).

52 *Id.*, para. 9.

53 *Id.*, para. 11.

54 "*The applicant states, moreover, that, contrary to the address mentioned in the application, its principal office is, in fact, in Ireland. The information in the application indicating an address in France is, it submits, incorrect, since that address is that of its chairman and of the principal office of a non-governmental organisation, registered in France, which is one of its members.*" *Id.*, para. 13.

55 *Id.*, *supra* note 51, para. 13.

56 *Id.*, para. 17.

57 *Id.*, para. 18.

58 *Id.*, para. 19.

59 *Id.*, para. 19.

60 *Id.*, para. 22.

61 *Id.*, para. 23.

62 *Id.*, para. 24.

63 It appears that the content of Commission Decision 2008/50/EC reflects the case law cited by the General Court in paragraph 23, *supra* note 51: one of the documents listed in the Annex of this Decision is, where relevant, documentation that the non-governmental organisation has previously been acknowledged by a Community institution or body as being entitled to make a request for internal review.

relating to its constitutional structure and internal processes, the file did not contain any evidence that the applicant enjoyed the independence necessary to act as a responsible body in legal matters.[64]

Finally, EPAW's argumentation regarding its fulfilment of the criteria in Art. 11 Aarhus Regulation could not stand since this conclusion resulted from incorrect information sent by the applicant.[65]

Taking all the above into account, the GC concluded that EPAW could not be valued as a legal person admissible to request an action for annulment under Art. 263(4) TFEU. It is not evident whether EPAW would have been regarded as a legal person if it would have sent documents relating to its structure and internal processes with the request for internal review. EPAW did not appeal the General Court's decision.[66]

On 7 February 2014, the Commission found inadmissible a new request for internal review lodged by EPAW for an alleged failure of the European Commission to comply with the Aarhus Convention with the adoption of a list of 248 Projects of Common Interest.[67] This time, the Commission considered that EPAW did not satisfy the criteria laid down in Art. 11(1)(a)(b)(d) Aarhus Regulation. The Commission highlighted that EPAW had stated in a letter of 12 December 2013 that it was not registered under the national law of any country. Moreover, they had not provided the Commission with any documents giving proof of its legal personality. Furthermore, the Commission recalled that EPAW had equally omitted to put forward any evidence on its legal personality before the GC in Case T-168/13.[68]

Where a MS' national law or practice does not require an organisation to be registered in order for it to be recognized as a legal person, an ENGO ought to provide the addressee of the request for internal review with other documents giving proof of its legal personality.[69] According to Article 4(2) of Commission Decision 2008/50/EC, if the institution or body concerned cannot fully assess whether the non-governmental organisation meets the criteria set out in Article 11(1) Aarhus Regulation, it shall request additional information. In this particular context, the Commission could have asked the Irish authorities for information about the national practice for recognition of organisations.[70] The EPAW situation shows that it might be more difficult for ENGOs which are not registered in a MS to prove their legal personality, even when a MS does not impose a legal obligation to be registered in the national competent authority. This practice may constitute a limitation to access to internal review for ENGOs. However, it could be solved by providing evidence that the ENGO has legal personality according to national law or practice. It remains to be seen what "*other documents fulfilling the same role under national practice*", apart from what is listed in the Annex of the Commission Decision 2008/50/EC, will be accepted by the Commission as proof of legal personality.

It is clear that in accordance with Art. 11(1)(a) Aarhus Regulation only organisations with legal personality are entitled to make a request for internal review, even if a MS, in accordance with their national law or practice, recognizes organisations without legal personality. Such a limitation, however, is not in contradiction with the Aarhus Convention. The Implementation Guide states "*that associations, organisations or groups without legal personality may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice*"[71] (emphasis added). It means that a stipulation of a requirement of legal personality at EU level is in compliance with the Aarhus Convention since discretion remains for the parties to the Convention with regard to the implementation of such criteria. However, it goes without saying that any requirements "*must comply with the Convention's objective of securing broad access to its rights*".[72]

3.2 Primary stated objective

Another reason for inadmissibility stated in the reply letter of 7 February 2014 by the Commission was that EPAW did not have as their primary objective the promotion of environmental protection. The Commission, citing the text in the documents sent by EPAW, reminded EPAW that it had stated that their primary objective was to defend the interest of their members. The Commission concluded that whilst the primary objective of their members may be the protection of the environment, EPAW itself did not have a clearly stated objective to promote environmental protection. Additionally, the Commission found that the subject matter of the internal review request was not covered by EPAW's objectives and activities: the applicant had not been able to provide the Commission with any supporting documents to prove otherwise.[73]

64 *Id*., para. 25.
65 *Id*., para. 26.
66 EPAW decided not to appeal this decision because "*In some respects the issues have moved into a different forum*", see Communication ACCC/C/2013/96; "*a cost ruling, the order of magnitude of which was undefined*"; and the unpredictability of an effective remedy. Personal communication with EPAW, 8 January 2016.
67 Reply letter from the Commission to EPAW, 7 February 2014. See: http://ec.europa.eu/environment/aarhus/pdf/requests/20/reply.pdf.
68 See note 5 in the reply letter of 7 February 2014.
69 Article 3(1) Commission Decision 2008/50/EC.
70 Article 4(3) of the Commission Decision: "*Where relevant, the Community institution or body concerned may consult the national authorities of the non-governmental organisation's country of registration or origin to verify and assess the information provided by that organisation*".
71 The Aarhus Convention: An Implementation Guide, United Nations Economic Commission for Europe, Second edition, 2014, p. 55.
72 *Id*.
73 Reply letter of 7 February 2014, *supra* note 67, p. 2.

The question that follows is whether the Commission does not interpret Art. 11(b) Aarhus Regulation too strictly. EPAW promotes the interests of 908 member organisations, of which 649 are associations of 'wind-farm victims' across Europe. On their website, it is stated that the aim of EPAW is to defend the interests of its members.[74] The enumeration of the mentioned interests does seem to suggest that by defending the interests of their members, EPAW is committing itself to promote the protection of the environment. In light of this, one of the mentioned interests can serve as an example: defending of the flora, fauna and landscapes from damage caused by wind farms. It shows that the requirement for an association to have as primary objective the promotion of environmental protection needs to be directly stated and cannot be identified through the interests of their members.

3.3 Duration of existence and active pursuit of the objective

One of the first cases dealing with the interpretation of the standing criteria of Article 11 of the Aarhus Regulation is the PAN Europe case.[75] Pesticide Action Network Europe, (PAN Europe), an association under Belgian law, is a network of over 600 NGOs worldwide working to minimize the negative effects and replace the use of harmful pesticides with ecologically sound alternatives.[76] On December 2011, PAN Europe submitted to the Commission a request for internal review of Implementing Regulation No 1143/2011. This request was declared inadmissible by the Commission[77] on the grounds that when PAN Europe made its request for internal review on 21 December 2011, it had not existed for more than two years, as required by Article 11(1) (c) of Aarhus Regulation.[78] It was consequently not entitled to request internal review.

PAN Europe contested this decision before the GC by arguing that whilst it is true that PAN Europe was established as an entity under Belgian law on 21 May 2010, PAN Europe had been a duly registered entity in the United Kingdom since 2003.[79] PAN Europe in the United Kingdom and PAN Europe in Belgium are, it submitted, one and the same entity, the registered office of which was moved to Brussels in 2010. Additionally, it argued that the similarities in the statutes of both PAN Europe in Belgium and PAN Europe in the United Kingdom and its 2009 and 2010 annual reports showed that PAN Europe in the United Kingdom and PAN Europe in Belgium are one and the same entity.[80]

However, the GC concluded that the fact that PAN Europe in the United Kingdom and PAN Europe in Belgium are engaged in the same activities and have the same objects is not sufficient for them to be regarded as being the same organisation.[81] What would have been sufficient to contribute to the uniformity of the entities in the GC's view does not seem apparent.

The GC concluded PAN Europe's plea was manifestly unfounded.[82] Consequently, the action by PAN Europe was dismissed. PAN Europe did not appeal this decision. A possible explanation for this could be that by the time of the Court's decision (12/03/2014) the ENGO already existed for more than two years, thus fulfilling the criteria.[83] It shows that due to the length of the judicial process, an attempt of an ENGO to challenge a misapplication of Article 11(c) Aarhus Regulation will not have a concrete timely effect for the applicant. However, a Court decision which brings clarification on the application of the criteria will always help other organisations that may face the same issues.

The PAN Europe case enlightens three points. Firstly, the requirement that an ENGO needs to exist for more than two years is a mechanism by which an EU institution may verify whether an ENGO is active. The Commission and the GC decided to interpret this criterion in a relatively narrow manner. It can be concluded from this case that this criterion in practice means that an organisation should have existed for more than two years in the same country, despite the fact that the Article does not mention the need for an ENGO to be registered in the same country for more than two years. It appears that the wording of Article 11(1)(c) was thus not sufficiently clear. However, case law has now provided clarification of the scope of this criterion.

Secondly, the consequence of the interpretation as set out by the GC is quite remarkable. The internal review procedure creates a possibility for ENGOs to request a review of administrative acts adopted by the EU institutions and bodies. These acts are adopted in light of environmental law at the European level. If an ENGO is to challenge an EU measure, the necessity for the organisation to have existed for more than two years *in the same Member State* does not seem relevant and can thus be questioned. Such a restrictive interpreta-

74 See: http://www.epaw.org/about_us.php?lang=en.
75 Case T-192/12, Pesticide Action Network Europe (PAN Europe) v. Commission (CFI, 12 March 2014).
76 See: http://www.pan-europe.info/About/index.html.
77 Reply letter of the Commission to Greenpeace and Pan Europe, 9 March 2012, p. 2. See: http://ec.europa.eu/environment/aarhus/pdf/requests/11_reply.pdf
78 *Id.*
79 Case T-192/12, *supra* note 75, para. 18.
80 *Id.*, para. 23.
81 *Id.*, para. 23.
82 *Id.*, para. 28.
83 See *e.g.* another request for internal review in which PAN Europe was considered to fulfil Article 11 criteria: Request for an internal review (13 August 2012) of Commission Implementing Regulation (EU) No 582/2012 of 2 July 2012. This concerned a joined request for internal review by Pan Europe (Belgium), ClientEarth and Générations Futures. See: http://ec.europa.eu/environment/aarhus/pdf/requests/15.Request%20for%20internal%20review%20PAN%20Europe.pdf.

tion put aside an organisation which is a network of over 600 NGOs worldwide. PAN Europe's expertise and knowledge with such a large network could have been of added value with regard to the review of Implementing Regulation No 1143/2011. Therefore, doubts remain as to whether this criterion contributes to the aim of providing broad access for ENGOs to the internal review procedure, in line with the spirit of the Aarhus Convention.

Finally, upholding this requirement means that ad hoc ENGOs that emerge in quick response to a particular environmental proposal are de facto denied from having access to the internal review procedure.[84]

The UNECE has published the Implementation Guide to the Aarhus Convention.[85] Although a non-legally binding document,[86] "*its contents were taken into consideration by the Court of Justice of the European Union ('CJEU')*"[87] and the document has been recognized as a valuable tool for the purpose of interpreting the Convention.[88] With regard to ad hoc formations, the Aarhus Convention Implementation Guide mentions the following: "*ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention's objective of securing broad access to its rights.*"[89]

Taking all the above into account, it can be concluded that the standing criterion laid down in Article 11(1)(c) of the Aarhus Regulation may constitute an obstacle for providing wide access for ENGOs to the internal review procedure.

3.4 Subject matter covered by objective and activities

Article 9(3) of the Aarhus Convention gives members of the public access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Unlike 'the public concerned' contained in paragraph 2, the term 'the public' does not signify that these natural or legal persons, and in accordance with national legislation or practice, their associations, organisations or groups, should be affected or likely to be affected by, or having an interest in, the environmental decision-making. This rationale has been emphasized by the Commission proposal of the Aarhus Regulation which stipulated that these organisations would not have to have a sufficient interest or to maintain the impairment of a right to have access to review procedures before the Court of Justice, and by the EESC, which underlined that such organisations[90] "*are not required to have a sufficient interest or maintain the impairment of a right*".[91]

However, by requiring an ENGO to be directly linked by its objective and activities to the subject matter in respect of which the request is made, it looks as if they still need to demonstrate the EU body or institution a sufficient interest in the decision-making. This seems to be in contradiction with the principles and reasoning that gave the possibility for ENGOs in the Aarhus Regulation to request internal review, and contrary to the aim of the Aarhus Convention to provide wide access to justice. However, such an interpretation has not yet been considered, either by the CJEU or the Compliance Committee of the Aarhus Convention.

3.5 Commission reply letters

Lastly, a more general remark can be made with regard to the communications sent from the Commission to applicants requesting internal review. It appears that the Commission does not consistently address the entitlement criteria of Article 11 in the reply letters.[92] In most of the responses, the Commission does not address them at all. In the letters where the Article is indeed addressed, the Commission generally does not illustrate why it concludes an organisation meets the criteria, thereby not contributing to legal certainty for ENGOs with regard to the standing criteria in Article 11 of the Aarhus Regulation.[93]

4 Conclusion

In this article, the standing criteria that entitle ENGOs to request an internal review under the Aarhus Regulation were explored in order to analyse whether they are sufficiently clear in terms of legal certainty; whether the criteria are providing ENGOs with wide access to justice.

84 As mentioned in the introduction, Darpö shares this concern, see *supra* note 8. With regard to ad hoc formations, the Aarhus Convention Implementation Guide mentions the following: 'ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention's objective of securing broad access to its rights.'

85 The aim is to be "*a convenient non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in their daily work of implementing the Convention*". See: The Aarhus Convention: An Implementation Guide, United Nations Economic Commission for Europe, Second edition, 2014, p. 9.

86 Case C 204/09, Flachglas Torgau GmbH v. Federal Republic of Germany, para. 36.

87 Banner, C. (2015). The Aarhus Convention: A Guide for UK Lawyers, Bloomsbury Publishing. p. 8.

88 Case C-182/10 Marie-Noëlle Solvay and Others v. Région wallonne ECLI:EU:C:2012:82, para. 27.

89 See: The Aarhus Convention: An Implementation Guide, United Nations Economic Commission for Europe, Second edition, 2014, p. 55.

90 The Opinion still referred to 'qualified entities'. See *supra* note 24.

91 *Id.*

92 See for an overview of the reply letters: http://ec.europa.eu/environment/aarhus/requests.htm.

93 The following may serve as an example: "*After analysing the request and all supporting documents that you submitted, we can conclude that all the eligibility criteria laid down in Article 11 of Regulation No. 1367/2006 are respected by Greenpeace European Unit, WWF European Policy Office, Nature Code (Carbon Market Watch), Sandbag Climate Campaign and Climate Action Network Europe, who are therefore entitled to make a request for internal review.*" See: C (2015) 1539 final.

Solid argumentation with regard to the wording of the criteria was lacking in the legislative documents leading to the adoption of the Aarhus Regulation. These documents therefore did not fully clarify the aim with which the criteria have been selected. Subsequently, three requests for internal review to the Commission have been reviewed. Case law has given clarification to the wording of some of the criteria, which, as the reply letters from the Commission demonstrated, were not sufficiently clear. However, it became clear that the GC tends to interpret the criteria of Article 11 in a relatively strict manner.

Although Art. 11(1)(a) Aarhus Regulation states that an ENGO should be an independent non-profit-making legal person in accordance with a MS' national law or practice, the Commission has so far interpreted this criterion as meaning an independent non-profit legal person, *registered* in accordance with a MS' national law. The GC seems to have confirmed this interpretation. Thus far, it appears it will be more difficult for ENGOs based in a MS which does not require a registration to request an internal review procedure.

From the EPAW case, it can be concluded that in order to satisfy the criteria, an ENGO needs to describe its objectives in a very specific manner, not leaving any room for doubt as to whether the main objective of the ENGO is the promotion of the protection of the environment. It is uncertain whether such a narrow interpretation is in line with the spirit of the Aarhus Convention.

The PAN Europe case showed that the requirement that an ENGO needs to exist for more than two years, de facto means that an ENGO needs to exist for more than two years in the same country. The question of why an ENGO needs to exist in the same country for more than two years to be entitled to address an administrative act adopted by the EU institutions, should be addressed in literature and by the European institutions. Moreover, this criterion hinders wide access to justice for ENGOs as it prevents access to the internal review procedure for ad hoc ENGOs. However, no obligation to provide for access to such ENGOs can be derived from the provisions of the Aarhus Convention.

It can be questioned whether, for the purpose of Article 9(3) of the Aarhus Convention, the requirement for an ENGO to show that the subject matter in respect of which the request for internal review is made is covered by its objective and activities, is in compliance with the Convention's definition of 'the public'.

The current practice with regard to the reply letters from the Commission does not prove to contribute to a transparent and consistent application of the criteria as stressed by Art. 11(2) Aarhus Regulation. Therefore, in order to improve legal certainty for ENGOs, the Commission should start developing a more consistent practice while reviewing the requests of ENGOs for internal review, in which it would describe more precisely how an ENGO fulfils the criteria of Art. 11 Aarhus Regulation.

Finally, it is important to acknowledge that a limitation on access to the internal review procedure means a limitation of access to justice, which is one of the main objectives of the Aarhus Convention.[94]

94 Article 1 of the Aarhus Convention.

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).

Environmental Law in Morocco: Opportunities and Challenges

Elhoucine Chougrani

1 Introduction

Environmental law is an age-old subject of debate in Morocco. So the Moroccan doctrine and NGO's have advised developing effective environmental law in the country.

Morocco is now defined as a 'water-stressed' country, with a strong energy dependency, limited economic growth and social development policies, weakness to create job opportunities and reduce social and spatial disparities between regions and generations. However, Morocco can build capacities to adapt to vulnerability due to climate change.

In attempting to solve some difficulties and problems, this paper will examine the opportunities and the challenges in applying environmental law and enforce sustainable development goals.

In brief, this study contains three chapters. Chapter I focuses on the legal framework to protect the environment. Chapter II describes how to integrate environmental dimensions in public policy. And the last chapter looks into the opportunities and specific challenges for environmental protection.

2 The legal framework to protect the environment

The Moroccan Constitution serves as a significant potential source of laws and procedures that can guarantee environmental protection[1]. Furthermore, The National Charter for Environment and Sustainable Development (NCESD) can support the Moroccan effort to protect the environment.

2.1 The 2011 Moroccan Constitution

Environmental protection and sustainable development, as rights of every citizen, occupy a large space in the 'new' Moroccan Constitution. Some of the constitution principles are:

- Access to public service: Article 31 describes the framework for access to water, a healthy environment, and sustainable development.
- Rights to Future Generations (Art. 35): The State guarantees the freedom to contract and free competition. It aims at boosting a sustainable human development, permitting the consolidation of social justice, preserving the national natural resources and the rights of the future generations.
- Enlargement of the Parliament attributions (Art. 71): The New Moroccan Constitution has also enlarged the parliament to legislate in the domain of urbanism and land management, the management of the environment, the protection of natural resources, sustainable development, the regime of waters, forests and fishing.
- The contents of the government programme (Art. 88): In Morocco, the governmental programme includes the directive lines of action that the government proposes to lead in the various sectors of national activity and notably; economic, social, environmental, cultural and foreign policy fields.
- The creation of the Economic, Social and Environmental Council (ESEC): Art 152 admits the re-establishment of a 'New' institution in order to relate environmental, social and economic norms (the three dimensions of sustainable development). The ESEC has received a number of functions and missions. For example, it may be consulted either by the government, by the Chamber of Representatives or by the Chamber of Councillors on all economic, social and environmental aspects. Also the ESCE can give its opinion about the general orientations of the national economy and of sustainable development.

2.2 The National Charter for Environment and Sustainable Development (NCESD)

The NCESD was created by the Dahir N:1-14-10 on March 6, 2014. This charter constitutes a framework to enhance many sectorial strategies.

2.2.1 Objectives

The NCESD aims to:

- recognize environmental rights that should be protected and respected. The charter focuses on the duties of the State, local authorities, public institutions and companies concerning sustainable development;
- strengthen the legal protection of resources and ecosystems by listing the types of actions or steps that the State proposes to take in order to fight against all forms of pollution;
- establish sustainable development as a core value shared by all segments of society and as a process followed by the public policy development;
- create a coherent and efficient system to implement the contemplated measures, and;

1 For more information see: Tim Hayward. "Greening the Constitutional State: Environmental Rights in the European Union", In: John Barry and Robyn Eckersley (eds.): The State and the Global Ecological Crisis (Massachusetts Institute of Technology: 2005), pp. 75-95.

- establish an environmental policy that ensures respect for these rules.

The main goal is to establish an integrated Sustainable Management of the Environment (SME), a real running and management tool willing to implement the principles and values of the CNEDD, as part of a gradual strategic planning phase which consists of:

- conduction an environmental upgrading;
- building the National Strategy for the Environment (NSE);
- building the National Strategy for Sustainable Development (NSSD).

2.2.2 Reaffirming the principles of environmental law

The NCESD reaffirms the following principles: The principle of integration[2], the principle of territoriality, the principle of solidarity, the principle of precaution, the principle of prevention, the principle of common responsibility, the principle of participation. Nowadays, we can say that the current debate in Morocco is over the implementation of environmental legal framework and how to create green jobs.

3 Advancing integrated environmental aspects in public policy

The NCESD tried to show the importance of the environmental education, the international and regional engagement, the South-South cooperation and the global ambition to face the effects of climate change.

3.1 Environmental education

Environmental education includes:

- environmental awareness: According to the measures of the NCESD, education must provide awareness programmes, suitable academic background, and training regarding environmental and sustainable development.
- access to environmental information: any person can have access to environmental information and must be respected to ensure the achievement of the objectives of this Charter.
- engaging all the stakeholders: Firstly, the Moroccan Constitution recognizes the central role of civil society, including non-governmental organizations (NGOs). So NGO's are called upon to help support social sustainability and the preservation of the environment. In addition, the constitution identifies the individual and collective responsibilities in order to protect spatial and natural resources.

3.2 International and regional engagement

In order to enhance international and regional engagement, Morocco:

- is fully committed and must actively contribute to the efforts of environmental and sustainable development displayed by the international community, the implementation of the Rio Declaration (1992), and to the aims of the Millennium Development Goals (MDG) (UN: September 2000) defined by the United Nations Organization[3].
- should enhance cooperation in the field of environmental protection and the development of the water sector, capacity building of regulatory bodies and better financial assistance from the EU[4], without forgetting the US-Moroccan (2014-2017) Plan of Action for Environmental Cooperation that establishes specific priority areas and objectives for cooperation that reflects national priorities for each government.[5]

3.3 South-South Cooperation

Morocco has subscribed to several international conventions, including those on biodiversity,[6] desertification,[7] and contributed to improving international environmental governance. Thus the South-South Cooperation has become a necessity. For instance, between 2009 and 2012 the Moroccan government took part in the Adaptation to Climate Change in Morocco for Resilient Oasis (PACC/Oasis)[8] Project. The PACC/Oasis, part of the 'Programme on Climate Change Adaptation and Mitigation', includes twenty different African Countries.

3.4 Global ambition to face the effects of climate change

Morocco is directly exposed to natural vulnerabilities that require an urgent, sensible management of natural resources and space. It must thus develop a methodology to minimize the risks and environmental impacts in the near future. In order to fight the climate change, Morocco's commitment aims at reducing its greenhouse gas emissions (GGE) by 32% by 2030[9] on the condition that Morocco will have a new source of finance beside the transfer of technology (TOT). Nev-

2 See Marie Claire Cordonier Segger and Ashfaq Khalfan. Sustainable development law. Principles, practices and prospects (Oxford University Press, 2004), p. 102.

3 Transforming our world: the 2030 Agenda for Sustainable Development, UN G.A RES 70/1 on September 25, 2015.

4 Boutaina Ismaili Idrissi. "Analysis of Morocco European Union partnership within the framework of the Advanced Status. Main features and challenges", http://www.europautredningen.no/wp-content/uploads/2011/04/Rap21_Marokko.pdf, accessed February 4, 2016.

5 See http://www.state.gov/e/oes/eqt/trade/morocco/239560.htm, accessed February 28, 2016.

6 The United Nations Convention on Biological Diversity (CBD), 5 June 1992.

7 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994.

8 Projet d'Adaptation au Changement Climatique au Maroc (PACC): vers des Oasis résilientes.

9 Morocco intended Nationality determined contribution (INDC) under the UNFCCC): COP21, France November- December 2015.

ertheless, it is suggested that more precise mechanisms for reducing the GGE without waiting for the international support are necessary. "*The technologies of industrial countries are not always suited or easily adaptable to the socio-economic and environmental conditions of developing countries*".[10]

4 Opportunities and challenges

This chapter contains two sections The first considers the opportunities of a green economy and operational projects benefits, and the second approaches the challenges of implementing national green projects.

4.1 Opportunities

Morocco can exploit the opportunities provided by a green economy and the economic energy. For example, it can increase operational projects for these 'new' fields of sustainable development.

4.1.1 Green Economy

In order to seize green economic opportunities, Morocco can focus on a global approach. For instance, the ESEC[11] estimates that the investments projected in four key sectors of the green economy: renewable energy,[12] energy efficiency,[13] solid waste management and sewerage, amounting to €20 billion, should be expected to create over 90,000 new jobs by 2020.

The green economy can promote social, ecological and economic interactions. Also, it encourages decision makers to invest in technical innovation. In order to update our legislation in this regard, major reforms have been carried out in recent years in institutional, regulatory and strategic terms, for example: The National Water Policy (NWP, 2009-2015), The National Action Plan Against Global Warming (NAPAGW, 2009), The Green Morocco Plan for Agriculture (GMPA, 2008), and The Halieutis Strategy for Fisheries (HSF, 2009).

The Moroccan Agency for Development of Renewable Energy and Energy Efficiency (ADEREE[14]), The Moroccan Agency for Solar Energy (MASEN)[15], and The National Agency for the Development of Aquaculture (IRESEN) have also been created. In addition, an eco tax on plastic products has been introduced, but its implementation has been very difficult to speed up.

An environmental police force has also been established. However the question that may be asked is: how should they implement the rules and regulations without having the means and operational instruments?

4.1.2 Operational Projects

In recent years, operational projects have become a reality in Morocco. The country is supporting a green growth strategy through policies such as The Green Morocco Plan (GMP), The National Irrigation Water Saving Programme (NIWSP), The Moroccan Project of Solar Energy, and The National Liquid Sanitation and Waste Treatment Programme (NSP).

1. **The Green Morocco Plan (GMP) from April 2008**

The aim of this plan is restructuring the agricultural sector, a key economic sector: 15% GDP; employs 46% of the total and 80% of the rural workforce. 23% of total exports; 1/3 of the production is processed grain, grain production dominates (75% of UAA) and covers 60% of needs (average year); 97 million quintals of grain (2012-2013). Environmental constraints include: uses 80% of water resources for irrigation with more than 50% of network losses; 18.7% of total energy consumption (2010), soil degradation and water pollution (fertilizers, solid waste and pesticides), 31% of global GHG emissions (2004 data), high vulnerability to climate change (mainly rain-fed agriculture)

2. **The National Irrigation Water Saving Programme (NIWSP)[16]**

The 'Vision 2030' is to

- save up to 2 billion m³/year, of which 1.4 billion m³/year at farm level;
- Reconversion into drip irrigation of 550,000 ha (2020);
- 330,000 ha equipped with modern water saving systems (2013) nearly 24% of the total area against 11% in 2007

3. **The Moroccan Project of Solar Energy**

The 'Solar Plan' includes (Vision 2020):[17]

- Five plants (total output 2,000 MW) or 14% of national electricity needs[18];
- Total cost estimated at 70 billion Dirhams;
- Annual saving: 1 million Tpe;
- Avoided emissions: 3.7 million tons of CO2/year;
- Commissioning of the first plant: 2015.

10 WCED. Our common future (Oxford: Oxford University Press, 1987), p. 60.
11 Conseil Economique et social. Economie verte. Opportunités de création des richesses et d''emploi (Rabat: CESE, 2012).
12 Law 13-09 on renewable energy, regulated by Decree 2-10-578.
13 Law N: 47-09 on Energy Efficiency (2011).
14 Law N: 16-09, creating the Moroccan Agency for Development of Renewable Energy and Energy Efficiency (ADEREE).
15 Law 57-09, creating the Moroccan Agency for Solar Energy (MASEN) (2010).
16 United Nations Economic Commission for Africa. Office for North Africa. The Green economy in Morocco: A strategic goal involving partnership dynamics and intensified coordination of policies and initiatives (UNECA, 2014), p.4.
17 United Nations Economic Commission for Africa. Office for North Africa. The Green economy in Morocco: A strategic goal involving partnership dynamics and intensified coordination of policies and initiatives (UNECA, 2014), p. 8.
18 USA. Department of State: Investment Climate Statement 2015, p. 7.

For example, the Ouarzazate power plant will be the largest in the world using "*concentrated solar power technology*",[19] but *"the biggest challenge we faced was being able to finish the project on time with the performance [level] we needed to achieve*".

Morocco has set out to reduce its dependence on imported energy [extreme energy dependence: 97%][20] and on imported fossil fuels. So an ambitious target of 42 percent of installed renewable energy capacity by 2020 has been established, coupled with the goal of a 15 percent reduction in projected energy demand through the implementation of energy efficiency measures.[21]

4. **The National Liquid Sanitation and Wastewater Treatment Programme (NSP)**[22]

- Reach an overall urban sewage connection rate of 75% by 2016, 80% by 2020 and 100% by 2030;
- reach to 50% volume of treated waste water by 2016, 60% by 2020 and 100% by 2030;
- expand waste water management to services and re-use 50% of waste water by 2020.

4.2 A global Challenge

Morocco is facing the challenge of implementing its national green projects concerning the green economy. First of all, how to develop a sustainability strategy over the long term[23], for example by encouraging a rational use of energy in transport and promoting partnerships and collaboration with civil society organizations (CSO). A second challenge is how to include the institutionalization of climate finance in the state budget[24]. A final challenge lies in the integration of the costs of environmental degradation into the GDP[25].

In order to face the environmental challenges as cited previously, Morocco needs to consider the following recommendations:

- Ensuring a better coordination between international donors to optimize their support for Morocco, so it can reduce GGE in the near future;
- Designing innovative tools in the areas of environmental and climate policy;
- Setting up an environmental monitoring system (EMS) and elaborating on a previous cost–benefit analyses;
- It would be fairer to focus our strategies to benefit of the future generations;
- Strengthening the national response for bilateral, regional and international cooperation on climate change;[26]
- It has been suggested, that 'greenhouse' policy should be guided by a calculus of the economic costs of climate change, including an estimate of the economic value of human lives to be lost in the country;[27]
- Developing interventions based on models of future impacts, as well as modelling future benefits and harms of public health interventions under different environmental and socioeconomic scenarios.[28]

5 Conclusion

It is not easy to draw general observations, however the main idea is that we must change our habits and our behaviours in order to build a green state for present and future generations in Morocco. The ambitious work begins with the enforcement of environmental law, and the finding of a combined instrument i.e. interaction between law and economy. In addition, we should take into account the pre-conditions for building a green state, for example on the one side cooperation between agencies and institutions, and on the other side identifying a new social contract in order to change the paradigm[29] from 'Inflation des Lois' to 'Efficacité des Lois'.

19 Arthur Neslen. Morocco poised to become a solar superpower with launch of desert mega-project, In: The Guardian, http://www.theguardian.com/environment/2015/oct/26/morocco-poised-to-become-a-solar-superpower-with-launch-of-desert-mega-project, accessed February 4, 2016.

20 United Nations Economic Commission for Africa. Office for North Africa. The Green economy in Morocco: A strategic goal involving partnership dynamics and intensified coordination of policies and initiatives (UNECA, 2014), p. 6.

21 WB. Morocco Takes the Long View on Green Growth, http://www.worldbank.org/en/news/feature/2014/01/24/morocco-takes-the-long-view-on-green-growth, accessed February 4, 2016.

22 Morocco Intended National Determined Contribution (INDP) under the UNFCCC (Paris, December 2015), http://www4.unfccc.int/submissions/INDC/Published%20Documents/Morocco/1/Morocco%20INDC%20submitted%20to%20UNFCCC%20-%205%20june%202015.pdf, accessed February 6, 2016.

23 Brown Weiss: Climate Change, Intergenerational Equity, and International Law, p. 618.

24 Nicholas Stern Review (2007): The Economics of Climate change, p. 147, 437, 477, http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf, accessed November 22, 2016.

25 Joseph E. Stiglitz, Amartya Sen and Jean-Paul Fitoussi. Report by the Commission on the Measurement of Economic Performance and Social Progress (2009).p 64, 66, 111, 120, 134 and 193, http://library.bsl.org.au/jspui/bitstream/1/1267/1/Measurement_of_economic_performance_and_social_progress.pdf, accessed November 22, 2016.

26 World Bank. Kingdom of Morocco Climate Change Strategy Notes, Report No: ACS7031 (WB: December 28, 2013), p. 7.

27 Joan Martinez-Alier. The Environmentalism of the Poor. A Study of Ecological Conflicts and Valuation (UK: Edward Elgar Publishing Limited, 2002), p 22.

28 James D. Ford, Lea Berrang-Ford Editors. Climate Change Adaptation in Developed Nations. From Theory to Practice, op, cit, p. 125.

29 For more information about the concept of paradigm see Thomas S. Kuhn. The Structure of Scientific revolutions. With an introductory essay by Ian Hacking (Chicago: The University of Chicago Press, 2012).

Conference report: 5th 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 Rütsche, 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

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

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If you want to join the Environmental Law Network International, please use the membership form on our web-site: 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 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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I·E·S·A·R
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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:
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  - Environmental management
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sofia

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 conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
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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, focussing 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 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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