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CONTENTS

Editorial

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP) began in 2013 and have been the source of heated debate since then. In addition to various concerns regarding a feared reduction of statutory health and environmental standards, the main discussion has centered around the introduction of the so-called Investor-to-State Dispute Settlements (ISDS).

Against this background the current elni issue focuses on issues relevant to TTIP with the following contributions.

Andrea Carta addresses the question of whether the Investor-to-State Dispute Settlement (ISDS) fits in the EU legal system. His article describes the framework underlying the inclusion of ISDS in EU international investment agreements (IIAs) and discusses the concerns raised, particularly by NGOs, regarding the potential impact of ISDS on EU and Member States' regulatory powers.

The regulatory coherence in the TTIP Agreement in the context of chemicals is discussed by *Vito Buonsante*. He outlines the conflict between seeking regulatory coherence and at the same time maintaining the right to choose different levels of protection in regard to health, safety, consumer, labour and the environment.

In the recent developments section *Julian Schenten* reports on activities to strengthen REACH provisions concerning (imported) articles which also touch a sensitive point in the relationship between the EU und the USA.

A second series of contributions to this issue of the elni Review covers a variety of other topical legal issues.

In an article by *Viktoria Raczyńska* the main provisions of Ukrainian legislation regulating hazardous waste management are analysed in terms of its compliance with the Basel Convention and the Directive 2008/98/EC.

Furthermore, the contribution of *Gerhard Roller* deals with the ambiguous relationship between speed and quality in decision-making in Germany by analyzing the measures taken to expedite procedures.

Finally, the issue concludes with recent developments – described by *Nicola Below* -with regard to participatory rights in the environmental decision-making process and the implementation of the Aarhus Convention.

We hope you enjoy reading the journal.

Contributions for the next issue of elni Review are very welcome. Please send contributions to the editors by mid-March 2015.

Claudia Schreider (née Fricke) / Martin Führ
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Do investor-to-state dispute settlement mechanisms fit in the EU legal system?

Andrea Carta

1 Introduction

Investor-to-state dispute settlement (ISDS) mechanisms are a feature of international investment agreements (IIAs). They give private investors the right to initiate a claim against the State in which they made an investment, seeking redress against violations of an IIA concluded between that State and the investor's home State.[1]

ISDS takes place before arbitration tribunals. The forum for the dispute and the rules governing the proceedings depend on the relevant IIA's provision. These can be the World Bank's International Centre of Investment Disputes (ICSID),[2] or ad hoc arbitrations established under UNCITRAL rules or under the Arbitration Institute of the Stockholm Chamber of Commerce.[3]

Through ISDS, investors can claim compensation for damages deriving from the breach of one or more IIA clauses. IIAs commonly include, inter alia: the requirement to accord to investors non-discriminatory[4] and fair and equitable treatment (FET)[5] as well as the prohibition of direct and indirect expropriation.[6] ISDS does not empower arbitrators to annul the state measures in breach of an IIA.[7]

As it will be explained in section 2, the current EU policy foresees the inclusion of ISDS in EU IIAs. This raises a number of critical issues, related: i) to the appropriateness of ISDS as a mechanism for the fair administration of justice, ii) to the risks that ISDS may affect public interest (e.g. environmental and health) laws, and iii) to the compatibility of ISDS with EU law: the EU Court of Justice (CJEU) has recognised that the Union's competence in the field of international relations "*and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions*".[8] However, the CJEU has qualified this principle and defined, in very rigorous terms, the conditions under which it would consider international agreements, establishing a system of judicial remedies, to be compatible with EU law. These conditions relate, in particular, (i) to the respect of the CJEU's exclusive jurisdiction on the interpretation of EU law,[9] and (ii) to its ability to ensure, through the preliminary ruling procedure, its uniform and consistent interpretation throughout the EU, in cooperation with national courts. They are essential for the preservation of the autonomous character of EU law.[10]

This article describes the framework underlying the inclusion of ISDS in EU IIAs and analyses the above-mentioned issues. It discusses the concerns raised, particularly by NGOs, on the potential impact of ISDS on EU and Member States' regulatory powers.[11] It is structured as follows: section 2 outlines the EU policy on ISDS; section 3 examines some critical aspects of ISDS as a mechanism for the administration of justice, using the CETA provisions as reference; section 4 illustrates the threats posed by ISDS to environmental and health regulations. It also highlights the challenges in preserving public authorities' regulatory space in the context of IIAs; section 5 deals with the compatibility of ISDS with the exclusive jurisdiction

1 C. Gerstetter and N. Meyer-Ohlendorf, "Investor-state dispute settlement under TTIP – A risk for environmental regulation?, Heinrich Boll Stiftung, TTIP series, p. 5.

2 Idem, page 7.

3 A. Dimopoulos, "EU Foreign Investment Law", (1st Ed., 2011), p. 183.

4 The Canada-EU Trade Agreement (CETA), signed in September 2014, includes rules on non-discriminatory treatment of investments (Chapter 10, Section 3). A provisional version is available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

5 The CETA contains also a FET clause (Chapter 10, Section 4, Article 9, p. 158). Pursuant to Article 9, "*a Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:*
- *Denial of justice in criminal, civil or administrative proceedings;*
- *Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.*
- *Manifest arbitrariness;*
- *Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;*
- *Abusive treatment of investors, such as coercion, duress and harassment; or*
- *A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.*"

6 Gerstetter and Meyer-Ohlendorf, p. 4.

7 CETA, Chapter 10, Section 6, Article X.36, p. 175.

8 See, Opinion of the Court of 14 December 1991. "Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.", Opinion 1/91. ECR [1991] I-6079, para 40.

9 Pursuant to Article 19 TEU, the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed".

10 See, P. Craig and G. De Búrca, "EU Law, Text, Cases and Materials", (5th Ed.2011), p. 339.

11 Gerstetter and Meyer-Ohlendorf, p. 5. Some examples of NGOs' positions on ISDS: Corporate Europe Observatory, "Profiting from Injustice" (at: http://corporateeurope.org/trade/2012/11/profiting-injustice), Friends of the Earth Europe, "The TTIP of the anti-democracy iceberg" (http://www.foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf), Greenpeace EU, "Greenpeace contribution to ISDS" (http://www.greenpeace.org/eu-unit/en/Publications/2014/140706-Greenpeace-contribution-on-ISDS); Transport & Environment, "10 reasons why Europe and America DO NOT need business v state dispute rules" (http://www.transportenvironment.org/newsroom/blog/10-reasons-why-europe-and-america-do-not-need-business-v-state-dispute-rules-0).

of the CJEU and the principle of autonomy of EU law. Section 6 concludes the analysis.

2 EU international investment policy and investor-state dispute settlement: policy framework

Following the Lisbon Treaty, Article 207 (1) TFEU confers to the EU the exclusive competence on international agreements for the protection of foreign direct investments (FDI). In the communication "*Towards a comprehensive European international investment policy*",[12] the European Commission (hereafter the Commission) presented its strategy for the negotiation of IIAs.

The communication identifies the enforceability of investment protection rules as a "*key objective of the Union*".[13] It notes that "*investment agreements also feature investor-to-state dispute settlement, which permits an investor to take a claim against a government directly to binding international arbitration*" and that "*[i]nvestor-state [dispute settlement] 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.*"[14] "*For these reasons,*" the Commission concludes, "*future EU agreements including investment protection should include investor-state dispute settlement.*"[15]

The Council agreed on "*the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements*"[16] and invited the Commission to carry out a detailed study on the relevant issues concerning international arbitration systems.[17]

The European Parliament (hereafter the Parliament) also took the view that EU IIAs should include ISDS in order to secure comprehensive investment protection[18]. However, MEPs stressed the need to better address the protection of the EU's right to regulate.[19] The Parliament warned that "*in spite of generally positive experiences, a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of 'fair and equitable treatment.'*"[20] Both the Council and the Parliament asked the Commission to prepare rules on the allocation of financial responsibility deriving from ISDS awards.[21]

Consistently with this approach, the Council's mandates to the Commission for the negotiation of the CETA and of the Transatlantic Trade and Investment Partnership (TTIP) provide directives for the inclusion of ISDS in these agreements.[22] The CETA agreement effectively provides for an ISDS mechanism, which can be considered as a reference for other IIAs (including the TTIP).[23]

The inclusion of ISDS in EU IIAs is the subject of a lively debate. In 2014, the Commission has launched a consultation on investment protection and ISDS in the TTIP.[24] It gathered almost 150,000 replies, mostly from individuals. 180 NGOs, 66 trade associations, 60 companies and 42 trade unions filed submissions.[25] The broad participation in the consultation shows that ISDS is a controversial feature of IIAs, and that it raises problems that are still unresolved.

3 ISDS: structural issues

ISDS is widely used in IIAs. At present, about 3000 agreements worldwide allow investor-to-State arbitrations.[26] Many of these are binding for EU Member States. Nine are already in place between EU Member States and the US.[27] The Commission considers it necessary to include ISDS in EU IIAs, in view of guaranteeing that "*the substantive protections provided for under the Treaty can effectively be enforced by the investor*."[28] The stated objective of this policy is protecting foreign investments.[29]

12 COM (2010) 343 final, of 7 July 2010.

13 Idem, p. 9.

14 European Commission, "*Towards a comprehensive European international investment policy*", see Footnote 9, p. 10 (emphasis added).

15 Ibidem.

16 Council Conclusions, of 25 October 2010, on a Comprehensive European International Investment Policy, para. 18.

17 Ibidem.

18 European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy, 2010/2203 INI, para. 32.

19 Idem, paras. 6 and 23-30. At para. 24, the Parliament expresses its 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*".

20 European Parliament Resolution, recital G.

21 See Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014, in OJ L 257 of 28 August 2014.

22 Council of the European Union, "*Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*", page 9. Available at: http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf. The CETA mandate is available at: http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html.

23 See footnote 4.

24 http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

25 http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf.

26 Gerstetter and Meyer-Ohlendorf, p. 6.

27 Ibidem. Bulgaria, Croation, Czech Republic and Slovakia, Estonia, Latvia. Lithuania, Poland and Romania are parties to these agreements.

28 European Commission, "Incorrect claims about investor-state dispute settlement", 3 October 2013, p. 1. http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf.

29 Although, particularly in the case of the EU and the US, there is no evidence that access to domestic courts only hinders investments on either side of the

However, it does not properly address the risks associated with arbitrators' jurisdiction on investment disputes. These risks are analysed in the following sub-sections, using the CETA text as a reference.

3.1 Conflicts of interest

The first problem is that, whilst courts operate stably within national judicial systems, exclusively pursuing the administration of justice, arbitrators are private practitioners whose activity depends on the existence of investment claims, in which they can act either as judges or as counsels. Since only investors can start ISDS claims, there is a concrete risk that arbitrators could be biased against host states[30] in order to promote arbitration as a convenient legal avenue for investment disputes.[31]

Instead of carrying out a proper risk assessment,[32] the Commission has dismissed the claim that ISDS panels are more often likely to find in favour of investors than of States, citing a "*lack of real world evidence*": "*UN statistics on investor state dispute settlement cases show that a majority of cases are decided in favour of the government (of all the cases concluded by 2012, 42% found in favour of the State, 31% in favour of the investor and 27% were settled).*"[33]

These figures are not conclusive: firstly, it cannot be determined what the outcome would have been, had those cases been brought before national jurisdictions and, secondly, there is a vast "grey area" represented by cases settled out of court: States might have accepted paying compensation to end unmeritorious claims, acting in response to pressure.

3.2 Absence of objective, transparent and effective criteria for the selection of arbitrators

Arbitrators are, in principle, appointed on the basis of an agreement between the parties. This aggravates the risk of lack of independence and conflict of interest.[34] Under the CETA, only in case of failure to reach an agreement on the presiding arbitrator (or to constitute the tribunal) within 90 days from the introduction of the claim, the Secretary General of ICSID can be asked to appoint the arbitrator(s), selecting them from a list of (at least) fifteen individuals with experience or expertise in international law (in particular international investment law).

This approach seems inadequate to guarantee the independence of arbitrators: a pre-defined roster of qualified lawyers would improve the accountability and predictability of the system. However, in the CETA, this is only a fall-back option for the case in which the parties fail to agree on the constitution of the tribunal;[35] furthermore, the selection of arbitrators would be delegated to the Secretary General of ICSID. The EU, however, is not a member of this organisation. Arbitrators are chosen amongst experts in international/investment law. This seems inappropriate since the solution of investors' claims may require deciding on the relation between environmental and health regulations, on the one hand, and investment protection rules, on the other hand. The arbitrators' background and legal culture is an important factor for the development of investment case-law applied in ISDS disputes. As has been observed, "*[l]egally bankrupt decisions are cited in subsequent cases involving the same issues in the hope that a new legal principle will emerge, and suddenly a theory that couldn't be taken seriously in any classroom is hailed in conferences like this and imbued with a certain legitimacy*".[36]

Atlantic. See: Lauge N. Skovgaard Poulsen, Jonathan Bonnitcha and Jason Webb Yackee, "Cost and Benefits of an EU-USA Investment Protection Treaty", April 2013. The study analyses the impact of investment protection on the UK. However, the authors observe that "*not a single investment treaty with a developed country – including Canada, Australia, Israel and Singapore – has had an impact on US investment outflows*" (p.15).

30 "*More broadly, in a system where only one side, foreign investors, can bring claims, does not everyone – such as a retired judge – who works in the system and wants to continue doing so have an apparent economic interest to encourage more claims? Even with the most robust code of conduct, the absence of basic institutional safeguards of judicial independence undermines fundamentally the claims of investor-state arbitration to neutrality and impartiality*". See: Harm Schepel, Peter Muchlinski, Horatia Muir Watt and Gus Van Harten, "Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)", University of Kent Law School, p. 20 (available at: http://www.kent.ac.uk/law/downloads/ttip_isds_public_consultation_final.pdf)

31 Gerstetter and Meyer-Ohlendorf found that "the number of investor-state investment disputes has sharply risen in recent years. For example, in 2012, 52 new investment disputes were filed, "*the highest number of known treaty-based disputes ever filed in a single year*"", p. 6. The authors refer to UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS),* IIA Issues Note (Geneva: UNCTAD, 2013), p. 1.

32 See, Corporate Europe Observatory, "Profiting from Injustice", Chapters 3 and 4.

33 European Commission, "Incorrect claims about investor-state dispute settlement", p. 6.

34 CETA, Chapter 10, Section 6, Article X.25 (1).

35 CETA, Chapter 10, Section 6, Article X.25 (2 and 3): "*2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed in accordance with Paragraph 3". "3. The Secretary-General of ICSID shall, upon request of a disputing party, appoint the remaining arbitrators from the list established pursuant to paragraph 4. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties."*

36 George Kahale III, "Keynote speech at the Eight Annual Juris Investment Treaty Arbitration Conference", Washington D.C., 28 March 2014, pages 6 and 7 (Available at: http://www.curtis.com/siteFiles/Publications/8TH%20Annual%20Juris%20Investment%20Treaty%20Arbitration%20Conf.%20-%20March%2028%202014.pdf).

3.3 Accountability of arbitrators and review of awards

It has also been noted that "*the entire issue [of arbitrators' impartiality and absence of conflict of interest] underscores the problem created by the reality that each tribunal is technically sovereign, not answering to a higher authority. If there were a higher authority confirming a certain interpretation, for example, of FET, whether it is a concept that reaches beyond the minimum standard of treatment, then it wouldn't matter whether an arbitrator happened to hold a contrary view in his or her personal capacity. A US federal judge may disagree with a Supreme Court decision, but will follow it nonetheless or risk reversal*."[37]

The scope for review of ISDS awards is indeed very limited. Under the CETA, challenges can be based on the grounds listed in Article 52 of the ICSID Convention or Article V of the New York Convention, depending on the law governing the procedure.

The agreement foresees the creation of a Committee on Services and Investments, with the task of facilitating consultations between parties on ISDS issues. These include, inter alia, "*whether, and if so, under what conditions, an appellate mechanism could be created to review, on points of law, awards rendered by an arbitration tribunal*".[38] The language of the provision is vague and non-prescriptive. There is no certainty that a mechanism for the review of points of law decided by arbitrators will be established, and on what basis. This means that, at present, the system cannot guarantee coherence in the interpretation of CETA, enhancing the risk of inconsistencies with EU constitutional and regulatory principles.[39]

It should be recalled, in this regard, that pursuant to Article 207 (3) TFEU, "*[t]he Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules*". One could question whether (or to what extent) the EU Institutions may lawfully enter into an IIA whose interpretation and concrete application may lead to conflicts with EU rules and policies.

It is also useful to point out that, in its Resolution of 6 April 2011, the Parliament has underlined the importance of protecting the EU's right to regulate, "*inter alia, in the areas of protection of national security, the environment, public health, workers and consumers' rights, industrial policy and cultural diversity*",[40] stating its "*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*".[41]

4 ISDS and environmental regulations: a problematic relationship

A fundamental concern on ISDS is that investors may use claims as a tool to challenge or weaken existing environmental and health laws, as well as to prevent the adoption of new ones. The structural deficiencies of the system, previously described, reinforce this concern.

A sample of ISDS cases (closed and ongoing) effectively illustrates the problem:[42]

- **The Vattenfall case I (Germany – water quality standards for coal fired power plants)**
  In 2009, the Swedish company Vattenfall filed an ISDS claim against Germany, on the basis of the Energy Charter Treaty (ECT).[43] Vattenfall intended to build a coal fired power plant in Hamburg-Moorburg, on the river Elbe. The Hamburg Environmental Authority had issued a permit imposing quality standards for the cooling waters released by the power plant into the river. Vattenfall asked for a compensation of EUR 1.4 billion from Germany, claiming that those standards would have made the investment project unviable.[44] Vattenfall and the city of Hamburg settled the case, agreeing on a "modified water use permit", which lowered the environmental requirements previously set by the Hamburg Environmental Authority.
- **The Vattenfall case II (Germany – phasing out of nuclear power plants)**

37 Idem, p. 14.

38 CETA, Chapter 10, Section 6, Article X.42. The Committee should consult on the following aspects: the nature and composition of an appellate mechanism; the applicable scope and standard of review; transparency of proceedings of an appellate mechanism; the effect of decisions by an appellate mechanism; the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article X.22 (Submission of a Claim to Arbitration); and the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.

39 Pursuant to Article X.27(2) of Chapter 10, Section 6 CETA, *"Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date."* By means of binding interpretations, the parties can intervene to limit the discretion of arbitrators. However, in the absence of an upper level of jurisdiction, ensuring that tribunals comply with such authentic interpretation appears to be a complex exercise.

40 European Parliament, Resolution on the Future European International Investment Policy, para 26.

41 Idem, para 24.

42 A broader range of cases is reported in Gerstetter and Meyer-Ohlendorf's article. See footnote 1.

43 The ECT is an international agreement protecting investments in the energy sector and providing for an ISDS mechanism. The EU and its Member States are part of this agreement.

44 http://www.encharter.org/index.php?id=213&L=0#Vattenfall.

In 2012, Vattenfall initiated a second international arbitration under the ECT. It asked compensation for Germany's decision to phase out the use of nuclear power by 2022 and to order the immediate closure of 7 nuclear power plants, of which two were operated by Vattenfall. Germany adopted this decision after the Fukushima accident. According to the ECT website, the claim could exceed EUR 700 million.[45] Other sources indicate that damages could amount to EUR 4 billion.[46] According to Gerstetter and Meyer-Ohlendorf, Vattenfall might have alleged a violation of the FET clause and of the prohibition of indirect expropriation.[47]

- **The Philip Morris case (Australia – rules on plain packaging of cigarettes)**

  In 2011, Philip Morris Asia (PMA) challenged the Australian "*Tobacco Plain Packaging Act 2011*", using the ISDS provisions in the Australia-Hong Kong BIT. PMA claimed that, as a result of the plain packaging legislation, Australia violated the treaty by: (i) substantially depriving PMA of the real value of its investments; (ii) treating PMA unfairly and inequitably; (iii) unreasonably impairing the full use and enjoyment of the investments; (iv) failing to provide full protection and security for the investments; and (v) breaching its obligations under other international agreements.

  PMA asked the arbitration tribunal to order that Australia "*(i) take appropriate steps to suspend enforcement of plain packaging legislation and to compensate PM Asia for loss suffered through compliance with plain packaging legislation: or (ii) compensate PM Asia for loss suffered as a result of the enactment and continued application of plain packaging legislation*".[48]

- **The Lone Pine case (Canada - moratorium on fracking)**

  On June 10, 2011, the Government of Quebec adopted Bill 18, an Act to limit oil and gas activities. Bill 18 revokes less than one per cent of licenses in the total exploration, including those belonging to Lone Pine Resources Inc., a company active in the exploration and mining for oil and gas under the St. Lawrence River. [49]

  On 6 September 2013, Lone Pine Resources filed a Notice of Arbitration, under chapter eleven of the North American Free Trade Agreement (NAFTA) ISDS. [50] The company is seeking a compensation for alleged damages deriving from Bill 18, estimated in CDN$ 250 million.

These cases provide examples of the use of ISDS to challenge environmental and health regulations.[51] The impact of this kind of challenges on the right to regulate is a critical aspect of investment arbitrations. As Kujiper notes, "*ISDS is increasingly associated with exercising a so-called 'chilling effect' on governments. The latter refrain from regulatory measures taken in the public interest due to the threat of investment arbitration*."[52] According to the author, "[t]his *'regulatory chill' is said to exist because governments would face difficulties in assessing the precise content and scope of their obligations under international investment law. Ever broader interpretations of substantive standards advanced by arbitral tribunals would exacerbate the situation*."[53]

In this regard, and taking into account the outcome of the Vattenfall I case, it has been observed that handing the task of reviewing public policy measures over to international arbitral tribunal "*could be a big and risky step, unless there are strong precautions against its uncontrolled use.*"[54]

45 http://www.encharter.org/index.php?id=213&L=0#Vattenfall2.

46 See DIE ZEIT No 10 27th February 2014, p. 15 (Dossier).

47 Gerstetter, and Meyer-Ohlendorf, p. 10.

48 Philip Morris v. Australia, Notice of Arbitration, p. 4, at: http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf.

49 See http://www.canadians.org/action/petition/index.php.

50 Available at: http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf

51 In relation to the Vattenfall and Philip Morris cases, the Commission has stated that they are ongoing so it is not possible to know the outcome. The Commission pointed out *"that Australia's legislation is also being challenged through the World Trade Organisation – though this time by other WTO members. Should Australia lose that case at the WTO it would indeed be under an obligation to change its legislation. This could not happen as a result of the investor-state dispute settlement. Whatever the outcome of the Philip Morris investor-state dispute settlement case, we can be sure that Australia will remain free to maintain its legislation. The same goes for the Vattenfall case and Germany's ban on nuclear energy*." Even if technically correct, the Commission fails to acknowledge the fact that, even if the outcomes of the arbitration cases do not force states to change or repeal their legislation, they may create sufficient (and undue) political pressure to help achieve this result; even worse, litigation risk may become a factor influencing legislative and regulatory processes in sensitive areas such as environmental, health and labour regulation. In addition to that, the parallel between ISDS the and the WTO does not seem to be a valid one since, firstly, the WTO dispute settlement is a state-to-state mechanism and, secondly, it does not present the same structural weaknesses as those found in ISDS. See, European Commission, "Incorrect claims about investor-state dispute settlement", p. 2.

52 Pieter Jan Kuijper, "Study on Investment Protection Agreement as Instrument of International Economic Law", in, "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements", (Ed.: European Parliament - Directorate-General for External Policies of the Union), September 2014, Volume 2, p. 74. Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979(ANN01)_EN.pdf

53 Ibidem. The author points out that "[r]ecent empirical studies show that this may be true at least for developed countries capable to some reasonable degree of appreciating their international legal obligations with respect to foreign investments" and that a "chilling effect" can be exemplified by New Zealand's decision to postpone plain packaging regulation due to the Philip Morris v. Australia arbitration. See footnotes 175 and 176 at p. 74 of the Study.

54 Ingolf Pernice: Study on International Investment Protection Agreement and EU Law", in "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements", Volume 2, p. 141. The author also notes that "[e]ven if it is only for a small number of cases, it would be

In the context of CETA, the negotiators have tried to protect the parties' right to regulate: firstly, the CETA incorporates Article XX GATT,[55] which allows the adoption of environmental measures necessary to protect human, animal or plant life or health. However, the reference to Article XX GATT also includes a proportionality test: the CETA, therefore, gives arbitrators the power to decide whether regulatory measures, having an impact on investments, are necessary and proportionate to the pursued objective. It would be a preferable solution if the agreement provided for the full exclusion of environmental measures from the scope of investors' claims. Secondly, the CETA refers to the right to regulate in the preamble. However, it does not translate the enunciation of this principle in a clear, comprehensive and prescriptive general clause. The agreement, on the contrary, contains: (i) a series of "carve-out" clauses, which apply to the audio-visual sector and to prudential regulations (e.g. to insure the integrity and stability of a Party's financial system);[56] (ii) a safeguard clause providing that "*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*" except "*in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive*";[57] and (iii) a recognition of the right to regulate and to set levels of environmental protection, whose impact on the scope of investment protection is substantially undefined.[58] It is uncertain whether these solutions are adequate to prevent system abuses: indeed, in the light of the cases listed in this Section, and in consideration of the structural issues discussed in Section 3, several authors have expressed the view that the provisions negotiated by the Commission may not be sufficient to protect the right to regulate.

According to Pernice, "*such provisions will certainly counterbalance the interests of investors for protection of their business and property. They do not give assurance, however, to the host state that in each case their legitimate and democratically decided policies are not impaired by the decision of an arbitration tribunal under ISDS*." [59]

Likewise, Schepel, Muchlinski, Muir Watt and Harten call into question the Commission's approach. Referring to the consultation document of March 2014,[60] they note that the institution implicitly condemned "*the investment arbitration community for its failure to police itself adequately in matters of ethics, independence, competence, impartiality, and conflicts of interest*" and acknowledged, by implication, "*that the institutional design of investment arbitration has given rise to reasonable perceptions that the decision-making process is biased against some states and investors as well as various interests of the general public*"; on the basis of these premises, they criticise the institution for seeming "*content to entrust to these same actors the vital constitutional task of weighing and balancing the right to regulate of sovereign states and the property rights of foreign investors. This task is one of the most profound roles that can be assigned to any national or international judicial body.*"[61]

5 Is ISDS compatible with the exclusive jurisdiction of the CJEU and with the autonomy of EU law?

The current debate on the inclusion of ISDS mechanisms in EU IIAs, and on their potential impact of public interest regulations, is based on the assumption that this dispute settlement mechanism is admissible under EU law.

Yet, as it will be discussed in this Section, the compatibility of ISDS with the EU legal order is the subject of an ongoing reflection among international/trade/EU law scholars, aimed at determining: 1) whether the TFEU provisions on the CJEU's jurisdiction on actions for damages admit derogations in favour of ISDS arbitrators, and 2) whether ISDS is compatible with the principle of autonomy of EU law, as defined by the CJEU in its case law on the EU external competence.

Preliminarily, it is important to note that both issues are related to the potential emergence of conflicts between the role of the CJEU under the treaties and that of ISDS arbitrators under IIAs. [62]

5.1 ISDS and the CJEU's jurisdiction on claims for damages

Article 340 (2) TFEU states that "*in the case of non-contractual liability, the Union shall, in accordance*

difficult to accept that democratically enacted environmental policies or measures taken on consumer protection and public health decided at the European or national level within the EU are scrutinized and, if the three lawyers of an international arbitration tribunal taking a different view on the legitimate interests at stake, deem it appropriate, to order compensation for the foreign investors who feel that their investment or profit expectations are adversely affected by them. Such risk for the legislative authorities could amount to be prohibitive for policies regarded necessary for the public good."

55 CETA, Chapter 22, Article X.2.

56 Idem, page 14.

57 CETA, Annex X.11. The public interest exceptions to the indirect expropriation clause are thus applied subject to a proportionality test. The FET clause, on the other hand, is not limited by a similar set of exceptions.

58 CETA, Chapter XX, Article X.4.

59 See: "*Study on International Investment Protection Agreement and EU Law*", p. 143.

60 See footnote 25.

61 Harm Schepel et al., p. 1.

62 In accordance to Article 19 TEU, the CJEU has the task of ensuring "*that in the interpretation and application of the Treaties the law is observed.*"

with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".[63]

According to the CJEU's case law, compensation is due for damages deriving from acts, whose adoption constitutes a sufficiently flagrant violation of a superior rule of law for the protection of the individual.[64] In principle, the Court has not excluded international law from the range of legal sources, whose violation is susceptible to trigger the liability of the institutions.[65] Given that the CJEU's jurisdiction covers the assessment of the compatibility of EU with international law,[66] there would be no reason to exclude that possibility.

Nevertheless, in order to be relevant for the purpose of Article 340 TFEU, international law provisions must be able to create individual rights and be clear, precise and unconditional.[67] Except in very specific circumstances, this is not the case for WTO rules.[68] It has been recognised, however, that IIAs provision may meet these requirements.[69] Thus, investors could be admitted to rely on IIAs and to bring claims before the CJEU for damages deriving from breaches of their rights caused by EU acts, provided that the parties to an IIA do not expressly rule out this possibility.[70]

In this context, it is important to determine whether the CJEU's jurisdiction on claims for damages deriving from the violation of EU IIAs is exclusive or may coexist with that of ISDS arbitrators.

The issue is a complex one and positions within the doctrine are not unanimous. The starting point is Article 268 TFEU, which establishes the CJEU's jurisdiction "*in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.*" According to Craig and De Búrca,[71] while Article 268 does not state that the court's jurisdiction is exclusive, this is implied by Article 274 TFEU.[72] This provision is clear in excluding the possibility that claims against the EU be brought before national courts. From its text only, however, it cannot be inferred with certainty that the competence of international arbitration tribunals is also excluded.

According to Dimopoulos, the fact that the CJEU enjoys the exclusive power to review the legality of acts of the EU institutions, "*does not mean that Union act cannot be challenged in front of international dispute settlement bodies, but rather that Union measures can only be invalidated by the ECJ. In other words, if an international dispute settlement body finds that a Union measure violates an EU IIA, the autonomy of EU law requires that the measure is not directly invalidated, but it is for the Union legal system to take the appropriate measures to conform to the EU's international obligations*."[73]

Pernice, on the other hand, considers that an arbitral tribunal, by awarding damages, "*may carry out a task specifically attributed to the CJEU, namely to determine the compensation for Union legislative acts which are in full conformity with the Treaties*".[74] The author accepts that a distinction is to be drawn between internal EU liability and liability established under international law. "*Yet*", he warns, "*under international law, responsibility of states is a settled issue among states. The case of liability to individuals is not established, except for ISDS. This is new and, therefore, the distinction referred to is not a compelling argument if, under international treaties like CETA or TTIP, it is the EU itself to create a system for the liability of the EU for individual claims in addition to what Treaties already provide for*."[75] Pernice explains that, in the system created by Article

63 See, P. Craig and G. De Búrca, "EU Law, Text, Cases and Materials", (5th Ed.2011) p. 557.

64 Judgment of the Court of 4 July 2000, Case C-352/98 P, Bergaderm, ECR [2000] I-5291, para. 11.

65 P. Craig and G. De Búrca, p. 560.

66 See, for instance: Judgment of the Court of 7 May 1991, Case C-69/89, *Nakajima*, ECR [1991] I-2069, para. 26 and subs; Judgment of the Court of 21 December 2011, Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, paras 49-54; Judgment of the General Court of 14 June 2012, Case T-396/09, *Vereniging Milieudefensie v European Commission*, para. 51 and subs.

67 Ibidem.

68 Judgment of the Court of 23 November 1999, Case C-149/96, *Portugal v Council*, ECR [1999], Page I-8395, para. 40 and subs. At para. 49 the Court explains that "*It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules*".

69 For an in-depth analysis of the issue, see A. Dimopoulos, "EU Foreign Investment Law", (1st Ed., 2011), p. 301 and subs. Quite interestingly, according to the author, *"the fact that investment rules are intended to apply directly and immediately to individuals is proven by the reference to investor-state dispute settlement"*. The author refers, in particular, to the ISDS mechanism in the ECT. See also Pernice, "*Study on International Investment Protection Agreement and EU Law*", p. 137.

70 In this case, the CJEU has no competence to determine whether the provision of the IIA produce direct effect in the EU legal order and take precedence over EU Law. Case C-366/10, *Air Transport Association of America,* para. 49: "*in conformity with the principles of international law, European Union institutions which have power to negotiate and conclude an international agreement are free to agree with the third States concerned what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice, in the same manner as any question of interpretation relating to the application of the agreement in the European Union*".

71 P. Craig and G. De Búrca

72 In accordance with Article 274 TFEU, "Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States." The provision is clear in excluding the possibility that claims against the EU be brought before national court. It does not apply

73 A. Dimopoulos, "EU Foreign Investment Law", p. 118.

74 Pernice, "Study on International Investment Protection Agreements and EU Law", p. 148.

75 I. Pernice, p. 148.

340 TFEU, the CJEU not only decides on individual cases, but has also the role of setting the standards and legal boundaries of the EU's "objective liability", deriving them from a comparative analysis of the Member States law on state liability. ISDS clauses would have an impact on that system "*by handing over to arbitral tribunal the task of determining the scope and extent of compensation for objective legislative liability, which – as a legal responsibility not only to adjudicate existing standards but also to actively develop such standards – is expressly assigned to the ECJ under Article 340 (2) TFEU*". Against this background, the author concludes that *it is doubtful whether the competence of the CJEU under Article 268 in combination with Article 340 (2) TFEU allows conferring powers to decide upon the liability of the EU to other courts or tribunal, even by international agreements at all*."[76]

5.2 ISDS and the autonomy of EU law.

The discussion on the relation between ISDS and the CJEU's competence under Articles 268 and 340 TFEU is part of a broader debate on the compatibility of international dispute settlement mechanisms with the principle of "*autonomy of EU law*". Throughout the years, the CJEU has developed a set of criteria that should help determining the conditions under which the EU could become party of an agreement providing for its own system of courts.

These criteria offer guidance in assessing whether, from a general standpoint, ISDS is admissible under EU law. In the seminal Opinion 1/91, concerning the jurisdiction of the EEA Court, the CJEU has recognised that the Union's "*competence in the field of international relation and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions*".[77]

However, the Court has qualified this principle, specifying that conferring jurisdiction to international courts is incompatible with EU law, when such jurisdiction would adversely affect the autonomy of the EU legal order.[78] In the Opinion 1/00, on the establishment of the European Common Aviation Area, the CJEU has listed the conditions under which an agreement can be deemed not to affect the autonomy of EU law. This occurs when: (i) the essential character of the powers of the EU and its institutions remains unaltered, (ii) the procedures for ensuring uniform interpretation of the said agreement do not have the effect of binding the EU and its institutions in the exercise of their internal powers, to a particular interpretation of the rules of EU law referred to in that agreement and (iii) the Court's exclusive task of reviewing the legality of EU acts is not called into question.[79] The Court has added, in Opinion 1/09 on the European Patent Court, that a dispute settlement mechanism would be incompatible with EU law if it conferred on an international court, outside the institutional and judicial framework of the EU, the jurisdiction to interpret and apply EU law in a given field, depriving "*courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary rulings, to questions referred to those courts*", since it would "*alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law*".[80]

The CJEU has never assessed ISDS mechanisms. However, particularly in the light of Opinion 1/09, a number of authors have raised doubts on the compatibility of ISDS mechanisms with EU law.[81]

These doubts are mainly related to the eventuality that ISDS tribunals may have to interpret EU law in order to solve an investment dispute, without having the faculty (or the obligation) of referring preliminary questions to the CJEU.[82]

This preclusion is a determining element, for the Court, in view of deciding whether a dispute settlement mechanism under international law is compatible with the Treaties or is, on the contrary, inadmissible. As Lavranos highlights,[83] in its Opinion 1/09, the Court insisted on the essential function of the preliminary ruling system for the "*preservation of the Community character of the law established by the Treaties [which] aims to ensure that in all*

76 Idem, p. 149.

77 Opinion of the Court of 14 December 1991, 1/91, Draft agreement relating to the creation of the European Economic Area, ECR [1991] I-6079, paras. 39-40. For an analysis of the Court's case law, see S. Shill, "Luxembourg Limits: Conditions for Investor-State Dispute Settlement Under Future EU Investment Agreements", Transnational Dispute Management, Vol 10, Issue 2, March 2013, p. 8 and subs.

78 Idem, para. 35.

79 Opinion of the Court of 18 April 2002, 1/00, Proposed agreement on the establishment of a European Common Aviation Area, ECR [2002] I-3493, paras. 12-13 and 24. S. Shill, idem, p. 10.

80 Opinion of the Court of 8 March 2011, 1/09, "Draft agreement - Creation of a unified patent litigation system", ECR [2011] I-1137, paras. 80 and 89. For an analysis: S. Shill, idem, p. 11.

81 N. Lavranos, "Is an international investor-to-state arbitration system under the auspices of the ECJ possible?", EUI, December 2011. Available at: http://ssrn.com/abstract=1973491. I. Pernice, "The Autonomy of the EU Legal Order — Fifty Years After Van Gend", Walter Hallstein-Institut für Europäisches Verfassungsrecht, paper 8/2013, p. 20. M. Burgstaller, "Investor-State Arbitration in EU International Investment Agreements with Third States", Legal Issues of Economic Integration 39, No. 2 (2012), pp. 207-222. See also Dimopoulos, "EU Foreign Investment Law", pp. 325-334.

82 Arbitration tribunals are not considered as "courts" for the purpose of Article 267 TFEU and are not, therefore, entitled to make preliminary references to the CJEU. See Judgment of the Court of 23 March 1982, Case 102/81, *Nordsee*, ECR [1982] 1095.

83 See footnote 86, p. 12,

circumstances, that law has the same effect in all Member States".[84]

There seem to be little doubts that ISDS arbitrators may have to deal with EU law issues.[85] Pernice explains that, in concrete, this could happen if ISDS arbitrators were to decide claims related to the national (i.e. EU) treatment of foreign investors. In such cases, arbitrators would be required to identify the rights to which investors would be entitled under national (EU) law, in view of deciding on the existence of a discrimination or unfair treatment.[86]

Arbitrators would also be required to interpret EU law, albeit incidentally, in view of determining whether an investment, for which protection is sought via an ISDS arbitration, was made in compliance with the host state rules, when this is a condition for bringing a claim.

Finally, ISDS claims may be started in reaction to a national decision to recover illegal State aid, in view of complying with Article 108 (3). In a similar situation, arbitrators would have to decide whether to apply the FET clause in favour of the investor subject to the recovery decision. However, the application of the said clause by the ISDS tribunal may prejudice the correct enforcement of EU State aid rules, depending on the interpretation and application of these rules made by arbitrators.[87] On the basis of their analysis and understanding of the case law, the authors mentioned in this sub-section conclude that the inclusion of ISDS in EU IIAs would not be accepted CJEU and that "*a modification of the Treaties will at the end be necessary in order to overcome the resistance of the ECJ as consistently illustrated in its jurisprudence*."[88]

6 Conclusion

Far from being exhaustive, this article illustrates some of the issues that are linked to the inclusion of ISDS in EU IIAs. These issues, until recently known only in the narrow circle of trade and investment law specialists, are now at the centre of a wider debate, including policy makers, NGOs, the industry, academics and lawyers with diverse backgrounds.[89] European citizens are also being involved.[90]

Disappointingly, this discussion has started when negotiations of both CETA and TTIP were at a very advanced stage.

The Commission, the Council and the Parliament had agreed, between 2010 and 2011, to include ISDS in EU IIAs. However, the Commission has decided to consult the public only in the first semester of 2014. In the consultation document it has acknowledged the problems posed by ISDS. Yet, it has failed to put forward convincing solutions. Strikingly, the consultation on the TTIP was based on the CETA text: hence, at least as far as the agreement with Canada is concerned, the consultation appears to have been a moot exercise.

Against this background, the President of the Commission, presenting his candidature before the European Parliament, has made the remarkable statement that he would not "*accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes*" and that "*the rule of law and the principle of equality before the law must also apply in this context*".[91]

It is unclear whether any concrete action will follow this political statement and whether a revision of the EU policy on ISDS will take place. As it has been pointed out, however, the Treaty requires the Council and the Commission to preserve EU policies and rules in the development of the common commercial policy.[92] Consistently with this principle, these institutions should refrain from negotiating treaties whose provisions may clash with primary and secondary EU law. In doubt, the said institutions should consult the CJEU, as provided for by Article 218(11) TFEU, on the compatibility of ISDS with EU law.[93] As has happened in the past, the opinion of the court would provide the institutions with a reliable guidance, in view of preserving the integrity of the Union's legal order.

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84 Opinion 1/09, para 83.

85 N. Lavranos, p. 13. Burgstaller, p. 221.

86 I. Pernice, p. 147.

87 Idem, p. 143.

88 Lavranos, p. 16. Whilst raising doubts on the compatibility of ISDS with EU law, as interpreted by the CJEU, the author is nevertheless convinced of the importance of ISDS as an dispute settlement instrument in international investment law. See also Pernice's conclusions at p. 150 and Burgstaller's at p. 221: "*In effect, it would seem that the EU could only include investor-state arbitration clauses in EU IIAs with third states following a change in EU* primary law such that investment tribunals could be deemed 'courts or tribunals of a Member State' within the meaning of Article 267 TFEU.60 Still, with a view to the Court's jurisprudence, such a change would constitute an anomaly in the EU legal order."

89 See, above, footnote 27. The "Statement of concern", an initiative of the Kent Law School at the University of Kent, gathered over 120 signatures of academics, specialised in a broad range of legal and economic disciplines, from universities all over the world.

90 In the spring of 2014, a platform of NGOs launched a European Citizens Initiative called "Stop TTIP", aimed at preventing TTIP and CETA "because they include several critical issues such as investor-state dispute settlement". The Commission refused to register the initiative: http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041.

91 Jean-Claude Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission", Strasbourg, 15 July 2014, p. 8. Available at http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf.

92 See Section 3.3.

93 Pursuant to Article 218(11) TFEU, "*[a] Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.*"

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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.
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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.

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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).

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