Workshop Environmental Law II

Ius Commune Conference 2014

Friday, 28 November (09.00 – 12.30)

Building: St Leonard's Hall

Room: St Trinnean's

Participants

General
The 2014 workshop of the Ius Commune Research Group in Transboundary Environmental Law will consist of two parts. The first part of the workshop will be about the theme of Regulation and Technological Innovation – to which the below text provides an explanation and a call for contributions. The second part will be dedicated to an exchange of information regarding current research projects amongst members of our group but also with colleagues from the University of Edinburgh (further information will follow).

Special workshop theme
Technological innovation is a major regulatory challenge in environmental and energy law, either as a matter of new risks or new opportunities.
New technologies may bring new *risks*, as through new types of activities (e.g. shale fracking), new substances and products (e.g. nanotechnology, GMO's) and new processes (e.g. cold fusion). The emergence of new technologies poses a permanent threat of 'regulatory disconnection'. *Radical* innovations may fall in the legal void, meaning 'what is not prohibited, is permitted'. Regulators may be called upon to decide firstly on a 'traffic light' regulatory channeling response: prohibitive (red); permissive (amber); ordered (green) (Brownsword, 2008: 19)[1] – perhaps motivated by a precautionary stance. Do we have proper 'protocols' and/or 'institutions' to properly handle these early stages' decisions? With *incremental* innovations, the issue lies especially with whether existing rules and regimes (i.e. legal facts included in them) encompass the new technologies and/or the effects that ensue from them or not – as in the classic theft of electricity-cases. It is said that regulatory regimes, such as that of Environmental and of Energy Law, are in a seemingly hopeless challenge to keep up with technology. The art of regulatory adaptiveness not only poses a challenge to *policy*-making (as a matter of fact-finding and weighing of interests), but also to legal *design* as in how rules and regimes can be made more robust – i.e. clear but yet resilient to change, such as by use of principle-based regulation, a dynamic/programmatic approach, experimental regimes, wide use of discretionary powers and 'meta-regulation', as in the EU new approach). Smartness of these design solutions may (and should), however, be questioned not only from an effectiveness and efficiency perspective, but also as to legitimacy and equity.

To approach the issue of technological innovation from a risk perspective may be sympathetic from a 'precautionary' stance – in itself it presents another kind of risk, that of acting on 'false positives' and thus perhaps unnecessarily restricting technological *opportunities* that may well be of significant importance to society – in public interests and personal freedoms. Many of the grand societal challenges stand to benefit by technological innovation. Not only in sectors such as food, transport, security, health and demography, but also environment and energy. Ultimately, some new technological opportunities may curb environmental risks (especially when we move away from

[1] Roger Brownsword, *Rights, Regulation, and the Technological Revolution*, New York: Oxford University Press 2008.

'grandfathering') and foster (renewable) energy services. Optimism and pessimism seem to rule the discussion about (collaborative) regulatory capabilities as against (collaborative) technological capabilities - so we probably have to mix both, through 'high tech' with a 'human touch'. Thus technological innovation also poses a challenge in our appraisal and perhaps facilitation of technological solutions to environmental and energy challenges, especially where both seem at odds with each other – e.g. are shale fracking and climate engineering environmentally 'sound' answers to energy and environmental problems?

The workshop starts with case-based presentations and moves towards more general, fundamental observations. The case-based presentations need to be targeted and seeking feedback from the public. Each speaker gets 25 minutes: 15 for presentation, 10 minutes for discussion. The final speaker will incorporate reflections on the presentations before.

Chair:	**Prof. Michiel Heldeweg** (Twente University)
09.00 – 09.10	*Welcome and opening*
09.10 – 09.35	**Haomiao Du** (University of Amsterdam) ***International law and the climate engineering challenge***
09.35 – 10.00	**Sander van Hees** (Utrecht University) *Legal barriers hampering the introduction of new and innovative forms of energy production*
10.00 – 10.25	**Floor Fleurke** (Tilburg Law School) *Deployment of technologies in environmental law: striking a balance between effectiveness and legitimacy*
10.25 – 10.35	Coffee break
Chair:	**Prof. Marjan Peeters** (Maastricht University)
10.35 – 11.00	**Leonie Reins** (KU Leuven) ***What's in a name? When is technology 'new' and does it matter for its regulation***
11.00 – 11.25	**Kristel De Smedt and Andrea Rigamonti** (Maastricht University) *Balancing between innovation and the necessity to regulate emerging technologies: the role of environmental liability*
11.25 – 12.00	**Michiel Heldeweg** (Twente University) ***Designs for regulating experiments fostering innovation in environmental and energy law***
12.00 – 12.30	Closing discussion of the workshop