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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

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.

Imprint

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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.

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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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