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Editorial

The current issue of elni Review is inter alia dedicated to a subject that has been on the Top Agenda in 2016: The Comprehensive Free Trade Agreement between the EU and Canada.

On 8 September 2016 an ELNI Forum on CETA took place at the St. Louis Faculty of Law in Brussels. A small group of environmental lawyers debated intensively different aspects of this far-reaching agreement and its impact on environmental law in Europe in particular. Delphine Misonne gives an introduction on the potential impact of CETA on environmental law, Laurens Ankersmit and Wybe Th. Douma analyse the dispute settlement schemes under CETA and shortcomings of the agreement concerning sustainability and precautionary aspects. Nicolas de Sadeleer then explains the sophisticated ratification process for CETA and the legal uncertainty surrounding it. Details of these analyses can be found in the articles of *Delphine Misonne*, *Laurens Ankersmit* and *Wybe Th. Douma*.

Besides a number of legal details, the interesting general aspect of *who should negotiate* such types of agreements arose during the discussion in the Forum. Given that CETA claims to be a progressive environmental agreement (which it is obviously not), it must be criticised that it has been negotiated only by trade experts and not by environmental experts. Whatever the outcome of this dossier is in the end, it has to be noted that public pressure and the scientific debate improved the Agreement considerably, even though it is still not sufficient from an environmental point of view.

Another persistent environmental issue in 2016 – and foreseeably also well beyond – is the so-called 'Volkswagen Scandal'; a symbol for a confidence crisis caused by and affecting not only the VW AG but also other major car manufacturers. A contribution by *Ludwig Krämer*, 'The Volkswagen Scandal – Air Pollution and Administrative Inertia' deals with the manipulation of NOx emissions from Volkswagen diesel cars on the one hand, and the manipulation of CO_2 emissions from its diesel and petrol cars on the other. Not all details of the manipulations have been made public until now. A number of conclusions may nevertheless already be drawn. In this context, the editors would also like to draw the readers' attention to the related analysis by Défense Terre ('Strengthening the regulation of defeat devices in the European Union', Legal Note, June 2016) as well as to the expert opinion by Martin Führ for the German Bundestag's Committee of Inquiry with respect to the car emissions affair.

A further article addresses the Aarhus Regulation which provides an opportunity for environmental non-governmental organisations (ENGOs) to request an internal review of an EU institution or body that has adopted an administrative act under environmental law, or should have done so in the case of an alleged administrative omission. *Thirza Moolenaar* and *Sandra Nóbrega* investigate whether the criteria that have to be met for an ENGO to be entitled to make such a motion are sufficiently clear, and whether they contribute to the objective of providing wide access for ENGOs to the internal review procedure.

This elni Review's *Recent Developments* section starts off with a report of C-673/13 Commission v. Greenpeace and PAN Europe by *Bondine Kloostra*, the representative of the two NGOs involved. In its Judgment of 23 November 2016 the CJEU rules that the concept of 'emissions into the environment' is not limited to emissions from industrial installations. Rather it includes the release into the environment of substances such as pesticides and biocides. This landmark decision will most likely influence future access to information practice – not limited to the context of pesticides. Lastly, *Elhoucine Chougrani* examines the opportunities and the challenges in applying environmental law and enforcing the sustainable development goals in Morocco and *Lynn Gummow* reports on the 5th Lucerne Law and Economics Conference.

The editors welcome submissions of contributions to the next elni Review until 1 April 2017. Please refer to www.elni.org for further detail on the call and for the author guidelines.

Gerhard Roller/ Julian Schenten

December 2016

Exploring CETA' s Relation to Environment Law

Delphine Misonne

1 Introduction: How to assemble the puzzle?

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

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

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

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

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

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

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

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

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

2 Chapter 24 on trade and the environment

2.1 Inside a sustainable development package

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

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

2.2 Anti-dumping provisions: the pollution haven hypothesis

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

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

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

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

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

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

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

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

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

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

32 *Id*., p. 2.

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

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

35 NAFTA, Art. 904.

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

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

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

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

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

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

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

43 *id*., p. 35.

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

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

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

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

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

2.3 Promises of greener trade

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

2.4 An implicit precautionary principle

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

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

3 The main points of encroachment with environmental law

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

3.1 Regulatory cooperation

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

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

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

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

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

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

59 Art. 21.1.

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

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

62 Art. 21.2.

63 Art. 21.2.

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

65 Point (1).

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

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

68 As mentioned in Art. 24.3, for instance.

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

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

3.2 Investment

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

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

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

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

70 Art. 21.8.

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

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

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

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

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

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

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

3.3 Others

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

4 Conclusion

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

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

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

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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.
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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.

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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 first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

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