

# CETA: gold standard or greenwashing?

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## Topics

- 1) EU goal: promoting sustainable development
- 2) EU practice: trade agreements and SD
- 3) CETA & SD
  - Trade Sustainability Impact Assessment & ISDS/ICS
  - SD chapters
- 4) Concluding remarks

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## 1) EU goal: promoting SD

### **Integration principle, Art. 11 TFEU**

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promote sustainable development.

### **Art. 3(3) TEU: -> internal**

The Union ... shall work for the sustainable development in Europe...

### **Art. 3(5) TEU: -> external**

In its relations w. wider world, the Union ... shall contribute to sustainable development of Earth...

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**Art. 21(2) TEU:** Union policy on international relations goal (f) ensure sustainable development

### **Art. 21(3) TEU:**

Union respects principles & pursue objectives set out in para 2 in:

- different areas of Union's external action;
- external aspects of its other policies

Union ensures *consistency* between different areas of its external action and between these and its other policies

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## 2) EU practice: trade and SD

**1999:** DG Trade introduced “Trade Sustainability Impact Assessment” & guidelines on process:

- consultant writes assessment & organizes consultations;
- EC reacts w position paper;
- EU negotiators take findings into account

**2008:** EU Trade agreements include chapters on Trade and Environment

- Vague norms
- Not enforceable through regular dispute settlement mechanisms, no sanctions

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## 3) CETA and SD

**Aim should be:** promote SD in EU trade agreements

**CETA negotiation directives:**

- Mention SD in preamble
  - Recognise that SD is *overarching objective* of parties
- So: no promoting / supporting SD, but minimising negative effects on SD

**CETA Trade SIA:**

- increased trade will lead to more CO2 emissions
- In relationship between EU and Canada, no need for ISDS
- Position paper EC not published after negotiations over

**CETA agreement:** no specific steps against more CO2 emissions + ISDS (classic); legal scrubbing -> ISDS / ICS

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## ISDS - ICS

**Annex 8A, Art. 3 CETA:** 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.* -> ICS decides whether, for instance, impact measure(s) against climate change are excessive

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## ISDS - ICS

**Dutch gov.:** over 80 BITs but never a claim against us, no reason to assume CETA will change this.

Yet: existing BITs are with countries in which Dutch invest, they bring claims against 3d countries.

Canadians invest billions in EU & NL, are used to bring ISDS claims: no reason to assume this will differ under CETA, except for some higher hurdles.

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## From provisional application to ratification

Provisionally applied since 21 September 2017, except for parts where EU is not exclusively competent: ICS

Ratification hurdles:

- Potentially no majority in Dutch senate
- Resistance in French Senate
- No majority in Cyprus parliament...

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## CETA and sustainable development

Chapter 22: Trade and SD

Chapter 23: Trade and labour

Chapter 24: Trade and environment

Example:

*Art. 24.5 The Parties recognise that it is inappropriate to encourage trade or investment by ... reducing the levels of protection afforded in their environmental law.*

-> no ban on reducing protection levels, only if it can be proven that reduction aims at encouraging trade; hard to prove. NB USMCA: accused party to prove that reason was not encouraging trade.

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## CETA and sustainable development

Art. 24.16: no recourse to general dispute settlement rules

Art. 24.15: panel of experts can issue recommendations; party violating rules “shall endeavour ... to identify an appropriate measure”

Dutch government on art. 24.15 =

“duty to take measures” Nadere memorie van antwoord EK 2020-2021, 35154, F, Antw op vrg 15 en 16

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Dutch gov: trade and SD provisions in CETA are:

- legally binding
- can be enforced idem, antw op vrg 21 maar ook 30

Issuing recommendations = enforcement?

No sanctions available -> no enforcement in legal sense, merely putting parties under pressure to obey rules SD chapters

NB US Congress vetoed USMCA, demanded stricter SD rules incl. sanctions, inter alia. So parliaments with a spine can achieve improvements even after negotiations are formally over.

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#### 4) Concluding remarks

TSIA guidelines not observed (NB compare EU Ombudsperson on similar issues EU-Mercosur: 'maladministration')

<https://www.ombudsman.europa.eu/hr/decision/en/13948>

Lack of sanctions in SD chapters:

- So far in practice not serious problem with Canada (?)
- No-go for EU-Mercosur: Bolsonaro not likely to be impressed by recommendation to put halt to deforestation
- Example USMCA shows: better SD provisions exist

Precautionary principle as EU uses it not sufficiently warranted under CETA

Minimising negative effects on SD instead of promoting SD

Conclusion: CETA no gold standard

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#### Research

- *Gouden standard of 'greenwashing'? CETA en het bevorderen van duurzaamheid en milieubescherming via EU handelsverdragen*, Milieu & Recht 2018, nr. 6, p. 362-376
- *The promotion of Sustainable Development through EU Trade Instruments*, European Business Law Review 2017, vol. 28, nr 2, p. 193-212
- *Investor-state dispute settlement in EU trade agreements in the light of EU sustainable development policy and law*, in: L. Pantaleo, M. Andenas, C. Contartese and M. Happold (eds.), 'The EU external action in international economic law', The Hague, 2018
- *The limits to precaution in international trade law: from WTO law to EU trade agreements*, in: Squintani a.o. (eds.), 2019

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## Further information

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*Thank you for your attention!*

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