



## **Regulatory chill**

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Sustainability: CETA dissected**

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EU duty to integrate environment into other policy areas like trade (since 1987):

### **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.

Lisbon Treaty added:

### **Art. 3(5) TEU:**

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



### **Aim should be:**

- Integrate environmental protection in trade agreements to *promote* sustainable development (SD)
- Ensure that trade agreements *support* SD in EU & in its partner countries

### **EU negotiation directives stated:**

- Mention SD in preamble & contribution int. trade to SD.
- recognise that SD is *overarching objective* of parties.
- No encouraging of trade by lowering standards.
- Trade SIA to *identify* potential effects on SD, findings to be *taken into account* by negotiators
- ≠ promoting / supporting SD  
= minimising negative effects on SD



**Trade Sustainability Impact Assessment** process insufficient:

- Not published in time to inform public debate
- Not taken seriously by Commission (examples: CETA Trade SIA recommended no ISDS, Peru/Colombia warnings on deforestation)
- Reaction of Commission to recommendations in case of CETA not made public to this day

Effectiveness of provisions on environment and sustainability in EU trade agreements seems limited. Needed: evidence based policy, so evaluate and adapt where needed.



## Regulatory chill?

- Definition: 'governments response to a high (perceived) threat of investment arbitration by failing to enact or enforce bona fide regulatory measures (or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished)' (Tienhaara, 2011)
- Does it exist?
- Could it undermine the right to regulate?
- Example: New Zealand waiting for outcome of ISDS case against Australia before introducing similar legislation against tobacco



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Hypothetical example: EU country phasing out coal v Canadian investor

Why not exclude from indirect expropriation measures, other than nationalizing or expropriation, aimed at safeguarding public interests such as measures on health, human rights, safety, environmental concerns (Norway BIT model)



## Precaution insufficiently warranted in CETA

P-T. Stoll, W.Th. Douma, N. De Sadeleer and P. Abel:

- *CETA, TTIP and the precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals* (English condensed version),

[http://www.foodwatch.org/fileadmin/foodwatch.nl/Onze\\_campagnes/Politiek\\_en\\_Lobby/Images/CETA/CETA\\_TTIP\\_precautionary\\_principle\\_study\\_EN.pdf](http://www.foodwatch.org/fileadmin/foodwatch.nl/Onze_campagnes/Politiek_en_Lobby/Images/CETA/CETA_TTIP_precautionary_principle_study_EN.pdf)

Reactions from minister Ploumen and Commissioner Walström  
(see Elni 2/16 p. 61 ff)

CETA limits precaution to environment, but in EU law it applies also to consumer protection, health etc.



## Concluding remarks

- Evaluate EU trade agreements incorporating environmental and sustainability provisions
- Adapt Trade SIA system (more involvement of civil society where draft SIA and draft Commission reaction is concerned, more timely)
- Especially where relations with countries with lower protection standards are concerned, ensure stronger provisions
- Ensure that energy transition, protection of environment and sustainable development is promoted



# Further information:

- European Environmental Law website [www.eel.nl](http://www.eel.nl) + free EEL News Service
- Twitter @EurEnvLaw
- CLEER Working Paper 2013/5, [\*EU environmental norms and third countries: the EU as a global role model?\*](#)
- *CLEER Working Paper 2016/01, Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?*

<http://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20161-pantaleo-douma-takacs-eds>