

HELFF-VMR Conference “Trade and Sustainability: CETA Dissected”

On Thursday 27 January 2017, the T.M.C. Asser Instituut hosted the conference “Trade and Sustainability: CETA Dissected”. This event, which formed a part of the Hague Environmental Law Facility (HELFF) lecture series, was co-organised by the Dutch Association of Environmental Law (Vereniging voor Milieurecht, VMR). HELFF is a cooperation between The Hague-based organisations dealing with environmental policy and law, specifically the T.M.C. Asser Instituut, The Hague University, the Institute for Environmental Security, and the Peace Palace Library. The speakers at this event included Dr Joris Larik of Leiden University and the Hague Institute for Global Justice, Mr Ronald Roosdorp of the Dutch Ministry of Foreign Affairs, Dr Laurens Ankersmit of ClientEarth and Dr Wybe Douma of the Asser Institute. The presentations were followed by a panel discussion featuring reactions by Mr Alan Bowman of the Mission of Canada to the EU and Dr Nikos Lavranos of NL-Investmentconsulting.

The Comprehensive Economic and Trade Agreement (CETA) liberalises trade in goods and services and contains several provisions aimed at protecting investments. It has faced criticism relating to consumer rights and environmental protection. Nonetheless, European Commission President Juncker has described the treaty as constituting a ‘golden standard’ for future trade agreements. Applying a trade and sustainability lens, this conference sought to demystify the content of this comprehensive treaty, and assess whether it truly forms a progressive standard for trade policy. The event took place against the backdrop of the International Trade Committee of the European Parliament’s approval of the agreement on 24 January, with a vote in plenary set to follow soon.

After the opening remarks by Dr Wybe Douma, Dr Joris Larik (Assistant Professor at Leiden University and Senior Researcher at the Hague Institute for Global Justice) provided a general introduction to CETA. He explained that the agreement faced criticism from civil society and referred to Dutch Minister for Foreign Trade and Development Lilianne Ploumen’s call for a ‘reset’ of free trade at the OECD. He also placed the agreement in the context of the new US administration and the decision to withdraw from the Trans-Pacific Partnership (TPP), which brings into question other existing trade treaties such as the North-American Free Trade Agreement (NAFTA), as well as agreements that, like the Transatlantic Trade and Investment Partnership (TTIP), are still under negotiation. Dr Larik gave an overview of CETA’s history, mentioning the Wallonia crisis, which led to the adoption of a number of declarations before the signature of the agreement on 30 October 2016. He also outlined the treaty’s final content and institutional provisions, and presented two perspectives on its sustainable development aspects, one positive and one negative. Dr Larik also touched upon the potential impact of Brexit on CETA. He concluded that, whereas CETA is certainly forward-looking and constitutes a model for future treaties, the question remains whether it will be put into practice.

Mr Ronald Roosdorp (Director for International Trade Policy and Economic Governance at the Dutch Ministry of Foreign Affairs) spoke about regulatory cooperation in CETA. He acknowledged that regulatory cooperation is one of the most contested issues in the CETA debate. He noted that trade agreements galvanise the status quo at a certain point of time, and that regulatory cooperation provides a pragmatic alternative to renegotiation when change occurs. He also stressed that this system does not aim to lower standards or circumvent democratic procedures. He then presented an overview of the relevant chapters in CETA and emphasised that regulatory cooperation will occur on a strictly voluntary basis. Mr Roosdorp's views were challenged by Mr Ankersmit in the question and answer session, who argued that transparency in CETA is a step backwards from, for instance, the WTO Technical Barriers to Trade (TBT) Agreement, and that regulatory cooperation grants the Canadian government privileged access to regulatory discussions in the EU. Supported by Canadian Ambassador to the Netherlands Sabine Nölke, Mr Roosdorp responded that public access is ensured by the domestic legislative process and that this type of cooperation is merely consultative.

Dr Laurens Ankersmit (EU Trade and Environmental Lawyer at ClientEarth) presented on the compatibility of the Investment Court System (ICS) with European law. He discussed the differences between ICS and the previous Investor-State Dispute Settlement (ISDS) mechanism, which had been subject to substantial critique. He noted that, where ICS entailed some positive improvements, especially the inclusion of an appeal mechanism, this rebranding was not a radical change. He pointed out that the ICS still does not require exhaustion of domestic remedies, impose any obligations on investors or grant third party rights. With regard to the compatibility with EU law, Dr Ankersmit mentioned the autonomy of the EU legal order, notably making reference to the EU Court's Opinion 2/13, where the Court found that the EU could not accept the jurisdiction of the European Court of Human Rights (ECtHR). He claimed that the ICS excludes the involvement of the Court of Justice of the European Union in questions of EU law and sidelines national courts. The possibility of requesting an opinion from the Court of Justice under Article 218(11) TFEU was also contemplated, particularly in light of the Belgian federal government's pledge to do so in an intra-Belgian declaration in October 2016. This presentation was followed by a lively question and answer session, which included a number of further comments by Ambassador Nölke.

Dr Wybe Douma provided the final presentation. He spoke about the duty enshrined in the EU Treaties to promote and support sustainable development and the role of Trade Sustainability Impact Assessments (SIAs) in identifying the potential effects of trade agreements. He noted that the system of Trade SIAs is still insufficient as it aims only to minimise negative effects and not to promote and support sustainable development. He also pointed out that the Commission does not always respect its own guidelines as assessments are not published on time and, in the case of CETA, the Commission position paper on the agreement was not published at all. Dr Douma also addressed the hypothesised 'regulatory chill' effect, which suggests that governments may be discouraged to regulate in view of possible compensation claims under investment arbitration. He mentioned the example of New Zealand waiting for the outcome of an ISDS case against Australia instead of introducing tobacco restrictions, and the hypothetical example of an investor suing an EU country for phasing out coal. Dr Douma concluded that the use of Trade SIA should be improved, and acknowledged that regulatory chill effects are likely to be more problematic in trade relations with other third countries.

Following the speakers' presentations, panel member Dr Nikos Lavranos commented from an investor's perspective, claiming that the ICS system does entail several important changes, which have a negative effect on investment protection. In particular, investors are no longer entitled to select an arbitrator and, following the NAFTA model, in principle no compensation is possible in cases where indirect expropriation has occurred for protection of the environment. Dr Lavranos suggested that, whereas the Court of Justice of the EU might not accept the ICS, an alternative would be to allow the possibility for the ICS to refer preliminary questions to the Court. He also remarked that comparing CETA to the ECtHR is unwarranted, considering that it is not a human rights treaty and that, in discussions about the exhaustion of local remedies, account must be taken of the fact that the judicial systems of some EU Member States are functioning very poorly. Finally, he noted that NGOs and US President Donald Trump have become 'strange bedfellows', in view of their shared opposition to new and existing trade agreements.

The second panellist, Mr Alan Bowman (Deputy Head of Mission of Canada to the EU), gave a spirited defence of CETA. He stated that Canadians see the agreement as a possibility to get closer to their most like-minded partner in the world and pointed out some clear benefits for the Netherlands, including the elimination of various tariffs and access to a 187 billion Euro procurement market. With regard to regulatory cooperation, he reaffirmed the voluntary nature thereof and characterised the interaction between Canada in the EU as a 'race to the top', noting that Canadian standards are frequently higher than their European equivalent and that the precautionary principle is by no means uniquely European. Mr Bowman also stressed that ISDS was not new in the EU as it was included in many BITs and that the change from ISDS to ICS illustrates that public concerns are being heard. Dr Larik brought the panel discussion to a close.