

More cooperation for less regulation

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Note: If not stated otherwise, all references in this article refer to chapter 21 of the final CETA text published by the European Commission in 2016: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf

PRELIMINARY REMARKS

There are significant **differences between the way Canada and the EU regulates**. Normally, they are the result of Canadian and European representatives making legitimate choices to create new rules, or strengthen existing ones, based on a perceived public benefit. Should we bypass those democratic decisions in the name of trade? Canada is, for instance, the fifth largest producer of genetically modified products (GMOs) in the world.¹ A regulatory cooperation chapter in CETA (chapter 21) would give Canada, on behalf of its agricultural exporters, a new means to open EU markets to these restricted products, undermining existing and future European regulations.

CETA establishes institutions and processes for the alignment of regulations between the European Union and Canada. New and existing laws will go through a

¹ <http://www.statista.com/statistics/271897/leading-countries-by-acreage-of-genetically-modified-crops/>



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burdensome process in order to converge or otherwise make them equivalent. As this process is based on an international treaty, it stands above domestic legislation and institutions. In other words, it will be far more difficult and sometimes effectively impossible to undo the results of regulatory cooperation.

In principle, the regulatory cooperation chapter in CETA covers a vast area, including many domestic regulations that have little or no relationship to, or significant impact on, trade. Yet, the project of regulatory cooperation or convergence is

central to the new generation of trade agreements like TPP, TTIP and CETA. These so called **living agreements** make the abolition of ‘non-tariff barriers’ (e.g. regulations in the public interest) a permanent project long after CETA has been ratified and political attention has waned.

In post-NAFTA² efforts to harmonise Canadian and US regulations, notably the joint Regulatory Cooperation Council established in 2011, stakeholder input and involvement is clearly aimed primarily at business, focuses on trade impacts, and takes place in relation to sectors (e.g. pesticides, chemicals, management, pharmaceuticals and biologics).³ Efforts at transatlantic regulatory cooperation since 1995 must also be taken into account, since they have already led to lower social and environmental standards in some cases. A very prominent example of past regulatory cooperation is the Safe Harbour agreement that resulted in weaker data protections for EU citizens and was declared illegal by the European Court of Justice.⁴

ANALYSIS OF KEY PROVISIONS

Delays and pressure to harmonise regulations

Regulatory cooperation in CETA might **delay and prevent new regulations**, and chapter 21 applies pressure to harmonize wherever one Party to the agreement prefers that course of action. Article 21.2.6 states, ‘Parties may undertake regulatory cooperation activities on a voluntary

basis. They can decline, but ‘if a Party refuses to initiate regulatory co-operation or withdraws from such co-operation, it should be prepared to explain the reasons for its decision to the other Party’. In this way, CETA may put diplomatic and bureaucratic pressure on the Parties to undertake regulatory cooperation even in sensitive policy areas such as GMOs.

Article 21.4(b) and 21.4(e) state the Parties will endeavour to share information ‘throughout the regulatory development process’, and that this consultation and exchange ‘should begin as early as possible in that process [...] so that comments and proposals for amendments may be taken into account’. This ‘**early warning system**’ would enable the other Party (i.e. the Canadian government) to make comments and propose amendments to draft regulations before the European Parliament has seen them. That is a lot of power to give a foreign entity over a domestic democratic institution.

Lower protections for Canadian and European citizens

Regulatory cooperation at the horizontal and sectorial levels is particularly dangerous for regulations in the public interest. For instance, CETA includes a chapter on bilateral dialogues and cooperation (chapter 25) with a section on biotechnology (Article 25.2), which covers ‘any relevant issue of mutual interest to the Parties’, and specifically ‘any new legislation in the field of biotechnology’.

Furthermore, chapter 21 contains a potential attack on the precautionary principle. Article 21.4(n)(iv) urges the Parties to ‘conduct cooperative research agendas in order to [...] establish, when appropriate, a common scientific basis’. This refers to the aftercare principle, or so-called **science-based approach**, which is applied

² North Atlantic Free Trade Agreement. Established in 1994 between the US, Canada and Mexico.

³ Government of Canada, Canada-US Regulatory Cooperation Council News, March 2016, pp. 1-3 (http://www.trade.gov/rcc/documents/PCO_Newsletter_Feb_2016_EN.pdf).

⁴ More examples can be found in Lobbycontrol’s and Corporate Europe Observatory’s report, ‘A dangerous regulatory duet: How transatlantic regulatory cooperation under TTIP will allow bureaucrats and big business to attack the public interest’, 18 January 2016 (<http://corporateeurope.org/international-trade/2016/01/dangerous-regulatory-duet>).

in Canada and the United States.⁵ An attack on the precautionary principle could weaken EU environmental protection laws and hinder the introduction of new rules and regulations to protect the environment and public health in the future.⁶

To give an example of the risk to public interest regulation, Canada has been highly litigious in the World Trade Organisation (WTO). In two high-profile cases, **Canada joined with the US in disputes against the EU on growth hormones in beef and market access for GMOs**. In both cases the EU argued on the basis of the precautionary principle and lost.⁷ Given the weak legal reference in CETA to this otherwise well-established principle, the chances of these countries accepting strong precautionary regulation by the EU in the future will be effectively nil.⁸

Business influence and lack of transparency

Chapter 21 of CETA provides the basis for a very ambitious model of regulatory cooperation that might lead to undue and secret corporate influence on the legislative process. Its vague language also leaves a lot of space for interpretation in the future—by trade lawyers and arbitrators—on

the way regulatory cooperation should work between Canada and the EU.

For instance, CETA states that, when regulating, ‘each Party shall, when appropriate, consider the regulatory measures or initiatives of the other party on the same or related topics’ (Article 21.5). There is no indication that any of this will be an open process. For the EU, the consideration of North American regulations would take place before any formal proposal is made to the European Parliament and Council.

CETA will create a Regulatory Cooperation Forum (RCF) composed of officials from the two Parties, but with the potential for meetings to be opened to ‘other interested parties’. The RCF is tasked with reviewing progress on regulatory cooperation and reporting to the CETA Joint Committee. It would also discuss regulatory policy issues raised through consultations each Party has with ‘private entities’.

Beyond this, the RCF is only vaguely described, lacks accountability, and remains open to the direct influence of business lobbyists—the **one group with sufficient resources to attend such meetings**. The public and elected representatives on both sides of the Atlantic may only become aware that consultations are occurring after the legislative proposals resulting from them are introduced.

The work of the RCF is intertwined in CETA with other important institutions, such as the aforementioned CETA Joint Committee, other specialised committees, and sectoral dialogues. **The most active of this last group of subcommittees will almost certainly be the one established for Biotech Market Access Issues.**⁹ But all specialised committees would prepare draft decisions for the CETA Joint Committee (Article 26.2.4). It seems likely these decisions, having been agreed by the two

5 The aftercare principle implies that the burden of proof in disputes regarding the harmfulness of a given product rests with the official body or individual complainant opposed to that product’s authorisation (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2016-000887+0+DOC+XML+V0//EN>).

6 The precautionary principle is a political philosophy of prevention and quick reaction to health risks for humans, animals, and plants, as well as to environmental protection matters. Where the available scientific data does not allow an extensive risk valuation, a precautionary approach allows for the prohibition of the commercial use of potentially noxious products (http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_de.htm). In contrast, the aftercare principle only allows for prohibition once the harmfulness of a product is proven beyond doubt.

7 BEUC: ‘CETA fails the consumer crash test’, May 2016 http://www.beuc.eu/publications/beuc-x-2016-045_lau_ceta_position_paper.pdf

8 For the EC-Biotech case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm; for the EC-Meat Hormones case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

9 In effect this means Canadian GMO access to the EU market. This is a continuation of a process established after the WTO panel ruled against the EU in the EU-Biotech case.



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experience in mind (e.g. Canada-US and EU-US cooperation efforts), this lack of clarity creates a real risk of lower social, environmental, and consumer standards and an undermining of democratic principles by strengthening the role of business lobbyists in the development of legislation. To enshrine regulatory cooperation in a trade agreement between the EU and Canada would permanently weaken the role of parliament and the public sector in setting regulation.

Parties with input from business groups, would be rubber stamped at this stage, giving CETA subcommittees considerable power in practice.

The process of regulatory cooperation, outlined in great detail in Article 21.4, is striking for what it leaves out. In all the examples of cooperation activities there is no **mention of transparency features** such as the publication of agendas, reports or participant lists from meetings. While the word ‘transparency’ has been emphasised on the EU side in relation to CETA,¹⁰ it appears only twice in chapter 21 (in Articles 21.2 and 21.3[b][ii]), more as a buzzword indicating business access than as a general commitment to openness.

CONCLUSION: BACKDOOR POLICY VIA TRADE AGREEMENTS

Regulatory cooperation in CETA is particularly dangerous because its character remains vague in the final text. With past

¹⁰ For example, it appears 35 times in the 31 pages of the European Commission document, ‘Trade for all: Towards a more responsible trade and investment policy’, October 2015.