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Moving Regulation out of Democratic Reach: Regulatory Cooperation in CETA and its Implications

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Moving Regulation out of Democratic Reach: Regulatory Cooperation in CETA and Its Implications

Ronan O´Brien

Summary

Regulatory cooperation in CETA potentially has profound implications. It is part of a broader international effort by the rich countries and their companies to control domestic regulation through international trade agreements that override domestic laws. In CETA, regulatory cooperation in principle covers a vast area, both goods and services, trade but also investment. Its formal objectives include prominently the elimination of 'unnecessary barriers to trade and investment'; the application of the 'necessity test' on foot of this criterion has previously resulted in a push towards deregulation. Putting the two sides' regulations in competition after mutual recognition of potentially quite different regulations is likely to lead to a race to the bottom in a number of those areas. Both sides commit themselves to regulatory cooperation in general though in specific cases one side may refuse to cooperate.

The CETA institutions and mechanisms are in practice likely to result in large business driving the agenda for cooperation. The close relationship of Canada to the US regulations and standards and the involvement of most large US companies in Canada will potentially open the door for US companies to influence significantly regulatory cooperation in CETA and achieve a substantial part of the objectives of TTIP. The almost complete absence of any provision for basic democratic features in the operation of CETA, including access to information, participation, openness to the public, public debate, or control, in a process which appears heavily oriented towards the large private interests being regulated, is likely to give those even greater influence in regulation than at present, at the sacrifice of the wider public interest in many cases.

The additional burden on regulators from the various additional steps due to CETA – and even more after its potential extension to other countries – in the context of diminished regulators' resources, is likely to lead to delays, blockages and a reduction in the standard of regulation. Use of the precautionary principle is likely to be under great pressure in a number of areas. All of this is done in the name of economic gains which turns out in the official impact assessment to be vanishingly small – the equivalent of a cup of coffee every three months for each European in terms of disposable income – and if the omitted effects of constrained regulations in the areas of climate change, finance, toxic chemicals, etc., were included in a more thorough assessment, then the economic evaluation would turn out to be heavily negative. Locking such provisions into an international treaty would turn out to be the height of folly.

This is extremely dangerous in an era when major action is needed on climate change and financial regulation, and with nanotechnologies, endocrine disrupting chemicals, synthetic biology, taking air pollution much more seriously, pharmaceutical pricing, data protection, and the problems with the chemical agriculture model, to mention only some of the regulatory challenges to be faced. It is clear that the public interest desperately needs to be given top priority in this situation and appropriate regulation not put out of democraticreach.

Zusammenfassung
Ronan O´Brien, ein unabhängiger Wissenschafter in Brüssel, beschreibt in seinem Paper mit dem Titel „Moving Regulation Out Of Democratic Reach: Regulatory Cooperation in CETA and its Implications“ die Hintergründe und die Auswirkungen der sogenannten Regulierungskooperation im Rahmen des Handels- und Investitionsabkommens zwischen der EU und Kanada. Er erläutert die Bestimmungen im entsprechenden Kapitel und übersetzt uns ihre die Bedeutung. Mit dem Ziel unnötige Handelshemmnisse zu beseitigen, wird das Deregulierungsprojekt, das wir auch innerhalb der EU beobachten, vorangetrieben. Durch die Regulierungskooperation werden zusätzliche Instanzen geschaffen, die schließlich zu einer Verlangsamung und Behinderung der Regulierungsentwicklung führen und schließlich in einem Rückgang der Regulierungsaktivitäten münden werden. Im Ergebnis wird CETA internationalen Konzernen noch mehr Einfluss im Gesetzwerdungsprozess einräumen als dies schon bisher möglich ist.

Introduction

CETA is one of a set of new trade agreements under negotiation or ratification that have regulations – and regulatory cooperation – at their core. These include most prominently TTIP, TPP and TiSA. Together, they constitute a 'coalition of the willing' strategy by the rich countries and their large companies to promote their interests and issues in international trade negotiations,[1] and CETA needs to be considered in this context. The CETA regulatory cooperation chapter presents this approach at the beginning: 'The Parties will … approach regulatory cooperation in a way that is open to participation by other international trading partners'.[2] This no doubt refers in the first instance to the United States, the most important current or anticipated future partner in international regulatory cooperation for both, and also to the agreements just mentioned.

Regulatory cooperation in this context has two main features: interaction between the parties to align regulations, and adopting a common set of 'good regulatory practices' which has been codified by the OECD, based initially on the US practices.[3] Both features are present in CETA. The cooperation is between officials but with a major role for 'stakeholders', especially companies, who are generally the dominant and often it appears the only source for specific ideas on the regulatory cooperation to be pursued.[4]

Canada and its relationship with the US

Another important feature that needs to be borne in mind when looking at regulatory cooperation under CETA is the close relationship between Canada and the US, some related characteristics of Canadian regulation, and how these might affect the CETA. As nearly three-quarters of Canada's exports of goods and services go to the United States, compared to 9% to Europe, it is not surprising that it has adopted US standards and in many cases its regulatory approaches.[5]

A Canadian researcher points out that Canada follows the US approach in its regulation and regulatory cooperation, with its science- and risk-based management being based on the US approach in many areas, its use of industry-driven standards, and an emphasis within international trade agreements on the mutual acceptance of the equivalence of regulations, of standards and conformity assessment processes.[6]

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[1] M. Froman, 'We are at the end of the line on the Doha Round of trade talks', *Financial Times*, 13/12/15. European Commission, *Trade for all: Towards a more responsible trade and investment policy*, October 2015, pp. 28-30. Correspondingly, the rich countries have abandoned the multilateral trade negotiations in the Doha Development Round under the WTO at the Nairobi meeting in December 2015; these had given prominence to the issues of most interest to developing countries such as agriculture and food security. Khor (South Centre), 'Shaky State of North-South Relations', Triple Crisis, 2/8/16, http://triplecrisis.com/shaky-state-of-north-south-relations/

[2] Article 21.2.3.

[3] P. Mumford, 'Regulatory Coherence: Blending trade and regulatory policy', *Policy Quarterly*, Nov. 2014, pp. 3-9; US Presidential Executive Order 13609 of May 1, 2012, *Promoting International Regulatory Cooperation*; US *Trade Priorities and Accountability Act of 2015*, Public Law 114-26, p. 326.

[4] As for example in the US-Canadian Regulatory Cooperation Council; see http://www.trade.gov/rcc/documents/PCO_Newsletter_Feb_2016_EN.pdf, pages 1-3.

[5] This is certainly not to say that this happens in all cases, with considerable differences in financial regulation, for example. 72% of Canadian export of goods and services go to the US (year 2014); source: Statistics Canada.

[6] C. Viju, 'CETA and Regulatory Cooperation: SPS and TBT', presentation at Canada-EU Strategic Dialogue (Regional Trade Agreements and EU Trade Policy), slide 8, McGill University, Montreal, October 31, 2014. www.mcgill.ca/fortier-chair/files/fortier-chair/2014_ceta_viju_crina.ppt

The US and Canada have had a Regulatory Cooperation Council since 2011, and have been working on processes of regulatory alignment in areas such as chemicals, nanotechnology, pesticides, pharmaceuticals, various aspects of transport, food, veterinary drugs, and animal health.[7]

Most US large companies have subsidiaries in Canada. However, that does not mean that they can export all of their companies' products to the EU under CETA; that depends on the CETA rules of origin. Nevertheless, it appears that they could potentially engage in a significant part of the CETA regulatory cooperation as some of that would address the conditions for future production, investment or services provision, and prominent US companies such as Monsanto, Eli Lilly, Johnson & Johnson and Google been have been engaging in the promotion of international regulatory cooperation by Canada.[8]

Canada has been highly litigious in the WTO on regulations for goods (SPS and TBT, the key WTO areas that have sought to constrain regulation along with the GATS for services), being present in one-third of all cases in this area (i.e. in 11 cases) and the complainant in all of these, with the EU the defendant in 6 of them.[9] In two of the most high-profile cases in the WTO, Canada joined with the US against the EU, on beef growth hormones and on GMOs. The EU argued on the basis of the precautionary principle, and lost both.[10]

These WTO rulings will affect those produced by the dispute panel in the CETA. The text on state-to-state dispute settlement arrangement in CETA says under its 'general rule of interpretation' that '[t]he arbitration panel shall … take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body.'[11] While 'take into account' does not mean it has to absolutely follow these, such panels are likely to be very reluctant to deviate significantly from them, even more so in a broader context when CETA is extended to a larger group of countries.

Further, the state-to-state dispute system – in this case CETA's panels – plays a crucial role in the interpretation of often vaguely-worded trade treaties.[12]

Regulatory cooperation in CETA

Regulatory cooperation in CETA in principle covers a vast area. It includes both goods and services, and not only trade but also investment, and potentially includes many domestic regulations that have little or no relationship to trade. No limit is indicated, for example there is no mention in CETA that the regulations included should have a significant impact on trade.

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[7] http://www.trade.gov/rcc/

[8] Canadian Chamber of Commerce, *Canada's Next Top Trade Barrier: Taking Regulatory Cooperation Seriously*, April 2016. These companies were prominent sponsors of this report.

[9] H. Prince: 'The Elimination of Regulatory Barriers to Trade and the CETA: The case of SPS and TBT measures', presentation at Canada-EU Strategic Dialogue (Regional Trade Agreements and EU Trade Policy), McGill University, Montreal, October 31, 2014. www.mcgill.ca/fortier-chair/files/fortier-chair/2014_ceta_prince_herve.pptx

[10] EC-Biotech case: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm; EC-Meat Hormones case: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

[11] Article 29.17. General rule of interpretation.

[12] A. Lang, *World Trade Law After Neoliberalism: Re-imagining The Global Economic Order*, 2011, p. 164-5.

The formal objectives of regulatory cooperation are of great importance, as all the regulatory cooperation activities under CETA are legally bound to follow them. Three main objectives are presented: to eliminate unnecessary barriers to trade and investment; to enhance the competitiveness, efficiency and innovation of industry; and to improve regulatory processes (including the use of 'best practices').[13] The more detailed elaboration of the objectives includes a further one, 'to contribute to the protection of human life, health or safety, animal or plant life or health and the environment';[14] however, this is stated in the weaker form of 'contributing to protection', as opposed to, say, improving the protection.

Under these main objectives, subsidiary objectives such as reducing unnecessary regulatory differences and reducing costs 'whenever possible' are emphasised, and are likely to have an important effect.

The two sides 'are committed to further develop regulatory cooperation',[15] so it would appear to be compulsory. While apparently compulsory in general, in specific cases one side may refuse to cooperate, though it would have to explain the reasons.[16] Seen in the broader context of an agreement extended later to others, however, such a refusal will usually have a price to pay, especially when dealing with a powerful and unified actor such as the United States.[17]

A very detailed list of the intended 'regulatory cooperation activities' is given, 19 in all, with 17 sub-items also elaborated.[18] These include informing the other side about 'contemplated' regulatory actions 'at the earliest stage possible', consulting and sharing information with the other party throughout the regulatory development process also beginning as early as possible, potentially having concurrent or joint risk assessments and impact assessments, and providing the actual text of the proposed regulation to the other Party to allow time for 'interested parties' (in practice very likely large companies in an international context such as this) to provide written comments, following the US practice. Also, when regulating, each Party is to consider the regulatory measures or initiatives of the other party on the same or related topics.[19]

Two key regulatory cooperation mechanisms in CETA to address existing regulations are recognition of the equivalence of both sides' regulations and mutual recognition.[20] With major pressure to recognise the regulations of the other side in particular areas under CETA, it is vital to know in how exactly these would be done, how public they would be, and how much influence different actors will have on them. Taking the first of the two, the recognition of equivalence of regulations on both sides of the Atlantic, no information appears to be given on how this will be done. For SPS (food safety and animal and plant health), a very large and particularly controversial regulatory area where there are major differences in regulations between the two sides ranging from the large-scale use of GMOs to animal welfare conditions, the text simply says the principles and guidelines on equivalence are 'to be agreed

[13] Repeated in Articles 21.2.4 and 21.3. The wording is slightly different between the formulations in the two articles; an attempt is made here to capture the essence of both.

[14] Article 21.3.

[15] Article 21.2.4.

[16] Article 21.6.

[17] On the relative power of the US compared to the EU in such a context cf. P. Defraigne, 'Choosing between Europe and the TTIP', Madariaga Foundation paper, November 2013.

[18] Article 21.4.

[19] Article 21.5.

[20] Articles 21.2.4, 21.3d, 21.4g and 21.4r.

at a later stage';[21] this could be done through an opaque process if the general approach in the CETA text is followed, as discussed below.

Even more concerning is mutual recognition of regulations, i.e. where a process of recognition of equivalence is not done. According to a recent study, just two existing international agreements include mutual recognition of regulations, the very specific cases of the EU Single Market and the Trans Tasman agreement between Australia and New Zealand.[22] Both are done under very specific conditions. In the first of these, which applies to technical regulations, a floor to the regulatory quality is guaranteed by the use of EU standards; in the second, the similarity of regulatory systems and their cultural and historical background mean that the regulator differences are generally small. However in CETA neither of these two conditions is present, potentially leading to mutual recognition of regulations that are quite different. And no limiting of this to particular kinds products or services is indicated. Unfortunately, again information on how the recognition would be done is absent.

Putting regulations of different quality in competition with each other will mean the lower quality regulations will often drive out the good since normally they involve lower costs for producers.

All of the CETA activities mentioned above are alongside the normal regulatory process that has to be undertaken by regulators. For the EU, it would all take place before the regulatory proposal is adopted by the Commission and formally put to the European Parliament and Council.

Apart from equivalence and mutual recognition, the insistence on the use of international standards in regulatory cooperation in CETA[23] is likely to produce a further downward pressure on regulation, as these often give a lower level of protection than the existing standards used by either side. In practice in international trade international standards tend to become a ceiling for protection and not the floor that regulations and related standards are intended to be.[24] Further, ECOS has pointed to the lack of inclusiveness and openness in the way international standards bodies work and that sometimes they result in a standard that is the lowest common denominator.[25] The international food standards body Codex has often been mentioned as a problematic example in this context.

The regulatory cooperation institutions and their implications

The regulatory cooperation would be done largely through the eight Specialised Committees, covering essentially all the areas for regulations under CETA, from 'Trade in Goods' to 'Government Procurement'. There are to be four more specialised subcommittees under these as well.[26] In addition there are to be three Dialogues involving regulatory cooperation,

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[21] Annex 5-D.

[22] A. Correia de Brito, C. Kauffmann, J. Pelkmans, 'The contribution of mutual recognition to international regulatory co-operation', *OECD Regulatory Policy Working Papers*, No. 2, OECD, 2016.

[23] Article 21.4r. Also Article 2.5 of the WTO TBT Agreement that is to become part of CETA.

[24] F. Fontanelli, 'ISO and Codex Standards and International Trade Law', *International and Comparative Law Quarterly*, October 2011, pp 895–932.

[25] European Environmental Citizens Organisation for Standardisation (ECOS) Position Paper, 'Mutual Recognition of Standards in TTIP: Another Threat to Citizens' Welfare and the Environment?', January 2016, p. 11.

[26] Article 26.2.

including one on Biotech Market Access.[27] All of these Committees and Dialogues do regulatory cooperation. All report to the CETA Joint Committee, the top institution of the CETA. This Joint Committee could in the future decide to set up additional specialised committees.

All the Specialised Committees would prepare draft decisions for the Joint Committee, and make their own decisions when empowered to do so by the CETA.[28] It seems likely that the decisions they propose to the Joint Committee, having been agreed between the two Parties' representatives and with the help of business on both sides, are very likely to be approved by it, which would give the Specialised Committees considerable power in practice.

The Regulatory Cooperation Forum (RCF) is one of the Specialised Committees. It is to promote regulatory cooperation in general but also in specific sectors; it would discuss regulatory policy issues raised by consultations that each side would have with 'private entities' (business, think-tanks, consumer organisations, NGOs and academia are mentioned). The RCF would be composed of officials from the two parties and 'other interested parties' (no information given on these) would be invited to its meetings; it would also review progress on regulatory cooperation.

The detailed work in specific sectors and on specific initiatives is likely to be the most important and significant regulatory cooperation activity under the CETA.[29] However no information is provided on the means by which this would take place; from other indications such as TTIP, it seems likely that there would be sectoral working groups for these, with major involvement by international business and especially by businesses that are implanted on both sides of the Atlantic.

The question of who will provide the ideas for new initiatives on regulatory cooperation is very important, as it is likely to drive the agenda. In the equivalent US-Canadian body, the US-Canada Regulatory Cooperation Council (established in 2011), the 'stakeholder submission of ideas for Canada-US regulatory cooperation' is clearly aimed at business only and takes place in relation to sectors.[30] It seems likely that this will also be the case for CETA given the main formal objectives are to reduce barriers and to increase efficiency, etc., of industry; it seems likely that no other stakeholder would have the interest and the considerable resources needed to see a proposal through to success. This will affect very much which issues are addressed and the perspective from which they are examined in regulatory cooperation under CETA.

The effect on regulatory processes

The regulatory cooperation activities in CETA amount to a substantial number of additional steps for regulators when they are 'contemplating' regulations, bringing in new regulations, making amendments to them, engaging in reviews of existing regulations when proposed by the other side, and reviewing the regulatory processes of both sides.[31]

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[27] Chapter 25. Biotech Market Access in effect means access of Canadian GM products to the EU market. This is a continuation of a process established after the WTO panel ruled against the EU in the *EC-Biotech* case (see below).

[28] Article 26.2.4.

[29] The sectoral work is mentioned in Articles 21.3.c(iii), 21.4r and 21.6.2d.

[30] http://www.trade.gov/rcc/documents/PCO_Newsletter_Feb_2016_EN.pdf, pages 1-3.

[31] Article 21.4.

While doing these they will have to consider whether the regulations they are preparing are the least trade-restrictive and investment-restrictive, and unnecessarily different from the other side's, even when the other side has a different philosophy of regulation, which it will in quite a number of areas under CETA. If they contravene these restrictions, their side may have to face a case before the dispute tribunal. These restrictions can be summarised as the famous 'necessity test'; its area of application is however enlarged in CETA to investment and services as well as goods.

The actual application of the necessity test by WTO tribunals has led to the penalising of regulations even when they did not discriminate against imported goods. One experienced academic author puts it this way: 'The WTO's dispute settlement system is tilted toward market liberalization in that it creates opportunities to challenge government measures as trade barriers, but not to challenge them for providing insufficient regulatory protection. … Under the "necessity" test, WTO dispute settlement panels ask whether there is a less trade restrictive alternative available that meets the regulatory objective, potentially posing an additional force for deregulation.'[32] Further, the way the necessity test is actually used by WTO dispute panels also leaves public authorities uncertain as to whether their regulatory measures will be judged against,[33] which seems likely to further discourage stronger regulation.

Even though the application of the necessity test by dispute panels is supposed to consider if a less restrictive alternative (that has been proposed by the complainant) is both reasonably available and meets the regulatory goal of the defending country, an examination of the WTO judgements states that this was not properly done in various cases.[34] The author states that in these cases the alternative was accepted by the dispute panel, without anything like an adequate assessment of whether it was actually feasible or met the domestic regulatory goals of the country being charged.[35]

In the field of services, the necessity test has led to the seizing up of negotiations to conclude the GATS as a number of countries refused to let their services be exposed to this test.[36]

The (state-to-state) dispute system in CETA has no appeal, unlike the corresponding WTO system, compounding the problems. Instead, '[t]he ruling of the arbitration panel in the final panel report shall be binding on the Parties' and 'The responding Party shall take any measure necessary to comply with the final panel report. No later than 20 days after the receipt of the final panel report by the Parties, the responding Party shall inform the other Party and the CETA Joint Committee of its intentions in respect of compliance.'[37]

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[32] G. Shaffer, 'How the World Trade Organization shapes regulatory governance', *Regulation & Governance*, (2015) 9, p. 4.

[33] F. Fontanelli, 'Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about 'Weighing and Balancing'', *European Journal of Legal Studies*, 5(2) (Autumn/Winter 2012/13), p. 55.

[34] Under the rules it is up to the complainant to propose a less trade-restricting alternative.

[35] G. Kapterian, 'A Critique of the WTO Jurisprudence on 'Necessity'', *International & Comparative Law Quarterly*, 2010, 59(1), pp. 89-127.

[36] E.g. P. Delimatsis, 'The Principle of Necessity in the WTO – Lessons for the GATS Negotiations On Domestic Regulation', Tilburg Law School Discussion Paper, December 2014.

[37] Articles 29.10 and 29.12 respectively.

All of this, and the planned extension of the CETA and related agreements to a large number of countries, including the USA, will undoubtedly result in a heavy additional burden on regulators who are already under major pressure. This will inevitably result in delays, blockages and a reduction in the standard of regulations. In the EU, it is taking place in a context of more or less continual staff reductions both in the Commission and in the regulatory support agencies. We can see what has happened in the United States in a comparable situation, where from the mid-1990s the mandating of additional regulatory steps including of analysis and consultations, and in a context of reduced budgets, resulted in major delays, a reduction in the quality of regulations, and a failure to keep up with a changing world.[38]

Democracy and control

Two fundamentally different processes for regulatory cooperation are presented in CETA. In one, the importance of transparency, public access to information, and public participation is emphasised, and a joint Civil Society Forum with 'a balanced representation of interests' is to be established. However, this is only for the two areas where there is no provision for enforcement or penalties (i.e. for Labour and Environment as well as their joint chapter, Sustainable Development).[39] In all other areas, i.e. the vast bulk of CETA, where there is enforcement and penalties (under the Dispute Settlement mechanism), there is a complete absence of all these features, with the minor exception mentioned below.

To be more specific, the process of regulatory cooperation put forward in the CETA text, despite listing in great detail the regulatory cooperation activities (Article 21.4), is striking for a complete absence of any mention of basic democratic features, such as publication of agendas or reports of meetings, lists of participants in meetings, openness of meetings to the public, availability of documents, and representativeness of those invited to participate in meetings, with the limited exception of possible consultation as discussed below.

Further, while the word 'transparency' has been heavily emphasised on the EU side in relation to trade agreements,[40] a striking feature of the regulatory cooperation in CETA is its absence. There is indeed a full chapter on Transparency (chapter 27). However, this does not refer at all to transparency of the activities of the CETA itself, but instead to transparency for companies of the domestic regulatory activities of each Party.

The one limited exception to this broad gap is an article 'Consultations with private entities', which says that '[i]n order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties *may* consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations' (emphasis

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[38] T. McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival*, 2013, chapter 16.

[39] e.g. 'The Parties stress the importance of ensuring transparency as a necessary element to promote public participation and making information public within the context of this Chapter' (Art 22.2). 'The Parties stress the importance of ensuring transparency as a necessary element to promote public participation and making information public … The Committee on Trade and Sustainable Development shall promote transparency and public participation. … any decision or report of the Committee … shall be made public …'. It will establish a joint Civil Society Forum with 'a balanced representation of relevant interests'. (Chapter 22). The labour and environmental parts of such trade agreements have however been widely criticised by different actors for their ineffectiveness.

[40] For example, it appears 35 times in the 31 pages of the EU's 'Trade for All' policy document. European Commission, *Trade for all: Towards a more responsible trade and investment policy*, October 2015.

added).[41] However, such consultation, which is also optional, would not at all be an adequate substitute for the absence of public information, access to and full participation in the workings of the CETA itself, which is needed for the essential public debate to take place on regulations that have major effects on the public.

The functions listed for the "contact points" in this area indicate that they will in effect be the secretariat for the Regulatory Cooperation Forum. In the case of the EU, this contact point is the DG for Internal Market, Industry, Entrepreneurship and SMEs. Without a constraining text, this is likely to lead to an over-representation in consultations of the normal clients of this DG, i.e. business, such as took place in a gross form in the preparation for TTIP, where 94% of the consultation meetings on the EU side were with business.[42]

The CETA Joint Committee is to be the top body of the CETA. All the Specialised Committees are to report to it, and will make recommendations for decisions. Its members will be officials from both sides, and it will be co-chaired by the Minister/Commissioner of Trade on each side. Again, no indication is given of any transparency. The Joint Committee has the power to take decisions over a wide range of matters; these include amendments to CETA, 'subject to the completion of any necessary internal requirements and procedures'.[43]

Without the above-mentioned democratic aspects that make public debate possible – on the issues of the greatest public importance that will be addressed – being ensured by being written into the Agreement, they are likely to be neglected, especially as even with the best will in the world, for over-busy technocrats further weighed down by the additional processes of this Agreement, it will often constitute significant time spent.

The implications would appear to be profound. Regulatory decisions of great importance will be strongly affected by the activities of the Specialised Committees and by the CETA Joint Committee. A major neglect of provision for democratic access, participation, debate or control over these in a process which appears heavily oriented towards the private interests being regulated is in practice likely to give them even greater influence in regulation than at present, at the sacrifice of the wider public interest in many cases.

The likely consequences of CETA

This section addresses three additional issues to those mentioned above: the implications of CETA for the different approaches to regulation on both sides of the Atlantic; how the precautionary principle is likely to fare under regulatory cooperation; and the validity of the economic argument for CETA in the light of regulatory cooperation.

First, as mentioned above, Canada's approach to regulation has a number of similarities with that of the United States. The most basic difference between Europe and the United States in regulation is that the United States has in general (though not in all cases) a lower level of regulation but punitive damages in the event of negligence by the product manufacturer that results in harm, as opposed to the European approach which emphasises a higher level of regulation to protect against harm.[44] Canada is much more similar to the United States in

[41] Article 21.8.

[42] http://corporateeurope.org/trade/2013/09/european-commission-preparing-eu-us-trade-talks-119-meetings-industry-lobbyists

[43] Article 26.3.

[44] E.g. P. Defraigne, audition at Wallonian Parliament, 11th December 2014.

regulation and its use of tort law, though the level of damages is much lower.[45] Tort law in the United States – used for suing in civil courts for example with class action suits – has been very much weakened in recent decades, contributing significantly to a considerable overall weakening of the regulatory system there.[46] To align regulations with the generally lower level that obtains in the United States and Canada without a corresponding system of developed tort law is likely to bring the worst of both worlds.

Second, the precautionary principle. A precautionary approach is indeed mentioned in CETA. However, this does not to refer to regulations that would protect people or the environment against potential harm, but only 'the precautionary seizure of property of the alleged infringer' of intellectual property.[47]

While the words 'precautionary principle' or similar do not appear in CETA, there is one piece of text that contains a major version of it, though without using its name. The chapter on Trade and the Environment includes an article that says: 'The 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.' This text is from the Rio Declaration of 1992, the main reference point internationally for a statement of the precautionary principle.

An important issue is what status this article has in the CETA as a whole as well as for the environment more specifically. As mentioned above Environment is one of the two chapters of CETA, along with Labour (and their combined chapter, Sustainable Development), that are not legally enforceable and have no penalties. Further, key judgements of the WTO tribunals have been made against the use of the precautionary principle, as mentioned below, and this will strongly affect its interpretation in CETA.

The regulatory cooperation in biotechnology in CETA takes a stand against the precautionary principle, stating that one of the parties' 'shared objectives' for cooperation in that field is 'to promote efficient science-based approval processes for biotechnology products', which is the formulation often used for the US and Canadian approach in this field and some others that is the opposite of that principle, requiring scientific proof before regulating and denying the application of the hazard approach and the conditions of potentially serious irreversible harm. It goes against the European Commission's Communication on the precautionary principle (2000), which among other statements on the principle, incorporated the Rio Declaration's formulation quoted above.[48]

In important trade cases involving the EU – notably where it was taken to the WTO dispute settlement body over bans on imports of beef raised with growth hormones and over refusals of GMO approvals – the EU argued especially on the precautionary principle, including that as it had been widely adopted, such as in certain international conventions, and so had become a customary or general principle of international law, and hence by the Vienna Convention on treaties it should be taken into account. The WTO bodies (Appellate Body and panels) have not accepted that it is a customary or general principle of international law – they have refused to take a position on that – but said that even if it were, the precautionary principle

[45] L. Klar, 'The Impact of U.S. Tort Law in Canada', *Pepperdine Law Review*, 28(2), 359-374, 2011.

[46] T. McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival*, 2013, chapters 15, 16.

[47] Article 20.37.

[48] European Commission, *Communication on the Precautionary Principle*, COM(2000)1, 2000, p. 11.

'would not override' other parts of the SPS Agreement.[49] This has major consequences: since the precautionary principle does not override other parts of the agreement, this means that in practice they override it, as the decisions in those cases make clear. The interpretation of CETA is likely to follow this WTO jurisprudence.

The failure to include the precautionary principle in CETA does not augur well for its use under the CETA. The EU has been playing it down internally, it has been sharply downgraded in the EU's Better Regulation Package (2015), and as opposed to the previously key position it had held in the EU impact assessment guidelines that play a central role in its regulation, it has virtually disappeared in the latest version.[50] The difference with the CETA, however, is that any change brought there for the EU in the role of the precautionary principle will in practice be almost impossible to undo.

The fact that industry associations and companies in areas where the precautionary principle would apply – such as the leading world firms in biotechnology and related pesticides and herbicides (such as Monsanto and Syngenta as individual sponsors of the report and the other international companies in the Canadian industry association also as sponsors) – are publicly arguing for international regulatory cooperation for Canada would appear to imply that the greatest danger to the expansion of their business, the precautionary principle, is unlikely to do well under regulatory cooperation.[51]

Third, the huge apparatus that CETA involves is to be launched in the name of an economic benefit which, when examined, turns out to be vanishingly small according to the official joint impact study by the EU and the Canadian government, especially for the EU but would be miniscule for Canada too. As a result of CETA, every person in the EU would have a gain in disposable income of €0.28 per week on average, enough to buy a cup of coffee every three months. In the case of Canada, the same figure is €2.74 per week (4.0 Canadian dollars), enough for a little over one cup of coffee per week there.[52]

The impact study, as with similar trade impact studies, makes the assumption in the modelling the impacts that regulations are pure costs for business and have zero benefits.[53] The effect of CETA on the *benefits* from regulations is left entirely out of the picture. If these were to be included in a realistic way, the very large economic *losses* – that are likely from loss of democratic control over regulation in areas such as climate, finance, toxic chemicals, public health, food safety, and many other areas – would show a major net economic loss from CETA. The damage costs alone in all these areas would vastly outweigh the economic gains estimated by the impact study.

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[49] A. Lang, op. cit., pp. 150-4. Links to case details at WTO in n. 10 above. The cases are *EC- Hormones* and *EC-Biotech.*

[50] In the Better Regulation Package of May 19th 2015.

[51] Canadian Chamber of Commerce, *Canada's Next Top Trade Barrier: Taking Regulatory Cooperation Seriously*, April 2016.

[52] European Commission and Government of Canada, *Assessing the costs and benefits of a closer EU-Canada economic partnership*, 2009. Increase in GDP: p. 167. Disposable income for EU: Eurostat; for Canada: OECD. The reasonable approximation is made that the % increase in GDP and disposable income would be approximately the same. Disposable income was highlighted as the key indicator of how people would benefit from the TTIP in the official EU impact study; on closer examination it also turns out to be miniscule.

[53] ibid. p. 41.

Conclusion

CETA, with regulations and regulatory cooperation in its core, is part of a larger effort by the rich countries and their companies to impose – by international treaty – constraints on the domestic regulations of countries, regions and local authorities. Regulatory cooperation intervenes in the way regulations are done. In the CETA numerous potential additional steps will be added to the regulatory process, in a fundamentally non-transparent way and through a process that will give large business a dominant position due to the official objectives of regulatory cooperation (notably to reduce regulatory differences and to mutually recognise regulations), to its superior resources and lack of public debate.

Added to the already existing increase in pressures on regulators, CETA will inevitably have the effect of a major slowing, blocking and withdrawing of regulations. Legal threats hanging over regulators in the preparation of new and updated regulations, and using a WTO jurisprudence which has already given key decisions against the precautionary principle, before a dispute body with no avenue for appeal, is likely to lead to a substantial regulatory chill.

Democratic involvement in regulation would be fundamentally sidelined at crucial stages, with all these processes taking place before a regulation is formally proposed on the EU side to the European Parliament and Council, if indeed it gets that far. All of this is done in the name of an economic benefit which turns out in the official impact assessment to be vanishingly small especially for the EU, and if the omitted effects of constrained regulations in the areas of climate change, finance, toxic chemicals, etc., were included in a more thorough economic assessment as they should have been, then the economic effect would undoubtedly turn out to be heavily negative. Locking such provisions into an international treaty would turn out to be the height of folly.

Further, approval of CETA is likely to prepare the ground for approval of TTIP. Both have essentially the same objectives in the core area of regulatory cooperation and most of the same methods of achieving them, as well as a potential openness to many of the same participants. Both would to contribute to the realisation of the broader effort to fundamentally constrain domestic regulation on a wide international scale.

One of the arguments put forward for regulatory cooperation in international trade and investment agreements such as CETA is that each side can learn from the other and thus achieve regulations that attain more of the benefits of regulation, e.g. more effective pollution controls or safer finance. Such cooperation does not require a legally compulsory international treaty.

To sum up, CETA hugely expands the constraints on regulation by insisting strongly that they be the least trade- and investment-restrictive while achieving the regulatory goal. We have mentioned the critique of how this actually operates in practice under the WTO tribunals, and how another analysis viewed it as inherently de-regulatory. This is extremely dangerous in an era when major action is needed on climate change and financial regulation, and with nanotechnologies, endocrine disrupting chemicals, synthetic biology bringing organisms that have not existed in nature and with unknown properties, the need to take air pollution much more seriously, pharmaceutical pricing, ‘net neutrality’, data protection, and the problems with the chemical agriculture model, to mention only some of the regulatory challenges to be faced. It is clear that public interest desperately needs to be given top priority in this situation and appropriate regulation not put out of democratic reach.

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