

International regulatory cooperation and the public good

How “good regulatory practices” in trade agreements erode protections for the environment, public health, workers and consumers



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Imprint

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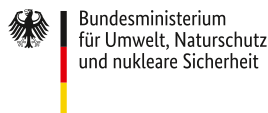
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The responsibility for the content of this publication lies with the author.

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Glossary

APEC	Asia-Pacific Economic Cooperation
CBI	Confidential Business Information
CFIA	Canadian Food Inspection Agency
CEO	Corporate Europe Observatory
CERT	Canada Europe Roundtable for Business
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CEUTIA	Canada EU Trade Investment Association
COOL	Country of Origin Labelling
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUSFTA	Canada-U.S. Free Trade Agreement
EC	European Community (not European Commission)
ECP	Electronically controlled pneumatic braking system
ECTI	EU-Canada Trade Initiative
EFSA	European Food Safety Authority
EPA	Environmental Protection Agency
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organism
GRP	Good Regulatory Practices
HPR	Hazardous Products Regulations (Canada)
LLP	Low-level Presence (usually referring to non-approved GMOs in grain shipments)
MOU	Memorandum of Understanding
MRL	Maximum Residue Level
NAFTA	North American Free Trade Agreement
NTM	Non-tariff Measure
OECD	Organisation for Economic Cooperation and Development
OMB	U.S. Office of Management and Budget
OIRA	U.S. Office of Information and Regulatory Affairs
PMRA	Canadian Pest Management Regulatory Agency
RCC	Canada-U.S. Regulatory Cooperation Council
RCF	EU-Canada Regulatory Cooperation Forum
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals (EU regulation)
RIA	Regulatory Impact Analysis
RPS	Regulatory Partnership Statements (EU-Canada)
SDS	Safety Data Sheet
SME	Small and medium sized enterprise
SMS	Safety Management System (Canada)
SPS	Sanitary and Phytosanitary Standards
TBS	Treasury Board Secretariat (Canada)
TBT	Technical Barriers to Trade
TEC	Transatlantic Economic Council
TIEA	EU-Canada Trade and Investment Enhancement Agreement
TTIP	EU-U.S. Transatlantic Trade and Investment Partnership
UAW	United Auto Workers
USMCA	United States–Mexico–Canada Agreement (U.S. name for the renegotiated NAFTA)
WTO	World Trade Organisation

1. Introduction

Regulation gets a bad name in much of the world today. Business lobbies have successfully equated it in many people's minds with just so much "red tape". Government-imposed rules on how things are made, how services are delivered and what products have no place on the market at all are said to hamper business competitiveness. Precautionary measures aimed at safeguarding people's health, or the health of fragile water bodies and ecosystems, are labelled unfair barriers to trade and investment—a claim made increasingly over the past quarter-century of corporate globalization.

At the same time, the need for stronger, and more precautionary, regulations has never been clearer. New science on the effect of chemicals on human and animal bodies strongly suggests we should be much more strictly controlling certain compounds in pesticides, cosmetics and other products—or taking those products off the market while we fully assess their risks. Our oceans are awash with plastic products nobody needs. And it's now obvious that market-based carbon trading schemes cannot, on their own, lower greenhouse gas emissions enough for

countries to meet their Paris Agreement targets. More forceful action will be needed on all these fronts—even if that action creates new trade barriers.

Since the 1995 founding of the World Trade Organization (WTO), environmental NGOs and public interest watchdogs have warned that overly restrictive language in the WTO agreements unfairly constrains the policy options available to governments for conserving animal and plant habitats, eliminating pollution, reducing greenhouse gas emissions and taking toxic chemicals out of our consumer products, among other public interest priorities. While some progress has been made to remedy this imbalance in newer free trade agreements—through the inclusion of environmental, labour and sustainable development chapters, for example—big business has lobbied successfully for other, less-discussed provisions and chapters that institutionalize an ideology of deregulation.

This report focuses on the significant threats to precautionary environmental, labour, consumer and public health policy from regulatory cooperation and "good regulatory practices"

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Plastic products increasingly pollute seas and beaches Photo: Dustan Woodhouse on Unsplash

chapters within the EU-Canada Economic and Trade Agreement (CETA), US–Mexico–Canada Agreement (USMCA), and the currently parked EU-U.S. Transatlantic Trade and Investment Partnership (TTIP).¹ It will be argued that, while international regulatory cooperation is often pitched to governments and the public as innocuous or beneficial, the terms under which this cooperation takes place belie its real function as a further entrenchment of corporate bias in the globalization project. “Good regulatory practices” can, and are intended to, delay or distract the public and decision-makers from introducing more democratic and sustainable economic and social policy.

Typically, regulatory cooperation and “good regulatory practices” chapters in trade agreements require governments to institutionalise voluntary or mandatory arrangements through which public servants in different countries can and in some cases must work together, usually in close collaboration with industry, to reduce or eliminate differences in domestic laws, policies, standards, regulations and testing procedures—including health, environmental and consumer protections—that are said to impede trade. This trade bias in the regulatory process has roots in U.S. law, but it has since been elaborated in a set of regulatory best practices developed within the Organisation for Economic Cooperation and Development (OECD) and at the WTO.

One important tenet of “good regulatory practice” is that regulation should be based on “risk management”, meaning that its objective is limited, and it is justified by currently available scientific evidence. As the risk-based regulatory framework has evolved, it has come to also require regulators to minimize the costs, or “burdens” on business, consider how they might regulate in ways that encourage trade and innovation, and adopt international standards or practices wherever possible. These tenets attempt to strip political or ethical considerations from government rule-making and are, in a fundamental way, directly opposed to the precautionary principle, which states: *“When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof”* (emphasis added).²

“Good regulatory practices” (GRP) are therefore, at once, an ideology of how and when government should intervene in the market (to protect people or nature, for example), a set of institutional arrangements for regulating in a pro-business way and in cooperation



Protest against Free Trade Agreements in Germany
Photo: CETA und TTIP stoppen on flickr

with other governments, and a new privileged space for multinational corporations to intervene in national rule-making, frequently and at the earliest stages. This report begins by exploring the roots of “good regulatory practices” ideology in the WTO, OECD and U.S. law. It then examines how GRP-based regulatory cooperation has functioned between Canada and the United States and compares that to the expected functioning of similar bodies in the concluded CETA and proposed TTIP and USMCA agreements. Following this, we consider what business lobbies have said they hope to get out of transatlantic regulatory cooperation.

The report concludes by considering the benefits of precaution and regulatory leadership, along with some alternative forms that international regulatory cooperation could take that are not based on the deregulatory GRP ideology. The findings here should be of special interest to European policy-makers, activists and the public as the European Commission sets out to revive the stalled TTIP negotiations—even as opposition to the ratification of CETA with Canada remains strong. But the report should also resonate in North America where policy-makers will soon debate the ratification of a NAFTA replacement that includes the most aggressive, short-sighted “good regulatory practices” chapter negotiated to date.

2. Origin and internationalisation of “good regulatory practices”

“Good regulatory practices” (GRP) are a relatively new feature of modern free trade agreements. But as an ideology for how to govern, GRP have a long pedigree in world trade negotiations. As tariff levels fell dramatically after the founding of the WTO in 1995, one category of non-tariff measures (NTMs in WTO lingo) called “regulatory barriers to trade” rose to the top of the priority list for multinational corporations. Developed countries, on behalf of their larger industries and exporters, began to amplify complaints, expressed in GATT negotiating rounds dating back to the 1970s, that food and product safety standards, public health measures and environmental protections that were stricter, or simply different, in some countries than in others were creating burdens on business, introducing market inefficiencies and limiting trade.

The WTO’s World Trade Report 2012 summarises the situation this way:

*“More than any other NTMs, [technical regulations and food and animal safety standards] prompted by legitimate public policy objectives can have adverse trade effects, leading to questions about the design and application of these measures.... Essential policy aspirations, such as ensuring the health, safety and well-being of consumers, for example, may have **adverse trade effects considered by some parties as indefensible** on public policy grounds.”³ (Emphasis added.)*

To reduce the potential for “regulatory barriers” to interrupt the flow of goods across borders, the WTO agreements on technical barriers to trade (TBT) and sanitary and phytosanitary standards (SPS—essentially animal and human health measures related to food production and trade) require member states to adopt international standards wherever possible (Art. 2.4 of the TBT and Art. 3 of the SPS),⁴ avoid discrimination between domestic and imported “like” products, and make sure technical regulations are not “*more trade-restrictive than necessary to fulfil a legitimate objective*” (Art. 2.2 of the TBT). The TBT and SPS agreements further require WTO member states to give advance notice of new rules to other members, grant access to the scientific basis for those rules and provide an opportunity for those members to comment prior to the rules coming into effect.

“What corporate lobby groups would like most is a means—preferably an enforceable one—of pre-empting, forestalling or weakening pro-consumer or pro-environment policies and regulations before they are ever implemented, avoiding the need to later challenge them at the WTO as burdensome trade barriers.”

Under these binding international rules, WTO member states have successfully challenged European bans on the use of hormones in pig and cattle rearing, country-of-origin labelling (COOL) of meat products in the United States, Canadian procurement measures aimed at increasing renewable power in the province of Ontario, and EU policies that restrict the importation of genetically modified organisms in crops and food. These and other examples demonstrate how, in practice, the WTO agreements can serve a deregulatory purpose affecting food, consumer product and environmental protections.

However, government interventions at the WTO are time-consuming and expensive—financially, in terms of legal and other bureaucratic costs, and also politically. At the same time, despite the enforceability of WTO Dispute Settlement Body decisions, countries can, and sometimes do, more or less ignore the adverse ruling, as the EU did after WTO decisions against its GMO and beef hormone policies. The GATT’s general exceptions for measures protecting public morals, human or animal health and the conservation of exhaustible resources (Article XX) also provide some cover for countries wanting to set higher standards of protection (e.g. strong public health warnings on cigarette boxes), prohibit imports for ethical reasons (as Europe has for Canadian seal products) or otherwise stray from international benchmarks (e.g. by maintaining higher minimum residue limits for pesticides), as long the WTO members can show that the measures are not disguised restrictions on trade.

In response, and as supply chains have become more globalised over the past two to three decades, international business lobbies have increased their advocacy of regulatory coherence and cooperation, and the internationalisation of so-called good regulatory practices, which include a right for industry

stakeholders to intervene in the regulatory process as early and as often as possible. What these lobby groups would like most is a means—preferably an enforceable one—of pre-empting, forestalling or weakening pro-consumer or pro-environment policies and regulations before they are ever implemented, avoiding the need to later challenge them at the WTO as burdensome trade barriers. As a shared priority of the influential QUAD governments in earlier GATT negotiations (the United States, Canada, Europe and Japan), the question of how to enforce trade-friendly rule-making, as now codified in the WTO agreements, was put high on the agenda of the TBT Committee made up of WTO member state representatives, which continues to emphasise GRP in meetings to this day.

2.1 Regulatory priorities of the WTO and OECD

During the TBT Committee's first triennial meeting in November 1997, participating WTO member states *“reiterated that good regulatory practice for the preparation, adoption and application of technical regulations was a priority for Members to facilitate trade”*. In outlining what GRP means, the committee noted *“the importance of avoiding the promulgation of national technical regulations where they were not necessary, limiting them to their specific requirements and, in accordance with the relevant provisions of the [TBT] Agreement, aligning them with international standards”* (emphasis added). The committee further noted that member states should *“consider all options available consistent with the Agreement”* in the preparation of technical standards, *“bearing in mind that in accordance with Articles 2.2 and 2.3 a technical regulation shall not be more trade restrictive than necessary to fulfil a legitimate objective”*. (G/TBT/5, paras. 23, 24).

Many of these ideas were themselves based on an OECD checklist published in 1995, the year the WTO was established, which recommended ways that governments could keep on top of *“intensified economic competition”* from globalisation and new technologies in an era of shrinking government and budgetary restraints.⁵ Governments, having cut the size of their public sectors (at the urging of the OECD, World Bank and International Monetary Fund, we should add),⁶ *“must learn to do more with less”*, said the OECD. This might include *“upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent”*.⁷



International trade is a major driver of the increase in sea and air freight transport Photo: Fancy Crave on Unsplash

In particular, the OECD recommended that public regulators should ask themselves ten questions before deciding how or whether to regulate in the first place, or if perhaps there was a voluntary, corporate-favoured solution to the same problem. The questionnaire, an early international template for what would become known as regulatory impact assessments, included *“is government action justified?”*, *“do the benefits of regulation justify the costs?”*, and *“have all interested parties had the opportunity to present their views?”* In a background note on the checklist, under the question about there being a justification for government action, the OECD states: *“Markets should always be considered as an alternative to government action, and the capacity of the private sector and individuals to deal with the problem should be assessed”* (emphasis added).⁸

At the third triennial review of the TBT committee in November 2003, member states agreed *“that for a Member to achieve good regulatory practice and to comply with the Agreement at the domestic level, it may be necessary...to establish administrative mechanisms to ensure that all relevant bodies are aware of and understand their obligations under the Agreement and know how to comply with them”*.⁹ This is achieved in Canada currently by cabinet directives on regulation overseen by the Treasury Board Secretariat (TBS), by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) in the United States, and in a less centralised way by the Regulatory Scrutiny Board of the European Commission, the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, and the Vice-President in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights.¹⁰

Furthermore, the committee noted the role that regulatory impact assessments can play in determining how member states might favour non-regulatory solutions to fulfil legitimate objectives (related to human health, the environment, etc.), and consider equivalency of measures with other member states rather than holding those states to potentially stricter domestic standards. The committee invited governments to share their experiences of GRP and equivalency with the committee for future discussions (G/TBT/18, paras. 8-14). In 2017, the WTO held thematic sessions on GRP, conformity assessment and risk assessment; a TBT Committee side-event in Chile on international regulatory cooperation included presentations from Canada, New Zealand, the OECD, Chile and the LEGO company.¹¹

2.2 The globalisation of U.S. regulatory policy

It's important to note here that the OECD guidelines for GRP, in particular the emphasis on impact assessments, are derived from U.S. norms and law including the 1974 Trade Act (with its incorporation of all-business advisory committees in the development of U.S. trade policy) and Executive Order 12866 (1993), which requires federal agencies to do a cost-benefit analysis and risk assessment of all proposed rules, including their impact on trade and *“any adverse effects on the efficient functioning of the economy, private markets..., health, safety, and the natural environment, together with, to the extent feasible, a quantification of those costs”*.¹² In the U.S. system, department- and agency-level regulations are vetted by the OMB in an opaque process involving a trade-off between the political, technical, and policy ramifications of taking a specified action.¹³

A 2008 study of these OMB reviews found *“that more interest group lobbying is associated with more regulatory change”*, i.e. the rules as proposed by whichever federal agency are adjusted in the OMB process. *“We also demonstrate that when only industry lobby groups lobby, we are more likely to see rule change; however the same is not true for public interest groups”*.¹⁴ This research offers an example of how “good regulatory practices” that are pitched to governments as a way to remove one type of political bias from the rule-making process in effect institutionalise another bias—that of not wanting to incur costs or disrupt the “free” market.¹⁵

This is clearly the OECD's preoccupation in its global campaign to harmonise regulatory policy and mechanisms not only among its own members but now with the Asia Pacific Economic Cooperation (APEC) region, including

through the development of common approaches and methodologies for assessing risk. As the OECD notes in an undated report from the late 2000s:

*“Governments need to assess and manage risk when developing policy options that include regulations. Consider the example of climate change. Markets for permits, emissions trading, and other instruments will need regulatory frameworks to function. Political pressures for action may generate regulatory proposals for water resources, energy efficiency, land use, power generation, and transport, to name a few. Without proper controls in the regulatory process, compliance costs could undo years of careful reform. The regulatory process, including [regulatory impact analysis], can play a key role in achieving policy coherence.”*¹⁶

Certain governments, including Canada and the European Commission, have enthusiastically internalised the “good regulatory practices” mantra, with all its industry-friendly deregulatory pressures. The OECD reports that in the ten years following WTO ratification, the adoption of regulatory impact analysis in OECD member countries tripled—from ten to 30 countries.¹⁷ At home, Canada has voluntarily adopted strict interpretations of the WTO's TBT and SPS agreements' transparency, notification and non-discrimination provisions in the government's domestic regulatory policies and has pursued WTO+ regulatory and food standards provisions in major recent international trade agreements including, as we will see below, CETA and the USMCA.¹⁸

2.3 From “smart regulation” to the “innovation principle”

In Canada, at around the time of the third triennial TBT Committee meeting in 2003, the government launched a regulatory review process called “Smart Regulation”, which was followed closely in the EU by the “Better Regulation” agenda. The Canadian review was led by an external advisory committee made up of industry, academics and NGOs, with one representative a former head of the OECD's programme on regulatory reform. In 2004, the committee made several sector-specific recommendations for how the government should adapt its regulation practices to match what it claimed to be the global economic realities at the time. Those recommendations included the adoption in Canada of U.S.-style, OECD-supported risk and cost-benefit analyses of all new rules.¹⁹ Risk to public health or the environment, however, would take a back seat to other

considerations, such as Canada's attractiveness as a destination for biotechnology or nanotechnology investment opportunities.

At this point, Canadian environmental and public health advocates had been fighting an opaque and industry-dominated regulatory model in key areas such as biotechnology for at least a decade.²⁰ Their pressure forced the government to establish an expert panel to assess Canada's biotechnology approval process. In 2001, the panel issued 58 recommendations for including precaution in the regulatory process, almost all of which were ignored. Instead, two years later, Canada published a muddled and self-contradictory framework on the precautionary principle that would guide regulators for years to come. "Precautionary measures should be cost-effective", it said, "with the goal of generating (i) an overall net benefit for society at least cost, and (ii) efficiency in the choice of measures".²¹ The Canadian Environmental Law Association responded that the government's focus on cost-benefit analysis,

*"does not deal with non-monetary or difficult-to quantify costs and benefits, nor with distributional issues (who bears whose costs) nor does it adequately deal with future interests. The Discussion Document also overlays an insistence on selecting measures that would be 'least trade-restrictive', an approach that unduly restricts domestic Canadian decision makers who might otherwise choose to stress safety, health or fairness."*²²

European public interest watchdogs such as the Friends of the Earth Europe, Corporate Europe Observatory (CEO) and Lobby-Control, among many others, have warned about similar sleights of hand within the European Commission. A 2006 briefing note from CEO linked the Commission's "Better Regulation" agenda to U.S.-style deregulation as well as trade deals like the dormant Transatlantic Trade and Investment Partnership (TTIP), which aim to replace the precautionary principle with regulatory impact assessments, cost-benefit analysis, "red tape reduction" and risk management.²³ Like in Canada, the Commission's "Better Regulation" process was developed by an industry-heavy 15-member working group with links to the GMO-farming and agribusiness lobby, tech giant Invensys, the coffeemaker Illy and a Polish business association linked to BUSINESSEUROPE. Included in the package is an annual review of EU law in search of rules that can be weakened or eliminated, and a "fitness check" for some laws to identify "excessive burdens, overlaps, gaps, inconsistencies and/or obsolete matters".²⁴



Protests against TTIP in Belgium Photo: Global Justice Now on flickr

When Jean-Claude Juncker became president of the Commission in 2014, the "Better Regulation" project took on "an even greater deregulatory push, not just on specific rules and laws which should be scrapped, but on how decisions are made about future laws".²⁵ "Better Regulation" was given more political weight through the appointment of a vice-president in charge of regulatory reform. A new Regulatory Scrutiny Board was established with "de-facto veto power" to approve or reject regulatory impact assessments produced by Commission agencies, similar to the role played by the OMB in the United States. The Commission emphasises stakeholder input "at every stage of the process", notes the CEO report, adding that business almost always has greater capacity to engage with regulatory discussions due to having more money and other resources. Impact assessments in the U.K. have led to higher speed limits for "heavy goods vehicles" on single-carriageway roads, despite widespread concerns about safety, and the cancellation of a requirement that construction sites produce waste management plans.²⁶

Environmental and consumer groups in the EU are also fighting the adoption by the Commission of business proposals from the European Risk Forum for a so-called innovation principle, which states that, "Whenever legislation is under consideration its impact on innovation should be assessed and addressed".²⁷ The concept was developed by a list of chemicals, energy, tobacco and biotech companies and has the blessing of the Commission, whose in-house think-tank issued a favourable opinion of the forum's idea to legally require European regulators to prioritise the needs of industry and a competitive European market when developing new rules.²⁸

Proponents of the innovation principle, which was formally adopted in mid-July 2018 by DG Research and by the European Parliament in December that year, say it would sit alongside the precautionary principle. In reality, and in the Canadian experience, the first cancels out the second, or at least severely restricts the ability of public agencies to act in a precautionary manner.

The application of GRP in Canada and the EU is gradually shrinking the options available to regulators, who are required to emphasise the trade implications of all new environmental or other public interest measures in their OECD-guided impact assessments, along with the potential “burden” on business of new rules or their effect on competitiveness, before taking any action. Stakeholder input, largely from business, is incorporated at multiple steps in the rule-making process, and countries are under increasing pressure to mutually accept each other’s standards, conformity assessment (testing) procedures and technical regulations as being more or less compatible.

This process of harmonisation or mutual recognition can be innocuous in some cases. In others, where it is clear that standards or rules in one country are more informed by industry preferences than by evidence of potential harm to human and animal health or the planet, institutional forms of cooperation can have significant ramifications for the public good.

As OECD countries internalised these pro-business “good” regulatory practices, they also set out to advance corporate priorities in bilateral discussions beyond the WTO where the Doha Development Round was floundering. Governments and business lobby groups saw the potential to combine institutional regulatory cooperation with the new GRP mantra. In fact, the two processes are intimately connected in the eyes of the U.S. Chamber of Commerce, one of the most vocal proponents of regulating in the interest of supply chain efficiency above public protection.²⁹ As we discuss in the following section, the co-evolution of regulatory cooperation and “good regulatory practices” in North America proves that the Canadian and U.S. governments see eye to eye with the business lobby on this point.

3. Canada-U.S. regulatory cooperation in the NAFTA era

Regulatory cooperation and the spread of “good regulatory practices” is advanced in Canada in large part due to its proximity to and integration with the U.S. economy. The Canada-U.S. Free Trade Agreement (CUSFTA), which came into force January 1, 1989, was at the vanguard of U.S. efforts to constitutionalise a global capitalist order based on U.S. law and norms.³⁰ Subsequently, the NAFTA (1994) and creation of the WTO (1995) vastly expanded the scope of trade obligations aimed at reducing or eliminating non-tariff barriers to trade and capital accumulation in areas such as finance, intellectual property, public procurement, services (including public services) and other sectors of the economy.

As NAFTA aimed to lock in existing patterns of trade, investment and production in the region, it resulted in a wave of corporate consolidation and amalgamation. In fact, this pooling of corporate ownership and market power into fewer and fewer hands in North America was arguably the most important result of the agreement,³¹ much more so than increased trade flows, which reflected increased intra-firm trade and more complex, cross-border supply chains much more so than new production.

To manage integration in the post-NAFTA period, the U.S., Canada and Mexico created several dozen technical working groups made up of policy and regulatory officials. These working groups are to be distinguished from two bodies established by NAFTA side agreements: the Commission for Environmental Cooperation, which produced some very positive examples of trilateral cooperation, and Commission for Labour Cooperation, which produced little of any importance for workers in any country. Some NAFTA technical working groups continue to meet, including one devoted to pesticides regulation.³² Most, however, either soon or gradually stopped functioning in the decade following NAFTA’s ratification.

Until the early 1990s, Canada showed potential to be a leader on environmental protection. In the free trade era, federal regulatory policy shifted to prioritise innovation (as discussed above) and tended to favour the adoption of U.S. norms wherever possible. The pesticides working group under NAFTA all but locked Canada and the U.S. into a common way of assessing risks, registering new chemicals and uses, and setting maximum residue levels for



Pesticides used in industrial agriculture can have negative impacts on human health and the environment
Photo: Jeff Vanuga on publicdomainfiles

crop protection products.³³ The group, which works closely and almost exclusively with industry stakeholders (versus other members of the public), last met in 2018 to set another five-year work plan to further align approvals outcomes.³⁴ In general, whether it was Health Canada, Environment Canada, the Canada Food Inspection Agency (CFIA) or the Pest Management Regulatory Agency (PMRA), markets took precedence over precaution in how potentially hazardous materials were to be regulated. As Canadian environmental lawyer and professor David Boyd noted in 2015:

“New chemicals and technologies continue to be created and become widely used before their potentially harmful effects on human health and the environment are adequately studied or understood. Hydraulic fracturing, antibiotic resistance, nanotechnology, and replacements for brominated flame retardants offer recent examples where regulation has not kept pace with new developments.”³⁵

Spending on environmental protection in Canada peaked in 1993 at CAD \$1.76 billion—the year NAFTA was signed—and dropped to CAD \$1.27 billion by 2012, which undercuts the government’s ability to enforce its own laws.³⁶ This period overlaps with Canada’s “smart regulation” reforms described above, which promoted more industry self-regulation (as in the

food processing and rail safety sectors) and a reduction of government inspections to focus on only the most risky businesses or business activities.

Between 1994 and 1998, across the departments responsible for fisheries and oceans, health, environment and natural resources, scientific personnel were reduced by 17%, which included reductions in their capacity to assess toxic chemicals.³⁷ In contrast, despite a similar “risk assessment” process for regulating in the United States, the public there has, at least until recently, benefited from stricter enforcement of environmental law.³⁸ For example, in 2012 the Environmental Protection Agency “hammered lawbreakers with over US\$204 million in civil penalties... and secured court judgments requiring defendants pay US\$44 million in criminal fines”, writes Boyd.³⁹

Canada’s auditor general recently reviewed the inspection activities of Environment and Climate Change Canada with respect to the release of toxic substances. The latest audit paints a picture of an understaffed department trying to put out fires (metaphorically) and public controversies, and that rarely follows up on infractions, even on sites where fines were issued. The auditor general also slammed the agency for not basing its risk assessments on risks to human or environmental health, but on the chance that a business would be in violation of the law.⁴⁰

With respect to chemicals used in agricultural production, a 2006 report from the David Suzuki Foundation found that Canada allowed many ingredients in registered pesticides that were banned in other OECD countries, including known or suspected carcinogens and developmental toxins.⁴¹ The report claimed North American harmonisation efforts were a “driving force” behind changes to Canadian pesticide regulation. The problem was—and still is—that “both Canada and the U.S. fare poorly in protecting public health from pesticide risks in comparison to the European Union and Australia”.⁴²

3.1 The Regulatory Cooperation Council

Despite the convergence of regulatory philosophy and methodology in Canada and the U.S., differences in regulatory outcomes persisted as NAFTA grew older. At the urging of business, efforts were therefore made to re-emphasise regulatory cooperation in the mid-2000s coinciding with Canada’s “smart regulation” policy reform process. These trilateral efforts, under the banner of the Security and Prosperity Partnership, were halted when

the Obama administration took office 2008. In 2011, the U.S. administration established bilateral regulatory cooperation councils with Canada and Mexico to reduce barriers to business, improve the competitiveness of the North American economic platform, and align the three countries to a common regulatory method.

The Canada-U.S. Regulatory Cooperation Council’s (RCC) work is coordinated by a binational secretariat led by the Treasury Board Secretariat (TBS) in Canada and Office of Information and Regulatory Affairs (OIRA) in the U.S. A Joint Action Plan was developed in 2011 based on stakeholder input for priorities for cooperation. Work agendas in different economic sectors were selected using the following criteria: “potential for tangible benefits to businesses or consumers; support from impacted stakeholders; opportunity for a lasting solution to the immediate irritant; feasibility of delivery within a two-year time frame; potential to enhance regulatory efficiency while preserving regulatory objectives; and potential to serve as a model to develop transformational tools or mechanisms for durable regulatory alignment that could be applied across sectors”.⁴³

Through this process, 29 initiatives were selected for the RCC’s first two years in areas covering food safety (e.g. recognise the equivalence of meat safety systems, mutually accept lab test results, and reduce certification requirements for meat and poultry trade), agricultural methods (e.g. align maximum residue limits and crop protection product approvals, align veterinary drug marketing approvals), road and rail safety, the containment and transport of dangerous goods, workplace chemicals labelling, air quality and emissions from locomotives, nanomaterials, and other areas. Alongside this sectoral work, Canada and the U.S. agreed to “[s]hare approaches and tools being developed by Canada and the U.S. to assess and account for the needs of small businesses when developing regulations”.⁴⁴

The cooperating, aligning and harmonising is done by working groups made up of senior relevant department officials and representatives from regulatory agencies. While the general working plans of these groups are publicly available, information on their meetings and stakeholder engagements is spotty. Some of the working groups appear to only report back to and hear from stakeholders during RCC stakeholder meetings, generally in Washington, D.C., about once every two years. Other groups, such as those working on chemicals management and crop protection, appear to cooperate very closely with industry.⁴⁵

“What was at first a voluntary effort to reduce regulatory burdens on businesses engaged in international trade was becoming — very much by design — a required part of the jobs of many departmental scientists and policy experts.”

The joint report on outcomes from the first two-year phase of the RCC lists only a few concrete achievements, including the creation of a common electronic gateway for pharmaceutical and biological product approvals, progress on mutual recognition of each country’s animal disease zoning decisions, and a joint review process for pesticides with minor uses, *“which will reduce administrative burden on industry and provide simultaneous product access to growers”*.⁴⁶ Importantly, the 2014 report compares the RCC work to a “‘laboratory’ of sorts”, in which regulators in both countries *“have learned a lot about what it takes to achieve more systematic regulatory cooperation”*.

Canada and the U.S. credit their already existing shared commitment to “good regulatory practices”, including “science-based” decision-making and “rigorous regulatory impact assessments”, for creating the groundwork on which cooperation can be built up—a line that is echoed frequently by the U.S. Chamber of Commerce and other business groups. In its recommendations for TTIP, the Chamber claimed *“It is impossible to spur cooperation without agreement on the importance of coherence and adherence to good regulatory practices”*.⁴⁷ Likewise in North America, Canada and the U.S. have stated that, *“our next phase of work will seek to make regulatory cooperation a routine, ingrained practice between Canadian and U.S. regulatory authorities”*.⁴⁸

Regulatory Partnership Statements (RPS) were drawn up between Canadian and U.S. regulators as a step toward institutionalisation of cooperation activities at all stages—from risk assessments to conception, development and rollout. What was at first a voluntary effort to reduce regulatory burdens on businesses engaged in international trade was becoming—very much by design—a required part of the jobs of many departmental scientists and policy experts.

From the RPS, some departments developed commitments with each other to ongoing alignment, as between the U.S. Department of Agriculture and CFIA on animal health, the U.S. Environmental Protection Agency and Canadian PMRA (to *“move*

towards the establishment of a single application for crop protection products that will be accepted in both countries”), or the EPA and Environment and Climate Change Canada on reporting requirements and risk assessments for new and existing chemicals. This predetermined approach to cooperation—where industry-driven goals are established up front—creates barriers to good public engagement and input on the proposals being discussed.

The 2014 Joint Forward Plan deepened both countries’ commitment to cooperation and alignment in general while adding new areas of sectoral collaboration. These included rail safety—after a series of derailments and explosions of tank cars carrying volatile oil, most tragically in Lac-Mégantic, Quebec (more below)—aquaculture (e.g. cooperation in management of environmental impacts from fish farms and alignment of regulatory approaches) and toy safety. The document also committed to publishing detailed technical work plans within six months and continuing to discuss “horizontal” issues with respect to differences in regulatory policy and how cooperation activities are funded.

In summary, while regulatory alignment efforts between Canada and the U.S. have had mixed results and processes have evolved over time, in general we can see that voluntary mechanisms for dialogue are solidifying into stable institutions. Cooperation between regulators on both sides of the border is a default in many departments, guided by “good regulatory practices” enshrined in federal law in both countries. Much of this activity takes place outside the public view, but from the information we do have from certain working groups, we can find examples of where regulatory cooperation is undermining precautionary rule-making in North America.

3.2 Cooperation case studies and their public interest outcomes

Among the Canadian and U.S. government’s “success stories” for the RCC are some areas of convergence where both consumers and business stand to benefit. For example, the Canadian government has agreed to accept U.S. energy efficiency standards on air conditioners, fridges and other appliances, which are higher than in Canada, and estimates this will save Canadian households about \$1.8 billion CAD in energy costs by 2030 while saving manufacturers \$1.5 billion CAD per year from having to meet just the one standard. Canada has also agreed to match slightly stricter locomotive emissions caps in the U.S. for nitrous oxides and other particulate matter.



Regulatory Cooperation between the U.S. and Canada on rail transport has not yet prioritised safety
Photo: David Brossard on flickr

However, there are also examples of past cooperation that has produced sub-optimal results from a public good perspective—where alignment got in the way of adopting the highest standards, or a mutual recognition agreement leaves consumers less protected than they were before—and where there is a strong likelihood in the future of Canada accepting lower standards for workplace safety. The future of regulatory cooperation was also given a decidedly deregulatory emphasis by the current U.S. administration, with strong support from federal regulators in Ottawa.

3.2.1 Rail safety and transportation of dangerous goods

North American rail transport operates as a private oligopoly, with large, established firms holding enormous sway over government policy in the sector and smaller players picking up many of the less lucrative transportation routes. Both large and small firms have an interest in keeping costs as low as possible, including labour time—both on the trains and for inspection of the lines and safety systems. Until recently, both the Department of Transportation (DOT) in the United States and Transport Canada have obliged industry demands for light-touch regulations in the important and highly integrated sector.

But then a runaway train, carrying volatile Bakken crude oil from North Dakota, barrelled into the centre of the small village of Lac-Mégantic, Quebec just after midnight on July 5, 2013, derailed and exploded, killing 43 people and destroying much of the downtown core. It wasn't the only industrial accident of its kind in the recent past—there had been several similar explosions in the United States and Canada that were partly blamed on flimsy

containers not suitable for holding explosive or toxic materials—but it was the most devastating.⁴⁹ Parliamentary and departmental investigations were launched in Canada and regulators in both Canada and the U.S. agreed to cooperate on discussing rail safety measures within the RCC.

In his recent book on the disaster, Bruce Campbell summarises Canada's regulatory response so far and finds it comes quite short of a good outcome for the public.⁵⁰ Despite increasing funding for rail safety after getting elected in 2015, the Liberal government plans to let it fall again, by 17%, between 2018 and 2021. Money slated for additional inspectors has gone mainly toward desk jobs of the kind that examine company-produced "safety management systems" (SMS) rather than getting out into the field to test track, equipment and procedures. New rules since the Lac-Mégantic disaster require companies to consider the science of fatigue management in their safety management plans, but they have avoided doing so due to the costs involved.⁵¹

Meanwhile, the current U.S. administration is rolling back Obama-era reforms that would have required two-person crews and electronically controlled pneumatic (ECP) braking systems on all trains carrying high-hazard liquids. In the case of ECP brakes, which could have stopped the Lac-Mégantic derailment had they been in place, the U.S. administration cited a badly miscalculated cost-benefit analysis as justification for not burdening the rail industry with new rules.⁵² According to Campbell, "It's really interesting how industries in both countries work in tandem to block, delay, and dilute regulations that affect costs in their own countries and in cross-border trade and investment areas".⁵³

With Canada already experiencing another oil-by-rail boom from tar sands production in Alberta and fracked oil in the U.S., the chances of another Lac-Mégantic are moderately reduced by the phase-out of the weakest containers. But even here the Canadian government is ignoring the warning signs, writes Campbell in his book. In June 2018, "a Burlington Northern Santa Fe train hauling diluted bitumen from Alberta in retrofitted CPC-1232 tank cars (rebuilt to the [new] state-of-the-art TC/DOT-117 standard) derailed near the Little Rock River, Iowa. Fourteen cars punctured, spilling over 871,000 litres of bitumen".⁵⁴

If the results of the RCC cooperation process did not prioritise safety it is because safety is only one of multiple concerns taken into account when cooperation happens under the principles of "good regulatory practices". According to Canada's former transport minister,

Canada-U.S. alignment of rail safety standards and procedures happens mainly “with a focus on international trade and commodity movement”. He added that the results of RCC discussions “have and will inform decision-making on subjects such as tank cars and classification”, and that “it is vital that both countries continue to coordinate regulatory and policy actions to the greatest degree possible”.⁵⁵

At the December 2018 RCC stakeholder event in Washington, D.C., OMB director Mick Mulvaney praised the potential of Canada-U.S. regulatory cooperation to enhance the “deregulatory efforts” of the current U.S. administration.⁵⁶ Michael Fitzpatrick, a lobbyist for General Electric (maker of the locomotive involved in the Lac-Mégantic derailment) who, as a former OIRA official in 2010, helped launch the Canada-U.S. cooperation dialogue, told the same gathering that the working group outcomes on rail safety were a “signature achievement of the RCC”. He went as far as to say the RCC is the reason there have been “no more Lac-Mégantics”.⁵⁷

Not only is this impossible to prove, it is a huge exaggeration of the outcome. At best, RCC cooperation on rail safety has so far produced a compromise between industry demands for low-cost, light-touch regulation and government’s responsibility to protect public safety. Canadian regulators can continue to hide behind pressure to align with the U.S. as an excuse for not moving more forcefully to remove faulty rail cars, insisting on the highest standards for all present and future shipments of volatile goods, and setting a higher standard of labour protections that might have raised poor North American working conditions to levels where they would truly help us avoid such disasters.

3.2.2 Tested once: The sunscreen pilot project

In April 2017, the president of the Treasury Board Secretariat (TBS)—Canada’s minister responsible for regulatory cooperation—announced a pilot project under the RCC that would “allow sunscreens that have already undergone rigorous approvals and testing in the U.S. to come across the border freely without being quarantined and tested for a second time”.⁵⁸ The ease with which this important decision was made contrasts sharply with how difficult it is for government agencies to take regulatory measures to restrict or prohibit potentially dangerous substances. Nonetheless, the effort was expected to save industry CAD\$ 100,000 a year per sunscreen product, “and provide Canadian consumers with access to a greater variety of products at lower prices, just in time for summer”.⁵⁹

The “tested once” pilot project comes at the same moment countries are reassessing assumptions about the safety of chemicals used in sun protection products. For example, while oxybenzone has been approved as safe by the Food and Drug Administration since 1978, recent studies have shown it can produce skin rashes in humans and interfere with hormones, at least in lab experiments. Oxybenzone has also been linked to coral reef erosion, which prompted the U.S. state of Hawaii to ban use of products containing the chemical starting in 2021.⁶⁰ U.S. sunscreens are far less likely to protect skin against UVA—the ultraviolet rays that cause cancer—compared to products available in Europe, Canada and elsewhere. Products containing oxybenzone are an exception, but with new science questioning the chemical’s safety, the FDA is under pressure to approve reportedly safer and more protective European brands.⁶¹

The U.S. cosmetics industry has been self-regulating for the last century, but government regulators are coming under increasing pressure to change from repeated news stories about bad reactions and serious health risks, including cancer, from use of certain chemicals in cosmetic products, including sunscreen. “It’s hard to think of a category that is less regulated [than cosmetics]”, Scott Faber, senior vice-president for government affairs at the Environmental Watch Group, told CNBC in August 2018. In comparison, the EU has banned 1,328 chemicals from cosmetics, “and has required premarket safety assessments, mandatory registration and government authorisation for the use of materials”.⁶²

From a precautionary perspective, this seems like the wrong moment for Canada to be giving up the opportunity to test an entire



Chemicals used in some sun protection products might be harmful to human health and the environment
Photo: Drew Hays on Unsplash

category of chemically intensive products widely used by Canadians, including vulnerable groups such as children. But it is not surprising when we consider the industry-driven and trade-biased nature of cooperation in the RCC. For example, five of the seven “key stakeholders” of the RCC working group on aligning rules for monographs—what information is considered necessary for consumers—in the closely related personal care products and pharmaceuticals industry were industry associations.⁶³

3.2.3 Chemical hazard labelling and worker safety

Chemicals management in all its policy iterations looms large in the RCC dialogue precisely because of the volatile mix of rapid innovation and abundance of new products (or new uses of existing chemicals) hitting the market; changing scientific understanding of their effects on health and the environment; the high level of integration in the North American chemicals industry; and public pressure for governments to get their act together by banning hazardous, carcinogenic or otherwise toxic substances.

RCC working groups stacked with chemicals industry players have been busy trying to understand exactly where Canadian and U.S. risk assessments, testing, labelling, fees and approvals processes differ so that common regulatory systems can be established in North America. Industry hopes that common regulatory systems based on “good regulatory practices” will produce the same outcomes in countries engaged in regulatory cooperation activities.⁶⁴

Workplace chemicals is one area of RCC work where harmonisation could theoretically result in higher standards but where unions worry the opposite will happen. According to the company Arbill, hazardous chemicals caused nearly three million nonfatal private industry injuries or illnesses in 2012, and they have been linked to cancers and diseases of the kidney, skin, heart, stomach, brain, and the nervous and reproductive systems.⁶⁵ A RCC workplace chemicals labelling working group has been meeting since 2013 to: *“ensure that the requirements in Canada and the U.S. for hazard classification and communication can and will be met now and in the future, to the greatest extent possible, with one label and one safety data sheet that would be acceptable in both countries, without reducing the level of safety or protection to workers”*.⁶⁶

In their submission to OIRA proposing priorities for the RCC for the next few years, the United Auto Workers (UAW) noted several



Hazardous chemicals caused nearly three million non-fatal private industry injuries or illnesses in 2012.
Photo: The Navigators on commons.wikimedia

areas of workplace safety policy where Canadian norms are better for workers than current U.S. practice. These include occupational exposure limits for hundreds of air contaminants, which are more protective in Canada than the U.S., maximum allowable noise levels (lower in many cases in Canada) and hazard communication, where labelling requirements are also slightly more protective in Canada.⁶⁷

For example, Canadian Hazardous Products Regulations (HPR) require all mixtures containing one or more Category 1 or 2 carcinogenic ingredient at concentrations of 0.1% or higher to indicate the hazard on the label and have a safety data sheet (SDS) reporting the properties of each chemical, the health hazards, protective measures workers should take and precautions for handling and transporting the chemical. In the U.S., the SDS requirement is the same, but labels are not needed where the Category 1 or 2 carcinogen is at concentrations less than 1%. UAW also points out that Canada requires biohazardous infectious materials to be labelled and have SDSs while the United States does not, and there are better worker protections in Canada with respect to water activated toxicants and the need to issue new data sheets on a hazardous substance when new science about the substance becomes available.⁶⁸

Another area where Canada and the U.S. have differed—to the chagrin of the chemicals lobby—is on the handling of confidential business information (CBI). Canada’s Hazardous Products Regulations, which came into effect in 2015, at first required companies to list actual concentrations of hazardous chemicals on safety data sheets where before only generic ranges were listed. If the companies wanted to withhold the exact concentrations as CBI, they would have needed to apply for an exemption from Health Canada and pay a fee, which the agency predicted would cost

the industry as much as \$18 million.⁶⁹ The U.S. allows companies to self-declare information as confidential (CBI) and there is no application fee.⁷⁰

The discrepancy had been raised in the RCC context in 2015, and once the HPR came out that year industry lobby groups went to work trying to bring the Canadian rules in line with U.S. norms. The American Chemistry Council sent a letter to Health Canada claiming that, contrary to what unions were saying, “*requiring the exact concentration percentages on [safety data sheets] does not enhance this information or protections for workers*.”⁷¹ Chemical Watch reported in March 2016 that, at that point, Health Canada had no plans to change the legislation to harmonise the differences.

However, a year later Canada delayed implementation of the CBI registration requirement to consider stakeholder concerns about the “*burden and cost*.”⁷² And a year after that, in April 2018, Canada yielded completely, allowing manufacturers of chemicals to protect concentrations on SDSs and labels without submitting an application or paying a fee. As reported again by Chemical Watch, “*Labour organisations have protested that the CBI rules will defeat the intent of the new WHMIS (Workplace Hazardous Materials Information System) to increase worker protection. Health Canada reported that these groups continued to oppose the regulations in comments on the draft, while all other stakeholders supported it*.”⁷³

Though we can’t draw any generalisations about the Regulatory Cooperation Council from these examples, they do strongly support the concerns of non-industry stakeholders about the deregulatory objectives of some cross-border working groups. The current U.S. administration’s enthusiasm for the RCC only compounds those fears.

3.3 Cooperation and deregulation

The RCC got a boost from the U.S. administration in February 2017 when President Donald Trump and Prime Minister Justin Trudeau highlighted the institution in a joint statement following their first official meeting. “*We will continue our dialogue on regulatory issues and pursue shared regulatory outcomes that are business-friendly, reduce costs, and increase economic efficiency without compromising health, safety, and environmental standards*”, the leaders said (emphasis added).⁷⁴

A few weeks earlier, the U.S. administration had issued Executive Order 13771, on “Reducing Regulation and Controlling Regulatory

Costs”, which required all federal agencies to identify two existing regulations to be repealed for every new one introduced and make sure there are zero net incremental regulation-related costs to the government at the end of each year. In a memorandum for policy officers on the executive order, its definitions and function, the OMB highlighted the role that regulatory cooperation should play in helping agencies meet their deregulatory quotas:

*“Regulatory activities associated with regulatory cooperation with foreign governments that reduce costs to entities or individuals within the United States, including at the border, or otherwise lower the cost of regulations on the United States economy, may qualify as EO 13771 deregulatory actions.... However, agency actions to harmonise with the standards of an international body or foreign government that increase costs on United States entities or individuals may need to be offset.”*⁷⁵

A year later, in June 2018, then TBS President Scott Brison and OMB Director Mulvaney signed a memorandum of understanding to reboot the RCC process between Canada and the U.S. with a greater emphasis on deregulation. “*Reducing regulatory burdens promotes more effective, limited government, which contributes to economic growth and stimulates innovation*”, said OIRA Administrator Neomi Rao in a press statement (emphasis added). “*Identifying and eliminating unnecessary or duplicative regulations can help businesses and consumers on both sides of the border*.”⁷⁶

The Australian government has also recently dropped the friendly rhetoric on its internal regulatory reform agenda—its version of “Better Regulation”—which is now referred to as the “Deregulation Agenda.”⁷⁷ In this era of rising temperatures, failing ocean ecosystems, declining insect populations, stressed water systems and mass accumulation of plastics, chemicals and pharmaceuticals in nature, it is astounding that our governments continue to prioritise the removal of alleged red tape for business over the need for more effective public and environmental protections.

It would be a mistake to think the EU is struggling against these coordinated attacks on the precautionary principle. Just as the Commission has slowly integrated “good regulatory practices” into the EU’s rule-making guidelines, through CETA and potentially a new TTIP with the U.S. it is recreating the same kinds of institutions for GRP-based cooperation that have undermined public interest regulations in North America.

4. Regulatory cooperation and “good” regulatory practices in CETA

Canada-EU regulatory cooperation has been less institutionalised to date than the RCC, but the idea goes back at least two decades and has long been a high priority for domestic and transnational corporate lobby groups. CETA is the latest iteration of that agenda in the Canada-EU space. Many of the biggest trade irritants between the two jurisdictions are the same as between the European Union and the United States, which is a result of both the similarities in major Canadian and U.S. exports, but also the level of integration in the North American economy and comparable regulatory regimes in Canada and the U.S., as explored above.

For example, the world’s largest chemicals and pesticide makers see regulatory cooperation in CETA and the proposed Transatlantic Trade and Investment Partnership (TTIP) as a means of stopping the EU from diverging further from North American norms, and preferably scaling back the EU’s hazard-based framework for the Registration, Evaluation, Authorisation and Restriction of Chemicals, or REACH for short.⁷⁸ Biotech firms and commodities exporters complain of Europe’s strict low-level presence (LLP) rules for shipments of grains containing trace amounts of genetically modified material, and both the U.S. and Canadian beef and pork lobbies have for years complained about different European standards for food processing and the use of hormones and other veterinary drugs. Canadian government lobbying in coordination with domestic, U.S. and European oil companies succeeded, in 2014, in watering down the EU Fuel Quality Directive, an environmental measure aimed at lowering the carbon intensity of transportation fuels.⁷⁹

There are three questions we need to ask about Canada-EU regulatory cooperation now that CETA has been in place a year. First, what are the differences and similarities between CETA’s regulatory cooperation provisions and those established in North America through NAFTA and the Regulatory Cooperation Council? With that information we can venture a guess as to how closely the results of North American cooperation will be mirrored in the transatlantic context. Second, what do business groups hope to get out of CETA’s Regulatory Cooperation Forum, or the 18 other CETA committees and working groups whose goal is also the elimination of differences in Canadian and EU policy affecting trade and investment? Finally, and importantly for this

report, how are these provisions likely to affect Canada’s and the EU’s ability to intervene in markets to protect human, animal or environmental health?

Before getting to these questions, it’s worth revisiting how CETA came about in the first place, as this history reinforces the deregulatory expectations of the agreement’s biggest corporate backers on both sides of the Atlantic.

4.1 The deregulatory origins of CETA

As touched upon earlier, the focal point of developed countries in the immediate aftermath of the launch of the WTO in 1995 was to eliminate existing and new so-called non-tariff measures. With tariffs dropping as fast as the walls that separated former Cold War rivals, Western nations looked to consolidate neoliberal globalisation in a righteous “end of history” fervour underpinned by a belief that markets are always right. The OECD plan to internationalise good regulatory practices and one-size-fits-all regulation prompted European and North American countries to imagine tighter transatlantic integration—a potential bridging of the NAFTA zone with the evolving European common market.

In 1998, as part of a Canada-European Community Trade Initiative (ECTI), the EC and Government of Canada signed several agreements and commenced dialogues aimed at increasing transnational cooperation on regulatory and standards-related matters. These included a veterinary agreement recognizing the equivalence of certain EU and Canadian sanitary and phytosanitary measures applied to meat, fish, dairy and other animal products (the EU etched a similar agreement with the U.S. a year later),⁸⁰ and the beginning of regular dialogues on biotechnology, ecommerce, investment protection and other areas where joint positions were expected to lead to a successful end of the WTO’s Doha Development Round of negotiations.⁸¹

The ECTI further produced an Agreement on Mutual Recognition in Relation to Conformity Assessments, which laid out the circumstances under which Canada and the EC would recognise each other’s accreditation and conformity assessment bodies for the purposes of guaranteeing that standards had been adhered to.⁸² Separate annexes covered telecommunications terminal equipment,

electro-magnetic compatibility, electrical safety standards, recreational crafts, “good manufacturing practices” with respect to medicinal products/drugs, and medical devices. Joint sectoral groups made up of regulators from participating EC countries and Canada were established to maintain confidence in the process, along with an overall Joint Committee to manage it all.

Despite achieving results in areas of mutual recognition of equivalency (for some meat production methods, for example), business groups pushed for more binding forms of regulatory cooperation. The scope of cooperation in the ECTI was purposely limited in the conformity assessment agreement, which “*shall not be construed to entail mutual acceptance of standards or technical regulations of the Parties and, unless otherwise specified in a Sectoral Annex, shall not entail the mutual recognition of the equivalence of standards or technical regulations*”. At a Canada-EU Summit in 2001, a joint progress report described “*particular challenges*” in the application of the MRA with respect to medical devices.

In December 2002, heeding calls from the business community for deeper transatlantic relations, Canada and the EU announced “*we have agreed to intensify our regulatory dialogue and to work towards a new framework in this field*”.⁸³ The summit statement said both parties: “*applaud the continued engagement of the Canada Europe Roundtable for Business (CERT) on bilateral trade and investment issues, and recognise CERT’s important contribution to date. We are encouraged by the results of CERT’s recent CEO Roundtable in Montreal and look forward to reviewing their Action Programme for further liberalizing bilateral trade and investment*”.⁸⁴

CERT was a coalition of Canadian and European businesses and business lobby groups including major engineering, manufacturing, energy, water, spirits and biotechnology firms. The roundtable’s 2002 document, released at the same time as the joint Canada-EC statement, put regulatory cooperation first on a list of priority areas for closer collaboration. CERT clarified that “*Chemicals policy and agriculture and food policy are two areas of particular interest to CERT’s members in this regard*”, and linked cooperation to both Canada’s and the EU’s efforts to “streamline” regulatory policy to make it more business- and trade-focused.⁸⁵

CERT hoped that Canada and the EU might base new regulatory cooperation efforts on a recently agreed EU-U.S. cooperation framework, but the lobby group pushed for an agreement that “*goes much further*”.⁸⁶ The

A word on science

There are good reasons why governments would choose to regulate to achieve multiple purposes at the same time, such as protecting the environment while also supporting local job growth. In Canada, for example, the provincial government in British Columbia has decided to close a third of open-net fish farms on the Pacific coast not purely based on scientific evidence of impacts on wild salmon (as abundant as it is), but importantly as a gesture of reconciliation with the region’s First Nations—a hard-to-quantify effort to build a new relationship that respects their desires for the region as well as those of the state or industry.

The WTO decision in the U.S.-hormone case offers another example of the limitations of “science-based” regulation. In that case, the U.S. claimed the EC ban on the importation of beef that had been raised using growth hormones violated sections of the WTO’s Agriculture, SPS and TBT agreements. The first Dispute Settlement Panel decided that the EC had in fact violated three articles of the SPS agreement related to harmonisation and risk assessments. The Appellate Body narrowed this to one violation (of SPS Article 5.1), which states:

Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations (emphasis added).

The EC did not argue for the beef hormone ban on the grounds of animal welfare (as it would later, while defending against Canada’s WTO challenge to a European ban on seal product imports). But, as highlighted here, the SPS text does not leave much room for such a justification. It is not unreasonable to imagine that a country may wish to prohibit the importation of animals raised through factory farming, or fed unnatural, hormone-laced diets, precisely because of animal welfare concerns (as long as these practices are not allowed domestically). There may be environmental considerations in such a ban as well, given the high carbon emissions associated with animal rearing, meat production and international trade.

Regulatory cooperation, “good regulatory practices” and the elaboration of SPS and TBT commitments in new free trade deals offer industry groups and governments an opportunity to block these regulatory innovations before they are applied.

group mentioned regulations that “are based neither on good science nor good risk assessments”—code for precautionary measures or regulations that may also have political, ethical or moral justifications—as a key area of concern. Less than two weeks prior to the 2003 Canada-EU Summit in Athens, Greece, the Canadian government had joined a U.S. WTO dispute against the European authorisation regime for GMOs.⁸⁷

The transatlantic business lobby group followed up with another report pledging CERT’s support for Canada and the EU as they considered pursuing a Trade and Investment Enhancement Agreement (TIEA), conversations that were taking place in parallel to EU-U.S. regulatory discussions that would lead to the creation, in 2007, of the Transatlantic Economic Council.⁸⁸ CERT stated their view “that any enhanced regulatory dialogue between the EU and Canada should seek a maximum degree of coherence with the co-operation that both, the EU and Canada, have developed with the U.S. in this area”.⁸⁹

Regulatory cooperation was once again the top priority for CERT in its 2005 document in support of the TIEA, negotiations on which had been launched the previous year. According to the Canadian government, the TIEA—a CETA prototype—was to build on the Canada-EU Framework on Regulatory Cooperation and Transparency. Though the framework was voluntary it clearly tied the “Smart Regulation” and “Better Regulation” processes to ongoing discussions at the WTO with respect to implementing the TBT and SPS agreements via “good regulatory practices”.⁹⁰

The objectives of cooperation under the framework were taken straight out of the OECD recommendations for GRP and aimed strictly at promoting competitiveness and reducing differences in regulations, with a nod to “high levels of safety for the protection of human, animal or plant life or health, the environment, consumers”.⁹¹ According to a Canadian government summary of the TIEA, the agreement would: “consequently refer to the voluntary Framework as the instrument of regulatory cooperation for those areas within its scope. Other regulatory issues will be addressed according to the relevant sections of this document”.⁹²

These negotiations were aborted by Canada and the EU in 2006. In one version of events, WTO member states were refocussing energies on the possible conclusion of the Doha Development Round; in another version, the Commission was annoyed that Canada would not relent to EU demands to completely open provincial and municipal procurement

markets. No matter, the dream of a transatlantic free trade agreement would be revived less than a year later. Heavy lobbying by the Quebec and French governments, in tandem with politically connected Canadian and European business leaders, convinced the Conservative government in Canada and several EU member states and decision-makers to launch new negotiations in 2009.⁹³ Just like the TIEA, “other regulatory issues” would be central to what would be dubbed the Comprehensive Economic and Trade Agreement (CETA).

4.2 The CETA regulatory cooperation chapter and forum

In the realm of international trade, Canada frequently plays a double role. On the one hand it is a “rule taker” in negotiations where it is the smaller player, as with the United States and European Union.⁹⁴ On the other hand, Canada has taken on the role of “rule maker” or ground-breaker in negotiations with smaller countries, such as Colombia, Peru, Jordan, etc., that may be considering or simultaneously pursuing a free trade deal with the United States. Negotiating with Canada, and adopting the North American trade and investment treaty template, acts like a practice run for these countries as they seek to liberalize economic relations with the more economically important U.S.⁹⁵

As the much smaller player in the CETA negotiations, Canada was a rule-taker in many respects. That was certainly true of the procurement chapter, which comprehensively covered provincial and municipal procurement contracts in Canada for the first time, and on investment, where public opposition to investor-state dispute settlement forced the European Commission to improvise a friendlier-sounding Investment Court System that would not have been Canada’s first choice. On services, however, the CETA outcome is much closer to North American norms. And because both Canada and the EU saw their deal as a precursor to a larger transatlantic trading block, CETA was very much a table-setter for the Transatlantic Trade and Investment Partnership negotiations.⁹⁶

In general, CETA’s regulatory cooperation chapter looks much like the EU’s proposals for a similar chapter in those stalled TTIP negotiations.⁹⁷ Both incorporate and institutionalise many of the “good regulatory practices” language described above and list the types of cooperation activities governments are prepared to engage in to reduce regulatory differences affecting trade in goods and services, and investment. The Canadian government expresses the goal of CETA’s regulatory cooperation chapter this way (emphasis added):

*“By facilitating earlier access to regulatory development processes under CETA, it is expected that the **differences in regulatory approaches between Canada and the EU will be reduced over time**, resulting in fewer barriers to trade when regulations are implemented.... **The goal is not regulatory harmonisation, but rather, effective regulation that facilitates trade.** Each party retains complete control over its own regulatory process.”⁹⁸*

CETA’s regulatory cooperation chapter can be broken down into three main parts: principles and objectives (Arts. 21.2, 21.3); the activities both parties will pursue to meet those objectives (Arts. 21.4, 21.5); and the institutional measures that will carry out those activities (21.6, 21.7, 21.8). Unlike the North American regulatory cooperation tables (i.e. between Canada and the U.S., and between the U.S. and Mexico), CETA’s regulatory cooperation activities are to be *“open to participation by other international trading partners”* (Art. 21.2.3), which could signal the EU’s openness to allowing U.S. regulators and companies to participate in CETA regulatory convergence, or else its desire to use such regulatory provisions in trade agreements to export EU regulatory practices to other countries. Regardless, like the Canada-U.S. project, cooperation is expressed in CETA as a way to prevent “unnecessary” barriers to trade and investment (Art. 21.2.4[a]), *“enhance the climate for competitiveness and innovation”* (Art. 21.2.4[b]) and, as the Canadian government quote above emphasises, *“promote...efficient and effective regulatory processes”* (Art. 21.2.4[c]).

Efficiency of regulation is key to “good regulatory practices” philosophy. The idea, expressed in early OECD guidance documents on regulatory reform (as discussed above), is that governments have limited resources to review all the scientific and technical data, test every new product for safety or properly inspect constantly evolving manufacturing practices. The *“protection of human life, health or safety, animal or plant life or health and the environment”* is listed as an objective of cooperation under CETA (Art. 21.3[a]). But in line with this focus on the efficient use of government resources, this protection is to be achieved by *“leveraging international...research, pre-market review and risk analysis”* (sub-article i) and sharing information used by regulators to *“manage risks”* (sub-article ii)—not by enhancing the capacity of government to protect the public.

CETA also aims to *“build trust”* between Canada and the EU about their regulatory regimes in general (Art. 21.3[b]) with an aim to: *“improve the planning and development of*



Conditions of animal transport are amongst the first five working projects of the EU-Canada Regulatory Cooperation Forum (RCF) Photo: Izvora on commons.wikimedia

regulatory proposals” (sub-article i); *“promote transparency and predictability”* in the process (sub-article ii); identify *“alternative”* (i.e. non-regulatory or non-legal) instruments for achieving similar health or environmental objectives, for example (sub-article iv); and *“recognise the associated impacts of regulations”* (sub-article v). Regulatory cooperation should improve competitiveness by minimizing administrative costs and harmonising country measures when possible (Art. 21.3[d]).

Like the RCC, CETA establishes a central coordinating body, the Regulatory Cooperation Forum (RCF), which is co-chaired by senior government trade officials from Canada and the Commission. Also like the Canada-U.S. body, the RCF has a mandate to pursue both forward- and backward-looking cooperation efforts (Art. 21.6.2[d]) and engage with outside stakeholders as the parties *“deem appropriate”* (Art. 21.8). The senior level of RCF coordinators, and the political authority invested in the position, will allow them to call in Canadian and European scientists and regulators as needed to cooperate on priority areas. Put another way, cooperation may be voluntary for the Commission and Canadian government, but it will appear quite mandatory for rank-and-file regulators, inspectors and policy-makers.

The first five working projects of the RCF under CETA are a mix of industry, NGO and regulator-led priorities that Canada and the EU hope to provide proof of concept—*“low-hanging fruit”* in the words of officials at a December 14, 2018 stakeholder briefing on the RCF’s first meeting.⁹⁹ Those areas are cybersecurity, animal welfare (specifically conditions of



Protests against TTIP and CETA in Brussels
Photo: M0tty on commons.wikimedia

animal transport), cosmetics, pharmaceutical inspection (a follow-up to the mutual recognition agreements under the EU-Canada Trade Initiative), and the possibility of reconciling the Canadian and European consumer product safety reporting systems (EU RAPEX and RADAR). It was suggested that success on reconciling differences in these areas would give industry and NGO stakeholders confidence that the process works and encourage future collaboration on more difficult, long-standing regulatory differences.

Like in the North American RCC context, there is potential in some of these first CETA cooperation items for upward harmonisation. Europe's rules governing the transportation of animals for trade or slaughter are more humane than Canada's, though they could still be vastly improved. For example, transported livestock must be given a rest and water every 14 hours in Europe but only every 52 hours in Canada.¹⁰⁰ It was unclear during the RCF stakeholder briefing session how reconciling these and other differences would affect Canada-EU trade. Animal rights and consumer groups participating in the Brussels meeting in December are nonetheless strongly supportive of using the RCF to raise Canadian standards.

With respect to cosmetics, stakeholders were informed of the North American RCC pilot project (discussed above) in which products tested in the U.S. will be accepted into Canada as safe without the need to inspect them at the border. It was proposed that Canada could open the EU to the same arrangement. According to the agenda of the first RCF meeting, "Some 'cosmetic-like' products regulated



Canadian industry proposals for areas of future regulatory cooperation include the regulation of pesticides.
Photo: CGP Grey on commons.wikimedia

as drugs in Canada are classified as cosmetics in the EU and are not subject to the same regulatory requirements and oversight as drugs".¹⁰¹

Given the relatively lax regulation of cosmetics, as noted above, and their environmental impacts, any cooperation under this project should be fully transparent. However, European and Canadian regulators suggested at the RCF debrief that it would be potentially disruptive to have NGOs or industry representatives kept abreast of all the details of cooperation activities. While the EU officially stated "transparency is key", that commitment may entail only the publication summaries of the five work plans (to be published in 2019) and involvement in annual RCF stakeholder gatherings.¹⁰²

A scan of the Canadian industry proposals for future work reveals a list of deregulatory opportunities in the areas of chemicals management, pesticide and veterinary drug maximum residue levels, the presence of GMOs in international grain shipments, meat processing safety measures, medical devices and pharmaceuticals standards. The North American cosmetics lobby, for example, mentions the EU non-registration of siloxane D5 as an example of where "real world" experience is not considered in EU rule-making.¹⁰³ "We suggest better coordination between the [Canadian Chemicals Management Plan] and REACH, including the full ability to use the most current science and real-world data in decisions making. This is necessary to ensure that the two processes can **come to the same science-based regulatory outcomes**" (emphasis added).¹⁰⁴

The Canola Council of Canada, which complains that “*science doesn’t underpin*” the EU’s approval process for GMOs, wants the RCF to “*empower senior officials who have the authority to compel change*”. The Canadian Toy Association (mostly U.S., European and other multinational companies) says EU safety standards are “*unscientific...in an effort to be seen as ‘stricter’*”.¹⁰⁵ Cereals Canada hopes to use the RCF “*to prevent the politicisation of regulatory decisions on crop production products, like the decisions related to the re-approval of glyphosate*”.¹⁰⁶ The European and North American chemicals lobbies continue to push the adoption of “*transparent science and risk-based regulations and voluntary industry initiatives*”¹⁰⁷ such as Responsible Care, which have dubious pollution control records.¹⁰⁸

A priority of CropLife is to push Canada and the Commission to come to an agreement on MRLs for pesticides (to the North American level).¹⁰⁹ In 2011, a Canadian Federal Court found Canada’s Pest Management Regulatory Agency (PMRA) had misrepresented its own legislation by refusing to review pesticides registered in Canada but no longer available in other OECD countries. In 2013, another lawsuit pressed PMRA to review 23 active ingredients approved in Canada but not in Europe.¹¹⁰ In 2015, there were at least 46 active ingredients used in more than 1,000 pesticide products in Canada that are banned in other OECD nations.¹¹¹ When Dow and CropLife both mentioned the MRL issue at the December 2018 Regulatory Cooperation Forum debrief, Canadian regulators urged them to continue to raise this issue and consider how CETA’s other committees (on agriculture, and sanitary and phytosanitary standards, for example) might also be places where these discussions could take place. Canadian officials further proposed that the matter or crop protection, though “*not ripe enough*” currently for regulatory cooperation, is on Canada’s agenda.¹¹²

We should be concerned that these industry priorities may soon become priorities for institutional cooperation under CETA. Despite the EU and Canadian governments’ commitment to transparency, the North American experience with regulatory cooperation shows there is a high risk that non-industry civil society groups will not be in the room when these future talks on chemicals, cosmetics, toys and other under-regulated industries begin. Choreographed discussions between officials and regulators can, over time, create a club-like environment impervious to contesting viewpoints. Regulators in this situation can get bogged down discussing the most trade-facilitative and least burdensome options for

addressing a public health or environmental concern when they could be leading by example, and in a precautionary way.

4.3 Other CETA working groups with deregulatory potential

For NGOs, politicians and other civil society actors worried about the effect of GRP and regulatory cooperation on protective measures, it would be a mistake to focus too much attention on CETA’s regulatory cooperation chapter alone. Much as NAFTA did 25 years ago, CETA establishes many working groups whose goals including ironing out differences in public policy, laws and regulations affecting commerce between Canada and the EU.

For example, along with the Biotech Market Access Issues committee (see below), Canada’s pesticide- and GMO-intensive agricultural lobbies will have at least five venues for pressing greater European alignment with North American levels of protection. If Canadian regulators are encouraging corporate lobbyists to consider what these working groups can do for them, other actors representing non-commercial interests should be monitoring their work closely and insisting on full transparency of meeting agendas, minutes, decision points and lists of participants.

Trade in Goods Committee

The Trade in Goods Committee under CETA manages the agreement’s chapter on technical barriers to trade (TBT). It has a mandate to encourage cooperation on technical regulations, facilitate discussions on risk assessments and hazard assessments conducted by either of the parties and make recommendations to the CETA Joint Committee to amend the chapter. The TBT chapter in CETA is WTO+ (i.e., slightly more constraining) with respect to regulating in non-trade-restrictive ways, and it is more explicit in how corporate interests should be integrated into state regulatory processes.

For example, in CETA each party “*shall ensure*” there are ways for “*persons*” of the other party to take part in rule-making at an early stage and “*on terms no less favourable than those accorded to its own persons*” except in “*urgent*” situations, like when a public health emergency may necessitate quick action (Art. 4.6.1). Parties must also reply in writing to comments on regulations from the other party “*before the technical regulation...is adopted*” (Art. 4.6.4).

Whereas in the EU’s recent Andean trade agreements (with Peru and Colombia), countries must, upon request of the other party, “*provide information*” about the measures (Art. 79.6),¹¹³ in CETA the types of information to



In 2016, sea transport accounted for over half of all goods imported into the EU. Photo: chuttersnap on Unsplash

be shared are specified and include “the objectives of, legal basis and rationale” for the measures (Art. 4.6.6). This mandatory requirement to share detailed information about the rule-making process itself stands in contrast to the allegedly voluntary basis of cooperation activities per CETA’s regulatory cooperation chapter (Art. 21.2.6).

Canada and the EU are also more likely to take disputes about the basis of new public protections, including environmental policy affecting transatlantic trade or investment, to the CETA Trade in Goods Committee. This committee has a mandate to “promptly address” issues related to the development of standards, technical regulations and conformity assessment procedures (Art. 4.7.1[b]), and to “facilitate discussion of the assessment of risk or hazard conducted by the other Party” ([c]). If disputes related to the TBT chapter cannot be handled by the Committee on Trade in Goods, the CETA Joint Committee can establish an ad hoc technical working group to find a solution.

Canada explains in its note on CETA implementation from September 2017 that Article 4.4 “builds on the obligations related to technical regulations incorporated in Article 4.2 to add a **commitment to cooperate in seeking to ensure compatibility of their technical regulations**” (emphasis added).¹¹⁴ Cooperation on some of the most contentious areas of regulatory difference may therefore be much less voluntary than described in the regulatory cooperation chapter.

With both Canada and the European Commission dedicated to deregulatory or trade- and innovation-biased central regulatory policies, we can expect discussions at the Trade in Goods

committee to exert additional pressure on regulatory agencies to choose pro-industry options over more precautionary measures. Unfortunately, the summary of the committee’s first meeting (held November 29, 2018) was not available on either the Canadian government’s or Commission’s CETA working group website when this report was being finalized.

SPS Joint Management Committee

In its CETA implementation explainer, Canada said “the Government will make use of the bilateral SPS Joint Management Committee to monitor and discuss issues that could have an impact on trade, including equivalency and science-based risk assessment. The Committee will also promote the alignment and equivalence of SPS measures, and facilitate technical consultations including consultations regarding disputes that involve sanitary and phytosanitary measures”.¹¹⁵

The first meeting of this committee, which manages CETA’s SPS chapter dealing with food safety, animal disease and pest control, and food systems policy, took place March 26-27, 2018 in Ottawa. The agenda was “challenging”, according to the notes.¹¹⁶ Canada raised the possible EU decision not to reapprove a maximum residue limit for the fungicide picoxystrobin, a chemical sprayed on soybeans, corn, wheat and legumes and marketed in more than 65 countries, according to the company. Picoxystrobin has been found highly toxic to fish and invertebrates. The U.S. Environmental Protection Agency proposes this feature of the product can be mitigated with proper labelling, but it is reasonable to expect that some governments may want to take stronger action to remove it from the market.¹¹⁷

Nonetheless, Dupont claims the EU move is “excessive” and inconsistent with Europe’s WTO commitments. In a 2018 letter, the company even proposes that Europe’s precautionary approach to chemicals management is contrary to WTO rules:

“Specifically, in view of the fact that the crop protection product at issue has been widely used, safely, for over a decade, regulatory disapproval based on the fact that the review found insufficient data for determining outcomes of a risk assessment is likely to be “more trade restrictive than necessary” to achieve a legitimate policy objective, contrary to the EU’s TBT Agreement obligation. Withdrawing regulatory approval for picoxystrobin would have severe effects on the global agriculture market.”¹¹⁸

Canada also raised the issue of enforcement of EU measures that member states choose not to abide by—on the spraying of glyphosate, for example. These first items took enough time on their own that meeting participants had to put off the issues of trade in cattle and pig semen, and hatching eggs and day-old chicks; EU audits of Canadian fish plants; and the animal welfare item (transportation) that was discussed at the Regulatory Cooperation Forum.

Committee on Agriculture

This committee first met on September 19 in Brussels. Based on a summary, again on the Canadian and European Commission CETA websites, quotas for meat and cheese trade took up most of the discussion. But the EU's pesticides policies were once more a hot topic (emphasis added):

*“Canada highlighted legislative developments in the EU on pesticides and veterinary medicinal products, pointing out that they have the potential to seriously impact EU imports of agricultural products **without a clear basis in international norms or a scientific assessment of risk**. The EU explained that the legislation in question is intended to address legitimate public health concerns; it is fully transparent and non-discriminatory. With respect to pesticide residues, the EU reconfirmed that their intent was that while applying the hazard-based criteria to pesticides, import tolerances will be evaluated when requested on the basis of a risk assessment carried out by the European Food Safety Authority (emphasize added).”¹¹⁹*

In its RCF proposals, CropLife states, “At some point the relationship is anticipated to mature to explore the desirability and feasibility of joint PMRA/EFSA (Pest Management Regulatory Agency/European Food Safety Authority) reviews for new applications for active substances and/or work sharing for scheduled re-evaluations of existing chemistries”. While ClientEarth has warned Canada may use the Regulatory Cooperation Forum to put “pressure on the successful implementation of EU chemicals and pesticides rules and on the capacity of the EU to address the remaining legislative gaps”,¹²⁰ this work may in fact take place within the less transparent agriculture committee.

Dialogue on Forest Products

The EU is a net importer of wood products, but prohibitions on the use of some biocides for pest control have been a long-standing irritant of the Canadian forestry and wood sectors. At the May 23, 2018 meeting of the



The Committee on Agriculture first met in September 2018. Photo: Seth Sawyers on flickr

CETA Dialogue on Forest products, unnamed participants discussed this issue as well as EU circular economy targets for wood and paper, use of wood in biomass, and meeting climate objectives; the EU Timber Regulation; EU construction products regulations and SPS measures related to plant health.

Biotech Market Access Issues

Canada and the EU have been meeting annually to discuss biotech market access issues for over a decade—a result of Canada's participation in the U.S.-initiated WTO challenge to Europe's GMO bans—but the conversation has now been wrapped into CETA. The summary of the working group's April 26, 2018 meeting shows Canada “expressed concerns over specific issues of the EU risk assessment, including the existing timelines for risk assessing GMO applications, including stacked events, the EU's 10-year expiry of authorisations which then necessitate renewal applications, and the retroactive application of EFSA guidance documents”.¹²¹

CETA and the environment

The threats to environmental policy in CETA neither begin nor end with the agreement's regulatory cooperation provisions. Other chapters in CETA related to investment and the regulation of domestic services may further constrain environmental policy options for government.

Investment: Canada and the European Commission insist the proposed Investment Court System in CETA protects governments' right to regulate much more so than standard investor-state dispute settlement. A 2016 joint study found, to the contrary, that some of the most problematic investor lawsuits against environmental measures under NAFTA and other bilateral investment treaties would still have moved ahead under ICS. In fact, CETA's articles on "fair and equitable treatment" and investors' "legitimate expectations" are more pro-business (and therefore restrictive of policy flexibility) than even NAFTA, under which about 60% of corporate challenges have targeted environmental measures.

Domestic Services: Chapter 12 (Domestic Regulation) applies to any "law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure" related to licensing and qualifications requirements. CETA requires these rules be "as simple as possible" and not "unduly complicate or delay" the supply of a service related to almost any economic activity, including mineral exploration permits, power plant zoning decisions, manufacturing practices. Thoroughly consulting the public on these frequently controversial projects, or imposing environmental conditions a company finds too onerous, could potentially trigger CETA state-to-state or investor-state disputes.

More information on these and CETA's other chapters affecting public policy can be found in the 2016 reports *Making Sense of CETA and Investment Court System Put to the Test*, both co-produced by Canadian and European NGOs.

The EU retorted that its regulations are clear and the applications process has not gotten longer. Canada asked for pre-submission meetings between industry and EFSA, which the food safety authority seems to be contemplating but which BEUC (the consumer advocacy group network) finds problematic "because of the risk it might affect EFSA's independence".¹²² The Canadian Food Inspection Agency and EFSA have been cooperating under a food safety risk assessment memorandum of understanding (MOU) since 2015.¹²³

The EU updated Canada on its transparency proposal to the WTO (in a nutshell, the proactive release of industry data used in risk assessments).¹²⁴ The EU requested info on Canada's GM salmon, which is approved for production and consumption in Canada. Currently the GM salmon is farmed in Panama and reimported into Canada, though it is very difficult to track because there are no labelling requirements. GM salmon is almost certainly being consumed unknowingly by Canadians and potentially re-exported to other countries.¹²⁵ (Traceability of GMOs and exports to the EU was one item on the agenda of a March 4, 2019 second meeting of the CETA biotech working group in Brussels.)¹²⁶

A 2017 report on GM salmon for the Commission claimed it is "not realistic" to imagine a transgenic fish offered on the European Market.¹²⁷ CropLife, on the other hand, claims in its proposals for CETA's Regulatory Cooperation Forum and biotech dialogue that "unduly restrictive GMO policies can deter adoption of beneficial technologies in developing countries, inconsistent with the EC's own international development objectives".¹²⁸ Canadian officials are bound to press the same line.

CETA Domestic Advisory Councils

Though the Canada Europe Roundtable for Business (CERT) lobby group has faded into the background now that its dream agreement, CETA, is in force, another group has established itself in Brussels with the aim of ensuring CETA's regulatory cooperation commitments are kept by both governments. The Canada-EU Trade & Investment Association (CEUTIA), which is currently led by a former Canadian ambassador to Europe, was one of several groups to submit detailed proposals for CETA regulatory cooperation to the Canadian government's consultation on the matter.

"We feel that further cooperation, planning and assessment on how regulation should be designed and implemented are key to ensure the success of CETA and the chapter 21", read the submission. The RCF "will be key" to

getting “CETA beneficiaries to shape and get involved directly into the CETA implementation”; addressing “public opinions and interests group concerns and therefore ease the public acceptance process”; and paving the way the way for future FTAs.¹²⁹

CEUTIA asserts that CETA can solve regulatory issues not yet covered at the WTO, including “guidelines and codes of practice on maximum levels for contaminant in food and MRLs for residues of veterinary drugs in food as well as for pesticide residues”.¹³⁰ The group also wants the Regulatory Cooperation Forum to ensure regulators do not consider economic actors (e.g. European lobster fishers who may not appreciate competition from Canada) in decision-making, but only “science and technology-based arguments”. They are totally fine, however, if those economic actors are Canadian corporations. CEUTIA President Mark Camilleri told a Canadian newspaper in 2018 that the RCF “institutionalises the opportunity for Canadian business to take full advantage of CETA by having a role in EU decision-making”.¹³¹

While CEUTIA, on its own behalf or that of its corporate clients, will no doubt engage within the CETA working groups and through other lobbying channels to achieve business’s deregulatory ambitions for the Canada-EU trade relationship, civil society groups have fewer resources and fewer options. One potential zone of contestation will be the Domestic Advisory Groups in the EU and Canada that are tasked with monitoring the agreement’s labour, environment, and trade and sustainable development chapters.

The first meeting of the CETA Committee on Trade and Sustainable Development was held on September 13, 2018 in Brussels. Officials discussed their preferences for experts to adjudicate disputes brought by civil society, labour or business under CETA’s environment and labour chapters.¹³² Canadian and European officials “stressed the important role of business in promoting labour and environmental objectives”, thus their focus on promoting the idea and practice of corporate social responsibility to non-CETA trading partners, and “agreed as a follow-up to explore potential synergies and cooperation activities” in this respect.¹³³ The committee discussed trade in plastics, trade and biodiversity, clean tech, multilateral environmental agreements, and their respective mechanisms for accepting and seeking NGO input on the TSD chapter.

At a meeting in Ottawa in September 2018, organised by Environment and Climate Change Canada to assess civil society interest in participating in the CETA domestic advisory



Genetically modified salmon is legally sold within the Canadian Market Photo: Andrea Pokrzywinski on flickr

group on the environment, the government expressed some openness to allowing civil society groups to monitor the entirety of the agreement—not just those chapters related to trade and sustainable development—in recognition of the many ways that CETA’s other working groups and dialogues may affect environmental policy. Canadian and European NGOs working on environmental issues should insist on this course of action, perhaps in future meetings of the labour and environment advisory groups.

Until such access is granted, however, CETA implementation will remain heavily skewed toward industry interests, and in most cases based on the deregulatory logic of “good regulatory practices”. If the Canadian government’s intentions in this respect are not clear enough from its stated priorities for these and other CETA committees, they become more so in the regulatory provisions Canada has agreed to with the U.S. and Mexico in the “New NAFTA.”

5. Regulatory cooperation in TTIP and the “New NAFTA”

“No more REACHes”

According to U.S. Special Envoy Murray Gray, writing in a May 2008 cable to various U.S. government officials heading to a bilateral meeting in Brussels, *“the EU sees its market as an instrument of ‘soft power,’ and uses its ‘tougher’ regulation in consumer and environmental protection to create new global standards (sometimes consciously at our expense). For this reason, a key focus of the TEC (Transatlantic Economic Council) for us is to help improve the way the EU regulates: minimizing unnecessary regulatory divergences between us depends on the EU using a transparent regulatory process, science-based risk assessments, cost-benefit analysis and thorough impact assessments”*.

In the same cable, Gray refers to the EU’s lauded (for its focus on precaution) REACH chemicals management system as *“one of the most egregious examples of over-regulation.... In some ways, the motto for the United States of the TEC should be ‘no more REACHes.’”* The cable credits OIRA/OMB work with the Commission for the establishment by the EU of the Impact Assessment Board in 2006, which was *“strengthened”* in February 2008, says Gray, *“so now EU Directorates cannot submit proposals to the Commission until IAB economists have approved the accompanying impact assessments”*. Emphasising the importance of regulatory cooperation not only to the U.S. but perhaps to market-based globalisation, Gray says, *“We both need smart regulation to improve our competitiveness and expand economic growth opportunities on both sides of the Atlantic”*.

Source: WikiLeaks (09.05.2008): https://wikileaks.org/plusd/cables/08BRUSSELS704_a.html, accessed 24.02.2019.

If the CETA regulatory cooperation chapter reflects the EU’s comfort zone for the same within an eventual EU-U.S. Transatlantic Trade and Investment Partnership (TTIP), the recently concluded USMCA—the “New NAFTA”—is all American. Canada’s acceptance of heavy-handed U.S. proposals for regulatory cooperation in that agreement suggests two things of importance to European environmental, consumer and public health advocates.

The first is that the USMCA “good regulatory practices” chapter exposes Canada’s comfort zone with regulatory cooperation and its expectations for what is appropriate in the Canada-EU context. Once the “New NAFTA” is ratified, likely at some point in 2019 or early 2020, the Canadian government will be married to a North American philosophy of deregulation that prioritises getting out of the way of commercial interests—the opposite of precaution.

A second important consideration for Europeans is how much the USMCA regulatory cooperation provisions draw from the Obama administration’s proposals for the stalled TTIP. As aggressively as the current U.S. administration has moved to deregulate at home, efforts by the current administration to restart transatlantic trade talks with the Commission represent a continuation more than a radical break from the long-standing U.S. project to align transatlantic regulations and regulatory practices. With U.S. President Trump and Commission President Jean-Claude Juncker now apparently committed to discussions on a regulation-focused trade agreement in the near term, we should expect the USMCA to provide a dangerous new template. So what does that agreement look like with respect to regulation?

In proper OECD form, Article 28.2.1 of the “good regulatory practices” chapter explains that the goal of regulation is to *“facilitate trade, investment and economic growth”*. Health, safety and environmental protection are bracketed as examples of legitimate public policy objectives that GRP can contribute to, but nowhere does the chapter propose they are of primary importance. Rather, governments should adopt GRP as a foundation for regulatory cooperation to *“support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements”*.

Article 28.2 notes that the guidelines for GRP in the chapter are “obligations” on the parties (i.e. binding), which is reinforced by the applicability of the USMCA’s dispute resolution process to recurring violations of the chapter after the agreement has been in force for one year (Art. 28.20).

Like the earlier U.S. proposals in TTIP, Article 28.4 asks Canada, the U.S. and Mexico to retain centralised regulation-setting agencies to enforce GRP across all federal departments (e.g. Health Canada, the Environmental Protection Agency or the Comisión Federal para la Protección contra Riesgos Sanitarios) so that new public protections “avoid unnecessary restrictions on competition in the marketplace”, do not create burdens on small business, and comply with international trade and investment obligations, including requirements to adopt international standards rather than developing more protective provisions.

In Canada, this clause of the USMCA would appear to lock into place the role that the Treasury Board Secretariat (TBS) currently plays as a regulator of last resort. The Cabinet Directive on Regulation, which came into force in September 2018, already enshrines in law many business-friendly GRP norms such as a one-for-one rule—regulators must kill one existing regulation for each new one they want to introduce—and a requirement that government agencies annually estimate how much they have reduced the “cost of administrative burden” on corporations.¹³⁴ Under the USMCA, a move to regulate in a more protective or pro-consumer way than this could conceivably be disputed by the U.S. or Mexico.

Article 28.6 of the USMCA obliges parties to publish annually a list of regulations they plan on implementing or introducing over the next year—standard practice in the U.S. and Canada, but again now enshrined into a binding international treaty. Further transparency requirements are outlined in Article 28.9, such as the obligation to justify the need for a new regulation, publish all scientific and other data consulted, and to treat input from any person in the NAFTA region equally in the regulation’s final development. Regulators are to “take into account the comments received and, as appropriate, make revisions to the text of the regulation published”.

In theory, these transparency clauses could be used to force regulators to better account for the positions of environmental organisations, food safety advocates and consumer groups in new product approvals, reviews of existing chemicals known to be harmful to humans, or other policy changes of public importance. However, as discussed throughout this report,

the primary objective of GRP is to reduce the burden on business. Presumably, recommendations to make national public protections stronger will be discarded as less facilitative of commerce (not to mention as violations of the deregulatory Executive Order 13771).¹³⁵

USMCA countries are not obliged to perform regulatory impact assessments (RIA) of new rules, but if they do (as currently in the U.S. and Canada), Article 28.11 requires the RIA to include: an explanation of why the new rule is needed and what problem it is meant to address; a list of all feasible regulatory and non-regulatory alternatives (including an assessment of doing nothing) that could also address the same problem; the costs and benefits of each of these scenarios; and the grounds for choosing one option over the other. This is an absurd amount of work to put public officials through each and every time they want to add, amend or remove a public protection, which happens quite frequently in all countries.

Adding to the burden on public regulators, and much like recent Commission regulatory policy, Article 28.13 requires all USMCA parties to create procedures to retroactively review regulations to “determine whether modifications or repeal is appropriate”, while Article 28.14 says any “interested person” (usually corporations and their lobbyists) must be given the means to submit written suggestions for “the issuance, modification, or repeal of a regulation” when it has: “become more burdensome than necessary to achieve its objective (including with respect to its impact on trade), fails to take into account changed circumstances (such as fundamental changes in technology, or relevant scientific and technical developments), or relies on incorrect or outdated information”.

There is significant potential here for multinational corporations to abuse this notice and review process. Global producers of chemicals, pesticides, pharmaceuticals, genetically modified food products, cosmetics and food additives are forever disputing good science showing risks to human health or the environment. Delays in removing known toxics, carcinogens, bio-accumulative products and endocrine disruptors from consumer products can be blamed in part on regulatory capture, but also result from pressure to harmonise measures across borders so as not to interrupt profitable supply chains and trade flows.

The GRP chapter in the USMCA will not be totally foreign to European civil society groups, since it draws heavily from the U.S. proposals for regulatory cooperation in TTIP that Wikileaks published in May 2016.¹³⁶ Like the

European Commission at the time, the Obama administration hoped the chapter would “reinforce regulatory cooperation thereby facilitating trade and investment in a way that supports Parties’ efforts to stimulate growth and jobs”, “reduce unnecessarily burdensome, duplicative or divergent regulatory requirements”, and “promote an effective, pro-competitive regulatory environment” and international cooperation on instruments that will lead to more “consistent regulatory outcomes”.¹³⁷ But the U.S. TTIP proposal, like the USMCA text, was more radical in how strictly it would enforce GRP.

The U.S. wanted TTIP to require each party to maintain internal processes to facilitate coordination among regulators—the role that OIRA plays in the U.S. and that the TBS has been given in Canada—so they are not duplicating work or violating international trade agreements, but were always emphasizing the special concerns of “small entities” (likely small enterprises) and prioritizing innovation. Other U.S. proposals would require parties to consider the trade effects of new rules; provide persons of the other party ample opportunity to comment on new rules at multiple stages of the process; in some instances, provide detailed descriptions of the regulatory process such that a stakeholder might know precisely what was happening at each stage (a bit like how online shoppers get regular email notifications of where their package is); provide a year’s advance notice of what new rules are being prepared and a compilation, easily available online, in a searchable database, of all new rules; and require regulatory impact assessments (or “analytical tools”, in the EU preferred language) of all new commercially important rules.

This was the U.S. administration at the end of its rope (so to speak) with the EU (see box “No more REACHes”). Granted, as discussed above, there has been considerable support from Europe, the German government and German officials in particular, for adopting more pro-business U.S. types of regulation, including impact assessments and cost-benefit analysis.¹³⁸ For example, at a January 2007 meeting between Chancellery Senior Economic Advisor Jens Weidman and representatives of the U.S. State Department, the Germans and Americans spoke of the potential to use Germany’s presidency of the EU to launch closer cooperation on “low-hanging fruit” leading to longer-term economic cooperation:

*“[Dr. Weidman] said that with new technologies developing, new areas, such as radio-frequency identification (RFID) technology and nanotechnology, are emerging that may soon require regulation. The United States and the EU need to begin cooperating now, so that they do not find themselves with conflicting regulatory regimes in the future.”*¹³⁹

Remember that this was all taking place under the neoconservative Bush administration. The French and German governments were agreed at this point on the need for a binding agreement that would set timelines for regulators to “reduce diverging regulatory requirements” on both sides of the Atlantic. The U.S. text for the TTIP regulatory cooperation process should be seen as an effort of the U.S. to radically speed up the process of harmonisation by putting U.S. regulatory norms into the text of a binding treaty for the first time. European NGOs such as Greenpeace, the Seattle to Brussels Network, Food and Water Europe, Friends of the Earth Europe, Transnational Institute and others were aghast at the implications of the chapter, which became a primary target of their activism, and an important reason behind widespread public opposition to TTIP.¹⁴⁰

Canadians are now contending with these same U.S. proposals within the “New NAFTA”, or USMCA. The issue of regulatory cooperation in trade agreements does not have the same media profile as it does in Europe, which might explain why it has not been as controversial, but this could change as the USMCA is brought forward for ratification. Still, environmental activists and public interest NGOs should be highly concerned that much of the U.S.-favoured TTIP language can be found word for word in the USMCA; the chapter is even subject to dispute settlement, which the Obama administration had not proposed in the EU-U.S. context.

6. Alternative foundations for international regulatory cooperation

As we have seen, “good regulatory practices” and regulatory cooperation are gradually chipping away at what little room governments have left to regulate in a precautionary way. Though multinational corporations may incur minor costs from differences in technical regulations, standards and conformity assessment procedures, these do not justify putting the foxes in charge of the proverbial henhouse. Promoters of regulatory cooperation rarely acknowledge the increased costs that governments incur through time-consuming, mandatory regulatory impact assessments and cost-benefit analysis.

A 2016 report on the EU-U.S. cooperation under the proposed Transatlantic Trade and Investment Partnership lists some of the other, rarely mentioned downsides of regulatory cooperation: “*time spent negotiating and carrying out coordination agreements*”, the risk of undermining social well-being by mismatching rules to local preferences (for degrees of environmental risk, for example), the greater chance that regulatory errors will have wider consequences under a uniform versus a heterogeneous policy environment, and the lost learning opportunities from harmonisation.¹⁴¹

As practiced in North America, voluntary regulatory co-operation has been much less transparent and accessible to NGOs and academics, or even elected officials, than it has for industry lobbyists. As the examples of Regulatory Cooperation Council activities listed above demonstrate, this can easily lead to suboptimal regulatory outcomes from a public interest perspective. Were countries to agree, instead, to cooperate in an ad hoc way, guided by democratic and precautionary principles, the outcomes could theoretically be positive for the environment, public health, and consumer and worker protections.

Environmental, consumer and public health activists, along with forward-thinking policymakers, need to be playing a double role in this evolving era of international regulatory cooperation based on “good regulatory practices” principles. First, there is the important job of monitoring current cooperation activities in the NAFTA region and under the fledgling CETA committees. Public funding for NGO participation could help ensuring that these spaces are not monopolized by corporate lobbyists.

In their submissions to the Canadian and European Commission consultation on regulatory cooperation in CETA, several environmental groups proposed there should be full transparency in the cooperation process itself (not only, as business groups demand, in government rule-making) and harmonisation upward to the higher standard (e.g. the adoption of the EU’s REACH standard for chemicals management in North America). Crucially, cooperation should be embedded in the precautionary principle instead of the misleadingly named risk-based approach at the heart of “good regulatory practice”.¹⁴²

These and other proposals from domestic and transnational civil society actors for states to adopt stricter standards (e.g. on food or consumer product safety) should be given as much if not more weight in the consideration of current and future areas of regulatory cooperation. After all, the whole purpose of environmental and health regulations is to protect the public.

Governments should also provide funding to NGOs to participate at the Codex and other international standards setting bodies to make it more likely their views will be integrated into international best practices. At the same time, we should dispense with the idea that regulatory divergence is only acceptable where regional conditions (usually physical, geographical, meteorological, etc., but also sometimes social) make it necessary



The European Parliament in Brussels Photo: Ash Crow on commons.wikimedia

to address a similar issue in different ways. Regulatory variation, even in otherwise identical situations, can be beneficial to everyone in the long term, including business, by providing a testing ground for multiple approaches to dealing with the same or similar regulatory issues.¹⁴³

For example, where a stronger ban on neonicotinoid pesticides (as in Europe, California or Ontario, Canada) has beneficial impacts on pollinators, water systems and health, this should serve as a benchmark for other countries to follow. The ban needn't be permanent, either, if in the future it can be demonstrated conclusively that these chemical products are safe for spraying—an unlikely prospect in this example, given new scientific evidence. U.S. automobile emissions standards are stronger than in most of the world today because one jurisdiction, the State of California, decided to show leadership by adopting different, stricter rules than were in place federally. Industry decided it would be better for them to push that higher standard nationally than to fight a series of varying state-level efforts to mimic the California example.¹⁴⁴

Testing in multiple jurisdictions, rather than being viewed as wasteful duplication, also has benefits, notably by increasing technical knowledge and engendering trust in government, business and the products we consume. Here the concept of open data could come in handy. If government regulators in all countries had access to an electronic repository of all the science, public comments and other information used to set national environmental, consumer protection and human health standards, they would be better able to understand why decisions were taken to regulate one way or another—and to advocate an appropriate path. Open data would provide cover for governments who may be facing strong corporate lobbying against taking stricter measures than industry would like to see implemented.

Of course, there are sometimes vast differences in the capacity of governments to regulate for product safety. Where developing countries worry legitimately that they do not have the resources or expertise to match, inspect or enforce the same standards and regulations as developed countries, bilateral and multilateral trade discussions should focus on capacity building and public-public partnerships to strengthen the application of precautionary decision-making globally.

But even between wealthy countries such as Canada and the United States there can be vast differences in the resources available to develop and enforce standards and

regulations. In these cases there may be legitimate reasons why Canadian regulators would opt to harmonise with U.S. standards where they have been shown to be highly protective of consumers, human or animal health, or the environment. But where new science, or the experiences of vulnerable or more directly impacted communities—farmers living close to fracking equipment, for example, or Indigenous communities living downstream from chemical-intense mining or energy projects—suggests a need for stricter regulations, it only makes sense for both governments to put adequate resources to the task.

There are clearly options for international regulatory cooperation that are not based strictly on WTO/OECD “good regulatory practices”, whose purpose is to internationalise a “light touch”, trade-biased regulatory methodology favoured by corporations and their lobbyists. A progressive regulatory cooperation agenda would create space for political, ethical or moral considerations in the rule-making process, emphasise open access to all scientific data, and prioritise the precautionary principle over rapid commercialisation and purely market-based solutions to today's significant environmental, public health and consumer protection challenges.

7. Concluding remarks

Multinational corporations, in particular those with vast and complicated global supply chains, have obvious financial incentives for lobbying governments to harmonise technical regulations, standards, conformity assessment procedures and risk assessments. The fewer approvals these companies must seek or inspections they must pass, and the less paperwork to fill out, the more money they stand to make—with lower market approval costs said to marginally improve competitiveness in world markets. But regulations, standards and certification regimes frequently serve important protective purposes and will differ for legitimate political, economic or ethical reasons, or due to consumer preferences. Governments should have a right to regulate in a precautionary way that takes these public concerns seriously, and that puts public health, labour rights and the environment as first priorities.

Under “good regulatory practices” ideology, however, governments agree to consider mainly how to reduce friction in international commerce, to grease the wheels of corporatized globalisation, when drafting public interest regulation. “Smart” or “better” regulation reforms and campaigns for the “innovation principle”, which are backed internationally by the OECD, are the domestic tools that proponents of this ideology—in Canada, the EU and the United States—very purposefully used to shrink the space for public interest environmental, consumer and human health policy. These deregulatory frameworks are now being locked into place through regulatory cooperation provisions in binding new free trade agreements such as CETA and USMCA.

Canada’s acceptance of a starkly deregulatory brand of “good regulatory practices” in the USMCA should be a warning to EU decision-makers of how North American industry, in line with Canadian trade and high-level regulatory officials, hope to use the many CETA committees, including the Regulatory Cooperation Forum, to interfere with or pre-empt precautionary decision-making by EU institutions and member states. The USMCA’s regulatory cooperation chapter is also a signpost of where the current U.S. administration hopes the Commission will land in the reboot of the TTIP negotiations. This would be a tragic outcome for Europe, which has spent so much political capital building an alternative framework for regulating based on the precautionary principle.

More fundamentally, “good regulatory practices” and regulatory cooperation should be seen not as novel or benign features of modern free trade agreements, but as a confirmation of the deregulatory project in the World Trade Organization, and in particular its agreements on technical barriers to trade and sanitary and phytosanitary standards. This corporate vision for how globalisation should proceed is tragically out of date in our era of climate change and destabilising inequality. Whole ecosystems have been pushed to the brink of collapse by exponential growth in economic activity and commerce over the past two centuries, and in particular since the Second World War. Greenhouse gas emissions must be halved globally by 2030 for humanity to have any chance of meeting its Paris Agreement commitments.¹⁴⁵

Given the need to rethink how and what we produce, trade and consume, so that we might meet these and other existential challenges, our governments’ preoccupation with multinational supply chain efficiencies seems hopelessly out of step. Under different principles, international regulatory cooperation could help countries put the global trade regime on a more sustainable, democratic and popular path. As long as that cooperation is based on poorly named “good regulatory practices,” however, that progressive vision for global trade will continue to recede from view.

Endnotes

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- 3 WTO (2012): *World Trade Report*, p. 37.
- 4 In the EC hormones case, on the question of whether or not governments must abide by Codex Alimentarius and other internationally recognised standards where they allow for a certain food production method, for example, the Dispute Settlement Body ruled restrictively in the affirmative. The Appellate Body disputed this finding: “To read Article 3.1 as requiring Members to harmonise their SPS measures by conforming those measures with international standards, guidelines and recommendations, in the here and now, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex recommendatory in form and nature) with obligatory force and effect” (p. 67). The Appellate Body found that the SPS agreement makes no such claims to do this. See: *European Communities – EC Measures Concerning Meat and Meat Products (Hormones) – AB-1997-4*, Report of the Appellate Body (16.01.1998). Accessed February 14, 2019: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds26/ab/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScripte_dSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds26/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScripte_dSearch&languageUIChanged=true#).
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- 11 Remarks and presentations can be accessed on the WTO website. Accessed February 19, 2019 https://www.wto.org/english/tratop_e/tbt_e/tbtchileevent2018_e.htm.
- 12 EO 12866 quoted in Office of Management and Budget and the Secretariat General of the European Commission (05.2008): “Review of the Application of EU and U.S. Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment”, Brussels/Washington DC.
- 13 Simon Haeder and Susan Webb Yackee (2015): “Influence and the Administrative Process: Lobbying the U.S. President’s Office of Management and Budget”, La Follette School Working Paper No. 2015-001, p. 3.
- 14 *Ibid.*, p. 29.
- 15 The EPA’s Natural Resources Division described risk management this way in 1994: “Risk management decisions often require value judgements on such questions as ‘What level of risk is acceptable?’ and ‘What level of expenditure is reasonable?’” See: Linda-Jo Schierow (1994): “Risk Analysis and Cost-Benefit Analysis of Environmental Regulations”. EPA. Accessed December 22, 2018: https://digital.library.unt.edu/ark:/67531/metacrs112/m1/1/small_res_d/.
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- 17 OECD (not dated). *Regulatory Impact Analysis. Trend in RIA adoption across OECD jurisdictions*. Accessed December 18, 2018: <http://www.oecd.org/regreform/regulatory-policy/ria.htm>.
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