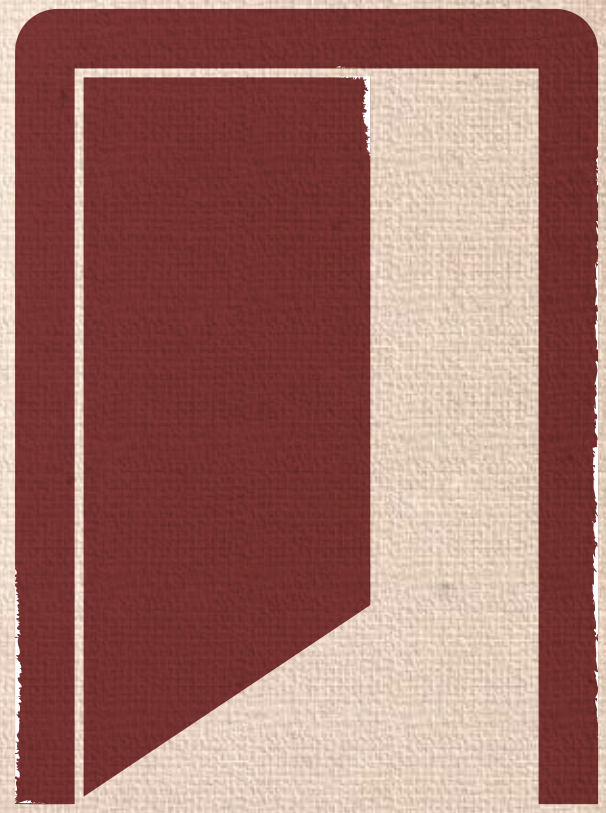
From NAFTA to CETA: Corporate lobbying through the back door



How regulatory cooperation serves as lobbyists' boulevard of influence in NAFTA and CETA

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EXECUTIVE SUMMARY

Canada and the European Union have included a regulatory cooperation chapter in the recently concluded Comprehensive Economic and Trade Agreement (CETA)—the first fully formed effort of its kind in an international trade and investment agreement. The chapter institutionalises what had been, until now, a series of ad hoc dialogues between Canadian and EU regulators through the creation of a Regulatory Cooperation Forum (RCF) to be led by trade officials.

The European Commission has assured that cooperation in CETA will be purely voluntary, achieved while respecting European laws and norms, and that the precautionary principle will not be undermined. But as the North American experience with regulatory cooperation shows, there is a genuine threat emerging from any project, voluntary or not, that starts from the premise that differences between regulations are above all a burden on business.

Since about the time of the Canada-U.S. Free Trade Agreement, and especially after the North American Free Trade Agreement (NAFTA) was signed in the early-1990s, Canada has used the need for cooperation with its major trading partners, in particular the U.S., as an excuse not to introduce stricter consumer protection or environmental measures. The establishment in 2011 of a Canada–U.S. Regulatory Cooperation Council (RCC) offers evidence of how business groups hope to use CETA's regulatory cooperation provisions to try and preclude precautionary measures that would hurt cross-border trade or investment in goods deemed unsafe or unacceptable in Europe.

1 Stuart Trew is a trade researcher with the Canadian Centre for Policy Alternatives and senior editor of the CCPA Monitor, the centre's bimonthly journal

2 Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (2014), "Making Sense of CETA: An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement," Canadian Centre for Policy Alternatives, p. 67: https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_TRADESTARIFF-STRANSPORT.pdf

INTRODUCTION

Traditional trade barriers, in the form of tariffs and quotas, have come down considerably since the early days of the General Agreement on Tariffs and Trade (GATT 1947). European exports to Canada, for example, face an average custom duty of only 3.5%, while Canadian imports to the EU are taxed at an average rate of 2.2%.[2] The most significant impacts of the proposed Canada–European Union (EU) Comprehensive Economic and Trade Agreement (CETA) are therefore expected to be on the regulation of trade, services and investment within the EU and Canada. The situation was similar when Canada and the United States signed a free trade agreement (FTA) in 1988, followed several years later by the North American Free Trade Agreement (NAFTA) with Mexico.

From this point on, trading partners started to work closer together to ensure regulations do not come in the way of trade. Regulatory cooperation is the term attributed to this closer collaboration between regulators for the sole purpose of favouring trade. It is also a longstanding demand of multinational corporations with supply chains spanning two or more countries.

Business lobby groups complain of different consumer protection and of different health measures creating unreasonable "barriers" to trade and investment. They have thus identified international cooperation, with industry input at the earliest stages of regulatory development, to be the next great leap forward to shape globalization according to their interests.

This report hopes to demonstrate how North American regulatory cooperation served as an external justification for a move towards widespread business-friendly regulation in Canada over the past quarter-century. Much of this cooperation was and continues to be driven by business-supported political parties and export-oriented companies, informed largely by industry lobbying, and institutionalized in Canada-U.S. sectoral working groups. Despite its largely voluntary nature, cooperation has nonetheless acted as a barrier to better consumer protections and public interest regulations in Canada.

01. Cooperation and capture in recent regulatory reforms

Over the past 30 years, Canada has prioritized harmonized regulations with the U.S. whenever possible—the natural result, some argue, of economic integration with a superpower flowing from the Canada-U.S. Free Trade Agreement (1988) and subsequent NAFTA (1993). There is some truth to this. As Canadian business and exporters became increasingly dependent on access to the U.S. market, they were highly vulnerable to shifts in U.S. policy affecting cross-border supply chains.[3] Automotive, food processing and agricultural firms, whose operations and ownership frequently span both sides of the border, have been the strongest advocates for common standards in food and consumer safety.

However, pressure to harmonize cannot fully explain the zeal with which consecutive governments in Canada have endorsed unilateral deregulation, to the point many Canadian regulators have come to depend on industry and foreign government science in their decision-making process.[4] For example, even before NAFTA's 30 cross-border regulatory working groups had been established, the Canadian federal government had asked all departments "to reduce the regulatory burden on Canadian businesses and individuals,"[5] such as by making sure "Information and administrative requirements should be *limited to what is absolutely necessary and impose the least possible cost on regulatees.*"

In Canada, the 2003–2005 "smart regulation" reform initiative was tied to international cooperation. The second recommendation of the 2004 External Advisory Committee on Smart Regulation was that "the federal government should review and adopt international approaches wherever possible" and "limit the number of specific Canadian regulatory requirements."[6] Unique Canadian regulations "may be appropriate," the committee added, when there is no commonly agreed upon international or North American standard, or the regulatory processes or decisions of a trading partner do not "meet Canadian policy objectives."[7]

There was no space here for Canada to move more quickly than its trade partners to protect the public interest where precaution would advise it. The fourth recommendation of the smart regulation committee even qualifies that should Canadian-specific rules be applied, regulators should first assess "alternative instruments for meeting policy objectives (e.g. voluntary measures, information strategies)."[8] At heart, "smart regulation" was about prioritizing business innovation, and the introduction and cross-border trade in "novel" products whose safety would be tested on the market, all the while free-riding off foreign (U.S.) regulators.[9] As a former Canadian industry minister put it in a 2003 speech:

Ottawa's structure is overwhelmingly oriented towards the interests of Canadian producers, not consumers. Our sectoral departments, from Industry to Agriculture to Natural Resources to the Space Agency and even the granting councils, have producer interests foremost in mind.[10]

Of course, similar forces were at play south of the border. A 2007 Canadian Centre for Policy Alternatives report on Canada-U.S. regulatory cooperation warned of the Bush administration's "concerted assault" on the U.S. regulatory system: "It has put corporate lobbyists and anti-regulation extremists in charge of regulatory agencies, centralized the regulatory control in the White House, stacked scientific advisory bodies with non-scientists or pro-industry scientists, suppressed or edited agency reports, manipulated regulatory tools, obstructed regulatory processes and slashed enforcement budgets."[11]

3 Stephen Clarkson, Sarah Davidson Ladly and Carlton Thorne (2002), "De-institutionalizing North America: NAFTA's Committees and Working Groups," paper presented to the third EnviReform Conference, November 8, 2002, p. 24

4 The free trade era intersects in Canada with a period of large federal deficits and growing debt, which triggered much rethinking about what governments should do and how they regulate. As a Health Canada official said in 2000, "Both officials and political leaders realize that governments regulate too much." Harmonization was a way to bring government budgets down (even at the expense of domestic scientific capacity and knowledge) while at the same time removing a "regulatory burden" from business engaged in cross-border trade

5 Government of Canada (1994), "Agenda for Jobs and Growth," Quoted in Lucy Sharratt (2002), "Regulating Genetic Engineering for Profit," Polaris Institute, S. 15.

6 External Advisory Committee on Smart Regulation (2004), "Smart Regulation: A Regulatory Strategy for Canada – Report to the Government of Canada," S. 19: http://publications.gc.ca/collections/Collection/CP22-78-2004E.pdf (Emphasis added)

7 Ibid.

8 Ibid., p. 20

9 Marc Lee and Bruce Campbell (2006), "Deregulation and Continental Regulatory Harmonization," in Campbell and Ed Finn, Living With Uncle: Canada-U.S. Relations in an Age of Empire," Lorimer, p. 124

10 Harry Swain, "Reflections on the Evolution of the Federal Industry Department," speech to the Industry Canada 2003 Executive Conference, quoted in Public Interest Advocacy Centre (2009), "Consumer Protection in Canada and the European Union: A Comparison," p. 31

11 Bruce Campbell (2007), "More Than Jellybeans: The SPP Regulatory Framework Agreement and its Impact on Chemicals Regulation," Canadian Centre for Policy Alternatives, pp. 3-4

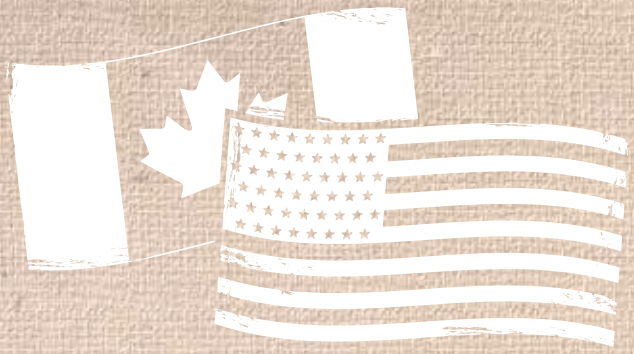
02. The Canada-U.S. Regulatory Cooperation Council

This pressure for common rules in favour of cross-border trading companies was a significant driver behind the creation of the Regulatory Cooperation Council (RCC) in 2011. The RCC is composed of senior regulatory, trade and foreign affairs officials from both countries. "The United States and Canada are committed to working through the RCC to provide early notice of regulations with potential effects across our shared border, to strengthen the analytic basis of regulations, and to help make regulations more compatible," said a joint statement in 2011.[12] This goal was elaborated in a three-part mandate for the RCC that can be summarized as follows:

1. **Increased regulatory alignment and transparency:** At the government level, this involves opening up each country's regulatory process "at the earliest stage possible" to examine options for alignment. It also foresees giving relevant stakeholders "early warning" of "upcoming rules that are significant and of mutual interest." Stakeholders are primarily business lobbyists who can afford to get involved in these regulatory processes (see page 12).

2. **Greater alignment in regulations and recognition of regulatory practices:** Recognizing the steps Canada and the U.S. have already taken to require cost-benefit assessments and the use of "best available science" before establishing new rules, the RCC is to align "also the activities associated with the application of regulations (testing procedures, inspection and certification activities, etc), and to accept and recognize the work done in each other's jurisdiction."

3. **Smarter, less burdensome regulations in specific sectors:** These target sectors are characterized by high levels of cross-border integration and a history of past regulatory cooperation, as well as those with "significant, emerging growth potential and that are characterized by rapidly evolving technologies where regulatory approaches are anticipated or are currently in early stages of development."[13]



RCC working groups, made up of high-level Canadian and U.S. departmental officials, meet regularly by teleconference and occasionally in person to assess progress and consider new priorities for cooperation (alignment) submitted by stakeholders.[14] The RCC terms of reference state, in language similar to that found in the CETA domestic regulation chapter, that "Each country will maintain its own sovereign regulation." But this is just a broad principle, and in practice there is no hard and fast requirement to keep legislators abreast of progress: "In the interests of open government, the agencies *may, as appropriate,* consult and engage with their legislative bodies and key stakeholders regarding efforts on regulatory cooperation" (emphasis added).

Key areas of RCC cooperation to date include, but are not limited to, a joint reassessment of neocotinoid pesticides and harmonization of the registration and maximum residue limits of chemical pesticides; a common North American approach to the disclosure, testing and tracking of chemicals and novel materials in consumer products; harmonized engine and vehicle emissions standards; mutual recognition of plant and animal health regulations and food inspection methods; harmonized standards for the transportation by rail of flammable liquids; and a common set of principles for the regulation of nanotechnology.[15] In some areas, including the regulation of toxic chemicals, technical working groups comprised of industry and civil society actors are regularly consulted on an ongoing basis. In other cases, industry is initially consulted on priorities for cooperation, but afterwards the work is carried out independently by regulators.[16]

12 Joint Statement by President Obama and Prime Minister Harper of Canada on Regulatory Cooperation, February 4, 2011, https://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0

13 Terms of reference for the United States – Canada Regulatory Cooperation Council, June 3, 2011, https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada_rcc_terms_of_reference.pdf

14 RCC Newsletter, March 2016 https://www.tbs-sct.gc.ca/ip-pi/trans/ar-lr/rcc-ccmr/rpswp-epmrpt-eng.asp#toc2

15 For more on the RCC working groups, see Government of Canada, "Canada–U.S. Regulatory Cooperation Council," https://www.tbs-sct.gc.ca/ip-pi/trans/ar-lr/rcc-ccmr/index-eng.asp

16 Personal communication with RCC contacts in Canada

03. Regulation of toxics and pesticides in Canada

The RCC's work so far on toxics regulation and pesticide management can help us understand how cooperation efforts, even when they are voluntarily entered into, can become yet another venue for industry lobbying against new rules, and erect "barriers" to effective public health and environmental measures.

Canada used to be a leader in the assessment of the toxicity of chemicals in commercial use, earning praise from consumer groups for the toxics provisions of the Canadian Environmental Protect Act (1999). Since then, Canada has fallen behind the EU in some respects, and may even become the weaker North American link in chemicals management once reforms to the U.S. Toxic Substances Control Act come into effect.[17] The role played by regulatory cooperation—in particular the directives to Canadian regulators not to create unnecessary trade "barriers" through more stringent rules—cannot be overlooked in this regression.

Prior to a 2007 North American Leaders' Summit, both the Environmental Protection Agency (EPA) in the U.S. and Health Canada had come under fire for hastily approving chemicals that were shown to harm human health, and for regulating in a way that was too slanted in support of industry.[18] As in other areas, like biotechnology, Canada's regulatory decisions on chemicals are reliant on industry data, are made in a non-transparent way, and have been slow to phase out toxics.[19] Consumer groups celebrated a recent decision to ban the use of Bisphenol A (BPA) in baby bottles, based on the risk of consumption for infants. But they are puzzled why neither Canada nor the U.S. chose to ban it from all food packaging as a potential hazard for consumers of all ages.

Despite regulatory cooperation efforts, there are still significant differences in how Canada and the U.S. regulate toxics. Canada, for example, makes greater use of hazard and exposure criteria in its listing decisions, and plans to scrutinize more than 4,000 high-risk chemicals of the 23,000 substances allowed into commerce without a proper assessment—double the number of chemicals on the existing U.S. priority list. The EU REACH process (Registration, Evaluation, Authorisation and Restriction of Chemicals), by contrast, will "require producers and users of an estimated 30,000 chemicals in commerce in Europe to register them and provide information on their production, use, hazard and exposure potential."[20]

The NAFTA governments could have decided at their 2007 meeting to harmonize upwards to the higher European standards. Instead, they issued a joint declaration on "Regulatory Cooperation in the Area of Chemicals," with the goal of producing a continental alternative to REACH. This goal has carried over into the RCC process, though under somewhat different circumstances. The revised TSCA in the U.S. incorporates positive Canadian and some European features that improve the risk assessment process used by the EPA.[21] But, from a consumer and health protection perspective, it is still falls behind EU legislation on favouring alternatives to chemicals, and with respect to endocrine disrupters.

Canada and the U.S. have agreed to try to jointly assess six high-priority chemicals using the RCC process. Meanwhile, technical working groups have been established in the areas of nanotechnology, risk assessment of new and existing chemicals, and how significant new activities (or significant new usage rules in the U.S.) are regulated.

Table 1 lists the members of the RCC technical working group on chemicals risk assessment, broken down by industry, NGOs and "alternate" members. The American Chemistry Council, which played a significant lobbying role in Europe to postpone a proposed ban on pesticides containing harmful endocrine disruptors (EDCs), has three seats on the technical working group (four if you count the alternate).[22] Apart from the obvious imbalance between industry and non-industry voices, the working group is notable for its dominance by U.S. multinationals, reflecting the high levels of foreign ownership in the Canadian chemicals sector.

17 The election of Donald Trump as U.S. president at the end of 2016 has created uncertainty over the fate of the RCC and U.S. regulatory policy in general. The new administration has stated its intention to drastically deregulate in areas like finance and the environment. This report was written before the U.S. election, and in any case we cannot predict where the new administration will move on these regulatory issues

18 Campbell (2007), p. 4

19 Environmental Defence, letter to Canada's health minister on improving toxic chemicals regulation: http://action.environmentaldefence.ca/p/dia/action3/common/public/index.sjs?action_KEY=11294

20 Richard Denison (2007), "Not That Innocent: A Comparative Analysis of Canadian, European Union and United States Policies on Industrial Chemicals," Environmental Defence and Pollution Probe, p. 4: https://www.edf.org/sites/default/files/6150_NotThatInnocent_ExecSum.pdf

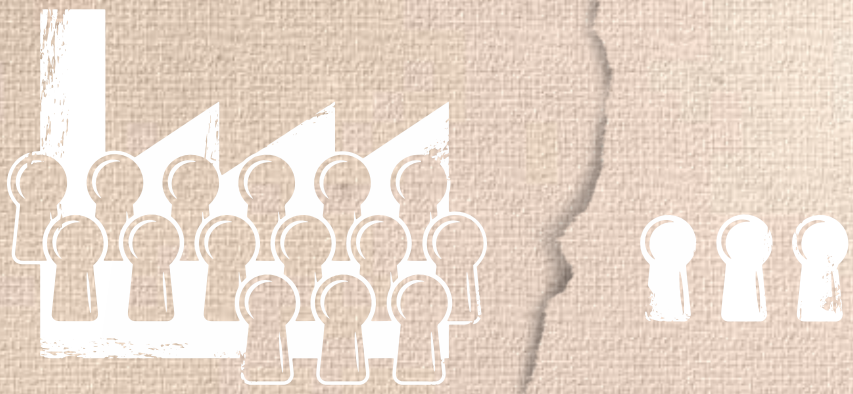
21 See Richard Denison's blog series for the Environmental Defense Fund, http://blogs.edf.org/health/2015/04/15/tsca-reform-legislation-enhancing-epa-testing-authority/

22 Union of Concerned Scientists (2015), "Bad Chemistry: How the Chemical Industry's Trade Association Undermines the Policies That Protect Us," http://www.ucsusa.org/center-science-and-democracy/fighting-misinformation/american-chemistry-council-report#.WBuVj0ErIUE

Table 1

RCC Risk Assessment Technical Working Group Members [23]

Name	Affiliation	Country
	Industry stakeholders	
Sarah Amick	Rubber Manufacturers Association (RMA) Verband der Gummihersteller (RMA)	USA
Tim Brown	Consumer Specialty Products Association (CSPA) Verband der Spezialprodukte für Verbraucher (CSPA)	USA
Sandra Carey	International Molybdenum Association Internationaler Molybdän Verband	UK
Pat Casano	General Electric	USA/CAN
Marcia Castellani	Ford Motor Company	USA
Shaun Clancy	Evonik	
Shanna Clark	Chevron	USA
Paul DeLeo	American Cleaning Institute (ACI) Amerikanisches Reinigungsinstitut (ACI)	USA
Christina Franz	American Chemistry Council (ACC) Amerikanischer Chemikalienrat (ACC)	USA
Pratima Gangopadhyay	Global Automakers	USA
Andrew Jaques	Cyanide Council Zyanid Rat	USA
Gordon Lloyd	Chemistry Industry Association of Canada (CIAC) Verband der Chemischen Industrie Kanadas (CIAC)	CAN
Barbara Losey	Alkylphenols & Ethoxylates Research Council (APERC) Forschungsrat zu Akylphenol und Ethoxylat (APERC)	USA
Beta Montemayor	Canadian Cosmetic, Toiletry and Fragrance Association (CCTFA) Kanandischer Verband der Kosmetik, Pflege- und Badprodukte und Parfum (CCFTA)	CAN
Steve Risotto	Phthalic Anhydride Panel (American Chemistry Council) Panel zu Phthalsäureanhydrid (ACC)	USA



Gordon Sanders	Givaudan	USA
David Shortt	Dow Chemical Canada	CAN
Karluss Thomas	Silicones Environment, Health and Safety Council (SEHSC) (American Chemistry Council) Rat zu Umweltsilikonen, Gesundheit und Sicherheit (SEHSC)	USA
Susan Van Volkenburg	Lanxess Konzern	USA
Don Wilke	Procter & Gamble and Canadian CSPA	USA/CAN
Peter Miranda	SI Group	USA
Non-governmental organizations		
Fe de Leon	Canadian Environmental Law Association (CELA) Kanadischer Verband für Umweltrecht	CAN
Sandra Madray	Chemical Sensitivities Manitoba (CSM)	CAN
Jennifer Sass	Natural Resources Defense Council (NRDC) Rat zur Verteidigung der Natürlichen Ressourcen	UK
Alternates		
Denise Roesh	Chevron	USA
Nancy Beck	ACC	USA
Linda Santry	Nova	USA
Deborah Vercek	Lanxess Konzern	USA
Nina Hwang	NRDC	USA
Susan Hazen	Global Automakers	USA

Source: Environment and Climate Change Canada (shared with author)

According to publicly available government records, the technical working group met in October 2015 to identify the scope of joint collaboration, and to establish roles, responsibilities, timelines and milestones. A "forward plan" posted to the Environment and Climate Change Canada website says Canadian and U.S. regulators will now (between November 2016 and April 2017) develop "common high-level principles for chemical risk assessment," and identify opportunities and impediments to further collaborative work.[24]

A source with access to the process claims it is still too early to know if the RCC will be a drag on needed reforms to Canada's toxics regulatory framework. They report, however, that the joint assessments of six priority chemicals are stacked with industry players, and that NGOs were only incorporated into the technical working groups after the RCC working areas were established.[25]

Cooperation on pesticide regulation, including harmonizing maximum residue limits, or MRLs, was already advanced in North America prior to the RCC, through work that started within one of the more active NAFTA technical working groups (TWG). A 2006 report found that, to that point, "There is evidence that patented producers, through their industry organization, CropLife, are highly involved in [the] process, while generics and agricultural producers are not. From the TWG minutes, there seem to be key roles adjudicated to [the] global pesticide industry and government federal agencies leaving behind farmers, NGOs and consumers."[26]

Another report that year found that Canada allowed many ingredients in registered pesticides that were banned in other OECD countries, including known or suspected carcinogens and developmental toxins.[27] The report claimed North American harmonization efforts were a "driving force" of changes to Canadian pesticide regulation. The problem was that "both Canada and the U.S. fare poorly in protecting public health from pesticide risks in comparison to the European Union and Australia."[28] The largest pesticide makers, represented through CropLife, have made it clear they see regulatory cooperation in the Transatlantic Trade and Investment Partnership (TTIP) and CETA as a means of stopping the EU from diverging further from North American norms.[29]

In April 2016, the Canadian government moved responsibility for the RCC from the Privy Council Office (PCO) to the Treasury Board Secretariat (TBS). "Housing the RCC at TBS brings together the Government's primary regulatory policy functions, which will result in increased synergies and better support of regulatory cooperation between Canada and the U.S.," said a government official.[30]

This further institutionalization of the RCC has been received with mixed praise by business groups. A report from the Canadian Chamber of Commerce, funded by Monsanto, CropLife, Johnson & Johnson, Google, Eli Lilly and several other multinationals and released in April 2016, complains of an "impotent" RCC and promotes, instead, the value to industry of a more "bottom-up" approach to cooperation. The report recommends the establishment of a "dashboard that industry stakeholders can use to track the agendas and progress of bilateral partnerships between Canadian and U.S. regulatory agencies," and to provide input to regulators. Such an online portal was under development by the Canadian Food Inspection Agency at the end of 2016.[31]

23 Chart supplied by the RCC Substances directorate within Environment Canada

24 Regulatory Cooperation Council Joint Work Plan: Chemicals Management, http://www.ec.gc.ca/international/default.asp?lang=En&n=7C5E4437-1

25 Personal conversation with author

26 Dan Badulescu and Kathy Baylis (2006), "Pesticide Regulation Under NAFTA: Harmonization in Process?" CATPRN Commissioned Paper CP 2006-6, p. 15

27 David Suzuki Foundation (2006), "The Food We Eat: An International Comparison of Pesticide regulation," p. 5: http://www.davidsuzuki.org/publications/downloads/2006/DSF-HEHC-Food1.pdf

28 Ibid. p. 22

29 Erica Smith, David Azoulay and Baskat Tuncak (2015), "Lowest Common Denominator: How the Proposed EU-US Trade Deal Threatens to Lower Standards of Protection From Toxic Pesticides," Center for International Environmental Law, p. 14

30 BJ Siekierski, "Liberals shift responsibility for Regulatory Cooperation Council from PCO to Treasury Board," iPolitics.ca, April 10, 2016, https://ipolitics.ca/2016/04/10/liberals-shift-responsibility-for-regulatory-cooperation-council-from-pco-to-treasury-board/

31 Personal communication with CFIA official, November 7, 2016

04. Regulatory cooperation in CETA

For geographic and historical reasons, Canada-U.S. regulatory cooperation is more advanced, and has been a higher priority for North American business lobbies, than Canada-EU cooperation. Still, groups like the Canada-Europe Round Table for Business (CERT), an important CETA proponent in Canada and Europe, have been lobbying for direct stakeholder engagement in the minimization of transatlantic regulatory "barriers" since the early 2000s.[32]

Obligingly, in 2004, Canada and the EU signed a Framework on Regulatory Cooperation and Transparency. Its preamble took into account "the shared commitment to regulatory reform as reflected in the EU 'Better Regulation Package' and the Government of Canada's 'Smart Regulation' initiative (described above), and noted that "regulatory co-operation is considered a priority by our respective business communities."[33] Regulators were encouraged to share information on new rules that may affect trade "at as early a stage as possible so that comments and proposals for amendments may be taken into account." "Unnecessary" differences between Canadian and European rules were to be identified and eliminated where possible."

In a 2008 Canadian government consultation, the business lobby group CERT expressed its hope that "[n]egotiating a Canada-EU agreement with a regulatory co-operation arrangement at its core would allow the affected party to comment in advance on how the proposed regulation could affect trade and investment patterns. This would be a useful development in preventing future disputes."

What business lobbies wanted in CETA, they obtained. Regulatory cooperation is today a full chapter of CETA. And the footprint of business lobbying is easy to identify in this chapter:

CETA Text
Regulators are encouraged to share information on new rules that may affect trade "at as early a stage as possible so that comments and proposals for amendments may be taken into account."

Position of big business
[CETA would] allow the affected party to comment in advance on how the proposed regulation could affect trade and investment patterns.

Canadian government promotional material boasts that CETA will be the first bilateral agreement with a standalone regulatory cooperation chapter, highlighting the benefits to Canadian business as follows:

By fostering cooperation earlier in the regulatory process, the Forum is expected to enhance information sharing between Canadian and EU regulators, facilitate the development of more compatible regulatory measures, resulting in fewer barriers to trade, and making it easier for Canadians to do business in the EU. For example, a Canadian company, working through the Regulatory Co-operation Forum, will be able to request information at an early stage regarding new EU regulations in development,

and provide comments and recommendations on how such regulations should be developed in order to prevent and eliminate unnecessary barriers to trade [34] *(emphasis added)*

To know the intentions of the Canadian government in CETA, one needs to look no further than the World Trade Organisation (WTO). The Canadian government has opened disputes in the WTO with the European Union on GMOs and asbestos import bans, and against European restrictions on the use of hormones in raising animals for human consumption.[35] Canadian agricultural exporters and food processors see regulatory cooperation as a means to reduce or eliminate "non-tariff barriers" to European imports of restricted Canadian goods. In the GMO case, which Europe lost in 2006, Canada settled (in 2009) for a "bilateral dialogue" on regulatory issues rather than imposing trade penalties on EU member states for maintaining their import bans—a sign, perhaps, that the government recognizes the potential of institutionalised cooperation to produce a regulatory regime more conducive to North American business interests.

The precise functioning of the CETA regulatory cooperation chapter and proposed Regulatory Cooperation Forum (RCF) are yet to be determined. Consumer and public interest advocates are rightly concerned big business will gain new opportunities in CETA to fight unwanted public health and environmental measures and the use of the precautionary principle.[36] Indeed, it is clear from the public record of Canadian government and big business statements that this chilling effect is precisely the goal of regulatory cooperation, not its unintended consequence.

Where the Canada–EU framework agreement was vague about how regulators would cooperate, CETA firmly establishes the RCF to be chaired by high-level officials of the Canadian government and European Commission, and include "other interested parties" as mutually agree to by the Parties. CETA requires the RCF to adopt terms of reference and procedures at its first meeting, to meet at least once annually, and to report to the CETA Joint Committee on the implementation of the regulatory cooperation chapter.

The contact points on both sides of the Atlantic—in Canada, the Technical Barriers to Trade and Regulations Division of Global Affairs Canada; in the EU, the International Affairs Unit of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs—suggest whose interests will be most served by cooperation. These departments have a core mandate to expand commerce, not to protect consumers, citizens or the environment. Regulatory initiatives, "whether in progress or anticipated," that a Party would like to consider for cooperation will be reviewed "in consultation" with other regulatory departments and agencies, but it will be trade officials coordinating the effort and reporting to the Joint Committee.

Article 21.8 of CETA opens the door to multi-sectoral input into the activities of the RCF, but again environmental and consumer watchdogs worry it will mainly benefit

private sector actors with the most resources and best connections to the trade officials chairing the committee. It reads:

In order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations. ***These consultations may be conducted by any means the Party or Parties deem appropriate***.[37] *(emphasis added)*

As stipulated by Article 26.2.4, as a "specialised committee" the RCF "may propose draft decisions for adoption by the CETA Joint Committee, or take decisions when this Agreement so provides." The Joint Committee is given "the power to make decisions in respect of all matters when this Agreement so provides," and these decisions "shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them." This process is part of the reason the European Commission and Canadian government refer to CETA as "a living agreement," since it is designed to evolve over time based on work that will go largely unscrutinised by national and regional parliaments.

How might this process work in practice? If we take the RCC in North America as a prototype, and given the structural similarities with the RCF there is no reason we should not do so, one can see the risks that a broad range of regulatory initiatives may be influenced, inhibited, delayed or even blocked by business interests.

In the area of toxics, for example, the Center for International Environmental Law (CIEL) has noted that between March 2003 and June 2011, "Canada has raised concerns about REACH 21 times at the WTO [Technical Barriers to Trade] Committee. Most worryingly, Canada has pointedly criticized REACH's precautionary, hazard-based approach, which places a greater, and appropriate, responsibility on industry to investigate and disclose the potentially harmful effects of its products."[38]

Under CETA, should Canada request a dialogue on regulatory cooperation in the area of toxics, the EU may decline, "but it should be prepared to explain the reasons for its decision to the other Party," per Article 21.2.6. If the RCC process is a guide, Canada and/or the EU could then consult with industry stakeholders to determine the priorities for cooperation, and action plans will be drawn up with deadlines for short- and medium-term objectives. Industry may be pulled into the cooperation process more or less indefinitely, through a technical working group, or else in an ad hoc manner—to update interested stakeholders on progress and solicit input on future cooperation opportunities. In both cases, industry associations, like the American Chemistry Council or CropLife, would have access to the CETA cooperation process through their Canadian operations.

Should the RCF, or another specialised committee established underneath it, come to a bilateral understanding (e.g. on the equivalence of Canadian and European risk assessment methodologies, or the joint listing of a specific chemical or pesticide as safe or unsafe for human exposure), it would be up to the CETA Joint Committee to finalize the decision. While the decision is binding, per Article 26.3, "subject to the completion of any necessary internal requirements and procedures," it is unclear whether regulatory reforms achieved through cooperation would be presented as such to European decision-making bodies and member states.

Much as Canada used the excuse of North American cooperation as a justification for avoiding calls for better regulation of toxics, food safety and biotechnology, the European Commission has already shown a preference for harmonization with North American standards over setting a high European benchmark for consumer protection. For example, progress on listing endocrine disrupting chemicals for hazard-based cut-off has stalled due to lobbying from CropLife and the U.S. government, who worry about the impacts on U.S. agricultural exports from an EDC ban in Europe. As CIEL reported in 2015, two of the three options considered in the commission's 2014 roadmap for possible impact assessment frameworks for new EDC regulations employed a U.S.-based "risk-based" approach, "representing a major substantive shift in EU policy under industry and foreign government pressure."[39]

CETA's apparatus of regulatory cooperation can reasonably be expected to enhance this predilection for moving toward more big business–friendly North American regulatory models.

32 Canada-Europe Roundtable for Business (2004), "CERT Working Groups – Overview of Policy Priorities": http://www.canada-europe.org/en/pdf/CERT%20Overview%20of%20Policy%20Priorities%20-%2010%20March%202004.pdf

33 See framework archived here http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/eu-framework.aspx?lang=eng

34 Global Affairs Canada, "Boost your bottom line," promotional material for CETA, http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/boost_your_bottom_line-optimisez_vos_resultats.aspx?lang=eng

35 European Communities – Measures Affecting the Approval and Marketing of Biotech Products (DS292): https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds292_e.htm; European Communities – Measures Concerning Meat and Meat Products (Hormones): https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm

36 Max Bank, Ronan O'Brien and Lora Verheecke (2016), "More cooperation for less regulation," in "Making Sense of CETA – 2nd Edition," pp. 43-46: https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/09/Making_Sense_of_CETA_2016.pdf

37 CETA Chapter 21, Regulatory Cooperation, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/21.aspx?lang=eng

38 Letter from Carroll Muffet, CEO of CIEL, to Paul Magnette, Minister-President of Wallonia, October 19, 2016, http://www.ciel.org/wp-content/uploads/2016/10/CIEL-letter-to-Mr.-Magnette.pdf

39 CIEL (2015), p. 15

CONCLUDING REMARKS

European governments and citizens concerned with maintaining the right to take precautionary measures to avoid risks to health and the environment should find little solace in assurances from the European Commission that the regulatory cooperation process in CETA is voluntary and will not compromise public health or environmental policy. In the North American experience, voluntary cooperation initiatives have proven quite damaging to the integrity of Canada's regulatory process, and dangerous to the democratic process and the greater public good.

In an age of declining rates of return from traditional industries, and declining growth opportunities from tariff elimination on trade, investors are banking on innovative or "disruptive" breakthrough technologies that may also create new levels of risk. Countries like Canada, hoping to attract investment in these areas, have regulated lightly and with more of an eye to supply-chain efficiencies than public safety.

By invoking the need for harmonization when it suits their purposes, but ignoring it when it does not, successive Canadian federal governments have—hand in hand with business lobbyists—gradually deregulated, under-regulated and moved toward industry self-reporting in order to "reduce the burden" on business. Where consumer and public interest groups call on Canada to do more, in particular in the areas of toxic chemicals, pesticides and GM crops, governments have emphasized the need to take cooperative transnational approaches, thereby discouraging or delaying positive regulatory intervention.

The priority given in the North American context to transnational (especially industry) cooperation, international harmonisation and assessing regulations for their trade impacts has limited freedom in government rule-making, tilted the balance in favour of commercial over consumer interests, and undermined the overall capacity of government to properly assess risks to human health, workers' safety and the environment.

In effect, industry lobby groups are no longer satisfied to wait until a foreign regulation comes into force before challenging it as a trade barrier. Instead, they have pursued, and to an important extent obtained, the chance under new trade deals like CETA to nip potentially costly regulations in the bud. Voluntary cooperation activities under CETA, as within North America, would add significant business access, and political pressure, on both sides of the Atlantic—at a time when much more active government regulation is demanded, for example, to address today's multiple and overlapping environmental crises.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