EU-CANADA TRADE AND INVESTMENT DEAL THREATENS EU CHEMICAL POLICIES

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INTRODUCTION

One of the main purposes of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is to reduce non-tariff barriers to trade.[1] The question is whether it is in the EU's interest to reduce barriers that are caused by a difference in regulatory approach. In the area of environmental health, where the EU provides a higher level of protection,[2] it is only in the EU's interest to reduce regulatory barriers if the EU can maintain the same level of protection.

However, Canada's views on trade barriers with the EU, the standards in CETA, and the processes set up by CETA suggest that the agreement would lead to deregulation, rather than setting high trans-Atlantic standards. Through CETA, Canada and Canadian companies will gain new avenues to invalidate the EU's more precautionary approach.

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1 European Commission (January 2017) "CETA explained" http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/

2 The Canadian Environmental Law Association (January 2007) "European and Canadian Environmental Law: Best Practices and Opportunities for Co-operation" at p. v http://www.cela.ca/sites/cela.ca/files/555_EU.pdf

1. CANADA'S OPPOSITION TO EU ENVIRONMENTAL HEALTH REGULATIONS

Canadian exporters have cited EU health and safety standards as a primary barrier to trade[3] and Canada has repeatedly complained about the European Commission's regulations related to environmental health.

For example, for more than a decade, Canada complained over 20 times about REACH — among the world's most ambitious systems to limit our exposure to dangerous substances — at the World Trade Organization's (WTO) Technical Barriers to Trade (TBT) Committee.[4] Moreover, over the past two years, Canada has raised concerns against the EU approach to endocrine disruptors at every single meeting of the TBT Committee.[5]

Endocrine disruptors, or EDCs, are harmful chemicals that disrupt our endocrine system. They have been linked to a wide range of diseases, including cancer, birth defects and other developmental disorders.[6] They are conservatively estimated to cost Europeans more than €160 billion each year in additional health expenses.[7]

According to Canada, if the EU takes a precautionary approach to regulating endocrine disruptors, this will be an unnecessary barrier to trade, in violation of WTO commitments, which are mirrored in CETA.[8] In its comments to the European Commission on the proposed EDC criteria, Canada argued that the very definition should be based on a consideration of potential exposure, or how likely it is that harm would occur.[9]

The EU EDC impact assessment notes that "the pressure on the EU is mounting as demonstrated by the growing number of WTO Members taking the floor to express concerns or to question the EU's

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3 The European Commission and the Government of Canada (October 2008) "Assessing the costs and benefits of a closer EU-Canada economic partnership" at p. 31 http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf

4 Center for International Environmental Law (CIEL) (October 2016) Letter to Paul Magnette http://www.ciel.org/wp-content/uploads/2016/10/CIEL-letter-to-Mr.-Magnette.pdf

5 CIEL (January 2017) Letter to Giovanni La Via https://tradinghealthforprofit.files.wordpress.com/2017/01/edcs-one-more-way-ceta-endangers-public-health-and-the-environment.pdf

6 Endocrine disruptors are harmful chemicals that interfere with the natural hormones in our bodies. Diamanti-Kandarakis, E. et al (June 2009) "Endocrine-Disrupting Chemicals: An Endocrine Society Scientific Statement" at p. 293 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2726844/#

7 Trasande, Kortenkamp A. et al (July 2016) "Burden of disease and costs of exposure to endocrine disrupting chemicals in the European Union: an updated analysis" at p. 565 https://www.ncbi.nlm.nih.gov/pubmed/27003928

8 Government of Canada (July 2016) Comments on criteria to identify endocrine disruptors for plant protection products http://ec.europa.eu/info/law/better-regulation/initiatives/ares20163071834/feedback/F381_en

9 *Id.*

ongoing work on" defining the EDC criteria.[10] The impact assessment then observes that this pressure "makes the EU position very difficult"[11] and that the unprecedented opposition at the WTO "strongly suggests that, depending on the final decision, formal WTO dispute resolution could be expected."[12] The impact assessment concludes that to achieve compliance with WTO obligations, the European Commission should include additional risk considerations into EDC criteria.[13]

The notes from a meeting obtained through a freedom of information request reveal that the European Commission is prioritizing trade rather than health concerns.[14] In July last year, a European Commission official acknowledged to Ambassadors from the US, Canada and other countries that it proposed to establish maximum residue levels for pesticides containing EDCs in an effort to "address the concerns" of the ambassadors.[15]

Indeed, the proposed revisions to EU pesticides legislation lower the level of protection applied to chemicals with endocrine disrupting properties. In particular, the European Commission is proposing an amendment to the annex of the pesticide regulation that would allow the EU to set much higher maximum residue limits for endocrine disrupting pesticides.[16] In addition, the proposed revisions include a derogation for substances that involve 'negligible risk', instead of 'negligible exposure', thereby widening an existing limited exemption into a major loophole. [17] These proposed revisions have been controversial and have yet to receive approval the member state expert committees.[18]

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10 "Overall, the pressure on the EU is mounting as demonstrated by the growing number of WTO Members taking the floor to express concerns or to question the EU's work on defining the criteria to identify EDs." European Commission (June 2016) "Impact Assessment: Defining criteria for identifying endocrine disruptors in the context of the implementation of the plant protection products regulation and biocidal products regulation," p. 190 http://ec.europa.eu/health/sites/health/files/endocrine_disruptors/docs/2016_impact_assessment_en.pdf

11 *Id.* at 191.

12 *Id.* at 192.

13 European Commission (June 2016) "Impact Assessment: Defining criteria for identifying endocrine disruptors in the context of the implementation of the plant protection products regulation and biocidal products regulation," p.193 http://ec.europa.eu/health/sites/health/files/endocrine_disruptors/docs/2016_impact_assessment_en.pdf

14 European Commission (July 2016) "BTO meeting Commissioner Andriukaitis with Ambassadors from CDN, USA, BRA, URU, ARG – 13 July 2016" http://www.stephanehorel.fr/wp-content/uploads/2016/11/11_BTO_Meeting_Andriukaitis_Ambassadors_2016.pdf

15 *Id.*

16 European Commission, "Draft Regulation amending points 3.6.5. and 3.8.2. of Annex II to Regulation (EC) 1107/2009 taking into account current scientific and technical knowledge" https://ec.europa.eu/health/sites/health/files/endocrine_disruptors/docs/ppp_amend_en.pdf

17 See ChemTrust (November 2016) "Still not protective of public health: Commission revises its criteria for identifying endocrine disrupting chemicals (EDCs)" http://www.chemtrust.org.uk/problems-new-edc-criteria-draft/

18 European Commission, "Summary Report of the Standing Committee on Plants, Animals, Food And Feed Held in Brussels on 21 December 2016" (Section Phytopharmaceuticals - Plant Protection Products - Legislation) http://ec.europa.eu/food/sites/food/files/plant/docs/sc_phyto_20161221_pppl_sum.pdf
European Commission, "Draft Minutes 68 th meeting of representatives of Members States Competent Authorities for the implementation of Regulation (EU) No 528/2012 concerning the making available on the market and use of

This change to the standard would be particularly welcome by transatlantic trading partners, which continue to disregard the large body of science showing that there is no safe level of exposure for these chemicals. As legal experts for the European Parliament confirmed last fall, however, the proposed amendment would exceed the European Commission's delegated powers and violate its mandate under the pesticides regulation.[19]

More fundamentally, yielding to US and Canadian pressures would result in the continued contamination of European food supplies with these dangerous substances, in violation of the European Commission's duties to all EU citizens.

Canada's position on EU regulations is clear – it is continuously pushing for a higher level of risk of environmental harm in Europe. The entry into force of CETA will only make matters worse, as CETA would put the decision-making powers of the EU and its Member States in a straitjacket by prioritizing trade interests over people's health and the environment.

2. THE STANDARDS IN CETA

Defenders of CETA argue that the trade agreement's references to environment and health will protect the EU's ability to maintain its high standards. CETA does reference "high levels of protection" for health and the environment,[20] and encourages both parties to promote and enforce these high levels of protection.[21] Although a "high level" of protection may sound good, these standards are not enforceable[22] and they are qualified by much more restrictive and specific standards for trade.

WTO obligations, reaffirmed in CETA, require that measures to protect human health, such as the EDC criteria, be imposed "only to the extent necessary."[23] Such measures must not create "unjustified barriers to trade."[24] In addition, these measures must be based on "sufficient" scientific evidence.[25]

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biocidal products Brussels, 21 December 2016,"https://ec.europa.eu/health/sites/health/files/endocrine_disruptors/docs/ev_20161221_mi_en.pdf

19 Giovanni La Via (September 2016) Letter to Commissioner Andriukaitis http://files.chemicalwatch.com/LaVialetter.pdf

20 CETA art. 21.2.

21 *Id.*, arts. 24.3 & 24.5.

22 ClientEarth and Transport & Environment (November 2016) "CETA and the environment: a gold standard for the planet or for big business?" at pp. 9-10 https://www.transportenvironment.org/publications/ceta-and-environment-gold-standard-planet-or-big-business

23 WTO SPS art. 2.2 (reaffirmed in CETA art.5.4).

24 CETA art. 5.2.

25 WTO art. 2.2 (reaffirmed in CETA art.5.4).

CETA also requires the EU to accept Canadian measures such as those related to food safety as equivalent to its own as long as Canada can demonstrate that its measures achieve an "appropriate" level of protection.[26] The vagueness of the term "appropriate" could be exploited during investor-state or state-to-state trials against EU regulatory decisions, such as on pesticide laws. Similarly, technical regulations, such as REACH, "shall not be more trade-restrictive than necessary."[27]

In addition, although CETA states that the lack of fully scientific certainty should not be a reason for implementing cost-effective measures to protect against a potential harm,[28] this provision doesn't protect the EU's decision to enact such measures from a challenge under CETA.

This is the same problem with CETA's affirmation of the parties' right to regulate in the public interest; although CETA acknowledges this right, it does not protect those regulations from challenge.

Indeed, while the environmental standards in CETA are not enforceable and the EU cannot challenge Canada for having less protective regulations, Canada and its investors can challenge the EU and member states for having more protective regulations.

Previous state-to-state and investor-state dispute settlement cases have blocked laws that protect people's health and the environment from dangerous substances, and/or have imposed a significant financial burden on governments.

A notorious example for such an investor-state dispute is Ethyl Corporation versus Canada.[29] The corporation sued Canada over a ban of the imports of the gasoline additive MMT for use in unleaded gasoline. MMT is a suspected neurotoxin and poses a significant public health risk. The case resulted in a settlement, where Canada reversed the ban and agreed to pay USD 13 million to the corporation.[30]

Trade policy has also threatened environmental health laws through state-to-state disputes. The EU failed to successfully invoke the precautionary principle in the WTO dispute regarding bans on the importation of meat that contained artificial beef growth hormones. This meat had been approved for

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26 CETA art. 5.6 (reaffirmed in CETA art.5.4).

27 *Id.* art 4.2.1(a) (incorporating WTO TBT Agreement art. 2).

28 *Id.*, art. 24.8.2.

29 UNCITRAL, Ethyl Corporation vs. Canada http://www.uncitral.org/transparency-registry/registry/data/can/ethyl_corporation.html

30 United Nations Conference on Trade and Development (UNCTAD) Ethyl v. Canada http://investmentpolicyhub.unctad.org/ISDS/Details/16

use in the US and Canada, and the two countries challenged the ban at the WTO.[31] The panels judged that the ban was not based on a risk assessment, as required by the WTO SPS Agreement, and Canada and the US imposed over $100 million in total extra annual tariffs on goods coming from the EU.[32]

In sum, the standards under CETA favor trade goals over the protection of the environment and health, making it unlikely that the EU will be able to maintain its higher levels of protection.

3. THE PROCESSES SET UP BY CETA

CETA establishes a regulatory cooperation process, which aims to remove differences between regulations in the EU and Canada, on the assumption that when such differences exist, they create unnecessary obstacles to trade. However, regulatory cooperation as envisioned by CETA is not aimed at strengthening standards of environmental, health, consumer and labor protection.

Under the Technical Barriers to Trade (TBT) chapter, regulators in the EU, upon request by Canada, must provide comprehensive information justifying a new regulation.[33] This is required even when the process of creating the regulation is not yet complete and even if Canada has not asserted that the regulation could have a negative impact on trade.

The TBT chapter also requires that whenever Canada requests recognition of its regulations as equivalent to regulations in the EU, the European Commission or a Member State must respond to that request, including a detailed explanation of the reasons for rejecting the equivalency of the measures.[34]

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31 WTO, EC — Hormones, United States (dispute DS26) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm; WTO, EC — Hormones, Canada (dispute DS48) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm

32 The individual amounts are USD 116.8 million for the US and CAD 11.3 million per year. WTO (July 1999) Decision by the arbitrators on the EC — Hormones, United States dispute, at p. 16 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds26/arb*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# and WTO (July 1999) Decision by the arbitrators on the EC — Hormones (Canada) dispute, at p. 14 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds48/arb*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

33 CETA art. 4.4.1.

34 *Id.,* art. 4.4.2.

Finally, CETA requires the European Commission and Member States to refrain from making decisions on new technical regulations or conformity assessments before a 60-day comment period has passed, and allows for Canada to request a delay between adoption of the regulation and the date that it becomes effective.[35]

These obligations are additional burdens that can slow the regulatory process and create new bases for attack through dispute resolution.

Moreover, the agreement creates a CETA joint committee, which is led by the trade ministers of both parties. This committee has enormous powers to amend the agreement, adopt binding interpretations of the agreement and change or undertake the tasks assigned to specialized committees.[36]

This is particularly worrisome, since there are important areas of the agreement that remain undeveloped and the decisions of this joint committee, which are binding on the parties, do not have sufficient democratic scrutiny.

CETA committees will have the power to define important commitments, such the guidelines for determining and recognizing equivalence of pesticide laws, which are to "be agreed at a later stage".[37] The binding decision of the CETA joint committee is at present subject to consent by the Council, but there is no such requirement for the Parliament. The failure to ensure sufficient democratic scrutiny of these binding decisions threatens to trade away public health for private profit.

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35 *Id.,* arts. 4.6.3 & 4.6.7.
36 *Id.,* arts. 26.1 & 26.3.
37 *Id.,* Annex 5-D, p. 295.

CONCLUSION

To sum up, Canada views EU chemical laws as trade barriers, the standards in CETA favor trade over health and the environment and prohibit a precautionary approach, and the regulatory cooperation processes set up by CETA are burdensome, lack full democratic scrutiny, and are unlikely to result in Canada's adoption of higher levels of protection.

Since Canada and Canadian companies will gain new avenues to challenge the EU's more precautionary approach, the EU is at risk of undermining its own democratic legal order as well as its environmental and health standards.

Recent comments by the European Commission reinforce the point about how much power the dispute resolution and arbitrational panels will have over EU Law, affirming that if EU legislation is found to be inconsistent with CETA, "then the EU would get a certain period of time to bring itself into conformity."[38] This means that either the EU would have to undergo a financial burden from the panel's decision, or it would have to reverse decisions to implement strict environmental and health measures. This threatens to reverse the status of the EU as a global leader in the area of environmental health.

[38] EU Trade Commissioner Cecilia Malmström (January 2017) Response to a letter by Member of the European Parliament (MEP) Sorin Moisă http://www.s2bnetwork.org/wp-content/uploads/2017/01/170113-Malmstroem-response-to-Moisa-on-Joint-Committee-powers.pdf. The earlier letter by MEP Moisă to Commissioner Malmström (January 2017) is available here: http://www.s2bnetwork.org/wp-content/uploads/2017/01/170110-Moisa-letter-to-Malmstroem-on-Joint-COmmittee-powers.pdf