

## **Regulatory Cooperation under CETA:**

## **Implications for Environmental Policies**

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# 1. Summary

The Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) is a **living agreement**. This means that CETA is designed as a dynamic agreement that allows the Parties to respond to changing circumstances and needs. To fulfil these objectives, CETA establishes a new and comprehensive institutional framework for cooperation between Canada and the EU and sets primarily procedural obligations. In many cases, CETA does not set detailed and hard obligations that predetermine a specific outcome. This also applies to regulatory cooperation, where CETA introduces various procedural obligations (e.g. obligation to exchange information and to consult) but no hard obligations on substance. CETA also establishes a new institutional framework for regulatory cooperation which consists of the Joint Committee (JC) and the Regulatory Cooperation Forum (RCF).

Because the work of these institutions cannot be predicted, regulatory cooperation under CETA is to some extent a **journey with no clear destination**. Predicting the impacts of regulatory cooperation on the environment is also difficult because CETA does not oblige Parties to engage in regulatory cooperation on specific matters. In principle, regulatory cooperation is voluntary. Empirical evidence suggests that the outcome of regulatory cooperation largely depends on the political environment, which makes assumptions about the effects of regulatory cooperation under CETA even harder. At the same time, **however, regulatory cooperation has a focus on trade liberalisation and consistency of rules across borders; it has no focus on enhancing environmental protection**. This makes it unlikely that regulatory cooperation will become a driver for ambitious environmental policies. It should be noted that CETA addresses only future regulatory cooperation after ratification and has no direct impact on existing regulation.

In **more detail**, regulatory cooperation under CETA could potentially have the following effects on environmental policies and standard setting in the EU:

- **Joint Committee:** The Joint Committee (JC) is CETA's leading political body. Co-chaired by the Canadian Trade Minister and the EU Trade Commissioner, the JC supervises and facilitates the implementation and application of CETA. Importantly, the JC has the power to adopt legally binding decisions – “subject to the completion of any necessary internal requirements and procedures” (Article 30.1). This means that JC decisions become legally binding if requirements and procedures of national law are complied with. The JC also has the power to modify annexes and protocols – which is significant because of the annexes' practical importance. It is not clear, however, whether amendments to the annexes only enter into force when the Parties have approved them in accordance with their internal processes. The respective Article 30.2 of CETA states that Parties *may* approve such changes in accordance with their respective internal requirements and procedures. The JC and its decision-making powers are important aspects of CETA – also for environmental policies as well as (environmental) standard setting. They turn the agreement into a living agreement and require constant attention from civil society and parliaments of the parties.
- **Regulatory Cooperation Forum:** It is not possible to predict the exact impact of the Regulatory Cooperation Forum (RCF) on regulatory cooperation and on

environmental policies. On the one hand, the RCF has no decision-making power. As such, the RCF is no supervisor or even censor for the regulatory work of the Parties. On the other hand, the RCF prepares decisions of the JC which has the power to adopt binding decisions. Given the technical nature of regulatory cooperation, it is possible – and the aim of the cooperation mechanisms – that the discussions in the RCF factually predetermine the JC’s decision-making – despite the fact the RCF is a subsidiary body that reports to the JC.

- **No specific form of regulatory cooperation required:** The agreement does not require Parties to engage in specific regulatory cooperation activities. There is, for example, no obligation or automatism for mutual recognition, one of the strongest forms of regulatory cooperation.
- **Bias towards trade facilitation, little focus on enhancing environmental protection:** It is one of six principles and one of four objectives of regulatory cooperation to contribute to environmental protection. According to Article 21.2 of CETA, it is a principle of regulatory cooperation that Parties commit to ensuring high levels of protection – in accordance with the rules of the World Trade Organization (WTO). Pursuant to Article 21.3, regulatory cooperation aims to contribute to environmental protection through research and risk management. Although these rules address concerns of environmental protection to some extent, they have a bias towards trade facilitation and convergence of regulation. The future regulatory cooperation agenda – as set out in Article 21.1.4 – is not explicitly aimed at improving the quality of environmental regulation and standards. The agenda on regulatory cooperation has a primary focus on trade and investment facilitation. The provisions do not take account of the fact that regulation can be a catalyser for innovation and – thereby – trade.
- **Joint Interpretative Instrument does not address bias towards trade facilitation:** To accommodate numerous concerns from EU Member States, Parties adopted a so-called Joint Interpretative Instrument (JII) on 30 October 2016. The JII confirms, among others, CETA’s commitments relevant for environmental policies. It also underlines the voluntary nature of regulatory cooperation. The JII, however, does not specify that the future regulatory cooperation agenda aims at improving the quality of environmental regulation. It simply states that regulatory cooperation has the objective of achieving “better quality of regulation and more efficient use of administrative resources”. It is important to note that Parties are legally obliged to refer to the JII when interpreting CETA. As a means of legal interpretation, the JII, however, cannot override or change CETA’s legally binding text (Article 31(2)(b) of the Vienna Convention on the Law of Treaties).
- **No changes in legislative processes, but possibly discursive shift:** Regulatory cooperation in itself does not change legislative processes or the processes of standard setting – neither in the EU nor in Canada. Regulatory cooperation does not impact the constitutional arrangements for adopting laws, regulation or standards. The bias of regulatory cooperation towards trade facilitation and – possibly – the work of the treaty bodies, however, can lead to a discursive shift where trade and investment facilitation through deregulation becomes the focus of the discussion – possibly at the

expense of environmental considerations. It should be noted, however, that regulatory cooperation has also worked to enhance chemical safety, for example.

- **Involvement of the European Parliament:** The European Parliament (EP) plays a critical role during the ratification process (Article 218.6 (a) (v) of the Treaty of the Functioning of the EU (TFEU)) but has only limited influence after ratification. According to Article 218.9 of the TFEU, the European Parliament's consent is not required when a body established by an international agreement, such as the JC, takes a binding decision. In such cases, the European Parliament is only informed (Article 218.10 of the TFEU). This may become a problem not only in terms of democratic legitimacy but also for the environment because the EP is often an advocate of ambitious environmental policies.
- **Stakeholder involvement:** CETA provides opportunities for stakeholders to engage in regulatory cooperation activities. Stakeholders include, for example, representatives from non-governmental organisations, businesses, consumer and other organisations. Concerning regulatory cooperation, Parties may consult stakeholders, but there is no obligation to engage with stakeholders. Equally, there is no obligation to allow stakeholder involvement in the JC discussions (Article 26.1 5(b)). CETA commits Parties, however, to facilitate the Civil Society Forum (CSF). The CSF conducts dialogues on CETA's sustainable development aspects, including regulatory cooperation. It remains to be seen to what extent this institutional structure allows stakeholders to influence the implementation of CETA. A JC decision should specify and strengthen stakeholder involvement in the discussion on regulatory cooperation.
- **Chapters on environment and sustainable development:** Chapters 22 and 24 provide for a framework on the relation between trade, on the one hand, and environment and sustainable development, on the other. The Chapters are largely aspirational and programmatic. They contain few "hard" obligations in substance. Only procedural obligations, such as mandatory review or consultations requirements, are "hard" and enforceable. The Chapters are excluded from the dispute settlement system established by the treaty. The Chapters are important context for the interpretation of the agreement.
- **Binding legal framework not the most important factor for regulatory cooperation:** The effectiveness and success of regulatory cooperation depend only to a limited extent on the binding nature of the legal rules governing it, but rather on a set of other factors, including political commitment to regulatory cooperation or levels of convergence between the regulatory environments. This is important. It calls for active and constant engagement of stakeholders in regulatory cooperation and standard setting.

## 2. Introduction

On 26 September 2014, the EU-Canada Summit concluded the negotiations of CETA – in large parts. In the context of the so-called legal scrubbing of the text, important and contested parts of the treaty were amended: the Chapters on investment protection and essential institutional provisions were revised. The legal scrubbing – probably one of the most intensive in the history of trade negotiations – was completed in early 2016. On 30 October 2016, Canada’s Prime Minister, the President of the European Commission, the President of the European Council and the President of the Council of Ministers signed the agreement.<sup>1</sup> They also signed a so-called Joint Interpretative Instrument (JII). Ratification of CETA will be the next step.<sup>2</sup>

Initially the European Commission considered CETA to be an “EU only” agreement but for political reasons decided to propose CETA as a “mixed” agreement on 5 July 2016. In principle terms, it remains contested whether CETA is a mixed agreement or not. Because CETA is treated as a mixed agreement, not only Canada and the competent EU institutions, but also the parliaments of all 28 EU Member States must ratify CETA for it to enter into force.<sup>3</sup> In some Member States, ratification requires consent by a second chamber and / or regional parliaments. At EU level, ratification requires approval by the Council and the European Parliament. It is possible that some Member States will ratify CETA only after the positive outcome of a referendum. After the Brexit referendum in the UK, the referendum in the Netherlands on the Association Agreement with the Ukraine, the Presidential elections in Austria and the rise of political parties in many European countries that are skeptical of free-trade, ratification of CETA is not a given. Discussions in some EU Member States on signing CETA indicate how cumbersome ratification might be although signing of CETA demonstrated a political commitment by Member States to ratify the agreement. It is noteworthy, however, that a number of Belgian regions<sup>4</sup> declared that they will not ratify CETA because of continuing disagreement over CETA’s investment protection rules.

In light of the length of the ratification process, Article 30.7 of CETA provides for the possibility of applying CETA provisionally.<sup>5</sup> On 28 October 2016, the EU Council of Ministers adopted a decision on CETA’s provisional application and requested the European Parliament to give its consent. If the European Parliament also approves the provisional application for the EU, CETA provisions that are within the exclusive competence of the EU apply provisionally. For reasons of clarity, the decision on the provisional application would specify which provisions apply provisionally. Provisional application of a treaty is common practice in the EU. There are about 200 international treaties that the EU applies provisionally.

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<sup>1</sup> <http://www.consilium.europa.eu/en/press/press-releases/2016/10/30-eu-canada-declaration/>. In addition to CETA Canada and the EU also signed a Strategic Partnership Agreement (SPA); for this reason the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission Federica Mogherini was also attending the signing ceremony. See [http://europa.eu/rapid/press-release\\_IP-16-3582\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3582_en.htm).

<sup>2</sup> It is important to differentiate between signature and ratification. Signature by the Parties entails that CETA’s text is definitive and cannot be changed. Ratification expresses the consent of the Parties to be bound by the treaty; only upon ratification by all Parties CETA enters into force (Article 30.7.1. of CETA).

<sup>3</sup> If CETA were an EU only agreement, only the Council of Ministers and the European Parliament would have to ratify. Ratification by Member States would not be required by EU law.

<sup>4</sup> The Walloon Region, the French Community, the German-speaking Community, the French-speaking Community and the Brussels-Capital Region.

<sup>5</sup> Refer also to Article 25 of the Vienna Convention on the Law of Treaties that states: 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed.

Signature was on the agenda of the EU-Canada Summit in Brussels, initially planned for 27 October 2016. However, the summit was cancelled because EU Member States first failed to reach the necessary agreement for signing CETA – due to an initial veto from Belgium. Following intensive negotiations of a Joint Interpretative Instrument (JII)<sup>6</sup> and number of other declarations<sup>7</sup>, Belgium agreed to sign CETA. The JII was adopted on 30 October 2016 and is an integral part of CETA. It includes – among others – articles on the right to regulate, regulatory cooperation, trade and sustainable development and environment protection.

### What is regulatory cooperation?

The OECD defines international regulatory cooperation “as any agreement or organizational arrangement, formal or informal, between countries (at the bilateral, regional or multilateral level) to promote some form of cooperation in the design, monitoring, enforcement, or ex-post management of regulation, with a view to support the converging and consistency of rules across borders.”

Regulatory cooperation can take various forms; each form can have very different legal and practical implications:<sup>8</sup>

- **Information exchange:** Exchange of relevant information is the most basic and common form of regulatory cooperation.
- **Mutual recognition:** (Mutual) recognition describes a process where countries mutually accept their decisions as valid in their own legal order, despite differences in national regulation. Mutual recognition can, in principle, relate to a variety of decisions and procedures, e.g. conformity assessments that are carried out to verify whether a product fulfils certain legal requirements or – such as within the EU’s internal market – marketing approval decisions. It is also possible that only one country unilaterally takes a decision on recognition of another country’s decisions.
- **Harmonisation:** Harmonisation is a process whereby laws or standards in different countries are made more similar to each other or even identical. Harmonisation is the most far-reaching form of regulatory cooperation, only found in the EU and between Australia and New Zealand

This report provides a legal analysis<sup>9</sup> to what extent CETA could lower or improve the level of environmental protection in the EU. The report focuses on Chapter 21 (Regulatory Cooperation), Chapter 22 (Trade and Sustainable Development), Chapter 24 (Trade and Environment) and Chapter 26 (Institutions). The report only briefly touches upon the chapters on sanitary and phytosanitary (SPS) measures and technical barriers to trade (Chapters 4 and 5) and dispute settlement (Chapter 29). Like any other international trade agreement, CETA presents an opportunity for environmental policies; trade agreements can – in principle – spur phasing out harmful subsidies, promote trade in environmental goods or advance green public procurement. It is not the focus of this report to discuss whether CETA missed or utilised these opportunities. The report does not address the question to what extent regulation and standards in Canada and the EU

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<sup>6</sup> [http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/joint-interpretative-instrument\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/joint-interpretative-instrument_pdf/).

<sup>7</sup> <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>.

<sup>8</sup> Gerstetter, C. et al. (2014).

<sup>9</sup> For easy readability, relevant CETA provisions are reproduced verbatim and then commented upon. Legal text that the authors consider important for assessing the effects of regulatory cooperation under CETA for environmental policies is highlighted in bold.



differ and to what extent regulatory cooperation could possibly lead to greater convergence between standards in Canada and the EU.<sup>10</sup>

### **CETA – the “gold standard”?**

There is an argument that CETA, but also TTIP, would help to develop global standards for technical regulation on, for example, consumer, labour or environmental protection. CETA and TTIP are - allegedly - the blueprint for international trade agreements of the future. This argument is based on the expectation that third countries would adhere to, or even adopt the transatlantic standards developed within the CETA or TTIP framework, thereby de facto elevating these standards to the status of international standards.<sup>11</sup> In turn, these agreements would set the “gold standard” for international trade in the 21st century. The argument also implies that third countries could de facto set global standards if transatlantic trading partners do not.

However, this argument needs to be considered with caution. Article 2.4 of TBT Agreement requires WTO Members to base their technical regulations on relevant international standards “except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems”. By definition, rules developed under CETA are no such international standards. Only standards adopted by international standardisation bodies, such as the Codex Alimentarius Commission or the International Standardisation Organisation (ISO), are international standards.<sup>12</sup> Rules developed in the CETA context would only become such international standards if approved by an international standardising body. Because these rules are not international standards, neither the EU nor Canada can deny a third country importer access to their markets, arguing that this importer does not abide by standards developed under CETA. Third country importers can still refer to international standards.

Furthermore, neither CETA nor TTIP focus on enhancing environmental standards (see below), weakening the “gold standard” argument even further.

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<sup>10</sup> Scherrer and Beck (2014), p. 14 find important regulatory differences in the approval of GMOs, permitting of fracking or exploitation of tar sands. This report does not comment on these findings. See also Then, C. (2016).

<sup>11</sup> Pitschas, C. (2015).

<sup>12</sup> Pitschas, C. (2015).

## 3. Chapter: Regulatory Cooperation

### 3.1. Scope

#### **Article 21.1**

This Chapter applies to the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered by, among others, the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and Chapters Four (Technical Barriers to Trade), Five (Sanitary and Phytosanitary Measures), Nine (Cross-Border Trade in Services), Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment).

Article 21.1 defines the scope of the regulatory cooperation Chapter. According to Article 21.1, the scope of regulatory cooperation is broad. There is no *ex ante* restriction on matters that are not subject to regulatory cooperation. However, Article 1.9 (general clause) determines that "water in its natural state" is not subject to regulatory cooperation. Article 21.1 clarifies that the regulatory cooperation applies to a number of other Chapters of CETA, which are enumerated in an exemplary way.

### 3.2. Principles and objectives

#### **Article 21.2 Principles (emphasis added)**

1. The Parties reaffirm their rights and obligations with respect to regulatory measures under the TBT Agreement, the SPS Agreement, the GATT 1994 and the GATS.
2. The Parties **are committed to ensure high levels of protection for human, animal and plant life or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and this Agreement.**
3. The Parties recognise the value of regulatory cooperation with their relevant trading partners both bilaterally and multilaterally. The Parties will, whenever practicable and mutually beneficial, **approach regulatory cooperation in a way that is open to participation by other international trading partners.**
4. Without limiting the ability of each Party to carry out its regulatory, legislative and policy activities, the Parties are committed to further develop regulatory cooperation in light of their mutual interest in order to:
  - (a) **prevent and eliminate unnecessary barriers to trade and investment;**
  - (b) **enhance the climate for competitiveness and innovation,** including by pursuing regulatory compatibility, recognition of equivalence, and convergence; and
  - (c) promote transparent, efficient and effective regulatory processes that support public policy objectives and fulfil the mandates of regulatory bodies, including through the promotion of information exchange and enhanced use of best practices.
5. This Chapter replaces the Framework on Regulatory Co-operation and Transparency between the Government of Canada and the European Commission, done at Brussels on 21 December 2004, and governs

the activities previously undertaken in the context of that Framework.

6. The Parties may undertake regulatory cooperation activities on a voluntary basis. **For greater certainty, a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation. However, if a Party refuses to initiate regulatory cooperation or withdraws from cooperation, it should be prepared to explain the reasons for its decision to the other Party.**

#### **Article 21.3 Objectives of regulatory cooperation**

The objectives of regulatory cooperation include to:

**(a) contribute to the protection of human life, health or safety, animal or plant life or health and the environment** by:

- (i) leveraging international resources in areas such as research, pre-market review and risk analysis to address important regulatory issues of local, national and international concern; and
- (ii) contributing to the base of information used by regulatory departments to identify, assess and manage risks;

**(b) build trust, deepen mutual understanding of regulatory governance and obtain from each other the benefit of expertise and perspectives in order to:**

- (i) improve the planning and development of regulatory proposals;
- (ii) promote transparency and predictability in the development and establishment of regulations;
- (iii) enhance the efficacy of regulations;
- (iv) identify alternative instruments;
- (v) recognise the associated impacts of regulations;
- (vi) **avoid unnecessary regulatory differences;** and
- (vii) **improve regulatory implementation and compliance;**

**(c) facilitate bilateral trade and investment in a way that:**

- (i) builds on existing cooperative arrangements;
- (ii) **reduces unnecessary differences in regulation;** and
- (iii) identifies new ways of working for cooperation in specific sectors; or

**(d) contribute to the improvement of competitiveness and efficiency of industry** in a way that:

- (i) minimises administrative costs whenever possible;
- (ii) reduces duplicative regulatory requirements and consequential compliance costs whenever possible; and
- (iii) pursues compatible regulatory approaches including, if possible and appropriate, through:
  - (A) the application of regulatory approaches which are technology-neutral; and
  - (B) the recognition of equivalence or the promotion of convergence.

Articles 21.2 and 21.3 set out the principles and objectives of regulatory cooperation. Both provisions refer to the protection of the environment. It is one of six principles of regulatory cooperation under CETA to ensure high levels of protection of the environment – in accordance with relevant WTO agreements. Article 21.3 explicitly states that contributing to the protection of the environment is an objective of regulatory cooperation; these contributions are made by leveraging

international resources in areas such as research or risk analysis, and by adding “to the base of information used by regulatory departments to identify, assess and manage risks”.

These provisions are further strengthened by Chapters 22 and 24 on Trade and Environment, and Trade and Sustainable Development respectively. According to Article 24.2, Parties “stress that enhanced cooperation to protect and conserve the environment brings benefits that [...] will complement the objectives of this Agreement”. Parties also reaffirm their commitment to promote international trade “in such a way as to contribute to the objective of sustainable development” (Article 22.1). In addition, Parties may not, for example, waive or otherwise derogate from existing environmental laws to facilitate trade and investment (Article 24.5.2).

As another principle of importance for environmental policies, Article 21.2.6 determines that regulatory cooperation on any specific matter is voluntary. Parties are not obliged to engage in “*any particular regulatory cooperation activity*” (*emphasis added*). They only have the obligation to provide reasons when they are not willing to participate in a new initiative or withdraw from ongoing initiatives of regulatory cooperation. Parties, however, may not refuse to participate in regulatory cooperation altogether.<sup>13</sup>

While these rules and the voluntary nature of regulatory cooperation seem to address concerns over negative impacts on environmental protection, they have a bias towards trade facilitation.<sup>14</sup> They could have been designed in a way that would have enhanced environmental protection:

- **Improving environmental regulation is not explicitly part of the regulatory cooperation agenda:** Article 21.2.4 *commits* the Parties to further develop regulatory cooperation. This regulatory cooperation has three objectives: (1) prevent and eliminate unnecessary barriers to trade and investment; (2) enhance the climate for competitiveness and innovation, and (3) promote transparent, efficient and effective regulatory processes. In other words, future regulatory cooperation is not explicitly aimed at improving the quality of environmental regulation and standards. The agenda has a (primary) focus on trade and investment facilitation. It would have been an important clarification and improvement if this provision had determined that Parties commit to develop future regulatory cooperation also to strengthen environmental regulation and standards or foster sustainable development more broadly. The JII does not clarify this issue but simply states that CETA provides a platform to facilitate cooperation between regulatory authorities, “with the objective of achieving better quality of regulation and more efficient use of administrative resources”.<sup>15</sup>
- **Environmental regulation as a barrier to trade and investment:** According to Article 21.3 b) and c), it is one of the objectives of regulatory cooperation to facilitate trade and investment “in a way that avoids/reduces unnecessary differences in regulation”. The prevention and elimination “of unnecessary barriers to trade and investment” is also one of the principles of regulatory cooperation (Article 21.2.4). According to the same provisions, regulatory cooperation is aimed at improving competitiveness of industry “in a way that minimises administrative costs whenever possible and that reduces duplicative regulatory requirements and consequential compliance costs whenever possible”. Although soft and vague in its wording, these Articles suggest that regulation is an economic burden and

<sup>13</sup> See also Stoll, P. T., Holterhus, T. P. and Gött, H. (2015), p. 6.

<sup>14</sup> See also Stoll, P. T., Holterhus, T. P. and Gött, H. (2015), p. 4.

<sup>15</sup> Joint Interpretative Instrument, para. 3, [http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument_pdf/).

regulatory differences are a barrier to trade. The provisions do not take account of the fact that regulation can be a catalyser for innovation and – thereby – trade. Moreover, they also do not acknowledge that regulatory differences may be desirable or even required by different local circumstances.

- **No commitment to contribute to environmental protection through regulation:** According to Article 21.3.1, it is the objective of regulatory cooperation to contribute to the protection of the environment by leveraging international resources and by improving information used by regulatory departments. However, it is not the aim of regulatory cooperation to promote environmental protection through better standards and regulation – which could be facilitated through regulatory cooperation. This shortcoming is not remedied by the Chapter on Trade and Sustainable Development (Article 22.3). Although this Chapter addresses the issue of promoting the “improvement of environmental performance goals and standards” – as a contribution to environmental protection –, it is vague and has little legal force in its own right. It simply states that Parties shall *strive* to promote “trade [...] that contributes environmental protection, including by [...] promoting the improvement of environmental performance goals and standards”.
- **Right to regulate and environment:** With regard to internal decision-making of the parties, Article 24.3 acknowledges the “right to regulate” in environmental matters. Accordingly, “Parties *recognise* the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement”. Furthermore, the Article states that Parties “*shall seek to ensure* that those laws and policies provide for and encourage high levels of environmental protection, and *shall strive* to continue to improve such laws and policies and their underlying levels of protection”. These provisions are important. They help interpret the agreement and give guidance for regulatory cooperation. They provide legal arguments when a party needs to justify an environmental measure. They constitute, however, **no legal obligation in itself** because:
  - they recognise or confirm what States have already committed to. States have the right to regulate under international law unless an international obligation sets limits. In other words, an international obligation – by definition – limits the right to regulate.
  - the wording is vague (“shall seek to ensure”, “encourage”). It leaves significant room for interpretation despite the usage of the mandatory “shall”.<sup>16</sup>

Moreover, these provisions relate only to measures taken by each of the Parties, not to regulatory cooperation and joint decisions of the Parties.

At this point in time, the consequences of this bias of towards trade facilitation are uncertain. With a few exceptions, the principles and objectives constitute no strong, specific obligations for parties, but define the aspirations of the parties in vague terms. Terms such as “unnecessary barriers” or commitments to minimise administrative costs “whenever possible” leave parties wide discretion in interpreting the agreement and will have little leverage. In addition, regulatory cooperation on specific matters is voluntary. This makes assumptions on the practical impacts of these rules even

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<sup>16</sup> A similar provision can be found in several EU trade agreements: EU-Korea FTA (Article 13.3), the EU – Peru, Columbia and Ecuador (since 2015) Trade Agreement (Article 268 - Recognising the sovereign right of each Party to establish its domestic policies and priorities on SD, and its own levels of environmental and labour protection, consistent with the international recognised standards and agreements referred to in Article 269 and 270...” - Article 270 is about MEA and standards), the EU Singapore FTA (Article 13.2).

more unreliable. It should be stressed, however, that regulatory cooperation does not necessarily entail weaker environmental standards; it can also contribute to strengthening standards. For example, according to an OECD study<sup>17</sup>, regulatory cooperation on chemicals not only has the advantage of reducing administrative costs through shared testing but also resulted in environmental and health gains because more chemicals are tested when governments cooperate than when they act individually.

### 3.3. Regulatory cooperation activities

#### **Article 21.4 Regulatory cooperation activities (emphasis added)**

The Parties endeavour to fulfil the objectives set out in Article 21.3 by undertaking regulatory cooperation activities that may include:

- (a) engaging in ongoing bilateral discussions on regulatory governance, including to:
  - (i) discuss regulatory reform and its effects on the Parties' relationship;
  - (ii) identify lessons learned;
  - (iii) explore, if appropriate, alternative approaches to regulation; and
  - (iv) exchange experiences with regulatory tools and instruments, including regulatory impact assessments, risk assessment and compliance and enforcement strategies;
- (b) **consulting with each other, as appropriate**, and exchanging information throughout the regulatory development process. This consultation and exchange should begin **as early as possible in that process**;
- (c) sharing non-public information to the extent that this information may be made available to foreign governments in accordance with the applicable rules of the Party providing the information;
- (d) sharing proposed technical or sanitary and phytosanitary regulations that may have an impact on trade with the other Party at the earliest stage possible so that comments and proposals for amendments may be taken into account;
- (e) **providing, upon request by the other Party, a copy of the proposed regulation, subject to applicable privacy law, and allow sufficient time for interested parties to provide comments in writing**;
- (f) **exchanging information** about contemplated regulatory actions, measures or amendments under consideration, at the earliest stage possible, in order to:
  - (i) understand the rationale behind a Party's regulatory choices, including the instrument choice, and examine the possibilities for greater convergence between the Parties on how to state the objectives of regulations and how to define their scope. The Parties should also address the interface between regulations, standards and conformity assessment in this context; and
  - (ii) compare methods and assumptions used to analyse regulatory proposals, including, when appropriate, an analysis of technical or economic practicability and the benefits in relation to the objective pursued of any major alternative regulatory requirements or approaches considered. This information exchange may also include compliance strategies and impact assessments, including a comparison of the potential cost-effectiveness of the regulatory proposal to that of major alternative regulatory requirements or approaches considered;

<sup>17</sup> OECD: International regulatory cooperation – Case Studies, Volume 1 (2013), p. 15: [http://www.keepeek.com/Digital-Asset-Management/oced/governance/international-regulatory-co-operation-case-studies-vol-1/chemical-safety\\_9789264200487-3-en#page15](http://www.keepeek.com/Digital-Asset-Management/oced/governance/international-regulatory-co-operation-case-studies-vol-1/chemical-safety_9789264200487-3-en#page15).

**(g) examining opportunities to minimise unnecessary divergences in regulations through means such as:**

- (i) conducting a concurrent or joint risk assessment and a regulatory impact assessment if practicable and mutually beneficial;
- (ii) achieving a harmonised, equivalent or compatible solution; or
- (iii) considering mutual recognition in specific cases;

**(h) cooperating** on issues that concern the development, adoption, implementation and maintenance of **international standards**, guides and recommendations;

**(i) examining the appropriateness and possibility of collecting the same or similar data** about the nature, extent and frequency of problems that may potentially give rise to regulatory action when it would expedite making statistically significant judgments about those problems;

(j) periodically comparing data collection practices;

(k) examining the appropriateness and the possibility of using the same or similar assumptions and methodologies that the other Party uses to analyse data and assess the underlying issues to be addressed through regulation in order to:

- (i) reduce differences in identifying issues; and
- (ii) promote similarity of results;

(l) periodically comparing analytical assumptions and methodologies;

(m) **exchanging information** on the administration, implementation and enforcement of regulations, as well as on the means to obtain and measure compliance;

(n) conducting **cooperative research agendas** in order to:

- (i) reduce duplicative research;
- (ii) generate more information at less cost;
- (iii) gather the best data;
- (iv) establish, when appropriate, a common scientific basis;
- (v) address the most pressing regulatory problems in a more consistent and performance-oriented manner; and
- (vi) **minimise unnecessary differences in new regulatory proposals while more effectively improving health, safety and environmental protection;**

(o) conducting **post-implementation reviews of regulations or policies;**

(p) comparing methods and assumptions used in those post-implementation reviews;

(q) when applicable, making available to each other summaries of the results of those post-implementation reviews;

**(r) identifying the appropriate approach to reduce adverse effects of existing regulatory differences on bilateral trade and investment in sectors identified by a Party, including, when appropriate, through greater convergence, mutual recognition, minimising the use of trade and investment distorting regulatory instruments, and the use of international standards, including standards and guides for conformity assessment;** or

(s) exchanging information, expertise and experience in the field of **animal welfare** in order to promote collaboration on animal welfare between the Parties.

This Article describes possible regulatory cooperation activities that the parties could undertake. It mentions different types of activities, such as information exchange and consultation on regulatory issues. It is important to understand that possible regulatory cooperation activities are open-ended and no specific outcome is mandated. The provision does not require Parties to engage in specific activities of regulatory cooperation. There is, for example, no obligation for mutual recognition on any specific issue. Furthermore, the wording of Article 21.4 is generally vague, using weak language such as “if appropriate”. According to the Article, Parties only *endeavour* to fulfil the objectives of regulatory cooperation through a number of broadly described activities. The particularly relevant Article 21.4 r) only states that regulatory cooperation may include “identifying the appropriate approach [...], including, *when appropriate*, through greater convergence, mutual recognition, minimising the use of trade and investment distorting regulatory instruments, and the use of international standards, including standards and guides for conformity assessment”.

In consequence, most of the activities are either procedural in nature or relate to information exchange. In terms of providing information on planned regulations, Article 21.4 b) states that Parties consult with each other, as appropriate, and exchange information throughout the regulatory development process. According to the same provision, this “consultation and exchange *should* begin as early as possible in that process”. Article 21.4 c) states that non-public information should only be shared to the extent that national laws allow that this information may be made available to foreign governments. According to Article 21.4 e), Parties provide, upon request by the other Party, a copy of the proposed regulation – subject to applicable privacy law. Parties should submit timely to “allow sufficient time for interested parties to provide comments in writing”.

These rules have caused concern over undue influence from foreign governments in internal decision-making. However, it is not clear to what extent these rules will actually impact the legislative and regulatory processes in the EU and Canada. It is beyond the scope of this report to examine to what extent national rules allow Parties to withhold requested information. As a theoretical case, it would be problematic, for example, if the Canadian government could request insights into planned EU legislation before the European Parliament. Despite these uncertainties, it is clear that Article 21.4 does not establish an obligation that Parties take part in or even supervise law making in the other Party.

## 3.4. Compatibility of regulatory measures

### **Article 21.5 Compatibility of regulatory measures (emphasis added)**

With a view to enhancing convergence and compatibility between the regulatory measures of the Parties, each Party shall, when appropriate, consider the regulatory measures or initiatives of the other Party on the same or related topics. **A Party is not prevented from adopting different regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party.**

The first sentence of this Article contains a rather softly worded obligation which serves to enhance coherence between regulatory measures of the Parties. However, the regulatory measures or



initiatives of the other Party have to be “considered” only when “appropriate”. “Considered” is not strongly worded; it is not an obligation such as those found elsewhere, e. g. in WTO law where parties are required to “base” their measure on an international standard. There is also no obligation to provide reasons to the respective other side when not “considering” the measure. Altogether, this Article – with its soft wording and the restriction in the second sentence – appears to be of little practical effect.

## 3.5. Regulatory Cooperation Forum

### **Article 21.6 The Regulatory Cooperation Forum (emphasis added)**

1. A Regulatory Cooperation Forum (“RCF”) is established, pursuant to **Article 26.2.1(h)** (Specialised committees), **to facilitate and promote regulatory cooperation** between the Parties in **accordance with this Chapter**.

2. The RCF shall perform the **following functions**:

(a) provide a **forum to discuss** regulatory policy issues of mutual interest that the Parties have identified through, among others, consultations conducted in accordance with **Article 21.8**;

(b) assist individual regulators to **identify potential partners** for cooperation activities and provide them with appropriate tools for that purpose, such as model confidentiality agreements;

(c) **review regulatory initiatives**, whether in progress or anticipated, that a Party considers may provide potential for cooperation. The reviews, which will be carried out in consultation with regulatory departments and agencies, should support the implementation of this Chapter; and

(d) **encourage the development of bilateral cooperation activities** in accordance with Article 21.4 and, on the basis of information obtained from regulatory departments and agencies, review the progress, achievements and best practices of regulatory cooperation initiatives in specific sectors.

3. The RCF shall be **co-chaired** by a senior representative of the Government of Canada at the level of a Deputy Minister, equivalent or designate, and a senior representative of the European Commission at the level of a Director General, equivalent or designate, and shall comprise relevant officials of each Party. The Parties may by mutual **consent invite other interested parties to participate in the meetings** of the RCF.

4. The RCF shall:

(a) adopt its **terms of reference, procedures and work-plan** at its first meeting after the entry into force of this Agreement;

(b) meet within one year from the date of entry into force of this Agreement and at least **annually** thereafter, unless the Parties decide otherwise; and

(c) **report to the CETA Joint Committee** on the implementation of this Chapter, as appropriate.

The RCF is the central body for future regulatory cooperation. It provides for an institutionalised, technical and detailed dialogue between the Parties on regulatory cooperation. The RCF is co-chaired by a senior representative of the Government of Canada (at the level of a Deputy Minister), and a senior representative of the European Commission (at the level of a Director General). The

RCF – often in the centre of the political debate on regulatory cooperation – has no power to adopt legally binding decisions.<sup>18</sup>

Articles 21.6 and 26.2 (see below) specify the powers and functioning of the RCF in some detail:

- **Dialogue:** It is one of the primary functions of the RCF to provide a forum for discussing regulatory policy issues, to facilitate and promote regulatory cooperation. Issues will be identified through, among others, consultations with private entities, such as representatives from academia, non-governmental organisations, businesses, consumer and other organisations (Article 21.8). Reference to Article 21.8 strengthens – in principle – contributions from stakeholders, although consultation with civil society is not mandatory (see below). Parties are entitled to bring regulatory policy issues onto the agenda if they are of mutual interest. The Committee on Trade and Sustainable Development has no explicit mandate regarding regulatory cooperation, but will – in all likelihood – also contribute to the discussions in the RCF.
- **Procedural framework:** The RCF adopts its terms of reference, procedures and work-plan at its first meeting. Important aspects of the RCF's work are agreed at a later stage and remain unknown. The terms of reference and the procedures will shape the functioning of the RCF for the coming years, while the work program will probably have an important impact on the substance of the regulatory cooperation. The fact that the terms of reference and work programme do not yet exist makes an evaluation and projection of its work, let alone of its impact on environmental policies difficult.
- **Review of regulatory initiatives:** It is another important function of the RCF to review regulatory initiatives of the Parties. This review covers regulatory initiatives that a Party considers may provide potential for cooperation. Initiatives may be in progress or anticipated. The reviews will be carried out in consultation with regulatory departments and agencies. The scope and rhythm of the review is not established at this point in time. The terms of reference and/or procedures will probably specify the review. If the review entailed a systematic and routine analysis of a wide range of regulatory subjects, it would have the potential to politically impact regulatory cooperation and environmental standard setting.
- **Prepare the JC and propose draft decisions:** According to Article 26.2, the RCF may submit draft decisions to the JC for adoption. Because of its technical expertise, the preparatory work of the RCF will – in all likelihood – have a determining effect on the JC's decision-making. Depending on the future work and dynamics of the discussions in the RCF, this could have an impact on of CETA on environmental policies – negative or positive.

Because of these many unknowns, it is not possible to predict the impact of the RCF on regulatory cooperation and on environmental policies. The possible impact of the RCF remains ambivalent. On the one hand, the RCF has no decision-making power.<sup>19</sup> As such, the RCF is no supervisor or even censor for the regulatory work of the Parties. On the other hand, the RCF prepares decisions of the JC which has the power to adopt binding decisions. Given the technical nature of regulatory cooperation, it is possible that the discussions in the RCF predetermine *de facto* the JC decision-making and shape the regulatory agenda of the Parties – to some extent.

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<sup>18</sup> According to Article 26.2, the RCF – as a specialised committee – would only have such powers when explicitly stated in the agreement. Article 21.6 grants no such powers to the RCF.

<sup>19</sup> Then, C. (2016), p. 20.

It should be noted, however, that the effectiveness and success of regulatory cooperation efforts (in terms of achieving greater regulatory coherence between the participating states) depend – according to an OECD study – only to a limited extent on the existence of a binding legal framework but rather on the following factors:<sup>20</sup>

- high-level political commitment to regulatory cooperation,
- embedding regulatory cooperation in (internal) regulatory processes,
- appropriate consultation mechanisms,
- common language and definitions,
- high level of compliance with the decisions taken,
- regular evaluation of the cooperation efforts, and
- flexibility to adapt regulatory cooperation to changing circumstances.

## 3.6. Further cooperation between the Parties

### **Article 21.7 Further cooperation between the parties (emphasis added)**

1. Pursuant to Article 21.6.2(c) and to enable monitoring of forthcoming regulatory projects and to identify opportunities for regulatory cooperation, the Parties shall periodically exchange information of ongoing or planned regulatory projects in their areas of responsibility. This information should include, if appropriate, new technical regulations and amendments to existing technical regulations that are likely to be proposed or adopted.

2. The Parties may facilitate regulatory cooperation through the exchange of officials pursuant to a specified arrangement.

3. The Parties endeavour to cooperate and to share information on a voluntary basis in the area of non-food product safety. This cooperation or exchange of information may in particular relate to:

- (a) scientific, technical, and regulatory matters, to help improve non-food product safety;
- (b) emerging issues of significant health and safety relevance that fall within the scope of a Party's authority;
- (c) standardisation related activities;
- (d) market surveillance and enforcement activities;
- (e) risk assessment methods and product testing; and
- (f) coordinated product recalls or other similar actions.

[...]

5. Before the Parties conduct the first exchange of information provided for under paragraph 4, they shall ensure that the Committee on Trade in Goods endorse the measures to implement these exchanges. The Parties shall ensure that these measures specify the type of information to be exchanged, the modalities for the exchange and the application of confidentiality and personal data protection rules.

6. The Committee on Trade in Goods shall endorse the measures under paragraph 5 within one year from the date of entry into force of this Agreement unless the Parties decide to extend the date.

7. The Parties may modify the measures referred to in paragraph 5. The Committee on Trade in Goods shall endorse any modification to the measures.

<sup>20</sup> OECD (2013), p. 109ff. – which is one of the rare empirical studies on the effects of regulatory cooperation.

This Article contains more specific provisions than Article 21.4 and 21.6; it also deals with the role of the Committee on Trade in Goods, one of the other Specialised Committees established in Article 26.2 of CETA. Most of the clauses are procedural in nature. It is unlikely that they would have any discernible impact on environmental policy-making, apart from – potentially – imposing some additional tasks in terms of information exchange on the environmental administration.

## 3.7. Consultations with private entities

### **Article 21.8 consultations with private entities (emphasis added)**

**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.**

This Article determines that the Parties (jointly or individually) may consult with a range of stakeholders and “interested parties”. The actors mentioned are both business communities and other organisations. While it is desirable that such consultations are conducted, the clause has no obligatory character, using the term “may”. Each Party would have been free to conduct such consultations without such requirement. Article 21.8 does not specify the modalities and rhythm of the consultations or any obligation to take the results into account (even though there are some obligations to this end in other Articles, see for example Article 22.5). There are no rules on the selection of stakeholders and interested parties, either.

A recent study finds that civil society organisations may have capacity problems to participate in multiple fora created under trade agreements.<sup>21</sup> It is likely that civil society will face similar capacity problems when participating in regulatory cooperation (and other matters) under CETA, which establishes at least seven committees relevant for environment and consumer protection.<sup>22</sup> CETA does not address this issue – at this point in time. A decision by the JC could establish a mechanism similar to the World Bank Climate Investment Funds or the Trust Fund under the Convention on Biodiversity. These funds support specifically civil society representatives.<sup>23</sup> Such a mechanism would not only facilitate participation from environmental groups but could also help address imbalances in resources between commercial interests groups and other stakeholders. In the context of the EU, a study found that industry, for example, often has more financial means to lobby their interests than other groups.<sup>24</sup>

In sum, while it is laudable that the CETA Chapter on regulatory cooperation includes a provision on consulting stakeholders and interested parties, it remains to be seen whether this approach will help set an agenda of regulatory cooperation that promotes ambitious environmental regulation and standards. Empirical evidence suggests, regrettably, that civil society has only limited influence

<sup>21</sup> Van den Putte, L. (2015), p. 230.

<sup>22</sup> Then, C. (2015), p. 22.

<sup>23</sup> <https://www.cbd.int/kb/record/decision/13395?Event=COP-12>.

<sup>24</sup> Lee, M. (2014), p. 194-195.

in EU trade policy-making so far.<sup>25</sup> This is especially true when issues are concerned where the public is not easily mobilised<sup>26</sup>; such as technical issues of regulatory cooperation.

## 4. Chapters 22 and 24: Sustainable Development and Environment

Chapters 22 and 24 provide for a framework on the relation between trade on the one hand and environment and sustainable development on the other. The Chapters are largely aspirational and programmatic. They contain few “hard” substantive obligations. The Chapters generally use terms such as “enhance”, “promote” and “aim to”. Only procedural obligations such as mandatory review or consultation requirements are “hard” and enforceable. The JII refers to these chapters but cannot change their content and character.<sup>27</sup> However, the Chapters are important tools for the interpretation of the agreement. Importantly, the Chapters introduce a number of institutions that might be able to shape CETA’s environmental impact – to some extent.

In more detail, Chapters 22 and 24 could have the following consequences on regulatory cooperation and environmental protection:

- **Upholding levels of protection:** Pursuant to Article 24.5.1, Parties recognise that “it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.” For this reason, a Party “shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory”. Furthermore, a Party “shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment”. These provisions are probably the most important substantive obligations in Chapter 24. The JII reiterates these obligations.<sup>28</sup> Although relatively strong, the provision will probably only have an impact on the interpretation of the agreement, but will barely have force in its own right:
  - According to Article 24.5.1, Parties only *recognise* the inappropriateness of lowering environmental protection as a means of facilitating trade and investment, but they do not *commit* to refraining from adopting measures with such an effect. It could be difficult to prove the causal link between an (alleged) weakening of environmental protection and trade facilitation. It might even be difficult to prove that levels of environmental protection have been lowered. Evidence could only be produced where Parties explicitly state that levels of environmental protection have been lowered to promote trade.

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<sup>25</sup> See for example, Dür, A. and De Bièvre, D. (2007) who observe that even in the case of the Economic Partnership Agreements of the EU, a topic that business actors had little interest in, the positions of civil society were not taken up in actual EU policy-making, see p. 91ff.

<sup>26</sup> See for example, Dür, A. and De Bièvre, D. (2007).

<sup>27</sup> Joint Interpretative Instrument, Para. 7, [http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument_pdf/).

<sup>28</sup> Joint Interpretative Instrument, Para. 9, [http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument_pdf/).

- Parties shall not waive or derogate from environmental laws to encourage trade (Article 24.5). While the wording “shall” creates a hard legal obligation, it covers the fairly unlikely scenario that a Party gives a waiver to existing laws. In many cases such action could violate national laws.
- Furthermore, Article 24.5.1 forbids Parties – through a sustained or recurring course of action or inaction – to effectively enforce its environmental law as a measure to encourage trade or investment. This is a hard legal obligation (“shall”), but limited to relatively rare cases of “sustained or recurring course of action or inaction”. Through the latter qualification, the obligation is less stringent than those contained in the environmental side agreement (North American Agreement on Environmental Cooperation, NAAEC) to the North-American Free Trade Agreement. The NAAEC requires Parties to “effectively” enforce their environmental legislation. The mechanism whereby third parties (e.g. NGOs) can make submissions to the Commission on Environmental Cooperation (CEC) created by the NAAEC<sup>29</sup> has been used repeatedly by NGOs<sup>30</sup>. CETA contains no similar mechanism.

In sum, Article 24.5 is no guarantee that Parties will not lower environmental standards to promote trade.

- **No obligation to improve environmental standards (Article 22.3):** The Parties “affirm that trade should promote sustainable development. Accordingly, each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by: (a) encouraging the development and use of voluntary schemes relating to the sustainable production of goods and services, such as eco-labelling and fair trade schemes; [...] (d) promoting the development, the establishment, the maintenance or the improvement of environmental performance goals and standards”.
- **Mandatory monitoring and review:** Parties are committed to “review, monitor and assess the impact of the implementation of this Agreement on sustainable development” in their territories (Article 22.3.3). The JII strengthen the review further.<sup>31</sup> Parties may carry out assessments jointly. Parties carry these assessments out in a manner that is adapted to the practices and conditions of each Party. Specifically, the respective participative processes of the Parties, as well as those processes set up under CETA will apply. These assessments could generate data about CETA’s effects on environmental policies. For example, it might be possible to ascertain whether the results of the Trade Sustainable Impact Assessment conducted by the EU on CETA actually proved to be correct or not. However, the provision does not state what should be done as regards to the results.
- **Cooperation on trade-related environmental issues:** In general terms, Parties are committed “to cooperate on trade-related environmental issues of common interest” (Article 24.12.1). More specifically, CETA requires Parties to cooperate in areas such as “the trade impact of environmental regulations and standards as well as the environmental impact of trade and investment rules including on the development of environmental regulations and policy” (Article 24.12). This obligation to cooperate could promote EU-Canada cooperation in international standard setting bodies such as the International Organization for Standardization (ISO). This is important but would not automatically contribute to or even result in ambitious environmental standard setting.

<sup>29</sup> Procedures are defined in Article 14, 15 NAAEC.

<sup>30</sup> See Registry of submissions at <http://www.cec.org/sem-submissions/registry-of-submissions>.

<sup>31</sup> According to paragraph 10 of the JII, Parties “are committed to initiating an early review of these provisions, including with a view to the effective enforceability of CETA provisions on trade and labour and trade and the environment”.

- **Committee on Trade and Sustainable Development:** CETA establishes the Committee on Trade and Sustainable Development. The Committee oversees the implementation of the Sustainable Development Chapter, including cooperative activities and the impact assessments.
- **Dispute settlement:** CETA establishes two dispute resolution mechanisms for matters under the sustainable development and environment chapter: consultations (Article 24.14) and the Expert Panel (Article 24.15). In addition Article 24.16 explicitly states that disputes on the environment Chapter are not subject to the general dispute settlement mechanism of CETA (Chapter 29). The general mechanism allows, for example, for trade sanctions and/or compensation. These options are not available for the dispute settlement on the environment (Chapter 24).<sup>32</sup> According to Articles 24.14.1 and 24.15.1, Parties can only initiate consultations or make a request to the panel of experts which cannot lead to trade sanctions or compensation.<sup>33</sup> This arrangement has been common for an inter-state dispute settlement mechanism in international trade agreements but some agreements such as NAFTA's environmental side agreement go further and contain a complaint mechanism on environmental matters for NGOs.
- **Civil Society Forum:** CETA obliges Parties to facilitate a joint Civil Society Forum which in general convenes once a year. According to Article 22.5, Parties "shall promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations, environmental groups, as well as other relevant civil society organisations as appropriate. It is the task of this forum, "to conduct a dialogue on the sustainable development aspects of this Agreement." Importantly, the JII states that Canada and the EU "are fully committed to make effective use of these mechanisms".<sup>34</sup> Despite this important clarification of the JII, it remains to be seen to what extent discussions in this Forum will have an impact on the CETA in general and regulatory cooperation in particular. In any case, it is an institutionalised opportunity for environmental groups to influence the implementation of CETA. Similar fora exist in other EU trade agreements: the EU-Colombia Agreement (Article 282)<sup>35</sup> or the EU-South Korea Agreement<sup>36</sup>). As discussed above, it is unclear whether this forum will be able to effectively influence decision making. While generally civil society's capacity to influence trade policy is limited<sup>37</sup>, it has also been observed that stakeholder dialogues under trade agreements facilitate policy-learning across countries and as a consequence do have an effect on domestic policies.<sup>38</sup>

<sup>32</sup> Stoll, P. T., Holterhus, T. P. and Gött, H. (2015).

<sup>33</sup> According to Article 24.15, a panel of experts can be requested to examine the matter. It is an independent panel and resembles the panel of arbitration in its internal organisation (para.5). Being composed of independent experts in environmental law (para. 7), the panel provides an external and independent point of view on a dispute. A difference to the arbitration panel is that the panel of experts has no recourse to any mandatory measures but merely issues an interim and, subsequently, a final report. This report is to outline potential breaches, explanations of the findings and recommendations, possibly contributing to a solution.

<sup>34</sup> Joint Interpretative Instrument, Para. 10, [http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/Joint-interpretative-instrument_pdf/).

<sup>35</sup> Text available at [http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc\\_147704.pdf](http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf).

<sup>36</sup> For more information see <http://www.eesc.europa.eu/?i=portal.en.external-relations-international-trade-monitoring-korea-csf>.

<sup>37</sup> See for example, Dür, A. and De Bièvre, D. (2007).

<sup>38</sup> Postnikov/Bastiaens 2014, 927ff.

## 5. Chapter 26: Institutional Arrangements

### 5.1 CETA Joint Committee

#### **Article 26.1 CETA Joint Committee (emphasis added)**

1. The Parties hereby establish the CETA Joint Committee comprising representatives of the European Union and representatives of Canada. The CETA Joint Committee shall be **co-chaired** by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees.

2. The CETA Joint Committee shall meet **once a year** or at the request of a Party. The CETA Joint Committee shall agree on its meeting schedule and its agenda.

3. The CETA Joint Committee is **responsible** for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement. A Party may refer to the CETA Joint Committee any issue relating to the implementation and interpretation of this Agreement, or any other issue concerning trade and investment between the Parties.

4. The CETA Joint Committee shall:

(a) **supervise and facilitate the implementation and application of this Agreement** and further its general aims;

(b) **supervise the work of all specialised committees** and other bodies established under this Agreement;

(c) without prejudice to Chapters Eight (Investment), Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour), Twenty-Four (Trade and Environment), and Twenty-Nine (Dispute Settlement), **seek appropriate ways and methods of preventing problems** that might arise in areas covered by this Agreement, or of resolving disputes that may arise regarding the interpretation or application of this Agreement;

(d) adopt its own **rules of procedure**;

(e) **make decisions** as set out in Article 26.3; and

(f) consider any matter of interest relating to an area covered by this Agreement.

5. The CETA Joint Committee may:

(a) **delegate responsibilities** to the specialised committees established pursuant to Article 26.2;

(b) **communicate with all** interested parties including private sector and civil society organisations;

(c) **consider or agree on amendments as provided in this Agreement**;

(d) study the development of trade between the Parties and consider ways to further **enhance trade relations** between the Parties;

(e) **adopt interpretations of the provisions of this Agreement**, which **shall be binding on tribunals** established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement);

(f) make **recommendations** suitable for promoting the expansion of trade and investment as envisaged in this Agreement;

(g) **change or undertake the tasks assigned to specialised committees** established pursuant to Article 26.2 or dissolve any of these specialised committees;

(h) **establish specialised committees and bilateral dialogues** in order to assist it in the performance of its



tasks; and

(i) take such **other action** in the exercise of its functions as decided by the Parties.

The Joint Committee is CETA's primary body. Co-chaired by the Canadian Trade Minister and the EU Trade Commissioner, the JC supervises and facilitates the implementation and application of CETA. The JC helps prevent and solve disputes – in accordance with the specific rules on dispute settlement in Chapter 29.

In more detail, the JC has the following powers and functions:

- **Binding decisions:** the JC has the power to adopt decisions that are legally binding for the Parties – in principle. Decisions are taken by consensus, i.e. Parties have veto power. The decision making power of the JC – one of the most important aspects of CETA– is discussed below.
- **Agree on amendments to protocols and annexes:** The JC may agree on certain amendments and protocols to CETA – as provided in this Agreement. Given the Annexes on Cooperation in the field of motor vehicle regulations (Annex 4A), Recognition of Sanitary and Phytosanitary Measures (Annex 5-E) and the Protocol on the mutual acceptance of the results of conformity assessment, this is a practically relevant provision.<sup>39</sup> This could have important consequences for environmental policies and regulatory cooperation.

The practical impact of these powers of the JC will also depend on whether Parties have to approve these amendments agreed by the JC or not. According to Article 30.2.2, the JC „may decide to amend the protocols and annexes“. Article 30.2.2 specifies further that „the Parties *may* approve the CETA Joint Committee's decision in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment“. Although this provision has been amended during the so-called legal scrubbing, the provision remains ambivalent. First, the provision states that Parties may approve the JC decision; it does not stipulate that approval is constituent for the amendment to a protocol or annex to enter into force. Second, CETA contains cases where approval by Parties is explicitly required.<sup>40</sup> Conversely, this could mean that Party approval is only required where CETA contains a specific approval requirement. The need to amend technical protocols and annexes swiftly also argues against a requirement of approval by Parties.<sup>41</sup> This provision should be clarified – as earlier requested by the Federation of German Industries.<sup>42</sup> The wording should clearly state that Party approval is a condition for the entry into force of amendments to protocols and annexes.

- **Binding interpretation of CETA:** The JC may adopt interpretations of the provisions of CETA. These interpretations are general in scope and bind the tribunals that adjudicate investment cases and general disputes (Article 26.1.4 (e)). A binding interpretation of

<sup>39</sup> Annex 2-A: Tariff Elimination, Annex 2-B Declaration of the Parties concerning tariff rate quota administration, Annex 4-A Cooperation in the Field of Motor Vehicle Regulations, Annex 5-A Competent Authorities, Annex 5-B Regional Conditions: Diseases for which regionalisation decisions may be taken (Foot-and-mouth disease etc), Annex 5-D Guidelines to Determine, Recognise and Maintain Equivalence, Annex 5-E Recognition of Sanitary and Phytosanitary Measures, Annex-5-F Approval of establishments or facilities, Annex-5-G Procedure Related to Specific import requirements for plant health --> a list of regulated pests for commodities where a phytosanitary concern exists in its territory, Annex-5-H Principles and Guidelines to Conduct and Audit or Verification, Annex 5-I Export Certification --> SPS and animal health, Annex 8-A Expropriation, Annex 8-C Exclusions from dispute settlement.

<sup>40</sup> Stoll, P. T., Holterhus, T. P. and Gött, H. (2015).

<sup>41</sup> Stoll, P.T., Holterhus, T. P. and Gött, H. (2015).

<sup>42</sup> Bundesverband der Deutschen Industrie e.V (2015), Stoll, P. T., Holterhus, T. P. and Gött, H. (2015) with a similar critique.

(broad) terminology used in Chapter 21, for example, could also impact regulatory cooperation. It is common practice in international law that treaty bodies have the power to develop binding or authoritative interpretation of the treaty. Examples include the International Covenant on Civil and Political Rights (ICCPR) where the Human Rights Committee is entitled to adopt so-called General Comments that provide an authoritative interpretation of these treaties. In WTO law, the WTO's Ministerial Conference and General Council can adopt interpretations of WTO law which are binding on the WTO dispute settlement bodies (Article XI:2 WTO Agreement).

- **Supervision of specialised committees:** The JC supervises the work of CETA's various specialised committees and may delegate responsibilities to the bodies. The JC may "change or undertake the tasks assigned to specialised committees established". It may also dissolve specialised committees at any time without being obliged to give reasons. This provision does not entitle the JC to *abolish* committees that are explicitly enshrined in the treaty because this would require an amendment to the treaty. The latter requires the approval from the Parties in accordance with their internal requirements and procedures (Article 30.2). The JC is, however, entitled to dissolve the committees in their current composition and it may change their terms of reference and work – as deemed appropriate. While the JC cannot *de facto* terminate the functioning of committees – as foreseen in the treaty – it has considerable leverage in shaping the work of the committees, including the Committee on Trade and Sustainable Development or the RCF.
- **Establishing new specialised committees:** The JC is largely free to establish new specialised committees and bilateral dialogues. These new fora are only required to assist the JC "in the performance of its tasks". This mandate can help enhance environmental policies but can also have the opposite effect, depending on what new institutional arrangements Parties choose.
- **Other action:** Treaty bodies are limited to their mandate, as granted by the Parties and as set out in the founding document. If treaty bodies act beyond this mandate, their action is "*ultra vires*", i.e. beyond their powers, and illegal. To accommodate the needs of a changing environment, the JC can take other action in the exercise of its functions "if the Parties decide to grant the JC such powers" (Article 26.1.4 (i)). This is an important constraint because Parties have a veto and can stop the JC from taking action that they consider being beyond the JC's explicit mandate. With regard to regulatory cooperation, Article 26.1.4 (i) could be the legal basis for other action the JC deems necessary to fulfill its function in the field of regulatory cooperation.

**These are far-reaching powers.** They make CETA a "living agreement" that is dynamic and develops over time to help fulfil CETA's purpose. Although these powers are far-reaching, they are not unusual. Most new EU trade agreements establish a political body that supervises the implementation of the agreement and has the power to adopt legally binding decisions.<sup>43</sup> It is important to note, however, that the power to adopt legally binding decisions does not change the internal decision-making processes in the Parties' respective legal orders as set out in their constitutions and other national laws.

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<sup>43</sup> See EU-South Korea Free Trade Agreement, Articles 15.1 and 15.4 para. 1 and 2; EU-Singapore Free Trade Agreement, Articles 17.1, 17.2 and 17.4; EU-Colombia, Peru and Ecuador Trade Agreement, Articles 12 and 14 para. 1 and 2; EU Central America Association Agreement with a strong trade component, articles 4, 6 para 1 and 2 as well as Articles 7.1 and Article 7.2 in conjunction with Article 6 para 1 and 2.

## 5. 2 Specialised Committees

### Article 26.2 Specialised Committees (emphasis added)

1. The following specialised committees are hereby established, or in the case of the Joint Customs Cooperation Committee referred to in paragraph (c), is granted authority to act under the auspices of the CETA Joint Committee:

[...]

(g) the **Committee on Trade and Sustainable Development**, which addresses matters concerning sustainable development;

(h) the **Regulatory Cooperation Forum**, which addresses matters concerning regulatory cooperation; and

2. The specialised committees established pursuant to paragraph 1 shall operate according to the provisions of paragraphs 3 through 5.

3. The remit and tasks of the specialised committees established pursuant to paragraph 1 are **further defined in the relevant Chapters and Protocols of this Agreement**.

4. Unless otherwise provided under this Agreement, or if the co-chairs decide otherwise, the specialised committees shall meet once a year. Additional meetings may be held at the request of a Party or of the CETA Joint Committee. They shall be co-chaired by representatives of Canada and the European Union. The specialised committees shall set their meeting schedule and agenda by mutual consent. They shall set and modify their own rules of procedures, if they deem it appropriate. **The specialised committees may propose draft decisions for adoption by the CETA Joint Committee, or take decisions when this Agreement so provides.**

5. Each Party shall ensure that when a specialised committee meets, all the competent authorities for each issue on the agenda are represented, as each Party deems appropriate, and that each issue can be discussed at the adequate level of expertise.

6. The specialised committees shall inform the CETA Joint Committee of their schedules and agenda sufficiently in advance of their meetings and shall report to the CETA Joint Committee on results and conclusions from each of their meetings. The creation or existence of a specialised committee does not prevent a Party from bringing any matter directly to the CETA Joint Committee.

The provision refers to the RCF and the Committee on Trade and Sustainable Development. It does not refer to the Chapter on Trade and Environment because the Committee on Trade and Sustainable Development is also responsible for the Trade and Environment Chapter (and the Chapter on Trade and Labour). According to Article 26.2, specific Chapters and Annexes contain detailed provisions on the specialised committees, which are discussed above. Article 26.4 contains the important rule that specialised committees are entitled to propose draft decisions for adoption to the JC. It remains to be seen to what extent decision making will *de facto* rest with the specialised committees.

## 5.3 Decision Making

### Article 26.3 Decision Making (emphasis added)

1. The CETA Joint Committee shall, for the **purpose of attaining the objectives of this Agreement**, have the **power to make decisions in respect of all matters when this Agreement so provides**.
2. The decisions made by the CETA Joint Committee **shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them**. The CETA Joint Committee may also make appropriate recommendations.
3. The CETA Joint Committee shall make its decisions and recommendations **by mutual consent**.

**Article 26.3 is one of CETA's most important provisions. It stipulates that the JC has the power to take decisions.** The JC may take decisions – for the purpose of attaining CETA's objectives – if provided in the agreement. The scope of the JC's decision-making power is ambiguous. On the one hand, it is clear that the JC may take decisions if explicitly stipulated in the agreement. On the other hand, it is less clear whether the JC may take a decision where CETA only refers to the JC without explicitly granting the power to take legally binding decisions. It is not clear whether the JC may take decisions if not provided for in the agreement, but necessary or useful for attaining the objectives of the agreement.<sup>44</sup>

Article 26.3 clearly determines that the JC takes decisions by **consensus**. Each Party can veto a decision. There is no way that a Party will be outvoted.

Article 26.3.2 stipulates that the **decisions of the JC are binding on the Parties** - "subject to the completion of any necessary internal requirements and procedures". This means that JC decisions only become legally binding if requirements and procedures of national law are completed. This is an important clarification compared to the CETA text of September 2014, adopted before the legal scrubbing. The old text stated that "the decisions taken shall be binding on the Parties, which shall take the measures necessary to implement the decisions taken". The old text made no reference to internal requirements and procedures but only stated that Parties are obliged to take the necessary measures to implement the decisions of the JC.

Article 218.9 of the Treaty on the Functioning of the EU (TFEU) regulates these **internal requirements and procedures for the EU**. According to this provision, the Council establishes, following a proposal from the Commission or the High Representative for Foreign Affairs and Security Policy, the position that the EU will take in the treaty body – "provided the treaty body is called upon to adopt acts having legal effects".<sup>45</sup> Unlike in the ratification process where the European Parliament takes the final decision, it has no formal say on when the EU decides the common position it will take in JC (Article 218.9 TFEU at the end). The European Parliament is only to be immediately and fully informed when the Council decides on the common position the EU will take in the JC (cf. Article 218.10 TFEU). EU law, however, requires the approval by Parliament when

<sup>44</sup> Stoll, P. T., Holterhus, T. P. and Gött, H. (2015).

<sup>45</sup> Article 218.9 TFEU: "The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement."

the decision of the JC would supplement or amend the institutional framework of CETA (Article 218.9 at the end in conjunction with 218.6 iii TFEU).<sup>46</sup>

The **limited role of Parliament** weakens the democratic legitimacy of decisions by the JC, but is not unusual. Decision-making in treaty bodies is, in general, the domain of the executive where quick action on technical issues is the norm and detailed parliamentary oversight is rare. Because the scope of regulatory cooperation under CETA is broad and largely only limited by its vague objectives, the limited role of the European Parliament could become problematic. There are concerns that the JC and the specialised committees would develop CETA further – to an extent that is not sufficiently democratically legitimate.<sup>47</sup>

### **To what extent are EU institutions bound by CETA?**

According to Article 216.2 of the TFEU, all organs of the EU, including the European Parliament, must implement international agreements to which the EU is party.<sup>48</sup> International agreements form an integral part of the EU legal order.<sup>49</sup> This includes legally binding decisions of treaty bodies.<sup>50</sup>

However, the European Court of Justice has ruled that international agreements – in principle – do not override EU primary law, i.e. the EU Treaties.<sup>51</sup> Only directives, regulations and decisions are secondary in hierarchy to international agreements.<sup>52</sup> This hierarchy of norms is also valid for decisions taken by treaty bodies such as the JC.<sup>53</sup> In consequence, the JC decision would not affect the legislative requirements and processes set by the TFEU. However, it is possible that a JC decision obliges the European Parliament to adopt a specific piece of legislation – provided the JC decision can only be implemented by this specific legislation. In other words, the EU would violate its CETA obligations if the European Parliament and Council fail to adopt the legislation that is required for the implementation of a JC decision.

The situation is different when the JC takes a decision that does not require implementation by a legislative act, but by an implementing or delegated act. In this case, the European Parliament is not directly involved in decision-making; the decision is taken in a process involving the Commission and one of the numerous committees in which Member States are represented.<sup>54</sup>

<sup>46</sup> Schmalenbach, K. (2011b), para. 25.

<sup>47</sup> Stoll, P. T, Holterhus, T. P. and Gött, H. (2015).

<sup>48</sup> See Schmalenbach, K. (2011a), para 25.

<sup>49</sup> Haegeman-Decision mentioned in Schmalenbach (2011a), para. 25.

<sup>50</sup> European Court of Justice, Case 188/91, *Deutsche Shell*.

<sup>51</sup> European Court of Justice, Opinion 2/94, *ECHR* and Opinion 3/94 (GATT/WTO).

<sup>52</sup> Schmalenbach, K. (2011a), para. 50, and European Court of Justice, Case C-308/06, *Intertanko*, para 42.

<sup>53</sup> Schmalenbach, K. (2011a), para. 51.

<sup>54</sup> See in greater detail Gerstetter et al. (2014), p. 25ff.

## 6. Technical Barriers to Trade and Sanitary and Phytosanitary Measures (Chapters 4 and 5)

The **TBT Chapter** includes various obligations for Parties in relation to regulatory cooperation. Article 4.3 requires that they “shall strengthen their cooperation in the areas of technical regulations, standards, metrology, conformity assessment procedures, market surveillance or monitoring and enforcement activities”. In this regard, Article 4.4.1 states that the Parties aim at making their technical regulations compatible with each other and to this end will provide certain information to the respective other Party. Moreover, there is a clause regulating the recognition by one Party of another Party’s technical regulation as “equivalent” to its own (Article 4.4.2). Equally, there are rules on the mutual acceptance of the results of conformity assessments (Article 4.5). It is important to note that the respective Article refers to a “Protocol on the mutual acceptance of the results of conformity assessment” in this context. As noted above, CETA’s JC can take binding decisions on the modification of Protocols. Moreover, Parties are required to allow the participation of the other side in the development of technical regulations and conformity assessment procedures; when the other side comments a written response has to be provided (Article 4.6).

The effect of these rules on environmental regulation in the EU and Canada is difficult to predict. What is clear is that e.g. the requirement to respond in writing to comments of the respective other Party imposes a (potentially small) additional administrative burden on the respective regulator. Potentially, the date from which technical regulations are applied could also be delayed for a limited period of time, which is undesirable when technical regulations are aimed at environmental protection. To what extent the provisions on the recognition of equivalence of technical regulations and conformity assessment will influence the level of environmental protection within the EU and Canada remains to be seen. Conceptually speaking, such recognition decisions would lower the level of environmental protection if one side has lower levels of ambition in its regulatory and conformity assessment activities than the other, but the measures of both sides were recognised as equivalent nonetheless. However, the Parties retain the discretion to decide which of the other Party’s technical regulations they wish to recognise as equivalent; therefore much depends on the future course of action by the Parties in this regard.

Article 5.6 is one of the central provisions in the SPS Chapter. It obliges the importing Party to accept the SPS measure of the exporting Party as equivalent to its own, if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party’s appropriate level of SPS protection. Two Annexes determine the details. Moreover, there are several provisions aimed at facilitating the import of products subject to SPS measures to the territory of the respective other Party.

Again, the impact of these rules on the level of health and environmental protection in the EU and Canada are difficult to estimate. There is nothing in the clauses requiring any of the Parties to adopt regulations that are less environmentally ambitious than the ones existing so far. However, if the respective administrations decide to recognise measures as equivalent although they are not, a lower level of protection could be the result. Thus, again much will depend on how the EU and Canada actually apply these provisions in the future.

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