



# Food Safety, Agriculture and Regulatory Cooperation in the Canada-EU Comprehensive Economic and Trade Agreement (CETA)



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# Introduction

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***Food is something we take for granted in the Western world. It is what brings communities together. It is our identity. It is the source of life itself.***

***The food standards we have are important for good health, quality living and our culture. The standards define what farmers will grow. They affect how farmers make their living and what we eat.***

The European Union's proposed Transatlantic Trade and Investment Partnership (TTIP) with the United States and the Comprehensive Economic and Trade Agreement (CETA) with Canada have a lot to say about our food and how it will be regulated.

While many Europeans are aware of the risks posed by TTIP to weaken food safety standards to the lower standards in the U.S., CETA, in its current form, is also worrisome.

Canada's experience with food regulations under the North American Free Trade

Agreement (NAFTA) shows that the threats trade agreements pose to food quality and safety are very real in free trade agreements. Canada's experience with regulatory harmonization in NAFTA gives clues to what the European Union can expect with CETA.

Canada's current food regulation system encompasses many contentious issues including the precautionary principle, genetically modified (GM) foods, pesticides, animal welfare, chemicals and food safety inspections. These areas are considerably different from the EU's and need to be considered before CETA is ratified.

In addition, a process called "regulatory cooperation" will jeopardize the EU's own food standards. Given the differing standards between Canada and the EU over food safety, European farmers would be in direct competition with food produced under lower standards.



# Canada's NAFTA experience

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## Agriculture under NAFTA

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Trade agreements tend to boost export-oriented farming. On both sides of the Atlantic, CETA supporters argue that the deal will increase agricultural exports.

Under the North American Free Trade Agreement (NAFTA), a deal between Mexico, the United States and Canada (and under a previous bilateral deal between the U.S. and Canada), agricultural exports did increase, although farmers saw little gain in revenue. In all three NAFTA countries, corporate concentration in the agricultural sector has intensified since the agreement came into force, leading to larger farms, heavy and unsustainable chemical use, and weaker prices for farmed goods.

In the U.S. there is evidence to indicate that "NAFTA and the World Trade Organisation (WTO) require American farmers to adopt factory-style agricultural operations in order to survive. Record drops in net farm income translate into sub-poverty wages."<sup>1</sup>

In Canada, the statistics are revealing:

- According to the Canadian Centre for Policy Alternatives, almost 45 per cent of Canada's food production is exported.<sup>2</sup>
- Agriculture exports tripled from \$11 billion to \$33 billion between 1988 and 2007. Yet according to a survey by the National Farmers Union, net farm income fell by more than half during this same period while farm debt doubled.<sup>3</sup>
- In the last 40 years, Canada has lost 45 per cent of its farms. The number of farms fell from 366,128 in 1970 to 204,730 in 2011.<sup>4</sup>

In Mexico, under NAFTA, two million Mexican farmers have lost their livelihoods. At the same time, consumer food prices have risen. The price of tortillas rose by 279 per cent in the deal's first five years.<sup>5</sup>

Farmers do not get a fair price for their crops. The gap is widening between what

In the last 40 years, Canada has lost 45 per cent of its farms. The number of farms fell from 366,128 in 1970 to 204,730 in 2011.



suppliers pay and what farmers earn. The losers in this are farmers and consumers.

## Corporate concentration of farming in Canada

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In Canada, agribusiness has become highly concentrated. For example, two foreign companies – U.S.-based Cargill and Brazilian-based GBS – together account for more than 90 per cent of Canada's inspected beef-packing industry.<sup>6</sup>

Here are some of the statistics on farm concentration:

- Most cattle, hogs and poultry are concentrated in large holdings. Some feedlots contain more than 20,000 head of cattle, or between 5,000 and 20,000 hogs. For poultry, as many as 100,000 birds are squeezed into small areas.
- According to Statistics Canada, between 2006 and 2012 the number of farms in Canada decreased by 10 per cent on average while the average farm size increased by seven per cent.<sup>7</sup>
- In the province of Saskatchewan, the number of farms fell by 17 per cent, while average farm size grew 15 per cent.<sup>8</sup>
- The fastest-growing farm sector consists of farms with more than \$1 million in annual revenue. The number has risen 36 per cent between 2010 and 2016.<sup>9</sup>
- In Canada, farms with \$1 million or more in revenue make up 5 per cent of the number of producers, but provide nearly half of Canada's food production.<sup>10</sup>

Professor David Sparling of the University of Western Ontario says farms have to scale up or sell to corporations to drive up their productivity. It is a matter of getting bigger or getting out.

Many farmers are selling their farms and leaving the business. Often, those who stay become tenant farmers. Drowning in debt, they sell their land to investors and lease it back.

A parallel can be made between the experiences under NAFTA and what Europeans can expect under CETA.

### **Learning from NAFTA's regulatory harmonization**

**Through CETA, the EU and Canada want to reduce "barriers to trade" by minimizing rules for sanitary (relating to human or animal life or health) and phytosanitary (relating to plant life or health) regulations (SPS). SPS regulations govern the movement of goods that may pose health risks.**

NAFTA draws heavily on SPS regulations in the General Agreement on Tariffs and Trade (GATT). This means that Canada, the U.S. and Mexico cannot restrict trade beyond "appropriate" levels of phytosanitary protection.

### **Informal regulatory cooperation on pesticides in NAFTA**

NAFTA has an informal process for regulatory cooperation. In 1996, NAFTA's Technical Working Group (TWG) on Pesticides was set up to harmonize pesticide regulation in NAFTA.

So far, large companies – those with patented pesticides – have dominated the process.

According to the Canadian Agricultural Trade Policy Research Network, the TWG on Pesticides meets annually with stakeholders, be they from the pesticide industry, grower organizations or environmental groups. There is evidence that patented producers, through their industry organization, Crop Life, are highly involved in the process, while generic and agricultural producers are not. From the TWG minutes, there are key roles given

**Under CETA, small family farms will continue to disappear, along with a way of life that has existed for centuries. Countries with smaller farms – and farmers who depend on agriculture as a way of life – will be most heavily affected.**



to representatives of the global pesticide industry and government federal agencies, but none for farmers, NGOs and consumers.<sup>11</sup>

The TWG on Pesticides has three parts:

- For new pesticides: a joint review process;
- For older pesticides: cooperative re-evaluation; and
- For risk assessments: partial harmonization.<sup>12</sup>

Between 2016 and 2021 the TWG on Pesticides aims to:

- Align maximum residue levels (MRLs) – the amount of legally acceptable pesticide in a food.
- Expand the joint review process for biopesticides and registration for minor users.
- Address differences in data requirements and the risk assessment process, which is recognized as a significant challenge.<sup>13</sup>

Glyphosate, the core ingredient of the weedkiller known as "Roundup." The EU Commission recently renewed its permit despite public objections. Roundup includes other substances that are also known to have negative health impacts. This pesticide, as well as neonicotinoids, are two key substances recommended for use by Health Canada.<sup>14</sup>

There has been a mixed record of harmonization in NAFTA. The U.S. and Canada have set up a number of common MRLs for pesticides, which facilitate the ease of food shipments.

Research on harmonization efforts, like those around MRLs, shows harmonization has helped

Research on harmonization efforts, like those around MRLs, shows harmonization has helped increase the market size and concentration of the chemical industry.



increase the market size and concentration of the chemical industry.<sup>15</sup> Instead of making standards fairer for all players, harmonization can change the rules to the advantage of bigger players by adjusting entry barriers and options for producers in smaller crop markets.<sup>16</sup>

In the area of pesticide registration, harmonization to a higher standard doesn't happen.<sup>17</sup> There are significant differences in approaches between the three NAFTA countries to a number of key pesticides.

For example, methyl bromide (MB) is an ozone-depleting substance, according to the Montreal Protocol on Substances that Deplete the Ozone Layer. It is a fumigant used for seed production and on some crops. In NAFTA, countries are required to phase out its use.

There is no common approach, however:

- Mexico is in the process of phasing MB out, but has yet to enact a ban.
- The U.S., a large manufacturer of the substance, created a "critical use exemption" clause. The U.S. allows 4,813,452 kilograms of methyl bromide for critical uses like strawberry and tomato production, and commodity fumigation.<sup>18</sup>
- Canada is phasing the fumigant out, but has left the door open for a critical use exemption in 2017 and 2018.<sup>19</sup>

### **Pesticides and investor-state challenges under NAFTA**

When agreement cannot be reached through

other channels, corporations can launch trade complaints through the investor-state dispute settlement (ISDS) mechanism in Chapter 11 of NAFTA. This gives pesticide makers a powerful tool to challenge policies or regulations.

There have been several challenges brought forward involving regulation around banned substances including:

- Lindane, a chlorinated hydrocarbon insecticide banned in Canada in 2005, was called by one U.S. Environmental Protection Agency administrator "one of the most toxic, persistent, bioaccumulative pesticides ever registered."<sup>20</sup> In 2015, the World Health Organization determined there was "sufficient evidence" for lindane to be ruled a human carcinogen.<sup>21</sup> After Canada decided to phase out the chemical because of these concerns, Chemtura, one of the pesticide's manufacturers, challenged Canada under NAFTA.
- Methyl tertiary butyl ether (MTBE), a gasoline additive that has contaminated water in California, was banned there in 2004.<sup>22</sup> In this case, the Canadian company, Methanex, challenged the ban and claimed almost \$1 billion under NAFTA's Chapter 11. MTBE has not been banned in Canada despite several cases of ground water contamination.

In both cases, the complainants lost, and the bans were upheld, but the cost of defending the public interest was high.

In 2006, the province of Quebec banned certain chemical pesticides on lawns, including 2,4-D. Dow AgroSciences gave a notice of intent to bring a dispute to the Quebec government, but a settlement was reached before a case was filed.<sup>23</sup> As part of the settlement, Quebec had to publicly state that 2,4-D was not a threat to human health.

Although these cases did not require Canada to pay or re-regulate, ISDS provisions provide a way to attack regulations and standards. It

is clear that the harmonization process has been uneven. Despite numerous committees tasked with resolving disputes, ISDS has been used to try and force the hand of states to deregulate.

This is what happened with Ethyl Corporation, a U.S. chemical corporation that successfully challenged a Canadian ban on imports of its gasoline that contained the additive MMT, a suspected neurotoxin. The Canadian government repealed the ban and paid the company \$13 million for its loss of revenue.

But corporations are not the only ones that can drive regulatory change. In a state-to-state dispute through the Canada-United States Free Trade Agreement, Puerto Rico's ban on Quebec's ultra-high temperature (UHT) processing of milk was reversed in

The Canadian government paid \$13 million to Ethyl Corporation after the company challenged Canada's ban on the gasoline additive MMT, a suspected neurotoxin.



1996. Quebec's UHT milk "was not made under the conditions of the Pasteurized Milk Ordinance and therefore did not meet the requirements for sale in Puerto Rico." Canada filed a challenge based on the equivalence of pasteurized and non-pasteurized UHT milk under the Canada-U.S. Free Trade Agreement.<sup>24</sup>



# The regulatory system in Canada

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Health Canada is responsible for the Canadian Food Inspection Agency (CFIA) and activities related to food safety. Pesticides are regulated by Health Canada's Pest Management Regulatory Agency (PMRA).

In 1993, Health Canada's formal framework defined and described the risk assessment and risk management process. However, as of 2011, Health Canada itself said that there was "no formalized, consistent approach being applied across the spectrum of health protection issues."

Canada's Auditor General's 2015 audit of the PMRA revealed that in each of the five areas it reviewed, the PMRA did not live up to its mandate under the *Pest Control Products Act* to protect human health, safety and the environment.

Key findings:

- The PMRA continued to rely on "conditional" registrants, which allows companies to release their products to the market before the PMRA had completed its risk assessment.<sup>25</sup>
- The PMRA made "insufficient progress" in its efforts to re-evaluate older pesticides. This means that pesticides currently on the Canadian market might not meet existing standards, exposing consumers to unacceptably high risks.
- The PMRA "failed to assess the cumulative health effects of pesticides when required."<sup>26</sup>
- In some cases where the PMRA had found that existing pesticides posed unacceptable levels of risk, the agency did not recall them in a timely manner.
- New information on pesticide risks was not adequately relayed to the public.

These findings significantly undermine public trust in the agency to ensure human health and the environment are the priority, not corporate interests.

In practice, there is significant ambivalence about the precautionary approach in Canada.



## The precautionary principle in Canada

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Although Health Canada considers the precautionary principle to play an important role in its regulatory approach, in practice the government remains ambivalent about applying it.<sup>27</sup> This ambivalence is partially due to the evolving nature of the concept, but also because of preexisting legislative barriers.

This is shown by Canada's "permissive attitude" towards genetically modified (GM) foods. In comparison to Europe, Canada has taken a far less precautionary approach to regulating GM foods.<sup>28</sup>

These cases make this ambivalence more clear:

### Neonicotinoids

Neonicotinoids are pesticides commonly used as commercial insecticides. In 2013, Health Canada found neonicotinoid residues on 70 per cent of the dead bees collected during the corn and soybean planting periods. The majority of live bees did not have the residues present.<sup>29</sup> Health Canada concluded that "exposure to neonicotinoids during [this period] contributed to bee mortalities in 2012 and 2013."<sup>30</sup> In 2014, Siskinds LLP filed a class action lawsuit against Bayer and Syngenta for negligence in their design, production and distribution of neonicotinoid pesticides.<sup>31</sup>

The European Commission has already banned some of the chemicals after the European Food and Safety Agency said neonicotinoids negatively affect bee colonies and pollinators.<sup>32</sup> Research reviewed by Health Canada shows that "long-term effects on pollinators can result from sub-lethal exposure levels."<sup>33</sup> In the EU, this ban is being challenged by agrochemical companies who are taking legal action.

In Canada, there is a conflict between the province of Ontario's approach, which has expressly adopted the precautionary principle, and the federal risk management approach. The Ontario government introduced new regulatory requirements in 2015 to reduce the number of hectares planted with neonicotinoid-treated corn and soybean seed by 80 per cent in 2017.<sup>34</sup> And while Health Canada's PMRA recently found in a preliminary assessment that imidacloprid – a neonicotinoid insecticide – posed "a potential risk to bees" for some soil treatments, the pesticide is still under review.

PMRA's Director of the Environmental Assessment Directorate said that neonicotinoids will remain on the market because "the risks are acceptable with appropriate mitigation."<sup>35</sup> While the PMRA has implemented some (arguably weak) mitigation measures before it concludes its re-evaluation – which is expected to be completed in 2017 or 2018 – it is clear that the federal government has not followed the precautionary principle.

At the same time, in the U.S., the U.S. Environmental Protection Agency and the California Department of Pesticide Regulation are also reviewing the pesticide.<sup>36</sup> It is unclear whether the PMRA will come to a different conclusion in its re-evaluation of the neonicotinoid. It also remains to be seen whether these divergent approaches could open Canada up to an ISDS complaint under CETA.

### **Glyphosate**

Another contentious case concerns the herbicide glyphosate, the active ingredient in Monsanto's Roundup product. The World Health Organization (WHO) classified glyphosate as "probably carcinogenic" to humans.<sup>37</sup>

In April 2015, the Canadian government found that glyphosate is "unlikely to pose a human cancer risk."<sup>38</sup> This discrepancy with the WHO does not bode well for application of the precautionary principle in Canada.

In March 2016, the European Committee on Environment, Public Health and Food Safety voted against the Commission's proposed renewal of glyphosate. There has been a deadlock in the Standing Committee on

Plants, Animals, Food and Feed, and the appeals committee voted on the renewal in June. Despite being rejected by a vote of the European Council on June 24, the European Commission announced the renewal of Monsanto's permit for glyphosate on June 29.

### **Beef and pork imports**

The EU would increase its imports of Canadian beef and pork by about 65,000 tons of beef and 80,000 tons of pork under CETA.

In essence, the EU would allow tariff-free 3,000 tons of bison, 30,840 tons of fresh beef and veal, and 15,000 tons of frozen beef and veal. The EU would have to add 11,400 tons shared between the U.S. and Canada to compensate for the WTO decision that sanctioned the EU after it banned imports of hormone-treated beef.

Once a tariff is removed or a quota increased, Section 2 of CETA prohibits governments from re-implementing the tariff or quota. At the moment, Canada doesn't meet CETA's export quotas because it cannot meet European standards. Canada may exert pressure on the EU to lower standards in order to meet these quotas.

### **Chlorinated beef and chicken**

Many worry about chlorinated beef and chicken coming into the EU from the U.S. But Canada's regulations also allow beef and chicken to be washed and processed with chlorinated water.<sup>39</sup> Until recently, the EU has banned these imports. In 2013 the EU dropped its ban on beef rinsed in lactic acid as a sign of good faith before the TTIP negotiations began. This shows that the European Union is willing to lower its standards in certain areas to accommodate trade deals.



In 2014, E. coli was found in meat exported to the United States from a Canadian plant that slaughters 40 per cent of the cattle in Canada.



Commission guidelines. This was after Health Canada's review found that "[r]actopamine was shown to have pharmacological effects on cardiovascular systems."<sup>42</sup> Other countries have harmonized according to the levels set by the Joint Food and Agriculture Organization of the United Nations/ World Health Organization Expert Committee on Food Additives.

### Food safety: Meat and lax regulations

There is growing controversy in Canada over problems with inspection of meat products exported to the U.S. including:

- In September 2012 U.S. food inspectors found E. coli bacteria in a shipment of beef from the XL Foods plant in Brooks, Alberta.
- In April 2014 E. coli was found in meat exported to the U.S. from the same plant in Alberta, which is now owned by the Brazilian company JBS Food Canada. Forty per cent of the cattle in Canada is slaughtered in this plant.

The Canadian Food Inspection Agency has exacerbated this situation by laying off 100 food-safety inspectors to cut costs.

The European Union upheld a ban on the drug in 2012, effectively overriding the MRLs used in the Codex Alimentarius Commission.

Applying these kinds of bans in the future would make the EU vulnerable to ISDS challenges for its existing rules.

Canada's federal government has no penalties for violating animal welfare codes. It lags far behind the European Union. EU farmers will have to compete with cheaper, less humane Canadian practices.



### Ractopamine

In Canada, ractopamine, a beta agonist growth stimulant, is used as a veterinary drug in cattle, swine and turkeys. Multiple studies have identified systemic and cardiovascular effects in animals infused with ractopamine as well as increased heart rates in human volunteers.<sup>40</sup> Health Canada, however, has concluded that residues in edible tissues do not result in adverse health effects in humans.

Ractopamine is banned in 160 countries – including the EU – over concerns about human health. The drug is administered in the days before slaughter, so there is no clearance period that would reduce the residue for human consumption.<sup>41</sup>

In 2013, Canada lowered the MRLs of ractopamine permitted in cattle, swine and turkeys. It harmonized these rules with the international 2012 Codex Alimentarius

### Animal welfare

In Canada, 700 million animals are slaughtered for food. Canada's federal government has no penalties for non-compliance with voluntary codes of practice for animal welfare. It lags far behind the European Union in this regard.<sup>43</sup>

Factory farms now largely dominate in Canada. Animals are seen as production units – they are raised in cramped spaces and given the least amount of feed over the shortest possible lifespan. There is little scrutiny of meat producers, who are under market pressure to raise livestock at the lowest price. Under CETA, Canada would be exporting meat raised under these conditions. EU producers would be forced to compete with these cheaper, but less humane practices.

## Genetically modified (GM) foods

Canada is among the top three largest producers of genetically modified (GM) foods in the world.

Canada is one of the largest producers of GM canola oil, as well as GM maize, soybean and sugarbeet crops.<sup>44</sup>

The Canadian Food Inspection Agency assesses and authorizes GM plants. Health Canada authorizes the sale of GM foods for human consumption.

Health Canada “is not aware of any published scientific evidence demonstrating that novel [GM] foods are any less safe than traditional foods.”<sup>45</sup> For this reason, there is no mandatory labelling to identify the method of production – including genetic modification – in the creation of a food product, although voluntary labelling is permitted.<sup>46</sup>

By contrast, the EU has adopted mandatory labelling for any product that has been genetically modified (containing more than 0.9 per cent GM ingredients).<sup>47</sup> The EU’s “zero tolerance approach” allows 0.1 per cent of GM material in unapproved varieties.

Even though the EU does not use GM crops for direct human consumption, two are authorized for production and allowed in animal feed, and Canadian GM soybeans are widely used in the EU.

### GM apples

In March 2015, the Canadian Food Inspection Agency gave permission to a British Columbia-based company, Okanagan Specialty Fruits Inc., to grow and sell a brand of GM apples in Canada.<sup>48</sup> The apple has been modified so that it does not brown when cut or bruised. Canada will increase its apple exports to Europe because the EU seasonal tariff on Canadian apples (as high as nine per cent) will be reduced to zero per cent.<sup>49</sup> Therefore, it is possible – even likely – that Canadian GM apples will enter the European market.

### GM fish

In November 2015, the U.S. Food and Drug

Canada is one of the top three largest producers of genetically modified organisms (GMOs) in the world. Canada also has no mandatory labelling of GMOs.



Administration allowed an American company to market its GM fish as a food product. Health Canada may adopt a similar policy. This salmon will contain a growth hormone from a Chinook salmon and a gene from an ocean pout – an eel-like fish – so that it will grow to maturity at twice the normal rate. The result is a fish that is large enough to eat in about a year and a half, rather than the typical three years. In May 2016, Health Canada and the Canadian Food Inspection Agency announced AquaBounty’s genetically modified salmon has been approved for sale as food in Canada.

This is the first genetically modified animal to be approved in Canada for both human and animal consumption, whether it is fish filets, fish oil or fish meal. And in Canada, the company is not required to label it on grocery shelves.

Tariff rates on salmon, which now range up to 15 per cent, will be eliminated under CETA, so more Canadian salmon will be sold in Europe.



## Spotlight on food additives: Colouring agents

In 2012, Health Canada put a new system in place to regulate food additives and streamline the regulatory process. Food and Consumer Products of Canada, the largest industry association representing Canadian food, beverage and consumer product companies, welcomed the change.<sup>50</sup> With the new system, Health Canada reduced wait times for authorizing food additives or addressing concerns about an existing additive.

Health Canada has 15 lists of permitted food additives for sweeteners, preservatives, firming agents and other substances. With colouring agents, the current regulation is that food manufacturers can label food colours using their common names, for example, “Fast Green FCF,” or simply as “colours.”

There are several problems with this, including:

- When the term “colours” is used, it does not provide sufficient information for consumers with sensitivities.<sup>51</sup>
- There are no warning labels on the use of synthetic colours. In 2010, despite stakeholders expressing concerns and providing recommendations for food labelling for children, Health Canada responded that it was not “considering warning labels on prepackaged foods containing certain synthetic colours.”<sup>52</sup> This is despite the fact there are many studies that found that dyes affect the behaviour of some children and that eliminating food colours has beneficial effects on ADHD symptoms.<sup>53</sup>

There are some food dyes that are allowed in Canada, but not in Europe.

- Fast Green FCF is banned in the EU but not in Canada, as is Citrus Red No. 2 (although it is categorized as “restricted use” in the EU).<sup>54</sup>
- Others, although not banned by the EU entirely, are banned in particular member states including: Allura Red (permitted in Canada, but banned in Denmark, Belgium, France, Germany, Switzerland, Sweden, Austria and Norway), Ponceau SX, Brilliant Blue FCF, indigotine and tartrazine.<sup>55</sup>

Several types of food dye that are allowed in Canada have been banned by the EU or by specific member states.



There are also different regulatory approaches to labelling that might be subject to harmonization. For example, in Europe, warning labels are required on foods with one of six artificial colours, including the commonly used tartrazine, Sunset Yellow FCF and Allura Red. The label reads: “May have an adverse effect on activity and attention in children.”<sup>57</sup> Warning labels are also required for foods containing other ingredients such as aspartame, caffeine and sweeteners.<sup>57</sup>

Given the different approaches to food dyes, regulatory cooperation will most likely be required and corporations will be seeking the least restrictive standards.



# CETA and regulations

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## Can CETA maintain the precautionary principle?

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The precautionary principle is to be invoked “when a phenomenon, product or process may have a dangerous effect, identified by a scientific and objective evaluation, if this evaluation does not allow the risk to be determined with sufficient certainty.”<sup>58</sup>

That means when there is scientific uncertainty the burden of proof is on the product creator to prove that it is not dangerous rather than government and society to prove that it is dangerous.

EU Trade Commissioner Cecilia Malmström says she will “defend the precautionary approach to regulation in Europe in TTIP and all other agreements.”

However, the EC-Hormones case shows that the precautionary principle may not hold up in an investor-state dispute. In the wake of the mad cow crisis, the European Commission banned the import of meat containing artificial hormones. In 1997, Canada and the U.S. opposed this ban at the World Trade Organization (WTO) – and won. The precautionary principle, although recognized as a legal concept in international environmental law, was not recognized by the WTO Appellate Body.<sup>59</sup>

Moreover, CETA recognizes and incorporates the WTO sanitary and phytosanitary measures (Article 5.4). These are the same WTO rules that were used to counter the EU refusal of hormone-treated beef.

Many questions remain about how CETA will influence domestic policies and the right to regulate.<sup>60</sup>

## GM food harmonization

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Europe has committed to cooperation on biotechnology issues through CETA’s bilateral Dialogue on Biotech Market Access Issues.<sup>61</sup> The working group will address issues like residue levels in GM foods. The parties have committed to minimize the “adverse trade impacts of

regulatory practices related to biotechnology products,” promote “efficient science-based approval processes for biotechnology products”<sup>62</sup> and to cooperate on questions such as the low-level presence of GMOs in foods. In negotiations for CETA, Europe has already committed to move Canada’s canola proposals through the EU regulatory process quickly.<sup>63</sup>

Only 10% of EU geographical indicators registered – or in the process of being registered – are protected under CETA.



According to the Canadian Centre for Policy Alternatives, the regulatory cooperation provisions in CETA will “create new channels for industry to apply pressure to weaken EU food safety standards.”<sup>64</sup> In 2015, Members of the European Parliament approved new rules permitting EU member states to decide whether to allow the cultivation of GM foods, including the use of national bans on the cultivation of GM crops.<sup>65</sup> Although the national bans do not mention imports, these may be challenged through an ISDS case.

## Geographical indicators

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Geographical indicators (GIs) are names or signs used to identify products that correspond to a specific geographical location. They act like a brand that attracts customers and allows producers to charge a premium price. They also guarantee a certain quality of production and follow strict guidelines. Unlike trademarks, they cannot be bought or sold;<sup>66</sup> they belong to the regional producers accredited by an association. They are accepted in international trade agreements with their inclusion in the WTO’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.

## Feta-style cheese from Canada

The EU has advocated for recognition of GIs for agrifood products in CETA – these rights have been provided to the EU for asiago, feta, fontina, gorgonzola and munster cheeses.<sup>67</sup> This would make it illegal for Canadian producers to use certain names or signs on their products.

But while 145 European food names for products sold in Canada are protected, and there is some protection for wines and spirits through existing agreements, thousands of European GIs are not protected. For example, Cornish pasties and Yorkshire Wensleydale cheeses are not protected. In addition to the 145 GIs, there are 20 other wine and spirits protected under the 2003 EU-Canada agreement on these products in the Canadian market. Yet there are more than 1,400 GIs either recognized by the EU as registered or in process of being registered. Therefore, only 10 per cent of GIs are protected in CETA.<sup>68</sup>

As well, with CETA, Canadians can sell versions of protected products by adding the word “style.” For example, they can sell “feta-style” cheese.

As of the publication date of this paper, there are no protected Canadian GIs.<sup>69</sup>

## Regulatory cooperation in CETA

Chapter 21 of CETA establishes a Regulatory Cooperation Forum to review regulatory initiatives, whether in progress or anticipated.<sup>70</sup> This sets in motion a process of how government officials will notify and consult each other over regulation changes. Through this systemic dialogue, there will be an effort to reduce and make regulations efficient and as low as possible. This dialogue will be open to industries and lobbies on both sides of the Atlantic. As seen in a similar process in NAFTA, it will be unlikely that NGOs and civil society will be involved, much less on equal footing in the process. And there are fundamental differences in priorities, for example, as the Association internationale de techniciens, experts et chercheurs notes, “[N]ow, what companies and their allies consider as barriers to commerce, we consider as our sanitary, ecological, industrial, and technical norms and regulations defined by the collective will.”<sup>71</sup>

Article 21.4.d in the Regulatory Cooperation Chapter states that the parties will endeavour to share “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.” This means that information on “future legislation could be shared with the other Party even before it has been shared with Parliaments.”<sup>72</sup>

Many contentious areas have been left out of the CETA text and are expected to be included in future negotiations.



One form of regulatory cooperation specified in CETA is mutual recognition, which governs the means through which products will enter the EU (or Canada). In a bilateral agreement, mutual recognition is whether one country’s standards should be recognized as equivalent to those of the other country. This could have significant consequences for European farmers. First, interest groups could leverage this provision (Article 21.4) to lobby for European standards to align with their competitors to provide a “level playing field.” And if these standards change, European farmers could face market losses due to their new lack of comparative advantage.

A major area of proposed regulatory cooperation concerns biotechnology and is outlined in Article 25. Cooperation is listed as an objective of the bilateral working group,<sup>73</sup> noting the group will “cooperate internationally on issues related to biotechnology, such as low level presence of genetically modified organisms.”

Another source of regulatory cooperation relates to pesticides. Looking at differences in the maximum residue levels for pesticides gives insight to the challenges facing countries on both sides of the Atlantic. Canadian and EU pesticide standards differ considerably. The

EU has some of the strongest standards for most of the pesticides examined in the Codex Pesticides Residues in Food Online Database.<sup>74</sup>

Although these MRL levels are similar to Canada for most pesticides, there are some significant differences:

- Apple MRLs:
  - Ziram has an MRL of 0.1 parts per million in the EU and 7 in Canada and the U.S.
  - Thiram has an MRL of 5 in the EU and 7 in Canada and the U.S.

There are cases where the Canadian MRL is higher than the Codex MRL. Some examples include apple MRLs for acetamiprid, malathion, thiram and ziram, or cases where MRLs have not been set.<sup>75</sup>

In short, many contentious areas have been left out of the CETA text and are expected to be included in future negotiations. If regulatory cooperation is not achieved – which would be understandable given the significant differences between Canada and Europe’s regulatory systems – they would be subject to ISDS challenges. Canada’s experience with ISDS provisions illustrates that even when regulatory cooperation is achieved, there is no immunity from legal challenges by investors.

Also, CETA calls on the parties to renounce sanitary and phytosanitary measures that create unjustified barriers to commerce (article 5.2) and seeks to find the mutual recognition of norms and procedures regarding qualification and inspection.<sup>76</sup> Under mutual recognition, the EU would have to accept certain Canadian regulations for imports.

### **Investor challenges in CETA of European food regulations**

The precautionary principle is enshrined in the Treaty of Lisbon and is considered a “central tool” in European policy making by EC Trade Commissioner Cecilia Malmström.<sup>77</sup> However, the precautionary principle has not held up when it has been tested in international trade law.

This resulted in the costly outcome of the EC-Hormones cases with Canada and the U.S. The WTO ruling – which the EC appealed and lost

– resulted in imposed tariffs of \$116.8 million USD per year by the U.S. and \$11.3 million CDN per year by Canada. Both Canada and the U.S. imposed a 100 per cent ad valorem duty rate on select agricultural products from the EU.<sup>78</sup>

If the EU hopes to avoid a dispute under CETA, much rests on how the precautionary principle will be applied, and if it constitutes an unnecessary trade-restrictive measure. For example, in Chapter 12 on domestic regulation, parties must ensure “that licensing and qualification procedures are as simple as possible and do not unduly complicate or delay the supply of a service or the pursuit of any other economic activity.”<sup>79</sup>

If the precautionary principle were used to delay the supply of a service, there would be grounds for a dispute. There is language in Chapter 21 of CETA (a commitment to “establish, when appropriate, a common scientific basis”<sup>80</sup>) that could be used to overturn the precautionary principle in a dispute.<sup>81</sup> Moreover, research into Canadian biotech firms illustrates that heavy reliance on data and information provided by industries casts a dark shadow on the process of independent scientific assessment.<sup>82</sup>

Despite the insertion of language about the “right to regulate” in the investment and trade and environment chapters of CETA, the weakness of regulatory protections and past panel rulings call the ability to uphold this right into question.<sup>83</sup>

The “general exceptions” clause in Chapter 28 of CETA is modeled on Article XX of the GATT. It has not yet been tested in arbitration.<sup>84</sup> The exception states that a “Party may adopt or enforce a measure necessary [...] to protect human, animal or plant life or health.”<sup>85</sup> It is unclear, however, what “necessary” means here because it is also untested in investment law.<sup>86</sup> According to a report by the Canadian Centre for Policy Alternatives, “[e]ven if the exceptions are applied, the necessity of a measure can be a very difficult standard to meet.”<sup>87</sup>

# Conclusion

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Food regulations protect the values that define the quality and type of production of food within the European Union.

Canada's experience with NAFTA shows that exports increase the size and concentration of farms, and put more emphasis on factory farms. This is also likely to occur as a result of CETA. However, it must be noted that this is opposite of consumer trends, as more people seek healthy, locally grown food to eat from small producers. Internationally, consumers and food sovereignty advocates are opting for a small farm model due to environmental issues and wanting healthier, tastier and better produced food.

Canada's experience with informal regulatory harmonization and ISDS challenges through NAFTA suggests that there could be similar negative impacts on food safety regulations through CETA. Given what we know about NAFTA's effects of food safety, there should be deep concern about CETA.

In addition, many current Canadian regulations on food quality, GM foods, pesticides, food dyes, chlorinated chicken, hormones, and animal welfare are not as robust as EU regulations. Europeans must know what these practices are – and how their own regulations could be downgraded – before they make a decision on CETA.

For example, since Canada has no penalties at the federal level for violating animal welfare standards, it is likely that European farmers will be in direct competition with farmers who can produce in inhumane and cheaper conditions. Even without changes in EU regulations, EU farmers would be in direct competition with farmers who produce under very different regulatory frameworks.

There is much to be concerned about in both the text of CETA and through the negotiation process. For example, there are very few GIs protected within CETA in comparison to the number of GIs in Europe.

In CETA, there is no requirement for food policies to protect human health. They simply need to be the least trade restrictive while meeting the SPS requirement. A regulatory cooperation process is unlikely to engage consumers or health advocates, as in NAFTA, and is likely to reduce regulations. A 2014 report by the European Parliament on the TTIP acknowledged the risk of downward harmonization “which may undermine the traditional EU precaution and risk management policy on which the current regulatory framework is based.”<sup>88</sup>

Already, through CETA negotiations, the precautionary principle has been targeted. If there are investor-state dispute claims, it is unclear whether foundational European values, including the precautionary principle, will stand up. Regulatory cooperation in the field of GM foods appears to have a pro-GM bias.

Under CETA, tariff rate quotas for Canadian meat increase to 80,000 tons of pork and 65,000 tons of beef. These new quotas would be phased in over three to seven years. This was decided before Britain voted to leave the European Union. Without Britain, Canada's biggest export partner in the EU, according to many analysts the quotas are exceedingly high and would impact Continental European farmers already facing a crisis over low agricultural prices.

There are many similarities in the scope and content of CETA and TTIP. While an agreement with Canada may seem less dangerous than an agreement with the United States, many of the American practices are prevalent in Canada and are just as concerning. There is much at stake for both Canadians and Europeans if CETA is ratified.

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