INTRODUCTION

While the Comprehensive Economic Trade Agreement (CETA) has just been concluded between Canada and the European Union,¹ the Transatlantic Trade and Investment Partnership (TTIP) is currently being negotiated between the European Union and the United States.² Similar trade agreements are also being negotiated between other States, such as the Trans-Pacific Partnership Agreement (TPP) between Malaysia, New-Zealand, Peru, Singapore, Chile, Australia, Brunei, Canada, Mexico and the United States.³ These agreements all belong to a new

¹ Licence en Droit (Université de Reims Champagne-Ardenne), LL.M. Candidate (Université de Montréal). The author acknowledges la Faculté des études supérieures et postdoctorales for their support in this research. She also thanks the two anonymous peer-reviewers and professor Hervé Agbodjan Prince for their comments on this essay. The author can be contacted at angeline.couvreur@umontreal.ca.

² EC, CETA—Summary of the final negotiating results (December 2014), online: EC


The generation of Regional Trade Agreements (RTA) that are global, comprehensive and with one main purpose: tackling non-tariff barriers.

Following the drastic reduction of tariff barriers, non-tariff measures among which regulations such as technical and sanitary standards occupy a central place are now considered one of the most significant barriers to trade. Within the multilateral trade forum, such barriers have been scrutinized since the 1970s. Following the Uruguay Round and along with the creation of the World Trade Organization (WTO), the Technical Barriers to Trade (TBT) Agreement and the Sanitary and Phytosanitary (SPS) Agreement have been adopted as an attempt to regulate the creation of regulatory barriers. These agreements frame the regulatory power of the Member States in such a way that purely protectionist measures are prohibited, while preserving the right to adopt measures in order to protect legitimate concerns such as human, animal and plant health. However, most of the time, it is quite hard to disentangle legitimate concerns from protectionist motivations. Thus, science has been placed as the source of legitimacy and objectivity that should be the basis of all regulations, acting as a radar against protectionism, and risk assessment being a “universal tool of policy.” As such, under the SPS Agreement, Member States are generally permitted to adopt sanitary and phytosanitary measures, provided that they are necessary to protect human, animal or plant health and that they are based on scientific evidence. The rules and procedures to be followed by States in adopting such measures are stipulated in the SPS Agreement.

---

4 It is interesting to note the range of nuances that can be found regarding the definition of ‘non-tariff measures’ or ‘non-tariff barriers’. See for e.g Max Planck Encyclopedia of Public International Law [MPEPIL], 2014, “Non-Tariff Barriers to Trade” by Jörg Philipp Terhechte. Notably, it is important to underline that whereas non-tariff barriers to trade are often perceived as protectionism, they are also the simple side effect of States trying to safeguard legitimate concerns. In this sense, Stanko S Krstic notes that non-tariff barriers can occur ‘where the state seeks to protect interests that are not prima facie trade related (such as public health and safety, the environment and consumers) but nevertheless results in restrictions or additional costs for market access for business from other jurisdictions’. (Stanko S Krstic, “Regulatory cooperation to remove non-tariff barriers to trade in products: key challenges and opportunities for the Canada-EU Comprehensive Trade Agreement” (2012) 39:1 LIEI 3 at 1.).


6 WTO Agreement on Technical Barriers to Trade, 15 April 1994, 1868 UNTS 120 [TBT Agreement].

7 WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, 1867 UNTS 493 art 2.2 [SPS Agreement].


required to base their measures on scientific principles,\textsuperscript{11} and risk assessment.\textsuperscript{12}

In the context of liberalization, such a scientific approach is advantageous because it provides WTO members and WTO dispute settlement bodies with a rational scanning tool to review domestic regulations. However, science also has its limits and, sometimes, scientific analyses fail to predict the occurrence of risk or there can be uncertainty, especially when it involves long term, multifaceted issues such as health or the environment.\textsuperscript{13} This is where the precautionary principle comes in. Essentially, the precautionary principle “involves greater reflectiveness over the nature of incertitude”\textsuperscript{14} when adopting measures aiming to prevent the occurrence of harm. The principle is currently embodied in various legal spheres (whether domestic or international) and is implemented in a multitude of domains, such as environmental, food safety or public health.\textsuperscript{15} Because of the variety of its sources and areas of application, a multitude of definitions\textsuperscript{16} with varying degrees of intensity exist both at the international and national levels. However, “at the core of each statement is the idea that action should be taken to prevent harm (...) even if scientific evidence is inconclusive or incomplete”.\textsuperscript{17}

Within its strict scientific framework,\textsuperscript{18} WTO law has relatively limited space within which the precautionary principle may operate. Primarily, the SPS Agreement incorporates the precautionary principle in a “specific and limited”\textsuperscript{19} manner, allowing States to adopt precautionary measures in case of scientific uncertainty and in a temporary manner, while

\begin{itemize}
  \item \textsuperscript{11} SPS Agreement, \textit{supra} note 7, art 2.2.
  \item \textsuperscript{12} \textit{Ibid}, art 5.1.
  \item \textsuperscript{15} Zander, \textit{supra} note 10 at 26.
  \item \textsuperscript{16} Khan, \textit{supra} note 8 at 54.
  \item \textsuperscript{17} Zander, \textit{supra} note 10 at 73.
\end{itemize}
seeking additional information.\textsuperscript{20}

The WTO dispute settlement bodies had the opportunity to provide such a blueprint of the WTO's law regarding risk regulation notably over the transatlantic divide on Hormones\textsuperscript{21} and GMOs\textsuperscript{22} cases. Both claims were brought by Canada and the United States\textsuperscript{23} against the European Union over the use of the precautionary principle and are generally considered the longest and most controversial claims within WTO's history.\textsuperscript{24}

Since then, major emphasis has been placed on the regulatory divergence between North America and Europe, the former privileging the role of science while the latter reputed to take a more cautious stance in the area of risk regulation. These varying orientations are generally described as being two different approaches to risk regulation. In practice, both North America and Europe generally aim to set high standards for issues such as health and safety and they have a similar degree of protection.\textsuperscript{25} Their regulatory frameworks both incorporate science and precaution but to varying degrees and in different ways.\textsuperscript{26} For example, the European perspective defines science as one factor among others to consider when adopting a regulation,\textsuperscript{27} while the North American approach strongly and primarily relies

\textsuperscript{20} Supra note 7, art 5.7. This article is the clearest incorporation of the precautionary principle in WTO law. However, the precautionary principle is not necessarily limited to this article and can find reflection in other articles and could potentially be applied under other specific conditions. For a concise but thorough analysis of the place of the precautionary principle within the WTO framework, see Zander, supra note 10 at 39-74. The author underlines the reflection of the precautionary principle in other provisions than Article 5.7, such as the SPS Agreement Preamble and art 3.3. According to him, the precautionary principle as reflected in art 5.7 is a temporary exception to the risk assessment requirement in case of a lack of scientific information. Given the WTO framework and the law cases, its implementation could also potentially be allowed following a risk assessment where there is still scientific uncertainty (for example, in case of conflicting evidence, where a minority opinion differs from the majority opinion).


\textsuperscript{23} Argentina was also a claimant in the GMOs case.


on science.\textsuperscript{28} Moreover, a series of legal, political, cultural, societal and economic factors can explain how different choices can be made over similar risk situations and the use of precaution,\textsuperscript{29} leading to the creation of regulatory barriers.

The North American approach is \textit{a priori} more supported by WTO law, but the European one is also grounded in WTO's law to some extent as well as other domains such as international environmental law. Moreover, the dispute settlements have not led to the irrevocable condemnation of the EU's approach nor to the elimination of the regulatory barriers against which the claims were brought. Thus, the two approaches currently co-exist or even compete on the broader multilateral level.\textsuperscript{30}

As a way of deciding which approach should prevail, such divergence has resulted in continuous and unresolved controversies over the role that the precautionary principle should play in the international legal sphere. Mainly, there is a core disagreement concerning whether or not the principle has acquired a customary status and thus constitutes an independent legal concept that can orient or influence interpretations and applications of legal instruments.\textsuperscript{31} On the political scene, while the United States and Canada

\textsuperscript{28} These diverging rationales can be visible throughout the respective argumentation of the European Union and the United States in the Hormones case. See for example, \textit{European Communities – Measures concerning Meat and Meat Products (Hormones) (Complaint by the United States)} (1997), WTO Doc WT/DS/26/R/USA (Panel Report), online: WTO <docsonline.wto.org> [Hormones].

\textsuperscript{29} Among other differences: the science-based assessment, cost-benefit analysis, and cost-effectiveness analysis are mandatory requirements on which the US regulatory system is built on (Lucas Bergkamp \& Lawrence Kogan, "Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership" (2013) 4:1 European Journal of Risk Regulation 493 at 497-498), while the framework in which European Union applies the precautionary principle is not binding (Zander, \textit{supra} note 10 at 330). In addition, while Canada and the US generally set general requirements and then delegate to competent regulatory authorities, European Union generally set its own regulations by legislature (Kogan, \textit{supra} at 498), which make it generally more open to societal concerns. Thus, because the precautionary principle is "produced and shaped by legal culture, variations in how the principle is formulated, interpreted and implemented are not only inevitable but also a feature of how deeply it is embedded into different legal cultures" (Fisher, \textit{supra} note 13 at 20).

\textsuperscript{30} Julia M Bognar, \textit{Regulating Risk: Explaining Diverging Labeling Policies Between Canada and the European Union and Whether These Differences Can be Reconciled} (MA Thesis, The University of British Columbia (Vancouver), 2008) at 26 [unpublished]. In a similar line, Philippe Sands explains that the tension in the two approaches has not been resolved at the level of international legislation, and will fall to international adjudicators to determine on a case-by-case basis. See Philippe Sands, \textit{Principles of international environmental law} (New York: Cambridge University Press, 2003) at 7.

\textsuperscript{31} Ole W Pedersen, "From Abundance to Indeterminacy: The Precautionary Principle and its Two Camps of Custom" (2014) 3:2 Transnational Environmental Law 323. In this article, the author expresses the continuous divide between the pre-customary camp, generally basing its argumentation on the abundance of the principle in multiple treaties and national legal systems, while its oppose camp claim that the indeterminacy of the principle prevent it from acquiring this status.
figure among the main opponents to the recognition of the precautionary principle status, the EU has since long been one of its leading advocates.

Thus, the debate on how to balance science and precaution remains one of the most controversial issues in the international legal sphere. Although the reflexivity and the cautiousness underlying the precautionary principle are generally regarded as legitimate and necessary, its implementation also involves a greater degree of discretion. Therefore, the principle is hard to coordinate with the multilateral trade regime, which is seeking objectivity. Precautionary measures are the source of controversies because they create regulatory barriers that are difficult to understand and accept by the trading partners affected by them. Moreover, such barriers have proven hard to remove. Hence, some countries argue that it jeopardizes the WTO's achievements.

These developments regarding risk regulation can reflect the wider challenge faced by the multilateral trade regime in overcoming regulatory divergence between national jurisdictions. Pursuing regionalization, States are now trying to address their regulatory divergence by negotiating trade agreements which deepen and further WTO's disciplines. Thus, the newest generation of trade agreements seems to embrace a comprehensive approach to trade liberalization and have a central objective of the elimination of non-

33 See e.g Hormones, supra note 28 at 7, para 16.
35 Fisher, supra note 13 at 21.
37 Once a country has considered necessary to implement precautionary measures for a particular risk, it is likely to require a certain amount of time before the regulation of this risk come under new consideration. Moreover, when a Member State has implemented the precautionary principle and the others have not, the trade-facilitating tools are inefficient to absorb the barriers created by the measures. Finally, in the event of recourse in front of the WTO dispute settlement bodies, the length and complexity of the GMO and Hormones cases can reflect the difficulty to settle disputes regarding risk regulations.
38 Krstic, supra note 38 at 4.
40 Krstic, supra note 38 at 4.
New Generation Regional Trade Agreements

tariff barriers, notably through the enhancement of regulatory convergence.\textsuperscript{42} As for Canada, the United States and the European Union, this continuous quest currently materialized through the above cited agreements: the CETA and the TTIP.\textsuperscript{43} These agreements have indeed been identified as significant opportunities to tackle non-tariff barriers and resolve regulatory divergence. However, in regard to risk regulation, this would seem to require a concrete agreement on how to evaluate and manage risk.\textsuperscript{44} Consequently, the precautionary principle has obviously been identified as one of the most contentious issues of the negotiations.\textsuperscript{45} The remaining divergence of the North American and European approaches is naturally in question. Thus, any negotiation regarding the precautionary principle occurs in a fragmented context: while some are concerned about the consequences of a stronger acceptance of the precautionary principle in North America,\textsuperscript{46} others fear that new generation agreements could contribute to a weakening of the precautionary principle in Europe.\textsuperscript{47} Both of these theorized outcomes seem to presume that the CETA or the TTIP will favour one approach over the other. However some other authors have also stated that these agreements will simply be unable to overcome regulatory divergence, especially when it comes to the precautionary principle.\textsuperscript{48}

Against this background, it seems particularly interesting to examine the way that new generation RTAs deal with the precautionary principle. How will this crucial issue be treated in these agreements whose primary goals are to tackle regulatory divergence? What is their potential incidence on the role of the precautionary principle within risk regulation? As one of the first new generation trade agreements concluded between two developed parties,

\textsuperscript{42} Ibid at 309-310.
\textsuperscript{43} These agreements are the latest materialization of a series of bilateral transatlantic efforts to tackle non-tariff barriers that have been engaged since the 1970's. For a history of previous attempts between the US and the EU, see: Alemanno, supra note 39 at 25.
\textsuperscript{44} Matthias Herdegen, "Legal Challenges for Transatlantic Economic Integration" (2008) 45:6 CML Rev 1581 at 1591.
\textsuperscript{47} Meri Koivusalo, Ronald Labonte & Scott Sinclair, The Proposed EU-Canada Trade Agreement Raises Health Concerns in Both Canada and European Union, Canadian Centre for Policy Alternatives, 2011 at 5.
\textsuperscript{48} Krstic, supra note 38 at 4.
Canada and the European Union, CETA has often been described as setting the precedent. With the consolidated text publicly available,\textsuperscript{49} it provides a good basis to outline some answers to the above questions. This paper will therefore aim to contribute to the analysis of CETA’s content, while also placing it in the wider multilateral context in order to lay out an assessment. Considering the novelty of the agreement as well as the complexity and controversial character of the issues at stake, the present paper may not be exhaustive and only aims to draw to some of the key tendencies visible at the time of the writing.

My examination and assessment of CETA will focus on selected substantive provisions as well as the trade-facilitating mechanisms, contemplating the precautionary principle as the central issue.

I. SUBSTANTIVE PROVISIONS

Out of the 42 sections CETA contains, two Chapters are particularly relevant for their strong connection to the precautionary principle controversy. As such, this paper will mainly explore the Trade and Environment Chapter and the SPS Chapter.

a. The trade and environment chapter

It is at the environment and trade interface that frictions between science and precaution might be the most visible.\textsuperscript{50} Because international law “develops through issue-oriented fields of law-making driven by specialized and relatively autonomous spheres of social action and structure”,\textsuperscript{51} international environmental law and the multilateral trade regime are quite conflictual. While the precautionary principle is regarded as a pillar of international environmental law\textsuperscript{52} and the governance of sustainability,\textsuperscript{53} “it is

\textsuperscript{49} European Commission, “Consolidated CETA text” (26 September 2014), online: EC<ec.europa.eu> [CETA].


\textsuperscript{52} Bohanes, supra note 24 at 328.

\textsuperscript{53} Stirling, supra note 14.
regarded with extreme circumspection” in the multilateral trade regime.\textsuperscript{54}

Throughout the CETA text, several mentions are made about the mutual supportiveness and interdependency between economic and environmental aspects, particularly in the Preamble,\textsuperscript{55} the Sustainable Development Chapter,\textsuperscript{56} and the Trade and Environment Chapter.\textsuperscript{57} The affirmation of such objectives and inclusion of such Chapters at the core of a trade agreement between two developed parties is an interesting propensity. Such linkage between trade and non-directly trade related concerns encourage a better articulation of the different spheres of international law.\textsuperscript{58} Specifically relevant to the precautionary principle’s issue, the Trade and Environment Chapter contains two sets of provisions that are particularly interesting: the provisions dedicated to the Multilateral Environmental Agreements as well as the ones incorporating the precautionary principle.

1. Provisions related to Multilateral Environmental Agreements

The interface between Multilateral Environmental Agreements (MEA) and the international trade regime is one of the most contentious aspects of the wide divide between environment and trade.

A MEA, aiming towards the resolution of trans-boundary environmental concerns can entitle or require its parties to implement measures in order to attain the treaty objectives or provisions. These measures can potentially conflict with the WTO disciplines. As such, WTO has identified 20 MEAs that could potentially enter into conflict with its rules.\textsuperscript{59} As a fundamental tenet of international environmental law, the precautionary principle is included or mentioned in a number of MEAs through various forms and functions.\textsuperscript{60} The Stockholm Convention on Persistent Organic

\textsuperscript{54} Halle, supra note 50 at 400.

\textsuperscript{55} CETA, supra note 49 at preamble, 6.

\textsuperscript{56} ibid at 371.

\textsuperscript{57} ibid at 384.


\textsuperscript{59} WTO Secretariat, Trade and Environment Report (Geneva: WTO, 2004) at 36–37, online: WTO <www.wto.org>: This report identifies several ways measures adopted following MEAs could come into conflict with WTO disciplines. One example is the situation where “an MEA authorizes trade between its parties in a specific product, but bans trade in that very same product with non-parties (hence, a violation of the WTO’s MFN clause, which requires countries to grant equivalent treatment to ‘like’ imported products”.

\textsuperscript{60} Zander, supra note 10 at 328.
Pollutant,\textsuperscript{61} the Montreal Protocol,\textsuperscript{62} the Cartagena Protocol\textsuperscript{63} and the Kyoto Protocol\textsuperscript{64} are examples of MEAs that include both references to the precautionary principle as well as trade measures that could potentially lead to conflict with WTO disciplines. While this issue of coordinating MEAs and the international trade regime has been largely discussed over the last years and has been set on the Doha agenda, it is recognized that the negotiation mandate is very narrow and that it is unlikely that the outcome of the negotiations will clarify the relationship between MEAs and the multilateral trading system.\textsuperscript{65}

Without revolutionizing this issue, the CETA Environment Chapter contains several provisions that are worth noting. \textit{Inter alia}, the parties affirm their right to make "full use of the General Exceptions...in relation to environmental measures, including those taken pursuant to MEAs to which they are party",\textsuperscript{66} as well as their right to adopt or modify laws and policies in a manner consistent both with the MEAs to which they are a party and with the CETA.\textsuperscript{67} This type of provision is particularly interesting because the measures adopted or modified by the Parties are expected to comply both with their MEAs and with the framework set under the trade agreement. As such, it represents a great potential for interpreting both environmental agreements and trade agreements in a way that complete rather than oppose each other.

Nevertheless, no further details are given on the manner in which these various agreements are to be concretely applied and articulated. Some MEAs and the current trade international regime can appear hard to conciliate at first sight. For example, if the Biosafety protocol is to be seen as "an alternative set of rules for trade on genetically modified products",\textsuperscript{68} it might be hard to apply it in a manner consistent with the disciplines set under WTO or the CETA.

\textsuperscript{62} Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3, 26 ILM 1541 (entered into force 1 January 1989).
\textsuperscript{63} Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 39 ILM 1027 (entered into force 11 September 2003).
\textsuperscript{65} This is the statement made by number of authors, such as: Halle, supra note 50 at 399; Arie Reich, "The WTO As A Law-Harmonizing Institution" (2004) 25:1 U Pa J Intl L 321 at 348.
\textsuperscript{66} CETA, supra note 49, ch 25, art X.3.3 at 386.
\textsuperscript{67} Supra note 49, ch 25, art X.4 at 386
\textsuperscript{68} Viju & Kerr, supra note 46 at 690.
This issue arises even more strongly when one party intends to apply measures pursuant to a MEA that the other party has not ratified. On this point, the above-mentioned provisions could be interpreted as allowing the parties to adopt measures in application of their respective MEAs, regardless of whether it has been ratified by the other party. Such provisions could thus be interpreted as going against the current of the interpretation set by the WTO panel in the GMO dispute report, in which it had denied to take into account a MEA to interpret the WTO disciplines because of the absence of ratification by all the parties to the dispute. 69

In sum, provisions such as the ones contained in the CETA Environment Chapter could promote a better inclusion of policies adopted pursuant to MEAs in coordination with the international trade regime. However, their vagueness means that the concrete conciliation of MEAs and trade disciplines remains in the hands of the parties when implementing domestic measures or in the hands of the arbitrators when interpreting the agreement to resolve trade disputes.

These disciplines remain an indirect linkage between the precautionary approach set through MEAs and the trade disciplines. Maybe most importantly, the CETA also makes several mentions in its core to the precautionary principle.

2. Incorporation of the precautionary principle

The issue of precaution and science has been treated rather differently by Canada and the European Union in the environment chapters of their respective Free Trade Agreements (FTA). The Canadian FTAs contain environment chapters that either refer only to science 70 or either do not address the question.71 The European FTAs seem to either refer both to

69 Biotech Products, supra note 18 at 335-336, par 7.74-7.75. In this case, the panel had denied to take into account the Convention on Biological Diversity and the Biosafety Protocol in the trade dispute between Argentina, the US, Canada and European Union, stating that ‘if a rule of international law is not applicable to one of the Parties to this dispute, it is not applicable in the relations between all WTO Members’.

70 See e.g. Canada-Korea Free Trade Agreement, 22 September 2014, ch 17 (entered into force 01 January 2015), online: Foreign Affairs, Development & Trade Canada <www.international.gc.ca>.

71 See e.g. Canada-Honduras Free Trade Agreement, 05 November 2013, ch 18 (entered into force 01 October 2014), online: Foreign Affairs, Development & Trade Canada <www.international.gc.ca>; Canada-Panama Free Trade Agreement, 14 May 2010, ch 17 (entered into force 01 April 2013), online: Foreign Affairs, Development & Trade Canada <www.international.gc.ca>; Canada-Jordan Free Trade Agreement, 28 June 2009, ch 10 (entered into force 01 October 2012), online: Foreign Affairs, Development & Trade Canada <www.international.gc.ca>; Canada-Colombia Free Trade Agreement, 21 November 2008, ch 17 (entered into
science and precaution\(^\text{72}\) or ignore it altogether.\(^\text{73}\)

In the CETA, the precautionary principle is incorporated within the Trade and Environment Chapter, which contains an acknowledgment that "where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."\(^\text{74}\) This chosen definition appears to be a replication of Principle 15 of the Rio Declaration on Environment and Development of 1992.\(^\text{75}\) This comes as no surprise as the Rio Declaration is a universal instrument that was ratified by both Canada and European Union, and the definition contained in the Rio Declaration can be seen as "the most cited and conclusive definition of the principle in effect at the international level."\(^\text{76}\) In addition, it is important to note that the Rio Declaration itself is also recalled in the Sustainable Development Chapter.\(^\text{77}\)

In the CETA Environment Chapter, the reference to the precautionary principle is preceded by an emphasis on the role of science in environmental regulations.\(^\text{78}\) Like in other agreements, no further details are provided regarding the way science and precaution should be conciliated.\(^\text{79}\)

Similarly, the Labor Chapter also encourages a precautionary approach regarding the health protection and safety of workers, with a prior requirement to take into account the relevant scientific and technical
Such incorporation of the precautionary principle within the core of this new generation trade agreement between European Union and Canada is worth noting. Firstly, this is particularly interesting because in “international agreements, reference to the principle is often included in sector-specific agreements.” New generation agreements such as CETA, by their scope and goals, are the opposite of sectoral agreements. By definition, they are generally referred to as being 'global' and 'comprehensive'. While evidently they remain trade-oriented, they encompass numerous other issues. As a result, in the CETA, WTO disciplines are incorporated together with other principles such as precaution, which creates an encouraging imbrication trend. Secondly, despite their traditional opposition, Canada and the European Union seem to have reached a symbolic compromise with such provisions. Science and precaution are enshrined together in the same article within the trade agreement but in the limited frame of sectoral, best-endeavor chapters. If North America and Europe are to be considered the biggest opponents regarding the precautionary principle, such development between Canada and the European Union is particularly interesting. It is worth reminding that the strong divide over the precautionary principle was one of the main reasons that in the Hormones Case, the WTO Appellate Body (AB) considered it “imprudent” to take a position on its status. Additionally, the AB also stated in the same case that “the precautionary principle, at least outside the field of international environmental law, [was] still await[ing] authoritative formulation”.

Thus, if the tendency to mention the precautionary principle in trade agreements was to be pursued, it could favor a better articulation between regulations aiming to prevent long term multifaceted risk issues - such as environmental ones - with the international trade regime. In this sense, key developments remain to be seen, especially with the conclusion of the TTIP between the European Union and the United States. On this last point, the position paper released by the European Union concerning its “general approach on Trade and Sustainable Development' in the TTIP negotiations” does not contain direct reference to the precautionary principle. This suggests that such mention of precaution might not be included in TTIP.

---

80 CETA, supra note 49, ch 24, art 3.3, at 377.
81 Zander, supra note 10 at 72.
82 Hormones, supra note 28 at para 123.
This first part outlined some developments regarding the inclusion of precaution matters within the CETA Environment Chapter. The tendency to further WTO's regulatory framework regarding environment matters could have a positive impact on the precautionary principle, particularly by promoting and enhancing its articulation within the international trade regime. However, such evolution is also enclosed in the wider multilateral context. Moreover, as stated above, such chapters are sectoral and mainly aspirational and thus remain limited in their impacts. On the contrary, SPS disciplines are generally more committal while also being central in the science/precaution debate.

b. SPS Chapter

"Seeking to bridge" the precautionary approach and the scientific approach has been identified as one of the main interests of furthering the disciplines of the WTO SPS Agreement. And indeed, at first sight, it seems that one of the main purposes of developing SPS-plus rules within a bilateral agreement would be to further the multilateral disciplines on risk regulation, for example, by providing "practical guidelines" for the application of the precautionary principle.

However, new disciplines on risk regulation are notably absent from the SPS Chapter incorporated into CETA. Thus, CETA simply replicates WTO's framework by incorporating the SPS Agreement. This apparent reluctance to further WTO's framework on risk regulation can be explained by the fact that the divide over this controversial topic occurs in a multilateral context. It thus appears inappropriate for the parties to settle their position within a bilateral agreement. This is particularly true for Canada who was in a difficult bargaining position. Indeed, the EU and the United States, being

---

84 Schott & Cimino, supra note 45 at 4.
86 Among "simple, well thought-out, practical guidelines on applying the precautionary principle", such criterion could address: proportionality of the measure, tendency to err on the side of caution where there is uncertainty, evaluating the costs and the benefits of taking action versus adopting measures, transparent process of regulation, etc.
87 CETA, supra note 49, ch 7, art 5: "the Parties affirm their rights and obligations under the WTO SPS Agreement" at 100.
the most opposed regarding their risk regulation approaches, are also its two first trading partners. Thus it was expected that Canada would not engage in an agreement with the European Union that could jeopardize its privileged trading relationship with the United States.

Because of their respective standard-setting prevalence, the United States and European Union are in a different situation and further developments regarding the content of TTIP remain to be seen. In the High Level Working Group Report from 2013, it was stated that “the two sides should seek to negotiate an ambitious ‘SPS-plus’ chapter...build[ing] upon the key principles of the World Trade Organization (WTO) SPS Agreement, including the requirements that each side’s SPS measures be based on science and on international standards or scientific risk assessments”. Whether such a goal will be transcribed in the actual agreement remains to be seen. Most authors seem to agree that the United States and the European Union will not be able to commit to SPS-plus disciplines regarding risk regulation either, because their regulatory divergence remains too strong. In the proposal text from the European Union, any kind of deeper commitment indeed seems to be avoided.

With reference to CETA, while there is no substantive mention of risk, precaution or science, new disciplines focus on setting additional procedural requirements or incentives for cooperation regarding the establishment of regulations. Such provisions participate to the will of establishing an on-going mechanism addressing bilateral SPS matters and will thus be analyzed in the following part.

Thus, the substantive SPS provisions under CETA do not represent a shift from the existing situation and do not tilt towards either of the approaches. Rather, the present structure of the CETA extends the status quo regarding the precautionary principle’s place within risk regulation. The contrary would have been surprising as it was expected “that neither Canada nor EU would act as a ‘rule-taker’ of the other”, rather that they would aim for a “more balanced approach.” While such an approach could not be adopted within the hard disciplines of the SPS Chapter, the best endeavor

---

89 Alemanno, supra note 39 at 36.
91 Alemanno, supra note 39 at 36.
and aspirational specific chapters such as the environment and labor chapters might represent a first step toward it.

In sum, these selected substantive provisions do not represent a radical shift toward one approach to risk regulation. Thus much of the efforts to mitigate the impact of regulatory divergence are reflected within the trade-facilitating tools that CETA contains.

II. TRADE-FACILITATING TOOLS

Several mechanisms are generally available to contracting parties when aiming to reduce trade barriers created by regulations: harmonization, mutual recognition and equivalency, and regulatory cooperation are among the main ones. Since the CETA does not contain measures of harmonization, this part will aim to assess the potential impact of equivalency as well as regulatory cooperation regarding the precautionary principle and its resulting measures.

a. Equivalency

Underlying equivalency is the concept that regulations can, despite their differences, achieve the same policy goals and set an identical level of protection and thus be recognized as equivalent. The products of a company should then only need to comply with the standards of one State without requiring costly adaptation with another set of regulations, thereby eliminating regulatory barriers.

Within the multilateral trade regime, the SPS Agreement requires Members to recognize the equivalency of the measures of other Members who objectively demonstrate that their own measures achieve the same level of protection. To do so, Members are incited to enter in negotiations to conclude bilateral or multilateral agreements recognizing the equivalency of specific SPS measures.


94 Supra note 7, art 4.1: “Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that is measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.”

95 Supra note 7, art 4.2: “Members shall, upon request, enter into consultations with the aim of achieving
The CETA incorporates an equivalency provision, similarly worded to the one contained in the WTO SPS Agreement, completed by a list of measures that are to be recognized.

Because equivalency implies that a State accepts products into its territory that do not directly comply with its regulations, the effect of its implementation can be hard to prefigure. Does equivalency present a potential threat to the level of protection set by existing regulations based on the precautionary principle? Some authors have expressed such concerns relating to the potential adverse effects of equivalency within new generation agreements on the level of protection set by health and environmental regulations.

One of the defining criteria of equivalency is that the two measures achieve a similar level of protection. When a State decides to implement the precautionary principle for a given product or sector, its level of protection is by definition higher. Thus, it constitutes an obstacle to the recognition of equivalency, as it will be impossible for a party to demonstrate that its regulation has reached the appropriate level of protection set by the other party. As a result, existing measures based on the precautionary principle would not be able to be recognized as equivalent with measures that do not incorporate the precautionary principle.

For example, the European ban on hormone use in the growth of meat has been defined as setting a zero-risk level. At the opposite, the use of hormones is allowed under the Canadian regulatory framework. The SPS annex listing the equivalent measures encompasses regulations related to inspection and certification of health safety of meat products. However, under special conditions, the parties explained that although they “are deemed to provide an equivalent level of protection with respect to microbiological requirements, their microbiological criteria (differ)” and thus

\footnote{CETA, supra note 49, ch 7, art 7 at 101: “The importing Party shall accept the SPS measures 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 protection.”}

\footnote{CETA, supra note 49 at 113–123.}

\footnote{Kogan, supra note 29 at 493–494.}

the exporter will have to meet "the food safety criteria of the importing country." Therefore, in this example, Canadian farmers will still have to comply with the European legislation regarding the ban on hormones and adjust their production to meet the European standards.

How should the regulations that cannot be recognized as equivalent be dealt with? New generation trade agreements have been defined as "living agreements", setting on-going and progressive mechanisms. Thus, the parties are expected to try to expand the scope of equivalency. But in order to do so, the parties might have to shift their policy goals. This is something that needs to be carefully assessed in order to make sure that the shift occurs both in favor of the reduction of regulatory barriers as well as the upholding of the level of protection. Such process would most likely occur within the frame of regulatory cooperation.

b. Regulatory cooperation

The topic of regulatory cooperation might be the one that has been gathering the most attention on both sides of the Atlantic. Depending on the source and interests involved, the assessment regarding the scope of regulatory cooperation and its possible impact on domestic regulations vary greatly. While some have predicted that these voluntary provisions will not be able to enhance the convergence of the parties' respective regulations, others fear that this "living agreement" could bring convergence to the "lowest common denominator", leading to the weakening of health and environmental standards.

Regulatory cooperation is inserted in multiple parts of CETA, particularly: in the Regulatory Cooperation Chapter, the SPS Chapter and the TBT Chapter, as well as in the bilateral dialogues established for specific domains. Rather than adopting a sectoral approach, this part aims to analyze the most relevant provisions dedicated to regulatory cooperation and their possible interaction with the precautionary principle on a thematic basis. Three angles of views will be touched on, successively examining regulatory

---

100 CETA, supra note 49 at 121.
cooperation as hindering scheme or a factor of mutual understanding and finally evoking the involvement of stakeholders.

1. Regulatory cooperation as a hindering scheme for the precautionary principle?

The precautionary principle is not mentioned in the Regulatory Cooperation Chapter, the SPS and TBT Chapters, or in the Bilateral Dialogues section. Rather, several elements such as risk assessment\textsuperscript{103}, cost-effectiveness analysis\textsuperscript{104} or scientific basis\textsuperscript{105} are formulated throughout the agreement.

Because of the regulatory divergence over the understanding of the content of these elements, the insertion of such components in new generation agreements can appear to be an attack on the use of precaution while regulating risk. For example, some authors have expressed concerns that the incentive to "establish, when appropriate, a common scientific basis"\textsuperscript{106} could constitute a "possible attack on the precautionary principle", possibly weakening "EU environmental protection laws" and "hindering the EU's introduction of new rules and regulations to protect the environment in the future".\textsuperscript{107} Similarly "some commentators believe the commitment to 'efficient and cost-effective' regulation could in practice present a significant challenge to the precautionary approach".\textsuperscript{108} If the precautionary principle had been mentioned under regulatory cooperation it would have projected the impression of equilibrium between these components of risk regulation and precaution. However, even the actual framework set under CETA does not hinder the parties' ability to incorporate precaution within their risk regulations.

Firstly, the level of commitment of the parties regarding these elements is very low. Such components take place within voluntary and best-endeavor schemes such as information exchanges, discussions, or regulatory activities. Regarding the Regulation Cooperation Chapter, specifically, the

\textsuperscript{103} CETA, supra note 49, ch 6, art 8.1 (c) at 89; Ibid, ch 7, art 15.2.f at 105; Ibid, ch 26, art X.4.1 (d) at 398; Ibid, art X.4.7 (a) at 399, art 14.d; Ibid, ch 29, art X.03.2 at 443.

\textsuperscript{104} Ibid, ch 26, art X.4.6 (b) at 398-399.

\textsuperscript{105} Ibid, ch 26, art. 7.1 (d).


\textsuperscript{107} Sinclair, Trew & Mertins-Kirkwood, supra note 58.

\textsuperscript{108} Khan, supra note 8 at para 1.4.7.
parties strongly underline the voluntary character of the provisions.\textsuperscript{109} Thus, "no obligation exists to align or otherwise reconcile product standards or technical regulations beyond existing WTO obligations."\textsuperscript{110}

Secondly, such criterion of risk regulation already exist as part of the current framework in which the precautionary principle is to be applied both in the domestic system of European Union and Canada, as well as at the international level, both in trade and environmental legal spheres. The European Commission\textsuperscript{111} and Government of Canada's\textsuperscript{112} communications both emphasize the role of science when adopting precautionary measures as well as the importance of cost-benefit analysis. In international environmental instruments such as the Rio Declaration or the Convention on Biodiversity or the Cartagena Protocol, cost-effectiveness\textsuperscript{113} is made a defining element of precaution. In the international trade regime, it is already acknowledged that "a total absence of science cannot underlie a precautionary measure"\textsuperscript{114} and science is generally seen as the 'starting point' of a rational approach to risk management.\textsuperscript{115}

Thus, without strong commitments regarding the content of these various elements, the present framework does not prevent either of the parties from conserving their respective approaches to risk regulation.

However, while these elements are already a part of the domestic and international frameworks in which the precautionary principle is to be applied, as we stated above they are also differently understood, conciliated and applied within North America and Europe. The following part will thus explore whether regulatory cooperation could facilitate a mutual understanding of the place of the precautionary principle in risk regulation.

\textsuperscript{109} CETA, supra note 49, ch 26, art X., at 396.
\textsuperscript{110} Krstic, supra note 38 at 19.
\textsuperscript{111} European Commission, Communication from the Commission on the precautionary principle, COM/2000/0001 final, 02 February 2000, online: <eur-lex.europa.eu/>.
\textsuperscript{114} Doaa Abdel Motaal, "Is the World Trade Organization Anti-Precaution?" (2005) 39:3 J World Trade 483 at 486.
\textsuperscript{115} Arbour, supra note 36.
2. Regulatory cooperation as favoring a common understanding of the precautionary principle?

The core criticism of the precautionary principle is that “there is no internationally agreed way to operationalize it for decision-making purposes.”[^116] Thus, the question is whether new generation agreements could give rise to a harmonized application of the principle.

In the absolute, an appropriate framework with balanced conditions could favor such evolution, leading to a reduction of risk level on both sides of the Atlantic while reducing impediments on trade. For example, details could be established regarding the level of scientific uncertainty necessary to invoke the precautionary principle or the concrete role of a cost-effectiveness analysis.[^117]

Currently however, new generation trade agreements do not seem to accomplish this. Indeed, the divergence of perspectives between North America and Europe remains strong and the challenges associated with the negotiations are reflected in the content of CETA with procedural commitments and the voluntary character of the related provisions.

In any case, the desirability of a binding framework is in question. Indeed, as explained by Ole Pedersen:

> [T]he real nature of the precautionary principle necessarily dictates that it cannot give rise to a set of *a priori* clear-cut, binding obligations. Instead the exact contours of the principle are by and in themselves defined by and contingent upon the context in which the principle is applied.”[^118]

Thus, new generation trade agreements are not likely to provide a definite answer to prevent divergence between risk regulations and a common, harmonized application of the precautionary principle is an unrealistic settlement.

However, even if no binding disciplines or practical guidelines regarding risk regulation are set under the CETA and most likely will not be

[^116]: Viju & Kerr, supra note 46 at 690. This statement has been made by number of authors, such as Zander, supra note 10 at 328; Philippe Sands & Jacqueline Peel, *Principles of International Environmental Law*, Cambridge University Press, 2012 at 228. It is even at the core criticism of the “no-custom camp”: Pedersen, supra note 31 at 324.

[^117]: Arbour, supra note 36 at 19: the author here questions missing application criterions of the precautionary principle; Ward, supra note 85: the author suggests practical guidelines for the application of the principle.

[^118]: Supra note 31 at 325.
set under the TTIP, in practice, the best-endeavor and voluntary basis of cooperation can be an advantage for bridging the two approaches to risk regulation. Matthias Herdegen underlines that "institutionalized forms of political cooperation" comprising "periodical consultation with a constant exchange of information and views on sensitive transatlantic regulatory disputes are often considered more appropriate than binding bilateral agreements". As such, the CETA provides a new "forum" for the parties in which they can discuss issues such as their previous regulatory experiences; exchange information concerning their risk analysis or the scientific basis of their SPS measures; and communicate projects of future regulations to "better understand the rationale behind regulatory choices". Common regulatory activities such as conducting concurrent or joint risk assessments and regulatory impact assessment can also be interesting.

This type of cooperation mechanism developed under the CETA constitutes an incremental step enhancing mutual understanding between Canada and the European Union. It could allow the parties to "explore rules on the use of safety factors that incorporate an "appropriate degree of precaution" thus seeking for a balanced approach to risk regulation.

Hence, new generation trade agreements set a context where both parties could learn from each other. Indeed, "some of the ideas behind the precautionary principle could prove useful in further reforming the US [and Canadian] regulatory process" such as implementing consultation.

---

119 Supra, note 44 at 1583.
120 CETA, supra note 49 ch 26, art X.4.1 (d): "exchange experiences with regulatory tools and instruments, including regulatory impact assessments, risk assessment and compliance and enforcement strategies".
121 Ibid at 103–104: "The parties will endeavor to exchange information on other relevant issues including: e) on request, risk analysis and scientific opinions, relevant to this Chapter and produced under the responsibility of a Party"; ibid, art 15.2: "The functions of the committee include:... f) to provide a regular forum for exchanging information relating to each Party's regulatory system, including the scientific and risk assessment basis for SPS measures."
122 Ibid, ch 26, art X. 4.6 (a) "exchanging information about contemplated regulatory actions, measures or amendments under consideration, at the earliest stage possible, in order to: (a) better understand the rationale behind regulatory choices".
123 Ibid, ch 26, art X.4.7: "examining opportunities to minimize unnecessary divergences in regulations through means such as: (a) conducting concurrent or joint risk assessments and regulatory impact assessment if practicable and mutually beneficial."
124 Krsitc, supra note 38 at 19.
125 Kogan, supra note 29 at 505. Such exploration could review how to apply the precautionary principle "where there are profound uncertainties regarding the nature and significance of particular risks, the magnitude and severity of known and/or uncertain potential harms, the degree and certainty of human exposure to such harms and the vulnerability of the various groups (populations) so exposed, and how the degree of reversibility of potential harm can be reliably assessed".
126 Kogan, supra note 29 at 505.
procedures. The EU could also learn from across the Atlantic by “subjecting the issuing of precautionary measures to strict and objective regulatory impact Assessment, a balancing of the pros and cons of regulation can be carried out, and more effective and efficient risk-reducing choices can be made”\textsuperscript{127}. This idea seems to be reflected in the CETA which underlines the importance of “building trust, deepening mutual understanding of regulatory governance and obtaining from each other benefit of expertise and perspective.”\textsuperscript{128}

If such an outcome occurred in the context of the CETA, and \textit{a fortiori} of the TTIP, the question here is how this greater understanding of the precautionary principle on the bilateral level would have repercussions on the multilateral level.\textsuperscript{129} On one hand, the effect of greater cooperation between North America and Europe, traditionally opposed, regarding risk regulation should not be neglected.\textsuperscript{130} On the other hand, due to bilateralism, it might be hard to overcome obstacles such as enlargement to countries that were not associated with the negotiations, or to overcome obstacles resulting of the multitude variants set under the agreements.\textsuperscript{131}

In sum, new generation trade agreements such as CETA contain the potential to enhance a shared understanding of the precautionary principle and a reduction of the regulatory barriers its application can create. Nonetheless, such developments greatly depend on the degree of involvement of the parties within the coopeational mechanisms; as well as on the evolution of disciplines under other Regional Trade Agreements and discussions in the multilateral trade forum. The inclusion of stakeholders, the next element discussed, is also essential to a successful outcome of regulatory cooperation regarding the precautionary principle.

\textsuperscript{127} Zander, \textit{supra} note 10 at 346.
\textsuperscript{128} CETA, \textit{supra} note 49 ch 26, art X.3 (b).
\textsuperscript{129} Such issue falls within the wide questioning over the role of RTAS, their potential and challenges in regards to the multilateral trade regime. See for e.g: Leon E Trakman, “The Proliferation of Free Trade Agreements: Bane of Beauty?” (2008) 42:2 J World Trade 367.
\textsuperscript{131} The risk here is that different trade partners set different disciplines within their respective Regional Trade Agreements, leading to an even more fragmented risk regulation (compared to the uniform character of WTO law). See e.g. Schott & Cimino, \textit{supra} note 45 at 14. In that article, the authors show that the respective trade agreements of EU and US with South Korea vary greatly concerning risk regulation. While the Korea-EU SPS Chapter does not include explicit language committing to reliance on science and risk-based assessment, the agreement between Korea and the US “emphasizes that the resolution of SPS matters ‘must rely on science and risk-based assessment and is best achieved through bilateral technical cooperation and consultation’, and further that ‘scientific risk analysis shall be conducted and evaluated by the relevant regulatory agencies of each Party’.
3. Regulatory cooperation, stakeholders and the precautionary principle

As shown in the previous parts, CETA’s content does not imply in itself any direct change of the legal framework in which the precautionary principle is to be applied.

However, CETA, such as other new generation trade agreements, still establishes an on-going and permanent regulatory cooperation mechanism whose goal is to ensure regulatory compatibility and convergence. In this regard it creates institutional bilateral bodies and involves several tools such as early warnings and notifications, transparency, consultations, exchange of comments and information regarding existing and future regulations. Such scheme naturally increases the level of mutual political influence between the parties, which could have a factual impact on the elaboration and the content of regulations. Considering the ambition and design of regulatory cooperation, concerns of legitimacy arise and the involvement of civil society needs to be assessed. In this regard, a widely spread definition emerging from the Organization for Economic Cooperation and Development (OECD) defines regulatory cooperation as follows:

[The range of institutional and procedural frameworks within which national governments, sub-national governments, and the wider public can work together to build more integrated systems for rule-making and implementation, subject to the constraints of democratic values, such as accountability and openness.]^{140}

---

132 Alemanno, supra note 39 at 5. The author describes here the TTIP under negotiations between the US and the EU.
133 Under CETA, the bilateral regulatory cooperation is most notably institutionalized with the creation of a 'CETA Joint Committee' as well as a series of specialized committees. See CETA, supra note 49 ch 30, at 447–450.
134 Consolidated CETA, supra note 49, ch 7, art 12.1 at 103-104; ibid, art 14.1 at 104; ibid, art 15.3 at 105-106 and annex IV. 1b) at 112; ibid, ch 26, art X.4.2-3-6 at 398; ibid, ch 31 Art X.02 at 452.
135 Transparency promotion and enhancement is to be found throughout the agreement, but CETA also contains a specific section: Chapter 31: 'Transparency' at 452.
136 CETA, supra note 49, ch 7, art 13 et 14.1 at 104; ibid, ch 26, art X.4.2 at 398.
137 Ch 6, art 6.3 et 4 at 88.
138 Supra note 42, ch 7, art 12.2 at 104, ch 26, art X.4.6 at 398.
139 It is important to note that some of these procedural tools have a mandatory character, particularly the ones included in the SPS Chapter.
140 Scott H Jacobs, "Regulatory cooperation for an interdependent world: issues for government" in
While these issues are relevant in a general manner, a few specific implications with regard to risk regulation can be underlined. Firstly, the societal aspect of risk regulation and particularly of the precautionary principle has been emphasized by number of authors. As "full scientific certainty almost never exists with respect to environmental and health risks" and financial resources are limited, the principle necessarily has to be applied with regard to the priorities of the concerned population. Secondly, regarding the main demands of businesses on transatlantic regulatory barriers, most of them aimed at regulatory barriers resulting from the difference of policy goals and involved regulations based on the precautionary principle. As the CETA's disciplines do not address those barriers directly, it is likely that they will be discussed under regulatory cooperation. Since the CETA is a living agreement, outcomes of regulatory cooperation are to be seen on the long term and public society must be included in any modification of policy goals that could result from regulatory cooperation.

Given these developments, a specific problem arises in what the tools or provisions incorporated into new generation trade agreements that would integrate public society into the process of regulatory cooperation should be.

In this regard, the role of the Parliaments - as the first representative of civil society - is naturally questioned within the scheme of regulatory cooperation. Alberto Alemanno's in-depth analysis regarding the parliamentary dimension within TTIP concludes with the importance to "foresee - in the conception and implementation of TTIP - a parliamentary involvement capable of guaranteeing the possibility for the legislators to provide input into the regulatory dialogue".

It remains to be seen if such recommendation will be heard by the EU and the US negotiators regarding the TTIP. Concerning the CETA's

---

2015 [New Generation Regional Trade Agreements 289

141 Arbour, supra note 36 at 5; Sheila Jasanoff, States of Knowledge: The Co-Production of Science and the Social Order (London: Routledge, 2004); Zander, supra note 10 at 7; Herdegen, supra note 44 at 1591.
142 Bernasconi-Osterwalder et al, supra note 13 at 255; Zander, supra note 10 at 331.
143 This idea seems reflected to some degree in CETA, which states that the endeavor of enhancing convergence and compatibility of regulatory measures should not prevent the parties "from adopting differing measures or pursuing differing approaches for reasons including different institutional and legislative approaches, or circumstances, values or priorities particular to that Party." See CETA, supra note 49, ch 26, art X.5 at 400.
144 The Canada Europe Roundtable for Business, "Policy Priorities for the Canada-EU Trade and Investment Agreement" (March 2009), online: CERT<www.canada-europe.org>.
145 Alemanno, supra note 39 at 57.
framework, it does not seem to mention any reference to the role of the European and Canadian legislators, which leaves matters of legitimacy and accountability in question.

Despite this apparent lack of legislators' involvement, it must be noted that the CETA incorporates several other tools referring directly to civil society. The Chapters dedicated to Sustainable Development, Labor and Environment provide, inter alia, the establishment of a civil society forum;\(^{146}\) incentives to raise public debate and awareness regarding environmental regulations or to take into account 'submissions from the public' on environmental matters;\(^{147}\) and a requirement to proceed to consultative mechanisms to 'seek views and advice' on environmental issues from public society.\(^{148}\)

More specifically to regulatory cooperation provisions, the parties or the institutions set by CETA may consult\(^ {149}\) and communicate with stakeholders\(^ {50}\) as well as encourage their participation in order to enhance cooperation.\(^ {151}\)

While such provisions are interesting and innovative, they remain sectoral, aspirational or optional. Moreover, it is worth noting that these provisions aim at both civil society and other stakeholders, notably the private sector. The consultation of private parties into the regulatory process can be beneficial for the quality and efficiency of the regulation, which would be defined as efficiently protecting legitimate public objectives such as the

---

\(^{146}\) CETA, supra note 49, ch 23, art 5 at 373: the Civil society forum should convened once a year and involved "a balanced representation of relevant interests, including independent representative employers, unions, labor and business organizations, environmental groups, as well as other relevant civil society organizations as appropriate".\(^ {4}\)

\(^{147}\) Ibid, ch 25, art X.7. 1 at 387: "Each Party, as well as complying with Art X.01 of Transparency Chapter, shall encourage public debate with and among non-State actors as regards the development and definition of policies that may lead to the adoption by public authorities of environmental laws and regulations. Each Party shall promote public awareness of its environmental laws and regulations... Each Party shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns".\(^ {14}\)

\(^{148}\) Ibid, ch 25, art X.13.4, at 391: "Each Party shall make use of existing, or establish new, consultative mechanisms, such as domestic advisory groups, to seek views and advice on issues relating to this Chapter. Such mechanisms shall involve independent representative organizations of civil society in a balanced representation of environmental groups, business organizations, as well as other relevant stakeholders as appropriate".\(^ {15}\)

\(^{149}\) Ibid, ch 26, art X. 8 402: "in order to gain non-governmental perspectives, the Parties may jointly or separately consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organizations, business, consumer and other organizations by any means they deem appropriate on matters relating to the implementation of this Chapter".\(^ {16}\)

\(^ {15}\) Ibid, ch 30 art X. 01 at 446.

\(^ {16}\) Ibid, ch 29, art X.06.5, at 445.
environment or health, while minimizing obstacles to trade created for businesses. Stanko S. Krstic identifies the inclusion of private parties as a factor of building a “better understanding of regulatory practices” as well as a “greater mutual trust for regulatory cooperation efforts.”\textsuperscript{152} However, equilibrated regulations require a balance between powers involved. Factually, the business sector has been much more involved in the negotiation of the CETA than public society. It seems that regulatory cooperation tools also allow de facto a greater prominence to businesses than public society. Indeed, because the provisions seen above and extracted from the various chapters are vague and voluntary in nature, the degree of participation ultimately lies in the hands of the stakeholders. It goes without saying that businesses generally have more important financial means to reach out and be associated with regulatory cooperation.

Thus although the intention to incorporate specific tools for stakeholders to be associated with the CETA’s regulatory cooperation framework is noteworthy, in practice it fails to redraw a fair representation of interest at the bilateral level and civil society’s voice may be diluted by regulatory cooperation.\textsuperscript{153} In this sense, such an imbalance could potentially lean towards a lower degree of precaution for future regulations. Furthermore, the absence of a stronger inclusion of public society within the regulatory cooperation's scheme could hinder the efficiency of regulatory cooperation.

CONCLUSION

From a legal point of view, the place of the precautionary principle should not be substantively or radically changed by the framework of new generation trade agreements. In this sense, the CETA constitutes an emblematic reproduction of the current place of the precautionary principle: as a fundamental tenet of international environmental law it is introduced in the sectoral and aspirational Environment chapter without further details on its application; as a minor part of the international trade regime regarding risk regulation it is incorporated via the replica of the WTO SPS Agreement; as a concept differently rooted in legal and political domestic cultures it is left within the best-endeavor regulatory cooperation.

Despite this apparent replication, new generation regional trade agreements...
agreements could have impact on the long term. In this sense, this essay has tried to identify several ways that new generation trade agreements could influence further development regarding the precautionary principle and its related regulations.

A first potential influence relates to the propensity to incorporate reference to the precautionary principle—either direct or through MEAs—that argue for a better articulation between the principle and the international trade regime.

Secondly, the regulatory cooperation mechanisms and their implementation could have practical consequences on the place of the precautionary principle within risk regulation. As such, a positive aspect of new generation agreements is that they represent a new avenue to explore “how scientific and non-scientific inputs might be blended in risk assessment in different settings to ensure a broadly acceptable balance of credibility and legitimacy concerns.”154 In this sense, by promising compromise and mutual understanding, the CETA is an incremental step towards it. Regarding risk regulation, regulatory cooperation can potentially foster in the long term the effective reduction of regulatory barriers while reaching the highest level of protection possible. However, such an outcome greatly depends on the inclusion of public society. New generation agreements could have a hindering impact on precaution if they were to be used as a way to factually increase political, economic or lobbyist pressure while decreasing the possible involvement of civil society.155

Overall, this trial assessment regarding the potential impact of new generation agreements is rather mitigated. While it is important to scrutinize these agreements as they are being negotiated and concluded, it is evident that their repercussions remain to be seen in the long term. Notably, because of the voluntary or soft character of most of the relevant provisions, it remains hard to predict how they will evolve and impact the precautionary principle. A major source of response will come from the decisions to be rendered following to the recourse to the dispute settlement mechanisms set under these agreements.

154 Peel, supra note 13 at 10: “Emerging as a crucial issue for global risk regulation and governance is not whether science or values should triumph, but rather how scientific and non-scientific inputs might be blended in risk assessment in different settings to ensure a broadly acceptable balance of credibility and legitimacy concerns”.

155 Hansen-Kuhn & Suppan, supra note 102 at 4: “While there may be legitimate reasons for and benefits from regulatory coherence between the US and EU, those discussions of public rules need to happen under conditions of full transparency and should not be subsumed within a trade agreement”.