CETA Threatens EU Member States

Domestic Disciplines

Under the recently concluded trade agreement between the European Union (EU) and Canada (the Comprehensive Economic and Trade Agreement, or CETA), Canada and Canada-based companies will have new ways to pressure governments into granting pollution permits and new legal avenues to challenge denied permits.

One of the better known avenues for companies to challenge regulations will be under the investment protection provisions provided by CETA, including fair and equitable treatment and compensation for expropriation. However, the agreement also imposes new requirements on laws in EU Member States through its provisions on domestic regulation. These provisions, also known as "domestic regulatory disciplines," prescribe standards for the domestic licensing process. These standards are not aimed at traditional trade barriers, but instead are tailored to limit the amount of discretion, and therefore authority, that regulators can exert on companies in licensing processes, such as in chemical manufacturing and mining.

Many of CETA's provisions came into force provisionally on September 21, 2017, after the European Commission, the Council of Ministers, and the European Parliament formally approved it. However, EU national parliaments must also ratify CETA before it can take full effect.

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This briefing examines CETA's provisions in more detail, identifying how the agreement's requirements for licensing procedures could constrain the ability of competent authorities to regulate in the public interest, including in industrial mining and pollution permitting decisions.

The domestic disciplines of CETA

The general objective of CETA is to facilitate the unfettered expansion of trade between the EU and Canada, including by limiting the regulatory burden for companies in both jurisdictions. This includes constraining the discretion of domestic regulators, which limits their ability to impose restrictions when granting licenses to companies. For example, CETA requires licensing procedures to be clear and transparent, objective, established in advance,[1] and as simple as possible.[2] While these requirements seem reasonable at first glance, in reality they provide foreign investors with additional avenues to challenge permitting decisions with which they are unsatisfied.

For example, if a Canadian company is denied a permit, or considers additional requirements to mitigate environmental or social harms to be too expensive or unnecessary, it can use CETA's rules on domestic regu-

lation to undermine that decision. In this way, CETA provides not only an additional way to challenge an unfavorable decision, but also encourages "forum shopping," by allowing a company to pick either domestic or international dispute resolution, based on where it thinks it will achieve the most favorable outcome.[3] Depending on the interpretation of the criteria used by the arbitration panel that is convened to resolve the dispute, the EU and Member States could be responsible for compensating companies for costs imposed by additional requirements accompanying the license. This privilege extends beyond Canadian companies to any company with an office in Canada.

Clear and objective

While CETA's requirements that regulations be "clear" and "objective" seem reasonable, they could be used to challenge decisions in which the competent authority exercises any degree of discretion to balance competing interests, such as those of the investor and those of the general public. These criteria could also be used to challenge decisions that are based on unquantifiable or inherently subjective concerns, such as preserving historic, cultural, aesthetic, or scenic values.

It is unclear how an arbitration panel would interpret CETA's requirements, but interpretation of similar requirements in the General Agreement on Trade in Services (GATS) suggests that such panels generally interpret them in favor of commercial interests and to the exclusion of subjective values. Under GATS, an objective and transparent determination should be established according to whether the investor has demonstrated "competence and the ability to supply the service."[4] Leaked documents from the ongoing negotiation of the Trade in Services Agreement (TiSA) use the same language.[5] This definition excludes other considerations, such as the public interest, which may also be at stake in the authorization decision. The interpretive guidance in those agreements underlines the priority that CETA arbitration panels are likely to give to commercial interests when determining whether a permit decision is objective and transparent.

Established in advance

Under CETA, decisions must also be "established in advance." This requirement is also vague and subject to interpretation, but it is similar to requirements in related contexts that require governments to compensate a company when new regulations reduce the company's expected profits. The GATS, for example, prohibits parties from imposing requirements that "could not reasonably have been expected of that Member at the time" the trade deal was reached.[6] International arbitration panels have found governments liable for the costs incurred by companies as a result of regulatory changes.[7] However, the nature of industrial regulations, including those that govern mining or chemical manufacturing, is in tension with the requirement that all rules be established in advance. The regulation of these industries is necessarily a continually evolving process because of incomplete information about the impacts of many industrial activities, the particular technical and environmental conditions of each case, and rapid advances in operational and engineering techniques.

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As simple as possible

Finally, CETA requires procedures to be "as simple as possible." While unnecessary bureaucracy or lengthy administrative procedures are undesirable, complex industrial processes such as extraction operations or chemical manufacturing may require extensive regulation processes, in which case effectiveness should not be sacrificed out of concern for simplicity. It is possible that an arbitration panel would interpret this requirement in the same way that other panels have applied the "necessity test," where panels decide whether the government could have devised a less trade restrictive measure.[8] Thus, this requirement opens the door to allowing an arbitration panel to substitute its judgment about the necessity of highly technical regulations over the judgment of local regulators. Because arbitrators are usually corporate lawyers with no specific expertise related to the control of pollution from mining activities or chemical manufacturing, it is deeply problematic that their judgment would supersede that of local regulators who have specific training in overseeing these processes.

Conclusion

CETA provides a basis for Canada and Canadian corporations to challenge, before an international arbitration tribunal, licensing procedures that involve any degree of discretion or evolving environmental protection standards imposed by competent authorities. Indeed, CETA's "domestic regulatory disciplines" are inherently incompatible with a precautionary approach, as the prevention of environmental harm necessarily involves an evolving practice of management. In highly technical areas requiring professional judgment, the decisions of competent authorities are particularly vulnerable to challenge. As a result, CETA is likely to impose serious obstacles on government efforts to protect people and the environment from activities that threaten the integrity of both, such as chemical manufacturing and industrial mining.

Endnotes

1. Comprehensive Economic and Trade Agreement (CETA), EU-Canada, art. 12.3.2, 30 Oct. 2016, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng [hereinafter CETA].

2. CETA art. 12.3.7.

3. By providing companies with an alternative to domestic courts, CETA also undermines the domestic judiciary.

4. General Agreement on Trade in Services (GATS), art. 6.4(a), 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

5. *Preliminary Analysis of Leaked TISA Annex on Domestic Regulation*, WikiLeaks, https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation (Feb. 2015); https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation (Apr. 2015); https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation (Oct. 2015).

6. GATS art. VI(5)(a)(ii).

7. *See, e.g.*, Lise Johnson & Oleksandr Volkov, *State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law*, 5 Investment Treaty News 3 (6 Jan. 2014), http://www.iisd.org/pdf/2014/iisd_itn_jan_2014_en.pdf.

8. *See* World Trade Organization (WTO), *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Panel*, para. 459, WT/DS161/R (31 July 2000), https://www.wto.org/english/tratop_e/dispu_e/161r_e.pdf.

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CETA Threatens EU Member States: Domestic Disciplines is part of a four-part series that examines the impacts the EU-Canada trade deal would have on the ability of EU Member States to regulate in the public interest.