

The background of the top half of the page is a photograph of a large-scale open-pit mine. The landscape is rugged and brown, with steep, excavated slopes and a winding road or path. In the distance, there are more hills under a cloudy sky. The overall tone is somewhat somber and industrial.

CETA Threatens EU Member States **Mining**

Globally, Canada is home to the largest mining companies, which operate throughout the world. Under the recently concluded trade agreement between the European Union (EU) and Canada (the Comprehensive Economic and Trade Agreement, or CETA), Canada-based companies will have new ways to pressure governments into granting mining permits and new legal avenues to challenge denied permits. One of the better known avenues for challenge will be under the investment protections of fair and equitable treatment and expropriation provided by CETA. 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 domestic licensing processes. Instead of being aimed at traditional trade barriers, these standards are tailored to limit the amount of discretion, and therefore authority, that regulators can exercise in licensing processes. The Greek mining sector provides

a compelling case study into how CETA would grant even more avenues for Canada and Canadian companies to challenge EU and Member State permitting decisions.

In Greece, mining constitutes an important sector of the economy, representing 3-5% of GDP.¹ Despite the country’s economic recession since 2008, the Greek mining sector employed approximately 23,000 people in 2014 and remains a regional and global leader in extracting and exporting various minerals.²

Provisions in Greek mining laws could be subject to challenge under CETA’s rules on domestic regulation.

Given the importance of mining to the Greek economy, this sector is likely to continue growing, and CETA, which Greece has yet to ratify, could have significant national impacts. For example, one of Greece’s largest foreign investors is

the Canadian Eldorado Gold Corp, which leads Greek production of gold, lead, and zinc.³ In the past decade, Eldorado Gold has acquired numerous mining projects and invested billions of dollars in Greek mining operations.

Despite the economic benefits of the mining industry, however, these activities also threaten the environment and human health in Greece. Ongoing controversies related to Eldorado Gold’s permits demonstrate civil society’s wide-ranging concerns with respect to the industry.⁴

This briefing examines how certain provisions in Greek mining laws could be subject to challenge under CETA’s rules on domestic regulation. Many of CETA’s provisions came into force provisionally on September 21, 2017, after it was formally approved by the European Commission, the Council of Ministers, and the European Parliament. However, EU national parliaments must also ratify CETA before it can take full effect. Greece has not yet ratified the agreement.

Specific aspects and provisions of Greek mining regulations may be particularly vulnerable to CETA-based challenges.

Mining in Greece is subject to a number of legal requirements. Two of the most important laws require an environmental impact assessment (EIA)⁵ and approval of a technical study to regulate mining and quarrying works (Kanonismos Metalleftikon kai Latomikon Ergasion, or KMLE).⁶ The technical study provides the details of how the mine will be built and how it will operate.

All measures taken by a party to CETA that relate to licensing requirements and procedures (with limited exceptions) apply to CETA's "domestic regulatory disciplines."⁷ These disciplines therefore apply to measures adopted pursuant to the Greek mining regulations.

Expert judgment could be viewed as subjective.

The legal requirements for mining include various standards that require a judgment by the competent authority. These standards are in conflict with CETA's requirement that licensing regulations be clear, transparent, and objective.⁸

For example, under the Greek rules governing EIAs, the competent authority can impose "any necessary remedial or preventive measures" as a condition of approval.⁹ The terms of these conditions must be "fair and proportionate to size and type of projects and activity."¹⁰ In addition, "where there are substan-



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tial differences in environmental impact, a new EIA needs to be submitted."¹¹ Because the rules are necessarily not prescriptive, a company could challenge the competent authority's determination of what is necessary, fair, and proportionate before an arbitration tribunal as not being "objective," as required by CETA.

In addition, the competent authority can deny a permit if it finds that the environmental impact of the proposed project or activity is "extremely significant even after the provision of special conditions and restrictions and after their offsetting."¹² Similarly, the prefect or Minister can adopt measures if "there is danger of significant deterioration of the characteristics of the surrounding space."¹³ Because the determination of "significant" is subjective, the denial of a permit on this basis could also be challenged under CETA.

Approvals of the technical aspects of a proposed mining project in-

Because the determination of "significant" environmental impact is subjective, the denial of a permit on this basis could be challenged under CETA.

volve an even more extensive exercise of discretion by the regulatory authority. For example, the regulator must find that the technical studies ensure the proper economic utilization of the ore, the security and the health of the workers, and the protection of the environment, and that they minimize "the social cost in the framework of sustainable development."¹⁴

The operator is also required to follow "good scientific and engineering practice."¹⁵ Additionally "the management of extractive waste must be carried out so as to: a) not jeopardize public health; b) not use methods that may harm the environment; and c) not cause nuisance by noise or smells or negatively

Any decisions that involve public participation and consider public input could be challenged as subjective.

affect the landscape and locations of special interest...”¹⁶ The operator must also ensure the non-deterioration of the environment “except to the absolutely necessary degree,”¹⁷ employ the “best available technique,”¹⁸ and select the location and orientation of each installation to ensure that it “minimizes the esthetic degradation” of the landscape.¹⁹ The decision as to whether each of these standards has been met requires expert judgment that could be challenged under CETA’s domestic disciplines for failing to be objective.

In addition, any decisions that involve public participation and consider public input could be

challenged as subjective. For example, public participation is required as part of the EIA process,²⁰ and in making a decision, the competent authority must take into account the input provided by the public.²¹ Because public input may include non-commercial considerations, companies may also challenge the competent authority’s consideration of such input as subjective.

Further potential for challenges based on subjectivity include projects and activities in Natura 2000 sites, for which the Minister of Environment, Energy, and Climate

Mining companies could argue that requirements to ensure the non-deterioration of the environment go beyond what is necessary and are therefore not as simple as possible.

Change can impose additional requirements.²² Because these measures are left to the discretion of the Minister, requirements under this provision could also be challenged under CETA as not objective.

Decisions by the competent authority could be challenged as not “as simple as possible.”

Many of the licensing requirements could also be challenged for not being as simple as possible. For example, mining companies could argue that requirements to ensure the non-deterioration of the environment “except to the absolutely necessary degree,”²³ to employ the “best available technique,”²⁴ and to select the location and orientation of each installation to “minimize the esthetic degradation” of the landscape²⁵ go beyond what is necessary to protect the environment and are therefore not as simple as possible.



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Necessary adjustments to regulate mining activities over time could be challenged as not “established in advance.”

Finally, the regulation of mining is necessarily a continually evolving process because of the inherent limitations on scientific certainty about the environmental and health impacts of mining activities, the particular technical and environmental conditions of each case, and the rapid advances in mining and engineering techniques. For example, the competent environmental authority is empowered to modify existing conditions or impose new ones if, in the course of an inspection, the authority identifies serious environmental degradation or environmental effects not foreseen when the initial permits were granted.²⁶ Furthermore, as discussed above, an

entirely new EIA process is required when there are significant changes in the environmental impacts of a proposed project.²⁷ However, a company could argue that new EIA conditions conflict with CETA’s requirement that regulations be established in advance.

CETA is likely to impose serious obstacles on government efforts to protect people and the environment from the harmful effects of activities like mining.

Similarly, although technical regulations are detailed in many respects, it is simply not possible for regulations to anticipate and specifically articulate, in advance, all of the measures that may be necessary for each specific mining project.

Thus, mining legislation must be purpose- and goal-oriented to allow regulators and mining operators to take into account changing conditions and competing values and interests. Yet the very nature of this mining oversight renders it subject to challenge, as mining companies can argue that evolving or specifically tailored requirements are not “established in advance.”

Conclusion

The Greek case study demonstrates how CETA’s domestic regulation provisions provide Canadian mining companies new ways to fight permitting regulations and mining protections. As a result, CETA is likely to impose serious obstacles on government efforts to protect people and the environment from the harmful effects of activities like mining.

Endnotes

1. Greek Mining Enterprises Association, *Greek Extractive Industry and Metallurgy: Sustainable Development 2007-2013* (2014), p. 2, <http://www.sme.gr/enimerosi/european-issues?download=283%3Agreek-extractive-industry-metallurgy-sustainable-development>.
2. Sinan Hastorun, *The Mineral Industry of Greece*, in U.S. GEOLOGICAL SURVEY, 2014 MINERALS YEARBOOK (2017), p. 19.1, <https://minerals.usgs.gov/minerals/pubs/country/2014/myb3-2014-gr.pdf>.
3. *Id.* p. 19.9.
4. See, e. g., Elena Becatoros, *Canadian Mining Firm Threatens to Suspend Greece Investment*, U.S. NEWS AND WORLD REPORT (11 Sept. 2017), <https://www.usnews.com/news/business/articles/2017-09-11/canadian-gold-company-suspends-investments-in-greek-mines>.
5. Law 4014/2011, On the Environmental Licensing of Works and Activities, Regulation of Illegal Constructions in Connection with Environmental Stability and Other Provisions Falling under the Competence of the Ministry of Environment, Efemeris tes Kyvernesos tes Hellenikes [EKED] 2011, I.21 (Greece) [hereinafter Law 4014/2011]. This law transposes the EU's Environmental Impact Directives 85/337/EC and 97/11/EC.
6. Kanonismos Metalleftikon kai Latomikon Ergasion, Ministerial Decision Δ7/Α/ οικ.12050/2223/23.5.2011, art. 4(1)(β), Ephemeris tes Kyvernesos tes Hellenikes Demokratias [EKED] 1227/B/2011 (Greece) [hereinafter KMLE].
7. Comprehensive Economic and Trade Agreement (CETA), EU-Canada, art. 12.2.1, 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]. Canada and the EU have negotiated exemptions regarding several services and sectors, including social services, aboriginal affairs, minority affairs, gambling and betting services, and the collection, purification, and distribution of water by Canada and audio-visual services and health, education, and social services, gambling and betting services and the collection, purification, and distribution of water by the EU. CETA art. 12.2(b).
8. CETA art. 12.3.2.
9. Law 4014/2011 art. 2(7). The fall of a project into a specific category is depending on the significance of the environmental impacts envisaged for this project. Projects / activities with environmental impacts are within "Category A" and therefore need an EIA for environmental permitting.
10. *Id.* art 2(7)(δ).
11. *Id.* art 5(2)(b)(αα).
12. *Id.* art 3(2)(β)(ζ ζ); art. 4(3).
13. Law 210/1973 (as amended), The Mining Code, art. 114(b)(2) (Greece) [hereinafter Law 210/1973].
14. KMLE art. 4(1)(β).
15. *Id.* art. 4(1)(γ).
16. *Id.* art. 6 (4).
17. *Id.* art. 89(1).
18. *Id.* art. 89(3)(a).
19. *Id.* art. 90(a).
20. Law 4014/2011, art. 3(2)(β)(δδ).
21. *Id.* arts. 19(5) and (9).
22. *Id.* art. 10(2). These requirements are imposed through the "appropriate assessment," which is an analysis required by the EC Habitats Directive and which has been incorporated into Greek Law.
23. *Id.* art. 89(1).
24. *Id.* art. 89(3)(a).
25. *Id.* art. 90(a).
26. *Id.* art. 2(9).
27. *Id.* arts. 5(2) and 6(2).



CETA Threatens EU Member States: Mining 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.

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