

CETA Threatens EU Member States **Pollution Controls**

Industrial plants throughout the European Union (EU) emit vast amounts of pollutants into the air and water each year. Out of some 14,000 facilities, more than 900 are active chemical manufacturing factories.¹ The chemical industry is among the world's ten worst polluters² and is responsible for a wide range of hazardous wastes and byproducts, most of which are released through wastewater but also are emitted into the air and

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soil. As a result, chemicals such as chromium, mercury, arsenic, lead, and various pesticides find their way into our environment and food. Exposure to these pollutants can lead to serious health impacts, including allergies and diseases such

as respiratory infections, strokes, depression, heart diseases, and cancer, with children and infants especially vulnerable. Estimates place chemical manufacturing responsible for costing as many as 750,000 years of life worldwide in 2016.³

Under the recently concluded trade agreement between the EU and Canada, (the Comprehensive Economic and Trade Agreement, or CETA), Canada and Canada-based companies will have new ways to pressure the government into granting pollution 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 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. Specific aspects and provisions of the EU law governing industrial pollution may be particularly vulnerable to CETA-based challenges.

Industrial Emissions Directive

In the EU, the cross-cutting Industrial Emissions Directive 2010/75/EU (IED) is the primary EU instrument regulating pollutant emissions from industrial installations. The IED covers a wide range of industrial sectors, including chemical manufacturing, and sets out the main principles for the permitting and control of installations. The Directive is based upon an “integrated approach,” meaning that it aims to prevent and control emissions into air, water, and soil, and it covers areas such as waste management, energy efficiency, and accident prevention.⁴

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CETA's domestic disciplines apply to all measures taken by a party to CETA relating to licensing requirements and procedures, with limited exceptions.⁵ CETA's requirements will thus apply to measures taken in the EU, including measures adopted pursuant to the IED, and to measures taken by Member States on the authority transferred to them by the IED.

Expert judgment could be viewed as subjective.

The legal requirements for permitting industrial emissions include various standards that require the application of judgment by the competent authority. These standards are in conflict with CETA's requirement that licensing regulations be clear, transparent, and objective.⁶

For example, the competent authority must ensure that an industrial installation includes "appropriate requirements ensuring protection of the soil and groundwater and measures concerning the monitoring and management of waste generated by the installation," "appropriate requirements for the regular maintenance and surveillance of measures taken to prevent emissions to soil and groundwater," "appropriate requirements concerning the periodic monitoring of soil and groundwater in relation

to relevant hazardous substances," and "suitable emission monitoring requirements."⁷ The competent authority's determination of what is appropriate and suitable could be challenged by a company before an arbitration tribunal as not being "objective," as required by CETA.

The competent authority also has wide discretion "where an activity or a type of production process carried out within an installation is not covered by any of the BAT (Best Available Techniques) conclusions or where those conclusions do not address all the potential environmental effects of the activity or process."⁸ In this case, the competent authority is authorized, after prior consultations with the operator, to "set the permit conditions on the basis of the best available techniques that it has determined for the activities or processes concerned."⁹ In addition, the competent authority can allow emission limit values to be supplemented or replaced by "equivalent parameters

or technical measures" ensuring an "equivalent level of environmental protection."¹⁰ The application of these standards requires the competent authority's judgment, which is inherently subjective. These provisions, and the decisions made under them, are therefore subject to challenge under CETA's requirement that they be "objective."

Many additional requirements for an IED permit could also be subject to challenge under CETA. Pursuant to the IED, permit conditions for industrial installations must be set on the basis of Best Available Techniques.¹¹ BAT Reference Documents (BREFs) are compiled for various industries and processes,¹² and BREFs are official EU documents that must be applied in the permitting process by the Member States' competent authority. For example, to ensure protection of the environment from wastewater and gas discharges from chemical plants, the competent authority must refer to the BREF for Common Waste Water and Waste Gas



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Treatment/Management Systems in the Chemical Sector. This document identifies many quantifiable, clear, and objective standards, but it also includes subjective standards for which the competent authority must exercise their judgment.

For instance, to prevent uncontrolled emissions to the water, companies are required to provide “appropriate buffer storage capacity . . . and to take appropriate further measures.”¹³ Similarly, companies must “prevent, or where this is not practicable, reduce quantity of waste.”¹⁴ From an investor’s perspective, the question of whether a measure is appropriate or practicable is determined on the basis of whether it is financially worth it to prevent waste, whereas the competent authority is more likely to weigh social and environmental impacts. An investor could argue that a decision as to what is appropriate or practicable is not objective, as required by CETA.

The waste water and gas BREF contains numerous other examples

of nonspecific terms that could be challenged as not objective or not transparent, such as “equivalent,”¹⁵ “where possible,”¹⁶ and “as comprehensive as is reasonably possible.”¹⁷

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Decisions such as these necessarily involve a degree of expert opinion and judgment, which a decision-maker may not be able to fully document. Investors will be able to challenge, before an international arbitration tribunal, a competent authority’s determination of

whether requirements to grant a permit are appropriate or suitable or whether equivalence has been achieved.

In addition, any decisions that involve public participation and consider public input could be challenged as subjective. The IED requires public participation in the decision-making processes.¹⁸ Member States must ensure that the public is given an opportunity to participate in permitting decisions¹⁹ and competent authorities must take into account the results of the consultations.²⁰ Chemical companies could argue that the consideration of public opinion is “subjective” and therefore violates CETA’s “objective” requirement.

Because a panel of arbitrators focusing solely on trade aspects of a dispute would be responsible for deciding the outcome of challenges to CETA’s provisions, CETA could undermine the right of the public to participation in environmental decision-making.



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

Many of the licensing requirements could also be challenged for not being as simple as possible. For example, chemical manufacturers could argue that the requirement to control pollution “as comprehensively as is reasonably possible”²¹ goes far beyond what is necessary to protect the environment and is therefore not as simple as possible.

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

Finally, because of the inherent limitations related to uncertainty about the environmental and health impacts of industrial activities, the particular technical and environmental conditions of each case, and the rapid advances in chemical manufacturing, the regulation of this activity is necessarily a continually evolving process. As the BREFs explain, “BAT is a dynamic concept” where “new measures and techniques may emerge, [and] science and technologies are continuously developing.”²²

The changes that result from evolving BAT regulation could potentially conflict with the “established in advance” criterion under CETA. It is possible, for example, that a company that has begun to develop a business plan but has not yet

applied for a license could challenge the government when it updates its interpretation of BAT. A company could argue that because the new understanding of BAT was not established in advance of the compa-

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ny’s investment in its business plan, the EU should compensate the company for the costs of adopting the new technology or policy.

The IED also explicitly allows competent authorities to set stricter permit conditions than those achievable by the use of the best available techniques as described in the BAT conclusions.²³ Companies could argue that new or stricter emission limits are not “established in advance.”

Conclusion

Under CETA, Canada and Canadian corporations can challenge, before an international arbitration tribunal, licensing procedures for industrial emissions that involve any degree of discretion or evolving environmental protection standards imposed by competent authorities. CETA is therefore likely to impede the efforts of Member States and the EU to protect people and the environment from the harmful effects of industrial pollution from chemical manufacturing.

Endnotes

1. Thomas Brinkmann et al., *Best Available Techniques (BAT) Reference Document for Common Waste Water and Waste Gas Treatment/Management Systems in the Chemical Sector*, EUROPEAN COMM'N JOINT RESEARCH CTR. (2016), Ch. 1.2.1, p. 3, http://eippcb.jrc.ec.europa.eu/reference/BREF/CWW_Bref_2016_published.pdf [hereinafter BREF].
2. *World's Worst Pollution Problems: The Toxic Beneath our Feet*, PURE EARTH & GREEN CROSS SWITZERLAND (2016), pp. 30–32, <http://worstpolluted.org/docs/WorldsWorst2016Spreads.pdf>.
3. *Id.* These years are referred to as “Disability-Adjusted Life Years.”
4. European Parliament Directive 2010/75/EU, 2010 O.J. (L 334) 17, recital (3).
5. Comprehensive Economic and Trade Agreement (CETA), E.U.-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).
6. CETA art. 12.3.2.
7. European Parliament Directive 2010/75/EU (Industrial Emissions Directive), 2010 O.J. (L 334) 1, art. 14.1 [hereinafter IED].
8. *Id.* art. 14.6.
9. *Id.*
10. *Id.* art. 14.2.
11. *Id.* recital (12).
12. *See Reference Documents under the IPPC Directive and the IED*, EUROPEAN COMM'N JOINT RESEARCH CTR., <http://eippcb.jrc.ec.europa.eu/reference/> (last visited 19 Feb. 2018).
13. BREF, Ch. 4.3.2, BAT 9, p. 546.
14. BREF, Ch. 4.4, BAT 13, p. 551.
15. BREF, Ch. 4.2, BAT 4, p. 544.
16. BREF, Ch. 4.5.1, BAT 15, p. 552.
17. BREF, Ch. 4.1, BAT 2, p. 543.
18. IED, Preface, para. 27.
19. IED art. 24.1. This includes decisions related to the granting of a permit for new installations; the granting of a permit for any substantial change; the granting or updating of a permit for an installation under less strict emission limits than usual; and the updating of a permit or permit conditions for an installation in the event that the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit.
20. IED, Annex IV, art. 4.
21. BREF, Ch. 4.1, BAT 2, p. 543.
22. BREF, Preface, para. 5, p. ii.
23. IED art. 14.4.



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