CETA Threatens EU Member States

Pesticides

After the European Commission, the Council of Ministers, and the European Parliament formally approved the trade agreement between the EU and Canada (the Comprehensive Economic and Trade Agreement, or CETA),[1] a large part of it provisionally came into force on September 21, 2017. However, EU national parliaments must also ratify CETA before it can take full effect.

Because tariff levels are already low or non-existent, CETA seeks to increase commerce between the EU and Canada by eliminating non-tariff barriers to trade. These "barriers" include regulations to protect human health and the environment, which the agreement weakens or eliminates in a variety of ways. First, the agreement focuses on reducing differences in regulations, which are considered "trade irritants," by encouraging the EU and Canada to harmonize their regulations.[2] This process is known to reduce regulations to the lowest common denominator that offers the least protection. Because Member State governments, as well as the EU as a whole, are parties to the agreement, CETA rules apply to, and would water down, the regulations of both. Second, CETA imposes additional red tape on EU and Member State regulators who try to enact measures to protect the public from harm. Finally, CETA incorporates traditional trade rules that are contrary to the precautionary principle, such as the requirement that sufficient scientific evidence be identified before measures to protect the environment can be enacted.[3] The processes created under CETA to achieve regulatory convergence are likely to exclude Member State government representatives and instead involve only representatives of the EU and Canada.

CETA seeks to increase commerce between the EU and Canada by eliminating non-tariff barriers to trade, including regulations to protect human health and the environment.

Until now, EU Member States and their local governments have had broad authority to apply a precautionary approach to decisions regarding whether or not to place pesticides on the market and how to protect people, ecosystems, and environments from hazardous pesticides. Because CETA is already being applied provisionally, most of its rules are already in force. This includes provisions that constrain the ability of Member States and local governments to enact and enforce legislation to protect their residents from the harmful effects of pesticides.

Member States have the power and obligation to protect their residents from the harmful effects of pesticides.

The EU legal framework for pesticides provides broad power to Member States to determine how

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best to protect people and the environment from hazardous pesticides. It does so by placing the primary responsibility on Member States to ensure that pesticides are not harmful before they are sold on the market, by entrusting Member States to design appropriate mitigation measures, and by allowing them to take additional measures to protect vulnerable people and places.

Member States have broad authority to deny the authorization of a pesticide or impose risk reduction measures to ensure an authorized product is safe.

The EU and its Member States share regulatory authority in approving pesticides. The EU is charged with approving the individual components of a pesticide, including the active substances, safeners, synergists, and co-formulants, while Member States are responsible for authorizing pesticides that can be placed on the market within their jurisdictions.[4]

Before allowing the sale of a pesticide, Member States must find that the applicant has adequately demonstrated that the product will have no harmful effect on human health and no unacceptable effects on the environment.[5] The "primary responsibility" for ensuring that pesticides are not harmful lies with

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the Member States.[6] In addition, even when the European Commission has approved all the components of a pesticide product, Member States are solely responsible for considering the interactions among its components.[7] The responsibility of Member States to ensure the safety of pesticides is ongoing, and Member States can revoke authorization for a pesticide if new information calls into question the safety of an already approved product.[8]

The determination that a pesticide is safe must be based on the precautionary principle,[9] which means that Member States should prohibit products that are likely to be hazardous even in cases where scientific data does not allow for a comprehensive risk evaluation.[10] Member States also have the authority — and often, the responsibility — to implement mitigation measures restricting the use of pesticides.[11]

The right of Member States to determine whether and under what conditions to authorize a pesticide's use is important, as local governments are often in the best position to assess the impacts of certain pesticides on their environments and local populations.

Member States have used this authority to create higher health and environmental protections than those offered at the EU level. For example, France banned pesticides containing two ingredients, glyphosate and POE-tallowamine, based on a finding that unacceptable risks to human health could not be ruled out and as required by article 29 of the EU Pesticides Directive, while the combination of those ingredients continued to be allowed at the EU level.[12]

Member States have wide discretion to ban or implement restrictions on the use of pesticides in order to protect vulnerable people and places.

Member States also have wide discretion to regulate pesticides to protect certain areas, such as the aquatic environment, important resources such as drinking water supplies,[13] and people who are particularly vulnerable to the harmful effects of pesticides. In particular, Member States have the authority to completely ban the use of pesticides in specific areas, such as public parks, sports and recreation

grounds, school grounds and children's playgrounds, and in close proximity to healthcare facilities.[14]

Member States have used this broad authority to impose restrictions that go beyond EU requirements. For example, the Netherlands has prohibited the professional use of pesticides in certain circumstances. Beginning in November 2017, the professional use of pesticides outside the agricultural context has been prohibited altogether to protect the drinking water quality and ecological quality of surface water in the Netherlands.[15]

Similarly, France banned the use of all pesticides in non-agricultural areas, such as green spaces and public parks and gardens as of 2020[16] and in private gardens beginning in 2022.[17] As of January 2017, French law also prohibits the use of pesticides in playgrounds, and it requires special prevention measures when pesticides are used near facilities for vulnerable groups.[18]

CETA constrains the ability of Member States to protect their populations from the harms of pesticides.

CETA imposes rules that constrain the broad discretion and authority of Member States, adds additional layers of red tape on their regulatory processes, and will likely exclude Member States from participating in important policy forums.

CETA will constrain Member State authority to deny the authorization of pesticides, to impose risk reduction measures, and to protect certain people, habitats, and natural resources from the harms of pesticides.

CETA requires Member States and local governments to base their regulations on risk assessments and "sufficient scientific evidence,"[19] which runs contrary to the precautionary principle's call for protective measures when risk is likely and scientific information is insufficient. Given Canada's overt opposition to the EU's reliance on the precautionary principle in regulating pesticides,[20] the Canadian government and Canadian businesses are likely to challenge Member State decisions that are based on this principle.

CETA's requirement for "sufficient scientific evidence" runs contrary to the precautionary principle's call for protective measures when risk is likely and scientific information is insufficient.

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Furthermore, one of the central objectives of CETA is to eliminate regulatory differences, including by ensuring that Member State technical regulations, standards, and conformity assessment procedures are not more trade-restrictive than necessary. Thus, whenever a Member State decision is more protective than what the EU provides, Canada is likely to argue that the EU standard should apply, and that the more protective local standard is unnecessary.

CETA's state-to-state and investor-state dispute resolution provisions allow both Canada and any company with business ties to Canada to challenge Member State decisions regarding pesticide authorization, risk reduction measures, and professional certification. Because the cost of litigating – let alone losing – a challenge under CETA's arbitration provisions is significant, these provisions are likely to have a significant chilling effect on Member States' ability to protect their residents. For example, if an investor succeeds in demonstrating that insufficient scientific evidence exists to justify a measure, or that a measure is more trade restrictive than necessary, Member States will be responsible for paying the damages awarded by the arbitration panel.[21]

CETA imposes red tape that will slow and complicate Member States' ability to protect their residents from the harmful effects of pesticides.

CETA imposes a number of burdens on Member State regulators, which will inhibit their ability to effectively protect their residents. For example, upon Canada's request, the EU and Member States must provide a risk analysis, scientific opinions, relevant information, studies, and data supporting its proposed regulations.[22] CETA also

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encourages regulators to provide information on the costs and benefits of enacting protective measures and the "economic practicability" of those measures in relation to their objective.[23] These considerations are likely to have a chilling effect on regulations seeking to protect human health and the environment or, at best, seriously slow down the adoption of such measures.

Moreover, Member States must allow Canada to participate in decision-making related to technical regulations at "an early appropriate stage when amendments can still be introduced and comments taken into account."[24] Member States are also obliged to give "positive consideration to a reasonable request to extend the comment period."[25] This requirement allows Canada to postpone or slow the implementation of a new measure.

These added procedural steps could potentially paralyze the regulatory power of Member States. CETA is therefore a direct threat to Member State sovereignty and frustrates the ability of Member States to protect their citizens.

Under CETA, Member States may be excluded from important forums where the EU and Canada will cooperate on policymaking related to pesticides regulation.

CETA creates three different regulatory forums for the Parties to consult on issues related to pesticides, and it also provides additional consultations in which a Party can present its concerns about food safety measures and technical regulations, including pesticides.[26] These forums are explicitly designed for the Parties to influence each other's laws and manage implementation of the agreement.[27]

However, CETA is silent as to whether Member States will be part of these forums or notified about what takes place within them, even though decisions made at the meetings could impact Member States or local governments.[28] For example, the Regulatory Cooperation Forum makes no reference to Member States in its discussion of opportunities for voluntary consultation and discussing participation. The provision identifying contact points foresees only two Parties, the EU and Canada, suggesting that the agreement intends to exclude Member States from participation in the forum.[29] The agreement further fails to identify Member States as potential "interested parties" who can be invited to the Regulatory Cooperation Forum.[30] Similarly, the agreement is unclear as to whether representatives from Member States will participate in the Joint Committee, a powerful group overseeing all other CETA-created committees.[31]

The EU and Canada intend to make important policy decisions with respect to the regulation of pesticides in these forums, and the exclusion of Member States would reduce States' ability to ensure adequate protections and to shape the laws that they are ultimately responsible for implementing.

CETA increases pressure on the EU to bring infringement proceedings against Member States who enact more protective measures.

Trade agreements set out what measures, if any, central governments must take to seek compliance at the local level.[32] The WTO, for example, requires Members to "take such reasonable measures *as may be available to it* to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory" (emphasis added).[33] This means that if for constitutional reasons[34] a central government does not have authority over a lower level of government in certain issues, it is

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not required to force the lower level of governments to comply with the trade rules.

CETA imposes a stronger obligation on central governments to force Member State or subnational governments to comply with its rules. Under CETA, the EU must "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance at all levels of government."[35]

The WTO safeguard "*as may be available to it*" is absent from CETA, implying that even when the law prevents a central government from controlling lower levels of governments on certain issues, the central government will still be in violation of trade rules if it does not use all measures to force the lower level of government into compliance.

Conclusion

CETA drives deregulation of toxic pesticides by promoting the harmonization of regulations, eliminating precautionary measures that are not supported with sufficient scientific evidence, adding additional layers of red tape on their regulatory processes, and excluding Member States from participating in important policy forums. Thus, although Member States have broad discretion and authority to regulate pesticides in a more protective manner than the European Commission, CETA constrains this authority and imposes significant financial risks on Member States that violate CETA's trade rules.[36]

Endnotes

1. Comprehensive Economic and Trade Agreement (CETA), E.U.-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 arts. 21.3(b)(vi) (agreeing to avoid "avoid unnecessary regulatory differences"); 21.4(f)(i) (committing to "examine the possibilities for greater convergence on objective and scope of regulations"); 21.4(g) (committing to examine "opportunities to minimize unnecessary divergences"); 21.4(h) (committing to cooperate on international standards); 21.4(k) (agreeing to use same assumptions and methodologies); 21.4(n)(vi) (agreeing to "conduct cooperative research to minimize unnecessary differences"); 21.4(r) (committing to identify "the appropriate approach to reduce adverse effects of existing regulatory differences"); 21.5 (agreeing to enhance "convergence and compatibility between the regulatory measures").

3. *See, e.g., CETA Threatens EU and Member States' Ability to Effectively Regulate the Dangers of Pesticides*, Center for International Environmental Law (July 2017), http://www.ciel.org/reports/ceta-threatens-eu-members-states-ability-effectively-regulate-dangers-pesticides-july-2017/ [hereinafter CIEL Report].

4. European Commission Regulation 1107/2009, 2009 O.J. (L 309) 1, art. 29 [hereinafter EC Reg. 1107/2009]. The regulation divides the EU in three zones, North, Centre, and South, and Member States must authorize products that are authorized by other Member States located in the same zone. *Id.* art 3(17), Annex I.

5. *Id.* arts. 4(3), 29.

6. European Ombudsman, *Decision in case 12/2013/MDC on the practices of the European Commission regarding the authorisation and placing on the market of plant protection products (pesticides)* (18 Feb. 2016), para. 45, https://www.ombudsman.europa.eu/cases/decision.faces/en/64069/html.bookmark [hereinafter European Ombudsman Decision] (noting that "the primary responsibility for carrying out checks and for ensuring that the rules set out in the Regulation are complied with, lies with Member States").

7. EC Reg. 1107/2009, art. 29.

8. *Id.* art. 44.

9. EU legislation on pesticides is based on the precautionary principle. *Id.* art. 1(4). Indeed, all of EU environmental policy must be guided by the precautionary principle. Consolidated Version of the Treaty on the Functioning of the European Union art. 191(3), 2010 O.J. (C 83) 47 [hereinafter TFEU].

10. EC Reg. 1107/2009, art. 1(4).

11. For example, the Commission's Directives approving active substances often recommend that Member States impose mitigation measures to protect workers, water, and wildlife. *See, e.g.*, European Ombudsman Decision, *supra* note 6, para. 44.

12. Agence Nationale de Sécurité Sanitaire de l'Alimentation, de l'Environnement et du Travail (France), *Withdrawal of Plant Protection Products Combining Glyphosate and POE-tallowamine from the French Market* (22 June 2016), https://www.anses.fr/fr/node/122980. See also EC Reg. 1107/2009, art. 29(1)(e) (referring to art. 4.3). Months later, the Commission followed suit. See European Commission Implementation Regulation 2016/1313, 2016 O.J. (L 208) 1.

13. European Parliament Directive 2009/128/EC, 2009 O.J. (L 309) 71, art. 11.

14. *Id.* art. 12.

15. Besluit Gewasbeschermingsmiddelen en Biociden, 2016 Staatsblad van het Koninkrijk 112, 9 Mar. 2016, https://zoek.officielebekendmakingen.nl/stb-2016-112.html; *see also* Unie van Waterschappen, Verbod Gewasbeschermingsmiddelen Buiten de Landbouw (2 Dec. 2015), https://www.uvw.nl/verbod-gewasbeschermingsmiddelen-buiten-de-landbouw/.

16. Law No. 2014-110 of 6 Feb. 2014, Journal Officiel de la République Française [J.O.] [Official Gazette of France], 8 Feb. 2014, p. 2313. Regulation is part of the 'Ecophyto 2018' Action Plan in France. *See Ministere de L'agriculture et de la Pêche, Le Plan Écophyto, Pour Réduire l'Utilisation des Produits Phytosanitaires en France* (26 Oct. 2015), http://agriculture.gouv.fr/le-plan-ecophyto-pour-reduire-lutilisation-des-produits-phytosanitaires-en-france.

17. Law No. 2015-992 of 17 Aug. 2015, Journal Officiel de la République Française [J.O.] [Official Gazette of France], 18 Aug. 2015, p. 14263, art. 68(V).

18. Arrêté of 27 June 2011, Journal Officiel de la République Française [J.O.] [Official Gazette of France], 28 July 2011, p. 12880.

19. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2.2, 15 Apr. 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]; CETA art.5.4 (affirming rights and obligations under the SPS Agreement).

20. *See, e.g.*, CIEL Report, *supra* note 3.

21. CETA arts. 8.21(3), 8.21(4)(a).

22. *Id.* arts. 4.4, 5.11(2).

23. *Id.* art. 21.4(f)(ii) ("a comparison of the potential cost-effectiveness of the regulatory proposal to that of major alternative regulatory requirements or approaches considered"); *see also* art. 21.4(a)(iv) ("exchange experiences with regulatory tools and instruments, including regulatory impact assessments").

24. *Id.* art. 4.6(1).

25. *Id.* art. 4.6(3).

26. *Id.* arts. 4.7, 5.12, 5.14, 21.6.

27. *Id.* art. 21.4(d) (stating purpose of cooperation is "so that comments and proposals for amendments may be taken into account").

28. *See, e.g.*, *id.* arts. 4.4–4.6, none of which mention Member State consultation even though Member State policies could be affected.

29. *Id.* art. 21.9.

30. *Id.* art. 21.8.

31. *Id.* art. 26.1(5) provides that the Parties "shall insure" that all of the "competent authorities" are represented when Specialized Committees meet. "Competent authorities" are defined Annex 5-A with respect to the SPS chapter only, and here they do include Member States. Otherwise the term is not defined.

32. Edward T. Hayes, *A Comparative Analysis of the Regulation of State and Provincial Governments in NAFTA and GATT/WTO*, 5 Chi. J. Int'l L. 605, 613 (2005).

33. General Agreement on Trade in Services (GATS), art. 1.3(a), 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

34. For example, if a subnational government has exclusive competence in certain areas, such as land use planning/zoning and national governments cannot interfere with subnational government decisions in this area according to the national constitution.

35. CETA art. 1.8(2).

36. *See, e.g.*, CIEL Report, *supra* note 3.

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