



Toxic Chemicals and Trade Policy: How a US-EU Trade Agreement Could Tie the Hands of State Legislators and Stall State-Level Action on Toxics

In the face of weak, ineffective and out of date U.S. federal laws, over 30 states have adopted or proposed stronger standards for toxic industrial chemicals to protect public health and the environment. State legislation includes bans on specific chemicals known to pose unreasonable risks to people, labeling of consumer products containing hazardous chemicals, and standards for exposure to hazardous chemicals that are more protective than federal law. Often, these efforts have been inspired by leadership across the Atlantic. It is generally acknowledged that the European Union has stricter legislation for toxic chemicals. In the cosmetic arena for example, the European Union has banned the use of 1,328 chemicals and additionally regulated more than 250 ingredients, whereas in the U.S. approximately 11 substances have been banned at federal level; similarly, 82 pesticides that are banned in the EU are allowed in the U.S.

Legislators are all too familiar with the extensive, and often effective, lobbying against their initiatives carried out by the chemical industry in state capitols around the country. Industry and Congressional allies are engaged in an effort to amend federal law to preempt states from enacting more protective chemical policies. Yet an even greater threat to the continued ability of states to enact and enforce chemical regulations may be posed by a massive trade agreement being negotiated between the U.S. and the EU. This agreement, the Transatlantic Trade and Investment Partnership (TTIP), is being negotiated behind closed doors, where the chemical industry has privileged access to trade negotiators, and has even drafted key provisions under negotiation.

TTIP Threatens the Ability of States to Take Action on Toxic Pollutants

TTIP would be the largest bilateral trade agreement in history. Unlike earlier trade agreements focused on reducing tariffs to open up markets, TTIP is intended primarily to reduce or eliminate regulations – so called technical or non-tariff barriers to trade. If approved by Congress, TTIP will establish rules governing state and local laws and regulations, as well as federal law. Although the draft text of the TTIP is secret, leaked documents and public statements by negotiators and the chemical industry reveal several areas of great concern. These include:

- **“Regulatory coherence” provisions that could be used to challenge state chemical policies that are more protective than federal law.** Regulatory coherence could prevent states from enforcing independent or more protective regulations than those enacted by the federal government. Regulatory coherence could include “harmonization,” “mutual recognition” and/or “equivalence” provisions

- **Provisions allowing foreign corporations to challenge state laws and to seek millions in compensation in arbitration tribunals that bypass the courts.** Companies could use these arbitration (investor-state dispute settlement or ISDS) provisions to sue for lost profits because they were unable use or sell toxic chemicals due to state law – even where a court claim under the takings clause of the U.S. Constitution could not succeed. ISDS clauses in NAFTA and other trade agreements have been used repeatedly to attack efforts to protect the environment and public health; even unsuccessful challenges take years to resolve, cost millions to defend, and have a chilling effect on the development of new legislation. For example:
 - In 1997, Ethyl Corp. sued a Canadian province for banning the importation of MMT, a neurotoxin added to gasoline. The case settled and eventually cost Canada 13 million dollars, prioritizing industry’s expected profits ahead of protecting human health and the environment.
 - In 1998, Metalclad Corp. challenged decisions by Mexican municipal and state governments to refuse a permit to operate a hazardous waste treatment facility and landfill and to instead create an ecological preserve in the area. The tribunal ruled the actions were “tantamount to expropriation.” Although on appeal part of the award dealing “minimum standards of treatment” was set aside, most of the tribunal’s original award was allowed to stand and Mexico was ordered to pay 15.6 million dollars.
 - In 1999, the chemical company Methanex Corp. sought \$970 million in damages in a challenge to California’s phase-out of MTBE, a gasoline additive that had contaminated ground and surface water throughout the state. Although ultimately dismissed in 2005, the case had a chilling effect on the willingness of other states to follow California’s lead, and tied up state financial and staff resources in assisting in the litigation for several years.

Including ISDS in TTIP would dramatically increase the likelihood of future challenges to U.S. state chemical laws, by expanding the number of investors that could bring arbitration cases to include thousands of businesses with a corporate presence in Europe.

Sources and additional resources:

Toxic Partnership: A Critique of the ACC-Cefic Proposal for trans-Atlantic Regulatory Cooperation on Chemicals, Center for International Environmental Law, available at: http://ciel.org/Publications/ToxicPartnership_Mar2014.pdf

Toxic Partnership Revealed, (CIEL/Climate Earth/NRDC), available at: http://www.ciel.org/Publications/TTIP_Leaked_29Sep2014.pdf

Lowest Common Denominator: How the proposed EU-US trade deal threatens to lower standards of protection from toxic pesticides, Center for International Environmental Law, available at: http://ciel.org/Publications/LCD_TTIP_Jan2015.pdf

Cosmetic products: What TTIP will not make up, August 8, 2014 Blog, The European Consumer Organization (BEAC), available at: <http://www.beuc.eu/blog/325/>

SAFER States website, resources for state legislators on chemical policy: <http://www.saferstates.com>

Democracy Under Challenge: Canada and Two Decades of NAFTA's Investor-State Dispute Settlement Mechanism, Canadian Centre for Policy Alternatives, available here:
<https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015>

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