Toxic TAFTA: A Backdoor to Unsafe Chemicals

The safety standards on which we rely daily for our food, medicines and cars. The energy and climate policies needed to save our planet. The new financial regulations designed to prevent banks from gambling with our money and creating another crisis. These are policies that should be determined in open, democratic venues where we have a say. But a group of the largest U.S. and European corporations want to rewrite these safeguards behind closed doors. For over a decade, they have pushed for a new U.S. "trade" deal with Europe – the Trans-Atlantic Free Trade Agreement (TAFTA), which corporate proponents have tried to rebrand as the Transatlantic Trade and Investment Partnership (TTIP) – a deal that would roll back consumer protections on both sides of the Atlantic. European Union (EU) and U.S. negotiators launched TAFTA negotiations in July 2013 and plan to finish the sweeping deal by next year.

A "trade" deal only in name, TAFTA would require the United States and EU to conform domestic financial laws and regulations, climate policies, food and product safety standards, data privacy protections and other non-trade policies to TAFTA rules. This could include obligations for products and services that do not meet domestic standards to be allowed under processes called "equivalence" and "mutual recognition," or obligations to actually alter domestic U.S. and EU policies to conform to existing international standards or to new trans-Atlantic standards negotiated to be more convenient to business. These constraints on policy space would be binding. Failure to comply with TAFTA rules could result in trade sanctions. The pact could also newly empower foreign corporations, including the world's largest chemical corporations, to directly challenge public interest policies and demand taxpayer compensation in extrajudicial tribunals.

The EU/U.S. TAFTA Agenda: Deregulation in Disguise

The U.S. approach to chemical regulation exposes consumers and the environment to greater risks than the EU approach. The 1976 Toxic Substances Control Act (TSCA) sets U.S. federal policy on over 80,000 industrial chemicals, many of which are used in everyday products. Not only is the law sorely outdated, but incredibly it allowed more than 60,000 chemicals existing at the time of its passage to continue being used under an unwarranted presumption of safety. Testing of these chemicals has been virtually non-existent, with only 200 of the grandfathered chemicals tested directly by the Environmental Protection Agency (EPA). The EPA has even had limited success controlling the chemicals that it has tested and deemed dangerous. A Government Accountability Office report finds that successful restrictions have been enacted on only five chemicals (PCBs, chlorofluorocarbons, dioxin, asbestos, and hexavalent chromium) in TSCA's history, and the ban on asbestos was overturned. Even more, TSCA allows new chemicals to be used in everyday products without proof that they are safe. The policy puts the burden on the EPA to prove a chemical is dangerous and sets high hurdles for doing so – from allowing producers to withhold critical information claimed as "trade secrets," to allowing a chemical to be marketed if EPA does not determine it to be unsafe within a set period. In 2010, EPA had tested less than 1 percent of the more than 80,000 industrial chemicals found on the U.S. market. The President's Cancer Panel named TSCA as perhaps "the most egregious example of ineffective regulation of environmental contaminants."

The EU, by contrast, has developed a far more effective set of chemical safeguards in its 2007 Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) policy. REACH requires chemical manufacturers and importers to register most new and existing chemicals not already subject to regulation. Manufacturers and importers must provide regulators with key health and safety data for all chemical substances covered by the policy – from those used in industrial processes to the chemicals found in cleaning products, paints, clothes, furniture and electrical appliances. REACH places the burden of proof that chemicals are safe on the companies that make them. Chemicals posing hazards of "very high concern" (e.g. carcinogens, reproductive toxins) are banned by default, and only authorized if a company can satisfy strict conditions. (TSCA, by contrast, allows consumer exposure to hazardous chemicals if the EPA cannot prove that the risk of harm is "unreasonable.") For chemicals permitted under REACH, companies must identify and manage the risks linked to the substances, and demonstrate (and communicate to customers) how the substance can be safely used.

The REACH regulatory system is based on the precautionary principle – that in the face of uncertainty about a product's health or environmental threats, those seeking to sell the product bear the burden of proving it is not harmful.

The U.S. drug safety system is precautionary – drugs must be proved safe before they are permitted on the U.S. market. But for industrial chemicals, the President's Cancer Panel has concluded, "The prevailing regulatory approach in the United States is reactionary rather than precautionary," forcing the public to bear the burden of potentially unsafe chemicals.

While EU TAFTA negotiators have stated that REACH will not be changed within the negotiations themselves, EU Trade Commissioner Karel De Gucht has allowed for the possibility of "lighter regulations on both sides of the Atlantic" that could be instated through a TAFTA-established "regulatory cooperation" process, which could weaken implementation of REACH. Such cooperation could include "harmonization" to a common single standard for chemicals, which would threaten to water down the stronger protections of REACH while locking in the ineffective protections of TSCA. Another "cooperation" mechanism is "equivalence," through which a government must allow products meeting a foreign country's regulatory standards to be sold domestically if the foreign country's regulatory system, despite potentially significant differences, is deemed to provide broadly "equivalent" levels of protection as the domestic regulatory system. Under such "free passage," a good containing a TSCA-permitted chemical, for example, would need to be accepted in the EU.

Meanwhile, the evidence to date would indicate that U.S. negotiators aim to use TAFTA to directly weaken REACH. In 2003, as REACH was first being developed, U.S. Trade Representative (USTR) staff met privately with U.S. chemical corporations to hear their criticism of the proposed legislation and solicit their suggestions for how the EU should change REACH (e.g. "There should be exemptions for chemicals used in an industrial setting."). USTR then offered to "convey to the EU" the U.S. corporate warnings on REACH, including, "It is a huge problem for competitiveness."

Chemical Corporations' TAFTA Agenda: Deregulation without Disguise

European and U.S. chemical corporations, in their formal demands issued to TAFTA negotiators, have been remarkably candid in naming the specific U.S. and EU safety regulations that they would like to see dismantled:

- **Use lowest-common-denominator approach for chemical safety standards:** Procter and Gamble, the largest U.S. manufacturer of household and personal products, including chemical-based goods ranging from cosmetics to household cleaners, complains, "Differences between TSCA and REACH create a barrier to our business model," noting that the divergent levels of consumer protection "significantly hamper[]" the "speed to market" of the company's products. The corporation suggests that under TAFTA, the United States and EU should "allow[] for the production, sale and use of chemicals that are lawful in one continent to also be lawful in the other," meaning that Europeans should be exposed to U.S. products containing chemicals permitted under the outdated TSCA regime.
- **Loosen requirements to keep toxins out of household goods:** U.S. cosmetics and household chemicals firm Amway has argued that EU "restrictions on volatile organic materials" and "criteria for identifying environmental toxins" create "arbitrary barriers to trade," and expresses hope that such "barriers" can be dismantled via TAFTA. Amway also asks TAFTA negotiators to "encourage" EU regulators "to be open to a dialogue with U.S. companies disadvantaged by [REACH]," and suggests, "If a product containing a chemical compound is freely offered for sale in the United States, it should be authorized for sale in the EU without additional chemical ingredient registration."

Investor Privileges: Corporations Empowered to Attack Chemical Safety Laws Directly

U.S. and EU corporations and officials have called for TAFTA to grant foreign firms the power to skirt domestic courts, drag the U.S. and EU governments before extrajudicial tribunals, and directly challenge health and environmental laws that they view as violations of TAFTA-created foreign investor "rights." The tribunals, comprised of three private attorneys, would be authorized to order unlimited taxpayer compensation for domestic policies perceived as undermining corporations' "expectations." Such extreme "investor-state" rules have already been included in U.S. "free trade" agreements, forcing taxpayers to pay firms more than $440 million for toxics bans, land-use rules, regulatory permits, water and timber policies and more. Under the North American Free Trade Agreement, Dow Chemical and other U.S. chemical corporations have used such privileges to attack Canadian bans on lawn pesticides, toxic gasoline additives, and even carcinogenic chemicals banned in the United States. Just under U.S. pacts, more than $34 billion remains pending in corporate claims against medicine patent policies, pollution cleanup requirements, climate and energy laws, and other public interest polices.

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