

Trade Agreement Threats to Toxics Regulations

Should trade rules get in the way of public safety?

Prompted by the absence of an effective U.S. federal chemical regulatory policy that could protect consumers and the environment from the multiple threats posed by toxic chemicals, many states have stepped into the vacuum. From Maine to Hawaii, states are taking action to restrict certain plastic additives (and other dangerous substances) contained in children's toys and an array of other products. Industries are attacking these much needed consumer and environmental protections, employing claims that the laws violate U.S. obligations under trade agreements.

Indeed, over-reaching rules in the World Trade Organization (WTO) agreements, the North American Free Trade Agreement (NAFTA), and other NAFTA-style pacts conflict with some key initiatives state legislators are creating to safeguard the public against toxic chemicals. This shows how desperately the existing "trade" rules need reform.

For instance, the WTO contains a general prohibition on "quantitative restrictions" i.e. a *ban* of a particular chemical or product. Even bans on toxic chemicals that apply equally to domestic and imported goods are only considered WTO-legal if they meet certain absolute limits on regulation. These include a provision stating that federal and state measures must be based on international standards. Among the recognized standards are those set by the industries in question! **Unfortunately, under WTO rules, international standards serve as a ceiling – rather than a floor – for policies.** Policies taking precautionary actions that *improve* upon poor international standards are subject to challenge. Plus, domestic toxic rules relating to product characteristics, labeling, and packaging are required to be "no more trade restrictive than necessary" to achieve their purpose. This very subjective standard would be judged by a WTO dispute resolution tribunal comprised of trade experts with no toxics regulatory expertise.

The WTO also contains most-favored-nation obligations, which prohibit treating products imported from one WTO country differently than goods from other countries. This conflicts with policies focusing on products from countries with known problems with lead and other toxic chemicals. The rules also require that "like products" produced domestically and offshore be treated the same, but what is a "like product" is highly subjective. This would be decided by a tribunal of trade experts, who might consider bans on certain baby bottles (for instance) to be discrimination against a "like product," if less toxic alternative bottles were allowed.

Because of rules like these, anti-toxics campaigners have long had to battle against industry use of trade threats, such as those aimed at chilling toxin bans, policy innovations and the search for nontoxic alternatives. Interests who oppose improved safety standards loudly tout how countries, states and localities could be subject to trade challenges if they institute precautionary health and environmental policies that require changes in production processes or design. State legislators need to push back on this usurpation of their authority as democratically elected state officials, and demand changes to trade agreements. This would allow them to appropriately address new and emerging hazards in the absence of federal leadership.

I truly feel the [chemical] industry and the toy industry are running to China and saying, 'You ought to oppose these bills, and if you don't you'll lose out on product sales in America.'

-Del. James Hubbard (Md.), after receiving complaints from the Chinese government and WTO for introducing bills that would ban potentially harmful toxins.

State Public Health Policies at Risk

We need to alter our existing trade rules so that critical public health policies, like the restrictions on toxins below, are not vulnerable to challenge in closed-door trade tribunals. **Even though in reality actual challenges take years to play out, industry often uses the threat of a challenge to chill innovation.**

States Tackle BPA in Baby Bottles: Recently, significant concerns have been raised about the safety of bisphenol-A (BPA) a chemical used in the creation of clear, hard plastics. Scientists have found that BPA raises concerns for human development, including links to early puberty, prostate effects, and breast cancer. New studies showing BPA leaching from heated baby bottles has led many groups to call for a complete ban on the use of the chemical in baby bottles, sippy cups, water bottles and other food and beverage containers. Legislators in Calif., Conn., Hawaii, N.J., N.Y., Maine, Md., Mass., Minn., and Pa. quickly responded to the threat by proposing elimination of BPA from key consumer products.

States Douse Ubiquitous Flame Retardants: Polybrominated diphenyl ethers or PBDEs are a type of chemical flame retardant used in a wide array of household products, including fabrics, furniture, and consumer electronics. PBDEs are associated with adverse effects on neurodevelopment, reproductive health, and endocrine function. PBDEs are similar to PCPs. They are persistent organic pollutants that bioaccumulate in the environment, in the food chain and in human tissue. Their presence in human breast milk has been skyrocketing in recent years. Since safer alternatives are available, nearly a dozen states have restricted the use of certain PBDEs.

Massachusetts to Require the Use of Safer Alternatives: Mass. is taking an innovative and more comprehensive approach to the problem. Pending legislation in that state will target 10 known toxins and require the removal of toxic chemicals from products when safer chemicals or processes exist. This precautionary approach could also face trade challenge if, in choosing a safer alternative, Mass. inadvertently favors a similar or “like” product from one WTO member country over another.

How a WTO challenge of a U.S. state or federal law would work:

- The other 152 WTO signatory countries are empowered to challenge nonconforming federal and state policies as GATS violations before trade tribunals in a binding dispute resolution system.
 - State government officials have no standing before these tribunals and thus must rely on federal officials to defend a challenged policy.
 - The tribunals are staffed by trade officials who are empowered to judge if state policy violates WTO requirements.
 - Policies judged to violate the rules must be changed, or trade sanctions can be imposed.
 - The federal government is obliged to use all constitutionally available powers – for instance preemptive legislation, lawsuits and cutting off funding – to force state and local governments to comply with trade tribunal rulings.
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Get plugged into a network of state leaders working on these issues! Join our working group of state legislators committed to improving U.S. trade policy.

