

Oral comments at public hearing on the Transatlantic Trade and Investment Partnership (TTIP)

May 29, 2013

Thank you. My name is Baskut Tuncak, an attorney with the Center for International Environmental Law (CIEL), based here in Washington DC. Established in 1989, CIEL is a nonprofit organization that uses the power of law to protect the environment, promote human rights and ensure a just and sustainable society. CIEL has been engaged actively on issues relating to trade and the environment for nearly two decades. CIEL appreciates the opportunity to comment on the proposed Transatlantic Trade and Investment Partnership (TTIP) at this stage.

As mentioned in our submission, CIEL endorses and adopts by reference the comments submitted by the Sierra Club in this docket. Without taking further time to re-state our written comments provided on May 10, 2013 together with ClientEarth, CIEL wishes to address certain issues in other submissions that relate to the regulation of the chemical industry, transparency, and public participation.

My comments today are directed towards why calls for “enhanced regulatory cooperation” on chemicals regulation between the EU and US are of concern to the public and U.S. government.

By way of background, since the turn of the century, the European Union has taken substantial but necessary steps towards ensuring that chemicals are safe for their intended use. In contrast, the U.S. EPA remains hobbled by what the Government Accountability Office refers to as a “high-risk” piece of legislation, the 1976 Toxic Substances Control Act (TSCA). Fundamental flaws of TSCA include: presuming the safety of over 60,000 existing chemicals in the 1970s, placing the burden of proving that a chemical is not safe on the government, not requiring a safety determination of new chemicals entering the market, weak provisions to ensure the legitimacy of claims of confidential business information, and more. While the EU’s previous laws and policies shared these flaws for many years, REACH is a response to these fundamental flaws.

Elements of the EU’s flagship regulation for industrial chemicals, REACH, enacted in 2006, have quickly spread to at least ten industrialized countries and countries with economies in transition, mostly in Asia, including countries that are the biggest competitors of both the EU and United States in chemical manufacturing. In the case of Korea’s recently enacted version of REACH, or K-REACH, provisions of the U.S.-Korea FTA were used to seek revisions to the proposed Korean law, such as an increase in the *de minimis* production volume exclusion from 0.5 tonnes to 1.0 tonnes, a potential impediment to accessing information about speciality chemicals, such as manufactured nanomaterials, that may be manufactured in commercially significant volumes while still falling below these tonnage requirements.

It is worth noting that France’s ban on manufacturing, sale and import of asbestos was upheld by the WTO’s Appellate Body under Article XX(b) of the GATT, which reiterated that WTO Members have the right to determine their own levels of health protection.

I will focus on a few, key differences that further illuminate the differences between U.S. and EU approaches to chemical regulation.

Hazard vs. Risk

A fundamental difference between EU and U.S. approaches is the role of chemical hazards v. risk in regulatory decision-making. A chemical's risk is a function of its intrinsic hazards and likelihood of exposure. The EU's approach has been to require the chemical industry to submit basic information about a chemical's intrinsic hazards during Registration depending on production volume, to Evaluate the degree to which these hazards are of concern, and then to formulate risk reduction measures on chemicals that raise sufficient concern during Authorization.

At present, the European Chemicals Agency lists 138 substances that it considers to be of very high concern based on intrinsic hazards, in what is referred to as the "candidate list." A 2001 'white paper' by the European Commission calculated that 1,400 of approximately 30,000 chemicals subject to REACH may eventually be on the 'candidate list' when information is provided on the tens of thousands of chemicals that were presumed to be safe in the 1970s.

According to the European Commission's mandated assessment of the impact of REACH on innovation, this hazard-based approach to listing of substances of very high concern in the candidate list is "*the* driver for change at the present." In other words, the hazard-based approach in REACH is driving innovation away from the status quo mix of existing chemicals, and is not an impediment to innovation.

By contrast, the U.S. has taken a risk-based approach, which requires projections for exposure level and other socio-economic considerations to be taken into account before chemicals are restricted. According to the GAO's 2009 report, this has resulted in the regulation of only *five* existing chemicals under TSCA since 1976, from a universe of over 60,000 existing chemicals, many of which were incorrectly presumed to be safe for human health and environment when TSCA was enacted. In noting discrepancies between EU and US approaches, the American Chemistry Council (ACC) states in its submission that they identified thirteen chemicals that overlap between the EU's candidate list and the U.S. EPA's work plan on existing chemicals – thirteen out of 138 substances of very high concern today, and possibly over 1,400 in the coming years.

Efforts for "scientific cooperation" or "cooperation in prioritization" should be examined with a view to whether increasing efficiency undermines continued progress on efforts to transition away from the status quo mix of chemicals in commerce, towards safer alternatives with low costs for governments and individuals, as well as downstream users of chemicals. Indeed, measures that continue to be taken by the EU are beneficial to Americans to the extent that they reduce or eliminate the use of and exposure to toxic chemicals, such as persistent, bioaccumulative and toxic chemicals that travel long-distances from where they are used, eventually resulting extremely high and disproportionate levels of contamination of people and the environment in Alaska.

Economic impacts of chemical regulation

Regarding the impact of chemicals regulation on trade, during the debate over REACH, estimates were made by the American chemical industry about the potential impacts of this regulation on competitiveness, jobs, innovation and the overall American economy. Although the actual impact of REACH is difficult to estimate, it is now clear that these estimates were overstated. Potential economic benefits of “regulatory cooperation” should be treated with well-warranted scepticism given the track records of these estimates.

CIEL’s recent report, *Driving Innovation*, shows that stronger laws to protect people and the environment from certain chemicals of concern have in fact accelerated innovation in the chemical sector, and sent innovative efforts in a safer direction.

Moreover, since the enactment of REACH, both the European and American chemical industries have steadily expanded. ACC’s own submission shows that U.S. exports grew steadily at approximately 18 % from 2003 through 2012, with an understandable decrease during the global economic downturn in 2009. Similar growth is recorded for the European industry. The OECD’s economic projections estimate continued expansion and growth of the American and European chemical industry, over 20%, for the next several decades.

Regardless of any potential cost savings from regulatory cooperation, these savings pale in comparison to the externalized costs of chemical pollution on the public. According to reports by the UN Environment Program and experts at the World Health Organization, toxic chemicals exert billions in externalized costs on governments and the public at large. For example, the cost of late action on PCBs alone in just Europe is estimated to be over 15 billion USD. By contrast, the total costs of the EU’s REACH regulation on the chemical industry and downstream users were estimated to be EUR 2.8-5.2 billion over 15 years. The costs of REACH represent an even smaller fraction of the 90 billion in cost savings the law generated due to reductions in respiratory and dermal illnesses.

Given the profound implications of chemicals on public health and associated externalized costs, negotiations should ensure that both the EU and US retains the right to determine their own levels of health protection from toxic chemicals.

Confidential Business Information

Intellectual property provisions of trade agreements continue to be of substantial concern. When appropriately balanced against public-interest considerations, intellectual property protection can encourage innovation by leveraging additional investment and rewarding inventors for their investment. However, the balance between public and private benefits has shifted steadily and undeterred towards private benefit at the expense of the public good.

Trade secrets and confidential business information raise considerable public-interest concerns. Unlike patents, trade secrets and CBI are obviously not publicly available and not time-limited, raising considerable concerns for the development of safer alternatives to toxic chemicals. The calls by certain

companies and trade associations to include stronger protections for trade secrets in TTIP would negatively impact innovation and impair the protection of people and the environment from toxic chemicals. Respective agencies in the EU and U.S. should be able to share all relevant information to aid decision-making, but this should not come at the cost of impaired access by chemical users and consumers to health and safety information about chemicals.

Transparency & Public Participation

To conclude, we would like to offer some comments on the process moving forward. Recent trade negotiations by both the United States and the EU with other countries or regions have been conducted in a manner that does not satisfy the requirements of transparency in a constitutional democracy, despite profound implications for public health, well-being and the environment. Negotiations between the United States and the EU should demonstrate a clear commitment to public participation and should be conducted in an open, transparent and participatory manner. Specifically, the United States and the EU should commit to broad public access to negotiating documents and positions, to facilitate informed public debate regarding the negotiations and any resulting agreement.

While a new reform proposal was recently introduced in the U.S. Senate, previous efforts to reform U.S. chemical laws to be more in-line with the basic principles of REACH have been stymied by industry opposition. This comes despite this “high-risk” finding by GAO and over 70 % of republican and democratic voters supporting stronger measures to ensure safer chemicals and products free of toxic substances.

CIEL and our partners look forward to working with USTR in an open, transparent and participatory manner through the process. Thank you, and I look forward to your questions.