A Compliance Check of the European Parliament's TTIP Resolution

Public health, environment and democracy at risk

A preliminary analysis by the Center for International Environmental Law (CIEL), ClientEarth and the Health and Environment Alliance (HEAL) published on 7 July 2016

Introduction

In a Resolution adopted in July 2015, the European Parliament (EU Parliament) made explicit recommendations to European Commission (EU Commission) trade negotiators to ensure that negotiations on the Transatlantic Trade and Investment Partnership (TTIP) did not undermine the ability of European Member states to regulate in the public interest.[1] The present analysis examines the conduct of the negotiations in the ensuing year to determine whether and to what extent the EU Commission has responded to the Parliament's recommendations, particularly with respect to European Union (EU) environmental health policy and democracy.

This compliance assessment is based on the latest, publicly available documents. In light of ongoing limitations on public access to negotiating positions and proposals, however, this assessment must be considered preliminary in nature. A full assessment would necessitate the comprehensive release of negotiating texts, and the review of those texts in light of the recent reforms to the United States' decades old Toxic Substances Control Act (TSCA) and the systemic uncertainties, engendered by the recent Brexit referendum in the United Kingdom.

Our analysis concludes that the EU Commission has failed to follow the EU Parliament's recommendations. Specifically, we find that the EU Commission has failed to abide the Parliament's recommendations (1) not to negotiate in areas where the EU and the US have very different rules or to allow regulatory cooperation to affect standards that have yet to be set in such areas; (2) to prevent TTIP from affecting the EU regulatory process; and (3) to meaningfully reform the investor-state dispute settlement (ISDS) mechanism.

[1] European Parliament (July 2015) European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN

Summary Table

Point	EU Parliament's Recommendation in the TTIP Resolution	Preliminary compliance check[2]
Point 2(c)(i)	The EU Parliament has called on the EU Commission to ensure that regulatory cooperation in TTIP will not jeopardise *"the highest levels of protection of health and safety in line with the precautionary principle laid down in Article 191 [of the Treaty on the Functioning of the EU], consumer, labour environmental and animal welfare legislation"* and "*will not affect standards that have yet to be set in areas where the legislation or the standards are very different in the US as compared with the EU, such as, for example, the implementation of existing (framework) legislation (e.g. REACH), or the adoption of new laws (e.g. cloning), or future definitions affecting the level of protection (e.g. endocrine disrupting chemicals)".*	
Point 2(c)(iii)	The EU Parliament has called on the EU Commission "*to recognise that, where the EU and the US have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, and therefore not to negotiate on these issues*".	
Point 2(c)(v)	The EU Parliament has called on the EU Commission "*to improve the adoption and implementation of international instruments, whilst respecting the subsidiarity principle*".	
Point 2(c)(ix)	The EU Parliament has called on the EU Commission "*to fully respect the established regulatory systems on both sides of the Atlantic, as well as the European Parliament's role within the EU's decision-making process and its democratic scrutiny over EU regulatory processes when creating the framework for future cooperation while at the same time ensuring the utmost transparency and being vigilant about having a balanced involvement of stakeholders within the consultations included in the development of a regulatory proposal and not do delay the European legislative process; […] to also monitor that [the Regulatory Cooperation Body] fully preserves the capacity of national, regional and local authorities to legislate their own policies, in particular social and environmental policies*".	
Point 2(d)(xv)	The EU Parliament has called on the EU Commission "*to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives*".	

[2] The 'Failed' stamp is under a Creative Commons licence (Flickr). Connor Millin (December 2008) "failed_stamp" https://www.flickr.com/photos/connormillin/3135102614/

1. Recommendation: Do not negotiate on areas where the EU and the US have very different rules and do not allow regulatory cooperation to affect standards that have yet to be set in such areas

In the TTIP Resolution, the EU Parliament called on the EU Commission not to negotiate on areas where the EU and the US have very different rules and not to allow regulatory cooperation to affect standards that have yet to be set in such areas. Despite this clear guidance, the latest documents available indicate that the EU Commission continues to negotiate on areas where standards vary greatly across the Atlantic, disregarding the EU Parliament recommendation.

A) The EU Commission proposals will affect the adoption of future standards in areas where EU and US standards differ greatly

The EU Parliament has also called on negotiators to ensure that regulatory cooperation in TTIP "*will not affect standards that have yet to be set in areas where the legislation or the standards are very different in the US as compared with the EU, such as, for example, the implementation of existing (framework) legislation (e.g. REACH), or the adoption of new laws (e.g. cloning), or future definitions affecting the level of protection (e.g. endocrine disrupting chemicals)"* (Point 2(c)(i) TTIP Resolution).

Standards have yet to be set under critical legislation in the EU. For example, the EU has not yet fully adopted or implemented the criteria for endocrine-disrupting chemicals; and the adaptation of REACH to the specificities of nanomaterials is still pending. Similarly, the REACH candidate list for Substances of Very High Concern, which will determine the standard of protection for EU consumers and workers from such chemicals, is still being populated.

However, the implementation of EU chemicals and pesticides legislation has not been exempted from the "Good Regulatory Practices" and "Regulatory Cooperation" chapter proposals. Future legislation — including implementing legislation — will therefore be subject to trade impact assessments, will be brought to the attention of the US Government at an early stage, and will be subject to prospective and retrospective stakeholder consultations (see Section 3 below). Therefore, without an express carve-out for chemicals and pesticides legislation, these standards will clearly be affected by TTIP.

Indeed, the EU Commission has proposed that trans-Atlantic regulatory cooperation include regulatory areas such as the implementation of REACH and pending EU chemical laws. In its position paper on chemicals,[3] the EU Commission proposes the establishment of a "*mechanism for mutual consultation on prioritisation of chemicals for assessment/risk management and for cooperation in the development of assessment methodologies*" (Point 3.1). The EU Commission also gives endocrine disruptors, nanomaterials, and mixture toxicity as examples of "*current topics of interest*" and claims that "*[c]o-operation on new and emerging issues in a forward-looking manner has the greatest potential to avoid trade irritants in the future*" (Point 2.3).

[3] EU Commission (Updated May 2014) "EU Position on Chemicals" http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

B) The EU Commission is negotiating on areas where the EU and US have very different rules

Members of the EU Parliament (MEPs) called for negotiators "*to recognise that, where the EU and the US have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, and therefore not to negotiate on these issues*" (Point 2(c)(iii) TTIP Resolution).

EU and US rules are, for example, "very different" in their approach to regulating cancer-causing chemicals. The EU Regulations for Plant Protection Products (Regulation EC 1107/2009), Biocidal Products (Regulation EU 528/2012) and Cosmetic Products (Regulation EC 1223/2009) prohibit the use of carcinogenic, mutagenic, or reprotoxic (CMRs) chemicals. By contrast, the US counterpart legislation does not prohibit CMRs. Neither the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), nor the Federal Food, Drug, and Cosmetic Act (FFDCA) expressly prohibit the use of CMRs as a class in those products.

Previous research clearly establishes that standards between the US and EU are indeed "*very different*" in areas such as pesticides[4] and cosmetic products[5], and provide very different levels of protection for human health, the environment, and labor standards. For example, 82 pesticides that are banned in the EU are allowed in the US.[6] Similarly, the US has banned only eleven chemicals from use in cosmetics, whereas the EU has banned over 1,300.[7,8]

Nonetheless, the latest negotiating documents accessible to the public indicate that the EU and US continue to negotiate on regulatory cooperation in the areas of pesticides, chemicals, and cosmetics.[9,10] This appears to directly contradict the EU Parliament recommendations in Point 2(c)(iii).

C) The EU Commission has already affected current standards of protection during the TTIP negotiations

In addition to the recommendation that TTIP not be permitted to affect future standards in areas where rules between the EU and the US are very different, the EU Parliament has also recommended that regulatory cooperation under TTIP not jeopardise *"the highest levels of protection of health and safety in line with the precautionary principle laid down in Article 191*

---

4 CIEL (January 2015) "Lowest Common Denominator: How the proposed EU-US threatens to lower standards of protection from toxic pesticides" http://www.ciel.org/wp-content/uploads/2015/06/LCD_TTIP_Jan2015.pdf

5 BEUC (August 2014) "Cosmetic products: What TTIP will not make up" http://www.beuc.eu/blog/325/

6 CIEL (January 2015) "Lowest Common Denominator: How the proposed EU-US threatens to lower standards of protection from toxic pesticides" http://www.ciel.org/wp-content/uploads/2015/06/LCD_TTIP_Jan2015.pdf

7 Some of these chemicals are no longer used in cosmetics because of voluntary initiatives.

8 European Parliament (November 2014) ENVI Relevant Legislative Areas of the EU-US Trade and Investment Partnership Negotiations (TTIP) http://www.europarl.europa.eu/RegData/etudes/STUD/2014/536293/IPOL_STU%282014%29536293_EN.pdf

9 EU Commission (April 2016) "Report of the 13th Round of Negotiations for the Transatlantic Trade and Investment Partnership" http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154581.pdf. In this report, the EU Commission also announced it will table a text proposal for a Chemicals Sector Annex for the next negotiating round.

10 Greenpeace leak: EU Commission (March 2016) "Note – Tactical State of Play of the TTIP Negotiations" https://www.ttip-leaks.org/pandaros/doc16.pdf

[of the Treaty on the Functioning of the EU], consumer, labour environmental and animal welfare legislation" (Point 2(c)(i) TTIP Resolution).

The EU Commission published a proposal in March 2016 stipulating that regulatory cooperation activities "*shall aim at improving, and not reduce, undermine or otherwise compromise the level of protection in public policy areas [...] as considered appropriate by either Party*" (Article x1(2) EU Regulatory Cooperation proposal[11]). The EU Commission's proposal also indirectly references the precautionary principle in a footnoted reference to the Treaty on the Functioning of the EU (Article x1(3)(c), footnote 2, EU Regulatory Cooperation proposal).

These provisions continue, however, to be undermined by the EU Commission's textual proposals within specific chapters, including proposed text relating to the WTO SPS Agreement (Article 2(3), Article 3), the Codex Alimentarius (Article 7), and equivalence (Article 9).

The EU Commission's proposal on Sanitary and Phytosanitary (SPS) measures[12] affirms the intention to further the implementation of the WTO SPS Agreement[13] (Article 2(3), Article 3, EU SPS proposal) — an agreement that supports a risk-based approach to the regulation of pesticides (Article 5, WTO SPS Agreement). In contrast, the Plant Protection Products Regulation (PPPR) and Biocide Products Regulation (BPR) in the EU have established a hazard-based approach, which is in line with the EU precautionary principle defined in Article 191 of the Treaty on the Functioning of the EU. Although this provision would not, by itself, bar the EU from pursuing a hazard-based approach[14] (in fact both the PPPR and BPR were adopted while the EU was already party to the WTO SPS agreement), it is emblematic of the EU Commission's ongoing and active efforts to undermine the hazard-based approach and push the EU onto a new, fundamentally different and far less protective regulatory course (see below).

Article 7 of the EU proposal on Sanitary and Phytosanitary (SPS) measures stipulates that the EU and the US "*shall ensure that tolerances and maximum residue levels adopted by the Codex Alimentarius Commission after the entry into force of this Agreement will be applied by each Party without undue delay unless the importing Party had signalled a reservation in the Codex Alimentarius Commission. Such tolerances and maximum residue levels, shall apply between the Parties within 12 months after their adoption*."

As recognised by the US Ambassador to the EU, many of the maximum residue levels in the EU are lower than those in the Codex Alimentarius (which are developed pursuant to a risk based approach).[15] For example, Codex Alimentarius levels for carbaryl – a known carcinogen, [16] developmental toxin,[17] and potential endocrine disruptor[18] are much less protective of human

---

11 EU Commission (March 2016) EU proposal for 'Regulatory Cooperation' http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf

12 EU Commission (January 2015) EU proposal for 'Sanitary and Phytosanitary Measures (SPS)" http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf

13 The World Trade Organization (1994) "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)" https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

14 Article 3(3) of WTO SPS Agreement. The World Trade Organization (1994) "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)" https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

15 Leak by Politico Europe: EU Commission (May 2016) "EU-US agricultural trade and TTIP impact" http://www.politico.eu/wp-content/uploads/2016/05/2016-06-27-TTIP-agriculture-US-Amb-Gardner-letter-to-MSs-FINAL2.pdf

16 State of California Environmental Protection Agency (May 2016) "Chemicals Known to the State to Cause Cancer or Reproductive Toxicity" http://oehha.ca.gov/media/downloads/proposition-65//p65single05202016.pdf

17 State of California Environmental Protection Agency (May 2016) "Chemicals Known to the State to Cause Cancer or Reproductive Toxicity" http://oehha.ca.gov/media/downloads/proposition-65//p65single05202016.pdf

18 The Endocrine Disruption Exchange (May 2011) TEDX List of Potential Endocrine Disruptors http://endocrinedisruption.org/endocrine-disruption/tedx-list-of-potential-endocrine-

health and the environment compared to the levels established in the EU. In the EU, the limits of this pesticide in, for example, tomatoes, asparagus, and table olives is set to 0.01 mg/kg, while the Codex limits are 500, 1500 and 3000 times higher than the EU level respectively.[19, 20] Again, this proposal, by itself, would not prevent the EU from taking a reservation on new Codex value less protective than its own. However, the inclusion of this provision in the EU proposal, together with continuing efforts by the EU Commission to lower standards to address long-standing and loudly voiced US concerns (see below) sends a worrying political signal for the protection of human health and the environment.

This is clearly evidenced in a leaked internal EU Commission document[21] on the impact of TTIP on EU-US agricultural trade, which lists "recent steps [the EU has] taken to solve SPS concerns." Among other such steps touted to EU Commission's US counterparts, the EU "[a]pproved 17 GMOs in 2015 as a package", "[e]xtended the provisional [maximum residue level] for [the chemical] fosetyl in almonds [...] to allow US almonds to continue to enter EU market", and "[a]pproved an import tolerance for residues of [the potential groundwater contaminant[22]] Chlorothalonil in cranberries." These are in direct contradiction to the EU Parliament recommendations in Points 2(c)(i) and (iii).

Article 9 of the EU SPS textual proposal does state that "*The importing Party shall accept sanitary and phytosanitary measures of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection*." As discussed above, however, the US has taken a less protective approach to regulating pesticides compared to the EU — one based on risk, rather than hazard.[23] In fact, US Government officials have systematically objected to the EU's precautionary principle, objections that have been raised on the basis that it is protectionist and "non-scientific".[24]

This fundamental difference in the regulatory burden of proof, viewed in light of the EU Commission's recent 'equivalence' concessions, suggests that the equivalence provisions in Article 9 of the EU SPS proposal, while ostensibly requiring objective evidence that US standards meet EU levels of protection, could in reality result in products with unacceptable levels of contaminants entering EU markets.

---

disruptors/chemicalsearch?sname=carbaryl&x=0&y=0&action=search&sall=1&searchfor=any&scas=&searchcats=all (date chemical added: May 2011, accessed in June 2016)

19 EU Commission (June 2016) "EU Pesticides database: Current MRL values" http://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/public/?event=pesticide.residue.selection&language=EN (database updated in June 2016, accessed in June 2016)

20 Food and Agriculture Organization of the United Nations (July 2015) "Codex Pesticides Residues in Food Online Database" http://www.fao.org/fao-who-codexalimentarius/standards/pestres/en/ (database updated in July 2015, accessed in June 2016)

21 Leak by Politico Europe: EU Commission (May 2016) "EU-US agricultural trade and TTIP impact" http://www.politico.eu/wp-content/uploads/2016/05/2016-06-27-TTIP-agriculture-US-Amb-Gardner-letter-to-MSs-FINAL2.pdf

22 California Department of Pesticide Regulation (June 2016) "California Code of Regulations (Title 3. Food and Agriculture) Division 6. Pesticides and Pest Control Operations" http://www.cdpr.ca.gov/docs/legbills/calcode/040101.htm

23 CIEL (January 2015) "Lowest Common Denominator: How the proposed EU-US threatens to lower standards of protection from toxic pesticides" http://www.ciel.org/wp-content/uploads/2015/06/LCD_TTIP_Jan2015.pdf

24 US officials and industry have attacked the precautionary principle for decades. See, New York Times (May 2003) "The Bush administration believes the precautionary principle is an unjustified constraint on business and does not even recognise the existence of the doctrine." http://www.nytimes.com/2003/05/18/weekinreview/precaution-is-for-europeans.html and EurActive "US wants 'science' to settle GMO debate in trade deal with EU" (June 2014) http://www.euractiv.com/section/science-policymaking/news/us-wants-science-to-settle-gmo-debate-in-trade-deal-with-eu/ Inside US Trade (June 2016) "Farm Bureau On TTIP 'Imperative': A 'Single, Comprehensive Agreement'" https://insidetrade.com/trade/farm-bureau-onttip-%E2%80%98imperative%E2%80%99-%E2%80%98single-comprehensive-agreement%E2%80%99

The text of EU proposals for the SPS chapter must thus be analysed in light of the broader evidence of Commission intent as reflected in its recent regulatory activities. Still more evidence of this intent emerges from the EU Commission's activities in relation to the regulation of pesticides. In June 2016, the EU Commission released long-delayed proposals for defining criteria to identify endocrine disrupting chemicals, which have been harshly criticised by public interest organizations,[25,26] independent scientists[27] and Member States[28]. In particular, stakeholders argue that the EU Commission's approach is 1) not based on the precautionary principle because it requires a disproportionally high level of evidence to identify a substance as an endocrine disruptor; and 2) allows for derogations based on 'negligible risk' rather than 'negligible exposure', resulting in a lower levels of protection against endocrine disruptors in Europe. In so doing, it undermines the aims of the pesticide and biocide regulations, which provide the legal basis for the EU Commission's proposal, by deliberately excluding potential endocrine disruptors from the scope of the regulations.

The EU has been subjected to intense lobbying and opposition from the US Government (and industry representatives) on endocrine disrupting chemicals.[29] In January 2015, for example, the US Government insisted that the EU "ensur[e] that global trade is not unnecessarily disrupted" by the EU Commission's approach to these chemicals, and cautioned that the EU taking a different approach than the US would be contrary to the "primary objective" of TTIP.[30] In addition, the US Trade Representative has identified the EU attempt to regulate endocrine disruptors as a trade barrier in both of its 2015 and 2016 annual reports.[31,32]

Although there is no direct evidence that the EU Commission's flawed proposal for EDC criteria is the direct consequence of US interference, the examples above support an interpretation of the EU Commission's textual proposals indicating that even before its adoption, TTIP is being used to justify undermining efforts to take a strict approach to regulate endocrine-disrupting chemicals — including pesticides[33] — and to undermine the precautionary approach to human health and environmental protections.

---

25 EDC-Free Europe (June 2016) "Commission's EDC criteria proposal: More humans will have to be harmed before action is taken" http://env-health.org/IMG/pdf/15062016_edc_free_response_final.pdf

26 ClientEarth (June 2016) "Commission's endocrine disruptor definition only protects chemicals industry" http://www.clientearth.org/commission-definition-endocrine-disruptors-protects-chemicals-industry/

27 The Endocrine Society (June 2016) "EU Commission's Overreaching Decision Fails to Protect Public Health" https://www.endocrine.org/news-room/current-press-releases/european-commissions-overreaching-decision-fails-to-protect-public-health

28 Environmental ministers Ségolène Royal (France), Esben Lunde Larsen (Denmark) and Karolina Skog (Sweden) (June 2016) Joint open letter to EU Health Commissioners Vytenis Andriukaitis http://www.regeringen.se/globalassets/regeringen/dokument/miljo--och-energidepartementet/pdf/vytenisandriukaitis.pdf

29 Corporate Europe Observatory (May 2015) "A Toxic Affair: How the chemical lobby blocked action on hormone disrupting chemicals" http://corporateeurope.org/sites/default/files/toxic_lobby_edc.pdf

30 US Government (January 2015) "European Commission's Public Consultation on Defining Criteria for Identifying Endocrine Disruptors (EDs) in the Context of the Implementation of the Plant Protection Product Regulation and Biocidal Products Regulation: Comments of the U.S. Government" http://www.usda-eu.org/wp-content/uploads/2015/01/United-States-Submission-Endocrine-Disrupters-2015-01-20.pdf

31 Office of the u Trade Representative (April 2015) "2016 National Trade Estimate Report on Foreign Trade Barriers" https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf

32 Office of the United States Trade Representative (March 2016) "2016 National Trade Estimate Report on Foreign Trade Barriers" https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf

33 CIEL (January 2015) "Lowest Common Denominator: How the proposed EU-US threatens to lower standards of protection from toxic pesticides" http://www.ciel.org/wp-content/uploads/2015/06/LCD_TTIP_Jan2015.pdf

2. Recommendation: Prevent TTIP from affecting the EU regulatory process

The EU Parliament has called on the EU Commission "*to fully respect the established regulatory systems on both sides of the Atlantic, as well as the European Parliament's role within the EU's decision-making process and its democratic scrutiny over EU regulatory processes when creating the framework for future cooperation while at the same time ensuring the utmost transparency and being vigilant about having a balanced involvement of stakeholders within the consultations included in the development of a regulatory proposal and not do delay the European legislative process; […] to also monitor that [the Regulatory Cooperation Body] fully preserves the capacity of national, regional and local authorities to legislate their own policies, in particular social and environmental policies*" (Point 2(c)(ix) TTIP Resolution). The EU Commission, however, has failed to implement these recommendations.

A) The EU Commission is infringing on the EU Parliament's role by granting the US Government an early warning of draft measures and enabling the US Government to propose certain legislation or undermine existing proposals

The EU Commission has proposed in TTIP that *"[w]hen developing new or amending existing regulatory measures which will have or are likely to have an impact on cooperation […] the Parties shall provide each other opportunities for cooperation and information exchange, at the earliest possible stage*" — "*before the Commission adopts a formal position*" (Article x.4(2) EU Regulatory Cooperation proposal) and "*at the stage preceding the regulatory process*" (Article x.5 (4) EU Regulatory Cooperation proposal). This proposal would effectively grant the US Government an early warning and privileged access to incipient EU policy or legislative measures before the formal regulatory process has even begun. While the EU Commission asserts in a footnote that this does "*not imply any commitment to share draft texts before they have been made public under the respective regulatory or administrative procedures*", (Article x.4(2) EU Regulatory Cooperation proposal, footnote 8) this provision would give the EU Commission the legal basis to share draft EU laws with the US Government even before sharing them with the EU Parliament. The EU Commission has further proposed that the EU and the US shall "*share information on planned retrospective evaluations*" (Article 9(2) Good Regulatory Practices).

The EU Commission's text is simultaneously vague and expansive in defining the kind of information to be shared with the US Government at this early stage, specifying only "*any information relevant for this purpose*" (Article x.5 (4) EU Regulatory Cooperation proposal). If the EU Commission shares documents with the US Government for comment before they are made available to the EU Parliament, effectively providing a foreign government the opportunity to request changes to proposed legislation before it is even presented to Parliament, this will clearly modify the established regulatory system and diminish "*the European Parliament's role within the EU's decision-making process and its democratic scrutiny over EU regulatory processes"* (Point 2(c)(ix) TTIP Resolution).

There can be no doubt there will be significant impact should the US Government be allowed early consultation on legislation that would provide a higher level of protection for human health or the environment. The US Government has systematically sided with corporate interests in criticising REACH, the EU's fundamental chemicals regulation at every meeting of the Word Trade Organization's TBT (Technical Barriers to Trade) Committee.[34] Similarly, the US Trade Representative has identified EU efforts to regulate nanomaterials as a trade barrier in both its 2015 and 2016 annual reports.[35,36] Most recently, the US Government lobbied the EU to re-approve the pesticide glyphosate,[37] which the International Agency for Research on Cancer (IARC) classified as a probable carcinogen, and it has repeatedly tried to lower the scope of regulation addressing the specific risks of endocrine disrupting chemicals (see above).

The EU Commission's proposals would also facilitate the US government's ability to initiate regulatory compatibility through, among other things, mutual recognition and harmonisation (Article x.4 (2) and x.5 (1) EU Regulatory Cooperation proposal and Article 4.2 EU TBT proposal[38]). It would also allow stakeholders to submit "*sufficiently substantiated proposals for regulatory measures*" (Article x.5(2) EU Regulatory Cooperation proposal) as well as suggestions to revise the existing regulatory frameworks (Article 7, EU Good Regulatory Practices proposal).

These far-reaching participatory rights in the EU regulatory process would grant the US Government comparable rights to initiate legislation in the EU as the EU Parliament. Article 225 of the Treaty on the Functioning of the EU gives the EU Parliament the right to request that the EU Commission submit a proposal for EU acts and the EU Commission is only required to inform the EU Parliament of its reasons if it does not do so. While the US Government's powers will be more limited in scope, their powers will allow the US government and stakeholders to take regulatory initiatives in key areas such as chemicals, pesticides, and cosmetics legislation. As TTIP would codify the participatory rights of the US Government in the EU regulatory process, this would go against the EU Parliament's recommendation in Point 2(c)(ix) of the TTIP Resolution.

Moreover, public interest organisations have fewer resources to engage in these exercises than their corporate counterparts, and their capacity to contribute and influence the regulatory dialogues and processes is limited compared to private and corporate interests.[39,40] These new opportunities for stakeholder engagement threaten to further tilt the balance of stakeholder engagement power in favour of private actors with corporate (rather than public) interests in contradiction to the Parliament's recommendation to be "*vigilant about having a balanced*

---

34 ChemTrust (January 2015) "Written evidence submitted by CHEM Trust to the UK House of Commons Environmental Audit Committee Enquiry on the Transatlantic Trade and Investment Partnership" http://www.chemtrust.org.uk/wp-content/uploads/Final-CHEM-Trust-TTIP-EAC-evidence-Jan15.pdf

35 Office of the United States Trade Representative (April 2015) "2016 National Trade Estimate Report on Foreign Trade Barriers" https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf

36 Office of the United States Trade Representative (March 2016) "2016 National Trade Estimate Report on Foreign Trade Barriers" https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf

37 POLITICO Europe (May 2016) "POLITICO Pro's Morning Agri and Food, presented by ECPA: Higher milk ceilings — Crisis solutions" (Newsletter sent to subscribers on May 27, 2016 at 7:59:12 AM GMT+3)

38 EU Commission (January 2015) EU proposal for 'Technical Barriers to Trade (TBT)' http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153025.pdf

39 Alliance for Lobbying Transparency and Ethics Regulation in the EU (ALTER-EU) (April 2010) "Bursting the Brussels Bubble" https://www.lobbycontrol.de/wp-content/uploads/bursting-the-brussels-bubble.pdf

40 LobbyFacts (May 2016) "Corporate lobbies are biggest EU lobby spenders, but dodgy data persists" http://lobbyfacts.eu/news/01-05-2016/corporate-lobbies-are-biggest-eu-lobby-spenders-dodgy-data-persists

involvement of stakeholders within the consultations included in the development of a regulatory proposal" (Point 2 (c)(ix) TTIP Resolution).

B) EU Commission proposals will delay the adoption of more protective human health and environmental legislation

In its resolution, the EU Parliament called on the EU Commission "*not to delay the European legislative process*" (Point 2(c)(ix) TTIP Resolution).

The latest TTIP proposal stipulates "*the regulatory authority shall, among other aspects, assess how the options under consideration […] have an impact on international trade or investment*" (Article 8(4) of the EU Good Regulatory Practices proposal).[41] There is also an extensive stakeholder consultation process, described above, that will result in additional delays before rules can be finalised (Article 6). These provisions are a codification of some of the most controversial elements of the so-called "Better Regulation" agenda, which has already been identified as a cause for delays in adopting regulatory measures protective of human health and the environment.[42]

The long delays in adopting identification criteria for endocrine disruptors and the failure to adapt the REACH registration requirements to the specificities of nanomaterials in time to meet the 2018 registration deadline were both caused by decisions to conduct lengthy impact assessments and public consultations. In the case of endocrine disrupting chemicals, the delay led he EU General Court's to rule that the EU Commission had breached its legal obligations.[43]

Article 1(2) does assert the Good Regulatory Practices chapter shall not affect the right to "*adopt, maintain and apply measures without delay in accordance with deadlines under its respective regulatory or administrative procedures*". However, experience to date with the better regulation agenda, including the EU Commission's reaction to the ruling of the EU General court, suggests this provision appears largely unenforceable. Furthermore, limited as it is to existing deadlines, the provision has no bearing on emerging public health or environmental threats not already subject to regulatory authority.[44]

Any law that seeks to limit the use of a toxic chemical will inevitably have an impact on international trade. The impact of such laws on international trade or investment will be greatest in areas where there are high levels of variation between EU and US legislation and standards, such as the chemicals sector. As a result, the EU's ability to adopt and implement regulation will be affected and delayed significantly in these areas. The EU Commission proposals under Articles 8(4) of the Good Regulatory Practices therefore violate the EU Parliament recommendations in that respect.

---

41 EU Commission (March 2016) EU proposal for 'Good Regulatory Practices' http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf

42 Pieter de Pous (January 2016) "Better Regulation: TTIP under the Radar?" http://www.eeb.org/index.cfm/library/better-regulation-ttip-under-the-radar/

43 Court of Justice of the European Union (December 2015) Arrêt du Tribunal http://curia.europa.eu/juris/document/document.jsf?text=&docid=173067&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=72476

3. Recommendation: Substantially reform the investor-state dispute settlement (ISDS) mechanism

The EU Parliament called on the EU Commission to substantially reform the controversial ISDS mechanism, "*to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives*" (Point 2 (d) (xv) TTIP Resolution).

The EU Commission's proposed modified version of ISDS, the "Investment Court System" (ICS) [45] has sought to address some of the key concerns of the EU Parliament, in particular the institution of a new system that includes an appellate mechanism. However, it fails to address the fundamental concerns expressed in the resolution.

A) The EU Commission's ICS proposal does not respect the jurisdiction of courts of the EU and of the Member States

One of the key recommendations made by the EU Parliament is to ensure that "*the jurisdiction of courts of the EU and of the Member States is respected*" (Point 2 (d)(xv)). Unfortunately, the new ICS proposal does not meet this requirement both in legal and political terms.

From a EU legal point of view, all acts of the EU institutions must be compatible with the EU treaties, which constitute the EU's constitutional framework. This requires that international agreements negotiated by the EU Commission, including the TTIP, respect the powers of the EU courts granted in the EU Treaties. Under article 267 Treaty on the Functioning of the EU, the courts of the Member States, when hearing claims by individuals involving questions of EU law, must[46] refer those questions to the European Court of Justice. The European Court of Justice, in turn, has the exclusive jurisdiction to give a definitive interpretation of EU law.

Since ICS tribunals may hear claims by individuals that will require addressing questions of EU law, not involving the European Court of Justice, would violate article 267 Treaty on the Functioning of the EU.[47, 48]

Moreover, the proposal does not respect the jurisdiction of the EU courts more generally, as it does not require the exhaustion of domestic remedies. The ICS proposal merely contains a fork-

---

45 EU Commission (November 2015) EU proposal for 'Investment' http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf

46 For the highest courts in the Member States a preliminary reference is obligatory, for lower courts a preliminary reference is optional.

47 ClientEarth (October 2015) "Legality of investor-state dispute settlement (ISDS) under EU law". http://ttip2016.eu/files/content/docs/Full%20documents/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf

48 Transport & Environment (T&E), European Consumer Organisation (BEUC), Transatlantic Consumer Dialogue (TACD), European Public Health Alliance (EPHA), European Heart Network (EHN), European Association for the Study of the Liver (EASL) and their legal experts (as part of the TTIP Advisory Group work) (November 2015) "Detailed analysis of the Commission ICS proposal" https://www.transportenvironment.org/sites/te/files/2015_11_12_ICS_Annex%201_fullanalysis.pdf

in-the-road clause requiring investors to choose between bringing a claim before national or international courts on the one hand, and the investment tribunals on the other. The US and the EU have developed legal systems that should, at the very least, be presumed to guarantee adequate judicial protection for foreign investors. Only when all domestic remedies have been exhausted or where the investor can clearly demonstrate the inadequacy of the judicial system for its particular case should a foreign investor be able to resort to investor-state dispute settlement. Instead, the EU Commission's proposal appears to presume that domestic legal systems in the EU and the US are structurally inadequate to ensure investors a fair hearing on the merits.

B) The EU Commission's latest ISDS proposal fails to ensure cases are heard by independent judges

The EU Parliament has called on the EU Commission to appoint independent professional judges (Point 2 (d)(xv)). While the ICS proposal makes incremental progress relative to other ISDS provisions, i.e. through random case-selection on the basis of a permanent roster of judges appointed by the Parties, it nonetheless fails to clearly and effectively guarantee the independence of the ICS judges.[49] Indeed, this lack of independence of ICS judges has been raised not only by civil society, but by the European Association of Judges[50] and the German Association of Judges. [51]

There are three aspects of the proposal that raise serious concerns about the judicial independence of the ICS:

- Tribunal members are (still) not financially independent and remain incentivised to hear cases that can only be brought by private investors.
- The selection process of the roster of Tribunal Members is opaque and lacks concrete rules on appointments or scrutiny thereof.
- The system will require tribunal members with insufficient knowledge of domestic law or expertise in public policy fields to interpret complex, sovereign public policy decisions from a narrow trade/investment perspective.[52]

The EU Commission's ICS proposal thus fails to implement the EU Parliament's recommendation for reforming ISDS to ensure that independent judges treat the potential cases, as outlined in Point 2 (d) (xv).

---

[49] Deutscher Richterbund (April 2016) "Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015" http://www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf

[50] Magistrats européens pour la démocratie et les libertés (March 2016) "Big Transatlantic market: Yield and bow down" http://www.medelnet.eu/index.php?option=com_content&view=article&id=242:big-transatlantic-market-yield-and-bow-down&catid=45:an-independent-judiciary&Itemid=61

[51] Deutscher Richterbund (April 2016) "Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015" http://www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf

[52] For a more detailed analysis, see ClientEarth, European Consumer Organisation BEUC, European Environmental Bureau, European Public Health Alliance and Transport and Environment (June 2016) Joint analysis of CETA's Investment Court System (ICS) - Prioritising Private Investment over Public Interest: http://www.documents.clientearth.org/library/download-info/joint-analysis-of-cetas-investment-court-system-ics-prioritising-private-investment-over-public-interest/

C) The EU Commission's latest ICS proposal fails to ensure that private interests cannot undermine public policy objectives

The EU Parliament has called on the EU Commission to ensure that "private interests cannot undermine public policy objectives." In its proposal about ICS, the EU Commission introduced a number of provisions supposed to guarantee the 'right to regulate' (article 2 of section 2 of the proposal). The right to regulate can be understood as defining the balance between the sovereign right of a party to regulate in the public interest and its obligations towards foreign investors. Article 2.2 of the proposal usefully clarifies that the provisions of the proposal shall not be interpreted as commitment from the parties not to change its regulatory framework. However, while Article 2.1 of the proposal reaffirms an existing sovereign right to regulate, it also restricts this right by inserting a necessity condition requiring that the ICS tribunal assess whether contested measures are 'necessary' for the protection of 'legitimate' public interests. As result, the necessity, and thus validity, of any contested measure would be put in the hands of non-democratically selected arbitrator in a non-public forum systematically oriented to favour private interests, effectively restricting the sovereign right to regulate of Member States.

Contrary to public statements made by the parties, these provisions effectively fail to introduce a full carve-out or a binding principle to guide interpretation that would effectively limit claims challenging public policy measures. Such a carve-out could be formulated as follows: "Any measure or action undertaken by a Party that aims or has the effect of contributing to a public interest, such as environmental protection including measures or actions combating climate change, social protection, consumer protection, and health protection, does not constitute a breach of the provisions of this Chapter."

In light of the foregoing, the EU Commission's ICS proposal fails to implement the EU Parliament's recommendation for reforming ISDS to ensure that that private interests cannot undermine public policy objectives, as outlined in Point 2 (d) (xv).

Conclusion

The EU Parliament has called on the EU Commission not to negotiate on issues "*where the EU and the US have very different rules*" and not to allow regulatory cooperation to affect future standards in such areas. Despite this explicit guidance—and clear expression of European public will, the EU Commission has continued to negotiate on regulatory cooperation in the areas of chemicals, pesticides, and cosmetic products. This is particularly worrying because the EU Commission is already lowering current EU standards of protection (such as on limits to pesticide residues in food) in order to remove barriers to trade.

Similarly, the EU Parliament has called on the EU Commission "*to fully respect the established regulatory systems on both sides of the Atlantic*". Nonetheless, the EU Commission is proposing to grant privileged access for the US Government to draft EU measures and has proposed measures that would enable the US Government and corporations to propose certain legislation in the EU on terms broadly similar to the power Parliament itself exercises.

Contrary to Parliamentary recommendations, the EU Commission's latest proposals would codify tools that have already led to delays in introducing legislation that would protect human health and the environment, and they lack a guarantee to ensure that Member States can legislate their own social and environmental policies.

Finally, and fundamentally, the EU Parliament has called on the EU Commission to meaningfully reform the ISDS mechanism. While the EU Commission has proposed to replace ISDS with a newly-fabricated and vaguely-elaborated ICS, this proposal falls far short of the EU Parliament's demands on behalf of the European public. ICS fails to respect the jurisdiction of EU courts and those of its Member States; it fails to ensure that independent judges arbitrate the potential cases; and it fails to ensure that private interests cannot undermine public policy objectives.

For these reasons, we conclude that the EU Commission is disregarding the EU Parliament's 2015 Resolution on TTIP regarding environmental health policy and democracy, in particular as outlined in Points 2(c)(i), (iii), (v), and (ix) and Point 2(d)(xv).

More fundamentally, and more fatally, the EU Commission is disregarding the expressions of public interest and public will embodied in Parliament's recommendations. Absent an immediate and dramatic reversal of course, the EU Commission stands poised to negotiate a proposed TTIP agreement that the EU Parliament, the EU Member States and the European public cannot, should not and almost certainly will not accept.