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TTIP: fast track to deregulation and lower health and safety protection for EU workers

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Aída María Ponce del Castillo

Aída María Ponce del Castillo is a senior researcher and head of the ETUI's working conditions, health and safety unit.

Policy recommendations

The Transatlantic Trade Investment Partnership (TTIP) will negatively impact European regulation and will affect the level of protection provided to citizens and workers by EU fundamental principles and treaties. This Policy Brief focuses specifically on how EU occupational health and safety may be affected by the TTIP; it draws attention to the connections between the TTIP and the REFIT programme and insists on the need to consistently opt for upwards convergence and avoid lowering protection standards. If and when deregulation takes place, appropriate criteria must be used to identify what is to be

regarded as an 'administrative burden'. The recommendations make the case for an exclusion of health and safety aspects from the ISDS jurisdiction and for the need to ensure that member states maintain their ability to enforce their rules and go beyond minimum standards. Ratifying the ILO convention before the agreement is signed, in order to ensure workers' rights, is also recommended. Finally, the Policy Brief concludes that one major aim of the European Commission's REFIT programme is to facilitate adoption of the TTIP, at the expense of the whole EU acquis.

The first part of this Policy Brief shows how the TTIP is being negotiated as a top priority for the EU and explains, with special reference to the occupational safety and health dimension, its connection to the 'better regulation agenda'. The second part looks at how other agreements, such as NAFTA, have negatively impacted occupational safety and health (OSH) policies in their region, notably through the Investor State Dispute Settlement (ISDS) mechanism. Several examples are given of cases where investment treaties have affected workers' rights and it is shown that the different regulatory approaches are mutually incompatible. The third section describes how OSH policies are being affected by REFIT which is presented as an initiative designed to 'make space' into which the TTIP can be fitted; it is thus argued that TTIP and REFIT share a common objective, namely, to place deregulation high on the agenda.

Introduction

Since the early 2000s, the United States and the European Union, highlighting the key role that regulatory cooperation can play in building a strong transatlantic relationship, have stressed the need to promote better regulation, minimize regulatory divergence and facilitate transatlantic commerce. These tenets are now becoming reality through the TTIP, designated by EU Commission President Juncker as one of the Commission's ten key priorities (Juncker 2014).

The focus of the TTIP is the liberalization of trade and investment, and both the European Commission and the USA have decided that what they regard as unnecessary regulations should be eliminated, reduced or prevented. Both sides are in favour of policies marked by '*regulatory coherence*' and '*regulatory cooperation*'. According to the European Commission, 'the aim is a more integrated transatlantic marketplace that respects each side's right to regulate the protection of health, safety and the environment at a level it considers appropriate. (...) The main hurdles to trade lie 'behind the border' in regulations, non-tariff barriers and red tape' (European Commission 2013a).

The danger of an approach aimed at eliminating 'unnecessary' regulation is that important protective measures, if regarded exclusively as 'hurdles', may disappear or be 'eliminated'. This danger is particularly acute in the field of occupational health and

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safety where deregulation would imperil the fundamental principle of prevention and prevent member states from adopting levels of protection that go beyond the minimum standards defined by EU law. And yet the potential impact of TTIP on OSH seems, up until now, to have gone relatively unnoticed.

In addition, serious doubts have rightly been raised about the methodology of the whole TTIP process, in particular its blatant lack of transparency. On 3 July 2014, the Court of Justice even ruled in favour of easier access to TTIP-related documents, considering that 'specific and actual' harm from disclosure had to be demonstrated when restricting access to such documents (Judgment of the General Court of the European Union in *In't Veld v Council*, T 529/09, EU:T:2012:215).

1. Investor-state dispute settlement (ISDS): the NAFTA experience

The guidelines given to the Commission by EU governments state that the EU should seek to include in the Treaty provisions on investment protection and Investor-state dispute settlement.

The ISDS is an international instrument that will grant companies the possibility to sue the European Union or member states when they believe a regulation is not in line with the investment agreement and that it threatens their profit. The claim can lead to compensation, and litigation takes place outside the legal system, in special international arbitration bodies.

Cause for concern arises when trade rules become the baseline for policy measures, and this applies particularly in the field of health and safety provisions. Investors could use ISDS to challenge rules adopted by states to protect the health and safety of workers. Such a situation would have a chilling effect on legislators and place citizens and workers in a situation where they would end up paying for corporate risk.

To better understand how ISDS could affect health and safety in the EU, it is worth looking at what the impact has been under the North American Free Trade Agreement (NAFTA). The investment chapter of NAFTA for the first time gave corporations the right to sue governments in international courts. Several cases referring to national health and safety laws have been filed under the NAFTA complaints mechanism and lessons should be drawn from these cases.

Ethyl Corp. v. The government of Canada is perhaps the best known of the abovementioned cases. The Canadian Parliament banned, on grounds of health concerns, the import and interprovincial trade of MMT, a gasoline additive produced by US company Ethyl Corporation. Canadian legislators were concerned that MMT emissions posed a significant public health risk; they claimed there was 'compelling evidence of neurotoxicity associated with low-level occupational exposure' and enacted the Bill C-29 (MMT Act). When it came into force in 1997, Ethyl sued the government, asking for the restitution of \$251 million to cover losses and damages incurred as a result of prohibitions in the MMT Act that affected its trade in and outside Canada.

Under the resulting settlement, Canada agreed to rescind the MMT ban, paid Ethyl \$19 million, and issued a statement that MMT was neither an environmental nor a health risk (1998, NAFTA Chapter 11 Arbitral Tribunal).

In 2008, **Dow AgroSciences LLC** sued **Quebec** for \$2 million, alleging losses caused by the Government of Quebec's ban on the sale and use of herbicides containing 2,4-D (2,4-Dichlorophenoxyacetic acid), an endocrine-disrupting substance with inconclusive evidence of carcinogenic potential. Quebec and other provinces decided to apply the precautionary principle, claiming that they were doing so on scientific grounds, and banned the ingredient. Dow, a US multinational corporation, claimed that the ban was in breach of Canada's obligations to provide minimum standards to foreign investors within NAFTA. Dow argued also that precautionary decisions are not scientifically based and do not constitute a valid basis upon which to impose a ban. Eventually, after extensive tests, no evidence was found to prove that 2,4-D poses health and safety risks to humans when used according to the label directions. Under the settlement agreed in 2011, the ban on 2,4-D is maintained and Dow AgroSciences LLC received no compensation. In exchange, the Government of Quebec acknowledged that 'products containing 2,4-D do not pose an unacceptable risk to human health or to the environment, provided that the instructions on the label are followed'. The result of the settlement confirmed the right of governments to regulate the use of herbicides (Government of Canada 2011).

More recently, on 19 February 2010, within the framework of the Bilateral Investment Treaty between Switzerland and Uruguay, **Philip Morris** sued **Uruguay** before the International Centre for Settlement of Investment Disputes (ICSID). The company claimed that several anti-tobacco legislative provisions adopted by Uruguay violated the terms of the Switzerland-Uruguay bilateral investment treaty (BIT). The same problem has arisen in the course of the negotiation of the Trans-Pacific Partnership Agreement (TPPA), a free-trade agreement to be concluded among the US, Australia, New Zealand, Singapore, Malaysia, Brunei, Chile and Peru. Philip Morris Asia is actively combatting anti-smoking laws, arguing for example that Australian packaging regulations are in breach of its intellectual property rights and commitment under the Hong Kong agreement (Porterfield 2011). Phillip Morris Asia is asking the arbitration panel for Australia to revoke the legislation and to pay damages for the loss. The case is still ongoing.

The approach described in these three cases can be traced back not to NAFTA alone but to a long-developing situation in the USA whereby courts can apply a cost-benefit approach to all laws. This is contributing to a twofold 'privatization' of public law: while private corporate actors and public authorities are being placed on an equal footing, the large powerful companies, who can afford the high legal costs, are being allowed to influence lawmaking. At the same time, this trend enables private arbitrators to review government actions, court decisions, and laws and regulations adopted by parliaments, in the absence of any possibility of appeal.

The danger posed by ISDS to protective regulations is obvious. The three abovementioned cases demonstrate how any regulation designed to promote health and safety can be attacked by

companies if they regard it as setting limits on their potential profits. ISDS is an unacceptable mechanism, insofar as democratically adopted laws and regulations (including the 24 directives that govern health and safety at work in the EU by setting minimum standards) should always be accorded precedence over investment agreements, as should the public interest over corporate power.

2. REACH and TSCA: incompatible regulatory approaches

Where international trade policy is concerned, the EU and the US are seeking to enhance regulatory compatibility in numerous areas (medical devices, cosmetics, pharmaceuticals, chemicals, pesticides, information and communication technologies, and automobiles). When trying to understand what the future may hold, an interesting sector to look at is chemicals, as the Commission has decided not to propose any legislative action within the EU but to opt instead for mutual collaboration at international level. Such collaboration will, however, be almost impossible to achieve given the existence of two very different sets of laws (REACH in the EU and the Toxic Substance Control Act, TSCA, in the US).

Examples of regulatory differences

Registration/ Pre-Manufacture Notice

REACH requires the registration of all chemicals placed on the market. It provides different registration deadlines for existing chemicals – those that were on the market before 2007 – and those that have been developed more recently, the so-called 'new substances'.

TSCA stipulates a pre-manufacture notification procedure applying only to chemicals placed on the market, used, or produced, after 1976.

Technical information

REACH is based on the '*no data, no market*' principle. This requires registrants to provide comprehensive data concerning any substance produced or imported in quantities exceeding one tonne per year, in order to prove that it is safe for use.

TSCA requires the submission of pre-existing data on the *quality* of the substance; there is no requirement to prove that the substance is safe.

Risk assessment

REACH has provision for mandatory risk assessment if a substance is placed on the market in volumes exceeding ten tonnes per year. If the substance is dangerous, an exposure assessment and risk characterization statement also have to be produced.

TSCA does not require the manufacturer to produce risk assessments for new and existing chemicals.

Authorisations and restrictions

REACH requires registrants to guarantee that the substance is safe for use, and an authorization is required for substances giving rise to very high concern. A restriction procedure bans or limits the use of substances that pose unacceptable risks, ensuring that designated substances cannot be manufactured or used in the absence of specific exemption.

TSCA requires the US Environmental Protection Agency (EPA) to demonstrate that substances will cause unreasonable risks and that they should have limits placed on their production or use.

The silica case

The regulation of silica serves to illustrate the diverging regulatory processes in force in Washington and Brussels. Occupational exposure to crystalline silica dust occurs frequently on construction and maritime sites during cutting, sawing, grinding, drilling and crushing activities. Workers can develop pulmonary diseases and cases of silicosis ultimately prove fatal.

In the US, the standards currently governing the use of silica are forty years old. Based on information dating from 1968, they allow high levels of exposure and contain no provision for training workers or monitoring exposure levels. The standards have been subject to development by OSHA since 1997 and in 2013 the Labor Department's Occupational Safety & Health Administration proposed updating them by lowering the exposure limit by 50%. To date, no real action has been taken and in 2014 OSHA is still carrying out informal public hearings involving different stakeholder groups.

The International Agency for Research on Cancer (IARC) has classified crystalline silica as a carcinogen. Various EU member states have adopted measures to reduce exposure to crystalline silica dust by establishing occupational exposure limits (OELs). Additionally, Article 139 of the EC Treaty gives social partners the right to negotiate agreements in this field, and in 2006 such an agreement was signed by 16 European employer organisations and two European industry federations for the chemical and metalworking industries, allowing early implementation of practical measures to reduce workers' exposure to crystalline silica dust.¹ This agreement, albeit far from perfect – it is implemented only on a voluntary basis and fails to encourage the replacement of crystalline silica by safer alternatives wherever possible – is nonetheless seen as a positive outcome of social dialogue. Crystalline silica is not yet covered by the EU directive on carcinogens and the threshold value requires updating according to the latest scientific assessment (Musu 2013).

As illustrated by the example of crystalline silica, the two regulatory approaches are mutually at odds and economic concerns are here competing with workers' safety. Regulatory cooperation will not be, as it is often portrayed, a merely technical exercise. What needs to be promoted here is an approach that aims at raising US standards so as to ensure high levels of protection.

¹ Agreement on workers' health protection through the good handling and use of crystalline silica and products containing it.

Exploring possibilities of cooperation under the TTIP

The Commission and the EU are currently looking at areas in which 'cooperation' is possible (European Commission 2014a). The Commission wants to avoid unnecessary duplication of effort and cost by sharing the work involved in assessing priority chemicals (De Gucht 2014). Interestingly, a restricted paper outlines the provisions, procedures and topics for cooperation: prioritization of substances for assessment; assessment methodologies; alignment of classification and labelling; exchange of information on regulatory plans; consultation of regulatory processes affecting individual substances; and new draft regulations and cooperation on new and emerging issues (European Commission, 2014b). Whether coincidentally or otherwise, most of these topics featured in a joint proposal on how to facilitate trade in this area submitted to the negotiators by European and US companies.

Given the huge currently existing differences between the EU and US approaches to regulation, the comparatively stronger EU legislative system and policies should be upheld and an in-depth structural reform of the US chemicals legislation should take place. Nanomaterials, endocrine disrupters, chemicals used in exploration and extraction of unconventional gas, etc. are issues that have not yet been regulated in the EU and may thus be subject to negotiation. This may happen without proper notice to and participation of social partners, since recently the European Commission confirmed that a 'non-paper'² will address the possibility of cooperation in the field of nanomaterials.³

In conclusion, a regulatory race to the bottom must be avoided. Instead, genuine regulatory cooperation should be placed on the agenda and such cooperation should entail formal consultation of social partners and the tripartite expertise of the Advisory Committee on Safety and Health at Work to assist the Commission.

3. REFIT and OSH deregulation in the EU: paving the way for TTIP

Health and safety at work is regulated by the European Framework Directive on Safety and Health at Work (Directive 89/391 EEC) and 23 'daughter' Directives which apply in all member states.

In 2006, the European Commission, with its 'Better Regulation' programme, started a deregulatory programme addressing administrative burdens, simplification and ex-post evaluations. The programme places its main focus on competitiveness and innovation with little emphasis on social benefits.

The REFIT Communication was published in 2013, in the wake of the Commission's consultation of SMEs on the Top 10 most burdensome EU pieces of legislation. The regulations on chemicals

and health and safety at work had appeared high on the resulting list. REFIT classified the Framework Directive 89/391/EEC and its 23 related directives as outdated and requiring evaluation with a view to reducing regulatory costs and simplifying procedures. This was the first time in the history of the EU that 24 EU Directives in 27 member states were being evaluated for simplification and it became clear that, as a consequence of this decision, the pursuit by the Commission of legislative proposals in this field would be discontinued.

In June 2014, the Commission issued its Strategic Framework on Health and Safety at Work 2014-2020, with seven priority objectives, including 'simplifying existing legislation where appropriate to eliminate unnecessary administrative burdens, while preserving a high level of protection for workers' health and safety' (European Commission 2014c). This coincided with announcement of the shared EU-US objective of achieving regulatory coherence and eliminating, reducing or preventing unnecessary regulation.

Better regulation, REFIT and the Strategic Framework are policy instruments that share similar objectives and are in line with policy approaches developed in the US since the early 1980s (Vogel 2010). The future TTIP looks set to be based on the same rationale and guiding principles, with deregulation high on the agenda.

Conclusion and policy recommendations

The TTIP process will place the EU on a fast track to deregulation. Given the major existing differences between the EU and USA in various legislative sectors, some important questions will be how to find common ground, where to position the level of protection, and how to define new standards of regulatory cooperation.

Starting out from the same level is desirable, and both parties should thus ratify the ILO conventions relating to health and safety; where an ILO convention has already been ratified by one of the parties, it needs to be ratified by all parties before any trade agreement can be signed. In this way, the parties ensure basic workers' rights.

Labour provisions will be ineffective if the parties lack the will or the power to enforce them. In such cases, national authorities should act to ensure that the problem is addressed. This is even truer when International trade agreements that establish an ISDS grant multinational corporations the ability to sue national governments where they consider that protective rules or labour standards represent a threat to their profit or investments. ISDS and any similar mechanisms that may be set up under the TTIP can threaten the sovereignty of the states and key governing principles protected by the European Court of Justice and the Treaty on the functioning of the EU, which provides the basis for the EC to adopt high-level protective measures. In most cases, signature of ISDS has entailed no benefits for governments.

Other free-trade agreements like NAFTA have left workers on the sidelines. The TTIP must be inclusive and guarantee high levels of

2 The term 'non-paper' is increasingly used in European Commission parlance to designate unofficial documents issued to stimulate discussion or test positions of stakeholders on sensitive issues.

3 Response to oral question during the meeting 'Meet the team negotiating chemicals in TTIP at our upcoming stakeholder meeting', 25 November 2014.

protection for workers. There is a need for a careful examination of the specific characteristics and importance of occupational health and safety to determine whether it should be the subject of negotiation and, if so, how it should be negotiated. Health and safety provisions should not be subject to ISDS and this should be guaranteed by the parties in the text of treaties signed.

Finally, large sections of the EU legislation on health and safety are currently in jeopardy. Paving the way for the TTIP, REFIT, and other evaluation processes, will lead to simplification or even outright deletion of OSH-related Directives that form part of the EU *acquis*, before any agreement on the TTIP takes place. Here too, the European Commission should use the appropriate evaluation criteria and supporting evidence when determining what constitutes an 'administrative burden' so as to ensure that the result of this crucial process is upwards and not downwards, that public policy is protected, and that the current OSH framework remains guaranteed under the TTIP.

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The editor responsible for this issue is Kurt Vandaele, kvandaele@etui.org

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