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Consumers want and expect that product labels will identify where their food is from, how it was produced and what is in it. In the absence of action by the federal government to provide this information, states across the United States are stepping up to require informational labels on food, including nutrition details, health warnings, GMO ingredients and how and where the food was produced. These state labeling laws are at risk, however, from international trade agreements. In particular, two comprehensive regional agreements, the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), will have sweeping consequences for states across the country. Under these proposed international agreements, state laws and regulations that differ from, or are more protective than, federal or international standards could be superseded by these weaker provisions.

States lead the way protecting consumers and providing information for healthy eating

Consumer interest in healthy eating, organic food and supporting sustainable local food systems has never been higher. A recent Department of Agriculture (USDA) report found that organic farms in the United States sold a total of \$5.5 billion in organic products in 2014, up 72 percent since 2008.¹ Consumers want and expect that labels will identify where their food is from, how and where it is produced and what is in it.

A recent nationwide survey by the respected Consumer Reports National Research Center found that when shopping for food, two-thirds of Americans check to see if the food is locally produced, and 59 percent check to see if it is “natural.” The overwhelming majority of consumers want food labels to reflect country of origin (92 percent) and state of origin (82 percent). Most consumers (83 percent) also want government-mandated labels identifying meat that is from animals routinely given antibiotics.² Over 90 percent of Americans polled in another survey supported mandatory labeling of foods containing genetically modified organisms (GMO).³

Americans’ interest in buying less-processed food with fewer additives is consistent with international trends. A recent article in the business magazine *Fortune* referenced research findings that “68 percent of global consumers wanted to recognize every ingredient on the label, and 40 percent desired food made with as few ingredients as possible.”⁴

Unfortunately, federal food labeling policies lag far behind what consumers want and expect from their government. It took Congress until 1990 to enact a law regulating organic certification, and then the USDA delayed promulgating rules until the end of 2000—almost thirty years after Oregon passed the first law establishing organic standards. Indeed, by the time Congress acted to establish a uniform national organic labeling standard, 22 states had already passed their own laws.⁵ Little has changed in the intervening decades. The federal Food and Drug Administration (FDA) has yet to regulate many food-related marketing claims, including general terminology such as “wholesome” and “all-natural.” In spite of strong consumer support for mandatory GMO labeling—a

recent petition to FDA garnered 1.1 million signatures—the agency has failed to adopt labeling standards for GMO foods.⁶ Voluntary GMO labeling just adds to the confusion of a federal food labeling regime that public health and consumer organizations argue does little to address food industry packaging claims that “are out of control and interfere with the consumer’s ability to make healthy food choices.”⁷

With Congress and federal regulators ineffective, state legislatures are leading by enacting food labeling laws to educate and protect consumers and support local food systems. Labeling legislation has been introduced in virtually every state; the sheer number of bills and the range of subjects addressed indicates strong and continuing interest. In the 2014 and 2015 legislative sessions combined, there were approximately 300 bills introduced in state legislatures related to food labeling, including nutrition and calorie disclosures, warning labels on sugary drinks, identifying locally produced or harvested products including olive oil and seafood and identifying foods containing GMOs.⁸

There are also hundreds of state food labeling requirements already signed into law.⁹ In 2013, Connecticut,¹⁰ Maine¹¹ and Vermont¹² each enacted mandatory GMO labeling laws. Seventeen states considered similar legislation in 2015.¹³ Vermont’s law is scheduled to take effect July 1, 2016, with the implementation of the Connecticut and Maine laws contingent on other states adopting GMO labeling laws.

A number of states have enacted laws requiring labeling of seafood and farmed fish. Washington law requires all fresh, frozen or processed fish and shellfish to be labeled with the common name as defined by the state; salmon must be labeled with scientific or common names to prevent farm-raised fish being sold as wild.¹⁴ Alaska requires labels identifying farm-raised halibut, salmon or sablefish and genetically-modified farmed fish.¹⁵ California’s food misbranding regulations require disclosure of artificial colors added to farmed salmon.¹⁶ Arkansas requires labeling of catfish sold in retail and wholesale markets, including whether it is farmed, wild-caught or imported.¹⁷ Other states with catfish labeling laws include Alabama, Kansas, Louisiana, Mississippi and Tennessee.¹⁸

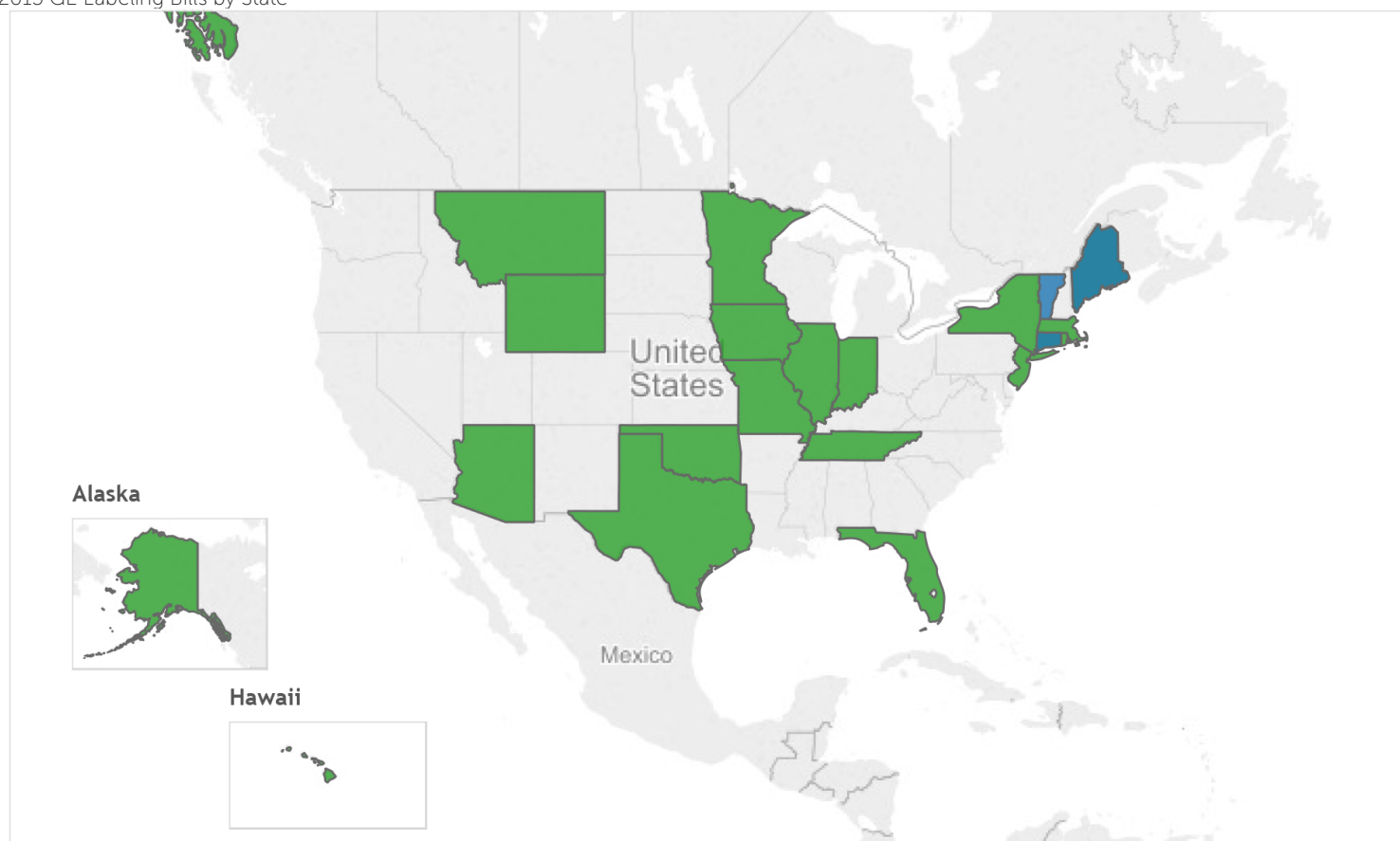
New York requires labeling of “imitation cheese,”¹⁹ and New York, New Hampshire and Vermont require products labeled “maple syrup” to be free of any additives. Similar laws and proposed legislative measures apply to honey in several states.²⁰ A new California law sets strict standards for olive oil labels: 100 percent of the product with “California” on the label must be from olives grown in California.²¹

This state legislation has often been hard-fought with intense industry opposition. States have longstanding authority to prevent mislabeling of food through general consumer protection and unfair trade practices laws, and courts have upheld a variety of state food labeling requirements.²² Still, with few hard and fast rules governing the permissible scope of state labeling regulations—preemption provisions in different federal laws vary greatly²³—the food and biotech

industries often take their campaigns against state legislation to the courts when they lose in state legislatures.²⁴ As the evolution of the organic standards shows, state action can help to construct a consensus that builds to the national level, so opposition by agribusiness is not only about the state action but also about delaying or preventing future federal action protecting consumers.

More often than not, where Congress and federal regulatory agencies have failed to act, states succeed in defending their laws from attempts to preempt in Congress or the courts.²⁵ Unfortunately, corporate interests have another card to play in their attacks on consumer and environmental regulations: international trade agreements. The federal government has been negotiating two massive new trade agreements that could threaten the continued viability of local food policy

2015 GE Labeling Bills by State



Key

- Passed Mandatory Labeling Legislation
- GE Labeling

Center for Food Safety. “State Labeling Legislation Map: GE Labeling Bills 2015.” Accessed November 20, 2015. http://salsa3.salsalabs.com/o/1881/p/salsa/web/common/public/content?content_item_KEY=13981.

initiatives, including food labeling standards. Indeed, the same corporations and industry trade groups challenging state food labeling laws in federal court and Congress are heavily influencing the outcome of these very trade negotiations.²⁶

The Trans-Pacific Partnership (TPP) among 12 Pacific Rim nations would cover 40 percent of the global economic activity. The Transatlantic Trade and Investment Partnership (TTIP), between the U.S. and European Union, would be the largest bilateral trade agreement in history.²⁷ The U.S. is seeking to both finish negotiations and achieve Congressional approval of both agreements by the end of 2016.²⁸ Unlike earlier trade agreements focused primarily on reducing tariffs to open up markets, these trade and investment agreements are likely to include extensive provisions intended to reduce or eliminate regulatory differences. Prime examples of these regulatory differences, characterized by industry as “trade irritants,” are consumer and environmental protections adopted by U.S. states that are different from, and more protective than, federal law, such as food labeling laws.

Although most details of the TPP during the nearly six years of negotiations were shrouded in secrecy, in advance of Congressional consideration of the agreement, the text was made publicly available November 5, 2015. Although the U.S. continues to refuse to release any of its TTIP text, we know from leaks and some public proposals from the European Commission that both agreements are likely to include specific chapters governing domestic regulatory practices, technical standards for products including packaging labels and investor protections including a system of corporate arbitration of claims against governments. As we discuss below, each of these chapters has the potential to undermine progressive food policies not only in the U.S. but for our trading partners in the EU and Pacific Rim as well.

Regulatory cooperation and coherence in proposed trade deals will undermine strong state consumer protections, including food labeling

REGULATORY COOPERATION IN TTIP. Nothing illustrates better the nature and scope of these new so-called “trade” agreements than the EU’s textual proposal for a Regulatory Cooperation chapter in the Transatlantic Trade and Investment Partnerships (TTIP), which was publicly released in May 2015.²⁹ This far-reaching proposal goes well beyond previous international trade agreements entered into by the United States in its explicit and comprehensive focus on influencing internal domestic legislative and regulatory procedures. The purpose of the EU’s Regulatory Cooperation chapter is to facilitate trade and investment and “reduce unnecessarily

burdensome, duplicative or divergent regulatory requirements affecting trade or investment” by minimizing regulation, promoting convergence of regulatory standards and defaulting to international standards developed with significant involvement of the regulated industries.³⁰

The EU proposal seeks to achieve these goals by establishing an ongoing, unelected regulatory oversight entity composed of trade functionaries and regulators from the EU central and U.S. federal governments. At the behest of foreign government officials, a U.S. federal agency would be charged with collecting information about proposed and pending federal and *state* legislation and regulations. The all-encompassing language of the EU’s proposal would apply to state laws and regulations on virtually any subject. Proposed, as well as already enacted, state-level policies thus targeted could be subjected to additional requirements. These could include regulatory and trade impact assessments intended to determine whether the policies are more “trade restrictive than necessary,” likely measured against weaker federal U.S. or international standards. Foreign governments’ concerns would be injected into U.S. state domestic policies and procedures, and regulatory exchanges between the U.S. and EU intended to “harmonize” standards could result in setting federal minimum standards as the regulatory ceiling.³¹

Although precisely how the provisions of the EU’s Regulatory Cooperation chapter would apply to U.S. state governments is unclear due to the many blank spaces and footnotes promising more detail in the future, the bottom line is that attempts to harmonize U.S. and EU regulatory standards will necessitate reining in outlier state standards that impose additional or different requirements on businesses. An EU “fact sheet” promises that participation in regulatory exchanges intended to harmonize standards is voluntary for state government.³² But this is a hollow promise; unless state officials are at the table and vested with the same authority as federal officials, it is unlikely that the end result will reflect their concerns. The lack of language protecting the right of state governments to regulate in the public interest or any provisions exempting public health or other state legislation is also grounds for concern.³³ At the same time, the proposal will increase the influence of industry stakeholders who are invited to comment on regulatory cooperation initiatives and to participate in working groups associated with harmonization efforts.³⁴

The proposal would also impose new costs and staffing burdens on budget-strapped state agencies and legislatures, shifting resources from the timely adoption and implementation of consumer protection regulations to preparing documents for federal bureaucrats and monitoring and attending international meetings. The consequences could go well

beyond increased red tape. Government-prepared regulatory or trade impact assessments analyzing state regulations could provide support for legal attacks on those regulations in corporate arbitration proceedings (see investor-state arbitration discussion below).

REGULATORY COHERENCE IN TPP. The United States Trade Representative (USTR) has not publicly addressed the merits of the EU’s Regulatory Cooperation chapter or made available to the public its own proposal, if any. The recently released TPP text agreed to by USTR does contain a Regulatory Coherence chapter that aligns with the EU’s Regulatory Cooperation goals in TTIP, including a focus on cost-benefit analysis and regulatory impact statements, assessing alternatives to regulation, reliance on “the best reasonably obtainable existing information,” and coordinating regulation across government.³⁵

The TPP text differs from the EU proposal in that it is much less detailed. Also, while the EU’s Regulatory Cooperation proposal comprehensively applies to U.S. state governments, it is unclear whether or to what extent the TPP’s similar Regulatory Coherence chapter will apply to U.S. states. The scope of covered regulatory measures is left unstated, requiring each country that is a party to the agreement to determine and announce the regulations covered within a year of the date the TPP enters into force. The text advises, “In determining the scope of covered regulatory measures, each party should aim to achieve significant coverage.” Sub-central regulations, including measures adopted by U.S. states, are not specifically referenced in this chapter but could be included if designated by the USTR.³⁶

Given that the USTR has not publicly rejected the heavy-handed regulatory cooperation rules being promoted by the EU, and that corporate advisors to the USTR clearly view trade agreements as a mechanism to preempt state regulations,³⁷ states will need to be in close communication with federal officials if they wish to insure that their regulatory measures are not subject to this chapter. In any event, other chapters of the TPP, discussed below, include additional regulatory cooperation provisions that clearly are applicable to state governments.

State food labeling laws are vulnerable under trade agreements as impermissible “technical barriers to trade”

“Technical Barriers to Trade” (TBT) provisions are already in effect under World Trade Organization (WTO) rules and have been successfully invoked to overturn federal food labeling standards. In May 2015, the WTO Appellate Body ruled that the popular federal U.S. “country of origin” consumer meat

labeling standard (COOL) violates WTO rules due to their requirement that labeling of pork, poultry and beef sold in the United States disclose the country in which the animals were born, raised and slaughtered. Although adopted to provide information to help consumers to make informed food shopping choices, the WTO panel ruled the label is a “technical barrier to trade” that favors U.S. products and violates trade rules.³⁸ This decision, which follows an earlier successful trade challenge to voluntary “dolphin-safe” tuna labels, makes clear that food labeling at both the federal and state levels is vulnerable under modern trade agreements.

Regional or bilateral trade deals like TPP and TTIP are required to be “WTO plus,” meaning that their rules must be at least as stringent as those enshrined in the WTO. These agreements are thus likely to pose even greater threats to domestic food policy, including at the U.S. state level. Both the TPP and the TTIP will have chapters on technical barriers to trade with provisions that are applicable to U.S. states’ regulations.

STATE GOVERNMENT REGULATIONS TARGETED FOR “TECHNICAL DISCUSSIONS” UNDER THE TPP. A provision in Chapter 8 of the TPP, Technical Barriers to Trade, would require the U.S. federal government to notify WTO members of U.S. state-level proposals for “new technical regulations and conformity assessment procedures” where those proposals “may have a significant impact on trade.” Further, the federal government *must* engage in “technical discussions” upon request by another party to the TPP concerning proposed or existing state government regulations or compliance reviews “that may have a significant impact on trade.”³⁹ The intended outcome of these discussions is to bring U.S. state standards into compliance with the chapter’s provisions, which include greater alignment of regulations with international standards, mutual recognition of conformity assessments between countries and accepting as equivalent the technical regulations of another country that is party to the TPP.⁴⁰ The mechanism for achieving these goals at the U.S. state level is not spelled out, nor whether or how state policymakers would be consulted in these “technical discussions” at the federal level. Even if invited, as discussed above, state governments are ill-equipped to participate effectively in international technical exchanges.⁴¹

JUNK FOOD WARNING LABELS. An emerging area of U.S. state legislation is to encourage healthy food choices through label disclosures and warnings. For example, warnings now appear on sugary drinks to help prevent obesity, particularly in children. In 2015, bills were introduced in three states—California, New York and Vermont—to require safety warnings on sugary drinks.⁴² This is an issue of national importance. Indeed, First Lady Michelle Obama has made avoidance of sugary drinks one of the centerpieces of her “Let’s Move”

campaign, urging children and parents to “pass on sugar-sweetened drink(s)” as part of “5 simple steps to success.”⁴³ Thus it is disturbing that USTR’s 2014 *Report on Technical Barriers to Trade* specifically targets junk food warning labels adopted by Chile to assist children and parents in choosing healthy foods.⁴⁴

According to USTR, the annual TBT report addresses “outdated, overly burdensome, discriminatory, or otherwise inappropriate” measures that can “reduce competition, stifle innovation, and create unnecessary technical barriers to trade.”⁴⁵ Identifying Chile’s regulations as a potential trade barrier, the report details U.S. government actions intended to pressure Chile to weaken its program.⁴⁶ After meetings with U.S. trade negotiators, Chile changed its regulations to reduce the number of products affected, shrink the size of the warning icon, and change the color of the warning from red to green. The USTR’s objection to the warning label as initially proposed boils down to its likely effectiveness: “Consumers may also interpret the six-sided icon on the package as a stop sign that will discourage consumption even when the product is consumed in the context of an overall healthy diet and active lifestyle.”⁴⁷

It appears that Chile’s junk food warning labels were an early victim of the USTR’s aggressive advocacy in the TPP negotiations on behalf of junk food and other transnational corporations seeking to avoid or water down food labeling.⁴⁸ The TPP contains a first-ever annex to the TBT chapter on “Proprietary Formulas for Prepackaged Foods and Food Additives.”⁴⁹ This annex would make it more difficult to gather information relating to “proprietary formulas” in order to prepare, adopt and apply technical regulations and standards, by imposing a requirement that information requested is “limited to what is necessary to achieve its legitimate objective” and that the confidentiality of information about products “is respected ... in such a manner that legitimate commercial interests are protected.”⁵⁰

This annex applies only to central governments, so its provisions would not be directly applicable to states’ food labeling regulations. Nonetheless, by imposing a version of the “necessity test” (discussed in more detail below) and additional confidentiality protections on government regulators seeking information to regulate food ingredients, it could hinder the timely development of stronger federal standards relating to junk food warnings, GMO labeling and detailed information about “proprietary” food additive formulas.

GMO LABELING TARGETED BY AGRIBUSINESS IN TRADE NEGOTIATIONS. Agribusinesses and transnational business trade groups have not hesitated to state their interest in using trade agreements to challenge existing food labeling

requirements and to thwart U.S. states’ regulatory authority. For example, the United States Council for International Business testified to USTR that TTIP should “[p]rohibit subsidiary political units from imposing approval requirements or restrictions” and that “[s]ubsidiary political units, such as EU Member States or US States should be prohibited from seeking to impose separate requirements for approval or local restrictions on sale or use.”⁵¹ Industry groups have specifically targeted GMO labeling in TTIP. The U.S. National Confectioners Association has stated, “US industry also would like to see the US-EU FTA achieve progress in removing mandatory GMO labeling and traceability requirements.”⁵² The American Soybean Association’s testimony in 2013 urged that TTIP be used to address existing GMO labeling requirements in the European Union, and complained that “no action has been taken” on the U.S. food industry’s request from 2003 that USTR challenge the EU’s labeling policy in the World Trade Organization.⁵³

The just-released TPP text does not single out GMO labeling for attention in the TBT chapter, however, it does include a special section on “modern biotechnology” in the agriculture section of the chapter on market access that could have implications for state and local efforts to regulate GMOs. This text seeks to encourage “authorization of plants and plant products of modern biotechnology,” includes fish and fish products, and addresses procedures for inadvertent low-level presence or contamination.⁵⁴ The market access provisions require “national treatment,” meaning no less favorable treatment of other TPP countries’ goods than accorded goods produced within the U.S. These provisions also apply to the actions of U.S. states, including treatment a state “accords to any like, directly competitive, or substitutable goods.”⁵⁵ These market access provisions are enforceable through the government-to-government dispute resolution chapter, and even proposed regulations may be challenged under the TPP’s rules.⁵⁶

TTIP’S FOCUS ON GLOBAL HARMONIZATION AND THE “NECESSITY TEST.” EU negotiators have publicly released a proposed TBT chapter for the TTIP.⁵⁷ According to that text, the intended outcome for the chapter is “global harmonization of technical requirements” with the goal to “ensure that products originating in the other Party that are subject to technical regulation can be marketed or used across all the territory of each Party on the basis of a single authorisation, approval or certificate of conformity.”⁵⁸ This text targets labeling for special attention, with the likely consequence that labeling requirements either adopted or under consideration by U.S. states will be jeopardized. If food labeling requirements differ between the federal government and U.S. states, state standards could be challenged or targeted for harmonization, even if U.S. law allows those differences.

Of great concern, the EU's TBT chapter would also impose a "necessity test" to ensure that labeling or marking requirements "shall not be more trade-restrictive than necessary to fulfill a legitimate objective" and further that "compulsory marking requirements, while continuing to provide the necessary information to the user or consumer as well as to public authorities regarding compliance of products with specific requirements, *should be limited as far as possible to what is essential and to what is the least trade restrictive to achieve the legitimate objective pursued*" (emphasis added).⁵⁹

Would Vermont's GMO labels, for example, be considered "essential" and "necessary" under this standard, when U.S. federal regulatory agencies have established no disclosure requirements and lightly regulate GMO agricultural practices themselves? Legal scholars suggest that U.S. states should be concerned about how such a necessity test would operate. In a 2012 report written for a Maine commission on trade policy, Georgetown Law Center Professor Robert Stumberg raised concerns about how the "burdensome" necessity test might be applied to limit the state's public health measures intended to limit tobacco use. Stumberg wrote:

This so-called "necessity test" requires governments to prove that their approach is less of a burden on trade than other approaches they considered, and it limits the regulatory objective to quality of the service, as opposed to protecting public health. Tobacco regulations are generally unconcerned with competence of distributors or ensuring the quality of the service; they are intended to stop the spread of tobacco use.⁶⁰

Professor Albert Alemanno of NYU School of Law has written about food industry objections to health warning labels on prepackaged food based on the necessity test where those labels go beyond international standards on nutrition such as the Codex Alimentarius.⁶¹

Legislation that promotes informed and healthy eating choices should be encouraged, whether those labels are adopted by the FDA (unlikely any time soon); by U.S. states like California, New York and Vermont; or by forward-thinking countries such as Chile. The U.S. action pressuring Chile to weaken its nutrition labels by invoking the WTO's TBT rules was a win for the U.S. junk food industry but not for consumers. By supporting "WTO plus" chapters in both TPP and TTIP, and special rules for the biotech and pre-packaged food industries, USTR appears to be willing to jettison effective food and health labels in the U.S. as well, in the name of free trade.

Investor-state dispute settlement provisions will give foreign corporations a preferential forum in which to challenge state labeling laws

The Investor-State Dispute Settlement (ISDS) procedures included in NAFTA and proposed for TPP and TTIP are of particular concern.⁶² ISDS allows foreign investors the right to sue governments for lost profits caused by regulations in offshore private investment tribunals, bypassing the courts or allowing a "second bite" if the investors do not like the results of domestic court decisions. Although the investor-state tribunal has no power to directly nullify U.S. federal, state and local laws, in practice, when a country loses to an investor, it will change the offending law, pay damages or both. Moreover, a country need not even lose an ISDS case to be negatively affected; the mere threat of suit or filing of a case can chill future policy deliberations.

Under ISDS, transnational corporations could sue for claimed lost profits due to food labeling requirements such as warning labels that discourage purchase of junk food or GMO disclosure rules that companies claim will lower sales of GMO-containing products. Numerous ISDS cases around the world are based on the notion that public interest laws are arbitrary or violate the "fair and equitable treatment" of their investments. Indeed, the U.S. soybean industry has already objected to the EU's current GMO labeling requirements on this basis, blaming GMO labeling for a significant drop in U.S. exports of soybeans and soy products.⁶³

Seeking to halt implementation of Vermont's GMO law in a domestic legal challenge, the Grocery Manufacturers Association and other industry groups claimed the law caused "irreparable harm." In that case, which must be decided under the provisions of the U.S. Constitution and federal statutes, the federal court made short shrift of speculative assertions of significant harm and refused to grant an injunction barring the law from going into effect.⁶⁴ In contrast, under the ISDS arbitration system, transnational corporations making speculative claims of lost profits and trade burdens frequently win their challenges and receive multimillion-dollar settlements in compensation.⁶⁵ These arbitration cases may also benefit from data generated in the regulatory impact assessments described above, which could be used to bolster investors' cases on the "losses" they incur as a result of differing regulations.

ISDS clauses in other trade agreements have been used repeatedly to attack environmental and public health measures; even unsuccessful challenges take years to resolve, cost millions to defend, and have a chilling effect on the

development of new legislation. U.S. state and Canadian provincial policies have been targeted in a number of ISDS cases under NAFTA, including challenges to laws banning toxic gasoline additives, denials of mining permits, and a moratorium on fracking permits.⁶⁶

The cost just for defending a challenged policy in an ISDS forum is \$8 million on *average*;⁶⁷ Phillip Morris's ISDS challenge to Australia's tobacco regulations, which require graphic health warnings and "plain packaging," has already racked up litigation costs of over \$50 million for the Australian government, and the case is still in preliminary stages.⁶⁸ Although U.S. state governments are not currently required to pay the costs of an ISDS case, which is defended by the federal government, participation as a "friend of the court" or by assisting federal lawyers is expensive, as California and other states discovered when their tobacco regulations were challenged under NAFTA.⁶⁹

TPP and especially, TTIP, would also exponentially increase the number of corporations that could take advantage of these special rights to challenge consumer and environmental standards. As Public Citizen reports, TPP would double the number of corporations able to launch ISDS cases, adding about 1,300 foreign firms with about 9,500 U.S. subsidiaries.⁷⁰ TTIP "would roughly *quadruple* the United States' exposure to investor-state attacks against U.S. policies." The proposed EU trade deal "would newly empower more than 5,000 EU parent corporations, which own more than 27,000 U.S. subsidiaries, to launch investor-state cases against the U.S. government. A mere 21 EU parent corporations currently have that power under existing U.S. pacts."⁷¹

As we have seen in the context of GMO labeling legislation, U.S. states are already litigation-averse and the threat of even a domestic lawsuit can freeze legislative action for years as legislators await the outcome of lawsuits filed against other states. The threat of an international trade case is even more likely to chill state regulation.

Conclusion

Trade negotiations take place in secret, and the U.S. government has refused to release negotiating proposals or otherwise provide the public with information in any level of detail about its actions and positions in ongoing trade negotiations. While the 6,000-plus pages of TPP text are now posted online, it is too late to change anything in that text, which was only publicly released after it had been finally agreed to by U.S. negotiators and the trade ministers of the 11 other TPP countries. Trade law and policy is complex and can seem far removed from the day-to-day challenges facing state

governors, legislators and regulatory agencies. But, state policymakers ignore trade policy and trade agreements such as the TPP and TTIP at their peril.

These international agreements are binding on state governments, unless U.S. negotiators successfully carve out state laws and regulations from their scope. In previous negotiations, protecting states' regulatory authority has not been a U.S. priority; the exception that proves the rule is USTR's agreement to allow states to make their own purchasing or procurement decisions. Even this limited area of state authority is at risk as EU negotiators are seeking procurement provisions that will bind U.S. states and localities without their consent,⁷² and the TPP commits all Parties to reopen negotiations on binding sub-central governments within three years of its entry into force.⁷³

State and local government officials must take steps to get as informed as possible, as quickly as possible, and then communicate their views to the USTR and to Congress, which will review the final agreements under an abbreviated "fast track" process. Actions could include commissioning studies to assess the likely impact of trade agreements on state policies and food producers, holding hearings, and passing resolutions directed at Congress. State legislators can circulate national sign-on letters and adopt policy positions through organizations such as the National Conference of State Legislatures and the National Caucus of Environmental Legislators to further amplify their voices. Governors, attorneys general and agency directors can likewise write to Congress to communicate concerns about their loss of authority to regulate and protect public health.

If states fail to act, they could see important state health and consumer protections, including food labeling, undermined and rendered moot by these international agreements under the guise of trade facilitation.

Endnotes

1. 2014 Organic Food Survey, U.S. Department of Agriculture, National Agricultural Statistics Service, accessed here: http://www.agcensus.usda.gov/Newsroom/2015/09_17_2015.php
2. Food Labels Survey (2014) accessed here: <http://www.greenerchoices.org/pdf/ConsumerReportsFoodLabelingSurveyJune2014.pdf>
3. *Strong Support for Labeling Modified Foods*, by ALLISON KOPICKI, July 27, 2013, http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html?_r=1
4. *Special Report: The war on big food*, by Beth Kowitz, May 21, 2015, accessed at: <http://fortune.com/2015/05/21/the-war-on-big-food/>

5. Of the 22 states adopting organic food rules, three—Washington, Texas and Colorado—operated their own organic certification programs, four—Minnesota, Ohio, New Hampshire and Vermont—contracted with an independent certification organization and fifteen defined organic food and production techniques but did not provide any government oversight of certification. See, Jessica Ellsworth, *The History of Organic Food Regulation* (2001) at p.4-5, accessed September 20, 2015 here: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:8889458>. Although federal law defines what is “organic,” state organic standards and certification continue to be relevant, see eg, *SDNY allows consumer “organic” claims to proceed* (Posted on May 13, 2015), commenting on *Segeidie v. Hain Celestial Group, Inc.*, 2015 WL 2168374, No.14–cv–5029 (S.D.N.Y. May 7, 2015), where the court allowed a case challenging organic certification of body lotions to proceed based on New York and California law, accessed here September 28, 2015: <http://tushnet.com/2015/05/13/sdny-allows-consumer-organic-claims-to-proceed/>.

6. Petition circulated by the “Just Label It” Campaign, accessed here: <http://www.justlabelit.org/taking-it-to-the-white-house-just-label-it/>.

7. *Food Labeling Chaos: The case for reform*, Bruce Silverglade and Ilene Ringel Heller, Center for Science in the Public Interest (2010), at p.ii, accessed here: https://cspinet.org/new/pdf/food_labeling_chaos_report.pdf.

8. Analysis by Laurel Curran of National Conference of State Legislatures’ (NCSL) databases of state legislation on environmental health, available here: <http://www.ncsl.org/research/environment-and-natural-resources/environmental-health-legislation-database.aspx> and agriculture and rural development, available here: <http://www.ncsl.org/research/agriculture-and-rural-development/agriculture-and-rural-development-database-2014-beyond.aspx>. Databases were last accessed July 30, 2015.

9. Ten years ago, there were at least 200 state-level food labeling standards. See, testimony of Benjamin Cohen, Senior Staff Attorney, Center for Science in the Public Interest, on S.3128 (hereinafter “Cohen testimony on S.3128”) before the Senate Committee on Health, Labor, Education and Pensions (July 27, 2006), see appendix listing state laws, accessed here: http://cspinet.org/new/pdf/testimony_2.pdf.

10. Public Act No. 13-183, AN ACT CONCERNING GENETICALLY-ENGINEERED FOOD, text available here: <https://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00183-R00HB-06527-PA.pdf>.

11. 22 MRSA c.565 GENETICALLY ENGINEERED PRODUCTS, text available here: <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0490&item=11&num=126>.

12. Act 120, text accessed here: <http://www.leg.state.vt.us/docs/2014/Acts/ACT120.pdf>. The Attorney General’s Office has formally adopted Consumer Protection Rule 121 implementing the law. The rule can be accessed here: <http://ago.vermont.gov/assets/files/PressReleases/Consumer/Final%20Rule%20CP%20121.pdf>. The law and rule will take effect on July 1, 2016.

13. According to NCSL, in 2015 there were 101 bills generally relating to GMOs introduced in state legislatures. Not all of this legislation supports state-level labeling standards. See NCSL’s report on GMO-related legislation in the states, accessed here: <http://www.ncsl.org/research/agriculture-and-rural-development/state-legislation-addressing-genetically-modified-organisms.aspx>.

14. Act No. 290, House bill 1200. The legislation was unanimously supported by both the House and Senate. Public educational materials explaining the law are posted on the state website here: http://agr.wa.gov/FoodAnimal/docs/seafood_regulations.pdf. Similar legislation was enacted by California in 2014 (SB 1138) but vetoed by the Governor, see *Jerry Brown vetoes seafood labeling bill*, Sacramento Bee, September 30, 2014, <http://www.sacbee.com/news/politics-government/capitol-alert/article2616398.html>.

15. Food & Water Watch, available here: <http://www.foodandwaterwatch.org/common-resources/fish/seafood/labeling/>.

16. Cal. Health & Saf. Code § 110090. California’s labeling requirements for the disclosure of color additives in salmon are identical to federal regulations, but separately enforced by the state.

17. Arkansas Act 1191 (2015), effective January 1, 2016, amended an earlier catfish law. Text is available here: <ftp://www.arkleg.state.ar.us/acts/2015/Public/ACT1191.pdf>.

18. *State-Level Catfish Labeling Laws*, Elizabeth R. Springsteen (2008), The National Agricultural Law Center, University of Arkansas, accessed here: http://nationalaglawcenter.org/publication/springsteen-state-level-catfish-labeling-laws-national-aglaw-center-publications-10-2008/wppa_open/.

19. N.Y. AGM. LAW § 63: NY Code - Section 63: Labeling of imitation cheese; imitation cheese food and products containing imitation cheese, accessed here: <http://codes.lp.findlaw.com/nycode/AGM/4/63#sthash.zaY4NnVx.dpuf>.

20. *Cohen testimony* on S.3128. See also NCSL database for bills introduced in 2014-15 available here: <http://www.ncsl.org/research/agriculture-and-rural-development/agriculture-and-rural-development-database-2014-beyond.aspx>.

21. The new law further requires that if a label indicates the product’s origin is a specific region in California, at least 85 percent of the oil, by weight, must be traceable to fruit grown specifically in that area, and any reference to a particular California estate requires a minimum of 95 percent from olives grown on that estate. Senate Bill 65, Chapter 138, Statutes of 2015, Signed by Governor 08/07/15, text and history available here: <http://www.legtrack.com/bill.html?bill=201520160SB65>.

22. Courts have upheld, for example, New York’s imitation cheese label, California’s salmon additive disclosure, and in several states, required posting of calorie counts at chain restaurants. For a list of food labeling litigation from January 1996 – March 2011, see the National Agricultural Law Center, accessed here: <http://nationalaglawcenter.org/aglaw-reporter/case-law-index/food-labeling/>.

23. Examples of federal laws with clear-cut language preempting state food labeling are the Federal Meat Inspection Act 21 U.S.C. §§ 601-695 and the Poultry Products Inspection Act, 21 U.S.C. §§ 451-472. What is pre-empted and what isn’t seems more governed by which industry groups have the clout to pass specific laws limiting state regulations than any consistent legal or policy principles.

24. Vermont’s GMO labeling law is currently under challenge in federal court. Based on initial court rulings, Vermont appears to be on solid legal ground defending its law; a preliminary decision was mostly favorable to Vermont. See *Grocery Mfrs Ass’n et al v. Sorrell*, Case No. 5:14-cv-117, Opinion and Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss and Denying Plaintiffs’ Motion for a Preliminary Injunction (Doc. 24, 33, April 27, 2015), U.S. District Court for the District of Vermont [hereinafter *Grocery Mfrs Ass’n et al v. Sorrell, April 27, 2015 Opinion and Order*]. Litigation documents posted here: <http://ago.vermont.gov/hot-topics/ge-food-litigation.php>. Even if Vermont wins this case; however, it faces considerable costs. It is estimated the litigation may cost the state as much as \$8 million. See, *ROCK STAR GIVES \$100,000 TO VERMONT’S GMO DEFENSE FUND*, by Sam Heller, July 20, 2015, Vermont Digger, <http://vtdigger.org/2015/07/20/rock-star-gives-100000-to-vermonts-gmo-defense-fund/>.

25. Agribusiness and chemical industry groups are turning to Congress to try to stop state GMO labeling laws. H.R. 1599 would pre-empt state and local authority to label and regulate GMO foods. The bill passed the House of Representatives in July 2015, but a Senate version of this bill has not yet been introduced.

26. Named plaintiffs in *Grocery Mfrs Ass’n et al v. Sorrell* challenging Vermont’s GMO labeling law are the Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association, and the National Association of Manufacturers. The American Chemistry Council, Biotechnology Industry Organization, U.S. Chamber of Commerce and the Agricultural and Commodity Trade Associations, among others, have joined as amicus curiae. These same industry groups and their member companies serve on trade advisory committees and have developed detailed textual proposals that appear to have heavily influenced the likely provisions of the TPP and TTIP.

27. See, USTR website at www.ustr.gov.

28. Negotiators for the 12 TPP countries announced a final deal October 5, 2015, and after legal and other review, the agreement will be sent to Congress for consideration. The text was made public November 5, 2015 and is posted on the U.S. Trade Representative’s website here: <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. The TTIP is still under negotiation by the EU and U.S.

29. This analysis is of the text tabled for discussion by the EU in the April 2015 negotiating round and made public on May 4, 2015, hereinafter referred to as “EU Regulatory Cooperation chapter.” The chapter is posted on the website of the European Commission here: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>. See also detailed textual analysis in the Center for International Environmental Law (CIEL) report, *Preempting the Public Interest: How TTIP Will Limit US States’ Public Health and Environmental Protections* (September 2015) [hereinafter *Preempting the Public Interest*] at p. 9-12.

30. *EU Regulatory Cooperation chapter*, Section I: Objectives, definition and scope, Article 1.b.

31. *Preempting the Public Interest* at p.10-11, 14-17. The regulatory exchanges and other procedures, as described in the actual EU textual proposal, go well beyond the voluntary procedures described in the fact sheet “*Detailed Explanation of the EU proposal for a Chapter on Regulatory Cooperation*,” (May 6, 2015), posted here: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf.

32. *Preempting the Public Interest* at p. 11-12.

33. *Preempting the Public Interest* at p. 16.

34. *Preempting the Public Interest* at p. 20. Other provisions of the regulatory cooperation proposal favoring industry include relying on international standards that are heavily influenced and often directly written by industry, early warning of proposed laws and regulations that impose costs on industry, access to regulators outside of the more transparent and accountable notice and comment and public hearing process; and additional meeting and review opportunities that favor interests with deep pockets and large lobbying staffs over staff and resource-poor civil society and public interests. *Ibid.* Transnational corporations see many benefits in promoting regulatory cooperation and coherence, and powerful USTR advisors including the Chamber of Commerce and CropLife America, an opponent of GMO regulations and labeling, are pushing their own extreme regulatory proposals. See, U.S. Chamber of Commerce, *Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP)* available here: https://www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_chamber_ttip_paper-final_2.pdf and The European Crop Protection Association and CropLife America, *Proposal on US-EU Regulatory Cooperation* (March 7, 2014) available here: <http://www.croplifeamerica.org/sites/default/files/ECPA-CLA%20TTIP%20Position%20-%20Paper%2010-03-14.pdf>.
35. TPP Chapter 25, available here: <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.
36. TPP Article 25.3: Scope of Covered Regulatory Measures. For analysis of an earlier draft of this chapter see Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence* (23 October 2011) available at: http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherence-Memo.pdf and Bill Warren, The TPP trade agreement regulatory coherence chapter is an environmental hazard (June 1, 2012), Friends of the Earth, <http://www.foe.org/news/archives/2012-06-the-tpp-trade-agreement-investment-chapter-is-an-env>; and <http://www.dailykos.com/story/2015/05/19/1385953/-A-2014-TPP-draft-is-enough-to-tell-us-that-we-need-to-see-the-final-version-before-fast-tracking>.
37. *The United States Council for International Business Submission to USTR on The Transatlantic Trade and Investment Partnership* 11 (May 10, 2013) available at http://www.uscib.org/docs/2013_05_14_ttip_submission.pdf [hereinafter USCIB May 10, 2013 Submission]
38. *Eyes on Trade Blog, WTO Orders U.S. to Gut U.S. Consumer Country-of-Origin Meat Labeling Policy, Further Complicating Obama Fast Track Push*, Public Citizen, May 18, 2015 accessed here: <http://citizen.typepad.com/eyesontrade/2015/05/wto-orders-us-to-gut-us-consumer-country-of-origin-meat-labeling-policy-further-complicating-obama-f.html>.
39. See, TPP Article 8.7 Transparency, paragraph 7; Article 8.10 Information Exchange, paragraph 2*bis*. Other provisions applicable to state governments concern online publication of technical regulations, Article 8.7.5*bis*.
40. See, TPP Article 8.9: Cooperation and Trade Facilitation. In addition, Article 8.3.1*bis* on the scope of the TBT chapter states "Each Party shall take such reasonable measures, within its authority, to encourage observance by local government bodies on the level directly below that of the central government within its territory which are responsible for the preparation, adoption and application of technical regulations, standards and conformity assessment procedures ...".
41. The TBT chapter is enforceable through government-to-government dispute settlement, see Chapter 28, Dispute Resolution, Article 3. Confusingly, the TBT chapter provides that, with respect to certain articles of the WTO TBT Agreement that are included in the TPP by reference, dispute settlement is not available "for a dispute that exclusively alleges violation of the provisions of the TBT Agreement incorporated into [the TPP]."
42. See, CA S 203 (2015), Sugar-Sweetened Beverages: Safety Warnings, Senator Monning; NY A 2320 (2015) Labeling of Sugar Sweetened Beverages, Assembly-member Dinowitz; VT H 89 (2015), Health and Safety Warnings on Sugar Sweetened Beverages, Representative Stevens. These bills are either still pending or carried over to next year's session; none has been enacted to date. Text and bill status available through the NCSL environmental health database, accessed here: <http://www.ncsl.org/research/environment-and-natural-resources/environmental-health-legislation-database.aspx>.
43. Let's Move website, available here: <http://www.letsmove.gov/drink-lots-water>.
44. The Chilean Congress adopted Law No. 20,606 on nutrition and composition of food and food advertising on July 6, 2012, and the Chilean Ministry of Health (MOH) published the corresponding final implementing regulations in Chile's Official Journal on December 17, 2013. See, USTR 2014 Report on Technical Barriers to Trade, at p. 54.
45. USTR media release available here: <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2014-TBT-Report>.
46. USTR 2014 Report on Technical Barriers to Trade, available here: <http://www.ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>.
47. USTR 2014 Report on Technical Barriers to Trade, at p. 55.
48. Chile is one of the parties to the TPP and was involved in TPP negotiations with the USTR at the same time that its junk food warning labels were targeted by the USTR as being in violation of TBT standards.
49. TPP TBT Annex 8-F.
50. TPP TBT Annex 8-F paragraph 3 (a), (b).
51. USCIB, *The United States Council for International Business Submission to USTR on The Transatlantic Trade and Investment Partnership* (May 10, 2013) available at http://www.uscib.org/docs/2013_05_14_.
52. Public Citizen, *TAFTA as Monsanto's Plan B: A Backdoor to Genetically Modified Food*, <https://www.citizen.org/documents/TAFTA-GMO-factsheet.pdf>.
53. *USTR hears concerns about US-EU trade deal*, Agri-Pulse (May 31, 2013), accessed on September 22, 2015 at: <http://www.agri-pulse.com/USTR-hears-concerns-about-US-EU-trade-deal-0532013.asp>.
54. TPP Article 2.29: Trade of Products of Modern Biotechnology; see also Article 2.21: Definitions.
55. TPP Article 2.3: National Treatment, paragraph 2: "For greater certainty, the treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment that regional level of government accords to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part."
56. TPP Article 28.3.1.
57. The initial proposal from the EU for a Technical Barriers to Trade chapter in TTIP was tabled for discussion with the U.S. in the March 2014 negotiating round and made public on January 7, 2015, and is posted here: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153025.pdf.
58. EU TBT Chapter, Article 4.
59. EU TBT Chapter, Article 8.
60. TRADE POLICY ASSESSMENT prepared for the Maine Citizen Trade Policy Commission (June 25, 2012) at p. 8, <http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf>.
61. "Health warnings on junk food," Albert Alemanno (March 25, 2013) available here: <http://albertoalemanno.eu/articles/health-warnings-on-junk-food>.
62. A leaked copy of the TPP investment chapter, dated January 20, 2015, is posted here: <https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf>. In the EU, the ISDS system is highly controversial. In response to public opposition to the inclusion of ISDS in TTIP, the European Commission recently proposed an "Investment Court System" as a replacement: http://europa.eu/rapid/press-release_IP-15-5651_en.htm.
63. *USTR hears concerns about US-EU trade deal*, Agri-Pulse (May 31, 2013), *ibid.*
64. *Grocery Mfrs Ass'n et al v. Sorrell*, April 27, 2015 Opinion and Order at p. 82-83.
65. Public Citizen, *Case Studies: Investor-State Attacks on Public Policies* [hereinafter *ISDS Case Studies*], <http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf> (last visited Sept. 18, 2015).
66. In 1997, Ethyl Corp. sued a Canadian province for banning the importation of MMT, a neurotoxin added to gasoline. The case settled and eventually cost Canada 13 million dollars, prioritizing industry's expected profits ahead of protecting human health and the environment. In 1999, the chemical company Methanex Corp. sought \$970 million in damages in a challenge to California's phase-out of MTBE, a gasoline additive that had contaminated ground and surface water throughout the state. Although ultimately dismissed in 2005, the case had a chilling effect on the willingness of other states to follow California's lead and tied up state financial and staff resources in assisting in the litigation for several years. Recent cases relevant to state-level chemical and environmental regulation include Lone Pine's attack on a fracking moratorium enacted by the Quebec provincial government in Canada and a judgment in support of Bilcon's challenge to the Nova Scotia provincial government's denial of a mining permit. *Ibid.* See also TABLE OF FOREIGN INVESTOR-STATE CASES AND CLAIMS UNDER NAFTA AND OTHER U.S. "TRADE" DEALS (June 2015) accessed at: <http://www.citizen.org/documents/investor-state-chart.pdf>
67. *ISDS Case Studies*.
68. "Australia faces \$50m legal bill in cigarette plain packaging fight with Philip Morris," by Peter Martin, The Sydney Morning Herald (July 28, 2015) available here: <http://www.smh.com.au/federal-politics/political-news/australia-faces-50m-legal-bill-in-cigarette-plain-packaging-fight-with-philip-morris-20150728-gim4xo.html>

69. See *Preempting the Public Interest*, at FN 110, referencing letter from National Association of Attorneys General to Michael Froman, Ambassador to the Office of the United States Trade Representative, (February 5, 2014,) available at: <http://www.naag.org/assets/files/pdf/signons/2014-02-05%20TPP%20Final%20Letter1.pdf>. (“A recent example of such a challenge is a NAFTA investor arbitration brought by Grand River Enterprises Six Nations Ltd., a Canadian cigarette manufacturer that challenged certain MSA-related laws in 45 states—laws that have been upheld in every challenge to them in a United States court, including several by Grand River itself. The NAFTA challenge was rejected by an arbitration panel, but only after extensive litigation that consumed significant state and federal time and resources to defend”).

70. *Secret TPP Investment Chapter Unveiled: It's Worse than We Thought*, Public Citizen, at p. 2, available here: <https://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf>.

71. TAFTA Corporate Empowerment Map, Public Citizen, available here: <http://www.citizen.org/TAFTA-investment-map>.

72. Karen Hansen-Kuhn, *Local Economies on the Table*, IATP (November 14, 2014), available here: <http://www.iatp.org/documents/local-economies-on-the-table>.

73. TPP Article 15.24: Procurement, Further Negotiations, paragraph 2.