



STATE'S LEADERSHIP ON HEALTHY FOOD AND FARMING AT RISK UNDER PROPOSED TRADE DEALS

Consumer interest in healthy eating, organic food and supporting sustainable local food systems has never been higher. Consumers want and expect that product labels will identify where their food is from, how it was produced and what is in it. With federal food labeling policies lagging far behind public expectations, state legislatures have taken the lead by enacting labeling laws to educate and protect consumers and support local food systems. Nearly 300 food labeling bills were introduced in state legislatures in 2014 and 2015, including nutrition disclosures, sugary drinks warnings, identification of local products such as olive oil and seafood, and disclosure of GMO ingredients.¹

U.S. negotiators are looking to wrap up two new massive trade agreements that could threaten the continued viability of these local food policy initiatives. If approved by Congress, the Trans Pacific Partnership (TPP) among 12 nations would cover 40 percent of global economic activity. The Transatlantic Trade and Investment Partnership (TTIP) would link the U.S. and European Union (EU). Unlike earlier trade agreements focused primarily on reducing tariffs to open up markets, these agreements are likely to include extensive provisions intended to reduce or eliminate state and federal regulations.

State food labeling laws are vulnerable to challenge as “technical barriers to trade”

Both the TPP and the TTIP will have a chapter on “technical barriers to trade” (TBT).² TBT provisions are already in effect under World Trade Organization (WTO) rules and have been successfully invoked to overturn federal food labeling standards, including Country of Origin Labeling for meat.³ Regional trade deals like TPP and TTIP are required to be “WTO plus,” meaning their rules must be at least as stringent as those in the WTO so that they are likely to pose even greater threats to domestic food policy. A draft TBT chapter for TTIP seeks 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.”⁴ Labeling rules are specifically targeted. The TBT chapter would also impose a “necessity test” such that labeling 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.”⁵ The TPP includes a first-time annex on “Proprietary Formulas for Prepackaged Foods and Food Additives” to the TBT chapter that imposes the burdensome “necessity test” and additional confidentiality protections on government regulators seeking information to regulate food ingredients. These provisions could hinder the timely development of stronger federal standards relating to junk food warnings, GMO labeling and detailed information about “proprietary” food additive formulas.

State food labeling laws are clearly vulnerable under these provisions. State standards that differ from federal rules could be challenged, even if U.S. law allows for those differences. Would Vermont’s GMO labels, for example, meet the “necessity test,” when U.S. federal regulatory agencies have established no disclosure requirements? Legal scholars suggest that U.S. states should be concerned about how such a necessity test would operate.⁶

Health warnings are also at risk. In 2015, bills were introduced in three states—California, New York and Vermont—to require safety warnings on sugary drinks.⁷ The US Trade Representative (USTR) has opposed such laws in other countries, objecting to Chilean nutrition warning labels because they might discourage consumption of imported processed foods.⁸ Business groups have openly stated their interest in using these trade agreements to thwart state regulations. The U.S. Council for International Business testified that “[s]ubsidiary political units, such as EU Member States or U.S. States should be prohibited from seeking to impose separate requirements for approval or local restrictions on sale or use,”⁹ and the U.S. National Confectioners



Association has stated that “US industry also would like to see the US-EU FTA achieve progress in removing mandatory GMO labeling and traceability requirements.”¹⁰

Regulatory cooperation in the TTIP and TPP

Nothing illustrates the scope of these international agreements better than the EU’s proposal for a Regulatory Cooperation chapter in TTIP.¹¹ This far-reaching proposal seeks to “reduce unnecessarily burdensome, duplicative or divergent regulatory requirements affecting trade or investment.” A U.S. federal agency would be charged with collecting information about proposed and pending federal and state legislation and regulations on virtually any subject, including advance notice of bills and impact assessments intended to determine whether the policies are more “trade restrictive” than necessary. Foreign governments’ concerns would be injected into domestic policies and procedures, and procedures intended to “harmonize” standards could result in setting federal and international minimum standards as the regulatory ceiling.¹²

The TPP also includes regulatory cooperation requirements applicable to U.S. states. Tucked into the TBT chapter is a provision requiring the federal government to provide advance notice of state-level proposals for “new technical regulations and conformity assessment procedures” where those proposals “may have a significant impact on trade.” The federal government *must* engage in “technical discussions” upon request by another TPP country. The intended outcome of these discussions is to align state regulations with international standards, and move towards mutual recognition of standards of TPP countries as equivalent.

These provisions don’t specify how—or if—state policymakers would be consulted in these harmonization initiatives. In general, regulatory cooperation would impose new burdens on budget-strapped state agencies and legislatures, shifting resources from the implementation of consumer protections to collating documents and monitoring and participating in international meetings. The consequences could extend well beyond increased red tape. Attempts to harmonize U.S. and EU regulatory standards will necessitate reining in outlier state standards that impose additional or different requirements on businesses, such as enacted and proposed state-level food labeling standards.

Investment provisions give corporations a preferential forum in which to challenge state laws

The Investor-State Dispute Settlement (ISDS) procedures in trade agreements allow foreign investors to sue governments directly in 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. laws, in practice, when a country loses to an investor, it will change the offending law, pay damages or both. Under ISDS, transnational corporations could sue for claimed lost profits due to food labeling requirements or GMO disclosure rules that companies claim will lower sales of GMO-containing products.

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, including laws banning toxic gasoline additives and a moratorium on fracking permits, have already been targeted in challenges under the North American Free Trade Agreement (NAFTA). TPP and TTIP would exponentially increase the number of corporations that could take advantage of these special rights to challenge consumer standards.¹³ Additionally, government-prepared impact assessments analyzing state regulations proposed in the regulatory cooperation provisions of these agreements could provide support for these legal attacks.

Conclusion

The U.S. government has refused to make negotiating proposals for the TPP and TTIP public. 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 at their peril. State government officials and local food advocates 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 soon be reviewing the final agreements under an abbreviated “fast track” process. If they do not, they could see important state health and consumer protections, including food labeling, undermined and likely rendered moot by these international agreements masquerading as trade facilitation.

Endnotes

1. National Conference of State Legislatures’ databases of state legislation on environmental health and agriculture and rural development. Last accessed July 30, 2015.
2. TTIP Regulatory Cooperation text. An early leaked draft of the Regulatory Coherence chapter in TPP includes similar provisions.
3. *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.
4. See initial proposal for legal text on “Technical Barriers to Trade”, Article 4.
5. EU TBT Chapter, Article 8.
6. “Health warnings on junk food,” Albert Alemanno (March 25, 2013). See also TRADE POLICY ASSESSMENT prepared for the Maine Citizen Trade Policy Commission (June 25, 2012) at p. 8.
7. 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.
8. USTR 2014 Report on Technical Barriers to Trade, p. 55.
9. U.S. Council for International Business Submission to USTR).
10. Public Citizen, *TAFTA as Monsanto’s Plan B: A Backdoor to Genetically Modified Food*.
11. *Preempting the Public Interest: How TTIP Will Limit US States’ Public Health and Environmental Protections*, Center for International Environmental Law (September 2015) at p. 9-12, and the EU Regulatory Cooperation chapter.
12. *Ibid.*, p.14-20.
13. TTIP alone could “quadruple” the number of newly empowered investors, see *TAFTA Corporate Empowerment Map*, Public Citizen.