

STOP THE WORLD, WE WANT OUR OWN LABELS: TREATIES, STATE VOTER INITIATIVE LAWS, AND FEDERAL PRE-EMPTION

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1. INTRODUCTION

The conflict between federal government treaties and state voter initiative legislation, at first, seems to be an arcane scholarly curiosity, one that presents novel questions of competing sovereignty. Presently, the United States is rapidly moving toward greater adherence to global institutions' needs for predictable trade norms. Simultaneously, the re-empowerment of states with formerly federal areas of regulation has reflected voter frustration with federal administrative inadequacy. Treaty mechanisms for trade protection will generate more conflicts with the preferences of individual states as the trend towards the empowerment of states develops.

This Article posits that the federal executive branch's constitutional authority to make treaties and the federal Senate's role to consent to treaties override the voting power of state citizens who wish to control aspects of the international commerce in goods. The challenge to the state laws is likely to be most visible when exporting nations use the General Agreement on Tariffs and Trade ("GATT")¹ dispute mechanisms to challenge California's controversial product labeling laws.

International commerce continues to integrate at a rapid pace.² Nations are challenging non-tariff trade barriers more frequently in international tribunals as national sanitary protections are replacing tariffs as a means of excluding competitors. The world's

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¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

² United States import and export trade in manufactured goods has increased steadily. *See, e.g.*, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 818 (114th ed., 1994) [hereinafter STATISTICAL ABSTRACT].

new trading arrangements do not merely disfavor dis-integrative local impositions on trade, but exclude them as well.³ Congressional compromises over U.S. acceptance of the Uruguay Round of GATT structured but did not eliminate this jeopardy to state laws.⁴

Within the United States, if state voter initiatives clash with the Constitution, or with the nation's international trade obligations as established by treaties, the state initiative legislation must recede.⁵ California's eccentric 1986 labeling initiative, voter-approved "Proposition 65"⁶ requiring product warnings and imposing privately-enforced penalties, will be an important test case of treaty supremacy in the coming years.

The states as a "laboratory of democracy" at the state ballot box have produced an unusual mixture of laws over the years. The California initiative produced a disclosure scheme impacting thousands of imported and domestic goods. When import trade, state sovereignty, cancer fears, and the environment clash, the result makes for interesting new legal disputes: will the engine of world commerce and global trade politics be strong enough to overpower one state's novel scheme?

Section 2 of this Article sets the groundwork for the potential conflict between state law and international treaty obligations. Section 3 examines the substantive and procedural aspects of California's Proposition 65. Section 4 discusses principles of

³ See generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act] (establishing the World Trade Organization in furtherance of the general goals of liberalizing world trade and eliminating domestic barriers thereto).

⁴ See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 103 (codified at 19 U.S.C. § 3512 (1994)) (establishing a dispute settlement mechanism to resolve conflicts that may arise between state law and the Uruguay Round agreements).

⁵ The rules of statutory construction apply to the initiative statute. See *Center for Pub. Interest Law v. Fair Political Practices Comm'n*, 259 Cal. Rptr. 21, 26 (Cal. Ct. App. 1989). However, the presumption of constitutionality will lead the court to adopt an interpretation that avoids rendering the statute unconstitutional. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.11 (5th ed. 1992).

⁶ See CAL. HEALTH & SAFETY CODE § 25249.1 (West 1992). The law was adopted as a ballot measure enumerated as "Proposition 65" on the 1986 general election ballot. See generally ROGER L. CARRICK, SURVIVING PROPOSITION 65 (1987) (providing historical background on the measure).

federal pre-emption doctrine and reasons why they, in themselves, have not rendered Proposition 65 unenforceable. Section 5 explores the theoretical implications of the GATT and WTO on domestic laws. Section 6 predicts the ways that these principles might actually be applied by WTO panels. Finally, Section 7 foresees an inevitable collision between the principles discussed in the previous sections and suggests that the results of this conflict will shape the future of federalism, government regulation, and international trade.

2. BACKGROUND OF THE DEBATE

2.1. *The Role of Treaty Obligations*

Many treaties are international agreements used to speed up and simplify trade in commercial goods. World trade has increasingly been subject to tariff reduction or elimination treaties that promote the free flow of goods among nations. The recently-formed World Trade Organization (“WTO”),⁷ an outgrowth of seven years of negotiation under GATT’s Uruguay Round,⁸ for example, is the most far-reaching affirmation of the importance of a global view of trade for the United States.⁹ GATT opened U.S. markets to consumer goods made in every other signatory nation.¹⁰ Multinational decisions made in the form of global treaties and bilateral agreements will dominate the twenty-first century regulatory obligations of producers and exporters with respect to topics such as labeling and bans of certain ingredients.

⁷ See Final Act, *supra* note 3, art. I (“The World Trade Organization (hereinafter referred to as ‘the WTO’ is hereby established.”); see also *id.* arts. II-IV, VII-VIII (establishing the scope, functions, structure, budget, and general legal status of the WTO).

⁸ See generally JEFFREY SCHOTT & JOHANNA W. BUURMAN, *THE URUGUAY ROUND: AN ASSESSMENT* (1994) (detailing the events and contours of the Uruguay Round of GATT negotiations).

⁹ See generally ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993); 2 *LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION* (Joseph Dennin ed., 1995) [hereinafter *LAW & PRACTICE*].

¹⁰ See GATT, *supra* note 1, art. III (establishing generally the principle of national treatment: once goods have been imported into one GATT member nation from another, the receiving nation may not discriminate between the imported goods and domestically produced goods); see generally KENNETH N. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

Under the Constitution, the President is assigned the task of negotiating international treaties, subject to the advice and consent of the Senate.¹¹ Treaties have special status; they become the law of the United States under Article VI, Clause 2 of the Constitution.¹² A decision that a treaty should contain certain provisions regarding trade, for example, would probably generate considerable political conflict within the Senate. The Senate has the authority to decide whether to ratify a treaty¹³ and then both Houses of Congress enact the necessary implementing legislation.¹⁴

This treaty power is part of the national government's constitutional duties, a power that the Tenth Amendment did not reserve to the states by the Tenth Amendment.¹⁵ Federal courts have exclusive jurisdiction over cases arising under international treaties.¹⁶ Treaties are contracts between the United States and another nation.¹⁷ They ordinarily pre-empt any state law to the contrary,¹⁸ especially state laws that hinder operation of an international treaty.¹⁹ In effect, a treaty trumps state law that adopts a contrary requirement.

¹¹ See U.S. CONST. art. II, § 2, cl. 2.

¹² See *id.* art. VI, cl. 2; see also *Dreyfus v. Von Finck*, 534 F.2d 24, 29 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) ("A United States treaty is a contract with another nation which under art. VI, cl.2 of the Constitution becomes a law of the United States.").

¹³ See U.S. CONST. art. I.

¹⁴ See, e.g., Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4814 (1994) (codified at 19 U.S.C. § 3512 (1994)).

¹⁵ See U.S. CONST. amend. X; *Reid v. Covert*, 354 U.S. 1, 18 (1957) (stating that "to the extent that the United States can validly make treaties, the people and the states have delegated their power to the National Government and the Tenth Amendment is no barrier").

¹⁶ See 28 U.S.C. § 1331(a) (1994).

¹⁷ See *Von Finck*, 534 F.2d at 29 (holding that a "United States treaty is a contract with another nation which under Art. VI, cl. 2 of the Constitution becomes a law of the United States").

¹⁸ See *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1088 (2d Cir. 1982) (stating that under the Supremacy Clause, "treaties entered into by Congress were binding on the states and paramount to any conflicting acts on the part of their legislatures").

¹⁹ See *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1309 (9th Cir. 1982) (holding that California state law was pre-empted to the extent it would prevent the operation of an international treaty).

2.2. *Communicating About Risks*

This Article addresses an unusual variant on the toxicological principle that “the dose makes the poison.”²⁰ Toxicologists calculate the risk of cancer from product exposure to or misuse of certain chemicals; in some cases, the assessment of risk is so high that the government opts to regulate by compelling protective measures such as warning labels. The presence and composition of chemicals in a formulated product can be determined by analysis. The mere presence of a chemical is not properly equated with risk of cancer or other hazards to human users of a product.²¹

Risk assessment²² precedes risk communication in most rational systems. We entrust the communication task to communicators after the health experts have assessed the level of risk. The gasoline in one’s car is both poisonous and explosive; to communicate that the car’s driver will die from proximity to gasoline is foolish. Once the chemical’s exposure and other factors are calculated, a decision can be made on whether the product presents a risk.²³ This accurate and important information about product risk can be communicated by many means, including public education campaigns and product labels.

This Article addresses an example of a state-required risk

²⁰ RONALD E. GOTS, *TOXIC RISKS: SCIENCE, REGULATION, AND PERCEPTION* 40 (1993).

²¹ See *id.* at 41-42 (discussing the relationship between dose and toxicity); SHELDON KRIMSKY & ALONZO PLOUGH, *ENVIRONMENTAL HAZARDS: COMMUNICATING RISKS AS A SOCIAL PROCESS* 27-28 (1988) (noting that instead of being entirely objective, assessment of risk “provides a more formal statement of a group’s underlying assumptions about the nature of environmental hazards and the levels of economic/health tradeoffs that is considered acceptable”); see generally W. KIP VISCUSI ET AL., *LEARNING ABOUT RISK* (1988) (discussing differences in consumer perceptions of risk and actual risk assessments).

²² Risk assessment in the federal system includes U.S. Environmental Protection Agency cancer risk assessment guidance. See 51 Fed. Reg. 34000 (1988).

²³ Controversies about the probabilities and extent of injuries that a product may cause are usually resolved by expert witness testimony. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993) (holding that “[f]aced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine the issue”).

communication that is imposed on any imported or domestic product sold in California. Proposition 65 requires a label warning once chemicals are listed as subject to warnings because of the laboratory finding of potential cancer effects in animals.²⁴ Under California's approach, a statutory duty to communicate is established, *prima facie* and subject to any defenses, by the detectable chemical presence in the product.²⁵ The resulting label requirements pose a significant problem for U.S. and non-U.S. marketers alike: the identical product lawfully sold in the forty-nine other states must either be labeled with a drastic, risk-announcing label or be kept out of California. What products are affected and what ingredients will next be listed are key facts, not readily identified by observers far distant from California.

Scholars of the phenomenon of health risk have extensively studied how the public responds to communications about risk.²⁶ For the more severe risks, it is more likely that a public safety entity such as a government health agency will ban the ingredient,²⁷ or require that information about the risk be included on product labels.²⁸ The governmental decision to impose "warning" labels reflects the protective determination of public health officials that information is the optimal solution to the reduction of public risk.

The quandary that results from this set of choices is a difficult one for the product marketer: where two or more regulators take different risk assessment views, risk communication is forced to satisfy the demands of the regulator who is most stringent even if the majority of other regulators do not share that extreme view. The risk communication purpose is especially important when a marketer designs the messages that will fit on a particular product's label. Multiple risk warning label decisions, made

²⁴ See *AFL-CIO v. Deukmejian*, 260 Cal. Rptr. 479 (Cal. Ct. App. 1989) (ordering the relevant state agency to include animal carcinogens in addition to chemicals that cause cancer in humans under Proposition 65 principles).

²⁵ See CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992).

²⁶ See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1992); W. KIP VISCUSI, *PRODUCT RISK LABELING: A FEDERAL RESPONSIBILITY* (1993); BARUCH FISCHHOFF ET AL., *ACCEPTABLE RISK* (1981).

²⁷ See, e.g., 29 C.F.R. § 1910.1001 (1996) (describing bans on asbestos products in occupational settings).

²⁸ See, e.g., 16 C.F.R. pt. 1500 (1996) (setting forth Consumer Product Safety Commission regulations on labeling of hazardous products).

locally at various times and with various wordings, are likely to conflict directly with the desire in international trade for efficient and multinational product labels. Where punitive local additions skew the variation in risk communications, inconsistent demands confront the label designer. Particular issues arise for international exporters when local warning commands affect their product sales in the United States by imposing unpredicted liabilities which most California-based competitors were able to anticipate and avoid.

2.3. *Product Labels and Trade Issues*

Making product users aware of information relevant to protection of human health can reduce real risks. One important trade-related aspect of private solutions to public risk concerns is the decision to use multilingual product labels, a choice for marketers selling products in more than one nation to make. Only a finite amount of consumer product label space is available. Thus, labeling information tends to be compressed to allow, for example, English, Spanish, and French wording on a product sold throughout North America. The amount of content that can be communicated on the same label decreases as the languages of the label messages increase.

Uniformity of content of the label statements is essential to receiving cost efficiencies in packaging and distribution of consumer goods. The challenges for non-U.S. marketers of consumer products will intensify if treaty protections for imported products are not able to assure uniformity of labeling. The number of local variants on product label information must be necessarily reduced as multiple national requirements are imposed on the same label. There is a tension between local desires for product label variations, and the interests of an efficient international economy. Trade in consumer goods across national and state boundaries is expanding rapidly.²⁹ Information that is of interest to consumers in one corner of the globe, if it must also be communicated to all others who receive the labeled product, will add costs to purchasers elsewhere who do not share that locality's concern. A unitary label for a product offers a significant distribution cost advantage over multiple segregated streams

²⁹ See STATISTICAL ABSTRACT, *supra* note 2, at 818.

of differently-labeled products that present information desired by local consumers.³⁰

2.4. *Illustrating the Label Preference Concerns*

The distinction between a warning based on preferences and one based on reasoned scientific consensus, is reminiscent of the similar distinction drawn by a federal appellate court in 1996.³¹ A Vermont labeling statute³² required the announcement on dairy products of the presence of the biotechnological feed additive "rBST," but was not on its face a warning of adverse effects. The Second Circuit Court of Appeals struck down the state law in August 1996.³³ Opponents of the mandatory label framed the primary issue under First Amendment "compelled speech" case law.³⁴ The court drew a distinction between product composition information that represented a legislature's judgment about a "reasonable concern for human health or safety," and the types of information that are nice to know but can be determined by consumers' choice in marketplace decisions.³⁵

Vermont opponents of the chemical argued that rBST posed human health concerns, but the federal agencies disagreed after years of complex technical examinations of the human and animal safety of the additive.³⁶ The appellate court differentiated between the concern that some consumers felt, and the state's governmental interest in safety of products.³⁷ The court commented in a footnote that the state government had taken no

³⁰ See generally ABA, SECT. OF TORT & INSURANCE PRACTICE, PRODUCT WARNINGS, INSTRUCTIONS AND USER INFORMATION (1994) (summarizing product label warning studies).

³¹ See *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

³² See VT. STAT. ANN., tit. IV, § 2754 (Supp. 1996).

³³ See *International Dairy Foods Ass'n*, 92 F.3d at 74.

³⁴ Compelled speech is suspect under First Amendment principles. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). This applies even in the context of a product label, which is "commercial speech." See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-3 (1980).

³⁵ *International Dairy Foods Ass'n*, 92 F.3d at 73 n.1.

³⁶ See *id.* at 73.

³⁷ See *id.* at 74.

position on whether the chemical is beneficial or detrimental,³⁸ but wanted consumers to know of the presence of the chemical. The court held that the presence of rBST was an insufficient basis on which to compel private persons to speak where First Amendment rights existed.³⁹

2.5. *State Initiative Legislation*

Most laws are adopted through normal channels of legislative consideration, amendment, and compromise. But many states also allow the public to vote on the adoption of laws through ballot initiatives. While referendum authority for such topics as zoning decisions is well understood,⁴⁰ a number of states, such as California, have gone far beyond the mundane, allowing initiative votes on hundreds of controversial policy topics.⁴¹

State courts are required to construe the complex statutory products of the initiative process, without legislative records or reports, or colloquies of legislative sponsors that are sometimes used to construe the terms of conventional statutes.⁴² In practical terms, the difference is that courts cannot view initiative legislation through the prism of legislative history, amendment, and compromise, a view that sometimes is a useful tool of construction in applying state laws. The drafters' lack of precision in creating initiative legislation leaves the court to decide whether, for example, the state law can be construed to avoid conflicts with earlier or parallel federal requirements.⁴³

In construing a state statute, a state court often presumes that

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See J.R. Kemper, Annotation, *Adoption of Zoning Ordinance or Amendment Thereto Through Initiative Process*, 72 A.L.R.3D 991, 993 (1976).

⁴¹ See Doug Willis, *California Voters Love the Idea of Taking the Law into Their Own Hands*, AP, Apr. 14, 1997, available in WESTLAW, 1997 WL 2516499.

⁴² The rules of statutory construction apply to the initiative statute. See Center for Pub. Interest Law, 259 Cal. Rptr. at 26.

⁴³ See, e.g., *Committee of Dental Amalgam Mfrs. & Distrib. v. Stratton*, 92 F.3d 807, 810 (9th Cir. 1996) (stating that Proposition 65 could be pre-empted by federal act only where "all possible consumer product warnings that would satisfy Proposition 65 conflict with provisions of the" act); *Cf. Rossi v. Brown*, 889 P.2d 557, 559 (Cal. 1995) (finding conflict between voter initiative law and state constitution only where state constitution expressly precludes the disputed exercise of initiative power).

the state legislature was aware of, and did not wish to conflict with, an inconsistent federal statute.⁴⁴ Though the case law is sparse, one could posit that a court's scrutiny of the meaning of an initiative's terms will be as great or as small as its deference to legislation adopted through conventional means.⁴⁵

3. CALIFORNIA PROPOSITION 65

3.1. *Illustrating the Treaty-Initiative Clash*

The best current illustration of the clash of treaty rights and state powers is a voter-adopted initiative statute that imposes an explicit state-specific, chemical-specific set of words on packages of many products sold at retail stores in California.⁴⁶ California voters adopted the initiative proposal as Proposition 65, entitled the "Safe Drinking Water and Toxics Enforcement Act of 1986,"⁴⁷ on the 1986 ballot by almost a 2-to-1 margin.⁴⁸ The initiative was more stringent in its warning labels than the legislature's conventional enactments on the same subject.⁴⁹ Sponsors of the ballot initiative did not trust conventional regulation systems for chronic risks such as cancer.⁵⁰ Because they believed that existing California regulation was inadequate,⁵¹ they drafted and submitted Proposition 65 to the state's voters.⁵²

⁴⁴ See SINGER, *supra* note 5, § 45.11.

⁴⁵ See Rossi, 889 P.2d at 557.

⁴⁶ See CAL. HEALTH & SAFETY CODE § 25249 (West 1992).

⁴⁷ See "Restrictions on Toxic Discharges into Drinking Water; Requirement of Notice of Persons' Exposure to Toxics. Initiative Statute," California Ballot Pamphlet, General Election at G86 (Nov. 4, 1986) [hereinafter Proposition 65].

⁴⁸ See Julie Anne Ross, Comment, *Citizen Suits: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 U.S.F. L. Rev. 809, 813 (1995).

⁴⁹ See *id.* at 141 (stating that "our present toxic laws aren't tough enough").

⁵⁰ See Judith A. DeFranco, *California's Toxics Initiative: Making It Work*, 39 HASTINGS L.J. 1195, 1199 (1988) (explaining risk related purposes of Proposition 65 advocates).

⁵¹ See John R. Emshwiller, *California Ballot Proposal Would Give Citizens a Role in Safeguarding Against Toxic Materials*, WALL ST. J., Sept. 17, 1986, at 60.

⁵² See Proposition 65, *supra* note 47, § 1 (stating that "state government agencies have failed to provide [people] with adequate protection"). The sponsors justified their ballot language to the officials who review state ballot language: "The purposes section makes it clear that the level of protection against the risks of hazardous chemicals which is currently being provided by

Advocates of the ballot initiative proposed labeling requirements, rather than an outright ban, as a control measure against the sale of carcinogenic ingredients. One such mandatory label reads: "WARNING: THIS PRODUCT CONTAINS A CHEMICAL KNOWN TO THE STATE OF CALIFORNIA TO CAUSE BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM."⁵³ Implicit in this wording is the assumption that consumers will refuse to buy a product so labeled when other alternatives without such labels exist. This assumption presumes that the other products on the retail shelf do in fact avoid the exposure to detectable levels of the listed ingredient. The requirement of such severe warnings gave Proposition 65 advocates the strategic leverage to drive the hundreds of listed chemicals out of the consumer market, through the predictable avoidance by manufacturers of the stigma effect of negative labels.

It thus seems reasonable to infer that Proposition 65 supporters intended to make products unmarketable by requiring these label warnings, thereby inducing marketers to reformulate the product by deleting the chemicals in question. For example, assume that the state officials chose to list ingredient ABC. Then widgets with ingredient ABC that were put on sale in California would need to change their labels to incorporate this warning. The required label language is so harsh an addition that widget makers would cease any use of ABC as an ingredient.

The California initiative's advocates specifically disagreed with the adequacy of centralized control of product risk decisions.⁵⁴ Product warning labels imposed under existing state laws and federal laws such as the Toxic Substances Control Act,⁵⁵ the Consumer Product Safety Act⁵⁶ and the Occupational Safety and Health Act of 1970⁵⁷ were deemed not sufficient to protect

state agencies is not adequate." Letter from David Roe and Carl Pope, Environmental Defense Fund, to Robert Burton, Deputy Attorney General 1 (Dec. 31, 1985) [hereinafter Letter].

⁵³ CAL. CODE REGS., tit. 22, § 12601(b)(4) (1995).

⁵⁴ See Proposition 65, *supra* note 47, § 1.

⁵⁵ See 15 U.S.C. § 2601 (1994).

⁵⁶ See 15 U.S.C. § 2051 (1994).

⁵⁷ See 29 U.S.C. § 651 (1994); see also *California Labor Fed'n, AFL-CIO v. California Occupational Safety and Health Standards Bd.*, 271 Cal. Rptr. 310 (Cal. Ct. App. 1990) (finding that federal workplace safety requirements can be augmented by state label warnings).

Californians. The result was that a set of California-specific warning labels, incorporating the state's assessment of certain chemicals, would be required on all products sold in that state that contain one of the hundreds of listed chemicals.⁵⁸ The compelled warning would be required even though the product maker, federal government agencies, and other states did not agree that the consumer product needed the same warning statement on its labels. Disclaimer language is not acceptable under the California scheme.⁵⁹

This compelled announcement of the state's opinion, triggered by presence rather than risk, is a critical distinction. Regardless of what Vermont, Korea, France, or the U.S. government believes to be a product's consumer health risk, the product must bear the words describing to consumers this state's opinion of the risk posed by the presence of a chemical in this product. The other states or nations considered and did not use the warning "this product is a risk;" but one U.S. state puts *its* opinion of the chemical on the label of the product, making mere presence of the chemical subject to warning, as opposed to the actual risk of the product.

3.2. *What Proposition 65 Requires*

Proposition 65 requires warning labels to be included on the products which contain certain chemicals.⁶⁰ A typical product offered for sale in California, which has one of hundreds of chemicals in its formula, will bear the label statement, "WARNING: THIS PRODUCT CONTAINS A CHEMICAL KNOWN TO THE STATE OF CALIFORNIA TO CAUSE BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM."⁶¹ If only one such effect applies, the label need mention only that effect.⁶²

Scientific knowledge of the intricacies of birth defect and cancer causation is evolving. Science knows much less about these

⁵⁸ See CAL. CODE REGS. tit. 22, § 12601 (1995).

⁵⁹ See *id.*

⁶⁰ See CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992). The law also has a provision regarding environmental spills of chemicals into a source of drinking water, a feature that is not addressed in this Article. See *id.*

⁶¹ CAL. CODE REGS. tit. 22, § 12601(b)(4) (1995).

⁶² See *id.* (setting forth separate warnings for the variety of risks products may pose).

chronic hazards than is known about easily-measured immediate risks.⁶³ Existing methodologies that measure acute risk can calculate well the likelihood that a chemical will explode, catch fire, or burn exposed skin. The California labels mandated by Proposition 65 do not relate to acute risk warnings, but instead apply to chemicals for which animal studies predict some reproductive effect, such as lowered birth weight of rat offspring when measured in a rodent feeding study.⁶⁴ For example, if the state determines that dihydrogen oxide causes a slower rate of growth in rabbits than does a placebo dosage, products containing dihydrogen oxide could be required to include the prominent warning shown in the preceding paragraph.

The initiative legislation's trigger for warning is the simple presence of the listed chemicals, *not* a showing of the causal relationship between the chemicals in this quantity or path of exposure and illnesses such as birth defects or cancer.⁶⁵ This is a distinction that sets Proposition 65 apart from federal labeling systems. An acutely dangerous product that could burn or directly injure the person is already the subject of universally required warnings in the United States and Canada.⁶⁶

The presence of the listed chemical is the triggering event for the *prima facie* duty to label.⁶⁷ For example, a paint manufacturer who makes paint in Maine must be certain that the cans it sells in California bear a label giving the precise California-specific words quoted above if the paint contains one or more of the several hundred listed chemicals. An Ohio customer who reads

⁶³ See, e.g., GOTS, *supra* note 20, at 94 (contrasting the limitations of scientific knowledge in the search for "cancer-causing chemicals" with the availability of scientific data for identifying toxicity of industrial discharge).

⁶⁴ See CAL. CODE REGS. tit. 22, §§ 12306(e)(2), 12306(g)(2) (West 1992); see also Paulette L. Stenzel, *Right-to-Know Provisions of California's Proposition 65: The Naivete of the Delaney Clause Revisited*, 15 HARV. ENVTL. L. REV. 493, 503 (discussing the use of animal studies in assessing chemical risk for Proposition 65 purposes).

⁶⁵ See CAL. HEALTH & SAFETY CODE § 25249.11(c) (West 1992). There is an affirmative defense available to the litigation defendant who can assert the level was one of "no significant risk," but this is a factual issue for the jury to determine. CAL. HEALTH & SAFETY CODE § 25249.10(c).

⁶⁶ See, e.g., 16 C.F.R. pt. 1500 (1996); see generally JAMES O'REILLY, *COMPLYING WITH W.H.M.I.S.: THE U.S. MANUFACTURER'S GUIDE TO CANADIAN CHEMICAL LABELING* (1989) (describing Canada's system in detail).

⁶⁷ See § 25249.11(c).

the "known to California"⁶⁸ label on an Ohio retail shelf is very likely to select a product with a less alarming label; the alarming words scare consumers and may even puzzle others.⁶⁹

The federal government has not adopted such a universal requirement for warning of cancer or reproductive effects, opting instead for the more scientific approach of tying warnings about the exposure of the chemical to its risk levels in products.⁷⁰ Consequently, California requirements for labels on products will be different than federal or other state norms for the labels of products sold throughout the United States. Though other states are free to impose labeling requirements relating to safety, such as fire and flammability warnings and recycling information, none have followed California's stringent approach. Comparable legislative proposals in such states as Oregon,⁷¹ New York⁷² and Hawaii⁷³ have failed. Ohio overwhelmingly rejected a California-style initiative drafted by the creator of Proposition 65 in November 1992.⁷⁴ As a result, California is the only venue that requires a state-specific warning of chronic health effects on a product otherwise lawfully labeled for marketing in the United States, thereby rendering the product illegal for failure to describe the presence of certain chemicals.

The parallels of the Vermont rBST litigation⁷⁵ to the Proposition 65 scheme include the fact that California's listing of chemical names stands alone; listing is not related to specific levels or risks of exposure that occur with a particular product. Private litigants challenge products that contain detectable amounts of the listed chemical. The defense can claim that "no significant risk" level exists, but only as an affirmative defense for which the

⁶⁸ See CAL. CODE REGS. tit. 22, § 12601(b)(4) (1995).

⁶⁹ See VISCUSI ET AL., *supra* note 21, at 96 (noting that "if labels or other information programs are constructed to force buyers to focus on the risks of injury from a product, no matter how small (as long as they are positive), then many consumers will avoid purchasing the product . . .").

⁷⁰ See, e.g., 29 C.F.R. § 1910.1001 (1996) (describing regulation of asbestos in products); see generally 16 C.F.R. pt. 1500 (1996) (describing regulation of toxic effects of consumer products).

⁷¹ See S. 975, 64th Legis. Assembly (Or. 1987).

⁷² See Assembly 2273, 1989-90 Legis. Reg. Sess. (N.Y. 1989).

⁷³ See H.R. 52, 15th Legis. (Haw. 1989).

⁷⁴ 78% of Ohio's voters rejected ballot Issue 5 in the 1992 general election.

⁷⁵ See *supra* Section 2.4.

marketer bears full burdens of proof.⁷⁶ While California residents may be exposed to many other sources of carcinogenic chemicals, the only specific warnings imposed are those on consumer products.⁷⁷ Although the dose makes the poison, California ties its law to presence and not to dose.

3.3. *The Labeling Command for Imported Products*

Non-California manufacturers and processors who market their products inside California are legally liable for \$2,500 per day penalties⁷⁸ if their product is sold or offered for sale in that state without the expressly defined warning statement.⁷⁹ The retail seller is liable as well, but larger California retailers have obtained indemnification clauses in their purchasing contracts.⁸⁰ As a result, the total costs of the defense and penalty fall upon the manufacturer.

To illustrate, a non-U.S. manufacturer of widgets who wishes to sell to buyers anywhere in the United States must anticipate that the widgets will move through channels of retail distribution, including, perhaps, to California's huge market. The foreign exporter must find a way to examine the current California list of chemicals.⁸¹ The updated listing will include the names of several hundred materials, some of which may be contaminants present in a detectable quantity in the widgets. The duty of the non-U.S. firm is to watch for new and revised listings, and to measure for the intended and unintended presence of chemicals in

⁷⁶ See CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 1992).

⁷⁷ See CAL. HEALTH & SAFETY CODE § 25249.6 (imposing warning requirement on persons "in the course of business"); CAL. CODE REGS. tit. 22, § 12601(b)(5) (imposing warning requirement on any person "who manufactures, produces, assembles, processes, handles, distributes, stores, sells or otherwise transfers a consumer product").

⁷⁸ See *infra* Section 3.4.

⁷⁹ See § 25249.6.

⁸⁰ Cf. Jack D. Shumate & David K. Tillman, *Proposition 65 — California Law Becomes a National Problem*, 67 MICH. B.J. 516, 517 (1988) (noting that the threat of liability has led to a "rash of demands from California businesses for certifications from manufacturers and suppliers that their products do not contain any substance on the Proposition 65 list"); see also § 25249.11(f) (providing that regulations implementing § 25249.6 place an obligation to warn "on the producer or packager rather than on the retail seller").

⁸¹ The listings are amended frequently. For a description of the amendment procedure, see CAL. CODE REGS. tit. 22, § 12101 (1997).

its widgets. For any products that contain any detectable amount of a listed chemical, such as toluene, the non-U.S. firm must then place the English language label on the widget, "WARNING: THIS PRODUCT CONTAINS A CHEMICAL KNOWN TO THE STATE OF CALIFORNIA TO CAUSE BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM."⁸²

It is the presence of a toxic substance such as lead, and not the health risk of lead ingestion from a unit of product, that gives rise to a *prima facie* legal duty to use a label warning.⁸³ For example, if a calcium supplement pill is made in Mexico from calcium derived from seashells that were on the bottom of the ocean near where ships and boats had used leaded gasoline and lead-based preservative paints, the manufacturer would have an obligation to label the product. The manufacturer would be under such a duty because the calcium may thereby contain low levels of lead that the supplement maker had not intentionally added to its pills.

3.4. *Penalties for Non-Compliance*

Violations of the California state requirements may result in three consequences: a fine of \$2,500 per day per violation; attorney fees and cost awards to the successful challenger; and a court order to re-label or re-formulate the units still on sale.⁸⁴ Additional consequences may result from the inclusion of other collateral claims.⁸⁵

In measuring and awarding an actual amount of damages in a Proposition 65 case, a judge or jury would probably consider factors such as fair notice, good faith, and ability to recapture products shipped before the deadline that are sold after the effective date. The foreign manufacturer whose product contains an unintended contaminant (like the lead in the calcium pills

⁸² § 12601(b)(4).

⁸³ See CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992).

⁸⁴ See CAL. HEALTH & SAFETY CODE § 25249.7 (West 1992). It is unsettled law whether the \$2,500 per day penalty can be multiplied by the number of exposures to individuals, by the number of units, or by some other factor.

⁸⁵ Plaintiffs may also allege violations of the Unfair Practices Act, thereby generating additional liability of up to \$2,500 a day beyond the Proposition 65 penalties. See CAL. BUS. & PROF. CODE § 17200 (West 1997). The statute of limitations for claims of unfair trade practices is four years, while the statute of limitations for Proposition 65 violations is just one year. See CAL. BUS. & PROF. CODE § 17208 (West 1997); CAL. CIV. PROC. CODE § 340 (West 1997).

described above) would have to pay \$912,500 per year⁸⁶ plus \$100,000 in legal fees. In order to obey the law, the manufacturer may have to change its calcium source so as to avoid using seashells with low amounts of lead in them.

3.5. *Compliance Activity Needed to Avoid Violation*

For the non-U.S. manufacturer, obtaining copies of the California label warning regulations and the periodically updated Proposition 65 lists of chemicals will be just the beginning. One who wishes to comply must also have technical advisors skilled in toxicology who can discern from the literature studies, whether consumer product contaminants and unintended migration of chemicals may result in detection in the product of a newly-discovered chemical, from whose presence there arises a labeling requirement. A chemical need not be intentionally present; it is the surprise detection of one of the hundreds of contaminants within one's product that ambushes the unwary manufacturer.

Unfortunately, the information gap between large and small companies in dealing with Proposition 65 is vast because of the scientific resources needed to remain aware of the detectability of contaminants and to remain up to date on the state's listings of chemicals. Few of the smaller non-U.S. marketers could afford the U.S. legal fees to litigate a massive penalty case and thereby risk the \$912,500 per year in penalties, in addition to reformulation expenses; thus the pressure to settle is enormous.

Non-U.S. manufacturers likewise have an information deficit that puts them at greater risk. Another nation whose chemical safety agency does not regulate the particular chemical is not likely to be on notice that one of the fifty U.S. states has the chemical on its list. A French-made product may comply with French and European Union requirements, and probably with U.S. government standards, but the surprise appearance of a different risk assessment and different risk communication demand would force the French company to pay a settlement, or else play on California bounty hunters' favorable terms in one of the state's superior courts.

⁸⁶ \$2,500 multiplied by 365 days.

3.6. *Enforcement by Private Bounty Hunter Suits*

Part of the extraordinary impact that Proposition 65 has had on marketing in the United States has resulted from the drafters' chosen vehicle of case law enforcement. By paying a twenty-five percent "bounty" from the \$912,500 annual fine to anyone who sues and wins as a private enforcer,⁸⁷ the mini-industry of bounty hunter enforcement was born. More than 600 cases have been filed since the law went into effect in February 1988, and the great majority have been settled for cash payments made by manufacturers to private lawyers.⁸⁸

A public policy difficulty inherent in any bounty hunter arrangement is that case selection, definitional precedents, and statutory interpretation issues are all vested in a private person who has a strong cash incentive to bring cases that return the best payout. By analogy, the bounty hunter of the Old West might have profited when a bank robber was arrested, thereby diverting public attention to the capture of bank robbers, even though society's priorities might have placed murderers first on the most wanted list. The reward-incentive system introduces systemic distortions even greater than the flawed citizen suit system of private enforcement of federal environmental laws.⁸⁹

The California system does not assign a public priority to each lawsuit brought for enforcement. A few lawsuits are investigated and initiated by the state Attorney General; the vast majority involve no public official. The initiative drafters' choice of bounty hunter mechanisms, "in order to create new incentives for enforcement,"⁹⁰ places enforcement into the hands of any person who wishes to sue any foreign or domestic producer or marketer who fails to comply with the law. The creation of cash incentives for the collection of twenty-five percent of any penalties and for settlements with large attorney fee awards has induced litigants,

⁸⁷ See CAL. HEALTH & SAFETY CODE § 25192 (West 1992).

⁸⁸ The State Attorney General's office maintains the only log of Proposition 65 litigation, and because the payment in settlement rate is so high, few reported court decisions have arisen.

⁸⁹ See MICHAEL GREVE AND FRED SMITH JR., ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 115 (1992) (providing detailed analysis of the defects in the citizen suit structure).

⁹⁰ Letter, *supra* note 52, at 3.

including the groups that sponsored the drafting effort,⁹¹ to search for violations.

The practical effect is that multi-defendant lawsuits for alleged failure to label the same chemical, brought against many producers of the same class of products, have proven to be extremely lucrative sources of settlement income for the bounty hunters.⁹² The use of private profit incentives as an alternative to conventional public enforcement has worked as initiative drafters had intended, to induce the filing of the vast majority of Proposition 65 cases. In turn, settlement of cases between private plaintiffs and corporate defendants has made compliance efforts more difficult, for the norms of compliance are set forth in consent decrees and not in public processes such as rulemaking.

4. FEDERAL PRE-EMPTION

4.1. *State Laws and Rules*

Federal pre-emption claims by U.S. firms have not been successful in Proposition 65 cases for two reasons. First, some product categories regulated by federal laws lack a sufficiently clear federal statutory provision that establishes pre-emption of label warning contents. Second, in other cases with a stronger statutory argument for the labeler, pre-emption has been defeated⁹³ because of a loophole in state regulations that allows retail store shelf labeling to complement, or substitute for, the on-package label.⁹⁴

Advocates of the California system have successfully asserted

⁹¹ Arguments in support of Proposition 65 were presented on behalf of the Environmental Defense Fund and allied organizations. *See id.* After the law was passed, the Environmental Defense Fund, along with others, brought an action for violations of Proposition 65 against a paint-stripper manufacturer. *See Dennis Pfaff, Plaintiffs Attorneys and "Bounty Hunters" Are Taking the Initiative in Enforcing Proposition 65*, CAL. LAW., Aug. 1995, at 42.

⁹² *See* Judy Stringer, *Manufacturers Settle Big with Activist Group*, CHEM. WK., Apr. 24, 1996, available in WESTLAW, 1996 WL 923720 (discussing a \$1.1 million settlement by several California activist groups of numerous suits brought under Proposition 65).

⁹³ *See* Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir. 1992), cert. denied, 506 U.S. 825 (1992) (holding that alternate forms of labeling undercut claims of federal label pre-emption). *But see* Ingredient Communication Council, Inc. v. Lungren, 4 Cal. Rptr. 2d 216 (Cal. Ct. App. 1992) (finding that alternates to label warning not accepted by state).

⁹⁴ *See* CAL. CODE REGS. tit. 22, § 12601(b)(1)(B) (1995).

that federal label requirements can be augmented, at least in theory, by a multitude of posted signs at the point of purchase of every product in each retail outlet in California.⁹⁵ Under this line of reasoning, if shelf posting is uniformly successful, the required state label does not "conflict" with federal label exclusivity. Federal courts have struggled to avoid the constitutional conflicts that would arise if pre-emption of the state initiative law were declared.⁹⁶ California courts have a similar desire to avoid unconstitutional outcomes.⁹⁷

The avoidance of pre-emption by in-store shelf warnings is a useful legal defense but the reality is that no reasonable retail marketer in California *would* place thousands of product-specific signs in proximity to the shelves where the manufacturer's product is displayed to customers.⁹⁸ One alternative warning method, using in-store signs and a telephone call-in number, was rejected because of very small use of the system by consumers.⁹⁹ Still, the defenders of Proposition 65 may use the potential in-store option, regardless of its feasibility, to forestall pre-emption based on label costs. They have asserted successfully that courts need not reach issues of constitutional pre-emption, since an alternative system of warnings could, in theory, be utilized.¹⁰⁰ The loophole has provided a comfortable legal fiction, to assert that because an option could be utilized with cooperation of retailers, the daunting questions of federalism and labeling pre-

⁹⁵ See *id.* § 12601.

⁹⁶ See *Committee of Dental Amalgam Mfrs. & Distrib. v. Stratton*, 92 F.3d 807, 810 (9th Cir. 1996) (holding that FDA medical device law is not preemptive unless all possible warnings conflict); *Industrial Truck Ass'n v. Henry*, 909 F. Supp. 1368, 1377-78 (S.D. Cal. 1995) (permitting no pre-emption of state labeling requirements in the absence of express federal standards).

⁹⁷ See, e.g., *San Francisco Unified School Dist. v. Johnson*, 479 P.2d 669 (Cal. 1971).

⁹⁸ See *Ingredient Communication Council v. Lungren*, 4 Cal. Rptr. 2d 216 (Cal. Ct. App. 1992) (stating that warning systems are not "clear and reasonable *per se* by virtue of their mere existence").

⁹⁹ See *Ingredient Communication Council*, 4 Cal. Rptr. 2d at 1495 (finding insufficient a system using in-store signs and a toll-free number to give Proposition 65 warnings due to "critical evidence set forth at trial . . . that in its first year of operation the . . . system provided a total of only 488 taped telephone warning messages to California consumers").

¹⁰⁰ See, e.g., *Committee of Dental Amalgam*, 92 F.3d at 809 (stating that "the fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

emption may be avoided.

4.2. *Federal Pre-emption of State Tort Cases*

The federal pre-emption case law of private tort cases is in flux, but Supreme Court decisions in 1992 and 1996 set a threshold that makes pre-emption of Proposition 65 by conventional statutory theories more doubtful. In *Cipollone*,¹⁰¹ the Court's careful parsing of pre-emptive language in federal cigarette labeling provisions impliedly disfavors opponents of state label warning laws.¹⁰²

The state courts' medical device products liability claims are not pre-empted by the federal Medical Device Amendments of 1976.¹⁰³ Pre-emption would involve hundreds of millions of dollars in lessened liability exposure for manufacturers. In 1996, the Supreme Court ruled in *Medtronic, Inc. v. Lohr*¹⁰⁴ that federal statutory language pre-empting state "requirements"¹⁰⁵ did not also pre-empt the indirect requirements resulting from adverse verdicts in state tort cases.¹⁰⁶ Consequently, such a tort damage award could indirectly force manufacturers to move away from using federally accepted label terms toward use of narrower warnings.¹⁰⁷

The Supreme Court's direction seems to be that state court damages claims of injury are not pre-empted by vague federal statutes, because they are not a "requirement."¹⁰⁸ Applying this logic, a law that operates by lawsuits rather than by substantive administrative rules, like Proposition 65, would not usually be pre-empted since the bounty hunter's violation charge is not itself

¹⁰¹ *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

¹⁰² *See id.* at 518 (stating that federal statutory provisions must be construed "in light of the presumption against the pre-emption of state police power regulations").

¹⁰³ *See* 21 U.S.C. § 360 (1994).

¹⁰⁴ *See Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996).

¹⁰⁵ 21 U.S.C. § 360k (1994).

¹⁰⁶ *See Lohr*, 116 S.Ct. at 2240.

¹⁰⁷ *See id.* at 2240 (noting that "additional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement").

¹⁰⁸ *Id.* at 2240 (reasoning that general federal regulatory statutes are unlike more specific regulation which is "designed to protect from potentially contradictory state requirements").

a rule of the state. The federal acceptance of a certain chemical risk level, while California awards damages for a lower level of the same chemical, demonstrates an inconsistency of the federal and state systems. However, this inconsistency does not result in invalidation under the *Lohr* analysis.

4.3. Federal Pre-emption and the Bounty Hunter

Pre-emption is often tied to existence of a state "requirement."¹⁰⁹ The federal pre-emption that applies to the imposition of a state regulation on such issues as package net weight¹¹⁰ is different from the pre-emption claim that would apply when a private enforcer, acting as a "private attorney general," seeks statutory penalties. The California enforcement case is very much like a civil damages action, albeit with no showing of injury. The general public acts only as a bystander in the Proposition 65 case; half of the payment in settlement or after trial goes to public agencies.¹¹¹

The degree of private control and involvement in Proposition 65 cases is a significant factor that relates to the above discussed Supreme Court cases.¹¹² This law's novel enforcement scheme imposes a non-governmental penalty collection system, and the privately-induced litigation scheme is not a state "requirement" as it applies to a product in a Proposition 65 case. The *Cipollone* and *Lohr* decisions, which have suggested that statutes pre-empting state requirements do not also preclude private tort suits, become more significant when the enforcement system moves farther away from conventional state regulation-writing. It was the inadequacy of conventional regulatory methods¹¹³ that led proponents to radically alter the enforcement system in Proposition 65.¹¹⁴ That radical alteration has made federal pre-emption

¹⁰⁹ *Id.*

¹¹⁰ See generally *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (discussing differences between state and federal requirements for net weights on labels).

¹¹¹ See CAL. HEALTH & SAFETY CODE § 25192(a) (West 1992). Many Proposition 65 suits brought by activist groups have settled with "contribution" payments to those groups, along with fee awards to counsel. See, e.g., Stringer, *supra* note 92.

¹¹² See *supra* Section 4.3.

¹¹³ See Proposition 65, *supra* note 47, § 1 (asserting that "state government agencies have failed to provide [people] with adequate protection").

¹¹⁴ See CAL. HEALTH & SAFETY CODE § 25249.7 (West 1992).

on statutory grounds unlikely.

5. THE GATT ARGUMENTS

The GATT binds the United States government to enforceable rules of trading and customs tariffs on products that are shipped across international boundaries.¹¹⁵ The typical consumer product sold in stores from California to Maine is likely to contain a foreign-made component or part, or to have been assembled, grown, or harvested outside the United States.

The GATT compels fair treatment of all product imports. It creates an enforcement body, the WTO, to enforce the treaty proscriptions against non-tariff trade barriers such as unreasonable local requirements that might be disguised as "health protection" rules.¹¹⁶ The WTO has enforcement teeth as a result of its empowerment by the Uruguay Round amendments to GATT,¹¹⁷ and these teeth can bite a nonconforming law or rule of a signatory nation.¹¹⁸

Counsel to the complaining nation will probably use several sophisticated arguments against Proposition 65 in the WTO. The private bounty hunter litigation is not a tariff, not a national tax, and not on its face a source of distinction between points of origin within California, in the United States, and outside the United States. The adverse effect on trade is real, but subtle. The probable WTO case's facts derive from the particular bounty hunter lawsuit against a particular imported product, and so the particular approach cannot be specified in advance. The nation from which the challenged product is exported will file the complaint at WTO on behalf of its domestic company, the exporter that is now a defendant in the California state courts. The United States government will consider its response to the WTO complaint after consultation with California officials.¹¹⁹

In GATT terms, nations will allege that their non-U.S.

¹¹⁵ See GATT, *supra* note 1.

¹¹⁶ See DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 213-15 (1994); see generally LAW & PRACTICE, *supra* note 9.

¹¹⁷ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act, Annex 2; 33 I.L.M. 1225, 1226 (1994) [hereinafter Settlement Understanding].

¹¹⁸ See generally HUDEC, *supra* note 9; LAW & PRACTICE, *supra* note 9.

¹¹⁹ See 19 U.S.C. § 3512(b) (1997).

companies are not given fair national treatment by the United States because the California companies may much more easily avoid the peculiar vulnerabilities of Proposition 65 than may those at a distance.¹²⁰ The free flow of goods is hampered when one of the fifty states can impose a huge penalty on a shipper which increases transaction costs. In particular, a non-U.S. company could not anticipate such costs if it shipped goods to a port other than the ports in California and the recipient moved the goods to California. The non-U.S. company may still be held liable under Proposition 65 due to the notion that the sale of its product in California should have been foreseeable.¹²¹ Ostensibly, "doing business"¹²² in California triggers an extra label obligation that is not applicable in the forty-nine other states. The duty to label exists even where the shipper had no control over the U.S. importer's distribution practices.

Although transparency¹²³ is a virtue in the world trade system, the content of the obligation to label is not transparent. Many Proposition 65 cases have involved very tenuous contaminant or byproduct claims rather than assertions about intended ingredients. However, where the belated discovery of a detectable amount of a listed chemical can trigger private litigation exposing a company to huge potential liability, requirements cannot be characterized as transparent. Transparency is also offended by the per-day penalty scheme. It is usually a year or more after the obligation to label arises before the shipper learns that its product is vulnerable, by which time the non-U.S. company may already have accrued a huge penalty that year.¹²⁴

¹²⁰ See *supra* Section 3.5.

¹²¹ A single intentional sale in California in violation of Proposition 65 merits penalties. See *As You Sow v. Crawford Lab.*, 50 Cal. App. 4th 1859, 1864 (Cal. Ct. App. 1996).

¹²² CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992) (stating that "[n]o person in the course of doing business" may expose a person to a cancer-causing chemical without first meeting the warning obligations).

¹²³ See Hans van Houtte, *Health and Safety Regulations in International Trade*, in LEGAL ISSUES IN INTERNATIONAL TRADE 128, 137 (Petar Sarcevic & Hans van Houtte eds., 1990) (asserting the importance of "openness and transparency" and that a nation "should inform other nations about [its] health and safety standards").

¹²⁴ Penalties include \$2,500 per day for each of two penalty schemes, Proposition 65 and "Unfair Business Practices" violations. See CAL. HEALTH & SAFETY CODE § 25249 (West 1992); CAL. BUS. & PROF. CODE § 17200 (West 1997).

Proposition 65 is also discriminatory on the basis of information flow. Because the law expressly eliminates¹²⁵ the kinds of notice and comment pre-regulation rights that federal rules have,¹²⁶ many U.S. organizations and companies pay California consultants for expert monitoring of the information in order to anticipate listings and enforcement trends. California's decision to allow the majority of cases to be brought by private attorneys further precludes the non-U.S. company from predicting *which* chemicals, and at what levels of presence, will be litigated.

Although the GATT permits national health protection measures and allows nations to adopt necessary sanitary measures,¹²⁷ the provision would be offended by the enforcement of localized liability on the basis of standards that a nation itself has refused to adopt. Congress has considered but never adopted Proposition 65-like liability schemes. Federal agencies have not embraced the Proposition 65 degree of warnings, instead preferring a risk assessment approach that is far more science-based. Given a national health protection system in place that does not rise to the stringency of the Proposition 65 scheme, it may be difficult for Proposition 65 advocates to convince WTO panels, while alongside the United States Trade Representative's regular negotiators,¹²⁸ that the law is necessary.

Finally, arbitrariness in target selection may incline a WTO panel to reject the application of Proposition 65 to the particular goods in dispute in a particular case. The bounty hunter lawsuit against the product shipper or manufacturer can only proceed after sixty days notice to government officials has lapsed with no public enforcement action against the named companies.¹²⁹ The federal, state, and county public officials' decision not to pursue this product as a public health risk, thereby leaving enforcement

¹²⁵ The section of the law providing for notice and comment rights was repealed in 1988. See CAL. HEALTH & SAFETY CODE § 25259.8(e) (West 1992).

¹²⁶ See 5 U.S.C. § 553 (1996).

¹²⁷ See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, reprinted in OFFICE OF UNITED STATES TRADE REPRESENTATIVE, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, GENERAL AGREEMENT ON TARIFFS AND TRADE 69 (1994) [hereinafter Sanitary Measures Agreement].

¹²⁸ States are entitled to consultation but not to negotiate on behalf of the United States position at the WTO. See 19 U.S.C. § 3512 (1997).

¹²⁹ See CAL. HEALTH & SAFETY CODE § 25249.7(d) (West 1992).

to the private attorney, is an admission of priorities that is likely to influence non-U.S. governments from whom the WTO panel members are drawn. The size of penalties imposed through private actions, after the governmental entity had itself refused to pursue penalties against the non-U.S. company, undercuts the potential claims that the pending Proposition 65 enforcement action is necessary for the public health of the citizens of California.

5.1. *The Case for GATT Acceptance*

Given an opportunity to defend Proposition 65 to the WTO, proponents of the private attorney general approach to cancer warnings likely would argue that an individual state made a conscious choice to have distinct standards of health protection and that GATT members should accept each state's choices out of deference to U.S. principles of federalism. They may argue that greater cancer and reproductive harm information is necessary to protect the health of state residents, even if federal officials do not share the state's risk assessment and its level of demand for risk communication.¹³⁰

Proponents also may argue that the law results in no trade-relevant discrimination, since all product sellers in California must have labels, and thus foreign and domestic firms are equally vulnerable to penalties. The fact that large penalties against domestic firms have been imposed indicates the law is not targeted against non-U.S. shippers of goods.¹³¹ Proponents of Proposition 65 may also assert that non-U.S. shippers can arrange to exclude their products from California, to sticker each container with a special California label, or to have retailers post a shelf-specific warning label that is prominent, clear, and durable enough to be visible when every potential retail customer examines the

¹³⁰ The Agreement on the Application of Sanitary and Phytosanitary Measures states that member *nations* "have the right to take sanitary and phytosanitary measures necessary for the protection of human . . . health, provided that such measures are not inconsistent with the provisions of this Agreement." Sanitary Measures Agreement, *supra* note 127, art. 2, para. 1. Member nations must ensure, however, that any such measure is "applied only to the extent necessary to protect human . . . health, is based on scientific principles and is not maintained without sufficient scientific evidence . . ." *Id.* art. 2, para. 2.

¹³¹ See Stringer, *supra* note 92.

imported product.¹³² However, although it is potentially feasible to have compliance without labels, in practice only a universally applied label warning reciting California's opinion about the product's dangers that is visible on each package when sold in every state of the United States, will assure that products which wholesalers and retailers ship to and from their several outlets will comply with California's law.

5.2. *The GATT Safety Exception*

The GATT Article XX(b) permission for "measures . . . necessary to protect human, animal or plant life or health" is an exception to the treaty proscription against nontariff trade barriers.¹³³ The Proposition 65 label requirement concerns cancer and other chronic risks.¹³⁴ In the consultation that customarily precedes attempts to invalidate laws under GATT,¹³⁵ proponents of the law may argue the warning is necessary and permissible as a sanitary measure under GATT agreements.¹³⁶

In order to claim this exception, the proponents of Proposition 65 likely would argue that information about the presence of listed chemicals aids consumer choice. They would assert that the label is not a ban, but a mere informational device. They would characterize the initiative law as a measure that reflects a "policy choice" by state voters¹³⁷ who endorsed the view that disclosure of chemical risks is necessary to protect the California consumer from even small exposures to chemicals that may pose health risks.

GATT also has sanitary and phytosanitary agreements that

¹³² See CAL. CODE REGS. tit. 22, § 12601(b)(1)(B) (1995). Because the onerous tasks of sign-posting, maintenance and changes are uncertain while the liability is stringent, very few producers have successfully used means other than labels to avoid Proposition 65 liabilities.

¹³³ GATT, *supra* note 1.

¹³⁴ See CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992) (stating that no person shall expose another to a chemical known "to cause cancer or reproductive toxicity").

¹³⁵ See 19 U.S.C. § 3512 (1997).

¹³⁶ See Sanitary Measures Agreement, *supra* note 127, art. 2, para. 4.

¹³⁷ Of course, only those voters who read through to the 86th page of the ballot pamphlet and the 142d page of the explanatory book at the polling place before marking their ballot were fully informed as to the "policy" of Proposition 65. See Proposition 65, *supra* note 47.

allow the United States (not individual states) to offer a higher level of protection than do other nations.¹³⁸ Risk assessment principles are expressly included in the sanitary measures agreements.¹³⁹ California uses some international listings of chemicals as a basis for some of its labeling commands,¹⁴⁰ but the state's risk assessment judgments for listing have been far more restrictive than are most federal and foreign national systems.¹⁴¹ Proponents of Proposition 65 nevertheless would argue that the law is not vulnerable because it complies with scientific requirements.¹⁴²

6. APPLYING GATT

6.1. *Proposition 65 Liability and GATT*

Goods imported into the United States from other nations enjoy the full protection from non-tariff trade barriers that GATT has established. The effect of Proposition 65's unusual listing methods, its uncertain risk criteria, and its unpredictable bounty hunter-created case law, will be a triple threat to any foreign company entering the U.S. market. The importer attacked by a bounty hunter begins at a real disadvantage, because the product selection decisions of California officials are exempt from normal rulemaking processes.¹⁴³ Very conscientious observers can track the process by watching specialized trade press outlets.¹⁴⁴ But the isolation of the process is compounded by the reality that many of the cases claiming penalties for an "exposure" have alleged that the chemical was present as a contaminant, rather than as an ingredient.¹⁴⁵

The uncertainty that California's law creates for the makers of

¹³⁸ See Sanitary Measures Agreement, *supra* note 127, art. 3, para. 3.

¹³⁹ See *id.* art. 5.

¹⁴⁰ See CAL. CODE REGS. tit. 22, § 12306(l)(1) (1995).

¹⁴¹ For example, California listed Vitamin D at certain levels, while most other federal and foreign national systems did not.

¹⁴² See Zane O. Gresham & Thomas A. Bloomfield, *Rhetoric or Reality: The Impact of the Uruguay Round Agreement on Federal and State Environmental Laws*, 35 SANTA CLARA L. REV. 1143, 1149 (1995).

¹⁴³ See CAL. HEALTH & SAFETY CODE § 25249.8(e) (West 1992).

¹⁴⁴ One such publication is the *Proposition 65 News* of San Francisco.

¹⁴⁵ See, e.g., *As You Sow v. Crawford*, 58 Cal. Rptr. 2d 654 (Cal. Ct. App. 1996).

these goods negatively affects trade more than the usual impact of a conventional tariff decision. A Korean, Thai, or Sri Lankan shipper of products containing any level of listed chemicals can either label all packages shipped to the United States with the California-specific wording, or not do so (through ignorance or intent) and take the risk of a bounty hunter suit. This is a difficult decision to make at a distance, upon the shipment of goods to the United States, since the appearance of goods on a California retail shelf may occur months after the label is affixed in a foreign city.

6.2. *Will the WTO Panel Accept Proposition 65?*

Disputes can only be presented to the WTO by nations against other nations. As discussed above, only the national governments participate in the GATT dispute resolution system.¹⁴⁶ Only the U.S. Trade Representative can assert a position on behalf of the United States.¹⁴⁷ When the U.S. GATT legislation was adopted, a special consultation process was added to preserve state rights of intervention within the U.S. government.¹⁴⁸

Despite the consultative power allocated to states by Congress in the Uruguay Round legislation implementing amendments to GATT,¹⁴⁹ this internal sharing of power has no counterpart in Geneva when the WTO panel convenes. The fifty individual states do not have separate capacities to defend GATT complaints or to invoke a national privilege for a health-related exception to GATT.¹⁵⁰ A nation's non-tariff barrier to trade, once alleged to exist, can only be defended by the federal government. As discussed above, the national government itself has not adopted a California-style selection process and warning scheme, and the individual bounty hunter's lawsuit proceeded only because neither county nor state officials had become involved. So will the same

¹⁴⁶ See *supra* Section 5.

¹⁴⁷ See 19 U.S.C. § 3512 (1997).

¹⁴⁸ See *id.* § 3512(b)(1).

¹⁴⁹ See *id.* § 3512.

¹⁵⁰ The WTO procedures are found in the multilateral agreement. See Settlement Understanding, *supra* note 117, art. 3, para. 7 (providing remedies for violation including compensation or suspension of concessions or obligations); see also Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 588-98 (1996) (discussing the potential impact of these remedies on a nation that fails to comply).

government that declines to use a Proposition 65 labeling approach defend the existence of that approach in a world adjudicative forum?

A policy decision to defend the validity of Proposition 65 must be made at the federal level, before the WTO panel convenes to hear the particular allegation of non-tariff trade barriers against this one state's law. To date, no federal decision about defending Proposition 65 has been made. The federal regulatory bodies have not followed California's approach to mandating cancer label warnings. And many in the scientific community question the wisdom of the statutory text that arbitrarily fixed the risk level for reproductive toxicity at 1/1,000 of the level found in the most potent chemical effects study.¹⁵¹

The three WTO members of the panel will be diplomats of other nations. The political geography of risk assessment should not be overlooked. If a centralized health authority in the nations from which WTO dispute-resolution panel judges come does not believe that chemical X in product Y at level Z requires warnings, *and* the U.S. federal government does not impose such a requirement, then the state's claim to a power to impose warning labels on non-U.S. shippers is doubtful. Defenders of Proposition 65's classification and labeling scheme will face a challenge in confronting WTO panel judges from other nations of the world with American federalism and the curious concept of "states as laboratories of democracy."

And to further distance the case from a conventional nation-to-nation tariff dispute, the trade issue raised by the foreign government is likely to be presented in the context of million dollar civil penalty lawsuits by private plaintiffs seeking financial gain, using the bounty hunter provisions. Because the great majority of the Proposition 65 cases litigated have been brought by private sector plaintiffs, the challenge to the non-U.S. product that precipitates the claim at WTO is likely to arise out of a bounty hunter claim. The entire set of WTO challenges to date have been governmental, though some have reflected advocacy for affected industrial sectors against protectionist activity of their competitors in the receiving nation.¹⁵²

¹⁵¹ See CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 1992).

¹⁵² See generally ESTY, *supra* note 116 (providing a useful description of WTO cases through 1994).

This last twist on the unusual setting of this trade dispute has significance for the WTO panel members from less litigious nations with a greater tradition of centralized health protection decisions by national health authorities. The California bounty hunter proceeds after giving public officials the sixty-day advance notice required by the statute.¹⁵³ The state or county then makes a public agency choice not to adopt the cause of action, but to leave prosecution of the case to that self-selected private person. The suit then proceeds as a private person suing another private entity for the enforcement of the public's right to a label. The fact that public officials eschewed enforcement in a case that later comes to the WTO will likely affect the willingness of WTO panel members to defer to the wisdom of the Proposition 65 scheme.

As a jurisdictional matter, public laws of signatory member nations intruding on trade rights of trading nations are the proper subject of WTO proceedings.¹⁵⁴ The Proposition 65 case could be argued either as a private litigation matter, or as the action of a "private attorney general" as a surrogate of the state government. Proposition 65's express rejection of governmental regulatory schemes will certainly be part of the challenger's argument that this state law is inconsistent with conventional national risk assessment systems.¹⁵⁵

In the prototypical Proposition 65 lawsuit seeking millions of penalty dollars from a foreign shipper of goods, neither the U.S. government nor the California government nor the county government has chosen to challenge the label of this foreign product. Yet one-half of the cash generated from penalties on the foreign shipper come to the state's public officials.¹⁵⁶ Those officials are bound by any court interpretations of the law's terms and application.¹⁵⁷ So this quasi-public precedential litigation will be a particularly odd style of non-tariff barriers for the non-U.S. WTO panel members to accept.

¹⁵³ See CAL. HEALTH & SAFETY CODE § 25249.7(d) (West 1992).

¹⁵⁴ See Settlement Understanding, *supra* note 117 (setting forth the basis and process of the WTO proceeding).

¹⁵⁵ See Proposition 65, *supra* note 47, § 1 ("[S]tate government agencies have failed to provide people . . . with adequate protection . . .").

¹⁵⁶ See CAL. HEALTH & SAFETY CODE § 25192 (West 1992).

¹⁵⁷ Proposition 65 must be broadly construed so as to permit broader causes of action. See *People ex rel. Lungren v. Superior Court*, 926 P.2d 1042 (1996).

6.3. *Will a WTO Decision Override State Law?*

Although the laws of a member nation must conform to its responsibilities under GATT, a WTO decision does not immediately translate into national action. The U.S. statute implementing GATT recognizes that changes to an inconsistent state statute require special procedures within the federal system.¹⁵⁸ Thus, even if a WTO panel rejects a U.S. state's imposition of a "known to California" cancer label on a non-U.S. manufacturer, a foreign shipper may still incur Proposition 65 liability.

Considerable debate about the effects on U.S. environmental laws accompanied the controversial congressional adoption of both the GATT and the North American Free Trade Agreement ("NAFTA"). The dispute resolution mechanisms of GATT were not welcomed by advocates of states' rights, who won an important procedural protection.¹⁵⁹ Congress chose, during its hot debate over GATT, to preclude affected private persons from challenging state laws by asserting their inconsistency with GATT.¹⁶⁰

The U.S. implementation of GATT required the adoption of a statute, which resulted in a compromise accompanied by a number of complex safeguards and reservations that attempted to ameliorate political opponents' concerns in the final wording of the statute.¹⁶¹ States receive rights of notice, consultation, and participation; only after failure of agreement is there a full judicial evaluation of the disputed claims.¹⁶²

In practical terms, a complaint or an adverse WTO ruling will pressure the U.S. government to remove any non-tariff barrier to trade such as Proposition 65. In bringing a WTO complaint, a foreign nation will probably aim to halt further enforcement of the single-state label requirement against that class of imported products affected by Proposition 65. The private bounty hunter whose share of the civil penalty is imposed against foreign importers will vigorously protest any interference with the expected return, even though the private attorney lacks statutory

¹⁵⁸ See 19 U.S.C. § 3512 (1997).

¹⁵⁹ See *id.* § 3512(c).

¹⁶⁰ See *id.*

¹⁶¹ See Pub. L. No. 103-465, 104 Stat. 4815 (1994).

¹⁶² See § 3512(b)(1)(C).

standing, or standing before the WTO.

The legislation that implemented GATT suggests that the United States may foreclose Proposition 65 enforcement by initiating litigation in federal court for invalidation of the statute.¹⁶³ Consultations with California-elected officials would precede the federal case, and political opposition may be severe.

The predictable U.S. political infighting over GATT pre-emption could take a long time, during which the defendant manufacturer will expend tens of thousands of dollars defending the bounty hunter's lawsuit. One means of halting a Proposition 65 case in state court might be a "suggestion of interest" intervention by the Justice Department on behalf of the U.S. Trade Representative. The case might then be removed to federal court, where the Justice Department could petition the court to stay the case, pending the outcome of the special statutory proceeding created by the 1994 legislation.

A defendant company in a Proposition 65 case might ask the state court to dismiss the case because of the GATT-related invalidity of Proposition 65 as applied to its imported products. The success of that claim depends on the receptivity of the state judiciary to these constitutional claims. The question of treaty enforcement does not come before state judges routinely, and the receptivity of state courts to federal pre-emption assertions is unpredictable. In addition, although a federal cause of action exists, it does not provide the individual defendant with any remedy.¹⁶⁴

Another way to combat Proposition 65 lies in using the threat of a WTO case as a premise for seeking legislative changes in California.¹⁶⁵ Since proponents of Proposition 65 anticipated legislative attempts to alter its severe sanctions, any change in the terms of this voter-adopted initiative law requires a two-thirds vote of each house of the state legislature.¹⁶⁶ The amendment

¹⁶³ See *id.* § 3512(b)(2)(A).

¹⁶⁴ See *id.* § 3512.

¹⁶⁵ Proposition 65 permits the legislature to make only those changes to the initiative law that would "further its purposes." Proposition 65, *supra* note 47, § 7. Under state constitutional law, the legislature cannot negate an initiative law's provisions except by a new initiative or by the terms of the particular initiative itself. See *Amwest Surety Ins. Co. v. Wilson*, 906 P.2d 1112 (Cal. 1995).

¹⁶⁶ See Proposition 65, *supra* note 47, § 7.

option, however, is a far less likely remedy than federal court intervention to block operation of the state law.

6.4. *How Will Federal Officials Respond to a GATT Complaint?*

Due to the liability that Proposition 65 imposes on importers of products, a GATT signatory nation could file a complaint charging the United States with maintaining a non-tariff barrier to trade. This action would trigger U.S. government consultations under WTO procedures, and U.S. government consultations with states under U.S. federal statute.¹⁶⁷ The later process of WTO decision seeks consensus, but panels reach decisions whenever a settlement cannot be achieved.¹⁶⁸ Three-member panels of the WTO member nations hear and decide the disputes as part of the Dispute Settlement Body created by the 1994 GATT Uruguay Round agreements.¹⁶⁹ They seek an "objective assessment" of the disputed provisions.¹⁷⁰ The system encourages consultations leading to settlement.¹⁷¹ So the existence of a challenge is likely to motivate the U.S. Trade Representative to act against Proposition 65 under the procedures of U.S. law,¹⁷² whether or not the challenging nation could ultimately prevail in a fully contested case.

Politics and world trade are commonly linked topics. The real impact of a GATT violation complaint will be to force federal officials to choose between short-term political desires, and longer term selection of targets to be defended in the complex world of trade sanction conflicts. Whether or not the federal government could win on the merits at the WTO panel, the existence of any WTO challenge to Proposition 65 will force the President to make a choice: to accede to the settlement of the foreign state's complaint, or to defend against this international trade complaint based on domestic political priorities.

The GATT's ratification in Congress¹⁷³ was a very politically charged decision. The legislation implementing WTO dispute

¹⁶⁷ See 19 U.S.C. § 3512 (1997).

¹⁶⁸ See Settlement Understanding, *supra* note 117, art. 12, para. 7.

¹⁶⁹ See Settlement Understanding, *supra* note 117, art. 8, para. 5.

¹⁷⁰ *Id.* art. 11.

¹⁷¹ See Settlement Understanding, *supra* note 117, art. 4.

¹⁷² See § 3512.

¹⁷³ See Pub. L. No. 103-465, 108 Stat. 4815 (1994).

resolution rights reflects a sensitivity to this debate. The multi-step process leading to judicial termination of a state law in response to a multinational body's command¹⁷⁴ will test the commitment of U.S. political leadership to implementing their global agreements. The emotional backlash in states like California against the rise of world governance could be significant.

The legislation implementing the GATT Uruguay Round directed a consultation process to take place before determination of the U.S. position on a particular challenge to a particular state law.¹⁷⁵ The President may then choose to expend U.S. power at the WTO in defense of a state law, or to allow the WTO panel to order elimination of the state law as a non-tariff barrier to trade. If the WTO panel decides against the United States, only the Justice Department is authorized to sue the state to remove the barrier; no private party can sue to enforce the WTO decision.¹⁷⁶ Under the U.S. statutory procedure for implementation of WTO decisions, a federal court would issue an order¹⁷⁷ holding the state's requirements invalid as contrary to international treaty obligations of the United States.¹⁷⁸

The political implications of federal intervention against a state's voter initiative law, especially for a sitting President eager for re-election votes from California, will inevitably influence this policy decision. These factors must be weighed against the spectrum of complex challenges facing the United States at the WTO, where the former has a number of economically charged trade issues of much greater dollar significance.¹⁷⁹ Proposition 65, as the only law commanding chronic effects labels across many products based on presence, not assessment of risk from each exposure, runs contrary to the federal refusal to impose such requirements. Is it worth the effort to defend an extreme program that is primarily enforced by non-governmental bounty hunters? The U.S. Trade Representative possesses only a limited amount of bargaining power with which to fight any selected

¹⁷⁴ See § 3512.

¹⁷⁵ See *id.* § 3512(b)(1)(C).

¹⁷⁶ See *id.* § 3512(c)(1).

¹⁷⁷ See *id.* § 3512(b)(2)(B)(iv).

¹⁷⁸ See *id.*

¹⁷⁹ See generally ESTY, *supra* note 116 (detailing various trade issues of significance to the United States in the context of GATT).

trade issue.¹⁸⁰ The choice to federally endorse and fight for a particular state's approach means that some other U.S. trade issue will inevitably receive less attention.

The existence of the WTO challenge is a catalyst for decision. Although any challenge brought by another nation will trigger consultation between federal and state officials,¹⁸¹ the final choices are exclusively federal. If the state disagrees, its legal defense will go to the question of U.S. adherence to WTO decisions. If a federal district court rejects the WTO decision and refuses the pre-emption request, the consequence will be a confrontation of sovereignties and trust that will affect many other U.S. trading issues. Ironically, the local bounty hunter attorney who wished to extract a quick settlement payment from an unsuspecting foreign defendant may end up at the podium of the U.S. Supreme Court, defending the legitimacy of its cause of action within the vortex of swirling constitutional conflicts.

6.5. *Could a National Risk-Based Rule have Co-existed with GATT?*

Chemical-specific cancer warning label requirements, if adopted as consistent federal requirements and enforced by a federal prosecutorial mechanism, would probably withstand GATT challenges brought by other nations against the United States. The national entity, through the U.S. Trade Representative, could argue that the federal use of risk assessments to protect consumers was a national "sanitary" regulation under the GATT sanitary and phytosanitary agreements,¹⁸² and was validly applied to better protect consumers in a very populous state.

In such a situation, the U.S. Trade Representative would also likely assert that the process for federal listings of chemicals posing health risks is so readily tracked through the federal notice and comment rulemaking process,¹⁸³ and so well grounded in scientifically accepted risk assessments, that the conditions for compliance were both transparent and defensible. The transparency requirement of GATT would likely be satisfied by federal

¹⁸⁰ See generally LAW & PRACTICE, *supra* note 9.

¹⁸¹ See 19 U.S.C. § 3512(b)(1)(C) (1997).

¹⁸² See Sanitary Measures Agreement, *supra* note 127, art. 2.

¹⁸³ See 5 U.S.C. § 553 (1996).

Administrative Procedure Act publication requirements.¹⁸⁴

7. CONCLUSION

In a world of global trade, localized product label demands at the sub-national level, such as those in California, pose multi-million dollar traps for the unwary foreign manufacturer. The U.S. legal system has not fully reconciled the devolution of power to the states, with the supremacy and more intensive effects of international treaties. A predictable collision is ahead.

Although the 1994 federal legislation implementing GATT amendments envisioned a need for accommodation between state laws and treaties, the conflicts that will arise when Proposition 65 is challenged at the World Trade Organization will raise daunting political and legal issues. The voter-adopted nature of the California warning law, and the strength of California voters' voice in Congress, makes any pre-emption decision regarding that law especially controversial. Trade lawyers, states' rights advocates, constitutional scholars, and even the "bounty hunter" plaintiff lawyers will be watching the results of such a future challenge with great interest.

¹⁸⁴ See *id.* § 552(a)(1). The California listings of chemicals are expressly excluded from the equivalent state law's rulemaking procedures. See CAL. HEALTH & SAFETY CODE § 25249.8(e) (West 1992).