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Critical Legal Issues: WORKING PAPER SERIES

**WOULD STATE-MANDATED LABELS
FOR BIOTECH FOODS VIOLATE
WORLD TRADE AGREEMENTS?**

by
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Key Points in this WORKING PAPER:

- State laws mandating labels for foods produced with genetic engineering may be vulnerable to legal challenges under World Trade Organization (WTO) Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT).
 - A ballot initiative currently under consideration in California imposing such labels is likely an SPS Measure, and arguably violates the trade agreement.
 - The initiative raises novel issues under the TBT Agreement, and it is thus not clear whether a successful challenge could be brought under those measures.
 - WTO Member States could take action against mandated biotech food label laws, as could the United States, but it is uncertain whether private parties could.
-

INTRODUCTION

Proposition 37 is an initiative petition which, if adopted by California voters in November 2012, will impose mandatory labeling on a broad range of raw and processed foods. Specifically, proposed Section 110809 mandates that a food that “is or may have been entirely or partially produced with genetic engineering” state that fact through specifically worded labels. Failure to carry the labels on genetically engineered foods, unless one of nine enumerated

exceptions¹ applies, means that the foods are misbranded. In addition, Subsection 110809.1 arguably prohibits the use of the words “natural,” “naturally made,” “naturally grown,” “all natural,” or “words of similar import” for all processed foods.²

Multiple legal challenges are expected if Proposition 37 were to pass.

Those challenges may include:

- A constitutional challenge under the dormant commerce clause doctrine, which prohibits states from unduly burdening interstate commerce. States cannot wall themselves off from the economic union that is the United States of America;³ or
- A constitutional challenge under the First Amendment of the U.S. Constitution, whereby the commercial free speech doctrine prohibits states from mandating product labels unless the states are legislating to advance a substantial state interest in mandating labels, the labels directly advance that interest, and the mandate is no more restrictive of speech than necessary. In the case most likely to be precedent for the Proposition 37 challenge, the U.S. Court of Appeals for the First Circuit ruled that a general “consumer right to know” is *not* a substantial state

¹Labeling of Genetically Engineered Food-Exemptions, §110809.2.

²The Legislative Analyst’s Office, *Proposition 37: Genetically Engineered Foods. Mandatory Labeling. Initiative Statute* (July 18, 2012) (“Given the way the measure is written, there is a possibility that these restrictions [subsection 110809.1] would be interpreted by the courts to apply to *all* processed foods regardless of whether they are genetically modified”, at 3 [Italics in the original.]) A Sacramento County Superior Court Judge has ruled that the Legislative Analyst’s views, as expressed in the ballot summary, is an accurate understanding of the initiative. KMJN TV, *Prop 37 Ruling Riles Proponents* (Aug 13, 2012).

In this article, I do not intend to discuss subsection 110809.1 further. However, I expect that my analysis of Proposition 37 and the WTO Agreements may have similar implications for subsection 110809.1.

³In the context of a Nebraska constitutional ban on corporate farms, Professor Anthony Schutz has written three articles that carefully explore the dormant commerce clause. Schutz, *Nebraska’s Corporate-Farming Law and Discriminatory Effects under the Dormant Commerce Clause*, 88 NEBRASKA L. REV. 50-123 (2009); Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 DRAKE J. AGRICULTURAL L. 97-147 (2009); Schutz, *Nebraska Corporate-Farming Ban Unconstitutional: What does “the Farm” Mean?*, 24 AGRICULTURAL L. UPDATE 4-7 (2-2007).

interest.⁴

Another avenue of legal challenge, on which this WORKING PAPER will focus, lies under the World Trade Organization (WTO) Agreements—more specifically, the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and the Agreement on Technical Barriers to Trade (the TBT Agreement).⁵

I. THE WTO AGREEMENTS

Both the SPS Agreement and the TBT Agreement set forth a delicate and difficult balance between national sovereignty and the obligation to promote world trade through nondiscriminatory and harmonized measures. This balance is easily discerned in their Preambles:

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on

⁴*International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (1st Cir. 1996). See also, *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010).

⁵In addition to the SPS Agreement and the TBT Agreement, Proposition 37 could also face challenge under the foundational WTO agreement—the General Agreement on Tariffs and Trade (GATT 1994), especially Article III (National Treatment on Internal Taxation and Regulation); Article IX (Marks of Origin); Article X (Publication and Administration of Trade Regulations); and Article XXIII (Nullification or Impairment). I do not intend to discuss the GATT 1994 Agreement at any length in this analysis.

The two most thorough analyses of a labeling law, similar to that proposed by Proposition 37, and international trade agreements are found in, D. Wüger, *Consumer Information on GM-Food in Switzerland and WTO Law* (Draft Paper 5, Workshop on SPS and TBT: Tools for harmonization of national legislations, or tool for fragmentation of markets? SECO & WTI, Sept. 24, 2004) and D. Huemüller & T. Josling, *Trade Restrictions on Genetically Engineered Foods: The Application of the TBT Agreement* in R. Evenson & V. Santaniello, *THE REGULATION OF AGRICULTURAL BIOTECHNOLOGY* (CABI, 2004).

international trade.⁶

* * * * *

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, or the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.⁷

A. Do the WTO Agreements Apply to California Enactments?

The WTO Agreements are international agreements between Member States – i.e., recognized sovereigns in international law. The United States of America is a recognized sovereign in international law as well as a Member State of the WTO Agreements. By contrast, California is not a recognized sovereign in international law, nor is California a Member State of the WTO Agreements. Thus, the first question to ask is: do the WTO Agreements apply to California’s Proposition 37? The answer is “yes”—through indirect routes.

First, the SPS Agreement, Article 13 (Implementation) states,

Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies.

Article 13 thereby imposes a duty upon the Member State (the United States), as the overriding sovereign, to take positive measures to support compliance

⁶SPS Agreement, Preamble first paragraph.

⁷TBT Agreement, Preamble sixth paragraph.

by governmental units (California) within the sovereign nation to the SPS Agreement.

Second, under the TBT Agreement, Article 3 (Preparation, Adoption and Application of Technical Regulations by Local Government Bodies⁸ and Non-Governmental Bodies) and Article 7 (Procedures for Assessment of Conformity by Local Government Bodies) create obligations for the Member State (the United States) to “take such reasonable measures as may be available to them to ensure compliance by such [local government] bodies ...” with the TBT Agreement.⁹

B. Is Proposition 37 in Compliance with the WTO Agreements?

Determining whether Proposition 37 complies with the WTO Agreements requires asking against which WTO Agreement must the initiative be measured?—the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) or the Agreement on Technical Barriers to Trade (the TBT Agreement). The TBT Agreement Article 1.5 is explicit:

The provisions of this [TBT] Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

⁸TBT Agreement, Annex 1 contains a definition for “local government body” that expressly includes, among others, states of a Member nation.

⁹TBT Agreement, Article 3.1 and Article 7.1.

Proposition 37 thus must first be classified either as a *sanitary and phytosanitary* measure or as a *technical barrier to trade* measure. Once classified, the relevant WTO Agreement, and it alone, serves as the legal standard by which to evaluate legal compliance of Proposition 37.¹⁰

SPS Agreement Annex A defines sanitary and phytosanitary measures as all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria, processes and production methods, testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

From this Annex A definition, California's Proposition 37 is an SPS measure if it is "labeling requirements directly related to food safety."

Evidence that Proposition 37 is a label directly related to food safety comes from two sources—its language and the way it has been promoted as a ballot initiative.

Proposition 37 proclaims in five of the eleven paragraphs of Section 1 (Findings and Declarations) that proponents support it due to variety of health concerns such as ingesting toxicants from eating genetically engineered foods and associated health risks from water and environmental exposure.¹¹ In

¹⁰While the WTO dispute settlement bodies will classify the proposition as either an SPS measure or a TBT measure and decide the challenge based solely on the appropriate agreement, parties challenging Proposition 37 can bring claims against it under both agreements. Parties bring these alternative claims knowing that the dispute settlement bodies will eventually discard one set of claims as inapplicable.

¹¹Proposition 37, Section 1(a), (b), (c), (d) and (h).

addition, if adopted, Proposition 37 will become part of the California Health and Safety Code, i.e., the California Food, Drug and Cosmetic Law. Further evidence comes from subsection 110809(b) where the language makes clear that the label “shall not be construed” to be about ingredients. Rather, subsection 110809(a) likens the labels, as worded and as placed on packages and on store shelves or bins, more closely to health and safety warnings.

In materials promoting Proposition 37, proponents regularly proclaim that the voters should support Proposition 37 because Californians’ health and safety are at great risk, and labels would provide them with protection. For instance, the official pro-Proposition 37 campaign on its website urges readers to watch a video advertisement which begins by declaring, “The ad says it all – we’ve heard the false corporate health claims before”¹² Another individual proponent begins by stating, “If you care about food safety, human health and the environment, and if you haven’t hear of California’s Proposition 37, yet, please read on.”¹³

At face value from its language and its supporters’ statements, Proposition 37 can be classified as a labeling requirement directly about food safety and, therefore, as an SPS measure.

¹²Yes on Prop 37 – California Right to Know, <https://carighttoknow-labelgms.nationbuilder.com> (visited on August 30, 2012).

¹³J. Ewing, *Why California’s Prop. 37 Matters*, Jackson Free Press (Aug. 23, 2012).

C. Measuring California’s Proposition 37 against the SPS Agreement

SPS Agreement Article 2 (Basic Rights and Obligations) states, in paragraph 2.1, that:

Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this [SPS] Agreement.

Paragraph 2.2 provides that Members can adopt SPS measures

only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.¹⁴

Construing paragraph 2.1 together with paragraph 2.2 means that an SPS measure is not compliant with the SPS Agreement if the measure is not necessary and if the measure fails to be based upon and maintained upon sufficient scientific evidence. If the SPS measure fails the standard set forth in paragraph 2.2, the SPS measure is *per se* a violation of the SPS Agreement.¹⁵

Proponents of Proposition 37 face a difficult, if not impossible, task of meeting the burden of providing scientific evidence to support it as an SPS

¹⁴Paragraph 5.7 permits Member States, in cases of insufficient scientific evidence, provisionally to adopt SPS measures with a duty to seek additional scientific evidence so that an objective risk assessment can be made within a reasonable period of time. Paragraph 5.7 appears irrelevant to Proposition 37 because Proposition 37’s text makes clear that it is being adopted as a permanent SPS measure beginning in 2014 and with stricter labeling requirements coming in 2019. See Section 110809 (a) (commences July 1, 2014) and Section 110809.2(e) (stricter label requirements on July 1, 2019).

¹⁵Paragraph 2.3 sets forth two additional grounds for the illegality of a SPS measure—as an arbitrary and unjustified discrimination between Members with identical or similar conditions and as a disguised restriction on international trade. While Proposition 37 can be challenged under paragraph 2.3, this commentary does not pursue these two additional grounds for incompatibility between and SPS measure and the SPS Agreement.

measure under Paragraph 2.2. Regulatory agencies around the world—food safety agencies of Europe, Australia-New Zealand, Japan, Canada, South Africa, Argentina, Brazil, Canada, United States, Korea and other nations—have granted regulatory approval to genetically-engineered crops, from which the raw agricultural products and processed food ingredients come, after specifically evaluating human, animal, and plant health and safety. As of July 2012, the GENERA database listed 583 scientific studies on the safety of GMO crops and their food ingredients.¹⁶ And the most recent set of studies from the Swiss National Science Foundation identified no risks to health or the environment due to agricultural biotechnology.¹⁷ In addition, the experiential evidence of billions of meals consumed by persons around the world since commercial release of genetically-engineered crops in 1996 supports the safety of genetically-modified foods. Since 1996, there has not been a single verified health complaint involving humans, animals, or plants from genetically-engineered crops, raw foods, or processed foods. Despite some published attempts to deny this overwhelming scientific evidence in support of genetically-engineered foods,¹⁸ the scientific consensus is clear—genetically-engineered crops, foods, and processed ingredients do not present health and

¹⁶Access to the GENERA database at <http://www.gmopundit.blogspot.com>.

¹⁷National Research Programme (NRP 59), Benefits and Risks of the Deliberate Release of Genetically Modified Plants (Sept. 2012). See, Anon., *Results and recommendations of NRP 59* (28 August 2012), <http://www.snf.ch/media/pressconferences/pages> (NRP 59 consisted of 30 Swiss research projects from 2007 through 2011).

¹⁸*E.g.*, M. Antoniou, C. Robinson & J. Fagan, *GMO Myths and Truths* (Earth Open Source, June 2012).

safety concerns for humans, animals, or plants.

While SPS Agreement Article 3, Paragraph 3.2 affirms an SPS measure that conforms to international standards relating to health and safety, there are no international standards that categorize genetically-engineered raw or processed foods as unsafe or unhealthy. Furthermore, Paragraph 3.3 allows a Member to adopt a SPS measure in the absence of an international standard if the Member does a risk assessment to determine the appropriate level of sanitary or phytosanitary protection. The Member performs this risk assessment in accordance with SPS Agreement Article 5. But Proposition 37 would gain no protection from Paragraph 3.3 because Proposition 37 would come into existence through a ballot initiative process (i.e., collecting signatures) that never undertook, at any level or degree, a risk assessment of genetically-engineered crops or foods. Even if such a risk assessment, if undertaken, were to show health and safety concerns, as a matter of procedural fact, Proposition 37 did not undergo any risk assessment whatsoever. If adopted, Proposition 37 arises by electoral fiat, not by risk assessment as SPS Article 5 requires.

Comparing Proposition 37 to the legal standards in the SPS Agreement for evaluating SPS measures shows that the initiative almost assuredly is not compliant with the SPS Agreement.¹⁹ Indeed, the WTO SPS claim against

¹⁹A WTO challenge to Proposition 37 most closely would resemble *Argentina et al. against European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (DS291, DS292, DS293) (filed 14 May 2003). The WTO Panel report in the *European Communities Biotech Products* dispute came in November 2006. The WTO Panel

Proposition 37 is so strong that its proponents are probably not going to defend it as meeting the legal standards of the SPS Agreement. Rather, despite its textual language and the electoral advertising emphasizing food safety and health concerns, proponents will argue that Proposition 37 cannot properly be characterized as a labeling requirement “directly related to food safety.” Proponents of Proposition 37 will seek to have it classified as a technical barrier to trade in order to avoid the SPS Agreement and its scientific evidence standards. More likely, proponents of Proposition 37 will defend it as being subject solely to and compliant with the TBT Agreement.

D. Measuring California’s Proposition 37 against the TBT Agreement—Substantive Provisions

The TBT Agreement applies to technical regulations, including “marking or labeling requirements as they apply to a product, process or production method.”²⁰ As Proposition 37 imposes mandatory labels, Proposition 37 is a technical regulation under the TBT definitions. TBT Article 1.3 specifically says that the TBT Agreement applies to technical regulations for all products, including agricultural products.

TBT Article 2 sets forth several provisions against which to measure technical regulations for compliance with the TBT Agreement.

determined that the European Communities had violated the SPS Agreement by undue delays in the risk assessment approval process and for failure to provide sufficient scientific evidence to support regulatory actions taken with regard to agricultural biotechnology products.

²⁰TBT Agreement, Annex 1, Definition 1: Technical Regulation. Under the TBT Agreement, a technical regulation is a mandatory regulation by contrast to a standard (equivalent to a technical regulation) that is not mandatory. TBT Agreement, Annex 1, Definition 2: Standard.

TBT Article 2.2 reads as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*, national security requirements, the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

Article 2.2 expressly lists three legitimate objectives: national security requirements; protection of human health or safety, animal or plant life or health, or the environment; and prevention of deceptive practices.

Proposition 37 has no plausible implication for United States national security. As for health and safety, Proposition 37 does not provide a label giving consumers information about how to use a product safely, safe consumption level, or any other health and safety data – unless the warning-style label against genetically-modified food itself is considered a valid warning. But, as discussed with regard to the SPS Agreement, genetically-modified foods do not have negative health or safety implications for humans, animals, or the environment. Thus Proposition 37 does not assert a legitimate health and safety objective under TBT Article 2.2.²¹

²¹In June 2012, the American Medical Association adopted CSAPH Rep. 2-A-12 that states, in part, “Our AMA believes that as of June 2012 there is no scientific justification for special labeling of bioengineered food, as a class, and that voluntary labeling is without value unless is accompanied by focused consumer education.”

Proposition 37 could be defended as advancing the third legitimate objection—prevention of deceptive practices. Indeed, the Proposition is titled the “California Right to Know Genetically Engineered Food Act,” indicating that labels will assist California consumers in knowing what they are purchasing and avoiding purchases that they desire to avoid. Under the TBT Agreement, proponents of Proposition 37 can best defend it on its face as a legitimate protection from deceptive practices—failure to inform consumers about the food items that they are buying.

Those who would challenge Proposition 37 for noncompliance with the TBT Article 2.2 will argue that Proposition 37 is not a protection against deceptive practices. Opponents can point to the structure of the proposed Act and its exemptions to provide evidence that Proposition 37 will actually confuse consumers more than inform them accurately. If Proposition 37 is adopted, many foods in California stores that carry labels with “natural,” “naturally made,” “all natural,” or words of similar import become misbranded products. Moreover, Proposition 37 exempts foods that lawfully have the USDA Organic label. Under the USDA National Organic Program (USDA-NOP), organic foods can contain traces of unintentional genetically-modified crops or ingredients without losing the organic label.²²

²²“When we are considering drift issues, it is particularly important to remember that organic standards are process based. Certifying agents attest to the ability of organic operations to follow a set of production standards and practices that meet the requirements of the Act and the regulations. This regulation prohibits the use of excluded methods in organic operations. The presence of a detectable residue of a product of excluded methods [genetic engineering] alone does not necessarily constitute a violation of this regulation. As long as an organic operation has not used excluded methods and takes reasonable steps to

Consequently, under the structure and exemptions of Proposition 37, food processors can and may change to organic products to avoid both warning labels and the threat of misbranding liability and to appeal to the niche market of “natural” food consumers. Simultaneously, those California consumers still will be eating unlabeled food products containing genetically-modified crops or ingredients at trace levels, although those products will carry the label “USDA Organic.” In other words, opponents of Proposition 37 will argue that Proposition 37 is itself the deceptive labeling practice and, thus, fails to promote a legitimate objective under TBT Article 2.2.

Proponents of Proposition 37 will respond by citing the recent WTO Dispute Resolution Appellate Body’s comments relating to the challenge of Canada and Mexico against the United States country-of-origin label (COOL) for meat.²³ The WTO Panel (first level) ruled against COOL on the grounds that the COOL law would confuse consumers.²⁴ But the WTO Appellate Body reversed the Panel ruling and determined that COOL did provide information

avoid contact with the products of excluded methods as detailed in their approved organic system plan, the unintentional presence of the products of excluded methods should not affect the status of an organic product or operation.” USDA-National Organic Program – Final Rule with Comments, at 33-35, <http://www.ams.usda.gov/nop/NOP/standards/FullText.pdf>.

²³Canada and Mexico each brought a complaint against the U.S. federal COOL law. But by agreement, the WTO combined these separate complaints into one dispute resolution matter. Canada against the United States: Certain Country of Origin Labelling (COOL) Requirements (DS384) and Mexico against the United States: Certain Country of Origin Labelling (COOL) Requirements (DS386).

²⁴WTO Dispute Settlement: Dispute DS384 (Canada) and WTO Dispute Settlement: Dispute DS386 (Mexico), Summary of Key Findings, Panel Report (18 Nov 2011).

as a legitimate objective under Article 2.2.²⁵

Aside from “legitimate objectives,” TBT Article 2.2 also requires that technical regulations not be “unnecessary obstacles to international trade” and “not more trade-restrictive than necessary.” Opponents of Proposition 37 will argue that it violates these TBT obligations primarily because consumers already have labels that provide the same level of consumer protection from deception. Opponents will point to the existence in the United States of the Non-GMO label and the USDA-Organic label that allow consumers to choose foods which will have either no genetically-engineered content or minimal levels of it. These Non-GMO and USDA-Organic labels are voluntary labels that do not impose identity-preservation, commodity segregation, and paper-trail tracing requirements upon other food products in international trade.

Both Canada and Mexico similarly argued for voluntary labels in their COOL complaints. Both Canada and Mexico argued that mandatory labels for COOL were more trade-restrictive than necessary in light of voluntary labeling schemes that could accomplish the same consumer information objectives. The WTO COOL hearing bodies decided that the hearings had not sufficiently and properly addressed this TBT Article 2.2 issue and, therefore, did not rule on this argument.²⁶

TBT Article 2.1 provides an additional standard against which to measure Proposition 37. Article 2.1 reads as follows:

²⁵*Id.* Summary of Key Findings, Appellate Body Report (29 June 2012).

²⁶*Id.*

Members shall ensure in respect of technical requirements, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded like products of national origin and to like products originating in any other country.

In other words, TBT Article 2.1 requires Members to treat “like products” alike and to refrain from favoring either domestic or other international “like products” over the products of the Member bringing the Article 2.1 complaint.

Obviously, proponents of Proposition 37 consider genetically-engineered agricultural products to be fundamentally different than organic and conventional agricultural products. Proponents will argue that TBT Article 2.1 is inapplicable because Proposition 37 does not discriminate against or favor any “like” product over another. Proponents will argue that Proposition 37 deals with genetically-engineered agricultural products that constitute a class of products of their own. Proposition 37 treats all genetically-engineered products—the appropriate class—alike.

Opponents of Proposition 37 will respond with two arguments. Opponents can argue that regulatory agencies around the world have considered genetically-engineered raw agricultural products to be substantially equivalent in every regard to conventional and organic agricultural products. Opponents will argue that the substantive qualities of genetically-engineered agricultural products are “like products” and that the process producing the “like products” does not create a separate product classification. Opponents will argue “product” over “process” as the appropriate TBT Article 2.2

interpretation. With regard to “product” over “process,” opponents also will reference TBT Article 2.8 that states:

Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

Opponents of Proposition 37 will also argue that Proposition 37 applies to food products which are indistinguishable by any method of testing from other food products. More precisely, opponents of Proposition 37 will highlight the fact that Proposition 37 imposes labels, testing, and paper-trail tracing on vegetable oils even though the oil has no DNA remnants of the crop from which the oil came. Soybean oil is soybean oil regardless of what variety of soybean the food processor crushed to produce the oil.

With regard to the TBT Article 2.1 arguments, opponents of Proposition 37 may gain support from the Canada and Mexico WTO complaints against the U.S. COOL law. Both the WTO Panel and the WTO Appellate Body determined that Canadian and Mexican meat was a “like product” to United States meat. As a “like product,” the WTO reports ruled that the U.S. COOL law violated TBT Article 2.1 by imposing discriminatory costs and burdens on meat imported into the United States.²⁷

TBT Articles 2.4 and 2.5 provide a safe harbor for technical regulations if those technical regulations adopt international standards. Proponents of Proposition 37 can take no comfort from TBT Articles 2.4 and 2.5 because the

²⁷*Id.*

Codex Alimentarius Commission, the international standards body for food labels, has ceased consideration of mandatory labels for genetically-engineered foods. The Codex Alimentarius Commission has not created an international standard which proponents of Proposition 37 can claim as its origin and safe harbor.²⁸

E. Measuring California’s Proposition 37 against the TBT Agreement—Procedural Provisions

TBT Article 2.9 imposes procedural requirements upon Members when adopting a technical regulation that does not reflect an international standard and that “may have a significant effect on trade of other Members.” More precisely, before adopting such a technical regulation, Members must publish a notice, notify other Members through the WTO Secretariat, provide other Members, upon request, with copies of the proposed technical regulation, and allow other Members reasonable time to provide comments in writing about the proposed technical regulation. Because Proposition 37 will significantly affect international trade, proponents of Proposition 37, essentially acting through the United States, satisfied none of these procedural obligations.²⁹

TBT Article 5 carries the title: “Procedures for Assessment of Conformity by Central Government Bodies.” TBT Article 7 provides the comparable

²⁸For a full discussion of the debate about mandatory labeling for genetically-engineered foods at the Codex Alimentarius Commission, J. Bobo, *Two Decades of GE Food Labeling Debate Draw to an End—Will Anybody Notice?*, 48 IDAHO L. REV. 251 (2012).

²⁹TBT Article 4 creates similar obligations for the preparation, adoption and application of standards as more fully described in Annex 3 on the Code of Good Practice. Neither Article 4 or Annex 3 apply to Proposition 37 because Proposition 37 is a technical regulation, not a standard, under the TBT definitions.

provision for local governmental bodies. Under Article 5, when a Member is assessing conformity, the Member shall ensure, among other requirements:

[C]onformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks of non-conformity would create.³⁰

[C]onformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favorable order for products originating in the territories of other Members than for like domestic products.³¹

TBT Article 5 may be relevant because of Proposition 37's Section 110809.4 Enforcement mechanism. Section 110809.4 authorizes consumer lawsuits with two features:

- the consumer does not have to establish “any specific damage from, or prove any reliance on, the alleged violation” relating to misbranding or a failure to label; and
- the consumer shall be entitled to recover as damages an amount “deemed in at least the amount of the actual or offered retail price of each package or product alleged to be in violation.”

Consumer action lawsuits that are brought after the fact of importation and that give rise to huge damages unrelated to any specific harm to the consumer's health or property may well be problematic under TBT Article 5. Consumer action lawsuits arguably create unnecessary assessment obstacles to international trade and fail to provide an expeditious assessment of imported

³⁰TBT Article 5.1.2.

³¹TBT Article 5.2.1.

products for conformity to Proposition 37 technical requirements. Members of the WTO wanting to trade with California in agricultural commodities will be exposed at all times to consumer lawsuits. Members exporting agricultural commodities to California will have little sense of legal and regulatory security about their commodities complying with Proposition 37.³² Indeed with its consumer action lawsuits, Section 110809.4 may be more than a procedural concern and could be argued to constitute a substantive technical regulation itself that must comply with TBT Article 2.³³

II. DISPUTE RESOLUTION ISSUES—WHO CAN COMPLAIN?

Proposition 37 presents significant and difficult questions about whether it complies with the SPS Agreement or the TBT Agreement. But even if Proposition 37 were in violation of these WTO Agreements, who can complain? There are four possible claimants.

A. Member States to the WTO Agreements

SPS Agreement Article 11 and TBT Agreement Article 14 are both titled “Consultation and Dispute Settlement,” and make explicit that Member States

³²Members exporting agricultural commodities to California may be able to control the risk of consumer lawsuits to some extent by relying upon the exemptions set forth in Section 110809.2(b) [sworn statements] and Section 110809.2(f) [testing by independent organizations]. Complying with these two exemptions involves significant additional costs for paper-trail tracing and testing. These costs themselves raise questions about whether Proposition 37 complies with the TBT Agreement.

³³This WORKING PAPER is an overview analysis of Proposition 37 and WTO Agreements. This working paper does not provide a detailed explanation or discussion of every issue that could be raised or every WTO decision that has relevance. In this vein, this working paper does not explore what remedies exist under the WTO Agreements for violations of procedural obligations or whether the remedies for substantive and procedural violations are the same.

to these agreements can complain using the WTO Dispute Settlement Understanding (DUS) Agreement. For example, Argentina, Brazil, or Canada—all likely to be affected by Proposition 37 because of their export of soybeans and canola, especially for cooking oils—have the treaty right to file a complaint within the WTO dispute resolution system. All three countries have shown a past willingness to pursue their WTO rights against other Members who impede international trade in agricultural commodities from biotechnology.

Bringing a WTO complaint is fraught with difficulties. Members must think politically and diplomatically about whether it is worthwhile to bring a complaint—even a clearly valid complaint. Members must be willing to expend significant resources in preparing, filing, and arguing WTO complaints. Finally, even if a Member prevails in the Panel or Appellate Body reports, WTO remedies can be indirect and not fully satisfactory.

DUS Agreement Article 22 sets forth the remedies to which a Member gains access upon prevailing with a complaint. Article 22.1 reads as follows:

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

Translating DUS Article 22.1 into the situation of a prevailing Member complaint against Proposition 37 means the following:

- Even if a Member prevails in the WTO complaint, Proposition 37, if adopted, remains the law of California. The WTO has no legal authority to force California to repeal the non-complaint proposition.
- Members can then pressure California (and the United States) by requesting the WTO Dispute Settlement Body (DSB)³⁴ to authorize a suspension of concessions. Members can thus penalize exports from California (and the United States) in retaliation for the refusal by California (and the United States) to fully implement the WTO recommendation that Proposition 37 violates either the SPS Agreement or the TBT Agreement.

B. The United States of America

Although the United States is a Member of the WTO Agreements, the United States, in contrast to Argentina, Brazil, and Canada, is not an exporting Member to California. Consequently, the United States cannot file a WTO complaint invoking the DUS Agreement against California.

But by being a Member of the WTO Agreements, the United States has ratified these treaties as part of the law of the United States, transforming these treaties into the supreme law of the land.³⁵ Moreover, under the WTO Agreements, as explained above,³⁶ the United States has the duty to ensure that local governments (California) comply with the WTO Agreements.

³⁴DUS Agreement Article 1.2 and Article 2 create the Dispute Settlement Body as the administrative structure for the WTO Agreements.

³⁵U.S. CONST. Art. VI, Sec. 1, cl. 2: “ ... and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

³⁶See “Do the WTO Agreements apply to California enactments?,” Section I. A., *supra*.

Therefore, the United States has the legal authority to challenge Proposition 37 in order to enforce its supreme law of the land and to avoid violating its WTO obligations. If the United States does not take action against California's Proposition 37, other Members could file a complaint against the United States directly for a failure to act.

C. Farmers, Biotechnology Companies, and Other Opponents of Proposition 37

Opponents of Proposition 37 are likely to challenge Proposition 37 immediately if California voters adopt it in November 2012. As indicated in the Introduction, these opponents are likely to bring challenges under the U.S. Constitution.

Whether these opponents can add a claim challenging Proposition 37 based on alleged violations of the SPS Agreement or the TBT Agreement is much less clear. TBT Agreement Article 14.4 best highlights the opponents' difficulty in bringing a WTO-based challenge. Article 14.4 reads:

The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8, and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

What TBT Article 14.4 makes clear is that Member States have standing³⁷ to

³⁷The legal definition of the term "standing" is—"Standing: A party's right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in a federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question." BLACK'S LAW DICTIONARY 1442 (8th ed., 2004).

bring WTO-based complaints. Citizens of Member States do not have standing to bring WTO-based complaints.

Proponents of Proposition 37 will oppose the standing of those non-state actors who seek to challenge Proposition 37, immediately upon its adoption, with a WTO-based claim. Proponents will seek to have this WTO-based claim dismissed because the opponents do not have a right to make a legal claim based on the WTO. Proponents will argue that standing to bring a WTO-based claim resides solely in exporting Member States or the United States.

By contrast, opponents bringing the immediate challenge containing a WTO-based claim will argue that they are not invoking the WTO Agreements directly and, therefore, that they are not precluded by TBT Agreement Article 14.4 from bringing the WTO-based claim. Opponents will argue that they are challenging Proposition 37 to enforce the supreme law of the United States.³⁸ By invoking the supreme law of the United States, opponents will hope to blunt the standing issue and to avoid dismissal of the WTO-based claim.

D. Food Companies and Grocery Stores

If Proposition 37 becomes California law, the first efforts to enforce it would come through either administrative action³⁹ or a consumer lawsuit⁴⁰ against food companies and grocery stores for allegedly failing to label or

³⁸Opponents would argue that they can “stand in the shoes” of the United States. But the United States and the opponents of Proposition 37 may have differing or conflicting interests about Proposition 37 and the wisdom of challenging Proposition 37.

³⁹Proposition 37 authorized administrative action in Sections 110809.3 and 110809.4.

⁴⁰Proposition 37 authorizes consumer lawsuits in Sections 110809.4 and 111910.

misbranding.

When facing administrative actions or consumer lawsuits, food companies and grocery stores will want to respond with all possible legal challenges to Proposition 37—i.e., constitutional challenges and WTO-based challenges. Food companies and grocery stores would want to raise the issues of whether Proposition 37 complies with the SPS Agreement and the TBT Agreement as defenses to being found liable for administrative penalties or consumer damages.

The agency or consumer (plaintiff) bringing the lawsuit against the food company or grocery store will argue that the food company or grocery store (defendant) does not have standing to raise the WTO-based challenges. Under the legal definition of the term “standing,”⁴¹ the plaintiff likely has to concede that the defendant faces an actual injury. However, the plaintiff will contend vigorously that the defendant is not within the zone of interests that the WTO Agreements mean to protect. In other words, the plaintiff will argue that the WTO Agreements only mean to protect sovereign interests and not private commercial interests.

In response to the plaintiff’s standing argument, the defendant food company or grocery store can reply that the WTO Agreements specifically contemplate allowing compensation and retaliation for injuries inflicted upon

⁴¹For the definition, *see supra* note 37.

private commercial interests.⁴² Therefore, defendant would argue that it is only presenting a defense based on explicit WTO language. Moreover, defendant would argue that, if the doctrine of standing blocks raising WTO-based defenses, it would face administrative actions or consumer damages (actual injury) under a law (Proposition 37) that very likely violates either the SPS Agreement or the TBT Agreement. Defendants would argue that such a result is unjust and legally indefensible because nobody should be held legally accountable under a law that may be demonstrably invalid.

CONCLUSION

This analysis reaches several conclusions about the status of Proposition 37 and the WTO Agreements:

- Proposition 37, if a sanitary or phytosanitary measure, almost assuredly violates the SPS Agreement.
- Proposition 37, if a technical regulation measure, may or may not be a violation of the TBT Agreement. Proposition 37 raises novel and difficult issues under the TBT Agreement that WTO Dispute Resolution Bodies have yet to address. Proposition 37 may become a very important dispute within the jurisprudence of WTO law and decisions.
- Proposition 37 can be challenged by WTO Member States and the United States. What is unclear is whether Members and the United States will act against Proposition 37.
- Proposition 37 presents very difficult procedural issues of “standing” if and when private parties challenge Proposition 37, alleging WTO-based claims, either immediately upon adoption by California voters or later when they face enforcement action.

⁴²DUS Agreement, Article 22 (Compensation and Suspension of Concessions).