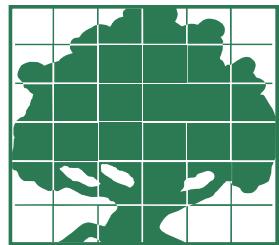


# Agricultural and Resource Economics UPDATE

GIANNINI FOUNDATION OF AGRICULTURAL ECONOMICS

• UNIVERSITY OF CALIFORNIA



V. 16 no. 1 • Sep/Oct 2012

## California's Proposition 37 and the WTO Agreements

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Proposition 37 raises significant and difficult issues as to whether it complies with World Trade Organization (WTO) Agreements. The analysis below describes and discusses the compatibility between Proposition 37 and WTO Agreements.

**P**roposition 37 is an initiative petition that, 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. In addition, Subsection 110809.1 prohibits the use of the words "natural," "naturally made," "naturally grown," "all natural," or "words of similar import" for processed foods.

Even if adopted by California voters, Proposition 37 assuredly faces multiple legal challenges prior to its entry into force in 2014. Three legal grounds often mentioned include:

- U.S. constitutional challenge under the dormant commerce clause doctrine;
- U.S. constitutional challenge under the First Amendment commercial free speech doctrine;
- U.S. constitutional challenge under the First Amendment prohibiting the establishment of religion.

By contrast, I provide an analysis of Proposition 37 and 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).

### 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

### 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 is a recognized sovereign and it is also a Member State of the WTO Agreements. By contrast, California is not a recognized sovereign and it is not a Member State of the WTO Agreements. The first question to ask is: Do the WTO Agreements apply to California's Proposition 37? The answer is "yes"—through indirect routes.

The SPS Agreement, Article 13 imposes a duty upon the Member State (the United States), as the overriding sovereign, to take positive measures to support compliance by governmental units (California) within the sovereign nation.

Under the TBT Agreement, Articles 3 and 7 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.

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## **Is Proposition 37 in Compliance with the WTO Agreements?**

Whether Proposition 37 complies with the WTO Agreements requires determining against which WTO Agreement—the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) or the Agreement on Technical Barriers to Trade (the TBT Agreement)—Proposition 37 must be measured.

Proposition 37 must first be classified either as a sanitary and phytosanitary measure or as a technical barrier to trade measure. Once classified, either the SPS Agreement or the TBT Agreement, and it alone, serves as the legal standard by which to evaluate Proposition 37.

SPS Agreement Annex A defines sanitary and phytosanitary measures as “all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, … packaging and labelling requirements directly related to food safety.” From this Annex A definition, California’s Proposition 37 is a SPS measure if it is “labelling 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 its electoral promotion.

In its language, Proposition 37 proclaims in five of the eleven paragraphs of Section 1 (Findings and Declarations) that its proponents support it because of concerns about adverse health. In addition, if adopted at the November 2012 election, Proposition 37 states that its provisions become part of the California Health and Safety Code.

In the documents and articles promoting Proposition 37, proponents regularly proclaim that the voters should support Proposition 37 because Californians are at great risk for their health and safety against which risks labels would provide them protection.

At face value from its language and its supporters’ statements, Proposition

37 easily can be classified as a labeling requirement directly about food safety and, therefore, as a SPS measure.

## **Measuring California’s Proposition 37 against the SPS Agreement**

SPS Agreement Article 2 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, …”

Construing paragraph 2.1 together with paragraph 2.2 means that a 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.

Proponents of Proposition 37 face a difficult, if not impossible, task of meeting the burden of providing scientific evidence to support it as a SPS measure under Paragraph 2.2. Regulatory agencies around the world 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.

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 one verified health complaint to 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, the scientific consensus is clear—genetically-engineered crops, foods, and processed ingredients do not present health and safety concerns for humans, animals, or plants.

SPS Agreement Article 3 (Harmonization) sets forth provisions that could save Proposition 37. Paragraph 3.2 affirms a SPS measure that conforms to international standards relating to health and safety. However, Paragraph 3.2 does not protect Proposition 37 because there are no international standards that categorize genetically-engineered raw or processed foods as unsafe or unhealthy.

Comparing Proposition 37 to the legal standards in the SPS Agreement shows that Proposition 37 almost assuredly is not compliant with the SPS Agreement. Indeed, the WTO SPS claim against Proposition 37 is so strong that its proponents are probably not going to defend it as meeting the legal standards of the SPS Agreement. 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.

## **Measuring California’s Proposition 37 Against the TBT Agreement—Substantive Provisions**

The TBT Agreement applies to technical regulations, including “marking or labelling requirements as they apply to a product, process or production method.” As Proposition 37 imposes mandatory

labels, Proposition 37 is a technical regulation under the TBT definitions.

TBT Article 2 sets forth several provisions against which to measure technical regulations for compliance with the TBT Agreement. It states, “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 fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia, … the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. ....”

### **TBT Article 2.2**

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.

As for health and safety, Proposition 37 does not provide a label giving consumers information about how to use a product safely or a 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, there is no scientific evidence available to indicate that genetically-modified foods have negative health or safety implications for humans, animals, or the environment. Proposition 37 does not assert a legitimate health and safety objective under TBT Article 2.2.

### **Prevention of Deceptive Practices—Pro and Con**

Proposition 37 can be defended as upholding the third legitimate objective—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 WTO Agreements, the United States has the duty to ensure that local governments (California) comply.***

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. 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.

Simultaneously, those California consumers still will be eating unlabeled food products containing genetically-modified crops or ingredients at trace levels, except 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 to the recent WTO Dispute Resolution Appellate Body relating to the challenge of Canada and Mexico against the United States country-of-origin label (COOL) for meat. The WTO Panel (first level) ruled against COOL on the grounds of a violation of TBT Article 2.2 because the COOL law would confuse consumers. But the WTO Appellate Body reversed this Panel ruling and determined that

COOL did provide information as a legitimate objective under Article 2.2.

### ***Unnecessary Obstacle to International Trade***

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 of the Non-GMO label and the USDA-Organic label that allow consumers to choose foods which will have minimal levels of genetically-engineered content. These Non-GMO and USDA-Organic labels are voluntary labels that do not impose legal and commercial burdens upon other food products in international trade.

TBT Article 2.1 also provides a standard against which to measure Proposition 37 by stating, “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.”

### **TBT Article 2.1**

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

Obviously, proponents of Proposition 37 consider genetically-engineered agricultural products as fundamentally different than organic and conventional agricultural products. Proponents will argue that Proposition 37 deals with genetically-engineered agricultural products that constitute a class of products of their own.

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 2.1 interpretation.

Opponents of Proposition 37 will also present a second argument. 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.

#### **TBT Articles 2.4 and 2.5**

TBT Articles 2.4 and 2.5 provide a safe harbor for technical regulations if those technical regulations adopt international standards. However, the Codex Alimentarius Commission, the international standards body for food labels, has not created an international standard which proponents of Proposition 37 can claim as its origin and safe harbor.

### **Dispute Resolution Issues—Who Can Complain?**

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

#### **Member States to the WTO Agreements**

SPS Agreement Article 11 and TBT Agreement Article 14 are both titled “Consultation and Dispute Settlement.” Thereby the SPS Agreement and the TBT Agreement make explicit that Member States to these agreements can complain using the WTO Dispute Settlement Understanding (DUS) Agreement. For example, Argentina or Brazil or Canada—all likely to be affected by Proposition 37 for the export of soybeans and canola, especially for cooking oils—have the treaty right to file a complaint within the WTO dispute resolution system.

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, Members recognizes that its WTO remedies are indirect and possibly not fully satisfactory.

#### **The United States**

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 under the U.S. constitution. Moreover, under the WTO Agreements, the United States has the duty to ensure that local governments (California) comply with the WTO Agreements. Therefore, the United States has the legal authority to challenge Proposition 37 in order to protect its supreme law of the land and to avoid violating its WTO obligations.

#### **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 on three different grounds under the U.S. Constitution. These opponents have non-frivolous grounds upon which to pursue these U.S. constitutional challenges.

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 highlights that the opponents will have difficulty in bringing a WTO-based challenge. TBT Article 14.4 makes clear is that Member States have the legal status (called “standing”) to bring WTO-based complaints. Citizens of Member States do not have standing to bring WTO-based complaints.

Proponents of Proposition 37 will challenge the standing of those opponents who seek to challenge Proposition 37. 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. Opponents will argue that they are challenging Proposition 37 to enforce the supreme law of the United States. 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.

### **Food Companies and Grocery Stores**

Assuming that the United States does not file a lawsuit against California and that other opponents are blocked, by the doctrine of standing, from raising WTO-based challenges, Proposition 37, if adopted in November 2012, would become California law. Thus, the first lawsuits related to Proposition 37 would come through either administrative action or a consumer lawsuit against food companies and grocery stores alleging failure to label or 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. Food companies and grocery stores will 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. The plaintiff likely has to concede that the defendant faces an actual injury. However, the plaintiff will contest 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 private commercial interests. 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 the raising of the 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 itself 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.

Suggested Citation:

Kershen, Drew. 2012. "California's Proposition 37 and the WTO Agreements." *ARE Update* 16(1):1-5. University of California Giannini Foundation of Agricultural Economics.

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*This essay is a reduced version of a previously published article: Drew L. Kershen, "Would State-Mandate Labels for Biotech Foods Violate World Trade Agreements?" Critical Legal Issues WORKING PAPER No. 181 (Wash. Lgl. Fndt., Sept. 2012), available at [www.wlf.org/](http://www.wlf.org/) (scroll down to list of latest publications; posted September 21, 2012).*

### **For additional information, the author recommends:**

Wüger, D. "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). [www.phase1.nccr-trade.org/images/stories/publications/ip9\\_working\\_paper\\_no\\_2.pdf](http://www.phase1.nccr-trade.org/images/stories/publications/ip9_working_paper_no_2.pdf)

Huemueller, D. and 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.

Sheargold, E. and A. Mitchell. "Oils Ain't Oils: Product Labelling, Palm Oil, and the WTO." *Melbourne Journal of International Law* 12, (2011):396-418. [http://epublications.bond.edu.au/law\\_pubs/474/](http://epublications.bond.edu.au/law_pubs/474/)