

MARCH 2016

**THE *TRANS-PACIFIC PARTNERSHIP*:
AGRICULTURE, FARMING, AND FOOD SECURITY**



*Canadian Farmers Protest against the Trans-Pacific Partnership
outside the Canadian Parliament in Ottawa*

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Executive Summary

There are a large number of Chapters in the *Trans-Pacific Partnership* dealing with agriculture, food security, farming, and plant intellectual property. As a result, it is a complex equation, assessing the benefits and costs for the sector under the *Trans-Pacific Partnership*.

The traditional provisions upon market access in respect of agricultural markets have received a mixed response.

The United States Department of Agriculture has argued that the deal will result in the elimination of tariffs:

Under the TPP agreement, most tariffs on U.S. agricultural exports will be eliminated. For Japan, once the TPP agreement is implemented, over 50 percent of U.S. farm product exports (by value) will receive duty-free treatment immediately. These products include grapes, strawberries, walnuts, almonds, raisins, sweet corn, lactose, certain fruit juices, and most pet foods. Canada will eliminate its tariffs on whey and margarine. Vietnam will eliminate tariffs on over 90 percent of current U.S. trade in five years or less. Malaysia will immediately eliminate tariffs on over 90 percent of current U.S. trade. New Zealand will immediately eliminate tariffs on nearly 80% of current U.S. trade, and Brunei will do the same for all U.S. trade.

The United States Department of Agriculture argues: ‘For some products, preferential market access will be provided through the creation of TRQs, which provide access for a specified quantity of imports at a preferential tariff rate, generally zero’. It notes: ‘Japan will provide access through TRQs for rice, wheat and wheat products, barley and barley products, malt, whey, milk powder, butter, evaporated milk, condensed milk, vegetables, sugar-containing

products, glucose, fructose, starch, corn & potato starch, and inulin'. It observes: 'Canada will provide access through TRQs for dairy, poultry and egg products'. In addition, 'Malaysia will provide access through TRQs for fluid milk, poultry and eggs', and 'the United States will provide access through TRQs for sugar and dairy products.' Moreover, there will be limited safeguards to help farmers adjust to potential import surges.

However, the agreement has not necessarily won favour with all quarters of the farming sector in the United States. The National Farmers Union senior vice president Chandler Goule: 'It's very obvious after reading through the text that this is another cookie cutter free trade agreement'. President Roger Johnson testified before the U.S. International Trade Commission (ITC) and warned that TPP will ultimately disappoint rural America because it is modelled after the failed agreements of the past. He commented:

Unfortunately for this nation, when it comes to these enormous trade deals, the list of promises is quite long but the list of actual deliverables is often very short. Instead of helping curb the U.S. trade deficit, agreements like the TPP are actually making it worse." Collectively, these massive trade deals have done immense damage to the economy, draining economic growth and jobs from American families. That is why the primary goal of these trade pacts should be to achieve an overall balance of trade, and on that standard, these deals are failing.

Johnson also warned that the *Trans-Pacific Partnership* and previous trade deals fall woefully short on enforcement tools to prevent foreign governments from cheating the system to give their businesses unfair competitive advantages – through measures such as currency manipulation.

In Australia, there has been debate over whether the *Trans-Pacific Partnership* provides for comprehensive market access in respect of agriculture. The Department of Foreign Affairs and Trade argues that the deal will be of great benefit to Australian agriculture:

Australia exported around \$16 billion worth of agricultural goods to TPP countries in 2014-15, representing close to 35 per cent of Australia's total exports of these products. The TPP will eliminate tariffs on more than \$4.3 billion of Australia's dutiable exports of agricultural goods to TPP countries upon entry into force of the Agreement. A further \$2.1 billion of Australia's dutiable exports will receive significant preferential access through new quotas and tariff reductions.

However, there has been a lack of independent economic analysis of such claims about the trade benefits to agriculture of the agreement. There has been concern about protectionism by certain countries in certain fields. The United States protectionism in respect of sugar has been a sore point in the *Trans-Pacific Partnership* – much as it was with the *Australia-United States Free Trade Agreement*.

Likewise, New Zealand has argued that the agreement will benefit its local agriculture. There has been some debate, though, about how New Zealand will fare against its rivals and competitors.

In Canada, there were dramatic protests by dairy farmers over the *Trans-Pacific Partnership*, with tractors and cows encircling the Canadian Parliament. Stephen Harper's Conservative Government promised a large compensation package to dairy farmers. Justin Trudeau's New Liberal Government is engaging in consultations over the *Trans-Pacific Partnership*. Obviously agriculture will be a sensitive issue.

Professor Michael Geist of the University of Ottawa has considered the Trans-Pacific Partnership and agriculture. He noted, ‘The agricultural sector is often pointed to as a likely winner with the expectation that more open markets will result in Canadian farmers selling more beef, pork, canola, and other products.’ Geist observed: ‘Those predictions may prove true, but based on what the Standing Committee on International Trade has heard, there are many other agricultural sectors that stand to lose as a result of the deal.’ Geist commented:

The dairy industry is the most obvious sector that projects losses in the billions of dollars. Indeed, the Conservative government promised billions of taxpayer dollars as compensation for those losses. When the dairy industry appeared before the committee, it made it clear that it expects the Liberal government to honour the same payout, arguing that the compensation – which amounts to \$150,000 per dairy farmer – is part of the agreement (even if not actually part of the TPP text). In fact, the compensation extends to other supply managed sectors such as the chicken industry, which is also projecting losses due to the TPP (and CETA). In all, these various sectors expect \$2.4 billion from an income guarantee program, \$1.5 billion from quota-value guarantee program, \$450 million for a processor modernization program, and \$15 million for a market development initiative.

Geist observed: ‘In other sectors, the impact of the TPP is modest at best’. He stressed: ‘For example, the Canadian Vintners’ Association appeared before the committee to discuss the impact on the Canadian wine industry. With low tariffs already in place in several TPP countries, the impact will be modest unless Vietnam suddenly starts drinking a lot of Canadian wine.’

Even more so, in Japan, there has been a fierce debate as to how the *Trans-Pacific Partnership* will affect agriculture, forestry, and fisheries.

The *Trans-Pacific Partnership* also contains a Chapter – Chapter 7 – which deals with sanitary and phytosanitary (SPS) measures. It promotes the development and application of SPS measures in a risk-based, scientifically sound manner, while ensuring that regulatory agencies in the United States and other TPP member countries are able to protect food safety and plant and animal health. There has been much controversy in this area in respect of the topic of food safety. From an Australian perspective, there was a significant scare in respect of Nanna’s Berries, which had been sourced from China: see the Australian Department of Health, <http://www.health.gov.au/internet/main/publishing.nsf/content/ohp-hep-a-fact-sheet-consumers-frozen-berry.htm>

The Intellectual Property Chapter in the *Trans-Pacific Partnership* addresses a number of forms of plant intellectual property – including plant breeders’ rights, plant patents, geographical indications, and data protection in respect of agricultural chemicals. There has been insightful work on this topic by Hannah Brennan and Burcu Kilic. See Hannah Brennan and Burcu Kilic, ‘Freeing Trade at the Expense of Local Crop Markets? A Look at the Trans-Pacific Partnership’s New Plant Related Intellectual Property Rights from a Human Rights Perspective’, *Harvard Human Rights Journal*, April 2015, <http://harvardhrj.com/2015/04/freeing-trade-at-the-expense-of-local-crop-markets-a-look-at-the-trans-pacific-partnerships-new-plant-related-intellectual-property-rights-from-a-human-rights-perspective/>

The Investment Chapter in the *Trans-Pacific Partnership* raises a number of concerns about the regulation of food. There has been a particular interest in the impact of investor-state dispute settlement on various food labelling initiatives. Esther Han, the consumer rights journalist for the *Sydney Morning Herald*, has noted concerns amongst consumer advocates

about how investor clauses will affect food labelling initiatives – such as laws that require food companies to list ingredients, country of origin statements, and health and nutritional information on food packaging: Esther Han, ‘Food labelling and product safety laws in jeopardy under TPP says Choice’, The Sydney Morning Herald, 11 March 2016, <http://www.smh.com.au/federal-politics/political-news/food-labelling-and-product-safety-laws-in-jeopardy-under-tpp-says-choice-20160310-gnfss6>

In my research, I have looked at the multi-faceted battle over GM food labelling. This submission draws upon published research: Matthew Rimmer, 'Just Label It: Consumer Rights, GM Food Labelling, and International Trade', in Charles Lawson and Berris Charnley (ed.), *Intellectual Property and Genetically Modified Organisms: A Convergence in Laws*, Farnham (Surrey): Ashgate Publishing, March 2015, 143-184.

There have also been some larger issues in respect of labor rights and farming.

The then United Nations Special Rapporteur on the Right to Food Olivier de Schutter and Kaitlin Cordes have raised concerns about the impact of the *Trans-Pacific Partnership* on the right to food. They have analysed how the agreement will affect agriculture, farming, and food security. They are particularly concerned about how the agreement will operate in respect of developing countries.

Recommendation 1

There is a need for a proper comprehensive assessment of the economic impacts of the *Trans-Pacific Partnership* in respect of farming, agriculture, and food security.

Recommendation 2

The Intellectual Property Chapter of the *Trans-Pacific Partnership* raises significant issues for agriculture – with text on plant breeders’ rights, patents, trade marks, geographical indications, and data protection for agricultural chemicals.

Recommendation 3

The Investment Chapter of the *Trans-Pacific Partnership* will raise major issues in respect of agriculture, farming, and food security. The UNCTAD ISDS Navigator reveals that there have been 14 disputes over crop and animal production; 8 disputes over forestry and logging; and 4 disputes in respect of fishing and aquaculture as at March 2016. In addition, there has been 25 disputes over the manufacture of food products, and several conflicts over beverages.

Recommendation 4

There has been significant concern as to how the *Trans-Pacific Partnership* will impact upon public regulation in respect of food labelling. There has been significant conflict in respect of GM food labelling, country of origin, nutrition

labelling such as with Health Stars, and palm oil labelling. Moreover, there has been significant trade disputes over eco-labels – such as the dispute between Mexico and the United States of America over the Dolphin-Safe Ecolabel.

Recommendation 5

The *Trans-Pacific Partnership* also contains a Chapter which deals with sanitary and phytosanitary (SPS) measures. It is worthwhile considering how the trade agreement will affect the regulation of food safety across the Pacific Rim.

Recommendation 6

The *Trans-Pacific Partnership* should be the subject of a human rights assessment – particularly in respect of the right to food.

Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the *Trans-Pacific Partnership*, the *Trans-Atlantic Trade and Investment Partnership*, and the *Trade in Services Agreement*. His work is archived at SSRN Abstracts and Bepress Selected Works.

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law* (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, "Gene Patents In Australia: Options For Reform" (2003-2005), an Australian Research Council Linkage Grant, "The Protection of Botanical Inventions" (2003), and an Australian Research Council Discovery Project, "Promoting Plant Innovation in Australia" (2009-2011). Rimmer has participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

Rimmer is the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-

Prizes. Rimmer is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015).

Rimmer has supervised four students who have completed Higher Degree Research on the topics, *Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere* (2007); *Intellectual Property and Applied Philosophy* (2010); *The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines* (2012); and *Marine Bioprospecting: International Law, Indonesia and Sustainable Development* (2014). He has also supervised sixty-seven Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students.

Just Label It: Consumer Rights, GM Food Labelling, and International Trade (2015)

Matthew Rimmer

1. Introduction

In the United States, there has been fierce debate over state, federal and international efforts to engage in genetically modified food labelling (GM food labelling).

A grassroots coalition of consumers, environmentalists, organic farmers, and the food movement has pushed for law reform in respect of GM food labelling. The Just Label It campaign has encouraged United States consumers to send comments to the United States Food and Drug Administration to label genetically modified foods.¹

This Chapter explores the various justifications made in respect of genetically modified food labelling. There has been a considerable effort to portray the issue of GM food labelling as one of consumer rights as part of ‘the right to know’. There has been a significant battle amongst farmers over GM food labelling – with organic farmers and biotechnology companies, fighting for precedence. There has also been a significant discussion about the use of GM food labelling as a form of environmental legislation. The prescriptions in GM food labelling regulations may serve to promote eco-labelling, and deter greenwashing.² There has been a significant debate over whether GM food labelling may serve to regulate corporations – particularly from the food, agriculture, and biotechnology industries. There are

¹ Just Label It, <http://www.justlabelit.org>

² Lane, E., 2011, *Clean Tech Intellectual Property: Eco-Marks, Green Patents, and Green Innovation*, Oxford: Oxford University Press, 2011.

significant issues about the interaction between intellectual property laws – particularly in respect of trade mark law and consumer protection – and regulatory proposals focused upon biotechnology. There has been a lack of international harmonization in respect of GM food labelling. As such, there has been a major use of comparative arguments about regulator models in respect of food labelling. There has also been a discussion about international law, particularly with the emergence of sweeping regional trade proposals, such as the *Trans-Pacific Partnership*, and the *Trans-Atlantic Trade and Investment Partnership*.

This Chapter considers the United States debates over genetically modified food labelling – at state, federal, and international levels. The battles often involved the use of citizen-initiated referenda. The policy conflicts have been policy-centric disputes – pitting organic farmers, consumers, and environmentalists against the food industry and biotechnology industry. Such battles have raised questions about consumer rights, public health, freedom of speech, and corporate rights. The disputes highlighted larger issues about lobbying, fund-raising, and political influence. The role of money in United States has been a prominent concern of Lawrence Lessig in his recent academic and policy work with the group, Rootstrickers.³ Part 1 considers the debate in California over Proposition 37. Part 2 explores other key state initiatives in respect of GM food labelling. Part 3 examines the Federal debate in the United States over GM food labelling. Part 4 explores whether regional trade agreements – such as the *Trans-Pacific Partnership (TPP)* and the *Trans-Atlantic Trade and Investment Partnership (TTIP)* – will impact upon initiatives in respect of genetically modified food labelling.

³ Lessig, L. 2011, *Republic, Lost: How Money Corrupts Congress and a Plan to Stop It*, Twelve Books, 2011; Lessig, L. 2012, *One Way Forward: The Outsider's Guide to Fixing the Republic*, eBook, 2012; and Lessig, L. 2013, *Lesterland: The Corruption of Congress and How to End It*, TED Books, April 2013.

2. **Proposition 37: *The California Right to Know Genetically Engineered Food Act***

In 2012 there was an intense debate in California over Proposition 37.⁴ Proposition 37 would require the labelling of food sold to consumers made from plants or animals with genetic material changed in specified ways. Proposition 37 would also prohibit the marketing of such food, or other processed food, as ‘natural’. The regime has a number of exceptions and limitations – including foods that are:

certified organic; unintentionally produced with genetically engineered material; made from animals fed or injected with genetically engineered material but not genetically engineered themselves; processed with or containing only small amounts of genetically engineered ingredients; administered for treatment of medical conditions; sold for immediate consumption such as in a restaurant; or alcoholic beverages.⁵

The advocates of Proposition 37⁶ argue that the measure would ‘give us the right to know what is in the food we eat and feed to our families’;⁷ require labelling of food produced

⁴ California General Election, *Proposition 37*. [Online]. Available at:

<http://voterguide.sos.ca.gov/past/2012/general/propositions/37/> [accessed: 29 March 2014].

⁵ Attorney General, *Proposition 37: Genetically Engineered Foods. Labeling. Initiative Statute*.

[Online]. Available at:

http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2315&context=ca_ballot_props [accessed: 2 April 2014].

⁶ See California Right to Know – Label Genetically Engineered Foods. [Online]. Available at:

<http://www.carighttoknow.org/> [accessed: 2 April 2014].

⁷ California General Election, *Proposition 37*. [Online]. Available at:

<http://voterguide.sos.ca.gov/past/2012/general/propositions/37/> [accessed: 2 April 2014].

using genetic engineering, so we can choose whether to buy those products or not’;⁸ because ‘we have a right to know’.⁹ The advocates of the measure maintained:

Fifty countries around the world – representing more than 40 per cent of the world’s population – already require GMO labelling, including all of Europe, Japan, India and China. Polls show that more than 90 per cent of Americans want to know if their food is genetically engineered. We are free to choose what we want to eat and feed our children. The free market is supposed to provide consumers with accurate information about products so we can make informed choices.¹⁰

To support its proposition, the ‘Yes’ Campaign enlisted a number of celebrities to provide endorsements in an advertising campaign. An all-star cast of Hollywood actors appeared in a piece on the ‘Right to Know’.¹¹ The actor and comedian Danny DeVito led the piece, asking the question: ‘What makes you think you have the right to know?’¹² He joked: ‘Inowing if you're eating or buying genetically engineered food is not your right’.¹³ This montage also featured spokespersons Bill Maher, Dave Matthews, Jillian Michaels, Emily Deschanel, John Cho, Glenn Howerton, Kaitlin Olson, KaDee Strickland and Kristin Bauer

⁸ Ibid.

⁹ Ibid.

¹⁰ California Right to Know. *Facts – Yes on Prop 37*. [Online]. Available at: <http://www.carighttoknow.org/facts> [accessed: 2 April 2014].

¹¹ Gates, S, 2012. California Prop 37: Danny DeVito, Dave Matthews and other celebs ask voters to approve mandatory GMO labelling. *The Huffington Post*, 9 October 2012. [Online]. Available at: http://www.huffingtonpost.com/2012/10/09/california-prop-37-video-celebrities_n_1952203.html [accessed: 2 April 2014].

¹² Food and Water Watch. 2012. *Right to know: Vote yes on Prop 37*, YouTube, 8 October 2012. [Online]. Available at: <https://www.youtube.com/watch?v=RB1xHFwSYIg> [accessed: 2 April 2014].

¹³ Ibid.

van Straten. The video featured the affirmation – ‘Demand that GMO’s are labelled’. This witty video was designed to garner support for Proposition 37 by the consumer advocacy group Food & Water Watch.¹⁴

Marisa Tomei and other celebrities appeared in a video, emphasizing that GM food labelling would not increase grocery costs.¹⁵ Another video entitled ‘I’m a Mom’ – featured celebrities like Molly Ringwald, attesting ‘I’m a Mom: if you label it, then I’ll Know’.¹⁶ James Franco also fronted a video, encouraging Californian voters to vote ‘Yes’.¹⁷ In another video, James Franco appeared in a blindfold, observing, ‘Right now, you are eating food with a blindfold on ... because companies do not have to tell you whether the food has been genetically modified’.¹⁸

¹⁴ Gates, above n 10.

¹⁵ Food and Water Watch. 2012. *Grocery costs: Vote yes on Prop 37*, YouTube, 2 November 2012. [Online]. Available at: https://www.youtube.com/watch?feature=player_embedded&v=i7V3q2HDQLI [accessed: 2 April 2014].

¹⁶ Food and Water Watch. 2012. *I’m a mom: Vote yes on Prop 37*, YouTube, 2 November 2012. [Online]. Available at: https://www.youtube.com/watch?feature=player_embedded&v=7XcAcFTjm0g [accessed: 2 April 2014].

¹⁷ Food and Water Watch. 2012. *Grocery costs, featuring James Franco: Vote Yes on Prop 37*, YouTube, 2 November 2012. [Online]. Available at: https://www.youtube.com/watch?feature=player_embedded&v=pxeWHvJJS54 [accessed: 2 April 2014].

¹⁸ Food and Water Watch. 2012. *Blindfold: Vote Yes on Prop 37*, YouTube, 2 November 2012. [Online]. Available at: https://www.youtube.com/watch?feature=player_embedded&v=MFaii2gGdjg [accessed: 2 April 2014].

Stacy Malkan, an advocate for environmental health, was a spokesperson for the Yes on the 37 *California Right to Know Campaign*.¹⁹ She commented:

Proposition 37 is very simple. It's about our right to know what's in the food we're eating and feeding our families. It's about our right to decide if we want to eat food that's been fundamentally altered at the genetic level, by companies like Monsanto, to contain bacteria, viruses or foreign genes that have never been in the food system before. And genetic engineering has been hidden from American consumers for two decades. Sixty-one other countries require labelling laws, but we haven't been able to get labelling here because of the enormous influence of Monsanto and the chemical companies..²⁰

Malkan maintained that the proposal was supported by leading environmental, labor, and consumer groups in California. Malkan argued that the opponents of GM labelling were running an astroturfed, faux populist campaign against Proposition 37: 'On the other side are the world's largest pesticide and junk food companies, who are spending \$40 million carpet-bombing California with a campaign of deception and trickery, with lie after lie in the ads that are going unchallenged in the media'.²¹

Writing in *The New York Times*, Michael Pollan wondered whether the push for GM food labelling was part of a larger food movement.²² He commented that the battle over Proposition 37 raised larger issues about 'Big Food' and the industrial production of food:

¹⁹ Goodman, A. 2012. Food Fight: Debating Prop 37, California's Landmark Initiative to Label GMO Food. *Democracy Now*, 24 October 2012. [Online]. Available at:

http://www.democracynow.org/2012/10/24/food_fight_debating_prop_37_californias [accessed: 2 April 2014].

²⁰ Ibid.

²¹ Ibid.

²² Pollan, M. 2012. Vote for the dinner party. *The New York Times*, 10 October 2012. [Online]. Available at: http://www.nytimes.com/2012/10/14/magazine/why-californias-proposition-37-should-matter-to-anyone-who-cares-about-food.html?pagewanted=all&_r=0 [accessed: 2 April 2014].

What is at stake this time around is not just the fate of genetically modified crops but the public's confidence in the industrial food chain. That system is being challenged on a great many fronts – indeed, seemingly everywhere but in Washington. Around the country, dozens of proposals to tax and regulate soda have put the beverage industry on the defensive, forcing it to play a very expensive (and thus far successful) game of Whac-A-Mole. The meat industry is getting it from all sides: animal rights advocates seeking to expose its brutality; public-health advocates campaigning against antibiotics in animal feed; environmentalists highlighting factory farming's contribution to climate change.

Pollan noted: 'The industry is happy to boast about genetically engineered crops in the elite precincts of the op-ed and business pages – as a technology needed to feed the world, combat climate change, solve Africa's problems, etc. – but still would rather not mention it to the consumers who actually eat the stuff'.²³ He observed that such a lack of transparency was contradictory maintaining that 'the fight over labelling GM food is not foremost about food safety or environmental harm, legitimate though these questions are'.²⁴ He stressed: 'The fight is about the power of Big Food'.²⁵ Pollan observed that:

Monsanto has become the symbol of everything people dislike about industrial agriculture: corporate control of the regulatory process; lack of transparency (for consumers) and lack of choice (for farmers); an intensifying rain of pesticides on ever-expanding monocultures; and the monopolization of seeds, which is to say, of the genetic resources on which all of humanity depends.²⁶

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

The opponents of the measure argue that ‘Proposition 37 is a deceptive, deeply flawed food labelling scheme, full of special-interest exemptions and loopholes’.²⁷ The opponents allege that the regime would ‘create new government bureaucracy costing taxpayers millions, authorize expensive shakedown lawsuits against farmers and small businesses, and increase family grocery bills by hundreds of dollars per year’.²⁸

Dr David Zilberman, a Professor of Agriculture from the University of California, Berkeley, was a champion for the No Campaign to Proposition 37.²⁹ He observed: ‘Of course I am for people’s right to know, but in the same way that you can label G-modified food, you can also label non-G-modified food’.³⁰ He noted: ‘Today, if you don’t really want G-modified food, you can buy organic, and there are also voluntary labelling of non-G-modified food’ and contended that ‘in every food system, you have some element of a mainstream food, things that are not being labelled’.³¹ Zilberman observed that the proposition was costly, badly drafted, and based on the wrong promise and denied accusations of corporate influence.³² He maintained: ‘Almost all the food that we eat is genetically modified’.³³ Zilberman makes arguments, both about the quality of the scheme, and its impact upon business.

²⁷ California General Election, *Proposition 37*. [Online]. Available at: <http://voterguide.sos.ca.gov/past/2012/general/propositions/37/> [accessed: 2 April 2014].

²⁸ Ibid.

²⁹ Democracy Now. *Food fight: Debating Prop 37, California’s landmark initiative to label GMO food*. [Online]. Available at: http://www.democracynow.org/2012/10/24/food_fight_debating_prop_37_californias [accessed: 2 April 2014].

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

Beyond the clear advocates and opponents there was some disquiet in the debate over the participation of food companies and biotechnology companies. The *Just Label It* movement complained:

Transparency is our right. Yet a handful of companies, such as Monsanto, Kraft, Kellogg's and General Mills, have gotten away with hiding important information about our food for more than two decades... For these companies, a defeat of labelling supports their interests, not the consumers. The Grocery Manufacturers Association (GMA) – Big Food's national lobby group – called defeating Prop 37 'the single highest priority for GMA' in 2012, and has already poured millions into defeating Washington State's initiative. While claiming their products are safe and that biotechnology is beneficial, they are emptying their pockets to fight a simple label.³⁴

The *Just Label It* movement maintained: 'Polling shows overwhelming public support for labelling of genetically engineered foods, yet the same food and chemical companies continue to ignore consumers fight [for] our right to know every chance they get'.³⁵ The group lamented: 'This will continue to be a David versus Goliath battle, an unequal fight between the American consumer and corporate money'³⁶ and argued: 'It's time to call out these companies, and demand that [they] support the consumer's right to transparency'.³⁷

Support for Proposition 37 faded as the Californian Election approached. In October 2012 a poll by the California Business Roundtable and the Pepperdine University School of Public Policy showed 39.1% of likely voters supported the measure, while 50.5% opposed

³⁴ Just Label It, *Labeling opponents: Who are the companies fighting our right to know?* [Online].

Available at: <http://justlabelit.org/right-to-know/labeling-opponents/> [accessed: 2 April 2014].

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

the labelling requirement.³⁸ The poll reported that undecided voters represented 10.5% of respondents. At the election on 6 November 2012 there were 6,088,714 votes in favour – 48.59% of the votes cast – and 6,442,371 votes against – 51.45% of the votes cast.³⁹

Leon Kaye argued that the outcome highlighted the need to reform California's initiative process: 'Whatever your opinion is on Proposition 37 ... one issue is clear: California's ballot initiative process is in desperate need of reform'.⁴⁰ He observed: 'The collapse of support for Proposition 37 is a textbook case of how opponents of such a measure can find success by funding a negative campaign that confuses and jades voters'.⁴¹ Kaye was concerned that the opponents of Proposition 37 relied heavily on out-of-state money: 'Californians' have got to find a way to limit the influence of companies whose operations are based outside of the state'.⁴² And lamented: 'The decision should be made by debate and analysis of the facts; not a \$45.6 million effort generated to buy an electoral outcome'.⁴³ In a

³⁸ Lifsher, M. 2012. Proposition 37 losing in late Business Roundtable-Pepperdine poll. *The Los Angeles Times*, 30 October 2012. [Online]. Available at: <http://articles.latimes.com/2012/oct/30/business/la-fi-mo-37-losing-in-poll-20121030> [accessed: 2 April 2014].

³⁹ California Proposition 37, Mandatory Labeling of Genetically Engineered Food, http://ballotpedia.org/California_Proposition_37,_Mandatory_Labeling_of_Genetically_Engineered_Food_%282012%29

⁴⁰ Kaye, L. 2012. Near death of Proposition 37 proves California's initiative process needs reform. *Triple Pundit*, 6 November 2012. [Online]. Available at: <http://www.triplepundit.com/2012/11/death-proposition-37-proves-californias-initiative-process-reform/> [accessed: 2 April 2014].

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

fall op-ed supporting GMO labels *New York Times* food writer Mark Bittman wrote, ‘as goes California, so goes the nation’.⁴⁴

In 2013 there was discussion of whether there will be further legislative initiatives in California. The Center for Food Safety commented:

Disinformation won the day, but it did not change the facts about what California voters think of GE food labelling. This poll shows that the more the truth about Proposition 37 was received by voters, the more they voted for it. It’s a certainty that once the money-induced cloud of doubt was lifted, many Californians viewed labelling of GE foods as the smart choice.⁴⁵

The survey noted: ‘While the state’s hotly contested GE food labelling initiative was defeated by less than a 3 per cent margin, a full 67 per cent of voters continue to support the labelling of GE foods’.⁴⁶ The Center for Food Safety highlighted the role of opponents of Proposition 37 – including Monsanto, DuPont, Dow, PepsiCo, and Kraft.⁴⁷

⁴⁴ Bittman, M. 2012. GMO’s: Let’s label’em. *The New York Times*, 15 September 2012. [Online]. Available at: http://opinionator.blogs.nytimes.com/2012/09/15/g-m-o-s-lets-label-em/?_php=true&_type=blogs&_r=0 [accessed: 2 April 2014].

⁴⁵ Center for Food Safety. 2013. ‘Post-Proposition 37 poll shows strong public support for future GE food labelling.’ 9 January 2013. [Online]. Available at: <http://www.centerforfoodsafety.org/press-releases/781/post-prop-37-poll-shows-strong-public-support-for-future-ge-food-labeling> [accessed: 2 April 2014].

⁴⁶ Ibid.

⁴⁷ Ibid.

More recently in 2014 Senator Noreen Evans has been agitating for law reform, putting forward new legislation, requiring GMO labelling in California.⁴⁸ The Senate Bill 1381 is being pitched as a simpler version of the unsuccessful Proposition 37.⁴⁹

2. State Battles over GM Food Labelling

In addition to the landmark proposition in California, there have been a range of initiatives in other states⁵⁰ including grassroots movements to improve the oversight of GM food.⁵¹ It is worth highlighting the debates in Connecticut, Maine, Vermont, Washington, and Colorado. Such jurisdictions have been at the forefront of efforts for law reform in this field. A number of conservative states – like Texas – remain resistant to proposals in respect of GM food labelling.⁵²

⁴⁸ Moore, D. 2014. Evans' GMO food-labelling clears state Senate Committee. *The Press Democrat*, 26 March 2014. [Online]. Available at: <http://www.pressdemocrat.com/article/20140326/articles/140329630> [accessed: 2 April 2014].

⁴⁹ Flynn, D. 2014. GE labelling resurrected in California, Petition for ballot measure circulating in Colorado. *Food Safety News*, 25 March 2014. [Online]. Available at: <http://www.foodsafetynews.com/2014/03/gm-labeling-resurrected-in-california-petition-circulating-for-initiative-in-colorado/#.UzO4gxAXL-k> [accessed: 2 April 2014].

⁵⁰ Center for Food Safety. 2013. *State labelling initiatives*. [Online]. Available at: <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/state-labeling-initiatives#> [accessed: 2 April 2014].

⁵¹ See Right to Know GMO. *Map*. [Online]. Available at: <http://www.righttoknow-gmo.org/states> [accessed: 2 April 2014].

⁵² Ahmed, A. 2014. The push to label genetically modified products. *The New York Times*, 22 March 2014. [Online]. Available at: <http://www.nytimes.com/2014/03/23/us/the-push-to-label-genetically-modified-products.html> [accessed: 2 April 2014].

2.1 Connecticut

In June 2013 Connecticut was the first state to pass legislation on GM food labelling – with the caveat that the legislation would only come into effect when four other neighbouring states passed similar bills. Representative Republican John Shaban reflected upon the initiative:

The House and Senate recently passed the ‘GMO Bill’ that will require the labelling of food containing genetically modified organisms (GMOs) once neighbouring states adopt similar provisions. GMOs are introduced into the genetic code of certain crops to promote particular characteristics such as a resistance to certain pesticides. The bill was prompted by the national debate regarding the potential health effects of ingesting GMOs ... The bill makes Connecticut the leader on this effort, and should create the spark needed to effect a regional or national labelling model driven by both government and market participants.⁵³

The Governor Dannel Malloy agreed that he would sign the bill into law – after reaching an agreement with the legislature that the law would not take effect unless four other states passed similar regulations.⁵⁴ He commented: ‘This bill strikes an important balance by ensuring the consumers’ right to know what is in their food while shielding our small businesses from liability that could leave them at a competitive disadvantage’.⁵⁵ The

⁵³ Shaban, J. 2013. Passage of GMO labelling legislation. 5 June 2013. [Online]. Available at: <https://cthousegop.com/2013/06/rep-shaban-on-passage-of-gmo-labeling-legislation/> [accessed: 2 April 2014].

⁵⁴ Stephanie Strom, Connecticut approves labelling genetically modified foods. *The New York Times*, 3 June 2013. [Online]. Available at: <http://www.nytimes.com/2013/06/04/business/connecticut-approves-qualified-genetic-labeling.html?adxnnl=1&adxnnlx=1396400602-757tRA0JESXtaUE+NOMcug> [accessed: 2 April 2014].

⁵⁵ Ibid.

neighbouring states clause seems to be a compromise to ensure that Connecticut will not be punished or adversely affected for being a first mover.

2.2 Maine

In February 2013, the State of Maine legislature introduced *An Act to Protect Maine Food Consumers' Right to Know about Genetically Engineered Food and Seed Stock*.

According to the Bill's summary, the legislation:

requires disclosure of genetic engineering at the point of retail sale of food and seed stock and provides that food or seed stock for which the disclosure is not made is considered to be misbranded and subject to the sanctions for misbranding. The bill provides that food or seed stock may not be labelled as natural if it has been genetically engineered. The bill exempts products produced without knowledge that the products, or items used in their production, were genetically engineered; animal products derived from an animal that was not genetically engineered but was fed genetically engineered food; and products with only a minimum content produced by genetic engineering. The bill also provides that the disclosure requirements do not apply to restaurants, alcoholic beverages or medical food. The disclosure provisions are administered by the Department of Agriculture, Conservation and Forestry.⁵⁶

On the 11 June 2013 the Maine House passed the legislation by a vote of 141 to 4. The Maine Senate unanimously supported the labelling of genetically modified foods. On 9 July 2013, Governor LePage pledged to sign the bill making it law in the state of Maine. In a letter sent to Representative Lance Harvell (Republican-Farmington) and Senator Chris Johnson (Democrat-Lincoln County), lead sponsors of the bill, Governor LePage stated: 'I deeply appreciate the strong public sentiment behind the bill and agree that consumers should

⁵⁶ The Right to Know GMO. *Maine*. [Online]. Available at: <http://righttoknow-gmo.org/states/maine> [accessed: 2 April 2014].

have the right to know what is in their food'.⁵⁷ The Governor noted: 'Additionally, my support for the bill is based in large part on the requirement in the bill that similar legislation be enacted and passed in other contiguous states'.⁵⁸

Legislator Sharon Treat from the State of Maine has been concerned about the regime being affected by international trade agreements.⁵⁹ She commented upon the desire of Maine to protect its unique local laws:

In our state of Maine, which is a rather low-income state with limited economic opportunity (especially now that our textile and shoe factories have almost all moved offshore following NAFTA and other trade agreements), a bright spot is local food initiatives. Our land use and procurement policies are encouraging young people to take up farming, and developing new markets for farmers to sell their produce to schools, hospitals, and other institutions. We have enacted a GMO labeling law similar to that in effect in EU countries, and policies that encourage organic and niche farming. We have also enacted procurement laws – in effect for over a decade – which do not permit the purchase by our state government of products made pursuant to unfair labor practices, or where discrimination is permitted.⁶⁰

Sharon Treat was concerned that Maine's food labelling regulations and environmental laws would be under threat from trade deals, such as the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*.

⁵⁷ Maine Organic Farmers and Gardeners Association. *Governor LePage pledges support for GMO labelling*. [Online]. Available at: <http://www.mofga.org/Programs/PublicPolicyInitiatives/RightToKnowGMOMaine/LePagePledge/tabid/2645/Default.aspx> [accessed: 2 April 2014].

⁵⁸ Ibid.

⁵⁹ Treat, S. 2014. *Concerns about TTIP not just in Europe: Interview with US state legislator, TTIP: Beware what lies beneath, 26 March 2014*. [Online]. Available at: <http://ttip2014.eu/blog-detail/blog/USA%20concerns.html> [accessed: 2 April 2014].

⁶⁰ Ibid.

2.3 Vermont

In 2005 Vermont considered the adoption of the *Farmer Protection Act* to deal with GM crops.⁶¹ The bill placed strict liability for any economic damage to farmers on the producers of GM products, the biotech firms. Under the proposal, when a farmer sustains any damages as a result of contamination, they can claim compensation without having to prove the company's negligence. Joe Mendelson from the Centre of Food Safety explained the impetus for the measure.⁶² There was a great debate in Vermont about that particular piece of legislation. Some members of the Vermont General Assembly believe that such legislation was unnecessary. One member said that it was like having a baseball bat to attack a gnat.⁶³ However, others believed that such legislation was very important in protecting farmers and growers from liability concerns in relation to GM crops.

In 2011 Representative Kate Webb of Shelburne was the lead sponsor of a bill requiring mandatory labels, the *VT Right to Know Genetically Engineered Food Act 2011*.⁶⁴ Although the bill was approved by the House Agriculture Committee by a vote of 9 to 1, the bill was not passed by the end of the legislative session. Interestingly, the biotechnology

⁶¹ Carrick, D. 2005. GM contamination of crops, *The law report, ABC*. [Online]. Available at: <http://www.abc.net.au/radionational/programs/lawreport/gm-contamination-of-crops/3373262> [accessed: 2 April 2014].

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Vermont Right to Know GMOs. *H.722, The VT Right to Know Genetically Engineered Food Act introduced to Vermont House of Representatives*. [Online]. Available at: <http://www.vpirg.org/news/h-722-the-vt-right-to-know-genetically-engineered-food-act-introduced-to-vermont-house-of-representatives-2/> [accessed: 2 April 2014].

company Monsanto threatened to sue the state of Vermont if the legislative bill was passed.⁶⁵ In 2012 Corin Hirsch wondered: ‘So with Proposition 37 dead in California, will Vermont become the first state to require labelling of GMOS?’⁶⁶ In 2013, supporters of the VT Right to Know GMO Coalition – including the Vermont Public Interest Research Group, the Northeast Farming Association of Vermont and Rural Vermont – sought to reintroduce a similar version of the bill.⁶⁷ Falko Schilling, a consumer advocate, commented: ‘I think Vermont has a great opportunity to lead on this issue’.⁶⁸

In May 2013, a GMO Labelling bill passed the Vermont House of Representatives.⁶⁹ However, some legislators opposed the bill. Governor Peter Shumlin was on record as dubious about whether the bill would withstand a constitutional challenge. And the biotechnology industry has threatened to challenge the validity and the legitimacy of any state laws in respect of genetically modified food labelling. Monsanto has maintained:

⁶⁵ Russia Today Question More. 2014. *Monsanto threatens to sue the entire state of Vermont*, 6 April 2014. [Online]. Available at: <http://rt.com/usa/news/monsanto-sue-gmo-vermont-478/> [accessed: 2 April 2014].

⁶⁶ Hirsch, C. 2012. With Prop 37 dead in California, will Vermont become the first to label GMOs? 8 November 2012. [Online]. Available at: <http://www.sevendaysvt.com/BiteClub/archives/2012/11/08/with-prop-37-dead-in-california-will-vermont-become-the-first-to-label-gmos> [accessed: 2 April 2014].

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ *An Act relating to the Labeling of Food Produced with Genetic Engineering* 2012 (Vermont) H. 722. [Online]. Available at: <http://www.leg.state.vt.us/docs/2012/bills/Intro/H-722.pdf> [accessed: 2 April 2014].

We oppose current initiatives to mandate labelling of ingredients developed from GM seeds in the absence of any demonstrated risks. Such mandatory labelling could imply that food products containing these ingredients are somehow inferior to their conventional or organic counterparts.⁷⁰

Monsanto has threatened to challenge any Vermont legislation on GM food labelling.⁷¹ In particular, it has placed reliance on the 1996 decision of the United States Court of Appeals for the Second Circuit in *International Dairy Foods Association v Jeffrey Amestoy, Attorney General of Vermont* on bovine somatotrophin (BST) labelling.⁷² In this matter, dairy manufacturers challenged Vermont laws, which required dairy manufacturers to identify products that were derived from cows treated with a synthetic growth hormone used to increase milk production. The dairy manufacturers alleged that the legislation violated the Commerce Clause and the First Amendment of the *United States Constitution*.

At first instance, the judge focused on the economic impact of labelling and found that the dairy manufacturers had not demonstrated irreparable harm to any right protected by the First Amendment.

On appeal, the court found in favour of the dairy manufacturers by a majority of two to one. For the majority, Judge Altimari held that the dairy manufacturers were entitled to an injunction. The judge held: ‘Because the statute at hand unquestionably implicates the dairy manufacturers’ speech rights, we reject the district court’s conclusion that the disclosure compelled by Vt. Stat. Ann. tit. 6, § 2754(c), is not a “loss of First Amendment freedoms”,

⁷⁰ Knowles, D. Vermont Senator continues fight for GMO labelling, defeat of Monsanto Protection Act. *New York Daily News*, 28 May 2013. [Online]. Available at: <http://www.nydailynews.com/news/politics/bernie-sanders-pressure-monsanto-article-1.1357031#ixzz2hf2EzMSK> [accessed: 2 April 2014].

⁷¹ Ibid.

⁷² *International Dairy Foods Association v. Attorney General of Vermont* 92 F.3d 67 (1996).

amounting to irreparable harm'.⁷³ Altimari maintained: 'We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate'.⁷⁴ However, the judge observed: 'We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernible impact on a final product'.⁷⁵ Judge Altimari held:

Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it. Instead, those consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it'.⁷⁶

The judge then considered that 'consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement'.⁷⁷

In dissent, Judge Leval held that the First Amendment should support the use of labelling for the purposes of consumer protection and public health:

The policy of the First Amendment, in its application to commercial speech, is to favor the flow of accurate, relevant information. The majority's invocation of the First Amendment to invalidate a state law requiring disclosure of information consumers reasonably desire stands the Amendment on its ear. In my

⁷³ Ibid., 72.

⁷⁴ Ibid., 73.

⁷⁵ Ibid., 73.

⁷⁶ Ibid., 74.

⁷⁷ Ibid., 74.

view, the district court correctly found that plaintiffs were unlikely to succeed in proving Vermont's law unconstitutional.⁷⁸

Judge Leval commented that the true objective of the milk producers is concealment. The judge maintained: 'The question is simply whether the First Amendment prohibits government from requiring disclosure of truthful relevant information to consumers'.⁷⁹ His Honour concluded: 'In my view, the interest of the milk producers has little entitlement to protection under the First Amendment'.⁸⁰ Judge Leval stressed that 'the case law that has developed under the doctrine of commercial speech has repeatedly emphasized that the primary function of the First Amendment in its application to commercial speech is to advance truthful disclosure – the very interest that the milk producers seek to undermine'.⁸¹ His Honour emphasized that in any case 'the precedential effect of the majority's ruling is quite limited' because 'it applies only to cases where a state disclosure requirement is supported by no interest other than the gratification of consumer curiosity'.⁸²

The decision in this matter could be contrasted with the recent decision of the High Court of Australia in respect of the plain packaging of tobacco products – which held that health warnings were commonplace, and that the Australian Government had the legislative power to enforce their use.⁸³ Justice Kiefel commented:

⁷⁸ Ibid., 74.

⁷⁹ Ibid.

⁸⁰ Ibid., 80.

⁸¹ Ibid., 81.

⁸² Ibid., 81.

⁸³ *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012). See Rimmer, M.

2014. The High Court of Australia and the Marlboro man: The battle over the plain packaging of tobacco products, in *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* edited by T. Voon, A.

Mitchell and J. Liberman. London: Routledge, 337-360; Rimmer, M. 2013. Plain packaging for the Pacific Rim:

Many kinds of products have been subjected to regulation in order to prevent or reduce the likelihood of harm. The labelling required for medicines and poisonous substances comes immediately to mind. Labelling is also required for certain foods, to both protect and promote public health.⁸⁴

It should be noted that, in this particular case, the combination of graphic pictures and plain packaging of tobacco products were considered to be consistent with the *Australian Constitution*.

In 2014, the Governor of Vermont signed the GM food labelling bill. Governor Peter Shumlin discussed the legislative measure:

Vermonters take our food and how it is produced seriously, and we believe we have a right to know what's in the food we buy. I am proud that we're leading the way in the United States to require labeling of genetically engineered food. More than 60 countries have already restricted or labeled these foods, and now one state – Vermont - will also ensure that we know what's in the food we buy and serve our families.⁸⁵

Shumlin commented: 'There is no doubt that there are those who will work to derail this common sense legislation.'⁸⁶ He noted: 'As you know, we're in the middle of an agricultural renaissance in Vermont because more and more Vermonters care about where their food

The Trans-Pacific Partnership and tobacco control, in *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* edited by T. Voon. Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 75-105.

⁸⁴ *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012) [316].

⁸⁵ Shumlin, P. 2014, 'Governor Signs First in the Nation Genetically Engineered Foods Labeling Law', 8 May 2014, <http://governor.vermont.gov/newsroom-gmo-bill-signing-release>

⁸⁶ *Ibid.*

comes from, what's in it, and who grew it.’⁸⁷ Shumlin observed that the legislation would create momentum for change elsewhere in the United States: ‘It makes sense that we are again leading the nation in this important step forward.’⁸⁸

The legislative bill created a special fund to support the implementation and administration of the state labelling law, including costs and fees associated with any legal challenge to the regime. The Vermont Attorney General William Sorrell observed: ‘The constitutionality of the GMO labelling law will undoubtedly be challenged. He commented: ‘I can promise that my office will mount a vigorous and zealous defense of the law that has so much support from Vermont consumers.’⁸⁹

It is anticipated that Vermont’s GM food labelling laws will be challenged under a number of grounds by its opponents – including in respect of the First Amendment; Federal pre-emption; and constitutional laws regarding commerce and acquisition of property.⁹⁰

The Independent Senator from Vermont in the United States Congress, Bernie Sanders, was supportive of Vermont’s bill.⁹¹

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Chokshi, N. 2014, ‘Vermont Just Passed The Nation’s First GMO Food Labeling Law. Now it Prepares to Get Sued’, *The Washington Post*, 9 May 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/29/how-vermont-plans-to-defend-the-nations-first-gmo-law/>

⁹¹ Knowles, D. 2013. Vermont Senator continues fight for GMO labelling, defeat of Monsanto Protection Act. *New York Daily News*, 28 May 2013. [Online]. Available at: <http://www.nydailynews.com/news/politics/bernie-sanders-pressure-monsanto-article-1.1357031> [accessed: 2 April 2014].

2.4 Washington State

In January 2013 the bill – SB. 5073 was introduced to provide for the labelling of genetically engineered foods and prescribe penalties for violation. The bill was sponsored by Senators Chase, Klein, Keiser, Rolfes, and Hasegawa. Although this bill was not passed, it nonetheless provided the impetus for public debate, and led to a citizen initiated initiative.

The State of Washington had a citizen initiated initiative relating to I-522.⁹² This initiative is entitled ‘an act relating to disclosure of foods produced through genetic engineering’. Section One served as a preamble or a recital. The bill maintained that ‘polls consistently show that the vast majority of the public, typically more than ninety percent, wants to know if their food was produced using genetic engineering’.⁹³ The bill warned: ‘without disclosure, consumers of genetically engineered food unknowingly may violate their own dietary and religious restrictions’.⁹⁴ The bill observed that there was a gap in the legal framework in the United States:

Currently, there is no federal or state law that requires food producers to identify whether foods were produced using genetic engineering. At the same time, the United States Food and Drug Administration does not require safety studies of such foods. Unless these foods contain a known allergen, the United States food and drug administration does not require the developers of genetically engineered crops to consult with the agency. Consultations with the United States food and drug administration are entirely voluntary and the developers themselves may decide what information they may wish to provide.⁹⁵

⁹² Yes on 522. [Online]. Available at: <http://yeson522.com/about/read/> [site now archived].

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

The bill contended that ‘mandatory identification of foods produced with genetic engineering can provide a critical method for tracking the potential health effects of consuming foods produced through genetic engineering’.⁹⁶ Moreover, the sponsors of the bill maintained: ‘Consumers have the right to know whether the foods they purchase were produced with genetic engineering’.⁹⁷ The bill observed: ‘Forty-nine countries, including Japan, South Korea, China, Australia, New Zealand, Thailand, Russia, the European Union member states, and other key United States trading partners, have laws mandating disclosure of genetically engineered foods on food labels’.⁹⁸ The bill stressed: ‘Many countries have restrictions or bans against foods produced with genetic engineering’.⁹⁹ Finally, the bill claimed: ‘No international agreements prohibit the mandatory identification of foods produced through genetic engineering’.¹⁰⁰

Section 2 of the bill provides definitions of key words in the legislative proposal. Section 3 provides the key prescriptions in respect of GM food labelling:

Beginning July 1, 2015, any food offered for retail sale in Washington is misbranded if it is, or may have been, entirely or partly produced with genetic engineering and that fact is not disclosed as follows:

- (a) In the case of a raw agricultural commodity, on the package offered for retail sale, with the words ‘genetically engineered’ stated clearly and conspicuously on the front of the package of such a commodity, or in the case of such a commodity that is not separately packaged or labelled, on a label appearing on the retail store shelf or bin where such a commodity is displayed for sale;

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

- (b) In the case of any processed food, on the front of the package of such food produced by a manufacturer, with the words ‘partially produced with genetic engineering’ or ‘may be partially produced with genetic engineering’ stated clearly and conspicuously; and
- (c) In the case of any seed or seed stock, on the seed or seed stock container, sales receipt or any other reference to identification, ownership, or possession, with the words ‘genetically engineered’ or ‘produced with genetic engineering’ stated clearly and conspicuously.¹⁰¹

However, the legislation does ‘not require either the listing or identification of any ingredient or ingredients that were genetically engineered, nor that the term “genetically engineered” be placed immediately preceding any common name or primary product descriptor of a food’.¹⁰² The legislation contains a number of exemptions from the operation of this scheme.

Section 4 provides that ‘the department may adopt rules necessary to implement this chapter, provided that the department is not authorized to create any exemptions beyond those provided in section 3(3) of this act’.

Section 5 provides for penalties. Section 5 (2) noted: ‘The department may assess a civil penalty against any person violating this chapter in an amount not to exceed one thousand dollars per day. Section 5 (3) provides ‘An action to enjoin a violation of this chapter may be brought in any court of competent jurisdiction by any person in the public interest if the action is commenced more than sixty days after the person has given notice of the alleged violation to the department, the attorney general, and to the alleged violator’. Section 5 (4) stipulates: ‘The court may award to a prevailing plaintiff reasonable costs and attorneys’ fees incurred in investigating and prosecuting an action to enforce this chapter’.¹⁰³

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

Carole Bartolotto – a dietician – supported the labelling of GMOs in the state of Washington: ‘Washington’s Initiative 522 to label genetically engineered foods, on the November ballot, will help us get the transparency we desire’.¹⁰⁴ She maintained that ‘if Washington’s Initiative 522 passes and genetically modified foods are labelled ... it just might change the face of American agriculture forever’.¹⁰⁵

There has been concern that the debate over GM food labelling in Washington has been shaped by industry contributions.¹⁰⁶ A journalist reported that opponents of the initiative had raised \$17.2 million, while its supporters had only raised \$4.9 million:

The money raised so far by both sides, about \$21.9 million, is the second highest amount for a state ballot measure, according to records kept by the Washington Public Disclosure Commission. It trails money raised for and against a 2011 measure to privatize liquor sales.

Nearly all of the opposition money against I-522 has come from six out-of-state contributors that also were among the top donors against California’s measure. The Grocery Manufacturers Association has given \$7.2 million, while the biotechnology company Monsanto Co. has given \$4.8 million. The average contribution to No on 522 is \$1.2 million.

About 72 percent of the money raised by supporters of I-522 has also come from out of state. Dr. Bronner's Magic Soaps has given the most: \$1.7 million. The pro-labelling group has received lots of smaller donations from within the state. The average contribution to Yes on 522 is \$874.¹⁰⁷

¹⁰⁴ Bartolotto, C. 2013. Why genetically modified food should be labelled. *The Huffington Post*, 4 October 2013. [Online]. Available at: http://www.huffingtonpost.com/carole-bartolotto/why-genetically-modified-food_b_4039114.html [accessed: 2 April 2014].

¹⁰⁵ Ibid.

¹⁰⁶ Le, P. Big money shapes GMO food labelling fight in Washington. *Associated Press*, 6 October 2013. [Online]. Available at: <http://www.komonews.com/news/local/Big-money-shapes-GMO-food-labeling-fight-in-Wash--226675431.html> [accessed: 2 April 2014].

¹⁰⁷ Ibid.

Environmentalists have urged food industry and biotechnology industry groups to desist from funding the campaign against the proposed food labelling law in Washington State. Lucia von Reusner of Green Century Capital Management, manager of environmentally focused mutual funds, argued: ‘We believe that political contributions are a poor investment and are calling companies not to spend money opposing legislation that would give consumers labelling information’.¹⁰⁸

In November 2013 Washington State voters rejected the initiative. The vote was 45.2 per cent in favour of labelling, and 54.8 per cent opposed to labelling.¹⁰⁹ Marion Nestle, Professor of Nutrition at New York University, predicted that there would be further regulatory efforts: ‘At some point the industry is going to get tired of pouring this kind of money into these campaigns’.¹¹⁰ No doubt there will be further efforts to push for GM food labelling in Washington State.

3.5 Colorado

In 2014 there was an effort to put forward a ballot initiative.¹¹¹ Initiative #48 would require that GM food would come with packaging that announced ‘produced with genetic engineering’ by the 1 July 2016. This initiative was challenged in the Supreme Court of

¹⁰⁸ Abbott, C. 2013. Greens ask US biotech firms to sit out food-labelling vote. *Reuters*, 9 October 2013. [Online]. Available at: <http://www.reuters.com/article/2013/10/10/usa-agriculture-gmo-idUSL1N0HZ1OJ20131010> [accessed: 2 April 2014].

¹⁰⁹ Weise, E. 2013. Washington State voters reject state labeling of GMO foods. *USA Today*, 6 November 2013. [Online]. Available at: <http://www.usatoday.com/story/news/nation/2013/11/06/washington-state-voters-reject-gmo-labeing/3450705/> [accessed: 2 April 2014].

¹¹⁰ Ibid.

¹¹¹ RT Question More. 2014. GMO labelling effort in Colorado scores win in State Supreme Court, 19 March 2014. [Online]. Available at: <http://rt.com/usa/colorado-gmo-label-court-945/> [accessed: 2 April 2014].

Colorado.¹¹² The Rocky Mountain Food Industry Association President Mary Lou Chapman and Mark Arnusch, a farmer in rural Keenesburg, brought a challenge alleging that the ballot was misleading. The Supreme Court of Colorado dismissed action. Larry Cooper, one of the individuals who proposed the initiative, observed: ‘We are pleased that the state Supreme Court ruled in favor of the GMO labelling ballot title, and we look forward to bringing a GMO labelling initiative before the voters of Colorado this fall’.¹¹³ He stressed: ‘Coloradans have the right to know what is in their food, and to make purchasing decisions for their families based on knowing whether their foods are genetically engineered, and we believe they will have that opportunity after November’.¹¹⁴

It remains to be seen whether there will be a larger coalition of states, proposing regimes dealing with GM food labelling, given the closely contested nature of the initiatives.¹¹⁵

3. President Barack Obama, the United States Congress, and GM Food Labelling

Turning from State to Federal legislation, in 2007, as a Presidential candidate, Barack Obama, supported GM food labelling, emphasizing that he would strive to ‘let folks know

¹¹² *Arnusch and Chapman v. Cooper and Gray* (2014) Colorado Supreme Court, Case Number L 2013SA335.

¹¹³ Long, J. Colorado Supreme Court OKs ballot title on GMO labelling initiative. *Natural Products Insider*, 19 March 2014. [Online]. Available at: <http://www.naturalproductsinsider.com/news/2014/03/colorado-supreme-court-oks-ballot-title-on-gmo-la.aspx> [accessed: 2 April 2014].

¹¹⁴ Ibid.

¹¹⁵ Flynn, D. 2014. GE labelling resurrected in California, petition for ballot measure circulating in Colorado. *Food Safety News*, 25 March 2014. [Online]. Available at: <http://www.foodsafetynews.com/2014/03/gm-labeling-resurrected-in-california-petition-circulating-for-initiative-in-colorado/> [accessed: 2 April 2014].

when their food is genetically modified, because Americans have a right to know what they are buying'.¹¹⁶ However, he has shown little enthusiasm for policy reform during his two terms of Presidency. In his piece, 'The Vote for the Dinner Party', Michael Pollan observed that the Food Movement needed to gain greater influence in Federal Politics:

That's why, sooner or later, the food movement will have to engage in the hard politics of Washington — of voting with votes, not just forks. This is an arena in which it has thus far been much less successful. It has won little more than crumbs in the most recent battle over the farm bill (which every five years sets federal policy for agriculture and nutrition programs), a few improvements in school lunch and food safety and the symbol of an organic garden at the White House. The modesty of these achievements shouldn't surprise us: the food movement is young and does not yet have its Sierra Club or National Rifle Association, large membership organizations with the clout to reward and punish legislators. Thus while Big Food may live in fear of its restive consumers, its grip on Washington has not been challenged.¹¹⁷

The key features of Federal involvement with GM food labelling have been the indecisive debate about the role of the United States Food and Drug Administration (FDA) in respect of the regulation of GM food labelling; concerted efforts in 2013 to introduce legislative measures in the United States Congress; and the response by Congressional supporters of biotechnology to counter GM food labelling efforts at federal and state levels.

¹¹⁶ Philpott, T. 2011. Obama's broken promise on GMO food labelling. *Mother Jones*, 6 October 2011. [Online]. Available at: <http://www.motherjones.com/tom-philpott/2011/10/fda-labeling-gmo-genetically-modified-foods> [accessed: 2 April 2014].

¹¹⁷ Pollan, M. 2012. Vote for the dinner party. *The New York Times*, 10 October 2012. [Online]. Available at: http://www.nytimes.com/2012/10/14/magazine/why-californias-proposition-37-should-matter-to-anyone-who-cares-about-food.html?pagewanted=all&_r=0 [accessed: 2 April 2014].

3.1 The United States Food and Drug Administration

In 1992 the FDA published a policy statement on foods created through genetic engineering.¹¹⁸ The policy allowed for genetically engineered foods to be marketed without labelling. The policy was based upon the determination that genetically modified foods were substantially equivalent to foods produced through conventional methods. There has been much debate and controversy over this policy statement. In 2011 the Center for Food Safety petitioned the FDA to reform its regulation.¹¹⁹ The Center maintained:

Genetic engineering results in changes to foods at the molecular level that have never occurred in traditional varieties. These changes are determinative of consumers' food purchases and not readily apparent. Thus, the absence of mandatory labelling disclosures for GE foods is misleading to consumers. FDA's failure to require labelling for GE foods is an abdication of its statutory mandate to require labelling for foods that are "misbranded" because they are misleading.¹²⁰

The petitioners demanded that the FDA require 'that foods that are genetically engineered organisms, or contain ingredients derived from genetically engineered organisms – collectively referred to as "GE foods" – be labelled under the *Federal Food Drug and Cosmetic Act*'.¹²¹ The Center contended that 'the requested actions are necessary to prevent

¹¹⁸ FDA, 1992, Statement of Policy – Foods Derived from New Plant Varieties, *Federal Register*, Vol. 57 (104), 22984,

<http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/biotechnology/ucm096095.htm>

¹¹⁹ *Center for Food Safety v United States Food and Drug Administration* 2011. [Online]. Available at: http://www.centerforfoodsafety.org/files/ge-labeling-petition-10-11-2011-final1_21309.pdf [accessed: 2 April 2014].

¹²⁰ Ibid., 2.

¹²¹ Ibid.

economic fraud, and to protect consumers who are deceived by thinking the absence of labelling means the absence of GE foods'.¹²²

The Center lamented that the current regulatory regime was inadequate and insufficient for genetically modified food labelling:

FDA's outdated regulatory regime for food labelling is woefully inadequate. FDA is still using 19th century ideas to regulate 21st century foods, focusing only on traits that consumers can detect with their senses. But modern public preferences and purchasing decisions are based not only on sensory perceptions, but also on concerns related to latent or unknown health risks, animal welfare, faith, political concerns, social justice, and environmental impacts. In addition to genetic engineering, other novel and unnatural food production technologies are either on the horizon or are currently in use, many completely unbeknownst to consumers.¹²³

The Center argued 'The use of these novel food technologies on a commercial scale has so far slipped underneath FDA's current threshold for 'materiality' because they make silent, genetic, and molecular changes to food that are not capable of being detected by human senses'.¹²⁴ The Center was concerned about the impact of such policies upon consumers: 'As the use of these and future food production technologies proliferates, consumers know less and less about the food they put in their bodies.'¹²⁵

The Center stressed that 'the power and duty to modernize the oversight of food lies with Food and Drug Administration'.¹²⁶ The Center argued that the 'failure to require labeling of GE foods conflicts with this past FDA precedent and creates the appearance that

¹²² Ibid.

¹²³ Ibid, 7.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid., 8.

FDA has altered its past policies to benefit the biotechnology industry, not the public'.¹²⁷ The Center submitted that the 'FDA has not just the statutory authority, but also the duty to require that products of novel food technologies, particularly genetic engineering, be labeled differently from their conventional counterparts'.¹²⁸ The Center maintained that the 'FDA's failure to take the requested action would be arbitrary, capricious, and contrary to law'.¹²⁹ The Center concluded:

Genetic engineering makes silent but fundamental changes to our food at the molecular and cellular level, the full human health and environmental consequences of which are still being discovered. Unlabelled GE foods are misleading to consumers, who in the absence of labelling overwhelmingly purchase based on the reasonable assumption that their food is produced conventionally. Mandatory labelling for GE foods is necessary in order to prevent consumer deception and economic fraud.¹³⁰

The FDA, though, has been unyielding in the face of such entreaties for the introduction of GM food labelling. The Administration entirely ignored the prominent issue of GM food labelling in new food labelling rules in 2014. Ronnie Cummins of the Organic Consumers Association welcomed new regulations on nutrition: 'Changes to nutrition labels are long overdue, and it's great that Mrs. Obama is leading the charge to force food manufacturers to provide more accurate information about their products'.¹³¹ However, he lamented that 'conspicuously absent from the media hype was any mention of the one label

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid., 20.

¹³¹ Cummins, R. 2014. New FDA food label rules ignore the GMO elephant in the room. *The Huffington Post*, 25 March 2014. [Online]. Available at: http://www.huffingtonpost.com/ronnie-cummins/new-fda-food-label-rules-_b_5022900.html [accessed: 2 April 2014].

that consumers have been crystal clear about wanting, the label that consumers in nearly 60 other countries have but Americans don't – a label that tells us whether or not our cereal or soda or mac & cheese contains genetically modified organisms (GMOs)'.¹³²

3.2 The *Genetically Engineered Food Right to Know Act 2013 (US)*

In April 2013, United States Senator Barbara Boxer, a Democrat for California, and Congressman Peter DeFazio, a Democrat from Oregon, introduced the *Genetically Engineered Food Right-to-Know Act 2013 (US)*.¹³³ The legislation would require the FDA to mandate clearly labelled genetically engineered foods. Senator Boxer commented on the legislative bill:

Americans have the right to know what is in the food they eat so they can make the best choices for their families. This legislation is supported by a broad coalition of consumer groups, businesses, farmers, fishermen and parents who all agree that consumers deserve more – not less – information about the food they buy.¹³⁴

Congressman DeFazio commented: 'When American families purchase food, they deserve to know if that food was genetically engineered in a laboratory'.¹³⁵ He observed: 'This legislation is supported by consumer's rights advocates, family farms, environmental

¹³² Ibid.

¹³³ Boxer, B. 2013. Boxer, DeFazio introduce Bill to require labelling of genetically engineered foods. *Press Release*, 24 April 2013. [Online]. Available at: <http://www.boxer.senate.gov/en/press/releases/042413.cfm> [accessed: 2 April 2014].

¹³⁴ Ibid.

¹³⁵ Ibid.

organizations, and businesses, and it allows consumers to make an informed choice'.¹³⁶ Senator Gillibrand maintained: 'American consumers have made it clear that they want to be empowered to make choices about the food they eat'.¹³⁷ The Senator stressed: 'This legislation will deliver the transparency every American deserves by providing clear labelling standards for food containing genetically engineered ingredients'.¹³⁸ Senator Richard Blumenthal commented of the legislative proposal:

This is a common sense approach to ensuring that American consumers know more and make more informed decisions about the foods they eat. As an advocate for consumers' rights and ally of many groups supporting this measure, I want to make sure the food industry gives consumers the full story about what they put on their dinner tables. Consumers deserve to have clear, consistent, and accurate facts about the food products they purchase. More information is always better than less.¹³⁹

Alaskan Senator Begich maintained: 'Labelling Genetically Engineered food should be a no-brainer which is why I'm pleased to join my colleagues on this bill to make sure consumers are fully informed when they make choices at the grocery store'.¹⁴⁰ Senator Tester said: 'American families shouldn't have to play a guessing game when it comes to the food they put on their kitchen tables'. The Senator insisted that 'consumers have a right to know what's in their food, and this bill gives them the tools they need to make informed decisions about the foods they choose'.¹⁴¹ Vermont Independent Senator Bernie Sanders observed: 'All

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

over this country people are becoming more conscious about the foods they are eating and the foods they are serving to their kids’.¹⁴²

Oregon Senator Merkley, ‘Labelling is the common sense way to bring more transparency to consumers’.¹⁴³ Congressman Jared Polis, a Democrat from Colorado, supported the measure in terms of consumer rights.¹⁴⁴ He commented:

Despite the prevalence of Genetically Modified Organisms (GMOs) in grocery stores and prepared foods, it remains difficult if not impossible for consumers to determine if the foods they eat contain GMOs. This labelling bill is about empowering consumers: consumers can choose to eat or not eat GMOs, or to pay more or less for GMOs. I believe consumers have a right to know what they are eating so they can make their own informed food choices. I am proud to be working toward more informative food labels.¹⁴⁵

The press release noted: ‘Unfortunately, the FDA’s antiquated labelling policy has not kept pace with 21st century food technologies that allow for a wide array of genetic and molecular changes to food that can’t be detected by human senses’.¹⁴⁶ The press release invoked common sense: ‘Common sense would indicate that GE corn that produces its own insecticide – or is engineered to survive being doused by herbicides – is materially different from traditional corn that does not’.¹⁴⁷ The press release also made comparisons to patent

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Polis, J. 2013. Polis, Defazio introduce Bill to require labelling of genetically engineered food. 24 April 2013. [Online]. Available at: <http://polis.house.gov/news/documentsingle.aspx?DocumentID=331458> [accessed: 2 April 2014].

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

law: ‘Even the US Patent and Trademark Office has recognized that these foods are materially different and novel for patent purposes’.¹⁴⁸

In an interview with *The Huffington Post*, De Fazio – who has grown organic produce – said that he was agnostic about the health effects of GMOs.¹⁴⁹ However, he supported the mandatory labelling of food with genetically-engineered ingredients because of a strong conviction about the importance of consumer choice: ‘Even the most ardent free market advocate, someone who’s a devout follower of Adam Smith, would have to admit that consumers aren’t being given full information right now’.¹⁵⁰

De Fazio was hopeful that the legislative bill would generate a ‘grassroots tidal wave of support’ from voters – much like the National Organic Standards did in 1993. Nonetheless, he was concerned that the Obama administration was rather indifferent to the proposal: ‘They’re approaching it more like a competitive biotech issue for the US, as opposed to a much more insidious threat to our farmers and to consumers’.¹⁵¹

Scott Faber, president of the Environmental Working Group and the *Just Label It!* campaign in favor of GMO labelling, expected opposition from the biotechnology and agricultural industries and predicted that the bill ‘faces an uphill climb in both the House and Senate’.¹⁵² Biotechnology Industry Organization (BIO) spokeswoman Karen Badt signalled that the biotechnology industry would oppose the proposal in relation to food labelling:

¹⁴⁸ Ibid.

¹⁴⁹ Satran, J. 2013. Genetically engineered food labelling taken on by Congress in Right-to-Know Act. *The Huffington Post*, 25 April 2013. [Online]. Available at: http://www.huffingtonpost.com/2013/04/25/genetically-engineered-food_n_3149418.html?utm_hp_ref=tw [accessed: 2 April 2014].

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

‘Unfortunately, advocates of mandatory “GMO labelling” are working an agenda to vilify biotechnology and scare consumers away from safe and healthful food products’.¹⁵³

Elizabeth Kucinich, the Policy Director of the Center for Food Safety, has called for President Barack Obama to fulfil his campaign promises on GMO labelling.¹⁵⁴ She stressed ‘Although the FDA doesn’t need congressional authorization in order to mandate a federal labeling standard for GMOs, federal lawmakers have become increasingly vocal on the issue’.¹⁵⁵ Kucinich observed:

There is ample precedent. As well as basic ingredients, labels also disclose country of origin, irradiation and even, orange juice ‘made from concentrate’. FDA’s labelling requirements are not based on solely on safety concerns and nutrition, a common myth propped up by the food and chemical industries. A federal labelling standard would give consumers the opportunity to make their own choices about the foods they bring home to their families.¹⁵⁶

In her view, President Obama should push for transparency in respect of food labelling to help build public trust.

3.3 The ‘Monsanto Protection Act’

¹⁵³ Ibid.

¹⁵⁴ Kucinich, E. 2014. Members of Congress, farmers and businesses call on Obama to Fulfill campaign promise on GMO labelling. *The Huffington Post*, 16 January 2014. [Online]. Available at: http://www.huffingtonpost.com/elizabeth-kucinich/post_6676_b_4612219.html [accessed: 2 April 2014].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

There has been a murky debate over the introduction, passage, and subsequent repeal of the Farmer Assurance Provision, ‘Monsanto Protection’ Act.¹⁵⁷ A large number of civil society groups complained about the measure:

Earlier this year, hundreds of thousands of Americans called their elected officials to voice their frustration and disappointment over the inclusion of a controversial policy rider (Sec. 735) – dubbed ‘the Monsanto Protection Act’ – in the Continuing Resolution spending bill (H.R. 933). The rider represents a serious assault on the fundamental safeguards of our judicial system, and could negatively impact farmers, the environment and public health across America. Yet it was quietly slipped into HR 933 without congressional debate, hearings or input from any of the relevant committees.¹⁵⁸

The civil society groups objected that ‘Sec. 735 is an unprecedented overstep of the clear-cut boundary of a Constitutionally-guaranteed separation of powers essential to our government’.¹⁵⁹ In their review, ‘this rider sets a dangerous precedent for congressional intervention in the judiciary’.¹⁶⁰ The civil society groups maintained the measure was a significant interference in the operation of the rule of law: ‘The ability of courts to review, evaluate and judge an issue that impacts public and environmental health is a strength – not a

¹⁵⁷ Sheets, C. 2013. ‘Monsanto Protection Act’ killed in Senate: Controversial measure removed from Spending Bill. *International Business Times*, 27 September 2013. [Online]. Available at: <http://www.ibtimes.com/monsanto-protection-act-killed-senate-controversial-provision-removed-spending-bill-1412160> [accessed: 2 April 2014].

¹⁵⁸ Center for Food Safety. 2013. 129 organizations and companies strongly oppose the *Monsanto Protection Act*, 11 September 2013. [Online]. Available at: http://www.centerforfoodsafety.org/files/group-letter-opposing-biotech-rider-in-fy14-cr_14926.pdf [accessed: 2 April 2014].

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

weakness – of our system’.¹⁶¹ The groups complained that ‘the rider does not merely allow, it would force, the Secretary of Agriculture to immediately grant any requests for permits to allow continued planting and commercialization of an unlawfully approved genetically engineered (GE) crop’.¹⁶² The organisations were concerned that a rubber-stamp process ‘could leave public health, the environment and livelihoods at risk’.¹⁶³

Under pressure from the food movement, Democrats Barbara Mikulski and Jeff Merkley of the United States Senate took action to remove the ‘Monsanto Protection Act’ language from the Senate version of the Bill.¹⁶⁴ Monsanto defended the measures.¹⁶⁵ The biotechnology company emphasized that the purpose of the measure was ‘to reinforce the integrity of the regulatory system and protect farmers from the disruption of frivolous lawsuits’.¹⁶⁶ The company maintained that there is a need to ensure that the regulatory system was ‘based on real science, operating in a timely and data-driven manner to deliver choices to farmers and the economy they support’.¹⁶⁷ Monsanto stressed: ‘We will be working to support the efforts of the USDA and US EPA to make the regulatory system work to provide

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Sheets, C. 2013. ‘Monsanto Protection Act’ killed in Senate: Controversial measure removed from Spending Bill. *International Business Times*, 27 September 2013. [Online]. Available at: <http://www.ibtimes.com/monsanto-protection-act-killed-senate-controversial-provision-removed-spending-bill-1412160> [accessed: 2 April 2014].

¹⁶⁵ Monsanto, 2013. Expiration of the Farmer Assurance Provision, 26 September 2013. [Online]. Available at: <http://monsantoblog.com/2013/09/26/expiration-of-the-farmer-assurance-provision/> [accessed: 2 April 2014].

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

timely, science-based decisions on new products designed to help our farmers produce food and fiber as efficiently and sustainably as possible'.¹⁶⁸

3.4 *The Safe and Accurate Food Labeling Act 2014*

There has also been discussion as to whether there would be federal efforts to make it illegal for the states to engage in the labelling of genetically modified foods.

In April 2014, United States Representative, Mike Pompeo, a Republican congressman from Kansas introduced legislation, which would nullify state efforts to require the labelling of genetically modified foods.¹⁶⁹ The legislation was called the *Safe and Accurate Food Labeling Act 2014*.¹⁷⁰ Pompeo explained of the federal legislative proposal:

We've got a number of states that are attempting to put together a patchwork quilt of food labeling requirements with respect to genetic modification of foods. That makes it enormously difficult to operate a food system. Some of the campaigns in some of these states aren't really to inform consumers but rather aimed at scaring them. What this bill attempts to do is set a standard.¹⁷¹

¹⁶⁸ Ibid.

¹⁶⁹ Gillam, C. 2014. 'U.s. Bill Seeks to Block Mandatory GMO Food Labeling by States', *Reuters*, 9 April 2014, Available at <http://www.reuters.com/article/2014/04/09/usa-gmo-lawmaking-idUSL2N0N115F20140409>

¹⁷⁰ *Safe and Accurate Food Labeling Act of 2014 (HR 4432)*. Mike Pompeo, 'Pompeo, Butterfield Release Bipartisan Food Labeling Reform', Press Release, 10 April 2014, Available at <http://pompeo.house.gov/news/documentsingle.aspx?DocumentID=376238>

¹⁷¹ Gillam, C. 2014. 'U.s. Bill Seeks to Block Mandatory GMO Food Labeling by States', *Reuters*, 9 April 2014, Available at <http://www.reuters.com/article/2014/04/09/usa-gmo-lawmaking-idUSL2N0N115F20140409>

Pompeo maintained that GM foods are safe and ‘equally healthy’ and no special labeling was required or needed. He observed that GM crops: has ‘to date made food safer and more abundant’ and ‘has been an enormous boon to all of humanity.’¹⁷²

The peak body for the biotechnology industry, BIO, applauded the introduction of the legislation.¹⁷³ Cathy Enright, BIO’s Executive President for Food and Agriculture, contended: ‘We also endorse the Safe and Accurate Food Labeling Act as a federal GMO labeling solution that helps to address consumers’ questions about GMO safety and provides them with tools necessary to make informed decisions.’¹⁷⁴ The Coalition for Safe Affordable Food was established in order to support the passage of the legislative bill.¹⁷⁵

In response, Elizabeth Kucinich suggested that Pompeo’s bill was designed to ‘muddy congressional waters and keep consumers in the dark by preventing GMO labelling.’¹⁷⁶ She suggested that the Grocery Manufacturers Association was the driving force behind Pompeo’s proposal. She also wondered whether the Coalition for Safe Affordable Food was really a popular movement, or just an exercise in astroturfing. Kucinich observed: ‘The overall strategy is one that Sun Tzu could be proud of: obfuscation.’¹⁷⁷ She retorted: ‘Tired

¹⁷² Ibid.

¹⁷³ BIO, 2014, ‘BIO Applauds Introduction of the Safe and Accurate Food Labeling Act’, Press Release, 9 April 2014, Available at <http://www.bio.org/media/press-release/bio-applauds-introduction-safe-and-accurate-food-labeling-act>

¹⁷⁴ Ibid.

¹⁷⁵ Coalition for Safe and Affordable Food, <http://coalitionforsafeaffordablefood.org/>

¹⁷⁶ Kucinich, E. 2014. GMO Pushers and The Art of War, The Huffington Post, 10 April 2014/ Available at: http://www.huffingtonpost.com/elizabeth-kucinich/gmo-labeling_b_5120692.html

¹⁷⁷ Ibid.

and false claims about GMOs saving the world are not a sufficient reason to deny citizens their right to know.¹⁷⁸

There may be insufficient support for this bill under the present United States Congress. If the bill is passed, there could will be conflict between state and federal regimes in respect of GM food labelling.

4. Trade, Investment, and GM Food Labelling

There has been significant debate over the Obama administration's pursuit of regional trade agreements – such as the *Trans-Pacific Partnership* (TPP), involving a dozen countries in the Pacific Rim,¹⁷⁹ and the *Trans-Atlantic Trade and Investment Partnership*, a proposed trade agreement between the United States and the European Union. Will the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership* affect policy flexibilities in respect of the public governance of food, the environment, and public health? There has been concern about the impact of such regional trade initiatives on packaging and labelling laws and regulations – such as graphic health warnings and the plain packaging of tobacco products; food nutrition information; and GM food labelling.

There has been significant opposition to the fast-tracking of the *Trans-Pacific Partnership*, and the *Trans-Atlantic Trade and Investment Partnership*. A grand coalition of civil society organisations – including campaigners on GM food labelling – have lobbied the United States Congress against fast-tracking the trade deals.¹⁸⁰ The Organic Consumers Association has opposed the grant of a fast track authority because it is concerned that secret

¹⁷⁸ Ibid.

¹⁷⁹ Brewster, K. 2013. Trans-Pacific Partnership could damage Australia, Lateline, ABC, 10 October 2013. [Online]. Available at: <http://www.abc.net.au/lateline/content/2013/s3866749.htm> [accessed: 2 April 2014].

¹⁸⁰ Stop Fast Track. [Online]. Available at: <http://www.stopfasttrack.com/> [accessed: 2 April 2014].

trade agreements threaten food safety and subvert democracy: ‘If these deals are rammed through Congress without scrutiny or debate, we could lose our right to regulate factory farms and GMOs’.¹⁸¹ LabelGMOs.org has also opposed Fast Track: ‘We believe in food sovereignty for all people and are taking a strong stand against corporate control of our food supply’.¹⁸² GMO Inside opposes Fast Track because of its concern that ‘under the TPP GMO labels for US food would not be allowed’.¹⁸³

GMO Free Arizona fears that the ‘TPP will pre-empt important GMO labelling and moratoriums’¹⁸⁴ and is concerned that ‘the TPP would unravel our movement’s work with GMO labelling, GMO cultivation bans and gut food and environmental safety standards’.¹⁸⁵ In addition to such specific concerns about GM food labelling, there are broader concerns about how the trade deals will affect intellectual property, public health, the environment, consumer rights, and workers’ jobs and wages.

The debate over GM food labelling is a highly polarised discussion – even in international discussions over the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*. It is still hard to determine whether such hopes or fears are justified, in the absence of open, public text and negotiating positions.

¹⁸¹ Ibid. See Organic Consumers Association. Don’t let Congress ‘fast-track’ dangerous trade deals. [Online]. Available at: http://salsa3.salsalabs.com/o/50865/p/dia/action3/common/public/?action_KEY=12779 [accessed: 2 April 2014].

¹⁸² Stop Fast Track. [Online]. Available at: <http://www.stopfasttrack.com/> [accessed: 2 April 2014]. See also Hall, S. 2013. Monsanto to outlaw GM labelling worldwide through secret trade – the TPP, 26 November 2013. [Online]. Available at:

http://www.labelgmoms.org/monsanto_to_outlaw_gmo_labeling_worldwide_through [accessed: 2 April 2014]

¹⁸³ Stop Fast Track. [Online]. Available at: <http://www.stopfasttrack.com/> [accessed: 2 April 2014]. See also GMO Inside.org. [Online]. Available at: <http://gmoinside.org/> [accessed: 2 April 2014].

¹⁸⁴ Stop Fast Track. [Online]. Available at: <http://www.stopfasttrack.com/> [accessed: 2 April 2014].

¹⁸⁵ Ibid.

There has been much debate about the secrecy of such regional trade agreements. Critics have lamented the lack of transparency, accountability, legislative, and public participation. United States Congressional Democrat Senator Elizabeth Warren warned of the dangers of the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*:

For big corporations, trade agreement time is like Christmas morning. They can get special gifts they could never pass through Congress out in public. Because it's a trade deal, the negotiations are secret and the big corporations can do their work behind closed doors. We've seen what happens here at home when our trading partners around the world are allowed to ignore workers' rights, wages, and environmental rules. From what I hear, Wall Street, pharmaceuticals, telecom, big polluters, and outsourcers are all salivating at the chance to rig the upcoming trade deals in their favor'.¹⁸⁶

She commented: 'I believe that if people would be opposed to a particular trade agreement, then that trade agreement should not happen'.¹⁸⁷ The Democrats in the United States Congress have been reluctant to provide President Barack Obama with a fast-track authority in respect of the regional trade deals.¹⁸⁸ As such, there is an impasse between the Obama administration and the United States Congress over these sweeping trade deals, spanning the Pacific Rim, and the Atlantic.

4.1 The *Trans-Pacific Partnership*

¹⁸⁶ Warren, E. 2013. Remarks to the AFL-CIO Convention, 8 September 2013. [Online]. Available at: http://www.warren.senate.gov/?p=press_release&id=234 [accessed: 2 April 2014].

¹⁸⁷ Ibid.

¹⁸⁸ Needham, V. 2014. Pelosi comes out against fast track. *The Hill*, 12 February 2014. [Online]. Available at: <http://thehill.com/homenews/house/198297-pelosi-comes-out-against-fast-track-bill> [accessed: 2 April 2014].

There has been much controversy over the *Trans-Pacific Partnership* – a plurilateral trade agreement involving a dozen nations from throughout the Pacific Rim.¹⁸⁹ One of the most contentious areas of debate has been the question of agriculture. Deborah Elms comments that there has been discussion over the inclusion of agriculture in the deal:

In preparing their calculations about the net benefits of the TPP, many officials realised that if agricultural trade were excluded from the final agreement (or if significant sectors were carved out of the final document, the net economic benefits from the TPP would be lower. Because some agricultural sectors had not been liberalised or had not been fully liberalised in past agreements, there was still scope for improvement in the TPP... If any one area could be carved out as too sensitive for inclusion, it would establish the possibility that countries could carve out other highly sensitive issues from the text elsewhere.¹⁹⁰

There are a range of agricultural issues under debate – including tariffs and harmonised system codes; rules of origin; sanitary and phytosanitary rules; intellectual property standards; investment; the protection of the environment; and the use of regulations, such as food labelling.

¹⁸⁹ See Voon, T. (ed.). 2013. *Trade liberalisation and international co-operation: A legal analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar; Lim, C., Elms, D. and Low, P. (eds.). 2012. *The Trans-Pacific Partnership: A quest for a Twenty-First Century trade agreement*, Cambridge: Cambridge University Press; Kelsey J. (ed.). 2010. *No ordinary deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*. Wellington: Bridget Williams Books Inc; and Kelsey, J, 2013, *Hidden Agendas: What we need to Know About the TPPA*, Wellington: Bridget Williams Books Inc..

¹⁹⁰ Elms, D. 2013. Agriculture and the Trans-Pacific Partnership, in *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* edited by T. Voon. Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 106-130, 107.

In November 2013 WikiLeaks published a Draft Text of the Intellectual Property chapter of the *Trans-Pacific Partnership*.¹⁹¹ The Intellectual Property chapter includes text on patent law; trade mark law; copyright law; data protection; and intellectual property enforcement.¹⁹² A number of the United States proposals are particularly about boosting the intellectual property rights of agricultural companies, the biotechnology industry, and the food industry. In January 2014 WikiLeaks also published a Draft Text of the Environment Chapter of the *Trans-Pacific Partnership*.¹⁹³ The text reveals a weak regime for the protection of the environment, biodiversity, and climate change.¹⁹⁴ As such, the Environment Chapter will do little to provide for protection of public regulation in respect of food and the environment. There has also been much concern about the proposals in respect of the Investment Chapter.¹⁹⁵ The investor-state dispute settlement regime would enable foreign

¹⁹¹ WikiLeaks. 2013. Secret Trans-Pacific Partnership Agreement: The IP chapter, 13 November 2013. [Online]. Available at: <https://wikileaks.org/tpp/> [accessed: 22 May 2014].

¹⁹² Rimmer, M. 2013. Our future is at risk: Disclose the Trans-Pacific Partnership now. *New Matilda*, 15 November 2013. [Online]. Available at: <https://newmatilda.com/2013/11/15/our-future-risk-disclose-tpp-now> [accessed: 2 April 2014].

¹⁹³ WikiLeaks. 2013. WikiLeaks release of secret Trans-Pacific Partnership: Environment chapter consolidated text, 24 November 2013. [Online]. Available at: <https://wikileaks.org/tpp-enviro/> [accessed: 2 April 2014].

¹⁹⁴ Rimmer, M. and Wood, C. 2014. Trans-Pacific Partnership greenwashes dirty politics. *New Matilda*, 17 January 2014. [Online]. Available at: <https://newmatilda.com/2014/01/16/tpp-greenwashes-dirty-politics> [accessed: 2 April 2014].

¹⁹⁵ Rimmer, M. 2012. A dangerous investment: Australia, New Zealand, and the Trans-Pacific Partnership. *The Conversation*, 2 July 2012. [Online]. Available at: <http://theconversation.edu.au/a-dangerous-investment-australia-new-zealand-and-the-trans-pacific-partnership-7440> [accessed: 2 April 2014].

investors to bring tribunal action against nation states in respect of government decisions which adversely affect their foreign investments.¹⁹⁶

The Biotechnology Industry Organization (BIO) has maintained that the status quo in the United States should be a model for the *Trans-Pacific Partnership*:

With regard to labelling of foods derived from agricultural biotechnology, BIO recommends the development of labelling practices consistent with the U.S. Food and Drug Administration (FDA) Draft Guidance. Therefore, any mandatory or required labelling for genetically engineered products should be science based, such as if the product has been significantly changed nutritionally or if there have been changes in other significant health-related characteristics of the food (allergenicity, toxicity, or composition). Voluntary labelling should be truthful and not misleading.¹⁹⁷

BIO has maintained:

The US government has stated the intention to treat the *Trans-Pacific Partnership* as a model agreement for the 21st century, and therefore BIO believes that sound, objective and science-based approaches to agricultural biotechnology regulation should be a top priority, particularly with respect to the challenges facing global agriculture and energy supplies in the 21st century and beyond.¹⁹⁸

The biotechnology industry is thus keen for the *Trans-Pacific Partnership* to address regulatory restrictions in respect of agricultural biotechnology – including in respect of

¹⁹⁶ United Nations Conference on Trade and Development (UNCTAD), 2014, ‘Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment’, April 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

¹⁹⁷ Biotechnology Industry Organization, ‘BIO comments on the proposed accession of Malaysia to the *Trans Pacific Partnership* (TPP) negotiations’, 22 November 2010. [Online]. Available at: <http://www.bio.org/node/228> [accessed: 2 April 2014].

¹⁹⁸ Ibid.

labelling. Accordingly, as James Trimarco has warned: ‘The *Trans Pacific Partnership* is likely to be a setback for efforts to regulate and label GMO foods’.¹⁹⁹

There has been concern about the impact of the *Trans-Pacific Partnership* on food regulation. Sharon Friel, Deborah Gleeson, and Libby Hattersley have stressed that ‘international trade agreements bring new transnational food companies into countries, along with new food advertising and promotion’.²⁰⁰ The health and trade researchers observed:

The *Trans Pacific Partnership* is likely to provide stronger investor protections and enable greater (food) industry involvement in policy-making. It could lead to sweeping changes to domestic regulatory systems, and open up new opportunities for companies to appeal against domestic policies they consider to be a violation of their privileges under the agreement. Together, these changes would weaken the ability for governments to protect public health by, for example, limiting imports and domestic manufacturing of unhealthy foods and drinks.²⁰¹

There has been particular disquiet that ‘at the 15th round of negotiations in Auckland last December, the Malaysian government – supported by the United States – reportedly suggested restricting the amount of information food companies would be required to provide about ingredients and formulae of processed food products’.²⁰² Friel and her collaborators comment that ‘these sorts of proposals raise concerns about consumer access to information

¹⁹⁹ Trimarco, J. 2013. Will a secretive international trade deal ban GMO labelling? *Yes Magazine!*, 18 October 2013. [Online]. Available at: <http://www.yesmagazine.org/planet/will-secretive-international-trade-deal-ban-gmo-labeling-trans-pacific-partnership> [accessed: 2 April 2014].

²⁰⁰ Friel, S., Gleeson, D. and Hattersley, L. 2013. Trans Pacific Partnership puts member countries’ health at risk. *The Conversation*, 9 May 2013. [Online]. Available at: <http://theconversation.com/trans-pacific-partnership-puts-member-countries-health-at-risk-13711> [accessed: 2 April 2014].

²⁰¹ Ibid.

²⁰² Ibid.

about food products, as well as the ability of governments to regulate food labelling on public health grounds'.²⁰³ The group maintained: 'Measures like that one will undermine health policy goals and extend the control of the food industry over domestic policy'.²⁰⁴ In their view, 'Re-balancing food industry influence in the negotiation process with input from the health sector is vital'.²⁰⁵ Friel and her collaborators called for a greater focus upon the protection of public health and nutrition in the trade negotiations: 'Public health advocates and health policymakers must engage with trade negotiations to preserve policy space for public health goals before the window of opportunity closes'.²⁰⁶

Barbara Chicherio complained that the *Trans-Pacific Partnership* was a boon to Monsanto, and would undermine public regulation in respect of food and health.²⁰⁷ She was particularly worried about the labelling of GM foods:

The labelling of foods containing GMOs (Genetically Modified Organisms) will not be allowed. Japan now has labelling laws for GMOs in food. Under the TPP Japan would no longer be able to label GMOs. This situation is the same for New Zealand and Australia. The US is just beginning to see some progress towards labelling GMOs. Under the TPP GMO labels for US food would not be allowed.²⁰⁸

The Sustainability Council in New Zealand has also been particularly concerned about the impact of the Trans-Pacific Partnership upon GM Food Labelling. In an opinion-editorial for *The New Zealand Herald*, Stephanie Howard and Simon Terry wondered: 'Will losing the

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Chicherio, B. 2013. How new 'free' trade deal aids Monsanto. *Green Left Weekly*, 28 September 2013. [Online]. Available at: <https://www.greenleft.org.au/node/55054> [accessed: 2 April 2014].

²⁰⁸ Ibid.

right to choose GM-free food be a price of the next and biggest free trade deal?’²⁰⁹ The researchers at the Sustainability Council observed:

The United States has made clear that a priority for the proposed Trans Pacific Partnership (TPP) is the abolition of laws that require genetically modified foods to be labelled. That puts New Zealand in its sights because of GM ingredients in food products must generally be labelled here.

Although there are exemptions such as highly refined oils and GM contamination below 1 per cent, New Zealand food companies and supermarkets have avoided ingredients in their products that would trigger the labelling and retailers essentially do not stock products tagged as GM.

Without the labelling law, New Zealanders who want to avoid genetically modified food would have to rely on the willingness of producers to declare such content - or a patchwork of independent testing.

Loss of the right to know when a product contains GM ingredients could quickly slide into effective loss of the right to choose everyday foods that are not genetically modified. Instead of it being the norm for food companies to strive to keep GM out of their products, this could become the preserve of niche eco brands.²¹⁰

The writers alleged: ‘The reason Washington wants to stamp out all mandatory labelling is plain: the US is the world's largest producer of GM crops and its soy and corn are now almost all genetically modified’.²¹¹

Olivier De Schutter, the United Nations special rapporteur on the right to food, and Kaitlin Cordes, a food security researcher from Columbia University have made an important

²⁰⁹ Howard, S. and Terry, S. 2011. Let’s Insist on Labels for GM Food’, *The New Zealand Herald*, 10 November 2011. [Online]. Available at:

http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10764893 [accessed: 2 April 2014].

²¹⁰ Ibid.

²¹¹ Ibid.

contribution to the policy debate over the *Trans-Pacific Partnership*.²¹² The writers lament the failure to consider the human rights implications of the agreement:

Whether trade liberalization generally helps or harms the most vulnerable is a complex question. But that theoretical debate should not prevent us from carrying out a thorough human-rights impact assessment on the terms of the deal currently on the table. Such an assessment should be conducted before the TPP negotiations reach any final agreement on the relevant issues, and it should not overlook how the terms are implemented in practice. Unfortunately, TPP member states have not only failed to do this; they have also excluded independent organizations from the assessment process by refusing to provide access to draft texts.²¹³

Citing the work of Joseph Stiglitz, Olivier De Schutter and Kaitlin Cordes worry that ‘the TPP’s emphasis on regulatory policies suggests that business interests will trump human rights’.²¹⁴

In particular, De Schutter and Cordes express concerns about the impact of the *Trans-Pacific Partnership* upon farming, agriculture, and food security:

Leaked drafts of intellectual-property proposals show an obstinate US effort to require patent protections for plants and animals, thus going beyond the World Trade Organization’s *TRIPS Agreement* 1994. The US stance could further restrict farmers’ access to productive resources, thus

²¹² Olivier De Schutter and Kaitlin Cordes, ‘Trading Away Human Rights’, *Project Syndicate*, 7 January 2014. [Online]. Available at: <http://www.project-syndicate.org/commentary/olivier-de-schutter-and-kaitlin-y--cordes-demand-that-the-trans-pacific-partnership-s-terms-be-subject-to-a-human-rights-impact-assessment#9Lq5cFjsOIfGZhhf.99> [accessed: 2 April 2014].

²¹³ Ibid.

²¹⁴ Ibid.

affecting the right to food. And such proposals would limit governments' options when addressing wider food-related human-rights issues.²¹⁵

The writers warn: 'This clash of interests contravenes basic principles of international law, namely that countries' trade deals must not conflict with their obligations under human-rights treaties'.²¹⁶ The policy-makers emphasized: 'That is why a human-rights impact assessment must be conducted – and necessary additional safeguards added – before any TPP deal is signed'.²¹⁷

De Schutter and Cordes stressed that transparency and inclusiveness should be the prerequisites of any deal: 'Although trade negotiations require discretion to avoid political grandstanding by participants, the secrecy that currently surrounds the TPP talks is preventing important human-rights arguments from being aired'.²¹⁸ De Schutter and Cordes emphasized that a change in the process could address significant injustices: 'If they truly want the TPP to be a model for the twenty-first-century global economy, as they claim, then they should show real leadership'.²¹⁹ The pair advised: 'The TPP negotiators should consider the rights of everyone affected by the deal and act in the public interest, not just the special interests of the economic players that stand to benefit the most'.²²⁰

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

In a report to the United Nations on the right to food, Olivier De Schutter has explored the interaction between intellectual property and food security.²²¹ The Special Rapporteur argued that:

in order to ensure that the development of the intellectual property rights regime and the implementation of seed policies at the national level are compatible with the right to food, States should ... support efforts by developing countries to establish a sui generis regime for the protection of intellectual property rights which suits their development needs and is based on human rights.²²²

Olivier De Schutter was hopeful that democracy and diversity could help mend broken food systems.²²³ He observed: ‘The greatest deficit in the food economy is the democratic one’.²²⁴ And argued: ‘By harnessing people’s knowledge and building their needs and preferences into the design of ambitious food policies at every level, we would arrive at food systems that are built to endure’.²²⁵ He maintained that ‘food democracy must start from the bottom-up, at the level of villages, regions, cities, and municipalities’.²²⁶ Olivier De Schutter has insisted

²²¹ De Schutter, O. 2014. *The Transformative Potential of the Right to Food: Report of the Special Rapporteur on the Right to Food*, Human Rights Council, United Nations General Assembly, A/HRC/25/57, 24 January 2014. [Online]. Available at:

http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf [accessed: 2 April 2014].

²²² Ibid., 21-22.

²²³ De Schutter, O. 2014. Democracy and diversity can mend broken food systems – Final diagnosis from UN Right to Food expert. United Nations, 10 March 2014. [Online]. Available at:

<http://www.srfood.org/en/democracy-and-diversity-can-mend-broken-food-systems-final-diagnosis-from-un-right-to-food-expert> [accessed: 2 April 2014].

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

that there is a need for an ‘alternative paradigm for the 21st century’: ‘There is much that can be done by developing countries themselves to support small-scale farmers with the land, credit, technology and market access they need’.²²⁷

4.2 The *Trans-Atlantic Trade and Investment Partnership*

In addition to the *Trans-Pacific Partnership*, President Barack Obama has also been pursuing a *Trans-Atlantic Trade and Investment Partnership*.²²⁸

In 2013, Utah Republican Senator Orrin Hatch and Montana Democrat Senator Baucus wrote to the United States Trade Representative on the priorities that should be embodied in any United States- European Trade Agreement.²²⁹ The pair demanded access for United States agricultural exports; a relaxation of biotechnology regulations; and strong intellectual property protection. Hatch and Baucus insisted that ‘broad bipartisan Congressional support for expanding trade with the EU depends, in large part, on lowering trade barriers for American agricultural products’.²³⁰ The pair lamented: ‘The EU has historically imposed sanitary and phytosanitary measures that act as significant barriers to US-EU trade, including the EU’s restrictions on genetically engineered crops’.²³¹ Hatch and

²²⁷ De Schutter, O. 2014. Ending hunger – the rich world holds the keys. *The Ecologist*, 25 March 2014.

[Online]. Available at:

http://www.theecologist.org/blogs_and_comments/commentators/2333245/ending_hunger_the_rich_world_holds_the_keys.html [accessed: 2 April 2014].

²²⁸ The *Trans-Atlantic Trade and Investment Partnership* <http://ec.europa.eu/trade/policy/in-focus/ttip/>

²²⁹ Baucus, M. and Hatch, O. 2013. Baucus, Hatch outline priorities for potential US-EU trade agreement’, Press Release, The United States Committee on Finance, 12 February 2013. [Online]. Available at:

<http://www.finance.senate.gov/newsroom/chairman/release/?id=17b2fd73-067d-4a4a-a50f-a00265efbf67>

[accessed: 2 April 2014].

²³⁰ Ibid.

²³¹ Ibid.

Baucus also stressed that ‘Congressional support will also require strong intellectual property protection’.²³² The pair noted: ‘Intellectual property is America’s competitive advantage, underpinning a wide range of industries including manufacturing, food processing, information and communications technology, entertainment, biotech, pharmaceuticals and financial services’.²³³ In their view: ‘It is imperative that US trade agreements protect US innovation and allow our innovative industries to compete in global markets’.²³⁴

The Food Democracy Now! movement has been alarmed by the influence of biotechnology companies on the development of the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*: ‘Just as we are on the verge of winning GMO labelling in the US, these secret negotiations could eliminate the ability of countries around the world to label GMOs or impose common sense restrictions on the sale of genetically engineered seed and food in their countries if Monsanto and other biotech companies get their way’.²³⁵

The European Commission has sought to deny that the European Union will be forced to change its laws on genetically modified organisms.²³⁶ The Commission insisted: ‘Basic laws, like those relating to GMOs or which are there to protect human life and health, animal

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Food Democracy Now! *Stop the Secret Trade Deals: The Monsanto Protection Act on Steroids*.

[Online]. Available at:

http://action.fooddemocracynow.org/sign/stop_tpp_tafta_monsanto_protection_act_on_steroids/ [accessed: 2 April 2014].

²³⁶ European Commission. *The Trans-Atlantic Trade and Investment Partnership*. [Online]. Available at:

<http://ec.europa.eu/trade/policy/in-focus/ttip/> [accessed: 2 April 2014].

health and welfare, or environment and consumer interests will not be part of the negotiations'.²³⁷ The Commission observed:

Under EU rules, GMOs that have been approved for use as food, for animal feed or for sowing as crops can already be sold in the EU. Applications for approval are assessed by the European Food Safety Authority (EFSA) and then sent to EU Member States for their opinion. So far, 52 GMOs have been authorised. The safety assessment which EFSA carries out before any GMO is placed on the market and the risk management procedure will not be affected by the negotiations.²³⁸

The Commission agreed that there would be co-operation on the regulation on biotechnology, emphasizing that 'the EU and US already exchange information on policy, regulations and technical issues concerning GMOs', and that 'cooperation of this sort helps minimise the effect on trade of our respective systems for approving GMOs'.²³⁹

However, the Directorate General for Internal Policies at the European Parliament has highlighted wide divisions between the European Union and the United States on the regulation of the environment.²⁴⁰ The study highlighted the significant prescriptions by the European Union in respect of GM food labelling:

Regulation No 1829/2003 also requires the labelling of GMOs and products thereof for food use when they contain, consist of, or are produced from GMOs in a proportion higher than 0.9 per cent of the food

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Directorate General for Internal Policies at the European Parliament. 2013. *Legal Implications of TTIP for the Acquis Communautaire in ENVI Relevant Sectors*, European Parliament. [Online]. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507492/IPOL-ENVI_ET%282013%29507492_EN.pdf [accessed: 2 April 2014].

ingredients considered individually or food consisting of a single ingredient (Art 12(2)). The same applies for feed containing material where the proportion of GMOs is higher than 0.9 per cent of the feed and of each feed of which it is composed (Art 24(2)). If the proportion is less than 0.9%, labelling is not required, provided that the presence of the GMO is adventitious or technically unavoidable. Regulation (EC) No 1830/2003 sets specific requirements for the traceability of GMOs at each stage of production and placing on the market, with monitoring of labelling and of the potential effects on human health or the environment.²⁴¹

By contrast, the report observed that ‘the US policy framework can be understood as the product of an ambivalent institutional mission: in the case of food and food crops, for instance, the FDA has sought simultaneously to ensure food safety and to promote biotechnology in agriculture’.²⁴²

The report noted: ‘While in the EU there is a specific legal framework to regulate GMOs, whether for food and feed uses or for cultivation, the applicable US legal and regulatory framework is comparatively basic and limited to non-binding policy statements on the application of existing product-related laws to GMOs’.²⁴³ The report stressed: ‘In addition, while labelling of GMOs and products thereof for food use is mandatory under EU legislation (if the proportion of GMOs is higher than 0.9 per cent), it is currently only voluntary under US federal law, although there are early initiatives at the state level to introduce mandatory labelling for improved consumer information’.²⁴⁴ The study recommended: ‘In light of the highly differing EU and US regulations applicable to GMOs, any TTIP provisions which could apply to GMOs should be carefully reviewed, in order not to inadvertently undermine the stricter EU standards for the authorisation of GMOs (e.g., risk

²⁴¹ Ibid., 34-35.

²⁴² Ibid., 38.

²⁴³ Ibid., 23.

²⁴⁴ Ibid.

assessment), as well as transparency of GMO-related information (notably public consultation, register and labelling)'.²⁴⁵

Michael Lipsky, a senior fellow at Demos, has wondered, 'Will European requirements for labelling GMO foods survive new trade negotiations?'.²⁴⁶ He feared that US and European negotiators could 'bargain away a key element in American resistance to GMO foods'.²⁴⁷ Lipsky worried that 'the proposed *Trans-Atlantic Trade and Investment Partnership* (TTIP), also referred to as a *Trans-Atlantic Free Trade Agreement* (TAFTA), will focus on "normalizing" regulatory practices that business interests deem limit trade, including the European approach to genetically modified foods'.²⁴⁸ Lipsky commented:

In international trade negotiations, most often Americans worry that domestic regulatory protections or special tariffs will be bargained away in the interests of increasing trade overall. In the case of GMO foods, many Americans have exactly the opposite interest – maintaining the regulatory protections of foreign trade partners so that the precautionary approach to GMO foods practiced by Europeans remains intact.²⁴⁹

Lipsky stressed that the European experience was an important counterpoint: 'For Americans who believe that people should be able to know whether their food has been genetically modified, the European experience is a critical reference point'.²⁵⁰ He noted: 'The

²⁴⁵ Ibid., 27.

²⁴⁶ Lipsky, M. 2013. Will European requirements for labelling for GMO foods survive new trade negotiations? *The Huffington Post*, 3 July 2013. [Online]. Available at: http://www.huffingtonpost.com/michael-lipsky/will-european-requirement_b_3535795.html [accessed: 2 April 2014].

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

cautionary European policies toward GMO foods represent clear and tested alternative approaches to bio-engineering the food supply'.²⁵¹ Lipsky observed: 'It is difficult for opponents of GMO food labelling to marginalize their opponents when virtually every advanced industrial country except the United States (64 according to a recent count) requires labelling and subscribes to restrictive GMO policies'.²⁵²

There has been much debate over the proposal for the inclusion of an investor-state dispute settlement clause in the *Trans-Atlantic Trade and Investment Partnership*. Ska Keller, an MEP with the European/EFA Group has been concerned that investment clauses could be deployed against a range of public regulations:

States are often held back from adopting regulations solely by the threat of lawsuits - this is called the 'chilling effect'. If an action is pending, host countries often act in line with previous cases, which includes withdrawing regulations out of fear of having to pay out high levels of compensation later on.²⁵³

Keller is particularly concerned about United States companies deploying investment chapters against European environmental laws. She questions: 'Should we upend all the democratic decision-making processes in Europe and cause such a legal shake-up just for provisions like [investor-state dispute settlement clauses] and the few European companies who had problems with US American courts?'²⁵⁴ Her preference is to exclude investor-state

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Keller, S. 2014. Investor-state lawsuits threaten democracy', *TTIP: Beware what lies beneath*, 26 March 2014. [Online]. Available at: <http://ttip2014.eu/blog-detail/blog/Ska%20Keller%20Investors%20TTIP.html> [accessed: 2 April 2014].

²⁵⁴ Ibid.

dispute settlement clauses from the *Trans-Atlantic Trade and Investment Partnership* altogether.

Jose Bove – an MEP with the European Green/EFA group – has emphasized the need to defend the right to healthy, safe food in the negotiations over the *Trans-Atlantic Trade and Investment Partnership*.²⁵⁵ He warned that the proposed deal could impact public regulations:

We believe this is an assault on our democratic right to regulate. It could majorly impair our democratic institutions ability to legislate by creating a ‘chilling effect’ on proposals aimed at enhancing the public good, but that go against the interests of private companies trading in both regions. It could impact the extent to which our food is labelled or what processes become acceptable in the making of our food, among many. The Greens will not accept any trade deal that undermines democratic institutions’ right to regulate.²⁵⁶

Bove maintained: ‘It is time for all of us, our farming community, our citizens, and anyone who enjoys safe and healthy food, to become aware of what is being negotiated away- and to do everything in our power to stop it’.²⁵⁷

There has been much controversy over the possibility of the inclusion of an investor-state dispute settlement regime in the *Trans-Atlantic Trade and Investment Partnership*.²⁵⁸

²⁵⁵ Bove, J. 2014. We defend the right to healthy, safe food: We won’t trade this away in TTIP, *TTIP: Beware what lies beneath*, 26 March 2014. [Online]. Available at: <http://ttip2014.eu/blog-detail/blog/Food%20and%20agriculture.html> [accessed: 2 April 2014].

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ European Commission, 2014 ‘Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement’, 21 January 2014, http://europa.eu/rapid/press-release_IP-14-56_en.htm; St. Louis, M. 2014, ‘Public Interest Critique of ISDS: Drastic Increase in Government Liability’, *Public Citizen’s Global Trade Watch*, 17 March 2014; Kleinheisterkamp, J. ‘Is there a Need for

Glyn Moody has observed that there has been a backlash against the inclusion of investor-state dispute settlement, around the world.²⁵⁹ He noted that Germany has called for the repudiation of investment clauses in the *Trans-Atlantic Trade and Investment Partnership*.

The British environmentalist George Monbiot has written a series of articles about the *Trans-Atlantic Trade and Investment Partnership*.²⁶⁰ He raised concerns about the nature of the trade deal, suggesting that it had been captured by transnational corporate elites. Monbiot

Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?' (February 14, 2014), SSRN: <http://ssrn.com/abstract=2410188>; and Moody, G., 2014, Even the German Government Wants Corporate Sovereignty out of TAFTA/ TTIP, *TechDirt*, 17 March 2014, <http://www.techdirt.com/articles/20140313/10571526568/even-german-government-wants-corporate-sovereignty-out-taftattip.shtml>

²⁵⁹ Moody, G. 2014. Corporate sovereignty provisions called into question around the world. *TechDirt*, 26 March 2014. [Online]. Available at: <https://www.techdirt.com/articles/20140325/10074526680/corporate-sovereignty-provisions-called-into-question-around-world.shtml> [accessed: 2 April 2014].

²⁶⁰ Monbiot, G. 2013. From Obamacare to trade, supervision not subversion is the new and very real threat to the state. *The Guardian*, 15 October 2013. [Online]. Available at: <http://www.theguardian.com/commentisfree/2013/oct/14/obamacare-trade-superversion-subversion-threat-state> [accessed: 2 April 2014]; Monbiot, G. 2013. The Trans-Atlantic Trade deal is a full-frontal assault on democracy. *The Guardian*, 5 November 2013. [Online]. Available at: <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> [accessed: 2 April 2014]; Monbiot, G. 2013. The lies behind this transatlantic trade deal. *The Guardian*, 3 December 2013. [Online]. Available at: <http://www.theguardian.com/commentisfree/2013/dec/02/transatlantic-free-trade-deal-regulation-by-lawyers-eu-us> [accessed: 2 April 2014]; and Monbiot, G. 2014. Give and take in the EU-US trade deal? Sure. We give, the corporations take. *The Guardian*, 11 March 2014. [Online]. Available at: <http://www.theguardian.com/commentisfree/2014/mar/10/eu-us-trade-deal-give-corporations-take> [accessed: 2 April 2014].

was particularly concerned about the possibility of the inclusion of an investment chapter in the *Trans-Atlantic Trade and Investment Partnership*.²⁶¹ Monbiot observed:

Investor-state rules could be used to smash any attempt to save the NHS from corporate control, to re-regulate the banks, to curb the greed of the energy companies, to renationalise the railways, to leave fossil fuels in the ground. These rules shut down democratic alternatives. They outlaw leftwing politics.²⁶²

Monbiot was concerned that the treaty would grant big business the remarkable ability ‘to sue the living daylights out of governments which try to defend their citizens’.²⁶³ He warned that the regime ‘would allow a secretive panel of corporate lawyers to overrule the will of parliament and destroy our legal protections’.²⁶⁴

5. Conclusion

There is a strong case for GM food labelling – particularly in terms of promoting consumer rights in respect of the right to know about food. Ideally, there should be common standards in respect of GM food labelling. However, GM food labelling has been a flashpoint for policy conflict in the United States between consumer groups, environmentalists, the farm

²⁶¹ Monbiot, G. 2013. The Trans-Atlantic Trade deal is a full-frontal assault on democracy. *The Guardian*, 5 November 2013. [Online]. Available at: <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> [accessed: 2 April 2014].

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

movement, the food industry and the biotechnology industry. The battles have ranged across local politics, federal congressional debate, and international trade disputes. As a result, the state of the law is rather fragmented and fractured. There has been a strong grassroots movement in the United States, pushing for state initiatives in respect of GM food labelling, particularly through legislative bills, and citizen initiated ballots. The food industry and biotechnology industry have sought to thwart such efforts, engaging in lobbying, litigation, and well-funded public advertising campaigns. There has also been a significant push at a federal level to legislate in respect of GM food labelling. However, there has been a significant amount of inertia from the Obama administration, and a lack of consensus in the United States Congress. There has also been considerable debate as to how the state and federal GM food labelling initiatives in the United States will be affected by regional trade agreements. Professor Joseph Stiglitz has warned that ‘there are trade proposals in the works that threaten to put most Americans on the wrong side of globalization’.²⁶⁵ There has been a concerted push by the Obama Administration to build regional partnerships with the *Trans-Pacific Partnership*, and the *Trans-Atlantic Trade and Investment Partnership*. There has been much debate as to whether such trade agreements will directly or indirectly undermine public regulation in respect of food labelling – particularly in respect of GM food labelling. There is a need ensure that consumer rights – particularly in respect of food labelling – are properly respected and recognised in such regional and international trade negotiations.

²⁶⁵ Stiglitz, J. 2014. On the wrong side of globalization. *The New York Times*, 15 March 2014. [Online]. Available at: <http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/> [accessed: 2 April 2014].