http://www.bjwa.org/article.php?id=5ll6XmLUw89l406HbXt2Li9Hjx68VHCd22uUfeut

Brown Journal of World Affairs

Food Principles: Regulating Genetically Modified Crops after the 2006 WTO Ruling

By Ian Sheldon

VOLUME XIV, Issue I

FALL/WINTER © 2008

In 2006, **the World Trade Organization (WTO) ruled** on a complaint by the United States concerning the European Union's regulation of genetically modified (GM) crops.1 It ruled **that the EU failed its WTO obligations by not lifting its moratorium on the approval of GM crops and delaying the approval of new crops. In addition, the WTO ruled against the marketing and import bans put in place by six EU member states**.2 Captured in the background to this ruling is the nature and breadth of the public debate about GM crops and biotechnology that has been raging since the late 1990s. Therefore, understanding this dispute and its impact on future GM crop regulation requires understanding the context of both the antecedents to the U.S.–EU dispute over trade in GM crops as well as the different approaches the United States and European Union have adopted in regulating genetically modified organisms (GMOs). Consequently, this paper begins with a discussion as to why the products of biotechnology have proven so controversial, followed by an outline of the U.S. and EU approaches to regulating such products. These regulations are then set in the broad context of WTO rules, which leads into a discussion and evaluation of the U.S.–EU dispute and the findings of the WTO.3 (p.121)

…**Even though there is as yet no reputable scientific evidence that existing, approved GM crops are unsafe for human consumption**, the political and regulatory environment of many importing countries gives little confidence that trade in GM crops will simply be accepted as a fait accompli.6 During the past decade, there has been widespread public discussion of GMOs—the debate having been most intense and most publicized in the European Union, where consumer surveys have consistently shown that the public typically has a very negative attitude toward GM foods. (p.122)

…The production and marketing of GM foods has raised issues about the ethics of biotechnology, food safety, and the environment…Tied in with these ethical concerns is the argument by consumer advocates and NGOs that consumers have a "right to know" whether the foods they are purchasing and consuming are either genetically modified or contain genetically modified ingredients.9

…From the standpoint of food safety, various regulatory efforts have not calmed concerns that the transfer of genes will also transfer allergenic risks to foods that never previously had that potential.10 (p.122)

Finally, there is an expectation that GM crops might be harmful to the environment…Widespread unease among EU consumers about GMOs formed an essential background to the European Union placing a moratorium on GMO approvals in
1999.

…The European Union's regulations have been described by some observers as protectionist. For example, trade lawyer Lawrence Kogan wrote in the *International Herald Tribune* in November 2004 that such policies are "arguably illegal from the perspective of international trade laws enforced by the World Trade Organization."15 Whether these actions really violate WTO rules will be discussed later. (p.123)

15. Lawrence A. Kogan, "Trade Protectionism: Ducking the Truth about Europe's GMO Policy," *International Herald Tribune*, 27 November 2004.

…The Position of GMO Regulations in the WTO

In order to understand the specifics of the recent WTO ruling, it is important to show broadly how WTO rules could affect the application of GMO regulations.

…It is unlikely that the European Union would either explicitly discriminate against U.S. exports of GM products or allow domestic production of a GM product without regulation, but it could impose regulations on the imported product. However, there might well be a claim of discrimination if the European Union, as a deliberate act of trade policy, were to ban imports of a GM product but allow imports of the conventional product. GATT Article III states that countries cannot discriminate between like goods on the basis of country of origin.30 The key issue in any GMO dispute could be the definition of like goods; the question then is whether genetic modification or presence of GM ingredients constitutes sufficient grounds for differentiation from conventional products. (p.126)

…**The key is how these approaches could be evaluated in terms of the SPS and TBT agreements. The standard interpretation of the SPS Agreement is that an import ban on a GM product would have to meet the risk assessment criteria of the agreement, and scientific justification would have to be made if the risk exceeded international standards.** The point of conflict might be where, for instance, the United States has approved a GM product under its regulatory system, whereas the European Union determines there is still a scientific reason not to approve that product for import. (p.127)

…**Importantly, Article 5.7 of the SPS Agreement does allow WTO member states to take precautionary measures if scientific information is unavailable, but at the same time members have to seek additional information. The term *precautionary principle* is not used explicitly in the SPS Agreement, but the language in Article 5.7 clearly implies use of a "limited, provisional and facts-oriented precautionary approach."32** In the hormone-treated beef case, the European Union argued that the broader precautionary principle had reached a level of international acceptance that it should be used in interpretation of the SPS Agreement. (p.127)

32. Lawrence A. Kogan, "World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes," *Global Trade and Customs Journal* 2 (2007): 149–155. **Specifically, Article 5.7 states, "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time." The full text of the SPS Agreement can be found at http://www.wto.org/English/tratop_e/sps_e/spsagr_e.htm .**

…**The WTO Ruling and the Regulatory Environment**

In light of the preceding discussion, the WTO's Dispute Panel ruled on three aspects of the European Union's regulation of GM crops. First, the European Union had acted inconsistently with its obligations under the SPS Agreement by applying a de facto moratorium on approvals on new GM crops between June 1999 and August 2003. Second, in the case of specific measures delaying the approval of 24 new GM crops, the European Union had breached its obligations under the SPS Agreement. Third, safeguard measures implemented by six EU member states against the import or marketing of specific GM crops were not based on any risk assessment as required by the SPS Agreement, and hence the European Union had acted inconsistently with its obligations under that Agreement. The latter ruling covering a total of nine GM crops is particularly important. **In each case, the panel found that the safeguard measure was neither based on a risk assessment as required under Article 5.1 of the SPS Agreement, nor was it consistent with the requirements of Article 5.7 of the SPS Agreement for applying a precautionary approach.35** (p.128)

35. Kogan, "World Trade Organization."