TRADE HOT TOPICS
Commonwealth
Issue No.26

The WTO GMO Dispute

By Maxine Kennett[1]

1. INTRODUCTION

The United States (US) announced on 13 May 2003 its request for WTO consultations with the European Communities (EC) on certain measures taken by the EC that affect the trade in genetically modified organisms (GMOs). The US claims that since October 1998, the EC has applied a moratorium on the approval of GMOs which has restricted the import of agricultural and food products from the United States.

The European Commission (which speaks for the European Communities on trade matters) dismissed the US's claim as "legally unwarranted, economically unfounded and politically unhelpful"[2]. Pascal Lamy, the EC's Trade Commissioner, added that "The EU's regulatory system for GMO's authorisation is in line with WTO rules: it is clear, transparent and non-discriminatory. There is therefore no issue that the WTO needs to examine"[3]. The European Commission has also tried to undermine the US claims by asserting that work on new EC labelling and traceability regulations is being finalised and that the EC regulatory system is being brought into line with the latest scientific and international developments.

This paper provides background to the WTO GMO dispute and outlines some of the implications of this dispute for developing countries. In addition, this paper considers a few issues on the periphery of the dispute, namely, the EC's proposed new labelling and traceability regulations; recent decisions of the Codex Alimentarius; and the coming into force of the Cartegena Protocol on Biosafety.

2. BACKGROUND: THE DEVELOPMENT AND ADOPTION OF GMOS

Although genetic manipulation of plants has been an ongoing science since prehistoric times, when early farmers began carefully selecting and maintaining seed from their best crops to plant for the next season, genetic modification involves passing on genes and traits that would be unavailable through traditional breeding methods. Genetic modification is a laboratory technique in which specific genes are cut from one source of DNA[4] and then incorporated into other DNA or used to make customised DNA.

Glossary

EC	European Communities
EU	European Union
GATT	General Agreement on Tariffs and Trade
GM	Genetically Modified
GMO	Genetically Modified Organism
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
WTO	World Trade Organisation

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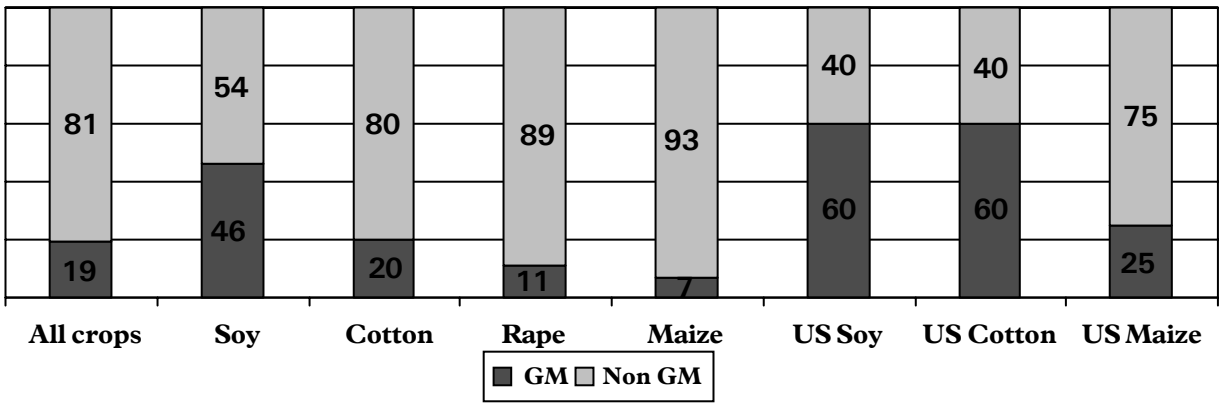
[2] Statement by the European Commission. 13 May 2003.
[3] Statement reported by World Trade Online. 13 May 2003.
[4] Deoxyribonucleic acid (DNA) is a self-replicating material present in all living organisms and the carrier of genetic information.

For example, tomatoes are sensitive to frost. This shortens their growing season. Fish, on the other hand, can survive in very cold water. Genetic engineers have been able to identify the particular gene, which enables a flounder to resist cold, and to insert this "anti-freeze" gene into tomatoes, thereby extending their growing season. Likewise genes from other sexually incompatible plants, animals, bacteria or insects can be introduced into living organisms to enhance or reduce their existing traits.

The first genetically modified plant (proof of concept) was produced in 1981, and the first field test was concluded in 1985. Within ten years, the first approval for the commercial production of a GM crop was granted in the US, and by 1996/7 there was large scale production of GM maize, soy bean, rapeseed and cotton[5]. By 2001, more than 50 million hectares of GM crops were grown in more than 13 countries worldwide and GM crops accounted for 19% of the world's crops (46% of the world's soy bean crop, 20% of the world's cotton crop, 11% of the world's rapeseed crop and 7% of the world's maize crop)[6].

Table 1: Percentage of GM and non-GM crops by acreage in 2001 (Source ISAAA and ENN)



So far, scientists have mostly used genetic modification to help growers in providing crops with herbicide tolerance (Bt) or with insect resistance (Ht). As a result, 75% of commercially available crops are herbicide tolerant and 17% are insect resistant[7]. However, future GMOs (such as food products with enhanced vitamins, minerals, carbohydrates or proteins) may well not be targeted at growers but at food companies and consumers[8]. GM crops that are of interest to developing countries such as drought tolerant, acid soil tolerant and vaccine enhanced crops are still in development[9].

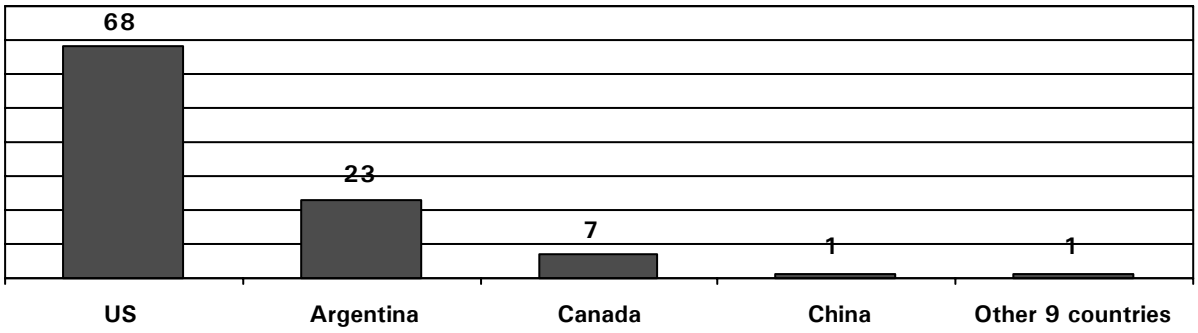
In 2000, 13 countries grew GM crops. No least developed country grew GM crops and only a few developing countries were represented. Interestingly, almost half of the countries that grew GM crops in 2000 claimed to only grow Bt Cotton – which is for the most part a non-edible crop[10].

Table 2: Countries that grew GM crops in 2000 in order of acreage (Source ISAAA)

1. United States	6. Australia*	11. Germany*
2. Argentina	7. Mexico*	12. France*
3. Canada	8. Romania	13. Uruguay
4. China*	9. Bulgaria	
5. South Africa	10. Spain*	(A * denotes Bt Cotton only.)

[5] The words maize and corn as well as rapeseed and canola are synonyms.
[6] Source ISAAA and ENN.
[7] Statement by the European Commission. 13 May 2003.
[8] Statement made by Andrew Bennett of Monsanto at a workshop on GMOs in South Africa. 22 May 2003.
[9] Statement by the European Commission. 13 May 2003.
[10] It is often forgotten that cotton seed oil is edible.

Table 3: Percentage distribution of GM crops by acreage in 2000 by country (Source ISAAA)



3. BACKGROUND: GROWING TENSIONS BETWEEN THE US AND THE EC

Adoption of GM crops has been far greater in the US than in any other country where nearly 60% of the soy bean and cotton crop and about 25% of the maize crop is genetically modified. In total, the US grows more than 30 million hectares of GMOs: 68% of the world's GMOs[11].

A considerable amount of these GMOs are consumed on the domestic market where US regulators treat GMOs as a natural extension of existing products. GMOs must simply pass the same safety tests as their natural counterparts. Once these tests have been passed, no discrimination may take place against this product[12]. As a result, almost none of the US's GM crops are segregated from their natural counterparts[13].

Access to export markets for these GM food and agricultural products is vital to the US economy. In a Statement made before the Committee on Agriculture of the US House of Representatives on 21 May 2003, Robert B. Zoellick, the US Trade Representative stated that "U.S. agriculture must look overseas to generate sales and the expansion of farm income. U.S. population and consumption growth are relatively flat, which means growth prospects for farmers and ranchers in our home market are limited. At the same time, U.S. agricultural productivity continues to climb, driving increased domestic output that can only be sold profitably if we expand overseas markets. Foreign customers are already critical for U.S. producers and processors. Twenty-five percent of all cash receipts for agriculture are generated by exports. Nearly half of American wheat and rice, about one-third of our soybean and meat production, and 20 percent of U.S. corn is sold for export."[14]

The EC has traditionally been a big importer (and exporter) of food and agricultural products. However, the European consumers have had a negative attitude towards GMOs. (It has been argued that the difference between American and European perspectives is historical and cultural.[15]) The first field trials of GM crops in the EU were destroyed by anti-GM activists in 1988. By 1997, attacks on facilities conducting research on GMOs were occurring throughout Europe with alarming frequency, imports of GM food products into the EC were being denounced as dangerous "Frankenfoods" and many large European supermarket chains were refusing to stock GMOs.

American agricultural exports to the EC plunged. The US traders refusal to segregate GM crops from their natural counterparts meant that many buyers preferred to import non-GM food and agricultural products from elsewhere.

The soy bean market was particularly hard hit as European buyers were looking to non-GM suppliers and to alternative ingredients. American soy bean imports into the EC fell from 398m bushels in 1997-

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[11] James, C., *Global status of commercialized transgenic crops*, ISAAA Briefs No. 21: Preview, ISAAA Ithaca, NY. (2001)
[12] Food and Drug Administration Policy for Foods Developed by Biotechnology (1995).
[13] Only 1-2% of GM-crops are segregated from their natural counterparts in the US.
[14] Statement of Robert B. Zoellick, US Trade Representative, before the Committee on Agriculture of the US House of Representatives. 21 May 2003.
[15] Runge, C., Bagnara, G. and Jackson, L., *Differing US and European Perspectives on GMOs: Political, Economic* and Cultural Issues, *in Estey Centre Journal of International Law and Trade Policy (2001)*.

98 to an estimated 221m bushels in 1999-2000. Bob Wisner, an Iowa State University economist, believes this is equivalent to losing the market for one out of every three bushels of soy beans grown in Iowa[16].

A glance at export figures for US soy beans into some of the EC Member States provides a more general indication of the extent of difference in opinion. In the period 1997 – 2001, exports of US soy beans fell significantly year after year both in value and in quantity[17].

Maize exporters did not fare any better. Since 1997, US maize imports to the EC have largely been replaced by Argentinean and Chinese maize and when the US tried to supply maize grain as food aid, there was fierce resistance from some African countries which wanted to remain GM-free.

Table 4: US exports of soy beans 1997 - 2001 (Source ITC TRADE MAP /COMTRADE statistics)

List of importing markets for a product exported by United States of America in 2001
Product : 120100 Soya beans
United States of America's exports represent 53% of world exports for this product, its ranking in world exports is 1

Importers	Exported value 2001 in US$ thousand	Share in United States of America's exports, %	Exported quantity 2001	Quantity unit	Export trend in value between 1997-2001, %, p.a.	Export trend in quantity between 1997-2001, %, p.a.	Ranking of partner countries in world imports	Share of partner countries in world imports, %	Total import growth in value of partner countries between 1997-2001, %, p.a.
World	5,447,232	100	28,836,688	Tons	-5	5			1
Netherlands	434,536	8	2,398,015	Tons	-13	-3	2	10	3
Spain	247,839	5	1,401,930	Tons	-15	-5	6	5	-9
Italy	98,119	2	549,724	Tons	-3	11	14	2	-9
Belgium-Luxembourg	81,048	1	446,780	Tons	-18	-8	9	2	-10
Germany	74,621	1	400,900	Tons	-31	-23	4	8	-2
Portugal	62,662	1	349,629	Tons	-6	3	13	2	-7
France	59,630	1	324,182	Tons	-16	-8	11	2	-3
United Kingdom	58,188	1	320,338	Tons	-18	-9	15	2	-14

4. BACKGROUND: EC REGULATION AND THE MORITORIUM

After the first field trials of GM crops and the first attacks on GM research facilities, the EC introduced a "first generation" of regulations on GMOs. Since then, the regulations have been reformed and refined. Currently, the EC has a number of different regulations which govern the authorisation, labelling and traceability of GMOs.

Under these EC regulations, the prospective effects of GMOs on human and animal health and the environment have to be scientifically assessed before the product can be marketed.

Biotech companies must supply the competent national authority of a Member State with a full risk assessment. This is then sent to the European Commission who circulates it to all the other Member States.

Current EC Regulation

Authorisation – Directive 2001/18/EC Articles 13 - 24 on the deliberate release of GMOs and the Novel Foods Regulation No. 258/97: Articles 4-5.

Labelling – Directive 2001/18/EC Article 13.2(f); Novel Foods Regulation No. 258/97 Article 8; Regulation 1139/98/EC (as amended) on labelling of foodstuffs and Regulation 50/2000/EC on labelling of GM additives and flavourants.

Traceability – Directive 2001/18/EC Article 4(6).

[16] The Economist, *To plant or not to plant,* 13 January 2000.
[17] Except in Italy and Portugal which reported an increase in the quantity imported from the US.

If the competent national authority gives a favourable opinion, the Member State will inform the other Member States of this opinion through the Commission. If there are no objections, the same competent authority will grant the consent for the placing of that GMO on the commercial market.

If any Member State raises an objection, the European Commission must seek an opinion from the Scientific Committee. If the scientific opinion is favourable, the Commission can then take a decision.

To date, 18 GMOs have been authorised by the EC. However, since 1998 no new GMOs have been authorised for release. There is technically no legislative ban by the EC on GMOs. The problem is that approvals have been blocked by some Member States and the European Commission has taken no action to push the approvals process through.

The European Commission openly stated that "the EU's regulatory regime was incomplete to address the challenges posed by modern technology of genetic modification"[18] . However, the Commission added that as a result of a new regulatory framework which was adopted in March 2001, and which entered into force in October 2002, biotech companies have been able to submit revised applications – and two GM cotton seed oils for food use have recently been placed on the market.

But, the problem is not only with the approvals process. GM products, which have already been approved, have been banned in some Member States and the European Commission has taken no action.

US trade representatives have repeatedly contended that Europe's "go-slow" approach is WTO inconsistent. Some EU officials are rumoured to agree with them and have themselves called the moratorium "illegal and unjustified".[19]

5. THE US REQUEST FOR CONSULTATIONS

The US announced on 13 May 2003 its request for WTO consultations with the EC on certain measures taken by the EC that affect biotech products. The US Ambassador to the WTO wrote[20] :

> "Since October 1998, the EC has applied a moratorium on the approval of biotech products. The EC has suspended consideration of applications for, or granting of, approval of biotech products on the market have been blocked in the approval process under EC legislation and have never been considered for final approval. The approvals moratorium has restricted imports of agricultural and food products from the United States."
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> "Moreover, the Member States maintain a number of national marketing and import bans on biotech products even though those products have already been approved by the EC for import and marketing in the EC. The national marketing and import bans have restricted imports of agricultural and food products from the United States."
>
> "The measures affecting biotech products in the EC include:
> 1. the suspension by the EC of consideration of applications for, or granting of, approval of biotech products;
> 2. the failure by the EC to consider for approval applications for biotech products…; and
> 3. national marketing and import bans as maintained by Member States…."

Questions have arisen about the timing of the US request for consultations as new legislation on authorisation, traceability and labelling is soon to come into force in the EU. Once it is in force, European officials claim, the moratorium will be lifted.

The Americans, having heard such promises before, are sceptical. US Trade Representative Robert B. Zoellick stated that "We've waited patiently for five years for the EU to follow the WTO rules and the recommendations of the European Commission….With this case, we are fighting for the interests of

[18] Statement reported by the European Commission reported by World Trade Online. 13 May 2003.
[19] The Economist, The GM gamble. 15 May 2003.
[20] Letter to the Ambassador of the Permanent Delegation of the European Commission to the WTO from the Ambassador of the Permanent Delegation of the United States to the WTO. 13 May 2003.

American agriculture." In fact, the US threatened to bring the case to the WTO earlier in the year, but waited for the war to finish in Iraq.

There are other reasons why the US does not seem to have chosen the perfect timing for such a dispute. Next month, they hope that there will be a reform of the EU's common agricultural Policy (CAP). The European Commission is pushing for far-reaching changes, but is facing resistance from some EU countries, notably France, a staunch opponent of GM food. Challenging the French over GM food, after they have already been wounded by war in Iraq, will not encourage them to accept CAP reform.

Indeed, in a report this week, some 15,000 French farmers, reinforced by coach loads of supporters from Germany, Belgium and Luxembourg, were due to take to the streets in four key French farming regions to make their voices heard[21].

However, being able to infuriate the French may perhaps have encouraged some US trade representatives to bring this dispute now. In addition, there may be a desire to hit back at Europe's behaviour in other trade disputes. "Last week, the Europeans upped the ante in a row over America's foreign-sales corporation tax, in which the WTO has already ruled in Europe's favour. The EU announced a list of products on which it might slap tariffs if the Americans do not fix their WTO-illegal practices. The Europeans set a deadline of 1 January 2004, by when they want America's tax code to be put right"[22]. When questioned, Zoellick stated that the US administration was not trying to counter the WTO's previous decisions favouring Europe. "I'm absolutely denying that," he said[23].

More generally there are good reasons for holding back on a GMO dispute in the WTO. The Categena Protocol on Biosafety, which addresses the potential risks posed by cross-border trade and accidental releases of GMOs, is about to come into force. In addition, the Codex Alimentarius is in the process of defining an international standard for the testing and labelling of GM foods. As international law the provisions of the Protocol and the standards set by the Codex Alimentarius may support or condemn the EC's stance (see below).

6. OTHER PARTIES TO THE DISPUTE

On 13 May, Zoellick also announced that the United States said that it would be joined in its challenge by Argentina, Canada and Egypt and that other countries expressing support for this case by joining it as third parties include: Australia, Chile, Colombia, El Salvador, Honduras, Mexico, New Zealand, Peru and Uruguay. (Interestingly, many of these countries are keen to negotiate bilateral trade agreements with the US.)

The Egyptian Government now says that it has decided "not to become a party" to the WTO complaint because it recognises "the need to preserve adequate and effective consumer and environmental protection". In a letter dated 27 May 2003 the Egyptian Ambassador to the European Union wrote that "The Government of Egypt took this decision in conscious emulation of the need to preserve adequate and effective consumer and environmental protection, and with the desire to reduce further distortions and impediments to international trade that may result due to the further pursuit of this matter within the WTO".

The other parties to the dispute have been remarkably quiet and Anti-GM voices claim that the US-led trade war coalition has started to crumble. "We're delighted that Egypt has withdrawn from this US attempt to force GM food and crops into Europe. Countries should be allowed to choose what they eat and what they grow in their fields. The United States should withdraw its WTO challenge, and stop trying to bully Europe over GMOs."[24]

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[21] World Trade Forum Weekly News Brief. 30 May 2003.
[22] The Economist. *The GM Gamble.* 15 May 2003.
[23] New York Times. *US Challenges Europe on Genetically Modified Food*. 13 May 2003
[24] Statement made by Friends of the Earth Europe's GM campaigner Geert Ritsema. Press Release by Friends of the Earth International. 29 May 2003.

New Zealand's decision to support the US has angered local GMO opponents. The chairman of the Sustainability Council, Sir Peter Elworthy said the move was "a blow to our marketing and to consumer perceptions of New Zealand". "Why is New Zealand joining a fight that pits us against our biggest trading partner over products we do not even grow?" he asked.[25]

7. THE WTO AGREEMENTS

WTO members have committed to ensure that trade flows as smoothly, predictably and freely as possible. These commitments are embodied in the WTO Agreements. There are general agreements which cover the trade in goods and services and the trade related aspects of intellectual property and there are additional agreements and annexes dealing with the special requirements of specific sectors or issues.

General WTO Agreements

General Agreement on Tariffs and Trade (GATT 1994) sets out the basic principles that apply to the liberalisation of trade in goods.
General Agreement on Trade in Services (GATS) establishes rules and obligations for the liberalisation of international trade in services.
Trade Related Aspects of Intellectual Property Rights (TRIPS) sets minimum standards for the protection and enforcement of intellectual property rights.

The US claims that the EC's measures appear to be inconsistent with the following provisions:

1. SPS Agreement, Articles 2, 5, 7 and 8 and Annexes B and C;
2. GATT 1994, Articles I, III, X and XI;
3. Agriculture Agreement, Article 4; and
4. TBT Agreement, Articles 2 and 5.

8. THE SPS AGREEMENT

The SPS Agreement is a specific agreement which applies to measures aimed at the protection of human and animal (sanitary) and plant (phytosanitary) life and health. The aim of the SPS Agreement is to balance the rights of Members to impose SPS measures which meet their chosen level of protection and the general need to liberalise trade in food and agricultural products.

Members are encouraged to use international standards, guidelines and recommendations where they exist and Members may use measures that result in higher standards if there is scientific justification. Where there is insufficient scientific evidence, they may take provisional measures. In each case, the approach must be consistent, least trade restrictive, not arbitrary or unjustifiable.

US claims – The SPS Agreement

The US request for consultations claims that the EC measures appear to be inconsistent with the following provisions of the SPS Agreement:

1. Article 2 – Basic Rights and Obligations
2. Article 5 – Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection
3. Article 8 – Control, Inspection and Approval Procedures
4. Annex B – Transparency of Sanitary and Phytosanitary Regulations
5. Annex C – Control, Inspection and Approval Procedures

[25] Reported in the WTO Forum's Weekly Trade Brief. 16 May 2003.

9. THE GATT 1994

The GATT 1994 is a general agreement which relates to international trade of goods. The most notable provisions are set out in Article I which requires WTO Members to offer most favoured nation treatment (MFN)[26] to other Members; Article III which requires WTO Members to provide national treatment (NT)[27] to other Members; Article X which governs the publication and administration of trade regulations and Article XI which prohibits WTO Members from using quantitative restrictions to regulate the trade in goods.

Much debate has focused on the meaning of "like products" within these provisions. Under WTO law, it is acceptable to treat different products differently, but like products must be treated the equally. The question therefore will be if GM and non-GM products are "like".

US claims – The GATT 1994

The US request for consultations claims that the EC measures appear to be inconsistent with the following provisions of the GATT 1994:

1. Article I – General Most Favoured Nation Treatment
2. Article III – National Treatment
3. Article X – Publication and Administration of Trade Regulations – General Elimination of Quantitative Restrictions

If GM and non-GM products are "like" products, Article XX of GATT 1994 provides a list of exceptions to the obligations of the GATT 1994 (including the provisions of Article I, III, X and XI above), which may be used by the EC. Article XX (a) of the GATT 1994 allows members to adopt measures "necessary to protect public morals". Article XX (b) of the GATT 1994 allows members to adopt measures "necessary to protect human, animal or plant life or health". Article XX (g) allows members to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

However, even if a measure fits within the scope of one of the exceptions of Article XX of GATT 1994, it must still conform to the chapeau of Article XX which requires that such measures do not result in arbitrary or unjustifiable discrimination and do not constitute disguised protectionism. If the measure does result in arbitrary or unjustifiable discrimination and does constitute disguised protectionism it may be found to be WTO inconsistent.

10. THE AGRICULTURE AGREEMENT

Agricultural trade has its own specialised agreement within the WTO, which includes specific commitments by WTO member governments to improve market access and reduce trade-distorting subsidies in agriculture.

US claims – The Agriculture Agreement

The US request for consultations claims that the EC measures appear to be inconsistent with Article 4 of the Agriculture Agreement of not imposing any measures other than tariffs to regulate market access:

1. "Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein."
2. "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 (Special Safeguard Provisions) and Annex 5 (Special Treatment)."

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[26] Most Favoured Nation (MFN) treatment means treating one's trading partners equally. Discrimination between "like" products imported from different trading partners is prohibited.

[27] National Treatment (NT) means equal treatment for foreign and domestic goods (and services in GATS). Discrimination between "like" products that are made domestically and those that are imported is prohibited.

11. THE TBT AGREEMENT

The Technical Barriers to Trade Agreement applies to mandatory technical regulations, voluntary standards and conformity assessment procedures. The aim of the TBT Agreement is to balance Members' regulatory autonomy to pursue domestic policy objectives and the need to prevent protectionism. In order to achieve this, the TBT Agreement not to discriminate between "like products", not to impose measures more trade restrictive than necessary and to use international standards except where these standards would be ineffective or inappropriate to achieve the objective.

US claims – The TBT Agreement

The US request for consultations claims that the EC measures appear to be inconsistent with

1. Article 2 – Preparation, Adoption and Application of Technical Regulations by Central Government Bodies; and
2. Article 5 – Procedures for Assessment of Conformity by Central Government Bodies.

12. WTO DISPUTE SETTLEMENT

The US has requested consultations with the EC, pursuant to:

1. Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);
2. Article 11 of the SPS Agreement;
3. Article 19 of the Agreement on Agriculture;
4. Article 14 of the TBT Agreement; and
5. Article XXII of the GATT 1994

Under these provisions, any member that considers that a benefit accruing to it under the WTO Agreements is being "impaired or nullified" by measures taken by another WTO Member may request consultations with that other Member.

Unless otherwise agreed, the defendant (the EC) has 10 days to reply to the request and should enter into consultations within 30 days. WTO Members have broad discretion as regards the manner in which consultations are conducted. The outcome of the consultations could be a mutually agreed solution or an agreement to establish of a dispute settlement panel (Panel). If at the end of the 60 days, no resolution has been achieved, then the claimant (the US) may seek the formation of a Panel to hear arguments.

After panellists are nominated, the complaining party normally has 3 – 6 weeks to file its first written submission and the complaints are given another 2 – 3 weeks to respond. Oral hearings and further written submissions follow. Panel proceedings usually take about 12 months. If either party disagrees with the Panel's decision, it can appeal to the Appellate Body on specific points of law, to make a final decision. The appeals process should not last for more than 90 days. Therefore, at the very latest, the outcome of this GMO dispute should be known before the end of 2004.

In this case, the US has made a broad range of claims under different WTO Agreements. Some of these claims may be dropped during the consultation process. However, once in the panel proceedings, it is likely that the US will require a Panel only to consider its strongest claims. In addition, for judicial economy, the Panel will try limit it's the number of claims it considers.

The scope of each agreement will therefore become very important because perhaps solving one issue under one agreement resolves another issue under a different agreement. For example, it is agreed that the TBT and SPS Agreements are mutually exclusive, which means that a measure taken by a WTO Member will either be a SPS measure or a TBT measure (or neither), it can not be both. If a measure is found to be consistent with the SPS Agreement, there is a presumption that that same measure is consistent with the more general GATT 1994. However, the TBT Agreement and the GATT 1994 have concurrent application.

13 ADDITIONAL ISSUES: CODE OF CONDUCT

An additional issue concerning a potential conflict of interest in the WTO Secretariat was brought to light by Robert Howse of the University of Michigan.

On May 18 2003, Rob Howse noted that[28]:

> "Rufus Yerxa, the most senior legal official at the WTO, to whom the legal affairs division reports, worked as European then International Counsel for Monsanto immediately before being appointed to his WTO post, or so indicates his curriculum vitae on the WTO web site."
>
> "A significant number of Monsanto [GM] products are listed in the annex to the US letter requesting consultations with the EC. Mr. Yerxa is the ultimate boss of the legal affairs division at the WTO, which in a number of ways may influence the proceedings if a panel goes ahead on GMOs - including involvement in the selection of panellists, legal advice to the panellists, advice in the identification and selection of outside scientific "experts" in the case."
>
> "According to Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, including Secretariat officials assisting in respect of [Dispute Settlement] proceedings are covered by the following Governing Principle:
>
> "1. Each person covered by these Rules (as defined in paragraph 1 of Section IV below and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein."
>
> "A threshold issue is whether Mr. Yerxa is a covered person - the exact wording of the Rules of conduct could lead to a negative inference - he isn't a secretariat member singled out to assist in the particular dispute. On the other hand, as the "top boss" he has unparalleled potential scope to control and direct the work of such secretariat members."
>
> "If the Governing Principle does cover him, does the requirement to "avoid direct or indirect conflicts of interest" require that a kind of Chinese wall be created whereby Mr. Yerxa doesn't engage in communications with members of the legal affairs division staff in relation to the case, or is a more stringent approach needed?"

Three days later, Robert Howse noted that[29]:

> "Responding to my post, a WTO employee contacted me by email to let me know that "very shortly after assuming his post in October, DDG Yerxa officially recused himself from all GMO matters through a letter to the Director-General's office and to the Legal Affairs division."

Robert Howse concluded that "Intuitively, that seems to me to have been the right thing to do on Rufus' part - a voluntary recusal to pre-empt conflict of interest concerns. On the other hand, while a precedent for subsequent practice, it doesn't substitute for thinking about appropriate rules and structures in the WTO concerning conflict of interest, which I encourage list members to do."

14. ADDITIONAL ISSUES: NEW EC REGULATION

In July 2002 the European parliament voted in favour of the European Commission's proposal on new regulations for the traceability and labelling of GM foods and feed products. The proposal calls for tracing of all GM food and feed products throughout all stages of the production and marketing cycle.

The proposed regulation on GM food and feed applies to products consisting of, containing, produced from (but not produced with) GMOs. Therefore, for example, genetically modified cows, pies containing beef from genetically modified cows and pastry containing suet from genetically modified cows would be covered, but beef feed on GM feed would fall outside of the regulations (as the cows were only produced with GMOs and the GM material is no longer present).

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[28] Email from Rob Howse to the WTO Forum Groups. 18 May 2003.
[29] Email from Rob Howse to the WTO Forum Groups. May 21st, 2003

The regulations set thresholds for the adventitious presence of genetically modified material. The suggestion in the European Council has been that anything containing less than 0.9% of the GM product will not have to be labelled, unless the product is unauthorised in the EU, in which case it will have to be below a threshold of 0.5%. The new regulations also provide for a centralised authorisation procedure, which would limit the Member States' ability to block approvals of new GMOs.

The proposed EC labelling and traceability regulation has not yet been enacted, but it is already finding opposition within the WTO Committees on TBT and the Committee on SPS Measures where it has been discussed. Both Canada and the US have complained to the WTO regarding the EC's proposed labelling and traceability regulation on grounds that these new measures violate WTO rules.

15. ADDITIONAL ISSUES: THE CODEX ALIMENTARIUS

On 28 April 1999 representatives from America, the EC and 36 other countries gathered at a meeting of the Codex Alimentarius in Ottawa, Canada, to discuss the testing and labelling of GM foods. The Codex Alimentarius was established by the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO) in 1962 to recommend minimum standards on food safety that all countries should follow.

Draft guidelines were published in May 2002, which covered "food and food ingredients composed of or containing GMOs obtained through modern biotechnology, or food and food ingredients produced from, but not containing GMOs obtained through modern biotechnology"[30] . The draft guidelines are applicable to the labelling of food and food ingredients composed of GMOs or containing proteins or DNA from gene technology, or that are produced from gene technology, but do not contain GM material.

The scope of the draft guidelines requires clarification. No examples of what should and should not be labelled were provided. For example, meat fed on GM grain and food processed with enzymes produced by GMOs could be covered by these guidelines, or could be excluded form the guidelines. Moreover, the draft guidelines did not set out what a label should contain.

Labelling can either highlight GMO content or spotlight those products that do not contain GMOs. The first type of labelling, which Runge, Bagnara and Jackson[31] call positive labelling might require a statement such as: "This product may contain GMOs". However, given the extent to which GMOs have already entered the food chain, such a label would convey relatively little information. Nonetheless, some advocates of positive labels argue that such statements would steer consumers away from GMO products. On the other hand, positive labels that indicate an attractive nutritional or pharmaceutical property, such as "vitamin enhanced rice", could very well lead to a greater demand for GMOs.

A negative label would read: "This product contains no GMOs". No would imply a minimum threshold-approaching zero. The cost of reaching zero is neither easy nor cheap. Hardly any processed food is 100% GMO-free. Even if non-GM soya can be found, for example, trying to keep it separate from GM soya – a process known as "identity preservation" would require segregation, monitoring and testing at every step. If these costs are not too prohibitive, such practices would create a possibility for niche markets specialising in non-GM foods.

When the Codex Alimentarius guidelines are finalised, there will be an international standard for the labelling of GMOs – and any WTO Member that "bases" its measures on this international standard is likely to be in conformity with the WTO Agreements.

16. ADDITIONAL ISSUES: THE CARTEGENA PROTOCOL

The 1992 Convention on Biological Diversity (CBD) included a commitment to establish an international protocol on biosafety in biotechnology. After four years of negotiations, the Cartagena Protocol on Biosafety (BSP) was approved by representatives of 130 countries at a meeting in Montreal, Canada, in January 2000.

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[30] ALINORM 03/22 Appendix IV

[31] Runge, C., Bagnara, G. and Jackson, L., *Differing US and European Perspectives on GMOs: Political, Economic* and Cultural Issues, *in Estey centre Journal of International Law and Trade Policy (2001)*.

Whilst the CBD addresses the potential risks posed by cross-border trade and accidental releases of GMOs, the BSP specifically allows governments use the "precautionary principle" to ban the importation of a GMO even in the absence of conclusive evidence that the product is not safe.

To assist countries in making import decisions, the BSP provides for a database to be established to facilitate the exchange of information relating to GMOs. Once a decision concerning acceptance or non-acceptance has been made, the Biosafety Clearing House communicates that decision to the world at large.

The BSP also provides for stricter Advanced Informed Agreement procedures to apply to seeds, live fish, and other GMOs that are to be introduced into the environment in the future. In these cases, the exporter must provide detailed information to each importing country in advance of the first shipment, and the importer must then authorise the shipment.

In addition, the BSP provides that international shipments that "may contain" GM food products must be so labelled. The exact nature of the genetic modification need not be specified, but the agreement calls for negotiations on more specific labelling requirements in the future. However, this labelling provision applies only to large-scale shipments, and does not affect labelling requirements on consumer products, which are determined by each country.

The overall aim of the BSP is to ensure that recipient countries have both the opportunity and the capacity to assess risks involving the products of modern biotechnology. Then once they are able to assess the risks and to make a policy decision, this decision can be communicated clearly and unambiguously to the world at large.

Particular issues to be aware of include the precautionary principle which has not been clarified sufficiently to prevent ambiguous interpretation, and the Advanced Informed Agreement regulation which could result in considerable administrative costs. In addition, the provisions relating to Acknowledgement of Receipt of Notification (Article 9), Decision Procedure (Article 10), Review of Decisions (Article 12), Handling, Transport, Packaging and Identification (Article 18), Socio-Economic Considerations (Article 26) and Compliance (Article 34) may be applied in such a way as to constitute impediments or technical barriers to trade (which could be WTO inconsistent).

Although the BSP has been signed by 103 countries, it will not enter into force until after it has been ratified by 50 governments. On 20 May 2003, Colombia ratified the BSP, bringing the current number of ratifications to 49[32]. Once the BSP does come into force, questions will arise about how the rights and obligations under the BSP should relate to the rights and obligations of the WTO Agreements.

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[32] http://www.biodiv.org/biosafety/signinglist.asp?sts=sign

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Produced by the Economic Affairs Division of the Commonwealth Secretariat.
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