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# A (Genetically Modified) Food Fight

## *Canada's WTO Challenge to Europe's Ban on GM Products*

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***In this issue...***

*In Canada's dispute with Europe over genetically modified foods, to be argued in the precincts of the World Trade Organization, a negotiated settlement would serve the interests of all participants more than a ruling by the WTO. The disputants have an incentive to seek an accord. The real issue is whether they have the political will to make it happen.*

## *The Study in Brief*

One of the most anticipated international trade disputes will shortly be argued before a panel at the World Trade Organization (WTO). Having failed to negotiate a solution in consultations, Canada will soon make its case against Europe's *de facto* moratorium on approving new genetically modified (GM) products to a tribunal in Geneva.

Proponents of bringing this case to the WTO argue that the European Commission has done little, if anything, to encourage its member states to adhere to a regulatory regime that has been evolving for more than a decade. More precisely, they contend that the EC has buckled under pressure from national governments that, for protectionist purposes, have stoked the fears of consumers, repeatedly referring to GM products as "Frankenfoods."

Critics of taking the case to the WTO counter that it is premature because the EC is well on its way to implementing a transparent and nondiscriminatory regulatory system. Moreover, they say that a legal victory for Canada and its co-complainants will spark a backlash by consumers in Europe and abroad and their anger is likely to be targeted not just at imports of GM products, but at the WTO itself.

We argue that both sides have an incentive to avoid protracted litigation in this case because the outcome of a legal victory is unlikely to be fully satisfying, regardless of which side prevails. Moreover, the downside to protracted litigation is that it might exacerbate tensions in the transatlantic relationship — already mired in other trade disputes and fallout from the war in Iraq.

This *Commentary* outlines the legal basis for the GM products case, making the point that Canada and its co-complainants are not asking the WTO to adjudicate good science. It then explains why a negotiated settlement is preferable to a ruling, regardless of who wins, and sets out the reasons both sides have an incentive to step back from the brink of a trade war over GM products. Finally, the *Commentary* concludes with some thoughts on the contours of a negotiated solution.

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One of the most anticipated international trade disputes will soon be before a panel at the World Trade Organization (WTO). Having failed to negotiate a solution through consultations, Canada will make its case against Europe's effective moratorium on approving new genetically modified (GM) products to an *ad hoc* tribunal in Geneva. In doing so, Canada[1] will join the U.S.[2] and Argentina[3] — and likely several third parties[4] — in litigating a case that some suspect will test the very fabric of the WTO's dispute settlement system. This is a high-profile issue in Europe, and the politics of the dispute are as central to the future of Europe's moratorium as the business and legal issues. What do Canada and its co-complainants stand to gain from filing this case?

Proponents of bringing the dispute to the WTO argue that the European Communities (EC) — when the European Union (EU) joined the WTO, it was known as the European Communities (EC) and that is the technical name used in the dispute — has done little, if anything, to encourage the 15 EU member states to adhere to a regulatory regime that has been evolving for over a decade. More precisely, they contend that the EC has buckled under pressure from national governments, which, for protectionist purposes, have stoked the fears of consumers by repeatedly referring to GM products as "Frankenfoods." As Canadian Trade Minister Pierre Pettigrew says, "[t]he moratorium on the approval of GMOs is inconsistent with the [EC's] WTO obligations and is not based on scientific risk assessments and thus creates an unjustified barrier to trade" (Canada 2003). Robert B. Zoellick, the United States Trade Representative, says that "[t]his moratorium violates [the EC's] basic WTO obligations to maintain a food approval process that is based on 'sufficient scientific evidence' and that acts without 'undue delay'" (Zoellick 2003).

Critics of bringing this case to the WTO counter that it is premature because the EC is well on its way to implementing a transparent and non-discriminatory regime. On July 2, 2003, for example, the European Parliament passed two laws that will anchor its system for authorizing and labelling new GM products.[5] In any event, opponents of the action warn, a legal victory for Canada and its partners will spark a backlash by consumers in Europe and abroad and their anger is likely to be targeted not just at imports of GM products, but at the WTO itself. Along these lines, David Victor and Ford Runge say that "a close look at the options reveals that each of the plausible outcomes from a dispute [at the WTO] would leave the U.S. worse off than before" (2003, 15).

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1 Canada announced its intention to request a panel on August 7, 2003 (WT/DS292/17).

2 The U.S. announced its intention to request a panel on June 20, 2003 (WT/DS291/23).

3 Argentina announced its intention to request a panel on August 7, 2003 (WT/DS293/17).

4 At the consultation stage, Colombia, Mexico and Peru requested third-party rights, although only Mexico did so for each of the consultations requested by Canada, Argentina and the U.S.; Colombia and Peru only requested third-party rights in consultations involving the U.S.

5 "Laws clear way for Europe to lift GM moratorium," *Financial Times*, July 2, 2003, p. 3.

Is the GM products case meritorious, or is it misguided litigation? On the one hand, EU consumers clearly harbour what they believe to be legitimate concerns about the potential health and environmental effects of genetically modified organisms (GMOs). In fact, there is disagreement within the scientific community on whether sufficient methodologies and data exist to accurately assess risk on a case-by-case basis.[6] Even those studies issued by European agencies that find current GM crops no more worrisome than non-GM crops still caution that future developments may pose untold challenges.[7]

On the other hand, by not enacting a transparent and non-discriminatory regime, the EU has managed to alienate both affected foreigners and Europeans as well, including EU biotech firms. The moratorium, moreover, has shut the EU's door to crops such as Canadian canola, which boasts a long and uncontroversial record on Europe's tables.

*Zambia refused U.S. food aid in the form of GM crops, explaining that to accept it would jeopardize Zambia's exports of agricultural goods to Europe.*

Both sides have an incentive to avoid protracted litigation in this case, given that the outcome of a legal victory is unlikely to be fully satisfying, regardless of which side prevails. At the same time, protracted litigation may exacerbate tensions in the transatlantic relationship, which is already mired in other trade disputes and fallout from the Iraq war, while chilling any momentum that the Doha Development Round picks up coming out of the Cancun, Mexico, ministerial meeting in September. This *Commentary* starts by outlining the legal basis for the GM products case, making the point that Canada and its co-complainants are *not* asking the WTO to adjudicate good science. We then explain why a negotiated settlement is preferable to a ruling, irrespective of who wins, and set out the reasons both sides have an interest in stepping back from the brink of a trade war over GM products. Finally, the paper concludes with some thoughts on the contours of a negotiated solution.

## A Hard Case to Swallow

The one fact that is agreed in this controversy is that, since 1988, Europe has not approved any new GM products, although there is some debate as to whether there is currently any action on pending applications. At the urging of several EU member states,[8] the EC brought to a halt the functioning of Europe's evolving regulatory regime for GM products, which debuted in 1990 as Directive 90/220, pending the adoption of new rules on labelling and traceability. As a result, GM products have only been permitted where prior approval had been granted by member states. By blocking the process of approving applications under their internal laws and regulations, the member states effectively enacted a ban on GM products, giving rise to the charge of a *de facto* moratorium. In October 2002, in the context of Directive 2001/18, the EC reiterated its intent to lift the moratorium as

6 EC polling data indicate that 70.9 percent of European consumers do not favour GM foods; 85.9 percent favour clear labelling of GM foods, and 94.6 percent claim that it is their right to choose when it comes to GM versus non-GM foods (Van der haegen 2002).

7 "Less Scary than It Used to Be," *The Economist*, July 26–August 1, 2003, p. 24.

8 Belgium, Germany, the Netherlands, Spain, Sweden, and the U.K. have forwarded applications for approval by the European Commission, for example. In contrast, Austria, Denmark, France, Greece, Italy, and Luxembourg have stated their opposition to entertaining any new applications.

soon as labelling and traceability rules were put into place. Still, even when rules of this sort appeared to be agreed, Denmark and others persuaded the EC to hold off again, arguing that legislation was required on environmental liability and the co-existence of GM and non-GM crops.

For Canada, this protracted process significantly reduced agricultural exports to Europe. About a quarter of the country's soybean production is genetically modified (Hategekimana and Beaulieu 2002), as is fully 70 percent of the canola grown in Western Canada (de Clercy et al. 2003). Canola is particularly salient in this dispute, accounting for six of 12 Canadian applications pending approval by the EC since 1988 (Isaac and Philips 1999). Agriculture and Agri-Food Minister Lyle Vanclief says that since the moratorium took effect, Canadian exports of canola to the EU have dropped to $1.5 million from an average of $185 million (Canada 2003). At the same time, Argentina and the U.S. have found their exports of GM corn, cotton, sugar beets, and soybeans, among other crops, denied market access to the EU as a result of the moratorium.[9]

The stakes are even greater when the effects of the moratorium on third countries are taken into account. Countries that import agriculture from Canada and also export to Europe, for example, express grave reservations about having their crops mixed together with GM crops. The reason, of course, is that if these countries cannot guarantee against gene flow, then they, too, will be shut out of the EU market. This goes to the heart of why the dispute is now intertwined with concerns for developing countries, in particular. Zambia, for example, refused U.S. food aid in the form of GM crops in the summer of 2002, explaining that to accept it would jeopardize Zambian exports of agricultural products to Europe. In fact, though, this is not just a developing-country concern: Canada, too, has cited this same fear in processing Monsanto's application for approval of its GM wheat.[10] As well, New Zealand and some Australian states maintain restrictions, or outright moratoriums, on the approval of new GM products, such that by challenging the EC, Canada and its co-complainants are litigating a dispute that will ripple throughout the global economy.

Canada's request for consultations set out the legal claims to be argued before the panel in what is known in WTO parlance as *EC—Biotech Products*. Invoking 19 articles and annexes across four agreements, Canada argues the moratorium is inconsistent with Europe's obligations under the Sanitary and Phytosanitary (SPS) Agreement, the Agreement on Technical Barriers to Trade (TBT), the Agreement on Agriculture (AOA) and the General Agreement on Tariffs and Trade (GATT). The crux of the dispute falls under the SPS Agreement, which concerns health and safety standards for plants, animals and humans, and the TBT Agreement, which covers technical regulations and conformity assessments. In essence, the claim is that the EC moratorium is "disguised protectionism," an opaque ban lacking scientific justification that is both overly trade restrictive and discriminatory.

The parties are not asking the WTO to adjudicate science *per se*, but rather to decide whether Europe's moratorium on new GM applications is justified, given the scientific knowledge and methodologies currently available for assessing the

9 Argentina's list of affected products is included in its request for consultations (WT/DS293/1), and the U.S. list of affected products is included in its request for consultations (WT/DS291/1).

10 "Monsanto takes on Canada's wheat chief," *Financial Times*, June 27, 2003, p. 7.

risks posed by individual GMOs on a case-by-case basis. The issue makes it tempting to try to learn lessons for the GM products case from the experience in *EC—Hormones*, a case in which Canada and the U.S. challenged Europe's ban on the import of hormone-fed beef, and prevailed. There are, however, telling differences between *EC—Hormones* and the current dispute. For one thing, the EC did not argue in *EC—Hormones* that the ban was temporary; however, it says the GM products moratorium is indeed a short-run necessity caused by a purported lack of scientific evidence with which to enact sound public policy. Because Europe's evolving regulatory system — which aspires to case-by-case risk assessments by independent regulatory authorities — is in line with the EC's SPS obligations,[11] the temporary nature of the moratorium is a focal point in this case. As a result, and unlike *EC—Hormones*, the Commission will likely argue in its defence SPS 5.7, which permits temporary measures, so long as the defendant actively seeks out data in crafting a more permanent regime.

While SPS 5.7 reflects the "precautionary principle," according to the WTO's Appellate Body (AB), that principle can also be incorporated into the way in which risk assessment is used as a basis for domestic regulations. Thus, in the WTO context, the fact that the precautionary principle is relevant does not *automatically* justify regulating without undertaking a case-by-case risk assessment. SPS 5.7 only endorses precautionary regulation when science is insufficient to even permit adequate case-by-case risk assessment.

Still, Europe may nonetheless find the WTO somewhat sympathetic to the spirit of the precautionary principle. Precaution in relation to GMOs is reflected in the Cartagena Biosafety Protocol, to which both Canada and the U.S.[12] are parties. Specifically, Article 11:8 of the Protocol states that

> lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a Living Modified Organism on the conservation and sustainable use of biodiversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects.

Building on the experience of the *Japan—Varietals* case,[13] however, Canada and its co-complainants will argue that SPS 5.7 urges a timely transition to a permanent regulatory system and that the length of time that the EC ban has been in place

11 Howse and Mavroidis 2000. As Pascal Lamy (2003) recently put it, "We obviously don't have the same system as the system the U.S. has. We have an authorization system, which is more precautionary. And this can perfectly be done within the margin of maneuver which WTO rules leave to each and every member in terms of consideration of health levels for instance."

12 The U.S. is not a signatory, though it was involved in the negotiations and has expressed in various ways its view that the principles in question are valid international law, perhaps even custom.

13 In this case, the U.S. challenged Japan's testing of apples, cherries, nectarines and walnuts for coddling moth (*Cydia pomenella*), arguing that the regime was overly burdensome given the identified risk to Japanese agriculture. While Japan invoked SPS 5.7, it was unable to show that it was actively gathering new information with which to re-evaluate, on an ongoing basis, the need for its temporary regime. The panel and AB agreed with the U.S. See WT/DS76/R.

requires additional justification, for which the EC bears the burden of proof. On the other hand, the EC could counter that, during this period, the state of the science has been such that there are inadequate methodologies for routinely — and with relative certainty — ascertaining the health and environmental effects of GMOs (Domingo 2000). Both sides, with caveats, will find evidence to back up their claims.

Another difference from the *EC—Hormones* case is that Canada and the U.S. targeted a specific good, beef, while the GM products case calls into question Europe's domestic regulatory politics at a much more fundamental level. One implication of this is that the WTO is likely to prove somewhat deferential to Europe, because of the complexities of coordinating public policies among its 15 member states, a taste of which was offered by the panel in *EC—Hormones*,[14] and will be even more apparent in this case. A second implication of challenging Europe's domestic regulatory politics is that, after the ruling in *EC—Asbestos*, the WTO will not look at the moratorium in isolation, but in connection with the EC's almost completed efforts to overcome the obstacles to doing credible risk assessments. More specifically, creation of a new independent European food-safety agency is a large part of the EC's initiative, a regulatory authority that will operate in a transparent and accountable way, insulated from the political influences that tarnished the credibility of member states' agencies in handling crises such as Mad Cow disease.

*The objective of the case should be to get Europe to process GM applications on the merits, not to force Europeans to eat GM foods against their will.*

Given these issues, and the question of whether the WTO is really the best place to adjudicate controversies about the democratic regulation of risk and its scientific basis, a variety of European observers — including those harbouring reservations about the moratorium — have insisted that litigation in Geneva would be a mistake. In anticipating the filing, one official involved, for example, declared "a WTO case would not help," and added, "[s]ince the problem is a consumer one, one should avoid, on both sides of the Atlantic…scaremongering tactics, gross exaggerations and unsubstantiated claims" (Van der haegen 2002). More succinctly, European Commissioner for Health and Consumer Protection David Byrne said, "Let me be very frank: Unless we can give EU consumers confidence in this new technology, then GM is dead in Europe" (2001). Even if these anxieties prove insufficient to justify the precautionary approach of the EC at the WTO (and they may well be sufficient), a legal victory against Europe would do little to mitigate these consumer concerns.

Canada and its partners are also challenging the moratorium on specific due-process obligations under the SPS Agreement. These provisions, contained in Article 8 and Annex C, require that control, inspection, and approval procedures be "undertaken and completed without undue delay." Here, the case against the EC may well be stronger. The EC could process applications on a case-by-case basis and still take a precautionary approach, denying approval of a new GM product, for example, where risk assessment techniques are deemed inadequate. This would go a long way toward addressing the legitimate concerns of Canada and its co-complainants; again, we believe the objective of the case should be to get Europe to process GM applications on the merits, not to force Europeans to eat GM foods against their will.

14 WT/DS48/R/CAN, para 245.

Still, it is not entirely obvious that the moratorium can be characterized as an example of undue delay. More to the point, the EC could argue that the obligations in question pre-suppose, and only apply to, an already operating regulatory program and that the moratorium reflects the fact that there are still elements of the overall regime that are subject to debate and definitive elaboration. Put differently, imagine a case where a new restaurant guarantees that every customer will be served in 15 minutes or less, but the store then delays opening because management is not satisfied that everything is ready for business. The guarantee of speedy service is not breached by the decision to delay the store's opening, an argument that may resonate with the EC, even if not with a panel.

As for the TBT Agreement, Canada and its co-complainants argue that technical regulations should be the least trade restrictive necessary to achieve Europe's desired public policy objectives. The issue is somewhat narrow: TBT applies to those GM products being regulated for reasons other than agricultural and food safety, such as preventing the deception of consumers. As it did in interpreting the SPS Agreement, the AB has recognized the right of WTO members to set out desired levels of protection against risk above international standards, where they exist, under the TBT Agreement. The upshot of this is that the EC could argue that it is not in violation of this obligation, particularly in light of the scientific uncertainty surrounding certain labelling and other issues.

Under the AOA, the issue is market access: Article 4.2 prohibits the use of measures against imports that were to be converted into tariffs or certain non-tariff barriers on entry into force of the agreement. The argument here depends upon some, not very clear, notion that the EC ban is a quantitative restriction on agricultural imports, rather than an internal health regulation applied across the board both to domestic and imported products.

Finally, Canada and its co-complainants allege that the EC is in violation of provisions of the GATT, notably the national treatment obligation under Article IIII:4. This stipulation requires that no less favourable treatment be afforded to "like" imported goods, in relation to domestic goods. If the claim is that GM and non-GM products are, in fact, "like" goods for purpose of Article III:4, it will be subject to considerable debate at the panel and likely AB stage. The issue of "like" goods, often considered to be as generic as issues get at the WTO, may be the most likely angle from which this case could take on the appearance of a dispute over science.[15] The leading precedent on this is the *EC—Asbestos* case, in which the AB gave considerable weight to perspectives of consumers on the issue of "like" goods. Because there is little doubt but that consumers in Europe view GM products as being different from non-GM goods, arguments about "like" materials will hardly be straightforward. As a result, the considerable public demand for the traceability and labelling policies that are now being developed, which would enable consumers to clearly identify and distinguish GM from non-GM food in the marketplace, may well carry some weight at the WTO.

15 We thank an anonymous reviewer for elaborating this point for us.

## Victory Can Be Hollow

Although Canada and its fellow complainants have requested a panel, settlement still remains a possibility before a ruling is issued (Busch and Reinhardt 2000). However, it is likely that this case will go the distance at the WTO for deterrent and precedent-setting reasons.[16]

In the event that the case goes to a ruling, there are two likelihoods that merit attention. First, regardless of the direction of the verdict — pro-plaintiff, mixed, or pro-defendant — both sides are likely to dig in after the WTO rules, lessening the odds of a positive outcome. In particular, the evidence makes clear that under the WTO, rulings in any direction do not lead to concessions, a problem compounded by the fact that SPS cases, in particular, are less likely to produce mutually agreed solutions, all else being equal (Busch and Reinhardt, forthcoming). As well, any ruling would probably be appealed and, if a pro-plaintiff verdict were upheld, the case will probably drag on for some time, going before a compliance panel and on to an arbitration panel, which, as in *EC—Hormones*, would set the level of retaliatory measures that Canada and its partners could take against EU members. From start to finish, the dispute settlement process could easily take three years.

Viewed from this perspective, a negotiated solution is the best option for Canada and its co-complainants, as well as for Europe. Here, we explain the incentives for both sides to settle this case.

### *The Advantages of a Settlement for the Complainants*

Canada and its partners in the dispute have several reasons to negotiate. For one thing, they may not win at the WTO. As argued, the legal merits of the case are especially strong on due process, but even here the WTO is likely to be cautious not to weigh in too forcefully in Europe's evolving regulatory politics. Additionally, in SPS cases the AB has proved more than willing to overturn panels on sensitive issues, notably on SPS 5.6, which concerns the trade restrictiveness of health and safety measures.

For another, even if Canada and its co-complainants ultimately win, the victory may be a Pyrrhic one. The AB could, for example, uphold a technical or procedural claim of undue delay without rejecting Europe's view of its precautionary principle *per se*. That would not force the EC to approve any particular GM product, but rather to start the process of vetting applications, an outcome that EU Trade Commissioner Pascal Lamy portrays as the status quo. A win that also challenged some of the specifics of the EC's regulatory regime might result in more market access, but at the risk of triggering a consumer backlash with obvious commercial consequences. U.S. observers have long anticipated that a victory would have precisely this effect, while calculating the cost of not filing to be greater still.[17]

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16 According to John Veroneau, General Counsel at the Office of the United States Trade Representative, the U.S. might push forward with the case even if Europe lifts the moratorium "for precedential purposes." See "U.S. Requests WTO Consultations with EU on Biotech Moratorium," *ICTSD Bridges: Weekly Trade News Digest*, May 14, 2003.

17 See "U.S. may challenge genetically modified food rules," *Financial Times*, December 11, 2002, p. 6.

At the same time, a consumer backlash may be as damaging politically as commercially because those countries in Europe, such as Britain, that oppose the ban may face stiff domestic electoral pressure to resist having their markets pried open by the WTO. Indeed, one reason that this case has been so long in the making is that Europe has anything but a unified view of the moratorium, leading many commentators to argue that domestic, as opposed to international, pressure would ultimately have led to reform. One consequence of obtaining a ruling at the WTO is that, regardless of its direction, the political divisions in Europe are likely to deepen. For Canada and its fellow complainants, the risk is that a victory may encourage European leaders to pander to those fearful of having their markets pried open, while a loss will embolden those favouring the moratorium and draw more elected officials to their cause.

In addition, a win on GM products, even on narrow grounds, will politically reverberate well beyond the EU. Indeed, a legal victory is likely to be used as proof by those wary of the WTO that multilateralism is undermining democracy, if not sovereignty. Ever since the *Shrimp/Turtle*[18] controversy was finally resolved in the environmentalists' favour, critics of the WTO, among others, have lacked a high-profile issue with which to chastise the dispute settlement system. In fact, in *EC—Asbestos*, the AB went out of its way to emphasize the sovereign right of each WTO member to maintain a strict level of precaution against health risks, a message that was picked up and praised by some of the more moderate — and better informed — civil society groups. As a result, there is a very real risk that even a modest victory in the GM products case could turn the political tide against the WTO.

*There is a very real risk that even a modest victory in the GM products case could turn the political tide against the World Trade Organization.*

Not only that, Canada and its partners may not ultimately want the precedent that the GM products case might set, should Canada win. Press reports indicate that the U.S. has expressed an interest in pushing for a legal victory — rather than looking for a settlement — to make case law.[19] If a verdict called into question the principle of precaution—and this is a very big if—it would make it more challenging for Canada to defend its own environmental, health and safety, or consumer protection regulations where justifications seemed wanting, either at the WTO or, perhaps even more relevantly, against investor claims under Chapter 11 of the North American Free Trade Agreement. Though WTO rulings are not even binding precedents at the WTO itself, in practice the organization and other international trade and investment tribunals have relied on them heavily.

As well, there is little prospect of EC compliance with a verdict that Canada and its co-complainants would even want to champion, given the concerns outlined. The *EC—Hormones* case is instructive in this regard: despite prevailing at the panel and AB stage, and taking the rare step of requesting, then acting on, authorization to retaliate, Canada and the U.S. have not been able to force Europe's hand. If anything, each verdict in this case had the effect of raising Europe's cost of compliance; weighed against Canadian and U.S. retaliation, the political realities of importing hormone-fed beef are such that non-compliance makes sense as a form of "efficient breach."

18 *U.S.—Import Prohibition of Shrimp and Shrimp Products* (WT/DS58/R).

19 "U.S. Requests WTO Consultations with EU on Biotech Moratorium," *ICTSD Bridges: Weekly Trade News Digest*, May 14, 2003, p. 1.

## Settlement Would Be Good for Europe, Too

Despite extensive coverage of the GM products case in the media and elsewhere, little attention has been devoted to Europe's incentives to seek a negotiated solution. In fact, the EC and EU member states have many reasons to avoid protracted litigation.

The most obvious incentive is that the EC may lose. As noted, a win for Canada and its fellow complainants might spark a consumer backlash against GM imports and even against the WTO itself. This, however, would not be good news for Europe. One reason is that consumers are likely to reserve a good bit of this anger for their own elected officials who, in no small measure, have contributed to the confusion surrounding GM products. Indeed, one hypothesis on why Europe did not invoke SPS 5.7 in its defence in *EC—Hormones* is that to do so, member states would have had to concede to their electorates that health arguments offered as factual for years were actually backed-up by little long-term research. Another reason is that Europe is no better served by whipping up anti-WTO sentiments among its voters than the complainants in this case.

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While many observers predict that for political reasons Europe could not comply with an adverse ruling in GM products, this is not to say that such a stance is cost free. In terms of the transatlantic relationship, in particular, the EC's non-compliance in *EC—Bananas* and *EC—Hormones*, despite retaliatory measures taken in both, including by Canada in the hormones case, has denied it the moral high ground in free trade debates and sent mixed signals to those countries with which Europe has negotiated regional trade agreements. If Europe were to lose the GM products case and willingly incur retaliation, the hit to the EC's reputation as a good citizen of the WTO — and, by extension, of regional trade agreements — would be costly. In particular, developing countries may come to see this as a worrisome pattern, whereby Europe's wealth enables it to skirt WTO obligations so long as it can pay its way. And while it is hard to weigh this reputational cost against the domestic gains from non-compliance, we submit that the latter are likely to be short lived, especially in light of Europe's internal momentum toward a GMO regulatory regime.

At the same time, even if Europe were to win, a victory may not be fully satisfying. It is important to avoid mistaking Europe as crusading against regulations grounded in science or, more specifically, fighting to keep the WTO out of SPS measures. Indeed, Europe has its own biotechnology industry to contend with, one that is voicing demands for a more transparent GM regime before its competitors abroad gain too much of a head start in the marketplace. Focusing more narrowly on trade and the WTO, the EC's stance on SPS cases is instructive in this respect. In third-party testimony in *Japan—Varietals*, for example, the EC questioned the scientific basis for Japan's testing regime, arguing the system was too cumbersome, lacking in transparency and probably overly trade restrictive (WT/DS76/R). Similarly, in *Australia—Salmon*, the EC chimed in on the issue of proper risk assessment, favouring a case-by-case approach to setting levels of acceptable risk in language reminiscent of the AB's decision in *EC—Hormones* (WT/DS18/AB/R). For that matter, six months after the outbreak of Mad Cow disease, the EC complained to the WTO's SPS Committee that Australia's import

20 *Australia—Quarantine Regime for Imports*, WT/DS287.

ban on EU beef lacked scientific justification and urged a more reasonable tack. More recently, the EC requested consultations concerning Australia's quarantine system,[20] a suit that would invariably hinge on many of the same arguments that Canada and its partners will offer against the EC's moratorium. In short, Europe has a strong interest in the SPS Agreement and in scientifically informed SPS measures.

As well, any verdict is sure to fuel political tensions within Europe over the moratorium and the emerging design of its regulatory regime. These tensions would prove untimely, to say the least. Fall-out from the war in Iraq has caused political fissures among EU member states, as has debate over the prospects of reforming the Common Agricultural Policy (CAP) at a time when 10 new nations are in the process of joining the European Union, never mind on the eve of the Cancun WTO Ministerial conference. These intra-EU considerations, together with the increasingly strained transatlantic relationship, illustrate that Europe is vulnerable to the domestic political cleavages that the GM case promises to rip open.

## Getting to Yes — Maybe

The key to market access for GM products in the EU is the confidence of consumers. As a result, efforts to lift the moratorium will need to focus on confidence-building measures and regulatory cooperation. These goals motivate our recommendations, which are offered to inspire creative thinking on the matter.

A starting point would be for Canada and its co-complainants to acknowledge that the concerns of Europe's consumers are not frivolous and for Europe to reaffirm that the status quo with respect to the moratorium is unacceptable. Any negotiated solution must pave the way for a transatlantic dialogue that has so far failed to occur—one that goes beyond exchanges of polemics between trade officials to engage citizens, politicians and scientists in serious discussions about GM products.

How might this be accomplished? One recommendation is to create a Transatlantic Joint Commission on GM products to oversee the dialogue, disaggregating the issues and pinpointing specific areas of scientific consensus, disagreement and uncertainty, as well as areas where consumer perspectives are divergent in ways that are not obviously explicable in light of the evidence.

The commission could be charged with recommending specific new scientific studies, jointly funded by the disputants, while establishing confidence-building practices that would allow monitoring or surveillance of each state's own internal regulatory procedures, as well as the EU's regulatory process, by other states. As suggested by the logic of mutual recognition agreements (MRAs), if an importing country has greater trust in the regulatory authorities of an exporting country, this can greatly ease demands for trade restrictions. This will be especially important as new technologies come on line because even the growing numbers of European studies that endorse current GM crops caution that future ones may well pose new challenges, warranting transatlantic cooperation in their evaluation.

At the same time, and especially because they have waited this long for Europe to develop its regulatory approach to GM products, Canada and its partners would want to ensure that the process put in place works in a timely fashion, and is not

21 This is consistent with a report issued by the International Council for Science. See "Scientists find modified foods are safe to eat," *Financial Times*, June 11, 2003, p. 4.

used, or abused, for protectionist reasons, or as a way of unreasonably impeding approvals and creating public controversy within individual EU members. One result of confidence building could be an agreed statement of best regulatory practices, which might gain in acceptance on both sides of the Atlantic and elsewhere, to be reviewed periodically given new developments in the science and the industry.[21]

Likewise, the parties in this case could agree to work with other countries, such as the signatories to the Biosafety Protocol, and with industry to develop a global insurance fund against the risk of catastrophic harm caused by GM products. The willingness to indemnify governments, individuals and businesses that actually suffer major losses as a result of a mishap would say a great deal about the genuine belief that the risks of GM products are not of a magnitude different from those that attach to non-GM foods or materials in the marketplace. Such an insurance fund — if independently monitored and actuarially sound — might go far in facilitating the acceptance of GM crops in developing countries, which rightly fear that they possess few resources with which to deal with a loss caused by GM foods. Such an insurance fund would also require traceability of a loss to GM products or technology and necessitate a cooperative approach to determining it. This is already a significant issue in the regulatory debate in Europe and the fact that industry and the EU's trading partners would cooperate to develop viable mechanisms for traceability, rather than denying its feasibility, might boost the confidence of EU consumers.

As well, the parties to this negotiated solution would affirm that such labelling must not be applied in a protectionist manner that discriminates between imports and domestic products, or between imports from different sources. There is clearly a gap of some measure between current U.S. and EU positions on labelling, which may motivate an additional filing at the WTO in the future. Progress on an insurance fund would necessarily be contingent on making headway on labelling.

## Weighing the Odds

At first glance, proponents of litigating the GM products case are unlikely to see much immediate return in the negotiated solution that this *Commentary* sketches. After all, confidence building will not succeed overnight. Still, as we have argued, the disputants are unlikely to get immediate results from going the distance at the WTO. Even if this verdict is a victory for Canada and its associates, it will not address the underlying points of contention and may prolong the ban. By requesting a WTO panel, Canada secures a seat at the negotiating table with the U.S., Argentina and Europe, and will thus have an opportunity to help craft a negotiated solution, if one is to be struck. We submit that both sides have an incentive to reach an accord.

The recent vote on labelling and traceability requirements by Europe's Parliament represents a big step in the direction of ending the *de facto* moratorium. On the one hand, the vote suggests that the EC has been moving in the right direction and not just stonewalling. On the other hand, with these pillars of new legislation largely agreed, there is no longer a rationale for further delay on the part of EU member states. Taken together, these developments indicate that the divisions in this dispute

are narrowing and that tensions may be more manageable if the two sides can distance themselves from the recent rhetoric and look to their genuine interests. It would be timely to do so because a WTO verdict will invariably come up short, regardless of which side ultimately claims victory. And that would be a loss for everyone.

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