Gently Modified Operations: How Environmental Concerns Addressed through Customs Procedures Can Successfully Resolve the US-EU GMO Dispute

David E. Sella-Villa
GENTLY MODIFIED OPERATIONS: HOW ENVIRONMENTAL CONCERNS ADDRESSED THROUGH CUSTOMS PROCEDURES CAN SUCCESSFULLY RESOLVE THE US-EU GMO DISPUTE

DAVID E. SELLA-VILLA*

INTRODUCTION

Genetically modified organisms ("GMOs") inspire heated policy competition among countries. 1 At the heart of the GMO dispute is a fundamental difference in belief about the impact of GMOs on the economy, the environment, and human health. 2 The GMO exporting world, lead by the United States, encourages and facilitates easy GMO entry into the economy and the food supply. The U.S. sufficiently trusts the science suggesting a limited negative impact of GMOs. 3 The European Union ("EU"), influenced by the precautionary principle that new technology should not be adopted until it can be proven safe, 4 desires definitive scientific proof

* J.D. candidate 2009, William & Mary School of Law. M.Sc. European Political Economy: Integration, London School of Economics, 2006. B.S. Economics & B.A. International Studies, West Virginia University, 2005. I would like to thank my wife, Geneviève Okuma, for her support and comments as this Note took form. I would also like to thank everyone who edited this piece for their excellent work. All mistakes and errors are solely my responsibility.


4 Communication from the Commission on the Precautionary Principle, COM(2000) 8 final (Feb. 2, 2000); UNITED NATIONS UNIVERSITY—INSTITUTE OF ADVANCED STUDIES
that GMOs will not irreparably damage the environment or human health.\(^5\) The World Trade Organization ("WTO") lends support to the United States' understanding on the matter. The United Nations under the Cartagena Protocol on Biodiversity tends to support a more EU-styled approach to GMO proliferation.\(^6\)

The US and EU perspectives on GMOs clashed at the WTO in 2003.\(^7\) In 1998, the EU commenced a *de facto* moratorium on allowing GMOs to enter the European food supply. Though a GMO approval regime was in place, no new GMOs gained the requisite permission for importation between 1998 and 2003. GMO exporting countries, the United States, Canada, and Argentina, challenged the EU moratorium under the WTO agreements. The case is known as EC—*Biotech*. The WTO Dispute Settlement Unit ("DSU") constituted a panel in 2003 and issued its final panel report in 2006.\(^8\) The DSU found the EU in violation of Sanitary and Phytosanitary Measures Agreement ("SPS Agreement").\(^9\) The EU was given until June 2008 to make changes to its GMO regime in accordance with the WTO DSU recommendation.\(^10\)

The US and EU domestic GMO regulatory systems reflect the differences displayed at the international level. The United States allows the Department of Agriculture ("USDA"), the Environmental Protection

---


\(^9\) Id. at 2.

\(^10\) As of this date, the WTO has not published any document indicating that the EU has brought its GMO regime into compliance or explaining what steps the EU is taking to bring its GMO regime into compliance. World Trade Organization, *Dispute Settlement: Dispute DS291*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last visited Feb. 11, 2009).
Agency ("EPA"), and the Food and Drug Administration ("FDA") to approve GMOs with only limited impact testing on humans and the environment. Only the party seeking approval needs to conduct such testing. In Europe, the handful of approved GMOs have had to pass rigorous impact tests conducted by both the party seeking approval and independent scientists within the EU's GMO approval bureaucracy.

The differences in the legal regimes reflect and inspire different social and cultural approaches to GMOs. In the United States, consumers tend to trust the USDA, EPA, and FDA approval processes. Few consumers take an active curiosity in the GMO content of their foods and the potential environmental and health impacts of GMOs. European consumers, unlike Americans, express deep skepticism about the environmental impact of GMOs. Many Europeans resist the competition between GMO and non-GMO foods because of the cultural impact on societies that actively seek to protect an indigenous agrarian element. Also, since the Mad Cow scare of the mid-1990s, Europeans have tended not to trust their governments' food safety regulations.

As the EU addresses the WTO's recommendations, the process exposes the tensions between the two competing views on GMOs at each level. Any change to the EU regime must negotiate between the United States' view embodied in the WTO decision and the already established EU view with its legal and cultural trappings. In recent years, the EU

11 Bridgers, supra note 1, at 175-80; Zurek, supra note 2, at 350-52.
13 See generally Commission Regulation 258/97, 1997 O.J. (L 043) (EC); Council Directive 2001/18, 2001 O.J. (L 106) 1 (EC); see infra Part II.B.
16 Fredland, supra note 15, at 187-92 (citing newspaper articles which reveal profound unease among Europeans regarding GMOs).
has approved some new GMOs to enter the European food supply. This indicates that the EU can change GMO regulations, and may already have changed its legal regime to reflect a more WTO oriented approach to GMO approval.

A GMO's approval, however, represents only one element of the process of GMOs arriving on the EU market. Ultimately, consumers will choose whether to buy products containing GMOs. Part of that decision will be based on the information the EU requires that sellers provide to consumers. Before GMOs even enter the economy, though, their shipments must clear customs.

The EU has limited control over the customs procedures in each Member State. While the EU sets common tariffs and customs policy, Member States design their own implementation procedures. Accordingly, each Member State can exert some control over how goods clear customs at each of their ports and borders, including GMOs. For example, EU legislation mandates consistent classification of GMOs for the purpose of collecting duties, but each Member State can enforce customs rules which require extensive warehousing delays, designate certain goods as dangerous to the environment, limit the permissible areas where dangerous goods can travel, and delay the resolution of disputes with lengthy administrative and judicial proceedings.

The GMO dispute before the WTO can only recommend changes in the EU level GMO approval regime. As long as the EU constituencies

---

19 EC—Biotech, supra note 7, at 64-75.
21 See Regulation 1829/2003, supra note 20; Regulation 1830/2003, supra note 20. cf. Redick, supra note 5 (arguing that the EU's traceability and labeling scheme still violates the WTO agreements).
23 Regulation 1829/2003, supra note 20; Regulation 1830/2003, supra note 20.
25 Council Regulation 2913/92 establishing the Community Customs Code, 1992 O.J. 1, arts. 1, 38, 44, 64, 183, 250 (L 302) (EC).
26 See MICHAEL LUX, GUIDE TO COMMUNITY CUSTOMS LEGISLATION 32-38 (2002).
27 Id.; see Council Regulation 2913/92, supra note 25, at art. 252; TERRA, supra note 24; Redick, supra note 5.
still perceive the risk posed by GMOs, governments will attempt to develop policies which try to mitigate those risks.\(^{29}\) As demonstrated, the EU GMO approval regime only constitutes one part of the system which brings GMOs to EU markets.\(^{30}\) Even if the EU brings its GMO approval regime within WTO standards, Member States may use their powers within the EU customs regime to restrict the entry of GMOs into domestic markets.

This Note will assess the ability of the WTO decision to allow for the easy and successful importation and entry of GMOs into the EU market while addressing the EU's environmental concerns. Part I will outline the environmental threats posed by GMOs. Part II will explain the international agreements affecting trade of GMOs, the EU GMO regulatory regime, and the competencies of the EU Member States regarding GMOs. Part III will outline the international customs system, explain the EU level customs system, and highlight Member States' powers within the EU customs system. Part IV will summarize the EC—Biotech case before the WTO and trace its impact on the GMOs importation and customs regimes in the EU.

Part V will explore possible legal solutions which both allow for the easy and successful importation of GMOs into the EU and address the EU constituencies' environmental concerns. Each proposed solution will also take into account the institutional and political realities of the EU, thereby serving as a gauge for the likelihood of the adoption of each such solution. The final part will summarize and conclude.

I. GMOs and the Environment

Farmers and plant scientists have been combining plants to achieve specific genetic and physical traits for several thousands of...
years. The modern version of plant science has been genetically modifying plants directly by adding artificial sections of genetic code to existing plants in order to give the plants characteristics they would not otherwise have. One example of this is golden rice, where genetic modification allows the rice to retain antioxidants in order to increase its nutritional value. Other GMOs are pesticide and herbicide resistant. Others become resistant to natural predators.

Evidence suggests, though, that GMOs with these traits can have significant environmental impacts. On a genetic level, GMOs can transfer their genes to other non-GMO plants, undermining their genetic integrity. The natural plants, therefore, adopt the artificial modifications and cease to exist in their natural form. This may produce more homogeneous hybrid plants across a species which reduce the diversity within the species.

GMOs also affect biodiversity in other ways. GMOs are more resilient than the unadulterated varietals of the species. The GMOs, or plants which have received the GMO material, could completely replace the natural species, which reduces biodiversity. Also, this resilience means that the plant’s natural predators cannot keep the population in its proper balance. Weediness, on a large scale, means that GMO plants could overrun other plants in the ecosystem.

The environmental effects of GMOs, therefore, can be catastrophic. Humans have been changing ecosystems through the import of non-native

37 Id.
38 Id.
39 Id.
41 Id.
species into ecosystems, such as the famous case of the fox in Australia.\footnote{Animals Australia, \textit{Introduced Animals Fact Sheet}, http://www.animalsaustralia.org/factsheets/introduced_wild_animals.php (last visited Feb. 11, 2009).} GMOs are designed to exist in a manner immune to the consequences of the ecosystem. Human involvement in such activities bothers some people and policy makers alike.\footnote{Zurek, supra note 2, at 350-51.} Ecosystems evolve, but some feel humans should not play such a direct role in the process.

II. \textbf{LEGAL REGIMES AFFECTING GMO TRADE}

As GMOs have emerged, countries and stakeholders have used established governmental organizations to try and regulate GMOs at levels proportionate to the risks perceived by their constituencies. This section summarizes GMO regulatory regimes at the international and EU levels.

A. \textit{International Agreements}

1. The WTO Agreements

   The WTO is an international organization that "deal[s] with the rules of trade between nations."\footnote{World Trade Organization, \textit{What is the WTO?}, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 11, 2009).} Countries of the former General Agreement on Tariffs and Trade established the WTO in 1995 and agreed to conduct trade in accordance with the WTO agreements.\footnote{World Trade Organization, Understanding the WTO 17 (Genève, 2007), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf.} Distinct from other international organizations, the WTO has a dispute settlement mechanism through which Member States can enforce the WTO agreements against each other.\footnote{\textit{Id.} at 9.}

   The agreement establishing the WTO outlines the structure of the WTO and includes the rules for the Dispute Settlement Unit and Trade Policy Reviews.\footnote{\textit{Id.} at 24.} The rules governing trade are divided into three basic agreements covering different trade issues: the General Agreement on Tariffs and Trade ("GATT") for goods,\footnote{The name of the agreement on trade in goods is the same as the name of the predecessor organization to the WTO. The GATT, in fact, only successfully dealt with goods. See \textit{id.} at 19.} the General Agreement on Trade in Services ("GATS") for services, and the Trade-Related Aspects of
Intellectual Property Rights ("TRIPS") for intellectual property. Each of these basic agreements, except TRIPS, has sub-agreements that deal with specific sectors and specialized trade issues.

Agreements under the GATT apply most directly to the trade of GMOs. The relevant sub-agreements are the Agriculture Agreement, the Sanitary and Phytosanitary Measures Agreements ("SPS"), and the Technical Barriers to Trade Agreement ("TBT"). Each of these agreements impacts how governments regulate, produce, classify, transport, and market GMOs. These agreements strive to make trade more market oriented, to establish internationally accepted norms, and to simplify existing regulatory structures. In short, the WTO agreements do not want to eliminate regulation of GMOs, but want regulations applying to GMOs to be as trade-friendly as possible.

2. United Nations Agreements

In 1992 members of the United Nations created the Convention on Biological Diversity, known as the Rio Convention. The Rio Convention sought to orient world leaders around the notion of sustainable development. Specific to GMO regulation, Article 19.3 of the Rio Convention allowed countries to establish protocols for dealing with "the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have an adverse effect on... biological diversity."

In 2000, member countries of the Rio Convention established such a protocol for the transport of living genetically modified organisms—the Cartagena Protocol. Driven strongly by the EU, "the [Cartagena] Protocol's

49 Id. at 23-24.
50 WORLD TRADE ORGANIZATION, supra note 45, at 23-24.
51 Id. at 27-29.
52 Id. at 30.
53 Id. at 30-31.
54 Id. at 27-30.
56 Id. The Convention defines sustainable development as "meeting [today's] needs while ensuring that we leave a healthy and viable world for future generations." Id.
main concern is restricting the movement of GMO's in accordance with
the precautionary principle." The Cartagena Protocol, however, covers
only those GMOs "that will be intentionally introduced into the environ-
ment, such as seeds, live fish, and genetically modified microorganisms
used for bioremediation purposes." Whether this list should be read to
include food stuffs meant for human consumption is heavily debated.61

3. Interaction between the WTO and the Cartagena Protocol

The intended purposes of the WTO agreements and Cartagena
Protocol appear to be in conflict.62 The WTO agreements seek to liberate
GMOs from trade-restrictive regulatory schemes while the Cartagena
Protocol limits trade in GMOs to only those products proven safe within
the high standard of the precautionary principle.63 However, a careful
examination of the two systems reveals that there is in fact little conflict
between them. The text of the agreements, the scope of the agreements,
and their differences in enforceability keep the realms of WTO agreements
and the Cartagena Protocol separate.

The Cartagena Protocol does not aim to conflict with the WTO
agreements.64 In its Preamble, the Cartagena Protocol attempts to coexist
on an equal plane with the WTO agreements, namely:

Recognizing that trade and environment agreements
should be mutually supportive with a view to achieving
sustainable development,

---

59 Laidlaw, supra note 6, at 429. Laidlaw points out that the Cartagena Protocol's bent
toward the precautionary principle is actually rooted in the Rio Convention's article 15.
Id. at 430; see UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY, supra note 57,
at art. 15.
60 Terence P. Stewart & David S. Johanson, A Nexus of Trade and the Environment: The
Relationship Between the Cartagena Protocol on Biosafety and SPS Agreement of the World
61 Id. at 8-9; Darren Smits & Sean Zaboroski, Trade and Genetically Modified Foods: GMOs:
Chumps or Champs of International Trade?, 1 ASPER REV. INT'L BUS. & TRADE L. 111, 124-
26 (2001) (characterizing the Cartagena Protocol as "an attempt to balance trade concerns
with the environmental and health concerns of five conflicting groups.").
62 Laidlaw, supra note 6, at 429.
63 See supra notes 54 & 59 and accompanying text.
64 CRAIG THORN & KEVIN BROSCH, THE CARTAGENA PROTOCOL ON BIOSAFETY AND THE
WORLD TRADE ORGANIZATION: IMPLEMENTING A WTO-CONSISTENT BIOSAFETY REGULATORY
sitebuilderfiles/cartagenavswto.pdf.
Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements, . . . 65

From this language, it is clear that the Cartagena Protocol was not designed to compete with, undermine, or fall subordinate to the WTO agreements. Thorn and Brosch make a convincing point of this by examining each provision which could conflict with the WTO agreements, and finding that none do in fact conflict. 66

The WTO agreements and the Cartagena Protocol tend to cover different goods. The Cartagena Protocol applies only to living modified organisms. 67 While the WTO's Agriculture Agreement takes steps to liberalize trade in agriculture—including live products, trade in the field tends to remain highly distorted. 68 The Agriculture Agreement does little to actually facilitate free trade in agricultural products because its terms only become enforceable after a country decides to open its agricultural market to trade and then resorts to protectionism. 69 As long as countries retain their current trade regimes concerning agricultural products, the Agriculture Agreement fails to help facilitate trade. 70 Accordingly, it is likely that WTO agreements cannot be enforced against provisions which apply to the living organisms regulated by the Cartagena Protocol. 71

65 CARTAGENA PROTOCOL, supra note 58, at Pmbl.
66 THORN & BROSCH, supra note 64, at 6-13.
67 CARTAGENA PROTOCOL, supra note 58, and accompanying text (emphasis added).
69 Such an action would be considered a breach of the WTO agreements because a party would have rights and then they would be nullified or impaired. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, art. 23 [hereinafter GATT].
70 Only twenty-six of the over three hundred and seventy cases before the DSB have involved agricultural products. Of those cases, only a handful resulted in panel or appellate decisions which turned on the Agriculture Agreement. World Trade Organization, Find dispute cases, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last visited Feb. 11, 2009) (using “agricultural products” as the search term to find the list of twenty-six); see also Gonzalez, supra note 68, at 484-89.
71 In fact, none of the Complaining Parties in the EC—Biotech dispute could convince the Dispute Panel that the EU had violated any provision of the Agriculture Agreements. See EC—Biotech, WT/DS291/R (Sept. 26, 2006).
Where WTO provisions do apply to GMOs, the Cartagena Protocol is not likely to be relevant. As indicated, the Agriculture Agreement is not likely to apply to live modified organisms. When GMOs are processed, though, they are more likely to be characterized as goods. If traded as goods, the GATT applies, exclusive of the Cartagena Protocol.  

Regarding enforceability, the WTO agreements and the Cartagena Protocol do not conflict. The WTO has a dispute settlement mechanism designed to handle disputes grounded in the WTO agreements. The Cartagena Protocol, like most UN Conventions, has no dispute adjudication or enforcement mechanism. Where both international agreements may apply, only the WTO will be able to adjudicate the matter. The WTO may consider other international agreements in its adjudication, but only within the scope of the dispute before it. This means that only interpretations of the Cartagena Protocol which are in accordance with the WTO agreements can actually be enforced.  

The WTO Dispute Settlement Unit, however, prefers to read the WTO agreements in the context of public international law. The WTO uses the Vienna Convention on the Law of Treaties to interpret the applicable law of covered agreements. Article 30 of the Vienna Convention insists that if “a treaty . . . is subject to . . . an earlier or later treaty, the provisions of that other treaty prevail.” The Cartagena Protocol does not explicitly mention the WTO agreements, but it does mention trade agreements generally. Per the Vienna Convention, neither treaty should prevail. If neither treaty prevails, then it cannot be said that the international agreements conflict.

When WTO members in dispute are also parties to the Cartagena Protocol, the WTO tends to try to interpret the WTO agreements in

72 See supra note 54 and accompanying text.
73 WORLD TRADE ORGANIZATION, supra note 45, at 9.
75 See MATSUSHITA ET AL., supra note 28, at 23-25.
76 See Stewart & Johanson, supra note 60.
77 THORN & BROSCH, supra note 64, at 5 (citing Appellate Body Report, United States— Standards for Reformulated and Conventional Gasoline, 17 WT/DS2/AB/R (Apr. 29, 1996)).
79 THORN & BROSCH, supra note 64, at 5 (citing VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331 (1969)).
80 CARTAGENA PROTOCOL, supra note 58, at Pmb1.
accordance with the Cartagena Protocol.\textsuperscript{81} If either of the parties in the WTO dispute is not a party to the Cartagena Protocol, then the WTO dispute settlement unit does not interpret the WTO agreements in light of the Cartagena Protocol.\textsuperscript{82} Accordingly, at no point during the enforcement of WTO agreements do the agreements conflict with the joint obligations of the parties to the Cartagena Protocol.\textsuperscript{83}

In summary, the WTO agreements and the Cartagena Protocol, though based on different principles, do not conflict in their application. The text of the agreements, the scope of the agreements, and interpretive mechanisms used in WTO agreement enforcement tends toward the harmonious coexistence and/or the correct application of the relevant treaty or treaties when necessary.

B. EU Level GMO Regulatory Regime

The EU, since its earliest incarnation as the European Coal and Steel Community in 1950, has pursued the integration of the economies of its Member States.\textsuperscript{84} To facilitate trade among Member States, European leaders designed a system of laws, regulations, and rules rooted most recently in the principle of mutual recognition. Mutual recognition requires that if a good meets the regulatory standards set in one Member State, then another Member State must accept it as safe and not restrict its sale more than it would a similar good produced domestically.\textsuperscript{85} Where Member States have more pressing concerns about specific goods and products, the EU attempts to harmonize and standardize the regulations governing those products, or the regulatory schemes which grant those goods access to markets.\textsuperscript{86} If a good is novel, not previously used for human

\textsuperscript{81} EC—Biotech, WT/DS291/R, 335-36 (Sept. 26, 2006).

\textsuperscript{82} Id.

\textsuperscript{83} If only one of the parties in a WTO dispute is party to the Cartagena Protocol, the WTO is in no position to extend the enforceability of the Cartagena Protocol to an unwilling party. Id.

\textsuperscript{84} LOUKAS TSOUKALIS, THE NEW EUROPEAN ECONOMY REVISITED 10-11 (Oxford 1997).


consumption, the EU takes the initiative in establishing the regulatory scheme to minimize regulatory conflict among the Member States. GMOs have only been sold since 1994. Accordingly, the EU has coordinated the approval process and regulation of GMOs since before their initial entry into the European market with Regulation 90/220. Regulation 258/97 on Novel Foods and Directive 2001/18 on Deliberate Release (the revision of 90/220) established the second incarnation of the EU GMO regulatory system. Loopholes and discretions in the system led to a patchwork of measures which complicated the approval and regulatory processes for each party involved. Regulation 1829/2003 on Food and Feed and Regulation 1830/2003 on Traceability and Labeling superseded the prior measures and brought some clarity to the EU's GMO regulatory regime. The major measures will be explained, followed by a discussion of the changes in the GMO approval system from an importer's perspective.

1. Regulation 258/97 on Novel Foods

This Regulation was designed to establish the safety of novel foods. Novel foods are defined as "foods and food ingredients that have not been used for human consumption to a significant degree within the Community before 15 May 1997." Accordingly, the EU sought to develop a new regulatory scheme to apply to novel foods. The Regulation sought to assure that the free movement of novel foods did not undermine the

---

87 Id. at 103-07 (describing the positive integration approach which includes common authorization of new products like GMOs).
90 See Mark Mansour & Sarah Key, From Farm to Fork: The Impact on Global Commerce of the New European Union Biotechnology Regulatory Scheme, 38 INT'L LAW. 55 (2004).
91 Ostrovsky, supra note 2, at 211; Schwartz, supra note 20 at 781.
92 Within the system of EU legislation, a Regulation is binding on all Member States in its exact form. A Directive is binding in intent, but each Member State has the liberty to transpose the legislation as it sees fit in order to best achieve the aims of the Directive. PAUL CRAIG & GRÁINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 106-09 (2d ed., 1998).
health and safety of the citizens and environments in other Member States.  

An importer or maker of a novel food, including a GMO, first had to gain approval from the Member State in which they intended to sell or release the novel food. In order to do this, the party seeking approval had to apply to the relevant approval body in that Member State. The approval body in the Member State conducted an initial assessment. A copy of the application and the assessment were forwarded to the European Commission so that they could be reviewed, prepared for circulation among the Member States, and sent to the other Member States for review by their approval bodies.

If the initial assessment was favorable and no other Member State raised any reasoned objections, then the novel food could be placed on the market. If the initial assessment was not favorable or reasoned objections were raised, then Regulation 258/97 called for further procedures.

During the review process, "[t]he applicant shall, where a Member State so requests, provide a copy of any pertinent information appearing in the request." If the initial assessment was not favorable, then additional assessments may have taken place, which would have required further information from the applicant. Based on these assessments or any other studies conducted within each Member State, the Member States could put forward "reasoned objections."

Based on these, the Commission took control of the approval process. The Commission considered the objections and concerns of the Member States and drafted authorization measures. These authorization measures may have conditioned the use of the novel food, designated the customs specification for the novel food, and/or required specific labeling for the novel food. The Council then voted by qualified majority to

---

95 Regulation 258/97, supra note 93, at 1.
96 Id. at art. 4(1).
97 Id.
98 Id. at art. 4(2), art. 6.
99 Id. at art. 4(3).
100 Regulation 258/97, supra note 93, at art. 6(4).
101 Id. at art. 4(2).
102 Id. at art. 6(3)-(4).
103 Id. at art. 6(4).
104 Id. at art. 6(3), art. 7.
105 Regulation 258/97, supra note 93, at art. 6(4).
106 Id. at art. 13.
107 Id. at art. 7(2).
approve the measures.\textsuperscript{108} If the Council failed to act within three months, then the Commission adopted and implemented the authorization measures.\textsuperscript{109} Either by affirmative Council approval or by time lapse default, the novel food could enter the EU market under certain conditions. If the Council flatly rejected the conditions, then the novel food could not enter the EU market.

2. Directive 2001/18 on Deliberate Release\textsuperscript{110}

This Directive sought to establish a comprehensive GMO approval process, based on the precautionary principle,\textsuperscript{111} which would do the utmost to protect human health and the environment.\textsuperscript{112} The Directive defined GMO release as either "deliberate release into the environment . . . for any other purpose than placing [into the EU market]" or "placing on the market genetically modified organisms as or in products within the [EU market]."\textsuperscript{113} Deliberate release was further defined as "any intentional introduction into the environment . . . for which no specific containment measures are used to limit [GMO] contact with and to provide a high level of safety for the general population and the environment."\textsuperscript{114} In short, the Directive covered all attempts at growing or selling GMOs in the European Union except those with a strictly scientific purpose.\textsuperscript{115}

Each applicant had to carry out an environmental assessment before submitting notice of an intent to deliberately release a GMO or place it in the EU market.\textsuperscript{116} This assessment required an "evaluation of risks

\textsuperscript{108} Id. at art. 13(4)(b). Qualified majority voting is the system by which the Council of the EU makes most of its economic policy decisions. The Council is made of representatives of each Member State. Each Member State is afforded a certain number of votes, roughly based on population. In order to reach a qualified majority, roughly two thirds (2/3) of the possible votes must vote in favor of the proposed legislation. CRAIG & DE BÜRCA, supra note 92, at 142-43 (2d ed., 1998). As applied in this context, each Member State gets another chance to express its disapproval of the novel food's entry into the EU market.

\textsuperscript{109} Regulation 258/97, supra note 93, at art. 13(4).

\textsuperscript{110} See supra note 92 for an explanation of the legal significance of a Directive within the European Union.

\textsuperscript{111} See supra note 4.

\textsuperscript{112} Council Directive 2001/18 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, 2001 O.J. (L 106) 1, art. 1 (EC); see also id. at art. 32 (indicating that the Directive is intended to be the EU's implementation of the Cartagena Protocol); supra notes 48-54 and accompanying text.


\textsuperscript{114} Id. at art. 2(3).

\textsuperscript{115} Id. at art. 2(4).

\textsuperscript{116} Id. at art. 4(2).
to human health and the environment, whether direct or indirect, immediate or delayed, which the deliberate release or the placing on the market of GMOs may pose." Applicants also had to submit a plan for monitoring the impact and effects of the GMO release and its entry in the market. Procedures for dealing with emergencies which might have arisen based on new information also had to be included.

Based on all this information, the competent authority in a Member State would begin the approval process. Similar to Regulation 258/97, the Member State conducted its own evaluation of the applicant's notification materials and formulated an assessment. The Member State had to make the applicant's notification materials available to the Commission, so that it could be available to each of the Member States upon request. Each Member State and the Commission also had to allow for public consultation on the approval of the GMO for deliberate release. The Member State's authority could take into account any comments raised by other Member States in making its decision. If the Member State's authority decided to approve the GMO for entry into the market, it could only authorize its deliberate release for up to ten years. Approvals for the introduction into the EU market served to allow for the free circulation of the GMO among all the Member States.

Even after member states authorized an applicant to release the GMO or introduce it into the EU market, monitoring and testing of the GMO had to continue. If any new information came to light which affected the terms of the Member State's consent for release, the competent authority in the Member State could modify the terms of the consent, even to the point of terminating it.

---

117 Id. at art. 2(8). Specifically, the assessment had to include adequate analysis of the direct effects of the GMO, its indirect effects, its immediate effects, its delayed effects, and its cumulative, long-term effects. See Council Directive 2001/18, supra note 112, at Annex II.
118 Id. at art. 6(2)(a)(v).
119 Id. at art. 6(2)(a)(v).
120 Id. at arts. 6(2)(c), 13(2)(e).
121 Id. at art. 6(2)(a)(vi), art. 13(6).
122 Id. at art. 6(1), art. 14.
124 Id. at art. 9, art. 24.
125 Id. at art. 6(5), art. 15(1); see also id. at art. 18.
126 Id. at art. 13(2)(d).
127 Id. at art. 22.
128 See supra notes 105-06 and accompanying text.
Once member states approved a GMO for deliberate release into the environment, only the discovery of new adverse information could justify revocation of consent. GMOs which have permission to enter the market must seek renewed consent from the Member State authority to whom they originally applied. Applicants had to file an abbreviated notice packet which reported the results of monitoring efforts, any new information regarding the safety of the GMO in question, and a proposal for amending the conditions of original consent. The competent authority then completed another assessment of the GMO to determine whether it should remain on the market, and under what conditions. In making its decision, the competent authority had to take into account the well-reasoned objections from the Commission and other Member States. Member States had to present their objections and reach a consensus on the renewal application within a very strict time frame.

At any time, any Member State could activate the Directive's Safe-guard provisions and refuse to allow the continued circulation or presence of a GMO in its territory. This decision could be based on "new or additional scientific knowledge, [having] detailed grounds for considering that a GMO as or in a product which has been properly notified and [have] received written consent under this Directive constitutes a risk to human health or the environment." A Member State taking such actions effectively restarts the applicant's consent process because the Commission, the Member States, and the Council would have acted to modify the conditions for the GMO's entry into the market, or revoke the consent altogether.


These regulations sought to clarify the patchwork of labeling and traceability rules left by the implementation of Directive 2001/18, Regulation 1139/98, Regulation 49/2000, and Regulation 50/2000.

---

129 Id. at art. 17. The Directive did not require that an applicant file for renewal with the Member State authority originally granting consent. If the applicant would choose to apply through another Member State, the application process would begin again per art. 15.

130 Id. at art. 17(2)(a)-(d).

131 Id. at art. 17(3).

132 Id. at art. 17(4)-(8), art. 18.

133 Id.


135 Id. at art. 23(2); see also arts. 28-31 (outlining the procedures for communication and decision making among the Member States and the organs of the EU).

136 Id. at art. 23(2); see also arts. 28-31 (outlining the procedures for communication and decision making among the Member States and the organs of the EU).

137 Mansour & Key, supra note 90, at 55-56 (citing Commission Regulation 1829/2003 on genetically modified food and feed, 2003 O.J. (L 268) 1, para. 5-19 (EC)).
Under Directive 2001/18, each Member State created its own rules on traceability and labeling in accordance with the monitoring and emergency response plans needed for individual GMO approval. Regulation 178/2002 established new rules for the coordination of the GMO approval process by "laying down the general principles and requirements of food law, establishing the European Food Safety Authority, and laying down procedures in matters of food safety." The result was a burdensome inconsistent system which effectively prevented the free circulation of approved GMO products in the EU market.

Regulations 1829/2003 & 1830/2003 try to resolve some of the problems in the system by defining traceability, providing clear objectives to be served by the traceability system, and facilitating implementation of a comprehensive traceability and labeling system for GMOs.

Regulation 1829/2003 addresses the issue by reframing and clarifying the application process for the entry of a new GMO, either food or feed, into the EU market. As in Directive 2001/18, parties seeking to introduce GMO foods into the EU market must submit an extensive application to the competent Member State authority. The competent Member State authority, however, must work more closely with the EFSA, other Member States, and other EU level scientific bodies in formulating its opinion on the GMO and in designing the methods for monitoring and tracing the GMO through its production and distribution. The competent Member State authority must submit its draft opinion to the Commission so that it can formulate a final decision which takes into account "any relevant provisions of Community law and other legitimate factors relevant to the matter under consideration." The final decision is then submitted to the Council Standing Committee on Food Chain and Animal Health for its approval. This committee is comprised of individuals nominated by various EU Member States with expertise in the fields of GMOs, food

---

138 See supra notes 103-05 and accompanying text.
139 Commission Regulation 1829/2003 on genetically modified food and feed, 2003 O.J. (L 268) 1, para. 9 (EC) (citing Commission Regulation 178/2002, 2002 O.J. (L 31) 1, 1 (EC)).
140 See Mansour & Key, supra note 90, at 56.
141 Id.
142 Commission Regulation 1829/2003 on genetically modified food and feed, 2003 O.J. (L 268) 1, art. 3-7 (EC).
143 Id. at art. 5.
144 Id. at art. 6.
145 Id. at art. 7(1).
146 Id. at art. 7.
supply safety, animal health, marketing, and other stakeholders such as consumer rights. A favorable decision by the Committee grants the GMO permission for entry into the EU market for no more than ten years. The decision of the Committee is final.

After a GMO food is authorized, the Member State authority must continue to monitor the GMO food. Based on information gained through supervision, or the request of another Member State, the Member State authority may suspend, modify, or revoke the authorization granting the GMO access to the EU market at any time. If the Member State authority suspends, modifies, or revokes the authorization, the Commission and the Committee must review and update the terms of the authorization in the same manner in which the authorization was initially granted. Renewals of authorizations follow a similar procedure. The same procedures apply for GMO feed as well. Both GMO food and GMO feed must be labeled to indicate the presence of GMOs above a certain threshold. GMO producers must label the product if more than 0.9% of the product contains GMO or if residual GMOs (less than 0.9%) were not adventitious or technically avoidable. For both food and feed, intermediate handlers and end consumers must be able to clearly identify which products contain GMOs and find an identification number for each GMO in the food or feed. Further, the label must also indicate whether the GMO changes the composition, nutritional value, intended use, or the health implications for any segment of the human or animal population respectively. These provisions are aimed to keep consumers and every operator in the supply chain alert to potential and actual impacts of GMOs present in the EU market.

To further facilitate this end, Regulation 1829/2003 established certain community level procedures and institutions. A Community

147 Id. at art. 35 [hereinafter "the Committee"]; Commission Regulation 178/2002, 2002 O.J. (L 31) 1, art. 58 (EC).
148 Council Regulation 1829/2003, supra note 20, at art. 7(5).
149 See Commission Decision 2004/614, concerning the creation of an advisory group on the food chain and animal and plant health, 2004 O.J. (L 275) 17 (EC).
150 Id. at art. 9.
151 Id. at art. 10(1).
152 Id. at art. 10(2).
153 Id. at art. 11.
154 Id. at arts. 15-23.
156 Id. at art. 13, art. 25.
157 Id.
158 Id. at art. 1(a).
Register keeps track of all the GMOs in the EU market. A Community Reference Laboratory serves as the nerve center of all the Member State laboratories conducting studies regarding GMOs. The Community Reference Laboratory may also serve as the arbiter of scientific disputes among Member State laboratories regarding conflicting studies of GMOs under review for access to the EU market. Furthermore, the Member States and the EU level institutions must make all information and documents concerning the GMO authorization process available for public access. Throughout the application and monitoring processes, the public is given the opportunity to comment on the findings and decisions of the Member State and EU level scientific and decision making bodies. The protection of confidential and proprietary information from the applicants, though, is ensured.

Regulation 1830/2003 complements the labeling system in Regulation 1829/2003 by orienting it towards clear traceability goals. The traceability provisions are intended to apply to any food or feed product made from or containing GMOs above the 0.9% threshold set in Regulation 1829/2003. The traceability rules apply to any operator. An operator is broadly defined as "any natural or legal person who places a product on the market or who receives [such] a product . . . at any stage of the production and distribution chain, but does not include the final consumer." Each operator must ensure that the next operator down the supply chain or the final consumer is aware of the specific GMOs contained in the product in question. To facilitate traceability, each GMO is assigned an alphanumeric code, known as a 'unique identifier,' which must be present on the label in order to identify the specific GMO. The Community Register keeps track of unique identifiers and relevant information about the GMO to which each unique identifier corresponds. All operators

---

159 Id. at art. 28.
161 Id. at Annex.
162 Id. at art. 29.
163 Id. at art. 4(2)(b), art. 6(7), art. 9(1), art. 10(1), art. 17(2)(b)(ii), art. 18(7), art. 21(1), art. 22(1), art. 28(2).
164 Id. at art. 30 (Confidentiality), art. 31 (Data Protection).
165 Council Regulation 1830/2003 on genetically modified food and feed, 2003 O.J. (L 268) 24, art. 2 (EC); see supra notes 156-157 and accompanying text.
166 Council Regulation 1830/2003, supra note 20, at art. 4(A)(1), art. 4(B)(6), ar. 5(1).
167 Id. at art. 3(5).
168 Id. at art. 4(B), art. 5.
169 Id. at art. 3(4), art. 8.
170 Id. at art. 28; see also supra note 165 and accompanying text.
must keep records of all the GMOs they handle for five years. With this system in place, any threat to human health, animal health, or the environment can be quickly addressed by tracing the movements of the GMO and facilitating its removal from the market and/or the environment.

In order to enforce these provisions, Member States retain the right to design and implement penalties for violation of the provisions in these directives as long as the penalties are "effective, proportionate, and dissuasive."

4. Changes in the GMO Regulatory System from an Importer's Perspective

The EU's GMO regulatory scheme has followed a basic formula for approving the entry of GMOs into the EU market. First, importers must file an application for approval. This application includes scientific studies about the GMO in question and its potential impacts. Second, the Member State authority evaluates the application. Other Member States also evaluate the application themselves. Third, all the Member States confer and decide whether to approve, reject, or approve the GMO's entry into the market with conditions. Fourth, the importer and the Member States continue to monitor and research the GMO. If any negative information about the GMO emerges, then the Member States engage the fifth part of the formula: a re-evaluation of the GMO's status in the EU market.

Importers seeking approval under Regulation 258/97 only had to conduct a limited assessment of the GMO in question. Other Member States could request more information from the importer. In the process of determining whether or how the GMO may enter into the EU market, the Commission or the Council could continue to contact the importer in order to develop terms and conditions for the GMO's entry. This process of consultation, however, was completely discretionary. If approved,

---

171 Regulation 1830/2003, supra note 20, at art. 4(A)(4), art. 5(2).
172 Id. at art. 11; Regulation 1829/2003, supra note 20, at art. 45.
173 The statements in this paragraph summarize the measures explained throughout Parts II.B.1-3.
175 Id. at 44 (noting that actual evidence of deliberation in the practice of EU policy making is limited).
the importer would have to abide by specific terms, such as labeling and monitoring requirements.

The 2001 Directive increased the importer's responsibility in the GMO approval and regulatory scheme. Importers were required to conduct more extensive impact studies before submitting applications. Also, the application included importer generated monitoring plans and emergency response plans to detect and prevent any threats the GMO might be determined to pose in the future. As before, the other Member States could weigh in on the approval decision. Additionally, the public was given a voice under this Directive. Thus, the importer should have considered the influence of other groups, which were given a voice in the approval process, in deciding when and where to submit an application. Though the Directive implied that Member States took a larger role in monitoring the GMO, it also increased the say of all Member States when an importer sought renewal of approval for the GMO to remain on the EU market. The importer effectively had to apply for approval again, albeit with an abbreviated application.

Under the Directive, the importer always had to be wary about new scientific discoveries regarding the GMO. If new evidence emerged, either from independent scientific research or monitoring of the GMO on the market, any Member State could start proceedings to modify, if not terminate, approval of the GMO's presence on the EU market. In short, the importer had to continually assess the potential impact of its GMO in every Member State.

Under Regulation 1829/2003 the importer must submit a similar application to the competent Member State authority as under Directive 2001/18. The Regulation requires the immediate forwarding of the application to the Commission and the other Member States. The importer, therefore, must be promptly ready to address the questions from all Member States. Unlike under Directive 2001/18, however, the importer does not bear primary responsibility for monitoring the GMO. Regulation 1830/2003, however, forces the importer to follow very strict labeling guidelines. The labeling guidelines effectively make the importer responsible for providing every operator in the supply chain with adequate information about the GMO. There is some evidence that these labeling

---

177 Id.
180 Id.
requirements can be very burdensome. As under Directive 2001/18, new scientific evidence may give cause for the terms of the GMO's presence on the EU market to change. The importer must exhibit a similar degree of attentiveness to scientific changes.

The emphasis on a scientific basis for changes to GMO approvals under Regulation 1829/2003 clarifies some ambiguity about Member State discretion. Under all the GMO approval and regulation measures, the Member States were granted broad discretion to comment on the GMO and challenge its approval with reasoned argument. Regulation 178/2002 established, and Regulations 1829/2003 and 1830/2003 confirmed, the importance of scientific evidence as the grounds for reasoned argument regarding GMOs. In other words, objections to the entry of a GMO into the EU market must be supported by scientific evidence. Though a political process ultimately provides approval of a GMO's entry into the EU market, importers can rest assured that the decision will be heavily informed by scientific evidence.

The evolution of GMO approval in the EU tells a story of political actors using science to address the concerns of the European public. EU sentiments on GMOs, however, still find policy expression in the precautionary principle. While science has addressed some of these concerns, the precautionary principle can be used to justify further restrictions on GMOs. In other words, other policy areas may be used by Europeans to find expression of their GMO concerns.

III. LEGAL REGIMES REGULATING CUSTOMS PROCEDURES

Customs rules are among the oldest features of the international order. As governments have become more democratic, so too has the

---

182 Chalmers, supra note 18, at 653-54.
183 Id. at 653-57 (describing the scientific dialectic present in the GMO approval regime).
184 See id. at 658 (discussing the process of turning scientific evidence and argument into a political decision made by the Regulatory Committee); Gitanjali Deb, Atrazine: A Case Study in the Differences between Regulations of Endocrine Disrupting Chemicals in the EU and the US, 25 TEMP. J. SCI. TECH. & ENVTL. L. 173, 177-79 (2006) (describing the combined process of scientific review and political approval).
185 See supra note 4 and accompanying text.
186 Id.
responsibility for customs spread across multiple institutions. Governmental bodies ranging from the international to the local have some influence on the rules and application of the international customs regime. This section summarizes the international and EU level customs regulation systems.

A. International Customs System\textsuperscript{188}

The World Trade Organization ("WTO") and the World Customs Organization ("WCO") have the most pervasive impact on customs regimes around the world. Specific to Europe, the United Nations Economic Commission for Europe brings perspectives from the United States and Canada to political and policy issues in the customs regime.\textsuperscript{189} A discussion of each organization and its influences follows.

1. The World Trade Organization and EU Customs Law

Since their inception as the GATT, the WTO agreements have aimed to reduce the number and impact of tariffs in order to facilitate trade.\textsuperscript{190} Each round of GATT/WTO negotiations has further reduced the customs duties levied on traded goods.\textsuperscript{191} Accordingly, the conclusion of each trade round affects which goods have customs duties levied on them and the value of those duties.

The WTO also concerns itself with the manner in which each member operates its customs system.\textsuperscript{192} Article 10 of the GATT requires that no customs measures take effect until they are published "in such a manner as to enable governments and traders to become acquainted with them."\textsuperscript{193} Further, each party to the WTO agreements has a duty to "administer in a uniform, impartial and reasonable manner all its [customs] laws, regulations, decisions and rulings"\textsuperscript{194} and to provide for "the prompt review and correction of administrative action relating to

\textsuperscript{188} Id. at 6-18; LUX, supra note 26, at 10-18.
\textsuperscript{189} LUX, supra note 26, at 17.
\textsuperscript{190} JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 343 (4th ed. 2002); MATSUSHITA ET AL., supra note 28, at 1-3.
\textsuperscript{191} JACKSON ET AL., supra note 191, at 610.
\textsuperscript{192} See GATT, supra note 69, at art. X.
\textsuperscript{193} Id. at art. X(1)-(2).
\textsuperscript{194} Id. at art. X(3)(a).
customs matters." Therefore, the WTO agreements also seek to ensure the fairness and uniformity of the manner in which a party administers its customs regime.

The WTO agreements have two direct impacts on the EU's customs regime. First, the EU has adopted the result of each round of trade negotiations since the European Community began negotiating at the WTO on behalf of its members. The schedule of concessions is like a treaty adopted by each party to the agreement. Accordingly, the terms of customs duties negotiated at the WTO level largely populate the EU's tariff schedule.

Second, parties to the WTO can enforce the terms of the WTO agreements against each other through the Dispute Settlement Understanding ("DSU"). If a WTO Member feels the measures and acts of another Member have violated its rights under the agreements, then it can request that a panel decide the dispute under the DSU. The DSU encourages parties to settle their disputes, but is prepared to adjudicate trade matters in order to "provide[e] security and predictability to the multilateral trading system." Accordingly, customs duties that deviate from the WTO's schedule can be the basis for suit before the DSU. Customs regimes that operate contrary to Article X can also be the basis for suit, though this option is rarely used.

195 Id. at art. X(3)(b).
196 LYONS, supra note 188, at 11; MATSUSHITA ET AL., supra note 28, at 11-12 (describing the process of accession which requires consensus among all WTO members after the negotiation of specific terms of accession and adoption of the most current WTO schedule, implying that current members abide by the most recent schedule).
197 Appellate Body Report, European Communities—Customs Classification of Certain Computer Equipment, ¶ 84, WT/DS62, 67 & 68/AB/R (June 22, 1998) ("the concessions provided for in that Schedule are part of the terms of the treaty").
198 LASOK, supra note 85, at 13 (noting that, per GATT Article XXIV, "the duties and other regulations of commerce are not higher or more restrictive with regard to third countries.").
199 DSU, supra note 28, at art. 1(1).
200 Id. at art. 3(1), (3); see supra note 56 (discussing nullification and impairment as grounds for bringing cases before the Dispute Settlement Body).
201 DSU, supra note 28, at art. 3(7) ("A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.").
202 Id. at art. 3(2).
203 GATT, supra note 69, at art. 2(5).
204 Id. at art. 10; see supra notes 175-82 and accompanying text; see also Daniel H. Erskine, The U.S.-EC Dispute Over Customs Matters: Trade Facilitation, Customs Unions, and the Meaning of WTO Obligations, 18 FLA. J. INT'L L. 423, 431-32, 443-48 (only finding two DSU panels constituted for the purpose of considering an alleged violation of Article X:
These principles of WTO law apply generally to all WTO members. WTO rules, however, have a particular relationship within the EU's legal system as it applies to customs law. The European Court of Justice has held that the Community Customs Code ("CCC") must, "as far as possible, be interpreted in a manner consistent with [the WTO] agreements." Although the effects of the GATT on the CCC are relatively straightforward, other questions of the scope and effects of the WTO agreements are left to the ECJ to help ensure consistency among the Member States. Though litigants in European courts cannot directly rely upon the GATT agreements as the basis for a suit, the legality of a Community act can be challenged on grounds that it violates the GATT, if the act itself was intended to be part of the GATT framework. This leaves the possibility that "one day some provision specific enough" might create rights in the WTO agreements for citizens and importers affected by the EU's customs regime.

2. World Customs Organization and EU Customs Law

The WCO advises the global community on customs matters towards the goal of facilitating international trade. The WCO exerts great
influence on all customs regimes because it maintains the Harmonized Commodity Description and Coding System ("HS"). Almost all countries use the HS as the basis for their customs codes. By setting the standards for classification, the WCO effectively sets the customs agenda both when customs rules are applied and when they are created.

The EU adopted the HS as the nomenclature system for its customs code in 1987. The EU regularly transposes the WCO's HS recommendations and amendments into EU law. This does not mean that the EU has chosen to have the WCO decide the customs classifications of all products imported into the EU. The ECJ, however, holds the WCO's explanatory notes as "authoritative in the interpretation of [the CCC]... in the absence of any relevant Community provision." Further the EU has signed on to the international conventions promulgated by the WCO, which seek to harmonize customs procedures. The EU, though, signaled accession to these conventions through Council Directives. Directives leave the specific terms of implementation to each Member State. The extent of harmonization of customs procedures among the Member States and with the rest of the global trading community, therefore, has always remained at the discretion of the Member States.

3. The United Nations Economic Commission for Europe and other United Nations Conventions and EU Law

As a largely political organization, the United Nations ("UN") serves as a platform for international cooperation on policy. Since the wake

211 World Customs Organization, What is the Harmonized System (HS)?, http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_hsharmonizedsystem.htm (last visited Jan. 28, 2009).
212 J ACKSON ET AL., supra note 191, at 360.
213 LYONS, supra note 188, at 6 (commenting that the WCO is "immensely powerful"); see also World Customs Organization, supra note 211 (noting that the WCO "administers the technical aspects of the WTO Agreements on Customs Valuation and Rules of Origin").
215 LUX, supra note 26, at 15-17.
216 Council Regulation 2913/92, supra note 25, at art. 20(3)(b)-(g).
218 LYONS, supra note 188, at 7-9.
219 See id.
220 CRAIG & DE BÜRCA, supra note 92, at 108.
of World War II, the UN Economic Commission for Europe ("UNECE") has pursued an agenda of fostering economic cooperation in Europe with the aim of enhancing prosperity.\footnote{United Nations Economic Commission for Europe, Inception, http://www.unece.org/oes/history/history.htm (last visited Feb. 11, 2009).} Towards that end, agreements affecting customs procedures in the area of transit and temporary importation have emerged from the UNECE forum.\footnote{LUX, supra note 26, at 17-18.} Other UN bodies, such as the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") and the Convention on International Trade of Endangered Species of Wild Fauna and Flora, promulgate agreements that also impact customs procedures.\footnote{LYONS, supra note 188, at 10-11.}

The EU takes part in these international conventions by transposing their terms into EU legal documents.\footnote{CRAIG & DE BÜRCA, supra note 92, at 106-07.} While the EU participates fully in these international fora, the transposition process signals the extent of EU support for the international agreements and recommendations in question.\footnote{See, e.g., Christian Lequesne, Fisheries Policy: Letting the Little Ones Go?, in POLICY-MAKING IN THE EUROPEAN UNION, 353, 357, 365 (Helen Wallace, William Wallace, & Mark A. Pollack eds., 5th ed. 2005). In the field of fisheries policy, the EU did not adopt the non-binding recommendations of the International Council for the Exploration of the Sea ("ICES"), but rather reacted to the recommendations of the International Commission for the Conservation of Atlantic Tuna ("ICCAT") by creating binding Total Allowable Catches ("TACs") system for Atlantic Tuna. Id.} The EU transposes international agreements that it intends to adopt as regulations, because of their binding nature.\footnote{CRAIG & DE BÜRCA, supra note 92, at 106-07.} For example, the EU adopted the International Convention on Harmonization on Frontier Control of Goods and the Convention on International Trade of Endangered Species of Wild Fauna and Flora as regulations.\footnote{Council Regulation 1262/84, Concerning the Conclusion of the International Convention on the Harmonization of Frontier Controls of Goods, 1985 O.J. (L 126) 1 (EC); Council Regulation 3626/82, On the Implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1982 O.J. (L 384) 1 (EC).} International agreements transposed as Council Decisions are not necessarily binding on any EU institution or Member State unless the directive specifically designates the addressee to be bound.\footnote{CRAIG & DE BÜRCA, supra note 92, at 109.} The UN's Customs Convention on the Temporary Importation of Private Road Vehicles was only adopted as a decision addressed to the European Union at large,\footnote{Council Decision 94/110, On the Conclusion of the Customs Convention on the Temporary Importation of Private Road Vehicles (1954) and the Acceptance of the United (EC).} thereby...
assigning responsibility for the Convention's implementation to no one. Ultimately, the EU can exercise full discretion in the adoption of customs agreements proposed by the UN.

B. EU Customs System

The EU is a customs union and a common market. As such the EU maintains a common external tariff while striving to eliminate the internal barriers that limit the free movement of goods, services, persons, and capital. In the pursuit of cogent and coherent policies, there may be no difference between measures with intra-EU effect and extra-EU effect. Nonetheless, the EU's Community Customs Code ("CCC") lays the foundation for the application of the common external tariff. An outline of the CCC and the powers of the Member States under the CCC follows.

1. The EU Community Customs Code (CCC)

The EU's predecessor, the European Community, maintained a CCC since 1968. Over the next two decades the customs code and its implementing legislation expanded and fragmented as more countries joined the European Community and the WTO advanced through more rounds of tariff concessions. The EU's creation in 1992 signaled a renewed commitment to fully realizing economic union, and the current CCC emerged as a step in the process of achieving that goal.

---

Nations' Resolution of 2 July 1993 on the Applicability of Carnets de Passage en Douane and CPD Carnets to Private Road Vehicles, art. 1, 1994 O.J. (L 56) 1 (EC).
232 See Melvyn B. Krauss, Recent Developments in Customs Union Theory: An Interpretive Survey, 10 J. ECON. LITERATURE 413, 413 (1972) (discussing the effect that coupling a common external tariff with an elimination of protection among domestic producers has on the overall balance between creating and diverting trade).
233 TSOUKALIS, supra note 84, at 13.
234 LUX, supra note 26, at 30-31 (listing a series of policies that affect both the common market and customs policies).
235 Council Regulation 2913/92, supra note 25, at art. 2.
236 LYONS, supra note 188, at 18.
237 Id. at 19.
238 JACKSON ET AL., supra note 191, at 227.
239 LYONS, supra note 188, at 19.
The CCC sets out the basic rules for "trade between the [EU] and third countries" and for certain goods within the EU.\textsuperscript{240} Customs officers supervise the movement of goods into, out of, and through the EU to determine their status as EU or non-EU goods.\textsuperscript{241} The determination of this status dictates which, if any, customs rules apply.\textsuperscript{242} The CCC sets out rules for making this determination,\textsuperscript{243} as well as rules for the classification of goods,\textsuperscript{244} their warehousing,\textsuperscript{245} their transit,\textsuperscript{246} and their release onto the market,\textsuperscript{247} to name a few. The CCC, however, leaves specifics of many customs procedures to the Member States, or for later determination by the Customs Committee.\textsuperscript{248}

Article 247 of the CCC establishes the customs committee.\textsuperscript{249} As the CCC has been implemented, the Customs Committee, with the help of the Commission and other EU level bodies,\textsuperscript{250} has promulgated regulations to help standardize customs procedures and solve common problems among the EU member states.\textsuperscript{251} The most important common procedure in the customs system is the common customs classification code known as the TARIC.\textsuperscript{252} The TARIC uses the Common Nomenclature and codes for goods promulgated by the WCO as its base and adds other digits for use by EU and the Member States.\textsuperscript{253} Other significant common systems under the CCC are the system for computerized customs declarations\textsuperscript{254} and the simplified customs declaration procedure.\textsuperscript{255}
2. Member State Power under the EU Customs Code

Ultimately, Member States implement the CCC. While the CCC seeks a common approach to customs, the CCC itself recognizes that an effective customs system must allow "customs authorities . . . [to] carry out all the controls they deem necessary to ensure that customs legislation is correctly applied." Rather than try and create an EU level customs service, Member States each bear responsibility for forming and maintaining an "effective customs service . . . [so] not to put at risk the economic benefits of the Single Market and the security of European citizens."

This responsibility allows for broad discretion on many customs matters. Most significantly, Member States can exercise independent judgment in the classification of imported goods. Article 12 of the CCC creates the Binding Tariff Information ("BTI") mechanism. Based on information provided by an importer, a customs authority can judge the TARIC classification of a good, binding all the customs authorities to that TARIC classification. A BTI is valid for six years or until an EU regulation makes it invalid. Customs authorities must inform the Commission of each BTI, thereby giving it an opportunity to correct inconsistent BTIs through a regulation. Due to the relatively involved process for the adoption of regulations and the incredible volume of BTIs issued yearly, inconsistencies in the BTIs are often not corrected promptly. This effectively gives each Member State the ability to classify goods as it sees fit, without regard for a consistent application of the CCC and TARIC across the EU.

---

256 Council Regulation 2913/92, supra note 25, at art. 13.
257 Helen Hartnell, Subregional Coalescence in European Regional Integration, 16 Wis. INT'L L.J. 115, 167 n.228 (1997) (citation omitted).
258 Council Regulation 2913/92, supra note 25, at art. 12.
259 Id. at art. 12(1)-(2).
260 Commission Regulation 2454/93, supra note 255, at arts. 6, 7, 10 & 11.
261 Council Regulation 2913/92, supra note 25, at art. 12(4)-(5).
262 Commission Regulation 2454/93, supra note 255, at art. 9.
263 Council Regulation 2913/92, supra note 25, at art. 249.
264 EC—Frozen Chicken, supra note 254, at ¶ 7.264.
266 See RALPH H. FOLSOM & MICHAEL P. CLOES, EUROPEAN UNION BUSINESS LAW: A GUIDE TO LAW AND PRACTICE HANDBOOK 272 (West 1995).
The CCC also grants Member States extensive freedoms to conduct appeals of customs decisions. Importers challenging a decision by a Member State's customs authority must initiate the appeal with the customs authority in that Member State. Further, Member States design and implement their own appeals procedures. The ECJ has reiterated this right on several occasions. In a recent case, the ECJ acknowledged that an importer may appeal directly to a judicial tribunal, more adept at interpreting EU law, if national law would permit it. In summary, importers must follow the appeals procedures of the Member State in which the goods clear customs.

Outside of the CCC proper, Member States are allowed to derogate from the CCC procedures in certain instances of significant national interest. Citing Art. 30 of the EU treaty, a Member State may enforce national measures which prohibit or restrict imports if justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; [or] the protection of industrial and commercial property.

Further, Member States may impose stricter national measures for the protection of the environment or the health, safety, or economic interest of consumers. Though the GMO approval process tries to take the

---

267 For a detailed exposition of the customs appeals process, see generally, Erskine, supra note 205, at 448-51.
268 Council Regulation 2913/12, supra note 25, at art. 243.
269 Id. at art. 245.
274 LUX, supra note 26, at 32.
275 Id. (citing EU Treaties, supra note 274, at arts. 95(4), 153(5), 176).
interest of all the Member States into account, the Treaty terms allow each Member State to still pursue these narrowly defined interests through national customs procedures.

IV. **THE EC—BIOTECH CASE**

A. **Summary of the Case**

The EU's GMO and customs regimes laid the terms over which the US and the EU fought in the EC—Biotech case. The US, Canada, and Argentina ("Complaining Parties") together charged the EU with three sets of violations of the WTO agreements. First, the Complaining parties alleged that the EU had a general moratorium in place preventing the approval of any GMOs from entering the EU market. The parties argued that the EU had allowed the GMO approval processes mandated by Regulation 258/97 and Directive 2001/18 to grind to a halt. No new GMOs, therefore, could gain the requisite approval to come onto the EU market.

Second, the Complaining Parties alleged that the EU had prevented certain GMOs from entering the EU market in a manner inconsistent with WTO obligations. The parties alleged that the moratoria on certain products lacked an adequate scientific basis. Third, the Complaining Parties challenged the legality of Member State bans on certain GMOs justified on human health grounds. In their eyes, the individual Member States failed to employ the proper scientific standards to justify the bans on human health grounds.

After three rounds of written and oral arguments over the course of two years, the Panel reached its conclusions. Regarding the moratorium on GMO approval, the Panel determined that the EU had in fact put a moratorium in place. Under Regulation 258/97 and Directive 2001/18, approval of a GMO, even with terms and conditions, required a qualified

---

276 See supra notes 132-34 and accompanying text.
278 Id. at 30-37, 41-44, 51-54.
279 Id.; see supra Parts II.B.1 & II.B.2 (describing the procedures under Regulation 258/97 and Directive 2001/18).
281 Id.
282 Id. at 37-38, 46-50, 60-64.
283 Id.
284 World Trade Organization, supra note 9.
majority vote in the Council or in the Committee.\textsuperscript{286} The Panel cited a joint public statement from five EU countries indicating their intent to prevent any new GMOs from entering the EU market.\textsuperscript{287} The combined votes of these countries under the qualified majority system could effectively prevent the approval of any new GMO from entering the EU market.\textsuperscript{288}

The Panel found the general moratorium to be in violation of the Annex C(1)(a), first clause and Article 8 of the SPS Agreement.\textsuperscript{289} Annex C(1)(a), first clause, requires that, "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that . . . such procedures are undertaken and completed without undue delay . . . ."\textsuperscript{290} Article 8 requires that, "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures . . . for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement."\textsuperscript{291} The general moratorium violated Annex C(1)(a) because it caused an impermissible delay in the application of at least one GMO, in turn violating Article 8.\textsuperscript{292}

The moratorium was realized in part because applications for specific products failed to be approved.\textsuperscript{293} The Panel examined the rejected and withdrawn applications to determine if the EU had taken actions, distinct from the general moratorium, which violated the WTO agreements.\textsuperscript{294} The Panel found no other justification for the GMO ban which violated the WTO agreements other than the general moratorium.\textsuperscript{295} Specifically, the Panel found no evidence indicating that the EU had based its assessments on anything other than appropriate scientific reasoning.\textsuperscript{296} That specific products did not gain approval because of the general

\textsuperscript{286} See supra notes 95, 121, 124 and accompanying text.
\textsuperscript{287} EC—Biotech, WT/DS291/R at 434-37.
\textsuperscript{288} Id. at 437-38.
\textsuperscript{289} Id. at 681-82.
\textsuperscript{291} Id. at art. 8.
\textsuperscript{292} EC—Biotech, WT/DS291/R at 658-81 (examining other permissible delays and determining that they alone could not explain the halt in GMO approvals).
\textsuperscript{293} Id. at 692-93.
\textsuperscript{294} Id. at 693.
\textsuperscript{295} Id. at 692-868.
\textsuperscript{296} Id. at 704-20.
moratorium, the Panel recommended that the EU, "bring the relevant product-specific measures into conformity with its obligations under the SPS Agreement." This means that the EU can no longer unduly delay the applications for entry of GMOs onto the EU market.

Regarding the Member State bans, the Panel found that EU Member States had supported their bans on individual GMOs with neither adequate risk assessments nor appropriate scientific information to justify the bans. Accordingly, the Member State bans stood in violation of Article 2.2, which requires that WTO Members' SPS measures justified on health or environmental grounds be "based on scientific principles and . . . not [be] maintained without sufficient scientific evidence." Article 5.1 of the SPS Agreement was also violated because the Member State bans were not "based on an assessment . . . appropriate to the circumstances." In response to these violations, the Panel recommended that "[M]ember State safeguard measures [be brought] into conformity with its obligations under the SPS Agreement."

B. How Later EU GMO Regulations Address the Panel Report

The EC—Biotech panel began its proceedings before Regulations 1829/2003 and 1830/2003 took effect. The Panel, therefore, found their terms and application irrelevant to the case. The Regulations, however, instituted some changes in the EU's GMO regime that might be in conformity with the Panel's report and recommendations.

The very existence of Regulations 1829/2003 and 1830/2003 indicates that the EU reached some political consensus regarding its GMO regime. The Group of Five countries, which effectively created the general moratorium, cited several reasons why they intended to prevent the entry of any new GMOs onto the EU market, namely the need for a "more transparent framework, in particular for risk assessment, having regard to the specifics of European ecosystems, monitoring and labelling, [and] . . . the need to restore public and market confidence." The

297 *Id.* at 1072-73, 1078, 1084.
298 *Id.* at 1073-76.
299 SPS Agreement, *supra* note 291, at art. 2.2.
300 *Id.* at art. 5.1.
301 EC—Biotech, WT/DS291/R at 1076.
302 *Id.* at 3.
303 *See id.* at 354.
304 *Id.* at 435.
Regulations address these concerns by creating clearer rules on labeling and risk assessment. 305 The Regulations also take significant steps to increase public awareness of the process and information about GMOs in the EU market. 306 The implementation of the Regulations, therefore, signaled an end to the general moratorium.

Second, Regulation 1829/2003 includes a set time frame for the processing of applications for GMOs. 307 This time frame can be explained by the political consensus, but there is also a point of legal significance. As a Regulation, its terms have direct effect, meaning that individuals can immediately enforce the terms of the Regulation in national courts. 308 Therefore, importers filing an application can sue for injunctive relief to have the Member State follow the mandated time line. This serves as a safeguard against the undue delays experienced in the old GMO system which violated the SPS Agreement. 309

Third, the Regulations' emphases on scientific reasoning and consistent labeling rules make it more difficult for Member States to reject a GMO from entering the EU market and/or the Member State's territory. Regulation 1829/2003 requires that the EFSA do a scientific analysis of each GMO applying for access to the EU market. 310 The EFSA has the power to act as the arbiter of scientific disputes about the GMOs. 311 It is very difficult for the Commission to go against EFSA's recommendations about any GMO. 312 Accordingly, the current GMO approval system places a high premium on sound science. A Member State would have to present very new, very compelling science in order to go against an EFSA recommendation. 313 Furthermore, Regulation 1830/2003’s harmonized labeling rules ensure that all GMOs are labeled in a consistent fashion throughout the EU. 314 This helps prevent a Member State from blocking a GMO from entering its territory because the GMO might be labeled according

306 See supra Part II.B.3.
307 Regulation 1829/2003, supra note 20, at arts. 5, 6, 10, 17, 18, & 22.
308 CRAIG & DE BÛRCA, supra note 92, at 165.
309 See supra notes 277-80 and accompanying text.
310 See supra note 145 and accompanying text.
312 Case T-13/99, Pfizer vs. Council, 2002 E.C.R. II-146 (holding that the Commission must act within the scientific recommendations of the EFSA unless new or additional scientific evidence and a corresponding justification are supplied).
313 Chalmers, supra note 18, at 653.
to another Member State's labeling rules. For these reasons, Regulations 1829/2003 and 1830/2003 make it quite difficult for Member States to find appropriate legal reasons to continue with their bans on individual GMOs in violation of the SPS Agreement. As demonstrated, Regulations 1829/2003 and 1830/2003 take significant steps to bring the EU's GMO regime into compliance with the WTO agreements.

C. Issues Affecting the GMO Regime Left Unresolved by the WTO Panel Report

Though the EU has arguably brought its GMO regime into accordance with the WTO agreements, several issues still stand in the way of the successful importation of GMOs into the EU. If these issues are not resolved, the WTO report and recommendations are for naught, because other obstacles can prevent GMOs from getting to market. If the GMOs do not get to market, then the EU or the Member States could have another case brought against them at the WTO to challenge the provisions that prevent the GMOs from reaching end consumers in the EU market. On the other hand, if the EU and the Member States choose to uphold the WTO decision to the utmost, many stakeholders within the EU and in the international community could resist such action.

First, the WTO decision regarding the Member State bans presents EU constitutional problems. Article 30 of the EU Treaties allows a Member State to restrict the import and transit of goods within its territory if "justified on grounds of public morality, public policy or public security." Such restrictions, however, cannot "constitute a means of arbitrary discrimination or a disguised restriction on trade." In other words, as long as a Member State has a principled, non-arbitrary justification for its restriction, the EU Treaties appear to allow it. Granted, Regulation 1829/2003 creates a complex GMO approval process designed to gather support for each GMO with scientific, technical and political consensus. Even under such a process, though, the EU cannot prevent Member States from acting under Article 30.

---

316 See supra notes 285-88 and accompanying text.
317 EU Treaties, supra note 274, at art. 30.
318 Id.
320 EC—Biotech, WT/DS291/R at 870 n.1686 (Sept. 29, 2006) (noting that evidence indicates that the Member States did not lift their bans even after called to do so by the Commission).
The WTO Panel, however, has held that the Member State bans are inconsistent with Articles 2.2 and 5.1 of the SPS Agreement. These WTO provisions, though, only value assessments with a clear scientific basis. Provisions under Article 30 need simply be justified on public morality or policy grounds, and these justifications cannot be arbitrary. The Panel decision seems to limit the available justifications that a Member State may use to restrict GMO trade to scientific justifications. The Panel, however, only directed its report to the EU, not the individual Member States. The EU cannot compel the Member States to construe Article 30 as narrowly as the Panel would have it. If the Member States are willing to suffer economic retaliation from the Complaining Parties, then compliance with the WTO obligations cannot be compelled.

Second, the WTO Panel explicitly did not resolve science based questions regarding the safety of GMOs, whether GMOs are effectively 'like' their conventional counterparts, and whether the scientific bodies in the EU correctly assess the safety of GMOs. With none of these questions resolved, questions about the environmental impact of GMOs remain open for consideration and policy response. Two environmental concerns are of particular significance in the EU: superweeds and hybridization. Superweeds result from genetic modifications that create variants of plant species resistant to the threats that keep a conventional plant's population in check, like natural predators and herbicides.

---

321 See supra notes 285-88 and accompanying text.
322 SPS Agreement, supra note 291, at arts. 2.2, 5.1.
323 EU Treaties, supra note 274, at art. 30.
324 See EC—Biotech, WT/DS291/R at 282 (in the findings section, the European Communities is the party, not the individual member states); id at 1073-76 (addressing state specific action as European Community violations).
326 EC—Biotech, WT/DS291/R at 1067.
327 Les Levidow et al., Genetically Modified Crops in the European Union: Regulatory Conflicts as Precautionary Opportunities, 3 J. OF RISK RES. 189, 191-92 (2000) (arguing that the absence of scientific, technocratic decision making leaves the process of policy creation in the GMO realm to political questions).
328 Les Levidow et al., European Biotechnology Regulation: Framing the Risk Assessment of a Herbicide-Tolerant Crop, 22 SCI., TECH., & HUM. VALUES 472, 473-74 (1997) (noting that a proposal to approve market access for an herbicide tolerant crops can result in the creation of ever more resistant weeds, inspired much policy debate); CLARE MILLER, MARIANNE KETTUNEN, & CLARE SHINE, SCOPE OPTION FOR EU ACTION ON INVASIVE ALIEN SPECIES (IAS) 41-47 (Institute for European Environmental Policy ed., 2006) (describing Member State policy measures ensured to prevent invasive species from endangering biodiversity).
Hybridization occurs when a genetically modified organism transfers some of its adulterated genetic material into another species, resulting in the replacement of the original species with the hybrid.\textsuperscript{330} The science behind these fears inspires much debate and the GMO scientific community has come to no clear consensus.\textsuperscript{331} The WTO Panel's decision, however, seems to suggest that the science which finds that GMOs generally lead to environmentally damaging superweeds and hybridization cannot be an adequate basis for preventing GMOs from entering certain Member States.\textsuperscript{332} By not addressing the validity of the general science or its application directly, the WTO has done nothing to prevent the EU and the Member States from using it as the basis to justify other regulations of GMOs in the EU. As long as such measures do not fit under the SPS Agreement, such measures would not be in conflict with the Panel's determination.

Third, the Panel Report does not address the customs procedures that Member States may use to prevent GMOs from entering the EU market. Free to determine BTIs,\textsuperscript{333} Member State customs authorities can put GMOs under customs classifications with increased duties or restrictions for entry onto the market.\textsuperscript{334} Also, each customs authority sets its own customs warehousing rules.\textsuperscript{335} Regulation 1829/2003 did not designate that approved GMOs be considered community goods intended for free circulation.\textsuperscript{336} Each customs authority, therefore, may require further safety testing of the GMO shipment at the point of entry.\textsuperscript{337} Such testing may require that the GMO shipment be warehoused. Each Member State may set rules for the manner and duration of customs warehousing as well as the terms of release from the warehouse.\textsuperscript{338} The terms of release

\textsuperscript{331} See id.
\textsuperscript{332} \textit{EC—Biotech}, WT/DS291/R at 870 (noting that generalized concerns about the safety of certain GMOs did not result in any specific GMO being given a safety assessment by the EU scientific committees).
\textsuperscript{333} See supra notes 246-54 and accompanying text.
\textsuperscript{334} See, e.g., Taxation and Customs Union, TARIC Textual Search, http://ec.europa.eu/taxation_customs/dds/cgi-bin/tarquer?Lang=EN (last visited Feb. 12, 2009) (searching for “corn” results in fifteen broad classifications, each with multiple different duty rates and regulations for entry).
\textsuperscript{335} See Council Regulation 1829/2003, supra note 20.
\textsuperscript{336} Id.
\textsuperscript{337} For example, Greece requires the laboratory testing of some agricultural shipments to ensure that they are GMO free. \textit{Stamatis Seklziotis, Greece Continues to Ban GM Corn for Planting} 2 (USDA Foreign Agriculture Service, Apr. 23, 2007), available at http://www.fas.usda.gov/gainfiles/200704/146280913.pdf.
\textsuperscript{338} Commission Regulation 2454/93, supra note 255, at art. 540.
may include assurances that the GMOs will only be transported in a certain manner or in certain vehicles. \(^{339}\) Furthermore, the misapplication of any of these rules can only give rise to appeals rights set by the Member State of import. \(^{340}\) These appeals processes may be cumbersome and lengthy. \(^{341}\) Each of these procedures may severely hinder the ability of an approved GMO to get onto the market. The WTO panel's report and recommendations only consider the GMO approval system. \(^{342}\) Therefore, the EU and its Member States can still effectively restrict, if not prevent, the importation of GMOs into the EU market.

As demonstrated, the WTO panel report is a tool that cannot address all the issues involved in the EU's GMO importation regime. To try and use it to force change would be a lengthy endeavor that might involve many more WTO Panel reports. \(^{343}\) Failure to allow the GMO imports could give rise to costly trade countermeasures. A solution to the dilemma must both address EU concerns about GMOs and still allow the market to decide whether Europeans can or want to consume them. The following section proposes solutions that could achieve both.

V. ENVIRONMENTALLY MINDED SOLUTIONS TO THE GMO DISPUTE

The EU's concern about GMOs is embodied in the precautionary principle. \(^{344}\) In essence, European constituencies do not let GMOs enter the EU market until they are proven completely safe. The WTO decision in EC—Biotech, however, strongly urges the EU to let GMOs come onto the EU market, irrespective of concerns rooted in the precautionary principle. \(^{345}\) The Panel decision did not challenge the validity of the precautionary principle as a principle of environmental law. \(^{346}\) Therefore, the EU and

---

\(^{339}\) See id. at arts. 471-95.

\(^{340}\) See supra notes 255-60 and accompanying text.

\(^{341}\) Request for the Establishment of a Panel by the United States, European Communities—Selected Customs Matters, WT/DS315/8 (Jan. 14, 2005) (arguing that the burdensome nature of customs appeals procedures are detrimental to U.S. business) [hereinafter EC—Customs].

\(^{342}\) EC—Biotech, WT/DS291/R at 1067.

\(^{343}\) If the complaining parties deem the EU did too little to change to the EU's GMO approval regime, further WTO action may take place. See also MATSUSHITA ET AL., supra note 28, at 32-40, 86-95. The EU's customs system has already come under some degree of WTO review. EC—Customs, WT/DS315/8.

\(^{344}\) See supra note 4.

\(^{345}\) The WTO Panel's interpretation of Article 2.2 of the SPS Agreement can be understood to require specific scientific backing for a decision to ban a GMO, rather than just a general concern because of unresolved science. See supra Part IV.C.

the Member States can design and implement measures in accordance with the precautionary principle to address their concerns. The specific concerns that have emerged fall generally into three broad categories: the creation of superweeds, the destruction of the native habitat, and moral concerns. The proposed solutions try to address each of these concerns while still allowing for GMOs to come onto the EU market.

A. Proposed Customs Procedures

The concerns about GMOs ultimately arise out of a lack of information about their impact on the environment. Any policies designed to address them should prioritize the collection and dispersion of information about GMOs, while preventing any of the known harms they may cause. In the EU's case, policies and procedures should take steps to prevent the creation of superweeds and the loss of native natural habitats in the Member State territories. Also, as much information about GMOs as possible should be collected and presented to the public in order to inform and/or challenge impressions about the moral and cultural implications of GMOs. The customs regime presents a perfectly situated forum to achieve both ends. Three policy proposals within the customs regime are presented below. The proposals are explained separately, but the cumulative effect of their implementation would only further a successful resolution to the GMO dispute.

1. Create BTIs for Each New GMO

BTIs set a common customs classification for any good coming into the EU. To date, the EU has issued no BTIs regarding GMOs. An importer holding a BTI “must . . . prove that . . . the goods declared correspond in every respect to those described in the information.” The BTI can require that the GMO in question be properly labeled in accordance

347 See supra notes 311-16 and accompanying text.
348 Id.
350 See Levidow, supra note 328, at 189-90.
352 Council Regulation 2913/92, supra note 25, at art. 12(3).
with Regulation 1830/2003, or be accompanied by safety certification similar to that issued by EFSA during the GMO approval process. Failure to provide either or both would mean that the GMO would not qualify for the BTI. Qualifying under a BTI can expedite customs processing.

With clarity and speed as incentives, importers would be more willing and diligent in following the labeling guidelines. Also, the importers could take a more proactive interest in the safety of the GMO in order to assure that it would continue to stay safe, and thus continue qualifying for the BTI. Both the labels and the safety certification increase information about the GMO for the EU, the Member States and end consumers.

2. Link Customs Laboratories to the Community Reference Laboratory on GMOs

Regulation 1829/2003 established a Community reference laboratory, in part, to collect information about best practices in methods of sampling and detection. Customs officials initiate procedures that affect entry onto the market, such as warehousing, based on sampling and detection of GMOs trying to clear customs. Having Member State customs laboratories report their findings to the Community reference laboratory would help provide valuable information on these important procedures in the GMO regime. The Community reference laboratory could serve to help keep customs officials throughout the EU abreast of the latest trends and discoveries in GMO detection and sampling. Exchange of such information would further the goals of the EU's customs cooperation program, known as Customs 2007.

The customs warehousing process also provides a unique testing ground for the environmental impact of GMOs. As employees in areas through which all GMO crops, seeds, feed, and food must pass, customs scientific officials are in a unique position to report on the effects of the presence of GMOs on the environment in and around customs facilities. Reporting any findings of a GMO’s weedy or other impact on the environment could readily alert other customs officials to any potential

\[353\] Council Regulation 1830/2003, supra note 20, at art. 4.
\[354\] Council Regulation 1829/2003, supra note 20, at \( \S \) 36.
\[355\] See supra note 338.
environmental dangers. Such information could help in the design of better warehousing facilities and procedures to prevent environmental damage. Analysis of warehoused GMOs may reveal that the longer the GMO remains in one place, the more likely it is that it will impact the surrounding environment. In short, customs can collect valuable information about the environmental impact of GMOs and make it readily available to other Member States.

3. Create Special GMO Transit Procedures

Each Member State has the ability to condition the release of goods held in customs. One such guarantee can be that GMOs be transported in specialized vehicles along designated routes. By designating the manner of transport, the risks associated with GMOs can be limited and contained. Further, using these procedures increases information about the impact of GMOs, because it will be possible to trace exactly where GMOs might have entered the environment in the Member State's territory. Such procedures can be deemed "GMO Transit Procedures."

The EU customs system already has significant common transit procedures. Many of these procedures are agreed upon internationally. For example, as a party to the International Plant Protection Convention, the EU already employs certain plant protection and quarantine procedures. Based on the specific concerns of Member States, the EU, or the Member States individually, can require transport of GMOs to include more stringent security measures than covering trucks with tarps or mowing roadside ditches. As with transportation under the TIR or ATA carnet procedures, customs authorities throughout the EU can control whether importers are following the GMO Transit Procedures. This way, each Member State, and even regions within Member States, can reflect how concerned they are with the environmental risks posed by GMOs through the level of restrictions they place on the transit of GMOs.

357 See EC—Customs, WT/DS315/8, at 2.
360 See Redick, supra note 5, at 103 (listing measures that have been required by IPPC Parties, including covering trucks and mowing road ditches).
361 Commission Regulation 2454/93, supra note 255, at art. 451-61.
B. Assessment of the Viability of the Proposed Customs Procedures

The proposed solutions can not only help resolve issues surrounding the importation of GMOs, but also align with the legal and political systems in the EU, and internationally. If these policies do in fact align with EU and international interests, there could be less resistance to their adoption. Adoption of these proposals would advance both trade in GMOs and protection of the environment.

First, none of the proposed solutions interfere with the current system on GMO labeling and risk assessment. As argued, Regulations 1829/2003 and 1830/2003 make the GMO approval system consistent with the WTO's SPS Agreement. Importers would not have to complete any more applications or risk assessments. Rather, they would be given an added incentive for following the labeling regulations and keeping abreast of the GMO's impact on the environment. Member States would still retain all of their rights under the current GMO approval regime and the customs regime. The proposals would simply draw a scientific link between customs authorities and the GMO community.

Second, the proposals make use of institutions and processes that already exist within the EU. The committees on customs and food safety would continue to monitor and adapt the customs and GMO regimes to new needs and challenges. These proposals might simply give them an opportunity to combine their expertise. The customs laboratories and the GMO laboratories would continue in their research, but would be better situated to learn from each other. The Commission and the Council would continue to design and implement the EU-level GMO and customs regimes under the current procedures. These proposals would simply be another combination of science and politics, ingredients which both institutions handle regularly.

Third, these proposals would help ease some of the EU constitutional tension presented by the WTO decision. As argued, the Panel report limits Member States in their ability to prevent GMOs from entering their territories. These proposals allow the Member States to still make use of their health, environmental, and public morality concerns, but to use this reasoning to design policies and procedures that govern the

362 See supra Part IV.B.
363 Id.
364 See supra Parts II.B & III.B.
365 See supra Part IV.C.
transport of GMOs within their territories. In this way, the question is not whether the goods can come in, but rather how they must travel. This still gives Member States a means of addressing their GMO-related concerns, but not at the expense of violating the WTO agreements.

Fourth, these proposals help assure that GMOs actually make it to market safely. Many EU consumers find the very presence of GMOs dangerous, and offensive.366 Other consumers and buyers of GMOs may not mind so much. By actually letting the GMOs be sold, the market can reflect whether importers should even bother to attempt to sell GMOs to Europeans. Until the market is free to make this determination, importers may still find reason to bring the EU before the WTO. If, on the other hand, EU consumers begin to buy GMOs, then the extensive monitoring systems in place can collect a wealth of information to help assess the true impacts of GMOs.

Fifth, these proposals are consistent with the international customs regime.367 The BTI proposal would make use of the internationally recognized customs nomenclature. These proposals would help create some clarity regarding the EU’s customs regime, thereby erring on the side of consistency with the WTO agreements. The proposed transit procedure would make use of other international agreements and procedures, thereby lending them credibility and advancing international cooperation on customs issues.

Sixth, the proposals are consistent with the international GMO trade regime.368 These proposals facilitate compliance with the WTO panel’s recommendations. The proposals also create a vehicle for the successful implementation of the precautionary principle embodied in the Cartagena Protocol.369 As such, the proposals would be seen as evidence that WTO Agreements and the Cartagena Protocol do not conflict.

CONCLUSION

The EC—Biotech case brought conflicting views on GMOs sharply into light. The Complaining Parties and the WTO Panel ultimately called on the EU to allow for the importation of GMOs into Europe. In the EU’s mind, though, successful importation of GMOs cannot come at the expense

366 See supra notes 14-18 and accompanying text.
367 See supra Part III.A.
368 See supra Part II.A.
369 See supra note 59 and accompanying text.
of the environment. In fact, since 2003, EU imports of GMO maize and corn products have steadily declined.\textsuperscript{370}

The EU customs system could reinforce resistance against GMO imports. Some new policies and approaches to GMO imports within the EU’s customs regime, though, can achieve the dual goals of both facilitating trade and protecting the environment. These proposals make sense legally and politically at the EU and international levels. No easy solutions can or will emerge about GMOs and their international sale. Considering her size and leadership on the matter, Europe must continue to develop policies that manage GMOs in an environmentally sound and socially conscious manner.