

THE TRANSATLANTIC TRADE DISPUTE CONCERNING GENETICALLY MODIFIED ORGANISMS – WTO-CONSISTENCY OF THE EC LABELLING SCHEME

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Volume 15, Number 2, 2002

URI: <https://id.erudit.org/iderudit/1069382ar>

DOI: <https://doi.org/10.7202/1069382ar>

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Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)

2561-6994 (digital)

[Explore this journal](#)

Cite this article

Hoehn, C. (2002). THE TRANSATLANTIC TRADE DISPUTE CONCERNING GENETICALLY MODIFIED ORGANISMS – WTO-CONSISTENCY OF THE EC LABELLING SCHEME. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 15(2), 25–38. <https://doi.org/10.7202/1069382ar>

Article abstract

This article examines the WTO-consistency of the EU labelling scheme on Genetically Modified Organisms (GMO). This regulation, requiring the labelling of authorised GMO food and feed placed on the market in the EU, presents serious economical as well as practical implications for US producers. At the heart of the debate are the different risk perceptions as well as regulatory approaches on both sides of the Atlantic. After a brief presentation of the European labelling scheme, the author examines its compliance with several agreements within the WTO international trading regime, namely the Sanitary and Phytosanitary Standards Agreement (SPS), the Technical Barriers in Trade Agreements (TBT) as well as basic GATT rules. Her analysis brings her to the conclusion that despite the non-application of the SPS agreement, the EU labelling scheme is in conformity of both the TBT and the basic GATT rules. The overall aim of the article is not only to present a legal analysis of one of the issues on the front burner of the global trade talks, but also to underline the difficulty in drawing the line between international free trade and domestic regulation expressing other values and objectives that affect trade as a non-tariff barrier.

THE TRANSATLANTIC TRADE DISPUTE CONCERNING GENETICALLY MODIFIED ORGANISMS – WTO-CONSISTENCY OF THE EC LABELLING SCHEME

*By Christiane Hoehn**

Cet article explore la conformité des règles d'étiquetage des organismes génétiquement modifiés (OGM) de l'Union européenne (UE) avec les règles de l'Organisation mondiale du commerce (OMC). Cette réglementation, qui demande l'étiquetage des OGM autorisé à placer sur le marché de l'UE, représente des implications économiques et pratiques pour les producteurs américains. La différente perception de risques, ainsi que différentes approches à la réglementation se trouve au cœur de débat. Après une brève présentation du système d'étiquetage européen, l'auteur se penche sur sa conformité avec certains accords internationaux au sein du régime de l'OMC, plus particulièrement l'Accord sur les standards sanitaires et phytosanitaires, l'Accords sur les barrières techniques dans les accords commerciaux, ainsi qu'avec les règles de base du GATT. L'auteure conclut que le système d'étiquetage européen n'applique pas l'Accord sur les standards sanitaires et phytosanitaires, mais il est conforme à la fois aux règles de l'Accords sur les barrières techniques dans les accords commerciaux et du GATT. L'objectif d'article est non seulement de présenter l'analyse juridique d'un des sujets d'actualité en matière du commerce internationale, mais aussi de mettre en accent lacune qui peut paraître entre la libéralisation du commerce international et les politiques internes qui expriment des valeurs autre que l'élimination des barrières tarifaires.

This article examines the WTO-consistency of the EU labelling scheme on Genetically Modified Organisms (GMO). This regulation, requiring the labelling of authorised GMO food and feed placed on the market in the EU, presents serious economical as well as practical implications for US producers. At the heart of the debate are the different risk perceptions as well as regulatory approaches on both sides of the Atlantic. After a brief presentation of the European labelling scheme, the author examines its compliance with several agreements within the WTO international trading regime, namely the Sanitary and Phytosanitary Standards Agreement (SPS), the Technical Barriers in Trade Agreements (TBT) as well as basic GATT rules. Her analysis brings her to the conclusion that despite the non-application of the SPS agreement, the EU labelling scheme is in conformity of both the TBT and the basic GATT rules. The overall aim of the article is not only to present a legal analysis of one of the issues on the front burner of the global trade talks, but also to underline the difficulty in drawing the line between international free trade and domestic regulation expressing other values and objectives that affect trade as a non-tariff barrier.

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Introduction

The EU-US dispute over the EC regulatory framework concerning genetically modified organisms (GMOs) is at the forefront of global international trade talks. The US is the most important producer of GM seeds worldwide, mostly for maize and soybeans, and these products have quickly entered the food chain. US soy exports to the EU in 1998, for instance, were valued at \$ 1.5 billion, more than ten times the value of declining US beef sales due to their *Hormones case* dispute with the EU¹.

At the heart of the debate is a different approach to risk perception and regulation on either side of the Atlantic². The US considers foods containing or produced from GMOs to be substantially equivalent to traditional foods and has not put a different regulatory scheme for GMOs in place³. Acceptance of those foods among American consumers is high, and consumers' attitude towards GMOs is mainly indifference. In Europe, on the other hand, regulatory failures have undermined public confidence in regulatory institutions and policies, including GM food⁴. Consumers who have experienced several significant food safety scandals during the last couple of years⁵ are sceptical about any kind of novel food, and especially so for GMOs. They insist on the right to be informed about what they are eating. In Europe, agricultural areas are much closer to natural reserves than in the US, which causes increased fear of GMO spread into those areas. In addition, GM food is regarded as inherently different from traditional food⁶, with a separate regulatory scheme for GMOs put in place requiring prior approval by EC authorities of new GM seed varieties, food and feed. Import, as well as release of those GMOs into the environment, is therefore restricted. In addition, the EC requires mandatory labelling of authorized GMO food and feed placed on the market in the EU⁷.

While the US is verbally attacking both the content and application of the authorization and labelling procedures, this paper will focus only on the labelling aspects of the dispute. GMO labels could be costly to (American) producers in two ways: first, consumers might be deterred by labels that indicate GM food. Second, in

¹ Mark A. Pollack & Gregory C. Shaffer, "Biotechnology: The Next Transatlantic Trade War?" (2000) 23:4 *The Washington Quarterly* 41 at 47.

² For an in-depth analysis of this problem see Alasdair R. Young, "Trading Up or Trading Blows? US Politics and Transatlantic Trade in Genetically Modified Food" (2001) EUI Working Papers, RSC 2001/30; David Vogel, "Ships Passing in the Night: The Changing Politics of Risk Regulation in Europe and the United States" (2001) EUI Working Papers, RSC 2001/16; *Pollack & Shaffer, supra* note 2.

³ For a detailed analysis of the American approach see Young, *supra* note 3 at 7-9; Vogel, *ibid.* at 5-8; Charles W. Smitherman, "World Trade Organization Adjudication of the European Union-United States Dispute over the Moratorium on the Introduction of New Genetically Modified Foods to the European Common Market: A hypothetical Opinion of the Dispute Panel" (2002) 30 *Ga. J. Int'l & Comp.L.* 475 at 483-485.

⁴ Vogel, *supra* note 3 at 19.

⁵ For details see *ibid.* at 23-28.

⁶ Young, *supra* note 3 at 10.

⁷ For a description of the EU approach see *ibid.* at 9-14; Vogel, *supra* note 3 at 8-30; Smitherman, *supra* note 4 at 485-490.

order to provide for GMO-free food, costly separation mechanisms throughout the food-chain would have to be introduced⁸.

The US, Canada and Argentina started WTO dispute settlement proceedings against the EU about “Measures affecting the approval and marketing of biotech products” in May 2003⁹. Interestingly, labelling requirements were not mentioned in the request for consultations; only the approval moratorium, the approval procedures and the additional import bans by individual member states were explicitly made a part of the dispute and regarded as illegal by the applicants. Unless labelling is made part of the dispute later on, possibly as a measure affecting the marketing of biotech products, this omission may indicate the outcome of the internal US, Canadian and Argentinean legal analysis concerning labelling. Namely, that those requirements are WTO-consistent.

I. Summary of the EC labelling scheme

Currently, the mandatory EC labelling scheme is contained in several regulations and directives¹⁰. Domestic and imported food that is placed on the market and consists of, contains, or is produced from GMOs has to be labelled as such if any DNA or protein resulting from genetic modification is detectable in the product¹¹. The labelling scheme is thus a positive one, as the presence of GMOs has to be adequately announced on the label. Genetically-modified feed which contains GMOs also has to be labelled¹²; however, no labelling requirements are in place for feed produced from, but which no longer contains, GMOs. A proposal which was tabled in 2001 by the European Commission to unify and slightly enhance authorization as well as labelling

⁸ John Stephen Fredland, “Unlabel Their Frankenstein Foods!: Evaluating a U.S. Challenge to the European Commission’s Labeling Requirements for Food Products containing Genetically Modified Organisms” (2000) 33 Vand. J. Transnat’l L. 183 at 192.

⁹ *EC – Measures Affecting the Approval and Marketing of Biotech Products, Request for Consultations by the United States* (2003), WT/DS291/1; *EC – Measures Affecting the Approval and Marketing of Biotech Products, Request for Consultations by Canada* (2003), WT/DS292/1; *EC – Measures Affecting the Approval and Marketing of Biotech Products, Request for Consultations by Argentina* (2003), WT/DS293/1 (The measures are deemed inconsistent with the SPS Agreement, GATT, the Agriculture Agreement and the TBT Agreement).

¹⁰ EC, *Council Regulation 258/97 of 27 January 1997 concerning novel foods and novel food ingredients*, [1997] O.J.L. 43/1; EC, *Council Regulation 1139/9 of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC*, [1998] O.J.L. 159/4 (as amended by EC, *Commission Regulation 49/2000 of 10 January 2000 amending Council Regulation (EC) No 1139/98 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC*, [2000] O.J.L. 6/13 [Council Regulation 1139/98]); EC, *Council Regulation 50/2000 of 10 January 2000 on the labeling of foodstuffs and food ingredients containing additives and flavourings that have been genetically modified or have been produced from genetically modified organisms*, [2000] O.J.L. 6/15; EC, *Council Directive 2001/18 of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC*, [2001] O.J.L. 106/1 [Council Directive 2001/18].

¹¹ *Council Regulation 1139/98, ibid.*, art. 2, 2.

¹² *Council Directive 2001/18, supra* note 11.

requirements has not yet been adopted¹³. According to this proposal, all products that need permission must be GMO-labelled. That means especially that products, such as food and feed, which are produced from GMOs but do not contain any DNA or protein resulting from genetic modification, will be included in the labelling requirements. In order to accommodate technical difficulties arising from minimal accidental GMO amounts in products, a tolerance threshold will be introduced at 1 per cent of the product¹⁴.

II. WTO-consistency of the EC labelling requirements

The WTO-consistency of the GMO labelling requirements put in place by the EC must be determined by reference to the Sanitary and Phytosanitary Standards Agreement (SPS Agreement), the Technical Barriers in Trade Agreement (TBT Agreement) and GATT rules. Both the SPS Agreement and the TBT Agreement operate independently from GATT and hence do not require a violation of the latter. As well, according to section 1 (5) of the TBT Agreement, this agreement is subsidiary to the SPS Agreement. As none of the agreements has been concluded with the recent developments of biotechnology in mind¹⁵, the outcome of this analysis is by no means certain; to this day neither a panel nor the Appellate Body (AB) have ruled on a dispute concerning GMOs.

A. SPS Agreement - threshold test

The test for determining whether the European GMO labelling scheme is deemed a “sanitary and phytosanitary measure” according to art. 1 (1) of the SPS Agreement and therefore covered by the SPS Agreement is crucial for the outcome a possible dispute may take¹⁶. In the SPS Agreement, measures have to be explicitly based on scientific risk assessment, with SPS measures defined in paragraph 1 of Annex A of the SPS Agreement. Such measures are taken, *inter alia*, “to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs” or to protect against “pests, diseases, disease-carrying organisms or disease-causing organisms”. SPS measures also include labelling requirements “directly related to food safety”.

¹³ Proposal for a Regulation of the European Parliament and of the Council on genetically modified food and feed, COM/2001/0425 final - COD 2001/0173, 2001 OJ (C 304 E), 221.

¹⁴ *Ibid.*, art. 6.

¹⁵ Arthur E. Appleton, “The labeling of GMO products pursuant to international trade rules” (2000) 8:3 N.Y.U. Envtl. L.J. 566 at 578 (with regard to the TBT agreement).

¹⁶ This test is not well covered in the literature dealing with GMO labeling/WTO issues, as most authors concentrate on substantive issues arising under the relevant agreements without deciding which of them should be applied. See, for instance *ibid.* at 571-574; Smitherman, *supra* note 4; Robert Howse & Petros C. Mavroidis, “Europe’s evolving regulatory strategy for GMOs – the issue of consistency with WTO law: of kine and brine” (2000) 24 Fordham Int’l L.J. 317; Peter W.B. Phillips & William A. Kerr, “The WTO Versus the Biosafety Protocol for Trade in Genetically Modified Organisms” (2000) 34:4 J. World Trade 63; Fredland, *supra* note 9 at 211.

There are two major problems with GMO labelling in relation to this definition: first, the risks enumerated do not include GMOs. This can be overcome by a broad interpretation of the risks like “disease-causing organisms”. The view that the SPS Agreement is not confined to the standard bacteria, toxin and spoilage-type situations is supported by the panel and ABs willingness to apply the SPS Agreement in the *Hormones* case¹⁷. Growth hormones result in an alteration of natural, inherent processes similar to transgenic modification; the SPS Agreement can therefore apply to GMO measures. Second, and most importantly, the decisive question has to be: “is the labelling being undertaken for the protection of human health or the environment or simply to inform consumers?”¹⁸ If there is no health or environmental objectives, the SPS Agreement will not apply. Labelling differs considerably from the issue of the import ban on beef treated with hormones decided in *Hormones*¹⁹. This is because labelling provides information and relies on market forces, but does not prohibit the products from being imported and sold for health reasons. The latter reason was the case in *Hormones*, where the ban was considered to be an SPS measure.

To answer the above question, one must look at the EC regulation of GMOs as a whole, which reveals a two-step approach. In order to exclude risks to the environment or to human health, the release into the environment and the placing on the market of GMO varieties first has to be approved by EC authorities carrying out a risk assessment²⁰. Release or marketing will be allowed only when this assessment (undertaken from a precautionary perspective, which means that even the slightest possible risk will be taken into account) qualifies the GMO-containing seed or product as safe. This authorization procedure is expressly undertaken for health and environmental reasons and may result in an import ban for unapproved GMOs. It is comparable to the import ban on beef imposed in the *Hormones case* and which constituted an SPS measure. The labelling requirement then applies as a second step, and only for the approved GMOs.

¹⁷ *EC - Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States)* (1998), WTO Doc. WT/DS26AB/R (Appellate Body Report) [Hormones USA ABR] and *EC - Measures affecting meat and meat products (Hormones) (Complaint by Canada)* (1998) WTO Doc. WT/DS48/AB/R (Appellate Body Report) [Hormones Canada ABR]; *EC - Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States)* (1996) WTO Doc. WT/DS26/R (Panel Report) [Hormones USA PR]; *EC - Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada)* (1996) WTO Doc. WT/DS48/R (Panel Report) [Hormones Canada PR]; Rex J. Zedalis, “Labeling of Genetically Modified Foods, The Limits of GATT Rules” (2001) 35:2 J. of World Trade 301 at 342.

¹⁸ *Ibid.* at 342 (raises the “question of whether measures that simply attempt to inform consumers of the existence of GMO content can be characterized as measures of a ‘sanitary or phytosanitary’ nature and, thus, fall within the scope of the SPS Agreement”).

¹⁹ *Hormones USA ABR*, *supra* note 18; *Hormones Canada ABR*, *supra* note 18, *Hormones USA PR*, *supra* note 18, *Hormones Canada PR*, *supra* note 18.

²⁰ Proposal for a Regulation, *supra* note 14 (Explanatory Memorandum, para. 2 c) reads: “In order to ensure a high level of human and animal health and protection of the environment, this proposal contains the following authorization criteria for genetically modified food and feed: - must not present a risk for human health, animal health or the environment [...]” Where there are no differences to existing EC legislation, I refer to the Commission proposal and its explanatory notes because it provides a unified, clear, instructive and hence better picture of EC legislation and its motives).

Reasons indicated for labelling are: (1) bringing coherence to Community legislation and avoiding trade barriers within the internal market caused by different labelling requirements in the EU member states; and (2) consumer protection: granting them the right to know and to decide what they are going to buy and eat; making it possible for them to take ethical, environmental and health considerations into account²¹. According to the EC, this labelling scheme would be in line with existing traditional labelling practices: producers already have to indicate in detail the composition and characteristics of food and feed so that consumers are able to make informed purchasing decisions²². For instance, instead of labelling the product as containing “soybeans”, it has to be labelled as containing “genetically modified soybeans”²³. The main objective of the labelling is thus not the protection of human health or the environment, both of which are achieved by the preliminary authorization process, but rather of granting consumers the right to know²⁴. Furthermore, mere labelling would not obtain the objective of protecting humans or animals from health risks because the products are already on the shelves and not everybody carefully reads the labels²⁵.

What, then, is “labelling directly related to food safety?”²⁶ A convincing interpretation is, for instance, an expiration date or warnings such as “should not be consumed by infants less than two years old”. In addition, labelling always has to fulfill one of the objectives enumerated in Annex A, paragraph 1 (a) to (d), those being the protection of the environment or health, neither of which is the case here.

The question to be answered is, therefore, whether secondary health or environmental objectives or effects exist and whether they are sufficient to trigger SPS applicability. I suggest a balancing approach to this question based on the nature of the objectives and, to a lesser extent, the effects and their relative importance for the regulating WTO member.

The EC wants the labels to provide information for people with allergies in order to make them aware that the product has a different composition from what they know²⁷; this is a secondary health objective. However, any traditional product labelling concerning ingredients and composition would serve this purpose, too. The

²¹ *Ibid.* (Explanatory Memorandum, para. 5 “The objective of the harmonized and comprehensive labeling requirements proposed is to respond to an overwhelming need to enable the consumer to make an individual choice and to ensure that consumers are not liable to be misled, and thereby to foster increased public confidence and acceptance of genetically modified foods”).

²² *Ibid.* (Explanatory Memorandum, para. 5).

²³ *Ibid.* at art. 14.

²⁴ See also Appleton, *supra* note 16 at 567: “the most important argument in support of GMO labeling [...] is the ‘consumer’s right to know’ ”.

²⁵ Zedalis, *supra* note 18 at 342-343.

²⁶ *Ibid.* at 344 (Points out that “[t]he implication is that, in the absence of GMO labeling being directly linked to issues of food safety, labeling would fall beyond the ambit of the Agreement’s rules”).

²⁷ Proposal for a Regulation, *supra* note 14 (Explanatory Memorandum, para 5 “[T]he consumer should additionally be informed about any characteristic or property which render a food not equivalent to its conventional counterpart as regards composition, nutritional value or nutritional effects, intended use of the food, health implications for certain sections of the population and in cases where food may give rise to ethical or religious concerns”).

objective is thus not to warn against GMOs specifically but rather to list the ingredients in as detailed a way as possible in order to ensure that hypersensitive consumers are able to detect substances they are allergic to. This suggests the health objective is not specifically GMO-related and should be treated like the health objectives generally required for food and product labels.

All those labels lay down mainly product characteristics and are therefore technical regulations covered by the TBT Agreement. Health may be a legitimate purpose for such regulations, see section. 2 (2) of TBT Agreement.

As any ingredient in a product may cause allergies, any other interpretation would render the product-characteristic labelling of the TBT Agreement void, which would go against the principle of *effet utile*.

Also, labelling gives consumers the possibility of making choices for their own health protection because no long-term studies regarding the impact of GMOs on health currently exist. Similarly, consumers might decline to buy GMO food for environmental reasons and, by consuming less GMOs, force farmers to grow less GMO seeds and hence contribute to the protection of the environment²⁸. The health and environmental effects that may result from the consumers' right to choose – by not consuming GMO food - are not intended by the EC as official objectives. Instead, labelling is used to increase the acceptance of EC food and feed by consumers²⁹. These products should not be forced on consumers; rather, they should have a chance to decide for themselves whether to purchase GMO-containing food.

Another line of argumentation to establish health reasons for labelling is followed by *Howse & Mavroidis*³⁰. They argue that labelling permits monitoring of the post-release effects of GMO products, and therefore contributes to the protection of human health and the environment. But this argument appears in a different context and monitoring is not the objective primarily intended by the EC. In addition, *Howse & Mavroidis* also regard compulsory GMO labelling as a technical regulation in accordance with art. 2.2 of TBT³¹.

The analysis of secondary health objectives and effects shows that, on the one hand, the EC has no specific GMO-related health or environmental objectives; there might only be unintended effects. In addition, those objectives/effects are very much subordinate to the primary goal of providing for the consumers' right to know. If, in a bundle of objectives/effects, one is more predominant than others, which are also only slightly relevant, the most important goals should be to determine the threshold test and which WTO rules will be applied. This would contribute to adequately addressing the real issues of the problem in legal analysis. Due to the lack

²⁸ Both points are being raised by Fredland, *supra* note 9 at 212-213; He suggests, however, that the actual purpose of the EC regulation therefore is to protect human life, health and the environment from some sort of risk.

²⁹ See Proposal for a Regulation, Explanatory Memorandum, *supra* note 22; Willy De Greef, "Regulatory Conflicts and Trade" (2000) 8:3 N.Y.U. Envtl. L.J. 579 at 583.

³⁰ See Howse & Mavroidis, *supra* note 17 at 342.

³¹ *Ibid.* at 320.

of relevant primary environmental or health objectives in the EC GMO-labelling scheme - in contrast to the authorization scheme – it is not considered an SPS measure; hence the SPS Agreement does not apply. Of course, the decision is a close call and arguments can be found in favour of it being an SPS measure, such as the case of monitoring and protection for people with allergies. But the labelling requirements have a good chance of surviving the stricter tests of the SPS Agreement (scientific evidence and risk assessment). *Howse & Mavroidis*, in their detailed analysis of the entire EC regulatory scheme concerning GMOs, show its probable consistency with the SPS Agreement³².

B. TBT-Agreement

1. APPLICABILITY

As GMO-labelling is mandatory and not undertaken for health or environmental purposes, it is a technical regulation according to Annex 1, paragraph 1, of the TBT Agreement, which includes “labelling requirements as they apply to a product, process or production method”. The current legislation, in which labelling is required only if genetically-modified proteins or DNA are still detectable in the product, deals with product characteristics applying to a product and which are not merely characteristics of the production process³³. Therefore, the TBT Agreement applies. This was the understanding of the EC: the notice of its draft GMO-labelling Regulation 1139/98, for instance, was filed with the WTO’s TBT Committee³⁴. Part of the new regulation, which also requires labelling for products in which no GMOs can be detected but which have been processed from GMOs, may prove to be problematic. This is because it might be a regulation related solely to the production process. In contrast to the GATT, however, the TBT Agreement explicitly applies to regulations concerning “product characteristics *or* their *related* processes and production methods”³⁵. “Related” means that a process and production method (PPM) has to restrict trade or competition in products, and that the domestic regulation has to deal with the PPM as affecting trade in goods, not services or intellectual property. Here, the trade in goods is regulated and affected, so the PPM is related. In addition, products that are processed with only the catalyst help of GMOs, but not stemming from them, do not have to be labelled³⁶. Hence, the new labelling requirements would also fall under the TBT Agreement³⁷.

³² *Ibid.* at 323 ff. (They conclude at 348: “The basic structure of EU regulation as reflected in the amended directive raises few serious risks of violating the SPS Agreement”).

³³ See Gabrielle Marceau & Joel Trachtman, “The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade *A Map of the World Trade Organization Law of Domestic Regulation of Goods*” (2002) 36:5 *J. World Trade* 811. Appleton, *supra* note 16 at 574.

³⁴ *Technical Barriers to Trade Agreement*, Annex 1, paragraph 1, Italics by the author [TBT Agreement]; see the report of the Appellate Body in *EC – trade description of sardines* (2002), WT/DS231/AB/R at para. 176 (Appellate Body Report): “These product characteristics may be intrinsic, or they may be related to the product”.

³⁶ Proposal for a Regulation, *supra* note 14 (Explanatory Memorandum, para. 3: “The proposed Regulation would cover products ‘produced from a GMO’, but not products ‘produced with a GMO’.

2. ART. 2 (1) OF THE TBT AGREEMENT

Art. 2 (1) of the TBT Agreement contains a most-favoured nation (MFN) and a national treatment (NT) obligation; its purpose being to prevent protectionism. The GMO-labelling applies to domestic products and imported products from all countries, so that neither the MFN principle nor the national treatment obligation is, on its face, violated (*de jure*). Problematic could be an actual (*de facto*) discrimination, as the EC domestic production of GM foods is far less than US production and exports. Treatment of US imports “must not be less favourable than that accorded to like products of national origin”. The first question, thus, is whether natural food or feed and GM food or feed are “like products”. Art. 2 (1) of the TBT Agreement is similar to art. III: 4 of GATT, but it lacks a defence provision like art. XX of GATT, which makes a narrower interpretation of “likeness” appropriate³⁸. Criteria to determine whether products are “like” are: “(i) the properties, nature and quality of the products, (ii) the end uses of the products, (iii) consumers’ tastes and habits – consumers’ perceptions and behaviour – in respect of the products, and (iv) the tariff classification of the products”³⁹. Arguments in favour of likeness between GM and non-GM food are that they have the same end-use and that there is no scientific evidence GM food differs from naturally-produced food. Some have argued that different labelling rules takes place only on the basis of the process or production method by which the food or feed is produced. Genetic modification is, according to this line of reasoning, a mere production method that does not affect the end product as such⁴⁰. However, process-related distinctions do not *per se* exclude likeness of products, especially in the case where they are product-related, as here, and not mere policies⁴¹.

The former implies that a proportion of the end product, whether it is the food or feed itself or one of its ingredients, has been derived from the original genetically modified material. The latter is produced with the assistance of a genetically modified organism, but no material derived from the genetically modified organism is present in the end product”).

³⁷ This analysis is in line with the general interpretation of the TBT Agreement’s applicability to PPMs (process and production methods) by Marceau & Trachtman, *supra* note 34 at 43-44 (“it seems that the TBT Agreement would cover PPM labels”. They argue that characteristics of a product do not necessarily have to be physically reflected in it. In addition, “related” seems to be satisfied at least by PPMs that have a “physical relation” to the product. But it could also mean just to exclude broader policy considerations that are not concerned with the production of specific products).

³⁸ *Ibid.* at 12 (They also suggest the sixth preambular paragraph of the TBT Agreement and the necessity requirement of Art. 2.2 of the TBT Agreement as reasons for a narrow interpretation).

³⁹ *EC– Measures affecting asbestos and asbestos-containing products* (2001), WTO Doc. WT/DS135/AB/R at para. 101 (Appellate Body Report).

⁴⁰ Vogel, *supra* note 3 at 6 (The basis for regulatory American policy is that “the product of genetic modification and selection constitutes the primary basis for decisions and not the process by which the product was obtained”).

⁴¹ Marceau & Trachtman, *supra* note 34 at 40-44.

On the other hand, consumer preference in the EU⁴², and the importing and regulating market that determines these preferences, strongly indicates that the products are not considered to be like products. GM foods encounter strong ethical, environmental and health concerns among European consumers and are not seen as equal to non-GM foods. For Europeans, a GM tomato does not replace a naturally grown tomato. Insofar, there is little cross-elasticity of demand. Actually, the US uses this argument to show how greatly their imports will be affected by the labelling requirement: they argue that the labelling is stigmatizing American GM food for consumers who would probably buy much less of it than if there was no labelling.

A critique to the consumer preference argument is that those preferences are created by the EC regulation⁴³. This reasoning, however, overlooks the fact that a preference for natural foods already exists; its exercise is merely made possible by labelling. Furthermore, especially when GMOs are still detectable in the product, the labelling requirement is not only a process regulation. The determination of likeness has to be undertaken on a case-by-case basis using a balancing approach. In this case, there is good reasons why the consumer preferences should outweigh all other criteria⁴⁴: the objective of the regulation is to give them a choice. In addition, even if the aims-and-effects test is not officially applied, the measure is not of a protectionist nature. European GMO producers also strongly opposed the labelling requirements, and the measure has so far not increased European market share in the relevant product areas. For soybeans, there is no relevant domestic industry; for maize, imports have been minimal, anyway⁴⁵.

The tendency of both the panel and AB is to assume likeness if the measure does not seem protectionist. Therefore, I will assume GMO food and feed is unlike natural food and feed in the European market. (That doesn't make sense, because the author previously mentioned that the measures are not strongly protectionist, therefore shouldn't the assumption be that there is likeness?)

Even if the products are regarded as "like" by downplaying consumer preferences, the GMO labelling requirement would probably not lead to "less favourable treatment", which means the "modification of competition to the detriment of the imported products"⁴⁶. As all products already have to be labelled with detailed

⁴² See Annelies Verdurme & Jacques Viaene, "Wahrnehmung der Verbraucher im Bereich Lebensmittelsicherheit: Beispiel genmanipulierte Lebensmittel", online: European Commission Joint Research Centre <http://www.jrc.es/home/report/report_main_gr.html>.

⁴³ On this problem in general see Marceau & Trachtman, *supra* note 34 at 10-11.

⁴⁴ See also Howse & Mavroidis, *supra* note 17 at 319 (with regard to Art. III (4) GATT: "In such a case, an appropriate reading of Art. III (4) of the GATT would accept that these products are 'unlike', if only because there are differences between them that will likely matter a great deal from the perspective of the consumer").

⁴⁵ Vogel, *supra* note 3 at 13-15.

⁴⁶ *Korea – Measures affecting imports of fresh, chilled and frozen beef (Complaint by the United States)* (2000), WT/DS161/AB/R (Appellate Body Report) and *Korea - Measures affecting imports of fresh, chilled and frozen beef (complaint by Australia)* (2000), WT/DS169/AB/R at para.137 (Appellate Body Report); Marceau & Trachtman, *supra* note 34 at 12 (suggest narrow interpretation of "less favorable" for the TBT Agreement due to the lack of availability of the Art. XX defense. Together with the narrow interpretation of likeness this should serve to defend non-protectionist domestic policy).

ingredients lists, the additional information required for GMOs would not be more burdensome. It would not require additional costs to place a “May contain GMOs” label on the product. Only the “GMO-free” label would be costly, due to a guarantee of the separation of GMOs and non-GMOs during all transportation and manufacturing. But if the products are regarded as like, why would the producers care about a “GMO-free” label? The answer is simple: producers care about such a difference because of the decisive consumer preferences! Hence, there is no *de facto* discrimination with regard to art. 2.1 of the TBT-Agreement.

3. ART. 2 (2) OF THE TBT-AGREEMENT

Labelling must not be more trade-restrictive than necessary and must also fulfill a legitimate objective. The list of objectives provided in art. 2(2) includes neither the consumers’ right to know nor a unification of laws, but the list is not meant to be exhaustive. Such a legitimate objective is necessary to prohibit disguised protectionism. As GATT art. XXIV allows for regional arrangements and customs unions, the elimination of barriers to trade in the EU internal market should constitute a legitimate objective. After the TBT Agreement was adopted, the consumers’ right to know has increasingly gained significance in the European Union due to recent regulatory failures. As the list is open-ended in order to include new objectives, this one should be deemed legitimate⁴⁷.

The labelling requirement is trade restrictive in two ways⁴⁸: first, production costs will be increased for US producers if they want to carry a competitive “GMO-free” label, due to the total separation of GMO and non-GMO products that would be necessary⁴⁹. Also, there might be technical problems in making a product 100 per cent free of GMOs, so that it is impossible to reach this level of purity. However, the EC was aware of this problem and therefore introduced a one per cent (1%) GMO tolerance threshold for GMO-free food and feed in its new legislation⁵⁰. The second reason that a labelling requirement is trade restrictive is that GMO labels might cause consumers to not buy US food and feed. There is no alternative to labelling that is less trade restrictive and which also informs consumers in a comprehensive way. Labelling is regarded as less trade restrictive than import bans, for instance⁵¹. Also, the choice is the consumers’, not government-induced. Voluntary labelling, and labelling requirements for only domestic producers, would not include all products,

⁴⁷ Appleton, *supra* note 16 at 576 (cites a US official who thought it unlikely that the US would argue that the Consumer’s right to know was not a legitimate TBT objective).

⁴⁸ C. Ford Runge & Lee Ann Jackson, “Labelling, Trade and Genetically Modified Organisms” (2000) 34:1 J. World Trade 111 at 114 (argue even that “labeling is a ‘market-based’ alternative, which requires no new regulatory authority or trade restrictions”).

⁴⁹ Phillips & Kerr, *supra* note 17 at 74.

⁵⁰ Howse & Mavroidis, *supra* note 17 at 345 “Finally, in order that labeling requirements not become and unnecessary impediment to market access, in cases where ascertaining whether there are ‘Adventitious’ traces of authorized GMOs in a particular product is technically unfeasible, the amended directive allows member states to establish a minimum threshold, below which labeling is not required”.

⁵¹ *Ibid.* at 345.

would not eliminate consumer concerns and would therefore be less effective. In addition, domestic-only labelling would still make US food suspicious and would probably force US companies to label their products, too.

The additional balancing test triggered by the “risk of non-fulfillment” leads to an analysis of the importance of the values and policies protected and the extent to which a specific measure contributes to the end goal⁵². The consumers’ right to know is very important in Europe, especially when it is linked, to individual health, ethical and environmental concerns, as is the case here. Mandatory labelling contributes perfectly and only to that end. The labelling scheme is thus consistent with art. 2 (2) of the TBT Agreement.

4. ART. 2.4 , ART. 2.5 AND ART. 2.8 OF THE TBT-AGREEMENT

The EC labelling scheme has to be based on relevant international standards, if they exist. Such a standard is still under consideration in the Codex Alimentarius⁵³, Section 18 of the *Cartagena Protocol on Biosafety*⁵⁴ requires parties to introduce “may contain” labels for GMOs⁵⁵. The Protocol is not yet in force, and the US is not a party, but supports it. A “standard”⁵⁶ does not have to be a binding treaty, so the Protocol’s legal status and membership is not a problem. Hence, either the *Protocol* is accepted as a (rudimentary) standard, upon which the EC undoubtedly based its regulation, or there is no relevant standard at all, which means that the EC does not have an obligation under Art. 2 (4) of the TBT Agreement. If the Protocol is considered to be an international standard, the EC scheme is therefore presumed to not create an unnecessary obstacle to international trade in the sense of art. 2.2 of the TBT Agreement.

It is argued that, because the GMO-labelling is based on descriptive characteristics rather than performance, the scheme is inconsistent with Art. 2.8 of the TBT Agreement. This opinion overlooks the fact that this rule only applies “wherever appropriate”. With regard to GMOs, it is the characteristics that cause consumer concern, therefore performance-based labelling would not be appropriate.

⁵² Marceau & Trachtman, *supra* note 34 at 20.

⁵³ The Codex Alimentarius Commission has established an Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology which is due to finish standards related to GMOs in 2004; See Howse & Mavroidis, *supra* note 17 at 353 (In 1999, the US, Canada and Argentina opposed a “Draft Recommendation for the Labeling of Foods Obtained Through Biotechnology” (including GMOs) requiring systematic labeling); Appleton, *supra* note 16 at 573-574 (Labeling is also under consideration at the Codex Committee on Food Labeling).

⁵⁴ *Cartagena Protocol on Biosafety*, 29 January 2000, 39 I.L.M. 1027 (adopted in the framework of the Convention on Biological Diversity).

⁵⁵ *Ibid.* at art. 18.2. (“Each Party shall take measures to require that documentation accompanying: (a) Living modified organisms that are intended for direct use as food or feed, or for processing, clearly identifies that they ‘may contain’ living modified organisms” The protocol was negotiated under the auspices of the Convention on Biodiversity).

⁵⁶ *TBT Agreement*, *supra* note 36, Annex 1 at para 2.

C. GATT

The analysis under GATT starts with Art. III: 4, which is very similar to Art. 2:1 of the TBT Agreement. I suggest the same outcome will apply for both, although “likeness” in Art. III: 4 of the GATT is slightly broader. With regard to process regulations, Art. III does not apply to regulatory distinctions; this is based on extra-territorial policy considerations that do not affect the products as such⁵⁷. This arguably is not the case here. But as the PPM issue is less clear under GATT than under the TBT, there might be a different outcome for the labelling of foods produced from, but no longer containing, GMOs. Those foods might be regarded by the panel as “like” natural products, but would still pass the “no less favourable” test, meaning Art. III would not be violated. I strongly favour one of these interpretations, as nowhere in GATT is it expressly stated that Art. III does not cover process regulations; this question should be solved by the likeness test⁵⁸. If likeness is established, the chapeau of art. XX would be decisive for the analysis⁵⁹.

D. Result

The EC labelling scheme would be covered by the scope of both the TBT Agreement and the GATT, and is therefore consistent with both.

* * *

This case highlights the difficulty in making a distinction between, on the one hand, international free trade and, on the other, domestic regulation which affects trade as a non-tariff barrier. When there is no protectionist objective, and the domestic industry does not benefit from the regulation, as is the case here, international trade law should be highly deferential to national sovereignty. This is especially so when the regulation directly affects consumers and their rights, and when those consumers have strongly urged such regulations.

The EC scheme has been developed and upheld due to a very public outcry against unlabelled GMO food. If the elected national officials were unable to respond to the sensitivities of their constituents – here, publicly-perceived health, environmental and ethical threats combined with a mistrust of the authorities’ competence – the global trading system would lose even more acceptance in civil society than it already has (I’m not sure that this sentence is supported. Who says that

⁵⁷ See Trachtman & Marceau, *supra* note 34 at 40-45.

⁵⁸ Alternatively, though, the rules concerning food no longer containing GMOs might be regarded by the Panel as a process regulation not covered by Art. III:4. Art. XI:1 would apply in this case and be violated. The only possibility for the EU to defend its policy would be to invoke Art. XX lit a, but it is rather uncertain whether the ethical considerations in favor of protection of the consumers’ right to know would fall under public morals.

⁵⁹ See Howse & Mavroidis, *supra* note 17 at 318 ff. for an analysis (They also discuss the relationship between the SPS Agreement and art. XX of GATT).

it has lost acceptance in civil society? It seems to be an arbitrary statement). It is only if an acceptable balance between trade and other values is achieved that there will be enough public support for further trade liberalization. (Again, to support this sentence the author should probably expand on the issue of public support instead of merely making an unsupported statement and leaving it). In this sense and from a policy point of view, the suggested solution of upholding the EC labelling scheme is convincing.

For the US, on the other hand, initiating panel proceedings does not seem to be the best solution. Although the outcome is by no means clear, and there is also a chance the panel might find in favour of the US, the EC would not likely change its policy. As core consumer interests and values are at stake, the EC would probably rather, as in the *Hormones* dispute, prefer to make compensation payments or retaliation than abandon its policy. Furthermore, the US exporting industry has started to realize that forcing their unlabelled GMO products onto the European market and “down the throats of European consumers” could cause a severe market backlash and strongly undermine their export interests⁶⁰. Some US companies have, therefore, switched their stance and now support the labelling of GM products in Europe⁶¹. It would be beneficial for both sides of the dispute if US authorities and producers could, over time, convince Europeans that GMO food is as safe as natural food.

⁶⁰ Pollack & Shaffer, *supra* note 2 at 49 and 53 ([...] “U.S. companies [...] realized that, as concerns over GMOs spread, they were losing ground not just in the marketplace, but on the public relations front as well”).

⁶¹ *Ibid.* at 50 (Montsano, for instance).