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

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Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.¹

—Oliver Wendell Holmes

With tempers flaring and tensions mounting, a collision seems inevitable between the United States and the European Union over the sale of new biotechnology food products in European market. Maintaining a de facto moratorium on the introduction of such products since 1998, the EU is trying the patience of Washington amidst US damage claims of over $600 million in lost exports resulting from the ban.² According to US Undersecretary of State Alan Larson, “after three years . . . patience is wearing out.”³ Claiming violations of World Trade Organization rules, US agricultural industry officials characterize the moratorium as a technical barrier to trade amongst a growing belief in the industry that World Trade Organization adjudication

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may be the only answer. Despite appeals for “urgent” action and increasing pressure by the Bush Administration on the European Commission to approve imports of crops manufactured with genetically-modified organisms (GMOs), the European Union seems resolute and impassable. Though the threat of litigation remains an ever increasing likelihood, EU officials are claiming that it will likely be at least two years before the moratorium can be lifted.

At a time of increased concerns regarding the US-EU alliance and the $500 billion annual trade relationship, officials from both sides are working diligently to resolve this dispute without resorting to the WTO. However, consent from member states of the EU, which presently insist on no changes to the de facto ban, seems unlikely. With the potential for an additional two years of waiting before the possible introduction of new genetically modified foods (GMFs) to the European market and the imminent additional damages the US agricultural industry will suffer as a result of lost exports, adjudication before a WTO Dispute Panel seems to be the last alternative available for the US. As the convening of such a panel is all but inevitable, this Comment will analyze the legal issues and challenges associated with this dispute through a hypothetical panel report that may likely resemble the ultimate decision of this case, if ever adjudicated. Part I of the report will analyze the conflict through the background of GMFs and their positive and negative uses, as well as legislation controlling such products in the EU and US, while Part II will set forth the applicable law found within WTO treaties and other international conventions. Part III will apply this law to the facts of the case through an analysis of the competing precautionary principle and scientific approach, and Part IV will set forth the likely ruling of the panel. Finally, this Comment will conclude with a call for the EU to conciliate and resolve this dispute before this matter is brought before a WTO Dispute Panel.

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5 See id.; Geitner, supra note 3.
6 See id.
7 See Europe's Ties With America: New Cause for Concern, INT’L HERALD TRIBUNE, Aug. 16, 2001, available at 2001 WL 4857462 (citing European disapproval of US President George Bush's handling of issues such as the Kyoto Protocol, as well as the possibility of a post-Cold War decoupling of the US from the EU, as causes for concerns over the state of the alliance). See also Irwin M. Stelzer, Is Europe a Threat?, COMMENTARY, Oct. 1, 2001, available at 2001 WL 25550690.
8 See Lambrecht, supra note 2.
9 See Geitner, supra note 3.
EUROPEAN UNION—DE FACTO MORATORIUM ON THE APPROVAL OF NEW GENETICALLY MODIFIED FOOD PRODUCTS HYPOTHETICAL REPORT OF THE PANEL

INTRODUCTION

The United States requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article XXII:1 of the General Agreement on Tariffs and Trade (GATT) regarding the de facto ban imposed upon importation of certain genetically modified products by the European Union.

I. BACKGROUND

In what represents perhaps one of the most polarized and contentious debate in international politics, the ongoing scientific and political dialogue over the safety and benefits of GMOs and GMFs finds its essence within national and cultural differences. Although little evidence exists demonstrating these products are dangerous to humans or the environment, and the National Academy of Sciences recently reported that it could find no existing evidence of crops and food products manufactured with GMO technology posing a threat to humans via consumption, multifaceted controversies still surround the assessment of the risks and benefits of GMOs and GMFs. Supporters argue such products are as safe, if not safer, than foods on the

10 For posterity, the author desires to warn any reader of this Comment of the possibility this case may be decided at the time of one’s reading, likely causing much of this argument to be a mute point. This is a hypothetical analysis of what the author believes the decision will be, not what such a decision is.


14 See Committee on Genetically Modified Pest-Protected Plants, National Research Council, Genetically Modified Pest-Protected Plants: Science and Regulation (2000), available at http://www.nap.edu/books/0309069300.html. In addition, the report sets forward recommendations for further study as to environmental impact. See id.
market not making use of such technology, while opponents counter with general themes arising out of a need to proceed with such technology with caution and care. While GMFs are commonplace and widely accepted in the United States, widespread European disfavor with such foods arises out of previous encounters with food contamination and fears of relapses caused by these so-called "Frankenstein" foods. This section reviews the arguments for and against the use and consumption of GMFs.

A. The Origin of the GMO Issue Before the WTO Dispute Panel

The subject of this proceeding before a WTO Dispute Panel involves the de facto failure of the EU to authorize any new genetically modified food product since March of 1998. Responding to growing concerns over potential health problems associated with imported food, largely driven by outbreaks of "mad cow disease," the foot and mouth disease crises, and other "bad food" phenomenon associated with food cultivation and consumption, the European Union opted to suspend approvals under Directive 90/220 of certain genetically modified crops. In May of 1999, relying upon a study indicating that pollen from a bioengineered form of corn, bacillus thuringiensis (Bt), posed a potential threat to monarch butterflies, the European Commission froze the approval process for hybrid seeds of this genetically modified product, in spite of previous approval by EU scientists and findings that such seeds presented no threat to human health or the environment. Soon thereafter, the European Council of Environment Ministers ruled out the approval of any GMO applications until revisions were made to Directive 90/220, approved by the European Parliament and implemented among the Member States. The non-retroactive effect of the ban allows for GMO products approved before 1998 to remain in the European market; however, the restriction on the approval of new products over the past four years,

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20 See EU Environment Ministers Strengthen De Facto Ban on GMOs; WTO Fight Looms, 22 INT’L ENV’T REP. (BNA) 567, 568 (1999).
coupled with the suspension of certain genetically modified corn products, continues to impair the United States agricultural sector, the world’s largest exporter of GMO products. Lost corn exports alone resulted in about $600 million in damages to US farmers.  

B. Defining Biotechnology

In the same way the benefits and dangers of GMO products and GMFs are subject to much debate, such remains true in arriving at a consensus on a definition of "biotechnology." Traditional agricultural modification of microorganisms dates back centuries and includes the production of products such as beer, wine, and bread, where through fermentation, the harnessing of organisms such as enzymes catalyze chemical reactions. However, the modern debate stems from the new form of biotechnology, which allows scientists to fuse genes on a cellular level, rather than organismal. The scientific community generally characterizes modern agricultural biotechnology or GM technology as using recombinant deoxyribonucleic acid ('rDNA') methods to alter plant characteristics through a variety of methods of inserting genes from one organism to another. Utilization of agricultural biotechnology results in plants characterized as GMOs, which can be processed further to make other foods. GMFs include the foods derived using GMOs, including both the GMO and foods resulting from further processing. Examples of well known GMOs include the FlavrSavr™ tomato, which

21 See Lambrecht, supra note 2.
23 See id. at 261-62. Other forms of traditional biotechnology include selective breeding procedures creating novel plants and animals. See id.
24 See id.
26 See Lietz, supra note 25, at 414; MCHUGHEN, supra note 25, at 9.
27 See id. at 11-12; Lietz, supra note 25, at 414.
maintains a longer shelf-life from a GM gene, and Bt corn, modified with a Bacillus thuringiensis gene that produces a protein toxic to some insects.  

Varying definitions of biotechnology exist amongst the United States and European Union, largely resulting from the varying scientific evidence/risk assessment method and precautionary approaches utilized by these respective parties. In the US, applying the scientific evidence/risk assessment method, the Food and Drug Administration defines genetic modification as involving "the alteration of a plant using any technique, new or traditional." Conversely, representing the precautionary approach, the EU maintains a distinct category of agricultural products, namely "novel foods," which includes "foods and food ingredients containing or consisting of genetically modified organisms, foods and food ingredients produced from but not containing genetically modified organisms and certain foods and food ingredients from a production process not currently used, among other possibilities." For purposes of this analysis, biotechnology will be defined as the process used "to isolate genes from an organism, manipulate them in the laboratory and inject them into another organism."

1. Benefits of GMOs

Supporters of GMOs and biotechnology assert several benefits arising from their use serving both environmental and economical means. Of primary importance, proponents base their arguments on the efficiency and productivity inherent in the transfer of favorable characteristics into new plants. Through higher food production per acre of farmland, proponents believe GMOs will enable farmers to feed a growing population while the reducing "ecological space" farmlands occupy on scarce arable land. In addition, GMO supporters argue biotechnological engineering will lower the levels of environmental impacts and increase agricultural yields.

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28 See Lietz, supra note 25, at 414; McHughen, supra note 25, at 108.
33 See id.
agro-chemicals used on farmlands given genetic modification’s capacity to implant pest resistance genes into many types of crops. Essential benefits may be derived from these limits on pesticide use, namely the mitigation of undesirable environmental damage caused by such products, as well as a conservation of natural resources utilized in such activities, such as fossil fuels necessary for farm equipment operation.

In addition to environmental and economic benefits, GMOs are believed to offer varying health benefits through enriched food profiles and improved pharmaceutical development. Certain GMFs contain vaccines for diseases, enhanced vitamins and minerals, and less fatty acids. Specific GMFs with enhanced health benefits include: (1) golden rice, enriched with beta-carotene to prevent blindness and increase disease resistance; amplified bananas with the Hepatitis B vaccine, which cuts price per dosage from $125.00 to $0.10, and avoids refrigeration, transportation and sterilization costs; and, (3) wheat and peanuts that no longer contain allergenic properties.

2. Potential Risks of GMOs

Contrasting the miraculous advancements promised by proponents of the use of agricultural biotechnology, opponents cite several threats associated with GMOs that merit further scientific investigation. For starters, genetic modification may potentially transfer genes through a natural process of hybridization from pesticide-resistant crops to other wild or semi-domesticate relatives, spurring the creation of uncontrollable “superweeds.” In addition,
opponents attempt to undermine the benefit of pesticide reduction, citing the potential for insect pests to develop immunities to crops with engineered toxins. Evidence supporting such an argument arises from laboratory and field tests where insects targeted by the toxins of Bt corn developed a resistance. Further, concerns exist over threats posed to beneficial insects, such as the Monarch butterfly, as well as the potential harm in human consumption, specifically relating to allergic reactions and long-term toxic effects, which fuel the opposition's cry for further research, testing the environmental and consumption impact of GMOs and GMFs.

Accompanying scientific and environmental arguments against the use of biotechnology, additional ethical and social concerns highlight the debate. For example, some opponents argue that all technology is unnatural and unacceptable, while others express concerns over the inclusion of animal genes in GMOs and GMFs, leading to disparities in moral and religious beliefs. In addition, GMO technology domination by large corporations raises fears that the realization of profits will result in legitimate risks being ignored, as well as a general perception that existing regulatory agencies provide no meaningful oversight for biotechnology and food development.

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41 See Alteri, supra note 40, at 34.
42 See id.
43 See Ferber, supra note 13, at 1663-65. In one study, scientists reported that Bt. corn adversely affected Monarch butterflies, causing caterpillars to eat less, grow more slowly, and suffer a higher mortality rate than larvae reared on leaves dusted with corn pollen from non-genetically modified corn. See John E. Losey et al., Transgenic Pollen Harms Monarch Larvae, 399 Nature 214 (May 20, 1999). Cf Amended Revised Response to EPA's Data Call-In Notice Concerning the Potential Adverse Effects of Bt Corn on Non-Target Lepidopterans (2001), available at www.epa.gov/pesticides/biostuff/otherdocs/Executive%20summary%20and%20preface.pdf.
47 See id. at 8. For a more thorough discussion of the threats of biotechnology, see York, supra note 31, at 432; Lietz, supra note 25, at 415-16.
C. Domestic US-EU Regulations of GMOs

1. United States Regulatory Scheme

No major statutes in the United States specifically address biotechnology. The Coordinated Framework for Regulation of Biotechnology provides the foundation for the general regulation of GMOs, asserting that foods and drugs derived through the use of modern biotechnology are to be regulated under the same statutory framework as similar products utilizing related techniques.\(^48\) This framework establishes several general principles: regulation of biotechnology by existing federal law;\(^49\) final product regulation of goods produced through biotechnology, as opposed to regulation of the process employed to produce the goods;\(^50\) case-by-case determination of the safety of biotech products;\(^51\) and, coordination among all government agencies involved in biotech regulation.\(^52\) Thus, a fragmented process exists for the approval of biotech products involving three departments exercising jurisdiction over specific matters: the US Department of Agriculture (USDA), the Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA).

a. FDA: Foods Derived Through Biotechnology

Under the authority of the Federal Food, Drug, and Cosmetic Act (FFDCA),\(^53\) the FDA maintains the responsibility to ensure the safety of most foods, including GMOs and GMFs.\(^54\) Generally speaking, the FDA regulates GMOs in the same way as traditional food products derived from normal breeding techniques.\(^55\) Although new additives in foods must be demonstrated safe before marketing, companies producing foods through biotech means need not obtain FDA approval to introduce such foods to the US market, as US and FDA policy recognize that such foods are like conventional foods and,

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\(^49\) See id.
\(^50\) See id.
\(^51\) See id.
\(^52\) See id.
\(^54\) See id.
thus, generally safe.\textsuperscript{56} While companies are given the option to consult with the FDA prior to marketing, companies customarily request such pre-marketing consultations.\textsuperscript{57} In the event the product raises health concerns during these consultations, the FFDCA empowers the FDA to require a pre-market review.\textsuperscript{58} Companies carry the legal obligation of ensuring the safety of foods placed into the market.\textsuperscript{59} The FDA possesses significant powers of enforcement in this regard, namely the capacity to cease distribution of unsafe food products,\textsuperscript{60} as well as subject companies introducing unsafe foods in the market to criminal prosecution.\textsuperscript{61} In essence, the US system places the burden on the producer to assure food safety.\textsuperscript{62}

\textbf{b. EPA: GMOs and Pesticides}

The FFDCA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)\textsuperscript{63} charge the EPA with approving pesticides derived from biotechnology and bioengineered plants, in particular, plants engineered with Bacillus thuringiensis.\textsuperscript{64} Under FIFRA, prior to market introduction, companies must register pesticides with the EPA.\textsuperscript{65} Through the FFDCA, the EPA establishes maximum tolerance levels for pesticide residues in foods.\textsuperscript{66} In addition, the EPA regulates the manufacturing and importation of new microorganisms, including intergeneric organisms procured through biotechnology, through notification procedures under the Toxic Substances Control Act.\textsuperscript{67}

\textbf{c. USDA: GMOs as Plant Pests}

Through the Animal Plant and Health Inspection Service (APHIS), the USDA regulates GMOs in so far as they qualify as plant pests.\textsuperscript{68} Producers of

\textsuperscript{56} See id.
\textsuperscript{57} See id. at 22,989.
\textsuperscript{58} See id. at 22,988.
\textsuperscript{60} See 57 Fed. Reg. 22,984, 22,988.
\textsuperscript{61} See id.
\textsuperscript{62} See id. For a more thorough analysis of FDA involvement in the regulation of GMOs, see Francer, supra note 22, at 267-275.
\textsuperscript{64} See id.; 21 U.S.C. §§ 301-395.
\textsuperscript{65} See 7 U.S.C. §§ 136-136y.
\textsuperscript{66} See 57 Fed. Reg. 22,984, 23,005.
\textsuperscript{67} See 15 U.S.C. § 2603(d).
\textsuperscript{68} See T. Morath, Office of the U.S. Trade Representative, U.S. Regulation of
new GMO plants must demonstrate through field trials via a petition to APHIS that the plant is safe and poses no significant risks as a plant pest. Charged with the task of conducting an environmental assessment to ascertain the GMO's potential effects on human and animal health, APHIS may deem the status of the new plant as non-regulated, whereby the GMO is no longer subject to APHIS' plant regulation rules. Since 1992, thirty-six GM plants received APHIS approval through non-regulated status. Given the increasing number of field test performed annually, analysts expect a rapid and significant increase in the number of approved plants.

\[d. \text{U.S. Labeling Policy}\]

Supporting the US belief that agricultural products enhanced through biotechnology do not significantly differ from their traditional counterparts, no general requirement exists for the labeling of agricultural products derived from or containing GMOs. Though some circumstances may call for labeling, such as when the GMF differs considerably from its conventional counterpart, e.g. containing a certain allergen not commonly found within the normal food product, labeling would likely be required to warn consumers of potential these potential threats. In fact, labeling of GMFs may be an unconstitutional violation of free speech in the US, as demonstrated in a 1994 Vermont case challenging a law requiring the labeling of milk and milk products derived from cattle treated with recombinant bovine somatotropin.

\[2. \text{European Union Regulatory Scheme}\]

Standing in sharp contrast to the bifurcated, final product focus of United States regulation of biotechnology and GMO products, the European Union...
maintains a comprehensive regulatory framework designed to ensure the protection of human health and the subsistence of a single European market for biotechnological products. Through an evolving approach reflecting the diversity of political views and historical attitudes towards food alteration technology, the EU provides for a dual approach to biotech regulation, namely pre-marketing safety assessments and a "one stop" clearance procedure. By focusing on the process employed to derive these products, the EU regulatory scheme highlights significant differences from the product rather than process design of US regulation. The fundamental issues addressed in EU GMO legislation include:

1. Regulation of the contained use of GMOs;
2. Authorization of deliberate releases of GMOs into the environment via field-testing and commercial growing;
3. Authorization for market inclusion of GMOs and GMO products;
4. Labeling of GMOs and GMO products.\(^{75}\)

This section will analyze the four essential components of the EU system, including: Council Directive 90/220/EEC on the deliberate release of GMOs into the environment;\(^{76}\) Regulation No. 258/97, the Novel Foods Regulation;\(^{77}\) Commission Directive 97/35/EC, amending Directive 90/220/EEC, to require the labeling of products containing GMOs;\(^{78}\) and Council Regulation No. 1139/98, regarding the compulsory indication of the labeling of certain foodstuffs produced from GMOs.\(^{79}\) Proposed legislation regarding additional labeling requirements will also be discussed.


\(^{77}\) Council Regulation 258/97, 1997 O.J. (L 43) [hereinafter Novel Foods Regulation].


Establishing the centerpiece of EU GMO legislation, the Deliberate Release Directive establishes a mandatory pre-market approval for GMOs. Seeking to provide “a high level of protection throughout the Community” for health, safety, and environmental protection, the Directive seeks to approximate the laws of the EU member states regarding GMOs intended for environmental release. Prior to market introduction of a GMO for commercial use in any part of the EU, notification must be sent to the competent member state authority where the GMO will be released. Notification must include a risk assessment with information necessary for evaluating the foreseeable risks posed by the GMO to human health or the environment, to which the competent authority will evaluate and provide written consent as a prerequisite release. In addition, a “Proposal for Labeling and Packaging” must accompany the notification. Competent authorities than forward to the Commission summaries of each notification, which are forwarded to other member states, followed by a decision from the competent authority on the compliance of the GMO with the Deliberate Release Directive.

The process continues through a series of notifications and opportunities for objections from the competent authorities of other member states, channeled through the Commission. In cases of successful applications, the Commission adopts the measures, whereas noncomplying proposals are forwarded to the Council for decision. GMOs approved by either the Commission or Council may be used without prohibition, restriction, or impediment in any member state. However, in the event a member state

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81 See id.
82 See id. art. 11(1).
83 See id. The directive provides a lengthy list of required notification data, including: characteristics of the donor, recipient, or parent organism; potential for cross-organism transfer of genetic information; pathogenicity; antibiotic resistance; and allergencity. See id. at Annex II. See also Commission Directive 94/15, 1994 O.J (L.103) 20 (providing subsequent enhanced notification requirements).
85 See id. art. 12(1-2). Release requires written consent from the Commission and all other member states. See id. art. 11(5).
86 See id. art. 13.
87 See id. art. 21.
88 See Council Directive 90/220/EEC, art. 15. The procedure for release of GMO products for research purposes is quite similar to that of the process for GMO released for commercial purposes. See id. art. 5-9.
finds that an approved GMO "constitutes a risk to human health and/or the environment," provisional marketing restrictions may be imposed. Such restrictions are subject to review by the Commission.

b. Council Regulation 258/97: Novel Foods Regulation

Aimed at providing a uniform law for new foods throughout the member states, the Novel Foods Regulation applies to foods "which have not hitherto been used for human consumption to a significant degrees within the community." These novel foods include GMO products within the meaning of the Direct Release Directive, foods produced by though not containing GMOs, and foods "with a new or intentionally modified primary molecular structure." Through an approval procedure similar to that of the Direct Release Directive, the Novel Foods Regulation focus of this legislation requires the submission of a proposed label for the product, including information as to how the product's characteristics differ from existing foods. Scientific assessment determines the novelty of the proposed food by comparing its equivalence to existing products, calculated to ultimately disclose through labels to consumers purchasing the product as to whether GMOs are present or may be present in the food. The Regulation details procedures for food assessment, the role of the Commission in the authorization process, and the institution of provisional restrictions similar to the Deliberate Release Directive for member states believing that a novel food poses a threat to human health or the environment.

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89 See id. art. 15. For further discussion regarding Council Directive 90/220, see Mackenzie, supra note 75, at 535-43.
90 See id.
91 See Commission Regulation No. 258/97 art. 1(2).
92 See id. art. 1.
93 See id. art. 6(1), 8(1)(a).
94 See id. art. 8(1), 8(1)(d).
95 See id. art. 12-13. The implementation of Directive 90/220 and Regulation 258/97 present the EU with significant challenges, namely the failure to provide uniform EU-wide labeling standards, the lack of harmonization in the notification and approval procedure requirements throughout the EU, resulting trade tensions between the US and EU over bulk food shipments, and a seemingly arbitrary de minimis threshold for labeling GMOs. For a thorough discussion of these issues, see Francer, supra note 22, at 286-90.

Commission Directive 97/35/EC essentially amends Annex III of the Deliberate Release Directive, placing additional requirements on labeling for products containing or made from GMOs.\textsuperscript{96} Essentially, a label or accompanying document must be included on products approved under Directive 90/220 indicating whether the product consists of GMOs, and the possibility that GMOs may be present within the product.\textsuperscript{97} Though placing stricter labeling requirements on new GMOs, the amendment does not require segregation of GMO and non-GMO products.


In an effort to encompass certain GM products not affected by the Novel Foods Regulation, given its non-retroactivity, such as GM soybeans and GM maize authorized under the Deliberate Release Directive, Council Regulation 1139/1998 attempts to apply uniform labeling requirements among the member states for such products. Arising out of concerns over diverging labeling requirements in the member states affecting the free movement of goods throughout the community, the Council saw necessary to “ensure the final consumer is informed of any characteristic or food property . . . which renders a food no longer equivalent to an existing food or food ingredient.”\textsuperscript{98} Foods made of and produced from GM soybeans and GM maize constituted no exception, and thus were made subject to these labeling requirements.\textsuperscript{99}

e. Subsequent Legislative Attempts

Important legislative attempts by the European Union reflect the trends underlying the previously described regulations, namely the strengthening of existing regulation to stringently monitor the approval and release of GMO products and an effort to disclose to the consumers the content of foods containing such GMO products. Recent draft legislation from July of 2001 proposed by the Commission to further regulate the marketing of such food products and to establish a reliable system of identification and labeling of

\textsuperscript{96} See Commission Directive 97/35.
\textsuperscript{97} See id.
\textsuperscript{98} See id. pmbl., para 4, 9.
\textsuperscript{99} See id. par 9.
GMOs is being pushed through the legislative process.\textsuperscript{100} Although the Commission contends such legislation, as well as the enforcement of other labeling requirements initiated since the passing of Directive 90/220, remains consistent with international trade obligations and other biotechnology agreements, the likelihood of increased conflicts among trading partners steadily grows and will likely spur further action before the WTO.\textsuperscript{101}

II. CONTROLLING LAW

A. GATT/WTO Treaty Law

As Member States of the General Agreement on Trade and Tariffs (GATT) and the incorporating body of the World Trade Organization, the United States and the European Union are subject to the restrictions of the GATT Agreement and other WTO agreements. In essence, the GATT/WTO system seeks to eliminate nontariff barriers to free trade while gradually decreasing tariff barriers and abolishing all forms of discriminatory treatment in international trade.\textsuperscript{102} However, such measures remain subject to the need to "protect and preserve the environment."\textsuperscript{103} Practically speaking, the issue submitted in this case revolves around this increasingly complicated paradigm: the promotion of free and open trade and the necessity for environmental protection. The following will set out appropriate sections of related WTO agreements and describe the applicability of each to the pervading issue.

1. GATT Article XX

Effectuating the WTO's concern for protecting the environment in the international arena and the interests of Member States in the preservation of

\textsuperscript{100} See Laurent Zecchini, Brussels Wants to Resume Marketing While Protecting Consumers, WORLD NEWS CONNECTION, July 26, 2001, available at 2001 WL 25736344.

\textsuperscript{101} While other issues surrounding the US-US GMO conflict exist, the scope of this paper is limited to the potentially existing conflict over the de facto moratorium impairing the approval of new foods produced through genetic modification and the resulting trade conflict between the US and the EU over this moratorium. For further information on other issues generally involved in the US-EU GMO conflict, see David M. Driesen, What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate, 41 VA. J. INT’L L. 279 (2001).


\textsuperscript{103} See id.
the environment domestically, article XX of the GATT allows for the implementation of domestic legislation that “sidestep the normal trading rules” of the GATT/WTO “if necessary to protect human, animal or plant life or health.” The latitude afforded to Member States remains subject to article XX’s chapeau, which prohibits measures constituting a means of:

[1] arbitrary or
[2] unjustifiable discrimination between countries where the same conditions prevail, or

Relevant to the present dispute is the third prong of the chapeau and the EU’s use of the de facto ban on new US imports of GMO food products. Whether such actions run afoul of this rule and effectively constitute disguised restrictions on trade remains the ultimate question of this dispute. As the EU bears a shifted burden under this section to prove these actions are in fact necessary for the protection of “human, animal or plant life or health,” the US must first demonstrate this ban represents a disguised restriction on trade. The fact should be noted that standard practice by the WTO Dispute Panel stands to weigh the benefit the EU gains from this ban of US imports against the burden such ban places on the international trading system, as opposed to weighing the benefit to the environment against the burden on the US. In addition, the US burden of showing the ban on new GMO products must overcome the principle of previous GATT decisions, namely the interpretation that publication of restrictive measures is enough to ensure that such measures are not to be considered as a “disguised restriction.”

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104 HAKAN, NORDSTROM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 9 (World Trade Organization Special Studies 4, 1999).
2. WTO Sanitary and Phytosanitary Agreement

The WTO Sanitary and Phytosanitary Agreement (SPS Agreement) composes the primary legal instrument for addressing biotechnology in the WTO forum. Above all, the SPS Agreement is a trade agreement, not a health agreement, targeting specifically the overuse of national health regulation. Broadly speaking, SPS rules apply only to sanitary and phytosanitary measures defined in the agreement, which for present purposes include laws aimed to protect against pest exposure, disease-carrying organisms, disease-causing organisms, disease-carrying plants, and to laws restricting additives, contaminants, and toxins in food and feedstuffs. Applying to "all sanitary and phytosanitary measures, which may, directly or indirectly, affect international trade," the SPS agreement recognizes the right of Member States to enforce such measures that are necessary for the protection of human, animal or plant life or health, which must be based on scientific principles and not without sufficient scientific evidence. Previous WTO Appellate Body decisions interpret this provision as requiring "a rational or objective relationship between the SPS measure and the scientific evidence." As established under GATT art. XX, measures not meeting this criteria may constitute disguised restrictions on international trade.

Article 3 of the SPS Agreement seeks to harmonize sanitary and phytosanitary measures, mandating Member States to base such measures on international standards, guidelines or recommendations. Measures consistent with such international criteria are deemed consistent with the need...
to protect human, animal or plant life or health, and, thus, consistent with GATT article XX.\textsuperscript{115} Measures resulting in higher levels of sanitary or phytosanitary protections may be utilized under the auspices of scientific justification or risk assessment considerations enumerated under article 5.\textsuperscript{116}

Perhaps the most essential aspect of the SPS Agreement relevant to this matter may be found in article 5's requirement for a risk assessment.\textsuperscript{117} Working in tandem with article 3's scientific evidence requirement, article 5 requires Member States to ensure measures affected by the agreement to be "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health."\textsuperscript{118} Risk assessment may either be "the evaluation of the likelihood of entry, establishment or spread of a pest or disease . . . or the evaluation of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."\textsuperscript{119} In undertaking a risk assessment, Member States must rely on factors such as "available scientific evidence, relevant processes and production methods; . . . [and] relevant ecological and environmental conditions."\textsuperscript{120}

Of further relevance to this matter, article 5 requires Member States to ensure measures under this agreement "are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."\textsuperscript{121} Essentially, the EU ban on new US GMO products must not be deemed to be overly excessive in the EU's desire to protect life and health, which requires an examination of alternative, less restrictive practices that may effectively provide the same level of protection without the current level of restriction.

In addition, article 5(7) makes allowances for circumstances where relevant scientific evidence is insufficient.\textsuperscript{122} In such a situation, SPS measures may be adopted by a Member State based on available information, including pertinent data from measures applied by other Member States or from relevant international organizations.\textsuperscript{123} Such measures remain subject, however, to

\begin{footnotes}
\item[115] Id. art. 3(2).
\item[116] Id. art. 3(3).
\item[117] Id. art. 5.
\item[118] Id. art. 5(1).
\item[119] See SPS Agreement, supra note 103, at Annex A, para. 4.
\item[120] Id. art. 5(2).
\item[121] Id. art. 5(6).
\item[122] Id. art. 5(7).
\item[123] See id.
\end{footnotes}
future objective risk assessment to be made within a reasonable period of
time.\textsuperscript{124} The recognition of the scientific evidence and risk assessment principle
comprises the essential importance of the SPS Agreement relevant to the US-EU GMO dispute. As described through articles 2 and 5, measures taken by
a Member State must be substantiated and justified through evidence that such
regulations serve to protect life and health from impending harm caused by the
object the measure seeks to prohibit. In this case, in order to justify its de
facto ban on the importation of new GMO products from the United States
consistent with the SPS Agreement, the EU must offer scientific evidence and
a viable risk assessment that GMO products constitute a threat to life and
health, and that such a ban effectively serves as a minimum obstacle to prevent
the impending harm caused by such products.\textsuperscript{125}

B. The Cartagena Biosafety Protocol

Expanding upon the United Nations' framework for addressing concerns
over transboundary movement of GMO arising out of the use of biotechnol-
ogy, the Cartagena Biosafety Protocol\textsuperscript{126} (BSP) to the Convention on
Biological Diversity (CBD)\textsuperscript{127} attempts to establish an international system for
the management of GMO products. Through the establishment of a clearing-
house for the exchange of information relating to biotechnology and regula-
tions requiring agreement and consent before movement of bioengineered
products may proceed, the BSP sets forth a legally binding means to address
trade risks associated with biotechnology. Of important consideration to this
WTO Panel, both the United States and European Union remain presently
bound under the BSP though the agreement has yet to go into effect.\textsuperscript{128}

The most relevant aspect of the BSP for purposes of this analysis may be
found in the Protocol's incorporation of the precautionary principle throughout
the document. Under the auspices of the basic premise that when a threat of
serious or irreversible harm exists, even in the absence of clear evidence of

\textsuperscript{124}See id.

\textsuperscript{125}For an in depth analysis of the SPS Agreement, see Steve Charnovitz, \textit{The Supervision

\textsuperscript{126}See Cartegena Protocol on Biosafety, Jan. 29, 2000, 39 I.L.M. 1027, reprinted in 23 Int'l


\textsuperscript{128}However, it should be noted threats are being made by the Bush Administration that the
US may choose to withdraw from the BSP. See John Nichols, \textit{Bush on Wrong Side of Food
harm or risk, the precautionary principal allows states to take precautions to protect health and the environment, regardless of costs.\textsuperscript{129} Standing in sharp contrast to the scientific evidence/risk assessment approach established within the SPS Agreement, the precautionary principal effectively allows states to act on the basis of concern over certainty. This principle permeates throughout the BSP, arising in five places: (1) the preamble, "reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development,"\textsuperscript{130} article 1, declaring the objective of the treaty to be interpreted according to the "precautionary principle";\textsuperscript{131} article 10, dealing with the decision making procedures for introducing GMOs to the environment;\textsuperscript{132} article 11, concerning biotech products "intended for use as food or feed, or for processing";\textsuperscript{133} and Annex II, expanding on the elements on an article 15 risk assessment.\textsuperscript{134} Of a noteworthy matter is the fact that although the BSP incorporates the precautionary principle, risks assessments based on scientific evidence must also be taken before a state may bar any biotech product, though such a state may act to restrict the product in absence of scientific evidence contrary to or in support of the state's position.\textsuperscript{135}

III. LEGAL ANALYSIS

Though the facts and circumstances surrounding the matter of the EU de facto ban on new US GMO foods present a set of complicated and uncertain problems, the essential legal issue of this case converges on the two conflicting principles found within WTO law and the Biosafety Protocol, namely risk assessment/scientific evidence v. the precautionary principle. As argued by the European Union, the de facto ban remains justified under GATT article XX and the precautionary principle of the BSP given the fact that scientific uncertainty precludes a full and thorough assessment of the risks posed by GMO foods, thus justifying the EU's chosen level through the ban of human, animal, and plant life and health.\textsuperscript{136} In contrast, the United States asserts the

\textsuperscript{130} BSP, supra note 122, at pmbl.
\textsuperscript{131} Id. art. 1.
\textsuperscript{132} See id. art. 10.
\textsuperscript{133} Id. art. 11.
\textsuperscript{134} See id. Annex II.
\textsuperscript{135} See id. art. 15 and art. 16.
\textsuperscript{136} See Communication on the Precautionary Principle, Communication from the
position that the de facto ban violates the chapeau of GATT article XX, constituting a disguised restriction on international trade illegal under the GATT. Specifically, the EU leaves unfulfilled the mandate of the SPS agreement to justify the ban through a risk assessment/scientific evidence analysis. In effect, both parties remain correct upon their assertions, based on the legal principles offered by each. However, one legal principle must trump the other in this case, hence the following section will analyze the applicability of the risk assessment/scientific analysis approach in contrast with the precautionary principle.

A. WTO Adjudication and the SPS Agreement

Widely heralded as the preeminent interpretation of the SPS Agreement, the 1998 WTO Appellate Body decision on European Community Measures Concerning Meat and Meat Products (Hormones) provides an acceptable, though not binding, starting point for understanding the role of the precautionary principal and the risk assessment/scientific evidence approach in international trade law. In a case similar to the matter at hand, the United States and Canada challenged a ban instituted by the European Union on the importation of beef injected with or fed one of six growth hormones. Ruling against the EU's ban, the Appellate Body asserted two key points relevant to this analysis:

It is "less than clear" that the Precautionary Principle is a principle of general or customary international law, and cannot, in any case, override any provisions of the SPS Agreement.

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138 Note that decisions of WTO Dispute Panels and Appellate Bodies are not considered binding precedent, though may be referenced, as is customary, for precedential value in subsequent cases.

139 See id.

140 See Thomas J. Schoenbaum, International Trade in Living Modified Organisms: The New
A WTO member exercising its right under Article 3.3 of the SPS Agreement to set its own level of SPS protection must have "sufficient scientific evidence" gathered as a result of a "risk assessment" required under SPS Article 5.\textsuperscript{141}

The implications of this ruling for the EU in this case supports the US's argument against allowing the EU to justify the ban based on the precautionary principle. In the principle's stead, the Beef Hormones case requires a showing that the new GMO foods affected by the de facto ban are in fact dangerous to human, plant, or animal life and health, substantiated by convincing scientific evidence. In fact, no sufficient amount of such evidence exists, consequently prohibiting the EU from offering such evidence in this case.

Additional WTO Appellate Body decisions provide insight as to the functioning of the SPS Agreement. In a matter likewise similar to the present EU case, the Appellate Body ruled against an Australian ban on fresh, chilled, and frozen salmon that violated the SPS Agreement.\textsuperscript{142} Of particular importance, the Appellate Body found that an adequate risk assessment under article 5.1 of the SPS Agreement required an identification of "the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequence associated with the entry, establishment or spread of these diseases," coupled with an evaluation of "the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied."\textsuperscript{143} In addition, given the lack of adequate scientific evidence and a sufficient risk assessment supporting the Australian ban on ocean-caught salmon in spite of allowing the importation of other disease susceptible fish, the Appellate Body ruled that the measures violated article 5.5 of the SPS Agreement, constituting an arbitrary, unjustifiable, and disguised restriction on international trade.\textsuperscript{144} A similar conclusion spurred from a subsequent case involving a Japanese ban on certain US agricultural products (Japanese Agriculture),\textsuperscript{145} resulting in the holding that such bans must be accompanied by scientific justification,


\textsuperscript{141} See id. (citing Beef Hormones, supra note 132, at para. 177).

\textsuperscript{142} See Australia-Measures Affecting Importation of Salmon, WTO Doc. WT/DS18/AB/R (World Trade Organization Dispute Settlement Body, Nov. 6, 1998).

\textsuperscript{143} Id. paras. 128-38.

\textsuperscript{144} See id. paras. 141-78.

\textsuperscript{145} See Japan Agriculture, supra note 112.
consisting of "a rational relationship between the SPS measure at issue and the available scientific evidence."\textsuperscript{146}

The holdings in the Beef Hormones, Australian Salmon, and Japanese Agriculture disputes represent significant obstacles for the EC's de facto ban in this case. Specifically, under these decisions, the de facto ban instituted by the EU prohibiting the approval and importation of new GMO products from the US must be accompanied by and justifiable through scientific evidence consisting of an adequate risk assessment identifying the risks associated with these new GMO products and evaluating the likelihood of actual effectuation of such risks. Further, these cases support the contention that the precautionary principle does not play a superior role to the scientific evidence/risk assessment approach mandated by the SPS Agreement; thus, the EU cannot make use of this principle alone to justify the ban. As asserted in these cases, if the EU cannot make a showing supporting the ban through the requisite scientific evidence, the ban must constitute an arbitrary, unjustifiable, and disguised impediment to international trade that must be removed.

Though previous WTO rulings on the SPS Agreement seem to point conclusively against the EU ban in this case, the issue remains as to what role, if any, the Biosafety Protocol may play in substantiating the EU's position. The following section will analyze this matter, as well as the relationship between the BSP and the SPS Agreement.

\textbf{B. The Precautionary Principle in International Law and the BSP}

Mentioned sparsely in the international arena, miscellaneous non-binding declarations,\textsuperscript{147} the Rio Declaration of 1992,\textsuperscript{148} and the Biosafety Protocol composes international law's primary embodiment of the precautionary


\textsuperscript{148} See Report of the U.N. Conference on Environment and Development, U.N. GAOR A/CONF.125/126 (1992). Article 15 of the Rio Declaration states: "In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." \textit{Id.}
The BSP's incorporation of the principal remains particularly important in this analysis given US and EU participation in the agreement, as well as the SPS Agreement's affirmation of an entirely inconsistent approach under the scientific evidence/risk assessment analysis. Thus, the conflict of the BSP and SPS Agreement must be examined.

The matter of treaty subrogation plays a particularly important role in the outcome of this case. The Preamble of the BSP asserts two conflicting statements:

1. The BSP "shall not be interpreted as implying a change to the rights and obligations of a Party under any existing international agreements;" and
2. The first statement "is not intended to subordinate this Protocol to other international agreements."

What does this mean? These inconsistent statements seemingly cancel each other, as how would it be possible for US and EU obligations under the SPS agreement, mandating a scientific certainty/risk assessment approach, which shall nor be changed in light of the BSP as stated in the first preposition, remain consistent with their respective mandate to make use of the precautionary principal of the BSP given the second statement's attempt to insure the BSP remains equally regarded with other international agreements, including the SPS Agreement. According to article 31(3) of the Vienna Convention on the Law of Treaties, "[t]here shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Accordingly, the likely conclusion stands that the precautionary principal in the BSP supplements the scientific evidence/risk assessment decree of the SPS Agreement. In effect, "this interpretation is the only one that gives maximum effect to both the BSP and SPS agreements so that neither cancels each other out." However, such cannot be the case as the equal treatment of

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149 See BSP, supra note 122, art. 11(8).
151 See BSP, supra note 122, at prml.
152 See Schoenbaum, supra note 140, at 864.
154 See Schoenbaum, supra note 140, at 865.
155 Id.
the WTO SPS Agreement and the BSP stands in the face of WTO Dispute Panel and Appellate Body adjudication. Such opposes the reasoning of Beef Hormones, Australia Salmon, and Japanese Agriculture, effectively "overruling" these decisions and yielding the result that bans on the importation of certain foods based on insufficient scientific evidence may be maintained if a risk assessment is carried out utilizing available scientific evidence and areas of scientific uncertainty are identified and addressed.\(^{156}\) The SPS Agreement neither intends nor contemplates such a result, nor do any other agreements of the WTO. Uniformity and harmonization of trade remains the paramount and fundamental objective of the WTO, thus, adherence to subsequent agreements by some Member States in lieu of an unvaried and consorted association by all WTO Member States cannot stand. Hence, in absence of other internationally binding obligations, and based on numerous decision made by the dispute settlement bodies of the WTO, the SPS Agreement and the risk assessment/scientific evidence analysis contained therein effectively trumps the precautionary principal of the BSP given the inconsistent outcome of their application.\(^{157}\)

In fact, the precautionary principal maintains no legal standing in the international arena aside from the binding agreements mandating such an analysis that do not conflict with WTO law. Accordingly, the precautionary principle neither constitutes a general principle of international law, nor can it be considered as customary international law. In the context of the former, the International Court of Justice Statute under article 38(1)(c) requires general principles of international law to be derived from the municipal laws of different legal systems.\(^{158}\) Although EU attempts to recognize the precautionary principle as a "general" principle of community law, as well as "a full-fledged and general principle of international,"\(^{159}\) exist, the limited usage of the principle prohibits the full recognition of the principle as a general principle of international law. The matter of customary international law remains much

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\(^{156}\) See id.


\(^{158}\) Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1031, T.S. No. 933 [hereinafter ICJ Statute].

\(^{159}\) EC Communication on the Precautionary Principle, supra note 136, at para. 3-4. The validity of this statement remains demoralized by the European Council's more conservative assessment of the precautionary principle as on which is "gradually asserting itself as a principle of international law in the fields of environmental and health protection." Id. para. 3.
clearer, as customary international law may only be established through actual state behavior coupled with the belief that such behavior is legally required-opino juris.'60 The process for a principal to become customary international law, as recognized by the International Court of Justice, requires:

1. A fundamentally norm-creating character of the principal;
2. Widespread and representative participation in the convention in question; and,
3. State practice.161

While fulfillment of the first two criteria may be questionable, widespread state practice remains unmistakably unfulfilled, verified even by the European Commission who did not even attempt to assert the conditions were met in its recent 2000 Communication on the Precautionary Principal.162

In absence of international legal recognition, the precautionary principle cannot supersede the scientific certainty/risk assessment approach of the SPS Agreement. Given the respective forum adjudicating this matter and the existence of numerous decisions by dispute settlement panels of the WTO, the SPS Agreement is deemed to overrule any inconsistencies found within other international agreements in conflict, which in this case pertains to the BSP’s recognition of the precautionary principle. Hence, the controlling standard for the decision of this matter is the scientific certainty/risk assessment analysis and the de facto ban maintained by the European Union must meet such standards in order to be found legal under WTO law.

IV. HYPOTHETICAL RULING

Based on the preeminence of the SPS Agreement and the scientific evidence/risk assessment analysis mandated therein, the European Union’s de facto ban on new United States GMO products constitutes an arbitrary, unjustifiable, and disguised restriction on international trade. The absence of a scientific certainty based on a proper risk assessment demonstrating the risks associated with these particular GMO agricultural products and an evaluation of the probability and likelihood of damage to human, animal, plant life or health causes the ban to suspiciously cultivate a disguised barrier to free trade for the benefit of farmers within the EU and to the detriment of their American

160 See ICJ Statute, supra note 158, art. 38(1)(b).
161 See id.
162 See generally EC Communication on the Precautionary Principle, supra note 136.
counterparts. If sufficient scientific certainty existed, or comes to exist in the future, the ban of GMO foods could likely be maintained. However, the EU must derive a fundamental understanding from this ruling that until the precautionary principal becomes a general or customary principle of international law, or is incorporated into the law of the World Trade Organization through future agreements and negotiations, future uses of this principle, whether it be in the area of further bans on GMOs or required labeling of GMO products, will almost certainly meet a similar judgment by a WTO adjudication panel. Hence, the EU is hereby ordered to reinstate the use of the approval process for GMO agricultural products and effectively lift the de facto ban that remains in place. Likewise, damages in the amount of lost US exports resulting from the ban shall be paid by the EU to the US.

CONCLUSION

As represented by the hypothetical holding and reasoning of this fictitious WTO Dispute Panel decision, if the EU persists in maintaining the four year old de facto ban of US GMO agricultural products, the EU will likely lose in WTO dispute settlement proceedings. The precautionary principle the EU seeks to hang its case upon will not overrule or supplement the scientific certainty/risk assessment of the SPS Agreement, thus leaving the EU with little to nothing to augment its claim that GMO products pose a risk to human, animal, or plant life and health.

In the event a WTO Dispute Panel follows the reasoning utilized in previous WTO decisions and rules against the EU over its de facto ban of US food products, the result will likely bring about numerous ramifications. First of all, contemporary EU moves towards a uniform labeling requirement that will single-out GMO products by requiring a label designating the product as such will likely also be found to constitute a disguised restriction on trade.163

163 A recent EU proposal published on July 25, 2001 targets the re-enforcement of GMO labeling requirements, which the Commission defends as aiming to allow consumers “to make an informed choice.” See Biotechnology: Commission Defends GMO Labeling Proposal, European Report, Sept. 19, 2001, available at 2001 WL 26061581. In response, calls for challenges are already being made by the US agricultural industry, citing the profound ramifications such measures will have on US food and commodity industries the “the potential that these proposals will form the basis for similar initiatives elsewhere.” See Stephen Clapp, U.S. Industry May Oppose EU Biotech Legislation, FOOD CHEMICAL NEWS, Aug. 6, 2001,
Perhaps a more rational and less controversial approach to EU labeling concerns may be to institute an inverted requirement, specifically a labeling system where the food would be designated as a "Non-GMO." Such practices remain in effect in the United States, yielding ludicrous profit margins for foods that can claim to be "organic" and "natural." In essence, a ruling against the EU on the current ban will likely spill over into the next contentious issue, which in this case will almost certainly be GMO labeling, and in the same manner Beef Hormones establishes loosely based precedential value in the biotechnology trade arena, the EU may be peering down a long and winless trek in the WTO adjudication system.

In addition, the likely and impending peril of the EU over the de facto GMO ban may be equally menacing in many other ways. As illustrated by the EU's failure to comply with the 1998 WTO Appellate Body's order for the removal of the ban on beef hormone products and opting to pay money damages, the legitimacy of the WTO dispute settlement system may be jeopardized should the EU continue this developing pattern in the case of a negative ruling over the GMO agricultural ban. Further, already strained US-EU relations will likely suffer further drawbacks, potentially sparking a much feared trade war between the world's largest trading partners. The occurrence of either of these events would be devastating to the WTO and the world trading system as a whole and should be avoided at all costs.

In many ways, the impending dispute between the EU and US over biotechnology represents the epic legal conflict of imposing strict, objective criteria without practically being able to factor subjective implications and societal concerns into the judgment. However, the beauty of this particular paradigm will become increasingly evident as elementary market forces work to rectify this problem through consumer discrimination. If genetically modified foods are unsuccessful in the European market, the result will be attributable to consumer activity arising out of health and scientific concerns over food safety, not discriminatory government regulation designed to interfere with market forces. Disclosure and dissimulation of information remain essential for market efficiency, and such objectives may be adequately addressed and accomplished through an optional labeling regime of non-GMO foods. Rather than inhibit market efficiency by limiting consumer food options through de facto moratoriums and mandatory labeling requirements,

available at 2001 WL 12773695.

which essentially deter and restrict diversification among imports from producers in the US and other states, consumers will be given numerous options and allowed to subjectively determine the success or failure of GMO foods in the European Market. Indeed, this laissez-faire approach will serve both US and EU concerns by allowing the economic free hand to ultimately resolve the GMO food dispute.

As former US Supreme Court Justice Oliver Wendell Holmes brilliantly observed, great cases sometimes make bad law. As the negative implications of the adjudication of this dispute over the EU’s de facto ban of new US agricultural products are evident, the US and EU must conciliate further to develop a compromise before resorting to the WTO. However, until the EU can offer substantiated evidence of risks to human, animal, or plant life and health posed by the GMO foods affected by the de facto ban, the United States will maintain the dominate hand and ultimately decide the dispute’s final outcome. As the old saying states, if it looks like a duck and walks like a duck, it probably is a duck. Likewise, the ban maintained by the EU certainly looks like an arbitrary, unjustifiable, and disguised restriction on trade, but the questions remains: does the world really need the WTO to make this clear?