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World Trade Organization



Genetically Modified: A New Frankenstein or Old Trade Barriers?

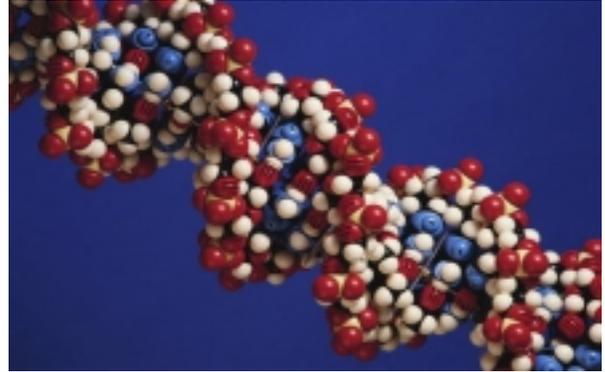
What do you get when you cross a refrigerator and a tomato? Or a can of bug spray with corn? Although these analogies are imprecise, recent technological advances using genetic engineering have created crops that can withstand freezing temperatures and make their own insecticide. While many scientists and farmers praise the benefits of using **genetically modified organisms (GMOs)**, critics and trade partners argue that they are dangerous to human health and to the environment. Because the US is the world's largest exporter of GMOs, it could find itself in its first trade war in the new century.

Scientists make GMOs (such as seeds, animals, and microbes) by transferring desirable traits from one species into another species. For example, plants can be made to produce their own insecticide, withstand the effects of weed killers, and survive adverse conditions such as dry weather. Ideally, this should increase crop yields and lower pesticide use, while causing less environmental damage.

GMOs also represent an increasingly important source of trade for the US which exports about a third of its crops every year worth tens of billions of dollars. Last year, American farmers planted 60 million acres of genetically modified corn and soybeans (equivalent to the size of the United Kingdom). Furthermore, genetically modified crops make up 38 percent of the soybean, 25 percent of the corn, and 45 percent of the cotton acreage in the US. According to the Office of the US Trade

Representative, efforts to impede American agricultural exports would be viewed as a "very significant trade threat."

On the other hand, trading partners such as the European Union (EU) and Japan have reacted to GMOs with intense distrust, especially in the wake of several food contamination scares in Europe. They point out that no one has conducted long-term studies showing the safety of eating GMOs. Others suggest that GMOs might combine with surrounding plants to create "super weeds" or insects resistant to pesticides.



Genetic engineering: beneficial or dangerous to human health and to the environment?

In response to public concerns over the safety of GMOs, the EU and Japan now require the labeling of GMOs sold in their countries. Mexico, the second largest importer of American corn, avoids using genetically altered corn when making tortillas. In the US, baby food manufacturers (such as Gerber) now market "GMO-free" food. Even a coalition of chefs from New York City restaurants such as the Union Square Cafe is calling for a ban on GMOs. One chef said: "I don't want a cow gene in my cabbage. It's like Frankenstein."

The US Government counters that there is no scientific evidence showing that GMOs are harmful to human health or to the environment. A Commerce Department official declared that "not one cough, not one sneeze, not one headache, not one rash" can be attributed to GMOs. Furthermore, many studies purportedly showing the dangers of consuming GMOs have been largely discredited. Many US trade officials accuse the EU and Japan of using GMOs as an excuse to keep out US products.

Efforts to regulate trade in GMOs began in February 1999 when over 100 countries gathered in Cartagena, Colombia, to negotiate the **Biosafety Protocol**, a treaty which would allow countries to bar imports of GMOs that could harm human health or the environment. The US, Argentina, Australia, and Canada were willing to have the treaty cover genetically modified seeds but not the final products made from those seeds such as soybeans and corn flakes. Other countries wanted to broaden the treaty to include seeds and any commodity having genetically

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Founded in 1996, the Center for International Law supports teaching and research in all areas of international law and concentrates on the law of international trade and finance. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice.

Continued on next page

modified materials such as corn flakes made from genetically modified corn and blue jeans made from genetically modified cotton. This arrangement would, according to the US, allow countries to use the treaty as an excuse for protectionism.

Negotiators reached a compromise in February 2000. The final treaty would require that exporters receive advance permission from importers before shipping GMOs. But advance permission would not be needed for final commodities made from GMOs such as soybeans and blue jeans. Negotiators did not address whether the protocol would override the rules of the World Trade Organization (WTO), an already-existing global forum for resolving trade disputes among nations.

Until the Biosafety Protocol becomes international law (which may take several years), every country will continue to use its own laws to regulate GMOs. Yet these very laws are the source of contention between GMO exporting and importing countries.

The EU regulates GMOs, using **Directive EEC/90/220** which outlines the process for importing and selling GMOs in the European market. Partly in response to public outcry over GMOs, the EU began revising the directive in 1998. The EU later announced that it would no longer approve the sale of GMOs until the European Parliament approves a final revised directive in the year 2002. US farmers and exporters claim that this has

effectively created an import ban on GMOs, costing them \$200 million in lost exports in 1998.



An editorial cartoon from Tom Toles.

Last year, the US warned the EU that it would file a formal complaint with the WTO over the GMO ban. The US argues that the ban violates the WTO's **Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)** which allows WTO member nations to restrict imports to protect animal, plant, and human health but only if the restrictions are based on strong scientific evidence. The EU ban, according to the US, lacks scientific justification as required by the SPS Agreement.

On the other hand, the EU claims that the SPS Agreement allows it to adopt import restrictions for reasons of public safety even in the absence of scientific evidence. Dubbing this approach the **precautionary principle**, the EU argues that it is important to err on the side of public safety instead of waiting to see if a danger exists. A US official commented that "use of the precautionary principle can easily be a subtle disguise for protectionism."

Despite efforts to showcase the benefits of using GMOs, the GMO industry is slowly losing the public relations battle. The US Environmental Protection Agency announced new regulations when planting genetically modified corn. And a class-action suit has been filed against Monsanto (one of the world's largest agricultural companies), accusing it of selling genetically modified seeds without properly testing for their safety.

To avoid a damaging trade war, the US and the EU will discuss the GMO import ban and the proper interpretation of the SPS Agreement in early 2000. One US official said: "If we don't work through these issues now and find a way to deal with them on the basis of sound science, these are going to end up being the major trade disputes of the next century." ❖

WTO Sidebar: Who decides if you're obeying a final ruling?

You lose your case and now have to abide by the court's final ruling. But your opponent insists that you're not following the court's orders. In the world of international trade, who decides whether a losing country in a trade dispute is actually abiding by a final decision issued by the World Trade Organization (WTO)?

The Spring 1999 newsletter brought the story of the banana trade war between the US and the European Union (EU). The WTO ruled in 1997 that the EU unfairly discriminated against Latin American-grown bananas and ordered the EU to change its regulations. The EU argued that they have since complied with the WTO ruling. However, the US called the EU's latest changes as "nothing but window dressing" and threatened trade sanctions. The EU then insisted that the US cannot decide on its own whether a country complied with a WTO ruling.

So what does the WTO have to say about this? They are still in the process of deciding the rules. In the latest version presented in December 1999, the WTO would create a "compliance panel" to see if a losing country in a dispute actually complied with a final WTO ruling. The compliance panel would have to make its ruling before any country imposed sanctions on the losing country in a dispute. Further discussions on the compliance panel are expected later this year. ❖

The Talented World

Trade Organization:

A Cure-All for the World's Problems?



Protestors at the WTO meeting in Seattle.

Of all the international organizations that have been misunderstood by the world in recent months, nothing has approached the level of misunderstandings faced by the World Trade Organization (WTO). The WTO has been accused of worsening and, at the same time, alleviating poverty; destroying and protecting the environment; sacrificing and improving workers' rights; lowering and maintaining health standards; and creating one world government while bringing some order to over a hundred countries.

Last December, while trying to hold a round of trade talks in Seattle, the WTO endured the protests of tens of thousands of demonstrators, including consumer advocates, farmers, human rights activists, steelworkers, religious groups, union members, and environmentalists who want the WTO to do more than promote open trade. In the face of increasing economic globalization affecting the lives of billions of people, the WTO must soon decide whether trade issues should include international labor and environmental standards.

Binding Nations to the Law of Trade

The WTO's main purpose is to help trade flow as freely as possible among its 135 members. Developing countries comprise over 75 percent of the membership. In the event that a member country finds itself in a trade dispute with another country, the WTO provides procedures and timetables for resolving the dispute, which could include the creation of a dispute settlement panel to review and make rulings on complaints brought to it. The rulings are often reviewed by the WTO's Appellate Body. Final rulings issued by the WTO are binding and enforceable unless there is a consensus

(among all 135 members, including the country which won the case) to reject a final ruling.

Open Trade Ahead of Everything?

The WTO argues that open trade will "strengthen the world economy and lead to more trade, investment, employment, and income growth throughout the world." But more and more people are focusing their attention on the effects of trade in areas such as the environment and labor conditions, and question whether the costs of open trade will outweigh its benefits.

Critics of the WTO charge that the organization puts trade ahead of other important goals. Environmentalists claim that the WTO prevents countries from imposing tough environmental restrictions on imports. They cite a recent decision where the WTO ruled against a US law that banned shrimp imports from countries that do not use special equipment to protect endangered sea turtles. Environmentalists say that the WTO decision contributes to the deaths of over 150,000 turtles every year.

Other critics, such as labor and human rights activists, believe that the WTO helps prevent the adoption of stronger labor standards around the world which include the right to collective bargaining, freedom of assembly, and the prohibition of forced labor, child labor, and discrimination in employment. As the WTO lowers trade barriers, they argue, American companies move their businesses to developing countries in order to take advantage of lower wages and poor working conditions, especially for women and children.



Critics accuse the WTO of contributing to the deaths of thousands of endangered sea turtles.

Health advocates cite a recent WTO decision which, they say, limits a government's right to set food-safety standards. The WTO recently declared illegal a European Union (EU) import ban on American hormone-treated beef because it failed to provide compelling scientific evidence to support the ban, prompting many activists to argue that the WTO was forcing EU consumers to eat allegedly dangerous foods.

To prevent further degradation in health standards, labor conditions, and environmental protection, these critics argue that the WTO must incorporate new standards into its trade rules. And by expanding the WTO's mandate to include these standards, they say, the WTO will also garner greater public support. Polls show

Continued on next page

that 58 percent of all Americans agree that foreign trade is "bad for the US economy" and also hold a negative view of the WTO.

A Cure-All for the World's Problems?

But those who support linking trade and social issues face an opposition just as resolute in separating them. Most developing countries believe that the linkage is simply a disguise for protectionism since any newly adopted standards would mostly affect developing countries where wages, working conditions, and environmental regulations are generally lower than those found in industrialized countries. A trade minister from a developing country recently commented: "When all of a sudden there is a concern about the welfare of our workers, it is suspicious."

Representatives from developing countries frequently point out that President Clinton and Vice President Gore are under tremendous pressure from labor unions to have the WTO set international labor standards, especially in this presidential election year. Unions have historically opposed free trade agreements.

Developing countries also argue that it is unrealistic to believe that many impoverished countries can pay their workers the same wages as American workers or even create similar working standards. Some of these critics also point out that the US usually fails to enforce its own laws protecting sweatshop and migrant farm workers.

They also contend that because the WTO's expertise lies in international trade, it cannot properly address environmental and labor standards. A *Financial Times* editorial declared: "Grafting social policy aims onto an institution designed to dismantle economic barriers is a recipe for confusion." Instead, they argue, bodies such as the International Labor Organization (which researches labor issues and promotes workers' rights but has been accused of being a toothless and underfinanced agency) is the proper forum to discuss such matters.

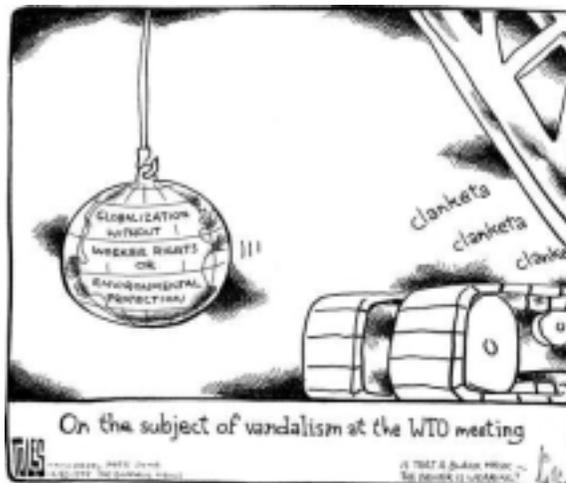
At the WTO, officials there counter that environmental protection can be a legitimate objective of a nation's trade laws. They point out that the WTO ruling on shrimp and endangered turtles affirms the US's right to adopt import restrictions for environmental purposes, but that it must enforce its restrictions in an even-handed manner -- while some countries were given four months to comply with the US law, others were given much more time.

The Seattle Disaster

Growing concern over the effects of trade on labor standards and the environment reached a showdown at the four-day WTO trade meeting in Seattle, Washington, in December 1999, where member nations tried to negotiate a draft agenda for a future round of global trade talks.

Throughout the meetings, tens of thousands of demonstrators protested that the WTO served only

corporate interests at the expense of labor rights and environmental protection. The mayor of Seattle declared a curfew after two days of sometimes violent clashes between police and rowdy protestors. Not only did the WTO take a public relations beating as protestors ransacked local Nike, Starbucks, and Nordstrom stores, WTO officials failed to draft any kind of agenda for a new round of global trade talks.



An editorial cartoon from Tom Toles: Is the WTO helping or hurting the world?

WTO members also handed the US a big defeat by rejecting its proposal to establish a WTO "study group" to examine the impact of increased trade on labor standards. US trade officials denied that the study would be used to justify future sanctions. Leading the opposition, developing countries argued that the US was promoting the so-called study group to satisfy the demands of labor unions (whose members constituted the majority of demonstrators at the Seattle protests).

President Clinton apparently confirmed the fears of the developing nations when he announced in an interview in the *Seattle Post-Intelligencer* that he wanted a proposed WTO study group to develop core labor standards; make these standards part of every future trade agreement; and enforce these standards by using sanctions.

Despite their failure to produce an agenda for the next round of trade talks, WTO officials announced that they would continue these efforts at their Geneva headquarters in early 2000. ❖

1999-2000 Jessup International Law Moot Court Competition: A very special thank you to the dedicated team representing New York Law School: Janet Abrams, Libby Babu, Seth Cohen, Daniel Curtin, Souren Israelyan, and Natalie Suárez. Coach: Kevin Sullivan. Moot Court Advisor: Professor Gerald Lebovits. ❖

The WTO's Biggest Case

On February 24, 2000, the World Trade Organization (WTO) announced that its Appellate Body had rendered a decision in the biggest trade case ever brought. At issue was US tax legislation governing corporations called Foreign Sales Corporations (FSCs). Last October, a WTO panel had decided the case against the US and in favor of the European Union (respectively the appellant and the appellee before the Appellate Body). Canada and Japan filed briefs favoring the EU. The Appellate Body, after reviewing the case in detail, affirmed the substance of the panel's report.

The EU claimed that the use of FSCs by US exporters resulted in tax subsidies of exports in the amount of some \$17.5 billion of WTO-illegal subsidies over five years. The US now faces the prospect of revising its tax legislation in a manner that will bring an end to these tax subsidies.



Tax subsidies for US exporters were first introduced in 1971 in the form of Domestic International Sales Corporations (DISCs). That was the year when the US, faced with a weak currency and low monetary reserves, detached the dollar from gold (declared that it no longer stood ready to exchange gold for dollars), and the international monetary system became a floating-rate non-system (which it still is). The DISC (one of several measures introduced to strengthen the dollar) created a tax subsidy for exports. Its opponents at the time warned that such tax subsidies, once introduced, would attract political support that would make it almost impossible to end them. These warnings have turned out to be quite prophetic.

The 1971 program enabled a US corporation (the exporter) to create an affiliated shell corporation (the

DISC) through which exports could be transferred on paper in a way that partially exonerated the exporter from federal income tax on export sales. This program was challenged under the old GATT (General Agreement on Tariffs and Trade) by the European Community (now the EU) in an ugly controversy that lasted ten years. (The United States, for its part, counter-attacked by challenging analogous subsidy programs of EU countries.) Finally, in 1981, in a diplomatically phrased GATT decision, the DISC controversy was resolved.

Or so it seemed. The US Congress then replaced the DISC with the FSC (pronounced fisc), another device for avoiding federal income tax on export sales. Here, the shell corporation (the FSC) is located outside the United States (certain offshore US possessions qualify as outside the United States for this purpose), and the US exporter transfers its export sales on paper through its affiliated FSC.

Following US adoption of the FSC, the controversy between the EU and the US was re-ignited under the WTO agreements that came into effect in 1995. One of these agreements specifically deals with subsidies of exports of industrial goods, and another with subsidies of exports of agricultural products. The Appellate Body has now found tax subsidies by way of FSCs to be incompatible with these WTO agreements.

The heart of the FSC controversy turns on the fact that, generally under the Internal Revenue Code, the US taxes foreign-source income that is "effectively connected with a trade or business within the United States". The Appellate Body pointed out that the US is not obligated to tax this category of foreign-source income. The Appellate Body then said:

"Rather, the issue in dispute is whether, having decided to tax a particular category of foreign-source income, namely foreign-source income that is "effectively connected with a trade or business within the United States", the United States is permitted to carve out an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation."

The US had argued (among other things) that the 1981 GATT decision authorized the FSC, but the Appellate Body ruled otherwise, in part because the 1981 decision did not deal with the relevant provisions in the WTO agreements. The Appellate Body called the FSC "a prohibited export subsidy" under those agreements, and recommended that the US "bring the FSC measure . . . into conformity" with those agreements.

(The Report of the Appellate Body is "United States - Tax Treatment for 'Foreign Sales Corporations'", WT/DS 108/ AB/R, AB 1999-9. The quoted statements are from ¶¶99 and ¶177(a) and 178 of the Report.) ❖



NYLS Alumnae Profile

Name and Year: Darlene Prescott '90.

Employer and Title: United Nations (Codification Division in the Office of Legal Affairs), Legal Officer.

Describe your work and responsibilities: "Responsibilities include covering several topics which are on the agenda of the UN Sixth Committee (Legal Committee), e.g. Protection of Diplomats; Program of Assistance in Teaching and Dissemination of International Law; and Review of the UN Administrative Tribunal Statute. I also work on the United Nations Juridical Yearbook series, which requires, inter alia, my drafting chapters for the publication."

Describe a favorite aspect of your job: "On occasion, being assigned, or suggesting, an ad hoc project that I must see through to its completion is welcomed. Knowing that I am directly involved in the codifying/progressive development of international law is very satisfying."

Career advice for students interested in the United Nations: "Such students should take as many international law-related courses as possible. There are six official languages of the UN (i.e. English, French, Spanish, Russian, Arabic, and Chinese), and at New York headquarters two working languages (i.e. English and French). Knowledge of one of these languages -- in addition to English -- is useful. US attorneys wishing to apply for legal posts at the junior professional level must go through a national competitive examination. However, the examination for US attorneys is only offered by the UN at certain times. Go to the web site www.un.org/Depts/OHRM/ for detailed information on the national examinations, as well as for information on vacancies at New York headquarters and other UN organizations. There is also information on the website for unpaid internship programs offered at the UN." ❖

<http://www.nyls.edu/CIL/>
for internships, job listings,
and upcoming events



Burma goes to the high court after its day with NYLS

The Fall 1999 newsletter tracked the progress of the Massachusetts "Burma Law," which restricts state purchases from companies doing business with or in Burma (now known as Myanmar) in response to that country's much criticized human rights conditions.

On June 22, 1999, the U.S. Court of Appeals for the First Circuit upheld a lower court's ruling and agreed that the Burma Law interfered with the foreign affairs power of the government and violated both the Foreign Commerce and Supremacy Clauses of the Constitution.

New York Law School's Center for International Law sponsored a symposium in October 1999 to discuss the Burma Law. Panelists included Massachusetts Assistant Attorney General Thomas Barnico, **Professor Paul Dubinsky of New York Law School**, Professor Peter Spiro of Hofstra Law School, and Professor Joel Trachtman of the Fletcher School of Law and Diplomacy. **Professor Sydney M. Cone, III, of New York Law School**, served as moderator. Visit <http://www.nyls.edu/CIL/> for a symposium transcript.

In his remarks, Mr. Barnico argued that the case presented a good opportunity for the Supreme Court to clarify the extent to which states can pass laws affecting the nation's foreign policy. As the US becomes further integrated into the world trading system, he reasoned, international bodies such as the World Trade Organization will inevitably challenge state laws violating international trade rules. On the other hand, Professor Dubinsky expressed the hope that the Supreme Court would not review the case because it could prove a poor vehicle for dealing with the issues involved.

From a broader perspective, Professor Spiro argued that while historical circumstances such as the Cold War have justified the federal government's exclusive role in foreign affairs, today's world recognizes subnational actors (i.e. states) as having some "limited form of international legal personality." While Professor Trachtman did not predict whether the Supreme Court would review the Burma Law, he stated that the US's trading partners would resume international litigation to void the Burma Law if the Court ruled in favor of Massachusetts.

On November 29, 1999, the Supreme Court announced that it would review the Burma Law. Oral arguments will be held in Washington, DC, on March 22, 2000, at 10:00 am. ❖

The 2000 Otto L. Walter Lecture

The Jewish Museum Berlin and the Future of the "Invisible Wall" by **W. Michael Blumenthal**

W. Michael Blumenthal, Chairman of the Jewish Museum Berlin, author of "The Invisible Wall: Germans and Jews," and former United States Secretary of the Treasury, will discuss the museum and the future of the "invisible wall" when he presents the 2000 Otto L. Walter Lecture. The Jewish Museum Berlin is already attracting thousands of visitors every month even though there are not yet any exhibitions on display and its official opening is scheduled in the year 2001. This alone attests to intense interest in the museum and its place in German-Jewish history.

**Thursday, March 30, 2000
4:00 pm - 6:00 pm**

**Stiefel Reading Room
New York Law School**

There will be no charge for admission.

To RSVP, send an e-mail to mrhee@nyls.edu or call (212) 431-2865.



TWO SPEAKERS ON THE WORLD TRADE ORGANIZATION AFTER SEATTLE

Last year, the 135 members of the World Trade Organization (WTO) met in Seattle to begin a new round of talks on an ambitious trade agenda. At the time, these talks were overshadowed by thousands of demonstrators protesting economic globalization. Now that the dust has settled, the WTO faces the challenge of promoting world commerce while putting a human face on trade. Should the WTO expand its mandate to tackle issues such as setting world labor standards? How can the WTO ensure that more countries benefit from open trade? Is the WTO too secretive? Should it open and streamline its dispute-settlement process? The faculty will discuss these and other important questions.

Speakers: April 5: William J. Davey, Edwin M. Adams Professor of Law, University of Illinois College of Law; Director, Legal Affairs Division, World Trade Organization, 1995-99. **April 25: Jagdish N. Bhagwati**, Arthur Lehman Professor of Economics, Columbia University; Economic Policy Advisor to the Director-General of the General Agreement on Tariffs and Trade, 1991-93.

**April 5 and 25, 2000
4:00 pm to 6:00 pm**

**Wellington Conference Center
New York Law School**

Co-sponsored with the NYLS Journal of International and Comparative Law.

There will be no charge for admission. To RSVP, send an e-mail to mrhee@nyls.edu or call (212) 431-2865.