Agricultural Biotechnology and WTO Litigation:

The U.S. Should Drop the GMO Case.

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Introduction.

Food fights are in poor taste if done in a fraternity house or at home among infant siblings. They often mask problems that need to be addressed in a calmer, more rational setting. Global food fights are not the way to make friends or mend important relationships among great trading nations. The United States should drop the WTO case it recently filed against the European Union, putting an end to an unnecessary dispute before it spirals out of control.

The U.S. should negotiate a satisfactory resolution of its concerns in a diplomatic setting. Transatlantic relations are more important now than ever before. Besides, in light of recent legal and political developments, the U.S. probably will lose the case anyhow.

Background.

On August 7, 2003, the United States formally asked for the establishment of a dispute settlement panel. Previously on May 13, 2003, the United States requested consultations concerning the EC moratorium, in a letter signed by United States Ambassador Linnet F. Deily to the Permanent Representative to the WTO from the European Communities. The United States contended this moratorium, in place since 1998, bars the approval of import of biotech products into the European Communities. "The approvals moratorium has restricted imports of agricultural and food products from the United States." In addition, the United States contended in its submission that a number of national marketing import bans on biotech products exist, even though particular products had been approved.

The United States argued that there are three wrongful actions in violation of WTO law: the EC's *suspension* of the consideration of applications or granting of approval of biotech products; the EC's failure to consider specifically enumerated products; and the banning by individual states of national marketing and imports of biotech products.

The United States relies on Articles 2 and 5 of the "Sanitary and Phytosanitary Agreement," (the SPS Agreement), one of the Uruguay Round of Multilateral Agreements. Article 2 provides that WTO members have the right to take sanitary and phytosanitary measures necessary for the protection of human life or health, provided they have a basis in scientific principles. The measures cannot arbitrarily discriminate between members. Article 3 requires sanitary and phytosanitary measures to be based upon international standards, where those standards exist. It specifically cites the Codex Alimentarius Commission as an international organization responsible for developing acceptable international standards. Article 5(1) requires a risk assessment that takes into account techniques developed by relevant international organizations. Article 5(7) provides that when the scientific evidence is insufficient, members may apply restrictive measures *provisionally*.

In addition to the SPS Agreement, the United States argues that the EC moratorium is inconsistent with "Technical Barriers to Trade Agreement" (the TBT Agreement), also one of the Uruguay Round of Multilateral Agreements. This provision mainly concerns the issue of labeling products. Article 2(2) requires that members shall ensure that technical regulations do not create unnecessary obstacles to international trade. Article 2(4) also provides that states use relevant international standards as the basis for their regulations.

This innovative legal structure governing the international food trade came into

existence in 1995 with the completion of the Uruguay Round of trade negotiations and the establishment of the WTO. What is particularly unique is the explicit incorporation into the WTO system of international standards developed *outside* of the WTO framework in order to determine the legality of a WTO member's action in compliance with its obligations. Before the explosion and development of biotech research of the last decade, there was little understanding of these provisions' implications on food trade. These rules were forward-looking, yet the consequences were not fully appreciated as the biotech revolution was about to proceed and consumers, governments and societies worldwide became apprehensive over genetically-modified food imports.

The incorporation of the Codex Commission into the provisions of the SPS Agreement rescued it from obscurity and thrust it into the center of global trade disputes. The Codex Commission, located in Rome, Italy, was created in 1963 by two specialized agencies of the United Nations -- the Food and Agricultural Organization (FAO) and the World Health Organization (WHO). Its standards, known as the Codex standards, were mainly voluntary measures for states to take into account in providing consumers with food security. However, with the incorporation of the standards adopted by the commission into the WTO system in 1995 and, with its binding decisions and trade sanctions, the Codex Commission has now become the seminal global reference point for international food trade today.

The standards adopted by the commission have become the benchmarks against which national trade measures concerning food imports and labeling are assessed for compliance with WTO trade obligations. If they do not support it, a trade measure may be deemed an illegal trade barrier. Thus, the U.S. case against the EC depends, in part, on whether the regulations adopted by the EC is consistent with international standards as promulgated by the Codex Commission. Conversely, the strength of the U.S. case depends primarily on whether the United States can persuade a WTO panel that the risk assessment by the EC were not in conformity with the standards of the Codex Commission and, thus, that there is no scientific evidence to support the measures of the EC or its member states. Where the EC relies on the precautionary principle, the United States would need to establish that there was scientific evidence that the EC overlooked. But this U.S. determination would need to conform with the Codex standards.

Discussion.

Recent Codex Commission actions, occurring since the U.S. request for consultations, raise serious problems for the United States. Newer actions by the European Parliament raise additional questions about the wisdom of the U.S. in pursuing this case. Indeed, the EU's recent legal action against eleven member states in the European Court of Justice in Luxembourg raises significant complications for the U.S. proceedings in the WTO. However, most importantly, other issues of foreign policy and national security, namely, the U.S. desire to rebuild transatlantic ties in light of the continuing war on terrorism and U.S. efforts to generate peace in the Middle East and Iraq, further call into question the wisdom of continuing this fight.

The volume of the global food trade industry is gigantic, probably between $300 and $400 billion dollars annually. Conventional breeding practices are now complemented by modern agricultural biotechnology. Genes can now be introduced or deleted in plants, animals and micro-organisms. Genetic engineering results in a product that is a genetically modified organism (GMO). Genetically-modified foods contain ingredients that have been genetically manipulated to contain DNA from more than one organism or are derived from genetically-modified crops. These genetically modified products are developed primarily by large-scale agricultural enterprises. Agricultural biotechnology has become increasingly controversial. This parallels the growing global concern over healthier foods. For example, McDonald's announced earlier this summer it would ask its meat suppliers in its global operation to reduce or eliminate use of certain antibiotics to promote growth. The World Health Organization (WHO) continued its longstanding opposition to use of drugs in healthy animals and recently recommended

eliminating use of antibiotic growth promoters in animal feed since they may cause antibacterial resistance in some humans.

The United States argues that it simply wants the EU to apply a scientific, rules-based review and approval process. The EU contends that its newer 2002 Directive attempts to accomplish that task and provides for the traceability and labeling of genetically modified organisms.

Subsequent to the U.S. request for consultations, the European Parliament approved legislation requiring strict labels and tracing requirements for food or feed made with genetically altered organisms. These new laws are expected to receive final EU approval in the fall, prior to any panel decision. They would permit genetically-modified foods to be imported if they comply with the new requirements. Thus, the formal enactment of this legislation would very likely make the U.S. action moot.

Another action clouding matters since the U.S. made its request for consultations is the Codex Commission's adoption of the first international guidelines for risk assessment studies concerning genetically modified foods. The guidelines require safety evaluations before food products are placed in the marketplace. The guidelines also require measures to ensure food products can be traced back to their origins. In the United States, the Food and Drug Administration (FDA) does not require a pre-market safety assessment or an assessment of unintended consequences due to gene modification. In all these actions these emerging standards appear to support stronger, not weaker regulation. Thus, the EC's position seems more justifiable today than last month; it is relying upon scientific evidence or in the alternative, where there is a lack of scientific evidence, it uses restrictions as a precaution while seeking additional information.

The EU has recently filed an action in the European Court of Justice against eleven member states of the European Union contending they (and implicitly *not* the EU itself) are maintaining moratoriums against approving biotech foods. Public international law imposes international liability on a country when one of its political sub-division (such as a state or county) violates an international obligation owed to another country. It simply does not allow a federal state to escape liability for wrongful actions of its political subdivisions. However, this rule does not apply to the EU. No matter what the pretensions of the EU are it is not a state, but a regional grouping. Thus, the EU would not be liable for the actions by its members. This new legal action by the EU foreshadows a strong defense by the EU in any WTO action concerning its responsibility for the actions of its members.

Conclusion.

The GMO case seems more to be about politics than science, more about domestic politics and international politics. It appears to be more about responding to the special pleas of agricultural firms and more in anger (and as part of a defensive legal strategy) over recent WTO losses by the U.S. over various trade issues -- antidumping duties ("*The Byrd Amendment Case*"), export tax subsidies to U.S. manufacturers ("*The FSC/ETI Case*"), and steel tariffs (the "*Bush Safeguards Case*"). It evidences a growing U.S. tendency to rely upon power politics and unilateral intimidation at the expense of diplomatic and multilateral efforts. Unilateral actions in trade relations ought to be avoided. If there is anything truly multilateral in the world it is global trade relations.

This approach is shortsighted. Just within the last few weeks the United States has prevailed in the WTO in actions brought by India (U.S. rules of origin and textile imports) and against Japan (testing of agricultural imports). The United States is a most aggressive user of the dispute resolution system. The United States was the chief architect of this rule-based dispute settlement system. It is in the national interest of the United States to act responsibly and not to abuse it. Litigation, especially a losing case, designed to appease unwarranted congressional angst, is not good public policy. Litigation is never viewed as a friendly act. The U.S. needs friends for larger foreign policy objectives.

While the United States agricultural biotech firms may have real grievances, at this point, they should not be settled by trade litigation. Negotiating labeling requirements with the EU makes more sense. Disclose the information and let the buyer and market decide.

Trying to regain friends to meet the graver problems of terrorism and peace should be top priority. We need to make the world a safer place, not for GMO's, but for all of us. The U.S. should drop this case now and get on with building a safer international community. Food fights should always be replaced with behavior that is more grown-up, responsible and satisfying in the long-run.