

# Caught in the Middle:

## Should the World Trade Organization Settle Environmental Disputes?

The 1990s have emerged as the decade of economic globalization. More than ever, countries are part of a global economy that demands the elimination of trade barriers and the smooth flow of goods and services from one place to another. But even as countries seek the benefits of open trade, they find themselves having to resist imports they find undesirable. In some cases, the overriding concern of the importing country is that a product or class of products could threaten the health of its environment or people. The result can be a trade quarrel that pits one country's desire for market access against another country's insistence on sovereignty over its own domestic environmental policies.

Since its inception in 1995, the World Trade Organization (WTO) has arbitrated trade disputes between its members involving public health and the environment. The WTO is the only international organization that deals solely with the development, implementation, and enforcement of global

rules of trade. Headquartered in Geneva, Switzerland, the WTO was established as a successor to the General Agreement on Tariffs and Trade (GATT), which was itself established in the wake of the Second World War. Part of the role of the WTO is to decide whether unilateral actions by WTO members such as trade bans or restrictions violate international free trade rules and to authorize penalties against members that are found to be noncompliant with such rules.

Recently the WTO has come under criticism by those who believe its emphasis on free trade undermines national efforts geared toward environmental protection. Public interest groups, in particular, have expressed concern that the WTO has yet to uphold any of the environmental programs and measures challenged as trade barriers by WTO members, leading these groups to question whether the organization has the mandate—and hence the will—to uphold environmental priorities over trade. One of their chief complaints is that the WTO conducts its

negotiations behind a veil of secrecy that effectively excludes public participation. Critics allege that, by closing its doors to the public, the WTO denies itself important information that could help it make better decisions regarding public health and the environment. Furthermore, these groups question whether the WTO has the technical capacity to resolve environmental conflicts based on scientific disputes.

A number of recent WTO decisions have highlighted concerns to this effect, including an October 1998 ruling that a U.S. ban on imports of shrimp caught without turtle excluder devices was an unnecessary trade barrier that the United States must modify. In this case, the WTO determined that the ban was applied unfairly because the United States had given Latin American countries three years to implement the devices whereas India, Thailand, Malaysia, and Pakistan were given only four months. Another contentious WTO decision involved a 1998 ruling against the European Union (EU), which had

previously imposed a ban on hormone-treated beef imports from the United States and Canada. In this case, the EU's claim that growth hormones in cattle might cause developmental, neurotoxic, genotoxic, and carcinogenic effects in human consumers was rejected by the WTO, which ruled that the evidence of adverse health effects presented by the EU was insufficient to justify a trade barrier. In a subsequent move that led some to question the WTO's credibility, the EU disregarded the ruling and upheld the ban anyway, prompting the WTO to authorize \$116.8 million in compensatory tariffs by the United States against the EU in May 1999.

Whether the WTO will preside over a current dispute involving exports of genetically engineered crops from the United States to the EU remains to be seen. These crops are highly unpopular among European consumers, who often refer to them as "Frankenstein foods." To date, the EU has approved 16 varieties of genetically modified plants for import. But in response to public fears about health and ecological effects, EU authorities have suspended the introduction of any new varieties into European markets and have imposed an eco-labeling requirement on all genetically engineered imports. The effects of these actions on U.S. farmers could be devastating.

"Problems arise because valid health and environmental measures often have the secondary effect of protecting national producers, as is the case with hormone-treated beef," says Matthew Stilwell, a Geneva-based managing attorney with the public interest law firm Council for International Environmental Law. "In this case, the EU will argue that their regulation is a valid health measure, while the United States argues that it is merely thinly veiled protectionism. The WTO, as a trade body, is asked to resolve these vexing questions—ones that go to the very basis of national policy making on central issues of health and environment. This brings up the question as to which institution should make these decisions. Should it be the WTO? And what level of deference should be given to national laws to protect health?"

### Dispute Resolution at the WTO

Arbitration of trade quarrels at the WTO takes place within a formal dispute resolution mechanism that determines whether a country's actions violate any of 60 agreements established by consensus among the organization's 134 member nations. The resolution mechanism proceeds as follows: If a compromise between the two parties can't be reached, the WTO's Dispute Settlement Body convenes a panel of three to five experts in consultation with the opposing

countries. This panel can draw on a variety of technical experts as it reviews the case. Upon completing its review of the available technical and legal evidence, the panel prepares a report that is released to the public and reviewed by all WTO members. Following that review, the panel decides whether the disputed measure violates WTO agreements or obligations and issues a final rule that either upholds the contested measure or requires that it be made to conform with WTO regulations. Rulings can be appealed, but successful appeals require the consensus of all WTO members to overturn a panel or appellate body ruling. This requirement is contentious because the prevailing country is unlikely to vote to overturn a ruling that falls in its favor. Finally, if the losing party refuses to comply with the ruling, the complaining side can ask the Dispute Settlement Body for permission to impose limited trade sanctions.

An example of an agreement frequently applied to environmental disputes is the Agreement on Sanitary and Phytosanitary Standards (SPS). This agreement was drafted to ensure that national laws that protect humans, animals, and plants from pests, diseases, and harmful food additives aren't used as disguised protectionism. The SPS agreement was applied in the beef hormone case and would likely be applied to genetically modified crops as well, should that issue be brought before the WTO. A key element to resolving disputes under the SPS agreement is risk assessment. Countries trying to prove that a trade ban doesn't violate the SPS agreement must produce risk assessments showing that the product they aim to restrict is capable of causing demonstrable harm. The WTO has ruled that "it isn't sufficient for governments to impose [regulations] simply on the basis of [the] theoretical risk . . . that underlies all scientific uncertainty." The WTO says that risk assessments must find evidence of "ascertainable" risk without too much weight being lent to "unknown and uncertain elements." However, there is no minimally sufficient magnitude of risk that regulators must find. Many WTO observers are concerned about the scientific evidence that dispute resolution panels bring to the table when they review risk assessment conclusions. Problems emerge because most stakeholders tend to want to interject their own interpretations of the data. The most vocal critics by far are those who feel they are being shut out of the process.

### Negotiating Behind Closed Doors?

Few would dispute the notion that trade issues are sensitive; in fact, part of the WTO's mission is to prevent military conflicts that might arise from economic

disagreements. Countries therefore have a certain incentive to prevent the release of sensitive and proprietary information during both the negotiation of trade agreements and the disputes arising from them. But the resultant aura of secrecy that appears to shroud dispute resolutions in particular is distressing to public-sector nongovernmental organizations, which complain that they are excluded from providing input during dispute panel negotiations. Officials at the United States Trade Representative (USTR) have voiced similar concerns, and the Clinton administration has warned that the widely held perception that panel negotiations take place behind closed doors undermines public confidence in the WTO.

However, a senior official with the Trade and Environment Division at the WTO counters that directing criticisms about secrecy (or "transparency," as it is commonly termed) at the WTO is unfair because the organization neither restricts member nations from releasing documents to the public during dispute settlements nor forces them to do so. "The WTO does not prevent countries from making their documents public. Each country can do so with its own documents if it so wishes. When countries do not do that, it is those countries that are to blame and not the WTO as an organization. Nothing in the rules of the WTO says that there should be secrecy," the official says.

John B. Weiner, an attorney with the Washington, DC-based law firm Beveridge and Diamond who practices in the area of international trade and environmental law, acknowledges that governments engaged in dispute settlements can at any time release their own panel submissions (but not those of the opposing party without permission) to the public. But the decision to consult any organization prior to the release of the panel's report rests solely with the government itself. What this means is that even though nongovernmental organizations may want to participate in the dispute settlement process, they are excluded unless their participation is directly requested or otherwise permitted by the panel or one of the governments involved. At most, they can consult with governments or submit their own materials to panels. However, they cannot attend or participate in actual panel sessions. These groups often find themselves in the frustrating position of sitting out negotiations on the sidelines or participating with only limited information.

### Access to Technical Expertise at Issue

Public interest groups' frustration over lack of access is compounded by their perception that dispute settlement panels, which are usually composed of trade lawyers, lack

the expertise to understand technical environmental data. Moreover, they claim that the WTO often fails to consult appropriate international organizations such as the World Health Organization (WHO) and the United Nations Environment Programme. Part of the problem, they suggest, is that the WTO is a new organization that is still defining its territory in the international policy landscape and that working closely with other organizations on technical environmental disputes might be seen as relinquishing its authority. Charlie Arden-Clarke, head of the Trade and Investment Unit at the World Wildlife Fund's office in Gland, Switzerland, says, "The WTO is a trade organization, and it doesn't have environmental expertise in its secretariat. It doesn't want to expand that expertise because its focus is on liberalizing trade and preventing protectionism; that's its job. We find that when the WTO makes its rulings, it doesn't fully consider health and environmental measures because it can't."

But neither WTO representatives nor officials at the USTR share the view that the WTO fails to consult international environmental organizations as it formulates its own policies. A senior official at the USTR maintains that several international organizations were consulted during preparation of the SPS agreement. These organizations include the Codex Alimentarius (an agency organized by the United Nations and the WHO to set global standards for food safety) as well as the United Nations Office for International Zootics and the International Plant Protection Convention (an independent intergovernmental animal health organization headquartered in Paris). Says a senior official with the WTO's Agriculture and Commodities Division in Geneva, "We do confer with other organizations when we think it makes sense to do so. WTO isn't doing WHO's work and vice versa, but we do confer with them."

During the recent hormone-treated beef negotiations, five technical experts with a combined experience base in veterinary medicine, toxicology, and risk assessment were retained by the panel for consultation. Among them was George Lucier, director of the Environmental Toxicology Program at the NIEHS, who noted that the experts were able to consult freely with one another as they prepared their technical comments. In assessing his experience as a technical expert, Lucier concluded that the panel in this case was focused on scientific issues and that the science, along with other trade-related issues, was a critical determinant in the outcome of the dispute. "I applaud [the WTO] for that," he says.

In the hormone-treated beef case, the WTO concluded that based on its review of the available risk assessments, potential health threats were nonexistent and ruled that the EU's trade ban was a protectionist measure that violated the SPS agreement. However, the EU ignored the WTO's conclusions regarding the scientific merits of its case. The union responded with a 139-page report—released to the public—that concluded that six hormones including 17 $\beta$ -estradiol, progesterone, testosterone, zeranol, trenbolone, and melengestrol acetate posed risks to consumers, but with different levels of evidence. The union also accepted the retaliatory tariffs of the United States pending the results of yet another series of risk assessments it is conducting in hopes of proving that there is sufficient health reason to ban hormone-treated beef.

The fact that the EU continued its ban of U.S. beef in spite of the WTO ruling led some to speculate that the credibility of dispute resolution at the WTO could be at stake, especially if the EU's actions set a precedent in which rulings are flouted routinely by countries on the losing end. When asked whether this might be the case, WTO officials countered that these concerns are unfounded because measures designed to address noncompliance among losing countries are built into the dispute resolution framework. For example, in the hormone-treated beef case, retaliatory measures were authorized by the WTO and found to be agreeable by the EU, the United States, and Canada. The fact that the retaliation has proceeded smoothly among the countries has led to agreement among WTO and USTR officials that the dispute resolution process, in this case at least, functioned as intended.

### The Precautionary Principle

What the ruling failed to do was reassure the concerns of EU consumers. Public interest groups, not to mention much of the European population, remain dissatisfied with the conclusions of the WTO's panel. Technologically enhanced foods—be they hormone-treated beef or genetically modified crops (which represent another looming trade dispute between the United States and the EU)—are a big health concern among Europeans. European leaders face a difficult prospect in that on the one hand, their people are demanding that technologically enhanced food imports be denied entry, while on the other, they have to deal with a WTO dispute settlement framework that rules in favor of health- or environment-based trade bans only in the event that they can be scientifically justified.

This essential conflict calls into question the whole basis by which the WTO resolves

disputes involving environmental risk. Critics of the current system have argued for greater use of the precautionary principle, which holds that in situations where serious or irreversible damage is possible, lack of full scientific evidence should not stand in the way of actions designed to prevent environmental damage. The EU has in fact suggested that its ban on hormone-treated beef, despite a lack of conclusive evidence of adverse health effects, was justified by the precautionary principle, which it characterized as a "rule of customary environmental law."

Part of the problem is that there are differing opinions as to how to interpret the precautionary principle. The EU interpretation is that, despite the lack of evidence today, new risks may reveal themselves tomorrow, and the prudent measure is to uphold a ban until further studies are conducted. Conversely, the United States counters that application of the precautionary principle doesn't warrant implementing conservative measures based on zero evidence of risk. The position of the United States is that issues of scientific uncertainty are already addressed by regulatory agencies in their policy decisions.

The prospect of giving greater weight to the precautionary principle at the WTO is not being taken lightly by its member nations. The United States has maintained that actions taken to restrict trade should be based on some minimal evidence that risks may in fact be valid. At stake, of course, is the U.S. genetically modified crop industry, which could be hurt by further restrictions to European markets. Lucier says that precautionary measures are necessary to protect public health, but he cautions against using the precautionary principle in ways that lead to excessive conservatism. Says one senior official at the WTO, "Even when the precautionary principle is better defined, there will always be situations in which countries need to put in place [perhaps] irrational trade restrictions [in response to] strong public opinion. The WTO is flexible enough to allow them to do so, provided they compensate their trading partners or allow themselves to be subjected to retaliatory trade measures in the event of a dispute [resolved against them]."

Future use of the precautionary principle may be an agenda item at the next ministerial meeting of the WTO, to be held in Seattle, Washington, in November 1999. In the meantime, it is clear that the WTO faces considerable challenges as it attempts to define its role and responsibilities as both an agent for free trade and an advocate of public health and environmental protection.

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