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WTO Ruling on the EU-US Biotech Products Dispute: A Review of Issues

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Abstract: The current paper reviews the future direction of US trade policy on genetically modified (GM) crops. The US has recently won a case at the WTO Dispute Settlement Body (DSB), challenging the EU's *de facto* moratorium on approvals of biotech products as well as the safeguard measures undertaken for that purpose. The DSB ruled the EU policy to be inconsistent with the 'sufficient scientific evidence' and 'risk assessment' requirements under the WTO SPS Agreement. The case law sets a precedent and the US might follow the same route for other WTO members, who are currently not permitting import of GM crops within their territories. It has earlier raised concerns on the policies of several developing countries including South Africa. India, which is yet to approve any GM food crops till date, may also face similar concerns. Considering the current scenario, the paper concludes that India must keep the Cartagena Protocol on Biosafety in mind while developing its legal provisions for GM crops through Food Safety Bills, to ensure the precautionary principle.

Keywords: GM, Cartagena Protocol, US, EU, India, Biosafety, Biotech, Cotton

Introduction

The cultivation of various GM crops (like corn, soya and maize) have expanded in both developed as well as developing countries, especially in Argentina, Canada, China and the US, with a consequent increase in the export interest. However, the EU decision in mid-1999 on not allowing marketing of any new GMOs there before updating the EU rules, to satisfy public concerns about possible dangers to human health and the environment, caused the US farmers to complain about a sales loss of US $300 million (172 million pounds) per year in the EU markets and elsewhere indirectly as a consequence (Crop Choice, 2002).[1] In

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May 2003, the US moved the WTO dispute settlement body against the EU's *de facto* moratorium on approvals of biotech products and individual member's marketing prohibitions on previously approved biotechnology products (DS 291). Canada (DS 292) and Argentina (DS 291) also joined the dispute. The complaints alleged a violation of Articles 2, 5, 7 and 8, and Annexes B and C of the SPS Agreement and Article 4 of the Agriculture Agreement among other provisions. Suppan (2005) noted that any panel ruling in favour of the US would have a profound impact on the viability of successfully using a precautionary principle-based defense. Currently, a number of Indian states are apprehensive about allowing cultivation of genetically modified (GM) crops within their territories. The situation needs to be viewed in the perspective of the current global conflict on GM crops and their implications for India.

Panel Report and Related Dynamics

The concerned WTO panel has delivered its interim report in February 2006 and the final report in May 2006, taking almost two years to complete the case. It concluded that the general *de facto* moratorium and product-specific approval policies of the EC as well as safeguard measures taken by individual Members are inconsistent with the 'sufficient scientific evidence' and 'risk assessment requirements' under the SPS Agreement. It also turned down the EC argument for considering the Convention on Biological Diversity (1992) and the Cartagena Protocol on Biosafety (2000) for interpreting the relevant WTO rules in this case, without providing much explanation.[2] However, the panel ruling has left a number of unresolved questions, for example, the issue of –'likeness' between GM crops and their conventional counterparts, WTO-compatibility of EC's current approval procedures based on a product-by-product assessment; future implications of the panel's narrow interpretation of 'risk assessment' in the SPS Agreement on Member's ability to adopt precautionary approach, etc.[3] Interestingly, the panel accepted, but refused to consider, *amicus curiae* briefs.

The panel decision has created more controversies than it actually solved, with questions being raised on the right of the WTO to decide on this issue claiming that every country should be free to decide the required level of protection for its environment and health.[4] In the

light of the panel findings, we try to understand what a possible US response to this might turn out to be. The driving impetus for the US to lodge the case at WTO has been its market losses at the EU. The US has so far raised concerns on the GM policies of several countries. Table 1 provides a brief summery of its views on that front.

Table 1: Biotech Policies of Select Countries – US Viewepoint

Country	Concern
Brazil	On March 2, 2005 Brazil approved a Biosafety Bill, replacing the previous legal framework in use since 1995. Despite creating a framework for judicial proceedings under the new regime, some unresolved issues like application of the labeling regulations for biotech products, marketing and transportation restrictions in some states, widespread piracy of (biotech) soybean and cotton seeds, etc. still remain.
China	In January 2002, the Ministry of Agriculture (MOA) issued new regulations on agricultural biotechnology safety, testing and labeling; affecting imports of soybeans, while corn, etc. As the rules did not provide adequate time for completion of required safety assessments, China issued interim rules, extended twice, which allowed trade to continue while authorities carried out safety assessments of biotech products. Although subsequently China has approved varieties of soybeans, cotton, corn and canola events, US is still concerned about the procedural framework, e.g. - limited timelines for submission of products, lack of clarity on assessment requirements for stacked (multiple trait) products, duplicative and unprecedented testing requirements, apparent lack of coordination of the development of biotechnology policy in China, etc.
EC	In April 2004, EC Regulations 1829/2003 and 1830/2003 governing the approval, traceability and labeling of biotech food and feed were brought into force, requiring mandatory traceability and labeling for all biotech and downstream products, indicating whether the food is different from its conventional counterpart in composition, nutritional value, etc. The rules requires the operators to introduce a standardized system for maintaining information about biotech products and to identify the operator by whom and to whom it was transferred for a period of five years from each transaction.
India	Given the absence of a policy framework for assessing the safety of biotech commodities and foods, the decision-making process is considered slow, non-transparent and arbitrary, which equally hampers the domestic research on agricultural biotechnology.

Table 1 continued

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Country	Concern
Indonesia	In early 2001, Indonesia has introduced labeling requirements for GM food products ('genetically engineered' and 'irradiated' ingredients), although the government is yet to implement them owing to the absence of established minimum threshold limits. The estimated approximate trade loss of US soybeans and soybean meal would be $411 million annually in the regulations come into effect.
South Africa	The GM Organisms Act was introduced in 1999, and further complemented by labeling regulations on biotech products in early 2004, making labeling of foods containing agricultural biotechnology, proof of enhanced-characteristic of it and establishing significant difference from a non-biotech equivalent mandatory. The use of biotech products is widespread in food processing industry, and the government published draft changes to make the GMO Act compatible with the Cartagena Biosafety Protocol in November 2004. However, the requirement of *de novo* review involving "stacked events" by considering it a new product, unlike a conventional one in the US is a problem area.
Sri Lanka	Ongoing discussions for introducing a labeling requirement for GM food imports are a major concern area and the Ministry of Health has drawn up a draft law for regulation purposes.

Source: Constructed with the help of USTR (2006).

A changing perspective in the EC is being observed recently. On 24 June, 2005, the Environment Council rejected the eight Commission proposals to lift the safeguard measures imposed by five Member States against biotechnology maize. Interestingly, 22 out of 25 Member states voted against the lifting of the bans; only the UK supported the Commission on all proposals, while Sweden and Finland abstained[5]. However, a number of Member States have now drafted new laws, for ensuring the co-existence of biotechnology and conventional crops, or have chosen to provide industry guidance. Moves to review the present decision-making process on biotechnology approvals are also observed.[6] Therefore, increasingly the US focus is likely to be on other countries from now on as well.

The US has already raised concerns over the South African policies for grains producers wherein the approval for biotech products involving "stacked events"[7] treat combinations of two previously

approved genetic modifications as a "new" variety rather than as "conventional" as in the US. This significantly delays the registration process there. Also the US has voiced concern over the non-approval of US yellow corn for importation in South Africa because of "stacked events".[8] Other African countries (for example, Zambia) have earlier rejected US food aid mixed with GM crops.[9] Chances are high that now the US might push African countries to accept GM crops, although several Africans countries are in no mood to comply with such pressure.[10] Among Asian countries, in 2001, Sri Lanka decided to put an outright ban on GM crops, but the US got the ban overturned by threatening to impose restrictions on imports of Sri Lankan tea (Global Week of Action, 2004). The WTO also asked Sri Lanka to give its trading partners 60 days to prepare for the restrictions.[11] In 2003, the US seriously considered the possibility of dragging Sri Lanka, Bolivia and Croatia to the WTO DSB over their GMO regulations.[12] In this context, the GM policies of India and their implications on consumer interest should be carefully assessed.

Indian Scenario

India has earlier rejected food aid of corn-soya blend from the US fearing that it may contain a GM strain.[13] While the EU and several African countries are very particular about labeling, in contrast in the US no special treatment is necessary, as these products are not segregated from their non-GM counterparts under local regulations. The US regulatory agency did not issue any certificate to specify that the corn-soya blend shipment did not contain any banned or obsolete variety of transgenic corn in a context where the Indian Council of Medical Research (ICMR) expressed its opinion against feeding GM foods to vulnerable populations. The Genetic Engineering Approval Committee (GEAC), a regulatory body working under the Ministry of Environment and Forests, therefore rejected the food aid.

India has not approved any GM food crops yet, although many such varieties (e.g. - transgenic rice, GM mustard, GM potato) are currently under various stages of development. During the last couple of years, field trials for various GM crops have been undertaken.[14] Approval for commercial production of GM cotton (Bt cotton), developed by Monsanto of the US was given after several years of field trials. It is likely that the government might approve large-scale field

trial of GM brinjal, mustard and potato soon prior to their commercial release / marketing.[15] One major reservation against the use of GM crops imported from other countries, apart from the human health risk, has always been that the crop might affect the local environment adversely. For instance, the pollen and seeds from GM crops may be transmitted to their non-GM varieties cultivated in nearby fields, and the passing of genes can create stronger weeds. As a consequence, farmers might resort to more damaging chemicals to curb them. In contrast, the nutrition value of the GM crops is highlighted at times.[16]

A changing Indian perspective is noticed in the recent period, as the GEAC has allowed imports of refined soyabean oil extracted from GM crops without any tests, provided it is accompanied by a certificate from the exporting country declaring its GM link.[17] The Foreign Trade Policy (2006) announced that all imported GM products should be labeled.[18] The health ministry subsequently was engaged in finalizing rules relating to the labeling of GM food. To facilitate finalization of the labeling norms, the Ministry of Commerce had kept on hold laws relating to the mandatory labeling of imported GM products till 7 July, 2006.[19]

Concluding Remarks

It has been argued that harmonization of the different policies and regulations formulated by different ministries are an essential prerequisite for ensuring the effective governance of biotechnology.[20] The recent Food Standards and Safety Bill 2005, proposed the setting up of an independent food authority, in line with the recommendations of Swaminathan and Mashelkar Committees, for regulating all laws pertaining to GM foods. Once the Bill is passed by Parliament, rules relating to the labeling of GM food would thereby be reviewed and administered by an independent food authority. However various quarters have already voiced concerns over the plans to dismantle the GEAC.[21]

In the near future, the regulatory aspect of GM crops in India will gain importance. The recent Supreme Court decision rejecting Monsanto's plea to put a stay on the Andhra Pradesh government order directing the company not to charge over Rs. 750 on a 450 gram packet of its GM Bt cotton seeds is only the beginning.[22]

Finally, one must note the possible implications of the "Cartagena Protocol on Biosafety" in future disputes as it highlights the precautionary principle for developing an international environmental agreement.[23] India must give importance to this principle while developing its legal provisions for GM crops through Food Safety Bills. The independent Food Authority while passing on its views should have a binding commitment to ensure the precautionary principle as highlighted in the Cartagena Protocol.

Endnotes

1 According to USTR (2006) in 2004 in Portugal itself the regulations caused losses of $56 million and $21 million for corn and soybeans, respectively.
2 Sharma (2006e).
3 Bernasconi-Osterwalder and Oliva (2006).
4 Beattie, (2006); Greenpeace (2006).
5 Greenpeace (2006).
6 USTR (2006).
7 If two different traits obtained by genetic modification are combined by breeding, the final product is termed as 'stacked event'.
8 USTR (2006).
9 Lobe (2003).
10 Shacinda (2006).
11 ICTSD (2001).
12 Baumüller (2003).
13 Luce (2003); Indian Express (2003); Devraj (2003).
14 Srivastava (2002).
15 Sharma (2006d).
16 Jagannathan (2004); Planet Ark (2004).
17 Sharma (2006c).
18 IEPORT (2006).
19 Sharma (2006a).
20 Chaturvedi and Chawii (2005).
21 Bharat Krishak Samaj (2006).
22 Sharma (2006b).
23 Baumüller (2003).

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