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HARMONIZATION ALERT, a publication of Public Citizen, seeks to promote open and accountable policy-making relating to public health, natural resources, consumer safety, and economic justice standards in the era of globalization.

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NAFTA / TRANSPORTATION

Topic: *Unsafe Mexican Trucks Headed for U.S. Highways*

Contact: Barbara Cobble, Director of Maritime & Highway Safety Programs, Office of Inspector General, U.S. Dept. Of Transportation, 400 7th Street, SW, Room 9201, Washington, DC 20590; Tel: 202-493-0327.

On February 6, 2001, a North American Free Trade Agreement (NAFTA)[1] dispute resolution panel ruled that the U.S. is violating NAFTA by restricting access for Mexican trucks to a narrow border zone within the U.S.[2] The panel ruled that the U.S. must either begin to evaluate petitions by Mexican trucking companies for full access to U.S. roads or face trade sanctions for refusing to comply with the trade agreement.[3] The decision has prompted highway safety experts to call upon the U.S. government to continue to block access to U.S. roads for unsafe Mexican trucks, even if it means paying trade sanctions. The decision highlights some of the problems connected with the continued liberalization and deregulation of the service sector as provided for in NAFTA and in the Free Trade Area of the Americas (FTAA), a proposed NAFTA expansion to 31 additional countries of the Western Hemisphere.

NAFTA includes provisions that required the U.S. to give Mexican trucks access to the four U.S.-Mexico border states by December 18, 1995 and to the entire U.S. by January 1, 2000.[4] The U.S. had delayed implementation of these NAFTA terms because of serious safety concerns raised in several audit reports by the Inspector General of

the U.S. Department of Transportation (DOT) regarding the condition of many Mexican trucks and the absence of Mexican truck safety laws or enforcement. In February 2001, the NAFTA panel, comprised of five trade lawyers, held that the U.S.'s moratorium on accepting applications for cross-border trucking authority from Mexican trucking companies is a breach of the U.S.'s obligations under NAFTA.[5]

History of the Dispute: Since 1982, Mexican trucks have been restricted to unloading U.S.-bound freight and picking up Mexico-bound freight in a 20-mile-deep "border commercial zone" within the U.S.[6] NAFTA required the U.S. to allow for greater access for Mexican trucks in incremental stages. However, when the implementation date for the first stage arrived, the Mexican government had failed to implement promised truck safety policies and has failed to do so to date. Mexican law lacks many fundamental elements of a basic highway safety policy, such as any limits on how long a driver may drive without rest, authority for inspectors to remove unsafe trucks from service, a safety rating system for trucks, and requirements regarding driver logbooks, regular vehicle maintenance, and roadside inspections.[7]

According to DOT highway and border inspection data, the lax Mexican truck safety system has resulted in the operation of many unsafe Mexican trucks. DOT data show that Mexican trucks now permitted to enter a narrow U.S. border zone are removed from the highway significantly more often than American trucks for failing to meet basic safety requirements. In 1999, fewer than 35,000 (or less than 1%) of the 4.1 million Mexican trucks crossing the border were inspected. Thirty-nine percent of those trucks failed to meet U.S. safety standards.[8] In 1998, about 42% of Mexican trucks were removed from the highway for safety violations, as compared with 26% of U.S. trucks.[9]

NAFTA's Chapter 9, which covers standards-related measures, did include provisions requiring that the U.S., Canada, and Mexico harmonize their truck safety standards by January 1997 in areas such as truck length, weight, and maintenance, as well as inspections.[10] The agreement required that the three countries establish the Land Transportation Standards Subcommittee (LTSS), which was supposed to implement the agreement's harmonization requirements. Consumer and highway safety groups were very worried that NAFTA's vague but broad harmonization mandate would result in a lowering of U.S. standards. However, LTSS has accomplished very little harmonization to date.

Seven years after the Mexican government promised to improve Mexican truck safety standards to match U.S. safety requirements, few changes have been made.[11] Mexico's trucks remain generally uninspected, drivers can haul for unlimited hours without logbooks, and truck weights remain greatly in excess of U.S. standards.[12] This outcome was made possible by the lack of a connection between the NAFTA rules requiring harmonization of land transportation standards and the provisions and commitments requiring the U.S. to open its border to Mexican trucking service providers. According to the NAFTA dispute resolution panel in this case, "the obligations of the Parties were not made contingent upon completion of the standards-capability program or the adoption of an identical regulatory system in Mexico."[13]

In light of the insufficiency of Mexican safety standards, the inability of U.S. border officials to inspect each and every truck, and the considerable risks posed to U.S. drivers by unsafe Mexican trucks, then-President Clinton refused in 1995 to implement the NAFTA provision requiring access to the border states for Mexican trucks. According to President Clinton, "[w]e now have evidence that two-thirds of the trucks that come across the border are not safe; they don't meet our standards. And I intend to see the rules are followed before I follow the rules on this."[14]

The Clinton Administration announced that three basic conditions had to be met before greater access would be granted. First, Mexico would have to fulfill its NAFTA promise and develop safety regulations that are substantially comparable to U.S. safety standards. Second, Mexico would have to implement an adequate enforcement regime to ensure that its safety rules were obeyed. Third, the U.S. Congress would have to provide U.S. safety regulators with sufficient resources to guarantee that Mexican trucks meet U.S. highway safety

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standards.[15] To date, none of the three conditions has been satisfied.[16] A 1998 DOT study concluded that the Mexican system's shortcomings in 1995 still existed in 1998.[17] Even in 2000, an official of the pro-NAFTA American Insurance Association stated that "[u]ntil we see more progress, the potential for loss of life, injury and severe property loss appears to be too high to allow operation of Mexican motor carriers beyond the commercial zones."[18]

In 1998, Mexico challenged the U.S. policy by initiating formal NAFTA dispute resolution proceedings. Mexico claimed that the U.S. was refusing to abide by its NAFTA commitment to give Mexican trucking service providers access to the U.S.[19] The U.S. responded in a brief in the case that it was justified in continuing its moratorium on granting Mexican trucks greater access because "highway safety can only be assured through a comprehensive, integrated safety regime,"[20] which Mexico currently lacks. Thus, the U.S. argued, so long as "adequate measures are not yet in place [in Mexico] to ensure U.S. highway safety," NAFTA cannot require the U.S. to lift its moratorium.[21] But in February 2001, the NAFTA panel concluded that the U.S. should give access to Mexican trucks regardless of the inadequacies of the Mexican regulatory system and the potential safety risks of Mexican trucks.[22]

The NAFTA Panel Decision: In the considering the case, the NAFTA panel stated that the central issue was whether the U.S. breached NAFTA's "national treatment" and "most-favored-nation treatment" requirements in Chapters 11 and 12 by 1) failing to lift its blanket moratorium on the consideration of applications by Mexican-owned trucking firms for authority to operate in the U.S., and 2) refusing to permit Mexican investment in U.S.-based transportation companies.[23] NAFTA's national treatment provisions require that the U.S. give Mexican and Canadian service providers and investors "treatment no less favorable than it accords, in like circumstances, to its own service providers" and investors.[24] The most-favored-nation provisions require that the U.S. give Mexican service providers and investors "treatment no less favorable than it accords, in like circumstances, to [Canadian] service providers . . . [and vice-versa].[25]

The panel also noted that the U.S. had made a temporary "reservation" in its Annex I service sector schedule that allowed it to avoid complying with the national treatment and most-favored-nation treatment requirements with regard to trucking services, but only for the time periods specified in the reservation. After those dates, the U.S. would be obligated to consider Mexican companies' applications for cross-border trucking authority and to permit Mexican investments in U.S. trucking companies unless one of NAFTA's general exceptions to the national treatment and most-favored-nation requirements applied.[26]

The U.S. argued that two exceptions supported its cross-border trucking ban. First, the U.S. pointed to the qualifying words "in like circumstances," which are part of the language of NAFTA's national treatment and most-favored-nation provisions. The U.S. asserted that the considerable deficiencies of Mexico's truck safety system and the high safety violation rate for Mexican trucks mean that Mexican trucking service providers are not "in like circumstances" when compared to U.S. and Canadian providers. Therefore, a U.S. brief argued, "service providers [in Mexico] may be treated differently in order to address a legitimate regulatory objective" such as safety.[27] According to the U.S., the different treatment—*i.e.*, the refusal to accept applications from Mexican providers—was necessary because the deficiencies of the Mexican system prevent the U.S. from adequately assessing the safety of the hundreds or even thousands of Mexican trucking companies that might apply for access to U.S. roads.

The panel rejected that argument and held that if the U.S. accepted and considered applications from U.S. and Canadian trucking service providers, then NAFTA's national treatment and most-favored-nation treatment rules required that the U.S. accept and consider applications from Mexican providers. The panel report in the case included references to the extensive U.S. data on Mexican truck safety problems. However, the panel ruled that "the inadequacies of the Mexican regulatory system provide an insufficient legal basis for the United States to maintain a moratorium on the consideration of applications for U.S. operating authority from Mexican-owned and/or domiciled trucking service providers."[28]

The panel focused on the fact that the U.S. "has permitted roughly 150 Mexican-domiciled carriers who claim U.S. majority ownership, five Mexican-owned carriers grandfathered under U.S. law, and one Mexican-domiciled, Mexican-owned carrier transiting the United States to reach Canada, to operate freely in the United States despite alleged deficiencies in the Mexican truck regulatory system."[29] The panel found the U.S.'s blanket moratorium and its "in like circumstances" defense to be inconsistent

with these prior exceptions made by the U.S.[30]

Second, the U.S. claimed that the general safety exception provided in NAFTA Article 2101 applied to the situation. That provision allows a country to maintain measures that do not conform with national treatment and most-favored-nation treatment requirements if they are "necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection."[31]

The NAFTA panel drew upon past General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) panel decisions to rule that the U.S.'s moratorium was not justified under the NAFTA Article 2101 exception because the U.S. "failed to demonstrate that there are no alternative means of achieving U.S. safety goals that are more consistent with NAFTA requirements than the moratorium."[32] This excerpt from the ruling is based on the notion that to be "necessary," a measure must pass a "least trade restrictive" test, for which a defending party must prove a negative—*i.e.*, that there was no other way to achieve its goal.

The NAFTA panel also noted that the U.S. was "well aware during NAFTA negotiations that the Mexican truck regulatory system was deficient in many respects,"[33] and that the U.S. nevertheless made no efforts to condition its commitment to open the border upon regulatory improvements by Mexico or to renegotiate its responsibilities in light of its safety concerns.[34]

Finally, the panel noted that Article 105 of NAFTA requires the U.S. to "ensure that all necessary measures are taken to give effect to the provisions of this Agreement." Thus, the panel ruled, budgetary and staffing shortfalls pleaded by the U.S. regarding the extra inspection of Mexican trucks "[are] not an excuse to fail to comply with U.S. obligations under [NAFTA] . . . ."[35]

With regard to Mexico's investment-related claims, the panel stated that the U.S. had made no significant effort to defend its position, and held that the U.S.'s prohibition on Mexican investment in U.S. trucking service providers violated the national treatment and most-favored-nation treatment requirements in Chapter 11 of NAFTA even though Mexico "[could not] identify a particular Mexican national or nationals that have been rejected [in an attempt to invest in a U.S. company]."

President George W. Bush indicated in response to the ruling that he will implement the NAFTA ruling and will take unspecified steps to address the associated safety problems. Under NAFTA rules, the U.S. was to have complied with the ruling by April 5, 2001—just days after the panel ruled.[36] However, the date passed without the Bush Administration implementing any changes regarding cross-border trucking. The Mexican government has stated that for the time being, it will not impose the trade sanctions against the U.S. that NAFTA permits when a losing country does not implement in time the changes required by the panel. The Bush Administration sent a delegation to Mexico City during in late March 2001 to offer a proposed plan of action on the case to the Mexican government. Neither the plan nor the Mexican government's response have been made public.

When asked how the U.S. might deal with the serious safety issues involved, a Bush spokesman has said only that "we are going to be doing what we need to do to ensure that there is an adequate level of inspection."[37] But in order to make even cursory inspections of the seven million Mexican trucks that DOT expects will cross an opened border, almost 32,000 new inspectors would have to be deployed. However, Congress has not massively augmented DOT's applications processing or truck inspection staff or facilities. Indeed, some in Congress argue that U.S. taxpayers should not be forced to pay for Mexico's failure to adequately ensure the safety of its trucks.

Public Citizen joined other consumer, auto safety, and labor groups in calling upon the Bush Administration to take action to protect highway safety. "It is imperative that we continue to limit access for these dangerous trucks even if it means paying trade sanctions. It is impossible to inspect every truck, and we cannot knowingly put drivers at risk by inviting dangerous rigs onto U.S. highways," said Joan Claybrook, President of Public Citizen and former director of the National Highway Traffic Safety Administration.

The NAFTA panel decision demonstrates both potential pitfalls in service sector liberalization and the difficulties in pursuing harmonization of standards related to public safety. Although NAFTA included no enforcement mechanism to ensure that Mexico raises its truck safety standards, it did include an enforcement mechanism to ensure that the U.S. permits access throughout the U.S. for Mexican trucks regardless of whether the safety of U.S. drivers would be maintained.

The NAFTA truck case provides a stark example of the dramatic imbalance between existing public health and safety policies and new corporate trade rights. It is this imbalance that is fueling hemisphere-wide opposition to the FTAA, which is based on the NAFTA model.

NAFTA INVESTOR-TO-STATE LAWSUITS

Topic: *Canadian Public Service Targeted in NAFTA Investment Suit*

Using the controversial "investor-to-state" mechanism of the North American Free Trade Agreement (NAFTA), United Parcel Service of America, Inc. (UPS) is suing the Government of Canada for US$160 million. UPS claims that the Canadian postal service is operating in violation of the expansive investor rights and protections granted to UPS and other foreign investors under NAFTA's investment chapter (Chapter 11).[38] This is the first NAFTA "investor-to-state" case against a public service and may have significant ramifications for all public services in the three NAFTA nations.

NAFTA's Chapter 11 contains a variety of new rights and protections for investors and investments in NAFTA countries. NAFTA Article 1102 provides for "national treatment," which means that governments must accord to companies of other NAFTA countries no less favorable treatment than they give to their own companies.[39] Article 1105 contains a "minimum standard of treatment" provision, which includes vague prose about fair and equitable treatment in accordance with international law.[40] In addition, NAFTA's Chapter 15 requires that NAFTA nations ensure that government monopolies and state enterprises do not abuse their authority to the disadvantage of foreign service providers.[41]

On January 19, 2000, UPS notified the Canadian government that it was pursuing claims under each of these NAFTA provisions. UPS says that Canada Post has abused its special status as a government monopoly. Specifically, UPS is claiming that Canada Post cross-subsidizes the parcel services it provides by using its postal infrastructure to reduce the cost of parcel delivery. This cross-subsidization takes the form of postal boxes, retail postal outlets, ground and air transports, and even letter carriers. UPS alleges that Canada Post violates NAFTA's national treatment obligations because UPS Canada does not have the same access to this infrastructure.[42] Further, UPS says that it is not treated fairly and equitably under the minimum standard provision of Chapter 11 because Canada Post has failed to properly investigate and resolve allegations of anti-competitive behavior and has failed to make its records available for review by an impartial agency.[43] The amount of damages claimed is calculated on revenue lost by UPS since NAFTA went into effect in 1994, plus an estimated two years of the life of the dispute settlement case.[44]

In a U.S. Embassy cable obtained by Public Citizen under the Freedom of Information Act, UPS Canada Legal and Public Affairs Vice President Allan Kaufman was characterized as "very confident the Government of Canada stood to lose its fourth and largest Chapter 11 challenge with the UPS case," and Kaufman signaled that UPS would be open to settlement.[45]

The case represents a phenomenal expansion of the scope of NAFTA. "The UPS claim is unique. Unlike the other NAFTA-based foreign investor claims which have sought to recoup investments, UPS is using NAFTA Chapter 11 provisions in a strategic offensive to secure a greater share of the Canadian market," asserted Canadian trade attorney Steve Shrybman. "UPS is arguing that because Canada Post provides public mail services, it shouldn't also be providing integrated parcel and courier services. In an era when monopoly and commercial service delivery is commingled, few public services including health care and education would be immune from similar corporate challenges."[46]

If it loses the dispute, Canada may be required to restructure its public services and compensate UPS for its lost profits. However, neither Canadian postal workers nor Canadian citizens have a voice in the NAFTA dispute resolution process. NAFTA investor-to-state cases are litigated in the special international arbitration bodies of the World Bank or the United Nations. UPS is pursuing its case in the United Nations Commission on International Trade Law (UNCITRAL).[47]

UNCITRAL rules do not provide for public observation of the proceedings or public release of any

documents or information about the case unless agreed to by the parties. A three-person panel composed of professional arbitrators will hear arguments in the case. If the panel decides that UPS's investment in Canada has been negatively impacted in violation of NAFTA rules, it can award an unlimited amount of Canadian taxpayer dollars to UPS in compensation for its past and future lost earnings connected with the Canadian policies in question.

At least three other NAFTA Chapter 11 cases are pending against Canada, leading the Canadian government to reconsider its support for NAFTA's expansive investor protections.[48] Canadian Trade Minister Pierre Pettigrew has gone so far as to state that he will not sign the Free Trade Area of the Americas—a planned expansion of NAFTA to 31 additional countries of the Western Hemisphere—if similar investor rights are incorporated.[49]

In the past, neither Mexico nor the U.S. have shown much interest in paring back the powerful corporate protections in NAFTA's investment chapter. Recently, however, in the first damage award under Chapter 11, Mexico was asked to pay $16 million to a U.S. company called Metalclad, which was prevented from opening and operating a toxic waste disposal site because the local and state governments were concerned about its potential impact on the environment. This has led some to speculate that Mexico too may soon be more amenable to renegotiating NAFTA's Chapter 11.

FOOD SAFETY/ENVIRONMENT

Topic: *EU's New GMO Rules Fail to End Moratorium*

On February 14, 2001, the European Parliament voted 338 to 52 with 85 abstentions to approve new rules governing the testing, planting, and sale of domestic and imported genetically modified (GM) crops and food products.[50] The directive regulates the "deliberate release" of genetically modified organisms (GMOs) into the environment, such as by cultivation or ranching, as well as the "marketing" or sale of GMOs as food or food products.

However, the new regulation lacks some important provisions for labeling and traceability of GMOs and includes no framework for corporate liability in the event that a GMO causes injury to consumers or the environment. Therefore, six European Union (EU) member states—France, Italy, Austria, Denmark, Greece, and Luxembourg—have indicated that they will maintain the EU-wide moratorium on new approvals of GMOs until those issues are adequately addressed in additional regulations that the EU hopes to promulgate within the year.[51] Because of U.S. opposition to labeling, traceability, and liability, the forthcoming regulations could trigger a new trade dispute between the U.S. and EU.[52]

The fifteen member states of the EU must incorporate the new regulation into their law within eighteen months of its expected April 2001 entry into force.[53] At that time, the new directive will replace a 1990 regulation that regulated the release of GMOs into the environment, such as by planting, ranching, or marketing (sale).[54] A separate directive regulates "contained uses" of GMOs in laboratories.[55] Approximately a dozen GMOs were approved under the 1990 directive, and they may still be grown and marketed.

However, no new GMOs will be approved for cultivation or marketing until the moratorium imposed by individual EU member states is lifted. Under both the existing rules and the new regulation, an approval for the marketing of a GMO can be temporarily blocked and contested by any EU member state.[56] Although such a temporary hold is designed to allow for resolution of the dispute, a sufficient number of holdout states could prevent the European Council from ending the temporary hold, thereby resulting in a de facto moratorium like the current one.

The new directive establishes the world's most comprehensive regulatory regime to date for GMOs, and includes a number of safety features demanded by consumer groups such as the Transatlantic Consumer Dialogue (TACD).[57] In particular, the new directive explicitly incorporates the Precautionary Principle, which supports the adoption of preventive and protective measures in the face of scientific uncertainty regarding possible risks to human or environmental health.

The directive includes a number of requirements that reflect a precautionary approach to biotechnology and a desire to foster consumer confidence through transparency and public access to information. For example, the directive allows GM crops and foods to be grown or marketed only after being approved by the appropriate regulatory authorities of the country in which the cultivation or sale of the GMO will take place.[58] In order to gain such approval, the applicant must submit a comprehensive application including the following: 1) an environmental risk assessment (ERA) showing that the GMO has been subjected to satisfactory field testing in ecosystems that could be affected by its use and has been shown to be safe; 2) a plan for monitoring the effects of the GMO on human health or the environment; and 3) information on control, remediation methods, waste treatment, and emergency response plans.[59] These requirements apply to both categories of GMOs—those intended for placement on the market and those produced for other, nonmarket-related purposes such as research.

The directive also provides for mandatory consultation of the public in the approval process. In the case of a proposed deliberate release of a GMO into the environment, the regulatory authority must provide information to the public and allow a reasonable period for public comment.[60] In the case of a market-bound GMO, the authority must submit a summary of the application to the Commission, and the Commission must release that summary to the public.[61]

Each EU member state's regulatory authority may grant cultivation and marketing approvals for terms of up to ten years, after which reapplication is required. The authority must compile an assessment report supporting its approval or rejection of the application. The assessment report—from which proprietary information of the applicant may be redacted at the discretion of the authority—must be released to the public along with the opinions of any Scientific Committees consulted in the assessment process.[62] The public then has thirty days to make comments to the Commission, which must forward the comments to the regulatory authorities.[63]

After approval, the directive requires that the applicant conduct comprehensive monitoring of the GMO released into the environment or the food supply and report the results of the release to the regulatory authority.[64] In the case of market-bound GMOs only, the authority must submit the results of the monitoring to the Commission and to the other member states' regulatory authorities, and make it available to the public.[65]

In order to facilitate postmarket control and inspection of GMOs, the directive requires that the applicant deposit samples of the GMO with the authority along with details about its genetic modification and methodologies for detecting and identifying the GMO. To the extent that the information is not proprietary, it must be listed in a public register at the Commission.[66] Moreover, member states must create public registers listing the locations of all GMO releases, regardless of whether the GMO is intended for placement on the market or not.[67] Thus, the public will be able to learn where each GMO is being produced.

The directive also requires a phase-out of the use of antibiotic resistance marker genes (ARMGs) in GMOs.[68] This was a recommendation by consumer groups such as TACD.[69] Scientists use ARMGs in some GM plants to confer immunity to antibiotics. This immunity is not the goal of the genetic manipulation, but is a secondary trait that helps scientists assess whether a primary trait has been successfully conferred. Taking into account fears that introducing antibiotic resistant GMOs into the environment could result in the unintended spread of antibiotic resistance to weeds and other plants, the directive requires special consideration of ARMGs in ERAs. It also sets phase-out dates of December 31, 2004 and December 31, 2008 for the use of ARMGs in market-bound products and non-market-bound products respectively.[70]

In light of the lack of scientific consensus on the risks of harm from ARMGs, the EU's phase-out of ARMGs is an application of the Precautionary Principle. The directive includes a blanket statement that EU member states "shall, in accordance with the [P]recautionary [P]rinciple, ensure that all appropriate measures are taken to avoid adverse effects on human health and the environment which might arise from the deliberate release or the placing on the market of GMOs."[71] Additionally, the Precautionary Principle must be taken into account by member states in their implementation of the GMO rules and by applicants in their conduct of environmental risk assessments.[72]

The directive recognizes international developments in the area of regulation of biotechnology. According to its preamble, the directive's content "duly takes into account international experience in [the GMO] field and . . . should respect the requirements of the

Cartagena Protocol on Biosafety to the Convention on Biological Diversity."[73] Article 32 requires the Commission to submit by July 2001 a legislative proposal for implementing in detail the Biosafety Protocol, and notes that the proposal should "complement" the directive.[74]

Many of the features of the EU policy align with the recommendations made by TACD and other consumer groups, and the directive comes closer to establishing a viable regulatory system for GMOs than do any other country's regulations. However, the directive lacks three crucial components that are necessary for protecting human health and safety and the environment.

First, while the directive notes that "[i]t is necessary to ensure traceability at all stages of the [marketing] of GMOs," it specifies no rules or requirements.[75] Instead, the directive requires member states to "take measures to ensure traceability"[76] until the EU can issue separate regulations on traceability, which the Commission has committed to do before the end of the year.[77] Traceability is a prerequisite for effective labeling and liability structures.

Second, the directive also fails to specify detailed rules requiring the labeling of GMOs and products containing GMOs. The directive does require that applications include a *proposed* label for the GMO stating that "[t]his product contains genetically modified organisms."[78] In addition, the directive requires regulatory authorities to require labels as a condition for approval of all GMOs.[79] But the directive does not specify detailed criteria for label content and applicability, instead leaving member states with the responsibility to enact their own labeling rules and to decide what labeling will be required for each GMO.[80]

The European Commission is currently drafting separate, more detailed labeling requirements, which are expected to be released by the end of 2001 along with liability and traceability regulations.[81] Current EU labeling policy is content-based, with a requirement of labeling for any product having at least 1% detectable GM ingredients.[82] In contrast, the new policy reportedly will require process-based labeling for which documentary evidence of the absence of GMO ingredients is required in order to avoid labeling as GM food.[83] Such a system would depend on segregation of GM and non-GM commodities and traceability of GM products, which producers oppose as being unfeasible in light of the U.S. practice of commingling the two types of products throughout the production chain.[84]

Finally and perhaps most importantly, the directive lacks a mechanism for imposing liability for harm caused to consumers or the environment by a GMO. Consumers have noted that even the most careful risk assessment before release of a GMO cannot ensure that no harm will result, and have called for mandatory insurance requirements and strict rules for corporate liability for any damage that might be caused by the unknown consequences of a GMO.[85] However, the Commission has not yet formally proposed any liability rules. France and the other five countries supporting the moratorium have stated that they will permit no new approvals of GMOs or GM food products until a liability regime is in place.[86]

Overall, the new EU GMO directive is a positive step toward ensuring consumer and environmental health and safety. It certainly is superior to the U.S.'s no-approval-needed system of voluntary notification for GMOs. If the necessary traceability, liability, and labeling regulations are enacted, the EU's GMO rules might serve as a model for other countries, including the U.S., to follow.

The new directive cannot take effect until all of the member states incorporate it into their national laws. Because France and the other states maintaining the moratorium are likely to take the entire eighteen months provided for under the directive, the EU's three-year-old moratorium on new approvals of GMOs is expected to continue until late 2002.[87] However, the moratorium could last beyond that time if the continuing controversy over labeling, liability, and traceability is not resolved.

The EU's moratorium and its efforts to create a labeling regime for GMOs have long been a topic of controversy between the U.S. and the EU. Continuing the Clinton Administration's policy in this area, the Bush Administration has signaled that it considers the stringent requirements of the new directive and the forthcoming regulations to be a potential barrier to trade under World Trade Organization (WTO) rules. In early March 2001, the U.S. Ambassador to the EU delivered a "note verbal" or diplomatic paper to the European Commission that laid out U.S. concerns about trade problems that could result from the pending rules.[88]

U.S. industry considers GM foods to be comparable to non-GM foods, and views requirements for process-based labeling and tracking or "traceability" of

GM foods from farm to table as having no basis in any known health risk.[89] Industry also argues that the practical difficulties and huge costs involved in segregating and documenting GM foods would greatly hamper U.S. trade in GMOs and might allow European consumers to discriminate against U.S. exports.[90] Therefore, the industry view is that such labeling and traceability requirements constitute unnecessary restrictions on trade under the WTO's Agreement on Technical Barriers to Trade.[91] And while U.S. officials are examining the EU's pending regulations against WTO rules, they have not yet alleged any violations on the part of the EU.[92]

In recognition of the fact that WTO rules designate the food standards set by the Codex Alimentarius Commission (Codex) in Rome as presumptively trade-legal,[93] the EU has indicated that it will advocate through member states' Codex delegations that Codex adopt GM food standards that mirror the stringent EU standards.[94] This Codex strategy is how the EU hopes to avoid challenges of its new GMO regulation in the WTO.[95] However, other precautionary proposals have been blocked in Codex by the U.S. government, which believes that GMOs and GM foods should be treated in the same manner as non-GM products.

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Department of Agriculture

Retained Water in Raw Meat and Poultry Products; Poultry Chilling Requirements (FSIS)

66 Fed. Reg. 1750 (Jan. 9, 2001).
Final Rule. This rule is effective Jan. 9, 2002. Comments due Apr. 9, 2001.

Codex Alimentarius Commission: Meeting of the Codex Committees on Fats and Oils and Methods of Analysis and Sampling (FSIS)

66 Fed. Reg. 3538 (Jan. 16, 2001).
Notice of Public Meeting and Request for Comments. Meeting Jan. 17, 2001; no comment due date specified.

Secretary's Advisory Committee on Foreign Animal and Poultry Diseases; Solicitation for Membership (APHIS)

66 Fed. Reg. 3978 (Jan. 17, 2001).
Notice of Intent. Nominations must be received by Mar. 5, 2001.

Nutrition Labeling of Ground or Chopped Meat and Poultry Products and Single-Ingredient Products (FSIS)

66 Fed. Reg. 4970 (Jan. 18, 2001).
Proposed Rule. Comments due Apr. 18, 2001.

Draft Guidelines for Testing of Residual Formaldehyde (VICH Topic GL25) and Testing of Residual Moisture (VICH Topic GL26) (APHIS)

66 Fed. Reg. 7614 (Jan. 24, 2001). Notice of Availability and Request for Comments. Comments due Mar. 26, 2001.

Codex Alimentarius Commission: Thirty-Third Session of the Codex Committee on Food Additives and Contaminants (FSIS)

66 Fed. Reg. 8188 (Jan. 30, 2001).
Notice of Public Meeting and Request for Comments. Meeting Feb. 13, no comment due date specified.

Living Genetically Modified Organisms and Invasive Species (APHIS)

66 Fed. Reg. 10974 (Feb. 20, 2001).
Notice of Public Meeting. Meeting Mar. 8, 2001.

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66 Fed. Reg. 12590 (Feb. 27, 2001).
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66 Fed. Reg. 3523 (Jan. 16, 2001).
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23. Panel Report para. 1.

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25. *See* NAFTA arts. 1103, 1203.

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34. *Id*. at para. 239.

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36. NAFTA art. 2109(1).

37. Gamboa, *supra* note 3.

38. North American Free Trade Agreement, Chapter 11: Investment, *available in* <http://www.nafta-sec-alena.org/english/nafta/nafta.htm> [hereinafter NAFTA]; Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, United Parcel Service of America, Inc. v. Government of Canada, Jan. 19, 2000, United Nations Commission on International Trade Law, on file with Public Citizen.

39. NAFTA art. 1102.

40. NAFTA art. 1105.

41. NAFTA, Chapter 15: Competition Policy, Monopolies and State Enterprises.

42. Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, United Parcel Service, Inc. v. Government of Canada, Apr. 19, 2000, at 10, on file with Public Citizen.

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45. Cable from U.S. Embassy, Ottawa, Canada to U.S. Department of State et. al. (Jan. 3, 2000), on file with Public Citizen.

46. Telephone interview with attorney Steve Shrybman of Ottawa, Canada, Feb. 21, 2001.

47. Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, United Parcel Service, Inc. v. Government of Canada, Apr. 19, 2000, at 10, on file with Public Citizen.

48. The three cases against Canada are S.D. Myers, Inc. v. Government of Canada, Pope & Talbot, Inc. v. Government of Canada, and Sun Belt Water, Limited v. Government of Canada. For more information about these cases, see the Canadian Department of Foreign Affairs and International Trade web site at <http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp>.

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52. William Drozdiak, *EU Plans Tight Biotech Food Controls*, WASH. POST, Apr. 11, 2001, at E01.

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58. Directive arts. 6, 13.

59. *Id*.

60. *Id*. art 9.

61. *Id*. art. 24.

62. *Id*. arts. 24, 25.

63. *Id*. art. 24(1).

64. *Id*. arts. 10, 20.

65. *Id*. arts. 20(1), (4).

66. *Id*. art. 31(2); Annex IV(A)(7).

67. *Id*. art. 31(3).

68. *Id*. art. 4(2).

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70. Directive art. 4(2).

71. *Id*. art. 4(1).

72. *Id*. preamble para. 8; Annex II(B).

73. *Id*. preamble para. 13.

74. *Id*. art. 32.

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76. *Id*. art. 4(6).

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78. Directive, art. 13(2)(f).

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80. *Id*. art. 21(1).

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