U.S. Biotech Crops Alliance

August 14, 2015

European Commission
EU-TBT Enquiry Point
E-mail: grow-eu-tbt@ec.europa.eu

European Commission
Directorate General for Health and Consumers
E-mail: sps@ec.europa.eu

Re: TBT Notification G/TBT/N/EU/284, 20 May 2015

Dear Sir or Madam:

The U.S. Biotech Crops Alliance (USBCA) offers the following comments on the above-referenced notification to the WTO Committee on Technical Barriers to Trade. USBCA is a broad-based group of U.S. organizations dedicated to improving the environment for technology innovation and access to markets for U.S. crops produced through the use of modern biotechnology.

I. General Comments

USBCA supports the views expressed on this proposal by numerous members of the E.U. Agriculture and Fisheries Council, members of the Agriculture and Environment Committees of the European Parliament and the Governments of Argentina, Brazil, Canada, Chile, Paraguay and the United States. With near-unanimity, these institutions and Governments have indicated the proposal would violate both the E.U.'s international trade obligations and the principles of the single-E.U. market, to the detriment of both the E.U's trading partners and E.U. agriculture. In addition, they have cited the lack of formal legal opinion and impact assessment of the proposal, and as such recommended that the proposal be rejected and withdrawn. We join with those urging that the proposal be withdrawn.

The proposal refers to "compelling grounds" under which a member state would be authorized to "opt-out" of E.U.-wide regulations governing marketing of genetically modified food or feed. However, it fails to define what would constitute "compelling grounds" or indicate how actions based on this proposal would not violate numerous provisions of GATT 1994, the SPS Agreement and the TBT agreement.

While the proposal has only been notified to the WTO TBT Committee, as an amendment to Regulation 1829/2003 whose objective is to "protect human and animal health," this regulation also should be subject to scrutiny through the SPS notification process and be measured by the standards of the SPS agreement.

European Commission officials have repeatedly described this proposal as a response to an internal political disagreement within the E.U. While this may be true, it does not justify a regulation that will impose trade restrictions and financial burdens on other parties.

II. WTO Issues

a. The Commission Proposal

Since the introduction of genetically modified food and feed, these products have been permitted (following an E.U. safety assessment and inclusion on the register of GM food and feed) to be freely imported, placed on the market and used without distinction from like products produced without genetic technology. This proposal would create a legal distinction between such like products, either imported or produced within the E.U. As a factual matter, the bulk of animal feed products imported by the E.U. consists of GM material, and the practical effect of the regulation clearly would be to discriminate against imports.

For reasons discussed below, adoption of this proposal by the European Union would violate a number of WTO provisions. The sole purpose of this proposal is to attempt to grant Member States a right to engage in practices inconsistent with Articles I:1 and III:4 of GATT 1994. As the enabling regulation authorizing its Member States to engage in such practices, this regulation itself also would violate the same provisions.

Further, the EU's attempt to explain away the proposal as not restricting the import or placing on the market of genetically modified food and feed does not withstand scrutiny and cannot be justified. As a practical matter, no party would participate in import or internal trade of a product that could not be "used", and restrictions on "use" of imported like products are prohibited under Article III:4.

Because the proposal is silent on what "compelling grounds" would be deemed sufficient to support Member State adoption of a measure prohibiting use of a GM food and feed product, it cannot be viewed as consistent with the specific general exceptions provided in GATT Article XX.

b. Potential Member State Adoption

Were this proposal to be adopted, E.U. Member States that rely on it to institute prohibitions or restrictions on "use" of GM food and feed would individually violate the GATT, as well as the SPS and TBT agreements. In DS291, the WTO found that, in light of positive safety assessments issued by the EU's own scientists, Member State bans were not supported by scientific evidence and thus were inconsistent with WTO rules.

Member States adopting "opt-out" measures would be subject to the same challenges discussed above regarding GATT Articles I:1 and III:4 prohibiting discrimination among products from WTO members (national treatment) and also potential challenge under GATT Article XI:1 prohibiting restrictions other than duties, taxes or other charges.

In the absence of a convincing reason why a national measure could be based on the general exceptions of GATT Article XX, Member States cannot escape their responsibilities under national treatment requirements. Even with a statement of reasons, such a measure would fail the test of Article XX if it were "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…." Given the factual evidence concerning the Member States' imports of GM food and feed, it would be difficult to view restrictions on imports as anything less.

Member State bans or restrictions also would be vulnerable to challenge under the TBT agreement. Measures would be subject to the specific national treatment provisions of Article 2.1 similar to their broader national treatment obligations under the GATT. Further, such measures must meet the provisions of Article 2.2 requiring that they be "not more trade restrictive than necessary, taking account of the risks non-fulfillment would create." At a minimum, meeting this Article would require a Member State to claim a "legitimate objective" taking into account an assessment of "scientific and technical information, related processing technology or intended end uses of products." Member States have freely imported and used GM food and feed for many years with no distinction based on scientific information, processing or end use, and it would be difficult to provide a coherent explanation as to why a new distinction should be made based solely on the existence of authorizing legislation at the E.U. level.

Finally, although this notification was not made under the SPS Agreement, as an amendment to Regulation 1829/2003, which is clearly an SPS measure, any Member State measure authorized under this proposal also falls within the scope of the SPS agreement.

Prior Member State restrictions have been found inconsistent with Articles 5.1 and 2.2 of the SPS Agreement requiring that measures be based on scientific principles and evidence, and be necessary to protect human, animal or plant life or health. Erecting new restrictions based solely on the existence of a new E.U. regulation does not exempt Member States from these provisions. Similarly, Article 2.3 requires the same adherence to core principles of national treatment as contained in GATT 1994 and the TBT Agreement, and prohibits restrictions on trade "where identical or similar conditions prevail" that would discriminate among WTO members and be a disguised trade restriction.

III. Trade and Economic Effects of the Proposal

If adopted, this proposal would have major short- and long-term effects on both GM crop exporters and the grain, feed and livestock industries, as well as E.U. consumers. Some of the short-term effects can be estimated. Longer-term effects can be envisioned, but at this point not fully quantified.

In the absence of an assessment from the Commission and the lack of a definition of "use," USBCA has developed preliminary economic analysis to estimate potential effects on E.U. internal and external trade. For purposes of this analysis, we assume that all 13 EU Member States that historically have opposed approval of new biotech traits[1] will choose to "opt-out" of importing, processing and using biotech crops and derived products. We also assume that these countries will "opt-out" of use of all biotech varieties, not just selected traits.

a. Short-Term Effects

Collectively, these "opt-out" countries imported a total of € 3.1 billion[2] ($4.1 billion) of potentially affected products from global suppliers in 2014.[3] Imports of these products sourced from major GM crop producers[4] in 2014 were € 2.2 billion ($2.9 billion), accounting for 71% of all potentially affected imports. Imports from the U.S. by these members of potentially affected products were € 189 million ($252 million). The most obvious short-term effect of "opt-outs" by these countries would be the loss of these direct export markets to major exporters.

The overwhelming majority of these exports are in the form of soybeans and soybean meal although, in the brief periods when exporter and EU approvals have been synchronized, imports of corn and co-products also have been significant. Because the E.U. feed industry relies on imports for 90% of its soy and soymeal needs, it is difficult to project how it would attempt to replace this supply.

The second short-term effect would fall on the E.U. industry due to the fragmentation of the single market. Within the E.U., exports of compound feed from other Member States to the potential "opt-out" countries totaled € 929 million ($1.24 billion) in 2014. In addition, € 1.6 billion ($2.1 billion) of feed raw materials were traded among E.U. Member States. Much of this trade in feed raw materials consisted of semi-processed products produced from imported GM raw materials. We assume that E.U. countries that continue to permit import and use of biotech products would incur short-term losses similar to these intra-E.U. shipments of feed and raw materials.

Another effect would arise from risk-related (shipment rejection), logistical and management costs of ensuring that any shipments to the "opt-out" countries are free from biotech content if any firms attempt to continue export to these countries. The proposed exemption for products with biotech content below the 0.9% labeling threshold would have little or no effect because of the large volume of imported crops and ingredients that contain virtually 100% biotech content. These costs cannot be immediately quantified.

[1] Austria, Bulgaria, Croatia, Cyprus, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, and Slovenia.
[2] EU import data from Eurostat
[3] GM exports include corn grain, soybeans, canola, oilseed meals and food/fuel co-products derived from GM crops.
[4] U.S., Canada, Argentina, Brazil, Paraguay, Uruguay.

b. Long-Term Effects

Long-term effects of discontinuing the use of biotech products in E.U. Member States are very difficult to quantify. However they potentially would include major structural changes both for exporters and E.U. industry. It is conceivable that production of non-biotech products could increase to meet some of the demand by "opt-out" countries over a long-term period. However, this production almost certainly would come at a great cost to the importing countries. These costs include:

- Re-alignment of cropping patterns, and storage, handling and shipping in exporting countries to attempt to serve a fully non-GM market. These costs would be born directly by importers; however they would have several wide-reaching effects in exporting countries, including reduced efficiency from forgoing some biotech crop production, and loss of volume in the more efficient bulk crop handling system.

- Because of very low tolerances, shipping non-GM product via bulk in 55,000-ton vessels that will contain production from hundreds of producers carries an extreme risk of rejection. Instead, such shipments would likely require shipping via 20-ton containers, as is done for other high-value/specialty grains and oilseeds that can be used to preserve identity close to the crop-production location. Reported premiums for non-GM soybeans are approximately $2.00/bushel or $73.50/metric ton[5] and could increase if E.U. demand rises. Shipping costs to the E.U. via container are approximately $150/ton versus $40/ton for bulk shipments, and could increase if container demand rises. In the "opt-out" countries alone the additional raw material and shipping costs of $183/ton would represent an increased cost to E.U. feed purchasers of approximately € 1.3 billion ($1.7 billion).

- Realignment of the E.U. bulk grain/oilseed import system and the feed manufacturing industry to accommodate the changed logistics of serving two separate markets to a near-zero tolerance.

- Potential changes in intra-E.U. trade in meat and poultry resulting from dramatically increased feed costs in some Member States, leading to decreased production that would be replaced by production from Member States that continue to use biotech-derived feed.

[5] Des Moines Register, April 18, 2015

IV. Conclusion

For both the trade policy and economic reasons discussed herein, USBCA believes this proposal cannot be supported under international trade rules or on practical grounds and should be withdrawn.

Sincerely,

American Farm Bureau Federation

American Seed Trade Association

American Soybean Association

Biotechnology Industry Organization

Corn Refiners Association

National Association of Wheat Growers

National Corn Growers Association

National Grain and Feed Association

National Oilseed Processors Association

North American Export Grain Association

North American Millers' Association

U.S. Canola Association

U.S. Grains Council

U.S. Soybean Export Council