

**TWO DECADES OF GE FOOD LABELING
DEBATE DRAW TO AN END—WILL ANYBODY
NOTICE?**

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TWO DECADES OF GE FOOD LABELING DEBATE DRAW TO AN END—WILL ANYBODY NOTICE?

JACK A. BOBO*

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I. INTRODUCTION

In May 2011, the Thirty-ninth Session of the Codex Committee on Food Labeling (CCFL) completed the *Compilation of Codex Texts Relevant to Labelling of Foods Derived from Modern Biotechnology (Compilation)*.¹ The objective of the CCFL is to develop labeling guidance to enhance consumer protection and facilitate trade. The questions of if, when, and how to label foods derived from modern biotechnology, also referred to as genetically engineered (GE) or biotech foods, have been under discussion in the CCFL for nearly two decades. The Codex Alimentarius Commission adopted the *Compilation* in July 2011. This paper summarizes the CCFL’s development of the *Compilation*, considers the meaning of the document to global biotechnology labeling policy, and discusses the document in the context of the World Trade Organization’s Sanitary and Phytosanitary Agreement.

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1. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, 39TH SESS., COMPILATION OF CODEX TEXTS RELEVANT TO LABELLING OF FOODS DERIVED FROM MODERN BIOTECH., U.N. Doc. CAC/GL 76-2011 (May 2011), available at http://www.codexalimentarius.net/download/standards/11769/cxg_076e.pdf [hereinafter COMPILATION DOCUMENT].

II. BACKGROUND

A. The Codex Alimentarius Commission

The Codex Alimentarius Commission (Codex) was created in 1963 as a joint body of the United Nations Food and Agriculture Organization (FAO) and the World Health Organization (WHO).² Membership in Codex is open to all member nations of the United Nations (UN) and approximately 183 member nations participate.³ The goal of Codex is to protect consumer health and ensure fair trade practices involving food.⁴ Codex's guidance documents are voluntary in nature, so countries may choose whether or not to adopt them as domestic law.⁵ However, the Codex standards are important in the context of international trade: The *World Trade Organization Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)* gives significant weight to Codex standards, guidelines, and guidance in the context of trade disputes.⁶

B. "Biotech" Foods

Agricultural biotechnology refers to the genetic engineering of crops, sometimes referred to as genetically modified organisms (or GMOs). Codex documents generally refer to such products as "foods derived from modern biotechnology" to distinguish such products from biotechnology techniques, such as mutagenesis and marker assisted selection, which are generally not regulated. In this paper I refer variously to GMOs, biotech crops, and GE or biotech foods. The last two terms describe food products or ingredients derived from biotech crops or GMOs. In all cases I am referring to foods derived from modern biotechnology as defined in the Codex text, *Principles for the Risk Analysis of Foods Derived from Modern Biotechnology*.⁷

2. WORLD HEALTH ORG. & JOINT FOOD & AGRIC. ORG. OF THE U.N., UNDERSTANDING THE CODEX ALIMENTARIUS 7 (3rd ed. 2006), available at ftp://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf.

3. Thomas Costea, *International Relationships Support Safe and Fair Trade*, LIAISON, Winter 2011, at 4–5, available at <http://www.inspection.gc.ca/english/agen/liaison/2011/vol1-3e.pdf>.

4. *Id.*

5. *About Codex*, CODEX ALIMENTARIUS, <http://www.codexalimentarius.org/about-codex/en/> (last visited Jan. 31, 2012).

6. WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures, in Agreement Establishing the World Trade Organization*, 69, 71 (1994), available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf [hereinafter *SPS Agreement*].

7. *Principles for the Risk Analysis of Foods Derived from Modern Biotechnology*, 2, U.N. Doc. CAC/GL 44-2003, JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM'N, (2004) available at http://www.who.int/foodsafety/biotech/en/codex_biotech_principles.pdf [hereinafter *Principles for Risk Analysis*]. ("Modern Biotechnology" means the application of: i) In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles[;] or ii) Fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombinant barriers and that are not techniques used in traditional breeding and selection.").

As of 2010, the commercial planting of biotech crops has been approved in twenty-nine countries.⁸ Developers of biotech crops must seek regulatory approval before commercial release of these products into the environment. Some countries also regulate the marketing of biotech food and feed through a separate approval process than that required for cultivation. Codex adopted international standards for the risk assessment and food safety evaluation of biotech foods in 2003 as a result of the work of the ad hoc Task Force on Biotechnology.⁹

Some countries have established food labeling provisions specific to biotech foods in addition to food safety evaluations. Regulations range from mandatory process-based approaches¹⁰ to labeling to voluntary approaches to labeling and everything in between. There are various approaches to labeling even among countries with mandatory labeling provisions. For example, in the European Union any product “produced from” a GMO must be labeled, even if there is no detectable DNA or protein from the GMO in the final product, as is the case with soybean oil.¹¹ However, EU regulations do not require products derived through the use of genetically engineered yeast and bacteria—such as beer, wine, and cheese—to be labeled because such products are not “produced from” GMOs.¹² On the other hand, Australia, which also has a mandatory labeling system, does not require labeling in the absence of detectable DNA or protein.¹³ As a result, soybean oil, which contains no detectable DNA or protein, must be labeled in the EU, while no label is required in Australia.

8. Press Release, Int’l Serv. for the Acquisition of Agri-biotech Applications (ISAAA), Biotech Crops Surge Over 1 Billion Hectares, ISAAA Brief 42-2010 (Feb. 22, 2011), available at <http://www.isaaa.org/resources/publications/briefs/42/pressrelease/default.asp>.

9. See generally *Guideline for the Conduct of Food Safety Assessment of Foods Produced Using Recombinant-DNA Microorganisms*, U.N. Doc. CAC/GL 46-2003, JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N (2009), available at http://www.codexalimentarius.net/download/standards/10025/CXG_046e.pdf; *Principles for Risk Analysis*, *supra* note 7.

10. Process-based labeling refers to labeling based on the method of production rather than on any particular characteristic of the final product.

11. Regulation 1829/2003 of the European Parliament and of the Council of 22 on Genetically Modified Food and Feed, 2003 O.J. (L 268) 2 (Sept. 2003), available at http://ec.europa.eu/food/food/animalnutrition/labelling/Reg_1829_2003_en.pdf.

12. *Id.* at 2–3. (“This Regulation should cover food and feed produced ‘from’ a GMO but not food and feed ‘with’ a GMO. The determining criterion is whether or not material derived from the genetically modified source material is present in the food or in the feed. Processing aids which are only used during the food or feed production process are not covered by the definition of food or feed and, therefore, are not included in the scope of this Regulation. Nor are food and feed which are manufactured with the help of a genetically modified processing aid included in the scope of this Regulation. Thus, products obtained from animals fed with genetically modified feed or treated with genetically modified medicinal products will be subject neither to the authorisation requirements nor to the labeling requirements referred to in this Regulation.”).

13. *Australia New Zealand Food Standards Code 2011*, s 1.5.2 (Austl.), available at <http://www.comlaw.gov.au/Details/F2011C00566>. According to the Code, GM foods, ingredients, additives, or processing aids which contain novel DNA or protein that has come from an approved GM food must be labelled with the words “genetically modified.” *Id.*

In 2011, following nearly twenty years of discussion on the topic of biotech labeling, the Thirty-Ninth Session of the CCFL completed work on a single document that compiled a list of various Codex food labeling texts applicable to biotech foods. Although the debate over the document was contentious, Codex members were eventually able to agree on a text. In the days and weeks after the Codex Alimentarius Commission adopted the text in July 2011, a number of press releases and articles were written describing the importance of the labeling guidance. One article described the outcome this way: “Codex has capitulated on the GE labeling issue after a battle spanning approximately 20 years, stating that it will allow countries to label GMOs and the WTO will not legally challenge them for it.”¹⁴ Another article explained, “The new Codex agreement means that any country wishing to adopt GE food labeling will no longer face the threat of a legal challenge from the World Trade Organization (WTO).”¹⁵ However, a July 5, 2011 article in the *The Hagstrom Report* noted a disagreement among organizations as to the meaning of the new guidance. The report quoted a Biotechnology Industry Organization spokesperson as saying, “[T]he agreement is totally consistent with the U.S. position, which we support since it says no new guidelines are needed, because the guidelines for other foods apply to biotech foods as well.”¹⁶

This paper will examine two questions in an attempt to understand the meaning and importance of this new Codex guidance document. First, what does the *Compilation of Codex Texts Relevant to Labelling of Foods Derived from Modern Biotechnology (Compilation)* tell us about whether countries should adopt mandatory versus voluntary labeling approaches to biotech foods? And second, what might the impact of this *Compilation* be on WTO challenges to mandatory biotech labeling systems?

III. THE CODEX COMMITTEE ON FOOD LABELING

The Codex Committee on Food Labeling (CCFL) is an important player in the establishment of international food-labeling standards. It exists to develop “labeling provisions that are applicable to all foods” and to endorse “labeling provisions prepared by Codex Committees charged with drafting standards, codes of practice, and guidelines.”¹⁷ In July 1991, the Nineteenth Session of the Codex Alimentarius Commis-

14. Barbara H. Peterson, *Codex Commission – Voluntary GMO Labeling Okay with WTO?*, FARM WARS, July 5, 2011, <http://farmwars.info/?p=6408>.

15. Press Release, Consumers Union, Consumer Rights Victory as US Ends Opposition to GM Labelling Guidelines (July 5, 2011), available at <http://www.consumersinternational.org/news-and-media/press-releases/2011/07/consumer-rights-victory-as-us-ends-opposition-to-gm-labelling-guidelines>.

16. *Biotech Labeling Interpretations Differ*, THE HAGSTROM REP., July 5, 2011, http://www.hagstromreport.com/news_files/070511_biotech.html.

17. Anne A. MacKenzie, *The Process of Developing Labeling Standards for GM Foods in the Codex Alimentarius*, 3 AGBIOFORUM 203, 204 (2000), available at <http://www.agbioforum.org/v3n4/v3n4a04-mackenzie.pdf>.

sion requested that the CCFL “provide guidance on how the fact that a food was derived from ‘modern’ biotechnologies could be made known to the consumers.”¹⁸

According to Anne MacKenzie, former Chair of the CCFL, since the beginning of the biotech discussion, Codex members have disagreed on the appropriate extent of mandatory labeling. Some argued that, “labeling should be required only when the food or ingredient is significantly different from its traditional equivalent, or if safety concerns are involved, such as in the case of the introduction of an allergen,” while others argued that labeling should be required for all foods produced through genetic engineering (i.e., “method of production” labeling).¹⁹ Some Codex members and observers urged the CCFL to adopt mandatory process-based labeling of all biotech foods to respect a “consumer[’s] right to know” how a food is produced, while other members preferred labeling only where there was a change in the composition, nutrition, or safety of the food.²⁰ In response to an early stalemate on the topic, the Forty-Third Session of the Codex Alimentarius Commission Executive Committee (CCEXEC) provided further guidance to the CCFL in June 1996. The CCEXEC “noted that the ‘claimed right to know’ was ill-defined and variable and in this respect could not be used by Codex as the primary basis of decision-making on appropriate labeling.”²¹ Despite this guidance from CCEXEC, the divergence of views on the topic continued to impede progress towards a single text.

Countries often took positions that reflected their own domestic approach to biotech labeling. Those with mandatory process-based labeling generally urged the development of a Codex standard that reflected this approach. For example, in 1997, the Report of the Twenty-Fifth Session of the CCFL stated:

18. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, REPORT OF THE 19TH SESSION OF THE JOINT FAO/WHO CODEX ALIMENTARIUS COMMISSION, ¶ 90 (1991), *available at* <http://www.fao.org/docrep/meeting/005/t0490e/T0490E01.htm#ch41> [hereinafter 19TH SESSION REPORT].

19. MacKenzie, *supra* note 17, at 204.

20. *See* JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, CX 4.15/2, REPORT OF THE 23D SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 115, (1998), *available at* www.codexalimentarius.net/download/report/140/a195_22e.pdf. (“Some delegations expressed the view that it was too early to decide on particular rules for products obtained through biotechnology, and that labeling should be required only when the food or ingredient was significantly different from its traditional equivalent, or if safety concerns were involved. Other countries stressed the necessity for full information, as new technologies could benefit the consumers as well as the industry, and transparency in such instances could only help build confidence between the industry and the consumer.”).

21. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, ALINORM 97/3, REPORT OF THE 43RD SESSION OF THE CODEX EXECUTIVE COMMISSION, ¶ 29 (1996), *available at* <http://www.fao.org/docrep/meeting/005/w1695e/w1695e00.htm> (internal quotations added).

Several delegations indicated that their national policy supported comprehensive labeling of genetically modified foods and expressed the view that the food safety approach reflected in the paper did not address concerns of consumers in such areas as ethics and environmental protection. It was pointed out that the Expert Consultation was essentially focused on food safety rather than food labeling and that the document under consideration should be redrafted in order to encompass all relevant issues. Other delegations expressed their appreciation of the document which was consistent with traditional food labeling approaches and provided a basis for further development of the recommendations.²²

The Delegation of Norway, also felt that “the right of consumers to make their choice should be respected.”²³ Ten years later, the positions delegates advocated for had not changed much. In 2006, the Report of the Thirty-fourth Session of the CCFL stated, “Several delegations indicated that they applied general mandatory labeling of foods derived from genetic modification at the national level and supported the same approach in the Proposed Draft Guidelines in order to ensure adequate consumer information.”²⁴

IV. WHY CODEX STANDARDS MATTER

Standards adopted by Codex are not binding on Codex members unless those members choose to apply them in domestic law.²⁵ This means that countries are free to follow, or not follow, Codex guidance as they choose. Why then did it take two decades for countries to agree to a Codex guidance document on the labeling of biotech products if they were always free to pursue the approach most appropriate to their country? More importantly, why were countries like Norway, which already had mandatory labeling laws, so concerned about development of a mandatory standard in Codex?

As it turns out, Codex members promoting mandatory GE labeling had important reasons for wanting Codex to validate their national approach to labeling. While Codex does not require members to adopt Codex standards, the existence of a Codex standard can be critical in the

22. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, ALINORM 97/22, REPORT OF THE 25TH SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 54 (1997), available at <http://www.codexalimentarius.net/download/report/142/al9722ae.pdf>.

23. *Id.* ¶ 55.

24. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, ALINORM 06/29/22, REPORT OF THE 34TH SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 87 (2006), available at http://www.codexalimentarius.net/download/report/658/al29_22e.pdf.

25. See JESSICA VAPNEK & MELVIN SPREIJ, PERSPECTIVES AND GUIDELINES ON FOOD LEGISLATION, WITH A NEW MODEL FOOD LAW 6 (2005).

event one country challenges the standard adopted by another country in the WTO, such as the maximum residue levels for pesticides.²⁶ In particular, the WTO's SPS Agreement provides special recognition to Codex standards within the international trade regime.²⁷

As a result, countries adopting or following Codex standards are less likely to be challenged by the WTO for having standards inconsistent with the SPS Agreement. The possibility of a WTO challenge, whether real or perceived, limited the flexibility of countries promoting mandatory process-based labeling for biotech foods. In the absence of a Codex standard specifically permitting mandatory labeling for biotech foods these countries remained vulnerable to a WTO labeling system challenge. It was therefore critical from a trade perspective that any standard adopted by Codex specifically allow for such an approach to labeling.

When a country adopts a mandatory biotech labeling system, companies that want to export to that market are required to either label their products if they contain biotech ingredients covered by the law or ensure that their products do not contain biotech ingredients. Companies that wish to export to a country with a voluntary labeling system are not required to change their labels to access the market, though they may wish to do so if there is a price premium for labeled products. Mandatory labeling requirements, therefore, may act as a barrier to market entry, while voluntary labeling approaches do not. During the 2008 Session of CCFL, the cost of mandatory labeling and the impact it might have on food prices in developing countries were also briefly discussed.²⁸

Countries that either opposed mandatory process-based labeling, or supported a voluntary approach to labeling, were less concerned with Codex adopting their specific approach to labeling than they were with ensuring that Codex did not adopt or legitimize (either explicitly or implicitly) a mandatory approach.²⁹ Given the trade implications of the discussion, these countries highlighted the difficulties in achieving con-

26. *Id.*

27. *SPS Agreement, supra* note 6, art. 3, ¶ 71, at 70. "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." *Id.* at art. 5, ¶ 171. "[F]or food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice." *Id.* at annex A, ¶ 3(a)77.

28. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM'N, ALINORM 08/31/22, REPORT OF THE 36TH SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 80 (2008) [hereinafter 36TH SESSION REPORT], available at http://www.codexalimentarius.net/download/report/703/al31_22e.pdf. ("Some delegations pointed out that mandatory labelling would substantially increase the costs of food production for the manufacturers and negatively affect the availability of foods, which would especially affect developing countries and low income consumers, especially in view of the increase in the price of food commodities at the international level.")

29. *Id.*

sensus, and at times, recommended that work be terminated or put on hold until consensus could be reached.³⁰ The Delegation of Argentina, for example, expressed general reservations in the 2001 Session of CCFL Report about the document then being discussed “due to its likely implications in international trade.”³¹

V. REACHING CONSENSUS WITH A NEW APPROACH

A. Thirty-Seventh and Thirty-Eighth Sessions of the CCFL

Prior to its work on the Compilation, CCFL worked on the Draft Guidelines for the Labeling of Foods and Food Ingredients Obtained through Certain Techniques of Genetic Modification/Genetic Engineering (hereinafter Draft Guidelines) without achieving consensus.³² Given the diversity of views on the topic and the inability of the CCFL members to achieve consensus on the issue, in 2008 the CCFL decided to end work on the Draft Guidelines and focus instead on compiling a list or summary of Codex texts relevant to the labeling of biotech foods.³³ The Compilation grew out of a background paper produced by the United States, Nigeria, and Canada that was presented at a working group meeting in Ghana in 2008.

By ending work on the *Draft Guidelines* on biotech labeling, the polarizing issue of mandatory versus voluntary labeling was minimized, though not eliminated. However, even with the limited goal of compiling a list of existing Codex texts, the underlying disagreement among Codex members that had blocked consensus on GE labeling for so long continued to surface in more subtle ways. As a result, countries continued to view the *Compilation* as an opportunity to influence a future WTO panel on the issue of whether mandatory process-based labeling for biotech foods was WTO-consistent.

During the discussions, countries that supported mandatory labeling insisted the new *Compilation Document* “acknowledge” or “recognize” as acceptable all the various methods of biotech labeling that exist among Codex members. For example, at the Thirty-Eighth Session of the CCFL in 2010, Brazil proposed the following text: “It also recognizes that each country can adopt different approaches regarding labeling of foods obtained by [genetically modified or genetically engineered] techniques and that food labeling is the primary means of communications between the seller on the one hand and the purchaser and consumer on

30. *Id.*

31. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, ALINORM 01/22/A, REPORT OF THE 29TH SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 66 (2001) [hereinafter 29TH SESSION REPORT], available at <http://www.codexalimentarius.net/download/report/146/Al0122ae.pdf>. See also JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, ALINORM 05/28/22, REPORT OF THE 28TH SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 45–60 (2005), available at http://www.codexalimentarius.net/download/report/642/al28_22e.pdf.

32. See 36TH SESSION REPORT, *supra* note 28, ¶ 89, at 11.

33. See *id.* at ¶ 88.

the other.”³⁴ Some Codex members viewed such language as validating mandatory labeling regimes, which they wanted, while other countries opposed language “recognizing” current approaches for the same reason. Countries opposed to recognizing various approaches were equally insistent that it was not the function of Codex to recognize member country labeling systems since these systems may or may not be consistent with Codex standards. The 2010 Session of the CCFL Report noted that the text proposed by Brazil was “considered by some as too permissive by allowing various approaches and by others as not necessary as Codex texts are voluntary.”³⁵

The Chair of the CCFL attempted to break the impasse between positions by organizing a facilitated discussion on the *Compilation Document* in Brussels, Belgium in November 2010, which was attended by approximately thirty countries and observer organizations.³⁶ The document that came out of the facilitated discussion refined the title, objective, chapeau, and body of the document.³⁷ Nevertheless, the group was unable to reach a consensus on any of these sections and several options were forwarded to the CCFL.³⁸ In addition, the concept of what to include in the *Compilation Document* was further narrowed to a simple list of Codex texts and citations without specific text being quoted in the document.³⁹

B. Thirty-Ninth Session of the CCFL

The Thirty-Ninth Session of the Codex Committee on Food Labeling was held in Quebec City from May 9–13, 2011, and attended by approximately sixty countries.⁴⁰ Among the items on the CCFL’s agenda was a discussion of the draft text entitled: *Labelling of Foods and Food Ingredients Obtained through Certain Techniques of Genetic Modification/Genetic Engineering*.⁴¹ The debate focused on the outcome document from the facilitated discussion in Brussels. Following nearly twenty years of discussion on the topic of biotech labeling, the Committee

34. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, ALINORM 10/33/22, Report of the 38th Session of the Codex Commission on Food Labelling, ¶ 145 (2010), available at http://www.codexalimentarius.net/download/report/742/al33_22e.pdf.

35. *Id.* ¶ 145.

36. See JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, CX/FL 11/39/13, LABELLING OF FOODS AND FOOD INGREDIENTS OBTAINED THROUGH CERTAIN TECHNIQUES OF GENETIC MODIFICATION / GENETIC ENGINEERING: REPORT OF THE FACILITATED SESSION, Appx. 1 (2010), available at ftp://ftp.fao.org/codex/ccfl39/fl39_13e.pdf.

37. *Id.* ¶ 12.

38. *Id.* ¶¶ 14–15.

39. *Id.*

40. JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMM’N, REP 11/FL, REPORT OF THE 39TH SESSION OF THE CODEX COMMISSION ON FOOD LABELLING, ¶ 1 (2011), available at http://www.codexalimentarius.net/download/report/765/REP11_FLe.pdf [hereinafter 39TH SESS. REPORT].

41. *Id.* ¶ 3.

was able to reach consensus and finalize a document that compiled various Codex food labeling texts applicable to biotech foods.

Significantly, at the meeting the Committee arrived at a consensus regarding a title, purpose, and relevant considerations for the document.

The title was amended to "Proposed Draft Compilation of Codex texts relevant to labelling of foods derived from modern biotechnology."⁴² The Committee identified the purpose of the article as "to recall and assemble in a single document some important elements of guidance from Codex texts, which are relevant to labeling of foods derived from modern biotechnology."⁴³ And the document outlined the following as relevant considerations:

Different approaches regarding labeling of foods derived from modern biotechnology are used. Any approach implemented by Codex members should be consistent with already adopted Codex provisions. This document is not intended to suggest or imply that foods derived from modern biotechnology are necessarily different from other foods simply due to their method of production.⁴⁴

The most challenging part of the discussion concerned the text under the "Considerations" heading. Countries opposed to mandatory labeling argued that the first sentence of the paragraph in the draft document should be deleted as the purpose of the document was not to acknowledge what other countries were doing. On the other hand, countries that supported mandatory labeling argued for deletion of the third sentence.⁴⁵ The Committee eventually "agreed to clarify that the first part was not an acknowledgment or endorsement but a statement of fact."⁴⁶ The Committee further strengthened this point by placing the statement in conjunction with the obligation that any approach should be consistent with already adopted Codex provisions.⁴⁷

VI. ANALYSIS OF THE COMPILATION DOCUMENT

The biotech labeling issue demonstrates how narrow technical issues related to international food standards, once only of interest to specialists, have become public policy issues of huge economic importance, imbued with social, cultural, and political overtones. Standard setting is particularly difficult where science is relevant but not determinative, and where an international standard may create economic winners and losers.

The Codex process for standards development is normally based on consensus. While the CCFL did ultimately finalize the *Compilation* on

42. *Id.* ¶ 135.

43. *Id.* app. III.

44. *Id.*

45. *Id.* ¶ 140.

46. *Id.* ¶ 141.

47. *Id.* ¶ 142.

biotech labeling, the document bears little relationship to the document originally envisioned by those who advocated a mandatory labeling standard.

So how does the *Compilation* address the issues raised at the beginning of this article, namely, (A) mandatory versus voluntary labeling, and (B) the impact on potential WTO challenges with respect to biotech labeling laws?

A. Mandatory vs. Voluntary Labeling

By its terms, the *Compilation* provides no new guidance to countries wishing to implement a labeling regime for biotech foods. It specifically states that it “is not intended to suggest or imply that foods derived from modern biotechnology are necessarily different from other foods simply due to their method of production.”⁴⁸ The rest of the document implements this egalitarian principle, choosing consensus over definitive resolution of controversial issues.

As a result, Codex members created a document with no winners or losers on the question of voluntary versus mandatory labeling. The *Compilation* does not elevate one approach to biotech labeling over another.⁴⁹ Nor does Codex weigh in on the consistency of any particular labeling framework with Codex standards.⁵⁰ CCFL members and observers who were looking to Codex to provide guidance that the use of mandatory labeling was consistent with Codex did not achieve that goal. News reports and press releases that suggest otherwise clearly do not reflect the specific terms of the document or the intent expressed by Codex members.⁵¹

The *Compilation* concludes that Codex labeling texts apply to biotech foods as they do to all foods.⁵² For countries that want to apply labeling standards to biotech foods, be it a mandatory or voluntary approach, the *Compilation Document* identifies a number of factors that should be taken into account. For example, if a food was genetically engineered to increase its nutritional value, as is the case with Golden Rice,⁵³ then the fact that the rice has increased levels of the vitamin A precursor should be labeled on the package. Such a labeling requirement has nothing to do with the fact that the rice has been genetically engineered. The labeling requirement would also apply if the nutritional

48. See COMPILATION DOCUMENT, *supra* note 1.

49. *Id.*

50. *Id.*

51. Press Release, Consumers International, Consumer Rights Victory as US Ends Opposition to GM Labeling Guidelines (July 5, 2011), *available at* <http://www.consumersinternational.org/news-and-media/press-releases/2011/07/consumer-rights-victory-as-us-ends-opposition-to-gm-labelling-guidelines>; *Biotech Labeling Agreement Interpretations Differ*, THE HAGSTROM REPORT, July 5, 2011, http://www.hagstromreport.com/news_files/070511_biotech.html.

52. See COMPILATION DOCUMENT, *supra* note 1.

53. GOLDEN RICE, <http://www.goldenrice.org/> (last visited March 5, 2012).

profile of the rice were altered in a similar fashion through traditional breeding.

B. Impact on WTO Challenges

The backdrop for the discussion on mandatory versus voluntary labeling is the possibility that the World Trade Organization (WTO) could challenge a country's labeling standards. This concern was raised by several countries, including Argentina as previously discussed.⁵⁴ Countries that have adopted mandatory labeling requirements are particularly concerned that their approach could be challenged given that such requirements can have a dramatic impact on trade. For example, when the EU adopted its labeling policy in 2006, products with biotech ingredients virtually disappeared from store shelves as companies chose to source non-GE ingredients or reformulate their products to avoid using a biotech label.⁵⁵ Companies that marketed biotech labeled products were sometimes the target of boycotts by biotech opponents, which further limited the number of products on the shelves.⁵⁶ The EU's labeling requirements did not impact animal feed and Europe continued to import billions of dollars' worth of GE soybeans each year.⁵⁷

The final *Compilation* is silent on the issues of consistency of any particular approach with Codex standards.⁵⁸ During the discussions, Codex members that supported mandatory labeling fought to include language that recognized each country's right to adopt different approaches to biotech labeling.⁵⁹ Such recognition has no meaning within the Codex context since all Codex standards are voluntary, but it would have been meaningful in the context of a WTO challenge.

The compromise adopted at the 2011 Session of the CCFL addressed the desire of one group of countries to note the existence of different approaches to biotech labeling, but rejected the notion that they had a right to adopt any approach irrespective of its provisions.⁶⁰ The

54. 29TH SESSION REPORT, *supra* note 32, at ¶ 66.

55. Jason McNichol & Jabril Bensedrine, *Multilateral Rulemaking—Transatlantic Struggles Around Genetically Modified Food* (forthcoming Ph.D. dissertation, University of California, Berkeley), available at <http://groups.haas.berkeley.edu/gmo/McNicBens4.doc>. “As European governments and the EU enacted new regulations requiring the labelling of GM imports, American grain processors and exporters increasingly suffered from cancelled orders for mixed shipments.” *Id.* at 22–23..

56. *See generally id.* “In 1998 and 1999, growing numbers of US farmers, who made planting decisions several months in advance by anticipating market trends, either held off from planting GM soy or reduced their acreage in order to hedge against possible boycotts and prepare for possible premiums offered by major buyers for GM-free harvests.” *Id.* at 24.

57. *See Soya Bean*, GMO COMPASS (Sept. 2, 2010), <http://www.gmo-compass.org/eng/database/plants/67.soybean.html>. Approximately forty million tons of raw soybeans are imported in to the EU yearly and these imports are predominantly used for livestock feed. *Soybeans*, GMO COMPASS (Dec. 3, 2008), http://www.gmo-compass.org/eng/grocery_shopping/crops/19.genetically_modified_soybean.html.

58. COMPILATION DOCUMENT, *supra* note 1.

59. *See* 39TH SESSION REPORT, *supra* note 40, at ¶¶ 62–70.

60. *Id.* at ¶ 141.

report from the 2011 Session emphasized that the text was not an endorsement but a simple statement of fact.⁶¹ The *Compilation Document* further limited the right of countries to adopt different approaches by juxtaposing the fact that different approaches exist with the obligation to be consistent with Codex.⁶² The Committee Report explains that this juxtaposition was intentional to achieve this purpose: “Different approaches regarding labeling of foods derived from modern biotechnology are used’ . . . [and] *any approach implemented by Codex members should be consistent with already adopted Codex provisions.*”⁶³ These two clauses, taken together, cannot be read as suggesting or implying that the various approaches to labeling are all equally valid. The Committee Report foreclosed such an interpretation. Instead, the emphasis would now seem to be on the need for members to be consistent with Codex standards, an admonition that would seem unnecessary if all approaches were, in fact, Codex consistent.

As a result of these provisions, the *Compilation Document* cannot be seen as providing guidance to Codex members or a WTO panel on the question of whether mandatory biotech labeling is WTO consistent. The *Compilation Document*, therefore, contains no new labeling provisions or principles that a panel might rely on directly for this question. However, there are two aspects of the *Compilation Document* that a panel might refer to on this question.

First, the existence of a Codex document on biotech labeling might be seen as undermining the notion that GE products are no different than conventionally produced foods. This would undoubtedly be raised as the primary exhibit by any country defending its mandatory labeling approach before a WTO panel. And yet, Codex members considered and rejected text that would have explicitly acknowledged that mandatory labeling approaches were consistent with Codex.⁶⁴ Given that Codex members were careful to avoid answering this question, either explicitly or implicitly, it is hard to see what weight a panel would be able to give to the existence of the document alone.

The second aspect of the *Compilation Document* that might have some bearing in a WTO dispute on the consistency of mandatory labeling with the SPS Agreement is the final sentence: “This document is not intended to suggest or imply that foods derived from modern biotechnology are necessarily different from other foods simply due to their method of production.”⁶⁵ This phrase suggests that the method of production does not, in and of itself, change the nature of the food. In the context of the WTO this could be important in helping to answer the question of whether biotech foods, once approved for consumption, should be con-

61. *Id.*

62. COMPILATION DOCUMENT, *supra* note 1.

63. 39TH SESSION REPORT, *supra* note 40, at ¶ 2 (emphasis added).

64. *Id.* at ¶ 142.

65. COMPILATION DOCUMENT, *supra* note 1.

sidered similar to non-biotech foods, or “like products” in WTO terms. The WTO discourages members from discriminating against “like products,” particularly if such discrimination results in a disparate treatment of imported versus domestic products,⁶⁶ as was the case with the introduction of the EU’s biotech labeling law.⁶⁷

VII. CONCLUSION

How did Codex members answer the charge to “provide guidance on how the fact that a food was derived from ‘modern’ biotechnologies could be made known to the consumers” and did Codex really capitulate on the issue of mandatory labeling?⁶⁸ As the title suggests, the *Compilation of Codex Texts Relevant to Labelling of Foods Derived from Modern Biotechnology* pulls together into one place a list of Codex texts relevant to biotech labeling. It remains unclear whether this guidance will provide any solace to Codex members interested in implementing biotech labeling—whether through mandatory or voluntary provisions.

So what about the charge to the CCFL regarding how to make known to the consumer the fact that a food was genetically engineered? The *Compilation Document* fails to provide guidance on the question of mandatory versus voluntary labeling for biotech foods.⁶⁹ In the end, Codex decided to answer the charge, not by creating new guidance, but by reaffirming the view that Codex texts apply to all foods, which includes those derived through modern techniques of genetic modification.⁷⁰ Codex members did not capitulate on biotech labeling, but rather reached consensus in those areas where compromise could be achieved.

With respect to a WTO challenge, the ultimate value or meaning of the document is less clear. Certainly the adoption of the *Compilation Document* does not mean that “any country wishing to adopt GM food labeling will no longer face the threat of a legal challenge from the World Trade Organization (WTO).”⁷¹ Beyond the title itself, the *Compilation Document* seems to be of little or no value in the WTO context. While the existence of the document might suggest that biotech foods are somehow different from other foods, and might therefore need to be labeled differently, the document clarifies that this is not the case.⁷² The *Compilation Document* therefore reinforces the view that biotech foods that have received positive risk assessments are the same as (or substantially equivalent to) conventional foods. As a result, the text of the document might just as easily provide support in the WTO context to

66. CORINNA HAWKES ET AL., TRADE, FOOD, DIET, AND HEALTH: PERSPECTIVES AND POLICY OPTIONS 284 (2010).

67. *Id.* at 232.

68. 19TH SESSION REPORT, *supra* note 18, ¶ 90.

69. *See* COMPILATION DOCUMENT, *supra* note 1.

70. *Id.*

71. Press Release, Consumers Union, *supra* note 15.

72. COMPILATION DOCUMENT, *supra* note 1 (“This document is not intended to suggest or imply that foods derived from modern biotechnology are necessarily different from other foods simply due to their method of production.”).

countries that oppose mandatory labeling measures on the basis of disparate treatment of like products.⁷³

In the final analysis, the *Compilation Document* confirms that Codex labeling texts developed for foods generally, also apply to biotech foods and that such foods are not necessarily different simply due to their method of production. The *Compilation Document* does not endorse one labeling approach over another, nor does it distinguish among them. Rather, it reminds Codex members that their laws and regulations should be consistent with already adopted Codex provisions.

73. *See id.*

