Civil society and disputes in the World Trade Organisation: Lessons from the *EC – Biotech* Dispute

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In November 2006, the World Trade Organisation (WTO) reached a decision in the *EC – Biotech* dispute – a dispute over the way in which approvals of genetically modified (GM) crops and food had been carried out in the European Communities (EC). For more than five years, the EC had delayed approvals of GM crops and food under an informal moratorium while some of its member states introduced bans on the import and sale of GM products. The WTO found that the EC had violated international trade rules in two main ways – by allowing unjustified delays in the approvals processes and by failing to back up trade bans with scientific risk assessments. The EC must now correct flaws in the implementation of their approval system for GM products or else risk sanctions being imposed against them by the WTO.

The three countries that launched the WTO dispute against the EC – the United States, Canada and Argentina – are some of the largest GM producers in the world. They have each claimed that the WTO decision is a victory for GM production and trade around the world. In an unusual step, the EC did not appeal the decision and has since adopted a 'business as usual' approach to the approval of GM products. Meanwhile, other members of the WTO, including developing countries, have been left to speculate about how the *EC – Biotech* decision will affect their regulation of genetically modified organisms (GMOs) and GM products.

The *EC – Biotech* dispute marks an important milestone in the relationship between international rules on trade and on biosafety regulation. Civil society organisations that had campaigned for strong controls on GM trade under the Biosafety Protocol were concerned that the outcome of the *EC – Biotech* dispute could undermine biosafety regulation around the world. Presented with the WTO's findings, those organisations can now consider the impacts of the decision and critically assess the strategies they used to voice their concerns about the dispute.

This background paper will briefly explain what the WTO is and how it manages disputes. It will then summarise the main findings and conclusions in the *EC – Biotech* dispute. Finally, it will examine one of the tools used by civil society organisations to have their voices heard in WTO disputes known as *amicus curiae* or 'friend of the court' briefs. The paper has been produced for the GeneWatch UK project on 'Trade in GMOs: the implications of labelling, traceability and the WTO dispute on developing countries'. It is intended to assist the civil society organisations participating in that project to critically assess the outcome of the *EC- Biotech* dispute and strategies for engaging in WTO disputes in the future.

The WTO and dispute settlement

Established in 1995, the World Trade Organisation (WTO) provides the institutional framework for international trade relations governed by the WTO Agreements – a package of international treaties that promote free trade in goods, services and intellectual property. The three main WTO Agreements that are often relevant to trade regulation aimed at environmental protection are the General Agreement on Tariffs and Trade 1994 ('GATT'), the Agreement on Technical Barriers to Trade ('TBT Agreement'), and the Agreement on Sanitary and Phytosanitary Measures ('SPS Agreement').

The WTO's Members comprise 150 developed and developing countries and – as it is known for WTO purposes – the European Communities. Civil servants representing WTO Members meet on a day-to-day basis in Geneva in councils, committees and working groups that are dedicated to specific WTO Agreements or issues. Members are assisted by a Secretariat, headed by a Director-General.

Every two years, the WTO conducts high level Ministerial Conferences where Ministers take stock of developments in the implementation of the WTO Agreements. From time to time, the Ministerial Conferences can also initiate negotiations to amend or create new treaty commitments. The current round of WTO trade negotiations, known as the 'Doha Round', is progressing very slowly as Members try to reach agreement on reductions in agricultural subsidies and decreased tariffs for industrial products.

WTO Members who feel that another Member is not sticking to its side of the bargain under the WTO Agreements may complain to the WTO's Dispute Settlement Body. The Dispute Settlement Body is made up of all WTO Members. It resolves disputes with the assistance of *ad hoc* panels of experts and, on appeal, a permanent group of seven international trade lawyers known as the Appellate Body. Panels generally have six to nine months in which to receive and hear submissions from parties and third parties to a dispute and to make recommendations for resolving the dispute. If a party appeals on points of law, the Appellate Body generally has a further three months to make recommendations for resolving the dispute. Timeframes for disputes are, however, often extended and can take several years to resolve.

Once the Panel or the Appellate Body has issued its report, the WTO Dispute Settlement Body then has the power to approve the recommendations made in the reports. Where a WTO Member is instructed by the Dispute Settlement Body to change its trade regulations to comply with the WTO Agreements, it has a 'reasonable' time (generally 15 months) in which to bring its trade regulations into line. If the offending WTO Member fails to comply within that time, other Members can again complain to the Dispute Settlement Body. On the advice of a panel and, where necessary, the Appellate Body, the Dispute Settlement Body can then authorise trade sanctions against the offending WTO Member. Trade sanctions can take the form of compensation or the imposition of higher tariffs on exports originating from the offending WTO Member.

Only WTO Members can participate in WTO dispute settlement proceedings and the WTO dispute settlement proceedings are confidential. Written submissions are confidential unless the submitting WTO Members make them publicly available. Hearings are closed to all other WTO Members and to the public. Only after the report on the panel or Appellate Body findings is circulated to the Members are all WTO Members given an opportunity to comment on the findings and to adopt the reports in a meeting of the Dispute Settlement Body. Only after the reports are circulated to the WTO Members are they derestricted and made available to the general public.

In reaching their conclusions, panels and the Appellate Body assess the WTO consistency of measures on a case-by-case basis, interpreting words in the WTO Agreements in terms of their ordinary meaning read in their context and in the light of a given Agreement's object and purpose. Although they are not bound by interpretations in past WTO disputes, panels and the Appellate Body will often rely on the reasoning in past disputes.

The *EC – Biotech* dispute in brief

The EC maintains a regulatory framework setting out requirements and procedures for the pre-market approval of GM products. This area of regulation – known as 'biosafety' regulation – aims to protect the environment and human health from any hazards that might arise from organisms that have been genetically modified or engineered by modern biotechnology processes. These processes can isolate a gene from micro-organisms, plants or animals and insert them into other species in a way that cannot occur in nature.

After October 1998, and until May 2004, the EC did not approve the growing of any GM crops or the sale of any GM products under its pre-market approval procedures. Several individual EC Member States had announced that they would not vote in favour of the approval of GM products until new requirements for labelling and tracking GM products through the supply chain ('traceability') had been introduced. Aspects of the EC's regulatory framework for GM approvals were amended with effect from October 2002, and again from April 2004 when new labelling and traceability laws came into force.

Meanwhile, several applications from biotech companies to the EC for the requisite pre-market approval experienced delays at different stages in the approvals process. Some delays were attributed to failures by the biotech companies to provide requested information, and some were attributed to the time lag for the EC's regulatory amendments to enter into force. In addition, several individual EC member states invoked their right under the pre-market approvals system to establish national 'safeguard' measures banning GM products that had been authorised by the EC as a whole. These EC member states were concerned that the methodology and scope of the risk assessments was flawed, and that the approvals made no or inadequate provision for monitoring impacts and labelling products.

In May 2003, the United States, Canada and Argentina (the Complaining Parties) initiated WTO challenges to the way in which approvals of GM crops and food had been carried out in the EC. In particular, the Complaining Parties objected to three sets of measures characterised by the:

- EC's refusal to assess new applications for GM product approvals (known as the 'general moratorium')
- EC's delays in processing existing applications for GM product approvals (known as the 'product-specific delays')
- bans introduced by individual EC member states on GM products that had already been approved by the EC as a whole (known as the 'national bans').

In response to the complaints received from the US, Canada and Argentina, the WTO established a single panel of experts to adjudicate the disputes. The Panel conducted hearings and received submissions from the parties, third parties, civil society, international organisations and scientific experts. The Panel issued its report of more than 1000 pages in time for approval by the WTO's Dispute Settlement Body in November 2006 – more than three years after the Complaining Parties first initiated their complaints. There was no appeal to the Appellate Body.

The Panel found that the EC had violated commitments under the WTO's Sanitary and Phytosanitary (SPS) Agreement which covers government measures to protect human health and the environment from pest and food-borne risks. In particular, the Panel concluded that the first two categories of challenged measures – the EC's general moratorium, and most of the product-specific delays – amounted to 'undue' (or unjustified) delays in the operation of sanitary and phytosanitary procedures for the approval of GM products. The EC's excuse that some stages in the approvals procedure had been delayed while decision-makers waited for legislative amendments to enter into force was not, in the Panel's view, a reasonable justification for delays in the approval procedures. The Panel believed that labelling and other requirements to be introduced by the legislative amendments could have been imposed on the applicants by other means – such as voluntary undertakings or conditions on the final approval.

The Panel also found that the third category of challenged measures – the national bans – were not based on risk assessments despite there being sufficient scientific evidence for risk assessments to be carried out. The Panel maintained that none of the EC Member States had evaluated the risks associated with the GM products prohibited by their national bans. Moreover, the Panel said, the national bans on GM products could not be based on the risk assessments undertaken by EC scientific bodies because they had assessed the risks favourably, leading to the approval of the GM products for the EC as a whole. Although the Panel acknowledged that the exercise of precaution could result in different legislative responses to the same product, it did not, the Panel said, dispose of the need to base measures on risk assessments.

In the course of its findings, the Panel made some general observations about the relevance of international law. The EC had argued that several international laws were relevant to the dispute, including the Biosafety Protocol and the precautionary principle. The Biosafety Protocol is an international treaty aimed at protecting biological diversity, and human health, from any risks arising from the transport and use of 'living' genetically modified organisms. The Panel found that it did not have to take account of the Biosafety Protocol and its parent treaty, the UN Convention on Biological Diversity, because not all of the Parties to the dispute were parties to those treaties. The EC, Canada and Argentina but not the US are party to the Convention on Biological Diversity and none of the Complaining Parties is a party to the Biosafety Protocol.

The Panel noted, however, that its interpretation of terms contained in the WTO rules could be informed by international agreements in the same way that a Panel might refer to a dictionary to determine the ordinary meaning of WTO terms – regardless of whether all Parties to the dispute, or all WTO Members, were also party to those other international agreements. The Panel nevertheless concluded that the Biosafety Protocol and other international treaties were not relevant to its interpretation of the 'ordinary' meaning of the WTO terms at issue in this dispute.

The Panel also examined the relevance of the precautionary principle – a principle applied by governments when they want to avoid harm to the environment or human health, even though there is a lack of scientific knowledge or consensus which makes judging the probability of harm resulting from a given product or activity difficult. Dismissing expressions of the principle in international instruments and in domestic laws, the Panel suggested that the precautionary principle is neither customary international law nor a general principle of law. Without stating any reasons, the Panel nevertheless found that it was not necessary for it to reach a conclusive finding on the legal status of the precautionary principle.

In the wake of the Panel's findings, the EC has continued to deny that there is a general moratorium and claims that approvals of GM products since the establishment of the Panel in this dispute demonstrate that the approvals procedures are functioning properly. The EC is also claiming to be taking action in respect of the Member States' national bans. If the Complaining Parties are not satisfied that the EC has complied with the Panel's recommendations within a reasonable time, they could launch a follow-up complaint seeking, for example, permission from the WTO to issue sanctions against the EC.

It is important to note that the Panel made no finding as to the EC's right to require pre-market approval or the safety of GM products, and it did not revoke the right of WTO Members to choose whatever level of protection they want to provide to their people from risks to human health and the environment – including 'zero-level' risk. However, the Panel's findings could mean that a wide range of governmental regulations aimed at health, environmental and consumer interests will have to be backed up by narrowly-

defined risk assessments, leaving little room for precautionary measures in the face of scientific uncertainty and irrespective of other obligations under international law.

Many developing countries have significant biodiversity, agricultural practices and 'GM-free' exports that they might want to preserve through bans or conditions on GM imports imposed in accordance with the Biosafety Protocol. Those developing countries that are also WTO Members could be particularly affected by the Panel's findings in this dispute because they might want to rely on the precautionary principle in imposing bans or conditions on GM imports based on a broad range of risks. They might also have limited resources that make delays in developing a regulatory framework and processing applications for approvals of GM imports likely.

Amicus curiae briefs in the WTO

Many governments and civil society organisations have worked hard to develop international and national rules on production and trade in GMOs and GM products. The Biosafety Protocol is a significant outcome of these global efforts and, with over 140 states parties, it is weighty testament to the right of countries to control the movement of GMOs and GM products across their borders. Civil society organisations that advocated appropriate controls on GM trade under the Biosafety Protocol were concerned that the outcome of the *EC – Biotech* dispute could undermine biosafety regulation around the world.

Some of these civil society organisations chose to express their concerns about the dispute in the form of *amicus curiae* or 'friend of the court' briefs to the Panel. One of the briefs was put together by a coalition of 15 public interest organisations (the *Amicus* Coalition) from around the world. The *Amicus* Coalition's *amicus* brief set out important facts not addressed by the Parties about the uncertainty surrounding the benefits and risks of GM technology, and developed progressive legal interpretations about the relevance of the Biosafety Protocol and the precautionary principle.

The practice of *amicus curiae* interventions in dispute settlement has evolved in national and international courts and tribunals to allow non-parties to a dispute to set out facts or arguments relevant to the dispute and often in the public interest. Unlike some other international dispute settlement bodies, the WTO has no formal procedures for *amicus curiae* interventions prescribed in its governing instruments. The WTO's Appellate Body has, however, interpreted provisions in the instrument that governs WTO disputes (the WTO's Dispute Settlement Understanding) as giving panels and the Appellate Body the discretionary authority to accept unsolicited information from non-parties to a dispute. Panels and the Appellate Body often accept the briefs but indicate in their final report that they did not find it necessary to take them into account.

Advocates of the practice of *amicus* submissions in the WTO maintain that *amici* can make the WTO adjudicators and parties aware of the range of

interests likely to be impacted by the outcome of a dispute, leading to better informed findings and contributing to the fair resolution of the dispute with an outcome which is more likely to be understood and accepted by the wider community. Critics of the practice range from governments to people that feel it is inappropriate for the WTO to hear directly from civil society organisations, that *amicus* submissions overburden the WTO's dispute settlement process, and that they typically present a Northern perspective.

In the lead up to the *EC – Biotech* dispute, civil society organisations met to discuss the pros and cons of making *amicus curiae* submissions. On the downside, it was noted that they were time intensive and that there was no guarantee that they would be taken into account. Some of the organisations involved in the discussions took the view that the WTO has systemic ideological flaws and they did not want to be seen to be legitimising the WTO as an institution by engaging in its dispute settlement process. These organisations, together with some members of the *Amicus* Coalition, developed complementary but parallel public campaigns on the dispute such as the 'Bite Back Campaign'.

In its report to the WTO Dispute Settlement Body, the Panel in the *EC – Biotech* dispute stated that it had accepted the *amicus curiae* submissions but did not consider it necessary to take them into account. However, the EC referred to the submission in its oral arguments and it is reasonable to assume that the Panel members read them. The *amicus* submissions also served a broader purpose. First, they provided a platform on which a range of civil society organisations could work together, sharing resources, to raise the awareness of people and governments about the dispute and the issues it raised. These organisations were informed and able to act proactively on developments in the dispute settlement process. Secondly, it made a statement about how WTO rules can impact on the interests of the broader community and demanded a voice in the WTO for people acting in the public interest.

If planning to make *amicus* submissions in further stages of the *EC – Biotech* dispute or future WTO disputes (e.g. disputes over labelling and traceability legislation), civil society organisations might consider the following issues:

- **Building diverse coalitions:** It is helpful if an *amicus* submission pools the resources of organisations with a range of interests, with representatives from the North and South, and from Party and non-party countries to the dispute.

- **Content and objective of *amicus* submission:** It is important to establish from the outset what issues organisations plan to cover in the *amicus* submission and what they hope to achieve.

- **Impact on the organisations' work and constituencies:** Organisations should confirm that the issues covered, and the strategy of submitting an *amicus* brief, is consistent with their other work or campaigns.

- **Use of organisations' resources and impact of the *amicus* brief:** Organisations with limited resources might feel that their time and money is better spent on other efforts. Or they might see benefits in working with other organisations who can take the lead in preparing the brief.

- **Limits on the scope of an *amicus* submission:** Information and arguments in the *amicus* brief should be accurate and credible and, in the case of an appeal, limited to points of law.

- **Relationship of the *amicus* brief to the parties' submissions:** Submissions should 'add value' to the pool of information before the panel or the Appellate Body (i.e. try not to duplicate material that is likely to be presented by the parties) without undermining the position of any party that the submission is seeking to support.

- **Form and timing of an *amicus* submission:** In the absence of formal procedures for *amicus* submissions in the WTO, organisations should consider following the form set out in the two-stage procedure (i.e. (1) requesting permission to make a submission and (2) making a submission) that was developed by the Appellate Body in a past dispute known as the *EC – Asbestos* dispute. Where possible, submissions should be made before the first oral hearing.

- **Legal 'representation':** Legal assistance in preparing a brief is by no means necessary but it can help to lend weight to the position put forward in a submission to a panel. Legal assistance is probably advisable where making a submission on points of law to the Appellate Body.

Further Reading and Resources

Amicus Coalition Brief, 27 May 2004, http://www.worldtradelaw.net/amicus.htm.

EC – Biotech Panel Report http://www.worldtradelaw.net/search/searchreports.htm

GeneWatch on the WTO Dispute: http://www.GeneWatch.org/sub.shtml?als[cid]=405264

Briefing paper on the '*EC – Biotech* Dispute: Implications for developing countries and the need for an appeal' November 2006 http://www.GeneWatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/WTO_Biotech_case_dcsummaryfinal_1.pdf

WTO website: http://www.wto.org/

An Explanatory Guide to the Cartagena Protocol on Biosafety: http://www.iucn.org/themes/law/pdfdocuments/Biosafety-guide.pdf

ICTSD Biotechnology Resources http://www.trade-environment.org/page/theme/biotechnology.htm