

The WTO GMO Dispute:

**Implications for developing countries and
the need for an appeal**

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The organisations are some of the partners in the GM Amicus Coalition, an international group of civil society organisations that made an amicus curiae submission to the WTO GMO dispute.

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1. Introduction

On 29 September 2006, a World Trade Organisation Dispute Panel circulated its final report in the international trade dispute over the European Communities' implementation of rules and procedures for approving the growing of genetically modified crops and the sale of GM food.¹ Having found several instances of WTO-inconsistency, the Panel has recommended that the EC correct flaws in the implementation of the pre-market approval system for GM products in light of the WTO rules prohibiting undue delays and requiring risk assessments. Unless appealed on points of law to the WTO's Appellate Body, the Panel's recommendations are expected to be formally adopted by the WTO in late 2006.

This note explains what the WTO Panel decided, what might be appealed, and what might be important to developing countries wanting to regulate GM imports and other products that could cause harm to health and the environment. The note reaches two conclusions. **First, it stresses that developing countries currently considering what laws to introduce to regulate GM crops and products should be aware that the dispute was only about the implementation of the EC's rules.** The dispute was not about the right to regulate GM products, including the right to require GM products to be labelled; it did not reach any conclusions on the safety or otherwise of GM crops and products; it did not say that GM crops and products should be regulated in the same way as their conventional counterparts; and it did not revoke a government's right to choose any level of protection for its citizens from health and environmental risks – including zero-level risk.

Secondly, this note concludes that the EC should not leave the Panel's erroneous description and application of WTO law unchallenged. The Panel's errors include the broad scope of measures covered by the WTO Agreement that governs health-related measures (the Agreement on the Application of Sanitary and Phytosanitary Measures) and the narrow interpretation of justified delays and scientific basis. The Panel also erred in its interpretation of how other international laws – including the precautionary principle and the Biosafety Protocol – relate to WTO rules. If left to stand, the Panel's errors 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.

2. The relevance of the dispute outcome to all WTO Members...

The three countries that launched the WTO dispute – the United States, Canada and Argentina (the 'Complaining Parties') – claim that the Panel's report is a victory for them and other exporters of GM seed and food.² The EC, on the other hand, claim that it will be 'business as usual' for their pre-market approval system for GM products.³ The Parties to the dispute are, however, not the only countries affected by the Panel's findings in this dispute. Several WTO Members registered a 'substantial interest' as Third Parties in this dispute – including developing countries that have an interest in maintaining flexibility in how they

¹ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, United States (WT/DS291/R), Canada (WT/DS292/R), and Argentina (WT/DS293/R), 29 September 2006, available online at http://www.wto.org/english/news_e/news06_e/291r_e.htm ('Panel Report').

² U.S. Trade Representative Susan Schwab and U.S. Agriculture Secretary Mike Johanns Announce Favorable Ruling in WTO Case on Agricultural Biotechnology, press release, 09/29/2006, http://www.ustr.gov/Document_Library/Press_Releases/2006/September/US_Trade_Representative_Susan_Schwab_US_Agriculture_Secretary_Mike_Johanns_Announce_Favorable_Ruling_in_WTO_Case_on_Agri.html.

³ 'WTO ruling against EU unlikely to have any effect EU', Observer, 11 May 2006, <http://english.pravda.ru/news/world/11-05-2006/80133-WTO-0>.

regulate GM imports.⁴ Moreover, reports in WTO disputes guide the future regulatory behaviour of WTO Members, as well as guiding the arbiters of future WTO disputes.⁵ The findings could therefore be relevant to other WTO Members wanting to regulate GM imports. They could also apply by analogy to other types of products that might pose risks to human health and the environment, affecting those WTO Members seeking to regulate such products.

3. The dispute outcome as a new basis for pressure on developing country WTO Members to open their markets to GM imports...

From the outset of this dispute, commentators speculated that the Complaining Parties' real motivation for bringing the dispute was to send a message to developing country WTO Members wanting to regulate GM imports.⁶ In the US submission to the Panel, it claimed that the EC's effective ban on GM imports was denying the claimed benefits of GM technology to developing countries fearful of EC bans on their own exports if they were to accept GM imports and grow GM crops.⁷ By challenging aspects of the *implementation* of the EC's pre-market approval system for GM products – rather than the approval system itself – the US, Canada and Argentina could have been reasonably confident that some of their claims of procedural flaws would succeed. They might now use the outcome in this dispute to put pressure on developing country WTO Members to open their markets to GM imports.

Issues raised by the US and other GM exporters in meetings of the SPS Committee and the Committee on Technical Barriers to Trade have already demonstrated a desire to open up developing country markets to GM imports. For example, the US' comments on India's notification of its GM regulations to the TBT Committee in May 2006 have suggested that the regulations also be notified to the SPS Committee – and therefore subject to the SPS requirements for scientific risk assessments – and have characterised the product coverage of the regulations as vague, expressing concerns that they might be unnecessarily burdensome and costly.⁸

4. The challenged EC measures...

In its report, the Panel considered the WTO-consistency of three types of measures attributed to the EC:

- (1) the suspension of all GM product approvals ('general moratorium');
- (2) delays in the approval process for specific GM products ('product-specific delays'); and
- (3) national 'safeguard' prohibitions of six EC member states on GM products already approved by the EC as a whole ('national bans').⁹

The EC maintains a regulatory framework setting out requirements and procedures for the pre-market approval of GM products.¹⁰ After October 1998, and until May 2004, the EC had

⁴ The third parties are: Australia, Brazil, Chile, China, Colombia, El Salvador, Honduras, Mexico, New Zealand, Norway, Paraguay, Peru, Chinese Taipei, Thailand, Uruguay.

⁵ E.g. *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, ('*Japan – Alcoholic Beverages*'), p. 14 says adopted panel reports 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute'.

⁶ Trade Observatory, 'USTR Seeks Industry Input on Possible Challenge in Biotech Dispute', 19 February 2002, <http://www.tradeobservatory.org/headlines.cfm?refID=17257>

⁷ See US First Submission, para 64

http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file720_5542.pdf.

⁸ The United States comments on the Indian Ministry of Commerce & Industry's Condition No. 18 in Para 4 of Notification No. 2(RE 2006)122004-2009, 7 April 2006 and 4(RE 2006)12004-2009, 4 May 2006, notified as G/TBD/N/IND/17.

⁹ Panel Report para 7.98.

¹⁰ See further EC Q&A, http://ec.europa.eu/environment/biotechnology/pdf/memo_28_02_06.pdf.

not approved the growing of any GM crops or the sale of any GM products under its pre-market approval procedures.¹¹ 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.¹² Aspects of the EC's regulatory framework for GM approvals were amended with effect from October 2002,¹³ and again from April 2004 when new labelling and traceability laws came into force.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷

5. The WTO rules on interpreting the WTO rules...

The WTO rules are contained in a package of agreements governing international trade in goods, services and intellectual property.¹⁸ The WTO agreement outlining the rules for dispute procedures (the Understanding on Dispute Settlement or the 'DSU') requires the arbiters of a dispute – namely the WTO dispute panels (comprising trade experts) and the WTO Appellate Body (comprising trade lawyers) – to interpret words in the WTO rules in accordance with the Vienna Convention on the Law of Treaties.¹⁹ The Vienna Convention requires words in a treaty to be interpreted in accordance with their 'ordinary' meaning, in their context, and in light of the treaty's object and purpose.²⁰ WTO arbiters often refer to dictionary definitions and other authoritative texts, including past interpretations of the terms in previous WTO disputes, to determine the meaning of WTO terms. In looking at the

¹¹ Note some were approved under the 'simplified procedure'. See EC GM Foods Authorised in the EU, http://europa.eu.int/comm/food/food/biotechnology/authorisation/258-97-ec_authorised_en.pdf; GMOs Authorised for Feed Use in the EU, available at: http://europa.eu.int/comm/food/food/biotechnology/authorisation/2001-18-ec_authorised_en.pdf; GMOs authorised for release under Directive 2001/18, http://ec.europa.eu/environment/biotechnology/authorised_prod_2.htm; GMOs authorised for release under Directive 90/220, http://ec.europa.eu/environment/biotechnology/authorised_prod_1.htm.

¹² See e.g. Declaration by the Danish, Greek, French, Italian and Luxembourg delegations concerning the suspension of new GMO authorizations, 2194th Council Meeting - Environment-, Luxembourg, 24/25 June 1999, cited in Panel Report, para. 7.474.

¹³ See Directive 2001/18/EC, of 12 March 2001, on the deliberate release into the environment of GMOs and repealing Council Directive 90/220/EEC, OJ L 106 of 17 April 2001: Member States required to bring into force by 17 October 2002, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0018:EN:NOT>.

¹⁴ See EC Regulation 1829/2003 of 22 September 2003, on GM food and feed Official Journal L 268, of 18 October 2003; EC Regulation 1830/2003 of 22 September 2003, concerning the traceability and labelling of GMOs and the traceability of food and feed products produced from GMOs, taking effect from April 2004.

¹⁵ See Panel Report, e.g. of applicant failure para. 7.2031; e.g. of time lag para. 7.2137.

¹⁶ For present list, see http://ec.europa.eu/environment/biotechnology/safeguard_clauses.htm.

¹⁷ See e.g. Austria's justification in the document entitled "*Reasons for the decision of the Republic of Austria to prohibit the placing on the market of GM maize line T25 [...]*", cited in the Panel Report para 7.2568, as well as its reasons in respect of Bt-176 maize, cited in the Panel Report at 7.2617; France's justification in the document entitled "*Motivation du moratoire, pour une période de deux ans, relative à la mise en marché sur le territoire français de colza génétiquement modifié tolérant aux herbicides, en application de l'Article 16 de la Directive 90/220/EEC: Nouveaux éléments en matière d'évaluation du risque pour l'environnement*" cited in the Panel Report para 7.2709.

¹⁸ Marrakesh Agreement Establishing the World Trade Organisation Marrakesh, 15 April 1994 ("Marrakesh Agreement"), http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

¹⁹ Article 3.2 the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU'), Annex 2 to the Marrakesh Agreement, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm; 1969 *Vienna Convention on the Law of Treaties*, 11 UNTS 331; 8 ILM 679 (1969) (the "Vienna Convention") is recognised as describing customary rules of interpretation for the purposes of DSU Article 3.2: see *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body adopted 20 May 1996, WT/DS2/AB/R, pp.10-11 ('*US – Gasoline*'); *Japan – Alcoholic Beverages*, above n. 5, pp.6-7.

²⁰ Vienna Convention on the Law of Treaties, Article 31.

'context' of WTO terms, WTO arbiters may consider the WTO rule in question, other WTO rules in the WTO agreement in question, and WTO rules in other WTO agreements.

According to the Vienna Convention, WTO arbiters must also take account of other 'relevant rules of international law applicable in the relations between the parties'.²¹ Rules of international law include treaties, customary international law and general principles of law.²² Commentators have said that, in the WTO context, 'applicable in the relations between the parties' means those international laws that bind the parties to the WTO dispute in question.²³ Treaties bind only those states parties that have ratified or acceded to a treaty. Customary international laws are 'unwritten' rules that evolve over time through practice and conviction and which bind all states.²⁴ In addition, WTO arbiters must interpret the WTO rules so that none of the rules is made redundant and none conflict with each other or other international laws.²⁵

6. The Panel's findings on the relevance of international law: the Biosafety Protocol and the precautionary principle...

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 with over 130 states parties which is aimed at protecting biological diversity, and human health, from any risks arising from the transport and use of 'living' genetically modified organisms.²⁶ Under the Protocol, living genetically modified organisms that are intended to be released into the environment – such as seed – cannot be exported without the prior approval of the importing country, following a risk assessment.²⁷ The Biosafety Protocol is based on the 'precautionary principle',²⁸ 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.

The Panel found that the Biosafety Protocol and its parent treaty, the UN Convention on Biological Diversity, were not 'applicable in the relations between the parties' for the purposes of the Vienna Convention because they had not been ratified or acceded to by all of the Parties to the dispute: 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.²⁹ In its view, the Panel was therefore not required to take those other international laws into account in the resolution of this dispute.³⁰ 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

²¹ Vienna Convention on the Law of Treaties, Article 31(3)(c).

²² Statute of the International Court of Justice, as sources of WTO law, per D Palmeter and P C Mavroidis 'The WTO Legal System: Sources of Law', July 1998, 92 *American Journal of International Law* 398; P van den Bossche *The law and policy of the World Trade Organization: text, cases and materials* CUP (2005); see also A. Cassese *International Law*, 2nd ed. OUP (2005) on other sources of international law.

²³ See e.g. G. Marceau 'A Call for Coherence in International Law' 33(5) *Journal of World Trade* 87 (1999); cf D Palmeter and P C Mavroidis *Dispute settlement in the World Trade Organization: practice and procedure* CUP (2004).

²⁴ See further Cassese, above n. 22.

²⁵ Cannot interpret rules in a manner that makes parts of the treaty or other treaties redundant or 'inutile', *US – Gasoline*, above n. 19, p 22; see also J. Pauwelyn *Conflict of Norms in Public International Law: How the WTO Relates to other rules of International Law* CUP (2003).

²⁶ Cartagena Protocol on Biosafety, adopted Montreal, 29 January 2000, available at <http://www.biodiv.org/biosafety>.

²⁷ Biosafety Protocol Articles 7-10, 15.

²⁸ E.g. Biosafety Protocol Articles 1, 11.

²⁹ See <http://www.biodiv.org/world/parties.asp>.

³⁰ Panel Report para. 7.74-5.

WTO Members, had ratified or acceded to those other international agreements.³¹ The Panel 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.³² The Panel also examined the relevance of the precautionary principle to the dispute. 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.³³

As discussed in section 10 below, the Panel's interpretation of the relevance of international law was incorrect and violates the customary international rules of treaty interpretation which the Panel was required to employ under DSU Article 3.2. The Panel Report addresses three separate disputes. The Panel should have determined that the Convention on Biological Diversity was applicable as between the EC and Canada for the purposes of their dispute and as between the EC and Argentina for the purposes of their dispute, and then interpreted the WTO rules so as to avoid any conflict with that treaty. It should also have determined whether the precautionary principle was international law 'applicable in the relations between the parties' and then interpreted the WTO rules so as to avoid any conflict with that principle.³⁴ It should also have determined that the Biosafety Protocol and the Convention on Biological Diversity were relevant to its interpretation of the WTO rules at issue, in terms of the ordinary meaning of terms such as 'undue' delay and risk assessment, as well as evidence of shared values relevant to the legitimacy of the delays and as evidence of the legal status of the precautionary principle.

7. The Panel's finding on the application of the WTO agreements...

The three Complaining Parties presented arguments to the Panel claiming EC violations of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures' (SPS Agreement), and further arguments were made by one or more of the Complaining Parties under the WTO Agreement on Technical Barriers to Trade and the General Agreement on Tariffs and Trade.³⁵

As a threshold question, the Panel had to decide whether the SPS Agreement applied to the challenged measures. To be covered by the SPS Agreement, the challenged measures had to be either 'SPS measures' or measures relevant to the operation of SPS measures. According to SPS Annex A(1) and SPS Article 1.1, 'SPS measures' are government requirements and procedures aimed at protecting humans, animals and plants from pests and disease, or protecting humans and animals from food-borne risks such as contaminants and toxins, or aimed at preventing other pest-related damage, which can affect international trade.³⁶ Measures relevant to the operation of SPS measures would, according to SPS Article 8 and Annex C, include delays in an SPS-related approvals process.

Contrary to arguments put forward by the EC, the Panel found that a general moratorium had been in place since June 1999 until at least August 2003 when the Panel was established.³⁷

³¹ Panel Report para. 7.92.

³² Panel Report para. 7.95.

³³ Panel Report para. 7.89.

³⁴ See e.g. Pauwelyn, above n. 25.

³⁵ The Agreement on Agriculture was included in the Parties' claims but not addressed in their arguments. All of the WTO Agreements, including the SPS Agreement, are available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

³⁶ SPS Agreement, Annex A(1) and Article 1.1

³⁷ Panel Report para. 7.1285. http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

³⁷ SPS Agreement, Annex A(1) and Article 1.1

It found that it did not have to determine whether the general moratorium had ceased any time after the establishment of the Panel.³⁸ The Panel concluded that both the general moratorium and the product-specific delays were not themselves SPS measures but that they concerned the *operation* of sanitary and phytosanitary procedures for the approval of GM products.³⁹ The national bans, the Panel said, were sanitary and phytosanitary measures under the SPS Agreement in their purpose, form and nature and in their effect on international trade.⁴⁰

In making their decision, the Panel interpreted the meaning of 'SPS measures' very broadly. The Panel did not draw consistently from appropriate interpretative sources to determine the ordinary meaning of terms in their context and in light of the treaty's object and purpose. Instead, the Panel readily identified risks being addressed by the pre-market approvals system for GM products as having an SPS purpose. Specifically, it said that the risks to be assessed under the pre-market approvals procedure, and the risks underlying the national bans, were evidence of SPS purposes because they were aimed at protecting humans, animals and plants from pest (e.g. GM weeds, GM pollen) and disease (e.g. antibiotic resistant pathogens), at protecting humans and animals from food-borne risks caused by GM additives, contaminants (herbicide residues) and toxins (e.g. produced by insecticidal GM plants), or at preventing 'other' pest-related damage (eg. to property and lost sales), for the purpose of SPS Annex A(1).⁴¹

As discussed in section 10 below, the Panel's use of interpretative sources available to it in accordance with DSU Article 3.2 was selective and arbitrary. Its expansive reading of the SPS purposes threatens to make the WTO Agreement on Technical Barriers to Trade – which applies to the exclusion of the SPS Agreement – redundant. This contravenes the customary international rules of treaty interpretation which the Panel was required to employ under DSU Article 3.2.

8. The Panel's findings of WTO-inconsistency: undue delay and no scientific basis...

The Panel found that the EC had violated commitments under the WTO's SPS Agreement. In particular, the Panel concluded that the first two categories of challenged measures – the EC's general moratorium, and most of the product-specific delays⁴² – amounted to 'undue delays' in the operation of sanitary and phytosanitary procedures for the approval of GM products.⁴³ These undue delays violated SPS Annex C and Article 8. 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 when labelling and other requirements to be introduced by the legislative amendments could have been imposed by other means – such as voluntary undertakings or conditions on the final approval.⁴⁴

Also, in the Panel's view, 'evolving science' and the application of a 'prudent and precautionary approach' could not justify a delay in the operation of procedures because regulators have the option of adopting temporary measures, or placing conditions on final

³⁸ Panel Report para. 7.1318-19.

³⁹ Panel Report re moratorium paras 7.1393 and 7.1491, re product specific paras 7.1713 and 7.1783.

⁴⁰ Panel Report paras 7.2610, 7.2662, 7.2702 (Austria), 7.2749, 7.2774 (France), 7.2813 (Germany), 7.2854 (Greece), 7.2891 (Italy), and 7.2922 (Luxembourg).

⁴¹ See Panel Report sections VII.C.3(b), p 361ff; VII.F.2(a) p 872ff.

⁴² The Panel Report summary says 24 out of 27 product specific delays were in violation (para. 8.7), but elsewhere it suggests that only 23 out of 27 product specific delays were in violation (re Argentina's claim concerning LL Soybeans (EC-71) see Panel Report, para. 7.2019, and paras 8.18(b)(ii), 8.53(a)(iii)).

⁴³ Panel Report paras 8.6-7.

⁴⁴ Panel Report para. 7.1515.

approvals, where scientific evidence is 'insufficient'.⁴⁵ Delays caused by new information coming to light⁴⁶ or caused by extreme events beyond the EC's control – such as natural disasters, civil war or an unexpected administrative overload⁴⁷ – might, the Panel said, be considered justified. Moreover, delays attributed to the applicant for an approval could not, the Panel said, amount to 'undue' delays by the EC.⁴⁸

The Panel found that the third category of challenged measures – the national bans – were sanitary and phytosanitary measures that were not based on risk assessments despite, in the Panel's view, there being sufficient scientific evidence for risk assessments to be carried out.⁴⁹ The failure to base the national bans on risk assessments violated SPS Articles 5.1 and 2.2, and was not permitted under SPS Article 5.7. The Panel maintained that none of the EC Member States had evaluated the risks associated with the GM products prohibited by their national bans.⁵⁰ 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.⁵¹ Without any analysis, the Panel found that the EC risk assessments were 'risk assessments' for the purposes of SPS Article 5.1.⁵²

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.⁵³ Furthermore, because the precautionary principle was reflected in the SPS right under Article 5.7 to establish temporary measures, such as bans, where scientific evidence is 'insufficient, the Panel found that it did not need to consider the relevance of the precautionary principle separately from its analysis of that SPS right.⁵⁴

As discussed in section 10 below, the Panel erred in finding that there was an 'undue' delay because there were alternative less trade-restrictive WTO-consistent measures available to the EC (voluntary undertakings or conditions on approval) without determining whether those alternative measures were in fact available to the EC. The Panel erred when it failed to examine the EC-level assessment of risks to determine whether they were 'risk assessments' for the purpose of Article 5.1. Had the Panel examined the EC-level assessment of risks in light of the inadequacies identified by the EC member states, they might have concluded that they were not 'risk assessments' for the purpose of Article 5.1 because they failed to assess the full range of risks, or that there was insufficient scientific evidence on which to base an assessment. The Panel should have referred to the Biosafety Protocol in its interpretation of 'undue' delay (as evidence of values shared among WTO Members, supporting the legitimacy of the delay) and of 'risk assessment', and it should have considered the precautionary principle relevant to its interpretation of the WTO rules.

9. Exclusions from the Panel's findings and its dismissal of other claims...

Several matters were excluded from or unaffected by the Panel's report. The Panel noted, for example, that it was the *implementation* of the pre-market approval system for GM

⁴⁵ Panel Report para. 7.1529.

⁴⁶ E.g. Panel Report para. 7.1498.

⁴⁷ Panel Report para. 7.1500.

⁴⁸ Panel Report para. 7.1497.

⁴⁹ Panel Report paras 8.9-10.

⁵⁰ Panel Report para. 8.10.

⁵¹ Panel Report para. 8.9.

⁵² Panel Report para. 7.3027.

⁵³ Panel Report para. 7.3065.

⁵⁴ Panel Report para. 7.3220.

products – not the system itself – that was in dispute.⁵⁵ Nor was the EC's new laws on labelling and traceability of GM products challenged in this case.⁵⁶ Importantly, the Panel stressed that it had made no findings in respect of the EC's right to require pre-market approval or on the safety of GM products.⁵⁷ It has not revoked 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.⁵⁸

The Panel found that several claims by the Complaining Parties were either not applicable or that they were unfounded, and some claims, it said, did not need to be considered once violations of the SPS Agreement had been identified. In the Panel's view, for example, claims by the Complaining Parties under SPS rules that apply only to SPS measures failed in respect of the EC's general moratorium and the product-specific delays. This was because the first and second types of challenged measures had been found to concern the *operation* of SPS measures, such as the timing of the approvals process, as opposed to the approvals process itself.⁵⁹

The Panel found that there was insufficient evidence presented to prove violations of several of the SPS provisions that did apply, such as the rules requiring delays to be explained. Having found no 'less favourable treatment' of imported GM products, the Panel did not find it necessary to reach conclusions in respect of the Parties' arguments that GM products are 'like' their conventional counterparts.⁶⁰ Noting that the SPS rules requiring special and differentiated treatment of developing country WTO Members did not require preferential access to the EC market, the Panel found no evidence that the EC had breached the relevant SPS rule. Although the Panel found that aspects of the EC's pre-market approval system for GM foods were not covered by the SPS Agreement – such as those objectives of the EC's pre-market approvals system aimed at consumer interests⁶¹ – it declined to consider the Complaining Parties' claims that some of the challenged measures violated rules in other WTO Agreements, namely the Agreement on Technical Barriers to Trade and the General Agreement on Tariffs and Trade.⁶²

10. EC to be requested to correct the WTO inconsistencies or face sanctions...

The Panel recommended that the EC be requested to correct the WTO inconsistencies in the implementation of its pre-market approval system for GM products.⁶³ In the absence of an appeal, EC compliance with the Panel's recommended requests would presumably involve:

- The EC lifting the EC's general moratorium, if it is in place;
- The EC completing the approvals procedures – which could include denying approval – for those applications in the pipeline for specific GM products found to have been subject to 'undue' delays; and

⁵⁵ Panel Report para. 8.3.

⁵⁶ Only the 3 measures, which concerned the application of the Deliberate Release Directives, and the Novel Foods Regulation, were challenged in the dispute. Directive 90/220/EEC, of 23 April 1990, on the deliberate release into the environment of genetically modified organisms, OJ L 117 of 8 May 1990 ('Deliberate Release Directive'), replaced by Directive 2001/18/EC, of 12 March 2001, on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ L 106 of 17 April 2001 ('Revised Deliberate Release Directive'); Regulation 258/97/EC, of 27 January 1997, concerning novel foods and novel food ingredients, OJ L 43 of 14 February 1997 ('Novel Foods Regulation'). The 2003 Regulations entered into force after the Panel in this dispute had been established.

⁵⁷ Panel Report para. 8.3.

⁵⁸ E.g. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body adopted 5 April 2001, WT/DS135/AB/R ('*EC-Asbestos*'), para. 168; cf Panel Report paras 7.3238, 7.3244.

⁵⁹ Panel Report re moratorium paras 7.1393 and 7.1491, re product specific paras 7.1713 and 7.1783.

⁶⁰ Panel Report para. 7.2418.

⁶¹ Panel Report paras 7.412, 7.414.

⁶² Panel Report, re product specific paras 7.2517, 7.2528, re national bans paras 7.3414, 7.3423, 7.3430.

⁶³ Panel Report paras 8.16, 8.20, 8.32 (US); 8.36, 8.40, 8.48 (Canada); 8.55, 8.64 (Argentina).

- In respect of the national bans, the EC requiring the relevant individual Member States to either:
 - identify or undertake a risk assessment that evaluates the likelihood or potential of the GM product at issue to cause harm to human health or the environment;
 - revoke the bans; or
 - revise them to include objectives that could not be covered by the SPS Agreement – such as consumer interests in labelling unrelated to harm to human health.

The EC has denied 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.⁶⁴ The EC is also claiming to be taking action in respect of the Member States' national bans.⁶⁵ 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.⁶⁶

11. Appealing errors of law to the WTO Appellate Body...

Although the EC might maintain that the Panel's recommendations can have no practical impact on the already properly functioning GM approvals procedures, the EC could be concerned that some of the Panel's findings stem from errors of law that should be corrected on appeal to ensure that they do not misguide WTO Members or future arbiters of WTO disputes.⁶⁷ Parties have 60 days from 29 September 2006 (the date on which the report was circulated to the WTO Members) within which to appeal, and other parties may also 'cross' appeal.⁶⁸

The Panel made errors of law relevant to substance and procedure.

Substantive errors

As detailed below, elements of the Panel's report that might amount to substantive errors of law include the broad interpretation of what constitutes an 'SPS measure'; the narrow interpretation of SPS provisions in terms of what might reasonably justify a delay, what qualifies as a 'risk assessment', when a measure can be said to be 'based on' a risk assessment, and when there is 'insufficient' scientific evidence to warrant a temporary ban; and the narrow interpretation of the relevance of international law to WTO rules, particularly to the interpretation of the specific terms.

- ***The broad interpretation of an 'SPS measure'***

Contrary to its obligation under DSU Article 3.2, the Panel failed in many cases to justify its interpretation of the SPS purposes with reference to the full range of interpretative sources at its disposal. The Panel's use of sources was at times selective and arbitrary. Moreover, the Panel's interpretation of SPS purposes was so broad that there are very few measures that fall outside the scope of the SPS Agreement: only those purposes related to consumer interests unrelated to danger to health were considered outside the scope of the SPS Agreement.⁶⁹ Contrary to its obligation to avoid making other WTO rules 'inutile', the Panel's

⁶⁴ See above fn 3.

⁶⁵ EC Q&A, http://ec.europa.eu/environment/biotechnology/pdf/memo_28_02_06.pdf.

⁶⁶ DSU Articles 21 and 22.

⁶⁷ *Japan – Alcoholic Beverages*, above fn. 5.

⁶⁸ DSU Article 16(4) and *Working procedures for appellate review* WT/AB/WP/5, 4 January 2005, rules 20 'Commencement of Appeal' and rule 23 'Multiple Appeals'.

⁶⁹ Panel Report paras 7.412, 7.414.

expansive reading of the SPS purposes threatens to make the WTO's TBT Agreement – which applies to the exclusion of the SPS Agreement – redundant.⁷⁰

- ***The narrow interpretation of a justified delay***

The Panel had to interpret 'undue delay' in accordance with its 'ordinary' meaning, in its context, and in light of the SPS Agreement's object and purpose. The prohibition on 'undue delays' in SPS Annex C has not been raised in past disputes so there is little guidance on the meaning of the term from past WTO dispute reports. The Panel seems to have suggested that delays caused by the time lag in introducing legislative amendments were not justified because there were less trade-restrictive WTO-consistent measures available to the EC in the form of negotiated voluntary undertakings on behalf of the biotech companies, or in the form of conditions imposed by the EC authorities on any final approval of the GM product granted to the biotech companies. However, the Panel did not go on to consider whether the EC was in fact empowered or able to negotiate voluntary undertakings or place conditions on the final approval. The Panel dismissed a 'precautionary approach' as a justification for delays on the basis that the EC could have adopted a temporary ban under SPS Article 5.7, even though it subsequently found that this was not a situation in which SPS Article 5.7 could be invoked.

- ***The narrow interpretation of 'risk assessment', 'based on' and 'insufficient' scientific evidence***

As was the case for the term 'undue delay' in SPS Annex C, the Panel had to determine the meaning of several terms in SPS Articles 5.1 and 5.7 in accordance with the ordinary meaning of those terms, in their context, and in light of the SPS Agreement's object and purpose. Specifically, the Panel had to consider what constitutes a 'risk assessment', what it means to 'base' a measure on a risk assessment, and what amounts to 'insufficient' scientific evidence. Several past WTO dispute reports provide guidance on the meaning of each of these terms.⁷¹ The EC member states had provided several reasons for their national bans, including their belief that the EC's risk assessments were flawed – either because the information on which they were based was inconclusive and fragmented or because they did not assess some risks of concern to those member states (such as long-term environmental effects, especially in environmentally sensitive areas, or allergenic and toxicological impacts, especially with respect to antibiotic resistance marker genes).⁷²

The Panel failed to examine the EC-level assessment of risks to determine whether they were 'risk assessments' for the purpose of Article 5.1, stating only that all of the Parties to the dispute agreed that they were 'risk assessments' and accepting their existence alone as evidence of sufficient scientific evidence. Had the Panel examined the EC-level assessment of risks in light of the inadequacies identified by the EC member states, they might have concluded that they were not 'risk assessments' for the purpose of Article 5.1 because, for example, they failed to assess the full range of risks, or it might have concluded that the information on which the EC-level risk assessments was based was inconclusive. These findings could have led to a different finding on whether the national bans were 'based on' those EC-level risk assessments for the purposes of Article 5.1, or on whether there was insufficient scientific evidence to allow the national bans under SPS Article 5.7.

- ***The narrow interpretation of the relevance of international law***

The Panel erred in finding that the Biosafety Protocol was not relevant to its interpretation of the WTO rules at issue in this dispute, and that it did not need to decide whether the

⁷⁰ Cannot interpret rules in a manner that makes parts of the treaty or other treaties redundant or 'inutile', *US – Gasoline*, p 22; cf AB's expansive reading of what is covered by TBT Agreement in *European Communities – Trade Description of Sardines* WT/DS231/AB/R Report of the Panel and the Appellate Body adopted 23 October 2002 ('*EC – Sardines*').

⁷¹ E.g. *EC Measures Concerning Meat and Meat Products (Hormones)* Report of the Appellate Body adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R ('*EC- Hormones*').

⁷² See e.g. Austrian and French justifications, above n. 17.

precautionary principle was international law 'applicable in the relations between the parties' for the purposes of the Vienna Convention. The relevance of international law to the resolution of WTO disputes has been the subject of much debate in the WTO's political circles. From a legal perspective, the WTO Appellate Body has emphasised that the WTO agreements must 'not to be read in clinical isolation from public international law'.⁷³ Although WTO arbiters are not authorised to determine the rights and obligations of states under other international laws,⁷⁴ they must take account of other international laws in their interpretation of WTO rules. As noted by the Panel, international laws can inform the interpretation of WTO rules and, where relevant and applicable between the parties, they must be taken into account in the interpretation of WTO rules. Taking account of relevant international rules applicable between the parties is necessary to avoid conflicts between WTO rules and other international laws. International law can also evidence values shared among WTO Members, which will be relevant to proving the WTO legitimacy of trade measures based on those values.⁷⁵

The Biosafety Protocol should have informed the Panel's interpretation of SPS terms such as 'undue delay' and 'risk assessment'. With over 130 parties, many of whom are also WTO Members, the Biosafety Protocol attests to a global concern about the risks presented by certain genetically modified organisms. Shared by the majority of WTO Members, this global concern could have been relevant to the Panel's assessment of whether the delay was 'undue'. The scope of risk assessments necessary for the purposes of the Biosafety Protocol – including, for example, socio-economic factors – could have been relevant to a determination of whether the EC-level assessment of risks was a 'risk assessment'. The Panel should have determined that the Convention on Biological Diversity was applicable as between the EC and Canada for the purposes of their dispute and as between the EC and Argentina for the purposes of their dispute, and then interpreted the WTO rules so as to avoid any conflict with that treaty. The Panel should have also determined whether the precautionary principle was international law 'applicable in the relations between the parties' and then interpreted the WTO rules so as to avoid any conflict with that principle.⁷⁶

Procedural errors

Elements of the Panel's report that might amount to procedural errors of law include:

- The order of the Panel's legal analysis (e.g. considering 'less favourable treatment' before assessing the 'likeness' of products) could be appealed by any of the Parties;
- The actual, as opposed to purported, application of the burden of proof, (e.g. where the EC appears to have been required to show there was insufficient scientific evidence rather requiring the Complaining Parties to show that there was sufficient scientific evidence) could be appealed by the EC;
- The Panel's decision not to consider the TBT or GATT claims with respect to the non-SPS measures has not resolved the dispute with respect to non-SPS objectives and could be appealed by the Complaining Parties.

⁷³ *US – Gasoline*, above n. 19.

⁷⁴ See e.g. *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body adopted dated 6 March 2006 WT/DS308/AB/R ('*Mexico-Soft Drinks*').

⁷⁵ *EC-Asbestos*, above n. 58, at para. 172, citing *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body adopted on 10 January 2001, WT/DS161/AB/R; WT/DS169/AB/R, para 164.

⁷⁶ See eg Pauwelyn, above n. 25.

12. Implications of the findings for developing countries wanting to regulate GM imports and other products that might harm health or the environment....

As noted above, 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, in the absence of a successful appeal, the Panel's errors of law 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.

GM exporters could use the Panel's interpretation of the SPS Agreement, and its reasoning on the relevance of international law, to undermine efforts by WTO Members to:

- regulate GM imports;
- implement and negotiate new commitments under the Biosafety Protocol; or
- regulate other products that might cause harm to human health and the environment.

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 may 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.

Developing country WTO Members that have not already registered a 'substantial interest' as Third Parties in this dispute could now consider submitting an *amicus curiae* brief in support of their interests in any appeal to the Appellate Body.⁷⁷ Developing country WTO Members should, in any event, be aware of the details of the Panel's findings and continue to assert and act on their right to regulate GM imports in accordance with whatever level of protection they choose.

⁷⁷ E.g. Morocco was permitted to submit an *amicus curiae* in *EC – Sardines*, above n. 70.