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WTO PANEL REPORT ON THE "EC–BIOTECH" CASE: CONSIDERATIONS FOR TRADE AND DEVELOPMENT

Executive summary

As the first interpretation of how WTO provisions apply in the context of biotechnology and biosafety, the WTO Panel report on the EC–Biotech case, in addition to addressing a specific set of facts and assessing them, will likely have an impact on ongoing regulatory and policy discussions on trade, biotechnology and sustainable development, at both the national and international levels. The case was examined by the Panel at the very moment when developing countries were struggling to develop a mutual supportive relationship between their trade, food safety, and environmental rules and policy. Developing country regulation and policy were often referred to by the countries involved in the dispute.

The case, which can be regarded as the "tip of the iceberg" of a long-standing divergence of views and interests among countries on agro-biotechnology, was launched in May 2003 by the United States, Canada, and Argentina with reference to three types of measures taken by the EC: (i) an alleged EC moratorium on approvals of biotech products; (ii) product–specific EC measures related to the approval of biotech products; and (iii) measures related to the import and/or marketing of specific biotech products taken by some EC Member States.

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I. INTRODUCTION

1. The debate on agro-biotechnology continues to be one of the most vocal and passionate debates that has been taking place in recent years. Countries' position on agro-biotechnology depends on many factors, such as the level of risk they are willing to accept, their perception of the benefits they could gain from biotechnology, their technological development, their capacity to carry out risk assessments in the sector, their ability to set an adequate regulatory framework and implement it, their dependence on agricultural exports, their reliance on food aid, the investments they have already made in the sector, and their perception of the linkages between genetic modification and ethical issues. As a result, assessments of the risks and benefits related to agro-biotechnology vary substantially between countries and regions, as do regulatory approaches. These different approaches have made the whole issue prone to dispute. Diverging national requirements and strict and complex rules on approval, marketing, imports and labelling of genetically modified (GM) crops are perceived to hamper international trade and further complicate an already difficult regulatory system in the agricultural sector.

2. In May 2006, a Dispute Settlement Panel at the World Trade Organization (WTO) issued the final report in the European Communities – Measures affecting the Approval and Marketing of Biotech Products (EC–Biotech) case.[1] In its report, the Panel addressed the various categories of European Communities (EC) and EC Member State measures challenged by the United States, Canada, and Argentina, and found that each type of measures was – at least in certain respects – inconsistent with WTO rules.

3. The EC–Biotech case can be regarded as the "tip of the iceberg" of a long-standing divergence of views and interests on agro-biotechnology. It is also an example of how countries may be tempted to use WTO's dispute settlement mechanism – more than to clarify the existing provisions of WTO agreements – to find authoritative answers to controversial questions. In other words, it seems that the countries involved in the dispute, as well as a range of other parties interested in the agro-biotechnology debate, including other WTO Members and civil society organizations, somehow expected the Panel to provide an answer to the difficult questions of whether GM products are or are not safe for health and for the environment; and what is the appropriate level of sanitary and phytosanitary protection that countries are allowed to choose to address the potential risks related to agro-biotechnology. The Panel did not, however, express any value judgment on how safe GM products were or how appropriate the level of sanitary and phytosanitary protection chosen by the EC was. Instead, it focused its analysis on how the EC legislation on agro-biotechnology had been implemented Community–wise and by individual Member States.

4. As the first interpretation of how WTO provisions apply in the context of agro-biotechnology, the Panel report is indeed likely to have an impact not only on the challenged measures but also on related legislative and policy discussions in other WTO Members. Developing country regulation and policy in relation to biotechnology have, in particular, been at the centre of this dispute. In its first submission to the Panel, for example, the United States expressed its concern that the alleged EC moratorium had contributed to the decisions by some developing country governments to restrict trade in biotech products and to impede relevant research activities. On the other hand, the EC argued that it was defending the legitimate right of WTO Members to establish and apply a regulatory regime to ensure that

[1] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC–Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006.

genetically modified organisms (GMOs) were only put on the market on the basis of a careful assessment of risks, appropriate control and monitoring measures, and proper information to consumers.

5. This note is meant to provide an analysis of some of the main conclusions reached by the Panel on the issues submitted to its attention, as well as to discuss the possible broader implications.

II. STATUS OF COMMERCIALIZED GENETICALLY MODIFIED CROPS

6. In 2006, the global area of GM-crops reached 102 million hectares, with a 60-fold increase between 1996 and 2006; this makes genetic engineering the fastest adopted crop technology in recent history.[2] 10.3 million farmers from 22 countries grew GM-crops. The 22 countries comprised 12 developing countries, which grew more than 40 per cent of the global GM–crop area, and 10 industrialized countries; they were, in order of hectarage, the United States, Argentina, Brazil, Canada, India, China, Paraguay, South Africa, Uruguay, Philippines, Australia, Romania, Mexico, Spain, Colombia, France, Iran, Honduras, Czech Republic, Portugal, Germany, and Slovakia.

7. The largest absolute increase in biotech crop area in 2006 was in the United States, followed by India and Brazil. The largest percentage increase was in India, with a threefold increase from previous year, mainly in Bt cotton that confers resistance to important insect pests of cotton. Biotech soybean continued to be the principal GM–crop in 2006, followed by corn, cotton and canola. Herbicide tolerance has consistently been the dominant trait, followed by insect resistance and a combination of the two traits.

8. In 2006, six EU countries planted biotech crops: Spain, which continued to be the lead country, followed by France, the Czech Republic, Portugal, Germany and Slovakia. Spain planted 60,000 hectares of corn in 2006. The collective Bt corn hectarage in the other five countries increased more than fivefold from approximately 1,500 hectares in 2005 to approximately 8,500 hectares. According to ISAAA, growth in these five countries is expected to continue in 2007 albeit on small hectarages.

[2] The International Service for the Acquisition of Agri-biotech Applications (ISAAA) Brief 35-2006: Executive Summary – Global Status of Commercialized Biotech/GM Crops: 2006, found at: http://www.isaaa.org/Resources/ Publications/briefs/35/executivesummary/default.html#_ftn2, visited on 29 January 2007.

Table. Global area of GM-crops in 2006 by country (millions of hectares)

Rank	Country	Area (million hectares)	Biotech crops
1*	United States of America	54.6	Soybean, corn, cotton, canola, squash, papaya, alfalfa
2*	Argentina	18.0	Soybean, corn, cotton
3*	Brazil	11.5	Soybean, cotton
4*	Canada	6.1	Canola, corn, soybean
5*	India	3.8	Cotton
6*	China	3.5	Cotton
7*	Paraguay	2.0	Soybean
8*	South Africa	1.4	Corn, soybean, cotton
9*	Uruguay	0.4	Soybean, corn
10*	Philippines	0.2	Corn
11*	Australia	0.2	Cotton
12*	Romania	0.1	Soybean
13*	Mexico	0.1	Cotton, soybean
14*	Spain	0.1	Corn
15	Colombia	<0.1	Cotton
16	France	<0.1	Corn
17	Iran	<0.1	Rice
18	Honduras	<0.1	Corn
19	Czech Republic	<0.1	Corn
20	Portugal	<0.1	Corn
21	Germany	<0.1	Corn
22	Slovakia	<0.1	Corn

Source: ISAAA Brief 35-2006 – Global Status of Commercialized Biotech/GM Crops: 2006.
*14 biotech mega-countries growing 50,000 hectares, or more, of biotech crops.

III. THE DISPUTE

A. Background

9. The EC–Biotech case was launched in May 2003 by the request by the United States, Canada, and Argentina for consultations with regard to three types of measures taken by the EC: an alleged EC moratorium on approvals of biotech products, product-specific EC measures related to the approval of biotech products, and measures related to the import and/or marketing of specific biotech products taken by EC Member States.

10. Given the failure of consultations to reach a mutually satisfactory resolution to the matter, a Panel was established in August of that year, with a range of countries constituting themselves as third parties, including developing countries such as Brazil, Chile, China, Colombia, El Salvador, Honduras, Mexico, Paraguay, Thailand and Uruguay. In light of the "unprecedented" number of claims and products involved in the case and the "immense" record before the Panel, the interim report was only issued to the Parties in February 2006 and finalized in May 2006 – an unusually long period of time for WTO proceedings.

Measures Taken by the EC and some EC Member States challenged by the United States, Canada and Argentina

An alleged EC moratorium on approvals of biotech products: The claimants did not request the Panel to make findings on the WTO–consistency of the EC regulations on the approval of biotech products, but rather argued that there had been a *de facto* suspension of such approvals. The EC denied the existence of a general moratorium on the approval of biotech products and submitted that the alleged practice alone, not based on a formal or informal instrument, would not constitute a measure under WTO agreements.

Various product–specific EC measures related to the approval of biotech products: The claimants argued that the failure of the EC to consider specific applications for approval of biotech products also constituted a violation of WTO rules. In response, the EC argued that failing to deal with product applications within a specified timeframe could not be considered a measure, and thus would only be subject to provisions dealing with the application, rather than development of a measure.

Various EC Member State measures related to the import and/or marketing of specific biotech products: The claimants challenged measures enacted by some EC Member States, including France, Germany, Italy and Greece, arguing these measures were not based on scientific evidence, as required by WTO rules. The "safeguard measures", permitted by EC regulations, allow EC Member States to limit the importation or marketing of certain biotech products already approved by the EC. The EC, on its part, claimed these measures, given their provisional nature, were in full compliance with relevant WTO disciplines.

11. In its report, the Panel addressed the various categories of challenged EC and EC Member State measures and found that each of these types of measures was inconsistent with WTO rules – in particular the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). First, the Panel concluded that the general *de facto* moratorium and product–specific measures affecting product approval had resulted in a failure to complete individual approval procedures without undue delay, and hence gave rise to an inconsistency with Article 8 and Annex C of the SPS Agreement. Second, the Panel found that the measures taken by some EC Member States restricting the import, use and marketing of certain biotech products – safeguard measures taken in relation to products already approved at the EC level – failed to meet the requirements of the SPS Agreement. In particular, the safeguard measures were found to be inconsistent with the obligation for SPS measures to be based on a risk assessment. The Panel found that the safeguard measures fell outside the scope of Article 5.7 of the SPS Agreement, which allows Members to adopt provisional SPS measures where relevant scientific evidence is insufficient.

B. Key considerations

12. Over its 1087 pages, the Panel report analyses the large number of issues relevant for the resolution of the particular case. Several of these points are also significant, nevertheless, for other WTO Members, particularly as they struggle to develop a mutual supportive relationship between their trade, food safety, and environmental rules and policies.

13. The SPS Agreement, for example, requires control, inspection and approval procedures to be undertaken and completed without undue delay. The Panel's interpretation of an adequate timeline for these procedures and of potential legitimate reasons for longer intervals is critical for developing countries, which often face significant difficulties in establishing and implementing such complex measures, particularly in relation to biotechnology. Similarly, the scope and specific obligations of the SPS Agreement's science–

related provisions are essential for WTO Members to determine whether and how they are entitled to adopt sanitary or phytosanitary measures. Finally, the Panel's reasoning and findings regarding the role of multilateral environmental agreements and other international law in interpreting WTO rules will impact on how WTO Members proceed in implementing the range of their international obligations.

14. Rather than providing an overview of the findings of the EC-Biotech Panel report, the present briefing note will focus on these three issues, which may be most relevant from a trade and development perspective.

1. Undue delay

15. One of the claims of the complaining parties was that the EC had failed to comply with SPS Agreement requirements that control, inspection and approval procedures be undertaken and completed without undue delay. The Panel report thus analysed whether the EC had started and carried out to their conclusion the approval procedures foreseen by the relevant legislation with no "unjustifiable loss of time". First, the Panel interpreted the SPS provisions at issue. Then, the Panel considered whether the EC's reason for applying a general moratorium on final approvals could provide a justification for any delays that could have occurred. Finally, the Panel evaluated whether there was, either as a result or independently of the general moratorium on final approvals, undue delay in the undertaking or completion of particular approval procedures.

Article 8 of the SPS Agreement

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Annex C (1)(a), first clause, of the SPS Agreement

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay [...].

16. In its interpretation of "unjustifiable loss of time", the Panel considered the reason for a delay more relevant than its exact duration. While stating that Members had to act expeditiously, it also added that this was only "as could be expected of it in the circumstances". The Panel added that whether a particular approval procedure had been undertaken and completed without undue delay could thus only be determined on a case-by-case basis. Notably, the Panel stated that, because the approval procedures served to check and ensure the fulfilment of the SPS requirements, Members applying such procedures should be allowed to take the time that was reasonably needed to determine with adequate confidence whether their relevant SPS requirements were fulfilled. Consequently, delays justified by the need to check and ensure the fulfilment of a Member's WTO–consistent SPS requirements could not, in the Panel's view, be considered "undue". This flexibility is critical, particularly for developing countries with insufficient human and financial resources for swift yet effective implementation of their SPS procedures.

17. In looking at the reasons for a general EC moratorium as a justification for any possible delays, the Panel addressed two possible explanations inferred or put forth by EC

submissions: (i) the perceived inadequacy of then-existing EC approval legislation and (ii) evolving science and the application of a prudent and precautionary approach. Although, as per the reasoning detailed above, the EC would have been entitled, in conducting approval procedures, to take the time reasonably needed to determine with adequate confidence whether its relevant SPS requirements were fulfilled, the Panel noted that, given that the new legislation on labelling and traceability was not adopted until later, any requirements set out therein were not EC requirements. If the EC had considered that it was important not to grant final approvals without imposing additional requirements of the type set out in the new EC legislation, the Panel stated, it could have imposed such requirements as conditions attached to approval decisions. These findings are particularly relevant for developing countries, many of which are in the process of adopting or revising their legal framework relating to biotechnology.

18. In relation to the evolution of science as a justification, again the Panel highlighted that the SPS provisions at issue did not preclude the application of a prudent and precautionary approach but rather allowed a Member to take the time that was reasonably needed to determine with adequate confidence whether its relevant SPS requirements were fulfilled. Nevertheless, the Panel also noted that the application of a prudent and precautionary approach was subject to reasonable limits, or otherwise would "swallow the discipline". Moreover, the Panel made references to the science–related provisions of the SPS Agreement (addressed below) to state that the insufficiency of scientific information did not, in the WTO context, affect a Member's ability to reach substantive decisions on an application. Therefore, the Panel found that the reasons for the general moratorium would not provide a justification for delays which might have occurred as a result of its application.

19. The Panel considered the challenged product–specific measures to assess whether there had been any undue delay in various instances. Given that the analysis of undue delay is conducted, as noted by the Panel, on a case-by-case basis, the conclusions regarding these products-specific measures are strictly only relevant for each particular measure. However, the analysis does provide some insight into how different facts and circumstances are taken into account. Time, it is clear, is not a determining factor in itself. In most cases, the time taken to follow the regulatory steps for approval was considered unjustifiably long. However, in cases like the transgenic potato, for which the approval procedure had been pending for more than seven years, the Panel considered that it had not been sufficiently established that the delays had been undue.

2. Risk assessment and precaution

20. The Panel report, although not itself considering the range of scientific and technical issues raised by Parties and experts, does address the extent and manner in which WTO Members may take these issues into consideration in their national measures and policies. A number of disputes have arisen in relation to the link between science, precaution, and measures under WTO rules, primarily in relation to the SPS Agreement. Significant questions remain, however, regarding the interaction between the SPS Agreement disciplines and the policy space needed by WTO Members to attain their chosen level of protection for human, animal or plant life or health. In this regard, the *EC–Biotech* Panel report addresses some fundamental issues and, as a result, the report has significant systemic implications.

21. The SPS Agreement strives for a balance between the right of WTO Members to adopt and enforce measures necessary to protect human, animal or plant life or health, and the need to restrict the use of sanitary and phytosanitary measures for protectionist purposes. Its approach to avoiding arbitrary or unjustifiable discrimination between Members or a

disguised restriction on international trade is to require a scientific basis for any sanitary or phytosanitary measure. At the same time, if scientific evidence is insufficient, the SPS Agreement enables WTO Members to nevertheless adopt sanitary and phytosanitary measures, provided that certain conditions are met.

SPS Agreement

Article 2.2

"Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5".

Article 5.1

"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".

Article 5.7

"In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time".

22. In the EC–Biotech case, all three types of challenged measures – the general moratorium on approvals of biotech products, the various product–specific EC measures related to the approval of biotech products, and the several EC Member State safeguard measures related to the import and/or marketing of specific biotech products – were challenged as inconsistent with science–based requirements of the SPS Agreement. These requirements, however, were found inapplicable in relation to the general moratorium and the product–specific measures, which were deemed not to constitute – in themselves – SPS measures. The Panel, however, did consider that Member States' safeguard measures, on the basis of their general and specific purposes, form and nature, and effect on international trade, were SPS measures within the meaning of the SPS Agreement. As a result, the Panel addressed the claims that EC Member States failed to base their measures on a risk assessment and on scientific principles pursuant to Articles 5.1 and 2.2 of the SPS Agreement.

23. In order to examine the consistency of the challenged measures with those articles, however, the Panel had to contemplate a preliminary issue: the relationship between Article 5.1 and Article 5.7 of the SPS Agreement – between the need to base measures on risk assessment and the possibility of adopting measures without sufficient scientific evidence. The EC had argued that, if measures were taken in the context of the latter situation, the Panel would not need to consider the risk assessment requirements. The reasoning of the EC was that Article 5.7 established an autonomous right, not an exception to Article 5.1, and thus excluded its application. The Panel report agreed that Article 5.7 was indeed an autonomous right within the SPS Agreement, but it did not agree with the EC argument that its nature as a right would exclude the application of the risk assessment requirements. Characterizing Article 5.7 as an autonomous right within the SPS Agreement was significant primarily because it implied that the complaining party needed to prove that the challenged SPS measure was inconsistent with Article 5.7.

24. As Article 5.7 did not exclude the risk assessment requirements, nonetheless, the Panel still considered the "critical legal issue" in the case to be whether the relevant safeguard measures met the risk assessment requirements set out in the text of Article 5.1. In the EC–Biotech case, there was agreement among the parties that the assessments carried out at the European level constituted "risk assessments" within the meaning of the SPS Agreement. In addition, none of the other studies and documents relied upon by the EC Member States to establish the safeguard measures, on the other hand, was considered by the Panel as a risk assessment under Article 5.1. Consequently, the principal issue in the analysis of the consistency of the safeguard measures with Article 5.1 was whether, given that the only assessments the Panel would consider had reached positive conclusions with regard to the biotech products at issue, those measures could be said to be "based on" those assessments.

25. In that regard, the EC argued that, as established by WTO jurisprudence, responsible and representative governments might act not only on the basis of mainstream scientific opinion but also on the basis of a divergent scientific view. In the EC–Biotech report, however, the Panel clarified that any divergent views, in order to be taken into account, had to form part of the same risk assessment. The Panel noted that the EC had not identified possible uncertainties or divergent opinions in the risk assessments in question, nor explained why, in view of any such uncertainties or divergent opinions, the safeguard measures were warranted by the relevant risk assessments. The Panel therefore found the safeguard measures to be inconsistent with Article 5.1 of the SPS Agreement, as they were not "based on" risk assessments.

26. The Panel then considered Article 5.7, since – according to its findings as to the relationship between provisions in the SPS Agreement – if a safeguard measure was consistent with the requirements of Article 5.7, Article 5.1 would not be applicable, and the EC would not have acted inconsistently with its obligations under that provision.

27. Article 5.7 of the SPS Agreement establishes four cumulative requirements that must be met in order for a WTO Member to adopt and maintain a provisional SPS measure. Specifically, (1) the measure must be imposed in respect of a situation where "relevant scientific information is insufficient"; (2) it must be adopted "on the basis of available pertinent information"; (3) the WTO Member that adopted the measure must "seek to obtain the additional information necessary for a more objective assessment of risk"; and (4) it must review the measure within a reasonable period of time. The analysis of the Panel in EC-Biotech centred on the first requirement: whether scientific information was or not insufficient. In that regard, the United States and other complaining parties argued that because the scientific evidence had been sufficient to perform risk assessments at the European level, Article 5.7 could not be applicable. The EC, on the other hand, claimed that the existence of a risk assessment did not preclude measures under Article 5.7. It argued that the concept of "insufficiency" in Article 5.7 was relational. It must, therefore, not be considered in a vacuum, but in relation to national concerns and the chosen level of protection. "Insufficient", as a result, would mean insufficient for the production of a risk assessment adequate for the purposes of the legislator who must decide whether an SPS measure should be applied.

28. The Panel, however, although agreeing that the concept of "insufficiency" implied a relationship between the scientific evidence and something else, considered that the only relevant relationship in that regard was that between the scientific evidence and the obligation to perform a risk assessment under Article 5.1: "where a risk assessment has been performed, and that risk assessment meets the standard and definition of [the SPS Agreement], it does not cease to be a risk assessment […] merely because a particular Member judges that the risks

have not been assessed with a 'sufficient' degree of precision". WTO jurisprudence on Article 5.7 is not conclusive. In the EC–Biotech case, the approach followed by the Panel is very similar to that of the Appellate Body in the Apple case: Article 5.7 is found to be linked to Article 5.1 and the possibility to resort to provisional measures is basically excluded once a risk assessment has been carried out.[3] In other cases, such as the Hormone case, the approach taken by the Appellate Body seems to be different: Article 5.7 was linked to Article 2.2 rather than Article 5.1. This would imply that, even if a risk assessment was carried out by a specific country, it would not prevent other countries from resorting to provisional measures, since available scientific evidence might still be "insufficient" for them.[4]

29. The conclusions reached on this issue by the WTO Panel could have far-reaching implications. What the Panel seems to say is that, considering that the EC was able to conduct a risk assessment, EC Member States that had put in place safeguard measures could not justify them any longer under Art. 5.7. This conclusion could also imply that, once a WTO Member has produced a risk assessment regarding a specific issue, other WTO Members would be prevented from using provisional measures under Art. 5.7, since they could not claim any longer that scientific evidence related to the specific risk was insufficient.

30. The Panel thus found that, because the safeguard measures were imposed in respect of situations where relevant scientific evidence was not insufficient, those measures were inconsistent with Article 5.7. The Panel thus reached its final conclusion that, by maintaining the measures in question, the EC had acted inconsistently with its obligations under Article 5.1.

3. WTO rules and other international rules and principles

31. One crucial question the Panel had to address was the relevance of other rules of international law to the interpretation of WTO agreements. The link between trade rules and other international law has been highly controversial at the WTO – the relationship between WTO rules and trade–related measures in multilateral environmental agreements, for example, is being negotiated in the context of paragraph 31 (i) of the Doha Ministerial Declaration, with different countries taking polarized positions. In EC–Biotech, the Panel did not have to evaluate the extent of possible interaction between WTO rules and other international law, but only the role of other international law in the interpretation of WTO rules. Nevertheless, its findings on the scope for other international rules and principles to be used to clarify the meaning of the WTO rules, in addition to the impact on the results of the case itself, are extremely significant due to the broader legal and political context.

32. Pursuant to Article 3.2 of the Dispute Settlement Understanding, the WTO dispute settlement system should interpret the existing provisions of WTO agreements "in accordance

[3] *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003, "Relevant scientific evidence will be 'insufficient' within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement" (at 179). The case was about a complaint by the United States concerning certain requirements and prohibitions imposed by Japan with respect to the importation of apple fruit from the United States.

[4] *EC Measures Concerning Meat and Meat Products (EC–Hormones)*, Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998. The Appellate Body stated that Governments commonly acted from the perspective of prudence and precaution where risks to irreversible damage to human health were at stake, and that responsible behaviour had to be taken into account when determining whether sufficient scientific evidence existed to warrant the maintenance by a Member of a particular SPS measure (at 124). The case related to a ban imposed by the EC on bovine meat and meat products from cattle treated with growth hormones.

with customary rules of interpretation of public international law". These customary rules are reflected, in part, in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention), which contains references to the role of other relevant rules of international law in the interpretation of treaties. On that basis, the EC argued for consideration of international instruments such as the Convention on Biological Diversity (CBD) and the Cartagena Protocol on Biosafety (Biosafety Protocol). According to the EC, the Biosafety Protocol's provisions on precaution and risk assessment informed the meaning and effect of the provisions of the WTO Agreements at issue, in particular the SPS Agreement.

Article 31 of the Vienna Convention on the Law of the Treaties

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

33. The Panel's analysis, however, did not focus on relevance so much as on the meaning of the term "parties". Article 31(3)(c) of the Vienna Convention indicates that a treaty interpreter is only mandated to take into account relevant rules of international law which are "applicable in the relations between the parties". Commentators have differing viewpoints regarding whether the term determines that the rules of international law have to be applicable to all participants in the dispute or all WTO Members in order for the Panel to be required utilize them in its interpretation.[5] In addition, the EC claimed that in the US–Shrimp case, the Appellate Body had – although without reference to Article 31(3)(c) – treated the term "parties" quite loosely, interpreting WTO rules by reference to treaties not binding on all parties to the proceedings, an approach the EC argued the Panel was bound to follow.[6]

34. The Panel, however, reached a different conclusion. Noting that the Vienna Convention defined "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force", the Panel concluded that the rules of international law applicable in the relations between "parties" were the rules of international law applicable in the relations between the States that had consented to be bound by the treaty which was being interpreted. In other words, a Panel is only required to use a non-WTO multilateral agreement, such as the

[5] See, e.g., Gabrielle Marceau, "A Call for Coherence in International Law", *JWT* 33(5), p. 87, at 115-128, and Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?", 95 *Am. J. Int'l L.* 535, 575–76.

[6] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US–Shrimp*), WT/DS58/AB/R, 12 October 1998.

Biosafety Protocol, as a tool to interpret WTO agreements if all WTO Members are also parties to the multilateral agreement to be used as an interpretative tool. Given the unlikeliness of a correspondence in the Membership of multilateral conventions, such a finding would make rare any use of international law in the interpretation of WTO provisions, in some experts' opinion cutting off those provisions from the rest of international law.[7] Notwithstanding, it must be noted that the EC–Biotech Panel, in spite of its strict interpretation of the term "parties", noted that – because the case at issue was not one in which relevant rules of international law were applicable in the relations between all parties to the dispute but not between all WTO Members, it did not take a position on whether, in such a situation, it would be entitled to take the relevant other rules of international law into account. In this particular case, however, given that several WTO Members, including the complaining parties to the dispute, were not parties to the Biosafety Protocol, the Panel did not agree with the EC that it was required to take into account the Biosafety Protocol provisions in interpreting the WTO agreements at issue.

35. The EC also claimed that the precautionary principle, as a general principle of international law, was relevant under Article 31(3)(c) and should be taken into account by the Panel in its interpretation of the WTO rules at issue. The Panel agreed that the Article 31(3)(c) reference to "rules of international law" was sufficiently broad to encompass recognized general principles of law so that, if the precautionary principle is a general principle of international law, it would be relevant. Nevertheless, following the Appellate Body in EC–Hormones,[8] the Panel saw the legal status of the precautionary principle as a general principle of international law as still "unsettled", and considered that "prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so". The legal reasoning for not considering it necessary to address the issue does not seem very solid. As mentioned, the Panel itself thought it would be necessary to take the precautionary principle into account if it was deemed to be a general principle of law, but then seemed not to follow through on its analysis.

36. After evaluating whether it was required to take into account any other applicable rules of international law, the Panel also examined whether it had the discretion to do so. The Panel found that other relevant rules of international law may indeed, in some cases, "aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used".[9] These rules would not be considered as legal provisions, the Panel stated, but rather as evidence of the ordinary meaning of terms in the same way as provided by dictionaries. Although the Panel concludes that, in the EC–Biotech case, it was not "necessary or appropriate" to rely on the international rules put forth by the EC in interpreting the WTO agreements at issue, its thinking seems primarily aimed at explaining the link with the US–Shrimp case. The Panel states: "the European Communities correctly points out that the Appellate Body referred to conventions which were not applicable to all disputing parties. However, the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted".[10] By explaining the Appellate Body's reasoning as a discretionary decision to look at other international rules to determine the ordinary meaning of a term, rather than as the application of Article 31(3)(c), the Panel in

[7] Study Group of the International Law Commission Report, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, International Law Commission, Fifty-eighth session, A/CN.4/L.68213 April 2006.
[8] Appellate Body Report, *European Communities – Measures concerning Meat and Meat Products* (*EC–Hormones*), WT/DS48/AB/R, 16 January 1998.
[9] Panel Report, *EC–Biotech*, para. 7.92.
[10] Id, at para. 7.94.

EC–Biotech thus puts forth its interpretation of this latter provision in a manner that it considers remains consistent with WTO jurisprudence.

37. Regardless of these clarifications, the Panel seems to have set up a new interpretation regarding the crucial issue of the interface between WTO agreements and other sources of international law, including MEAs. While, according to earlier jurisprudence, it seemed that the Appellate Body had established a close link between WTO law and other non-WTO sources of international law, the present jurisprudence, which requires identical Membership between WTO and any non-WTO agreements as a precondition for using these non-WTO agreements as interpretative instruments, drastically reduces the possibility of concretely using such agreements. In the specific case, the Biosafety Protocol, despite its very high number of ratifications – 135 – could not be used as an interpretative tool of WTO agreements. Several developing countries, especially in sub-Saharan Africa, have put in place strict rules regarding the use and imports of genetically modified crops, using the flexibility allowed by the Biosafety Protocol as the legal basis for their national regulations. The fact that, in the case of a dispute, the Biosafety Protocol may be given very little relevance as an instrument to interpret the relevant WTO agreements may put developing countries in a difficult position, since WTO agreements seem to have much less flexibility to accommodate GM–related trade-restrictive measures than the Biosafety Protocol.

IV. RECENT DEVELOPMENTS

38. Since the Panel report was issued, some noteworthy developments have taken place. First of all, the European Commission has decided not to appeal the Panel ruling, despite the call by some Member States and several NGOs to do so. Civil society groups pointed to alleged "serious errors" contained in the Panel report in the interpretation of trade law; warned that the ruling could weaken the role of the precautionary principle; and feared that it could lead to the further fragmentation of international law and the undermining of other sources and instruments of international law outside the WTO system. Secondly, a large majority of EU Member States voted on 18 December 2006 in support of Austria's right to ban two genetically modified corn varieties. While these crops had already been approved by the European Commission, Austria invoked the safeguard clause under the EU's approval procedures to justify the ban.[11] This development may make the implementation of the WTO ruling particularly challenging for the European Commission. Thirdly, agro-biotechnology will likely be increasingly used to enhance the efficiency of energy crops – such as corn, soybean and sugar cane – through yields increase and the development of suitable traits. Several countries, developed and developing alike, have included in their energy bills ambitious targets for the use of biofuels, especially in the transport sector. Increased production and use of biofuels are meant to contribute to achieve several goals, such as climate change mitigation, diversification of agricultural production, revitalization of rural areas, enhanced energy security and reduced expenditure on imported fossil energy. It will be worthy of note to see whether countries which at present oppose the use of GM-crops will adopt a more flexible attitude if genetic modification proves to play a key role in making biofuels a viable alternative to fossil fuels.

[11] Of the 25 Member States, only the United Kingdom, the Netherlands, the Czech Republic and Sweden backed the Commission's proposal to instruct Austria to lift the ban. See ICTSD reporting; *Austria allowed to keep its ban on GM corn*, FINANCIAL TIMES, 19 December 2006.

V. CONCLUSIONS

39. As in any WTO case, the EC–Biotech Panel report addresses a very particular set of facts and is primarily relevant to them. However, as the first interpretation of how WTO provisions apply in the context of biotechnology and biosafety, the Panel report will also have an impact on ongoing regulatory and policy discussions on trade, biotechnology and sustainable development, at both the national and international levels. In particular, the findings of the panel on undue delay, on risk assessment and precaution, and on the link between WTO rules and other rules of international law may have far-reaching implications.

40. A concluding reflection on this Panel report is how appropriate it is for WTO Members to bring complex and multifaceted issues, where countries hold polarized views and which involve ethical concerns, to the attention of a Panel, instead of trying to find common ground through dialogue and negotiations. The risk exists that a ruling on such issues may be regarded as lacking legitimacy and the dispute settlement body as exceeding the scope of its competence. The ruling may, then, create discontent, not only for the country found to be infringing its WTO obligations but also for civil society at large.

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