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**Article**

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Aussenwirtschaft

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*Suggested Citation:* Franken, Lorenz; Burchardi, Jan-Erik (2007) : Beyond Biosafety - An Analysis of the EC-Biotech Panel Report, Aussenwirtschaft, ISSN 0004-8216, Universität St.Gallen, Schweizerisches Institut für Aussenwirtschaft und Angewandte Wirtschaftsforschung (SIAW-HSG), St.Gallen, Vol. 62, Iss. 1, pp. 77-106

This Version is available at:

<https://hdl.handle.net/10419/231120>

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## **Beyond Biosafety – An Analysis of the EC-Biotech Panel Report**

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The Panel report in EC-Biotech, for the time being, puts an end to one of the most complex cases in the history of WTO dispute settlement. The analysis at hand covers the issues relevant beyond the realms of biotechnology, namely the impact of non-WTO rules of public international law on the interpretation of WTO law, the scope of the SPS Agreement, the categories “undue delay” and “insufficient scientific evidence” in connection with precautionary measures, and product-origin as a criterion for the national-treatment obligation. On the one hand, some of the criticism raised against the Panel report turns out to be unjustified. It is, on the other hand, a deficiency of the Panel report that some parts of it do not foster legal clarity.

*Jel-Codes:* F18, K40, L50, N50

*Keywords:* WTO, GMOs, biotechnology, EC-Biotech

### **1 Introduction**

In several respects, the report of the Panel in EC-Biotech<sup>1</sup> can be considered a milestone in WTO dispute settlement history.

Politically speaking, it is undoubtedly one of the disputes attracting the highest degree of attention by the public, not only in Europe. To some extent this might be due to the role played by non-governmental organisations in discussions about biotechnology and genetically modified organisms (GMOs) in general, and in this WTO dispute in particular.<sup>2</sup>

Secondly, the Panel proceedings and report required extraordinary resources, compared to other disputes. From the establishment of the Panel on August 29, 2003 and its composition by the Director-General on March 4, 2004 until

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\* The authors would like to thank colleagues and friends for their very helpful comments on the draft. All views expressed in this article are solely those of the authors and do not necessarily represent the position of the German Federal Government.

1 European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Reports of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, September 29, 2006.

2 During the proceedings, the Panel received amicus curiae-briefs from several NGOs presenting their position. The interim report of the Panel was published on an NGO-website. After the Panel in its final report criticised this disclosure of confidential information, NGOs replied referring to public interest as reason for the publication of the interim report (See CURRIE 2006, CIEL 2006).

the issuance of the final report on September 29, 2006, it took much longer than the periods envisaged by the Dispute Settlement Understanding. Not to mention the tremendous volume of the final report amounting to more than 1000 pages.

Thirdly and for our review most importantly, the Panel report covers a number of issues with a huge systemic importance for WTO law. Numerous assessments of the consistency of EC trade restrictions for GMOs with WTO requirements existed already prior to EC-Biotech (see: HOWSE and MAVROIDIS 2000, STÖKL 2003, BURCHARDI 2001, MACMILLAN and BLAKENEY 2001). Compared to the broad scope of those evaluations, the measures at stake in EC-Biotech were limited. Three categories of EC measures were challenged by the US, Canada and Argentina and led the Panel to the following conclusions:

- According to the Panel, the EC applied a *de facto moratorium* between June 1999 and August 2003 meaning that because of the moratorium no approvals were granted for the placing on the market of a GMO. This resulted in “undue delay” in terms of Annex C(1)(a), first clause, and Article 8 of the SPS Agreement.
- The complainants had singled out 27 specific approval-dossiers concerned by the moratorium. The Panel ruled that among these product-specific measures, 24 caused “undue delay”.
- Austria, France, Germany, Greece, Italy and Luxembourg had taken measures to restrict in their respective territories the placing on the market of certain GMOs subsequent to their approval at the EC level. The Panel found these EC Member State safeguard measures to be in breach of Article 5.1 and Article 2.2 and also inconsistent with Article 5.7 of the SPS Agreement.

These findings of the Panel will be further illustrated below. In order to reach its conclusions, the Panel had to address questions systemically important for WTO law. Since, to the surprise of many<sup>3</sup>, neither the EC nor the complainants appealed the Panel report, they may be even more important for future disputes. Our focus will be on the following horizontal issues:

- impact of the UN Biosafety Protocol and other non-WTO treaties on the interpretation of the WTO Agreements,

3 JOOST PAUWELYN, for instance, stated on February 24, 2006 that he “would, therefore, consider it wise for the EC to appeal the panel ruling on GMOs, a ruling which is – from the perspective of EC member states – far from ‘purely historical’ or ‘irrelevant’.” This remark and other interesting comments on the question of “to appeal or not to appeal” can be found at [http://worldtradelaw.typepad.com/ielpblog/2006/02/so\\_lets\\_talk\\_st.html](http://worldtradelaw.typepad.com/ielpblog/2006/02/so_lets_talk_st.html) and [http://worldtradelaw.typepad.com/ielpblog/2006/12/unappealing\\_bio.html](http://worldtradelaw.typepad.com/ielpblog/2006/12/unappealing_bio.html) (as of: February 15, 2007).

- scope of the SPS Agreement,
- “undue delay” and “insufficient scientific evidence” in the light of precaution,
- product-origin as a criterion for the national-treatment obligation.

## **2 Impact of the UN Biosafety Protocol on the Interpretation of the WTO Agreements**

### **2.1 Findings of the Panel**

It is one of the most contentious issues to what extent non-WTO rules of public international law are relevant in WTO dispute settlement. In EC-Biotech, the EC asserted that mainly the “UN Convention on Biodiversity” and, more importantly, the “Cartagena Protocol on Biosafety to the Convention on Biodiversity” were to be taken into account for the interpretation of the WTO Agreements, as “relevant rules of international law applicable in the relations between the Parties” according to Article 31(3)(c) of the “Vienna Convention on the Law of Treaties”.<sup>4</sup> The complainants, most notably the US, objected mainly relying on the argument that neither of the complainants was party to the Biosafety Protocol and the US not even party to the Convention on Biodiversity. The US’ voluntary participation to the “Biosafety Clearing House” (the general information-sharing-mechanism under the Biosafety Protocol) did not equal an endorsement of the Protocol itself. Canada stated that in the context of a WTO dispute “the Parties”, referred to in Article 31(3)(c) of the Vienna Convention, meant all WTO Members. Furthermore, the complainants asserted that the EC did not clarify how the Convention on Biodiversity or the Biosafety Protocol could substantially affect WTO provisions (EC-Biotech, Report of the Panel, paras. 7.58-7.61).

<sup>4</sup> Article 31. 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.”

For its exegesis of Article 31(3)(c) of the Vienna Convention, the Panel essentially had to select between three alternative interpretations according to which “the Parties” are:

- all WTO Members,
- all WTO Members participating in the dispute, or
- some WTO Members, but not necessarily the parties to the dispute.

The Panel aligned itself with Canada taking the view that “the Parties” referred to all the parties of the treaty to be interpreted, hence in a WTO dispute all WTO Members. Lacking an additional qualifier such as “one or more Parties” or “the Parties to a dispute”, “the Parties” had to be interpreted in accordance with the definition for “Party” under Article 2.1(g) of the Vienna Convention. The Panel therefore referred to “a State which has consented to be bound by the treaty and for which the treaty is in force”. Here, this would be the WTO treaty. This would also be in line with the Appellate Body’s view on Article 31(3)(b) in *EC-Customs Classification of Frozen Boneless Chicken Cuts*. The fact that Article 31(3)(c), unlike Article 31(2)(a), did not explicitly refer to “all Parties” resulted from the need to distinguish between Article 31(2)(a) and Article 31(2)(b) which referred to “one or more parties” (*EC-Biotech*, Report of the Panel, para. 7.68 and relevant footnotes).

Despite its interpretation in favour of the first of the three abovementioned alternatives, the Panel explicitly conceded that it did not have to rule on the second alternative. This would be a scenario where a treaty was at stake to which not all WTO Members but all parties to a WTO dispute were parties and where all parties to the dispute argued that this treaty should be taken into account (*EC-Biotech*, Report of the Panel, para. 7.72). The mere signature of the Convention on Biodiversity by the US did not equal its ratification, and the participation in the “Biosafety Clearing House” did not result in being a party to the Biosafety Protocol either (*EC-Biotech*, Report of the Panel, para. 7.74 and footnote 251).

The third alternative was rejected by the Panel. In particular, the Panel found that alternative not to be warranted by “US-Import Prohibition of Certain Shrimp and Shrimp Products” where the Appellate Body took into account treaties not binding on all WTO Members, not even on all parties to the dispute.<sup>5</sup> According to the Panel in *EC-Biotech*, the Appellate

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5 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, October 12, 1998.

Body did not explicitly rely on Article 31(3)(c) of the Vienna Convention and its use of treaties to which not all WTO Members are parties, this could be justified on the basis of Article 31(1) of the Vienna Convention. Thereby, the treaty would be used, like a dictionary, to elucidate the “ordinary meaning” of a WTO provision. Unlike under Article 31(3)(c), such reference would not be mandatory for a Panel. In the dispute at hand, however, the Panel did not find it useful to rely on the provisions of the Convention on Biodiversity and the Biosafety Protocol brought forward by the EC without further explanation of their relevance (EC-Biotech, Report of the Panel, paras. 7.90-7.95).

Most criticism raised in respect of these findings of the Panel focuses on their political dimension, regretting a negative impact on the legitimacy of the WTO (see: CIEL 2006, CURRIE 2006, HENCKELS 2006).

The Panel’s considerations are an important contribution to a long-standing debate in doctrine. In order to better understand the relevance of this highly complex discussion for EC-Biotech, it has to be emphasised that the theoretic discussion mainly concerns two different scenarios – one where the wording of a WTO provision and a non-WTO provision is sufficiently broad for an interpretation harmonising both provisions and thereby avoiding a conflict. The other scenario exists where the wording of the relevant provisions does not allow a harmonious interpretation. The latter setting poses specific questions, including the procedural consequences when, after application of the conflict-rules under customary international law, a WTO Panel might wish to apply a non-WTO provision (see: MARCEAU 2001, PAUWELYN 2001). Since, as will be further described below, in EC-Biotech the wording of the relevant provisions of the SPS Agreement is rather broad (“undue delay”, “that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances”, “where relevant scientific evidence is insufficient”), the following analysis focuses on the former scenario, where a potential conflict can be resolved without interpretation *contra legem*.

## **2.2 “All the Parties to the Treaty” or “all Parties to the Dispute”?**

Different views have been expressed in doctrine as to the “membership-question”. Whereas MARCEAU seems to focus on the disputants (MARCEAU 1999 and 2001), PAUWELYN requires that to become a tool for the interpre-

tation of WTO provisions the non-WTO rule must reflect the “common intentions” of all WTO Members<sup>6</sup>.

Taking Article 31(3)(c) of the Vienna Convention as point of departure for our analysis, we have difficulties finding the Panel’s interpretation entirely conclusive. There may be, in fact, some text- or context-based arguments in favour of the Panel’s “all WTO Members”-approach. However, the above-mentioned difference between “the Parties” in Article 31(3) and “all the Parties” in Article 31(2)(a) does, at the least, not support the Panel’s interpretation. Furthermore, the Panel itself acknowledges that it would be surprising if Article 31 explicitly referred to the parties “to a dispute”, since its scope of application is not confined to WTO disputes or similar proceedings (EC-Biotech, Report of the Panel, footnote 241).

Considering the WTO Agreements, we note that according to Article IX:2 of the “Marrakesh Agreement Establishing the World Trade Organisation” even for authoritative interpretations of WTO provisions, only a three-fourths majority among WTO Members is required, not unanimity. This might be an appropriate basis for an *a fortiori*-argument that for interpretations relevant are only the parties to a dispute, not all WTO Members must necessarily be parties to the non-WTO treaty. With respect to the *most-favoured-nation* rule, one of the WTO cornerstones, it has been demonstrated by doctrine that not all modifications of the rights and obligations between two WTO Members would negatively affect the rights of other WTO Members (for instance, the establishment of additional environmental or humanitarian restrictions between two Members, but excluding the trade-relations with third WTO Members).<sup>7</sup> Therefore, the MFN-principle would not necessarily be an impediment for an “all parties to the dispute”-interpretation of Article 31(3)(c).

Acknowledging that the common intention, the consent between states, is still the basis for rule-making under international law<sup>8</sup>, we consider it es-

6 PAUWELYN (2001), PAUWELYN (2004). Yet most interestingly, PAUWELYN would accept that non-WTO provisions, binding only on the parties to a dispute and neither reflecting common intentions of all WTO Members (and therefore, not eligible for use as interpretation-tool, in his view), could be relied on by a respondent as applicable law to the extent that a conflict cannot be resolved through interpretation and conflict rules lead to the applicability of that non-WTO rule (PAUWELYN 2004). One might summarise his approach as conceding non-WTO rules a rather narrow scope as interpretation-aid and a larger margin for application.

7 See PAUWELYN (2001). See also MARCEAU (2001), considering both interpretations of the MFN-principle.

8 See PAUWELYN (2001). According to CIEL (2006), the “customary rules of treaty interpretation reflect a State-centred view of international law. [...] The limitations of this State-centred paradigm and its impact on the interpretation of the rules of treaty interpretation are particularly evident in regards to issues of common concern to humanity, such as those addressed by multilateral environmental agreements.”

essential that the Panel's "all WTO Members"-interpretation of Article 31(3)(c) of the Vienna Convention would negatively affect the intention of those WTO Members which, in addition to their WTO rights and obligations, have agreed on further rules in other treaties.

Ultimately, the crucial question is whether we interpret WTO obligations as being always identical, or if we accept a lesser degree of uniformity as expression of the fact that there is no uniform international legislator.<sup>9</sup> It is noteworthy that the Panel stated: "Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules" (EC-Biotech, Report of the Panel, para. 7.70). We appreciate this statement which, in our view, rather supports the "all parties to the dispute"-approach than the Panel's conclusion.

### 2.3 Interpretation also Vis-à-Vis non-Parties?

Relying on Article 31(3)(c) of the Vienna Convention as point of reference, it seems understandable not to use an international treaty as interpretation-tool vis-à-vis a WTO Member who is not a party to that treaty. In respect of that WTO Member, that treaty would not be a "rule of international law applicable in the relations between the parties". The argument that international standards established under the auspices of the "Codex Alimentarius Commission" and the other organisations referred to in Annex A(3) of the SPS Agreement can, under certain circumstances, also be used vis-à-vis a WTO Member who has not voted in favour of that standard (WIRTH 2006), does not bring us to a different conclusion. The scope of Annex A(3) is narrow. Lacking a decision by the SPS Committee under Annex A(3)(d), the Convention on Biodiversity and the Biosafety Protocol are not standards in terms of the SPS Agreement.

Notwithstanding the inapplicability of Article 31(3)(c) of the Vienna Convention, a treaty can play an important role in WTO dispute settlement even in respect of a non-party to that treaty. Most importantly, like unilateral action, such a treaty can be evidence, e.g. demonstrating that trade-sanctions against a non-party were "necessary" in terms of Article XX of the

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<sup>9</sup> See PAUWELYN (2001), who uses this argument only in connection with application of non-WTO rules, not with interpretation of WTO provisions through non-WTO rules.



GATT 1994, because attempts of a cooperative solution failed in respect of the non-party (MARCEAU 2001).

In addition to that, the Panel's approach to use such treaties like a dictionary in order to elucidate the "ordinary meaning" of a WTO term, seems noteworthy. In practice however, this "dictionary-approach" will be difficult to apply. The informative value of an international treaty is only important where such a treaty contains additional information compared with common dictionaries. Since already many dictionary definitions are objected to in WTO dispute settlement, what would be the consequence of referring to subtly negotiated definitions in international treaties for clarifying the "ordinary meaning"? The "dictionary-approach" might therefore to some extent assuage those who insisted on the use of the Biosafety Protocol in EC-Biotech. Nevertheless, one of the essential strengths and sources of legitimacy of WTO dispute settlement is that it enhances predictability in trade conflicts. Against this background, the Panel's narrow reading of Article 31(3)(c) is not compensated by its interpretation of Article 31(1) of the Vienna Convention.

While having a rather critical view on the Panel's answer to the systemic question of the interpretation of Article 31 of the Vienna Convention, it is beyond the scope of this work to reveal if and how the Convention on Biodiversity or the Biosafety Protocol could actually lead to a different reading of the relevant WTO Agreements, if taken into account under Article 31(3)(c) of the Vienna Convention. The EC vaguely invoked the preamble and Article 8(g) of the Convention on Biodiversity and Articles 1, 8, 10, 11, 15, 23, 26 and Annex III of the Biosafety Protocol by the EC, not demonstrating their actual impact. Suffice it to point to the doctrine assessing that impact of the Protocol and in particular whether, after careful scrutiny, the Protocol's rather general reference to the Precautionary Principle would lead to a different interpretation of the SPS Agreement.<sup>10</sup>

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10 Among the numerous publications on that issue, see e.g. BERNASCONI-OSTERWALDER (2001), STÖKL (2001), EGGERS AND MACKENZIE (2000), HOWSE AND MAVROIDIS (2000), SAFRIN (2002).

### **3 Scope of the SPS Agreement**

#### **3.1 Exclusivity of a Measure as Either SPS Measure or Other Measure**

Having rejected the use of non-WTO rules in this dispute, the Panel had to determine which of the WTO Agreements was applicable. The complaining Parties had argued that the EC approval procedures for biotech products that formed the basis for the three categories of EC measures at issue all fell within the scope of the SPS Agreement which excluded the applicability of the TBT Agreement in line with Article 1.5 of the TBT Agreement (EC-Biotech, Report of the Panel, paras. 7.157-7.158, 7.161). In contrast, the EC maintained that these approval procedures only fell in part within the scope of the SPS Agreement. The Panel had thus to decide, whether a law, or a requirement contained therein, might be deemed to embody a SPS measure as well as a non-SPS measure (EC-Biotech, Report of the Panel, paras. 7.150-7.174).

The Panel followed the view of the EC that a WTO Member could act for two different purposes contained in one single requirement (EC-Biotech, Report of the Panel, para. 7.165). This requirement could be split up in two identical requirements imposed for two different purposes so that one requirement could be judged under the SPS Agreement and the other under the TBT Agreement. In the view of the Panel, it remained within the autonomous right of each member not to enact the same requirement twice (for different reasons), but to consolidate it into one requirement imposed for two different purposes (EC-Biotech, Report of the Panel, paras. 7.162-7.163, 7.171). The Panel also considered it the right of a Member to follow a prudent approach, due to uncertainties in the interpretation of the WTO Agreements, to base a measure on as many purposes – and thus defences – as possible (EC-Biotech, Report of the Panel, para. 7.168-7.169). This did not violate Article 1.5 of the TBT Agreement<sup>11</sup>, since Article 1.5 only made clear that to the extent the requirement qualified as a SPS measure, the TBT Agreement would not apply. However, a requirement enacted for a purpose that did not fall under the SPS Agreement did not qualify as a SPS measure and hence would not rule out the application of the TBT Agreement (EC-Biotech, Report of the Panel, para. 7.167).

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11 Article 1.5 TBT Agreement: „The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.“

This, in our view, correct interpretation of the interplay between the SPS and the TBT Agreement should prove to be an important finding for disputes to come. First of all, the Panel has confirmed the purpose of a measure to be of decisive nature in determining the choice between the SPS and the TBT Agreement. Furthermore, the Panel has put a clear stop to tendencies to add up the disciplines of the various WTO Agreements at least as far as it concerns one measure that could come under two different Agreements. Had it decided otherwise, the SPS Agreement with its strict disciplines could have been used to marginalise other Agreements, by arguing that a violation of the SPS Agreement was enough to force a Member to lift a measure that was perfectly legal under another Agreement. While the Panel does not explicitly confirm the EC's reading that in such a case it would suffice to remove the SPS objective (EC-Biotech, Report of the Panel, para. 7.153), it nevertheless is the only logically possible conclusion to be drawn from the Panel's findings. By agreeing that the Members had not chosen to apply the disciplines of the different Agreements in a cumulative fashion, the Panel also implicitly (and correctly) respected the *in dubio mitius*-principle in international law.<sup>12</sup>

### 3.2 Findings of the Panel as to the Applicability of the SPS Agreement

Following this preliminary question, the Panel proceeded to analyse whether the EC approval procedures are SPS measures in terms of the purpose element of the Annex A(1) definition.<sup>13</sup> After extensive analysis the Panel concluded that Directives 90/220 and 2001/18 sought to avoid risks that

12 The *in dubio mitius*-principle states that if a term is ambiguous, that meaning is to be preferred which interferes less with the sovereignty of the Member states. See European Communities – Measures Concerning Meat and Meat Products (Hormones), Reports of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, January 16, 1998, para. 165, footnote 154.

13 Annex A(1): "Sanitary or phytosanitary measure – Any measure applied:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety."

were covered by one or more of the subparagraphs in Annex A(1)(a) through (d). Likewise, Regulation 258/97 as far as it ensures that novel foods do not present a danger for the health of consumers was applied for a purpose identified in Annex A(1)(b). To that extent, the EC approval procedures constituted both in purpose and in form and nature<sup>14</sup> SPS measures and thus fell under the SPS Agreement.<sup>15</sup>

### 3.3 Extensive Interpretation of Annex A(1) and “Rational Relationship”-criterion

While the result that (at least some of) the EC measures fall under the SPS Agreement does not seem surprising to us, the methodology used by the Panel to reach this result is less apparent. The central problem is the Panel’s extensive interpretation of the terms in Annex A(1) that lead to an across-the-board applicability of the SPS Agreement.

As a first means for interpretation of the technical terms in Annex A(1), the Panel frequently reverted to general dictionaries. While this might be appropriate in general, to our minds it seems a lot less appropriate when dealing with technical or scientific terms that were agreed upon as such when concluding an agreement that specifically concerns sanitary and phytosanitary measures. To give but one example, the Panel defined “pest” according to a dictionary as “a troublesome, annoying or destructive person, animal, or thing” (EC-Biotech, Report of the Panel, para. 7.238). While this definition might seem helpful for determining the meaning of “pest” in the context of an ordinary conversation<sup>16</sup>, it certainly does not add a lot of clarity to the technical term “pest” as used in the SPS Agreement. The Panel then identified an internationally accepted more technical definition of pests<sup>17</sup>, in accordance with the approach in US-Import Prohibition of Certain Shrimp and Shrimp Products. But instead of using this definition in exchange for the dictionary one, the Panel added its elements to the dictionary definition and thus defined pests as injurious or troublesome and annoying

14 The formal elements, i.e. whether the approval procedures are “laws, decrees and regulations” and fall under “testing, inspecting, certification and approval procedures”, are considered jointly for both Directives and the Regulation. EC-Biotech, Report of the Panel, paras. 7.417-7.433.

15 The Panel explicitly left open the question whether the EC Directives and the Regulation constitute a single SPS measure or could be seen as containing several SPS measures (such as authorisation procedures, labelling, safeguard clauses). As neither the EC nor the complaining Parties had put forward arguments to this effect, the Panel treated them as one SPS measure. EC-Biotech, Report of the Panel, para. 7.433.

16 As in “My neighbour’s dog is a real pest”.

17 The Panel uses the 1997 International Plant Protection Convention, that defines “pest” as “any species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products”.

species.<sup>18</sup> As a result, the Panel came to the conclusion that genetically modified plants might in certain conditions be regarded as pests themselves, in other conditions their control might indirectly address risks arising from pests without the plant being a pest itself.

In the case of additives, the Panel simply disregarded a Codex definition that would have led to a more restrictive interpretation by arguing that, unlike Article 3.1 and Annex A(3), Annex A(1) did not make any reference to “international standards, guidelines and recommendations” (EC-Biotech, Report of the Panel, para. 7.300, CIEL 2006). Neither this argument nor the fact that the Panel did not even use the Codex definition to “inform” the terms of Annex A(1) appear plausible to us. In our view it can be reasonably assumed that the drafters of the SPS Agreement as a Sanitary and Phytosanitary Agreement had a more scientific (and correct) approach to the question of what constitutes additives than the one adopted by the Panel. Considering genes that have been intentionally added to a genetically modified seed to be “additives in foods” reaches (and arguably goes even beyond) the limits of textual interpretation as we understand it. It seems as if the Panel carried out an exclusively teleological interpretation departing from the text of the SPS Agreement without daring to explicitly explain its approach.

Apart from the extremely broad textual interpretation of Annex A(1), the Panel introduced a second element, the “rational relationship” between the measure taken by the EC and a risk addressed in Annex A(1), to establish the applicability of the SPS Agreement (see, e.g., EC-Biotech, Report of the Panel, paras. 7.265, 7.274, 7.284, 7.391). The Panel argues for example that as the EC Directives seek to avoid adverse effects of the release of GMOs into the environment, including those resulting from the transfer of antibiotic resistance to pathogens, and as those pathogens, if transfer occurs, might directly or indirectly harm animal and plant life which is part of the environment, there is a rational relationship between controlling the release of GMO into the environment and protecting animal life from risks arising from the establishment of disease-causing organisms (EC-Biotech, Report of the Panel, para. 7.284). In other words, if the control measure of

18 In this context the Panel mentions that “the negotiated IPPC definition is not dispositive of the meaning and scope of the term “pest” as it appears in Annex A(1)” (emphasis added). While this is certainly true, one might wonder why a negotiated definition that contains an internationally agreed definition might be less informative than a dictionary one that contains the view of one (or more) individuals. Last but not least, all international instruments used to interpret the WTO Agreements so far contained “negotiated” or at least internationally agreed definitions without that fact harming their credibility. EC-Biotech, Report of the Panel, para. 7.241.

GMOs furthers even indirectly<sup>19</sup> a purpose falling under Annex A(1), the measure will come in the scope of the Agreement. The concept of a rational relationship is thus used in this context as a hypothetical causal link between the measure question and a SPS purpose.

Without wanting to judge on the specific merits of this case, we would like to point out that this use of a “rational relationship” departs from the practice of this concept used by previous Panels and the Appellate Body so far. In EC-Hormones the concept of a rational relationship was used to describe the link between the risk assessment and a SPS measure, i.e. a risk management measure. The Appellate Body stated that in order to comply with Article 5.1 and Article 2.2 of the SPS Agreement a SPS measure should be “based on” a risk assessment in a way that there is a “rational relationship” between the two.<sup>20</sup> In Japan-Agricultural Products the Appellate Body clarified this concept as meaning that there should be a rational relationship between the scientific evidence available and the measure taken.<sup>21</sup> While not providing a clear definition of such a rational relationship the Appellate Body assumed that the findings concerning the risk must support the measure taken (PAUWELYN 1999).

To date, the concept of a “rational relationship” had thus been used to determine whether there was sufficient scientific legitimacy for the SPS measure taken; it was a question of justification. As applied in EC-Biotech, the concept is used to determine the applicability of the Agreement to the measure in question. To transfer a broad and rather undefined concept such as the “rational relationship” from the realms of the substantive provisions to Annex A, relevant for the scope of the SPS Agreement, leads to legal uncertainty as the applicability of the Agreement and its disciplines remain barely predictable. This is all the more true as the Panel has not put any limitations to this concept. If thought to the extreme, any measure aimed at protecting the environment as such could ultimately be seen as also protecting animal lives from diseases that might also be caused by environmental degradation or toxins.<sup>22</sup>

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19 As the control measure does not control the pathogen that causes harm to SPS goods directly but indirectly creates conditions in which the pathogen would not be likely to appear at all.

20 EC-Hormones, Report of the Appellate Body, paras. 192 ff. See also Japan-Measures Affecting the Importation of Apples, Report of the Panel, WT/DS245/R, July 15, 2003, para. 8.103.

21 Japan – Measures Affecting Agricultural Products, Report of the Appellate Body, WT/DS76/AB/R, February 22, 1999, para. 84.

22 In fact, the Panel partly uses this argumentation to bring risks relating to a change in biogeochemistry through GMOs partly within the scope of Annex A(1)(a) and partly within the scope of A(1)(d) “other damage” (see EC-Biotech, Report of the Panel, paras. 7.370-7.380; CONRAD 2006).

Having said that, we have to acknowledge that the Panel had to surmount great difficulties in the present dispute, the main one relating to its subject, GMOs, which, because of their specific nature, cannot easily be classified in traditional SPS terms. At the same time it is equally clear, and indeed has not be denied by the EC at the outset, that a large part of the EC measures were primarily adopted because of risks associated with GMOs that at least partly classify as SPS risks. Nevertheless, by stretching the interpretation of the SPS terms to (and arguably sometimes beyond (PALMER 2006, CURRIE 2006)) their limits to bring almost all aspects of the EC measures under the SPS Agreement, the Panel has not helped WTO Members in determining its scope for future cases.

### 3.4 Labelling as Sanitary or Phytosanitary Measure

Even though GMO labelling was not challenged in the present dispute, the Panel found that labelling under Dir. 2001/18<sup>23</sup> was rationally related to the purpose of protecting human health and the environment as it facilitated the detection of adverse effects and would therefore qualify as a SPS measure. It thus used the same argumentation as described above despite the fact that Annex A(1) provides that labelling must be “directly related to food safety”. In contrast, in the view of the Panel, Reg. 258/97<sup>24</sup> does not fall under the SPS Agreement, as far as it concerns its prohibitions to not mislead the consumer and to not allow nutritiously disadvantageous foods.

Although labelling in Dir. 2001/18 as compared to Reg. 258/97 can indeed be seen as rather related to (environmental) risk than to general (consumer) information, the direct relation to food safety is missing even in the argumentation of the Panel.<sup>25</sup> Again, the Panel used the concept of a rational relationship to extend the applicability of the SPS Agreement beyond its textual scope, this time to the detriment of the TBT Agreement that explicitly covers labelling if not directly related to food safety (BURCHARDI 2001 and 2007).

23 Directive 2001/18/EC of the European Parliament and of the Council of March 12, 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

24 Regulation (EC) No 258/97 of the European Parliament and of the Council of January 27, 1997 concerning novel foods and novel food ingredients.

25 The Panel merely explains, why food safety was but one object of labelling requirements of the SPS Agreement and other purposes identified in Annex A(1) could also be served through labelling. However, it does not justify how the rather remote link between the labelling and food safety as construed by the Panel could be considered “direct”.

#### 4 “Undue Delay” and “Insufficient Scientific Evidence” in the Light of Precaution

Almost exclusively applying the SPS Agreement, the Panel had to comment on one of the most contentious issues of WTO law: How can WTO Members deal with situations of scientific uncertainty? Persistent controversy about this question at the political level, primarily between the EC and the US, forms the basis of legal discussion.

The EC position is illustrated, *inter alia*, in the “Communication from the European Commission on the Precautionary Principle”.<sup>26</sup> Amongst other things, it quotes a statement from the European Court of Justice: “Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent”.<sup>27</sup> In addition to a general reference in Article 174 of the EC treaty, the Precautionary Principle also appears in EC secondary legislation.<sup>28</sup>

Against fierce objection by the US, the EC also invoked the Precautionary Principle in EC-Hormones as justification for its ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes. The position the Appellate Body took as to the status of the Precautionary Principle vis-à-vis the SPS Agreement has been assessed by quite a few commentators.<sup>29</sup> The main elements of this position are:

- Whether the Precautionary Principle has been accepted by WTO Members as principle of general or customary international law “appears less than clear”, and the Appellate Body did not take a further stance on this.

<sup>26</sup> Communication from the Commission on the Precautionary Principle, COM(2000) 1.

<sup>27</sup> C-157/96 National Farmers' Union and Others of May 5, 1998, para. 63. This decision is referred to, for instance, in the recent case C-504/04 Agrarproduktion Staebelow GmbH of January 12, 2006, para. 39.

<sup>28</sup> Article 7 of Regulation (EC) No. 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety: “Precautionary principle 1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment. 2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.”

<sup>29</sup> See, for instance, the recent publications by CHEYNE (2006), MOTAAL (2005), PEEL (2004).



- The Precautionary Principle, not explicitly contained in the SPS Agreement, does not justify measures that are otherwise inconsistent with the SPS Agreement.
- However, it is reflected in Article 5.7 of the SPS Agreement, furthermore in the sixth paragraph of the preamble and in Article 3.3 recognising the right of Members to establish their own appropriate level of sanitary protection.
- Always respecting the customary international law principles of treaty interpretation, the Precautionary Principle may also be relevant for the interpretation of the SPS Agreement. According to an example given by the Appellate Body, “whether ‘sufficient scientific evidence’ exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned” (EC-Hormones, Report of the Appellate Body, paras. 123–124).

In EC-Biotech, the EC again relied on the Precautionary Principle as justification for the challenged measures. The report of the Panel essentially addresses the Precautionary Principle in three sections – first, as potential rule of international law to the interpretation of the WTO agreements, secondly in connection with the complainants’ claim that the general moratorium and the product-specific measures resulted in “undue delay”, and finally for the assessment of the EC Member State safeguard measures.

#### **4.1 The Precautionary Principle as Principle of General or Customary International Law**

Having stated that it would be ready to consider whether, as claimed by the EC, the Precautionary Principle had become a rule of customary international law or a general principle of law, the Panel nevertheless refrained from taking a final position on this issue. It confined itself to confirm the complex nature of the question given the numerous references to the Precautionary Principle both in international and national law on the one hand, and open questions as to its precise definition and substance on the other hand, taking into account divergent views in doctrine about the status of the Precautionary Principle.

Although one might consider its abstention regrettable, this part of the Panel report did not cause much surprise. Undoubtedly the status of the Precautionary Principle in international law is an important question. Yet, in a dispute as comprehensive as EC-Biotech, it is understandable that the Panel tried to exert judicial economy on abstract matters as much as possible. We will discuss in the following subsections whether the Panel made appropriate findings on those questions where precaution did play an important role.

## 4.2 “Undue Delay” and Precaution

According to the Panel, both the general *de facto* moratorium and the product-specific measures caused “undue delay” in terms of Annex C(1)(a), first clause, and Article 8 of the SPS Agreement.<sup>30</sup> The Panel pointed out that whether a certain period of time is “undue” or “unjustifiable” had to be determined on a case-by-case basis (EC-Biotech, Report of the Panel, paras. 7.1495, 7.1497). In essence, it considered this provision a “good faith”-obligation (EC-Biotech, Report of the Panel, para. 7.1498). In this connection, two considerations of the Panel are noteworthy.

First, the Panel essentially followed the EC’s view that the reasons justifying a certain time span did not necessarily have to be based on scientific evidence. The Panel gave the interesting example of an “unforeseeable and sharp increase in the number of products submitted for approval” as a possible justification (while clarifying, in a footnote, that WTO Members are responsible for the allocation of sufficient resources to comply with their WTO obligations (EC-Biotech, Report of the Panel, para. 7.1500)). Importantly, the Panel added that modifications of domestic legislation were no sufficient reason for a delay, since otherwise the obligation not to unduly delay the procedure could easily be circumvented (EC-Biotech, Report of the Panel, paras. 7.1514-7.1518).

Second, the Panel considered the EC’s assertion that the Precautionary Principle had to be taken into account in order to determine whether there is “undue delay” (EC-Biotech, Report of the Panel, para. 7.1485). The Panel stated that Annex C(1)(a), first clause, did not prevent a WTO Member

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30 Annex C(1)(a) of the SPS Agreement: “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 and in no less favourable manner for imported products than for like domestic products; [...]”

from “a prudent and precautionary approach to identifying, assessing and managing risks to human health and the environment arising from GMOs and GMO-derived products”. In particular, requests for further information from the applicant could be legitimate (EC-Biotech, Report of the Panel, para. 7.1522).

Nevertheless, the fact that scientific information and data are still limited, does, according to the Panel, not *per se* justify the general moratorium and the product-specific measures. The Panel opined that WTO Members were bound to reach a substantive decision. “If a Member could endlessly defer *substantive* decisions on the grounds of a perceived need for caution and prudence in the assessment of applications, Annex C(1)(a), first clause, would be devoid of any meaning or effect” (EC-Biotech, Report of the Panel, para. 7.1522). The content of the decision might vary, according to the degree of information available and the level of protection chosen by the WTO Member. If, against this background, an application had to be rejected, the Member might ask the applicant whether he prefers the deferral of a substantive decision to the rejection (EC-Biotech, Report of the Panel, para. 7.1528).

These findings have been criticised (PALMER 2006). The crucial question is whether under the SPS Agreement scientific uncertainty is exclusively allocated to decision-making under Article 5 so that there is a need to take a substantive decision. The answer has to be given taking also into account the context and the purpose of the SPS Agreement.

The wording of Article 5.7<sup>31</sup>, the cornerstone of precautionary measures under the SPS Agreement and therefore part of the context, emphasises that such measures are optional and hence suggests that other reactions are possible. Could one infer that one of these alternative reactions envisaged by Article 5.7 would be not to take a substantive decision at all? As described above, according to the Appellate Body, the significance of the Precautionary Principle is not confined to Article 5.7. It may in particular, depending on the circumstances such as the risks at stake, be relevant for the interpretation of other provisions. The alternative measures alluded to by Article 5.7 could be substantive decisions under Article 5.1, in particular. Hence, the wording of Article 5.7 is not sufficiently clear-cut to be used as an argument against or in favour of the Panel’s interpretation of “undue delay”.

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31 “[...] a Member may provisionally adopt [...]” Emphasis added.

As to the purpose of the SPS Agreement stated in its preamble, one might distinguish between the protection of human, animal or plant health on the one hand, and the prevention of unjustified barriers to international trade on the other hand. Considering the first part, the assumption that WTO Members have to take a substantive decision, including provisional decisions on the basis of Article 5.7, would only impair WTO Members' level of protection if Article 5.7 was interpreted too narrowly. This question will be dealt with in the next subsection. Regarding the prevention of unjustified barriers to trade, it is useful to take the point of view of somebody applying for the approval to place a GMO on the market. From an applicant's perspective, the deferral of a decision does not equal the application's dismissal (WIRTH 2006). In fact, the legal consequences as to the impossibility of placing the GMO on the market appear similar to the extent that it would be illegal without approval. Nevertheless, even a negative decision can be challenged in respect of whether the substantive requirements for such decision are met. In a footnote, the Panel in EC-Biotech correctly stated that any decision under Article 5.7 had to meet substantive requirements and that these requirements could be circumvented if a WTO Member was entitled to simply delay any substantive decision in case of scientific uncertainty (EC-Biotech, Report of the Panel, footnote 1303).

Notwithstanding the WTO Members' right, recognised by the Panel (EC-Biotech, Report of the Panel, para. 7.1522), to appropriately request further information from the applicant, the Panel's finding that scientific uncertainty does not per se warrant the delay of an approval procedure, therefore appears convincing. However, a further outcome is that the Panel's assessment of the Precautionary Principle in connection with the EC Member State safeguard measures under Article 5 of the SPS Agreement, analysed in the next subsection, becomes even more important.

#### **4.3 “Insufficient Scientific Evidence” and Precaution**

The Panel's evaluation of the EC Member State safeguard measures under Article 5 of the SPS Agreement can be divided in two steps. First, the Panel set out its interpretation of the general relationship between Article 5.1 and Article 5.7, then it applied both paragraphs to the safeguard measures.

a) *General Relationship between Article 5.1 and Article 5.7*

The interaction of Article 5.1 and Article 5.7 first had to be clarified in abstract terms, because the EC asserted that only Article 5.7 was applicable. According to the EC, the whole of Article 5.1, including its core-requirement to base SPS measures on a risk assessment, did not apply to the safeguard measures since, also under EC legislation, they were provisional (EC-Biotech, Report of the Panel, para. 7.2930). Furthermore, the EC considered Article 5.7 was not an exception to Article 5.1, but an autonomous right. Consequently, the complainants had the burden on proof whether the substantive requirements of Article 5.7 were met (EC-Biotech, Report of the Panel, paras. 4.375, 7.2952).

The Panel dismissed the EC's argument that the provisional character of a measure is the demarcation line between Article 5.1 and 5.7. Mainly relying on the wording of both provisions and on former decisions of the Appellate Body, the Panel emphasised that the distinctive criterion is whether relevant scientific evidence is insufficient (EC-Biotech, Report of the Panel, paras. 7.2939-7.2948). Since the "provisional" character of a measure indeed is quite a broad feature, this finding appears persuasive. Otherwise, WTO Members could easily evade their obligations under Article 5.1 by simply qualifying a measure as "provisional".

As to the second claim of the EC in connection with the general relationship between Article 5.1 and Article 5.7, the Panel essentially adopted the EC's approach determining that Article 5.7 was not an exception, but a "qualified right". The Panel primarily based this conclusion on a comparison between the wording of the relevant provisions of the SPS Agreement and on a test developed by the Appellate Body in EC-Tariff Preferences.<sup>32</sup>

The Panel's train of thought has been severely criticised as "flawed", and "decontextualisation" (BROUDE 2006). In fact, considering the alleged differences between "exception" and "exemption" in the EC-Biotech Panel report (EC-Biotech, Report of the Panel, para. 7.2972), one might question whether the test in EC-Tariff Preferences, containing an explicit caveat<sup>33</sup>, is an adequate basis for the Panel's conclusions. However, as to the relationship between Article 5.1 and Article 5.7, the impact is limited, in light of the

32 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Report of the Appellate Body, WT/DS246/AB/R, April 7, 2004, para. 88.

33 „However, this distinction may not always be evident or readily applicable." EC-Tariff Preferences, Report of the Appellate Body, para. 88.

main consequences of the Panel's qualification of Article 5.7 as a right: "Accordingly, we think that when a complaining party presents a claim of violation under Article 5.1, the burden is on the complaining party to establish a *prima facie* case of inconsistency with both Articles 5.1 and 5.7" (EC-Biotech, Report of the Panel, para. 7.3000). The complainants in their submissions did not invoke a violation of Article 5.7 in their requests for the establishment of a Panel (in accordance with their view that Article 5.7 is an exception, not a right), but they contended a violation of Article 5.1 stating that the safeguard measures were not based on the existing EC risk assessments. As we will further describe below, the existence of these risk assessments led the Panel to the conclusion that there was sufficient scientific evidence and that, hence, the safeguard measures were neither consistent with Article 5.1 nor with Article 5.7. At least as applied by the Panel, its qualification of Article 5.7 as a "qualified right" does therefore not appear to be an insurmountable obstacle for a successful complaint.

*b) Application of Article 5.1 and Article 5.7*

The Panel's conclusions as to the different EC Member State safeguard measures can be summarised as follows: On the basis of the abovementioned considerations about the relationship between Article 5.1 and Article 5.7, it started its assessment with Article 5.1. The Panel found that the safeguard measures were not based on a risk assessment, as required by Article 5.1 and specified in WTO jurisprudence. For each argument and study brought forward by the respective EC Member States in order to justify the safeguard measures, the Panel opined that they did not constitute a "risk assessment" in terms of Annex A(4) of the SPS Agreement.<sup>34</sup> According to the Panel, those studies referring to "pests" or "diseases" did not qualitatively or quantitatively assess the likelihood of their entry, establishment or spread, as required by Annex A(4) first clause. Quoting the Appellate Body report in *Australia-Salmon*, the Panel emphasised that it was "not sufficient that a risk assessment conclude that there is a possibility of entry, establishment or spread [...]". As to those studies referring to the type of risks covered by Annex A(4) second clause, the Panel conceded that there was little guidance in WTO case-law apart from the Appellate Body's statement in

<sup>34</sup> Annex A(4): "Risk assessment – The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."

Australia-Salmon that the first clause was “substantially different” from the second clause and that Annex A(4) first clause referred to a “greater level of probability”.<sup>35</sup> Other studies were not accepted by the Panel because they had been conducted after the establishment of the Panel only (EC-Biotech, Report of the Panel, para. 7.3112) or were confined to procedural aspects (EC-Biotech, Report of the Panel, para. 7.3049).

The Panel also rejected the EC’s view that the arguments brought forward by EC Member States were a sufficient basis for the safeguard measures in the light of the Appellate Body’s openness in EC-Hormones vis-à-vis scientific minority opinions. The Panel stated that, unlike in EC-Hormones, the relevant risks were not “life-threatening in character” or that they “constitute a clear and imminent threat to public health and safety”. Furthermore, the divergent view would have to be expressed within “that” risk assessment in order to meet the standards established by EC-Hormones (EC-Biotech, Report of the Panel, para. 7.3059-7.3060). Even if based on a precautionary approach, the safeguard measures would have to comply with Article 5.1 (EC-Biotech, Report of the Panel, paras. 7.3066).

Having concluded that the safeguard measures were not based on a risk assessment and, consequently, did not meet the requirements of Article 5.1, the Panel continued its analysis under Article 5.7.

In this respect, it confined itself to the consideration that the first precondition of Article 5.7 was not fulfilled. Given the extensive risk assessments carried out for the relevant GMOs at the EC level, relevant scientific evidence was not insufficient (EC-Biotech, Report of the Panel, paras. 7.3232-7.3261). In particular, the Panel rejected the EC’s view that the level of protection chosen by the relevant WTO Member would have to be considered for the question whether scientific evidence is sufficient. Any scientific uncertainty, according to the Panel, is to be indicated in a risk assessment (EC-Biotech, Report of the Panel, paras. 7.3233-7.3246).

The application of Article 5.1 and 5.7 by the Panel has been vehemently criticised in doctrine (see HENCKELS 2006, PEREZ 2006, CIEL 2006). The criticism focuses

- on the Panel’s determination that the EC Member States’ justifications for their respective safeguard measures did not constitute risk assessments in terms of Annex A(4) of the SPS Agreement, and

35 Australia – Measures Affecting Importation of Salmon, Report of the Appellate Body, WT/DS18/AB/R, October 20, 1998, footnote 69.

- on its denial to take into account an importing country's level of protection for the assessment whether relevant scientific evidence is sufficient.

The Panel's assessment, at least, leaves a number of essential questions for further interpretation and clarification. The text of the definition of "risk assessment" in Annex A(4) of the SPS Agreement indeed suggests the Panel's insistence on the need to evaluate the respective likelihood or potential of a risk instead of stating that something cannot be excluded. However, the abovementioned comments by the Appellate Body in *EC-Hormones* about how the Precautionary Principle is reflected in the SPS Agreement give leeway to a differentiated approach taking also into account the relevant type of risk, especially as far as irreversible damage to human health is concerned. Even though the Appellate Body in *Australia-Salmon* enunciated minimum requirements for the risk assessment, that dispute did not regard human health.<sup>36</sup> Hence, in a dispute also concerning human-health-related risks, it would be persuasive to interpret *EC-Hormones* and *Australia-Salmon* harmoniously, resulting in lower requirements for the evaluation of the likelihood or potential of the risks. Not having ourselves a detailed knowledge of all those studies the Panel had to assess in *EC-Biotech*, it is a different question, though, whether such a differentiated reading of Annex A(4) would have led the Panel to different conclusions.

The justification by the Panel for its refusal to accept the EC Member State arguments as scientific minority opinions does not seem perfectly clear to us. However, it would indeed be logically incoherent if a divergent opinion, not meeting the minimum requirements for a risk assessment in terms of Annex A(4), could anyway be a sufficient basis for a SPS measure. The Panel's approach thus appears convincing.

Ultimately, the discussion about EC Member State arguments as minority opinions under Article 5.1 is connected with the Panel's analysis that due to the existing EC risk assessments, the safeguard measures cannot be based on Article 5.7. Both ideas relate to what can be described as exclusivity of risk assessments undertaken at EC level vis-à-vis assessments carried out by EC Member States. In addition to the EC itself, all EC Member States are individual WTO Members. Generally speaking, whether sufficient scientific evidence exists cannot be generalised for the whole WTO Membership.

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<sup>36</sup> This was already made clear by the Panel, see *Australia – Measures Affecting Importation of Salmon*, Report of the Panel, WT/DS18/R, June 12, 1998, para. 2.13.



Obviously, the evidence also has to be available to the WTO Member the measure of which is at stake. Furthermore, the Panel's statement that scientists do not need to "know a Member's 'acceptable level of risk' in order to assess objectively the existence and magnitude of a risk" (EC-Biotech, Report of the Panel, para. 7.3243), appears rather idealistic and barely realistic – it is more than difficult to completely dissociate scientists' work during risk assessment from policy and value judgements (WINICKOFF et al. 2005). Moreover, in any case the WTO Member must have the right to know who carried out a risk assessment and under which conditions. The sufficiency of evidence can only be assessed taking into account the reliability of the sources. Therefore, the mere fact that sufficient evidence is available in one WTO Member does not exclude the application of Article 5.7.

Yet, EC-Biotech is a particular case since even in respect of the EC Member States safeguard measures, the EC was respondent, not the EC Member States.<sup>37</sup> Against this case-specific background, it appears plausible that the Panel relied on the risk assessments undertaken at the EC level. Further clarification by future Panels as to the impact of risk assessments being available in different WTO Members would hence be extremely useful.

In a nutshell, although most of the Panel's findings on precaution-related issues seem well reasoned, several matters deserve further reflection.

## **5 "Product-Origin" as Criterion for the National-Treatment Obligation**

Having considered in detail the claims under the SPS Agreement, the Panel nevertheless had to address some of the claims regarding the product-specific measures and safeguard measures under the GATT 1994 and the TBT Agreement (EC-Biotech, Report of the Panel, paras. 7.2499-7.2528; 7.3407-7.3430). Canada and Argentina had argued that the EC treated imported biotech products less favourably than "like" non-biotech products (EC-Biotech, Report of the Panel, paras. 7.2501-7.2502; 7.3417-7.3420). This would run counter Article III:4 of GATT and arguably also Article 2.1 of the TBT Agreement, both embodying the "national treatment obligation".

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37 Unlike, e.g., in *European Communities – Measures Affecting Trade in Large Civil Aircraft* where – in addition to the EC – Germany, France, the United Kingdom, and Spain are respondents.

In view of the findings of violation of the SPS Agreement, the Panel exercised some judicial economy with regard to Article III:4 of the GATT 1994 (EC-Biotech, Report of the Panel, paras. 7.2505, 7.3422), and it found the TBT Agreement not to be applicable, in line with Article 1.5 TBT Agreement (EC-Biotech, Report of the Panel, paras. 7.2524, 7.3412), for most of the measures in question. For a few measures, however, it made findings as to Article III:4 of the GATT 1994. Without taking a decision on the likeness of biotech and non-biotech products, the Panel concluded that the complainants had not sufficiently shown that “the alleged less favourable treatment was due to their foreign origin rather than, for instance, a perceived difference between biotech and non-biotech products in terms of their safety, risk for consumers, etc.” (EC-Biotech, Report of the Panel, para. 7.2514; cp. also para. 7.2411).

However, despite two Appellate Body reports cited in support of its position, the approach taken by the Panel in EC-Biotech is quite new. The Panel seems to indicate that a different treatment between “like” domestic and imported products, even to the detriment of the imported product, might be permissible if the reason for the differentiation cannot necessarily be attributed to the foreign origin of the imported product. It thus seems to introduce the requirement of a “clear intent of discrimination” linked to the origin of the product. Absent such a clear intent or if there are possible non-origin-related reasons for a different treatment, the Panel concludes that a less favourable treatment has not been established.

One of the consequences of this approach is a change in the level of proof. While the establishment of “less favourable treatment” was so far based on a factual analysis of the conditions of competition and its alteration through the measure in question<sup>38</sup>, the Panel now seems to require the complaining Parties to establish an “intent” of the responding Party to treat foreign products worse or to establish the absence of other reasons for a different treatment. As is common knowledge in EC law since *DASSONVILLE* and *CASSIS DE DIJON*, the proof of a discriminatory intent is rarely possible; a discriminatory effect, on the other hand, can be established much more easily. In fact, the Panel does not address what sort of proof Argentina could have given in support of its allegation.

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38 EC – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R, March 12, 2001, para. 99.

This – in our view – departure from the current adjudication practice cannot be adequately supported by the cited Appellate Body reports. Instead, the Appellate Body in *EC-Asbestos* reiterates that if there is less favourable treatment of the imported product, there is, conversely, protection of the group of like domestic products. It then goes on to clarify that not every differentiation in treatment amounts to a less favourable treatment of the imported products.<sup>39</sup> The same is true for *Dominican Republic-Cigarettes*, where the Appellate Body confirms the alteration of competitive conditions as the decisive factor and then affirms that a negative alteration of competitive conditions was in that case not attributable to the different treatment, but to the market situation irrespective of that treatment.<sup>40</sup> Neither report, however, calls for the establishment of some “protectionist” intent or the research into alternative reasons for justification of the measure.

Indeed, had the Panel followed along the path taken by the Appellate Body in *EC-Asbestos* instead of second-guessing reasons that might justify a different treatment of GMOs, it might have, using its own reasoning of the perceived differences between GMOs and conventional products, declared the two groups of products “not like” using the criterion of consumer preferences and physical differences as to the genetic structure.<sup>41</sup> While it has to be acknowledged that the question of likeness is a particularly difficult one, given the nature of GMOs that can be distinguished from their conventional counterparts only at genetic level despite possible differences in their ecological effects, to our minds it is still a very significant change in the examination of the national-treatment obligation.

By trying to avoid the “straightjacket” of the criteria of likeness established by the “Report of a Working Party on Border Tax Adjustment”, the Panel shifted the core of the examination instead to the “less favourable treatment”, introducing elements that make violations of the national treatment obligation harder to establish and possibly less predictable. It remains to be seen whether this approach will be followed by Panels and the Appellate Body in future disputes. If this was the case, *EC-Biotech* would mark a considerable change in the examination of the national-treatment obligation

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39 *EC-Asbestos*, Report of the Appellate Body, para. 100. This can be explained by the fact that not every difference in treatment leads to a change of the competitive conditions to the detriment of the imported product.

40 *Dominican Republic – Import and Sale of Cigarettes*, Report of the Appellate Body, WT/DS302/AB/R, April 25, 2005, para. 96.

41 In *EC-Asbestos*, Report of the Appellate Body, para. 126, the Appellate Body ruled against the likeness of the products at issue, also taking into consideration differences at molecular level associated with health effects and consumer tastes and habits (WIRTH 2006).

and give Panels more leeway in deciding on its violation by rejecting or assuming a “protectionist intent”.

## 6 Conclusion

As described at the outset, the Panel Report in EC-Biotech is a milestone. Yet, although it provides for a number of answers regarding the margin of manoeuvre for national legal frameworks for agro-biotechnology, the transatlantic biotech-conflict is likely to continue. Intense discussions between the European Commission and EC Member States about the lifting of the EC Member State safeguard measures<sup>42</sup> demonstrate that compliance with the Panel report might become an issue in the short run, not to mention a possible dispute in respect of the EC legislation on issues such as traceability and labelling in the long run.

From a less biotech-focused and more general point of view, considering the systemic questions at stake, the Panel report may have significant importance for future WTO disputes. We have highlighted those issues of the Panel report which deserve further reflection and, in our view, different answers. Guidance by future Panels would be most useful, in particular, in respect of

- the impact of a non-WTO provision on the interpretation of the WTO rules when the non-WTO provision is binding on the parties to a dispute but not all WTO Members,
- the practical value of the “dictionary-approach”, i.e. the use of a non-WTO provision to clarify the “ordinary meaning” of a WTO provision under Article 31(1) of the Vienna Convention,
- the applicability of the SPS Agreement, e.g. where labelling is at stake,
- the minimum requirements for a “risk assessment” according to Annex A(4) of the SPS Agreement, especially where human health is at risk,
- the relevance of an importing country’s level of protection for the question whether relevant scientific evidence is sufficient,
- the applicability of the national-treatment rule to measures not explicitly distinguishing according to a product’s origin.

Whereas not all of the criticism raised against the Panel report is justified, the Panel’s answers to the abovementioned questions are not entirely compelling either. Most notably, the Panel report leaves us with considerable

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42 See [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/envir/92128.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/envir/92128.pdf).

legal uncertainty. For us, this is an important deficiency, bearing in mind the fundamental importance of predictability under the WTO dispute settlement system.

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## Home Market Effects of Foreign Direct Investment: The Case of Germany

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63

In diesem Beitrag werden die Auswirkungen deutscher Direktinvestitionen im Ausland auf den heimischen Arbeitsmarkt analysiert. Dafür wird auf einen neuen Datensatz zurückgegriffen, der es erstmals erlaubt, anhand von Mikrodaten für einzelne Unternehmen den Zusammenhang zwischen der Veränderungsrate ihrer Direktinvestitionen und der Veränderungsrate ihrer Inlandsbeschäftigung empirisch zu überprüfen. Eine ökonometrische Analyse legt den Schluss nahe, dass die weit verbreiteten Befürchtungen über einen massiven Exodus deutscher Arbeitsplätze in Niedriglohnländer eher unbegründet sind. Die Inlandsbeschäftigung deutscher multinationaler Unternehmen geht bei verstärkten Auslandsinvestitionen nicht etwa zurück, sondern steigt sogar statistisch signifikant an. Insgesamt stehen unsere Ergebnisse im Widerspruch zur traditionellen Aussenhandelstheorie, nach der Auslandsinvestitionen und Inlandsbeschäftigung negativ miteinander korreliert sind, und stützen eher die Theorie multinationaler Unternehmen.

The paper provides new evidence on the impact of foreign direct investment on the labour market of home countries. It is based on a new data set on change rates of foreign direct investment and domestic employment of German multinationals. The econometric analysis suggests that public concerns about a massive exodus of jobs to low-wage countries are not well-founded. Instead, parent firm's employment significantly increases with an increase of their FDI. All in all, our results provide strong evidence against traditional trade theory, which predicts a negative relationship between foreign and domestic employment, and weakly support the theory of the multinational firm.

## Beyond Biosafety – An Analysis of the EC-Biotech Panel Report

*Lorenz Franken and Jan-Erik Burchardi*

77

Der Panelbericht in EC-Biotech ist der vorläufige Abschluss eines der komplexesten Verfahren in der Geschichte der WTO-Streitschlichtung. Die vorliegende Analyse bezieht sich auf diejenigen Aspekte, deren Bedeutung über die Biotechnologie hinausgeht, nämlich die Auswirkungen völkerrechtlicher Normen ausserhalb des WTO-Rechts auf die Auslegung des WTO-Rechts, den Anwendungsbereich des SPS Übereinkommens, die Kategorien «unangemessene Verzögerung» und «unzureichende naturwissenschaftliche Beweise» im Zusammenhang mit Vorsorgemassnahmen und schliesslich die Produktherkunft als Prüfkriterium für das Prinzip der Inländergleichbehandlung. Dabei zeigt sich einerseits, dass ein Teil der gegen den Panelbericht ge-



äusserten Kritik ungerechtfertigt ist. Andererseits liegt ein Manko des Panelberichts darin, dass er in einigen Teilen nicht zu einer Verbesserung der Rechtssicherheit beiträgt.

The Panel report in EC-Biotech, for the time being, puts an end to one of the most complex cases in the history of WTO dispute settlement. The analysis at hand covers the issues relevant beyond the realms of biotechnology, namely the impact of non-WTO rules of public international law on the interpretation of WTO law, the scope of the SPS Agreement, the categories "undue delay" and "insufficient scientific evidence" in connection with precautionary measures, and product-origin as a criterion for the national-treatment obligation. On the one hand, some of the criticism raised against the Panel report turns out to be unjustified. It is, on the other hand, a deficiency of the Panel report that some parts of it do not foster legal clarity.

## Estimating Market Power in the Swiss Petrol Retailing Industry – A New Empirical Industrial Organisation Approach

*Peter Ehrensam, Nils Herger and Oliver Sutter*

107

Die Wettbewerbsbehörden verschiedener Staaten haben Mineralölgesellschaften beschuldigt, Wettbewerbsabsprachen getroffen zu haben, welche zu einem gleichförmigen Preissetzungsverhalten und zu überhöhten Benzinspreisen geführt hätten. Um hingegen den Wettbewerb tatsächlich beschränken zu können, müssen die Mineralölgesellschaften über erhebliche Marktmacht verfügen. Wir schlagen daher eine Methode im Geiste der New-Empirical-Industrial-Organisation vor, welche es erlaubt, die Marktmacht der Mineralölgesellschaften auf dem schweizerischen Benzinmarkt anhand eines Verhaltensparameters zu schätzen. Basierend auf Daten für den schweizerischen Benzinmarkt legen unsere empirischen Resultate ein tiefes Niveau an Marktmacht der schweizerischen Mineralölgesellschaften nahe.

Several competition authorities have accused petrol retailers of engaging in collusive conduct, which results in alleged "excessive" prices as well as simultaneous price setting across filling stations. However, petrol retailers must exert a substantial amount of market power if they are to dampen competition. Therefore, we propose a method within the spirit of the New-Empirical-Industrial-Organisation, which allows estimating market power held by petrol retailers in terms of a conduct parameter. Based on data for Switzerland, our empirical results suggest a low level of market power held by Swiss petrol retailers.

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