

The World Trade Organization's Report on the EU's Moratorium on Biotech Products: The Wisdom of the US Challenge to the EU in the WTO

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1. Introduction

On 26 September 2006, the World Trade Organization (WTO) released the Final Reports of the Panel on cases WT/DS291, WT/DS292 and WT/DS293 regarding the "European Communities—Measures Affecting the Approval and Marketing of Biotech Products," as requested by the USA, Canada and Argentina respectively. As all three countries lodged largely equivalent complaints, differing only in certain specific clauses, a single Dispute Settlement Panel was established, whose members were to write one report responding to all of the complainants' charges. The Panel's report is currently one of only a few official documents to address the European Union's moratorium on genetically modified organisms (GMOs) in detail, and it contains some very valuable insights into the working of the international regulatory system on GMOs.

In this article, our aim is to explore the outcomes and implications of the WTO's report; it judged in favor of the complainants, but only on a relatively narrow basis—that the EU had instigated an illegal delay in its sanitary and phytosanitary (SPS) procedures when, in 1998, it introduced a moratorium on genetically modified (GM) products. On substantive issues such as whether the EU's moratorium constituted a technical barrier to trade, or whether GM products are safe, the WTO declined to rule. We ask, does this result serve to justify the decision by the USA (together with Canada and Argentina) to choose the WTO as a forum for its challenge to the moratorium on GM products?

In section 2, we set out the framework through which we approach the topic to gain a clearer understanding of the significance of the WTO report. This framework is the theory of "forum" or "venue" shopping, with which we examine the two most appropriate, and overlapping, forums for GMO dispute settlement—the WTO and the Cartagena Protocol on Biosafety (CPB). In section 3, we explain the decision of the USA to bring its complaint to the WTO,

and in section 4, we examine the basis of that complaint. In section 5, we analyze the findings of the WTO's report, and in section 6, we discuss its implications for the complainant countries—in particular, whether or not it vindicates their selection of the WTO as the most appropriate forum for adjudicating their complaints against the EU moratorium. Our conclusion is that the WTO report is a pyrrhic victory for the US and its co-complainants, and it raises the question of whether the US should have made a bolder decision to confront the EU in an environmental forum like the CPB, rather than a trade forum, or not to mount a challenge at all.

2. Theoretical Framework

"Venue" or "forum" shopping are terms used by theorists to signify the practice of states shopping around for the most appropriate regime to consider their cases in international law against other states. As Raustiala and Victor point out, since 1945 there has been a "proliferation" and "growing density" of international institutions, regimes and treaties, and this has led to a complex of overlapping and sometimes competing jurisdictions:¹ "Regimes and rules are developed in one forum that frequently implicate and even challenge regimes and rules developed in other forums."² Indeed, the rapid development of international agreements has led some analysts to speak of "'treaty congestion' and insufficient coordination among agreements,"³ because, where two regimes clash, there is often no legal hierarchy to determine which regime takes precedence. Although some attempts have been made to deal with potential conflicts between regimes, such as "savings clauses," by which one regime explicitly defers to another regime on a particular issue, or trade-offs, by which mutual deals are negotiated to divide jurisdictions between regimes, on other issues, the perspectives of the different regimes are so far apart that no reconciliation or compromise is possible, and they simply have to fight it out politically.

Because of the rise in the number of international regimes, states now often have a choice over where to raise their disputes; for example, the WTO and the Cartagena Protocol on Biosafety (CPB), are both closely associated with the trade in GMOs. Interplay between these two regimes is interesting, and although, as Safrin notes, "the terms of the Biosafety Protocol do not appear . . . incompatible with those of the WTO Agreements,"⁴ differences in regime structure and principle attract nations to one or other. Damro⁵ identifies several factors which influence choice of regime, including membership size (the larger the membership set, the wider the impact of the regime's decisions); the status of the regime's decisions (the WTO's decisions are legally enforceable; the CPB's

1. Raustiala and Victor 2004, 277.

2. Raustiala and Victor 2004, 295.

3. Victor et al. 1998, 1.

4. Safrin 2002, 610.

5. Damro 2006.

decisions are not); and the mandate of the regime (the WTO's mandate is trade; the mandate of the CPB is biosafety). Busch argues that the crucial shopping factor is "precedent setting": "The complainant's choice of forum is not simply a function of which institution is likely to come the closest to its ideal ruling against the defendants, but where the resulting precedent will be more useful, facilitating litigation against other members, as opposed to inviting litigation against itself."⁶ In section 3, we examine the factors that influenced the US in its choice of the WTO. But in order to understand those factors, we must first examine the contrast between the WTO and the CPB.

2.1 *The WTO*

The WTO, which came into existence in 1995, has 149 members, including the EU and its 27 Member States, the USA, Canada and Argentina. According to the WTO, its role is to ensure "the stability of the global economy;" in doing so, it "underscores the rule of law, and it makes the trading system more secure and predictable." Disputes relating to trade are settled within the WTO, where "members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures and respecting judgements."⁷ WTO membership allows states to launch a dispute settlement process, and as Winham notes, "the conclusion of that process is nearly automatically 'adopted' (i.e. rendered legally binding) under Article 16, and the result can be enforced under articles 21–22 by sanctions authorised by the WTO."⁸

Trade in the products of agricultural biotechnology falls under the SPS agreement. Designed to regulate "measures taken by member states to protect human and animal health (sanitary measures) and those taken to protect plant life or health (phytosanitary measures)," the aim of the SPS Agreement is to ensure that measures taken by member states to protect food safety are not "disguised restrictions on international trade."⁹ This preambular clause and Article 2.2—which includes a specification that SPS measures be based on "sufficient scientific evidence"—require that objections to the trade in GM products demonstrate a difference between GM and non-GM products, not just between their respective processes of production, or their country of origin.

With regard to its relationship with other international regimes, Winham notes that the WTO's "Appellate Body has made use of the Vienna Convention in its decisions, especially in relation to the obligation to give precedence to treaties that are more recent, and it has stated that the GATT ought not to be interpreted in 'clinical isolation' from public international law."¹⁰ Regarding GM

6. Busch 2005, 2.

7. WTO 2006b.

8. Winham 2003, 148.

9. WTO 1995, preamble.

10. Winham 2003, 148.

trade, as Winham reports, “it has been argued in the WTO Secretariat that the provisions of the Biosafety Protocol should be taken into account in interpreting the provisions of WTO Agreements, especially given that there is a presumption in international law toward the removal rather than the perpetuation of legal conflict.”¹¹ However, it is doubtful whether the WTO would ever allow considerations of the precautionary principle (which is at the root of the CPB) to overrule a WTO Agreement. Tellingly, Winham reports that in the beef hormones case in 1998, the WTO’s Appellate Body “found that the precautionary principle, raised as a ‘customary rule of international law’ by the EC, did not override the requirements of the SPS Agreement for scientific risk assessment,”¹² while Safrin states that in 1998, both the hormones case and the Japanese fruit import case were rejected on the grounds that “‘precaution’ could not excuse SPS measures that otherwise violated the requirements of the SPS Agreement, such as the obligations of members to base their SPS measures on a scientific risk assessment and not to maintain such measures without sufficient scientific evidence.”¹³

Although the SPS Agreement does include “precautionary language,”¹⁴ during the Uruguay Round negotiations which established the WTO, while the EU pushed for a fuller incorporation of the precautionary principle, pressure from the US ensured that it was subordinate to the principle of scientific risk assessment.¹⁵ The EU had also argued that “exporting countries should carry the burden of proof to demonstrate the safety of a product that an importing country had found to be unsafe,” and supported “the use of criteria other than science to justify SPS measures,” but the USA’s rejection of both these proposals prevailed.¹⁶

2.2 *The CPB*

The Cartagena Protocol on Biosafety (CPB) was created because of growing public fears during the 1990s about the potential threat to human health and the environment posed by the trade in GMOs. Negotiated under the aegis of the Rio 1992 UN Convention on Bio-Diversity (CBD) to provide for the “safe transfer, handling and use of living modified organisms resulting from modern biotechnology” (Article 1), the Protocol came into force in September 2003 following its 50th ratification. Currently, 137 states are party to the Protocol,¹⁷ including the EU and all its 27 Member States, but not Canada or Argentina, which have signed but not ratified it, nor the USA, which has neither signed nor ratified it.

11. Winham 2003, 148.

12. Winham 2003, 132 footnote.

13. Safrin 2002, 611–612.

14. Safrin 2002, 610.

15. Winham 2003, 134–5.

16. Winham 2003, 137.

17. CPB 2007.

At the root of the Protocol is the precautionary principle, defined as entailing that “lack of scientific certainty . . . shall not prevent a Party of import from taking a decision, as appropriate, with regard to the import of the LMO [living modified organisms] in question, in order to avoid or minimize such potential adverse effects.”¹⁸ Under the CPB, responsibility for risk assessment and labeling of GM products lies with the exporter. Furthermore, the CPB allows for restrictions on trade in GM products based on objections to processing and production techniques, not just differences in the final product.

With regard to the CPB’s relations with other international regimes, there is considerable ambiguity. Raustiala and Victor explain how “a massive bargaining effort focused on a ‘savings clause’: a legal provision inserted into the Biosafety Protocol that purported to immunize the WTO provisions from any inconsistency with the Biosafety Protocol.”¹⁹ On the one hand, its Preamble states that the CPB should not be interpreted as displacing the rights and obligations of the parties under other international regimes. On the other hand, it also states that “the above recital is not intended to subordinate this Protocol to other international agreements.”²⁰ Although this apparent contradiction is the subject of controversy, Safrin notes that “International tribunals . . . are loath to interpret treaty provisions in such a way that they extinguish each other, let alone produce the opposite result of what the treaty plainly states,” and she suggests that the Preamble should be taken to mean that although “the inclusion of the savings clause does not mean that the Protocol is of a lower rank, class or significance than other agreements,”²¹ it will not be used to intentionally bypass trade regulations.

Nevertheless, the WTO and the Protocol have fundamentally different perspectives on the issue of trade in GM products. The WTO is driven by a trade perspective; a sound science approach to risk assessment; a legal profile backed by enforceable sanctions; a product-based assessment; and is largely inaccessible to NGOs: it is “identified more in formal terms with an emphasis on rules-based behaviour.”²² By contrast, the CPB is driven by an environmental perspective; a precautionary approach to risk assessment; a legal profile backed by normative sanctions; a process-based assessment; and welcomes participation by NGOs: it is “identified more in cognitive terms that place an emphasis on principles and shared understandings as well as communicative actions.”²³ However, Safrin suggests this collision of regimes amounts “to somewhat less than meets the eye. Customary rules of treaty interpretation, like rules of statutory in-

18. CBD 2000.

19. Raustiala and Victor 2004, 301.

20. CBD 2000.

21. Safrin 2002, 621, 620.

22. Winham 2003, 134.

23. Winham 2003, 134.

terpretation, seek to understand treaties as compatible with each other."²⁴ Winham states that the two regimes remain "in conflict with each other," and the result of this conflict could be "a growing paralysis in the implementation of international environmental law, along with an increasing hostility in the economic relations of the US and the EU."²⁵ This brings us to the question of the strategy of the USA in its venue shopping decision.

3. The US Decision to Bring its Case Against the EU Moratorium to the WTO

In our analysis, the main factors in the decision by the USA, Canada and Argentina to choose the WTO are as follows. First, the USA is not a Party to either the CBD or the CPB, while Canada and Argentina are Parties to the CBD but not to the CPB. Regarding environmental agreements, WTO rules specify that: "If both sides to the dispute have signed that agreement, then they should try to use [it] to settle the dispute. But if one side in the dispute has not signed the environmental agreement, then the WTO would provide the only possible forum for settling the dispute."²⁶ The *Biotech Products* case thus fell to the WTO: "the United States is not a party to the *Convention on Biological Diversity*, and so for the United States the *Convention* is not in force. In other words, the *Convention on Biological Diversity* is not 'applicable' in the relations between the United States and all other WTO Members."²⁷ The decision to seek dispute settlement through the WTO rather than the Protocol was thus precluded by the USA's earlier decision-taking: without ratifying the CBD it could not sign the Biosafety Protocol, and relevant disputes are thus under the remit of the WTO.

Second, the legally binding nature of the WTO's decisions enables the USA to exact heavy sanctions on defeated parties who are recalcitrant. Third, the USA sought to target developed countries rather than developing countries, at least in the first instance. Fourth, the WTO's primary focus is not the environment, but trade, which is the focus of the USA, Canada and Argentina on the GMO issue. Fifth, the US wanted to create a legal precedent to face down future attempts by states to ban its exports of GMOs. As Winham points out, the US was motivated by both "a concern that the US biotech industry and its agricultural products were becoming stigmatised in world markets," and "a perceived need to challenge the legitimacy of the EU regulatory system on agricultural biotechnology."²⁸ For the US, only the WTO had the legal authority to deal with these concerns. Failure to address these issues at the highest level would mean lack of

24. Safrin 2002, 623.

25. Winham 2003, 132.

26. WTO 2006c.

27. WTO 2006a, 302.

28. Winham 2003, 45.

"legal precision in international economic relations"²⁹ and continued trade conflict, leading to possible unilateral protectionism on a wide scale.

However, the decision to launch a WTO complaint was risky and not without drawbacks. The choice of venue attracted criticism as many observers felt that this case should have been adjudicated by the CPB rather than by the WTO. NGOs pointed to the undemocratic nature and trade focus of the WTO, asserting that "it should not be allowed to rule on what we eat or what our farmers grow,"³⁰ while other observers noted that the case could have the opposite effect from that intended; for example, Winham voices a concern that the case could have "a negative impact on public opinion in Europe," while "a victory in a dispute case would be unlikely to alter European behaviour, thereby necessitating another damaging round of retaliations."³¹ When the WTO challenge was first launched, even those who were certain that the USA would win were not confident that the EU would accept defeat. For instance, the *Washington Post* wrote that

The reason they [Europeans] reject sanity is that they are out to protect their own producers against biotech-powered Americans . . . Faced with this outrageous policy, the United States has no good choices. It can bring a case against Europe at the World Trade Organisation, which it would win; but this might not change European policy given the vehemence of the European public's suspicion of biotech.³²

Moreover, this case had the potential to seriously weaken the WTO's dispute settlement mechanisms, and to "deepen conflict between the trade and development regimes."³³ In 2003, Green MEP Caroline Lucas commented that "By trying to use the WTO to force GM foods on European Consumers, the US is launching the mother of all trade wars and could bring about the institution's collapse."³⁴ If the challenge failed, it could weaken the WTO as the world's leading forum for international free trade; if the challenge succeeded, it could result in the EU refusing to accept the ruling, which would be even more damaging to the WTO's authority.

Let us now turn to a detailed analysis of the course of the WTO challenge.

4. The Challenge Issued by the USA, Canada and Argentina to the EU's Moratorium

As the WTO is, in its own words, "a forum for governments to negotiate trade agreements [and] to settle trade disputes,"³⁵ not a court of law, the trade body

29. Winham 2003, 149 .

30. FoE 2006.

31. Winham 2003, 145.

32. *Washington Post* 2002.

33. Winham 2003, 145.

34. Quoted in Denny 2003.

35. WTO 2006c.

prefers “the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is, therefore, consultations between the governments concerned.”³⁶ Consultations were held between the USA and the EU on 19 June 2003; between Argentina and the EU on 19 June 2003; and between Canada and the EU on 25 June 2003, in an attempt to resolve the Biotech Products dispute without needing to convene a Panel. However, each set of consultations “failed to reach a mutually satisfactory resolution of the matter,”³⁷ and consequentially each complainant, on 7 August 2003, “requested the establishment of a panel to examine the matter.”³⁸

The general *de facto* moratorium formed only one part of a “three by three”-pronged complaint against the EU. Three countries; Argentina, Canada and the US, lodged three complaints against the EU’s Biotech Product approval system: the existence of a general *de facto* moratorium between October 1998 and August 2003; the national Member State safeguard measures imposed by six EU member states; and the existence of product specific moratoria. An USDA employee explained the terms of the USA’s complaint:

There are three levels of moratoria going on. First, there is a moratorium, which is general policy despite not being published—nothing gets approved and no decisions are made. Second, there is a moratorium going on at the member state level, implemented through measures taken under the safeguard clause of 90/220 and 2001/18. These safeguard clauses are meant to be temporary but some of them are still in place and were initiated in 1996 and 1997. Third, there was a moratorium at the product level. Although you would see some movement on some products, they never got to a final stage—the approval was just in limbo.³⁹

However, because the general *de facto* moratorium is the most important issue at stake,⁴⁰ it is this aspect of the WTO report that we will examine most fully.

The complaints are framed in terms of the Agreements that the EU has allegedly contravened. Suppan states that

Argentina, Canada and the United States charged the EC with violating its WTO commitments under four agreements: the Agreement on Agriculture, the General Agreement on Trade and Tariffs [GATT] 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade [TBT].⁴¹

However, although the Agreement on Agriculture (Article 4.2) was cited in the initial complaint and consultation request, it was dropped before the submis-

36. WTO 2006b.

37. WTO 2006a, 1.

38. WTO 2006d, 1.3, 1.6, 1.9.

39. USDA 2005a.

40. Bobo implies that the product specific challenge was launched by the USA primarily to provide evidence of the general *de facto* moratorium. Bobo 2005.

41. Suppan 2006.

sion stage. Moreover, only Canada argued that the EC had contravened the TBT Agreement, and then only regarding the “product-specific and national measures,” not the general moratorium. Furthermore, as the SPS and TBT agreements are “mutually exclusive,”⁴² citing both of them provides a possible alternative rather than a stronger case. Therefore, the Panel’s ruling addressed only those claims under the SPS agreement, and its relevant GATT articles.

Before turning to a detailed examination of the WTO findings, it is important to contextualize the report by looking at the issues the Panel did not address. First, the WTO report did not address issues *not* raised by the parties, including

whether the European Communities has a right to require the pre-market approval of biotech products [and] whether the European Communities’ approval procedures as established by Directive 90/220, Directive 2001/18 and Regulation 258/97, which provide for a product by product assessment requiring scientific consideration of various potential risks, are consistent with the European Communities’ obligations under the WTO agreements.⁴³

The Complaints charged only that the EU was failing to implement its own procedures for the approval of GMOs. As explained by an employee of a lead agency in the WTO dispute,

The reason we took the case was that we did not believe that the EU system was working, it was not functioning, and we wanted them to create a system that works. We want them to implement their own system, and that was still not happening even after many years of bilateral discussions and prompting.⁴⁴

Second, the Panel did not address certain issues *raised* by the complainants. Most importantly, “the Panel did *not* examine whether biotech products in general are safe or not [or] whether the biotech products at issue in this dispute are ‘like’ their conventional counterparts.”⁴⁵ The USA’s regulatory process for GMOs is founded on the premise that the products of agri-biotechnology are “like” conventional products. Indeed, their approval depends only on ascertaining “substantial equivalence.” The WTO’s refusal to rule on “likeness,” thus suggests that it does not necessarily adhere to US assumptions about transgenics. Moreover, this decision means that the case could neither be judged under the TBT, which identifies protectionism between domestic and foreign “like” products, nor under certain procedural SPS clauses, such as that “procedures are undertaken and completed . . . in no less favourable manner for imported products than for *like* domestic products.”⁴⁶

Let us now turn to analysis of the WTO findings.

42. WTO 2006d, 4.297.

43. WTO 2006d, 8.3.

44. USDA 2005b.

45. WTO 2006d, 8.3.

46. WTO 1995, emphasis added.

5. Analysis of the WTO Findings

5.1 *The Existence, Scope and Duration of the Moratorium*

The USA described the moratorium as “the suspension by the European Communities of consideration of applications for, or granting of, approval of biotech products.”⁴⁷ In response, the European Communities asserted that, since it had “never adopted any formal or informal act of any kind to impose a moratorium on approvals . . . the measure described by the Complaining Parties did not, and does not exist.”⁴⁸ It is undeniable that, moratorium or not, approvals did not proceed to final authorization, but although the EC “acknowledge[d] that no applications were approved between October 1998 and August 2003,” it claimed this was “prudent and responsible” practice, not a moratorium.⁴⁹ The Panel did not agree and concluded that, “Based on the evidence before it, the Panel has found that the European Communities applied a general *de facto* moratorium on approvals of biotech products between June 1999 and 29 August 2003,”⁵⁰ thus agreeing with the complainants that a *de facto* moratorium existed.

However, the moratorium is difficult to define both in scope and in duration, a situation that added weight to the EU’s argument. With regard to scope, because the WTO case relates to all “biotech products,” crops and foods, all approvals were examined by the Panel, including those novel food approvals issued *during* the moratorium. Although these approvals have been largely ignored by the literature, certain GM-derived food products were authorized under the simplified procedure of Novel Foods Regulation 258/97.⁵¹ Indeed, according to the EU, “between October 1998 and 2004 seven biotech food products were approved.”⁵² However, due to procedural differences between standard authorization and the simplified procedure, the WTO Panel ruled that these approvals do “not disprove the Complaining Parties’ claim that no ‘applications’ for the placing on the market of biotech products were ‘approved’ by the European Communities in the relevant time-frame.”⁵³ By doing this, the Panel narrowed the scope of the moratorium—to cover only “whole” crop and food products, not derivatives.

With regard to duration, both the start date and the end date of the moratorium are uncertain, and were open to debate until the Panel’s ruling. The final GMO approval granted to crops in the EU was in October 1998, which is viewed by many, including the Complaining Parties, as the start of the EU’s GMO moratorium. However, as the *Biotech Products* case addresses only decisions made on

47. WTO 2006d, 7.439.

48. WTO 2006d, 7.458.

49. WTO 2006d, 7.457.

50. WTO 2006d: 8.6

51. Lieberman and Gray 2006.

52. WTO 2006d, 7.497.

53. WTO 2006d, 7.513.

applications, and, as no decisions *not* to approve biotech products were made before June 1999, the Panel ruled that no moratorium existed before the signaled “intention on the part of the Governments of the Group of Five countries to do what is within their power to prevent the approval of further applications.”⁵⁴ In other words, so far as the WTO is concerned, the moratorium did not commence until June 1999.

The end date has proved to be even more controversial than the start date. The interim report outlined two opposing views: the EU argued that (if it had ever existed) the moratorium ceased to exist “subsequent to the establishment of the Panel;”⁵⁵ while the Complaining Parties alleged that “the moratorium was still in effect in February 2005, when the Panel’s second and last substantive meeting with the Parties was held.”⁵⁶ In settling the matter, the Panel’s interim report was ambiguous. Confirming that a moratorium did exist in August 2003, the Panel at first ruled that the moratorium “ceased to exist as a measure generally applicable to all biotech products with pending applications when the approval for Bt-11 sweet maize (food) was granted in 2004.”⁵⁷ However, in the same report, the Panel later stated, “we cannot, and do not, express a view on whether, notwithstanding the approval of Bt-11 . . . an amended *de facto* moratorium on approvals continues to exist or whether a new general *de facto* moratorium was subsequently imposed.”⁵⁸ Finally, in the interim report conclusions, the Panel “refrain[ed] from making recommendations,”⁵⁹ on the assumption that the moratorium had already ended.

However, the Panel’s final report responds to the complainants’ displeasure with the interim outcome. Additional comments made by Argentina, Canada and the USA assert “that the Panel’s analysis of this issue did not take account of all relevant factors and that the general moratorium which the Panel found to have existed in August 2003 did not cease to exist after August 2003.”⁶⁰ The Panel’s conclusions were therefore amended to include a new clause, which reads;

In the light of these conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring the general *de facto* moratorium on approvals into conformity with its obligations under the SPS Agreement, if, and to the extent that, that measure has not already ceased to exist.⁶¹

The amendments made between the interim and final reports regarding the current status of the moratorium are important; first because they alter the

54. WTO 2006d, 7.478.

55. WTO 2006a, 581.

56. WTO 2006a, 393.

57. WTO 2006a, 587.

58. WTO 2006a, 588.

59. WTO 2006a, 1033.

60. WTO 2006d, 6.74.

61. WTO 2006d, 8.16.

possibility of recommendations and sanctions; and second, because they illustrate the compromises made by the Dispute Settlement Panel.

5.2 *Whether the Moratorium Breached the EU's WTO Commitments*

In addition to the decisions regarding its existence, scope and timeframe, the Panel's remit required a decision be made on whether the moratorium breached the EU's WTO commitments, and, if so, which obligations it contravened. The EU argued that the moratorium could not be challenged under the WTO agreement because it was a practice—not an SPS measure. However, the Panel decided that “the moratorium is a measure which is the result of other measures (decisions) applied separately by the Group of Five countries and the Commission.”⁶² Consequently, the Panel ruled that, “the general *de facto* moratorium on approvals constitutes a challengeable EC measure.”⁶³

As noted above, the *Biotech Products* case was examined only under the terms of the SPS agreement and its relevant GATT dispute settlement articles; the final report discusses each SPS Article on which challenges were made, to determine whether the moratorium is inconsistent with its provisions. The first Article treated by the Panel is 5.1, which states that “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to their circumstances, of the risks to humans, animals or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”⁶⁴

However, fundamental to the issue of whether SPS Article 5.1 (or any other SPS article) has been contravened, is the question of whether the general moratorium is, or is not, an SPS measure; the Complaining parties claim it is, as “it is applied . . . to protect against certain of the risks identified in Annex A;”⁶⁵ the EU claims it is not, rather the complainants have merely identified a

delay in the completion of approval procedure [and] delay of this kind cannot constitute an SPS measure within the meaning of Annex A(1). Delay is a failure to act in a timely manner. A failure to act in a timely manner can be reviewed under the procedural obligations set out in Article 8 and Annex C(1) . . . as an issue of the application of an SPS measure (in this case, the EC approval system).⁶⁶

The Panel then embark on a lengthy analysis and discussion of whether the moratorium constitutes an SPS measure, establishing that “the decision to delay final approval decisions did not itself establish a procedure for approving biotech products, or . . . preventing the final approval.”⁶⁷ Nor did this decision

62. WTO 2006d, 7.1292.

63. WTO 2006d, 7.1295.

64. WTO 1995.

65. WTO 2006d, 7.1328.

66. WTO 2006d, 7.1329.

67. WTO 2006d, 7.1371.

result “in the EC applying a different type of approval procedure between June 1999 and August 2003.”⁶⁸ Noting that, for it to be an SPS measure, the general moratorium would have to be a substantive “requirement, a procedure or a measure of a different nature,”⁶⁹ the Panel ruled that “the European Communities’ decision to apply a general moratorium on approvals was not an SPS measure.”⁷⁰ This is reiterated in the Conclusions, where we are instructed that

The Panel determined that the moratorium was not itself an SPS measure within the meaning of the SPS Agreement, but rather affected the operation and application of the EU approval procedures which are set out in the relevant EC approval legislation and which we had found to be SPS measures.⁷¹

This decision is of great importance to the case, as it renders the complaint pursuant to Article 5.1 obsolete; the EU cannot have acted inconsistently with the SPS’s provisions if the general moratorium is not an SPS measure. The same analysis applies to Article 5.6 of the SPS, Article 5.5 of the SPS, and therefore Articles 2.2 and 2.3 of the SPS, which were consequential complaints. A similar conclusion is applicable to Article 7 and Annex B(1) regarding the prompt publication of all sanitary and phytosanitary regulations. The Panel decided that since this Article and Annex do not require documentary publication of all generally applicable measures “concerning the administration, or operation, of an SPS measure,”⁷² the EU had not acted inconsistently with these obligations. The USA charged the European Communities with inconsistencies relating to Annex A(1)(b) regarding the communication, examination, transmission and processing of approval applications, and Argentina claimed that the European Communities had failed to take into account the needs of developing countries, pursuant to Article 10.1 of the SPS Agreement. But both of these claims failed due to a lack of presented information.

However, with respect to Directives 90/220 and 2001/18, the Panel concluded that the general *de facto* moratorium 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.”⁷³ More specifically, the moratorium was judged to contravene one clause of one section of one Annex. The conclusion reads; “The European Communities has acted inconsistently with its obligations under Annex C(1)(a), first clause, of the SPS Agreement and, consequently, with its obligations under Article 8 of the SPS Agreement by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.”⁷⁴ Annex C(1)(a) reads “Members shall ensure, with respect to any procedure, to check and ensure the fulfilment of sanitary or

68. WTO 2006d, 7.1373.

69. WTO 2006d, 7.1338.

70. WTO 2006d, 7.1393.

71. WTO 2006d, 8.6.

72. WTO 2006d, 7.1458.

73. WTO 2006d, 8.6.

74. WTO 2006d, 8.14(a).

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.”⁷⁵ As the Panel did not examine whether “the biotech products at issue in this dispute are ‘like’ their conventional counterparts,”⁷⁶ the report could not pass judgment on the second clause of Annex C(1)(a)—that procedures are undertaken “in no less favourable manner for imported products than for like domestic products.”⁷⁷ Only the requirement regarding “undue delay” was judged to contravene WTO obligations.

The EU’s response was that the delay was not “undue,” but necessary, due to the inadequacy of EU GMO policy during the transition between the implementation of Directives 90/220 and 2001/18. However, the Panel decided, on this one clause, that “i) the perceived inadequacy of EC approval legislation and ii) evolving science and the application of a prudent and precautionary approach would not provide a justification for delays which might have occurred as a result of the application of the general EC moratorium on final approvals.”⁷⁸

The Panel thus judged that a general *de facto* moratorium on new GMO approvals did exist, and the fact that it caused undue delays in the approval procedure contravened WTO SPS obligations. However, even if the complainants choose to view this narrow ruling as a “win,” the addition of a significant paragraph, specifying that under certain conditions a moratorium would *not* be considered an “undue delay,” undermines the victory. In what reads like a personal note to the parties, the Panel emphasized that

we wish to note that our conclusion above should not be construed to mean that it would under no circumstances be justifiable, in the light of the provisions of Annex C(1)(a), first clause, to delay the completion of approval procedures by imposing a general moratorium on final approvals of biotech products. We consider that there may conceivably be circumstances where this could be justifiable. For instance, if new scientific evidence comes to light which conflicts with available scientific evidence and which is directly relevant to all biotech products subject to a pre-market approval requirement, we think that it might, depending on the circumstances, be justifiable to suspend all final approvals pending an appropriate assessment of the new evidence. The resulting delay in the completion of approval procedures might then be considered not ‘undue.’⁷⁹

In our opinion, this paragraph is crucial. First, as Friends of the Earth (FoE 2006) note, although “the US tried to obtain a ruling which explicitly declared the EU’s moratorium *per se* illegal” this statement sanctions the existence of “specific and general moratoria on GMOs” under certain circumstances. Sec-

75. WTO 1995.

76. WTO 2006d, 8.3.

77. WTO 1995.

78. WTO 2006d, 7.1530.

79. WTO 2006d, 7.1532.

ond, from the fact that the Panel consider that a GMO moratorium could be justifiable, we can infer that they have taken into consideration the possibility that the products of agri-biotechnology are not “like” their conventional counterparts, contrary to the USA’s assertion. This is borne out by the Panel’s refusal to comment on whether biotech products are safe or not, or whether biotech products are “like” their conventional counterparts.⁸⁰ Third, it makes the USA’s “victory” seem even slimmer, because as WTO rulings set precedents, this statement ensures that the conclusions of the *Biotech Products* case do not preclude a) the future suspension of approval procedures in Europe, and b) the instigation of moratoria on the approvals of GMOs in other countries. Therefore, although the EU’s moratorium was found guilty under the GATT agreement of having “nullified or impaired benefits accruing to the United States, [Canada and Argentina],”⁸¹ the Panel’s ruling effectively means that the future ability of the USA to prevent countries applying strict biotech legislation is compromised.

6. The Implications of the WTO Report for the US’s Choice of Venue

Returning to our theoretical framework, what does the analysis of the WTO case teach us about the wisdom of the US, Canada and Argentina in choosing the WTO as the forum for their challenge to the EU moratorium? On the plus side (from the USA’s perspective), the initial press reaction to the WTO report was very favorable. When the Panel’s interim report was first released, many newspapers, trade groups and commentators interpreted the findings as a clear win for the USA and the producers of biotech products. For instance, Julian Borger of the *Guardian*, reported that

The World Trade Organisation last night ruled that Europe had broken international trade rules by blocking the import of genetically modified food, in a decision US trade officials hailed as a victory . . . The US maintained the ruling lent support to the Bush Administration’s efforts to force an acceleration in EU approval procedures for GM food imports.⁸²

Similarly, the *Financial Times* stated that “the WTO ruled . . . that European restrictions on the introduction of genetically-modified foods violated international trade rules, finding there was no scientific justification for Europe’s failure to allow use of new varieties of corn, soybeans and cotton.”⁸³ The *Guardian* claimed that the EU was “fearing huge compensation claims from the American biotech industry after a ruling suggesting member states had illegally banned imports of GM food.”⁸⁴

Moreover, the WTO endorsed the US view that the CPB could not be

80. WTO 2006d, 8.3.

81. WTO 2006d, 8.15.

82. Borger 2006.

83. Alden et al. 2006.

84. Gow 2006.

deemed relevant to the GM case. Although the EU referred to both the CBD and the Biosafety Protocol as justification for its precautionary decision-making and GMO import restrictions, the WTO report states, in relation to the CBD, that

if a rule of international law is not applicable to one of the Parties to this dispute, it is not applicable in the relations between all WTO members. Therefore, in view of the fact that the United States is not a party to the *Convention on Biological Diversity*, we do not agree with the European Communities that we are required to take into account the Convention on Biodiversity in interpreting the multilateral WTO agreements at issue in this dispute.⁸⁵

A similar WTO judgment was recorded regarding the Biosafety Protocol, in that the Panel decided that, since Argentina and Canada had signed the Biosafety Protocol but not ratified it, therefore are not Parties to it, and since the USA had neither signed nor ratified it, "we do not agree with the European Communities that we are required to take into account the Biosafety Protocol in interpreting the multilateral WTO agreements at issue in this dispute."⁸⁶ The Panel added that the Biosafety Protocol "entered into force only on 11 September 2003, i.e. after this Panel was established by the DSB."⁸⁷

Furthermore, the legal authority of the WTO does not appear to have been diminished by the case, though this is probably because its report was a judicious balancing act between US and EU positions, rather than a wholehearted endorsement of US demands. The fact that EU compliance with its findings will not be particularly onerous means that the question of EU non-compliance does not arise, and so any formal threat to the prestige of the WTO has been averted.

On the minus side (from the USA's perspective), by contrast to the initial press analysis of the interim report suggesting a clear victory for the USA, Canada and Argentina, when the report became more widely available, less favorable interpretations began to emerge. For instance, Phil Bereano of Geactivists said,

The US claims of victory for the future of GM foods are bogus. The public, consumers and a growing number of governments around the world remain opposed to GMOs. There will continue to be no market in Europe for GMOs. In addition, the WTO dismissed most of the US arguments in the case. This was no victory for the biotech industry and countries can continue to introduce strict rules and measures to regulate GMOs, to protect the public and the environment.⁸⁸

Similarly, the *New York Times* reported that the WTO's conclusions were "largely of historical interest [and] will not alter the system within which the European

85. WTO 2006d, 7.74.

86. WTO 2006d, 7.74.

87. WTO 2006d, 7.75.

88. Bereano 2006.

Union takes decisions on GMOs.”⁸⁹ Likewise, a spokesman for Peter Mandelson (EU Commissioner for Trade) claimed, in a letter to the *Guardian*, that

Nothing in the report can oblige the EU to modify its framework on GMO approvals. Both the public submission by the US and the panel request explicitly do not challenge the EC’s regulatory framework, which is rooted in science based risk assessment. Nothing in this report can compel us to change that framework. Nor, to give due credit to the much-maligned WTO, was the panel given a mandate to judge our standards; simply the application of them between 1998 and 2003 . . . Whatever America’s master plan for GMOs might be, the WTO case is largely about the past and will not compel the EU to reassess its regulatory framework on GMOs.⁹⁰

Moreover, the WTO Panel declined to rule on three substantive issues: 1) whether or not GM products are safe; 2) whether sound science makes the precautionary principle irrelevant to GM safety issues; and 3) whether product-based criteria (“substantial equivalence”) trump process-based criteria for evaluating the safety of GM products. As a result, there has been no narrowing of the gulf between the WTO and the CPB, and the tension between them remains. Furthermore, the moral authority of the CPB has not been undermined—environmental NGOs continue to champion it as the proper forum for the resolution of issues of the safety of GM products.

As a result of the WTO ruling, the European Union is not required to change any aspects of its general approval process; the fact that the moratorium appears to have ended means no penalties have been issued; and the conclusions of the case specify only that the EU’s policies be brought into line with WTO obligations—i.e. that delayed biotech applications must be finalized. Moreover, even if certain GM products do achieve “import and marketing” approval by EU regulators, no market in Europe is likely to appear for GM foods and biotech derived products, and therefore there will be little demand for GM crops and seeds, until or unless European consumers change their minds. The WTO report may be interpreted by the complainants as a victory, but it will be a hollow victory, if in Europe, GMOs are doomed to commercial failure for the foreseeable future.

7. Conclusion

In this article, we have analyzed the WTO Panel’s 2006 report on the challenge mounted by the USA, Canada and Argentina against the *de facto* moratorium imposed by the EU on GM food and crops, with a view to evaluating what it tells us of the wisdom of the US, Canada and Argentina in bringing the case to the WTO. We have found that the report judges the EU guilty of violating WTO agreements, but only in a narrow, technical way, and that it rejects the com-

89. Meller 2006.

90. Power 2006.

plainants' challenges on more substantive issues. We conclude that the case is a pyrrhic victory for the USA, which formally vindicates its challenge to the EU moratorium, but in practice does little to settle the underlying issues at stake in the conflict between the EU and the USA, such as whether the precautionary principle is a legitimate justification for indefinite resistance to the import of GM products, and whether the CPB rather than the WTO is the right place for the resolution of the conflict. By its judicious and balanced report, the WTO has maintained its own standing in the international community, but the outcome does not appear to vindicate the complainants' choice of forum. The Panel did not give unequivocal support to the US' demands, therefore choosing the WTO did not produce an "ideal ruling." Moreover, the insertion of a conditional clause prevents the use of this case as a useful precedent in future cases. In terms of "forum shopping" this case has thus not fulfilled the USA's desired outcomes. Furthermore, the popularity of GM products in Europe has not been enhanced by the case. The question arises, therefore, whether the US decision to choose the WTO as the forum in which to bring the case of the EU moratorium on biotech products, was an own goal. Would it have been better advised either to ratify the CBD and CPB and to fight its case on enemy territory, or not to challenge the EU moratorium in any international forum?

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