Legal Issues of Economic Integration
Opening Pandora’s Box: The Panel’s Findings in the EC-Biotech Products Dispute

By Denise Prévost*

1. Introduction

The long-awaited reports of the Panel in the EC-Biotech Products dispute have potentially opened a Pandora’s Box of unintended consequences for the delicate balance between free trade and national sanitary and phytosanitary protection. This balance is reflected in the negotiated disciplines of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

This politically sensitive dispute involves a challenge by the United States, Canada and Argentina to the measures of the European Communities (EC) affecting the approval and marketing of biotech products. The repeatedly delayed Panel reports were circulated to the WTO membership on 29 September 2006. However, since 7 February 2006, when the confidential interim reports

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1. Panel Reports, European Communities-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R, circulated on 29 September 2006 (not yet adopted) [hereinafter Panel Reports, EC-Biotech Products]. A single Panel was established on 29 August 2003 to hear the three complaints by the US, Argentina and Canada against the EC, and the Panel issued its three reports in a single document, comprising some common parts and some parts specific to each report. The final reports were issued to the Parties on 10 May 2006, and circulated on 29 September 2006. The reports will be adopted within 60 days unless one or more of the Parties indicates its intention to appeal under Article 6.4 of the Dispute Settlement Understanding (DSU).

2. The complainants are among the four biggest growers of biotech crops. In 2005, the U.S. accounted for 55% of the global area planted with biotech crops (49.8 million hectares), Argentina for 19% (17.2 million hectares) and Canada for 6% (6.1 million hectares), according to the International Service for the Acquisition of Agri-biotech Applications. See ‘Global Status of GM/Biotech Crops in 2005: Executive Summary’ ISAAA Briefs No. 34–2005, available at http://www.isaaa.org/kc/bin/briefs34/es/index.htm (accessed 18 October 2006).

3. As in the Panel reports, the terms ‘biotech products’ and ‘genetically modified organisms’ (GMOs) will be used interchangeably here.

4. The Panel reports, initially scheduled for March 2005, were delayed six times before they were finally circulated on 29 September 2006. This means that the proceedings from the time of com-
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were issued to the Parties and subsequently leaked to the public, the Panel’s findings have been the subject of much public discussion. Regrettably, much of the commentary (including in the media, by NGOs and by politicians) has been misinformed, at best, and, at worst, deliberate scaremongering.

For example, with reference to the interim reports, Friends of the Earth Europe claimed that the Panel ‘has bluntly ruled that European safeguards should be sacrificed to benefit biotech corporations’; and the then-United States Trade Representative (USTR), Rob Portman, issued a statement that, ‘the facts on agricultural biotechnology are clear and compelling. It is a safe and beneficial technology that is improving food security and helping to reduce poverty worldwide.’ Reacting to the final Panel reports, USTR Susan Schwab stated, ‘The WTO has ruled in favor of science-based policymaking over the unjustified, anti-biotech policies adopted in the EU,’ and US Agriculture Secretary, Mike Johanns, said, ‘Today’s decision affirms what the world’s farmers have known about biotechnology for many years... Biotechnology crops not only are helping to meet the world’s food needs, they also are having a positive environmental impact on our soil and water resources.’ The US is reportedly using the outcome of this dispute to warn other countries, especially developing countries, against the use of regulatory barriers to biotech products.

position of the Panel on 4 March 2004 until the issuing of the final Panel reports to the parties on 10 May 2006 took more than two years. See the discussion on the delays in proceedings in this case, in Section 9 below.

5. See the discussion on the Panel’s actions to address the breach of confidentiality, in Section 9 below.


8. See ‘U.S. Trade Representative Susan Schwab and U.S. Agriculture Secretary Mike Johanns Announce Favorable Ruling in WTO Case on Agricultural Biotechnology’ Press Release, Office of the United States Trade Representative, 29 August 2006.

9. The US has long been trying to gain acceptance of its biotech products into developing country markets. The Guardian Unlimited reports, ‘It is now clear that the real reason the US took Europe to the WTO court was to make it easier for its companies to prise open regulatory doors in China, India, south-east Asia, Latin America and Africa, where most US exports now go. This is where millions of tonnes of US food aid heads, and where US GM companies are desperate to have access, buying up seed companies and schmoozing presidents and prime ministers’ (See ‘America’s Master Plan is to Force GM Food on the World’, Guardian Unlimited, 13 February 2006). Ac-
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Responses reflect misapprehension regarding what the Panel’s findings mean for the European regime on the approval and marketing of biotech products, and potentially for those of other countries.¹⁰

Such misunderstandings of the Panel’s findings are not without peril. Not only do they fan the flames of public dissatisfaction with the multilateral trading system, but they may also discourage other countries, particularly developing countries, from maintaining rigorous regulatory regimes for biotech products. In addition, they divert attention away from the truly worrisome aspects of the Panel reports (which, even excluding annexes, are over 1000 pages long). These lie in the often-surprising legal interpretations made by the Panel of some of the SPS Agreement’s provisions, which may have unintended negative effects for future SPS disputes. The Panel’s legal interpretations matter not only for future dispute settlement cases decided under the SPS Agreement, but also, perhaps more importantly, for ‘settlements negotiated in the law’s shadow.’¹¹

A large part of SPS disputes are resolved through informal bilateral consultations rather than by resort to adjudication. These negotiated settlements are informed by the content given to the legal provisions in dispute settlement.

It is not yet known whether one or more Parties will appeal the Panel reports and, if so, whether some of the Panel’s legal findings may be overturned on appeal. Nevertheless, the approach taken by the Panel to the complex legal and factual issues in dispute warrants critical attention already at this stage. This is necessary in order to understand correctly the Panel’s findings and to dispel the misapprehensions that have arisen, as well as in order to identify the more problematic aspects of the Panel’s interpretations of certain provisions of the SPS Agreement.

¹⁰ While the recommendations and rulings contained in adopted panel reports are binding only on parties to the dispute, and the WTO does not have a formal precedent system, in practice, later panels follow adopted findings in previous disputes. This is due to the legitimate expectations that previously adopted reports create among WTO Members, as well as the need to ensure the security and predictability of the multilateral trading system under Article 3.2 DSU (further on this issue see Panel Report, United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R, footnote 733). Thus, the relevance of the findings in this case, to the extent that they are not overturned on appeal, extends beyond the present dispute.

2. Scope of the Dispute

To grasp accurately the ramifications of this case, it is useful to start by examining what exactly this dispute was about and by making clear what it was not about.\textsuperscript{12}

It should be noted, as expressly stated by the Panel,\textsuperscript{13} that the dispute did not concern the question of whether biotech products in general are safe or not or whether the conclusions of the EC scientific committees regarding the safety of specific biotech products are scientifically valid or not.\textsuperscript{14} The Panel also did not address whether biotech products are ‘like’ their conventional counterparts or not. With regard to the EC regime for biotech approvals, the Panel did not examine whether the EC has a right to require pre-marketing approval of biotech products or not or whether the EC approval procedures requiring a product-by-product assessment of risks are WTO-consistent or not.\textsuperscript{15} In addition, the dispute was not about the WTO consistency of current EC legislation regarding biotech products.\textsuperscript{16}

Instead, the dispute concerned three types of measures:\textsuperscript{17} (1) the general \textit{de facto} EC moratorium on the approval of biotech products;\textsuperscript{18} (2) certain

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\item \textsuperscript{12} This point was made in Peter Van den Bossche, ‘Preliminary Conclusions of the Panel in the EC-Biotech Products Dispute: Much ado about very little?’ posted on the International Law and Policy Blog, available at <http://worldtradelaw.typepad.com/ielpblog/> (accessed 18 July 2006).
\item \textsuperscript{13} See Panel Reports, EC-Biotech Products, para. 8.3. The Panel noted that most of the issues it did not address were not raised by the complainants. Although the complainants did raise the question of likeness of biotech and conventional products, the Panel found it unnecessary to address this issue.
\item \textsuperscript{14} The only scientific issue raised was the scientific basis for the objections of some EC Member States, and it was in connection with this issue that the Panel consulted scientific experts.
\item \textsuperscript{15} It is interesting that the pre-marketing approval system itself was not challenged (as noted by the Panel more than once, see Panel Reports, EC-Biotech Products, paras 7.1353 and 7.1693) despite the fact that such a system sits uncomfortably with the disciplines of the SPS Agreement. The SPS Agreement requires that a risk assessment must exist on which the relevant SPS measure (such as a marketing prohibition) is based. A pre-marketing approval system, however, prohibits the marketing of a product until such time as its safety is proven by means of a risk assessment. It can be seen as a provisional ban pending a risk assessment. However, as most countries maintain pre-marketing approval systems for particular products, it is possible that the Complainants wished to avoid opening this can of worms.
\item \textsuperscript{16} The dispute was brought before the new EC legislation came into force, and therefore addressed issues arising under the old legislation. The current regime is embodied in Regulation on Traceability and Labelling of Genetically Modified Organisms and the Traceability of Food and Feed Products Produced from Genetically Modified Organisms and Amending Directive 2001/18/EC No 1830/2003/EC and Regulation on Genetically Modified Food and Feed No 1829/2003/EC.
\item \textsuperscript{17} See Panel Reports, EC-Biotech Products, para. 7.98.
\item \textsuperscript{18} All three Complainants challenged the general EC moratorium.
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EC measures affecting the approval of specific biotech products;¹⁹ and (3) the safeguard measures of six EC Member States²⁰ prohibiting biotech products that had been approved on European level.²¹ These three measures were challenged under various provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and the Agreement on Agriculture. The Panel analysed the measures under the SPS Agreement and, having found violations thereof, considered it unnecessary to rule on their conformity with the TBT Agreement, GATT 1994 or the Agreement on Agriculture.

The Panel’s findings regarding the claims under the SPS Agreement present interesting issues that deserve careful analysis. This casenote will not attempt to provide a comprehensive discussion of all the Panel’s findings, but will instead limit itself to selected issues. A critical look will first be taken at the Panel’s findings with regard to the scope of application of the SPS Agreement. Thereafter, the Panel’s findings of violation of that agreement will briefly be examined. Then attention will be turned to more general and systemic issues of interest in the reports.

3. Scope of Application of the SPS Agreement

The SPS Agreement is applicable to all SPS measures which may, directly or indirectly, affect international trade,²² in terms of Article 1.1 thereof. Therefore,

¹⁹. Different Complainants challenged different specific measures in this category. These measures relate to approval procedures concerning 30 different biotech products.

²⁰. Nine separate safeguard measures were taken by six EC Member States, namely Austria, France, Germany, Greece, Italy and Luxembourg. In each case, the relevant scientific committee of the EC found that there was no scientific basis for the use of the safeguard. The Commission has separate cases under way against Austria, France, Luxembourg and Germany for refusing to lift bans on gene-altered products, including Switzerland-based Syngenta AG’s Bt11 pest-resistant corn. In the meantime, Austria is appealing a European Court of Justice ruling against the country’s planting ban, and Greece is resisting a Commission order to allow for sowing Monsanto’s MON810 corn, which was approved before 1998.

²¹. Despite the fact that these measures were taken by Member States, the EC as a whole is the responding party in respect of the challenges to these measures. This is due to the fact that the Complainants have directed their complaints against the EC, and the EC has not contested that, for purposes of this dispute, the relevant MS measures are attributable to it. See Panel Reports, EC-Biotech Products, para. 7.101.

²². The uncontroversial issue of whether the measures ‘may directly or indirectly affect international trade’ was dealt with briefly. As did previous panels faced with this question, the Panel in this case noted that it is not necessary to prove that an SPS measure has an actual effect on trade, but only that it may do so. It therefore readily found that as the EC approval procedures lay down requirements for pre-marketing approval that also apply to imported biotech products, they may affect international trade. Further, as the procedures themselves are lengthy and impose information and
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the first issue before the Panel was the question of whether the relevant EC procedures for the approval of biotech products could be seen as 'SPS measures' as defined in Annex A(1) of the SPS Agreement. The EC approval procedures, which are relevant to all three categories of challenged measures, are found in Directive 2001/18 (and its predecessor Directive 90/220) on the Deliberate Release into the Environment of Genetically Modified Organisms and Regulation 258/97 concerning Novel Foods and Novel Food Ingredients. The Panel emphasised, however, that it was not these procedures themselves that were being challenged by the Complainants, but rather the EC's application of these procedures.

In order to determine whether the EC approval procedures could be regarded as SPS measures, the Panel examined the definition of an SPS measure in Annex A(1) of the SPS Agreement, which provides:

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

documentation requirements, they may directly or indirectly affect international trade. See Panel Reports, EC-Biotech Products, para. 7.435.

23. See Panel Reports, EC-Biotech Products, para. 7.103. The Complainants had alleged that the EC approval procedures were SPS measures and fell within the scope of the SPS Agreement, whereas the EC argued that these procedures fell in part within the scope, and in part outside the scope, of the SPS Agreement. In particular, the EC regarded the environmental objectives of its legislation to fall outside the scope of the SPS Agreement and instead under the TBT Agreement.


26. The Panel also examined the question whether a law or a requirement contained therein could be regarded as embodying an SPS measure as well as a non-SPS measure. It found that where two different objectives are sought by a measure embodied in a single document, one of which falls within the definition of an SPS measure and the other of which does not, there are in effect two separate measures which fall to be examined under different WTO Agreements. The Panel therefore had to determine whether the EC approval procedures are SPS measures, and if so, if they are only SPS measures. See Panel Reports, EC-Biotech Products, paras 7.150–7.174.
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.

The Panel found that there are three elements in this definition: (1) the purpose of the measure, as enumerated in sub-paras (a) to (d); (2) the form of the measure, as described in the second para. (‘all relevant laws, decrees, [and] regulations’); and (3) the nature of the measure, also set out in the second para. (‘requirements and procedures, including…’).27 These three elements will now be examined in turn.

As correctly identified by the Panel, the purpose of the measure, as enumerated in sub-paras (a) to (d), is crucial to the classification of a measure as an SPS measure under this definition. This list is exhaustive, designed to limit the application of the SPS Agreement to a specific category of measures, broadly speaking those that aim to protect human, animal or plant life or health, or the territory of a Member, from specified risks in food/feed or risks from pests or diseases. The Panel therefore had to determine if the EC approval procedures were aimed at one or more of the listed objectives. It examined, in turn, all the stated purposes of the approval legislation with regard to the deliberate release of biotech products into the environment (Directive 90/220 and its successor Directive 2001/18) and that with regard to novel foods (Regulation 258/97).

The stated objective of Directives 90/220 and 2001/18 is the protection of human health and the environment from the adverse effects that might arise from the deliberate release into the environment or the placing on the market of genetically modified organisms (GMOs).28 While the Directives do not specifically set out which risks for human health or the environment they aim at, the Panel identified a series of such risks from their provisions on information requirements and risk assessment coverage. After rejecting the EC’s argument that the SPS Agreement was not intended to cover measures aimed

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27. See Panel Reports, *EC-Biotech Products*, para. 7.149
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at risks to the environment in general, the Panel proceeded to examine each of the sub-paras (a) to (d) of Annex A(1) to establish whether certain potential adverse effects of GMOs identified in the Directives fall under these sub-paras. It found that all the risks aimed at by the Directives were covered by one or more sub-paras of Annex A(1). With regard to Regulation 258/97, the Panel noted that it had three purposes, namely, to prevent novel foods and food ingredients from presenting a danger to the consumer, misleading the consumer, and being nutritionally disadvantageous to the consumer. It found the first purpose to fall under Annex A(1)(b), but the other two purposes not to be covered by any of the sub-paras of Annex A(1).

In coming to these findings, the Panel’s interpretation of the list of relevant purposes contained in sub-paras (a) to (d) is so wide, however, that the scope of application of the SPS Agreement thereby is significantly extended. To name but a few examples, the Panel considered that in sub-para. (a) the term ‘animal or plant life or health’ includes non-target micro-organisms; the term ‘establishment or spread of pests’ includes risks of the development of resistance in already existing target pests; and the term ‘pests’ includes cultivated GM plants if they are growing where they are undesired, cross-breeds that result from unintentional gene-flow between GM plants and other plants if they have undesired introduced traits, and pesticide-resistant target or non-target organisms that result from exposure to pesticide-producing GM plants. Similarly, in sub-para. (b) the Panel regarded the term ‘food, beverages or feedstuffs’ as including GM crops not intended to be eaten by humans or animals but nevertheless consumed by them, as well as GM plants that are

29. The Panel found that as part of the Directives’ purpose of protecting the environment, they addressed the protection of the health of animals and plants. Further, to the extent that they addressed environmental damage not affecting plants or animals, the Directives might fall under the objective of preventing ‘other damage within the territory’ in para. (d). Consequently, to the extent that the Directives aimed at environmental protection, they were not a priori excluded from the scope of application of the SPS Agreement. See Panel Reports, EC-Biotech Products, paras 7.197–7.211

30. Novel foods and food ingredients include foods and food ingredients containing or consisting of GMOs and those produced from, but not containing, GMOs.

31. These objectives are set out in Article 3(1) of Regulation 258/97.

32. The EC had argued that GMOs could affect ecosystems without affecting animals or plants by affecting micro-organisms in soil or water that are specialised in biophysical or biochemical processes. The Panel considered that the fact that a footnote to Annex A(1) clarifies that the words ‘animal’ and ‘plant’ include wild fauna and wild flora indicates that the phrase ‘animal or plant life or health’ is intended to be comprehensive in coverage, encompassing micro-organisms and non-target organisms. See Panel Reports, EC-Biotech Products, paras 7.219–7.220.

33. The Panel considered that the development of resistance could lead to the existing pest becoming ‘established’ or spreading to new areas. See Panel Reports, EC-Biotech Products, para. 7.232.

34. See Panel Reports, EC-Biotech Products, paras 7.241 and 7.244.
not eaten as such but are processed into food or feed; 35 the word ‘additives’ as encompassing genes intentionally added for technological purposes to a GM plant that is eaten or processed into food; 36 and the term ‘contaminants’ as including proteins produced by GM plants through the unintended expression of modified genes. 37 With regard to sub-para. (c), the Panel regarded ‘pests’ as covering intentionally cultivated allergenic GM plants that have already been harvested. 38 Further, in sub-para. (d) the Panel interpreted ‘other damage’ to include not only economic damage or damage to property, but also damage to the environment (other than to the life or health of plants or animals) encompassing adverse effects on biodiversity, population dynamics of species or geochemical cycles. In coming to these broad interpretations, the Panel often went beyond the internationally-agreed upon definitions of the pertinent terms developed by the relevant international standard-setting bodies referred to in the SPS Agreement. 39 One may wonder if this extensive interpretation was intended by the negotiators of the SPS Agreement when they agreed to its rigorous disciplines.

The Panel’s identification of two additional separate elements (form and nature) in the definition of an SPS measure in the second para. of Annex A(1) is rather surprising. There seems to be no obvious reason to break the relevant sentence up in this artificial way. In fact, in order to do so, the Panel had to insert the word ‘and’ between ‘decrees’ and ‘regulations’, which seems contrary to the principle that a treaty interpreter must interpret the words actually used in the treaty, rather than add words it considers should have been used. 41

35. The EC had argued that food and beverages are things intentionally ingested by humans for nutritional purposes, and a feedstuff is something animals are intentionally permitted to ingest for nutritional purposes. The Panel, instead, held that a GM crop not grown as fodder for animals but which is nevertheless eaten by animals (including wild animals), or the pollen of which is consumed by insects, can be considered to be feedstuff. Further, it held that GM seeds intended for sowing that are spilt and eaten by birds are also animal feedstuff. See Panel Reports, EC-Biotech Products, para. 7.292.


37. See Panel Reports, EC-Biotech Products, para. 7.313.

38. At issue here was the potential of GM plants to produce allergic effects other than as foods, for example in persons working with or otherwise coming into contact with GMOs. The Panel found that pests need not be living, so that GM plants that cause harmful effects in persons handling them during harvesting, transport or processing, can be regarded as pests. See Panel Reports, EC-Biotech Products, para. 7.351.

39. See further on this point, Section 7 below.

40. See Panel Reports, EC-Biotech Products, para. 7.422.

41. As the Appellate Body held in US-Patents ‘The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.’ (See Appellate
It would seem more in line with the natural meaning of the text to regard the second para. as providing a broad illustrative list of five types (or in the Panel’s word *forms*) of measures that would be considered SPS measures, namely, all relevant laws, decrees, regulations, requirements and procedures. That this list is non-exhaustive is indicated by the use of the word ‘include’. The purpose of the list, rather than to limit the scope of the SPS Agreement by adding specific form and nature requirements, seems to be to make clear the broad reach of the Agreement to all types of measures, whether legislative, administrative or otherwise, once it is established that they are imposed for one of the four purposes listed in the sub-paras. The further list of various measures (‘including, *inter alia*, end product criteria…’) is again a non-exhaustive illustration, this time of the types of specific SPS measures that would be regarded as ‘laws, decrees, requirements, regulations and procedures’ under this definition.42

The Panel’s approach had practical implications for the application of the SPS Agreement to the measures in dispute.43 While the Panel recognised the broad ambit of the ‘form’ requirement,44 it relied on the ‘nature’ requirement it had read into Annex A(1), and which it regarded as ‘key’ to its determina-
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tion,\textsuperscript{45} to find that the EC general \textit{de facto} moratorium\textsuperscript{46} on biotech approvals did not fall under the definition of an SPS measure. The Panel regarded the general \textit{de facto} moratorium as neither a ‘requirement’ nor a ‘procedure’ but rather as the ‘application’ of approval procedures.\textsuperscript{47} As the second para. of Annex A(1) does not refer to the ‘application’ of requirements and procedures, the Panel saw its way clear to conclude that the moratorium was not an SPS measure.\textsuperscript{48} Similarly, the Panel regarded the product-specific measures challenged as ‘the alleged failure by the [EC] to consider particular applications for final approval.’\textsuperscript{49} As this was seen by the Panel to be neither a ‘procedure’ nor a ‘requirement’ but rather the ‘application’ of an approval procedure, it did not meet the Panel’s ‘nature’ requirement and therefore did not fall under the definition of Annex A(1).\textsuperscript{50} While this construction served a useful purpose in this dispute, as discussed below,\textsuperscript{51} it may have unexpected far-reaching effects.

\textsuperscript{45} See Panel Reports, EC-Biotech Products, para. 7.1338.
\textsuperscript{46} The Panel’s findings regarding the existence of the general \textit{de facto} moratorium are discussed in Section 4 below.
\textsuperscript{47} The Panel found that the general moratorium should be characterised as a decision to delay the decision on final approval of specific applications until certain conditions were met. It rejected the argument that the moratorium should be seen as an across-the-board marketing ban on biotech products requiring approval, and thus as a ‘requirement’. The Panel correctly noted that the pre-marketing approval system itself imposes a provisional ban on biotech products for which approval is sought, pending the final approval decision, yet the Complainants chose not to challenge the pre-marketing approval system (on this point see note 15 above). The Panel also disagreed that the moratorium could be seen as itself a ‘procedure’ by setting out a particular mode or course of action to be followed by the Commission and Group of Five Member States delaying applications. Instead, the Panel found that the EC continued to apply its existing approval procedures, but intentionally did not make full use of these procedures to complete the approval process. See Panel Reports, EC-Biotech Products, paras 7.1338–7.1378
\textsuperscript{48} See Panel Reports, EC-Biotech Products, para. 7.1382.
\textsuperscript{49} See Panel Reports, EC-Biotech Products, para. 7.1690.
\textsuperscript{50} The Panel rejected the argument that the failure to consider particular applications for final approval amounted to a ban, and was thus a ‘requirement’ under Annex A(1). It also disagreed with the allegation that the EC’s failure to consider particular applications for final approval was in itself a ‘procedure’ as it modified the approval procedure with respect to the biotech product in question. See Panel Reports, EC-Biotech Products, paras 7.1690–7.1697 (with regard to the US claim). The Panel rejected the claims of Canada and Argentina in this regard on the same reasoning (see Panel Reports, EC-Biotech Products, paras 7.1701–7.1704 and 7.1711–7.1712).
\textsuperscript{51} The Panel’s determination to find that all the objectives of the approval legislation fell under sub-paragraphs (a)-(d) of Annex A(1) appears to be motivated by its desire to limit its examination to the SPS Agreement. However, it seems unnecessary to stretch the enumerated purposes of an SPS measure to cover all the objectives of the EC approval legislation, since once some objectives fall under the definition in Annex A(1), the measure is at least to that extent an SPS measure. A finding of violation of the SPS Agreement would still allow the Panel to use judicial economy to avoid ruling on claims of violation of other WTO agreements (as it did with regard to Regulation 258/9).

The further finding that the moratorium was not an SPS measure, but rather the application of an SPS measure, allowed the Panel to limit its analysis to those procedural rules of the SPS Agree-
These unintended effects lie in the consequences of the Panel’s approach for future disputes, if not overturned on appeal. Under the Panel’s interpretation of Annex A(1), the determination of whether a measure falls within the SPS Agreement now turns on the rather technical criteria of its form and nature, rather than the more substantive (and arguably more important) criterion of its purpose. The limited list of objectives of SPS measures has been interpreted so broadly as to be practically all encompassing, reducing it to inefficacy. In addition, the Panel seems to be disregarding the inclusive nature of the list in the second para. of Annex A(1) and, in effect, requiring all SPS measures to have the ‘nature’ of either ‘requirements’ or ‘procedures.’ As discussed above, this approach does not seem to rest comfortably with the text of Annex A(1), which instead appears to restrict the purpose of an SPS measure to only the listed objectives, yet allow for the measures aiming at these objectives to be given a wide range of legal forms, providing only an illustrative list of possibilities to be included.

4. The General De Facto Moratorium

Before addressing the Complainants’ claims with regard to the EC’s alleged general de facto moratorium, the Panel had to establish whether such moratorium in fact existed. In order to do so, it considered whether the Commission and the relevant EC Member States had the ability to prevent or delay approvals, whether they had the intention to do so, and whether there had been, in fact, no approvals in the relevant time period. It also examined official and internal EC documents referring to a ‘moratorium’, and the facts and history of the individual approval procedures.

Based on such examination, the Panel found a general de facto moratorium to exist. The Panel regarded June 1999 as the date of commencement of
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the moratorium since on that date the Group of Five EC Member States (Denmark, Greece, France, Italy and Luxembourg) made a declaration that they had concluded an agreement to prevent the final approval of applications, pending the adoption of new EC rules on traceability and labeling of GMOs. The Panel held that the Commission did not make full use of its powers to complete the approval process, thus effectively cooperating with the Group of Five. Thus, the Panel determined that the Group of Five and the Commission followed a common plan or course of action, consisting of 'preventing the final approval of applications pending the adoption of new EC rules on labelling and traceability'. The Panel concluded, on this basis, that a general moratorium on approvals of biotech products was in effect in the EC between June 1999 and August 2003; that the moratorium was generally applicable (i.e. to all applications for approval); and that it was applied de facto (i.e. through the actions of the Group of Five and the Commission, without having been adopted through a formal EC decision).

The Panel then turned to Article 5.1, which the Complainants claimed was violated by the general moratorium. Article 5.1 requires that Members ensure that their SPS measures are based on a risk assessment. Thus, the Panel had to

that to be challengeable, a measure must be attributable to a Member. As the Commission and the individual Member States that comprise the Group of Five are organs of the EC from an international law perspective, it held that the de facto moratorium is attributable to the EC (see Panel Reports, EC-Biotech Products, paras 7.1290–7.1295).

Although the declaration of the Group of Five has no legal effect in EC law, the Panel regarded the declaration as expressing the official position and true intentions of the countries involved. These five Member States together have sufficient weighted votes to prevent the qualified majority necessary to take a decision on this issue. While no vote was taken on any application between June 1999 and August 2003, the Panel’s review of the conduct of these five Member States in individual application procedures led it to conclude that they acted to delay or prevent the final approval of applications. See Panel Reports, EC-Biotech Products, paras 7.480–481 and 7.1265.

With regard to the Commission, the Panel viewed the histories of individual application procedures as evincing a pattern of inaction, warranting the inference that its conduct was the result of an effective decision not to make full use of its powers under the relevant procedures to complete the approval process. See Panel Reports, EC-Biotech Products, para. 7.1274.

The Panel viewed as irrelevant the argument that the common plan was not regarded as binding by the Commission or Group of Five, since to hold otherwise would allow Members to evade their WTO obligations by applying a voluntary rather than a binding moratorium. See Panel Reports, EC-Biotech Products, paras 7.1281 and 7.1284.

The Complainants had alleged that the moratorium was in place from October 1998, the date of the last approval of a biotech product and was still in effect. After 29 August 2003, the date of establishment of the Panel, three applications concerning two biotech products (Bt-11 maize and NK603 maize) were approved by the EC Commission. However, as discussed below, the Panel declined to determine whether the moratorium had been lifted after the date of the establishment of the Panel. See Panel Reports, EC-Biotech Products, para. 7.1319.

See Panel Reports, EC-Biotech Products, para. 7.1272.
denote if the general moratorium on approvals constituted an SPS measure. As discussed above, the Panel held that the moratorium was not an SPS measure as defined in Annex A(1) of the SPS Agreement as it did not meet the 'nature' requirement. Instead, it could be seen as the 'application' of SPS measures, namely the EC approval procedures. To determine if this 'provisional conclusion' under Annex A(1) was inappropriate, the Panel examined Article 5.1 as the 'specific context within which that term appears.'

It expressed the view that the term 'SPS measure' in Article 5.1 should be interpreted to refer to a measure applied to achieve a Member's appropriate level of SPS protection. As the moratorium was merely a procedural decision to delay final approval decisions, it could not be said to achieve or imply a particular level of protection according to the Panel. It therefore held that the moratorium was not an 'SPS measure' for purposes of Article 5.1, and thus Article 5.1 was not applicable to it. In the same way, the Panel found the moratorium not to be an 'SPS measure' for purposes of Articles 2.2, 2.3, 5.5 and 5.6, thereby deftly avoiding ruling on the conformity of the moratorium with the substantive obligations of the SPS Agreement which require a scientific basis for SPS measures and an absence of arbitrary or unjustifiable discrimination. In addition, as the moratorium was held not be an SPS measure, the Panel found the transparency obligations in Article 7 and Annex B(1) inapplicable.

Rather than address these issues, the Panel focused on the challenge under Article 8 and Annex C(1)(a), which prohibit undue delays in control, inspection and approval procedures. Reiterating its finding that the EC approval

59. See Panel Reports, EC-Biotech Products, para. 7.1387.
60. See Panel Reports, EC-Biotech Products, para. 7.1388–7.1389. This finding was based on the somewhat tenuous argument that Article 5.1 refers to the obligation to base an SPS measure on a risk assessment, and Article 5.3 establishes a link between a risk assessment and the appropriate level of protection, thus the SPS measure must be applied to achieve the appropriate level of protection. Further, Article 5.6 requires that when establishing or maintaining SPS measures to achieve their appropriate level of protection, Members must ensure that their measures are not more trade restrictive than required. Thus, to be an SPS measure, a measure must be applied to achieve the Member’s appropriate level of protection.
61. See Panel Reports, EC-Biotech Products, para. 7.1391.
62. See Panel Reports, EC-Biotech Products, para. 7.1393.
63. See Panel Reports, EC-Biotech Products, paras 7.1396–7.1448
64. See Panel Reports, EC-Biotech Products, para. 7.1462. Annex B(1) refers to SPS regulations, defined in a footnote to mean SPS measures such as laws, decrees or ordinances which are generally applicable.
65. The EC argued that ‘undue delays’ refer to a period of time lost due to inaction or inability to proceed, which is unjustifiable. It claimed that there was no general suspension of the approval process, and that where delays occurred in individual instances due to requests for additional information, these were justified by the nature of the request. It argued that it is legitimate to request additional information necessary for the completion of a risk assessment or for compliance with certain standards of risk management or risk communication as set out by the regulator. See Panel Reports, EC-Biotech Products, paras 4.363–4.365.
procedures are SPS measures in the form of procedures to check and ensure the fulfilment of SPS measures as referred to in Annex C(1), the Panel found Annex C(1)(a) applicable to these procedures. Thus, the EC was obliged to ensure its approval procedures were ‘undertaken and completed without undue delay.’ The Panel noted that what matters is not the length of the delay, but rather whether there is a legitimate reason or justification for it. The Panel examined and rejected the EC’s arguments that the delays were justified by the perceived inadequacy of its existing legislation and the prudent and precautionary approach it applied due to the fact that the relevant science was evolving and in a state of flux. The Panel then examined a particular approval procedure to determine if the moratorium had led to undue delay and readily found this to be the case. It therefore found that the general moratorium constituted a violation of the procedural prohibition in Annex C(1) (a) and consequently of Article 8.

An interesting issue arises with regard to the findings and recommendations of the Panel regarding the general de facto moratorium in view of the fact that it had arguably been lifted during the Panel proceedings. In order to secure a positive resolution to this dispute, the Panel found that it was nevertheless competent to make findings on the consistency of the moratorium. How-

66. This must be determined on a case-by-case basis. Logically, a Member is only responsible for delays that are attributable to it (thus not for delays caused by the applicant). The Panel considered that Members applying approval procedures must be allowed to take the time reasonably needed to determine with adequate confidence that their SPS requirements are met. See Panel Reports, EC-Biotech Products, paras 7.1496–7.1498.

67. See Panel Reports, EC-Biotech Products, paras 7.1511–7.1530. While the Panel agreed that limited availability of scientific evidence may mean that deferring decisions might allow for better decisions to be taken, it pointed out that the core obligation of Annex C(1)(a) is for Members to come to a substantive decision. This decision need not give ‘a straight yes or no answer to applicants’. Instead, a Member, for example, may reject an application subject to later review, or give a time-limited approval.

68. The EC had argued that the Panel should make no findings regarding the moratorium, since it had ceased to exist. The Panel found that regardless of whether the general moratorium had ceased to exist during the panel process, it was competent to make findings on its WTO-consistency as the moratorium was still in existence at the time of the establishment of the Panel, and it should make use of this competence in order to secure a positive resolution to the dispute and help prevent the reintroduction of a de facto moratorium. It relied on the findings by the Panels in India-Autos (para. 7.26) and Indonesia-Autos (para 14.9) in this regard. The Panel in this case considered it necessary to make findings regarding the de facto moratorium, since due to the continuing opposition to approvals among EC Member States, and the informal de facto nature of the moratorium, it could easily be re-imposed. The Panel noted that most pending applications were still not at the final decision-making stage of the procedure and the approvals that were granted were possible only because the Commission had decided to make full use of its powers to complete the approval process. The Group of Five continued to vote against approvals or abstain and the required qualified majority could not be achieved in the relevant Regulatory Committee and the Council. The Panel therefore regarded as valid the concerns of the US and Canada that the general moratorium could be reintroduced. See Panel Reports, EC-Biotech Products, paras 7.1306–7.1312.
ever, it was more ambiguous with regard to its recommendations.\textsuperscript{69} Initially, in its interim report, the Panel had found that the general moratorium had ceased to exist,\textsuperscript{70} and it therefore declined to make any recommendations on this issue. This was modified in the final report. The US had argued at the interim review stage that the question of whether the moratorium had ceased to exist after the date of establishment of the Panel was outside the Panel’s terms of reference. The Panel noted that, according to previous case law, panels should avoid making recommendations which would apply to measures no longer in existence.\textsuperscript{71} However, it was of the view that as long as it appropriately qualified its recommendations, it did not need to decide whether the general moratorium had ceased to exist or not.\textsuperscript{72} Therefore, the Panel made the qualified recommendation that the EU bring the general moratorium into line with the SPS Agreement, ‘if, and to the extent that, that measure has not already ceased to exist.’\textsuperscript{73}

Clearly, the practical effect of the Panel’s findings and recommendation for the EC’s \textit{de facto} moratorium is negligible. Although in its final reports, the Panel refrained from finding that the moratorium had ceased to exist, this does seem to be the case from the recent approvals of biotech products. Thus, nothing more is needed to bring the EC’s measure into compliance with the SPS Agreement.

5. The Product-Specific Measures

As discussed above, with regard to the product-specific measures, namely, the failure to consider for final approval applications concerning certain specified biotech products, the Panel took the same procedural approach as it did with regard to the general moratorium, which allowed it to sidestep the substantive issues. Once again it determined that the measure at issue was not an ‘SPS measure’ as defined in Annex 1(A) of the SPS Agreement, but was rather the

\textsuperscript{69} Article 19.1 of the DSU obliges a panel that considers that a measure is inconsistent with a covered agreement to recommend that the measure be brought into conformity with that agreement.\textsuperscript{70} This was due to the fact that applications for Bt-11 sweet maize (food) and NK603 maize (food) were definitively approved in 2004 under Directive 2001/18 and Regulation 258/97 respectively.\textsuperscript{71} The Panel referred to the Panel reports in \textit{Canada-Wheat Experts and Grain Imports} and \textit{Dominican Republic-Import and Sale of Cigarettes}, where the Panels refrained from making recommendations in respect of WTO-inconsistent measures that had been amended in the course of the panel proceedings. See Panel Reports, \textit{EC-Biotech Products}, para. 7.1314.\textsuperscript{72} Panel Reports, \textit{EC-Biotech Products}, para. 7.1317.\textsuperscript{73} Panel Reports, \textit{EC-Biotech Products}, para. 8.18 (with regard to the US complaint) and para. 8.36 (with regard to the Canadian complaint). No recommendation on this issue was made with regard to Argentina’s complaint, since it did not allege a violation of Article 8 or Annex C(1)(a) by the general moratorium.
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Thus, Articles 2.2, 2.3, 5.5, 5.6 and 7 and Annex B(1) of the SPS Agreement were not applicable. The Panel consequently focused its examination to the question whether Article 8 and Annex C(1)(a) had been violated.

The Panel examined the procedures followed with regard to the 27 products specified in the dispute, and determined that there had been ‘undue delay’ in 24 of the 27 cases, contrary to Article 8 and Annex C(1)(a). Therefore, the Panel recommended that the EC bring these measures into compliance with its WTO obligations.

The consequence of these findings for the EC is fairly limited. To comply with the Panel’s recommendations, the EC must complete the application procedures for these 24 products without undue delay. However, the outcome of the approval procedures is left up to the EC. It is not required that the EC approve the biotech products for use in the EC.

6. The EC Member States’ Safeguard Measures

The third issue in this dispute was the WTO consistency of the nine safeguard measures taken by six Member States with regard to certain biotech products that had already been approved on European level for use in the EC. The Complainants did not challenge the EC legislation that allows the use of safeguard measures where a Member State has justifiable reasons to consider that an approved product constitutes a risk to human health or the environment. Instead, they challenged the safeguard measures themselves on the

74. See Panel Reports, EC-Biotech Products, paras 7.1697–7.1700 (with regard to the US claim), paras 7.1704–7.1705 (with regard to Canada’s claim), and paras 7.1712–7.1713 (with regard to Argentina’s claim).

75. Since it had already found a violation of the SPS Agreement, the Panel exercised judicial economy with regard to the claims under the GATT and the TBT Agreement.

76. Austria, Belgium, France, Germany, Italy and Luxembourg.

77. Safeguard measures by individual Member States are allowed under Article 12 of Regulation 258/97 and Article 23 of Directive 2001/18 (a similar provision was contained in Article 16 of Directive 90/220). These measures may only be maintained provisionally, pending a full assessment on the EC level. The safeguard is notified to the Commission, which must consult the relevant scientific committee and take a decision thereon resulting either in the modification of the EC marketing approval, or the termination of the safeguard measure. Although for each safeguard measure at issue, the relevant scientific committee reaffirmed its previous assessment, or that of another EC committee, that the biotech products at issue presented no risk to health or the environment, no decision was taken on EC level in this regard. The EC asserts that the Commission called upon all six Member States to withdraw their safeguard measures. However, the Member States have not done so and the Commission did not use the power given to it under Article 226 of the EC Treaty to initiate enforcement proceedings against these Member States.
grounds that they are not based on a risk assessment and scientific principles as required by Articles 2.2 and 5.1 of the SPS Agreement, and embody arbitrary or unjustifiable distinctions in levels of protection against risk resulting in discrimination or disguised trade restrictions contrary to Articles 2.3 and 5.5 of the SPS Agreement.

The Panel examined the purpose of each of the nine safeguard measures and found that they were ‘SPS measures’ as defined in Annex A(1). It then examined the risk assessments submitted in support of the safeguard measures and noted that the risk assessments conducted by the relevant EC scientific committees had found no risks from the approved products, either before approval or when reviewing the safeguard measures. The safeguards therefore could not be regarded as being based on such risk assessments, as required by Article 5.1. The Member States themselves did not come up with alternative risk assessments conforming to the requirements of Annex A(4).

The EC argued that the safeguards could be justified under Article 5.7, which allows provisional measures in cases of insufficient scientific evidence. The Panel, relying on the test used by the Appellate Body in EC-Tariff Preferences, agreed with the EC that Article 5.7 is an autonomous right, and not merely an exception from the general obligation under Article 2.2 and the obligation to base a measure on a risk assessment in Article 5.1. Thus, a

78. The Panel noted that since Annex A(1) refers to the purposes for which an SPS measure is ‘applied’, it could consider not only the objectives for which the measures were adopted, but also those for which they were maintained. It further held that it was not barred from considering purposes that were not articulated by the Member States when adopting the safeguard measures. It referred to the Appellate Body’s findings (in Japan-Alcoholic Beverages II pp. 27–28 and US-Offset Act (Byrd Amendment) para. 259) that panels need not seek the subjective intent of the legislators/regulators but should determine the purpose of a measure on the basis of objective considerations, such as the structure of the measure and the objective relationship between the stated objectives and the text of the measure. See Panel Reports, EC-Biotech Products, para. 7.2558. After identifying the objectives of each safeguard measure, the Panel applied the same broad interpretation to Annex A(1) (a)-(d) to find that the objectives of each safeguard measure fell thereunder. It further found that the measures met the form and nature requirements it had read into Annex A(1). The Panel held that the form requirement allows SPS measures to take many legal forms, and the nature requirement is met, as the prohibition on the marketing of a product can be considered a ‘requirement’.

79. For example, some of the studies relied upon by the Member States as risk assessments did not meet the requirement that they ‘evaluate the likelihood of entry, establishment or spread of a pest or disease... and of the associated biological and economic consequences’ laid down in the definition of a risk assessment in Annex A(4) of the SPS Agreement. See for example on Germany’s safeguard measure on Bt-176 maize, Panel Reports, EC-Biotech Products, paras 7.3145 and 7.3151.


81. This, as recognized by the Panel, has implications for the burden of proof regarding a violation of Article 5.7. The party claiming a violation of Article 2.2 (the Complainant) bears the burden of proving that the challenged measure is inconsistent with at least one of the four requirements set
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measure falling under Article 5.7 is excluded from the scope of application of the scientific obligations in Article 2.2 and Article 5.1. However, the Panel found that the trigger for applicability of Article 5.7 is the insufficiency of the scientific evidence, not the provisional nature of the measure at issue. In the cases at hand, scientific evidence was not ‘insufficient’, as enough evidence was available to permit a risk assessment as required under Article 5.1. Thus, this was not the kind of situation where Members are allowed to adopt provisional measures.

Consequently, the Panel found a violation of Articles 5.1, 2.2 and 5.7 of the SPS Agreement and recommended that the Member States bring their safeguard measures into conformity with the agreement. This recommendation entails that the Member States should either withdraw their safeguard measures or provide proper risk assessments to support them. Such an outcome should not be too difficult for the EC to accept, since the Commission has been trying, and failing, to get the Member States to remove their safeguard measures for some time now.

Interestingly, in response to public comment on its interim report, as discussed below, the Panel clarified some of its findings on the issue of insufficient scientific evidence, under Article 5.7, in a letter to the Parties. It made clear that insufficiency can be quantitative or qualitative. It also emphasised that in applying the concept of insufficiency it had born in mind the Appellate

out in Article 5.7. See Panel Reports, EC-Biotech Products, paras 7.2969 and 7.2976. This finding is contrary to the finding of the Panel in Japan-Apples, which held that the burden of proof under Article 5.7 is on the respondent. The Appellate Body in that case noted that this finding was not appealed, which the Panel in EC-Biotech Products took as expressing the Appellate Body’s reservation with regard to this allocation of the burden of proof (see Panel Reports, EC-Biotech Products, para. 7.2979). For a thoughtful look at the burden of proof issue, see Michelle T. Grando, ‘Allocating Burden of Proof in WTO Disputes: A Critical Analysis’ Journal of International Economic Law 9(3) (2006) 615–658.

82. This finding makes it rather strange that the Panel then started its analysis with examining whether Article 5.1 was violated, rather than first determining whether the requirements of Article 5.7 were met, in which case Article 5.1 would not be applicable. See Panel Reports, EC-Biotech Products, para. 7.3007.

83. The Panel noted that the provisional adoption of an SPS measure is not a precondition for the application of Article 5.7. Instead, the provisional adoption of an SPS measure is permitted by the first sentence of Article 5.7 (if certain conditions are met). See Panel Reports, EC-Biotech Products, para. 7.2939.

84. The Panel disagreed with the EC that the insufficiency of the scientific evidence must be assessed in relation to the appropriate level of protection of the importing Member, but found that it relates to the sufficiency of the scientific evidence to permit the performance of a risk assessment as defined in Annex A(4). See Panel Reports, EC-Biotech Products, para. 7.3239. In addition, the Panel held that the insufficiency of the scientific evidence must be assessed at the time when the provisional measure was adopted. See Panel Reports, EC-Biotech Products, para. 7.3253.

85. This letter is appended to the Panel Report in EC-Biotech Products as Annex K. It is discussed further in Section 9 below.
Body’s statement in *EC-Hormones* that the risk to be assessed is real world risk, rather than only risk ascertained in a laboratory under controlled conditions. Further, it noted that its findings preserve the freedom of Members to take prompt protective action in case new scientific evidence becomes available that affects their risk assessments. It pointed out that the possibility remains open that scientific evidence which is sufficient for a risk assessment at one time may later be considered insufficient. This would be the case if new scientific evidence negates the validity of the existing risk assessment but is itself insufficient to permit the performance of a new risk assessment. It appears that the Panel was concerned that its findings (in the leaked interim report) had been misconstrued, leading to public concern regarding the scope for government action in areas where science is in a state of flux.

7. Relevance of Other Rules of International Law

The EC raised the question of the relevance of other rules of international law to the interpretation of the applicable WTO agreements in this dispute. It relied on the provisions in the Vienna Convention on the Law of Treaties (VCLT) requiring a treaty interpreter to take account of relevant rules of international law. In particular, the EC referred to multilateral environmental agreements (MEAs), especially the Convention on Biological Diversity (CBD) of 1992 and the Cartagena Protocol on Biosafety of 2000, and the precautionary principle as international law rules to which the Panel must have regard. It further made reference in some of its arguments to definitions of terms developed by international standard-setting bodies.

86. The Cartagena Protocol on Biosafety is a protocol to the UN Convention on Biological Diversity. It deals with transboundary movement of living modified organisms. It contains provisions dealing with approval procedures, laying down a time line and addressing factors that could cause delays in such procedures (in Articles 9–11 thereof). It contains provisions on risk assessment (in Article 15 and Annex III) and the precautionary approach (Articles 1, 10.6 and 11.8 and Annex III). It currently has 135 contracting parties (as of 5 October 2006). The EC argued that the Cartagena Protocol and the SPS Agreement should be interpreted and applied consistently as far as possible. It claimed that there are no *a priori* inconsistencies between the two treaties, and that the Protocol’s provisions on risk assessment and the precautionary principle inform the meaning and effect of the relevant provisions in the SPS Agreement. See Panel Reports, *EC-Biotech Products*, para. 7.55.

87. The EC pointed to the strong relationship between the SPS Agreement and these international bodies, which are expressly referred to in Annex A(3) of the SPS Agreement as the relevant standard-setting bodies for purposes of the harmonisation obligations in Article 3. Further, it noted that Article 12.3 of the SPS Agreement refers to the objective of securing from the relevant international organisations the best available scientific and technical advice for the administration of the SPS Agreement (by the SPS Committee). See Panel Reports, *EC-Biotech Products*, para. 4.749.
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The Panel noted that Article 3.2 of the DSU requires it to interpret WTO Agreements ‘in accordance with customary rules of interpretation of public international law’. As acknowledged in previous WTO case law, these customary rules are reflected in Articles 31 and 32 of the VCLT. The Panel focused on Article 31.3(c) of the VCLT, which deals with the relevance of other international law rules to the interpretation of a treaty. It provides:

There shall be taken into account, together with the context:
…(c) any relevant rules of international law applicable in the relations between the parties.

The Panel noted that the use of the word ‘shall’ indicates that Article 31.3(c) mandates a treaty interpreter to take account of other international law rules, rather than merely gives the interpreter the option of doing so.88 Thereby, this Article enhances the consistency of international law rules applicable to the relevant States parties and contributes to avoiding conflicts between those rules.89

The Panel examined the term ‘rules of international law’ in Article 31.3(c) and noted that it is broad enough to encompass ‘all generally accepted sources of public international law’ including treaties and customary international law rules.90 Further, it noted that in US-Shrimp, the Appellate Body had made clear that general principles of international law also fall under Article 31.3(c).91 Thus, if the precautionary principle is a general principle of public international law, it could also be considered to fall under this provision.92

However, the Panel pointed out that Article 31.3(c) of the VCLT contains an important limitation, namely that only those rules of international law ‘applicable in the relations between the parties’ are to be taken into account.93 The Panel held ‘the parties’ to mean those states that have consented to be bound by the treaty being interpreted (i.e. all WTO Members).94 After ex-

88. See Panel Reports, EC-Biotech Products, para. 7.69. The Panel pointed out that although this obligation is limited to taking account of other international law rules and no particular outcome is prescribed, the principle of good faith would require that where more than one interpretation is possible, the treaty interpreter applying Article 31.3(c) of the VCLT must choose the alternative that is more in accord with the other rules of international law.

89. See Panel Reports, EC-Biotech Products, para. 7.70.

90. See Panel Reports, EC-Biotech Products, para. 7.67.


92. See Panel Reports, EC-Biotech Products, para. 7.67.

93. See Panel Reports, EC-Biotech Products, para. 7.68.

94. See Panel Reports, EC-Biotech Products, para. 7.67. To support its finding, the Panel noted that Article 31.3(c) does not refer to ‘one or more parties’ or ‘the parties to the dispute’. Further, it
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The Panel found that while the EC, Argentina and Canada are parties to the CBD (having signed and ratified it), the US is not. Further, the Cartagena Protocol has been signed and ratified by the EC only. Argentina and Canada have signed but not ratified it, and the US has neither signed nor ratified it. Thus, according to the Panel, these two treaties cannot be regarded as falling within the scope of 31.3(c) of the VCLT.

This finding would seem to practically exclude the possibility of a Panel being obliged to have regard to other treaties in the interpretation of WTO Agreements, since it is improbable that all 150 WTO Members would be parties to another treaty. As is stated in the report of the study group set up by the United Nations International Law Commission (ILC) to address the issue of the fragmentation of international law (expressly criticising this finding by the Panel in EC-Biotech Products):

Bearing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that any use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the ambit of the VCLT.

95. The US signed the CBD in 1993 but never ratified it.
96. Although the Panel limited its examination to the four Parties to this dispute, this should not give the impression that it had departed from its view that the other rules of international law must be applicable to all WTO Members. Instead, the Panel stated that if a rule of international law is not applicable to one of the four Parties to this dispute, it is not applicable to the relations between all WTO Members. Thus, although the Panel declined to take a position on this, it appears that even if the relevant international law rules raised in this dispute had been applicable to all four Parties, but had not been applicable to another WTO Member, they would still not have to be taken into account by the Panel under Article 31.3(c) of the VCLT. See Panel Reports, EC-Biotech Products, paras 7.71–7.72.
97. International Law Commission, 58th Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006. This report contains an analytical study finalised by the Chairman of the ILC Study Group. A set of 42 conclusions adopted by the Study Group is published separately as an appendix. The ILC took note of the conclusions and commended them to the UN General Assembly. The Study Group emphasised that conclusions are based on the analytical study and must be read together with it. It is interesting that this report expressly addresses the findings of the Panel in EC-Biotech Products although at that stage only the interim Panel reports had been issued and were officially confidential.
from the rest of international law. In practice, the result would be the isolation of multilateral agreements as "islands" permitting no references _inter se_ in their application. 98

The ILC Study Group finds it a better solution to allow reference to another treaty under Article 31.3(c), provided that the _parties in dispute_ are also parties to that other treaty. The resulting possibly divergent interpretations would respect party will, which is inherently divergent according to the Study Group. Further, it advocates taking into account the extent to which the other treaty can be regarded as implicitly accepted or tolerated by other parties in the sense that it can be considered to reflect the common understanding of members as to the meaning of the relevant term. 99 In the same vein, in the conclusions of the Study Group, the particular relevance of other treaty-based rules to the interpretation of a treaty under Article 31.3(c) of the VCLT is noted, _inter alia_ where 'they provide evidence of the common understanding of the parties as to the object and purpose of a treaty under interpretation or as to the meaning of a particular term.'100

The Panel's finding seems to be a step backwards from the progressive approach of the Appellate Body in _US-Shrimp_. In that case, the Appellate Body reaffirmed that WTO law is not to be read 'in clinical isolation from public international law'. 101 It followed an evolutionary interpretation of the relevant treaty terms, taking into account the 'contemporary concerns of the community of nations' as reflected in other treaties. In so doing, it relied on treaties that were not binding on all the parties to the dispute, let alone all WTO

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102. The Appellate Body was interpreting the term 'exhaustible natural resources', which it regarded as by definition evolutionary, necessitating regard to modern environmental treaties. See Appellate Body Report, _United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)_, WT/DS58/AB/R, adopted 6 November 1998, paras 129-130.
Members. However, the Panel in *EC-Biotech Products* considered that its approach was consistent with that followed by the Appellate Body in *US-Shrimp*. According to the Panel, the Appellate Body in the latter case ‘drew on other rules of international law because it considered that they were informative and aided it in establishing the meaning and scope of the term…’ rather than because it was obliged to refer to these other rules under Article 31.3(c) of the VCLT. The Panel pointed out that under Article 31.1 of the VCLT, a treaty must be interpreted in accordance with the ordinary meaning of its terms, in their context and in the light of its object and purpose. It regarded, in addition to dictionaries, other relevant rules of international law as aids for a treaty interpreter to establish the ordinary meaning of words in their context. Thus, the treaty interpreter may rely on such other rules when he/she considers them informative, but need not do so, particularly if the ordinary meaning of the treaty terms can be otherwise ascertained. In this case, the Panel apparently did not regard the CBD or Cartagena Protocol to be ‘informative’ for the interpretation of the SPS Agreement.

With regard to the precautionary principle, the Panel rejected the EC’s argument that it has now become a fully-fledged and general principle of international law. It referred to the Appellate Body’s finding in January 1998, in the *EC-Hormones* case, that the status of the precautionary principle was still subject to debate, and that it was ‘unnecessary and probably imprudent’ for the Appellate Body to take a position on that question. The Panel noted that this legal debate is still ongoing and that, despite its incorporation in numerous international conventions and declarations, mainly in the area of the environment, its precise definition, content and legal status remains an open question. Due to considerations of prudence, the Panel declined to resolve this complex issue, noting further that it was unnecessary to do so. While one can understand the Panel’s reluctance to rule upon this controversial issue, it

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103. It is interesting that in *US-Shrimp*, the Appellate Body referred to the CBD in support of the arguments of the US, which had itself neither signed nor ratified that convention.

104. See *Panel Reports, EC-Biotech Products*, para. 7.94.


106. The Panel stated that it ‘did not find it necessary or appropriate’ to rely on the CBD or Cartagena Protocol in interpreting the WTO agreements at issue. See *Panel Reports, EC-Biotech Products*, para. 7.95.

107. The EC pointed to several international instruments incorporating the precautionary principle and noted that the approval systems in many countries are based on the need to take precautionary action. See *Panel Reports, EC-Biotech Products*, para. 7.78.


109. See *Panel Reports, EC-Biotech Products*, para. 7.89. According to the Panel, it was not necessary for it to take a position on the question of whether the precautionary principle is a recognised principle of general or customary international law, in order for it to dispose of the legal claims before it.
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is difficult to see how it could be regarded as ‘unnecessary’ in this dispute. As pointed out by the Panel itself, if the precautionary principle has become a general principle of law, or a rule of customary international law, it must be taken into account in the interpretation of the SPS Agreement under Article 31.3(c) of the VCLT. It therefore seems imperative for the Panel to decide whether the precautionary principle has achieved this status, in order for it to know whether it is obliged to have regard to this principle.

It is also interesting to examine the Panel’s approach to internationally agreed upon definitions of terms used in the SPS Agreement. The Panel itself had invited several international organisations to identify appropriate standard references (such as technical dictionaries, glossaries, standards and guidelines) which might be useful to it in determining the meaning of terms in the SPS Agreement.\(^{110}\) In its arguments regarding the scope of application of the SPS Agreement, the EC repeatedly relied on definitions of terms used in Annex A(1), which have been developed by the international standard-setting bodies expressly referred to in the SPS Agreement. These are the Codex Alimentarius Commission (Codex) in the area of food safety, the International Office of Epizootics (OIE) in the area of animal health and the Secretariat of the International Plant Protection Convention (IPPC) in the area of plant health.

For example, the EC argued that the definition of a ‘pest’ in the IPPC of 1997 as a ‘plant, animal or pathogenic agent injurious to plants or plant products’ provides a context for the interpretation of the term in the SPS Agreement, requiring that the pest be a living organism and that it cause injury to a plant.\(^{111}\) Similarly, it relied on the definition of ‘additives’ of the Codex, which refers to a substance intentionally added to food in the manufacture thereof for a technological purpose, for its argument that the substance must be added to food and not to a plant that may later find its way into food.\(^{112}\) It also pointed to the Codex definition of ‘contaminants’ as ‘any substance not intentionally added to food, which is present in the food as a result of the production….of such food….’ to argue that as GMOs and the proteins they produce will be intentionally present in food, they cannot be contaminants.\(^ {113}\)

The OIE definition of a ‘disease’ as ‘the clinical and/or pathological manifestation of infection’ was further pointed to by the EC in support of its contention that a GMO is not a disease.\(^ {114}\)

The Panel found that while these internationally agreed upon definitions

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110. See Panel Reports, EC-Biotech Products, paras 7.19 and 7.31. The Panel consulted the Parties on the choice of organizations and decided to seek information from the secretariats of the CBD, Codex, FAO, IPPC, OIE, UNEP and WHO.
111. See Panel Reports, EC-Biotech Products, para. 7.241.
112. See Panel Reports, EC-Biotech Products, para. 7.295.
113. See Panel Reports, EC-Biotech Products, para. 7.314.
114. See Panel Reports, EC-Biotech Products, para. 7.276.
are informative, they are not dispositive of the meaning of the relevant terms in the SPS Agreement since the international standard-setting bodies are not referred to in Annex A(1). It therefore felt free to deviate from these definitions and come to a more expansive interpretation of the relevant terms. The Panel appeared to prefer to rely on definitions in the New Shorter Oxford English Dictionary to determine the ‘ordinary meaning’ of the terms used in the SPS Agreement. This approach does not seem in line with the SPS Agreement’s reliance on the work of the relevant international standard-setting bodies as establishing standards and guidelines that Members are encouraged to adopt. It seems strange to promote the use of these international standards by Members, while the Panel can freely disregard them in applying the provisions of the SPS Agreement.

The narrow view of the Panel regarding the role of other international law in the interpretation of WTO agreements is lamentable. The Panel fruitfully could have had recourse to relevant multilateral environmental agreements, general principles of international law (if found to exist) and internationally agreed definitions of terms to inform certain terms in the SPS Agreement, such as ‘pests’, ‘contaminants’, ‘undue delay’ and ‘insufficient scientific evidence’. In

115. The Panel, in its findings on the relevance of other international law as evidence of the ordinary meaning of terms used in a treaty, noted that the reference materials obtained from the relevant international organisations had been ‘taken into account by [the Panel] as appropriate.’ See Panel Reports, EC-Biotech Products, para. 7.96.

116. For example, the Panel noted that the IPPC definition did not support part of its interpretation of the term ‘pest’ but as it did not regard the IPPC’s definition as dispositive, it did not regard it as detracting from the Panel’s view that plants may be considered pests even if they are not injurious to other plants (see Panel Reports, EC-Biotech Products, para. 7.241). Likewise, the Panel, while noting that the word ‘manufacture’ in the Codex definition of ‘additives’ does not fit well with the situation where GM plants are grown for food purposes and the gene is added in the development of the seeds, preferred to rely on the dictionary definition of this term. It thus held that genes intentionally added to food for a technological purpose are to be considered ‘additives in food’ (see Panel Reports, EC-Biotech Products, para. 7.301). Further, the Panel preferred to make use of the wider definition of ‘disease’ in the New Shorter Oxford English Dictionary rather than rely on that of the OIE, although it refrained from finding that GMOs are themselves diseases (see Panel Reports, EC-Biotech Products, para. 7.277). Similarly, with regard to ‘contaminants’, after examining the New Shorter Oxford English Dictionary, the Panel agreed that intentionally added genes and the proteins produced by GM plants that are intended, are not contaminants. However, it regarded proteins that are an unintended expression of the intentionally added genes as contaminants if they infect or pollute the food product (see Panel Reports, EC-Biotech Products, para. 7.313).

117. Many of the definitions at issue are contained in actual ‘standards’ developed by the relevant organisations. While Article 3 of the SPS Agreement does not oblige Members to adopt international standards, guidelines or recommendations, it provides a strong incentive for doing so by providing a presumption of conformity with the SPS Agreement and GATT 1994 for measures conforming to international standards and requiring that deviation be justified by means of a risk assessment (see Article 3.1–3.3 of the SPS Agreement, as clarified by the Appellate Body in EC-Hormones, paras 173–177).
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this way, the Panel would have promoted the coherence of the international law system, in line with the progressive approach of the Appellate Body in US-Shrimp.

8. Special and Differential Treatment of Developing Countries

For the first time ever, a special and differential treatment (SDT) provision under the SPS Agreement has been raised in a dispute. Argentina relied upon the obligation in Article 10.1 of the SPS Agreement to take account of the special needs of developing countries in the preparation and application of SPS measures.118

In support of its reliance on this provision, Argentina claimed that the general moratorium had important implications for its economic development, due to the fact that Argentina is highly dependant on agricultural exports. Argentina pointed out that it is the world’s second-largest producer of biotech products and is the world’s leading developing country producer of biotech products. It further noted that it has a great interest in the integrated EC market. Therefore, it argued, the EC was obliged to take into account Argentina’s special needs in the preparation and application of its SPS measure.119

Argentina emphasised the mandatory nature of Article 10.1 and claimed that it requires more than mere attention to developing country problems. Instead, it requires ‘positive action’, in this case ‘preferential market access’ for developing country products or implementation of the Member’s obligations.

118. Article 10.1 of the SPS Agreement provides that Members ‘shall’ take account of the special needs of developing country Members, and in particular least-developed country Members, when preparing and applying SPS measures. This is the only SDT provision in Article 10 of the SPS Agreement that is couched in mandatory terms, and thus creates an obligation for Members. In the WTO Secretariat’s review of SDT provisions, this article is classified as a mandatory provision, creating an ‘obligation of conduct’, in that it does not prescribe a particular result. See Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions. A Review of Mandatory Special and Differential Treatment Provisions. Note by the Secretariat. Addendum, WT/COMTD/W/77/Rev.1/Add.2, (Geneva: World Trade Organization, circulated on 21 December 2001), 9.

119. The Panel considered that it seemed that Argentina intended to claim that the general de facto moratorium constituted the SPS measure at issue for purposes of its Article 10.1 claim. As the Panel regarded the general moratorium not to be an SPS measure but rather the application of an SPS measure, it did not find Article 10.1 of the SPS Agreement applicable to it (otherwise Article 10.1 would impose an obligation with regard to the ‘application’ of the application of an SPS measure, which would be illogical and contrary to the obligation on a treaty interpreter to give effect to all the terms of a treaty provision). However, while the Panel regarded Argentina’s claim as less than precisely clear, in light of its status as a developing country, the Panel was willing to consider the alternative possibility that Argentina regarded the EC legislation as the SPS measure at issue. See Panel Reports, EC-Biotech Products, para. 7.1611.
in a manner that is 'beneficial, or less detrimental, to the interests of developing country Members.' According to Argentina, the EC failed to comply with this obligation.

The Panel took a conservative approach to the interpretation of Article 10.1, in keeping with previous case law on SDT provisions in WTO Agreements. It held that the obligation to ‘take account’ of developing country needs merely requires Members ‘to consider along with other factors before reaching a decision’ the needs of developing countries. This obligation, according to the Panel, does not prescribe a particular result to be achieved, and notably does not provide that the importing Member must invariably accord SDT where a measure may lead to a decrease, or slower increase, in developing country imports. In fact, it is conceivable, according to the Panel, that the EC did take account of Argentina’s needs, but at the same time took account

120. Panel Reports, EC-Biotech Products, para. 7.1607.
121. For example, in EC-Bed Linen, the Panel addressed a claim of violation of the SDT provision contained in Article 15 of the Anti-Dumping Agreement, which like Article 10.1 of the SPS Agreement, is framed in mandatory terms. It provides in its first sentence that special regard ‘must’ be given to the special situation of developing countries when considering the application of anti-dumping duties and in its second sentence that the possibilities of constructive remedies ‘shall’ be explored where essential interests of developing countries are at stake. The Panel noted that both parties in that dispute, the EC and India, had agreed that the first sentence of Article 15 imposes no legal obligations on developed country Members. Thus, the Panel expressed no views on this matter. Focusing on the second sentence, the Panel held that it creates an obligation to consider actively, with an open mind, the possibility of constructive remedies before imposing an anti-dumping duty that would affect the essential interests of a developing country member. See Panel Report, European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.233. This issue was not appealed. Subsequently, with regard to the same provision, the Panel in US-Steel Plate held, ‘Members cannot be expected to comply with an obligation whose parameters are entirely undefined. In our view, the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action.’ See Panel Report, United States-Anti-Dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R and Corr.1, adopted on 29 July 2002, at para. 7.110. Similarly, on the same issue, the Panel in EC-Pipe Fittings held, ‘...even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action.’ See Panel Report, European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R, para. 7.68. This finding was not appealed. It appears from these cases that the use of mandatory language in SDT provisions is not sufficient to make them enforceable. Such SDT provisions must additionally contain specific obligations to undertake a particular action before a claim of violation can succeed. The discussion in this footnote is taken from D. Prévost, “Operationalising Special and Differential Treatment in the SPS Agreement” South African Yearbook of International Law 30: 82–111 (2005).
122. This finding was based on the definition of the expression ‘take account’ in the Concise Oxford Dictionary.
123. Panel Reports, EC-Biotech Products, para. 7.1620.
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of other legitimate interests (such as those of its consumers and environment) and gave priority to the latter.124

Even if one were to accept the Panel’s restrictive view of the nature of the obligation in Article 10.1, one might take issue with its approach to the burden of proof on this issue. In keeping with the normal rules on burden of proof followed in WTO disputes,125 the Panel found that it was incumbent on Argentina as the Complainant to adduce prima facie evidence that the EC failed to take account of Argentina’s needs, in violation of Article 10.1.126 However, the Panel made it very difficult for Argentina to meet this burden. Argentina had argued that there is no reference in the EC approval legislation to the special needs of developing countries. Neither could any evidence be found in the entire period of application of the general moratorium that the EC had taken account of Argentina’s special needs. Further, the EC had not provided any evidence that it had taken account of Argentina’s needs as a developing country Member. The Panel found these arguments insufficient. According to the Panel, the absence of reference to developing country needs in the approval legislation does not demonstrate a failure to take account of those needs in the adoption or application of that legislation.127 Further, the Panel found the absence of evidence supporting the conclusion that the EC took Argentina’s needs into account insufficient to indicate that Argentina had met its burden of proof. The Panel noted that Article 10.1 does not require a Member to document how it has complied with this article.128 In addition, the Panel stated that Argentina had noted the absence of relevant evidence without specifying what efforts it had made to collect such evidence.129 While recognising that Argentina may not have ready access to information regarding whether and to what extent the EC took its special needs as a developing country into account, the Panel found no evidence to show that Argentina had approached the EC for such information. Consequently, the Panel did not consider

125. The first WTO case dealing with the issue of burden of proof was US-Wool Shirts and Blouses where the Appellate Body held it is a generally-accepted rule applied by international courts and tribunals as well as in civil law, common law and most jurisdictions, ‘…that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.’ (Appellate Body Report, US-Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted on 23 May 1997, p. 14).
128. Panel Reports, EC-Biotech Products, para. 7.1624.
129. Panel Reports, EC-Biotech Products, para. 7.1624.
130. Panel Reports, EC-Biotech Products, para. 7.1625. The Panel explained that it did not mean to suggest that there is a duty on developing countries to specifically request that their needs as developing countries be considered.
that Argentina had met its burden of proof and thus found that a violation of Article 10.1 had not been shown.

It is unclear from these findings what a developing country would have to do to meet its burden of proof under Article 10.1. Aside from seeming to require that the Complainant set out what steps it has taken to collect evidence regarding whether its needs as a developing country have been considered, and approach the opposing party for such information, the Panel does not provide guidance as to how a developing country can make a prima facie case under Article 10.1. Given the absence of an obligation on Members to document how developing country needs have been taken into account, it seems particularly difficult for a developing country to meet its burden of proof regarding a claim of violation of Article 10.1. A request for information from the Member imposing the measure could be met by the mere assertion that due regard was had to developing country needs. This finding makes ineffectual the SDT obligation in Article 10.1, an unfortunate outcome.

On a more hopeful note, it should be noted that the SPS Committee in 2004 adopted a decision amending the recommended notification procedure for SPS measures in order to improve the transparency of SDT. New steps have been added to the notification procedure, requiring a Member that has notified a new or revised SPS measure to submit an addendum to its notification in the case that SDT is requested. This addendum must set out what SDT was requested and specify the SDT that was provided, or if none was provided, it must give reasons why not.\footnote{The new procedure was adopted on 27 October 2004. See Committee on Sanitary and Phytosanitary Measures, Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members. Decision by the Committee, G/SPS/33, circulated on 2 November 2004. The new procedure was adopted without prejudice to Members’ rights under Article 10.1 of the SPS Agreement. The adopted procedure comprises seven steps and requires bilateral consultations if an exporting developing country Member identifies significant difficulties in complying with the proposed SPS measure. The notifying Member is obliged to subsequently submit an addendum to its original notification where the SDT requested and provided is specified, or reasons are given why SDT was not provided and information is given regarding whether technical assistance or any other solution was found to address the identified concern. Possible ways in which concerns raised by Members could be resolved are set out in the procedure, including the provision of SDT (applied equally to all developing country Members), a change in the measure on most-favoured-nation basis or the provision of technical assistance to the affected Member. In addition, the adopted procedure provides that where requested by an exporting Member, and particularly where there have been delays in receiving or translating documents or where the notified measure needs further clarification, the importing Member ‘should’ extend the comment period ‘wherever practicable’, usually by 30 days.} Although this procedure has rarely been used to date,\footnote{The SPS Committee noted in February 2006 that the procedure to enhance transparency of SDT had only been used a few times. Therefore, it was unable to review the SDT notification process and assess its implementation in order to evaluate whether changes are needed, as required} in the future it may assist developing countries in meeting their
burden of proof under Article 10.1. The lack of submission of an addendum on SDT in cases where SDT was requested might be taken to indicate an absence of consideration of developing country needs. However, since the procedure only applies where a developing country has requested SDT from a notifying Member, it will not fully cover the situations where a developing country complainant may seek to rely upon the obligation in Article 10.1.133


In his communication to the Chairman of the Dispute Settlement Body (DSB) at the time of the circulation of the final Panel report, the Chairman of the Panel, Christian Häberli, drew the attention of the DSB to two systemic issues encountered in this dispute that should be of concern to the whole WTO Membership.134 These two issues were those of breaches of confidentiality and the delays in the legal proceedings that occurred in this case.

As mentioned above, the confidential interim reports of the Panel, which besides being confidential as a whole contained strictly confidential information (SCI), were leaked and published on the Internet. First a commercial trade publication placed the conclusions and recommendations of the Panel on its website, citing the Institute for Agriculture and Trade Policy (IATP) as its source. Thereafter, Friends of the Earth published the entire interim report on its website, but claimed that SCI had been excluded.135

After the breaches of confidentiality, the Panel expressed its grave concern about the effect of such breaches on the integrity of the WTO dispute settlement system. It referred specifically to the adverse effect this may have on the willingness of private parties to make available business confidential informa-

under para. 4 of that procedure. As more experience with its application was necessary for an appropriate assessment, the SPS Committee decided to extend the procedure until 2008, and to conduct a review at that time (See Committee on Sanitary and Phytosanitary Measures, Decision to Extend the Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Countries. Decision by the Committee of 1 February 2006. Addendum, G/SPS/63/Add.1, circulated on 6 February 2006).

133. This obligation requires Members to take developing country needs into account regardless of whether SDT has been requested or not, and applies not only to the development of (new or amended) measures, but also to the application of existing measures.


135. According to the US, this was not the case as several pages indicated on the cover sheet of the reports as containing SCI were included in the version published on the Internet by Friends of the Earth. See Panel Reports, EC-Biotech Products, para. 6.188.
tion that may be crucial to the resolution of a dispute, and to the possibility that as a result of the public discussion of the interim findings, the Panel or Secretariat may be exposed to political pressure. It requested the Parties to provide any information they had as to how the breaches had occurred. All Parties responded that they shared the Panel’s concern but had no involvement in the breaches. In its final report, the Panel noted that these statements are irreconcilable with the fact that the leaks did in fact occur. However, the Panel did not have sufficient information to determine the origin of the leaks.

Subsequently, the Panel sent a letter to the Parties indicating that it would take appropriate action to avoid the leaking of its final reports, once they were issued to the parties. It stated that it would issue paper and

136. These concerns were expressed in more detail in the abovementioned communication of the Chairman of the Panel, Christian Häberli, to the Chairman of the Dispute Settlement Body when the final Panel reports were circulated. See Communication from the Chairman of the Panel, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/32, WT/DS292/26, WT/DS293/26, circulated on 29 September 2006. It is worth noting certain developments that add weight to the Chairman’s concern regarding the political pressure that might be brought to bear on a panel during the interim review phase. Until recently, the substantive rulings in all final panel reports were almost identical to those in the interim reports, since the interim review phase was used only to correct technical or typographical errors in panel reports. However, this situation has changed since the dispute between Korea and Indonesia on anti-dumping duties on certain Indonesian paper imports. In that case, the Panel made additional substantive findings in its final ruling which were absent in its interim report. See Panel Report, Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R, adopted on 28 November 2005, paras 6.187–6.194.

137. The US noted that IATP is an NGO that opposes the adoption of biotechnology, and that it is apparent from the content of Friends of the Earth’s briefing paper on the interim reports that no complaining party would have had any reason to provide a copy of the Panel’s findings to Friends of the Earth. The US stated that no person provided by it with access to the interim reports had any contacts with IATP or Friends of the Earth and that it had not been the source of breaches of confidentiality. Similarly, the EC denied all involvement with the breaches, noting that IATP is a US-based NGO, but that it would refrain from speculating on which Party might have profited from the public dissemination of the interim report. Canada and Argentina briefly stated that they were not involved in the leaks and had no information in this regard. See Panel Reports, EC-Biotech Products paras 6.183–6.196.

138. The Panel in its final reports strongly criticized civil society groups, in particular Friends of the Earth and the IATP, for publishing the confidential report on their websites, warning that this leak threatened to damage the integrity of the WTO dispute settlement system as a whole, and pointing out that strictly confidential information was contained in the leaked report. Also, the Panel found it ‘surprising and disturbing’ that public disclosure of the confidential reports had been at the hands of two of NGOs who had claimed to act as amici curiae (friends of the court) when submitting unsolicited briefs in this case. These briefs had been accepted by the Panel, although the Panel had not found it necessary to take them into account in its decision. See Panel Reports EC-Biotech Products paras 6.183–6.196.

139. This letter is appended to the Panel Report as Annex K.

140. Panel reports remain confidential after they are issued to the parties until they are circulated to all WTO Members and simultaneously published on the WTO website in the three official lan-
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electronic versions of the confidential final reports to the parties in versions which would allow it to trace back and attribute any leaked version of part or all of the confidential reports to the Party receiving it.141

Interestingly, the Panel felt called upon to take the unprecedented step of explaining some of its findings in its letter to the Parties, in view of its concern that certain aspects of the leaked findings had ‘inadvertently or on purpose’ been misconstrued in the discussion of the interim reports by civil society groups. This explanation includes some new legal analysis of some issues, particularly under Article 5.7, as discussed above. It is unclear what practical effect the Panel’s clarification of its own legal findings may have. The Panel reports state, however, that the letter ‘is not part of the Panel’s findings and is not intended to modify them in any way.’142 It seems instead to be indicative of the pressure that public opinion regarding the leaked interim reports placed on the Panel. While the Panel was not influenced to change its findings in the final report, it tried to allay public concerns by making explicit the room its findings leave for Members to take provisional measures restricting biotech products if new scientific evidence invalidates previous risk assessments, but is itself insufficient to allow for a new risk assessment to be conducted.143

The second systemic issue raised by the Chairman of the Panel was the unusually long time taken by the panel proceedings in this case. Article 3.3 of the DSU emphasises the importance of the prompt settlement of disputes. According to Article 12.8–9 of the DSU, the panel process from the time of composition of the panel until the final report is issued to the Parties, should take no longer than six months or, if that is not possible (which is usually the case) no longer than nine months. Most panels exceed this time frame, but the delay in this case was exceptionally long, making this the longest panel proceeding in WTO history.

With the circulation of its reports, the Panel completed more than two and a half years of legal proceedings. Just the period between panel composition and issuing the final reports to the parties was itself longer than two years. The Chairman estimated that 7–8 years of professional Secretariat staff time had gone into the preparation of the Panel reports, excluding translation and support staff time. Added to that is the time invested by the Panellists themselves.

The Chairman explained that the delay was due to the unprecedented number of claims in this dispute, and the immense record before the Panel.

guages. The delay between issuance and circulation is largely due to the time it takes to translate the report.
141. Panel Reports, EC-Biotech Products, Annex K.
143. See in this respect the discussion in Section 6 above on provisional measures under Article 5.7 of the SPS Agreement.
Other factors mentioned by the Chairman in his communications, each time the report was delayed, were the EC’s delays in submitting information, the procedural and substantive complexity of the case, the lengthy procedure to select experts to advise the Panel, and the reduced availability of Secretariat staff because of the Hong Kong Ministerial Conference preparations.

The Chairman concluded that ‘this quite simply means that panels are unable to complete proceedings concerning such disputes within the 6–9 month timeframe laid down in Article 12.9 of the DSU, without additional resources being made available to the Secretariat for this purpose.’¹⁴⁴ This is a very real concern, especially in the case of SPS disputes, where panels typically have to deal with voluminous and complex scientific evidence and additional procedures are needed to appoint and question the panel experts.¹⁴⁵ If no steps are taken by the Members to provide the required additional resources, one can expect future SPS disputes to continue to exceed greatly the deadlines set out in the DSU, contrary to the objective of prompt settlement of disputes.

10. Conclusion

From the above discussion, it is apparent that the practical implications of the Panel’s findings for the European regime for biotech products are minimal, contrary to much of the alarmist commentary we have seen. As aptly noted by a Commission spokesperson, the outcome of the Panel findings in the EC-Biotech Products dispute ‘will not alter the system or framework within which the EU takes decisions on GMOs’.¹⁴⁶ None of the findings of the Panel supports the contention that WTO Members may not have in place strict regulatory systems for the pre-marketing approval of biotech products, provided that these systems are applied in a way that avoids undue delays.¹⁴⁷


145. The length of the panel proceedings in SPS disputes to date has been above average in almost all cases. The time from composition of the Panel to the issuing of the final report of the Panel to the parties was 363 days in EC-Hormones (US) (WT/DS26), 238 days in EC-Hormones (Canada) (WT/DS48), 342 days in Australia-Salmon (WT/DS18), 292 days in Japan-Agricultural Products (WT/DS76) and 344 days in Japan-Apples (WT/DS245). The average time for all panel proceedings thus far, between panel composition and issuing the final report to the parties is 299.90 days. These statistics are obtained from WorldTradeLaw.net (accessed on 23 October 2006).


147. It is important to be accurate in identifying the practical implications of the Panel’s findings. Misleading and alarmist comments on the outcome of this dispute are counterproductive and
The U.S. may have won this battle, but it seems to have lost the war.\textsuperscript{148} However, one should not underestimate the implications of the Panel report outside of the context of this particular dispute. This is where the ‘Pandora’s Box’ effects of this decision lie. The Panel’s interpretation of certain provisions of the SPS Agreement in the \textit{EC-Biotech Products} dispute have potentially important consequences for future cases in this area. The Panel seems to have inadvertently opened a Pandora’s Box of negative consequences for the balance between trade and health. By extending the scope of application of the SPS Agreement and interpreting its provisions in a way that is divorced from the international legal context, the Panel’s findings may make the disciplines of the SPS Agreement unworkable restrictions on the policy space of Member governments in the area of SPS regulation. In addition, the Panel’s conservative approach to the SDT provisions in the Agreement renders them ineffective, which is out-of-step with the current awareness of the need to make WTO rules responsive to developing country constraints.

However, just as in the case of Pandora, we are not without hope. It remains to be seen what, if appealed, the Appellate Body will make of these legal findings of the Panel. It is to be hoped that the Appellate Body will make use of the opportunity to correct some of the more troubling interpretations of the Panel and in so doing prevent this case from worsening the already fraught relationship between WTO trade disciplines and national sanitary and phytosanitary regulations.

\textsuperscript{148} However, a subsequent challenge to the current EC legislation on traceability and labelling of GMOs and on GM food and feed may be brought and perhaps decided on more substantive grounds.
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