

**The WTO GMO dispute:
the interim report of the dispute
panel**

Briefing note from GeneWatch UK

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On the 7 February 2006, the WTO's dispute panel considering the complaint brought by the USA, Argentina and Canada about the EC's moratorium on approval of GMOs and EU member state bans on certain GMOs, sent its interim report to the parties. This is a draft report and the parties have sixty days to comment – generally to correct errors in the representation of their evidence and arguments. The panel will then finalise its report which is unlikely to be substantially different from the interim report.

This short background paper summarises the main findings of the panel, but it should be borne in mind that these could be modified in the final report. A more detailed analysis and consideration of the implications for third parties is also under preparation. Although the US, Canada and Argentina have claimed 'victory', the findings are complex and specific to Europe and how the moratorium was handled by the European Commission. Even within this context, its implications are limited, but certainly it does not provide any basis for challenging other countries regulating GMOs as they wish, including establishing a level of zero risk.

Europe did have a moratorium on GMO approvals

First, the panel had to determine whether there was a moratorium or not because this was what the complaining parties claimed and it was disputed by the EC. The panel found that there was clear evidence that between June 1998 and August 2003 (when the dispute process began), GMO approvals were halted because of a moratorium.

The moratorium was not a 'measure' under SPS rules, but concerned the operation of Europe's human and environmental safety rules

Next the panel had to determine whether the moratorium was subject to the WTO agreements – whether it was a 'measure'. They decided it was not a measure under the Sanitary and Phytosanitary (SPS) Agreement that covers rules to protect human health and the environment from pest and food-borne risks, but that the moratorium affected how Europe operated its rules on safety. In other words, the EC's Directives and Regulations concerning the safety of GMOs (such as the Deliberate Release Directive and Novel Foods Regulation) are measures and the moratorium affected how these were administered.

Europe's moratorium violated WTO rules because it led to 'undue delay' in assessing marketing applications for GMOs

Because the panel considered the moratorium to be about the operation of human and environmental safety laws, it falls within Article 8 of the SPS agreement which lays down how the administration of such laws should be conducted. The panel found that in 24 of 27 cases involving specific GMO products, there had been 'undue delay' in the assessment of the GMOs which had halted decisions on whether or not to give product approvals. In the view of the panel, the delays that arose were connected with the

moratorium and could not be justified. The panel recommended that the EC be requested to bring its procedures into line with WTO rules.

Member state bans on certain GMOs were 'measures' under SPS rules

The panel also had to consider whether EU member state bans on certain GMOs approved before the moratorium began in 1998, broke WTO rules. First they determined that the bans were measures under the SPS Agreement because they were rules associated with human and environmental safety from pest or food-borne risk. Because the panel considered that sufficient information existed with which to conduct a risk assessment, it found that these bans fell within Article 5.1 of the SPS Agreement and were not temporary measures justified under Article 5.7 which applies only where there is insufficient scientific evidence.

Member state bans violated WTO rules because they were not based on a risk assessment

The dispute panel then considered the information that the EU member states had relied upon when they had introduced their GMO bans. The panel considered that this did not constitute a 'risk assessment' as required within the meaning of the SPS Agreement. In contrast, the panel found that the risk assessments conducted at the EU level (which had led to approval) were 'risk assessments' for the purposes of Article 5.1 of the SPS Agreement. The panel found that the EU member states had not based their bans on the EU level risk assessments. Because the member state bans are still in place, the panel found that steps should be taken to bring the EC into conformity with WTO rules. One way to bring the bans into conformity would be to abolish them. Several of countries with bans have already signalled their unwillingness to do this. Another way might be for the EU member states to conduct their own risk assessments within the meaning of the SPS Agreement, and then demonstrating that their ban is based on those risk assessments. Under WTO law, a ban can be based on a risk assessment even if the risk assessment is undertaken after the ban is created.

Because the USA is not a party to the Cartagena Protocol on Biosafety, its rules have only limited relevance to the dispute

There is an international agreement known as the Cartagena Protocol on Biosafety that was agreed under the Convention on Biological Diversity (CBD). This relates to environmental safety of transboundary movements of GMOs and so, on the face of it, appears relevant to the dispute. The Biosafety Protocol requires states to take a precautionary approach to safety and allows them to take socio-economic issues into account in their risk assessments. However, the USA has not ratified the CBD, and neither Canada, Argentina or the USA has signed the Biosafety Protocol. The panel, in a highly confusing analysis, said that they considered that if a member of the WTO was not a party to another international agreement, such as the CBD or the Biosafety Protocol, then that other international agreement could not be considered to be relevant in a given dispute except as a guide to interpreting the meaning of terms in the WTO agreements.

One measure - different objectives

The panel found that one measure can have different objectives and, accordingly, could be simultaneously covered by the SPS Agreement – dealing with measures aimed at human and environmental safety from pest or food-borne risks – and by the Agreement on Technical Barriers to Trade (TBT). This means that even if a measure is found to violate the SPS Agreement, it does not necessarily fall foul of the TBT Agreement. However, because the effect of the moratorium and member state bans were found to contravene the SPS agreement, the panel did not consider them under the TBT. This may prove to be

a significant omission because the TBT Agreement covers technical measures aimed at the protection of human health and the environment in general. It does not have the same requirements for risk assessment as the SPS Agreement. If a WTO Member's objective for a GM measure is not an SPS objective concerning pests and food-borne risks but only a TBT objective, it will not be necessary for it to be based on a risk assessment under the SPS Agreement – something other countries may be able to rely on.

Conclusions

As can be seen, this is a very narrow and specific ruling. It is also important that certain issues were not questioned by the complaining parties or addressed by the panel:

- The right to conduct pre-market risk assessments of GMOs
- The right to establish a level of risk acceptable to individual countries, including zero risk
- Whether GMO products are 'like' non-GMO products and can be treated differently

The final report of the panel is expected later in 2006 and parties will then have 60 days to decide whether to appeal.

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