



Peter Mandelson  
European Commissioner for External Trade  
The European Commission  
200 rue de la Loi  
B-1049 Brussels  
BELGIUM

02 November 2006

Dear Commissioner Mandelson

### **WTO Biotech Products dispute**

We are writing to you on behalf of GeneWatch UK and the RSPB to urge you to appeal against the WTO Dispute Panel's recent decision in the EC Biotech Products cases brought against the EC by the USA, Canada and Argentina.

We commissioned an analysis of the decision by an expert in international law, which reveals serious errors in the Panel's interpretation of WTO law which could have far-reaching implications for the evolution of fair trade rules. These implications are not restricted to trade in GM crops but would affect any product where health, environmental or social assessments were relevant. If this decision is allowed to stand, a country's ability to determine its own environmental, social and health standards may be seriously curtailed. It would also undermine the legal status of other international laws and their status in relation to WTO Agreements.

A note based on our legal analysis is enclosed. Key findings on the substance of the ruling include:

- The Panel's interpretation of the relevance of international law was incorrect when it determined that the Convention on Biological Diversity, the Biosafety Protocol and the precautionary principle were not relevant to the dispute and thus violates the customary international rules of treaty interpretation which the Panel was required to employ under DSU Article 3.2.
- The Panel should have determined that the Convention on Biological Diversity was applicable as between the EC and Canada for the purposes of their dispute and as between the EC and Argentina for the purposes of their dispute, and then interpreted the WTO rules so as to avoid any conflict with that treaty.
- The Panel should also have determined whether the precautionary principle was international law 'applicable in the relations between the parties' and then interpreted the WTO rules so as to avoid any conflict with that principle.
- The Panel should have referred to the Biosafety Protocol in its interpretation of 'undue' delay (as evidence of values shared among WTO Members, supporting the legitimacy of the delay) and of 'risk assessment'.
- The Panel's use of interpretative sources available to it in accordance with DSU Article 3.2 was selective and arbitrary. The Panel's expansive reading of the purposes of a sanitary and phytosanitary (SPS)

measure under Annex A.1 of the SPS Agreement threatens to make the WTO Agreement on Technical Barriers to Trade – which applies to the exclusion of the SPS Agreement – redundant. This contravenes the customary international rules of treaty interpretation which the Panel was required to employ under DSU Article 3.2.

- The Panel erred in finding that there was an ‘undue’ delay because there were alternative less trade-restrictive WTO-consistent measures available to the EC (voluntary undertakings or conditions on approval) without determining whether those alternative measures were in fact available to the EC.
- The Panel erred when it failed to examine the EC-level assessment of risks to determine whether they were ‘risk assessments’ for the purpose of Article 5.1. Had the Panel examined the EC-level assessment of risks in light of the inadequacies identified by the EC member states, they might have concluded that they were not ‘risk assessments’ for the purpose of Article 5.1 because they failed to assess the full range of risks, or that there was insufficient scientific evidence on which to base an assessment, allowing the national bans under SPS Article 5.7.

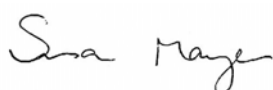
Furthermore, elements of the Panel’s report that might amount to procedural errors of law include:

- The order of the Panel’s legal analysis (e.g. considering ‘less favourable treatment’ before assessing the ‘likeness’ of products) could be appealed by any of the Parties;
- The actual, as opposed to purported, application of the burden of proof, (e.g. where the EC appears to have been required to show there was insufficient scientific evidence rather requiring the Complaining Parties to show that there was sufficient scientific evidence) could be appealed by the EC;
- The Panel’s decision not to consider the TBT or GATT claims with respect to the non-SPS measures has not resolved the dispute with respect to non-SPS objectives and could be appealed by the Complaining Parties.

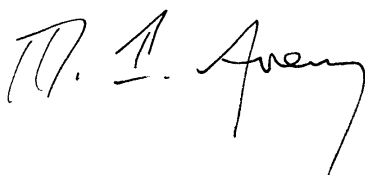
We have written to Health and Consumer Protection Commissioner, Markos Kyprianou, and the Environment Commissioner, Stavros Dimas, expressing similar concerns.

The importance of the European Union as a major trade area, promoting trade that does not pre-empt fair national policy on environmental, social and health standards cannot be overstated. We look forward to hearing your views on this important case.

Yours sincerely



Dr Sue Mayer, Director GeneWatch UK



Dr Mark Avery, Director of Conservation, RSPB

Cc: Mr Simon Fraser, Head of Cabinet  
Mr Hiddo Houben, Member of Cabinet  
Ms Renate Nikolay, Member of Cabinet