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## Looking behind the US spin: WTO ruling does not prevent countries from restricting or banning GMOs

### Executive Summary

The US Government is proclaiming victory in the WTO case launched against the European Union (EU) on Genetically Modified Organisms (GMOs). On 7 February the US Government used the publication of the WTO draft ruling to threaten the rest of the world “*against following the European lead in throwing up bans or partial bans against genetically modified crops.*”<sup>i</sup> Initial analysis of the full WTO report, now leaked to Friends of the Earth, makes it clear that both the claim to victory and the threats are very misleading. The WTO interim ruling does not question the right of countries to adopt strict biosafety legislation or even bans, to protect the public and the environment from GMOs.

The interim result of the case is mixed. The report gives limited support to some of the US claims, but comes out against most and does not go nearly as far as the US hoped it would in supporting trade in the technology.

### What the US lost

The US tried to obtain a ruling which explicitly declared the EU’s moratorium *per se* illegal. However, the WTO panel of trade experts did not accept the US’s arguments. Moreover, they reaffirm that specific and general moratoria on GMOs could be justifiable, even under WTO parameters. The ruling says: “*if new scientific evidence comes to light which conflicts with available scientific evidence and which is directly relevant to all biotech products subject to a pre-marketing approval requirement, we think that it might, depending on the circumstances, be justifiable to suspend all final approvals pending an appropriate assessment of the new evidence*”.<sup>ii</sup>

The US, together with the other complaining parties – Canada and Argentina, also claimed that the EC failed to consider applications to approve specific GM products by introducing “*product specific marketing bans or moratoriums*”,<sup>iii</sup> resulting in various violations of the EU’s WTO obligations. They argued that such specific bans and moratoria were not based on risk assessments which would constitute a violation of the WTO’s SPS agreement<sup>1</sup>. But once again, the WTO Panel did not accept their arguments, concluding that the EU breached only one of its obligations: there was “undue delay” in approval procedures for over 20 specified biotech products. All other claims that the product-specific measures breached other WTO obligations were dismissed.

The Panel did find the bans on GMOs in EU Member States Austria, Belgium, France, Germany, Italy and Luxembourg to be EU failures to meet its obligations under the SPS Agreement. Critically, however, the Panel did not question the right of the EU member States to ban GMOs, which is recognized in its main Directive 2001/18<sup>iv</sup>, and is permitted under the SPS agreement.<sup>v</sup> What the Panel examined was whether the

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<sup>1</sup> The SPS Agreement is the Agreement on the Application of Sanitary and Phytosanitary Measures. The SPS agreement sets out the basic rules for food safety and animal and plant health standards in the WTO. The agreement has been widely criticised for limiting the measures permitted so that they do not distort “free” trade and for downplaying the role of the precautionary principle.

elements that triggered such bans fulfilled WTO requirements. They concluded that the risk assessments presented by some Member States to justify their bans did not meet the requirements of "risk assessment" laid out in the SPS Agreement. (The Panel identified that most studies were missing the likelihood element, i.e. they did not assess "*the probability of entry, establishment or spread of diseases and associated biological and economic consequences*".<sup>vi</sup>). In the light of such interpretation, the Panel recommended that these bans should be brought into conformity with the SPS agreement. However, this part of the Panel's interim report needs to be fully examined now that it is publicly available. The gaps and lack of consensus in scientific knowledge, and the application of the precautionary principle are fundamental issues in ensuring biosafety, thus the interpretation by the Panel needs close analysis.<sup>vii</sup>

### **Strict Biosafety rules permitted**

The EU has one of the strictest regulatory frameworks for GMOs in the world, including mandatory pre-market assessments for all types of GMOs and products thereof imported to its territory, clear identification and labelling provisions, and traceability and monitoring provisions. This interim ruling does not touch upon these issues. It is therefore clear that it will not change the EU regulatory and policy regime for GMOs, and does not undermine the right of countries to introduce such strict regulatory frameworks at the national level.

In fact, the EU's regulations were never being questioned, just the way in which they were applied. Furthermore, the ruling will not accelerate the formal approvals of GMOs in the EU, as only limited claims of "undue delay" regarding the application of EU approval procedures were upheld. It will not prevent the dozens of Governments around the world who are currently developing regulatory systems for GMOs from proceeding, as they retain every right to do. Faced with this, the US Government is now trying to use a selective reading of the ruling and media hype to dissuade governments worldwide from exercising their rights to restrict the entrance of GMOs into their countries.

### **Opposition to GMOs in Europe**

More importantly, European public opinion remains steadfastly hostile towards GM food. The WTO did not rule on two important questions put before it, namely whether GMOs are effectively the same as non-GM foods, or if they are safe. Such a ruling is unlikely to persuade the public or EU institutions to accept GMOs. Quite to the contrary, opposition is growing: in the past few days Hungary has declared that it is in its economic interests to remain GM-free, and Greece and Austria have affirmed their total opposition to the crops. Opposition at local government level in Europe is also increasing, with more than 3,500 elected local governments and 170 specific regions in Europe now declaring themselves GM-free. As of November 2005, even the WTO's Geneva headquarters are in a country operating a legally binding moratorium on the cultivation of GM crops. The WTO's refusal or inability to cope with this reality is now plainly on show.

The final ruling on this dispute is expected in April 2006 and may be followed by an appeal phase. This briefing provides a preliminary analysis of the leaked WTO interim report, as well as the context of the WTO decision and likely impacts.

WTO Provisions claimed to be inconsistent by the Complaining Parties	General EC Moratorium		Product Specific measures	
	Accepted	Dismissed	Accepted	Dismissed
Moratorium caused undue delays, as did the approval of 21 out of 25 specific GM products Annex C(1)(a) –article 8 SPS	X		X	
Moratorium was intransparent, the EU did not follow its procedures and the biotech industry was kept in the dark. Annex C(1)(b)-article 8 SPS		X		X
EU failed to publish promptly the existence of the moratorium or the delays in approvals of new products. - Annex B(1) –article 7 SPS		X		X
The moratorium and the delay in approving new products were illegal because it was not based on a risk assessment Article 5.1 SPS		X		X
The moratorium and the delay in approving new products resulted in discrimination or a disguised restriction on international trade - Article 5.5 SPS		X		X
The moratorium and the delay in approving new products were more trade-restrictive than required - Article 5.6 SPS		X		X
The moratorium and the delay in approving new products were not based on scientific principles -Article 2.2 SPS		X		X
The moratorium and the delay in approving new products discriminated against other WTO members and constituted a disguised restriction on international trade-Article 2.3 SPS		X		X
The moratorium and EU legislation did not take into account the special needs of developing countries - Article 10.1 SPS		X		
The EC imposed information requirements not necessary and required excessive submissions under its legislation terms Annex C(1) (c) - article 8 SPS				X
The detail requirements of EU legislation did not meet the criteria of « reasonableness and necessity » Annex C(1) (e) – article 8 SPS				X
The EC accorded « less favourable treatment » to imported products than to domestic products Annex C(1)(a) 2nd clause-article 8SPS				X
The EC accorded « less favourable treatment » to imported products than to domestic products =Article III :4 GATT 1994				X

## 1. Early warnings: using the WTO to force acceptance of GMOs

Significant debate and literature has been generated about the WTO and its role in the field of GMOs, particularly with regard to the question of whether or under which conditions biosafety measures like bans are compatible with trade agreements. Measures to ban or restrict the use of GMOs (such as general bans, moratoria or specific bans on certain crops, type of GMOs, etc) are expected to be compatible with all WTO obligations, including the Sanitary And Phytosanitary Agreement (SPS, the WTO rules governing food safety and animal and plant health), Technical Barriers to Trade Agreements (TBT) and pre-WTO General Agreement on Tariffs and Trade (GATT).<sup>viii</sup> Countries attempting to take such measures have been threatened with action under the WTO's Dispute Settlement mechanism when another WTO member sees it as a "barrier" to trade and wishes to force compliance with WTO rules. For example:

- in September 2001 Croatia was under increasing pressure from the US to drop a proposed law banning GMOs.<sup>ix</sup> In a memo dated November 28th from the US Embassy in Zagreb to the Croatian Ministry of Environment, the US put its trade interests before Croatia's environmental protection and threatened to use the WTO stating, "If such a ban is implemented, the US Government must consider its rights under the WTO."<sup>x</sup> The total ban on GMOs was abandoned due to US intimidation, but Croatia did implement strict legislation on GMOs in 2003 that rules out GMO releases in protected areas, buffer zones, or areas for eco-tourism or organic agriculture.

- earlier in 2001 the US Government mounted opposition to a draft Sri Lanka Food Act banning GMOs. The Agricultural Counselor from the US Embassy in India threatened to challenge the ban at the WTO, claiming it would cost Sri Lanka US\$190 million in penalties if they refused to lift the ban.<sup>xi</sup> Sri Lanka dropped the ban.

- in August 2001 the Bolivian Government issued a written agreement with farm workers and small farmers pledging to extend and upgrade the authority of a one-year ban on the import of GM "products, sub-products and foodstuffs of agricultural origin derived from GM crops".<sup>xii</sup> <sup>xiii</sup> The Government of Argentina backed by agribusiness, exerted intense pressure to overturn the resolution using the WTO as a threat. Bolivia was forced to revoke the Ministry resolution and its previous commitments to extend it over a longer period of time.<sup>xiv</sup>

## 2. The EU-US WTO Dispute: Are EU GMO restrictions justified or not under the WTO?

With this history, the US-led attack on the EU's precautionary approach to GMOs, however unsuitable, was hardly a surprise. In 1998 the European Union authorized what would be its last GM product for over five years. Threats of WTO action over this *de facto* moratorium were accompanied by intense lobbying by US agribusiness and biotech companies. The US Government launched a formal dispute four years later, in 2003.

The US, Canada, Argentina, and initially Egypt (who rapidly dropped its support and withdrew from the case) challenged three types of GMO regulatory measures in the EU: the alleged suspension of GM approvals, the alleged failure of the EU to consider applications for new GM approvals, and GMO-specific bans or restrictions imposed by several Member States. They claimed that these measures constituted unjustified "barriers" to trade, and were therefore in breach of several WTO agreements.<sup>xv</sup>

The EU defended its actions and those of the Member States in two ways. Firstly, they questioned whether there were indeed "measures" covered by the WTO to be challenged. Secondly they submitted that any measures were in fact WTO compliant.<sup>xvi</sup> It is important to note, however, that at the same time as defending itself at the WTO,

the European Commission (under pressure from its own biotech industry) also actively sought to use the Council of Environment Ministers to force Member States to revoke their national bans and restrictions on GMOs. Many argue that pressure from the WTO is in fact the reason the EU Moratorium ended. EU Member States voted overwhelming against the Commission in 2005, and the bans remain in place.

### **3. What the WTO’s interim ruling says and what it does not say: the misleading claims of the US Government**

On 7 February 2006 the WTO dispute Panel issued its interim report on the GMO case to the parties in the dispute (US, Canada and Argentina as complainants, and the EU as defendant). Such reports are not made public. They are considered preliminary until parties have a chance to review or challenge the findings, after which a final report is issued, adopted by the WTO and then made public. Friends of the Earth has published most of the report after receiving a leaked copy.<sup>xvii</sup> The following is a preliminary analysis of this interim report.

#### **3.1 What the ruling did not examine**

The WTO Panel did not rule on several key issues put before it in this dispute. These include:

- whether GMOs are safe or not, which may constitute an implicit recognition that the WTO dispute settlement mechanism is not the appropriate venue to rule over the safety of GMOs;
- whether GM products are "like" their conventional counterparts or not. This is closely related to the vexed issue of “substantial equivalence”, one of the central pillars of the US regulatory approach to GMOs;
- the right of the EC to have its own pre-marketing authorization system or its risk assessment process for GMOs. Thus the current EU regulatory regime is not called into question by the WTO Panel as implied by some reactions to the interim ruling. In fact the US never challenged the EU legal regime on GMOs *per se*.

The fact that these crucial questions were left untouched shows that the US bit off more than it could chew with this dispute. Public and political opposition to GMOs hinges on concern for human health and ecological safety. This dispute cannot ease such concerns, and in fact is more likely to increase suspicions about both pro-GM motives and the WTO itself.

Moreover the EU has one of the strictest regulatory frameworks on GMOs in the world, including prior informed consent required for all types of GMOs and products thereof imported to its territory, clear identification and labelling provisions, and traceability and monitoring provisions. This ruling does not touch upon these issues. It is therefore clear that the right of countries to introduce such strict regulatory frameworks at the national level is not undermined by it.

#### **3.2 What the ruling did examine**

##### **3.2.1 Was there an EU moratorium on approving GMOs?**

<b>WTO Findings and recommendations</b>
<b>Claims dismissed:</b> Eight claims were dismissed or the inconsistency of the EU measures could not be established
<b>WTO Findings on remaining claims:</b> One claim was upheld: the EU did operate a <i>de facto</i> moratorium against approvals of GMOs causing “undue delay” in the application of authorisation procedures

**WTO recommendations:** none

The Panel found that the EU did apply a general *de facto* moratorium on approvals of biotech products between June 1999 and 29 August 2003 (the date of the establishment of the Panel). The moratorium was not in itself considered to be a sanitary and phytosanitary (SPS) measure *per se*, contrary to the US claims.<sup>xviii</sup> The US tried to obtain from the Panel a ruling which explicitly declared the moratorium *per se* illegal, but the Panel did not accept US arguments. Moreover the WTO ruling reaffirms that specific and general moratoria on GMOs could be justifiable under WTO parameters. The ruling says: “if new scientific evidence comes to light which conflicts with available scientific evidence and which is directly relevant to all biotech products subject to a pre-marketing approval requirement, we think that it might, depending on the circumstances, be justifiable to suspend all final approvals pending an appropriate assessment of the new evidence”.<sup>xix</sup>

However the Panel did find that the moratorium affected the operation and application of the EU approval procedures under the EU Directives, themselves considered SPS measures. The complaining parties had alleged that the *de facto* moratorium resulted in numerous breaches of the EU's obligations under the SPS Agreement. However, the Panel only considered the EU to have acted inconsistently with its obligations on the single issue that EU approval procedures during the time of the moratorium were subject to “undue delay”.<sup>xx</sup> All other claims that the *de facto* moratorium breached other WTO obligations were dismissed.

The Panel made no recommendations with regard to the *de facto* moratorium as it ended in 2004 with the first GMO approval since 1998.

**3.2.2 Did the EU fail to consider specific GMOs for approval?**

<b>WTO Findings and recommendations</b>
<b>Claims dismissed:</b> 11 claims related to specific GMO products were dismissed or the inconsistency of the EU measures could not be established
<b>WTO Findings on remaining claims:</b> One claim was upheld: the EU's approval procedures for over 20 specified biotech products was subject to “undue delay”
<b>WTO recommendations:</b> The EU should consider and complete any outstanding relevant applications without “undue delay” using its normal approval procedure

The complaining parties claimed that the EC failed to consider applications to approve specific GM products by introducing “product specific marketing bans or moratoriums”,<sup>xxi</sup> resulting in various violations of the EU's WTO obligations. The complaining Parties argued that such specific bans and moratoria were not based on risk assessment which would constitute a violation of the SPS agreement. The Panel however did not accept such arguments and once again, the Panel found the EU breached only one of its obligations: there was “undue delay” in approval procedures for over 20 specified biotech products. All other claims that the product-specific measures breached other WTO obligations were dismissed.

The Panel recommended that the EU bring such breaches into conformity with its obligations. If the recommendation is adopted, it would not necessarily require the EU to approve the products in question. It would merely require the EU to consider and complete any outstanding relevant applications without “undue delay”.<sup>xxii</sup> Some of these GMOs were approved after the Panel proceedings started, like the GM maize named Bt11. However, some of these have been withdrawn by the applying companies. For example Bejo-Zaden withdrew application for approval of GM chicory citing the absence of a market for these products and that they “preferred not to be associated with GMOs any longer.”<sup>xxiii</sup>

**Table 1. Claims from the US, Canada and Argentina dismissed or where the EU inconsistency could not be established by the Panel**

WTO Provisions claimed to be inconsistent by the Complaining Parties	General EC Moratorium		Product Specific measures	
	Accepted	Dismissed	Accepted	Dismissed
Moratorium caused undue delays, as did the approval of 21 out of 25 specific GM products Annex C(1)(a) –article 8 SPS	X		X	
Moratorium was intransparent, the EU did not follow its procedures and the biotech industry was kept in the dark. Annex C(1)(b)-article 8 SPS		X		X
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The moratorium and the delay in approving new products were illegal because it was not based on a risk assessment Article 5.1 SPS		X		X
The moratorium and the delay in approving new products resulted in discrimination or a disguised restriction on international trade - Article 5.5 SPS		X		X
The moratorium and the delay in approving new products were more trade-restrictive than required - Article 5.6 SPS		X		X
The moratorium and the delay in approving new products were not based on scientific principles -Article 2.2 SPS		X		X
The moratorium and the delay in approving new products discriminated against other WTO members and constituted a disguised restriction on international trade- Article 2.3 SPS		X		X
The moratorium and EU legislation did not take into account the special needs of developing countries - Article 10.1 SPS		X		
The EC imposed information requirements not necessary and required excessive submissions under its legislation terms Annex C(1) (c) - article 8 SPS				X
The detail requirements of EU legislation did not meet the criteria of « reasonableness and necessity » Annex C(1) (e) – article 8 SPS				X
The EC accorded « less favourable treatment » to imported products than to domestic products Annex C(1)(a) second clause - article 8 SPS				X
The EC accorded « less favourable treatment » to imported products than to domestic products				X

### 3.2.3 Are GMO bans by EU Member States WTO-illegal?

<b>WTO Findings and recommendations</b>
<b>WTO Findings:</b> GMO bans in EU member states breach the EU's WTO obligations
<b>WTO recommendations:</b> The EU is requested to bring the relevant member States' bans into WTO conformity

The Panel found the bans on GMOs in EU Member States Austria, Belgium, France, Germany, Italy and Luxembourg to be EU failures to meet its obligations under the SPS Agreement. The Panel did not question the right of the EU member States to ban GMOs, which is recognized in its main Directive 2001/18.<sup>xxiv</sup> The SPS Agreement does not disallow import bans.<sup>xxv</sup> What the Panel examined was whether the elements that triggered such bans fulfilled WTO requirements. Risk Assessments presented by some Member States to justify their bans were not considered to meet the requirements of "risk assessment" laid out in the SPS Agreement.<sup>xxvi</sup> The Panel argued that many of the studies in which the national governments based their measures did not contain all the elements considered by it as necessary to qualify as a proper risk assessment. The Panel identified that most studies were missing the likelihood element, i.e. "the probability of entry, establishment or spread of diseases and associated biological and economic consequences".<sup>xxvii</sup> Therefore the Panel considered the bans were not based in risk assessment.

In the light of such interpretation, the Panel recommended that these bans should be brought into conformity with the SPS agreement. However, this part of the Panel's interim report needs to be fully examined now that it is publicly available. The gaps and lack of consensus in scientific knowledge, and the application of the precautionary principle/approach are fundamental issues in ensuring biosafety, thus the interpretation by the Panel needs close analysis.<sup>xxviii</sup>

## 4. Did the EU lose the case? Implications for the EU of the WTO outcome

The findings of the interim ruling, contrary to the US Government claims, do not give the US a victory on the legal substance of the case. The result appears in fact to be mixed. Thorough analysis of the entire interim report will take time, but it appears that most claims by the complainants were dismissed or the breach of WTO obligations could not be established.<sup>xxix</sup> Only limited claims against the EU's "undue delay" and the ongoing national bans in Member States were upheld.

Friends of the Earth does not believe these findings, if adopted, warrant changes to the current EU regulatory framework for GMOs. Nor would these findings increase the approvals of GMOs in the EU. It was not the EU's regulations being questioned, but the alleged non-application or irregular application of these rules. Therefore it seems highly unlikely that the EU would have to change any of its biosafety rules as a result of this case.

More importantly, European public opinion remains steadfastly hostile towards GM food, and this WTO ruling is unlikely to persuade them or EU institutions to implement and accept unpopular pro-GMO measures. For example the ruling against the EU in the beef hormone case in 1998 did not force the EU to remove its prohibition of meat containing hormones from North America.<sup>xxx</sup> The EU instead adopted a new Directive (2003/74) reaffirming the prohibition and issued a new request at the WTO to end the retaliatory measures by the US and Canada.<sup>xxxi</sup> The discussion rumbles on, but the EU

prefers to continue to pay millions of Euros per year in WTO penalties than to expose European consumers to meat tainted with carcinogenic growth hormones.

This shows that “losing” a WTO dispute, or a part of it, does not automatically change a country’s decisions. Countries with national GMO bans may well keep them in place, as the recent statement from Austria’s health minister Maria Rauch-Kallat shows: “The protection of people and the environment have absolute priority, and the most recent scientific research vindicates our cautious approach in this matter....We will exhaust all possibilities to keep Austria's agriculture GM-free and ensure consumers' safety.”<sup>xxxii</sup>

Other European countries have also made statements committing to remain GM free. In the past few days Hungary has declared that it is in its economic interests to remain GM-free, and Greece and Austria have affirmed their total opposition to the crops.<sup>xxxiii</sup> Opposition at local government level in Europe is growing: more than 3,500 elected local governments and 170 EU regions of Europe have declared themselves GM-free.<sup>xxxiv</sup>

## 5. Implications for the rest of the world

After the interim ruling was issued, the US Government sent out a strong message through the media that the EU “lost” the case and that other countries around the world should learn the lesson.<sup>xxxv</sup> The US claims to have won a great victory for “free” trade, passing a significant milestone in US attempts “to have GM crops accepted throughout the world”.<sup>xxxvi</sup> US officials said the finding “against” the EU “sends an important warning to other parts of the world – particularly nations in Africa and Asia – against following the European lead in throwing up bans or partial bans against genetically modified crops”.<sup>xxxvii</sup> The American National Corn Growers Association made similar threats: “We don't expect the EU to become big importers of US corn but [the moratorium] cast a big shadow across other nations. This is a message to the world that [we] won't put up with the EU violating the rules.”<sup>xxxviii</sup>

While this is the first time GMOs have been discussed at a WTO Panel,<sup>xxxix</sup> several countries around the world have measures in place restricting the use of GMOs, so it may not be the last. In 2001 Thailand banned the experimental and commercial planting of GM crops.<sup>xi</sup> Benin has a five years moratorium on GM crops.<sup>xii</sup> More recently, South Africa imposed a moratorium on new applications for GMOs until a study on the socioeconomic implications of the technology on the country has been completed. Even Switzerland, where the WTO headquarters are based, adopted a five-year moratorium on planting GM crops, and import of GM animals in November 2005.<sup>xiii</sup>

The misleading interpretation of the WTO findings by the US Government and other GMO proponents may well add bite to long-standing threats to countries around the world against planning or adopting restrictions on GMOs. It is clear that any measure restricting or banning GMOs adopted by any WTO Member might be challenged at any time by another WTO member. This does not mean that every restriction on GMOs will necessarily be challenged or found to be a breach of WTO obligations. On the contrary, the dispute clearly recognized the right of WTO Members to adopt biosafety regulations and measures. Disputes depend on a number of economic and political circumstances, including the potential for profit losses and the weight of industry lobbying. For example it seems unlikely that the biotech industry will be able to convince any WTO member to challenge Switzerland’s new 5-year moratorium, as even biotech giant Syngenta states that, “the 5-year GMO ban in Switzerland will have little effect on Syngenta's bottom line, noting that Switzerland accounts for less than 1% of Syngenta's global sales of GM seeds.”<sup>xliii</sup>

However the burden and expense of defending a WTO dispute may well dissuade countries from adopting restrictions on GMOs, particularly those developing countries least able to afford it. In order to prevent this chilling of international scrutiny and regulation of GMOs, a clear, correct interpretation of the WTO case is needed. All countries must be aware that this WTO interim ruling does not undermine their right to adopt strict biosafety legislation, including product specific bans and moratoria based on risk assessment if they so choose. Furthermore, governments need to recognise that the WTO is not the right forum to deal with trade in GMOs due to a lack of environmental expertise and its bias towards trade liberalisation. Governments need to continue to protect their citizens and their environment from the threats of GMOs by reinforcing the Biosafety Protocol and its national legislation in the field of GMOs.

## **6. Bringing GMO disputes to the right forum: the Biosafety Protocol**

The Cartagena Protocol on Biosafety is an international legal agreement attached to the UN Convention on Biological Diversity (CBD). Both of these are legally binding international treaties called Multilateral Environmental Agreements (MEAs). The Biosafety Protocol is the only legally binding international treaty that deals with the transboundary movement of GMOs.<sup>xliv</sup> It has over 130 member Parties and is expected to grow.<sup>xlv</sup> The Biosafety Protocol deals specifically with GMO safety and strengthens the right of countries to use the Precautionary Principle to restrict GMO imports if these might harm the environment, health or sustainability of agricultural systems.<sup>xlvi</sup>

Since the Biosafety Protocol is the most specialized and expert international forum in the field of GMOs, it makes it the most sensible place to deal with disputes related to the functioning of GMO regulatory regimes. Issues related to the safety of GM crops and risk assessment, key elements of the Protocol, are also a natural fit. The fact that the WTO Panel in the GMO dispute shied away from ruling on these issues after over two years of deliberations underlines the unsuitability of the WTO to rule on this complex area.

The Biosafety Protocol has put in place a Compliance Committee to deal with disputes that may arise among the 130 Parties. The Compliance Committee objectives are to promote compliance, to address cases of non-compliance and to provide advice or assistance.<sup>xlvii</sup> Accusations of “undue delay” in compliance, for example, are genuinely a matter for consideration of the Compliance Committee of the Protocol. The Biosafety Protocol provisions contain a precise timeline in the approval process, as well as describing the elements that can delay such procedures.<sup>xlviii</sup> Evaluating any claims of breaches of those procedures, including claims of “undue delay”, would fit far more neatly within the competence of the Compliance Committee than that of the WTO dispute resolution mechanism.

A key challenge to implementing this is the fact that the main producers of GM crops, with the exception of Brazil, are not yet Parties to the Protocol. The US, the lead grower and promoter of GM crops worldwide, rejects the biosafety treaty and is pushing developing countries to accept GM imports.<sup>xlix</sup> The Panel in this most recent WTO case decided it was not required to take the Biosafety Protocol into account in interpreting the WTO agreements precisely because the complainants are not Parties.<sup>1</sup> While the Protocol will have little force over non-Parties, it is important that all members should work to strengthen the ability of the Compliance Committee to deal with any future disputes related to GMO safety or approval procedures.

There is growing controversy as to the most suitable venue to decide on conflicts between MEAs and the WTO. The WTO dispute settlement procedure is not an appropriate venue to deal with conflicts between trade rules and environmental protection, which according to international agreement should be based on the Precautionary Principle. As a trade body, the WTO is incapable of reconciling the growing conflict between “free” trade ideology and what citizens require of their governments. Environmental protection must not be expected to serve trade rules, as is inevitable if disputes about substantial issues deeply entrenched in MEAs are judged by a trade panel composed of trade experts acting in secrecy behind closed doors and with an exclusive trade approach. Other fora with expertise in environmental issues that operate with more transparency and independence from trading interests exist, and their suitability to rule over future dispute on such issues needs to be adequately explored and considered in the future.<sup>ii</sup>

While the US Government may claim a victory in this case, it is in fact clear that neither GMOs nor the WTO come out of this conflict very well.

**For more information see:**

*Who Benefits from GM crops? Monsanto and the corporate-driven genetically modified crop revolution.* Friends of the Earth International, 2006. see [www.foei.org/publications/pdfs/gmcrops2006full.pdf](http://www.foei.org/publications/pdfs/gmcrops2006full.pdf)

*Is the WTO the only way? Safeguarding Multilateral Environmental Agreements from international trade rules and settling trade and environment disputes outside the WTO.* Adelphi Consult, Friends of the Earth Europe and Greenpeace, 2005. see [www.foeeurope.org/publications/2005/alternatives\\_wto.pdf](http://www.foeeurope.org/publications/2005/alternatives_wto.pdf)

*The WTO, GMOs and Democracy.* Friends of the Earth England, Wales and Northern Ireland, 2005. see [www.foe.co.uk/resource/briefings/wto\\_gmos\\_democracy.pdf](http://www.foe.co.uk/resource/briefings/wto_gmos_democracy.pdf)

- <sup>i</sup> *The Wall Street Journal*. "EU loses a round on biotech crops". 9 February 2006.
- <sup>ii</sup> Interim ruling, page 637
- <sup>iii</sup> Interim ruling, page 669.
- <sup>iv</sup> Article 23, Directive 2001/18.
- <sup>v</sup> Interim ruling, page 933.
- <sup>vi</sup> Interim ruling, page 929
- <sup>vii</sup> Lin, L.L., Ching. L.L.. for Third World Network. *Interim report on WTO dispute*. 10 February 2006.
- <sup>viii</sup> See [www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#bAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#bAgreement)
- <sup>ix</sup> Scott, R. Draft "Law Bans Biotech Products". GAIN Report HR1009, 11/13.2001. see [www.zelena-akcija.hr/pdf/gmo-eng-zakon.PDF](http://www.zelena-akcija.hr/pdf/gmo-eng-zakon.PDF)
- <sup>x</sup> Letter to the Embassy of the United States of America (Zagreb) to the Croatian Department for Biodiversity and Landscape protection Ministry for Environmental Protection and Physical Planning. 29 November 2001. see [www.zelena-akcija.hr/ge/eng/us-memo.html](http://www.zelena-akcija.hr/ge/eng/us-memo.html)
- <sup>xi</sup> Friends of the Earth International. *US and biotech corporations impose genetically modified organisms worldwide under WTO threats*. 17 December 2001. see [www.foeeurope.org/press/17\\_12.01.htm](http://www.foeeurope.org/press/17_12.01.htm)
- <sup>xii</sup> Ministry Resolution n. 001. Republic of Bolivia. Ministry of Agriculture and Rural Development. 8<sup>th</sup> January 2001. see [www.foeeurope.org/press/Bolivian\\_Ministr.resol.htm](http://www.foeeurope.org/press/Bolivian_Ministr.resol.htm)
- <sup>xiii</sup> Agreement between the Nacional Government, the unique sindical Confederation of Bolivian farmworkers (CSUTCB), The Sindical Departmental Federation of peace farmers tupac Katari and the Nacional Federation of Women Farmers Bartolina Sisa, hosted and facilitated by the Episcopal Conference of Bolivia and the Permanent Assembly of human rights in Bolivia. 23 August 2001. see [www.foeeurope.org/press/Bolivian\\_agreement\\_farmers.htm](http://www.foeeurope.org/press/Bolivian_agreement_farmers.htm)
- <sup>xiv</sup> Letter from Bolivian Embassy in Geneva to Bolivian Minister of Foreign Affairs. Concerns of the Permanent Mission of Argentina on the WTO due to the Bolivian interdiction of Genetically modified products. 12 June 2001. see [www.foeeurope.org/press/Letter\\_Bolivian\\_Mission.htm](http://www.foeeurope.org/press/Letter_Bolivian_Mission.htm)
- <sup>xv</sup> US First Submission. see [www.trade-environment.org/output/theme/tewto/US\\_submission\\_biotech.pdf](http://www.trade-environment.org/output/theme/tewto/US_submission_biotech.pdf);  
Canada First Submission. see [www.trade-environment.org/output/theme/tewto/Canada\\_submission\\_biotech.pdf](http://www.trade-environment.org/output/theme/tewto/Canada_submission_biotech.pdf)
- <sup>xvi</sup> EU first Submission. see [www.trade-environment.org/output/theme/tewto/EC\\_submission\\_biotech.pdf](http://www.trade-environment.org/output/theme/tewto/EC_submission_biotech.pdf); Norway Submission to the WTO.
- <sup>xvii</sup> Friends of the Earth has, on legal advice, deleted limited company-specific information from the interim report we are publishing in order to avoid legal action against us.
- <sup>xviii</sup> US First Submission to the WTO. EC – Measures affecting the approval and marketing. 21 April 2004. see page 31.
- <sup>xix</sup> Interim ruling, page 637
- <sup>xx</sup> Annex C(1)(a), first clause of the SPS Agreement.
- <sup>xxi</sup> Interim ruling, page 669.
- <sup>xxii</sup> Lin, L.L., Ching. L.L.. for Third World Network. *Interim report on WTO dispute*. 10 February 2006.
- <sup>xxiii</sup> WTO Interim Report, page 471.
- <sup>xxiv</sup> Article 23, Directive 2001/18.
- <sup>xxv</sup> Interim ruling, page 933.
- <sup>xxvi</sup> Under the SPS Agreement "risk assessment" is defined as, "The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."
- <sup>xxvii</sup> Interim ruling, page 929
- <sup>xxviii</sup> Lin, L.L., Ching. L.L.. for Third World Network. *Interim report on WTO dispute*. 10 February 2006.
- <sup>xxix</sup> See Annex I.
- <sup>xxx</sup> DS26. European Communities – Measures Concerning Meat and Meat Products. See [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm)
- <sup>xxxi</sup> DS320. US – Continued Suspension of Obligations in the EC Hormones Dispute. See [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds320\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm)
- <sup>xxxii</sup> *The New York Times*. "Europe defends Stance on Genetically Altered Foods". 8 February 2006.
- <sup>xxxiii</sup> *The Guardian*. 2006. "America's masterplan is to force GM food on the world". 13 February 2006. see [www.guardian.co.uk/gmdebate/Story/0,,1708375,00.html](http://www.guardian.co.uk/gmdebate/Story/0,,1708375,00.html)
- <sup>xxxiv</sup> See [www.gmofree-europe.org/](http://www.gmofree-europe.org/)
- <sup>xxxv</sup> Reuters. "WTO condemns EU over GMO moratorium: diplomats". 7 February 2006. *The New York Times*. "Europe defends Stance on Genetically Altered Foods". 8 February 2006.
- <sup>xxxvi</sup> *The Guardian*. America's masterplan is to force GM food on the world. 13 February 2006. see [www.guardian.co.uk/gmdebate/Story/0,,1708375,00.html](http://www.guardian.co.uk/gmdebate/Story/0,,1708375,00.html)
- <sup>xxxvii</sup> *The Wall Street Journal*. "EU loses a round on biotech crops". 9 February 2006.
- <sup>xxxviii</sup> Reuters. "WTO condemns EU over GMO moratorium: diplomats". 7 February 2006.
- <sup>xxxix</sup> On 22 September 2000, Thailand requested consultations with Egypt concerning the prohibition imposed by Egypt on importation of canned tuna with soybean oil from Thailand. However, no panel was established nor a settlement notified. See [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds205\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds205_e.htm)
- <sup>xl</sup> IPS. 2004. *Thailand: Reversal of Ban on GM crops incenses activists*. See [www.ipsnews.net/interna.asp?idnews=25181](http://www.ipsnews.net/interna.asp?idnews=25181)
- <sup>xli</sup> The African Center for Biosafety. see [www.biosafetyafrica.net/west.htm](http://www.biosafetyafrica.net/west.htm)
- <sup>xlii</sup> *The Scientist*. "New Swiss Ban". 1 December 2005. see [www.the-scientist.com/news/20051201/02](http://www.the-scientist.com/news/20051201/02)

- xliii *The Scientist*. "New Swiss Ban". 1 December 2005. see [www.the-scientist.com/news/20051201/02](http://www.the-scientist.com/news/20051201/02)
- xliv See [www.biodiv.org/biosafety/about.aspx](http://www.biodiv.org/biosafety/about.aspx)
- xlv Status of ratification. Biosafety Protocol. See [www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt#sz](http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt#sz)
- xlvi Status of ratification. Biosafety Protocol. See [www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt#sz](http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt#sz)
- xlvii See [www.biodiv.org/biosafety/issues/compliance2.aspx](http://www.biodiv.org/biosafety/issues/compliance2.aspx)
- xlviii Articles 9, 10,11 Biosafety Protocol.
- xlix Falkner, R., Gupta, A. in *The Financial Times*. "Real impact of GM decision will be felt in developing countries". 13 February 2006.
- <sup>1</sup> Interim Ruling. p. 302.
- <sup>ii</sup> Adelphi Consult, Friends of the Earth Europe and Greenpeace. *Is the WTO the only way? Safeguarding Multilateral Environmental Agreements from international trade rules and settling trade and environment disputes outside the WTO*. See [www.foeeurope.org/publications/2005/alternatives\\_wto.pdf](http://www.foeeurope.org/publications/2005/alternatives_wto.pdf)