

# The Jurisprudence of WTO Dispute Resolution (2006)

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## I. Introduction

This chronicle summarises the jurisprudence of WTO dispute resolution in 2006. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective and also discusses their impact on Swiss domestic law and policy.<sup>1</sup> Four cases have attracted particular attention.<sup>2</sup> The disputes in *EC – Frozen Boneless Chicken Cuts* and *EC – Selected Customs Matters* turned on classical issues of trade regulation applied at the border, namely the correct classification of a product for tariff purposes and the uniform administration of customs laws.<sup>3</sup> The *Mexico – Soft Drinks* case concerned the controversial issue of parties to a free trade agreement having recourse to WTO dispute resolution in order to resolve bilateral dissonances. The *EC – Biotech Products* dispute represents one of the most high-profile cases adjudicated by a WTO panel so far, and goes to the heart of domestic regulatory approaches to food safety and diffuse consumer angst. These cases will be dealt with in turn. What's more, a series of 'compliance' panel and Appellate Body reports on the correct imple-

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<sup>1</sup> Switzerland did not actively participate in any dispute in 2006, not as complainant nor as defendant nor as third party.

<sup>2</sup> All WTO panel and Appellate Body reports are accessible online at [www.wto.org](http://www.wto.org) (click the link for disputes).

<sup>3</sup> *EC – Frozen Boneless Chicken Cuts* was issued in late 2005 but not discussed in the chronicle of last year (SZIER 2005, at 641–58, co-authored with WERNER ZDOUC).

mentation of recommendations as set out in previous reports (Article 21:5 DSU cases) were issued as well as some reports on trade remedy matters. These are not discussed in this chronicle.

The cases adjudicated in 2006 are examples in point of the ongoing attraction and popularity of the WTO dispute resolution mechanism. Unlike multilateral trade rounds, it does not depend on the dynamics of the political process, and members are free to have recourse to formal WTO dispute resolution independently of ongoing negotiations. With the fully-fledged dispute settlement system introduced in 1995, a major area of the WTO's work no longer depended on the fate of trade rounds. Nevertheless, a close connection remains. Whereas members may be more reluctant to bring cases when negotiations are in full swing, they may be willing to test the waters more readily in between rounds or during stalemates by seeking to resolve systemic problems through recourse to the judicial branch of the organisation. Although formally they are only binding as between the parties to a dispute, many panel and Appellate Body reports have significant implications in that their reasoning clarifies the legal disciplines and brings the full dimension of WTO law to the attention of a wider public. The risk looms large that the current zeitgeist of having resort to formal dispute resolution rather than of aiming at achieving consensus in the legislative process results in a critical imbalance between the legislative and the judicial branches of the WTO. Therefore, it is to be hoped that the WTO members return to the negotiation table and resume the deadlocked *Doha Round* as soon as politically possible.

## **II. Customs Classification**

### ***Introduction and Facts***

Article II:1 of the GATT 1994 stipulates that WTO members shall not levy tariffs on other WTO members which are less favourable than those provided for in their tariff schedules. However, WTO law does not mandate that specific rules be followed for the purposes of customs classification. Worldwide, most countries use the *Harmonized System* (HS) which is administered under the auspices of the World Customs Organization (WCO).<sup>4</sup> The Harmonized System comprises about 5,000 commodity groups, each identified by a six-digit code.

<sup>4</sup> International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983 (HS), SR 0.632.11; see, for an overview of the Harmonized System and its implementation in the Swiss customs legislation, REMO ARPAGAU, *Das schweizerische Zollrecht*, in: Thomas Cottier/Remo Arpagaus (eds.), *Schweizerisches Aussenwirtschafts- und Binnenmarktrecht*, Basel 1999, § 17-9.

Although the Harmonized System as such is not legally binding on WTO members, it is used by virtually all WTO members – including Switzerland – and hence plays a significant role in interpreting a member's tariff schedule.

The *EC – Frozen Boneless Chicken Cuts* dispute turned on the correct interpretation of a member's tariff schedule and its relationship to the Harmonized System.<sup>5</sup> It concerned the proper classification of frozen boneless chicken cuts, to which salt had been added, in the tariff schedule of the EC. This schedule was negotiated during the *Uruguay Round* and provides for a tariff of 102.4 €/100 kg/net for products covered by heading 02.07 concerning 'frozen' meat, and a tariff of 15.4 percent *ad valorem* for products covered by heading 02.10 concerning 'salted' meat. When classified under heading 02.07, the import duties levied on the products at issue substantially exceed the bound duty rate of 15.4 percent *ad valorem* under heading 02.10. Moreover, products under heading 02.07 are subject to a special safeguard mechanism provided for in Art. 5 of the Agreement on Agriculture whereas heading 02.10 does not permit the application of special safeguards. Between 1996 and 2002, the EC classified, under its own internal classification system, frozen boneless chicken cuts impregnated with salt as 'salted' meat under heading 02.10. The basis for this classification was an EC Regulation according to which the term 'salted' under heading 02.10 meant meat which had been deeply and homogeneously impregnated with salt in all parts, having a total salt content no less than 1.2% by weight. The products at issue undisputedly met this definition, thus falling under heading 02.10. In 2002, the EC re-classified frozen boneless chicken cuts impregnated with salt from item number 02.10 to item number 02.07 on the basis of a new Annex to the EC Regulation, stipulating that the addition of salt did not alter the character of the product as frozen meat under heading 02.07. In order to qualify under heading 02.10, a product needed to be "deeply and homogeneously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight, provided it is the salting which ensures long-term preservation".<sup>6</sup>

Brazil and Thailand challenged this re-classification. They claimed that frozen boneless chicken cuts impregnated with salt were properly classified as 'salted' meat under heading 02.10, the classification generally used from 1996 to 2002, due to the addition of salt to the product. Therefore, they argued that the product's classification under heading 02.07 was inconsistent with Art. II:1 of the GATT 1994.

<sup>5</sup> Panel and Appellate Body reports in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, adopted on 27 September 2005 (WT/DS269/AB/R, WT/DS286/AB/R).

<sup>6</sup> EC Regulation 1223/2002 of 8 July 2002 and EC Decision 2003/97 of 12 February 2003.

## Findings

The Appellate Body upheld the overall finding of the panel and concluded that the term ‘salted’ as used in heading 02.10 of the EC’s schedule means that the character of a product has been altered through the addition of salt, but it does not necessarily require that salting must, by itself, ensure long-term preservation. Therefore, frozen boneless chicken cuts that have been impregnated with salt (with a salt content of 1.2–3%) are covered by heading 02.10, and the reclassification by the EC resulted in the imposition of customs duties in excess of those provided for in its schedule. Article II:1 of the GATT 1994 had been violated.

The Appellate Body came to this conclusion by interpreting the relevant tariff heading, namely 02.10 of the EC’s schedule, in the light of the customary rules of interpretation codified in Articles 31 and 32 of the Vienna Convention.<sup>7</sup> It confirmed the central role of the *ordinary meaning* of a treaty term, repeating the long-standing principle that dictionaries are a “useful starting point” but not “necessarily dispositive” (para. 175). In interpreting the term ‘salted’ in its *context*, the Appellate Body agreed with the panel that the Harmonized System, including its Chapter and Explanatory Notes as well as decisions taken by the Harmonized System Committee on the correct interpretation and application of individual tariff headings, constitutes relevant context pursuant to Article 31:2(a) of the Vienna Convention. It noted that “prior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products” (para. 199). Furthermore, the *object and purpose* of the treaty provision at issue (security and predictability of the reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs) and the *circumstances of the conclusion* (classification practice within the Community after the conclusion of the WTO Agreement) pursuant to Articles 31:1 and 32 of the Vienna Convention, respectively, confirmed the conclusion that the term ‘salted’ in heading 02.10 of the EC’s schedule does not necessarily require long-term preservation. Lastly, the Appellate Body reversed the panel’s finding that the EC’s practice, between 1996 and 2002, of classifying the products at issue as salted meat constituted subsequent practice under Article 31:3(b) of the Vienna Convention as it was essentially based only on one treaty party’s practice. This reversal remained, however, without consequence for the ultimate conclusion that the EC’s re-classification was not consistent with WTO law.

<sup>7</sup> Vienna Convention on the Law of Treaties of 23 May 1969, SR 0.111.

*Commentary*

The Appellate Body report will serve as a further landmark decision for the interpretation of tariff schedules. Three aspects are particularly noteworthy: First, the present dispute reaffirms that WTO members cannot easily re-classify a certain product within their own tariff schedule after they have ‘bound’ that product in their WTO schedule, i.e. after they have specified a legally-binding maximum tariff level. The Appellate Body has again, and rightly so, set a high benchmark for a unilateral re-classification. Such an action only seems possible in one of two situations: either if it reflects “the common intentions of the parties” (para. 250), or if a classification is *manifestly* incorrect and needs to be remedied albeit belatedly and irrespective of whether such a remedy is based on a shared view held by the affected members. Thus, tariff negotiations are to be conducted with special care. Once successfully concluded and inscribed in the members’ schedules, a tariff classification is presumed to reflect the common intentions of the parties, and it is only very rarely to be altered.

Second, the Appellate Body has meticulously analysed and applied the various methods of interpretation as set out under Articles 31 and 32 of the Vienna Convention. The findings provided by the Appellate Body will serve as useful precedent for future disputes within the WTO as well as in other international dispute settlement fora.<sup>8</sup> In particular, it has been confirmed that the ordinary meaning plays the leading role in ascertaining the correct interpretation of a treaty term. According to the ironic statement of a former member and chairman of the Appellate Body, dictionaries, in particular the *Shorter Oxford Dictionary*, are in practice attributed the status of “one of the covered agreements”.<sup>9</sup> Moreover, the Appellate Body confirmed its seminal ruling in *EC – Certain Computer Equipment (LAN)*, where it was found that the legitimate expectations of an exporting member are not relevant for the purposes of interpreting a tariff schedule.<sup>10</sup> Its interpretation is conducted in the light of the common intentions of the parties which cannot be ascertained from the subjective and unilaterally determined expectations of only one of the parties. Lastly, the Appellate Body confirmed its interpretation of the term ‘salted’ by having recourse to the preparatory work (*travaux préparatoires*) and the circumstances of the conclusion of the treaty pursuant to Article 32 of the Vienna Convention. Whereas

<sup>8</sup> It stands out as a novelty in WTO dispute settlement reports that the Appellate Body consulted a variety of academic writings on Articles 31 and 32 of the Vienna Convention and fully cited them in its report in order to justify its positions. Thus far, panels and the Appellate Body have only rarely been willing to refer to the works of highly qualified publicists.

<sup>9</sup> CLAUS-DIETER EHLERMANN, reprinted in Thomas Cottier/Matthias Oesch, *International Trade Regulation*, Berne/London 2005, at 119.

<sup>10</sup> *EC – Certain Computer Equipment*, adopted on 22 June 1998 (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), paras. 84–98.

the International Court of Justice (ICJ) has affirmed the usefulness of recourse to the preparatory work and the circumstances of the conclusion on several occasions, WTO panels and the Appellate Body have only rarely been willing to take formal notice thereof.<sup>11</sup> There seems to be one exception to this rule: resort to Article 32 of the Vienna Convention is particularly appropriate and useful when a dispute involves specific negotiated commitments of a member. The present case has confirmed this practice. Members are therefore well advised to be aware of the potential weight and relevance of the preparatory work and the circumstances of the conclusion, when they negotiate specific tariff and other commitments under the GATT 1994 and the Agreement on Agriculture. Arguably the same holds true for specific commitments made under the General Agreement on Trade in Services (GATS) and the plurilateral Agreement on Government Procurement (GPA).

Third, the present dispute illustratively highlights the different roles of the WCO and the WTO in addressing tariff classification matters. The former administers the Harmonized System and deals with tariff classification as such, whereas the latter addresses the consistency of tariffs applied by WTO members with the concessions made in their tariff schedules. When invited by the panel to comment on the dispute, the WCO proposed that Brazil and Thailand bring the case to the attention of the Harmonized System Committee (which decides upon consensus), but they preferred the WTO dispute resolution mechanism (which acts as fully-fledged and binding third-party adjudication) to examine the matter. By choosing the WTO as the relevant forum, the dispute did not turn, in substance, on the correct classification of frozen boneless chicken cuts impregnated with salt but on whether the tariff treatment accorded to such products was less favourable than that provided for in the EC's schedule. During the panel and Appellate Body proceedings, the *motivation* of the EC to re-classify the products at issue played – unspoken yet – a prominent role. As the re-classification resulted in a substantially higher tariff charge, there was an underlying and subliminal feeling on the part of the panel and the Appellate Body that the re-classifying action was based on disguised protectionist purposes rather than on an allegedly incorrect classification of frozen boneless chicken cuts. Symptomatically, the Appellate Body did not authoritatively determine a certain minimum content of salt, which a product needs to contain in order to fall under heading 02.10, nor did it substantially analyse which heading – 02.07 or

<sup>11</sup> See, for the relevance of the *travaux préparatoires* within WTO dispute resolution, DAVID PALMETER / PETROS C. MAVROIDIS, *Dispute Settlement in the World Trade Organization*, Cambridge 2<sup>nd</sup> edition 2004, § 3.09; and MATTHIAS OESCH, *Standards of Review in WTO Dispute Resolution*, Oxford 2003, at 78–9.

02.10 – was the *correct* heading for the product at issue.<sup>12</sup> It simply concluded that the EC levied frozen boneless chicken cuts imported from Brazil and Thailand with a tariff rate inconsistent with Article II:1 of the GATT 1994.

### III. Uniform Administration of Customs Laws

#### *Introduction and Facts*

Article X of the GATT 1994 provides for the prompt publication of domestic laws and regulations in external trade matters prior to their coming into force and for their uniform, impartial and reasonable administration. This provision stipulates basic principles of good governance, transparency and procedural fairness in domestic and regional law and essentially contributes to a rule-oriented system of international trade regulation. At the same time, the requirement that governmental actions affecting international trade be uniform, impartial and reasonable touches upon sensitive areas of state sovereignty and has, at least potentially, a very broad reach into domestic affairs.

In the *EC – Selected Customs Matters* case, the United States challenged the administration of EC customs laws by some of the EC member states as being inconsistent with Article X:3(a) of the GATT 1994.<sup>13</sup> While the relevant EC customs legislation is enacted at the level of the Community which also renders explanatory notes, opinions and binding tariff information, its proper implementation and application is delegated to the member states which are responsible for all operations on a day-to-day basis. This arrangement is known as “executive federalism” (para. 2.13).<sup>14</sup> The United States argued that, contrary to the obligation to ensure a uniform administration throughout the Community, substantial differences existed between some members as to the valuation and classification of goods as well as to other areas of customs matters such as audit following release for free circulation, penalties for infringements of EC customs law, record-keeping requirements and local clearance procedures. Moreover, the United States challenged the allegedly non-uniform review system of

<sup>12</sup> In a domestic case before the Swiss Commission of Redress for Customs Matters (Zollrekurskommission) of 8 April 1999 (published in VPB 64.44), it was held that meat (bellies of pigs) with a salt content of less than 1% did not fall under heading 02.10 (‘salt’) but under heading 02.03 (‘fresh’) as only a “certain intensity” of the salting changes the characteristics of a meat as being salted rather than as being fresh.

<sup>13</sup> Panel and Appellate Body reports in *European Communities – Selected Customs Matters*, yet to be adopted at the time of writing (WT/DS315/AB/R).

<sup>14</sup> From the Panel report, with reference to KOEN LENAERTS/PIET VAN NUFFEL, *Constitutional Law of the European Union*, London 2<sup>nd</sup> edition 2005, para. 14-047.

customs decisions within the various EC member states as being inconsistent with Article X:3(b) of the GATT 1994.

### ***Findings***

The panel rejected most of the US claims by determining that they were not covered by the panel's terms of reference. In particular, it held that, although the United States sought to challenge the design and structure of the EC customs system "as a whole or overall", these words did not appear anywhere in the panel request submitted by the United States. The panel concluded that the requirements pursuant to Article 6:2 of the Dispute Settlement Understanding (DSU), according to which the request for the establishment of panel shall identify the specific measures at issue and provide a brief summary of the legal basis "sufficient to present the case clearly", were not met.

The Appellate Body subsequently reversed the panel's reading of the panel request and ruled that the United States was indeed permitted to challenge the EC's system of customs administration as a whole. It established that the specific measures at issue identified in the panel request were the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the Integrated Tariff of the EC (TARIC), as administered collectively.<sup>15</sup> It found that by highlighting the nature and extent of the differences that exist in the administration of the EC customs law by the member states, the panel request presented with sufficient clarity that the claim made under Article X:3(a) of the GATT 1994 concerned the EC customs system "as a whole or overall" (para. 172). The essence of the US claim was not the administration of individual provisions, but the absence of any mechanism or procedure at the EC level to reconcile divergences in the administration of the various legal instruments. Overall, the Appellate Body concluded that the conditions of Article 6:2 of the DSU were fulfilled although it admitted that the panel request "could have been drafted with more precision" (para. 172). Having said this, the Appellate Body declined to examine the US claims against the structure and design of the EC's system of customs administration as a whole, as the general observations made by the panel on this point "do not provide a sufficient foundation for us to complete the analysis" (para. 286). Hence, the majority of the claims set out by the United States were essentially excluded from an examination under Article X:3(a) of the GATT 1994.

As such, only minor claims were left to be examined in substance. *Inter alia*, the Appellate Body concurred with the panel that the differences in penalty laws and audit procedures among the EC member states did not, in and of

<sup>15</sup> See, for the references to these measures, Appellate Body report, para. 150.

themselves, constitute a violation of Article X:3(a) of the GATT 1994. Moreover, the Appellate Body confirmed the panel's finding that the EC violated Article X:3(a) of the GATT 1994 with respect to the different tariff classification of liquid crystal display (LCD) flat monitors. In some member states, such products were classified as computer monitors (entering the EC market duty-free), whereas in others, they were classified as video monitors (and subject to a 14% *ad valorem* duty). The EC did not refute this apparently non-uniform classification and has in the meantime remedied it. Lastly, the Appellate Body confirmed the panel's finding that the EC's system of providing prompt review and correction of administrative action relating to customs matters mainly within each member state itself does not violate Article X:3(b) of the GATT 1994. It stated that "neither text nor context nor the object and purpose of this Article require that the decisions emanating from such first instance review must govern the practice of *all* agencies entrusted with administrative enforcement *throughout the territory* of a particular WTO member" (para. 303).

### **Commentary**

The final outcome of this dispute is unsatisfactory. Due to insufficient factual findings by the panel, the Appellate Body report did not produce many concrete results for either party. On the major claims, they were left without a substantive ruling. This case brings to light, once again, an obvious deficiency in the current system under the DSU and reinforces the argument for the inclusion of remand competence for the Appellate Body. In the *Doha Round*, various proposals to this effect have been tabled, and a majority of the membership – including Switzerland – seems to support the introduction of remand authority.<sup>16</sup> At present, the Appellate Body's finding permits the United States to at least request the establishment of a new panel to examine the matter again.<sup>17</sup> Up to the end of 2006, no such action was initiated.

Besides, the Appellate Body report has two significant practical implications. First, both the panel and the Appellate Body were called upon to examine the requirement of *specificity* in respect to a member's request to establish a panel pursuant to Article 6:2 of the DSU. Such a request has a twofold objective: One; it informs the defending party and potential third parties of both the measures at issue and the legal basis of the complaint; and two; it subsequently

<sup>16</sup> See, on the issue of remand authority, FERNANDO PIEROLA, *The Question of Remand Authority for the Appellate Body*, in: Andrew D. Mitchell (ed.), *Challenges and Prospects for the WTO*, London 2005, at 193–213.

<sup>17</sup> See, for a precedent in which a complaining party initiated the dispute resolution process anew by requesting a second panel, the Panel report in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21:5 of the DSU* (WT/DS103/RW2, WT/DS113/RW2), para. 1.10.

defines the terms of reference of the panel and thus forms the basis for its jurisdiction in a specific dispute. A sufficiently precise and comprehensive request is necessary to ensure the ability of the responding party to appropriately defend itself and generally reflects the principle of *due process* within WTO dispute resolution. The allegation that such a request, on the basis of its language and content, does not meet the specificity requirement has over the last years become a ‘standard’ claim in panel and Appellate Body proceedings.<sup>18</sup> Nonetheless, in most cases, it was concluded that due process and the defendants’ basic rights to defend themselves properly were not impaired. In the present case, the Appellate Body confirmed that this question is generally to be viewed as pivotal. As long as it is answered in the negative, there is no rationale to dismiss a claim on the grounds of its being inconsistent with Article 6:2 of the DSU. The defendant needs to demonstrate that its defence would suffer *prejudice* on account of the alleged lack of clarity in the panel request. The case law to date indicates that the *benchmark* as to whether this burden is met is set relatively high.

Second, the Appellate Body’s interpretation of Article X:3(a) of the GATT 1994 has introduced a new category of measures which can be challenged under this provision. According to long-standing practice, Article X:3(a) of the GATT 1994 permitted the challenge of the *administration* of another member’s laws and regulations but not the *substantive content* of those laws and regulations themselves.<sup>19</sup> In the present report, the Appellate Body clarified that its earlier case law did not exclude “the possibility of challenging under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument” (para. 200). The Appellate Body’s conclusion is sound. There are no convincing arguments as to why a law or regulation which regulates the application or implementation of another legal instrument should not be ripe for panel examination under Article X:3(a) of the GATT 1994 if it allegedly results in a lack of uniform, impartial or reasonable administration of that legal instrument.

<sup>18</sup> See, for an overview on the case law, PALMETER/MAVROIDIS (supra fn. 11), § 4.04.

<sup>19</sup> See the Appellate Body report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997 (WT/DS27/AB/R), para. 200; and the Appellate Body report in *European Communities – Measures Affecting the Importation of Certain Poultry Products*, adopted on 23 July 1998 (WT/DS69/AB/R), para. 115.

## IV. WTO Dispute Resolution between Parties to a Free Trade Agreement

### *Introduction and Facts*

The *Mexico – Soft Drinks* dispute turned on the complex and controversial issue of the proper role of international law – *in casu* of the North American Free Trade Agreement (NAFTA) – in WTO dispute resolution proceedings.<sup>20</sup> It arose from taxes imposed by Mexico on soft drinks that used sweeteners other than cane sugar. This tax, albeit applied *erga omnes*, was mainly directed at US exports as Mexico considered that the United States restricted market access for Mexican sugar in a manner inconsistent with its NAFTA obligations. Mexico attempted to “compel the United States to comply with its obligations and protect own legal and commercial interests” (para. 54 fn. 106). Moreover, although Mexico had originally preferred to bring the matter before an arbitral panel under NAFTA Chapter 20, the United States refused to engage in the required panel selection process, and so no such panel could be composed. As the establishment of a NAFTA panel depends on the agreement between the parties to a dispute on a case-by-case basis, the United States successfully vetoed, so to speak, an examination of the matter under NAFTA rules.<sup>21</sup>

### *Findings*

Before the WTO panel, the United States argued that the imposition of the twenty percent ‘soft drink tax’ and ‘distribution tax’ as well as related ‘bookkeeping requirements’ violated Article III:2 and III:4 of the GATT 1994. Mexico did not actively contest this claim, and the panel opined – hardly surprisingly – that the soft drink and distribution taxes as well as the bookkeeping requirements were inconsistent with the principle of national treatment, as imported US beet sugar, soft drinks and syrups were subject to internal taxes in excess of those applied to like products of Mexican origin (i.e. cane sugar as well as soft drinks and syrups sweetened with cane sugar). Mexico anticipated this finding of the panel (which it did not appeal either) and concentrated its defence strategy on two other lines of argumentation. On the one hand, it claimed that the panel should decline jurisdiction in favour of an arbitral panel yet to be established under NAFTA Chapter 20. The Appellate Body rejected

<sup>20</sup> Panel and Appellate Body reports in *Mexico – Tax Measures on Soft Drinks and Other Beverages*, adopted on 24 March 2006 (WT/DS308/AB/R).

<sup>21</sup> WTO dispute resolution cannot end up in such an ‘institutional deadlock’, as Article 8:7 of the DSU provides for the appointment of panelists by the Director-General if the disputing parties cannot agree on the composition.

this view and confirmed the panel's finding that, pursuant to unequivocal provisions of the DSU as well as its object and purpose, a panel has not been granted the discretionary power "to decide not to exercise its jurisdiction in a case that has been properly brought before it" (para. 57). The Appellate Body underlined its finding with the observation that a decision by a panel not to examine a matter, for which jurisdiction has been validly established, would diminish the right of a complaining member to "seek the redress of a violation of obligations" as provided for in Article 23 of the DSU. With respect to the Mexican argument that the United States itself allegedly violated market access rights under NAFTA, the Appellate Body made it clear that the WTO dispute resolution mechanism has no jurisdiction to determine whether the United States has acted consistently with its NAFTA obligations or not. It concluded that "we see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes" (para. 56).

On the other hand, Mexico invoked Article XX(d) of the GATT 1994 in order to justify the violation of Article III of the GATT 1994. This provision entitles members to take actions "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement". Mexico argued that its tax measures were necessary in order to secure compliance by the United States with its NAFTA obligations regarding market access conditions for Mexican sugar. The Appellate Body concurred with the panel that this justification could not be invoked by Mexico in the present case. It opined that the term 'laws or regulations' as used in Article XX(d) covers "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system" (para. 79). It corroborated this view by referring to the illustrative list of laws and regulations provided in Article XX(d) as well as to other provisions that expressly distinguish between domestic laws and international obligations. Therefore, 'laws or regulations' pursuant to Article XX(d) of the GATT 1994 with which a member may seek to secure compliance "do not include obligations of *another* WTO Member under an international agreement" (para. 69). The Appellate Body confirmed its conclusion by noting that Mexico's interpretation implied that the WTO dispute resolution mechanism would have to assess whether a relevant international agreement (such as NAFTA) has in fact been violated, and panels and the Appellate Body would hence "become adjudicators of non-WTO disputes", which "is not the function of panels and the Appellate Body as intended by the DSU" (para. 78). Overall, Mexico thus failed to successfully invoke Article XX(d) of the GATT 1994.

*Commentary*

From the perspective of WTO law, the Appellate Body's reasoning is accurate. It explicitly confirms the traditional view established by case law and overwhelmingly supported in academic writings that WTO dispute resolution has no jurisdiction to adjudicate disputes in which a violation of international law other than the covered WTO agreements is alleged. Basically, panels and the Appellate Body hear and decide upon cases which are based on WTO law. Once their jurisdiction has been validly established, they have no discretionary power to refuse the adjudication of a case on the grounds of allegedly overlapping or conflicting international law. Legal instruments other than the covered WTO agreements can serve as *auxiliary means* for determining the meaning of a WTO provision. Article 31:3(c) of the Vienna Convention explicitly supports such a reading.<sup>22</sup> Moreover, international law can serve as part of a *factual analysis* of the circumstances of a dispute. These clear-cut principles provide legal security and predictability.

Often, however, the state of the art of international legal systems, which are still splendidly isolated with their separate dispute settlement fora, proves to fall short of providing comprehensive legal protection and reveals, as the present case illustrates, systemic shortcomings. Mexico was virtually left "in a legal limbo".<sup>23</sup> It could not initiate formal dispute resolution proceedings under NAFTA Chapter 20 because the United States refused to cooperate with the composition of a panel, nor could it depend on the WTO Dispute Settlement Body (DSB) to appropriately take into account the deadlock on the regional level. Although Article XXIV of the GATT 1994 (as well as Article V of the GATS) explicitly recognises – even encourages – the co-existence of the multi-lateral trading system and regional trade agreements in the form of free trade areas and customs unions, the different legal regimes remain separated. They are not institutionally interlinked nor are they subjected to a uniform dispute settlement mechanism. Every regional trade arrangement establishes its own dispute resolution system intended to remedy violations of the members' rules under that very agreement. With the ongoing proliferation of regionalism, the need to seek a more coherent framework becomes evident.<sup>24</sup> In the short-run, the present dispute demonstrates that parties to regional trade arrangements

<sup>22</sup> See, with respect to the relevance and scope of Article 31:3(c) of the Vienna Convention, the commentary on the *EC – Biotech Products* case which is discussed below.

<sup>23</sup> BRENDAN MCGIVERN, WTO Appellate Body Report: *Mexico – Tax Measures on Soft Drinks*, at 2, online at [http://www.ictsd.org/dlogue/2006-05-30/dialogue\\_materials/Brendan\\_McGivern\\_WTO\\_Appellate\\_Body\\_Report.pdf](http://www.ictsd.org/dlogue/2006-05-30/dialogue_materials/Brendan_McGivern_WTO_Appellate_Body_Report.pdf).

<sup>24</sup> According to WTO figures, more than 330 regional trade agreements have to date been notified to the GATT and the WTO, online at [www.wto.org](http://www.wto.org) (click the link to regional trade agreements).

shall promote, ideally at the time of the coming into force of the free trade area or customs union, the establishment of a watertight third-party dispute adjudication system with compulsory jurisdiction and a real enforcement mechanism. Otherwise, the permanent risk of not being able to enforce market access rights vis-à-vis other free trade partners looms large.

The bilateral *acquis* between the European Communities and Switzerland, comprising some 20 core treaties – including the Free Trade Agreement of 1972 and the agreements of 1999 and 2004 – and some 100 less well-known, secondary agreements and conventions, is a case in point.<sup>25</sup> This *acquis*, as comprehensive and far-reaching as it is, does not contain a fully-fledged dispute settlement mechanism. Rather, disputes are dealt with in joint committees and, hopefully, settled through mutual agreement, i.e. by consensus.<sup>26</sup> Hence, a situation similar to the deadlock between Mexico and the United States, which culminated in ‘retaliation’ measures (the soft drink tax) imposed by Mexico and formal dispute settlement proceedings at the WTO, might also arise between the European Communities and Switzerland.<sup>27</sup> Other free trade agreements to which Switzerland is a signatory, in particular those having been concluded more recently, contain elaborate provisions for the compulsory settlement of disputes by *ad hoc* arbitration panels.<sup>28</sup>

## V. Approval and Marketing of Biotech Products

### *Introduction and Facts*

The high profile *EC – Biotech Products* dispute is one of the most contentious cases ever adjudicated under the WTO dispute resolution system.<sup>29</sup> It has raised

<sup>25</sup> See, for this *acquis*, Europabericht 2006 des Bundesrates vom 28. Juni 2006, BBl 2006 6815, 6833.

<sup>26</sup> See, for example, Article 30 of the Free Trade Agreement of 22 July 1972, SR 0.632.401.

<sup>27</sup> A comparably deadlocked stalemate arose out of the imposition of tariffs on re-exports from Switzerland by the EC in March 2004. Whereas the EC considered such tariffs to be consistent with the FTA of 1972, Switzerland argued to the contrary. However, due to the lack of an adjudicative dispute resolution system, Switzerland was left to threaten the initiation of dispute settlement proceedings at the WTO, as the imposition of the tariffs allegedly violated WTO law (non-violation complaint under the GATS). Eventually, the EC withdrew the tariffs; see, for an account of this dispute, MATTHIAS OESCH, Regionale Integration Schweiz – Europäische Union und die Welthandelsorganisation (WTO), in: Peter-Christian Müller-Graff (ed.), *Die Schweiz und Europa*, Baden-Baden forthcoming 2007.

<sup>28</sup> See, for example, Articles 87–97 of the Free Trade Agreement between the EFTA States and the Republic of Chile of 26 June 2003, SR 0.632.312.451.

<sup>29</sup> Panel report in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, adopted on 21 November 2006 (WT/DS291/R, WT/DS292/R, WT/DS293/R). This report consists of some 2,400 pages (including Annexes), with the findings themselves some 800 pages!

important issues concerning the right and responsibility of WTO members to regulate food safety with respect to biotech products. This term – or, as used by the panel interchangeably, GMOs or GM products – refers to plants and products thereof that have been developed through recombinant deoxyribonucleic acid (DNA) technology. The EC regime for the approval of biotech products consisted, at the time of the establishment of the panel, of two primary legal instruments, namely EC Directive 2001/18 and EC Regulation 258/97, whose object is to protect human health and the environment from adverse effects which might arise from the deliberate release of biotech products and from foods and food ingredients produced from, but not containing, GMOs.<sup>30</sup> These instruments require the Community to evaluate, on a case-by-case basis, the potential risks which biotech products might pose in these areas, and to approve the import or marketing of a particular product only in the light of such an evaluation. In order to be approved Community-wide, a specific product needs, in essence, the support of a qualified majority of the member states. Exceptionally, the EC regime entitles the member states to adopt, under certain conditions, provisional safeguard measures with respect to biotech products, which have been approved of by the Community, if the member state demonstrates, based on new or additional information and scientific knowledge, that the product as issue poses a risk to human health or the environment.

Before the WTO panel, the United States, Canada and Argentina challenged three specific types of measures attributed to the EC: The first was an alleged general *de facto* moratorium of the EC on approvals of biotech products ('general EC moratorium'); the second was alleged delays in the approval of specific biotech products ('product-specific EC measures'); and the third was various safeguard measures by individual member states prohibiting the import or marketing of specific biotech products already approved by the Community ('member state safeguard measures').

### *Findings*

At the outset, the panel made some general findings on the relevance of other rules of international law to the interpretation of WTO law. It rejected the argument set forth by the EC that Article 31:3(c) of the Vienna Convention obliged the panel, in the present case, to take the *Convention on Biological Diversity*

<sup>30</sup> EC Directive 2001/18 of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (which replaced EEC Directive 90/220); EC Regulation 258/97 of 27 January 1997 concerning novel foods and novel food ingredients. Moreover, the current EC regime is also composed of EC Regulation 1829/2003 of 22 September 2003 on GM food and feed and EC Regulation 1830/2003 of 22 September 2003 on the traceability and labelling of GMOs and GM products. These two regulations were not at issue in the present case, as they entered into force only after the establishment of the panel.

and the *Biosafety Protocol* into account.<sup>31</sup> The panel based its finding on the observation that “it makes sense to interpret Article 31:3(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted” (para. 7.70). As (by far) not all WTO members are, unsurprisingly, also a party to the Convention on Biological Diversity or to the Biosafety Protocol, none of these treaties was, consequently, applicable in interpreting the relevant WTO law by way of Article 31:3(c) of the Vienna Convention. Though at least, the panel left a door open for outside legal sources as they may, in some instances, assist a treaty interpreter in establishing or confirming the ordinary meaning of a provision pursuant to Article 31:1 of the Vienna Convention “in the same way that dictionaries do” (para. 7.92). The panel concluded that the Convention on Biological Diversity and the Biosafety Protocol were not relevant to its interpretation of the ordinary meaning of the WTO terms at issue. Moreover, the EC claimed that the precautionary principle should be taken into account as it “has ‘by now’ become a fully-fledged and general principle of international law” (para. 7.86). The panel rejected this argument and held that “prudence suggests that we not attempt to resolve this complex issue” (para. 7.89), as the debate on the legal status of the precautionary principle in international law is still ongoing. It concluded that, for the purposes of disposing of the legal claims before it, it was not necessary to take a definite position on this issue.

Then, the panel turned to the substantive claims. By way of introduction, it determined that the relevant EC measures under examination, in particular EC Directive 2001/18 and EC Regulation 258/97, constituted, in terms of their purpose, their form and their nature as well as with respect to their effect on international trade, SPS measures within the meaning of Annex A(1) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>32</sup> Importantly, however, the panel noted that the complainants were not challenging the approval procedures as such but rather the EC’s *application* of these procedures. Furthermore, the member state safeguard measures were also considered by the panel to constitute SPS measures.

With respect to *the general EC moratorium*, the complainants argued that the EC had in place a *de facto* moratorium on the approval of biotech products.

<sup>31</sup> Convention on Biological Diversity of 5 June 1992, SR 0.451.43; Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 29 January 2000, SR 0.451.431. Switzerland is a party to both the Convention and the Protocol.

<sup>32</sup> In addition to the claims discussed here, the complainants had raised a number of other claims which were dismissed by the panel, partly on the grounds that the moratorium was not an SPS measure for the purposes of certain provisions of the SPS Agreement, partly on the grounds that the claims were unfounded in substance, and partly on the grounds that an examination was not necessary in order to come to an overall conclusion (judicial economy).

The panel ruled in favour of the complainants on this point. It found that such a *de facto* moratorium was generally applicable to all applications for approval that were pending between October 1998 and August 2003, without having been adopted through a formal EC decision. In fact, during this period, no single application was approved despite the fact that a large number of applications were pending and that many of these had received one or more favourable scientific assessments. The panel put particular probative weight on a joint declaration by five member states (Denmark, France, Italy, Greece and Luxembourg) of 1999 declaring that they would take steps “to have any new authorizations for growing and placing on the market of genetically modified organisms (...) suspended” until the coming force of rules on the labelling and traceability of such products (para. 4.144). The panel continued that “by not making full use of its powers to complete the approval process, the Commission knowingly entered into effective (*de facto*) co-operation with the Group of Fives countries” as this group was believed by the Commission to constitute “a credible and stable ‘blocking minority’” (para. 7.1279). The panel concluded that the Commission and the five countries followed a common “plan (...) of preventing the final approval of applications” (para. 7.1281). Therefore, this “clear and repeated pattern of inaction, or delayed action, by the Commission” (para. 7.1274) amounted to a *de facto* moratorium and therefore violated Article 8 and Annex C(1)(a) of the SPS Agreement, which provides for approval procedures to be “undertaken and completed without undue delay”. The panel corroborated this view by adding that “evolving science and the application of a prudent and precautionary approach”, as legitimate as such concerns might be, could not *per se* justify delays which occurred in the application of the moratorium (para. 7.1530).

With respect to *the product-specific EC measures*, the panel determined, largely based on similar grounds, that the *de facto* moratorium led to undue delays in the completion of approval procedures for certain specifically designated biotech products. Therefore, the EC violated Article 8 and Annex C(1)(a) of the SPS Agreement with respect to 24 out of 27 products for which complaints had been made.

With respect to *the member state safeguard measures*, the complainants argued that various member states (Germany, France, Italy, Austria, Greece and Luxembourg) prohibited the importation and marketing of various biotech products already approved by the EC without having provided a proper risk assessment. The panel concurred with the complainants that the safeguard measures were not “based on” a risk assessment as required by Article 5:1 of the SPS Agreement. It recalled the Appellate Body’s jurisprudence according to which the term “based on” means that a risk assessment needs to “sufficiently war-

rant” or “reasonably support” the SPS measure at issue (para. 7.3028).<sup>33</sup> The panel held that the risk assessments actually undertaken by the EC scientific committees as well as the scientific studies provided by the member states strongly suggested that a total ban was not sufficiently warranted. According to the panel, the assessments and documents submitted to it did not contain convincing evidence that biotech products posed any greater risk to human health or the environment than conventional non-GMO products. Therefore, the member state safeguard measures violated Article 5:1 and, by implication, 2:2 of the SPS Agreement as they could not present a scientifically-based justification for the adoption of such measures. With respect to an Austrian ban on a certain type of GMO maize, the panel underlined its finding with the observation that “if we were to allow Austria effectively to ignore favourable risk assessments, we would turn these assessments into documents without any substantive importance and the conduct of these assessments into a mere formality” (para. 7.3067). Lastly, the panel examined the EC’s argument that the safeguard measures were justified as “provisional measures” pursuant to Article 5:7 of the SPS Agreement. This provision permits the adoption of such measures in cases where “relevant scientific evidence is insufficient.” After having cited the well-established requirements that need to be fulfilled in order to invoke this provision,<sup>34</sup> the panel turned to the member state safeguard measures and determined that, in fact, sufficient scientific evidence was available to carry out a proper risk assessment. Hence, there was no room for the member states to adopt provisional measures. The panel also rejected the EC argument that it needed to have regard to the respective member’s appropriate level of protection in examining whether relevant scientific evidence was sufficient to perform a risk assessment or not. The panel concluded that Article 5:7 of the SPS Agreement could presently not be invoked by either the EC or the member states.

The panel report was not appealed by either party and accordingly adopted by the Dispute Settlement Body (DSB).

### **Commentary**

The overall outcome of the case is not surprising and had been expected by most commentators. With respect to its specific findings, the panel report is, at first sight, largely favourable to the complainants. They focused their complaints on challenges to aspects of the *application* of the EC’s approval system

<sup>33</sup> See the Appellate Body report in *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998 (WT/DS26/AB/R, WT/DS48/AB/R), paras. 193–94.

<sup>34</sup> See the Appellate Body report in *Japan – Measures Affecting the Importation of Apples*, adopted on 10 December 2003 (WT/DS245/AB/R), para. 89.

for biotech products rather than on the approval system *as such*. Thus, the dispute did not go to the heart of the strongly polarised debate on the WTO-consistency of potentially trade-restrictive measures against GMO products. The panel did not elaborate, nor decide, on whether biotech products in general are safe or not, whether biotech products are 'like' their conventional, non-modified counterparts, or whether the EC, or any other WTO member, has a right to require the pre-marketing approval for biotech products (para. 8.6). Moreover, the panel did not examine the relevance and application of the GATT 1994 and the Agreement on Technical Barriers to Trade (TBT Agreement) to biotech products. By focusing on the WTO-inconsistent application of the EC approval system, the complainants could be reasonably confident that some of their claims of procedural flaws would succeed. Indeed, the panel findings on the WTO-inconsistency of the *de facto* moratorium and of the product-specific EC measures are sound and well reasoned. Question marks remain for the EC and its member states as to the implementation steps necessary in order to comply with the report. Its representatives argued during the interim report stage in early 2006 that the Community had meanwhile revoked its alleged *de facto* moratorium, and suggested that the implications of the ruling for the current EC regime on the approval of biotech products as such are likely to be negligible. In fact, since August 2003 the EC has formally approved several biotech products to be imported into, and marketed on, the Community market. The panel refused to take the subsequent developments after its establishment into formal consideration and simply recommended in its final conclusions that the EC bring the general *de facto* moratorium into conformity with its obligations under the SPS Agreement "if, and to the extent that, that measure has not already ceased to exist" (paras. 8.16, 8.36, 8.51). Consequently, the EC resigned itself to the panel report and refrained from appealing it. With respect to the general *de facto* moratorium, it seems tempting to state that there was 'much ado about nothing'. The legal situation is different with respect to the panel ruling on the *member state safeguard measures*. They need to be removed unless a proper risk assessment pursuant to Article 5:1 of the SPS Agreement justifies a national ban on specific biotech products. It is to be hoped that the EC member states indeed comply fully with the panel ruling. Any future disagreement over what, if anything, the EC and the member states still need to do to bring the disputed measures into conformity with WTO law could generate complicated Article 21:5 DSU disputes and would unnecessarily prolong the tradition of inglorious transatlantic trade dissonances.

Although the panel's findings are framed so as to be noticeably specific to the EC context, the panel report will have a relevant impact on the debate surrounding the legality of trade-restrictive measures against biotech products on a more general level. Three aspects are in particular noteworthy. First, the panel

confirmed the central role of conducting a proper risk assessment in all SPS matters. A risk assessment provides a rational basis for regulatory action, supported by scientific evidence. It is the domain of science; only the subsequent management and communication of an identified risk also incorporates non-scientific elements in its consideration and involves political and societal value judgements. The panel reiterated the established case law on the requirements, which a proper risk assessment needs to meet under the SPS Agreement, and found it to apply similarly to the controversial issue of biotech products. Hence, any trade-restrictive measure in this area needs to be reasonably supported by scientific evidence demonstrating that biotech products pose a greater risk to human health or the environment than conventional non-GMO products.

Second, the panel's refusal to interpret the SPS Agreement in light of other rules of international law, specifically the *Convention on Biological Diversity* and the *Biosafety Protocol*, reflects a very conservative approach and neglects the close and, in most cases, mutually beneficial relationship between the WTO legal framework and the wider body of public international law. The panel read the term "applicable in the relations between the parties" in Article 31:3(c) of the Vienna Convention to mean *all* the members to the WTO and concluded that, as the mentioned Convention and the Protocol were not acceded to by all WTO members, neither of them were to be taken into account as relevant context. Doing so, the panel said, "ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules" (para. 7.70). Moreover, it considered this approach to be in line with prior Appellate Body practice.<sup>35</sup> Although the Appellate Body famously held, in its very first report ever, that the WTO agreements must "not be read in clinical isolation from public international law",<sup>36</sup> it has not yet unequivocally determined under which circumstances WTO adjudication bodies are under an *obligation* to take into account other rules of international law. A majority of academic writings seem to argue that, in the WTO context, "applicable in the relations between the parties" pursuant to Article 31:3(c) means those rules of international law which bind the *parties to the WTO dispute in question*.<sup>37</sup> Based on this view, the Convention on Biological

<sup>35</sup> See the Appellate Body report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998 (WT/DS58/AB/R), paras. 128–31.

<sup>36</sup> Appellate Body report in *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996 (WT/DS2/AB/R), at 17.

<sup>37</sup> See, for the relationship of WTO law and other international law, COTTIER/OESCH (supra fn. 9), at 517–20; GABRIELLE MARCEAU, A Call for Coherence in International Law, in: *Journal of World Trade* 1999(5), at 87–152; PALMETER/MAVROIDIS (supra fn. 11), at 73–8; JOOST PAUWELYN, *Conflict of Norms in Public International Law: How the WTO Relates to other Rules of International Law*, Cambridge 2003; and LORENZ STÖKL, Das Verhältnis multilateraler Umweltschutzabkommen zum WTO-Recht, dargestellt am Beispiel des Biosafety Protocol, in: *Aussenwirtschaft* 2001, at 327–57.

Diversity would have been applicable in the present dispute between the EC and Argentina and between the EC and Canada, as these entities are all parties to the Convention.<sup>38</sup> The panel, however, accepted the potential relevance of both the Convention on Biological Diversity and the Biosafety Protocol only under Article 31:1 of the Vienna Convention in order to determine the ordinary meaning of a treaty term. Its approach seems to indicate that it had the *option* to consider those legal sources, which are not binding on *all* WTO members, as it deemed useful. Such a wide discretionary power on the part of WTO adjudicating bodies is worrying. It does not enhance legal security and predictability, nor does it appropriately acknowledge the close relationship between the WTO and other legal regimes in international law. Illustratively, the Biosafety Protocol consists of over 130 parties, many of whom are also WTO members, and relevantly aims at providing an international regulatory framework to reconcile the respective needs of trade and environmental protection with respect to biotech products. In essence, the panel's reading of Article 31:3(c) of the Vienna Convention has rendered this interpretative tool "a dead letter."<sup>39</sup> It means that the WTO adjudicating bodies will almost never be obliged, in interpreting WTO law, to take other international law into account, as the membership of the WTO and that of other international organisations and/or treaties will almost never be completely congruent. A short glance over the existing multilateral environmental agreements (MEAs) results in the regrettable conclusion that the *Montreal Protocol* is the only agreement to which *all* WTO members – 150 at the time of writing – are a party.<sup>40</sup> Ideally, the proper relationship of WTO law and other international legal instruments is to be addressed in negotiations and thus in trade diplomacy. The need to clarify the relationship between the rules of the WTO and MEAs was affirmed in the Doha Ministerial Declaration in late 2001. It was explicitly agreed to negotiate rules "with a view to enhancing mutual supportiveness of trade and environment."<sup>41</sup> However, due to vastly diverging views among the WTO membership as to the most appropriate approach in reconciling different legal rules and regimes (as well as due to the current deadlock in the *Doha Round*), this tense relationship will most likely be resolved by case law eventually.

<sup>38</sup> The three disputes were, formally speaking, initiated by the United States, Argentina and Canada separately and examined by the panel as individual cases. The panel eventually issued a single document which constituted, technically speaking, three separate reports (para. 7.6).

<sup>39</sup> MCGIVERN (supra fn. 23), at 1.

<sup>40</sup> Montreal Protocol on Substances that Deplete the Ozone Layer (MP) of 16 September 1987, SR 0.814.021; see, for a comparative table of the membership in the WTO and in selected MEAs, [www.wto.org](http://www.wto.org) (click the link to environment/MEA database: Matrix on Trade Measures Pursuant to Selected MEAs).

<sup>41</sup> WTO Doc. WT/MIN(01)/DEC/1, adopted on 14 November 2001, para. 31.

Third, the panel dismissed the EC's invocation of the precautionary principle. It declined to rule on whether this principle has fully crystallised into a general principle or customary rule of international law. This ruling follows a standard pattern. Nearly ten years ago, the Appellate Body was similarly reluctant in *EC – Hormones*, and the status of the precautionary principle in international law “still awaits authoritative formulation” (para. 7.87, citing the Appellate Body in *EC – Hormones*). This cautious prudence seems convenient, as the precise definition and content of the principle as well as the conviction, that its legally binding effect is an inalienable part of the international legal order, remain the subject of debate and controversy both in domestic and international state practice and in academic writings.<sup>42</sup> Moreover, the panel also rejected the EC's reliance on Article 5:7 of the SPS Agreement which explicitly reflects elements of the precautionary principle and renders it – at least partly – applicable for SPS matters. The panel relied on the Appellate Body's statement in *Japan – Apples* according to which Article 5:7 sets out four strict requirements which need to be met in order for a member to adopt and maintain provisional SPS measures.<sup>43</sup> The establishment of those criteria has set a high legal hurdle for provisional measures. Against this background, it is not surprising that Article 5:7 of the SPS Agreement has not yet been successfully invoked in a single WTO dispute.

In Switzerland, various domestic acts and ordinances lay down a coherent legislative framework for the regulation of biotech products and genetic engineering (so-called ‘Gen-Lex’).<sup>44</sup> All GMOs must be formally approved before being imported into, or marketed on, the Swiss market. Overall, while Swiss regulation largely follows EC law, it is less trade-restrictive in key areas in relation to third countries. Switzerland has not introduced a moratorium similar to the general EC *de facto* moratorium on approvals for biotech products or undue delays in the approval of specific products, nor has it adopted outright bans similar to the member state safeguard measures. Therefore, the panel report in *EC – Biotech Products* does not impact directly on the Swiss regulatory approach to such products. Interestingly, no single application for the approval of a GMO seed has been formally submitted to the Swiss government to date,

<sup>42</sup> The EC, for instance, has explicitly declared that it considers the precautionary principle a rule of customary international law, whereas Switzerland has not done so, see Swiss Federal Office of Public Health et al. (ed.), *The Precautionary Principle in Switzerland and Internationally: Synthesis Paper by the Interdepartmental Working Group on the Precautionary Principle*, Berne 2003, at 17; also see, for an overview on the current state of the art, ROLF H. WEBER/MICHAEL VLCEK, «Vorsorgeprinzip» als Wegweiser im Lebensmittel- und Gesundheitsrecht, in: *Jusletter* 3. April 2006.

<sup>43</sup> See *supra* fn. 34.

<sup>44</sup> See, for an overview on the relevant acts and ordinances in Switzerland, CHRISTOPH ERRASS, *Öffentliches Recht der Gentechnologie im Ausserhumanbereich*, Bern 2006.

whereas several applications for the approval of GMO animal feeds and food products have been filed, five of which have in fact been granted as the requirements were fulfilled, and other applications are still pending. Moreover, in late 2005, Switzerland introduced, through an amendment to the Constitution, a moratorium on the use of GMOs in agriculture for a period of five years, based on a popular initiative which was approved by a positive vote of the people and the cantons.<sup>45</sup> Article 197:7 of the Constitution forbids, *inter alia*, the importation or marketing of GMO animals, plants or seeds for agricultural purposes, but it does not include animal feeds. In its report ('Botschaft') in the advent of the vote, the Federal Council left it explicitly open as to whether it considered the moratorium to be consistent with WTO law. At the very least, it hinted at potential inconsistencies.<sup>46</sup> In practice, this moratorium does not seem to pose any problems mainly because the economically lucrative GMO animal feeds and foods for human consumption are excluded from its scope. Therefore, a challenge by another WTO member against the Swiss moratorium is highly unlikely. Still, from a legal perspective, its WTO-consistency is questionable. Arguably, the panel's confirmation of the central role of conducting a proper, science-based risk assessment pursuant to Article 5:1 of the SPS Agreement (in order to adopt trade-restrictive measures against biotech products) and of the strict requirements under Article 5:7 of the SPS Agreement (in order to adopt provisional measures) as well as the panel's refusal to take into consideration the *Convention on Biological Diversity* and the *Biosafety Protocol* would complicate any Swiss defence against a potential complaint that its moratorium on the use of GMOs in agriculture violates WTO law.

<sup>45</sup> See BBl 2003 6903, 2004 4937, 2005 4039, 2006 1061.

<sup>46</sup> Botschaft des Bundesrates über die Volksinitiative «für Lebensmittel aus gentechnikfreier Landwirtschaft» vom 18. August 2004, BBl 2004 4937 4952.

