

Memorandum

**On the international trade law implications of the
judgment of the European Court of Justice in case C-
528/16**

Commissioned by the
Federal Agency for Nature Conservation (BfN)

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I. Subject of the analysis

National or supranational measures that restrict free trade in certain products are always additionally discussed in light of international trade law. It is therefore not surprising that the decision of the European Court of Justice (ECJ) in case C-528/16 has also been taken as an opportunity to speculate about possible consequences under international trade law. The structure of the international trade law "judiciary" system remains all too often as vague as analysis of the debatable violation of substantive law. Against this background, this Memorandum first briefly outlines consistency with international trade law, then addresses the formal structure of a WTO process for enforcing potential claims.

II. Substantive law aspects: consistency with WTO law

The World Trade Organization (WTO), founded in 1994, is an international umbrella organisation set up over various international agreements focussed on removing trade barriers and liberalisation of international trade. WTO law is primarily based on the General Agreement on Tariffs and Trade (GATT), concluded in 1947. It is further shaped by a number of international agreements including the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and others.

However, in the context of the cross-border effects of provisions that regulate technology, the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) are the most relevant.

The SPS Agreement defines what kind of measures are permissible for protecting the health of humans, animals and plants. The focus is only on measures that can have direct or indirect effects on international trade. SPS measures may be taken, in particular, where they are necessary for protecting the health of humans, animals or plants. In this context, the SPS Agreement obligates Members to base their measures as much as possible on the existing international standards of the Codex Alimentarius, the World Organisation for Animal Health (formerly Office International des Epizooties or OIE), and the International Plant Protection Convention (IPPC). Members may only take measures that go further when risk assessment based on scientific principles shows that this is necessary. The TBT Agreement, by contrast, establishes rules that governmental and non-governmental offices must follow when introducing technical regulations, standards and conformity assessment procedures. According to the TBT Agreement, the technical regulations and conformity assessment procedures may not restrict trade more than is necessary to fulfil a legitimate objective. In addition, they must be transparent and non-discriminatory. More details will be provided below.

1. SPS Agreement

In accordance with Article 1(1) and 1(2) SPS, the agreement applies to measures as defined in Annex A. Annex A(1) reads as follows:

"Sanitary or phytosanitary measure – Any measure applied:

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product

criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.”

Against this background, it must first be noted that the judgment of the ECJ does not constitute a “measure” under this definition. Because Annex A(1) second sentence SPS explicitly focusses on “all relevant laws, decrees, regulations, requirements and procedures”, it is clear that it applies to legislative or administrative procedural or substantive acts that have the legal character of a regulatory act. This understanding is consistent with both international and constitutional law, as otherwise an international dispute settlement system would be suddenly upgraded to something akin to a “super-revision authority”.

This assessment might well rule out both a claim against the judgment itself and a claim against Directive 2001/18/EC, which remains in force in the same form. What would actually be required is a concrete case involving a non-European actor wanting to export genome-edited material to the EU and the competent authority taking a decision unfavourable to the actor on the basis of the ECJ judgment. It

would be this concrete government measure, within the meaning described above, that would theoretically be an appropriate object for a Panel process. This assumption is supported by the decision of the WTO Panel in the case "EC – Approval and Marketing of Biotech Products"¹, which is discussed in depth below. Here, the Panel also assumed, in the case of the European Community's de facto moratorium, that this was not a "measure" within the meaning of the SPS Agreement.

This raises the question of which measures should be appraised against which SPS standards. In fact, Article 2 SPS first emphasises Members' rights to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement and are appropriate in extent and non-discriminatory. WTO law is therefore in no way blind to ecological issues.²

The criticism of European GMO law based on the SPS Agreement refers primarily to Articles 2(2), 5(6) and 5(7) SPS. Article 2(2) SPS requires that every trade-restrictive measure is based on scientific principles and is not maintained without sufficient scientific evidence. Article 5(5) and 5(6) SPS then

¹ See also II.3 on this point.

² Bungenberg, in: Pechstein, Nowak and Häde (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Volume III, AEUV, Art. 101-215, 2017, Art. 207 AEUV para. 230.

establish requirements for consistency and appropriateness.

"5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."

a. Scientific basis

Regarding the scientific basis of the disputed measures, it is notable that the WTO Appellate Body already made important statements on the scientific basis of SPS-relevant measures in the "hormone dispute" between the US and the then European Communities. The Appellate Body extended the definition of risk based on the view that the risk in question is not only risk ascertainable in a scientific laboratory under strictly controlled conditions. This extension also covers risk in existing human societies, namely actual potential for adverse effects on human health "in the real world where people live and work and die".³

With this statement, the Appellate Body calls for a realistic assessment of potential risks, which however must not completely break away from scientific standards. Rather, the following applies: "The risk assessment could set out both the prevailing view representing the 'mainstream' of scientific opinion, as well as the opinions of scientists taking a divergent view".⁴

Every Member is thus free within the scope of its risk assessment to draw on minority opinions in the

³ EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, [http://worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf), para. 187.

⁴ EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, [http://worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf), para. 194.

scientific community and to justify sanitary measures by making reference to these views. However, the divergent opinion must come from qualified and respected scientists.⁵ A minimum risk is not necessary.⁶ This allows Members comparatively broad leeway; the limits are only exceeded when trade-restrictive measures are based on dubious or unscientific studies. It is certainly the prevailing opinion that socio-economic ideas detached from science, such as general fear of specific products, do not constitute a sound basis for restrictive measures.⁷

Beyond this, Article 5(7) allows provisional measures to be taken in cases where no sufficient scientific evidence as described is available:

"In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from

⁵ EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, [http://worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf), para. 194.

⁶ Möhler, in: Krenzler, Herrmann and Niestedt (eds.), EU-Außenwirtschafts- und Zollrecht, 12th ed. October 2018, 40. Der Außenhandel mit landwirtschaftlichen Erzeugnissen und seine Einbindung in die Welthandelsordnung der WTO, para. 137 with further references.

⁷ A critical view of this point can be found, e.g. in Sander and Sasdi, Welthandelsrecht und "grüne" Gentechnik - Eine transatlantische Auseinandersetzung vor den Streitbeilegungsorganen der WTO, in: Europäische Zeitschrift für Wirtschaft 2006, 140 (142).

the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

b. Consistency

Concerns about conformity with the requirement of consistency are primarily based on the fact that genome-edited plants are not distinguishable from plants that have arisen from spontaneous mutations. Another purported inconsistency is the fact that European GMO law differentiates between organisms created with conventional mutagenesis and those created with new genetic engineering techniques.

This view may well, however, prove to be selective. There is nearly a century's wealth of experience with conventional mutagenesis, while most genome-editing processes have not even left the stage of basic research. This speaks against classifying this differentiation as an invalid, arbitrary measure⁸, especially as the ECJ addresses this point as follows:

⁸ Cf. Möhler, in: Krenzler, Herrmann and Niestedt (eds.), EU-Außenwirtschafts- und Zollrecht, 12th ed. October 2018, 40. Der Außenhandel mit landwirtschaftlichen Erzeugnissen und seine Einbindung in die Welthandelsordnung der WTO, para. 141.

"As laid down in Article 4(1) of Directive 2001/18, it is for the Member States to ensure, in accordance with the precautionary principle, that all appropriate measures are taken to avoid adverse effects on human health and the environment which might arise from the deliberate release or placing on the market of GMOs. This implies, in particular, that such deliberate release or the placing on the market may take place only on completion of procedures of assessment of the risks referred to in part B and part C of that directive respectively. However, as set out in paragraph 48 of the present judgment, the risks for the environment or human health linked to the use of new techniques/methods of mutagenesis to which the referring court refers might be similar to those which result from the production and release of a GMO through transgenesis. It follows that an interpretation of the exemption in Article 3(1) of Directive 2001/18, read in conjunction with point 1 of Annex I B thereto, which excludes organisms obtained by means of techniques/methods of mutagenesis from the scope of that directive, without any distinctions, would compromise the objective of protection pursued by the directive and would fail to respect the precautionary principle which it seeks to implement."⁹

Further differentiation criteria that are of regulatory relevance and must also be taken into account in international trade law arise from the

⁹ ECJ, Judgment of the Court of 25 July 2018, in case C-528/16, para. 50, Juris.

fact that new genetic engineering techniques are undeniably artificial in nature, whatever theoretically possible parallels can be drawn to natural processes. The use of these techniques is therefore a technical induction. That this kind of constellation leads to different levels of protection that can be justified under international trade law is also illustrated by the statements of the Appellate Body on the use of natural hormones versus synthetic hormones.¹⁰

Moreover, the non-distinguishability assumed in retrospect changes nothing about the differences in the risks to be controlled. The lack of detection methods does not cause a violation of international trade law, but quite the contrary leads to an obligation (justifiable under international trade law) for the producers concerned to label their products sufficiently. Incidentally, in light of the protection of intellectual property rights, it is highly unlikely that producers might fail to mark their genome-edited products accordingly.

c. Appropriateness

The principle of appropriateness results in measures that opt for the mildest possible but, at the same time, most suitable intervention in free trade. It has been pointed out that a special level of

¹⁰ EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, [http://worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf), para. 218ff.

intervention is per se inherent in approval procedures and that, for example, clauses for expediting the procedure tied to deadlines and the establishment of pure notification procedures would both make measures less interventional. The counterargument to this objection is of course that expedited procedures and notification procedures lack the absolutely required equal suitability in the constellation in question. It is precisely the techniques that lack a sufficient safety record within the meaning of Directive 2001/18/EC that need a thorough review of the feared adverse effects.

2. TBT Agreement

In addressing the question of whether and which international trade law implications the ECJ judgment could have, the TBT Agreement plays a much more minor role. Two considerations are noteworthy.

On the one hand, the TBT Agreement exclusively covers technical standards. Annex A(1) TBT legally defines the term "technical regulation" as follows:

"Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

This could apply at most to labelling and traceability provisions in EU GMO law, which due to the ECJ judgment must also be applied to products manufactured using new genetic engineering techniques.¹¹ On this point, however, as explained below, the European labelling system for GMOs has not drawn criticism from the EC Biotech Panel. If, however, the labelling system as such is acceptable under international trade law, it is also not apparent how the consistent application of this system to new genetic engineering techniques would lead to burdens under international trade law for export countries.

In addition, the TBT Agreement is subsidiary to the SPS Agreement.¹² Article 1(5) TBT unequivocally states: "The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures."

However, even if the applicability of the TBT Agreement were affirmed and some form of consequence of the ECJ judgment were identified with relevance

¹¹ Cf. Möhler, in: Krenzler, Herrmann and Niestedt (eds.), *EU-Außenwirtschafts- und Zollrecht*, 12th ed. October 2018, 40. *Der Außenhandel mit landwirtschaftlichen Erzeugnissen und seine Einbindung in die Welthandelsordnung der WTO*, para. 152.

¹² Möhler, in: Krenzler, Herrmann and Niestedt (eds.), *EU-Außenwirtschafts- und Zollrecht*, 12th edition, October 2018, 40. *Der Außenhandel mit landwirtschaftlichen Erzeugnissen und seine Einbindung in die Welthandelsordnung der WTO*, para. 151 with further references.

to international trade law, it must be remembered that Article 2(2) TBT forbids only “unnecessary obstacles” to international trade and, conversely, generally allows restrictions in the interest of protecting the environment, human health¹³ and consumers¹⁴. To this extent, then, the insights developed in regard to the SPS Agreement can be applied to the TBT Agreement. On the whole, the significantly sounder arguments speak against a violation of the TBT Agreement.

3. In depth: EC Biotech Panel

For the sake of comprehensiveness, it should be mentioned that in the ongoing discussion surrounding potential international trade law implications of the ECJ judgment, many eagerly make frequent, albeit selective reference to the EC Biotech Panel decision in the case “EC – Approval and Marketing of Biotech Products”.¹⁵

¹³ For a non-exhaustive list of examples, see Article 2(2) third sentence TBT.

¹⁴ Sander and Sasdi, Welthandelsrecht und “grüne” Gentechnik – Eine transatlantische Auseinandersetzung vor den Streitbeilegungsorganen der WTO, in: Europäische Zeitschrift für Wirtschaftsrecht 2006, 140 (143).

¹⁵ EC – Approval and Marketing of Biotech Products, Reports of the Panel, 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R. The 184 documents produced to date in relation to this process can be accessed here:

[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3dwt%2fds291%2f*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChange d=true \(09.04.2019\).](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3dwt%2fds291%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChange d=true (09.04.2019).)

In fact, a cursory reading shows that the Panel report does note nonconformity between particular requirements of the European GMO law - Directive 2001/18/EC on deliberate release of GMOs and Regulation (EC) 258/97 concerning novel foods - and the SPS Agreement.

Upon closer analysis, it becomes apparent that a large part of the questions at issue are not even addressed in this report. Rather, the Panel ruled exclusively on less significant issues, such as Members' bans based on the safeguard clause, and made no explicit assessment of genetic engineering, its regulation as a whole or the "equivalence" of organisms.¹⁶ Moreover, the general approach of the EC/EU policy, based on the precautionary principle, was not questioned; the provisions on labelling and traceability also drew no objections.¹⁷

Against this background, the literature correctly stresses that this kind of complex, scientifically determined issue of international environmental law overtaxes the WTO and also pushes the limits of its competences.¹⁸

¹⁶ Stoll, (K)eine Atempause im transatlantischen Gentechnikstreit - Das EC Biotech-Panel der WTO, in: Europäische Zeitschrift für Wirtschaftsrecht 2007, 471f.

¹⁷ Streinz, in: Streinz and Kraus (eds.), Lebensmittelrechts-Handbuch, 39th ed. May 2018, para. 575.

¹⁸ Stoll, (K)eine Atempause im transatlantischen Gentechnikstreit - Das EC Biotech-Panel der WTO, in: Europäische Zeitschrift für Wirtschaft 2007, 471 (472). More in-depth criticism can be found e.g. in: Panizzon, Arnold and Cottier, Handel und Umwelt in

In addition, the Biotech Panel deserves consideration in regard to another point. As already explained in the introduction, in the ongoing discussion, the impression is occasionally given that a WTO "judgment" is as swift for an export state "complainant" to receive as it is to implement. In fact, however, the consequences of the Biotech Panel rather illustrate the long duration of international trade disputes. The last Status Report by the European Union submitted to the chairs of the Dispute Settlement Body (DSB) is dated 15 March 2019 and, almost 13 years after the adoption of the Panel report, contains simply the following: "Following the mutually agreed solutions reached with Argentina (document WT/DS293/41) and Canada (WT/DS292/40), the European Union remains ready to continue its discussions with the United States with the goal of resolving this dispute and related issues."¹⁹

der WTO: Entwicklungen und Perspektiven, in: Umweltrecht in der Praxis / Le droit de l'environment dans la pratique 2010, 199 (234ff.).

¹⁹ European Communities - Measures Affecting the Approval and Marketing of Biotech Products - Status Report by the European Union - Addendum, WT/DS291/37/Add.131, 15 March 2019. The recent massive criticism expressed about the WTO by the US only references these time horizons only as an aside. The US criticism focusses on the Appellate Body's overreach of its competences, the review of national law by this body and the creation of precedents; see Glöckle and Würdemann, Die Appellate Body-Krise der WTO - eine Analyse der US-Kritikpunkte, in: Europäische Zeitschrift für Wirtschaftsrecht 2018, 978ff.

III. Procedural aspects of the WTO dispute settlement mechanism

Should a WTO process be initiated in spite of the considerations above, it will be important to take into account key provisions relating to its form. The creation of the World Trade Organization in the mid-1990s marked a radical reform of the dispute settlement system of the General Agreement on Tariffs and Trade (GATT). The Dispute Settlement Body (DSB) was established as an independent institution that establishes Panels to act "at first instant" in dispute settlement. The Standing Appellate Body serves to settle appeals.²⁰ The work of these two dispute resolution bodies is governed in detail by the provisions of the Dispute Settlement Understanding (DSU)²¹ and in specific cases²² is supported by expert groups.

1. From request to Panel conclusion

The request for establishment of a Panel must be submitted by the complaining party in writing. The request must state whether consultations were held. In addition, the specific measures at issue must be

²⁰ The usual German qualification of this as a "Berufungsinstanz" is a misnomer as the Appellate Body does not hear factual issues. See also the results of M. HILF, *Freiheit des Welthandels contra Umweltschutz* ?, in: *Neue Zeitschrift für Verwaltungsrecht*, p. 481 (483). In German it would be more appropriate to qualify the body as a "Revisionsinstanz".

²¹ OJEC 1994 No. L 336/234.

²² Senti, *WTO. System und Funktionsweise der Welthandelsordnung*, 2000, para. 343ff.

identified and a brief summary of the legal basis of the complaint sufficient to present the problem clearly must be included.²³ Following the selection of the Panel and the resolution of certain basic administrative issues, the Panel should provide the parties with a final report within six months as a general rule²⁴; in exceptional cases, this timeframe can be extended to a maximum of nine months.²⁵ However, it is also a fact that the WTO Panel in the biotech decision²⁶, which will be examined in greater detail below, more than doubled this timeframe, producing its final report after 30 months.²⁷

Within 60 days after the circulation of a Panel report to the Members, the report is either adopted or rejected by consensus at a DSB meeting. The adoption of a report is prevented when a party to the dispute notifies its decision to appeal.²⁸ The review of the matter by the Appellate Body, which focusses strictly on issues of law,²⁹ can lead to the body upholding, reversing or modifying the Panel report.³⁰ The proceedings of the Appellate Body shall, in general, not exceed more than 60 days; in exceptions with specific reasons, this deadline can

²³ Article 6(2) first and second sentence DSU.

²⁴ Article 12(8) DSU.

²⁵ Article 12(9) DSU.

²⁶ See also II.3 on this point.

²⁷ Stoll, (K)eine Atempause im transatlantischen Gentechnikstreit - Das EC Biotech-Panel der WTO, in: Europäische Zeitschrift für Wirtschaft 2007, 471 (472).

²⁸ Article 16(4) DSU.

²⁹ Article 17(6) DSU.

³⁰ Article 17(13) DSU.

be extended to 90 days.³¹ The Appellate Body report must be adopted or rejected by the DSB within 30 days.³² Only after the unconditional acceptance of the Appellate Body report by the DSB does it enter into legally binding effect for the parties to the dispute.³³ This binding effect, however, should not be considered equivalent to the effects of a judgment of a German court, for example. The consequences, which will be considered in more detail below, are significantly less stringent.

2. Consequences of a ruling

It is particularly important to bear in mind that a Panel or Appellate Body report adopted by the DSB does not directly lead to suspension of the disputed standard. Any other handling would lead to restrictions on state sovereignty that would hardly be reasonable. Instead, Article 19 envisages that the bodies make recommendations for rectifying the violations of international trade law standards identified.

If a Panel or the Appellate Body comes to the conclusion that a measure is inconsistent with a relevant provision of WTO law, it will recommend that the Member concerned brings the measure into conformity with that agreement. In addition to recommendations, the bodies may suggest ways in

³¹ Article 17(5) DSU.

³² Article 17(14) DSU.

³³ Article 17(14) first sentence DSU.

which the Member concerned could implement the recommendations.³⁴

To this extent, Article 19(2) DSU underscores once again the principle already set out in Article 3(2) DSU that the rulings and recommendations of neither the Panel nor the Appellate Body can add to or diminish the rights and obligations provided in the WTO agreements.

Article 21(1) refers to the basic necessity of prompt compliance with recommendations or rulings of the DSB. However, the implementation efforts of a party to a dispute affected by a Panel or Appellate Body recommendation can then become the object of further processes. First, the party concerned must inform the DSB of its planned implementation measures at a DSB meeting held within 30 days³⁵; if immediate implementation is impracticable, there are various options for setting an appropriate implementation timeline, which ultimately can last significantly more than one year.³⁶ The frequently much longer time horizons in practice are addressed separately under II.3 below.

3. In depth: (Un)suitability of an implementation measure

In the case of disagreement over whether an implementation measure is suitable ultimately

³⁴ Article 19(1) DSU.

³⁵ Article 21(3) first sentence DSU.

³⁶ Cf. Article 21(3) third sentence DSU.

reactivates the process provided for in the DSU. Article 21(5) DSU states the following: "Where there is disagreement as to the existence or consistency with a covered agreement³⁷ of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original Panel. The Panel shall circulate its report within 90 days after the date of referral of the matter to it. When the Panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

Only when the implementation efforts of the unsuccessful party have conclusively failed is it an option to (temporarily) suspend WTO concessions or negotiate compensation.³⁸ These steps are subsidiary to the preferred full implementation of a Panel or Appellate Body recommendation. Furthermore, compensation in accordance with Article 22(1) third sentence DSU is only possible on a voluntary basis. Only when the negotiations provided for in Article 22(2) between the parties for the development of a mutually acceptable compensation have failed does the successful party have the option to request authorisation from the DSB to suspend application of

³⁷ This refers to the WTO agreements listed in Annex 1 and 2 DSU.

³⁸ Cf. Article 22 DSU.

the most pertinent³⁹ concessions or obligations to the unsuccessful party. In this context too, it is important to refer to the comments on the EC Biotech Panel,⁴⁰ which illustrate well both the consequences of a "judgment against" by a Panel and the lack thereof.

In light of these many impact-softening factors, some hold the view that it would be more accurate to view DSB decisions as simple solution suggestions and guidelines, and that the DSB itself should be understood as a body with a moral and diplomatic function.⁴¹

4. Consequences for practical implementation

The overall picture this gives is that, notwithstanding all efforts to streamline them, there is considerable latitude in both the Panel and the Appellate Body processes, not least due to the considerable complexity of the facts of the cases and legal issues to be resolved. Where a party is unsuccessful, the main question is what measures are suitable for the Member concerned to remedy an identified violation of WTO law. This clearly requires establishing a legally compliant position.

However, as is known, there are countless options for modifying the regulatory approach, the primary

³⁹ On this point: Article 22(3) DSU.

⁴⁰ See II.3.

⁴¹ On this larger issue: Volz, *Die Organisation der Weltwirtschaft*, 2000, p. 115ff.

legal regime, implementation regulations or standards of substantive law, and these options are not limited to highly political objects of regulation. The Member concerned thus has a whole array of possibilities for action at its disposal for fulfilling the identified requirements. Nevertheless, the prerogative of assessing the measures to be taken clearly lies first and foremost with the unsuccessful party.⁴² If the successful party ultimately considers these measures inadequate, the procedures described, comprehensively set out in the DSU, must be followed.

IV. Summary of the main results

On the question of whether the extension of European GMO law to new genetic engineering techniques conforms with substantive law, it is apparent that neither the ECJ judgment in Case 528/16, nor Directive 2001/18/EC, the wording of which remains unchanged, are in themselves "disputable measures" within the meaning of the SPS Agreement. A theoretically more suitable object of a Panel process would be an unfavourable decision issued to

⁴² See also Ruffert, Der Entscheidungsmaßstab im WTO-Streitbeilegungsverfahren - Prozessuale Relativierung materieller Verpflichtungen?, in: Zeitschrift für Vergleichende Rechtswissenschaft 100 (2001), 304 (309, 311, 319); Sander and Sasdi, Welthandelsrecht und „grüne“ Gentechnik - Eine transatlantische Auseinandersetzung vor den Streitbeilegungsorganen der WTO, in: Europäische Zeitschrift für Wirtschaftsrecht 2006, 140 (142).

a non-European actor by a competent national authority.

Insofar as Article 2(2) SPS requires that a trade-restrictive measure is based on scientific principles, it must be pointed out that the Member concerned is also free to draw on minority scientific opinions provided by qualified and respected scientists. As established by the Appellate Body in a different context, the focus should not be on the isolated setting of a scientific laboratory, but instead on the real potential for adverse effects on human health "in the real world where people live and work and die".

In cases where scientific evidence is insufficient, Article 5(7) SPS allows, with certain restrictions, the adoption of provisional national measures.

With reference to the consistency requirement of Article 5(5) SPS, it may be stated that the distinctions between conventional mutagenesis and new genetic engineering techniques (also addressed by the ECJ) can justify a difference in their treatment.

Article 5(6), stipulating that a measure be no more trade-restrictive than is necessary for achieving its purpose, is only violated if alternative regulatory approaches are equally suitable for achieving the goal. This equivalence, however, is not apparent in the case of expedited or notification approaches.

Restrictions resulting from the TBT Agreement, which in any event is subsidiary to the SPS Agreement, are not apparent.

The Dispute Settlement Body (DSB) of the World Trade Organization is not a judiciary system but a mechanism for alternative dispute resolution. The work of the two dispute resolution bodies, the Panel and the Appellate Body, is governed in detail by the provisions of the Dispute Settlement Understanding (DSU).

Unfavourable decisions of the DSB do not result in the immediate revocation of, for instance, a disputed standard. Rather, it is incumbent on the WTO Member concerned to harmonise its legal position with the DSB analysis. The fact that, in the case of the EC Biotech Panel, consensus has still not been reached on identification and implementation of all measures, even nearly 13 years after the Panel report was adopted, illustrates the timeframe involved in these kind of disputes under international trade law.

Disagreement over whether an implementation measure is suitable ultimately reactivates the process envisaged in the DSU. Only after implementation efforts have conclusively failed is there the possibility of (temporarily) suspending WTO concessions or of (voluntary) payments by the unsuccessful party. These measures, however, are subsidiary to the implementation of a Panel or

Appellate Body recommendation, which is still the preferred option.