

National Bans in the Interim Report of the WTO-Panel

The Panel ruled on the national bans similar than they did with the moratorium just on procedural grounds. The whole argumentation is based on the question if the EC respective the member states fulfilled the requirements of a proper risk assessment according to the standards of the SPS agreement. A risk assessment according to §5.1 of the SPS agreement must:

„1) *identify* the diseases [or pests] whose entry, establishment or spread a Member wants to prevent on its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
2) evaluate the *likelihood* of entry, establishment or spread of these diseases [or pests], as well as the associated potential biological and economic consequences; and
3) evaluate the likelihood of entry, establishment or spread of these diseases [or pests] *according to the SPS measures which might be applied.*" (Art. 7.3031 p. 928)

The panel states that the proposed problems GMOs can cause (if a risk assessment would support this view) can legitimate biosafety measures. The whole argumentation which lead to a refuse of the national bans can be described as followed.

- 1) Biosafety measures up to bans can be declared under the umbrella of the SPS agreement Annex A(4), if there is the danger of the "establishment or spread of a pest or disease within the territory of an importing Member". The worried consequences of GMOs can be seen as a pest and therefore legitimate biosafety measures. (e.g. Art. 7.3030 p. 928 "*We have determined that to the extent Austria's measure is applied to address concerns over the spread of pollen to cultivated surrounding fields, long-term ecological effects and the development of antibiotic resistance, it falls within the scope of Annex A(1)(a) and/or (d) of the SPS Agreement.*")
- 2) To legitimate such measures risk assessments according to the criteria of the SPS agreement have to be carried out. It is not relevant who does these assessments as long they fulfil the criteria and the measures are based on them.(e.g. Art. 7.3016 p. 924 "*In the present case, the relevant member State safeguard measures might therefore be supported by a risk assessment carried out by these member States in respect of the product subject to their safeguard measures, or by a risk assessment performed by another entity.*")
- 3) The studies the member states submitted to the panel don't fulfil the of criteria risk assessments according to the SPS Agreement. (e.g. Art. 7.3044 p. 931: "*the flexibility which the phrase "as appropriate to the circumstances" may in some situations provide does not relieve Austria from the requirement in Article 5.1 to base its safeguard measure on a risk assessment which meets the definition of Annex A(4). All of the Annex A(4) definition of the term "risk assessment" which are applicable to Austria's safeguard measure, must, in our view, be met. Moreover, in circumstances where there is little available scientific evidence, the phrase "as appropriate to the circumstances" may provide a measure of flexibility in terms of how (but not whether) the applicable elements of the Annex A(4) definition, including the likelihood evaluation, are satisfied. In the case at hand, we have answered in the negative the question of whether the documents which Austria relied on satisfy the applicable elements of the Annex A(4) definition of the term "risk assessment".*"
- 4) The reason why these studies are not accepted is the missing "likelihood" analysis. This means there is no estimation of the probability of a respective damage which

legitimizes a biosafety measure. (e.g. Art. 7.3036 p. 929 “*[I]t is not sufficient that a risk assessment conclude that there is a possibility of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the 'likelihood' i.e., the 'probability', of entry, establishment or spread of diseases and associated biological and economic consequences.*”

- 5) The accepted risk assessments have been carried out by the EFSA and don't give a reason for biosafety measures, more than that they declare the GMOs for sale. All the other assessments don't fulfil the technical criteria of a risk assessment stated in the SPS agreement. (Art 7.3055 p. 933 “*In the present case, the risk assessments conducted by the lead CA and by the SCP with regard to T25 maize were favourable. These assessments concluded that there was no evidence that T25 maize presents any greater risk to human health or the environment than its conventional (non-biotech) counterpart.*”)
- 6) If there would be a risk assessment which fulfils these criteria and comes to a negative conclusion, member countries can conduct biosafety measures “based on” this assessment, even it's a “divergent opinion”. (Art. 7.3051 p. 932: “*Where a given risk assessment sets out a divergent opinion and this opinion comes from qualified and respected sources, it can be reasonably said that an SPS measure which reflects the divergent opinion is "based on" the risk assessment in question inasmuch as the divergent opinion is expressed in that risk assessment.*”

All in all there are some very interesting paragraphs which state the possibility of countries to ban GMOs and which we can use for our argumentation. My favourite one is: 7.356 (p.933): “*The European Communities asserts that each of the safeguard measures at issue in this dispute is based on the precautionary principle. We would agree that the fact that a Member has decided to follow a precautionary approach could have a bearing on a panel's assessment of whether an SPS measure is “based on” a risk assessment as required by Article 5.1. We consider that if there are factors which affect scientists' level of confidence in a risk assessment they have carried out, a Member may in principle take this into account in determining the measure to be applied for achieving its appropriate level of protection from risks. Thus, there may conceivably be cases where a Member which follows a precautionary approach, and which confronts a risk assessment that identifies uncertainties or constraints, would be justified in applying (i) an SPS measure even though another Member might not decide to apply any SPS measure on the basis of the same risk assessment, or (ii) an SPS measure which is stricter than the SPS measure applied by another Member to address the same risk. However, even if a Member follows a precautionary approach, its SPS measures need to be “based on” (i.e., “sufficiently warranted” or “reasonably supported” by) a risk assessment. Or, to put it another way, such an approach needs to be applied in a manner consistent with the requirements of Article 5.1.*”

So as I read the interim ruling, all forms of biosafety measures are possible, if the relevant bodies are carrying out proper risk assessments according to the rules of the Art. 5.1. of the SPS, although the panel states that the measures need to be adequate to the risk. The current problem seems to be more an internal European one, esp. with the EFSA. So we should try to influence the EFSA debate and try to make sure, that they will carry out better risk

assessments in the future. Alternatively the member states with national bans should carry out their own risk assessments and make sure that they are in line with the SPS requirements.