WTO PUBLIC FORUM
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TITLE OF SESSION: WTO Dispute Settlement: A Vehicle for Coherence?

ORGANIZER: The Center for International Environmental Law (CIEL)

ABSTRACT:

The international legal framework is increasingly fragmented. WTO Members have been largely unsuccessful in negotiating explicit multilateral solutions on coherence, shifting some of the responsibility to dispute settlement panels and the Appellate Body. Clarity is needed in order to foster coherence between the WTO, multilateral environmental agreements (MEAs), regional trade agreements, and other bodies of law (including human rights and labor).

Questions asked during the session include: Whether panels and the Appellate Body have a role in fostering coherence between WTO and other international law? If they do have that role, do they exercise it sufficiently well? What is the experience so far, looking at specific cases and decisions? How should future WTO panels deal with the interrelationship between WTO rules and other international legal systems? Are transparency and public participation useful procedural tools to enhance coherence in the context of WTO dispute settlement? If so, how should they be improved?

SUMMARY OF PRESENTATIONS:

The Chair of the panel discussion, **Ms. Mina Mashayekhi,** of UNCTAD initiated the discussion.

Brendan McGivern, White and Case
From* US – Shrimp *to* EC – Biotech*: An overview of the trade and environment debate in WTO jurisprudence.

According to Mr. McGivern, the incorporation debate within the WTO is a subset of a broader debate: what is the role of public international law in WTO dispute settlement, and what is the place of WTO law in the public international law regime? He explained that for most of the post-war era, the GATT was in a "closed box." In 1996, the WTO Appellate Body stated in the *Reformulated Gasoline* case that WTO agreements should not be read in "clinical isolation" from international law. So, Mr. McGivern raised the question: 10 years on... is the WTO still in clinical isolation? The majority opinion is yes. It really has only reached the "parking lot" of broader international law. Mr. McGivern then gave an overview and short summaries of some of the most important WTO cases tying broader international law principles to the "trade and" cases, including trade and environment WTO trade disputes.

With respect to ***EC-Hormones***, Mr. McGivern noted that the case, which concerned an EC import ban on hormone-treated beef, was significant, among other things, because it gave the first answer to the question: What is the required level of scientific proof needed by a government

before it may act? The Appellate Body answered that a government need not base its reasoning on a *majority* scientific opinion, but must do so in good faith on the basis of *respectable* scientific opinion, even if that opinion was in a scientific minority. This serves governments well, Mr McGivern noted, because if there is no scientific consensus on a given issue, governments may still act on the basis of respectable minority opinion as the basis of their SPS measure. The second interesting ruling related to the Precautionary Principle. Here the Appellate Body ducked the issue, saying that even if the precautionary principle was an emerging principle of international law or customary international environmental law, it need not be dealt with in this case because it would not override substantive SPS provisions.

In ***US – Shrimp,*** McGivern explained, the U.S. Congress imposed import restrictions on shrimp harvested in a manner which could cause harm to endangered sea turtles. While the Appellate Body found there was a violation of GATT Article XI, it also found that it could find refuge under Article XX(g). However, the ban nonetheless remained inconsistent with the chapeau of Article XX, as it was applied in an arbitrary and discriminatory manner. One of the interesting points of analysis here was the manner in which to interpret the phrase, "exhaustible natural resources." The Appellate Body ruled that the term should be interpreted based on the "contemporary concerns of the community of nations." Mr. McGivern noted that some developing countries had argued that they could not see a place in the WTO agreements for this "evolutionary approach" to interpretation. The second important point in this case related to the arbitrary and discriminatory application of the ban. The ban was found not to comply with the "chapeau" because it was rigid and had a "coercive" effect – it essentially required the same rather than comparable measures by other countries. The U.S. subsequently had to change this aspect of the measure.

EC – Asbestos, Mr. McGivern explained, involved an unsuccessful challenge by Canada to the EC's ban on the importation and use of asbestos. In assessing whether the measure was justified under the health exception in GATT Article XX(b), the Appellate Body stressed the importance of protecting human life and health, and such an important objective made it easier to find a measure to be "necessary." However, it is not clear how this translates into the invocation of Article XX(b) to protect the environment.

Japan – Apples, Mr. McGivern pointed out, was a case important for an argument that was actually *rejected*. Japan argued that when a government makes an assessment of scientific evidence, some deference should be given to it in that regard. The Appellate Body disagreed, ruling that they saw nothing in DSU Article 11 that stated there should be any deference given to the Member state. On the contrary, it ruled that DSU Article 11 imposed a standard of an objective review.

Mr. McGivern gave a quick insight to the most important aspect of ***EC – Biotech*** which was to be further discussed by Ms. Bernasconi-Osterwalder. Briefly, the EC put in place a ban on the importation of genetically modified products. This seemed like a place where the WTO would finally "leave the clinic," so to speak. However, the Panel rejected the EC's request that it take into account the Convention on Biological Diversity and the Biosafety Protocol to justify its ban. Based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the Panel concluded that unless all Members of the WTO are members of the MEA, then the MEA would not have to be considered in a WTO dispute as a "relevant rule of international law applicable in the relations between the parties."

Mr. McGivern also briefly touched upon the pending ***Brazil – Retreaded Tyres*** case, which was subsequently further expanded on by Mr. Dytz. The case involves a challenge by the

EC to Brazil's ban on the importation of used and retreaded tyres in an attempt to curb the large waste problem they created, which had implications for human health and the environment as they became fuel for forest fires and breeding grounds for mosquitoes. Mr. McGivern raised two issues. First, on necessity, the panel had assessed the capacity of Brazil to implement measures other than the ones currently employed to control tyre waste, and decided they were untenable for Brazil. Essentially, it referred to the old WTO maxim from *Beef Hormones* of making assessments in the "real world where people live, work and die" rather than an "ideal" situation. It will be interesting to see if the Appellate Body upholds this ruling, particularly as it relates to the question of what may be considered as an alternative measure that is "reasonably available" to a government. It seems that the Panel's approach implies that this issue may be at least partly a function of a government's level of development. The second interesting point went to the discriminatory application of the chapeau of GATT Article XX. The EC essentially alleged that the ban was not complete, as there was a leak of used and retreaded tyres into Brazil from MERCOSUR countries and the application was therefore discriminatory. Here, the panel looked at the real world effects of the measure, saying that tyre importations under court orders were taking place "in such amounts that the chievements of Brazil's declared objective is being significantly undermined." In other words, the Panel essentially applied a "trade effects" test to determine if the requirements of the chapeau were being met. This decision is currently under appeal.

In **conclusion**, Mr. McGivern noted that some hoped that WTO law would become a part of broader public international law, but he stated that Members probably did not want this to happen. However, Mr. McGivern stressed that this did not mean that there wasn't a role for MEAs in WTO dispute settlement proceedings. Mr. McGivern pointed to two issues that should be discussed and considered when discussing the WTO-MEA relationship: First, a long overdue discussion on the spaces for multilateralism and unilateralism. For example, in *US – Shrimp* the Appellate Body admonished the United States for its unilateral action. Secondly, there *should* be room for governments to unilaterally undertake legitimate environmental actions when necessary, even if there were no MEA in place. If executed correctly, a unilateral measure should be able to meet the requirements of Article XX.

Nilo Dytz, Permanent Mission of Brazil in Geneva
Trade, Health and Environment: the Brazilian experience in the Retreaded Tyres case

[Mr Dytz noted that his presentation was a personal testimony. He remarked that his comments, therefore, should not be taken as the official position of the Brazilian government. He also underlined that he would attempt to be as neutral as possible not to inappropriately influence the Appellate Body in any way.]

Mr Dytz noted that the Brazil-Retreaded Tyres case, currently under appeal, received special attention when it was initiated due to the health and environment issues it raised. For this reason there was considerable interest from civil society both in Brazil and in Europe. However, Mr Dytz said that there was "a certain degree of suspicion" in civil society regarding Brazil's environmental defence of a trade-restrictive measure, a suspicion generally and often observed also amongst other Members when a country seeks to defend a trade-restrictive measure on environmental and health grounds. This case was the first time a developing country has defended a trade measure on the grounds of health and the environment. It effectively showed that environmental protection is not an issue which only affects developed countries.

Each year, 1 billion tyres reach the end of their life cycle. 40 million of those are in Brazil. There is no simple solution for the management and disposal of such vast quantities of

waste tyres. It is especially difficult to deal with the waste problem in an environmentally sound and healthy manner. Four measures were challenged in the case, but one is the most important: the import ban on retreaded tyres. The EC alleged that the ban was a violation of Articles I and XIII of the GATT. Brazil conceded that although the ban was inconsistent, it could nonetheless be justified under the XX(b) exceptions in the GATT. Given the problems concerning health and the environment that waste tyres created, the ban needed to be implemented. The panel agreed, stating that the measure was necessary to protect human life and health. But the measure could not pass the *chapeau* of Article XX of the GATT, as some imports of used tyres were still permitted under judicial injunctions, which the government was still fighting in courts. With respect to the smaller amounts of imports of retreaded tyres from MERCOSUR, the panel concluded that the ban did not constitute an unjustifiable restriction to trade.

To relate this back to the discussions in this panel, Mr. Dytz noted that the panel at several instances had referred to studies and Guidelines relating to tyre waste under the Basel Convention on the Transboundary Movement on Hazardous and other Wastes. He noted that the relationship between the WTO regime and other international law was probably best served by taking a historical perspective, a patient perspective. He stressed that it was important to look towards a very high, broad level integration. The interaction of different forms of international law is still a very new field. But overall, Mr. Dytz stressed there didn't seem to be many reasons to have more than one 'international law' and that as we moved on, there would be more and more opportunities for them to interact, and "play together."

Nathalie Bernasconi-Osterwalder, Center for Internatioanl Environmental Law
EC-Biotech*: Fragmentation of international law versus mutual supportiveness*

Ms. Bernasconi's presentation focused on the Panel decision in the *EC – Biotech* case. She noted that the decision in that case did not have the legal force of an Appellate Body decision but was nevertheless very important because it put into question the approach taken by the Appellate Body in the *US - Shrimp* case. She said that the *Biotech* decision should serve as a wake-up call for environmentalists and negotiators who claim that the environment-trade inter-relationship had been resolved through dispute settlement, in particular in the *US-Shrimp* decision. She noted that in contrast to the Appellate Body in the *US-Shrimp*, the *Biotech* panel largely disregarded the relevance and importance of multilateral environmental agreements (MEAs).

In *EC-Biotech*, the EC asked the panel to take into account two treaties dealing precisely with the trade in biotech products – the issue at the heart of the *EC-Biotech* dispute. These treaties were: the Convention on Biological Diversity (CBD) and the Biosafety Protocol. Ms. Bernasconi stressed that these were treaties that were widely accepted: The CBD counts over 190 and the Biosafety Protocol over 140 parties.

In order to determine whether and how these MEAs should be taken into account, the Panel, in line with previous jurisprudence, relied on Article 31 of the Vienna Convention on the Law of Treaties of 1969 (VCLT) on treaty interpretation. The Panel went straight to Article 31(3)(c) of the VCLT, which directs adjudicators to take into account "any relevant rules of international law applicable in the relations *between the parties*." It interpreted this reference to mean that Article 31 (3)(c) mandates treaty interpreters to take into account non-WTO treaties only where these were ratified by *all* WTO Members. The consequence of this approach is that no MEA would ever be taken into account under this provision because no MEA has so far been ratified by all WTO Members. Ms. Bernasconi noted that in light of the absence of agreement as to the scope of Article 31 (3)(c) amongst international legal scholars, it was very surprising that

the Panel expanded extensively on its meaning and scope. A report issued by the International Law Commission (ILC) qualified the narrow reading of the *EC-Biotech* Panel as problematic because of the "unlikeliness of a precise congruence in the membership of most important multilateral conventions" and noted that the result would be the isolation of multilateral agreements as "islands" permitting no references *inter se* in their application.

In order to contextualize the panel's approach within broader WTO jurisprudence, Ms. Bernasconi looked back at how the Appellate Body dealt with the inter-relationship between WTO and outside WTO law in the *US – Shrimp* case. The Appellate Body in *US-Shrimp* did not mention Article 31(3)(c), and referred only to Article 31(1), according to which the terms of a treaty must be interpreted in accordance with the "ordinary meaning" to be given to its terms "in their context and in the light of its object and purpose." In this sense, the Appellate Body, for its analysis and interpretation of GATT Article XX, understood MEAs as part of the context and object and purpose of the terms it was to interpret, notwithstanding the outside treaty's party composition. Specifically, the Appellate Body took into account the concepts of sustainable development, multilateralism (including specific MEAs) and mutual supportiveness between trade and environment, as incorporated in the preamble of the *WTO Agreement* and reflected in subsequent developments within the WTO such as the *Decision on Trade and Environment* and the creation of the Committee on Trade and Environment.

This stands in contrast to the Panel's approach in *EC-Biotech*, which relied primarily on Article 31(3)(c), and relied on Article 31(1) only marginally. The *Biotech* Panel stated that it *could*, if it considered it useful, take treaties into account independent of their ratification status. However, while the Appellate Body in *US-Shrimp* stressed the importance of multilateral efforts to protect the environment and focused on the context, object and purpose of the WTO agreements, the *Biotech* Panel compared the role of environmental treaties to the role of dictionaries, noting that "[s]uch rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do." The ILC, again, criticized this approach, qualifying the comparison of international law to dictionaries inadequate.

In the end, the *Biotech* panel and the Appellate Body in *US –Shrimp* have taken fundamentally different interpretative approaches. In some instances, both approaches may lead to the same result, and arguably the Appellate Body's more conciliatory method would not have changed the result in the specific case. However, it is also possible that the approaches lead to dramatically different outcomes. Ms. Bernasconi favored the approach taken by the Appellate Body and noted that, after all, treaty interpretation implies that where more than one interpretation is possible, the interpreter must choose amongst the options available. In the trade and environment context, where one option is in line with other multilateral efforts and standards, would it not be logical, in light of the WTO objectives and the concept of mutual supportiveness, to opt for an interpretation that would accommodate standards and approaches incorporated into relevant MEAs?

Joost Pauwelyn, Graduate Institute of International Studies
Trade and ...: Negotiated Solutions versus Judicial Intervention* -- Mexico - Soft Drinks *and Hypotheticals on Labor and Human Rights

Professor Pauwelyn began his presentation by noting that the question of systemic coherence in the WTO dispute settlement system goes far beyond the trade and environment context: it arises in every instance where WTO law overlaps with other rules of international law. According to the WTO "conventional wisdom," the Appellate Body referring to rules outside the

WTO contract would be a form of judicial activism, whereas ignoring those rules altogether would be deferential to the political branch. Professor Pauwelyn called for a reversion of this notion. He argued that ignoring agreements by WTO members just because they are not concluded at the WTO in Geneva is the real activism. The opposite approach would enhance systemic coherence besides promoting coherence from within the WTO (e.g. through Articles XX, XXI, and XXIV of the GATT), it would allow reference to political agreements outside the WTO.

According to Professor Pauwelyn, the Appellate Body has used "backdoors" in order to take into account what goes on beyond the four corners of the WTO. He was worried by the Appellate Body referring to treaties that have not been ratified by the WTO members in certain interpretations of WTO law (e.g. in *US – Shrimp*). He also raised some concerns that under WTO law an international standard might be relevant even where not all members have agreed to it. This, he believes, could lead to unpredictable outcomes.

Professor Pauwelyn asked whether it would not be preferable, more logical, and predictable if WTO law recognized itself as part of international law. He cautioned this would not mean that parties, panels and the Appellate Body are free to use rules outside the WTO agreements and overrule WTO norms. The limits would be, in particular: (i) WTO dispute settlement can only be used in order to enforce WTO claims (i.e. the jurisdiction of panels is limited to claims based on the covered agreements); (ii) rules outside the covered agreements can only be relied on as a defense before WTO panels; (iii) both parties to the dispute must be parties to the treaty invoked as a defense; (iv) in order to apply, the rule invoked must prevail over WTO rules according to the rules on conflict of norms under international law (be it conflict clauses in a treaty, *lex specialis* or *lex posterior*). Professor Pauwelyn believes these limits would allow a fuller incorporation of international law and have the benefit of transparency and predictability, while impeding the WTO judicial bodies to exceed their carefully negotiated boundaries.

In order to illustrate the suggestion to take other rules of international law into account, Professor Pauwelyn offered some practical examples. First, he proposed that where an RTA contains a clear choice of forum clause, WTO Panels should feel comfortable in respecting the choice of forum. In *Mexico – Soft Drinks*, this was problematic because the establishment of panels under NAFTA is not automatic, as it is in the WTO. He hypothesized, however, that if France came before the WTO against Belgium for its ban on seal products, the choice to grant exclusive jurisdiction to the European Court of Justice, made on the regional level, should be recognized also at the WTO. Thus, a WTO Panel should decline to issue recommendations on the substance of the dispute, respecting the will expressed by the parties through Article 292 of the EC Treaty. Professor Pauwelyn then turned to the context of labor standards. He argued that an ILO recommendation calling upon ILO members to take sanctions against a country for its breaches of ILO Conventions on forced labor could excuse a breach of WTO law, provided that both the country targeted with the sanctions and the sanctioning country are members of the ILO and the WTO.

SUMMARY OF THE DISCUSSIONS:

One of the issues discussed was the role of international human rights law in the WTO. Professor Pauwelyn noted that any application of human rights law would be indirect and that no case has raised this issue so far. He noted that there may be scope to see a human rights argument mounted in the China Copyright case: Can China rely on public morals (censorship)? More importantly, however, Professor Pauwelyn raised the question of whether it was for the Appellate Body to interpret public morals with respect to free speech.

Mr. McGivern expressed his general concern that any incorporation of external treaties undermines the "commercial deal" that was reached in establishing the WTO Agreements or by later accession. By placing the WTO into the broader spectrum of international law you have the potential to change what was so delicately negotiated. He also reiterated his concern that multilateral action/standards should not be imposed via the WTO, but rather that Members should be able to take unilateral actions to address environmental and health concerns.

This discussion led to a debate on the fragmentation or splintering of WTO from other international law more generally and raised the question of whether such fragmentation could affect or damage the legitimacy of the WTO legal framework. Professor Pauwelyn noted that the problem was that, while the WTO may well remain a "closed box" to the world, the inverse was not true. In response to Mr. McGivern's point, he said that countries made deals at the WTO, but then made other deals elsewhere and that each deal affected the other. One deal could not be shielded from the other. On legitimacy, he noted that if the WTO stayed within its circle, that would not enhance its legitimacy. To the contrary, to gain legitimacy, the WTO needed to step out of its own "parking lot" and out into the world. At the same time, however, he raised concerns about the possibility of a generalised application of broad-membership MEAs because you could hold a country to a standard to which they had not agreed.

Addressing Professor Pauwelyn's concern, Ms. Bernasconi replied that the WTO had already accepted this approach in the TBT and the SPS Agreements, both of which seek to promote the use of international standards and harmonization. She noted that multilateral standards and principles set out in MEAs were precisely the types of agreements that worked towards harmonization, and explained that if WTO panels were to take MEAs into account, this would not be done in a way that would create new obligations on WTO Members. Instead, MEAs would typically be invoked as a defence, so that panels in deciding whether a Member is in violation of WTO rules, would take into account the fact that multilaterally agreed standards and principles set out in an MEA existed, and that MEA parties were expected to apply them. An MEA would not be used as a tool to impose the application of standards or principles on any WTO Member. She noted that this discussion was to be seen independently of the question of what constitutes a standard-setting body as defined under the TBT Agreement which could indeed lead to the obligation to apply specific international standards.

CONCLUSIONS AND RECOMMENDATIONS:

The discussion in this session focused on the issue of coherence between WTO and other international law and examined whether panels and the Appellate Body have a role in fostering coherence. The views expressed differed significantly one from the other, but there were common concerns and ideas articulated nevertheless. Further discussion and analysis are warranted, including to:

- Recap the various approaches possible, with a focus on those options/approaches proposed by the speakers;
- Identify elements of difference and concurrence in the different options, and explore ways in which some of the differences could be reconciled; and
- Identify and assess ways in which the different options/approaches could be practically implemented. This would include the question of whether there is a need to change WTO law or whether the options could be implemented on a case-specific basis through WTO jurisprudence.

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