



The Center for International
Environmental Law

 SAEFL – Swiss Agency for the Environment, Forests and Landscape

ENVIRONMENT AND TRADE JURISPRUDENCE AT THE WTO: LINKAGES TO THE NEGOTIATIONS

Date: 13 December 2005

Time: 11.00-13.00

Place: NGO Centre, Hong Kong Convention and Exhibition Centre, Room 408

Sponsors: Center for International Environmental Law (CIEL), and
Swiss Agency for Environment, Forests & Landscape

Agenda:

11.00: Welcome & Introduction

Maria Julia Oliva, Center for International Environmental Law (CIEL)

Ms. Oliva welcomed participants to the event, organized by CIEL and the Swiss Agency for the Environment, Forests and Landscape (SAEFL). Ms. Oliva briefly introduced the book ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE (EARTHSCAN, DECEMBER 2005), written by CIEL attorneys with the generous support of the Swiss Agency for the Environment, Forests and Landscape, describing the relevance of decisions in the dispute settlement system of the World Trade Organization (WTO) to the environment and trade debate, as well as the objectives and approach taken by the publication. In particular, Ms. Oliva highlighted that the book offers a convenient and easy-to-use tool for practitioners, civil society, academics, students, and policy makers who work on environment and/or trade issues, with both background information on various environment and trade themes and summaries and excerpts of relevant WTO cases.

11.10: Session 1: Trade, Environment, and Development: 10 years of WTO Jurisprudence

Mitsuo Matsushita, Former WTO Appellate Body Member

Mr. Matsushita provided an overview of significant WTO appellate cases involving environmental considerations and analyzed the challenges raised by the relationship between WTO disciplines and the Kyoto Protocol. In particular, Prof. Matsushita noted that some measures taken to implement the Kyoto Protocol could conflict with WTO rules, including measures such as taxes and import/export restrictions. In such cases of potential conflict, Prof. Matsushita discussed the application of environmental exceptions in Article XX of the GATT, in light of WTO jurisprudence and the objectives of the Kyoto Protocol.

Tiyanjana Mphepo, South Centre

Mr. Mphepo addressed the links between recent WTO case law, ongoing Doha Round negotiations, and the interests of developing countries. In particular, Mr. Mphebo analyzed the *EC-Sugar* case with a view to determining whether the WTO dispute settlement system is development friendly. Mr. Mphebo noted that developing countries had criticized the Appellate Body for exceeding its mandate and for negatively impacting development considerations. Mr. Mphebo also noted that the *EC-Sugar* case showed that development arguments presented by developing countries were insufficient to make the WTO dispute settlement more development-friendly. Rather, the textual approach taken by the Panels and the Appellate Body made clear that more development-friendly provisions were necessary in the WTO agreements themselves, and thus the need for negotiations to incorporate development to the text of the agreements.

11.40: Open Discussion

12.00 Session 2: Identifying key concepts in trade-and-environment jurisprudence and the relationship to WTO negotiations

Nathalie Bernasconi-Osterwalder, Center for International Environmental Law (CIEL)

Ms. Bernasconi-Osterwalder discussed a critical yet often misunderstood concept in relation to the trade and environment debate - processes and production methods (PPMs) – and its relation to current WTO negotiations on environmental goods. She pointed out that many negotiators continue to believe that WTO rules prohibit Members from using of trade-related measures that are based on non-product related criteria, in line with the unadopted pre-WTO *Tuna-Dolphin* cases. However, the more recent WTO Appellate Body reports in the *Shrimp-Turtle* dispute clearly upheld an import ban on shrimp that was harvested in a way that harmed sea turtles. While not explicitly addressing the processes/product distinction, the Appellate Body concluded that the PPM-based measure at issue was justified under the GATT Article XX general exceptions clause. Like the GATT, the TBT and the SPS Agreements do not prohibit the use of such measures. In fact, it has been argued that those agreements do not even cover such measures, making them fall instead under the scope of the GATT. Thus, given that PPM-based trade measures are legitimate under existing WTO law, Members should not be worried about including a discussion of products produced or harvested in a manner beneficial for the environment, in the ongoing negotiations on environmental goods.

Brendan McGivern, White & Case International Trade (Geneva)

Mr. McGivern discussed the different standards of review utilized by Panels at the WTO. Mr. McGivern analyzed evolving WTO jurisprudence, including *inter alia*, *EC-Hormones*, *Japan-Apples*, and *US-FSC*, and argued in favor of deference as the adequate standard of review in cases involving complex issues of trade and environment. In particular, Mr. McGivern described the three standards of review employed to date, *e.g.*, deference, objective assessment, and margin of appreciation. He noted the anomaly created by the use of deference in anti-dumping cases, but not in cases concerning health, safety, and the environment. Mr. McGivern also noted that while there was no textual support for importing deference from the Anti-Dumping Agreement to other contexts, the jurisprudence showed some movement toward qualified deference, particularly in difficult cases involving “close calls”. He concluded that governments should be allowed the “benefit of the doubt” for good faith environmental and health measures.

David Waskow, Friends of the Earth, U.S.

Mr. Waskow addressed the impact of WTO rules on environment laws and regulations. Mr. Waskow analyzed the potential impact of the General Agreement on Trade in Services (GATS) in light of the *US-Gambling* case, noting that a ban on waste disposal could be considered a violation of GATS commitments. WTO negotiations on non-agricultural market access (NAMA) could also be problematic, due to the impact of lower tariffs on forests, fisheries, mining, and other sensitive sectors. Mr. Waskow also addressed issues relating to measures adopted to address climate change, such as differentiated taxation depending on engine sizes, which has already been identified as posing problems by the United States. Finally, Mr. Waskow considered that the ongoing negotiations on the relationship between multilateral environmental agreements (MEAs) and the WTO are troubling, as the outcome could be negative. In particular, he noted that this relationship would be better addressed in a context that adequately balanced trade and environment concerns.

12.40 Open Discussion and Wrap-up

Speaker Bios:

Mitsuo Matsushita of Japan served on the Appellate Body from 1995 to 2000. He is Professor Emeritus at Tokyo University and counsel to Nagashima, Ohno & Tsunematsu, a leading international law firm in Tokyo. Having gained a Ph.D. from Tulane University, USA, and a D.Jur degree from Tokyo University, Professor Matsushita went on to become widely acknowledged as one of the most authoritative Japanese scholars in the field of international economic law. In his academic career, he has held Professorships at Sophia University and Tokyo University. He has been a Visiting Professor at Harvard University, Georgetown University, University of Michigan, Columbia University, and at the College of Europe in Bruges, Belgium. He has written many publications on various aspects of international trade and competition and investment law. In his public career, Professor Matsushita has been attached to the Ministry of Finance and the Ministry of International Economics and Trade as a member of various councils dealing with telecommunications, customs and tariffs, export and import transactions, and industrial property. He serves as a Member of the Office of the Ombudsman of Trade and Investment, which is part of the Japanese government and deals with market access

Nathalie Bernasconi-Osterwalder is the managing attorney of the Geneva office of the Center for International Environmental Law (CIEL). She works primarily on issues relating to trade, investment and sustainable development. Ms. Bernasconi is a former fellow of the Institute of International Economic Law in Washington, D.C. and has worked for the United Nations Development Programme (UNDP) in Vietnam, for the Australian law firm Phillips Fox, and for the Justice Department in Switzerland. She has an LL.M. from Georgetown University Law Center in Washington, D.C., and a Lic. iur. Université de Neuchâtel from Switzerland.

Tiyanjana Mphepo is a Malawian national. He is a member of the Bar in Malawi and he holds an LL.M degree from the University of Cambridge. He is currently the Project Officer on WTO Dispute Settlement in the Trade and Development Program of the South Centre (an intergovernmental think-tank of developing countries which is based in Geneva, Switzerland). Mr. Mphepo has written and published papers and analyses on issues relating to WTO dispute settlement relevant to developing countries.

Brendan McGivern practices international trade law, particularly the law of the World Trade Organization (WTO). He advises companies, industry associations and sovereign governments on the full range of WTO disciplines, including anti-dumping, subsidies and countervailing measures, market access, safeguards, state-trading enterprises, services, and intellectual property. He represents WTO Member states in dispute settlement proceedings, and is currently involved in four active WTO disputes before Panels and the Appellate Body. In 2003-2004, he served as a member of the WTO arbitration panel in the

U.S. - 1916 Anti-Dumping Act case, which adjudicated a request by the European Communities for retaliatory trade sanctions against the United States. Prior to joining White & Case, Mr. McGivern was the senior legal adviser and the head of the Dispute Settlement section at the Canadian Mission to the WTO in Geneva.

David Waskow is the International Program Director at Friends of the Earth – U.S. (FoE-US). Previous to that, he was the Trade Policy Analyst at FoE-US from 2000-2004. He has served on the U.S. Trade Representative's Trade and Environment Policy Advisory Committee and currently serves on the USTR Industry Trade Advisory Committee for Chemicals, Pharmaceuticals and Allied Products. His publications include “Environmental Services Liberalization: A Win-Win, or Something Else Entirely?” in *International Lawyer*. He has graduate degrees from Princeton University's Woodrow Wilson School of Public and International Affairs and from the University of Chicago

Organizers:

The Center for International Environmental Law (CIEL) is a nonprofit organization working to use international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society. CIEL's Trade Program seeks to reform the global framework of economic law, policy and institutions in order to create a more balanced global economy that is environmentally sustainable and beneficial to all people in a more equitable way. CIEL helps to achieve these goals through legal research and analysis, training and support, and outreach to policymakers, media, and other NGOs. Working through both our Geneva and Washington offices, CIEL is able to monitor both the U.S. government positions and the World Trade Organization itself.

Swiss Agency for the Environment, Forests and Landscape (SAEFL) is Switzerland's federal government's centre of environmental expertise and is part of its Federal Department of the Environment, Transport, Energy and Communications. It is responsible for providing a scientific basis for environmental protection measures, drafting laws and ordinances, promoting sustainable development, implementing environmental protection measures in cooperation with cantonal authorities, industry, non-governmental organizations (NGOs) and other players, and promoting global cooperation through involvement in international environmental bodies.