CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW
INSTITUE FOR INTERNATIONAL ECONOMIC LAW

SEVENTH ANNUAL WTO CONFERENCE, 22-23 MAY 2007
WTO DISPUTE SETTLEMENT: CURRENT ISSUES
THE GMOS DISPUTE

Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in *EC-Biotech*

Background note to presentation by Nathalie Bernasconi-Osterwalder,
Center for International Environmental Law (CIEL)

Background

On 29 September 2006, the WTO dispute settlement panel in *European Communities – Measures affecting the Approval and Marketing of Biotech Products* (*EC-Biotech*)[1] issued three consolidated panel reports outlining the Panel's final decision in the dispute.[2] While the long-awaited decision leaves many questions relating to trade in biotech products unanswered, it nevertheless addressed a number of important issues relating to the applicable WTO law, the scope of the Sanitary and Phytosanitary Agreement (SPS Agreement), as well as a number of questions relating to the obligations contained in the SPS Agreement.[3] The Panel also addressed the relationship between WTO law and multilateral environmental agreements (MEAs), the focus of this note.

In its submissions, the EC argued that the WTO agreements examined in the dispute must be interpreted and applied by reference to relevant rules of international law arising outside the WTO context. It criticized the approach taken by the complaining parties – the United States, Canada and Argentina – which treated the legal issues concerning the authorization and international trade of genetically modified organisms (GMOs) as though they were regulated exclusively by WTO rules, without regard to the relevant rules of public international law adopted to regulate the concerns and requirements arising from the particular characteristics of GMOs.[4] To support its argument, the EC

[1] Panel Report, *European Communities – Measures affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006).
[2] On 4 March 2004, the Director-General composed the consolidated *EC-Biotech* panel with Christian Haberli (Switzerland), Mohan Kumar (India), and Akio Shimizu (Japan).
[3] *Agreement on Sanitary and Phytosanitary Measures,* 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization (*available at* http://www.wto.org/English/tratop_e/sps_e/spsagr_e.htm).
[4] *EC-Biotech* at para. 7.49.

referred to the *US–Shrimp* decision,[5] in which the Appellate Body – when interpreting the General Agreement on Tariffs and Trade (GATT) – looked at several treaties, including treaties which at least one party to the dispute had not signed or had signed but not ratified.[6] Relying on the Appellate Body's approach in *US-Shrimp*, the EC argued that the Panel, when interpreting the relevant WTO rules, was required to take into account the 1992 Convention on Biological Diversity (CBD) (ratified by the EC, Argentina and Canada; and signed by the United States)[7] and the 2000 Cartagena Protocol on Biosafety (ratified by the EC and signed by Argentina and Canada).[8] Specifically, the EC argued that the rules of international law reflected in the Biosafety Protocol on the precautionary principle and on risk assessment should be taken into account to inform the meaning and effect of the relevant provisions of the WTO agreements.

The Panel sees no obligation to take into account the Convention on Biological Diversity or the Biosafety Protocol when interpreting relevant WTO rules

The Panel confirmed, in line with previous jurisprudence, that it was obligated to interpret the WTO agreements "in accordance with customary rules of interpretation of public international law" reflected, in part, in Article 31 of the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention).[9] Article 31 of the Vienna Convention provides guidance for treaty interpreters, and WTO panels and the Appellate Body have applied it since the beginning of dispute settlement under the WTO, including in environmental and health-related cases such as *US-Gasoline, US-Shrimp,* and *EC-Hormones*. In *US-Gasoline*, the first Appellate Body decision under the WTO, the Appellate Body recognized Article 31 of the Vienna Convention (entitled "General rule of interpretation") as customary or general international law of interpretation applicable also for WTO dispute settlement, stressing that WTO law should not be "read in clinical isolation from public international law."[10]

In the Vienna Convention, one rule of particular importance for the WTO-MEA linkage is Article 31(3)(c), which directs adjudicators to take into account "any relevant rules of international law applicable in the relations between the parties." It is thus not a surprise that the Panel in *EC-Biotech* focused primarily on Article 31(3)(c).[11] In interpreting Article 31(3)(c), the Panel found that "rules of international law" seemed sufficiently broad to encompass all generally accepted sources of public international law, including treaties, customary international law, and the recognized general principles of law, in line with the Appellate Body's approach in *US–Shrimp*.[12] Regarding the reference to rules "applicable in the relations between the parties," the Panel found that this reference limited the application of Article 31 (3)(c) to the rules of international law applicable in the relations between *all* the parties to the treaty being interpreted. Pursuant to this approach, the

---

[5] Appellate Body Report, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/R/AB (6 November 1998).

[6] *EC-Biotech* at para. 7.52.

[7] UNCED, Convention on Biological Diversity, opened for signature, 5 June 1992, 31 I.L.M. 818 (1992).

[8] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 39 I.L.M. 1027 (2000).

[9] *EC-Biotech* at para. 7.65; Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691-92 (entered into force 27 January 1980).

[10] Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (20 May 1996) at page16. .

[11] Article 31 (3) (c) reads as follows:

Article 31 General rule of interpretation

3. There shall be taken into account, together with the context:

(c) any relevant rules of international law applicable in the relations between the parties.

[12] *EC-Biotech* at para. 7.66.

category of rules "applicable in the relations between the parties" that would have to be considered in a WTO dispute would be limited to those applicable in the relations between *all* WTO Members.[13] Thus, this would logically include, besides customary law and general principles of law, those treaties ratified by all WTO Members. Given, however, that several WTO Members, including the complaining parties to the *EC-Biotech* dispute, were not parties to the agreements in question, the Panel rejected the idea that it was required to take into account either the CBD or the Biosafety Protocol pursuant to Article 31(3)(c).[14]

Thus, the Panel opted for the narrowest reading possible of Article 31(3)(c), according to which a WTO panel or Appellate Body would never be required to take into account any MEAs pursuant to Article 31(3)(c) because none of the MEAs have so far been ratified by all WTO Members.

A report issued by the International Law Commission (ILC)[15] qualified the narrow reading of the *EC-Biotech* Panel as problematic:

> **…** Bearing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that *any* use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law. In practice, the result would be the isolation of multilateral agreements as "islands" permitting no references *inter se* in their application. … This would seem contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers.[16] [Footnotes omitted.]

While the Panel categorically rejected the notion that it was *required* to take any treaty into account unless ratified by all WTO Members, it left open the question of whether it might have been *entitled* to take the CBD and the Biosafety Protocol into account if all WTO Members to the dispute were also parties of those treaties. In this respect, the Panel stated:

> [I]t is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.[17]

Concerned about the coherence and the "consistency of the multilateral treaty system as a whole," the ILC noted in this respect that taking "other treaties" into account as evidence of "ordinary meaning" appears a rather contrived way of preventing the "clinical isolation" as emphasized by the Appellate Body."[18]

---

[13] *Id.* at para. 7.68.
[14] *Id.* at paras. 7.73 - 7.75.
[15] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, U.N. Doc A/CN.4/L.682 (13 April 2006) (finalized by Martti Koskenniemi).
[16] *Id.* at para. 471.
[17] *EC-Biotech* at para. 7.72.
[18] ILC Report, *supra* note 15, at para. 450.

The Panel finds that it *may* consider non-WTO agreements independent of the party-status to interpret the "ordinary meaning of terms"

After rejecting the application of Article 31(3)(c), the Panel examined whether it could consider, in interpreting WTO agreements, rules of international law that are not applicable in the relations between WTO Members and thus do not fall within the category of rules under Article 31 (3)(c).[19] Referring to the EC argument that, in *US–Shrimp,* the Appellate Body interpreted WTO rules by reference to treaties that were not binding on all parties to the proceedings, the Panel concluded that it *may* consider such rules when interpreting the terms of WTO agreements if it deemed such rules to be informative. It stressed, however, that it need not necessarily rely on these.[20] To come to this conclusion, the Panel relied on Article 31(1) of the Vienna Convention, 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." It noted:

> The ordinary meaning of treaty terms is often determined on the basis of dictionaries. We think that, in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such 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. They would be considered for their informative character. It follows that when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it.[21]

Applying these considerations to the *EC-Biotech* case, the Panel noted that the EC had not explained how the provisions it identified as pertinent were relevant to the interpretation of the WTO rules at issue and concluded that it was not necessary or appropriate to rely on the particular provisions of the CBD and the Biosafety Protocol in interpreting the WTO agreements implicated in this dispute.[22]

Fragmentation versus Mutual Supportiveness

The Panel relied heavily on Article 31(3)(c) of the Vienna Convention in order to determine whether or not it was obliged to take the CBD and the Biosafety Protocol into account, as requested by the EC. Scholars' views differ with respect to the interpretation of the reference in Article 31(3)(c) of the Vienna Convention to 'rules applicable in the relations between the parties', and the Panel, opting for the narrower reading, may not be manifestly wrong. Nevertheless, its approach does not contribute to building channels of dialogue in an increasingly fragmented international legal system. The Panel's apparent attempt to avoid conflicts between relevant rules of international law[23] led it to conclude that the Vienna Convention did not establish a legal obligation for interpreting bodies to take into account treaties that were not ratified by all parties to the treaty being interpreted. Because there will most likely never be a precise overlap with WTO Members, this approach leads to the

---

[19] *EC-Biotech* at para. 7.90.
[20] *Id.* at paras. 7.91-7.93.
[21] *Id.*at para. 7.92, footnotes omitted.
[22] *Id.*at para. 7.95.
[23] *Id.* at para. 7.70.

absurd result that MEAs would never have to be taken into account by WTO interpreters. While it is unclear what exactly the drafters of the Vienna Convention had in mind in 1969 with the wording of Article 31(3)(c), it is clear that they were addressing a situation at a time in which most treaty-making activity focused on bilateral treaties. This stands in contrast with today's multitude of multilateral treaties. As of 22 May 2007, the CBD counted 190 parties, and the Biosafety Protocol had 141 parties. It is difficult to accept that the concepts and standards set out in treaties addressing a very specific global environmental problem can be entirely ignored by WTO panels.

Precisely to address this type of tension between different policy areas, the international community began in the early 1990s to stress the need for mutual supportiveness between trade and environment. Mutual supportiveness may be achieved if MEAs are taken into account for the interpretation of WTO agreements and vice versa. The decision of the Panel in *EC-Biotech* to ignore the importance of internationally negotiated environmental instruments outside the WTO runs counter to the notion of mutual supportiveness, which is now incorporated in a number of instruments, both inside and outside the WTO.

One of the first times the concept of mutual supportiveness was introduced in a major international instrument was in the Rio Declaration on Environment and Development and Agenda 21, adopted in 1992 at the United Nations Conference on Environment and Development (The "Earth Summit").[24] The concept was later heavily relied on by the WTO Committee on Trade and Environment (CTE), established through the WTO *Decision on Trade and Environment.*[25] In that decision, the Ministers, specifically referencing the Rio Declaration and Agenda 21, considered that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."[26] The Ministerial Decision also expresses the Ministers' desire "to coordinate the policies in the field of trade and environment.'[27]

The CTE repeatedly relied on the notion of "mutual supportiveness" throughout its initial report analyzing the issues raised in the *Decision on Trade and Environment.* In its conclusions, the CTE stated:

> The CTE's discussions have been guided by the consideration contained in the Ministerial Decision that there should not be nor need be any policy contradiction between upholding and safeguarding an open, equitable and non-discriminatory multilateral trading system on the one hand and acting for the protection of the environment on the other. These two areas of policy-making are both important and they should be *mutually supportive* in order to promote sustainable development. Discussions have demonstrated that the multilateral trading system has the capacity to further integrate environmental considerations and enhance its contribution to the

[24] *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 31 I.L.M. 874 (1992); *See also* Agenda 21, United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/5/Rev. 1, Vols. 1-3 (1992).
[25] *Ministerial Decision on Trade and Environment*, 14 April 1994, Marrakesh Agreement Establishing the World Trade Organization, (*available at* http://www.wto.org/English/tratop_e/envir_e/issu5_e.htm).
[26] *Id.* at preamble.
[27] *Id.* at preamble.

> promotion of sustainable development without undermining its open, equitable and non-discriminatory character; implementation of the results of the Uruguay Round negotiations would represent already a significant contribution in that regard.[28] [Emphasis added.]
>
> The CTE notes that governments have endorsed in the results of the 1992 U.N. Conference on Environment and Development their commitment to Principle 12 of the Rio Declaration that "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global problems should, as far as possible, be based on an international consensus." There is a clear complementarity between this approach and the work of the WTO in seeking cooperative multilateral solutions to trade concerns. The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a *mutually supportive* relationship between them due respect must be afforded to both.[29] [Emphasis added.]

The concept of mutual supportiveness is thus solidly rooted in the WTO. Ministers in the Doha Ministerial Declaration have again confirmed their adherence to the concept of mutual supportiveness by providing:

> With a view to enhancing the *mutual supportiveness of trade and environment*, we agree to negotiations, without prejudging their outcome, on (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)…. [Emphasis added.]

The Doha Mandate identifies the concept of mutual supportiveness as a basis which is to be enhanced through the negotiations relating to the relationship between WTO rules and MEAs.[30]

The Panel in *EC-Biotech* did not contextualize the linkage between WTO rules on the one hand and the CBD and the Biosafety Protocol on the other to the concept of mutual supportiveness in any way whatsoever. Instead, its reasoning centered primarily on Article 31(3)(c) of the Vienna Convention, which led it to conclude that it was under no obligation to consider either the CBD or the Biosafety Protocol because the treaties were not ratified by all WTO Members. Nowhere in the discussions relating to the notion of mutual supportiveness did the Ministers or the CTE limit the concept to situations dependant on the party status of treaties. To the contrary: The CTE noted that MEAs were "representative of efforts of the international community to pursue shared goals" and that "in the development of a *mutually supportive* relationship between [MEAs and WTO

---

[28] *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1, (96-4808), 12 November 1996, (*available at* http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm) at para. 167..
[29] *Id.* at para. 171.
[30] World Trade Organization, *Ministerial Declaration of 14 November 2001*, para. 6, WT/MIN(01)/ DEC/1, 41 I.L.M. 746 (2002) (*available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm).

Agreements] due respect must be afforded to both."[31] Whether the *EC-Biotech* Panel paid "due respect" to the CBD or the Biosafety Protocol is questionable.

The Appellate Body's approach in *US-Shrimp:* Taking into account the WTO's sustainable development objective, environmental concerns and multilateralism

In the quotation above, the CTE not only elaborated on the concept of mutual supportiveness, but it linked the concept to the preference of multilateralism over unilateralism to address environmental challenges and concerns. The CTE endorsed and supported "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature" and specifically identified MEAs representative of these efforts.[32] The preference for multilateralism in the environmental context is also evident in the Appellate Body's *US-Shrimp* decision, where the Appellate Body acknowledged the WTO Ministers' *Decision on Trade and Environment* and the 1996 CTE Report, both of which explicitly refer to Principle 12 of the Rio Declaration and Agenda 21.[33] The Appellate Body in *US-Shrimp*, in analyzing the terms of Article XX of the GATT, relied on the WTO's goal of sustainable development, on the preference for multilateral action, and on several specific MEAs, independent of their ratification status.

In interpreting the term "exhaustible natural resources" in Article XX(g) of the GATT, the Appellate Body stressed that the signatories of the WTO agreements were "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy" and noted that the preamble of the *WTO Agreement* – explicitly acknowledging the objective of *sustainable development* – informed all other WTO agreements.[34] In that context, it found that several agreements outside the WTO must be taken into account to determine whether or not the term "natural resources" also included "living resources," including the United Nations Convention on the Law of the Sea (UNCLOS), the CBD, Agenda 21, and the Convention on the Conservation of Migratory Species of Wild Animals.[35] Interestingly, the Appellate Body explicitly noted in a footnote that only some parties to the dispute had ratified the CBD and that others had signed but not ratified the Convention."[36] It nevertheless considered the CBD as relevant for its interpretation. Finally, the Appellate Body concluded:

> Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.[37]

In interpreting the chapeau of Article XX, the Appellate Body repeated that the negotiators of the *WTO Agreement* had decided to qualify the original objectives of the GATT 1947 with the Preamble

---

[31] *Report (1996) of the Committee on Trade and Environment* at para.171.
[32] *Id.*
[33] *US-Shrimp* at para. 168.
[34] *Id.* at 129.
[35] *Id.* at para. 130.
[36] *Id.* at note 111.
[37] *Id.* at para. 131.

of the *WTO Agreement*, which explicitly recognizes the objective of sustainable development. It noted:

> As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.[38]

The Appellate Body also referred to subsequent developments at the WTO, "which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment."[39] It noted that in its own view the most significant development was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment, in which Ministers expressed their intentions in the preamble of the Decision that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other. . . "[40] The Appellate Body then concluded:

> Pending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the *WTO Agreement* generally, we must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular. [41]

Finally, referring again to the CTE and the *Decision on Trade and Environment*, the Appellate Body stressed its preference for multilateralism and the need for concerted and cooperative efforts in transboundary contexts and noted that the "need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations."[42]

Article 31(1) of the Vienna Convention: Comparing the *EC-Biotech* Panel's and Appellate Body's approach in *US-Shrimp*

The Panel in *EC-Biotech* conceded that it *could* consider instruments independent of their ratification status under Article 31(1). However, its approach differed significantly from the Appellate Body's

[38] *Id.* at para. 153.
[39] *Id.* at para. 154.
[40] *Id.*
[41] *Id.* at para. 155.
[42] *Id.* at para. 168.

approach to the same article in *US-Shrimp*. 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." [43] It then continued, stating that if a treaty interpreter did not consider the treaty to be informative, there would be no need to rely on it.[44] The Panel did not consider the fact that MEAs are the product of important multilateral cooperative efforts and that the international community, including WTO members, have stressed that the trade-environment nexus must be mutually supportive.

By contrast, the Appellate Body in *US-Shrimp* took into account for its analysis and interpretation of GATT Article XX 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 as reflected in subsequent developments within the WTO, such as the *Decision on Trade and Environment* and the creation of the CTE. In this sense, the Appellate Body in *US-Shrimp* 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, while the *EC-Biotech* Panel found that it was in no way obliged to take MEAs into account for the interpretation of terms unless they fulfilled the (narrowly interpreted) conditions set out in Article 31(3)(c).

The importance of international standards in WTO law

The *EC-Biotech* Panel worried about accepting an obligation to take into account outside MEAs to which a disputing WTO Member was not a party, noting:

> … [E]ven independently of our own interpretation, we think Article 31(3)(c) cannot reasonably be interpreted as the European Communities suggests. Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.[45]

However, this is precisely the approach taken not only by the Appellate Body described above in the environmental context, but also the approach taken in a number of WTO Agreements, where preferences for multilateralism and international standards are incorporated into substantive provisions. The SPS and the Technical Barriers to Trade (TBT)[46] Agreements encourage the use of such standards, largely because they tend to facilitate trade through harmonization, while at the same time, helping to improve the environment, and human, animal or plant life. With this approach, the agreements aim to promote the use of international standards to avoid second-guessing specialized international bodies, and to recognize their institutional competence. With international harmonization as a goal, both the SPS Agreement and the TBT Agreement give privileged treatment to measures that "conform to" or are "based on" international standards, guidelines, or

[43] *EC-Biotech* at para. 7.92, footnotes omitted.
[44] *Id.*
[45] *EC-Biotech* at para. 7.71.
[46] *Agreement on Technical Barriers to Trade*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (*available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf).

recommendations.[47] MEAs set out standards and processes for how to deal with global and transboundary environmental problems.

The SPS Agreement incorporates numerous references to "relevant international standards, guidelines and recommendations." Under Annex A of the SPS Agreement, the section entitled "*International standards, guidelines and recommendations"* specifically refers to standards established by the FAO/WHO Codex Alimentarius Commission, the World Organization for Animal Health (OIE), and the FAO International Plant Protection Convention (IPPC). But, for "matters not covered" by these organizations, Annex A also defines as an international standard "appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee."

In contrast to the SPS Agreement, the TBT Agreement does not name any specific international standardizing bodies. Instead, it provides general definitions and sets out criteria, including that standardizing bodies must be open to all WTO Members and that the international standards need not be based on consensus.[48]

In sum, both the SPS and the TBT Agreements give strong preference to international standards. Although such standards do not become mandatory under the WTO, they do nevertheless have legal consequences on questions of interpretation and the repartition of burden of proof. Not only are these rules relevant despite the fact that they are non-binding, but they additionally need not have been adopted by consensus (so long as membership is open to all WTO Members). The importance of international standards in WTO law is evident, even where not all WTO Members have agreed on such standards.

Conclusion

The Panel in *EC-Biotech* was faced with the question of whether or not it was obligated to take into account the CBD and the Biosafety Protocol for the interpretation of WTO Agreements. Both of these specialized agreements deal with the conservation and protection of biological diversity and, more specifically, with the regulation of certain types of genetically modified organisms. In interpreting WTO law in this specific case, the Panel was neither confronted with a situation where it was required to deal with irreconcilable rights and obligations, nor did it risk "diminishing the rights and obligations" provided in WTO agreements," which is prohibited by Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In this respect, the ILC report on fragmentation notes pointedly:

> Interpretation *does not add or diminish rights or obligations* that would exist in some lawyers' heaven where they could be ascertained "automatically" and independently of interpretation.

---

[47] Pursuant to Article 3.2 of the SPS Agreement, SPS measures "which conform to international standards, guidelines or recommendations *shall be deemed* to be necessary to protect human, animal or plant life or health, and *presumed* to be consistent with the relevant provisions of this Agreement and of GATT 1994."
Similarly, Article 2.5 of the TBT Agreement provides that a technical regulation which pursues one of the legitimate objectives explicitly mentioned in the TBT Agreement and which "is *in accordance*" with relevant international standards "shall be *rebuttably presumed* not to create an unnecessary obstacle to international trade." This provision seems to imply that a technical regulation in accordance with international standards is (rebuttably) presumed not to be "more trade-restrictive than necessary to fulfill a legitimate objective," as required under Article 2.2 of the TBT Agreement.

[48] This concept was clarified in the *EC- Sardines* case, Appellate Body Report, WT/DS231/AB/R (23 October 2002).

> All instruments receive meaning through interpretation – even the conclusion that a meaning is "ordinary" is an effect of interpretation that cannot have *a priori* precedence over other interpretations.[49]

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?

For example, the Biosafety Protocol sets out template methods for risk assessment for parties to follow. This does not mean that non-parties should follow the same guidelines. However, if a party to the Biosafety Protocol followed those guidelines, and assuming that they are not *contradictory or irreconcilable* with WTO rules, then it would seem reasonable for a panel to adopt an interpretation that upholds the method applied according to the Biosafety Protocol rather than striking the method down as inconsistent with the provisions of the SPS Agreement on risk assessment. After all, even if not all WTO Members agreed to the method, it is a method adopted multilaterally in a specialized forum.

The *EC-Biotech* Panel, however, categorically focused on Article 31(3)(c) of the Vienna Convention to determine whether or not it was required to take into account the CBD and the Biosafety Protocol. It discussed at length the scope and meaning of Article 31(3)(c), an article on which scholars' views differ significantly. Ultimately, the Panel sided with a narrow interpretation of the provision pursuant to which a WTO panel or Appellate Body would be required to take into account an MEA only where all WTO Members have ratified the MEA, setting forth a theory that was later criticized by the ILC in its report on the fragmentation of international law.[50]

Arguably, the *EC-Biotech* Panel could have avoided addressing Article 31(3)(c) altogether. In interpreting various aspects of Article XX of the GATT, the Appellate Body in *US-Shrimp* applied only Article 31(1) and took into account the sustainable development objectives of the WTO, the Ministerial Decision on Trade and Environment, and under that umbrella, a number of MEAs independent of their party composition. In so doing, the Appellate Body in *US-Shrimp* gave legal effect to the goals of mutual supportiveness and multilateralism structured into the WTO's framework. Comparatively, the *EC-Biotech* Panel applied a narrow interpretation of Article 31(3)(c) and found that, at most, an MEA might be used like a dictionary to determine the ordinary meaning of terms on an entirely voluntary basis pursuant to Article 31(1). Thus, the final decision reached by the Panel in *EC-Biotech* represents a departure from the jurisprudential respect previously afforded to the objectives of sustainable development, mutual supportivness, and the preference for multilateral solutions, verging on a blanket rejection of MEAs as having any independent legal significance in the context of the WTO.

Although the *EC-Biotech* Panel's approach to interpretation in the context of trade and environment is indeed unfortunate and appears to deviate from previous Appellate Body jurisprudence, it is not entirely clear whether in this specific case the outcome would have been different, had the panel applied a "more mutually supportive" method of interpretation. The Appellate Body in *US-Shrimp*

---

[49] ILC Report, *supra* note 15, at para. 447.
[50] *See* ILC Report, *supra* note 15, at para. 471.

took specific MEAs into account because they were part of the overall context and objective of the terms it was interpreting, and that it was its *responsibility* to take them into account. But the usefulness for the specific case also played an important role. In *EC-Biotech*, the Panel could have acknowledged the relevance of the CBD and the Biosafety Protocol *a priori*, and then still have explained why in the specific instance the MEAs were not useful.

The *EC-Biotech* Panel reports were ultimately not appealed for a number of reasons – probably not linked to the MEA question. If WTO dispute settlement panels are to contribute to coherence in an increasingly fragmented international legal framework rather than working "in clinical isolation," future panels must be more sensitive to the principle of "systemic integration" in international law.[51] Otherwise, dispute settlement panels may threaten to undermine fundamental objectives structured into the WTO's legal framework and diminish the validity of specialized external international accords in which the international community addresses important environmental and other concerns.

For comments, please contact Nathalie Bernasconi-Osterwalder: nbernasconi@ciel.org

[51] This term is used throughout the ILC Report on fragmentation and is defined in the report as a principle "whereby international obligations are interpreted by reference to their normative environment ("system")." ILC Report, *supra* note 15, para. 413.