

REPORT
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TITLE OF SESSION:

Addressing global environmental challenges: What to expect from future dispute settlement panels

ORGANIZERS:

The Center for International Environmental Law (CIEL)
Friends of the Earth Europe (FOEE)

ABSTRACT:

The trade-environment debate has recently gained center-stage with the overwhelming evidence and the increasing political acknowledgement of the changing climate – possibly one of the most important challenges ever faced by humans. But the debate on the relationship between environment and trade is not new. The debate is long-standing, involving cultural and philosophical differences in approaching environmental/health risks, and sometimes tensions between environmental protection in the North and export interests of countries in the Global South. Still new trade-environment challenges stand on the horizon, and they are unlikely to be resolved in WTO negotiations. WTO dispute settlement may therefore gain on importance, and will be called upon to strike a balance between competing goals and interests.

The discussion amongst lawyers with different backgrounds and perspectives focused on the future of WTO dispute settlement relating to the environment, and asked whether WTO panels and the Appellate Body (AB) are well-equipped to deal with upcoming challenges. It was noted that the AB had developed a real jurisprudence of WTO law and not just a set of inconsistent decisions, and that the AB had assured an important place within the institutional framework of the WTO system. The AB had demonstrated jurisprudential consistency and predictability and never had the AB overruled itself. Thus, a clear trend of the AB was identified towards integrating environmental, developmental and trade considerations. In contrast to certain panels, the AB showed itself sensitive to Members' environmental policies and regulations, and it was expected that this would continue. In the area of the SPS Agreement, this trend seemed less clear. The discussants agreed that perhaps this would be clarified with the AB's decision in *US-Hormones (or Hormones II)*. Indeed, since the discussion at the WTO Forum, the AB rendered its decision in that case and showed, as expected, a much more nuanced approach to the SPS Agreement than the approaches taken by panels in the *EC-Biotech* and the *US-Hormones* cases, striking down most of the panel's findings in the latter.

The speakers agreed that environmental trade restrictions can be a problem for developing countries, but that it might be difficult to resolve that problem through dispute settlement. Rather, the issue should be addressed in the relevant WTO Committees.

The evolution of case law involving the complex inter-relationship between trade and environment will continue to be of importance and needs to stay on the radar screen of anyone interested in environmental protection and sustainable development more generally.

PART I: SUMMARY OF THE MAIN POINTS RAISED BY EACH PANELLIST:

The discussion was introduced by Mr. Charly Poppe of Friends of the Earth Europe (FOEE) and moderated by Mr. Vicente Yu of the South Centre in Geneva. Discussants were:

- Ms. Nathalie Bernasconi-Osterwalder, Center for International Environmental Law
- Prof. Robert Howse, Lloyd C. Nelson Professor of International Law, New York University School of Law
- Mr. Niall Meagher, Advisory Centre on WTO Law

The discussion focused on the following three questions to panellists:

1. How would you describe and characterize WTO jurisprudence relating to the environment since the WTO's creation? What are some of the milestones (positive or negative) from your perspective? How relevant is the *Shrimp -Turtle* decision today, including in the context of climate change?
2. The most recent AB decision relating to the environment is *Brazil – Retreaded Tyres*. Do you think the decision is a “green” decision? Why or why not? What changed since *Brazil – Retreaded Tyres* and what do you think the case will mean in the climate change context?
3. What are the main challenges for developing countries relating to trade-environment dispute settlement?

Charly Poppe, Friends for the Earth Europe (FOEE) - *Introductory remarks:*

The representative of FOEE opened the discussion raising several important issues. In his view, the environment seems to have become a primary concern for trade policy makers around the world, being nowadays in the center of our collective attention. He stressed the two possible dimensions of this phenomenon: from a positive perspective, this trend might be seen as the realization of superior social values and political imperatives over the trade expansion and market access concerns. On the negative side, the environmental regulations might still be primarily suspected as been an impediment for trade. In his view, the latter has been the predominant vision of trade policy makers in regard to environmental protection measures, exemplified by the numerous cases brought before the WTO.

Mr. Poppe pointed out that the outcomes of the cases involving environmental protection measures brought to the WTO have been mixed. Though a few cases have upheld the challenged environmental measures (*Asbestos*, *Shrimp-Turtle*, *Retreaded Tyres*), Mr. Poppe found that it was still unclear whether these cases have laid down the proper conditions for the protection of the environment in future dispute settlements within the WTO system.

Recalling the mutual supportiveness agenda between the trade and environment regimes, Mr. Poppe stressed the necessity to move away from its ambivalent and sterile

character and to recognize the primacy of environmental goals over trade interests. Re-addressing Pascal Lamy's speech in the context of climate change, Mr. Poppe considered that WTO law might have to adapt itself within this context. Moreover, Mr. Poppe stressed that WTO rules must change, recognizing the prevailing urgency of environmental issues over the need for further trade expansion efforts. He called on trade lawyers and delegates to take into consideration the consequences of their rulings for the people and the environment.

QUESTION 1: How would you describe and characterize WTO jurisprudence relating to the environment since the WTO's creation? What are some of the milestones (positive or negative) from your perspective? How relevant is the *Shrimp-Turtle* decision today, including in the context of climate change?

Ms. Bernasconi gave an overview of the state of play of WTO jurisprudence relating to the environment. She reminded the public of how concerned environmental groups and some governments were about the WTO and its impacts on environmental policy making at the time of the creation of the WTO, and that this concern was in large part due to two pre-WTO GATT decisions: the tuna dolphin cases. These were the first to test the Article XX(b) and (g) exceptions clauses, launching the trade – environment inter-linkage debate. Indeed the two panels seemed to put GATT law into a closed box detached of general international law and bluntly ignored and gave little space to environmental considerations. Although the two panel reports were never adopted, they harmed the image of the WTO that was to be created, which in large part was built on the same rules as the GATT.

Ms. Bernasconi stressed, however that the situation has changed. WTO panels, and especially the AB have generally been to be more sensitive and deferential towards environmental and health measures of their WTO Members. Indeed, one could argue that to some extent the place that environment deserves in the application of the trade rules has been restored. Though some suspicion remains, in practice the overt criticism in this respect has died down. Ms. Bernasconi also pointed out that the situation with respect to the SPS Agreement was, a point she would come back to at a later stage.

Ms. Bernasconi's presentation was tripartite, focusing on the following three issues:

- First, that there has been a decided move away from the "Trade ueber alles" approach demonstrated in the last few GATT panel decisions relating to the environment;
- Second, that the SPS Agreement has evolved on a somewhat separate track; and
- Third, that the *Shrimp-Turtle* decision remains one of the landmark decisions relating to the environment.

Ms. Bernasconi noted that with the first WTO AB decision, the Reformulated Gasoline case, the AB moved decidedly away from the closed box approach, opening the door to the rules of interpretation as codified in the Vienna Convention on the law of

treaties. With that decision and the later *Shrimp-Turtle* decision, the AB moved further away from the reasoning in the earlier Tuna-Dolphin cases, where the panels had rejected the application of the general exceptions clause in Article XX of the GATT largely based on the view that measures adopted to protect the environment would threaten the multilateral framework on trade in goods. The more deferential approach is still reflected in the most recent *Brazil – Retreaded Tyres* case, where the balance or imbalance between trade and environmental consideration depended, in large part on the interpretation of Article XX of the GATT. This brought Ms. Bernasconi to discuss the necessity test, which is incorporated in Article XX(b) of the GATT and which was at the center of the *Retreaded Tyres* case. She recalled that pre-WTO GATT panels adopted a strict least trade-restrictiveness test and that the test had become a major focus of criticism, especially by those who claim that it fails to give adequate consideration to societal values other than trade. She continued that the WTO AB in *Korea – Beef* and later *EC-Asbestos* reaffirmed the least trade restrictive approach but also stated that for a measure to be necessary, the measure did not need to be “indispensable” or “inevitable,” but rather that a measure was to “make a contribution to” a goal, albeit significantly closer to the pole of “indispensable.” The AB created a three factor balancing test for deciding whether or not a measure is necessary when it is not per se indispensable. The three factors to be considered are: (i) the contribution made by the (non-indispensable) measure to the legitimate objective; (ii) the importance of the common interests or values protected; and (iii) the impact of the measure on trade. (*Id.* at para. 164.) In both cases, the AB affirmed that a Member was free to choose its level of protection. (*EC – Asbestos* AB report, para. 174.) The necessity test was further refined in the *Brazil-Tyres* case. In brief, I think we can conclude that *Brazil – Tyres* furthered the flexibility of WTO members to adopt trade restrictive measures to protect human health and the environment. We will discuss this decision in a bit more detail in the next question, so I will not expand here.

She concluded that although we now have a better idea of how WTO case law may be applied in environment-related cases, the question of compatibility remains to be determined on a case by case basis, so that it is difficult to predict precise outcomes. Ms Bernasconi then moved to the next issue, the SPS Agreement, where, she noted the situation was quite different. Without wanting to embark in a detailed discussion on the SPS Agreement here, she said that the SPS Agreement was essential to the discussion on trade and environment/health at the WTO. The *EC-Hormones*, the first SPS case decided by the AB, which concerned an EC import ban on hormone-treated beef, was significant, among other things, because it was the first to examine some of the newly adopted scientific requirements. The AB was deferential insofar as it held that a government need not base its reasoning on a majority scientific opinion. Instead, it had to base its reasoning in good faith on the basis of respectable scientific opinion, even if that opinion was in a scientific minority. The AB also held that a government is permitted to adopt a zero-risk level of protection. Nevertheless, the AB concluded that the EC had not based its measure on a proper risk assessment as required under the WTO and until today, the EC faces economic sanctions. What followed since *EC-Tyres* is a series of SPS cases, in none of which a challenged Member has been able to justify its SPS measures.

In contrast to other WTO cases, the panels and the AB dealing with SPS cases have dealt primarily with the scientific requirements under the SPS Agreement, as the relate to the obligation to base a measure on a risk assessment, etc. The more “traditional” WTO principles aiming at eliminating protectionism and unjustified discrimination, or those requiring that trade rules are not to be unnecessarily trade-restrictive, have been non-issues in SPS decision. Here the focus has been science, science, science. Obviously the idea behind the scientific requirements is precisely that by scientifically sound measures, protectionism is guarded against. However, typically, science does not provide for straight-forward answers, and panels and the AB end up deciding between different, and often opposing scientific views of experts. Ms. Bernasconi recalled that last year, in a discussion CIEL organized at this Forum, Brendan McGivern had referred to *Japan – Apples*, noting that it was a case important for an argument that was actually rejected. In that case Japan argued that when a government makes an assessment of scientific evidence, some deference should be given to it in that regard. The AB 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. A discussion may be necessary to determine whether this role is adequate for trade experts sitting on panels and the AB, however talented and brilliant they may be.

Finally, Ms. Bernasconi briefly addressed the linkage between MEAs and the WTO. This remains one of the most important issues in any environmental discussion at the WTO, particularly when thinking about global environmental challenges. She noted that in absence of any success in the Doha negotiations relating to paragraph 31 (1) on the relationship between WTO and MEAs, the burden will continue to lie upon WTO panels and the AB. She said that the AB in *Shrimp-Turtle* was very nuanced, taking into account for the interpretation of WTO law, outside environmental treaties, without differentiating between treaties that have or have not been ratified by the disputing parties, or the whole of the WTO membership. By contrast, the Panel, based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 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.” That panel report in the EC-Biotech case put this conciliatory approach into jeopardy. It remains to be seen how this issue will be resolved in the future. Clearly, the approach taken by the AB in *Shrimp-Turtle* would be preferable. 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?

- Rob Howse – New York University School of Law

Commenting on Ms. Bernasconi’s presentation, Prof. Howse addressed two key decisions of WTO in regard to environmental measures. First, with respect to the *Shrimp-Turtle* case, he described its outcome as an enormous breaking point, not only for

environmental purposes but in terms of the interests and values of the stakeholders that now had a legitimate voice at the WTO. Secondly, he considered that part of the problem with the *Tuna-Dolphin* case was the notion that even non-discriminatory environmental measures would violate either Article III or Article XI of the GATT because of the product- process distinction. According to Prof. Howse a non discriminatory measure would not necessarily violate the provisions laid down by Article III of the GATT if the measure addresses policy considerations of health and environment. Prof. Howse explained how in the *Asbestos* case the AB made use of health considerations in order to determine whether products were like, particularly when it applied the test for likeness used in previous cases that focused on economic criteria. Prof. Howse pointed out that the AB in that case emphasized the importance of consumer perceptions in determining whether products were like since consumers can be proven to be worried about the environment and climate change through public campaign polling and other relevant evidence on their conduct. In his view, the resulting ruling of the AB was that a product might well be considered unlike based on consumer concerns for the environment and therefore, measures that address those concerns would not violate Article III.4 of the GATT, and would therefore not have to be justified by GATT Article XX. In the same line, Prof. Howse also explained how the AB interpreted the other part of the test of Article III with respect to the “treatment no less favorable”. Recalling on paragraph 100 of the *Asbestos* case, Prof. Howse explained how the AB stated that even distinctions drawn between like products might not violate Article III.4 of the GATT if those distinctions were nevertheless even-handed in their treatment of the group of imported products versus the group of like domestic products.

In *Dominican Cigarette* the AB went even further almost reverting, at least to some extent, to the aims and effects test. It suggested that to establish a violation of Article III.4 of the GATT, it is important to establish treatment no less favorable which really means discrimination. In doing so, the AB concentrated on the issue whether there was a legitimate regulatory purpose or whether the distinction was employed in a manner that was protectionist. Referring to the *EC-Biotech* case, Prof. Howse stressed how the panel applied the effects-test since it did not analyze whether the products were like but simply asked whether there was any evidence that might suggest protective discrimination. As he explained, in that case the complainants who were basing their argumentation on Article III.4 of the GATT did not provide evidence that there was some kind of protectionist dimension to the distinction between GM and non-GM products. The panel then refused to analyze whether the products were like because there was no *prima-facie* case of protectionism.

According to Prof. Howse, the jurisprudential developments on Article III.4 of the GATT are extremely important because they suggest that if a measure is non-discriminatory (including a PPM measure), Article XX of the GATT would not have to be used in order to justify such a measure.

To relate his argumentation back to Ms. Bernasconi’s presentation, Prof. Howse referred to the *EC-Biotech* case. As he explained, the case was not brought to the AB. In his view, the AB would have overruled such decision. However, he stressed how the

second round of the *EC-Hormones* is currently under the review of the AB. With respect to this case, Prof. Howse emphasized on its complexity by describing how it is outweighed by procedural issues. Nevertheless, he stressed how the AB might even want to analyze the substance of the provisions on SPS on risk assessment on *EC-Hormones* which was in his view even worse than the analysis on *EC-Biotech*.

Prof. Howse also shared with the audience his deep concerns with respect to some of the comments expressed by the WTO Director General Pascal Lamy interpreting the *Shrimp-Turtle* decision. In his view, the Director General was making interpretations *ex-officio* of WTO law and the AB's rulings. Prof. Howse stressed how these kinds of comments are outside his competence and presumably affect the proper balance of institutional competences within the WTO. In addressing the European Parliament, Mr. Lamy's noted that according to *Shrimp-Turtle*, before unilateral measures to be taken, all efforts must precede in order to achieve a consensual multilateral accord. Prof. Howse explained how this is a very common mistake when interpreting the *Shrimp-Turtle* case.

Prof. Howse agreed with the comparison made by the AB between the treatments of two groups of countries which ultimately showed how Asian countries did not receive the same openness to negotiate an agreement as other western hemisphere countries did. But at the same time he stressed how the AB did not impose a duty to negotiate as a precondition in order to impose unilateral measures. In his view, the AB may not interpret at what point the efforts are sufficient to conclude a negotiation. Moreover, he considered that the extent to which good faith and openness to negotiate are present within a negotiating process cannot be determined by the AB. He emphasized how the AB in the *Gambling* case rejected the notion that to justify a measure under Article XX there is the need to have previously entered into negotiations in order to conclude an international accord.

Prof. Howse was also critical of Mr. Lamy's statement that despite its importance, *Shrimp-Turtle* "only deals with shrimps and turtles". In Prof. Howse's view, the *Mexico-Stanley Steel* case clarified the nature and importance of the precedent within WTO law. Making use of paragraph 161 of this decision and paragraph 121 of the *Shrimp-Turtle* decision, Prof. Howse explained that the AB stressed how not only was this ruling not just about shrimps and turtles and the clarification of Article XX(g) of the GATT but how it applies to the very structure of the article as a whole. In his view, if the AB really wanted to confine its ruling only to shrimps and turtles, there was absolutely no reason why it would have made a ruling saying explicitly that it applies to all of the contents of Article XX.

Niall Meagher – Advisory Centre for WTO Law

According to Mr. Meagher, it is important to note that the environmental provisions, namely the exceptions within Article XX of the GATT, have been always part of the agreement since the conclusion of the Havana Charter. Therefore, one would have to acknowledge that trade lawyers have been always concerned about the environment. Moreover, in his opinion the trade lawyers that were involved in negotiating the Havana

Charter very much saw themselves as concerned with the preservation of the environment. Therefore, he thinks trade lawyers do take environmental concerns very seriously.

Mr. Meagher stressed how the exceptions encompassed within Article XX protect the domestic policy-making space with respect to the environment. In his view, the GATT recognizes how the obligations imposed by means of the agreement do not apply to some measures as long as they are not used as a disguised protection. Consequently, the main question concerning the exception clauses within WTO law has been and will continue to be the analysis of the relationship between domestic policy space of WTO Members for environmental protection and measures possibly being used as disguised protectionism that would not be acceptable under the GATT rules.

According to Mr. Meagher, some developments have been made during the last 60 years in terms of how that analysis has to be undertaken. Mr. Meagher explained that in the PPM context, there was a discussion seeking to establish the protection of domestic policy space within the substantive obligations encompassed in Article III of the GATT rather than making use of its Article XX exceptions clause. Mr. Meagher explained that while this may not appear to be problematic with respect to environmentally-friendly process-based distinctions, problems would arise if WTO Members were to use process-based distinctions for non-environment-related, protectionist purposes. Article III would provide no means of differentiating such measures and, accordingly, the better way to address such measures would be under Art. XX of the GATT.

Addressing science, Mr. Meagher shared with the audience his view on the current role given to scientific advice within the WTO procedures. With respect to scientific advancements, Mr. Meagher pointed out how science has evolved considerably in recent decades and how WTO Panels and the AB are consistently relying on scientific advice. As he explained, measures taken by the members that are supported by scientific rationales are likely to be considered WTO consistent. This holds especially true when addressing the SPS agreement. Nevertheless, in agreement with Ms. Bernasconi's presentation, Mr. Meagher pointed to several more complexities involving science that are starting to be relevant, particularly the possibility of multiple but opposite scientific considerations addressing the same situation or measure. As he explained, science seemed to have been expected to determine, in an objective way, the legitimacy of a given measure. Nevertheless, science is not always "on one side" and this poses its own set of complexities.

QUESTION 2: The most recent AB decision relating to the environment is *Brazil – Retreaded Tyres*. Do you think the decision is a “green” decision? Why or why not? What changed since *Brazil – Retreaded Tyres* and what do you think the case will mean in the climate change context?

Rob Howse – New York University School of Law

After a general description on the environmental issues concerning the production and disposition of tyres, Prof. Howse described in detail the *Brazil-Retreaded Tyres* case. As Prof. Howse explained, Brazil banned imported retreaded tyres whilst encouraging Brazilians to buy domestic tyres of the same characteristics. Whilst this measure could be interpreted as discriminatory according to WTO law, Brazil argued that there was environmental benefit within its jurisdiction because the final disposal of used tyres as waste was postponed, and its life-cycle extended, whenever a local tyre was retreaded. As a consequence, whenever Brazilian consumers bought imported retreaded tyres, the environmental risk associated with waste tyres was channeled to other jurisdiction i.e. the Brazilian jurisdiction, which was not responsible for the production of such materials but still had to bear with the consequences. Therefore, Brazil alleged health and environmental reasons to justify its import ban.

As Prof. Howse explained, since the EC was alleging discrimination because of the fact that Brazilian retreaded tyres were not receiving the same treatment, the analysis went to Article XX of GATT. Particularly important, the AB recognized that the more Brazilian retreaded tyres were consumed, the less environmental burden had Brazil to face by disposing of these tyres. The EC suggested a number of alternatives including other less restrictive measures, but the AB notably stated that these measures had their own health and safety issues attached to them or were not reasonably available for other reasons.

Nevertheless when the AB went to the analysis of the Chapeau of Article XX of the GATT, it was faced with another distinctive issue of this case -- namely the fact that Brazil only banned the retreaded tyres from the EC and not from Mercosur (regional trade agreement). As Prof. Howse pointed out, the question then was the following: if a measure like that is only applied to one of the parties, is it an arbitrary and unjustified discriminatory measure within the meaning of the chapeau of Article XX? The AB considered it was effectively an arbitrary and unjustified measure whereas arbitrary or unjustified were defined with respect to the relationship between the element of discrimination and the purpose for which the measure was taken. Since the discrimination was not appointed to environmental purposes but to the implementation of a regional trade agreement, the measure was considered inconsistent with WTO.

Prof. Howse pointed out that the definition of unjustified discrimination used within this case seemed to have obviated the literal meaning of arbitrary or unjustified which in his view, does not necessarily attach to the particular goal of the measure which is environment, but was rather defined in terms of non-protectionist purposes. Prof. Howse suggested that the AB may have to qualify its ruling because in a large number of settings the way in which a measure is applied may involve elements of discrimination which are perfectly legitimate but relate to other concerns. He pointed out that the way a measure is applied may differ as between the importing country for quite compelling reasons other than the objective that is justified under Article XX of the GATT. Nevertheless, in his view, the AB failed to recognize this situation and did not examine it in a careful way.

Prof. Howse also brought up the issue of the interaction between the rights and obligations of a regional trade agreement and WTO law. Prof. Howse recognized the importance of the phenomenon of fragmentation. In his view, the AB's ruling in the *Retreaded Tyres* case showed how the AB might have tried to find a simpler solution that did not require a thorough analysis of the issue of fragmentation. In his view, the AB applied the same approach to the *Mexico-Softdrinks* case, which precisely evaded this difficulty between regional trade agreements and the WTO.

Regarding the necessity test of Article XX of the GATT, Prof. Howse noted several key issues with respect to the *Brazil - Retreaded Tyres* decision. The first one is that the AB reaffirmed that health objectives are "of the highest importance". Secondly, the AB also stated that protecting the environment was "of importance". Given that the term environment is not mentioned within Article XX of the GATT, Howse noted this recognition was very important -- although some interpretations of Article XX would limit its environmental impact. As Howse explained, Article XX(g) has been widely interpreted as the environmental clause within Article XX of the GATT, circumscribed to conservation and natural resources only. Therefore when the AB suggested that Article XX(b) could be used as a conduit for a wide range of environmental claims it effectively broadened the environmental spectrum within Article XX of the GATT.

In the context of the necessity test, Howse also addressed the issue of reasonably available alternatives, noting that the AB had determined that a measure does not have to be making an actual contribution to the objective being served but only to appear rational or reasonable to think that the measure will effectively contribute in doing so. Closely related to the latter, Howse also pointed out that the AB recognized reasonably available alternatives to be associated to a countries' level of development. He explained how the kind of less restrictive alternatives that a country might be reasonably expected to adopt might be associated to its level of development.

Niall Meagher – Advisory Centre for WTO Law

Mr. Meagher agreed with Prof. Howse on the broadening interpretation of Article XX(b) of the GATT within the case. In his view, the AB tried to make it very similar to Article XX(g), particularly by interpreting the word "necessary" to mean something similar to the term "related to" which is used in XX(g). Nevertheless, although Mr. Meagher did not find that interpretation to be a problematic issue within the *Brazil -- Retreaded Tyres* case, he voiced his concerns about the application of such interpretation of Article XX(b) to future cases. Mr. Meagher explained that there is a reason why the terms used in Arts. XX(b) and (g) are different -- namely to restrict the application of the exception of Article XX(b). As he noted, issues related to health can cover almost every measure. Therefore the term "necessary" was introduced in Article XX(b) in order to limit the application of such exception.

In regard to the standard used to define the term "necessary" within the case, Mr. Meagher considered that the AB defined the term in regard to the trade-restrictiveness of

the measure therefore pre-empting the analysis of Chapeau of Article XX. In his opinion, this issue seemed unresolved to date.

Nathalie Bernasconi Osterwalder – Center for International Environmental Law

Ms. Bernasconi stressed that although Brazil lost the case for other reasons, the environmental arguments it put forward were successful on all accounts. Ms. Bernasconi considered the decision to be “green” and development friendly.

Referring to the new “material contribution test” of Article XX(b), Ms. Bernasconi explained how the AB introduced a test that provides that for a measure to be necessary, the measure’s contribution to the achievement of the objective pursued needed to be “material, not merely marginal or insignificant”. She explained how at first sight this new test appeared as a new barrier for countries to justify environmental measures. However, the AB ruled that there was no necessity to quantify the contribution of a measure to be objective. Such an analysis, as Ms. Bernasconi explained, could be undertaken either on quantitative or qualitative terms, therefore facilitating its interpretation.

Ms. Bernasconi also addressed the argument that the EC brought to the attention of the AB in the sense that an import ban or any other measure could be only justified if the contribution was immediately observable. As she explained, the AB rejected this interpretation by stating that the resulting consequences of a measure could be only verified after a period of time. In her view, this interpretation very much softened the “material contribution test” by taking into account the reality of environmental regulation.

In addition, Ms. Bernasconi pointed out that by accepting that the product targeted by the measure (retreaded tyres) did not have to be same product posing the risk (waste tyres), the AB established the link between the short life retreaded tyres and the risk arising from the accumulation of waste tyres, thereby reflecting a life cycle analysis. In her view this analysis is widely supported by the environmental community. As she further explained, the AB implicitly acknowledged the need for policy space for governments to effectively address the environmental and health impacts of products throughout their life cycle.

Finally, she commented on the analysis of the Article XX chapeau, noting that the AB and the Panel did everything to avoid addressing Article XIV on regional trade agreements (RTAs). In her view, it was very unfortunate to have analyzed the Mercosur issue under the provisions of Article XX and under its introductory clause. She noted that the Mercosur decision directed Brazil to allow the import of retreaded tyres from Uruguay and other Mercosur countries, leading Brazil to open its borders to retreaded tyres from Mercosur countries. This in turn led the AB to find a violation of the chapeau of Article XX. Ms. Bernasconi noted that this case, involving a conflict between a RTA decision that was opposed to the environmental trade restriction and a WTO decision that

in principle allowed the environmental trade restriction, demonstrated that the inter-relationship between RTAs and the WTO needed to be further refined.

QUESTION 3: What are the main challenges for developing countries relating to trade-environment dispute settlement?

Nial Meagher – Advisory Centre for WTO Law

Mr. Meagher proposed two different perspectives of the same topic: one is challenges to developing countries' measures and the other is developing countries willing to challenge measures imposed either by another developing country or a developed country. Regarding the former, he noted how effective Brazil had been in bringing its case before the AB and recognized its efforts in presenting very detailed evidence on how the measure was environmentally driven. Nevertheless, he stressed that not every developing nation would be able to do that. In this respect, he recognized that it was especially difficult for poor countries to marshal all the necessary resources and evidence whenever a case is brought to the attention of the WTO dispute settlement mechanism. To relate this back to the previous interventions, Mr. Meagher also stressed the fact that whenever applying environmental measures, developing countries will face great difficulties to afford to apply them in the least-trade-restrictive way. Moreover, he stressed how they might not be able to afford to structure their environmental measures in ways that would be WTO consistent.

With respect to developing countries as complainants, he acknowledged the same difficulties on behalf of developing nations, particularly resource difficulties marshaling proofs and resisting political pressures from environmental groups. He stressed how "green" and development did not always coincide, especially when acknowledging the poor people in developing nations whose livelihoods depended on export trade that may not meet the environmental standards of the developed world. In sum, he considered this issue to be a thorny political issue, making it very difficult for developing nations to challenge environmental measures of the developed world.

Nathalie Bernasconi Osterwalder – Center for International Environmental Law

Referring to the last point raised by Mr. Meagher on the cost of measures, Ms. Bernasconi stressed that in that context, one of the main concerns for developing countries will be the increase and multiplication of standards. Whether product standards or process based standards, she pointed out the need to use them to correct the disastrous consumption patterns of developed countries. Ms. Bernasconi stressed how especially within the climate change context, the issue of standards has become more relevant than ever. As she explained that so far there have been some discussions on the topic in the SPS and the TBT Committees and stressed the need to continue addressing these issues within the WTO but not necessarily within the dispute settlement mechanism. In her view, these discussions should focus especially on the costs imposed to developing countries whenever a developed country has imposed measures. She noted that a system

had to be put in place to help developing countries implement standards adopted in developed countries, including through the provision of financial aid and technical assistance. Ms. Bernasconi stressed the importance of addressing these issues within the WTO's Committees, especially with respect to transparency and cost concerns. In her view, this would avoid the need to go to dispute settlement.

Robert Howse – New York University School of Law

Addressing Mr. Meagher's point regarding the capacity of developing countries to comply with the necessity test and its least-restrictive measures requirement within the context of Article XX of the GATT, Prof. Howse pointed to statements made in the context of the *Brazil-Retreaded Tyres* case, in particular to paragraph 171 of the decision, which show that the economic circumstances of WTO Members will be taken into account.

With respect to the future of the WTO dispute settlement mechanism, Prof. Howse stated that the AB had evolved significantly and that there was a very strong affirmation of the idea of precedent, authority and jurisprudential key within the AB's rulings, emphasizing that the AB has developed a real jurisprudence of WTO law and not just a set of inconsistent decisions. Therefore, given all of the changes within the AB, Prof. Howse concluded that the AB has properly acknowledged its important place within the institutional framework of the WTO system. With respect to WTO's jurisprudential consistency, Prof. Howse also noted how there was no case so far in which the AB had overruled itself. Therefore, he acknowledged coherence and legacy within the WTO's jurisprudence regardless of the fact that the composition of the AB changes.

As a final comment, Prof. Howse addressed the SPS Agreement, noting how the cases brought before the AB in this regard have not been key cases and that they have not raised fundamental issues about human life and people's perceptions as consumers and human beings. He suspects that by having asserted human health as a priority issue, the AB will have to address such issues in a more sensitive way than panels have in previous cases, especially *EC-Biotech*.

PART II: SUMMARY OF DISCUSSIONS:

Much of the discussion focused on the *Brazil-Retreaded Tyres* case. One intervention reiterated that the AB in the *Brazil-Retreaded Tyres* case created a strict link between arbitrary and unjustifiable discrimination and the actual purpose of a measure, and asked Prof. Howse to clarify his criticism on this issue. The same intervention also stressed the importance of appreciating the complexity of reasonable, plausible policies as a whole, especially when serving environmental purposes.

In response, Mr. Meagher suggested that both the AB and the Panel were trying to avoid Article XXIV with respect to the Mercosur exemption. In his view, a very different situation would have arisen if there had been a Mercosur-wide ban on imports of used and retreaded tyres. Mr. Meagher considered that in that situation it would have been

very difficult for the AB and Panel to avoid the analysis of such Article XXIV. Prof. Howse, for his part, addressed the remarks made by the audience by first clarifying his comments on the Article XX chapeau. In his view, there is a distinction between two dimensions of the AB's reasoning: the first concerns the relationship between Regional Trade Agreements and MFN; and the second one concerns differential treatment not related to environmental purposes, thus imposing an analysis on the arbitrariness or unjustified dimension of a measure. In his opinion, the application of a measure is closely related to a country's administrative law structure. Therefore, in his view, the problem is that there can often be differential treatment that might emerge from administrative or judicial processes within a country that are related to other goals or values in that same process but are not directly related to an environmental purpose. Nevertheless, those measures would be equally legitimate. The issue rises, in his view, when acknowledging the importance of protecting a country's administrative structure. A measure based on the administrative goals of a country should not be described as arbitrary or unjustified just because the objectives concerned are not the environmental objectives of the substantive measure being imposed.

On the issue of regionalism, Prof. Howse identified two different claims at stake. The first one relates to Brazil's violation of either Article III.4 or Art. XI of the GATT. The second claim concerns the differential treatment of the non-Mercosur complainants. As he explained, these two claims were to be addressed separately, specifically making use of Article XXIV, which is specifically intended to address the problem of MFN inconsistencies arising from RTAs. Prof. Howse noted that the AB might not have addressed Article XXIV because it was influenced by the way the pleadings were structured in the case.

On the issue of regionalism, Prof. Howse identified two different claims at stake: the first one relating to Brazil's violation of either Article III.4 or Article XI of the GATT and the second claim concerning the differential treatment of the non-Mercosur complainants. As he explained, these two claims were to be addressed separately, specifically making use of Article XXIV, which is specifically intended to address the problem of MFN inconsistencies arising from RTAs. Prof. Howse noted that perhaps the AB had not addressed Article XXIV because it might have been influenced by the way the pleadings were structured in the case.

Another intervention concerned the *Retreaded-Tyres* case and the issue of injunctions. Ms. Bernasconi explained that some of the Brazilian "retreaders" had obtained injunctions from Brazilian national courts ordering that the import of "used" tyres for retreading in Brazil be allowed, despite the government wanting to ban both retreaded and used tyres. These injunctions, of course, vitiated the environmental purpose of the ban on retreaded tyres – against the will of the Brazilian government. Ms. Bernasconi noted that it was interesting that this was a situation where the WTO decision against Brazil gave leverage to the Brazilian government to enforce its environmental measures.

Finally, a further intervention concerned the role of science within SPS cases, in which the discussants were asked to further elaborate on the evolution of this issue, particularly on how the standard and burden of proof is evolving in terms of the scientific considerations and its interpretation within such cases. The speakers acknowledged that the issue of the role of science within the SPS Agreement was of great complexity. Ms. Bernasconi noted that the panels in *EC-Biotech* and *US-Hormones* seemed to have jeopardized some of the sensitive findings made in the original *Hormones* case. The speakers agreed that the second round of the *Hormones* case now with the AB would likely shed light onto this delicate and complex issue, and provide indications how the SPS Agreement would be applied and interpreted in the future.

Different views were expressed with respect to Prof. Howse's critique of Mr. Lamy's statements regarding the relevance and meaning of the *Shrimp-Turtle* decision. Prof. Howse noted that it would be useful to analyze whether the statements of director generals or key representatives of other international institutions have been used as part of the interpretative process in other international dispute settlement bodies or courts.

CONCLUSION/RECOMMENDATIONS/FOLLOW-UP ACTIONS:

The discussion helped clarify the state of play of WTO jurisprudence relating to the environment and provide insights about possible trends in future dispute settlement. The Center for International Environmental Law (CIEL) and Friends of the Earth Europe will continue to follow the development of WTO case law relating to the environment and assess whether the policy space of WTO Members to adopt adequate environmental and health policies and regulation is sufficiently safeguarded. This will be done with a sustainable development lens which gives special attention not only to environmental but also to the developmental considerations, including the effects of environmental requirements on market access opportunities of the poorest WTO Members.