

WTO Discussions Narrow in on Transparency and Civil Society Relations

Discussions in and around the WTO in the next few months are likely to focus increasingly on issues relating to transparency of the international trade body, as well as its interaction with civil society. At the WTO General Council Meeting on 15-16 July, Director-General Renato Ruggiero made a significant statement regarding the WTO's relations with NGOs.

Ruggiero's statement included a number of proposals for improving relations with civil society. These responded to the importance recognised in the Ministerial Declaration of enhancing public understanding of the benefits of the multilateral trading system (see below), as well as to the sometimes violent protests against the international trading system that took place in Geneva during the week of the Ministerial Meeting. Ruggiero's proposals include holding regular briefings for NGOs and setting up an 'NGO forum' on the WTO website. In addition, the Secretariat will compile a monthly list of documents received from NGOs, which will be circulated to all Member governments.

Underlying the current discussions on transparency and civil society relations is the May 1998 Ministerial Declaration, in which WTO Members recognised 'the importance of enhancing public understanding of the benefits of the multilateral trading system in order to build support for it'. In the Declaration, Members also said they would 'consider how to improve the transparency of WTO operations [and] continue to improve [their] efforts towards the objectives of sustained economic growth and sustainable development'. While WTO Members have no formal mandate or deadline for addressing the broader issue of the institution's relations with civil society, two processes involving transparency considerations are currently underway: the reviews of the Dispute Settlement Understanding and the 1996 decision on document derestriction.

Document derestriction, dispute settlement, civil society relations

The WTO General Council in July started consideration of these issues. Two kinds of documents – not counting dispute settlement documents – were mentioned in the context of derestriction: minutes of meetings and WTO working documents. The United States and the European Union both tabled proposals for speedier and more widespread document derestriction, calling for meeting agendas and minutes, submissions by Members and Secretariat background notes to be circulated as unrestricted.¹ Some Members were reticent about proposals to derestrict minutes of meetings as these could contain indications of current or future negotiating positions. There is also the fear that full document transparency could expose negotiators to contradictory (and potentially paralysing) pressures from domestic groups, preventing them from articulating coherent negotiation strategies in WTO

processes, or making negotiating positions quite inflexible once announced. The WTO Secretariat is in the process of preparing a background paper to provide Members with an overview of the rules and practices that currently apply to different categories of WTO documents.

It is unclear as yet to what extent transparency and participation issues relating to dispute settlement will be discussed in the General Council or in the context of the review of the Dispute Settlement Understanding (DSU), scheduled by the WTO built-in agenda to take place by the end of 1998. The principal issues include openness of dispute settlement panels to input through friends-of-the-court (*amicus curiae*) briefs, and the date of publication of panel reports. At the General Council meeting, the EU outlined possibilities for enhanced interaction between 'interested stakeholders' and WTO Members, and noted that it would present 'a number of proposals to improve transparency' in the context of the DSU review. The US had earlier called for opening the dispute settlement proceedings to the public, but did not include the topic in its paper to the General Council. While it remains unlikely that panels will be opened to the public, the issue of availability of reports is real, and goes beyond transparency. The current situation gives parties to a dispute, who know the panel's decision before the others, an advantage over other WTO Members. In the words of Canada's WTO Ambassador John Weekes, Chair of the General Council, 'derestriction of panel reports is not just about access to documents. It is also about equality amongst WTO Members.'

The way ahead

No decisions were made on transparency or WTO/civil society relations during the July General Council where most WTO Members limited themselves to stating their general positions on the principle of transparency. In addition, the meeting was too short for Members to put forward detailed positions on any specific points. While many countries voiced scepticism about bringing NGOs further into the WTO's operations, it is nevertheless worth noting that Ruggiero's proposals for civil society relations were not criticised, and were considered to be within the scope of what the Secretariat is allowed to do. On the other issues, the process of negotiation is still incipient and positions will probably only start being narrowed down when WTO meetings begin again in the autumn. For instance, it is not clear at this stage whether the three elements will be subject to separate conclusions or if the WTO will search consensus by integrating them into a package for negotiations.

Although the exact schedule of forthcoming meetings in which transparency and civil society relations are likely to be raised is not yet known, one can expect them to be discussed

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The New ECE Public Participation Convention: A Boost for Access to WTO-related Environmental Information

By Claudia Saladin and Brennan Van Dyke

In late June 1998, the environment ministers from the UN Economic Commission for Europe (UN-ECE) countries gathered to adopt the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹ The Convention, now signed by 35 of the UN-ECE's 55 Member States,² further defines the public participation component of sustainable development laid out in the 1992 Rio Declaration on Environment and Development and Agenda 21. The ECE Convention marks the first time that States have agreed on the minimum content of the principles of access to information, access to decision-making, and access to justice and established their minimum procedural elements in a single, legally binding international agreement. The Convention thus provides a template against which the policies and practices of the WTO can be scored. And, as this article will show, the WTO fails to meet even the minimum standards set out in the Convention.

The Convention will be a significant tool for NGOs in promoting greater transparency and accountability in trade policy-making on two levels. First, the Convention requires Parties to open up their domestic decision-making processes to greater public transparency, participation and accountability. Such domestic decision-making processes include the development of domestic trade policy. Second, the Convention requires each Party to 'promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.' Thus, Parties to the Convention who are also Members of the WTO are obliged to advocate for greater civil society access to the WTO decision-making process.

Improving Access to WTO Documents

The Convention's principle of access to information embodies the right of citizens to obtain environmental information from public authorities, subject to certain limited and explicit restrictions, without having to show an interest in the information. The Convention creates a presumption in favor of information disclosure. Public authorities can only deny a request for information on the basis of a list of specific grounds for refusal. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure. Refusals to provide information should be in writing and should state the reasons for the refusal. Information must be made available before a decision is made, in order to allow for informed public participation.

Current WTO policy on access to documents falls far short of the requirements of the Convention. The eventual public availability of some WTO documents, including final panel decisions, but excluding other documents related to dispute settlement proceedings, is governed by the General Council Decision on Procedures for the Circulation and Derestriction of WTO Documents. Under these procedures, official series WTO documents are now circulated as unrestricted, unless they fall into a category specifically identified as restricted in the Appendix to the Document Procedures. Unfortunately, the list of restricted documents includes most of the documents pertaining to pending policy decisions.

In general, the extent to which documents are available to the public lies almost entirely within the discretion of the Members. They can designate that any document submitted to the WTO be restricted. In addition, Members can keep many documents from the public indefinitely. Members are not required to state their reasons for withholding a document from the public, and there is no 'statute of limitations' after which time documents become publicly available. Therefore, WTO documents are, for the most part, released only after the underlying decision is made or a process is complete.

Measured against the minimum standards laid out by the new UN-ECE Convention, WTO document accessibility is inadequate. First,

the principle of access to information in the Convention requires that information be made available to the public prior to a decision being made. Under current WTO policy, documents are not made available early enough in the process for the public to be able to know what decisions are being made, and to give the public an opportunity to submit comments or questions.

Second, the Members have arbitrary and absolute authority to keep documents from the public indefinitely and for any reason (or none at all). The Convention recognizes a right of access to documents in favor of civil

society, and requires that denials of requests for information state the reasons for the denial, preferably in writing. The WTO Document Procedures, however, provide no rules or criteria for why documents can remain forever restricted.

Finally, the WTO's definition of restricted documents does not ensure that exceptions to disclosure are as narrow as possible. The Document Procedures appear, formalistically, to take an approach consistent with the Convention – official series WTO documents circulate as unrestricted, unless they fall within one of the categories listed in the Annex. The Annex then proceeds to list virtually all categories of documents. Thus the substance of the Document Procedures is actually in its Annex: the exclusions list is the WTO's document policy. In comparison, the Convention, while having the same structure, provides a limited list of exclusions. Exclusions are based primarily on the quality of the information contained in the document, rather than on the category of document that contains it. Moreover, the limits on disclosure are subject to a balancing of the interests to be protected by non-disclosure against the public's interest in disclosure. The WTO's document policy, on the other hand, takes no account of the public's interest in disclosure.

A final, essential element of the principle of access to information is that public authorities regularly and systematically collect information on the state of the environment relevant to their function and disseminate it to the public. Neither the WTO nor any of its Member States collect or disseminate even rudimentary information on the environmental impacts of WTO trade rules or activities. Nor is it WTO practice to assess potential environmental impacts prior to undertaking negotiations of new international trade disciplines that may have profound environmental implications.

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Trade, Environment and Sustainable Development: Synergies and Interactions

Prior to the July meeting of the WTO Committee on Trade and Environment (CTE), the European Union circulated to WTO Members a communication outlining the way it was envisaging the High-Level Meeting between top-level trade and environment policy makers. Both Sir Leon Brittan and President Clinton have promoted holding a High-Level Meeting to inject some political will into the CTE, but the Committee did not discuss the proposal at its meeting (see page 4). The text below is extracted from the EU's submission (WT/L/273), intended as a 'contribution for further developing the concept'.

Objective

The main objective of holding a High Level Meeting (HLM) of those involved in trade and environment would be to help move the policy debate forward at political level by contributing to confidence building and highlighting the importance of trade and environment for the WTO's present and future work as well as supporting the work to devise concrete solutions to relevant problems at the trade and environment interface.

In addition, the meeting would also have the objective of providing a forum for an exchange of ideas on the focus on trade and environment of the WTO's broader work after the 3rd Ministerial. Such mainstreaming would not detract, however, from the fact that it is the CTE itself which remains the main forum for discussions on trade and environment.

Format

The HLM should be an informal ad hoc meeting under the auspices of the WTO, convened by the WTO's Director-General. The WTO General Council, in liaison with the CTE and its chairman would play a role in the preparation of the meeting including consideration of suggestions for the HLM's agenda, the timing, the participants and the choice of possible venue.

Agenda

The agenda should aim to stimulate a free ranging debate among participants which could enable them to make progress and provide clear political guidance on particular issues where these are ripe. The overall theme for the meeting could be 'Trade, Environment and Sustainable Development: Synergies and Interactions'. The EC believes the most constructive approach to adopt would be to move away from a discussion on the specific items of the CTE's work programme and to focus on broader horizontal subjects. Therefore, the main agenda would be a political one and could be shaped along the following lines:

- Synergies between trade liberalization, the WTO agenda and environmental protection

Under this heading the challenges and 'win-win' opportunities for the WTO both in addressing environmental concerns and from the perspective of both developing and developed countries could be addressed, as well as the scope for and need to factor environmental concerns into the WTO across the board (mainstreaming).

Mainstreaming is important because, notwithstanding the focal and coordinating role of the CTE regarding trade and environment issues, in any future negotiations on trade liberalization there will be no single body within the WTO with the power to ensure that environmental aspects are taken into full consideration throughout

the process: the CTE discusses but does not implement policy. Rather, each committee will deal with the economic sector under its authority. It could be advisable, therefore, for there to be an indication that each committee should take account of relevant environmental considerations. The aim would be to consider how environmental concerns will be taken into account in future negotiations on the basis of the process agreed at the 1998 WTO Ministerial.

- Interaction between WTO rules and environmental protection

This item would allow consideration of broad issues concerning the relationship between trade disciplines and environmental policy including but not limited to specific subjects which are currently being discussed in the CTE.

While WTO panel and Appellate Body interpretations of GATT Article XX are valuable, the interaction between WTO rules and environmental protection may usefully be complemented by a broader perspective.

A series of rulings by panels and the Appellate Body (United States - Prohibition of imports of tuna and tuna products from Canada (1982); Canada - Measures affecting exports of unprocessed herring and salmon (1988); Thailand - Restrictions on importation of and internal taxes on cigarettes (1990); United States - Restrictions on imports of Tuna (1991); United States - Restrictions on imports of tuna (1994); United States - Taxes on automobiles (1994); United States - Standards for reformulated and conventional gasoline (1996); United States -

Turtle/Shrimp (1998)), not all of which have been adopted, have produced a number of interpretations of GATT Article XX which, although not necessarily linear in their development, have contributed to clarifying the relationship between trade rules and trade-related environmental measures. These legal interpretations are indeed valuable but the interaction between WTO rules and environmental protection may usefully be complemented by a broader perspective.

It could be useful, therefore, within the framework of its consideration of the various issues affected by the interaction between WTO rules and environmental protection, for the HLM to reflect upon appropriateness of relevant existing WTO rules in accommodating environmental requirements and concerns

- Dialogue between trade and environment communities

This item would encompass not only the issue of co-ordination between trade and environment policy makers, but also other matters such as transparency in the WTO and relations with civil society and NGOs the extent and modalities of openness towards whom merits particular attention. Outreach to the business community also needs careful consideration.

Dialogue between the trade and environment communities helps strengthen the mutual understanding of the complexity of each others' issues and of the relationship between them. The CTE's valuable contribution to this process should provide the basis for reflection on how further to reinforce such dialogue.

Greater transparency is essential to reinforce the WTO as an institution and to strengthen support for the multilateral trading system. This issue is also being dealt with at a more general policy level. Nevertheless, some aspects of this discussion, for instance the means of enhancing interaction with organizations of civil society, could still be taken up for political discussion in the HLM given their particular importance to trade and environment issues and in particular to public perception and support for the WTO.

Committee on Trade and Environment Considers Relationship Between the WTO and MEAs

The WTO Committee on Trade and Environment (CTE) met on 23-24 July, chaired by Singapore's Ambassador Chak Mun See. It focused almost exclusively on the relationship between WTO rules and multilateral environmental agreements (MEAs; items 1, 5, 7 and 8 of the CTE work programme), with an information session with eight MEA secretariats on the first day.

The purpose of the information session was to further the CTE's understanding of the linkages between MEAs and international trade rules. Participants included the secretariats of the United Nations Environment Program (UNEP), the UN Framework Convention on Climate Change (UNFCCC), the UN Economic Commission for Europe, the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, the Convention on Biological Diversity (CBD), the International Tropical Timber Organisation (ITTO), the Intergovernmental Forum on Forests (IFF), and the International Commission on the Conservation of Atlantic Tunas.

UNEP suggested that time was ripe to start defining a 'framework' to clarify the relationship between MEAs and the WTO, as called for by WTO Director General Renato Ruggiero at the WTO/NGO symposium on trade and sustainable development issues, held in March (see Bridges Vol.2 No. 3, page 10). Several countries submitted their views to the CTE on the use of trade measures in MEAs before the first WTO Ministerial in 1996, but no consensus was found between those advocating strictly conditioned (or no) use, and those in favour of keeping MEA-related trade measures out of reach of the WTO. UNEP's proposal to revive this work was well-received by several countries, including developing countries, although the latter on the whole continue to view attempts to accommodate MEAs in the WTO as a Northern agenda. Largely because of these differences, the CTE in 1996 made no recommendation for – or against – changing trade rules, particularly the environmental exception provisions of GATT Article XX.

Statements made at the CTE's July meeting suggested that little headway had been made since 1996 on the relationship between the two regimes. One of the key issues at the CTE continues to be the use of trade measures permitted under MEAs against non-Parties to the agreement in question. Such concerns underline the importance for Convention Secretariats to take an active role in elaborating a framework between international trade and environmental rules.

A number of countries and the CTE Chair noted that closer co-operation between UNEP and the CTE was welcome. In addition to proposing moving the framework debate forward, UNEP asked the CTE to clarify three central points: (i) what does the CTE understand by the term 'trade measures' in the context of MEAs?; (ii) what does the CTE view as measures in MEAs that are consistent with WTO rules?; and (iii) what does the CTE view as sustainable trade policies and how can these policies help strengthen MEAs?

The CTE's brief discussion on TRIPs centred on the provisions of the TRIPs Agreement relevant to the Convention on Biological Diversity (CBD). The CBD Secretariat asked for enhanced co-operation with the WTO Secretariat regarding this matter. Delegates were also concerned about the Biosafety Protocol of the CBD, raising issues of burden sharing, management responsibilities, and legal implications. At its meeting in June, the WTO Committee on Sanitary and Phytosanitary Measures also expressed concern about the Biosafety Protocol under negotiation (see also Bridges Vol. 2 No. 4 page 6).

With regard to the Basel Convention on Transboundary Movements of Hazardous Wastes, some members of the CTE, such as Canada, Australia and New Zealand, expressed concern about the 1995 export ban (Decision III/I), while the United States asked if the best approach might not be for countries to decide themselves whether they have sufficiently high domestic waste management facilities.

While the issue of trade in domestically prohibited goods (DPGs) was briefly touched upon, on the whole the Committee felt that DPGs were adequately addressed in other fora. Delegates also devoted some time to looking into the environmental benefits of liberalising trade in environmental services, a sector recently under scrutiny at UNCTAD, as well as the WTO Council for Trade in Services.

According to observers, the CTE meeting did not discuss the High-Level Meeting of senior environment and trade officials, proposed by EU Trade Commissioner Sir Leon Brittan last April to 'break the logjam' of the CTE. The proposal has been endorsed by the US, Canada and Japan – the so-called Quad countries – which agreed in July to start raising support for the meeting, as well as general progress in the trade and environment debate within the WTO. The timing – proposed for March 1999 – and level of participation, as well as the precise objectives and agenda of the High-Level Meeting are still under discussion between the Quad-countries (see text of EU proposal on page 3). The WTO General Council is also expected to address the matter at its 15 September meeting.

The CTE will meet for the last time in 1998 from 26-27 October. All items of the work programme will be on the agenda, including the hitherto undiscussed 'trade in services' and 'relations with non-governmental organisations' clusters. The CTE annual report to the General Council will be finalised at the October meeting.

A WTO Secretariat report of the meeting has been published as Trade and Environment Bulletin No.25. It is available on the WTO Web site or in hard copy from the Press and Information Division.

Contact: Sabrina Shaw, WTO Trade and Environment Division, tel: (41-22) 739-5482, fax: 739-5620, e-mail: sabrina.shaw@wto.org

WTO Secretariat Initiatives

The WTO Secretariat will start holding regular NGO briefings after important meetings of the world trading body (see cover story). The first such briefing will take place after the Special Session of the General Council on Friday 25 September (or Monday 28 if the session ends late). The Special Session will focus on preparations for the third WTO Ministerial Conference, which will adopt the agenda for post-2000 negotiations.

The NGO Forum, containing 'information of special interest to NGOs' (i.e. announcements of symposia, publications and contact persons within the Secretariat) is expected to be up and running on the WTO Web site by late September.

A list of NGO publications received by the Secretariat will be regularly compiled and circulated WTO Members. The first such list is likely to be available in October.

Contact: Alain Frank, WTO External Relations Division, tel: (41-22) 739-5152, fax: 739-5777, e-mail: alain.frank@wto.org

Rules of Origin Harmonisation Deadline Extended

Delegates agreed in early July to try and complete the work of harmonising Members' rules of origin by November 1999, shortly before the new round of trade liberalisation negotiations starts at the WTO. The original deadline of 20 July, 1998, could not be met due to the scope of the task, which involves harmonising the rules of origin of more than 5000 tariff lines of the 133 Member countries, as well as the sensitive nature of many sectors, including textiles and apparel, and agricultural and chemical products (for more details see Bridges Vol.2 No.4, page 5).

Meanwhile, a rules of origin fight is already looming in the WTO over textile exports from the European Union to the United States. At issue are 'flat goods', such as sheets or table cloths, which the US will continue to consider as originating in the country where the fabric was woven or knit rather than the country where the product was finished. Silk accessories, such as scarves, are the only exception: they are considered to originate in the country where the fabric was cut and assembled to a finished good. For fabrics, however, origin will be conferred to the country where the fabric is dyed and printed rather than the country where it was woven or knit. Distinctions such as these make a major difference to exporters, as textile exports from some countries are restricted by quotas while others are not. The US maintains that the new legislation conforms to a bilateral agreement reached last year between the two trading powers to avoid WTO dispute settlement procedures.

Contact: Susan Aspinall, WTO Rules Division, tel: (41-22) 739-5109, fax: 739-5505, e-mail: susan.aspinall@wto.org

Committee on Regional Trade Agreements

The Chair of the Committee on Regional Trade Agreements (CRTA) announced to the WTO General Council on 15 July, that the Committee could allow Members to 'briefly set aside ongoing disagreement over how to interpret and clarify WTO rules on RTAs'. Currently, Members are deadlocked over whether as many as 30 RTAs conform with WTO rules. By removing this sticking-point, the Committee should be able to advance with reviewing the regional customs-unions and free-trade areas under its purview. As one WTO source explained: 'We can leave aside those things that are unclear, but we can try to make temporary conclusions on different RTAs'.

With the exception of Mercosur, which reportedly is in no hurry to have its agreement reviewed, Members of the CRTA are feeling frustrated at the slow rate of progress in completing the reviews, which are planned to be finished for the end of 1998.

According to GATT Article XXIV, an RTA is judged to be consistent with WTO rules if it covers 'substantially all trade' between the parties and if the members of the RTA apply substantially the same duties and 'other regulations of commerce' (such as antidumping and safeguard measures) to trading partners that are not members of the arrangement. Many members of the CRTA are worried that resolving the ambiguity surrounding Article XXIV will result in stricter WTO rights and obligations vis-à-vis existing RTAs, potentially leading to costly renegotiation of regional rules. Some are also speculating that discussion of regional trade issues could become a factor in the context of a new WTO round of trade negotiations.

The next meeting of the Committee is scheduled for 3-4 December.

Contact: Richard Eglin, WTO Development Division, tel: (41-22) 739-5184, fax: 739-5774.

TRIPs Review Yet to Start

The Council for Trade-related Intellectual Property Rights (TRIPs) met on 16 July but, according to delegates present, did not address the upcoming review of the TRIPs Agreement's provisions dealing with the patentability and IPR protection of plant varieties. Very little has reached the public about this review of Article 27.3(b) which, according to the WTO's built-in agenda, must be completed in 1999. Key concerns of the review centre on the obligation of countries to either grant patents or to develop 'effective *sui generis* systems' for the protection of plant varieties. WTO members have never defined what an effective *sui generis* system would consist of, nor have they agreed on a definition of the 'essentially biological processes' that countries may exclude from patentability for the production of plants and animals. NGOs following the review process stress that whatever *sui generis* systems emerge from the review as TRIPs-compatible must also conform with the Convention on Biological Diversity. The Convention requires that benefits arising from communal and indigenous conservation of biodiversity be fairly shared with these groups. The review also raises concerns over potential patenting of life forms.

The Council is considering reviewing the IPR legislation of developing countries willing to have their TRIPs compatibility examined ahead of time. The TRIPs Agreement requires developing countries to comply with its provisions by 1 January, 2000. Least-developed countries have until 1 January, 2006. A small group of developing countries, notably Singapore and Hong Kong, are willing to be reviewed, but some others claim that there is no mandate for this type of process in the WTO Agreements, and that implementing advance reviews could put unnecessary pressure on other developing countries to undergo similar reviews.

In other news, the WTO and the World Intellectual Property Organisation on 21 July announced an agreement on a joint initiative to provide technical co-operation to assist developing WTO Member countries in conforming with the TRIPs Agreement. The two institutions plan to offer assistance in preparing legislation, training, institution-building, and modernising intellectual property systems and enforcement (see also story on page 10).

Contact: Matthijs Geuze, WTO Intellectual Property and Investment Division, tel: (41-22) 739-5418, fax: 739-5790.

Working Group on Trade and Competition Policy

The Working Group on the Interaction between Trade and Competition Policy met from 27-29 July to discuss the impact of trade policy on competition, with a particular focus on the relationship between anti-dumping, subsidies and domestic competition policy. Some Asian Members in particular were worried that new rules governing competition might facilitate the use of anti-dumping duties, a popular trade tool used by developed countries to guard against surges in Asian-produced goods. The EU proposed minimum standards for competition policy enforcement; a proposal that met with lukewarm reception. The US, for instance, expressed its fears that WTO rules will infringe on its ability to enforce its own anti-trust laws.

Although the Working Group's mandate ends at the end of 1998, Members still remain uncommitted over most issues; principally whether competition should be an area to come under WTO purview. The Working Group will submit its conclusions to the General Council at the end of the year in its report.

Contact: Robert Anderson, WTO Intellectual Property and Investment Division, tel: (41-22) 739-5198, fax: 739-5790.

WTO News in Brief

The **Working Group on Transparency in Government Procurement** agreed on 22 June to request the WTO Secretariat to prepare a paper on possible elements to be included in an agreement on government procurement. Those elements include publication of national legislation and procurement procedures, information on procurement opportunities and transparency of decisions regarding qualified bidders and contract awarding. Delegates have discussed other potential elements, such as dispute settlement, domestic review and appeal procedures and the definition of procurement, but these have proved more controversial. Like the two other working groups established by the Singapore Ministerial Conference in 1996, the Working Group on Transparency in Government Procurement will submit its final report to the General Council at the end of this year. The next meeting of the Working Group is scheduled for 8-9 October.

The **Working Group on the Relationship between Trade and Investment** has reviewed a number of existing agreements on investment, but has not agreed on the desirability of launching negotiations on a WTO investment agreement. The Secretariat has been requested to prepare a survey of existing literature on investment, with a particular focus on negative and positive effects. India, Pakistan and Venezuela are among Members particularly concerned about potential negative effects of international investment. Following the uncertain fate of the OECD Multilateral Agreement on Investment, some governments, including Japan and Canada, have stated a preference for moving the talks from the OECD to the WTO. UNCTAD, which could offer another venue for multilateral investment negotiations, is reportedly favoured by fewer governments. The Working Group will meet again from 1-2 October.

The Quad countries – European Union, United States, Canada and Japan – agreed in July to explore a ‘horizontal approach’ to the **WTO negotiations on further liberalising the services sector**, which are part of the WTO’s built-in agenda for the next round of trade talks. This approach would involve countries taking on a commitment to establish national treatment across all services sectors. A general national treatment commitment would lead a ‘negative list’ approach that assumes liberalisation and requires countries to seek specific exemptions from market access commitments, officials said. At present, the General Agreement on Trade in Services (GATS) applies national treatment obligations only to sectors identified by countries in a ‘positive list’. Quad officials conceded, however, that a change from a positive to a negative list approach would be difficult to sell to other WTO Members. An alternative would be to negotiate on a sectoral basis, as was done for financial services and telecommunications.

Talks stalled in July on expanding the **WTO Information Technology Agreement**, hailed as the major achievement of the Singapore Ministerial Conference. Negotiations on including more products to the existing list broke down largely because of disagreement between the EU and Malaysia regarding the coverage of consumer electronics, and the EU and the US over the inclusion of fibre optics and computer monitors in ITA II. The talks are set to resume on 30 September.

The Netherlands is funding a new **WTO training programme for developing country officials**. As of September 1998, up to three trainees a year will work in the WTO Secretariat for a maximum period of two years, and then return to their ministries. The purpose of the programme is to strengthen the institutional capacity of developing countries to deal with trade and development related matters and trade policy in general.

Dispute Settlement Corner

US Appeals Shrimp-Turtle Report

On 23 July, the United States submitted its appeal of the 6 April WTO ruling that its import ban on shrimp from certain countries ran counter to its obligations under the General Agreement on Tariffs and Trade. The ban, in effect since May 1996, concerns non-aquaculture shrimp caught without turtle excluder devices (TEDs) which keep endangered sea turtles from drowning in the nets dragged by mechanised shrimp trawling vessels. The case was brought to the WTO by India, Malaysia, Pakistan and Thailand, which objected to the extra-territorial and unilateral nature of the trade measure. Sixteen countries and the European Union joined the case as third parties. (For a summary of the panel’s findings, see Bridges Vol.2 no.3, page 11.)

In the appeal the US claims that the panel introduced a new ‘threat to the multilateral trading system’ test for judging whether a trade measure can be justified under GATT Article XX, which allows measures contrary to other GATT provisions to be taken for environmental or health reasons. The appeal says that, in adopting its ‘threat to the multilateral trading system’ analysis, ‘the panel fails to apply the ordinary meaning of the text – whether a *justification* can be presented for applying a measure which constitutes discrimination. As a result, the panel would add an entirely new obligation under Article XX that Members may not adopt measures that would result in certain effects on the system.’ According to the appeal, the panel’s interpretation of Article XX has no basis in the text of the GATT. Furthermore, it has never been adopted by prior panels, and it ‘would impermissibly diminish the rights that WTO Members reserved under XX’.

The panel had argued that ‘the provisions of the GATT are essentially turned toward liberalisation of access to markets on a non-discriminatory basis’, and concluded that ‘the chapeau of Article XX only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system.’ The US counters that Article XX is an integral part of that system, and using the ‘threat to the multilateral trading system’ test would void Article XX of its meaning.

The Appellate Body ruling on the case is expected in late September or early October.

EU Implementation of WTO Banana Ruling Contested

The European Union on 26 June adopted the framework for reforming its banana regime in an effort to implement the WTO Appellate Body September ruling that its quota and import licensing arrangements for bananas were discriminatory. The main features of the new regime are spelled out in the article on page 11, which reflects the views of the complainants in the case.

On 18 August, the complainants – the United States, Ecuador, Guatemala, Honduras and Mexico – requested consultations with the EU over ‘the WTO-consistency of measures being proposed by the EC in purported compliance with the recommendations and rulings of the panel and the Appellate Body.’ The Caribbean Banana Exporters’ Association called their threat to start compliance procedures against the EU ‘a cynical and ruthless exploitation of the WTO’ (see page 8). The rules of the Dispute Settlement Understanding are not clear as to whether a compliance procedure can be initiated before the measure in question has actually been implemented.

The European Union's New Banana Regime: A test case for the WTO

By Francisco J. Alvarez de Soto

On 28 July, a new regulation on the importation, sale and distribution of bananas in the EU was published in the Official Journal of the European Communities. Council Regulation No. 1637/98 amends the controversial Regulation No. 404/93 which was successfully contested at the WTO by the United States, Honduras, Guatemala, Ecuador and Mexico. It will be implemented as of 31 December 1998.

In spite of obtaining favourable panel¹ and Appellate Body² reports through the WTO dispute settlement process, the complainants – generally referred to as the G-5 – remain dissatisfied with the end result. They and Panama, collectively called the G-6, still find the regime – proposed in January 1998 by the European Commission and now approved by the EU Council of Ministers – restrictive and discriminatory against their bananas.

What does this new regime for the importation, sale and distribution of bananas consist of? Why is it still incompatible with WTO rules and principles? This article will attempt to clarify these questions.

New regime still quota-based

First, the new regime is still based on tariff quotas. These are distributed as follows:

The ACP quota: This quota of 857,700 metric tonnes includes the production of all African, Caribbean and Pacific countries which belong to the Lomé Convention.³ This production can be imported into the EU duty free. Curiously, the text of the new regulation refers to this quota as the 'available quantity' when it clearly is a quota.

The consolidated quota: This quota of 2.2 million tonnes comprises the production of the Latin American 'dollar zone', which includes the four producer countries identified in the EU proposal as having a 'substantial' interest in the EU banana trade: Ecuador, Costa Rica, Colombia and Panama. It also covers the other G-6 countries, as well as Nicaragua and Venezuela, which together with Costa Rica and Colombia belonged to the now dissolved Framework Agreement on Bananas.⁴ This quota can be imported into the EU with a tariff of 75 ECUs per tonne.

The new regime provides that, consistent with the EU's obligations under Article XIII of the GATT, the European Commission must negotiate with the four substantial suppliers country-specific shares of the overall quota reflecting their share of EU imports during a certain reference period. However, the negotiating mandate specifies that if no agreement is found with the four substantial suppliers, the Commission will unilaterally set these shares on the basis of the reference period, which in this case looks likely to be the years 1994-96. The G-6 oppose using this reference period because Regulation 404/93 already governed the EU's banana regime between 1994 and 1996, and the trade flows of the period were totally distorted. For Panama, exports to the EU declined from some 22 percent of trade to a little more than 13 percent in 1997. It is important to note that although ACP suppliers have access to this 75 ECUs/tonne quota up to 90,000 tonnes, the countries that participate in the European trade through this quota can not access the ill-named 'available quantities' set aside for ACP countries.

The autonomous quota: This quota of 350,000 tonnes covers trade with the three new EU members: Austria, Finland and Sweden. Since their accession in 1995, this quantity – established to 'guarantee the supply' – has been arbitrarily set by the European Commission. According to the Commission, the inclusion of this quota in the regime makes the system legitimate. All suppliers have access to this quota: the ACP countries, which export duty-free, and the others who pay a tariff of 75 ECUs a tonne.

Import licenses

In addition to the quotas, the new regime establishes a system of import licenses to administer them. It is important to thoroughly understand this system to be able to judge the consistency of the quota regime with WTO provisions. However, the Regulation only directs the relevant instances of the European Commission to

implement this system using two main criteria: 'actual imports' and the reference period of 1994-96.⁵ Applying the principle of 'actual imports' would mean that in the future, at least in theory, European distributors would only be awarded the licenses necessary to guarantee the importation of the quantities they will 'actually' buy. Contrary to past practice, they will not automatically obtain the same number of licenses each time that these are granted. With this change the Commission seeks to end the negotiation and sale in secondary markets of unused European import licenses to countries that have more

limited access to the EU market. In its proposal to reform the banana regime, the European Commission had to eliminate the 'type B' import licenses – granted in a quasi arbitrary manner to European operators, as well as the so-called 'hurricane' licenses, also arbitrarily granted to distributors in case of eventual meteorological disasters which might destroy banana crops in the ACP countries where they buy their fruit.⁶

The reforms are purely cosmetic as the regime under Regulation 404/93 remains in place with the new Regulation: ACP countries continue to benefit from preferential treatment which – because it goes beyond the exception granted under the GATT waiver – is discriminatory and obviously detrimental to more competitive and better quality Latin American bananas. The EU has argued that its Uruguay Round commitments allow it not to fulfil its non-discrimination obligations. However, the Appellate Body stated that the contingents granted to ACP countries in addition to their preferential tariff-rates were inconsistent with Article XIII because of their discriminatory nature. The Lomé waiver, which only refers to violations of Article I of the GATT, does not cover these shares.⁷ On the other hand, with the creation of another, less-favourable, quota for Latin American bananas, the EU regime discriminates against all Latin American suppliers – whether substantial or not – in favour of non-substantial ACP suppliers.

The G-6 has presented joint declarations expressing its total opposition to the new regime at all meetings of the Dispute Settlement Body since the Commission submitted its proposal to the EU Council of Ministers. In addition, Panama has written ministerial-level notes to all EU members detailing its misgivings regarding this regime. In

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spite of these interventions, the Commission attained its objective: the approval of its proposal with scarcely an alteration to the text. The regime enters into force in January 1999.

The next steps

What options does the G-6 have to halt the implementation of this regime, inconsistent from every point of view with WTO rules? The answer lies in the Dispute Settlement Understanding (DSU).

According to Article 21.5, 'Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such disputes shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it [...]'.¹

This provision raises some questions about due process: does 'through recourse to these dispute settlement procedures' imply consultations as required by Article 4 of the DSU? When must the matter be submitted to the panel for the 90 days to start running until it must circulate its report? Article 21.1 requires prompt compliance with recommendations and rulings of the Dispute Settlement Body (DSB). It would be logical for the DSB to support as expeditious a compliance procedure as possible since accepting dilatory measures such as new rounds of consultations could lead to questioning the DSU's jurisdiction.

Should the panel actually determine that the measures adopted by the EU in this case do not comply with its recommendations and rulings, the G-5 could have recourse to Article 22.2, according to which the Member concerned must enter into negotiations 'if so requested' in order to develop 'mutually acceptable compensation'. These negotiations should conclude 'within 20 days after the expiry of the reasonable period of time'. ('The reasonable period of time' refers to the time – usually 15 months – granted by the DSB to a country to comply with panel rulings, *ed.*)

If no agreement can be reached, the same Article provides that the party having invoked the dispute settlement procedures 'may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations within 30 days after the expiry of the reasonable period of time'. Should the suspension be authorised, the EU would still have the opportunity to object to the level of the suspension. The matter would then be referred to arbitration, which can take 60 days at most, after which the suspension can be carried out as a 'temporary measure'.

The practical consequences of this dispute settlement process are unpredictable. It is in the hands of the DSB, and the WTO itself, to realise one of the greatest objectives of international trade law: an effective and enforceable jurisdiction that contributes to the elimination of trade barriers between the nations of the world.

In our view, the banana case – after years of disputes within the GATT and now the WTO – could prove the turning point between an evolutionary dispute settlement process and the demise of the new Dispute Settlement Understanding. The DSU would lose its 'raison d'être' if the Dispute Settlement Body allowed the EU to implement its new regime, with all the discriminatory and restrictive aspects described above, without letting the G-5 countries initiate a truly expeditious compliance procedure in the spirit of DSU Article 21.5.

It would be very difficult for Members such as Panama, which have believed in the multilateral trading system and made great economic, political and social efforts to join it, to justify to their people an Agreement that fails to defend their legitimate commercial interests.

Dr. Francisco J. Alvarez De Soto is Lawyer-Negotiator at Panama's External Trade Council. The opinions expressed in this article are the author's own and not those of the Panamanian Government.

NOTES

¹ WT/DS27/R/USA, 27 May 1997

² WT/DS27/AB/R, 9 September 1997

³ The fourth Lomé Convention is a multilateral co-operation treaty committing the EU to preferential treatment for products from member countries. The EU notified this Convention to the WTO and obtained the so-called Lomé waiver which exempts it from the obligations arising from GATT Article I (most-favoured nation treatment).

⁴ Through the Framework Agreement on Bananas, the EU granted country-specific quotas for each of the four signatory countries. The legal standing of this Agreement was seriously affected by the WTO panel and Appellate Body, as well as the European Court of Justice, which recently outlawed the export certificates issued by the suppliers on the grounds that they were discriminatory.

⁵ The G-6 objects to the import licensing system for the same reason it opposes the use of this triennial in determining the shares of the substantial suppliers, i.e. the market distortion of that period.

⁶ In our opinion, the elimination of these 'hurricane' licenses in the new regime is not entirely clear, as the text refers to exceptions in case of 'force majeure', another ambiguous term.

⁷ Analysis by the G-6, 28 April 1998.

The banana case has generated much commentary from many different angles. Some have focused on the WTO-consistency of the Lomé Convention and questioned how far richer nations should be allowed to support poorer ones through favourable trade conditions. Several others have emphasised the social and economic disruption that drastic changes in the European banana regime would bring to many ACP countries. Among the most vulnerable are small Caribbean island states, which have depended on their ACP quotas to export bananas to EU markets. Finally, in addition to the market access issues involved in the dispute, banana production and trade raise important environmental and sustainable development considerations.

ICTSD's Bridges Weekly Trade News Digest has covered the case extensively (past issues are available at <http://www.icts.org>). After last July's Dispute Settlement Body meeting, the Digest reported that the Caribbean Banana Exporters Association (CBEA) called the G-6's condemnation of the revised EU regime a 'cynical and ruthless exploitation' of the WTO. The CBEA issued a statement saying that should the US (and other G-6 countries) press on with the case, it would be 'without regard to the economic and social turmoil it will cause in the small Caribbean countries that the US wishes to sacrifice in the name of free trade.' The CBEA represents growers in Belize, Jamaica, Suriname, St. Lucia, Dominica, St. Vincent and the Grenadines and Grenada.

A forthcoming issue of Bridges will look at some of the social implications of the new banana regime, as well as the wider question of the EU's renegotiation of the Lomé Convention.

ECOSOC Focuses on Market Access

For the first time, the high-level segment of the substantive session of the UN Economic and Social Council (ECOSOC) focused on market access. The meeting took place from 6-8 July 1998, at UN headquarters in New York.

For some years now, ECOSOC has convened a high-level, ministerial discussion at the outset of its summer substantive session. Each year, many of the 53 ECOSOC member States send ministers to participate in a policy dialogue on an issue of current concern to the world economy. In 1997, the high-level segment focused on fostering an enabling environment for development: financial (including capital) flows, investment and trade. This year, ministers reviewed developments since the Uruguay Round, particularly with regard to the implications, opportunities and challenges that globalisation and liberalisation have posed to developing and least-developed countries. The theme was requested by the G-77 group of developing countries.

The ministerial meeting on market access was preceded by a high-level policy dialogue on developments in the world economy, with the Managing Director of the IMF, the President of the World Bank, the Secretary-General of UNCTAD and the Deputy Director of the WTO.

The Asian crisis was prominent amongst the issues raised in the policy dialogue and in the high-level debate. Participants noted that the severity and the speed of the crisis had highlighted the need for rapid global response capacity to prevent and deal with similar occurrences in the future. Speakers during the high-level segment said enhanced co-operation between the WTO and the Bretton Woods institutions was crucial, as was greater co-operation between the WTO and the UN. The WTO was also called on to reflect on how to better achieve coherence between its activities and the needs of the global economy.

Participants recognised the value of regional trading arrangements which could help developing countries achieve integration into the world trading system. They also expressed support for making environment and trade policies mutually supportive, referring to the proposal for a high-level meeting on trade and the environment, which was seen as being able to help overcome the current impasse in discussion, and promote the concept of sustainable development in the WTO (see also page 3). However, many participants voiced concern about using trade conditionalities to enforce non-trading objectives, including those related to labour standards and the environment. Such practices could undermine the proper functioning of the multilateral trading system, these speakers warned.

Integration of the least developed countries in the global trading system was a priority for all. Ministers pointed out that some measures and policies – such as non-tariff measures and international and national product standards – continue to restrict exports from developing countries. They identified the lack of technical abilities of developing countries as a major constraint on their efforts to take fuller advantage of the multilateral trading system, and underlined the importance of technical assistance, including in the context of WTO's dispute settlement procedures.

Finally, ministers agreed that the UN system as a whole, and UNCTAD in particular, should continue to play an active role in helping developing countries strengthen their capacities to participate in trade negotiations. The UN should also promote better coherence among global development, financial and trade policies so that the ability of the developing countries to benefit from increasing trade is not compromised by imperfections in financial markets.

The UN Non-Governmental Liaison Service will shortly be putting out a « Round-Up » on the 1998 substantive session of ECOSOC. Contact: NGLS, Room FF-346, United Nations, New York, NY 10017, USA; tel: (1-212) 963-8712; fax: (1-212) 963-3125, nxls@undp.org.

UNCTAD Expert Group on Competition Law and Policy Meets

Experts and practitioners in competition policy from 70 developed and developing countries met in UNCTAD from 29 to 31 July, to monitor UNCTAD's work in this field and discuss specific competition issues. The meeting launched the preparatory process for the fourth UN Conference to Review All Aspects of the UN Set of Principles and Rules on Restrictive Business Practices, scheduled for the year 2000, and agreed on a number of activities to assist developing countries and economies-in-transition build capacity and upgrade the skills of those responsible for management of competition legislation.

Government representatives outlined recent developments in their countries' competition law, including problems encountered in application. In many countries state monopolies are being dismantled and competition laws are being revised to reflect the needs of a market economy. The representative of China pointed out that conflicts between industrial and competition policies had had a major negative impact on the country's telecommunications sector, and that experience gained in that sector would be useful in the elaboration of anti-monopoly legislation. The representative of the Andean Community said the group was starting to discuss introducing merger controls, as well as replacing anti-dumping and subsidies measures within the community by competition rules.

The next expert meeting will focus on the relationship between the competition authority and relevant regulatory agencies with respect to privatisation and demonopolisation processes; international merger controls, particularly where they affect developing countries; and the creation of a culture of competition. For the meeting, participants requested the UNCTAD Secretariat to prepare reports on international co-operation on competition policy, technical assistance, and the relationship between competition policy and intellectual property rights.

The conclusions of the meeting (TD/B/COM.2/CLP/L.2) will be submitted to the UNCTAD Commission on Investment, Technology and Related Financial Issues, in September.

Contact: Philippe Brusick, Chief, Competition Law and Policy and Consumer Protection, UNCTAD, tel: (41-22) 907-5671/5494, fax: 907-0048, e-mail: philippe.brusick@unctad.org

UNCTAD Expert Meeting Discusses Strengthening Developing Countries' Environmental Services Sector

Some 60 experts in environmental services and sustainable development from 48 countries adopted a set of recommendations aimed at strengthening developing countries' ability to develop their environmental services sector. The recommendations (TD/B/COM.1/EM.7/L.1) were adopted at the closing session of a three-day meeting in UNCTAD on 20-22 July entitled Expert Meeting on Strengthening Capacities in Developing Countries to Develop the Environmental Services Sector.

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According to the experts, the international community can facilitate the access of developing countries to environmental goods and services and help them strengthen their domestic capacities in this field through improved access to international financing and technical support for institutional capacity-building. Relevant international organisations should enhance their work on statistics and the definition of environmental services as well as providing analysis of existing barriers in the sector.

The experts also recommended that governments pursue further liberalisation in the environmental services sector in the framework of forthcoming GATS negotiations. This could result in 'win-win' situations, producing both environmental and economic benefits. At the national level, they should establish and maintain a strong and effective regulatory framework within which environmental laws and regulations are enforced.

In addition, the experts recommended more partnerships between environmental services firms in developed and developing countries to make it possible for the latter to acquire state-of-the-art technology and develop supply capacities, including for export markets.

Contact: Simonetta Zarrilli, Trade Analysis and Systemic Issues Branch, Division on International Trade in Goods and Services, and Commodities, tel: (41-22) 907-5622, fax: 907-0044, e-mail: simonetta.zarrilli@unctad.org

WIPO Hosts First Roundtable on Intellectual Property and Traditional Knowledge

The World Intellectual Property Organization (WIPO) organised its first Roundtable on Intellectual Property and Indigenous Peoples on 23-24 July in Geneva. About 60 NGOs participated in this event which marked the beginning of a dialogue between the member States of WIPO and the world's diverse indigenous peoples, local communities and other holders of traditional knowledge. The workshop aimed at sharing information and experience concerning protection of traditional knowledge, as well as increasing awareness of the mechanisms offered by the existing intellectual property system for the enhancement of such protection. The Roundtable was part of a new WIPO programme, which will be carried out primarily by the Global Intellectual Property Issues Division.

The mandate of this new division includes exploration of the needs and expectations of potential new beneficiaries of intellectual property protection. Indigenous peoples and local communities have been identified as the first group of such beneficiaries. Other activities will be undertaken in the next two years, including fact-finding missions to areas with significant indigenous populations and substantial bodies of traditional knowledge; pilot projects related to documentation of traditional knowledge formations; and a study of how information technology can facilitate the protection and conservation of traditional knowledge.

At the Roundtable, participants heard presentations on current initiatives to protect traditional knowledge and made statements regarding the situation in their communities, but did not develop any concrete recommendations. However, the meeting was a first step towards the democratisation of the intellectual property protection system and the recognition of other sources of inspiration and creativity.

Contact: Global Intellectual Property Issues Division, WIPO, tel: (41-22) 338-9319, fax: 338-8120, e-mail: richard.owens@wipo.int

Agriculture Slows Progress of Mercosur Outreach Efforts

Mercosur and the Andean Community (CAN) are in the process of finalising a Preferential Agreement, a first step towards the creation of a free trade area between the two sub-regional blocks. The nine countries involved will jointly define fixed preferential margins to enter into force on 1 October this year. Implementation of the preferential arrangements should then pave the way for a free trade area covering the full tariff schedule, to enter into force on 1 January 2000.

The list of preferences from the Andean Community includes 2700 products while that of Mercosur only contains 1400. Difficulties in the talks have to do primarily with the opposition from Andean agricultural producers to what they perceive as highly ambitious margins demanded from the Southern partners.

On the transatlantic front, the EU Council in late July authorised the Commission to carry out negotiations aimed at the creation of a Free Trade Agreement with Mercosur. The talks had barely started when EU agricultural ministers demanded an impact assessment of any such agreement on the European agricultural sector. An internal EC report already notes that the Commission would have to transfer up to US\$15 billion per year to farmers to compensate for markets lost to Mercosur products. The French government has taken a hard stance against such impacts, largely backing the claims of agricultural unions.

Any Agreement between the two blocks will have to cover 90 percent of total traded products to be in line with WTO provisions.

WTO Discussions Narrow in on Transparency, continued from page 1

for the 1999 Ministerial Meeting. An informal General Council meeting will precede the Special Session on 18 September. Both the informal session and the Special Session are expected to finish left-over work such as the appointment of a new Director General, deciding on the WTO senior management structure and the issue of electronic commerce, before moving on to issues such as the Third Ministerial Meeting and transparency in the WTO.

Around the time of the General Council special session, senior Cairns group representatives from capitals are expected to be present in Geneva, where they may raise the issue of WTO transparency. Given its geographical composition and relative weight in world trade, a consensus amongst this group could be important (the Cairns group comprises most of the world's principal agricultural producers).

WTO Members are also likely to discuss the issue of transparency as it relates to document availability, dispute-settlement and WTO-NGO relations outside formal sessions of the General Council, although the format, timing, location and formality of these meetings are as yet undefined.

No dates have yet been fixed for the Dispute Settlement Review, but substantive discussions on issues submitted by member governments are likely to start towards the end of September or early October (for more information on the review, see Bridges Vol.2 No.4, page 7).

NOTES

¹ On 7 July 1998, 98 non-governmental organisations sent WTO representatives the Civil Society Statement on Openness, Transparency and Access to Documents in the WTO. The Statement focuses on document dissemination and NGO inputs to the WTO's dispute settlement proceedings. It is available from ICTSD, as well as the ICTSD Web site <http://www.ictsd.org>.

ILO Adopts Charter for Fundamental Rights

Delegates to the 86th International Labour Conference on 18 June adopted a solemn ILO Declaration on Fundamental Principles and Rights at Work. The Declaration commits the ILO's 174 member states to respect and enforce the so-called core labour standards whether they have signed the relevant ILO Conventions or not (see box opposite).

Ever since the first WTO Ministerial Conference in Singapore rejected consideration of labour issues within the WTO, the ILO has been searching for a way to reinforce commitment to core labour standards in the context of globalisation. The Declaration's preamble states that the ILO should, now more than ever, 'ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development.'

Although the Declaration specifically states that labour standards should not be used for protectionist trade purposes or to undermine the comparative advantage of developing countries, it could still prove an efficient tool in curbing the most exploitative labour practices. Unlike most 'declarations of intent' of this sort, the new ILO pact comes complete with a follow-up mechanism, which foresees annual reporting on member states' compliance with the four areas of fundamental principles and rights specified in the Declaration. The reports will be based on information obtained from governments and compiled by the ILO. They will be reviewed by the ILO's governing body, which may also hear experts invited to 'draw attention to any aspects which might call for more in-depth discussion'.

The country reports will be complemented by an annual global report that is to 'serve as a basis for assessing the effectiveness of the assistance provided by the Organisation, and for determining priorities for the following period'. The follow-up mechanism will be reviewed 'in due course' to assess whether it has adequately fulfilled the overall purpose of the Declaration.

Many view the ILO Declaration as a more equitable alternative to a 'social clause' in the WTO. Such a clause – advocated by trade unions and other groups particularly in developed countries – would link respect for core labour standards to WTO provisions, and possibly allow retaliatory trade measures to be taken against countries where serious violations of those standards occur. While the ILO lacks the WTO's power to sanction offenders, it can bring the weight of public opinion against members repeatedly found in non-compliance with the Declaration's fundamental principles.

The Declaration can also be used to justify closer co-operation between the ILO and the WTO, as it obliges the former to encourage other international organizations with which the ILO has established relations to support efforts to attain the Declaration's objectives.

The International Labour Conference failed to reach consensus on new Conventions on contract and child labour. According to the ILO, the proposed Convention on child labour is 'designed to eliminate the worst forms of child labour, including hazardous work, debt bondage, forced labour and slave-like conditions, and children in prostitution, pornography and drug trafficking.' The text of the Convention went through a first round of discussion at the ILO Conference and is expected to be adopted after a second reading at the 1999 meeting of ILO member states.

Contact: ILO, Office of the Legal Adviser (JUR), tel: (41-22) 799-6525, fax: (41-22) 799-8570, e-mail: jur@ilo.org

ILO Declaration on Fundamental Principles and Rights at Work

The International Labour Conference,

1. Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;

(b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and

(c) by helping the Members in their efforts to create a climate for economic and social development.

4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

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The Convention obliges Parties to advocate for change in the WTO's information policies. As noted above, Parties to the Convention must promote its principles in international fora. At the very least, the WTO document policy will need to be substantially revised to bring it into conformity with the minimum principles of the Convention – making documents available before decisions are made, establishing a genuine presumption of disclosure with limited exceptions, and requiring the Membership to state reasons when it decides to exercise one of the exceptions and withhold information. Moreover, the principles of the Convention require that the WTO conduct regular assessments of the environmental impacts of trade rules and international trade flows, involve civil society in these assessments, and make the results publicly available.

In addition to advocating for such changes within the WTO, domestically Parties to the Convention must take action to create greater transparency in the formation of national trade policies. At a minimum, they will have an obligation to publicly disclose their domestically produced, WTO-related documents, where they do not fall within one of the narrow exemptions contained in the Convention. Parties to the Convention must carry out environmental assessments of their trade activities and policies and disseminate them.

Gaining Access to WTO Decision- and Policy-Making

Meaningful and effective participation requires that the public know both that a decision is being made and that they have a right to participate in the making of that decision. The minimum procedural elements of the principle of access to decision-making are designed to ensure that the public is able to participate in environmental decision-making in a meaningful and effective way. Notice of the pending decision-making process should come early enough in the process for the public to review relevant documents and prepare their input. The process must also allow adequate time for the decision-makers to process the public input and incorporate it into their decision-making process. Failure to take public input into consideration is a basis for challenging the outcome of the domestic decision-making process under the Convention.

The WTO, in contrast, provides virtually no formal role for public participation. In July 1996, the General Council adopted the Guidelines for Arrangements on Relations with Non-Governmental Organizations. These arrangements do little, however, to improve the situation of NGOs in the WTO. The Guidelines themselves are less than a full page long and bestow no right of participation on NGOs. Meetings of all WTO bodies and committees are closed to the public.

The Guidelines promote the national level as the appropriate place for cooperation and consultation with NGOs on trade policy. The national level is of course extremely important for NGO participation in trade policy-making. This does not, however, absolve the WTO of responsibility to provide for open and transparent decision-making processes. The public cannot participate effectively, even at a national level, because access to the relevant documents is extremely limited. Since documents do not become publicly available until after decisions have been made, NGOs do not have time to prepare comments, suggestions or ideas. Lack of access to documents handicaps NGO participation in the formation of both national and international trade policy.

Parties to the Convention must advocate such changes at the WTO to provide greater access for the public to trade policy-making. Members must still make significant reforms to the WTO Document Procedures to enable participation in both international and national trade policy-making. In addition, Members must open up WTO policy-making fora to the public and provide for minimum rights of NGOs to participate, consistent with the Convention. At a domestic level, the Convention provides a mechanism for opening up domestic trade policy-making. The Convention provides for three levels of decision-making each with different levels of public participation – permitting of specific activities involves the greatest public participation; development of plans, programmes and policies affords the public only the minimum participation rights outlined above; the participation rights in the preparation of executive regulations falls in between. At a minimum, the formation of domestic trade policy constitutes a 'plan, programme or policy' within the meaning of the Convention and therefore is subject to the minimum participation requirements of the Convention.

Access to the WTO Dispute Settlement Process: Access to Justice?

No legal right is effective unless it is enforceable. In order to adequately ensure that the law is respected, including the principles of access to information and access to decision-making, the UNECE Convention provides members of the public access to a court or other independent and impartial body, established by law. The Convention requires three types of access to justice: enforceability of access to information provisions, enforceability of decision-making provisions, and, to a more limited extent, enforceability of substantive environmental law.

The WTO provides no formal access to justice. An important aspect of the WTO decision-making process is the role played in that process by the Dispute Settlement Body. Although the Ministerial Conference and the Governing Council are the formal decision-making bodies, often the political process of resolving conflicts between trade priorities and other policy priorities,

such as environment, within these bodies breaks down. When the political process fails to resolve these conflicts, political issues frequently find their way into the dispute settlement arena. In effect, although the decisions of dispute settlement panels have no formal legal authority to bind future panels or establish generally applicable WTO policy, the dispute settlement process has become a de facto policy-making arena. Particularly in defining the relationship between trade and environment, the dispute settlement process has played an important policy-making and priority-setting role. Therefore, access to the dispute settlement process is not only important in implementing the principle of access to justice in the WTO, but also in implementing the principle of access to decision-making.

This latter role is especially problematic, as the dispute settlement forum is not a legitimate one for establishing generally applicable policy. In the formal decision-making bodies of the WTO, national interests are represented by officials from the WTO Member States. The dispute settlement panels, however, are staffed by trade experts, who do not have the political legitimacy to resolve fundamental policy issues, or overturn domestic policy choices. Nor do they have sufficient expertise in environmental matters to balance impartially the relative interests of trade and environment values. Public access to the dispute settlement process is therefore vital.

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Negotiations Start on Eliminating Dangerous Chemicals

Negotiators from 100 countries met in Montreal 29 June - 3 July to begin talks on a worldwide UN treaty to reduce and eliminate use and production of 'persistent organic pollutants' (POPs). The International Negotiating Committee to Prepare an International Legally Binding Instrument on Persistent Organic Pollutants (INC-POPs) got off to a good start, meeting all its organisational goals. It is expected to complete its work by the year 2000, with a treaty being ready for adoption in autumn of that year. INC-POP's next session will take place in February 1999, in Geneva.

These UNEP negotiations follow close on the heels of the signature, in June 1998, of a Protocol controlling POPs, adopted in the framework of the UN Economic Commission for Europe's Convention on Long-Range Transboundary Air Pollution. POPs are also covered by the Prior Informed Consent procedure, recently codified in an international Convention (see Bridges Vol. 2 No. 3 page 19).

POPs are chemical substances that persist in the environment and bioaccumulate through the food chain. Scientists have linked POPs to immune system and neurological defects, reproductive abnormalities, low sperm counts and cancer. Hazardous chemicals were the original inspiration of the modern environmental movement, starting with Rachel Carson's 1962 classic 'Silent Spring'. In response, many countries developed extensive regulatory controls at the national levels. But because chemicals circulate globally – through trade, or naturally, via air, water, and animals – no country acting alone can protect its citizens or environment from risk. Another reason for urgency in international action is the accumulation of unwanted and obsolete stockpiles of pesticides and toxic chemicals, particularly in developing countries.

This first session of INC-POPs was intended to be an organisational session, and did not, therefore, spend much time on issues of substance. The rules of procedure of INC-POPs were agreed on, as was the outline for the treaty. Issues discussed for inclusion in the treaty included measures to reduce and/or eliminate releases of POPs into the environment, the process for adding chemicals to the Convention, management and disposal of POPs stockpiles, information exchange, technical assistance and financial resources and mechanisms. As far as trade was concerned, several representatives said that the Convention should regulate the trade in POPs – some considered that international movements of POPs should be banned, except for the purpose of their destruction.

INC-POPs moved expeditiously on setting up two subsidiary bodies. The first of these is the Criteria Experts Group (CEG), which will meet inter-sessionally, and whose task is to define criteria for adding chemicals to the list of those to be controlled by the POPs treaty. Indeed, while the initial twelve chemicals to be included are uncontroversial, intense debate is expected about the criteria for adding new chemicals to the list. As in the case of the UN-ECE treaty, the initial twelve chemicals up for scrutiny in the future UNEP Convention are the so-called 'dirty dozen'. These are the pesticides aldrin, chlordane, DDT, dieldrin, endrin, heptachlor, mirex, toxaphene; the industrial chemicals hexachlorobenzene (also used as a pesticide) and polychlorinated biphenyls (PCBs); and dioxins and furans, which are unintended byproducts created during incineration or through the production of chlorine. In Montreal, some delegations indicated that they would like the UNEP POPs treaty to cover more than the 'dirty dozen', while others preferred to adopt a

treaty covering only the initial twelve, leaving open the possibility of adding others at a later stage. The CEG's next meeting will take place in October 1998, probably in Bangkok.

INC-POPs set up a second subsidiary body, to consider issues related to implementation and to financial and technical assistance and cooperation. The issue of financing under the POPs Convention is also likely to be controversial in future negotiations. One issue around which differences are probable is whether or not the GEF will be the POPs Convention's financing body.

For the documents of the session and other information, see UNEP Chemicals' POPs site at <http://irptc.unep.ch/pops/>

Contact: UNEP IRPTC, tel: (41-22) 979-9111, fax: 797-3460, e-mail: IRPTC@unep.ch

UNEP Convention Co-ordination Meeting

UNEP held a meeting in Geneva with the Secretariats of the environmental conventions it administers on 3 July. The main focus of the meeting was trade and environment. Other issues addressed included the report of the UN Task Force on Environment and Human Settlements (task force) and indicators for environmental conventions.

The creation of so many environmental agreements has been a success for the international community, but the dispersal of their secretariats has led to a great loss of efficiency. UNEP is seeking to strengthen links between the Conferences of Parties of the different environmental conventions by hosting meetings which have addressed common issues such as national-level implementation, capacity building and technical assistance.

The outcome of the discussions on trade and the environment were presented to the WTO's Committee on Trade and the Environment July meeting (see story on page 3). In this respect, UNEP's Executive Director stressed the need for a framework on multilateral environmental agreements (MEAs) and trade, discussions on the ingredients of such a framework, assessment of environmental impacts of trade and trade impacts of environmental conventions, agreement on standards of products and methods of production, and UNEP's integration in the development of trade agreements.

The Regional Seas Unit of UNEP has also been asked to prepare a paper on regional seas agreements' relationship with trade and environment issues. Other issues to be discussed at forthcoming convention co-ordination meetings are sustainable tourism, gaps and overlap between clearing house mechanisms established under the various conventions.

Contact: Michael Williams, Information Unit for Conventions, tel: (41-22) 917-8242, fax: (41-22) 797-3464, e-mail mwilliams@unep.ch

The fifth meeting of the Ad Hoc Working Group on Biosafety of the Convention on Biological Diversity was underway when this publication went to press. The September issue of Bridges will report on the outcome. Meanwhile, detailed summaries of those negotiations, as well as the POPs Convention meeting are available from the International Institute for Sustainable Development at <http://www.iisd.ca/linkages>.

ECE Convention, continued from page 12

Even if the dispute settlement process simply resolved individual disputes, the WTO would still hear cases with significant environmental impacts and public access to the process would still be essential to implementing the principles of the Convention. The WTO dispute settlement system determines whether a Member's environmental laws violate any of the WTO agreements and how, if a violation is found, it might be remedied. Despite this important role in implementation of domestic environmental law, the dispute settlement process is largely opaque and provides no opportunity for public input. Panel hearings are as a matter of practice closed to the public. Opportunities for the public to submit information or arguments to panels or the Appellate Body is strictly limited and may be provided only at their request. *Amicus curiae* briefs have never yet been accepted by either a panel or the Appellate Body.

The dispute settlement process in the WTO fails to adequately implement the Convention's principle of access to justice in several ways. First, there is no means to enforce a right of access to information or access to decision-making, as these rights do not exist. More importantly, however, the dispute settlement mechanism fails to provide an impartial forum for the resolution of disputes – a fundamental element of the principle of access to justice. Dispute settlement panels are composed only of trade experts, yet they often opine on the legitimacy of domestic environmental measures. In balancing the relative interests of trade and environment, for example, trade experts are likely to be biased in favor of trade concerns. While dispute settlement panels may call on outside experts, that decision is within the sole discretion of the panel. Panels have in fact declined to hear environmental experts in a number of cases. Moreover there is neither a legal requirement, nor a practice, of the panel abstaining from deciding environmental (or other) issues not within its competence or of balancing panels with trade and other legal experts. Finally the dispute settlement system is closed to any public input or oversight.

To adequately implement the principle of access to justice that will bind Parties when the Convention comes into force, WTO Members will need to significantly reform the WTO dispute settlement process. Such reforms include the need to open the dispute settlement process to greater public scrutiny, to improve the mechanisms for the public, particularly non-trade experts, to have input into the process, and to create an objective dispute settlement process that is either capable of balancing trade and other policy priorities fairly, or that abstains from opining on issues, such as environmental law, that are not within its expertise.

Brennan Van Dyke is Senior Attorney and Director of the Trade and Environment Program of the Washington-based Center for International Environmental Law (CIEL). Claudia Saladin is Senior Attorney at CIEL.

NOTES

¹ The text of the Public Participation Convention can be downloaded from the UN-ECE Website at <http://www.unicc.org/unece/env/europe/ppconven.htm>.

² The UN-ECE consists of all European countries, including the former states of the Soviet Union, as well as Israel, Turkey, Canada and the United States. The following countries signed the Convention: Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Iceland, Ireland, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom and the European Community. The Convention will enter into force after ratification by 16 countries.

Latin America Regional Trade and Environment Seminar for Government Officials and Civil Society

ICTSD and Participa, a Chilean NGO that focuses on the democratisation of decision-making processes, will be hosting a Latin America Regional Trade and Environment Workshop for Government Officials and Civil Society in Santiago, Chile on September 2-4, 1998. The workshop will provide an important opportunity for a Latin America-wide dialogue between civil society and government officials regarding trade, environment and sustainability issues. It will also include a training session for civil society participants on the WTO, trade and environment, similar to that offered to government officials at the WTO seminar.

The workshop will be held immediately following the World Trade Organisation's Regional Trade and Environment Seminar for Latin America. The WTO has also scheduled six other regional seminars for developing country governments on trade and environment, to increase understanding of these issues as well as identify possible actions for addressing trade and environment within the WTO context. The seminar in Santiago will be the first civil society meeting being held in conjunction with a WTO regional seminar for government officials. Together with ZERO, a regional environment organisation, and the African Resources Trust, ICTSD will also organise a civil society meeting to complement the WTO's Trade and Environment Seminar for English-speaking Africa, scheduled for December in Harare, Zimbabwe.

Two government representatives from 18 Latin American countries will attend the workshop: one from the Environment Ministry and one from the Trade/Foreign Affairs Ministry. At least two civil society participants from each Latin American country, ranging from business to environmental lawyers, academics and non-governmental organisations, will also attend. In addition, the meeting is open other participants interested in trade and sustainable development issues.

For further information about the ICTSD seminars contact Lucas Assunção, ICTSD, tel: (41-22) 917-8492, fax: 917-8093, e-mail: lucas@ictsd.ch.

New Trade and Sustainable Development Resources Available from ICTSD

- ICTSD and Cultura Ecológica (Mexico) have co-produced a **CD-ROM on Trade & Environment**. A useful reference tool in both English and Spanish, the CD-ROM contains the major WTO agreements, as well as the principal multilateral environmental agreements that contain trade provisions. Other documents include regional trade agreements of the Americas and much more. All documents are organised in a user-friendly fashion and include a Web address at which the original text and related information can be found. For more information, please contact Matej Hacin (e-mail: mhacin@ictsd.ch) at ICTSD.
- A folder containing ten lists of **Recommended Readings on Trade and Sustainable Development** has been prepared by ICTSD and IUCN-The World Conservation Union. Each list comprises ten short summaries of books, articles and other documents that offer a thorough and varied introduction to the issues, and the often confusing linkages between trade and sustainable development. For copies, please contact Marc Galvin (e-mail: ictsd5@unep.ch) at ICTSD.

Dialogue on Regional Trade Policy and Sustainability

On 3-4 December 1998, ICTSD and the Nautilus Institute for Security and Sustainable Development will hold a dialogue on regional integration approaches to addressing trade liberalisation and sustainable development. The meeting will take place in Geneva.

Regions with particularly high levels of economic integration have had to confront the problem of offsetting differences in cost arising from differences in environmental standards and regulations while simultaneously preserving an open trade system from restrictions and distortions. Moreover, although regional integration schemes are by their nature primarily focused on trade promotion, the emergence of environmental transboundary concerns and the need for preserving shared environmental resources constitute a strong incentive for providing mechanisms in improving environmental performance at regional level. Environmental pressures can thus push regional integration schemes to design and enforce environmental standards and norms with potential trade impacts.

The dialogue will gather about 80 academics, business and NGO representatives, as well as officials working on regional integration and multilateral trade. Participants will seek to answer two fundamental questions: Do higher levels of economic integration tend to promote a process of convergence in trade and environment policies? In the affirmative, what are the elements that contribute to such a process of convergence and what are the factors determining the dynamics and nature of it?

The dialogue will attempt to assess the prospects for regional trade and economic arrangements to reconcile trade expansion and environmental policy in the context of sustainable development. It will promote direct interaction between academics, NGO and business representatives, civil servants and policy makers involved in the different regions with these matters.

In the absence of concrete recommendations on harmonising international trade and environmental regimes in the WTO, the exchange and analysis of practical experiences relating to trade and environment pursued within regional trade integration schemes could contribute substantially to the understanding of dynamics between these two complex and interdependent areas.

Contact: Miguel Jimenez-Pont, ICTSD Dialogues Programme, tel: (41-22) 917-8492, fax: 917-8093, e-mail: ictsd2@unep.ch

Conference on Trade, Investment and the Environment

The Royal Institute of International Affairs is organising a two-day conference on Trade, Investment and Environment from 29-30 October, 1998, in London. The event will be co-sponsored by ICTSD.

The conference organisers note that the WTO's Committee on Trade and Environment has not managed to reconcile the global trade and environmental regimes, and that negotiations at the OECD for a Multi-lateral Agreement on Investment have stalled partly due to the negotiators' failure to incorporate environmental concerns from the start. The conference aims to bring more light on its complex subject before the start of the Millennium Round of trade talks in the year 2000. Keynote speakers include WTO Director General Renato Ruggiero and Lord Clinton-Davis, the UK Minister of Trade and Industry.

Contact: May Gray, The Conference Unit, RIIA, tel: (44-171) 957-5700/54, fax: 321-2045/957-5710

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Director: Ricardo Meléndez-Ortiz
Editor: Anja Halle
Address: 13 chemin des Anémones
1291 Geneva, Switzerland
Tel: (41-22) 917-8492
Fax: (41-22) 917-8093
E-mail: ictsd@iprolink.ch
Web: <http://www.ictsd.org>



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Associate Editor: Mariá Amparo Albán
Address: Casilla 17-17-558
Quito, Ecuador
Tel: (593-2) 435-521/461-273
Fax: (593-2) 462-204
E-mail: ffla1@ECNET.ec



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Co-ordinator: Taoufik Ben Abdallah
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Dakar, Senegal
Tel: (221) 822-2125
Fax: (221) 822-2695
E-mail: enda@enda.sn
Web: <http://www.enda.sn>

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All WTO phone and fax numbers start with (41-22) 739.

September 6-9	Environmental Responsibility in World Trade Contact: British Council, tel: (44-1865) 316-636
September 10-12	Trade and Sustainable Development within Mercosur: The role of civil society Contact: Fundacion ECOS, tel: (59-842) 71252; fax: 71532
September 17-18	WTO Council for TRIPs Contact: Matthijs Geuze, tel: 5418, fax: 5790
September 22	WTO Dispute Settlement Body Contact: Paulo Barthel-Rosa, tel: 5095, fax: 5761
September 23-25	Committee on Regional Trade Agreements Contact: Richard Eglin, tel: 5148, fax: 5774
September 24-25	Special Session of the WTO General Council Contact: Paulo Barthel-Rosa, tel: 5095, fax: 5761
September 28-30	WTO Working Group on the Interaction Between Trade and Competition Policy Contact: Robert Anderson, tel: 5198, fax: 5790
September 30-October 1	WTO Committee on Trade and Agriculture Contact: Paul Shanahan, tel: 5059, fax: 5760
October 1	WTO Council for Trade in Goods Contact: Suja Rishikesh, tel: 5485, fax: 5770
October 1-2	WTO Working Group on the Relationship Between Trade and Investment Contact: Mark Koulen, tel: 5224, fax: 5790
October 5	WTO Sub-Comm. on Least-Developed Countries Contact: Annet Blank, tel: 5349, fax: 5774
October 8	WTO Committee on Rules of Origin Contact: Eki Kim, tel: 5584, fax: 5770
October 8-9	WTO Working Group on Transparency in Government Procurement Contact: Vesile Kulaçoglu, tel: 5187, fax: 5790
October 14	WTO General Council Contact: Paulo Barthel-Rosa, tel: 5095, fax: 5761
October 14-15	WTO Council for Trade in Services Contact: A.-Hamid Mamdouh, tel: 5435, fax: 5771
October 14-16	WTO Committee on Rules of Origin Contact: Eki Kim, tel: 5584, fax: 5770
October 21	WTO Dispute Settlement Body Contact: Paulo Barthel-Rosa, tel: 5095, fax: 5761
October 26-28	WTO Committee on Trade and Environment Contact: Sabrina Shaw, tel: 5482, fax: 5620

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<http://www.cec.org/infobases/agreements/> Web site of the NAFTA Commission for Environmental Cooperation's new Transboundary Agreements Infobase, which provides free and unrestricted access to agreements and treaties on transboundary environmental co-operation in North America.

<http://iisd1.iisd.ca/trade/knownet> Website of the joint IUCN-IISD Knowledge Networks Project, which aims to build capacity in developing countries to address the issues of trade and sustainable development.