

### Implementation of Existing WTO Agreements: Developing Countries Focus on Special Treatment Provisions

The first Inter-sessional Meeting of the Special Session of the WTO General Council took place in Geneva from 26 to 27 October. Four such meetings will be held before the next Special Session in February to prepare the ground for the post-2000 round of trade negotiations. The first of these focused on the implementation of existing WTO Agreements. On the whole, developed countries felt that implementation problems were 'within the realm of the manageable' and should not slow the pace of further trade liberalisation. Developing countries, on the contrary, continued to emphasise the need for making effective implementation of existing agreements a priority. The meeting followed the Special Session of the General Council on 24-25 September, where countries aired their initial positions regarding the post-2000 negotiations (see Bridges Vol.2 No.6, page 1).

#### Special and differentiated treatment

Most developing countries evoked the same concerns with implementation. First and foremost of these was only partial implementation of the 'special and differential treatment' provisions in favour of developing countries in the Uruguay Round Agreements (this concern was brought up by virtually every developing country speaker, and particularly so by Cuba, Egypt, India and Pakistan. India had already submitted a detailed paper on the implementation of the special and favourable treatment provisions in the WTO Agreements to the General Council Special Session in September).

At the inter-sessional meeting, India particularly highlighted the need to develop guidelines for the implementation of the Understanding on Anti-dumping Article 15, which provides that 'special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures.' According to India, 'Only this would ensure that trade interests of developing countries are protected from the harassment arising out of frequent anti-dumping investigations.' India and other developing countries also stressed that special and differentiated treatment should offer better protection to developing countries against countervailing duties when they need to subsidise the development, diversification and upgrading of nascent industries.

Many speakers noted that special treatment provisions should be activated to afford developing countries greater flexibility in bringing their domestic legislation in line with WTO Agreements, to enhance technical assistance in a number of fields, and to provide more legal assistance to developing country Members in dispute settlement proceedings. Indonesia noted that the preambular language in favour of their countries' development needs in the

Agreement on Trade-related Investment Measures remained a 'dead letter', and needed to be addressed. India summed up the concerns of many in its statement that 'since implementation of the TRIMs Agreement is coming in the way of industrialisation and balance of payments stability of the developing countries, it is necessary to review the relevant provisions of the TRIMs Agreement with the objective of ensuring that industrialisation of developing countries is not impeded.'

#### Agriculture and textiles

The implementation of two agreements in particular was deemed insufficient by practically all developing countries: the Agreement on Agriculture and the Agreement on Textiles and Clothing. In agriculture, the most frequently mentioned shortcomings were: export and production subsidies (and notifications thereof); tariff escalation and other market access constraints, including the administration and implementation of tariff quotas, as well as other confusing and complex administrative procedures. The Cairns groups of agricultural producers and the United States shared many of these concerns, particularly with regard to export subsidies. Most countries acknowledged, however, that these implementation problems could probably only be addressed within the framework of the round of agricultural negotiations slated to start in the year 2000.

Many developing countries also expressed concern over the increasingly stringent SPS measures adopted by some WTO Members. ASEAN pointed out that risk assessment and risk management were new disciplines developing countries were still grappling with, and deplored the slow progress of international harmonisation of SPS measures. Korea, echoing the EU's position on agricultural liberalisation, said that the Agreement on Agriculture did not 'fully address the characteristics that distinguish agriculture from other sectors and thus failed to adequately address important non-trade concerns such as food security and positive environmental externalities.' Korea also noted the need for defining and updating the rules governing regional trade agreements.

On textiles, views continued to differ. Developed countries defended their record in conforming to the letter of the Agreement on Textiles and Clothing (ATC), while developing countries repeatedly pointed out that the implementation of the agreement had hardly increased their market access at all due to developed countries' 'back-loading' the most significant quota removals to the very end of the transition period. Colombia, Egypt and Pakistan argued most forcefully for better implementation of Agreement on Textiles and Clothing.

*Continued on page 2*

#### IN THIS ISSUE

General Council Debates Public Access to Documents	3
WTO News	4
Dispute Settlement	6
International Organisations	8
The US Shrimp-Turtle Appellate Body Report: Setting Guidelines for Moderating the Trade-Environment Conflict	9
MEA News: the Buenos Aires Climate Conference	13
Regional Integration News	15
International Commodity-related Environmental Agreements	17
ICTSD and Partner News	19
Meeting Calendar	20
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*Implementation of Existing WTO Agreements, continued from page 1*

Recalling that the central objective of the ATC was the integration of textiles and clothing into the normal GATT rules through progressive phase-out of quota restrictions (to be completed by 2005), Colombian Ambassador Néstor Osorio Londoño pointed out that 'although 33 percent of import trade may have been integrated, only four percent of the value of trade which was actually under quota restrictions has been freed of quotas in the European Union, and only six percent in the United States.' In addition, Members had failed to implement the provision to provide 'meaningful increases in access possibilities' for small suppliers and least-developed countries. Such access has in fact grown only by half a percent per year.

### TRIPs

The Agreement on Trade-related Intellectual Property Rights (TRIPs) also elicited much comment. Although Article 27.3(b) on the patentability of plants and animals other than micro-organisms is the only TRIPs provision that has to be reviewed according to the built-in agenda, interventions made it clear that many countries will bring other issues to the table. For instance, ASEAN said it would take up the issue of non-compliance with Article 66.2, which requires developed country Members to provide incentives to their enterprises and institutions to promote and encourage transfer of technology to least developed countries.

Echoing many others, Cuba said that any revision of the agreement that would result in greater obligations for developing countries would be contrary to the 'special and differential treatment' principle. It also said that technical assistance alone would not be sufficient for developing countries to change their IPR laws during the transition period (between five and ten years depending on the provision and whether the country is developing or least-developed). Similar concerns were expressed by South Africa, who said it had had to 'answer no less than 200 questions on its regime to protect intellectual property rights, notwithstanding the fact that the government has embarked upon an intense internal process of legislative and institutional reforms to meet standards of international best practice that are consistent with the TRIPs Agreement'.

In contrast, the United States expressed concern that many developing country Members had not yet informed the TRIPs Council on how they intended to meet their obligations when the TRIPs Agreement enters into force for them on 1 January 2000. It warned that technical assistance for achieving compliance was available, and that it 'would not be sympathetic to claims that implementation cannot be met because of lack of assistance'.

### Services

Several countries made remarks concerning services and the need for increased technical assistance for developing countries regarding both the implementation of GATS so far, and for the future negotiations. Turkey singled out movement of natural persons as an area where insufficient progress had been made and called for renewed attention to the issue during the upcoming negotiation round on further liberalisation of the services sector. Peru noted that accepting an emergency safeguard mechanism in services before launching the negotiations would provide a stimulus for developing country engagement and willingness to work out compromises.

### Transparency, dispute settlement and other matters

The Canadian delegate noted that the trade agenda must become 'more transparent, democratic and inclusive' as the WTO increasingly deals with issues once considered domestic. 'A strong and growing bias

against globalisation, genuine concern about the domestic impact of competition for markets and foreign investment, and the fallout from the crisis in global financial markets is expressed in public pressure to reflect social and cultural concerns in the development of trade policies and the negotiation of trade agreements. Failure to address these concerns has eroded support for further trade liberalisation. These experiences are forceful reminders of the need for ongoing dialogue with major stakeholders and more transparency and access to the processes and policies of the global trading system.' For more details on the transparency discussions, please see separate article on page 3.

Finally, although the dispute settlement review is handled in a separate process, many developing countries commented on the high cost and difficulty in securing legal expertise for dispute settlement proceedings. India said that those proceedings were being 'competitively used by certain developed countries to prove their aggression to domestic constituencies', and called for the development of procedures to protect developing countries' interests. Developing country delegates proposed more legal experts within the Secretariat to assist them in preparing and defending their cases. Some favoured the establishment of an autonomous unit for the purpose. For more information on the dispute settlement review, see article on page 7.

On behalf of ASEAN, Indonesia asked WTO Members to cease according preferential tariff treatment (beyond their GSP schemes), to countries 'subject to compliance with certain conditions intended to promote concerns such as workers' rights, the environment, and illicit drugs'. Indonesia argued that such tariff incentives, offered by the EU to developing countries (see Bridges Vol.2 No.4, page 9), were contrary to the GATT's most-favoured nation principle.

Members agreed that the notification system inherent in most WTO agreements contributes to greater transparency. Questions were raised on some Members' imperfect application of the system, on the one hand, and the difficulty of developing country Members to honour their notification obligations on the other. Increased technical assistance, as well as more flexibility in the form of special and differentiated treatment were proposed as solutions to the problem.

### Post-2000 Preparatory Process

November 23-24	Second Inter-sessional Meeting of the Special Session of the General Council (SS-GC). Negotiations already mandated at Marrakesh ("built-in agenda");
December 14 & 16	Third Inter-sessional Meeting of the SS-GC Recommendations on the follow-up to the October 1997 High-Level Meeting on Least-Developed Countries;
January 1999 3 <sup>rd</sup> week	Fourth Inter-sessional Meeting of the SS-GC Other possible future work on the basis of the work programme initiated at Singapore; Other matters proposed and agreed to by Members concerning their multilateral trade relations.
February 1999 2 <sup>nd</sup> half	Second Special Session of the General Council Preparation for 3 <sup>rd</sup> WTO Ministerial
30 Nov. to 3 Dec. 1999	Third WTO Ministerial Meeting Adoption of the post-2000 negotiating agenda

## WTO General Council Debates Public Access to Documents

WTO Members discussed document derestriction and transparency during the General Council's regular session on 14 and 16 October in Geneva but did not reach a decision on any of the transparency-related issues under consideration. This discussion, which can be seen in the context of the debate launched earlier this year on the broad issue of public participation in the WTO (see Bridges, Vol.2 No.5, page 1), has so far tended to concentrate more on the technical issues relating to public availability of WTO documents (document derestriction) and on the review of the Dispute Settlement Understanding (DSU). The DSU review is covered in a separate article, see page 7.

## The US-Canadian proposal

The October General Council discussion was based on a compromise proposal by the US and Canada on the derestriction of certain WTO documents (WT/GC/W/106). This proposal – based on earlier, separately-tabled proposals from the United States, Canada and the EC (WT/GC/W/88; WT/GC/W/98; WT/GC/W/920 – was elaborated after consultations with a large number of delegations.<sup>1</sup>

The new US-Canadian proposal is less progressive than the prior proposals in two key aspects. First, it does not mention meeting agendas at all, and second, it proposes that minutes of meetings be derestricted three months after they have been circulated to Members in all three languages. Currently, meeting minutes are derestricted after six months, but the EC and Canada had previously proposed that such minutes be made available immediately.

Key points of the US-Canadian proposal include:

- Documents Submitted by Members should be generally circulated as unrestricted unless the Member making the submission makes an exceptional request for restriction. These documents may not remain restricted for more than six months.
- Minutes of Meetings should be considered for derestriction three months after their circulation in all three WTO languages.
- Secretariat Background Notes should normally be circulated as unrestricted, with an exception made for those which purport to portray the views of WTO Members. In exceptional cases, such notes could be restricted for a maximum time period of six months.
- Panel Reports Once the 'Findings and Conclusions' portion of a completed panel report is ready in all three official languages of the WTO, a final report shall be issued to the parties to the dispute and the 'Findings and Conclusions' portion shall be circulated for information purposes as an unrestricted document. At the same time, pending the translation of the full report, the 'Descriptive' part of the report shall be made available as an unrestricted document in its original language.
- The US-Canadian paper proposes that the anticipated date of derestriction be clearly indicated on documents, such as minutes, which are initially circulated as restricted. In exceptional cases when a document is to remain restricted beyond the period foreseen, the Secretariat should issue a notice to this effect.
- Finally, the US and Canada propose that the revised decision on document derestriction be reviewed again after two years.

## WTO Members' reactions to the proposals

Most WTO Members expressed support for the proposal, although some asked for clarifications. Pakistan, Mexico and India seem to be amongst the most vocal in their resistance to moves towards increased document derestriction and transparency, opposing the US-Canadian proposals in favour of the status quo.

Australia noted that there were other documents, including those pertaining to the Agriculture Committee's analysis and information exchange process, which could be cleared for appropriate circulation. Australia, the EU and New Zealand deplored that the issue of derestricting meeting agendas (airgrams) was dropped in the US-Canada draft. Jamaica also favoured making agendas of meetings to be made public when circulated as a draft to Members. Egypt and Indonesia – speaking on behalf of ASEAN – said that meeting agendas should not be derestricted until approved by Members, i.e. *after* the meeting in question.

Some WTO Members who oppose releasing agendas argue that this is to avoid confusion amongst the public: since agendas are only drafts until adopted at the meeting itself, they may be changed after their public circulation. Those in favour of derestriction point out, however, that early release of draft agendas is common practice, which the general public is used to. Indeed, the draft agendas of virtually all UN bodies are public, although they too may be changed at the outset of the meeting to which they pertain. It might therefore be deduced that opponents of early release of agendas are more concerned about avoiding public spotlight on sensitive issues than about potential confusion. Some delegations also said informally that they were against background notes being automatically derestricted as they too are sometimes part of the decision-making process.

While WTO Members generally recognise that political and technological factors will spearhead a trend towards greater public participation in WTO policy making, there is some uneasiness within the WTO system about how to tackle the issue.

The basic concern expressed by some Members is that the potential benefits of increased transparency, such as better levels of international public support could put at risk the existing benefits of a fair international trade system: earlier release of documents could slow the whole system down; full transparency could expose negotiators to contradictory (and thus potentially paralysing) pressures from domestic groups and interests, and could prevent negotiators from articulating coherent negotiation strategies in WTO processes. Some Geneva-based negotiators fear, for instance, that earlier release of WTO meeting minutes would rigidify the system as negotiators would have to take positions that could be scrutinised not only by other countries, but also by domestic public opinion, before the position on an issue is mature. Such fears might push negotiations into backrooms rather than official meetings open to all.

Some developing country trade negotiators are less concerned about pressures exerted by public interest groups or protectionist domestic industries, than those coming from multinational corporations, which they see as driving many developed countries' trade liberalisation agenda. Large enterprises have the resources to make effective use of full document disclosure to further increase their lobbying power. That is one of the reasons why some governments reacted with consternation to the Appellate Body's recent interpretation of GATT law as allowing panels to consider unsolicited briefs from non-governmental sources.

*Continued on page 4*

## **High-level Dialogues Planned on Trade & Environment and Trade & Development**

WTO Members have reached a preliminary consensus to hold high-level dialogues on trade and environment, as well as trade and development back to back in March 1999, most likely during the week starting 22 March (or possibly the week of 8 March). The meetings, to be chaired by WTO Director General Renato Ruggiero, will be convened by the WTO Secretariat as free-standing events outside the WTO's formal structure. Neither meeting will involve a negotiated outcome in the form of recommendations to the General Council. Instead, the WTO Director General will prepare a factual Chairman's Summary for each meeting. Heads of delegations will meet on 18 November to consider the organisation, dates and agendas of the two events.

The proposed meetings respond to two separate initiatives: the EU's proposal to hold a high-level meeting on trade and environment 'to help move the policy debate forward at political level', and Egypt's suggestion to convene a similar meeting on trade and development as a counterweight to the EU initiative. The EU circulated a discussion document on its proposal in July (WT/L/273; see also Bridges Vol.2 No.5, page3). The Egyptian proposal was submitted to the WTO General Council meeting on 14 October.

According to observers, there is an emerging consensus on the trade and environment dialogue agenda, which is to seek balance between Northern and Southern priorities. The meeting is likely to address three broad issues: complementarity between the WTO and environmental protection; synergies between environmental protection, trade liberalisation and sustainable development; and dialogue between the trade and environment communities. Each subject will be introduced by a panel of speakers, after which the meeting will break up into workshops. Participants will include senior government officials from trade and environment ministries and representatives of inter-governmental and non-governmental organisations, academia and the private sector.

The EU has already offered funding for the Dialogue on Trade and Environment, and additional funds are being sought from other governments, in order to cover NGO attendance, particularly from developing countries, as well as participation of least-developed country government officials.

Plans for the Trade and Development Dialogue are less advanced due to the later timing of the proposal. Egypt suggested that the meeting focus on the following three topics: the impact of the WTO Agreements on developing countries and, in particular, the implementation of special and differential treatment; the implications of the global financial and economic crisis on the trade prospects of developing countries; and the future role of the WTO in the promotion of development objectives. Some observers predict that the TRIPs and TRIMs Agreements could come under particular scrutiny.

Participants in the Trade and Development Dialogue would include senior government officials, as well as representatives of international financial institutions, development NGOs and business. Egypt also proposed that the 'deliberations should be in the nature of a dialogue, with short interventions rather than formal statements.'

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*Access to Documents, continued from page 3*

Developing countries such as India and Mexico see the push towards transparency as a concern of industrialised countries, attempting to placate their increasingly vocal domestic constituencies and pressure groups. During the October General Council meeting, India said that it was for each country and government to take civil society – whether NGOs, the business community or others – into its confidence in relation to WTO activities. India noted that the WTO was an organisation of governments, and its activities should not, therefore, be run from the perspective of satisfying domestic constituencies of some countries.

### **Next Steps**

The US-Canadian proposal is still on the table as a basis for discussions. Informal consultations between delegations will continue. As this issue of Bridges goes to press, it is not known where – or when – the issue will next be formally on the WTO's agenda (except as far as the DSU review is concerned). It is, however, expected that in the course of November an informal meeting of WTO Members will be called, at which it will be decided whether or not the issue of document derestriction and transparency will be on the agenda of the next session of the General Council in early December.

<sup>1</sup> WTO documents can be found on the web, through their reference numbers, at <http://www.wto.org/ddf/ep/public.html>

## **Secretariat Initiatives on Transparency**

WTO Director General Renato Ruggiero has started a round of informal consultations with non-governmental organisations on possible mechanisms to advise the WTO on issues of concern to civil society. One such mechanism could be regular *ad hoc* consultations between the WTO and NGOs. Organisations canvassed by Mr Ruggiero include environmental, development and consumer NGOs, as well as business and employers' associations, and labour unions.

The Secretariat has held two NGO briefings. The first took place after the Special Session of the General Council in September, and the second after the inter-sessional meeting on implementation in October (see cover story). The October briefing also covered the last meeting of the Committee on Trade and Environment, as well as recent developments in the field of dispute settlement.

The WTO has also opened an electronic NGO Information Centre on its web site, which contains, inter alia, a list of NGO documents received by the Secretariat. Such lists will be compiled periodically and circulated to Members. Only position papers related to the activities of the WTO will be included in the list.

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## **Committee on Trade and Development**

The Committee on Trade and Development will meet on 2 November to review the application of the special provisions in the WTO agreements in favour of developing and least-developed country Members, adopt the WTO 1999-2001 plan for technical assistance activities (WT/COMTD/W/48), and review reporting on regional trade agreements. The next issue of Bridges will report on the meeting.

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## Committee on Trade and Environment

The Committee on Trade and Environment held its third and last meeting in 1998 from 26-27 October. All ten items of the CTE's work programme were on the agenda.

Under item 6 (environmental benefits of removing trade restrictions and distortions), Brazil submitted a paper on its experience with ethanol, distilled from sugar cane alcohol, as an environmentally friendly alternative to oil and gas (WT/CTE/W/98). Brazil produces 46 percent of the world's ethanol, but finds its market access restricted by other countries' export subsidies, as well as high import tariffs. The paper concludes that the elimination of such trade distortions would yield both economic and environmental benefits.

A Brazilian proposal to request a secretariat study on the environmental impacts of agricultural export subsidies was endorsed by developing countries – particularly Argentina and Chile – the Cairns group of agricultural producers, as well as the United States. The EU, however, said it could not support the proposal without conferring with national capitals. New Zealand said it would carefully examine subsidies notified to the WTO in the fisheries sector.

Also under item 6, Argentina tabled a paper on Non-trade Concerns in the Next Agricultural Negotiations (WT/CTE/W/97). The paper argues that the 'multifunctional' role of agriculture does not justify treating it differently from other sectors in the WTO. 'Multifunctionality' is a key concept of the EU's common agricultural policy (CAP) reform, and includes environmental and social aspects that the EU claims justify certain subsidies and other forms of support. Argentina argues that Members should not export their own non-trade concerns to trading partners, and concludes that the elimination of subsidies that prevent prices from reflecting private costs of production would have positive consequences to the environment (by reducing over-exploitation), for trade (by enhancing market opportunities for countries that cannot afford to subsidise local production), and for development (by reducing rural poverty and increasing food security in developing countries).'

Under item 3 (environmental charges, taxes and labels), Members inquired about pending Dutch legislation that would require timber products to be labelled according to whether the wood came from a sustainable managed source or not. The law is still in the parliamentary approval process and will also need to be approved by the European Union. Members also questioned the WTO-compatibility of a California government procurement policy, which requires tropical timber to be certified as sustainable by the Forest Stewardship Council.

While item 9 on 'the work programme envisaged in the Decision on Trade in Services' has been on the CTE agenda since the beginning, very little progress has been made up to now. Delegates noted that

the liberalisation of the environmental services sector could result in both commercial and environmental benefits, such as technology transfer. Attention was drawn to a 1997 US submission entitled Liberalisation of Trade in Environmental Services and the Environment (WT/CTE/W/70).

Under item 10 on the arrangements for relations with inter-governmental and non-governmental organisations, the CTE extended observer status to the International Plant Genetic Resources Institute. The larger issues to do with transparency and document derstriction are being discussed in the General Council (see separate story on page 3).

The European Union and Switzerland noted that the recent Appellate Body report on the shrimp-turtle case (see separate story on page 9) had made an important contribution to the interpretation of the GATT's environmental exceptions under Article XX. The EU suggested that UNEP prepare guidelines on the application of the precautionary principle to assist the WTO Appellate Body.

The European Union made a statement suggesting that, in the context of the upcoming WTO negotiations, 'careful consideration should be given to items 1 and 5 [WTO/MEA relationship, *ed.*] and item 6 [environmental benefits of removing trade restrictions and distortions, *ed.*] to give this Committee a sound basis for any concrete proposals it may wish to make to the General Council, proposals which would, of course, need to reflect the balance between the two main clusters of the CTE's work programme, as well as the interest of both developed and developing countries.' According to diplomatic sources, developing countries objected to any links between the CTE's agenda and the negotiations to come.

Delegates adopted a brief report to the WTO General Council, which summarises in one sentence the progress made on the different items of the CTE's work programme. On the market access cluster, the Committee notes that sectoral discussions on agriculture, energy, fisheries, forestry, non-ferrous metals, textiles and clothing, leather and environmental services had 'helped the process of identifying situations where removing trade restrictions and distortions has the potential to be of economic and environmental benefit'.

The paragraph on items related to the multilateral trade and environmental agendas says that the July meeting with representatives of multilateral environmental agreements 'helped deepen the understanding of delegations of the relationship between the objectives of MEAs and the WTO.' The March NGO Symposium 'provided a valuable opportunity for the exchange of views and information.'

The CTE will address the same programme of work in 1999. According to a tentative schedule adopted by delegations, the market access cluster (eco-labelling & product and packaging standards, removing environmentally harmful trade-distorting subsidies, etc.) will be discussed on 18-19 February, the relationship between the WTO and MEAs on 29-30 June, and all clusters, including environmental services and the CTE's relationship with intergovernmental and non-governmental bodies, on 12-13 October. No NGO Symposium is scheduled as yet, but the EU said it would be 'interesting' if one were scheduled 'at an appropriate moment' as was done in 1997 and 1998.

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## Tentative Schedule of CTE Meetings in 1999

February 18-19	Market access cluster Work programme items 2 to 6
June 29-30	Linkages between the multilateral trade and environment agendas Work programme items 1, 5, 7 and 8
October 12-13	All items on the CTE's work programme Adoption of the 1999 report to the General Council

**Dispute Settlement Corner**

**Compliance with Rulings Takes Centre Stage**

At the Dispute Settlement Body's meeting on 21 October, the United States threatened the European Union with trade sanctions as early as 1 February 1999 if the EU goes ahead with the implementation of its new banana regime. The US and the four other complainants in the case (Ecuador, Guatemala, Honduras and Mexico) continue to claim that the revised regime is as discriminatory as the current version, condemned by the Appellate Body in September 1997. The complainants would like the original panel that ruled on the case to be reconvened to assess the WTO consistency of the new regime before it enters into force on 1 January.

The two sides differ over the application of the compliance procedure, never yet used by the dispute settlement mechanism. The EU insists that the complainants follow the standard WTO procedure, which requires a sixty day consultation period before a panel request is made. The complainants oppose new consultations, calling them 'delaying tactics' and 'procedural roadblocks' inconsistent with 'the spirit of prompt compliance' of Article 21 of the Dispute Settlement Understanding. Once established, the compliance panel will have 90 days to deliver its verdict on whether the proposed measures are consistent with the Appellate Body's findings and recommendations.

The US said that it continued to hope for a WTO-consistent solution through negotiation before having to request DSB authorisation to suspend concessions. The EU condemned the trade retaliation threat as being based on a 'unilateral determination of non-compliance', and said that once its implementation of the Appellate Body decision was complete, the US would have 'every right to continue to pursue the appropriate and internationally agreed dispute settlement process'. Any unilateral action, however, would lead the EU to 'bring the matter to the WTO'.

The EU put the finishing touches on the revised regime on 27 October by adopting the licensing arrangement that will apply to banana imports into the EU as of 1 January 1999. Using 1994-96 as a reference period, the EU decided that licenses would be given to 'those operators who effectively imported' during the reference period for the same amounts as in 1994-96. The complainants had opposed the choice of the reference period, arguing that it reflected the trade distortions in place during the WTO-inconsistent regime. The regime guaranteed quotas and preferential tariffs for bananas exported from the EU's Lomé Convention partners in Africa, the Caribbean and the Pacific, and gave EU/ACP importers about half the import licenses. The complainants want the quotas to be removed and the licensing system dismantled.

The US has requested domestic comment on its proposal to make an 'affirmative determination that the [EU] measures fail to implement the WTO recommendations'. A list of retaliatory options is to be published on 10 November, and the actual retaliatory measures will be announced on 15 December.

Similar action will be promptly taken against the EU if it fails to comply with the WTO ruling against its import ban on beef raised with growth hormones. The Appellate Body condemned the ban in February 1998 on the grounds that there was not enough

scientific evidence of the beef's being a threat to human or animal health. The EU is currently conducting additional risk assessments, which it hopes will show that the ban is justified on health grounds. Observers say that the studies are unlikely to be completed by 13 May 1999, when the EU must be in compliance with the WTO ruling. The EU might choose to compensate the US for lost trade rather than lift the ban before the studies are complete.

A US retaliation threat is also hanging over Canada, which is in the process of adopting new legislation concerning magazine advertising aimed at Canadians. A WTO panel in May 1997 found against a Canadian tax of 80 percent on foreign magazines containing Canadian advertisement for Canadian readers. The tax was suspended on 27 October, but the new magazine advertising bill will prevent foreign publishers from selling Canadian advertising for a magazine aimed at Canadian readers, thus effectively continuing to keep foreign split-run magazines out of the Canadian market.

**Dispute Settlement Briefs**

The Appellate Body ruled on 12 October that although the US import ban on shrimp caught without turtle excluder devices could be justified under the exceptions provided by GATT Article XX, its discriminatory application made the measure incompatible with WTO rules. See separate article on page 9.

The Appellate Body on 20 October rendered its second verdict on an alleged violation of the Sanitary and Phytosanitary Agreement (SPS). As in the beef hormone case (see above), the AB found that Australia's import ban on uncooked, ocean-caught Pacific salmon was not sufficiently backed by science to make it acceptable on the grounds of protecting human, animal and plant health.

A panel report released on 27 October found that Japan's rules requiring separate testing for each variety of imported fruit violated the SPS Agreement, as the measures amounted to a discriminatory trade barrier which was not warranted by science. Japan is likely to appeal.

Another health-related SPS case is looming on the horizon between the EU and Canada. Canada requested on 21 October that a panel be established to examine the WTO consistency of a French import embargo on white (chrysotile) asbestos. The EU backed the French measure, saying that other EU states had also banned white asbestos imports since the French embargo was established in 1996 on the grounds that certain asbestos fibres were found to cause cancer.

The DSB on 21 October established a panel, requested by the EU and Japan, to judge the WTO consistency of the 'Burma Law', which effectively keeps companies dealing with Burma (now called Myanmar) out of the Massachusetts public procurement market. The law was adopted in 1996 in protest to human rights violations in Burma. The first WTO dispute to involve human rights may not go forward, however. The Massachusetts law was struck down by a US Federal Court, which ruled in early November that the law was unconstitutional because it intruded on the federal government's exclusive right to conduct foreign policy. Massachusetts is expected to appeal the ruling.

## Dispute Settlement Review

On 22 October, the WTO's Dispute Settlement Body met in an informal session for a first round of discussion on Member countries' proposals regarding the review of the Dispute Settlement Understanding. The review, mandated by a decision adopted in 1994 as part of the outcome of the Uruguay Round, is due to be completed within the next few months. Informal meetings on the subject are expected to be held every few weeks until the end of the year.

### Dispute Settlement – the 'Jewel in the Crown' of the Uruguay Round Agreements

While most delegations feel that, on the whole, the dispute settlement mechanism (DSM) is working well, some important changes have been proposed. Best-known of these is the call from the US, Canada and the EU for enhanced transparency of the DSM through, *inter alia*, earlier release of panel reports. Other suggestions for change include measures for enhancing developing country access to the DSM; improving the consultations stage of the dispute settlement procedure, as well as panels' work procedures; and clarifying conditions for implementation of, and compliance with, panel and Appellate Body rulings.

The review process covers issues in the order in which they arise in the Dispute Settlement Understanding itself. The discussion on 22 October centred around mutually agreed solutions to disputes and consultations (Articles 3.6 and 4 of the DSU).

### Proposals on Mutually Agreed Solutions and Consultations

There seems to be general agreement that the provisions for notification of mutually agreed solutions to a dispute should be clarified, although the time-period for such notifications has yet to be determined.

A number of WTO Members, including the EU, Guatemala, Japan, Korea, Turkey and Venezuela, have made proposals for changes to the consultation process (see Bridges, Vol. 2 No. 4, page 7). The Japanese and EU proposals are particularly detailed in this regard. Both recall that, as currently carried out, consultations are often a pure formality.

The European proposal points out, *inter alia*, that consultations serve to establish the facts of the case and to identify the measures at issue and the legal basis of the complaint. However, contrary to the spirit of the DSU, sometimes measures or claims that have not been the object of consultations appear before panels. Among other issues, Japan argues that a better-functioning consultation procedure could reduce the panels' burden of work by giving disputing parties an opportunity to seek a mutually satisfactory solution at an earlier stage of the dispute. Turkey has put forward a proposal to clarify the obligations of the complainant in the consultation process. Guatemala suggests the possibility of holding consultations on prospective measures, and on lightening the formality of the request for consultations.

### Scope and current status of the DSU review

At this stage, Members are still announcing their positions, rather than entering into specific discussions about which changes might be put forward and how such changes could be effected. Many more Members than expected have come forward with comments and

proposals under the DSU review, leading some observers to comment that even meeting every two to three weeks as is currently planned, it is unlikely that the review will be completed by the end of the year.

It is as yet unclear to what extent proposed changes to the DSM will be accepted, and to what extent those proposals will be political in nature – i.e. linked to other issues currently under negotiation or under examination in the context of a current dispute in the WTO. It is worth recalling that any formal changes to the DSU must be made by consensus and conversely, that some proposals – such as those of the EU and the US – point out that some changes may not require formal modification of the Dispute Settlement Understanding itself. The US proposal recalls that as '... practice in the first four years of the DSU has shown, parties to disputes can also agree with the panel on procedures that vary to some extent from the DSU rules. The dispute procedures of the GATT 1947 were built through just such incremental procedural innovation.'

### Transparency, civil society participation and document derestriction

Some of the best-known proposals for change of the DSM may possibly also be the most controversial. The proposals relating to transparency and document derestriction – supported by many countries including Australia, Egypt, Jamaica, Korea, Norway and Switzerland – are also being raised in the context of document derestriction discussions in the WTO General Council (see related story on page 3). Canada and the US favour speedier release of panel and Appellate Body reports by circulating final panel reports once the 'Findings and Conclusions' part of the report exist in all three of the WTO's working languages, even if the descriptive part of the report only exists in one language. The EU, on the other hand, emphasises in its proposal the importance of all documents being in all three official WTO languages. Cuba, India and Mexico have also said that they wanted panel reports to remain confidential until they were available in all three WTO languages and could be discussed at the DSB.

The EU nevertheless remains a champion of increased transparency in the DSM and makes a number of detailed suggestions to this effect: it advocates making all the arguments put to panels and to the Appellate Body available to the public, and opening legal proceedings up to non-participating Members and to representatives of civil society. The EU proposal notes that this is necessary because in recent years WTO rulings have touched on sensitive public health and environmental concerns.

The question of civil society participation in the DSM, such as submission of amicus briefs is all the more likely to come up in the DSU review in the light of the recent Appellate Body decision in the shrimp-turtle case which is not completely clear on this point, as well as being controversial (see related article on page 9). Some countries may want the limits and conditions for submitting amicus briefs to be clarified in the course of the DSU review while others clearly oppose participation of NGOs in the dispute settlement process. Pakistan's submission, for instance, states that it is '... troubling that in a recent dispute, legal submissions from NGOs were reviewed by a Panel and the Appellate Body.'

*Continued on page 8*



*Dispute Settlement Review, continued from page 7*

### Other proposals

Amongst the submissions received under the DSU Review, the EU's is noteworthy for its detail and far-reaching proposals for change. The paper, submitted in October, proposes changes in 24 issue areas, including the creation of a body of 15-24 professional panelists, from which panels could be created. Pakistan's proposal also supports this view, saying that Members should also address the question of ethical standards for panelists.

Two other important issues which will come up later in the Review, and on which a number of delegations have put forward their concerns are implementation of, and compliance with, DSB rulings, and facilitating use of the DSM by developing countries – on which Pakistan, Turkey and Venezuela have made specific proposals (see Bridges, Vol.2, No.4, page 7). In addition to opening the DSM to the public, implementation is the only point on which the US proposal touches. Guatemala, Pakistan and Japan also devote considerable attention to implementation in their proposals.

### 'Single-Minded Liberalisation' Draws Criticism

On 19 October, Joseph Stiglitz, Senior Vice-President for Development Economics and Chief Economist of the World Bank, delivered UNCTAD's 1998 Raúl Prebisch lecture.

Entitled Towards a New Paradigm for Development: Strategies, Policies and Processes, Dr Stiglitz's address focused on the policies and processes that he said should guide national and international decisions and action for successful development. At the October WTO General Council session on implementation, several developing country delegates quoted Dr Stiglitz, who said that the agenda 'advocated for developing countries by the West' had in recent years 'suffered from its single-minded focus on liberalisation though reduction of trade barriers in those countries'. Looking at developed countries' responsibilities in the area of trade policy, Dr Stiglitz called on them to increase developing countries' market access; reduce the use of protectionist measures such as anti-dumping and countervailing duties; and to strike a better balance between the producers and users of intellectual property.

Dr Stiglitz also castigated the 'Washington consensus' for making means such as privatisation, price stability, exchange rate stability and trade liberalisation into ends in themselves. In East Asia, for example, the consensus had placed far too little emphasis on strong financial regulation as a prerequisite for financial liberalisation.

UNCTAD'S 1998 Trade and Development Report also focuses on the need to regulate global financial markets in the wake of the Asian financial crises, and proposes four lines of defence against currency attacks: domestic – primarily monetary – policies; maintaining a sufficiently high level of precautionary foreign reserves and credit lines; recourse to an international lender as the last resort; and imposition of a debt standstill and rapid initiation of a debt workout.

UNCTAD has also recently published the 1998 editions of its annual reports on investment and the least-developed countries (LDCs). The latter analyses the aspects of the multilateral trading system that offer opportunities and those that act as constraints for least-developed countries' integration in world trade.

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### Whither the MAI?

The future of the Multilateral Agreement on Investment (MAI) appears more uncertain than ever after the 21 October consultation meeting between members of the Organisation for Economic Co-operation and Development (OECD). France withdrew from the MAI negotiations on 14 October, citing concerns over national sovereignty and leaving other OECD members in a limbo over how to proceed with the negotiations underway in the OECD since 1995. Talks were interrupted in May 1998 following large-scale civic opposition around the world and resumed in October for a stock-taking exercise after the abrupt French withdrawal.

The main reason for the French opposition is thought to be the limits the MAI would impose on states' right to protect their cultural sectors from foreign competition (other countries have also been keen to exclude sensitive sectors from the pact). After the October meeting, many government and OECD officials acknowledged that it was no longer possible to conduct 'business as usual' and that it was now obvious that several fundamental issues had to be addressed for the treaty to go forward. These include protection of labour and the environment, as well as the right of governments to exercise their regulatory powers without being sued by corporations under the MAI's expropriation or investor-state dispute settlement provisions. Labour and environmental groups have led the campaign against the MAI in industrialised countries, claiming that the treaty would enhance companies' power to challenge national legislation, as well as cause a 'race to the bottom' between countries competing for foreign investment.

Another major point of criticism has been the MAI's exclusive negotiation process, conducted between the 29 wealthy members of the OECD. From the beginning, OECD countries have stressed that the treaty would be open to all nations. However, developing countries have generally opposed the MAI, which they consider blind to legitimate development priorities and yet capable of directing foreign investment flows to away from countries unwilling to sign on. Developing country governments and civic groups have expressed misgivings about the power the treaty would confer to multinational companies vis-à-vis national governments.

Comments by OECD and government officials since the October meeting point to a significant down-scaling of the project, which might not amount to more than non-binding investment principles or a 'multilateral framework for investment' without a dispute settlement mechanism. Japan, Canada and France have stated their preference for developing international investment disciplines within the WTO, which offers a more multilateral forum for negotiation. The US so far seems to prefer to keep the talks at OECD. Speaking on 28 October, Under Secretary of State Stuart Eizenstat said that, among other things, labour and environment would be better off in an OECD-wide treaty because OECD countries already maintain high investment, labour and environmental standards. While some developing countries have said they would be willing to consider investment as part of the next round of WTO negotiations, others are adamantly opposed to such a move on the grounds that a legally-binding investment treaty would curb governments' freedom to regulate foreign direct investment in line with their development objectives.

OECD members – without France – will meet again in December to decide the direction of the work before their 1999 ministerial session. The December meeting is to include a one-day consultation with business, labour and environmental groups, according to sources close to the process.



# The U.S. Shrimp-Turtle Appellate Body Report: Setting Guidelines toward Moderating the Trade-Environment Conflict

By Gregory Shaffer

*On 12 October, the WTO Appellate Body rendered a much-awaited ruling on the GATT-consistency of a controversial U.S. import ban on shrimp captured with methods deemed harmful to endangered species of marine turtles (see box for background on the case). In the article below, Gregory Shaffer analyses the Appellate Body's verdict and its importance for future WTO disputes involving unilateral trade measures based on environmental concerns.*

The WTO Appellate Body report in "United States- Import Prohibition of Certain Shrimp and Shrimp Products" (hereafter "U.S. shrimp-turtle") represents a significant advance in the WTO's examination of the interaction between WTO trade rules and domestic trade measures taken on environmental grounds. A political realist, the Appellate Body responded to challenges to WTO legitimacy by environmental constituencies in the United States and Europe, in the face of international political stalemate in discussions over the need to amend or provide interpretative guidelines to existing GATT rules. In its report, the Appellate Body attempted to fashion guidelines to promote international cooperation and domestic regulatory due process over trade and environment matters. In this way, it hoped to moderate potential conflicts between environmental and trade goals.

In April 1998, the WTO dispute settlement panel controversially held that the U.S. import ban on shrimp and shrimp products "were clearly a threat to the multilateral trading system" and consequently were "not within the scope of measures permitted under the chapeau of Article XX." On October 12, 1998, the WTO Appellate Body overruled the initial panel in its reasoning, but not in its result. The legal provision over which the parties fought, and the panels struggled to interpret, is Article XX of GATT 1994, which reads:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption..."

The initial panel and Appellate Body could choose among three options to resolve the U.S. shrimp-turtle dispute.<sup>1</sup> First, they could apply a bright line *a priori* rule whereby certain "types" of measures would be excluded from protection under Article XX. The initial panel effectively took this route.

Second, they could have deferred to the U.S. regulations on account of their environmental purpose. The United States, supported by northern environmental groups, proposed this approach. However, both the initial panel and the Appellate Body rejected this option because they believed it provided an insufficient check to assure that the environmental objective was applied in a fair manner.

Third, they could employ a sort of balancing test, through which they would focus on the specific facts of the case. In particular, they would take account of the domestic procedures pursuant to which the measure is applied and the genuineness of attempts to reach a multilateral solution. In a significant development in WTO jurisprudence, the Appellate Body took this latter route.

## "Threat" to the Trading System

Since the term "unjustifiable discrimination" had "never actually been subject to any precise interpretation," the initial panel attempted to interpret it in the "context" of "the object and purpose of... the WTO Agreement as a whole." The panel found this purpose to be "essentially turned toward liberalization of access to markets." The panel held that, by "conditioning access to the US market" on a change in a foreign government's environmental regulatory policy, the U.S. measure "threatens the multilateral trading system." The panel controversially repeated its claim that such environmental measures "undermine," "threaten" and "put at risk" the trading system nine times.<sup>2</sup> Whether or not correct, the panel lacked tact. In reviewing an arguably legitimate environmental measure as a potential "threat" to the WTO's primary "object" of "liberalization," the panel revealed the WTO's trade bias. In this, it supplied ammunition to some of the WTO's fiercest critics. Given the clout of these critics in the U.S. and EC, the panel's report may have posed more of a threat to the trading system than the U.S. measure which was its object.

*Continued on page 10*

## Background

In January 1997, India, Malaysia, Pakistan and Thailand requested the WTO Dispute Settlement Body to establish a panel to determine whether a United States import ban of shrimp and shrimp products pursuant to Section 609 of U.S. Public Law 101-162 ("Section 609") is in violation of the United States' WTO obligations. The object of the U.S. legislation was two-fold. First, as declared by its sponsors, the legislation attempted to "level the playing field" between U.S. shrimpers who were subject to the costs of complying with U.S. environmental regulations and foreign shrimpers who were not. Second, for environmentalists, the legislation pressures foreign governments to change their domestic regulations to protect endangered sea turtles from commercial shrimping practices if they wish to sell shrimp products in the U.S. market.

The environmental regulation at issue was a requirement for commercial shrimp trawlers operating in sea turtle habitat to employ "turtle excluder devices," known as "TEDs." If properly installed and operated, TEDs permit most sea turtles to escape from shrimp trawling nets before they are drowned, while minimizing loss of the shrimp catch.

To be able to export shrimp to the U.S., as of May 1996, all countries in whose waters shrimp and sea turtles co-exist, must be certified by the U.S. State Department as having and enforcing TED legislation on commercial shrimp trawlers. The nation-by-nation certification obligation is still being litigated in U.S. courts between the government and a group of environmental organisations. The government wants the ban to be applied on a shipment-by-shipment basis, according to whether the shrimp in question was caught using TEDs or not. The environmental groups maintain that only national legislation in shrimp-supplying countries, will be effective in attaining the objective of Public Law 101-162: the conservation of endangered species of sea turtles.

*Shrimp-turtle, continued from page 9*

The Appellate Body's challenge was to focus the analysis away from the question of whether unilateral environmental measures pose a threat to the trading system. The Appellate Body did this through its particularized factual analysis of whether the specific U.S. import ban was applied in an unjustifiably or arbitrarily discriminatory manner. In the process, the Appellate Body tried to clarify how "unilateral" environmental measures having trade effects could be implemented in compliance with WTO rules.

### Appellate Body Reverses

In each of its three reversals of panel findings, the Appellate Body aimed to shield the WTO from charges that its dispute settlement process is trade-biased. First, the Appellate Body held that WTO rules do not prohibit a panel from accepting unsolicited amicus curiae briefs submitted by environmental NGOs. Second, it confirmed that the U.S. ban legitimately "relat[es] to the protection of exhaustible natural resources" for purposes of Article XX(g). Third, it criticized the panel for its "overly broad" depiction of the WTO Agreement's purpose and its focus on *a priori* "categories" of measures, rather than on a factual analysis of how the United States actually applied its particular import ban.

#### Amicus Curiae Briefs

The Appellate Body first overruled the panel's holding that "accepting non-requested information from non-governmental sources would be... incompatible with the provisions of the DSU as currently applied." The Appellate Body made this determination even though the language of Article 13 of the WTO Dispute Settlement Understanding refers to a panel's "right to seek information," and the panel clearly did not "seek" "non-requested" information. In the appeal, the Appellate Body not only accepted "for consideration" three NGO briefs attached as exhibits to the United States' submission,<sup>3</sup> it also accepted a revised version of one of these briefs independently submitted by a group of NGOs.<sup>4</sup> It did so despite Hong Kong's and Mexico's protest that "the Appellate Body would exceed its powers under the DSU" if it accepted the NGO arguments.

Yet the acceptance of the NGO briefs was largely symbolic, designed to counter accusations that the WTO is closed to environmental input. In its actual analysis, the Appellate Body focused "on the legal arguments contained in the main U.S. appellant submission." Thus, while the Appellate Body may have interpreted Article 13 contrary to states' original intentions, it did so in a manner aimed to shield the system from reproach without changing the individual case's substantive result.<sup>5</sup>

#### Article XX(g) Analysis: Evolutionary Jurisprudence

The Appellate Body then admonished the panel for failing to examine whether the U.S. measure was permissible under Article XX(g) as a "measure relating to the conservation of exhaustible natural resources made effective in conjunction with restrictions on domestic production." In turning to Article XX(g), the Appellate Body was

able to focus on the particulars of the U.S. environmental measure as opposed to its abstract "generic" character. It was also able to affirm the environmental legitimacy and "provisional" justification of the U.S. measure under Article XX(g). Though the Appellate Body carefully limited its finding to the "specific circumstances of the case before us," it effectively rejected the reasoning of the tuna-dolphin panel decisions of 1991 and 1994. The two tuna-dolphin decisions had held that the U.S. import bans of tuna did not fall within the scope of the Article XX(g) exception because they attempted to coerce foreign countries to modify their domestic regulations. It is precisely this type of analysis, focusing on categories of measures, which the Appellate Body rejected.<sup>6</sup>

In interpreting Article XX(g), crafted more than 50 years ago, the Appellate Body focused less on the context of "the overall WTO Agreement," than on the contemporary context in which it must render its politically sensitive decision.<sup>7</sup> Rather than analyze the "original intent" or drafting history of the Article, the Appellate Body affirmed that the term "exhaustible natural resources" is "not 'static' in its content or reference but is rather 'by definition, evolutionary'" (emphasis added). The Appellate Body held that the words "must be read... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." It stated that "it is too late in the day" to limit Article XX(g) coverage to "the conservation of exhaustible mineral or other non-living resources" as the complainants desired.

In response to challenges to WTO legitimacy, it interpreted the outdated terms of Article XX in a flexible manner, confirming that the term "natural resources" incorporates the protection of living species. It then shifted the analysis of whether particular environmental trade measures are permissible under GATT rules to the Article XX "chapeau." "In the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994," the Appellate Body amended prior GATT analysis in light of contemporary perspectives. Curiously, it did so without ever citing the tuna-dolphin decisions themselves.

#### "Chapeau" Analysis: A Balancing Act

The Appellate Body finally turned its analysis to the Article XX "chapeau," where it sought to maintain "a *balance*... between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members" (emphasis added). The Appellate Body defined its "task" as "the *delicate* one of locating and marking out a *line of equilibrium*" which "is not fixed and unchanging," but "moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ" (emphasis added). In searching for this "equilibrium," the Appellate Body attempted to "delicately" apply Article XX to the United States' indelicate application of an import ban. As a judge before its judges, who are the WTO member States and their disparate constituents, the Appellate Body turned to the "facts making up" the "specific case."

*Continued on page 11*

*Shrimp-turtle, continued from page 10*

### Errors in Application

The Appellate Body found seven flaws in the United States' application of Section 609. First, and "perhaps the most conspicuous flaw in this measure's application," the U.S. requires all "exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program)" as that applied in the United States. The report found that this has an unjustifiably "coercive effect" on policy decisions made by foreign governments. Second, the Appellate Body admonished the United States for failing to take "into consideration the different conditions which may occur in the territories of... other Members." Without taking these conditions into consideration, the U.S. cannot assure that its policies are appropriate for the specific local and regional "conditions prevailing" in these countries.

Third, the Appellate Body emphasized that even where shrimp are caught using U.S.-prescribed methods, the United States still prohibits their importation if they are caught in countries which do not require the use of TEDs. The report suggested that the United States was "more concerned with effectively influencing WTO members to adopt" US-prescribed regulatory regimes than assuring that shrimp actually imported into the U.S. are caught with methods which do not endanger migratory sea turtles.

Fourth, the report criticized the United States for not seriously attempting to reach a multilateral solution. The report noted that the U.S. successfully negotiated the signature of an Inter-American Convention for the protection and conservation of sea turtles, which demonstrates that "multilateral procedures are available and feasible." Yet the report found that the United States never seriously attempted to negotiate a similar agreement with the four complainants.

The report cited numerous international environmental agreements which stress the importance of multilateral cooperation and consensus, including the Rio Declaration, Agenda 21, the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals. By citing these agreements in support of its reasoning, the Appellate Body hoped to refute the charge that its findings are due to a trade-bias. It rather suggested that any fora (of which the same States are generally members) would fault the United States for failing to seriously attempt to negotiate a multilateral solution. The Appellate Body claimed that the new Inter-American Convention enacts the proper balance between environmental and trade goals which the Appellate Body must attempt to discern. Even the Convention confirms that "the Parties shall act in accordance with the provisions of the [WTO Agreement]."

Fifth, the Appellate Body held that the United States discriminated among WTO members by applying different "phase-in" periods during which they must require shrimp trawlers to use TEDs. Whereas countries in the Caribbean/western Atlantic region were permitted a three year phase-in period, the rest of the world, including the four complainants, was granted "only four months" to implement the requirements.<sup>8</sup> Sixth, the report faulted the United States for making far "greater efforts to transfer [the required TED technology]" to

countries in the Caribbean/western Atlantic region "than to other exporting countries, including the appellees." The Appellate Body found that all six of these examples constitute "unjustifiable discrimination" in the substantive application of the U.S. regulation within the meaning of the Article XX "chapeau."

Finally, the Appellate Body fleshed out the meaning of Article XX's reference to "arbitrary discrimination." The Appellate Body effectively requires the United States to create an administrative procedure analogous to that applied to U.S. shrimpers pursuant to which foreign governments or traders have an opportunity to comment on and challenge regulations before U.S. administrative bodies or courts.<sup>9</sup> The Appellate Body held that the application of the U.S. measure is "arbitrary" in that the certification process is not "transparent" or "predictable," and does not provide any "formal opportunity for an applicant country to be heard or to respond to any arguments that may be made against it." The report noted that the U.S. implementing agency issues "no formal written, reasoned decision, whether of acceptance or rejection," and there is "no procedure for review of, or appeal from, a denial of an

application." The Appellate Body cited Article X of GATT 1994 as requiring the U.S. to grant foreign traders and countries these "due process rights."<sup>10</sup> Without such procedures, foreign traders' only protection from arbitrary administrative action is through their government representatives before the WTO dispute settlement body.

Judiciously, the Appellate Body did not criticize the U.S. Congress, but rather the U.S. implementing agency, the Department of State, which drafted the applicable Guidelines. The Appellate Body noted that the actual statutory provisions of Section 609 "appear to permit a degree of discretion or flexibility" which has been "effectively eliminated in [their] implementation... by the Department of State." The Appellate Body implied that Congress, in using the term "comparable," could permit regulatory measures that aimed to protect sea turtles but did not require the use of TEDs. Similarly, the report indicated that Section 609 "directs" the State Department to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations." Had the U.S. State

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#### **The Appellate Body found seven flaws in the United States' application of Section 609:**

- **First, the U.S. requirement that all exporting Members adopt essentially the same policy as that applied in the United States had an unjustifiably "coercive effect" on policy decisions made by foreign governments .**
  - **Second, the U.S. did not assure that its policies were appropriate for the specific local and regional "conditions prevailing" in other countries.**
  - **Third, even where shrimp were caught using U.S.-prescribed methods, the United States still prohibited their importation if they were caught in countries not requiring the use of TEDs.**
  - **Fourth, the United States did not seriously attempt to reach a multilateral solution.**
  - **Fifth, the United States discriminated among WTO members by applying different "phase-in" periods during which they must require shrimp trawlers to use TEDs.**
  - **Sixth, the United States made far greater efforts to transfer the required TED technology to countries in the Caribbean/western Atlantic region "than to other exporting countries, including the appellees."**
  - **Finally, the application of the U.S. measure was "arbitrary" in that the certification process is not "transparent" or "predictable," and does not provide any "formal opportunity for an applicant country to be heard or to respond to any arguments that may be made against it."**
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*Shrimp-turtle, continued from page 11*

Department actually followed Congress' directions, the U.S. measures might well be in compliance with WTO rules.

### Conclusion

Many environmental groups quickly denounced the Appellate Body decision. Earth Island Institute, the NGO which, through its suit before the U.S. Court of International Trade, compelled the United States to forthwith apply Section 609 to imports from all countries, dubbed the decision "a death blow for sea turtles." WWF (US) maintained that the decision went "against the developments of international norms and practices." These responses are understandable. Northern environmental groups' primary focus is not procedural equity vis-à-vis developing countries, but rather the immediate need to save sea turtles. And sea turtles are clearly endangered.

Yet the Appellate Body has a different constituency. Its constituency is not only its trading Members. The Appellate Body is acutely aware of how the WTO is perceived in the world in light of "contemporary concerns." Here the WTO is in a bind, searching for an "equilibrium line." While powerful constituencies in the developed world, such as WWF International, declare that the WTO is undemocratic, "captured by special interests of multinational corporations and free trade technocrats," constituencies in developing countries fear the protectionist use of environmental arguments by the world's most powerful state to advance its own trading interests and those of its producers. The test for the Appellate Body was how to reach a result which did not cave into U.S. producer and environmental interests, but neither was blind to the plight of sea turtles.

In a realist system of world power politics, the United States may thumb its nose at the Appellate Body decision. With its eyes on Congress' reaction, the USTR may maintain that the developing countries must negotiate with the United States over compensation. If so, the USTR will do so knowing the leverage the United States has over developing countries, be it through threatening to withdraw GSP benefits and development aid, or in the case of India and Pakistan, through tightening sanctions in response to their nuclear tests. But that is a way for the United States to attain environmental goals on the cheap. It is far preferable for the United States to explore a multilateral solution which could include technology and other resource transfers to protect sea turtles and otherwise promote sustainable development goals. Given the current view in the U.S. Congress, however, expending tax revenues on such foreign aid may be unlikely, especially in response to a WTO decision.

Yet this is not to detract from the Appellate Body decision. The Appellate Body has carefully crafted a positive way to resolve trade-environment disputes. The Appellate Body has set forth, in a principled manner, a way to channel decision-making over sea turtles toward one that both takes account of unrepresented foreign interests in domestic decision-making and promotes multilateral cooperation. Noting the "absence up to now" of any recommendations from the WTO's Committee on Trade and Environment on how to apply Article XX, the Appellate Body has taken up the slack. It has set forth clear guidelines as to how the U.S. might both comply with GATT

requirements and still implement legislation designed to protect a shared, but endangered, world resource, the migrating sea turtles which otherwise risk being forgotten in the legal intricacies and competitive trade politics which gave rise to the dispute.

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### NOTES

<sup>1</sup> There are of course innumerable variations. For a fuller description of the alternative approaches, see Gregory Shaffer, "Trade and the Environment: Options for Resolving the WTO Shrimp-Turtle Case," 15 BNA Int'l Trade Rep. 294-301 (Feb. 18, 1998).

<sup>2</sup> See e.g. par. 7.44, 7.45, 7.51, 7.55, 7.60 and 7.61.

<sup>3</sup> These briefs were submitted by (i) collectively, the Earth Island Institute; the Humane Society; and the Sierra Club; (ii) collectively, the Center for International Environmental Law (CIEL); the Center for Marine Conservation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia; and (iii) collectively, the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development.

<sup>4</sup> This was submitted by CIEL et al.

<sup>5</sup> A panel's acceptance of amicus briefs could, in practice, benefit business enterprises more than environmental groups, since business interests lie behind most trade disputes. This is somewhat mitigated by the fact that panels are not required to accept or take account of private submissions.

<sup>6</sup> Like the shrimp-turtle panel, the tuna-dolphin II panel focused on the threat of these measures to the multilateral trading system. It claimed, "Under such an interpretation the General agreement could no longer serve as a multilateral framework for trade among contracting parties" (par. 5.26). The initial shrimp-turtle panel cited the tuna-dolphin II decision with approval (par. 7.46).

<sup>7</sup> As evidence of the contemporary context, the Appellate Body placed great emphasis on the single reference in the preamble of the WTO Agreement to "the objective of sustainable development."

<sup>8</sup> This was the result of a decision of the U.S. Court of International Trade, a body for which the United States "bears responsibility" (par. 32 of final section).

<sup>9</sup> U.S. courts, for example, review whether agency decisions are "arbitrary and capricious."

<sup>10</sup> Paragraph 3 of Article X, for example, requires parties to "administer in a uniform, impartial and reasonable manner" their laws and regulations, and to "maintain... judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action..."

## Buenos Aires Climate Conference Likely to Focus on Flexibility Mechanisms

While serious tensions and disagreements underlie the 2-13 November session of the Conference of the Parties to the UN Climate Convention, negotiators and analysts expect the meeting to produce methodological rather than substantial results. On the agenda are a review of the implementation of the Framework Convention on Climate Change itself (adopted at the Rio Earth Summit in 1992) and further progress in fleshing out the Kyoto Protocol, adopted at the last Conference of the Parties in December 1997. The Kyoto Protocol sets binding greenhouse gas reduction targets for industrialised countries. While these targets differ between individual countries, they are calculated to result in a 5.2 percent reduction from 1990 levels in the collective emissions of six greenhouse gases from OECD countries and countries in transition. The targets must be met between 2008 and 2012.

Among areas where incremental progress may be made is the establishment of rules and guidelines for the three 'flexibility mechanisms' contained in the Protocol, i.e. international trading in greenhouse gas emissions rights (see box), the clean development mechanism and joint implementation.

### Emissions trading

The European Union may have avoided a major flashpoint when it modified its initial negotiating position on the limits to cross-border greenhouse gas emissions trading. In spite of a European Parliament recommendation to the contrary, EU environment ministers on 6 October decided to drop their insistence that the Buenos Aires meeting set a precise cap on how much of the reduction targets can be obtained through international trading and the other flexibility mechanisms. Several EU countries and the European Parliament had argued in favour of capping emissions rights, stressing that the spirit of the Protocol required industrialised countries to achieve the targets mostly through domestic measures (see Bridges Vol.2 No.6, page 11). Instead, the EU will only insist in Buenos Aires that Parties agree on an emissions trading cap by 1999.

The United States has been the most vocal advocate of unlimited trading as a means to achieve the targets. In a recent interview, US negotiator Melinda Kimble said that even if more than half of a country's reductions were achieved through buying emissions rights from other countries emitting below their 1990 levels, the trade could still be considered 'supplemental' to domestic efforts. She also said that, as a first step, the US would set up an internal greenhouse gas trading regime, most likely based on the sulphur dioxide market, where intra-firm trade allowed the US to decrease SO<sub>2</sub> emissions 'more quickly than we would have through a strict regulatory system'. In Australia, the New South Wales state government is currently drafting legislation that would establish carbon emissions rights and pave the way for formal carbon trading in the state. According to New South Wales government officials, carbon trade in the state could equal the US sulphur dioxide market within twelve months.

### Clean Development Mechanism

The clean development mechanism (CDM) is a means of co-operation between developed and developing countries. Although still ill-defined, it will offer certified emissions reductions to developing countries that choose to participate in voluntary projects resulting in 'real, measurable and long-term benefits related to the mitigation of climate change'. Article 12 of the Kyoto Protocol, which establishes the clean development mechanism, does not explicitly mention technology transfer, but depending on how the CDM is defined, it

could trigger considerable transfers of cleaner production technology from developed to developing countries.

It is not yet clear whether the emissions reductions achieved would be shared between the two Parties, or benefit the developed country investor while the developing country Party's advantage would be the acquisition of the technology. In spite of such open questions, African environment ministers meeting shortly before the Buenos Aires Conference of the Parties, urged their governments to sign the Kyoto Protocol so as to be able to attract CDM projects. In any case, much remains to be done to make this mechanism truly operational, including ensuring low transactions costs, as well as efficient monitoring and verification procedures to make the CDM attractive to potential investors.

### Joint Implementation

The third flexibility mechanism, joint implementation, refers to collaboration between Annex I Parties, who decide by a formal agreement to reach their reduction targets jointly rather than individually. Such agreements could include technology transfer, as well arrangements regarding 'sinks', or forest resources capable of absorbing significant amounts of carbon. Calculating the carbon sequestration contribution of sinks remains another major technical task.

### Developing country participation

Among the controversial points that few expect to be resolved is developing country participation in the Kyoto greenhouse gas reduction process. The Group of 77 and China are likely to rebuff any such efforts by referring to the concept of 'common but differentiated responsibilities', on which the entire Framework Convention on Climate Change is based, and which underlies the Kyoto Protocol.

The Framework Convention states explicitly that Annex I countries commit themselves to 'policies and measures [that] will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions'. This commitment is consistent with the 'common but differentiated responsibilities' approach, adopted during the Rio process to reflect developed countries' primary and historical responsibility in mitigating global environmental damage. However, an Indonesian government official said shortly before the Buenos Aires meeting that many developing countries were willing to consider voluntary, non-binding reduction targets outside the Kyoto Protocol framework.

*Continued on page 14*

### International Emissions Trading

Industrialised (Annex I) countries agreed in Kyoto to country-specific greenhouse gas reduction targets. While many Western countries are likely to have difficulty in reaching their targets, some Eastern European economies – due to a sharp drop in industrial output – are projected to emit far less than their targets allow. Under the international emissions trading scheme (to apply only between Annex I countries), these countries could sell their 'excess' pollution rights to other countries unable or unwilling to meet their reduction commitments through domestic action. The buyer of the 'pollution rights' could then count that amount of greenhouse gas emissions as part of its own reduction effort under the Kyoto Protocol.

*Climate, continued from page 13*

While it is true that some developing countries, such as Brazil, China and India, already emit large amounts of greenhouse gases in absolute terms – and are likely to emit much more in the near future – in per capita terms their emissions remain modest. For instance, the US (36.1 percent of Annex I Party emissions) burns the equivalent of eight tonnes of carbon per person a year. A Chinese citizen consumes less than tenth of that. Developing countries argue that industrialised countries' per capita share of emissions, as well as their much longer contribution to greenhouse gas concentrations in the atmosphere, justify the 'common but differentiated responsibilities' principle underlying the Kyoto Protocol. Most of them acknowledge that without their eventual participation, it will not be possible to achieve the overall objective of the Framework Convention on Climate Change: the stabilisation of greenhouse gases in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. It is the timing and manner of this participation that is the subject of heated discussion. The 'common but differentiated responsibilities' principle notwithstanding, as soon as the Kyoto Protocol was adopted, the US Congress announced it would not ratify the treaty without 'meaningful' developing country participation. At the time of this writing, the Protocol was signed by 57 countries, and ratified by only one: the Pacific island state of Fiji.

Contact: UN-FCCC Secretariat, tel: (49-228) 815-1000, fax: 815-1999, e-mail: [secretariat@unfccc.de](mailto:secretariat@unfccc.de), Internet: <http://www.unfccc.de>

#### **Biotechnology, Biodiversity and TRIPS: the Battles Continue**

Controversy continues to surround biotechnology at both national and international levels. The European Union, in particular, is under contradictory pressures. The Commission is in the process of revising its directive on the release of genetically modified organisms (GMOs) amid calls from the EU Parliament to suspend all new authorisations of genetically modified crops until the parliamentarians have assessed the proposed revision of how licenses are granted. In the meanwhile, France has imposed a two-year moratorium on the cultivation of two oilseed rape varieties approved for EU-wide use last June. In addition, the French Council of State suspended approval for the cultivation of a genetically modified strain of corn developed by Novartis, a crop also approved by the European Commission. In order to 'achieve coherence' with the Council of State ruling, the French Ministry of Agriculture decided in early October that the first GM corn harvest, planted before the suspension, would be stocked separately from other maize and none of it would be put on the market for the time being.

Avoiding the imposition of such segregation obligations is one of the main aims of major GMO exporters. The issue continues to be on the agenda of the WTO Technical Barriers to Trade Committee in connection with the EU's labelling directive on foods containing GMOs (see Bridges Vol.2 No.6, page 2). Access to EU markets for biotechnology products is also a key objective of the United States in the Transatlantic Economic Marketplace negotiations.

Austria and Luxembourg have also defied EU law by banning Novartis maize, but the British government narrowly decided on 22 October to allow the cultivation of EU-approved GM crops under a new framework of strict controls. A ministerial group on Biotechnology and Genetic Modification has been set up to monitor the plantations, and a scientific review will be carried out on pesticides used on GM crops. While consumer and environmental groups continue their strong push for strict GMO controls and

labelling, the European biotechnology industry has set out five improvements it wants to see incorporated into the proposed revision of the EU directive. These are: increase or abolition of the proposed seven-year duration of GM product licenses; streamlining the information required under the proposed monitoring system; greater use of simplified approval procedures; and leaving final product approvals to a centralised EU agency rather than the Council of Ministers.

Biotechnology issues are also discussed at the Biosafety Convention negotiations. In this forum, industrialised countries with strong biotechnology industries and most developing countries have largely opposing views (see Bridges Vol.2 No.6, page 9). And, to avoid the issue of benefit sharing from products derived from traditional knowledge and *in situ* conservation efforts, the US still has not ratified the Biodiversity Convention.

There are signs that the US will make market access and intellectual property protection for biotechnology products a major point in the upcoming WTO reviews and negotiations. In a recent article<sup>1</sup>, Linda S. Lourie of the US Patent and Trademark Office regretted that in negotiating the TRIPs Agreement, the US had to accept 'deficiencies and weaknesses in the system, including aspects in the area of biotechnology, in coming to terms with our negotiating partners on a package of improved world standards for intellectual property protection.' She noted that the US was committed to seeking a strengthening of Article 27.3(b), which obliges Members to protect micro-organisms and to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The subparagraph is slated for a review in the Council for TRIPs during 1999, but Ms Lourie said the review would not amount to a 'second chance' for developing countries 'to minimise their obligations under this provision.' '[A]ny notion that a review will result in a weakening of the provision demonstrates an incomplete understanding of the history of the negotiations', Ms Lourie wrote.

A recent discussion paper entitled TRIPs, Biodiversity and Commonwealth Countries: Capacity-building priorities for the 1999 review of TRIPs Article 27.3(b) takes a different approach.<sup>2</sup> In this paper, prepared for the Commonwealth Secretariat and Quaker Peace and Service, Patrick Mulvaney of the Intermediate Technology Group concluded that capacity- and coalition-building was 'an urgent agenda, which, if not tackled promptly and effectively, will ultimately increase the legislative burden on, and reduce the benefits to, Commonwealth developing countries. These countries have much to contribute because the sovereign rights they have over the biological resources that industrial countries need give them a potentially strong negotiating position. Commonwealth developing countries must rapidly organise internally and within regional blocs to ensure that they have choice over the immediate outcome, for example, negotiating a delay in the process. This would allow time to assess fully and comprehensively the likely impacts of these measures and to develop *sui generis* legislation, recognised by trading partners, for the protection of their plants, animals and biological processes, especially their food production systems.'

<sup>1</sup> Steve Eberhart et al. (eds). 1998. *Intellectual Property Rights III. Global Genetic Resources: Access and Property Rights*. CSSA Miscellaneous Publication, Madison WI, pp 77-83.

<sup>2</sup> The Executive Summary is available on line at <http://ds.dial.pipex.com/ukgf/UKabc/TRIPs/cs-exsum.html>



## FTAA Committee Invites Civil Society Input

The Committee of Government Representatives on the Participation of Civil Society (CGR) held its first meeting from 19-20 October in Miami. Latin and North American governments agreed to set up the CGR last March in San José, prior to the Santiago Summit, which launched the negotiation process that is to lead to the establishment of the Free Trade Area of the Americas by 2005.

After two days of often heated debate, the Committee decided to issue an open letter to civil society groups in FTAA participating countries inviting them to submit their views on 'trade matters related to the FTAA process' by 31 March 1999. The invitation letter cites the San José Ministerial Declaration, which states: 'We encourage [...] sectors of civil society to present their views on trade matters in a constructive manner', and specifies that each submission must contain an executive summary identifying 'the trade matters it refers to and the way the views contribute to the FTAA process.' The United States and Canada argued that the content of the submissions should not be limited, while Mexico maintained that only 'constructive' input related to one of the substantive FTAA negotiating groups should be allowed. Countries compromised at 'trade matters' and a reference to the San José Ministerial Declaration.

While the letter has been posted at the FTAA web-site (see below) there is no consensus between countries on what to do with the submissions once they have been received. According to the José Ministerial Declaration, 'the Committee shall receive these inputs, analyse them and present the range of views for [the trade ministers'] consideration'. Groups critical of the FTAA process fear that the 'relevant to trade' criteria could be used to exclude input from environmental, labor and other activist groups from the compilation that the CGR will present to the ministers. After much acrimonious discussion, the Committee agreed that adding a statement or a document to the compilation would need to be approved by consensus.

At the close of the Miami meeting, trade officials predicted further controversy over how actively the Committee should seek civil society input. For instance, most Latin American countries are not in favour of holding public hearings, which have been suggested as an avenue of interaction by the US and Canada. These issues will next be addressed when deputy trade ministers meet from 3-4 December in Suriname to assess the work plans developed by the sectoral negotiating groups during their first round of meetings in September and October.

Submissions to the CGR should be mailed to: Chairman of the Committee of Government Representatives on Civil Society, c/o Tripartite Committee (Ref. Civil Society), ECLAC, 1825 K St. NW, Suite 1120, Washington, DC 20006, USA, fax: (1-202) 296-0826, e-mail: [mailto:eclac@tmn.com](mailto:mailto:eclac@tmn.com).

Contact: FTAA-ALCA Secretariat, 400 SE 2nd. Avenue, 4th Floor, Miami, FL 33131-2140, US, e-mail: [webmaster@alca-ftaa.org](mailto:webmaster@alca-ftaa.org), Internet: <http://alca-ftaa.org/>

### European Union – World Trade Infopack

The EU's External Relations Directorate has posted on its web site the second, updated edition of the EU – World Trade Infopack. The material covers EU positions on several areas trade policy, including competition, investment, textiles, intellectual property, trade and environment, WTO dispute settlement and agriculture.

Internet: <http://europa.eu.int/comm/dg01/trade0.htm>

## Transatlantic Economic Partnership Shapes up Slowly

Several roadblocks remain before the European Union and the United States will be able to agree on what exactly the Transatlantic Economic Partnership (TEP) will consist of. The European Commission approved its negotiating agenda on 16 September (see Bridges Vol.2 No.6, page 6), but EU and US officials failed to reach agreement on some of the key points when they met on 19 October. Seven broad areas have been identified for bilateral collaboration: intellectual property rights, government procurement, electronic commerce, services, standards including mutual recognition agreements, agricultural regulatory policy including biotechnology, as well as issues related to civil society and transparency. Disagreement persists, however, over the goal of the collaboration regarding many of these areas.

The TEP also aims at creating greater synergies between the two trading blocks in the multilateral trade sphere, particularly with regard to the post-2000 WTO negotiations. While considerable agreement seems to have been found on promoting transparency within the WTO, it has proved more difficult to establish a common agenda in areas such as agriculture, tariffs, investment and competition.

In a related development, a coalition of 19 European environmental groups issued a call for a moratorium in the talks on 23 October. The groups said that a wider discussion on 'the economic changes needed for these industrial regions to contribute to sustainable development' was necessary before proceeding with the plan. They also called for strengthened parliamentary control over the process, no challenge to national or EU-wide environmental standards or support to environmentally-friendly production, and a requirement that all TEP activities be subject to an environmental assessment. EU and US officials expressed surprise at the initiative. They said that the TEP did address environmental concerns, particularly since the proposal calls for a Transatlantic Environmental Dialogue, and promises government funding to assist NGOs in establishing a forum to advise governments on sustainable development issues. The moratorium statement is available at <http://www.eeb.org>.

On November 16, the EU Commission will host a meeting between the European Community and European non-governmental, business and labour organisations on the WTO's future work programme. Discussions will focus on the WTO's built-in agenda and 'issues for consideration in future negotiations', as well as 'systemic questions' such as the integration of developing countries, transparency, and the relationship between the WTO and international financial organisations. Among 'issues for consideration in future negotiations', the Commission lists competition, investment, trade facilitation, trade and environment, intellectual property and public procurement.

Contact: European Commission, DG-I, tel: (32-2) 299-1081/299-2220, fax: 299-0900

## Civil Society Involvement in Lomé Still an Open Question

Meeting on 14 October, European, African, Caribbean and Pacific officials agreed to carry out negotiations for the Lomé Convention's successor agreement through four groups: i) a central group responsible for political guidance to the entire process of negotiations; ii) a private sector and support for development strategies group; iii) a economic trade and co-operation group; and iv) a financial co-operation group. The four negotiating groups will meet each month. The first meeting will take place on 17 and 18 November.

*Continued on page 16*



*Lomé Convention, continued from page 15*

One of the open questions in the negotiation process is the role of the private sector and civil society. Both sides have established that the views of a broad range of non-governmental actors need to be heard and taken into account, but the mechanisms for doing so have not been defined. There also seems to be a fair amount of confusion over, first, whether non-governmental actors should be involved in the actual negotiation and, second, whether to involve only the business community or a wider range of civil society.

Speaking at the formal launch of the negotiations on 30 September, Barbados foreign minister Billie Miller said preferential access remained an important component of growth for ACP economies. She added that ACP countries would propose 'core product groups' where current preferences should be maintained, most likely to ensure that the benefits of the current banana, beef, sugar and rum protocols are not lost.

The first ministerial meeting will take place in February 1999 in an ACP country. The ACP are also requesting that a political meeting take place during the second week of December to discuss the nature of and framework for negotiations before the first ministerial negotiating meeting. The Bureau of the ACP Council will meet earlier on in December.

Contact: General Secretariat of the ACP Group, tel: (32-2) 743-0600, fax: (32-2) 7355-573, e-mail: [info@acpsec.org](mailto:info@acpsec.org)

**APEC Summit May Liberalise Environmental Sectors**

Leaders of the Asia-Pacific Economic Co-operation (APEC) members will meet in Kuala Lumpur on 14-15 November to discuss liberalising trade in nine priority sectors. Several of these have environmental impacts, such as chemicals, energy, fish and forestry products, and environmental goods and services. APEC leaders endorsed the so-called Early Voluntary Sectoral Liberalisation (EVSL) initiative in Vancouver last year. Meeting in June 1998, trade ministers agreed to a 'framework for guiding subsequent work' on EVSL, but could not reach a final agreement on product coverage, tariff cuts and timelines due to member countries' 'domestic considerations'. Australia and Hong Kong have said they would press for more liberalisation as a way to ease the Asian financial crisis. APEC leaders are expected to decide at the Kuala Lumpur Summit whether and how to move EVSL into the WTO.

At the conclusion of their meeting in early October, APEC energy ministers agreed to submit to the Leaders' Meeting an initiative aimed at accelerating natural gas infrastructure development. They emphasised the importance of the project in enhancing energy security, foreign direct investment and the development of new, energy-related industries. The ministers also endorsed guidelines for improving energy efficiency, and stressed the role of energy technologies in reducing greenhouse gas emissions.

Women's ministerial delegates also met in October in preparation for the November summit. They agreed on three priority points for the leaders' endorsement: the development of strategies to minimise the disproportionate impact on women of the financial crisis, making gender-based analysis an integral component of APEC decision-making, and convening an ad hoc task force to develop a Framework for the Integration of Women into APEC.

Contact: APEC Secretariat, tel: (65)-276-1880, fax: 276-1775, e-mail: [info@mail.apecsec.org.sg](mailto:info@mail.apecsec.org.sg)

**The Inter-American Strategy for Public Participation**

From Miami in 1994 to Santiago de Chile in 1998, through Santa Cruz de la Sierra in 1996, the Heads of State and Government of the Americas agreed on a host of initiatives dealing with a broad range of issues of concern to the hemisphere. Public participation featured in the action plans of all three Summits, and a specific mandate to the Organization of American States (OAS) emerged from Santa Cruz de la Sierra in this regard: 'to assign priority to the formulation of an Inter-American strategy for the promotion of public participation in decision-making for sustainable development'.

Acting on this mandate, the OAS Unit of Sustainable Development and Environment (USDE) is developing an Inter-American Strategy for Public Participation in Environment and Sustainable Development Decision-Making in the Americas (ISP) – the only hemispheric initiative specifically addressed to the promotion of public participation. In essence, the project aims to formulate a set of recommendations to be adopted by OAS's political bodies. To achieve this, USDE is undertaking six activities:

- Support for the development of three test cases in which public participation has been factored into decision-making;
- An assessment of existing legal and institutional mechanisms for public participation;
- Establishment of a network for the exchange of information;
- Development of training programmes to support public participation at the national level;
- Study of consultative fora that could serve as models for public-private partnerships, such as the National Councils on Sustainable Development;
- Establishment of a system of small pilot grants to support participation in decision-making at the national and regional levels.

The project is expected to conclude by mid-1999. Further information can be obtained from <http://www.ispnet.org>.

In general, the product of this project will be a useful source of knowledge and experience which, if adopted as strategy by the governments, could become an interesting tool for the promotion of participation at the national level.

The most interesting aspect of ISP, however, lies in its international dimension. The three Summits have left OAS with a wealth of responsibilities on a wide range of areas. With some leadership and vision, this agenda could revitalise a much downtrodden organization and turn it into an important forum. Civil society participation in such a forum could become a key ingredient in strengthening it, and OAS itself could become a model of constructive interaction of government and civil society at the international level.

ISP has also a connection with international trade. The Free Trade Area of the Americas (FTAA) process needs to become much more transparent and open to civil society. Among the various ways in which this can be done, the Tripartite Committee of FTAA (composed by the Inter-American Development Bank, the UN Economic Commission for Latin America and OAS) could become a possible avenue. The contribution of ISP to establishing OAS as a relevant international forum for civil society, as well as a more active role played by OAS in the FTAA negotiations, could constitute an opportunity (albeit a limited one) for engaging civil society in trade liberalisation.

By Nicolas Lucas, Director General of Fundación Futuro Latinoamericano based in Quito, Ecuador.

# International Commodity-related Environmental Agreements: A Way to Promote Sustainable Production of Primary Commodities

By Henk L. M. Kox

Internalisation or incorporation of environmental costs into prices of goods and services is a broadly supported policy target. Principle 16 of the Rio Declaration on Environment and Development states that 'national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.' However, with regard to internalisation of environmental costs in the price of internationally traded commodities there still is a long way to go.

As a follow-up to the Rio target, the UNCTAD Secretariat in 1995 proposed several initiatives to support the internalisation of environmental costs in the prices of primary commodities. One such initiative was to organise informal roundtable meetings between commodity-exporting and commodity-importing countries to discuss environment-related issues with regard to specific commodities in the hope that this might lead to the negotiation of formal international commodity-specific environmental agreements.<sup>1</sup>

The proposal was discussed in the October 1995 meeting of UNCTAD's Standing Committee on Commodities. In spite of some developing country support, developed countries opposed the UNCTAD initiative for fear of becoming financially involved and because of some unanswered questions in the proposals. Hardly any alternative has since then been elaborated for the problems that UNCTAD proposed to deal with. Let us therefore after three years reiterate and restate the essentials of international commodity-related environmental agreements or, more briefly: ICREAs.

## Objectives

Most developing country governments have a smaller operation margin in their environmental policies than those of rich countries. They are often confronted with poorly functioning domestic markets and weak resource management institutions, the urgency of poverty alleviation, and the need to secure sufficient hard-currency export earnings. These constraints contribute to the ongoing destruction of natural environments for the benefit of current income and currency needs. International trade in the mean time functions as a smokescreen between environmental destruction in the production phase and the ultimate consumer in the importing countries.

In this policy gap, ICREAs may become new forms of international environmental co-operation that facilitate or enable the internalisation of environmental costs in the price of internationally traded primary commodities. They are complements rather than substitutes to existing environmental policies by governments of commodity-exporting countries. The basic objectives of an ICREA are, in order of importance:

- support developing countries in extending environmental policy towards a commodity export sector;
- increase the commodity's world market price to a level that allows for internalisation of commodity-specific environmental externalities, so that the costs of environmentally sustainable production are shared by the ultimate consumers in importing countries;
- create temporary relief from competitive pressure during the transition to more sustainable production methods.

In some circumstances, ICREAs may contribute to export diversification programmes in developing countries where natural preconditions are not fit for producing the commodity in an environmentally sound way.

## Variants of the agreement

Commodity-specific international environmental co-operation may have several possible forms: formal and informal, binding and non-binding agreements. The juridical form may be flexibly adapted to market conditions prevailing in a particular world commodity market, and to the degree of mutual commitment by co-operating countries. While 'old-style' international commodity agreements aimed at commodity price stabilisation, ICREAs clearly have a different objective and need not be associated to existing international commodity agreement.

Table 1 shows four types of agreements, using different instruments for achieving internalisation of commodity-specific environmental costs in commodity prices. Most attention will here be given to the first three ICREA types as they offer the best perspectives for internalisation. Voluntary Fund ICREAs have been created in the ITTO (Bali Partnership Fund, 1994) and the International Cocoa Agreement (Environment Fund, 1997), and might eventually develop into one of the three other ICREA types.

*Continued on page 18*

**Table 1** Main ICREA types and their internalisation instruments

ICREA type	Internalisation instrument
Transfer ICREA	International compensation fund for commodity-specific environmental projects and programmes. Fund contributions are contractually agreed and proportional to imports.
Policy synchronisation ICREA	Synchronised introduction of environmental standards or other environmental policies with regard to a particular export sector.
Ecolabel ICREA	Issuing and certification of commodity-specific international ecolabel to create a market premium for sustainably produced commodities.
Voluntary fund ICREA	International compensation fund for national commodity-related environmental projects and programmes. Contributions to the fund are voluntary and not proportional to imports.

*ICREAs, continued from page 17*

### Transfer ICREAs

The transfer-type ICREA contributes to more sustainable commodity production by relieving financial obstacles to the adoption of appropriate production methods. It represents a 'carrot' approach with a compensation fund as its key instrument. The fund is fed by contractually fixed financial contributions from commodity-importing countries. Commodity-exporting member countries may draw on the fund for financing domestic projects and programmes that aim at producing the commodity in a more environmentally sustainable way. Signatories of the agreement specify a fund mandate as a basis for assessing the eligibility of individual funding requests. This can be formulated in a way that allows for differences in production conditions and ecological conditions: erosion, water pollution, waste generation, lack of extension services, or a need for locally adapted crop varieties. It is essential that funded projects are explicitly targeted at improving the environmental record of the ICREA commodity. Member governments submit funding project proposals on behalf of domestic export producers. Mutual obligations are laid down in a formal agreement between importing and exporting countries.

The effectiveness of transfer ICREAs in internalising environmental costs depends on the projects financed and on the way fund contributions are collected in the importing countries. Financed projects should preferably target commodity producers directly and relieve the financial obstacles to more sustainable production methods. In the importing countries, commodity users receive the best information on real commodity costs when fund contributions are collected through levies on commodity use or on commodity imports, e.g. specific import tariffs or specific taxes related to commodity use). In this way fund contributions are most likely to be passed on to commodity users. Strong internalisation changes supply and demand conditions, and will eventually affect the world market price.

Transfer ICREAs are created for a specified time period, which depends on the time necessary for adaptation of commodity-related environmental policies and production technologies in exporting member countries. Five to ten years might be sufficient for phasing out ecologically damaging production methods, introducing more preferable technologies, and installing appropriate policies in most export countries. After such a period, the long-term international commodity price will have adapted to the changed supply conditions. From then onwards, the ICREA has made itself largely superfluous, and things can be left to the market again. The appropriate time period may differ by commodity type. Mining commodities and perennial agricultural crops have longer amortisation periods, so that the required duration is probably longer than for annual crops.

### Policy synchronisation ICREAs

In a policy synchronisation ICREA, participating exporting countries deliberately synchronise the introduction of environmental policies related to production, transport or storage of a particular commodity. Complete congruence of national environmental policies is neither necessary nor efficient, because countries have different natural resource endowments, preference structures, and institutions. The policy synchronisation ICREA therefore does not aim at complete equalisation of environmental policies. However, to the extent that policies with regard to a specific export commodity are considered in exporting countries, the policy ICREA would lower the domestic economic costs of their introduction. When a group of export countries simultaneously introduces a cost-price increasing environmental policy for an export sector, this has two advantages for these countries: (a) national exporters are not confronted with competitive disadvantages compared to exporters in the other countries; and (b) the

world market price adapts to the cost-price change in export countries and increases. The internalisation of environmental costs will then be accomplished, and their burden is shared between domestic producers and international consumers. The eventual distribution of costs and benefits of such policy synchronisation depends on domestic supply conditions and international market structure.

Policy synchronisation may be effective without participation by importer countries. When a few large countries dominate international market supply, their joint operation can be highly effective. Small exporters countries may informally synchronise their environmental policies with those of the large export countries. This a low-profile type of environmental policy co-operation, with a low participation threshold. Active involvement of developed importer countries could in some circumstances be helpful to maintain cartel discipline, e.g. when importers make their import sourcing conditional upon compliance with the agreed environmental policies.

### Ecolabel ICREAs

Apart from some quality grades, most commodities are traded as relatively homogeneous bulk products. An ecolabel ICREA would generate a price premium for commodities on the basis of environment-related product differentiation. Ecolabels inform consumers or companies that a product has been produced according to some pre-specified environmental criteria. Not only tangible product qualities, but also characteristics of its production process – even if they do not change tangible product qualities – distinguish the labelled product from non-labelled products.

An ecolabel ICREA requires participation of importer and exporter countries, and should preferably be on a voluntary basis. An obligatory ecolabelling scheme that is only supported by importing countries would easily turn into a non-tariff market barrier. It could be challenged under WTO rules as a 'technical barrier to trade' based on extra-territorial application of environmental standards. Conversely, the impartiality of an ecolabel only supported by exporter countries would be suspect a priori. Therefore, joint participation of importer and exporter countries seems necessary. Member countries may have their export commodities certified under this ecolabel. The certification scheme 'defends' the price premium earned by ecolabelled commodities. An ecolabelling ICREA is most feasible for commodities such as vegetables and fruits, that enter final consumption in a direct way. However, as environmental lifecycle analysis becomes more and more common, commodities which are only used in a processed form, might also become eligible for ecolabelling schemes.

### Conclusion

The 1995 UNCTAD proposals on ICREAs probably came too early. At the October 1995 meeting of UNCTAD's Standing Committee on Commodities, several country representatives stressed that more expert research should be done before embarking on international commodity-specific environmental agreements. Since then three years have passed without much targeted research of this type having been done. It would be regrettable if at Earth Summit III in 2002 (Rio +10) a lack of progress with regard to the internalisation of environmental costs in internationally traded primary commodities would have to be reported. While the ICREA instrument may not be the environmental economist's *first-best* solution, it is a practical form for giving new impetus to the internalisation of environmental costs in primary commodity prices. It would be wise to revive UNCTAD's aborted effort and reinvestigate the possibilities for international commodity-specific environmental agreements.

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### ICTSD and Partner News in Brief

ICTSD, together with the Africa Resources Trust and ZERO, will host a Regional Trade and Environment Seminar for Governments and Civil Society in Harare from 9-11 December 1998, in conjunction with the WTO regional trade and environment seminar for English-speaking Africa, scheduled for 7-9 December.

The organisers expect about 70 participants from non-governmental and academic institutions, as well as governments, the WTO Secretariat and other international organisations. Discussions will focus on issues of particular interest to Africa, such as trade-related aspects of biodiversity and desertification, and more general questions of regional and multilateral trade and environment co-operation. Julius Nyerere, former president of Tanzania, will deliver the keynote address.

Contact: Christophe Bellmann, ICTSD, tel: (41-22) 917-8492, fax: 917-8093, e-mail: cbellmann@ictsd.ch.

ICTSD's dialogue on regional integration approaches to addressing trade liberalisation and sustainable development has been postponed to 1-2 February. The meeting will take place in Geneva. Some 80 academics, business and NGO representatives, as well as officials working on regional integration and multilateral trade, will seek to answer two fundamental questions: Do higher levels of economic integration promote a process of convergence in trade and environment policies? If so, what are the elements that contribute to such a process of convergence? (For more information see Bridges Vol.2 No.5, page 15).

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The Royal Institute of International Affairs organised a conference on Trade, Investment and Environment from 29-30 October, 1998, in London. The event was co-sponsored by ICTSD. Among speakers were WTO Director General Renato Ruggiero and Lord Clinton-Davis, the UK Minister of Trade and Industry. For copies of the speeches, please contact the addres below.

Contact: Philippa Challen, Conference Unit, RIIA, tel: (44-171) 957-5700/29, fax: 321-2045/957-5710

On 22-23 October 1998, the Mexican Environmental Law Center (CEMDA) and the Universidad Iberoamericana organised an International Seminar on Trade and Environment: the Latin American Perspective. While no 'homogeneous view' emerged among Latin American countries regarding the trade and environment intersection, participants from different sectors agreed on the following points:

- The importance of biodiversity for the region.
- The importance of broader participation in the design of trade liberalisation policies and decision-making processes, such as eco-labelling and certification schemes.
- Latin American governments ought to address trade and environment issues in the Free Trade Area of the Americas process for strategic reasons.
- Latin American countries should assume a proactive position on establishing criteria for the incorporation or non-incorporation of trade measures into multilateral environmental agreements.
- The CTE is the best framework for undertaking discussions on trade and environment, but it should broaden its approach to the issues, as well as pay more attention to Latin American specific conditions.

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aim to provide information and analysis on the interface between trade and sustainable development for the growing number of actors involved in the debate worldwide.



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### ICTSD WEB SITE

<http://www.ictsd.org>

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### BRIDGES Weekly Trade News Digest

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All WTO meetings take place in Geneva. Dates are subject to change, please contact the WTO for confirmation.  
Internet: <http://www.wto.org> (All WTO phone and fax numbers start with (41-22) 739. Only extensions are provided in this list.)

November 2-13 Buenos Aires	Fourth Session of the Conference of the Parties to the UN Convention on Climate Change Contact: Climate Change Secretariat, tel: (49-228) 815-1000, fax: 815-1999, e-mail: <a href="mailto:secretariat@unfccc">secretariat@unfccc</a> , Web: <a href="http://www.unfccc.de">http://www.unfccc.de</a>	Nov. 30 - Dec. 4 Nairobi	Second Governing Council of the Parties to the Lusaka Agreement Contact: D. Kaniaru, UNEP, tel: (254-2) 3507, fax: 62-230198, e-mail: <a href="mailto:donald.kaniaru@unep.org">donald.kaniaru@unep.org</a>
November 3-9 Yokohama	25th Session of the ITTO Council Contact: ITTO, tel: (81) 45 223 1111; fax: (81) 45 2231110; email: <a href="mailto:Itto@mail.itto-unet.ocn.ne.jp">Itto@mail.itto-unet.ocn.ne.jp</a>	December 1-2	WTO Council on TRIPs Contact: Matthijs Geuze, tel: 5418, fax: 5790
November 9-10	WTO Trade Policy Review Body (Argentina) Contact: Clemens Boonekamp, tel: 5226, fax: 5765	December 3-4	WTO Trade Policy Review Body (Indonesia) Contact: Clemens Boonekamp, tel: 5226, fax: 5765
November 11-12	WTO Committee on Sanitary and Phytosanitary Measures Contact: Gretchen Stanton, tel: 5086, fax: 5760	December 3-5	WTO Working Group on Transparency in Government Procurement Contact: Vesile Kulaçoğlu, tel: 5187, fax: 5790
November 12-13	WTO Trade Policy Review Body (Trinidad & Tobago) Contact: Clemens Boonekamp, tel: 5226, fax: 5765	December 7	WTO Committee on Trade and Development Contact: Chiedu Osakwe, tel: 5250, fax: 5774
November 14-15 Kuala Lumpur	APEC Economic Leaders' Meeting Contact: APEC Secretariat, tel: (65)-276-1880, fax: 276-1775, e-mail: <a href="mailto:info@mail.apecsec.org.sg">info@mail.apecsec.org.sg</a>	December 7-8	WTO Trade Policy Review Body (Hong Kong) Contact: Clemens Boonekamp, tel: 5226, fax: 5765
November 16-18	WTO Textiles Monitoring Body Contact: J.-P. Lapalme, tel: 5223, fax: 5765	December 10-11	WTO General Council Contact: Paulo Barthel-Rosa, tel: 5095, fax: 5761
November 17-18	WTO Committee on Agriculture Contact: Paul Shanahan, tel: 5095, fax: 5760	<b>PUBLICATIONS/DOCUMENTS</b>  Fox, Jonathan and Brown, L. David. 1998. <u>The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements</u> . MIT Press. Cambridge, MA  Panayotou, Theodore. 1998. <u>Instruments of Change</u> . UNEP/ EARTHSCAN. London  Thrupp, Lori Ann. 1998. <u>Cultivating Diversity: Agrobiodiversity and Food Security</u> . World Resources Institute. Washington, DC  UNCTAD. 1998. <u>The Least Developed Countries 1998 Report</u> . United Nations. Geneva/New York  UNCTAD. 1998. <u>World Investment Report 1998: Trends and Determinants</u> . United Nations. Geneva/New York  UNEP. 1998. 'Policy Effectiveness and Multilateral Environmental Agreements'. <u>Environment and Trade No. 17</u> . UNEP. Geneva  van Beers, Cees and de Moor, Andre. 1998. <u>Scanning Subsidies and Policy Trends in Europe and Central Asia</u> . UNEP. Nairobi  World Bank. 1998. <u>World Development Report 98/99: Knowledge for Development</u> . Oxford University Press  WTO. 1998. <u>Australia – Measures Affecting Importation of Salmon – Report of the Appellate Body</u> . WT/DS18/AB/R. WTO. Geneva  WTO. 1998. <u>Trade Policy Review of Jamaica</u> . WTO. Geneva  WTO. 1998. <u>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body</u> . WT/DS58/AB/R. WTO. WTO. Geneva	
November 17-19	WTO Working Group on the Interaction between Trade and Competition Policy Contact: Robert Anderson, tel: 5198, fax: 5790		
November 20	WTO Committee on Technical Barriers to Trade Contact: Vivien Liu, tel: 5455, fax: 5620		
November 23-24	WTO Council for Trade in Services Contact: A.-Hamid Mamdouh, tel: 5435, fax: 5771		
November 23-24 Cairo	10 <sup>th</sup> Meeting of the Parties to the Montreal Protocol Contact: UNEP, tel: (254-2) 621-234, fax: 521-930, e-mail: <a href="mailto:ozoneinfo@unep.org">ozoneinfo@unep.org</a>		
November 23-25	WTO Trade Policy Review Body (Uruguay) Contact: Clemens Boonekamp, tel: 5226, fax: 5765		
November 25	WTO Dispute Settlement Body Contact: Paulo Barthel-Rosa, tel: 5095, fax: 5761		
November 25	WTO Sub-Com. on Least Developed Countries Contact: Ingela Nilsson, tel: 5203, fax: 5774		
November 25-26	WTO Working Group on the Relationship between Trade and Investment Contact: Mark Koulen, tel: 5224, fax: 5790		
Nov. 30 - Dec. 4	WTO Committee on Rules of Origin Contact: Eki Kim, tel: 5584, fax: 5770		