

Confidence-building: A Cure for Post-Seattle Blues?

Two months after the Seattle debacle, WTO Members are cautiously starting to pick up some of the pieces. Countless analyses have pinned the blame on a variety of causes, all of which played their role: real and deep divisions about the scope of the new round; inadequate preparation in Geneva, which encouraged inflexibility and meant that key issues were not ripe for deal-making; flawed negotiating procedures; too little time; the labour linkage fuelled by US electoral politics, as well as the much-reported demonstrations and riots.

A first attempt to deal with the aftermath resulted in bitter finger-pointing at the 17 December 1999 General Council meeting, which ultimately agreed to delay consideration of Seattle follow-up to its first session in 2000.

Since then, WTO Director-General Mike Moore has conducted a series of informal consultations with Members about the way forward, particularly with regard to improving the WTO's decision-making and negotiating structures and the way to deal with expiring deadlines and provisions in WTO Agreements that were expected to be addressed through ministerial decisions at Seattle.

Built-in Agenda Negotiations Start in February

A more constructive atmosphere reigned at the General Council's meeting on 7-8 February. Members agreed to start the built-in agenda negotiations on agriculture and services on 23-24 March and 21 February respectively, based on the provisions in the Agreements themselves. The talks will take place in special sessions of the Committee on Agriculture and the Council for Trade in Services, to be held back-to-back with the regular sessions of the two bodies. The first sessions are not likely to start on substantive negotiations, but will attempt to agree on a mandate, work programme and rules of procedure.

The services negotiations will be chaired by Ambassador Sergio Marchi of Canada, who was elected chairman of the Council for Trade in Services on 8 February. A vice chair will be appointed later to conduct the regular Council meetings. The respective appointments for the Committee on Agriculture were still pending when this issue went to press (see page 4 for more details about agriculture).

First Step in Confidence-building: LDCs

WTO Members have agreed that at least some of developing countries' key concerns must be dealt with as a matter of priority in order to rebuild trust in the fairness of the multilateral trading system and get the WTO as an institution back to an even keel.

At the 7-8 February General Council meeting, a number of issues of particular importance to developing countries were on the agenda, some of which stemmed directly from unfinished business in Seattle, including initiatives aimed at better integration of least-developed countries (LDCs) in the multilateral trading system. WTO Director-General outlined steps taken in this direction in recent weeks, stressing that greater market access and capacity-building measures were 'never to be seen as a trade-off or leverage to gain agreement to a new round of negotiations'.

In Seattle, the European Union and Japan offered duty-free and quota-free access to 'essentially all' products of least-developed countries but failed to secure agreement from the United States and Canada. In the EU's case, certain 'sensitive' agricultural products were to be excluded, whereas the US sought to leave textiles outside the initiative. Instead, the US stressed its pending legislation that would increase market access for 'reforming' countries in Sub-Saharan Africa and the Caribbean, as well as greater technical assistance to LDCs.

Consultations are still going on between the Director-General and WTO Members regarding an LDC 'package'. A progress report is expected before the Easter break.

Transition Period Extensions Still Uncertain

Deadlines for compliance with several WTO Agreements remain a major concern for most developing countries, whose transition periods for full compliance with the Agreement on Trade-related Intellectual Property Rights (TRIPs), the Agreement on Trade-related Investment Measures (TRIMs) and the Agreement on Customs Evaluation expired on 1 January 2000. Least-developed countries have more flexibility for some of the provisions.

Some progress was made at Seattle in addressing these issues, but most of the key demands never came close to being met: the US in particular continued to oppose blanket extensions of the TRIPs and TRIMs deadlines, which it said it would at the most review on a case-by-case basis.

In its own draft declaration, the EU proposed a three-year extension of the transition periods of the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Customs Valuation, as well as a two-year extension for the TRIMs Agreement. On TRIPs, the EU proposed accepting developing countries' right to issue compulsory licenses to drugs on the WHO's essential medicines list,

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consideration of the relationship between the Convention on Biological Diversity and the TRIPs Agreement, and clarifying the effect of TRIPs Article 27.3(b) on the patentability of plants and animals and biological reproduction processes.

At the General Council meeting of 7-8 February, developing countries sought a multilateral agreement on three to five-year extensions, but no decision was reached. LDCs might still obtain some as part of the package currently under preparation, but so far developing countries have only managed to secure a 'gentlemen's agreement' that their non-consistent measures will not be challenged until trading partners have reviewed their individual specific requests (see separate article on page 9).

Consultations will continue on the issue, which will be on the agenda of the next General Council meeting on 3 May.

Other Implementation Issues

Before and during the Ministerial Conference, a great many developing countries resisted the inclusion of any 'new issues' to the built-in agenda, at least until an agreement to address imbalances in existing WTO rules and provisions had been secured. These demands were dealt under the loose cluster of 'implementation'. In addition to the deadline extensions, these included changes to some existing rules and a review of industrialised countries' implementation of Agreements and provisions in favour of developing countries. The implementation of the Agreement on Textiles and Clothing, as well as the Anti-dumping Agreement were particular priorities (see Bridges Year 3 No.8, pages 1 and 4).

The Seattle draft Declaration would have created a 'Special Mechanism' under the General Council to address the 'remaining issues relating to the implementation of existing WTO Agreements'. The process was to be completed within a year, and trade ministers were to review the results and take 'appropriate decisions' on outstanding issues at the Fourth WTO Ministerial Conference.

Most WTO Members acknowledge that they should address the implementation of existing Agreements – beyond the urgent question of deadlines – as part of the confidence-building effort, but it is still unclear where and how this should be done. The February 2000 General Council meeting did not discuss the wider implementation problems, but informal consultations are underway between Members on how to tackle the issue in the absence of a ministerial decision. The EU has developed a proposal on the subject, which – with the exception of measures aimed at LDCs – would leave the most difficult issues to be resolved as part of a wider negotiating round (see excerpts opposite). The General Council is likely to address implementation as a separate agenda item at its meeting on 3 May.

Textiles Concessions Are Unlikely

It was obvious throughout the tortuous Seattle negotiation process that – in an election year, with thousands of trade unionists in the streets – the US would neither agree to review its slow liberalisation of the textiles sector, nor to address anti-dumping. Briefing the House Means and Ways Committee on the US trade agenda at the WTO, US Trade Representative Charlene Barshefsky said on 8 February that US was meeting its 'own commitments, of course, in areas such as textiles'.

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Excerpts from the EU Implementation Proposal

Regarding the transitional periods, the EC recalls it was not *demandeur* for any extensions, but recognised the practical need of extensions on the part of some developing countries. The EC believes it necessary to continue to act sympathetically and flexibly in response to requests. It accordingly proposes the following approach consistent with the provisions of the relevant agreements:

On TRIMs and Customs Valuation, while extensions to transitional periods should be on a case-by-case basis, we should give sympathetic consideration to duly justified requests, which could in principle be granted for a period of up to 18 months or to the 4th ministerial conference.

For both Valuation and TRIMs, it would give greater legal security were Members to make a commitment not to engage in dispute settlement proceedings in respect of cases where Members have been granted a time-bound extension, for the duration of such implementation periods.

In view of the special difficulties faced by the least-developed countries, it is suggested, to provide greater legal security, to grant them a general extension of 18 months for the Customs Valuation Agreement provided that this is accompanied by an implementation work programme along the lines already developed with previous requests.

As regards the SPS Agreement, we propose that Members agree to extend for a further 18 months or until the fourth ministerial conference the transitional exemption from certain provisions for least developed countries.

Regarding the Subsidies Agreement, the EC had supported extension of Articles 6.1, 8 & 9 pending a review of their coverage. We are ready to discuss with other WTO members whether, and under what conditions, these provisions should be restored.

As regards TRIPs the EC is prepared to support the position adopted by most WTO Members, i.e. the moratorium on non-violation should be restored.

Regarding the proposal for an implementation work programme, the EC notes that even with adoption of the measures set out above, a number of implementation proposals made in the Seattle preparatory process still deserve detailed consideration. Members should be prepared to seriously take up the backlog of concerns, and to have a mechanism that, while allowing them to be individually discussed, subjects them to overview as an ensemble by the General Council. We propose therefore the launch of an implementation work programme that would evaluate all other outstanding implementation questions and draw up appropriate recommendations. This programme, which would be a continuation of the work begun according to the May 1998 Ministerial Declaration, could be carried out by individual WTO Committees and Groups who should report regularly to the General Council. This would be comparable to what would have been agreed at Seattle. *The implementation work programme should extend until the 4th ministerial conference which should consider how to address any problems that remain unresolved* (editor's italics).

Trade and Environment Après-Seattle

In spite of the demonstrators – some in turtle suits to protest the WTO's environmental record – the environment hardly amounted to a sideshow in the negotiations in Seattle. While several developed countries had made environment-related proposals in the run-up to Seattle, only two of these were raised at the Ministerial: fisheries subsidies and the establishment of a biotechnology working group.

The 'Principles Governing the Negotiations' section of the draft Declaration that ministers were working on when the talks collapsed stated that the negotiations should 'promote sustainable development and aim to make trade liberalisation, economic development and environmental protection mutually supportive' (paragraph 21). The draft also proposed that the Committees on Trade and Environment and on Trade and Development should 'within their respective mandates, each provide a forum to identify and debate the developmental and environmental aspects of the negotiations in order to help achieve the objective that sustainable development is appropriately reflected in the negotiations' (paragraph 22).

A bracketed preambular paragraph (12) on the relationship between trade liberalisation and the environment was unlikely to emerge in the final text, except perhaps as a general statement to the effect that the negotiations should seek to maximise synergies between trade liberalisation, economic development and environmental protection. Among other proposals, the paragraph referred to the need to ensure that trade liberalisation was did not conflict with sustainable resource management, as well as Members' right to apply high levels of environmental protection provided that the measures taken were not protectionist.

Biotechnology working group

Before the Ministerial, Canada, the United States and Japan had proposed the establishment of a WTO working group on biotechnology, although the terms of reference they sought were different (Bridges Year 3 No.8, page 12).

At Seattle, the European Commission caused a stir when it reversed its opposition to such a group. While Commission officials insisted that they would seek to address development, health, environmental and consumer issues (rather than the US mandate of ensuring speedy and transparent approval processes for bio-engineered products), EU environment ministers and concerned citizens' organisations objected to addressing biotechnology within the WTO. At the most, civil society organisations said, the EU should seek a clarification to the Agreement on Sanitary and Phytosanitary Measures that would recognise the precautionary principle as a valid reason to deny or delay entry of biotechnology products.

Five EU environment ministers issued a statement saying that negotiations on the Biosafety Protocol would be jeopardised by the establishment of a WTO working group. Those talks are now completed (see separate story on page 17), and trade diplomats very much doubt that the WTO biotechnology working group will see the light of day. Biotechnology exporters are likely to give the brand-new rules agreed under the Protocol for trade in genetically-modified organisms – both those intended for a release in the

environment and bulk commodities – a chance to prove their effectiveness in striking a balance between unnecessary trade barriers on the one hand and importers' concerns about the right to regulate in the absence of conclusive scientific evidence.

Fisheries subsidies

In the bitter and divisive debates over agriculture, implementation concerns and the transparency of the negotiating process, delegates never held in-depth discussions on the proposal to negotiate a phase-out of fisheries subsidies that contribute to the over-capacity of fleets and thus to a dangerous depletion of the world's fish stocks. At Seattle, some 25 countries – both developed and developing – backed the Iceland/US-led initiative, which emphasised the 'triple-win' nature of eliminating such subsidies: good for the environment, good for trade and good for the long-term development of the fisheries industry.

The draft Declaration text on fisheries (paragraph 34) states that a review of the Agreement on Subsidies and Countervailing Measures should include negotiations, *inter alia*, on 'certain subsidies that may contribute to the over-capacity in fisheries or cause other adverse effects to the interest of Members'.

However, no consensus emerged in Seattle to extend the negotiations to a review of the Subsidies Agreement, any more than to opening up other Agreements or negotiating new disciplines for investment, competition policy and government procurement.

The European Union said in Seattle that it was 'ready to contribute to future work in the framework of the WTO concerning fisheries subsidies' but it was clear that the EU would only consider the issue if it were part of the broad-based Millennium Round it was seeking. Absent a wider round, fisheries subsidies are highly unlikely to make it to the negotiating agenda, particularly since the European Union and Japan are among those WTO Members that most heavily subsidise their fisheries sectors.

Although some developing countries, such as the Philippines, supported the initiative at Seattle, others have noted that there are losses even in apparent win-win-win situations. Many of them are poised to exploit their fisheries sectors more fully, and must balance short-term economic growth against long-term sustainable development interests.

The WTO is not the only forum where fisheries management and subsidies can be addressed: countries are already supposed to phase out subsidies that contribute to over-fishing under the International Plan of Action for the Management of Fishing Capacity, adopted by FAO members in February 1999. The plan of action is non-binding, however, and its effectiveness in solving the problem remains to be proven (Bridges Year 3, No.1, page 14).

Some observers and trade delegates have suggested that the failure to launch a comprehensive WTO round offers an opportunity to vigorously pursue progress in the international environmental regime, pointing to the conclusion of the Biosafety Protocol as an example. Perhaps the Seattle failure will have a similar revitalising effect on the FAO fisheries management plan.

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The European Union, supported Hungary, Japan, Korea, Switzerland and Turkey offered to apply the stage three phase-in rate as of 1 January 2000 rather than 1 January 2002. Developing countries generally considered the offer insufficient.

Institutional Reform

One of the factors that helped derail the Seattle train was smaller countries' exasperation at the WTO's non-transparent 'consensus-building' procedures. Throughout the preparatory process, many of them complained about semi-official meetings where the majority of Members could not participate. In Seattle, working groups open to all delegations were set up on the clusters under consideration, but 'green room' meetings with far fewer participants were held simultaneously and many delegations – particularly from Africa and the Caribbean – felt that they were once again sidelined from real decision-making. Several Latin American countries and the members of the Organisation of African Unity issued statements warning that unless 'procedures designed to secure participation and consensus' were re-established, they would not be able to 'join the consensus required to meet the objectives of this Ministerial Conference.'

Institutional reform, or internal transparency as it is also known, has been a subject of consultations between the WTO Director-General and Members since Seattle. The issue was not discussed at the February Council meeting, but the Director-General proposed further consultations in March, possibly in an informal Heads-of-Delegation meeting or a special session of the General Council. He also stressed that the 'principle of consensus' was 'not negotiable'.

Although many Members now seem to agree that the negotiation procedures of the Seattle Ministerial were not the main cause of the failure, various approaches for increasing transparency are currently under consideration. The EU has outlined several immediate steps that could improve the preparation and organisation of future ministerial meetings, including advance agreement on the structure of such meetings, as well as a more transparent balance between 'informal processes and open-ended meetings'. The EU and Japan have also proposed setting up an Eminent Persons Group to consider all possible WTO institutional improvements. The group would then present its recommendations for the consideration of WTO Members.

The EU's institutional reform paper also contains a number of proposals designed to 'enhance transparency and consultations with civil society', such as the establishment of a formal accreditation system for NGOs or opening trade policy review meetings to parliamentarians and NGOs of the country under review. According to trade sources most developing countries are reluctant to discuss the subject.

Agriculture

Although agricultural negotiations will get under way 23 March, they are expected to proceed slowly, as the principal targets of the market opening drive – the European Union and Japan – will have little incentive to make politically-sensitive concessions. In the absence of the precise negotiating mandate that was to have been agreed in Seattle, the negotiations will proceed on the basis of Article 20 of the Agreement on Agriculture, which provides for the continuation of the liberalisation process but contains no precise goals or time frames for achieving the 'long-term objective of substantial progressive reductions in support and protection'.

Sub-paragraph 20(c) allows Members to take into account 'non-trade' concerns, as well as special and differential treatment for developing country Members while working towards the goal of a 'fair and market-oriented agricultural trading system'.

At Seattle, Members came closer to a compromise on agriculture than is generally recognised. The latest draft text recognised developing countries' right to special and differential treatment, which was to be 'embodied in the schedules of concessions and commitments and, as appropriate, in the rules and disciplines to be negotiated' so as to enable developing countries to take into account their development needs, including food security and agricultural and rural development. Paragraph 24 also provided for special attention to be paid to the situation of least-developed, net food-importing and small island developing countries.

The most controversial issues were export subsidies and multi-functionality. Virtuoso wording (paragraph 25(ii)) eventually emerged on the former where negotiations were to address 'export subsidies, and equivalent action in respect of the subsidy component of other forms of export assistance, in the direction of progressive elimination of export subsidies'. Multi-functionality disappeared from the text, but its key components remained under non-trade concerns, which in the draft text included 'the need to protect the environment, food security, the economic viability and development of rural areas, and food safety without prejudice to the Agreement on the Application of Sanitary and Phytosanitary Measures'.

Non-trade concerns were a subject of heated debate pre-Seattle and will continue to be contentious once the negotiations start. Developing countries will seek to enlarge the 'green box' agricultural subsidies in order to protect food security and rural employment. The EU, Japan, Korea, Switzerland and Norway will defend 'multi-functionality' – or the roles that agriculture plays in maintaining rural landscapes, employment and the environment. The multi-functionality argument is flatly rejected by the Cairns Group of fifteen developed and developing country agricultural exporters, which argue that eventually trade in agricultural goods must come under the same disciplines as trade in other goods.

In its statement on the EU's post-Seattle strategy, released on 25 January, the European Commission said that while the EU would 'participate in good faith in the scheduled negotiations', it noted that 'in the absence of a decision at Seattle to launch a new round as a single undertaking, there remains no time frame for the conclusion of these negotiations'. The EU has also made clear that the near-agreement reached in Seattle is now off the table and that negotiations will be pursued only on the mandate contained Article 20 of the Agriculture Agreement.

The US has warned, however, that it might significantly increase its own subsidies if Europe engages in foot-dragging. In addition, the 'peace clause' is due to expire in 2003. This Due Restraint Provision, contained in Article 13 of the Agreement on Agriculture, exempts domestic support policies and export subsidy arrangements from dispute settlement challenges. 'It's hard for me to see a situation in which the United States would agree to an extension of the peace clause absent a new agreement,' US special agricultural trade negotiator Peter Scher said on 12 January.

Labour

One issue united developing countries as no other in the pre-Seattle process, as well as at the Ministerial: the determination to

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US Complies with Shrimp-Turtle Ruling, At Least for Now

The United States considers itself to be in compliance with the Appellate Body rulings, adopted in November 1998, which condemned several discriminatory aspects in the application of the US import ban on shrimp but confirmed that the embargo itself was 'related to the protection of exhaustible natural resources' and as such legitimate under GATT Article XX(g). The deadline for implementing the Appellate Body rulings was 6 December 1999.

The contested ban, based on Section 609 of Public Law 101-162, concerned shrimp from all nations not certified by the US State Department as requiring mechanised vessels to use turtle excluder devices (TEDs) when trawling for shrimp in waters where sea turtles occur.

Among the Appellate Body's findings was that the national certification requirement amounted to an obligation for exporters to adopt essentially the same policy as the United States and as such had an unjustifiably 'coercitive effect' on foreign governments' policy decisions. National certification also discriminated against exporters that did use TEDs in uncertified countries, as well as against Asian countries, which were given less time and technical assistance to adjust to the measure than their Latin American counterparts. Furthermore, the AB deemed the certification process to be non-transparent and arbitrary, and faulted the US for not having seriously sought multilateral environmental co-operation aimed at protecting endangered sea turtles (Bridges Vol.2 No.7, page 9).

In response to these findings, the US did not lift the import embargo, but changed its application guidelines. The centrepiece of the new guidelines is replacing the nation-by-nation certification requirement by a shipment-by-shipment certification procedure. Changes were also made to implement the trade measure in a more transparent and non-discriminatory fashion. (For more information, see Bridges Year 3 No.2, page 5 and Year 3 No. 6, page 11. The new implementation guidelines are available as Public Notice 3086 on the US Federal Register Volume 64, Number 130, pages 36946-36952). In addition to the new guidelines, the US will offer technical training in the design, construction, installation and operation of TEDs.

On the multilateral co-operation front, the US in October 1999 participated in a workshop on sea turtle conservation, held under the auspices of the Australian government. Representatives of more than 20 countries – including the four complainants in the shrimp-turtle case (India, Malaysia, Pakistan and Thailand) – issued a resolution where they agreed to start consultations aimed at the conclusion of the Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and Their Habitats. Negotiations for the treaty – which, at least initially, is to be non-binding – are slated to start in the first half of this year.

Malaysia, NGOs Critical

While the US government considers to have implemented the WTO ruling in full, its compliance measures are contested from two very different quarters: the complainants in the case and US conservation organisations. The complainants still maintain that

only lifting the import ban would constitute 'good faith implementation'. Although Malaysia has reached an understanding with the US that it 'will not at this stage initiate proceedings under Article 22 or Article 21.5 of the DSU', the two countries have agreed that compliance proceedings may be initiated at a later date. The agreement, dated 22 December, states that Malaysia can request compensation or retaliation rights even after the deadline specified in Article 22.6, which requires the DSB to 'grant authorisation to suspend concessions or other obligations within 30 days of the expiry to the reasonable period of time'. Should a compliance panel be established under Article 21.5, Malaysia and the US agreed that both parties could appeal the resulting panel report.

Conservation organisations in the United States are equally dissatisfied with the government's implementation measures. Earth Island Institute, the Humane Society of the United States, the American Society for the Prevention of Cruelty to Animals and the Sierra Club have brought a case against the new guidelines to the US Court of International Trade, claiming that they would be impossible to monitor and enforce. The litigants argue that shipment-by-shipment certification would not effectively protect sea turtles, and thus falls short of adequately fulfilling the law's ultimate purpose. Section 609 provides that shrimp harvested with technology that may adversely affect sea turtles protected by the US Endangered Species Act may not be imported into the United States.

In April 1999, the Court of International Trade issued a preliminary ruling against shipment-by-shipment certification, finding it was 'on its face not in accordance' with Congressional intent in passing Section 609. Both sides have submitted supplementary information to the court, whose final decision is still pending. Should the court oblige the government to go back to nation-by-nation certification, a WTO compliance panel seems a near certainty.

NGOs Contest New Dolphin-safe Label

Before the shrimp-turtle case, the GATT tuna-dolphin disputes in 1991 and 1994 were undoubtedly the best-known environment-related cases to be adjudicated by the multilateral trading system. The first report condemned the US import ban on Mexican tuna caught with purse-seine nets – a method that contributes to dolphin mortality – and the second found against a ban on Mexican tuna re-exported from third countries. Among key findings was that a GATT contracting party could not discriminate against products on the basis of the way the product was processed or produced or, in this case, the method used to capture the tuna in question. While neither report was ever adopted, they caused a furore in much of the environmental community.

That community is up in arms again with regard to the latest developments in the tuna-dolphin saga: Earth Island Institute and nine other conservation groups have sued the Department of Commerce over new standards for a 'dolphin safe' tuna label in effect since 3 February. The previous dolphin-safe label was awarded to tuna caught without using encircling purse-seine

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nets. Under the new standards, both US and foreign vessels may use purse-seine nets as long as an on-board observer does not detect dolphins being killed or seriously injured during fishing operations. The National Marine Fisheries Service developed the new regulations to comply with the International Dolphin Conservation Programme Act.

Although the ban on purse-seine caught tuna was lifted nine months ago, most US importers did not purchase fish that did not meet the criteria of the 'dolphin-safe' label. Conservation organisations are now lobbying tuna companies to stick to those criteria rather than adopt the new label with its less exacting standards.

Arbitration of Ecuador's Retaliation Request Expected in March

An arbitration panel was established on 19 November to examine the level of trade retaliation Ecuador may impose against the European Union in compensation for the EU's continued non-compliance with WTO rulings against its banana import regime. Ecuador requested the right to 'suspend concessions' in several areas covered by the TRIPs Agreement, as well as the General Agreement on Trade in Services, because its 'ability to strike with the imposition of sanctions' was limited against the 'economic might' of the EU (Bridges Year 3 No.8, page 9).

The EU has contested the amount of 'nullification and impairment of benefits currently suffered by Ecuador', which the latter claims amounts to US\$450 million. The EU has also asked the arbitration panel to examine whether Ecuador was within its rights under Article 22.3 of the Dispute Settlement Understanding when it chose to seek cross-retaliation rather than increased tariffs on goods. The arbitration process should not take more than two months.

The EU's implementation status report to the Dispute Settlement Body on 27 January was short and essentially said that discussions were underway with interested parties regarding the EU's latest proposal (Bridges Year 3 No.8, page 9) while several other proposals 'had been received and were being studied'. The EU acknowledges that 'divergent views continue to be expressed by the main parties concerned, and even where there is apparent agreement, differences emerge in the details. As a result, no agreed conclusions can be reached at this stage.'

Meanwhile, the US and a number of Caribbean countries have submitted a proposal that would establish two tariff rate quotas, one of which would be open to all suppliers under the same non-specified tariff, and the other – smaller – quota where ACP bananas would enter duty-free and those from Latin America would pay a €115 tariff (instead of the €275 proposed by the EU). Bananas from the 'most vulnerable ACP countries (i.e. the Caribbean, *ed.*) would receive an additional margin of preference or support'.

The EU had proposed to grant import licences preferably based on a historical reference period, but if the interested parties could not agree on such a period, the licenses could be distributed on a 'first come first served' basis. The US-Caribbean proposal would award the licenses for the first quota based on the applicant's pre-1993 volume, and those for the second quota based on a reference period on 1995-1997. The licensing proposal would reduce European distributors' share in marketing Latin American bananas.

Panel Finds Section 310 of US Trade Act WTO Consistent

In an eagerly awaited ruling, a WTO dispute settlement panel report, released on 22 December, found that Sections 301-310 of the US 1974 Trade Act are consistent with the provisions of Dispute Settlement Understanding. Section 301, as the legislation is called for short, sets down the steps that the US Trade Representative must take when a foreign country is found in violation of international trade agreements. The European Union had claimed that the legislation in question violated DSU provisions, as its mandated timelines for retaliatory action could result in trade sanctions before the WTO dispute settlement process was complete (see Bridges Year 3 No.5, page 8).

The panel did find that Section 304, which gives the USTR the discretion to determine whether a WTO Member is violating its obligations even before the a definitive multilateral determination has been reached, was a *prima facie* violation of DSU rules and procedures. The existence of such legislation could have a 'chilling effect' on another country's trading patterns, particularly when the threat of unilateral action emanates from an economically powerful Member, the panel said, adding that in many cases 'merely carrying a big stick is as effective a means to having one's way as actually using the stick'. However, the panel considered that assurances provided in the Statement of Administrative Action that accompanies US implementing legislation for the Uruguay Round Agreements sufficiently removed the *prima facie* inconsistency and fulfilled the guarantees that the USTR would not use the discretion afforded by Section 304 to take unilateral action before the multilateral dispute settlement process is complete.

The ruling satisfied both parties. USTR Charlene Barshefsky said that Sections 301-310 would 'continue to serve as a cornerstone of our efforts to enforce our international trade rights', while EU Trade Commissioner Lamy called the report a 'victory for the multilateral trading system', saying the panel had 'clarified that [the legislation] can be used against other WTO Members only as long as it strictly follows WTO rules.'

Beef Hormone Update

The European Union's effort to convince the United States and Canada to accept compensation in the beef-hormone dispute has run to yet another hurdle: instead of increasing its import quota for hormone-free beef from the United States, the EU may terminate all of its meat imports from the US due to concern about US testing procedures for 24 chemical residues. The US does not test for the residues in meat for sale in the domestic market, and argues that US cattle farmers do not use the substances in question. The EU's Standing Veterinary Committee on 9 February extended by one month a mid-February deadline for banning all US meat imports in order to give US authorities time to improve the testing programme so it adequately guarantees that exports to the EU are free of unauthorised residues.

Until the residue issue flared up, the EU was trying to convert part of the trade sanctions it is facing in the beef hormone dispute to increased market access for North American beef certified to be hormone-free.

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Although the WTO Appellate Body ruled in February 1998 that EU's import ban on beef treated with growth hormones was not scientifically-justified, the EU refused to lift the ban until further studies had been conducted. The studies will not be completed before mid-2000, and the increased quota proposal was envisaged as 'interim compensation' before the EU can make a definite decision regarding 'hormone beef' imports.

The US is still considering changing some of the European product categories affected by trade sanctions. This so-called 'carousel' approach is hotly contested by the EU, which seeks to change the Dispute Settlement Understanding rules so that a country could only modify its trade retaliation targets after approval by all WTO Members.

In related news, the European Council issued a Decision (1999/879/EC) on 17 December prohibiting the sale and use of bovine somatotrophin (BST) in EU countries. BST is a synthetic hormone that stimulates milk production in dairy cows, but some recent studies have found it to be detrimental to animal health (Bridges Year 3 No.1, page 15). The Council Decision makes definite an earlier provisional moratorium on BST use, but specifies that the measure 'shall not affect the production of bovine somatotrophin in the Member States, or imports, for the purposes of its export to third countries'. Canada has also banned the sale and use of BST. Imports of meat and milk products from cows treated with BST are not affected in either country.

Hushkitted Aircraft Law to Be Judged by ICAO

A potential trade and environment conflict is to be judged by the International Civil Aviation Organisation rather than WTO, at least for now. The US is challenging the EU's pending legislation that would prohibit flights of hushkitted airplanes in Europe after April 2002 unless the aircraft was registered in the EU before April 1999. Hushkits are installed on most US-made aircraft to muffle engine noise. The EU says the measure is necessary to diminish noise around European airports, while the US contends that the measure is design- rather than performance-based and would benefit European aircraft manufacturers at the expense of US engine and hushkit makers. So far, bilateral talks have only resulted in the EU's suspending the law's implementation until 2002 in hopes that the ICAO General Assembly will adopt a stricter multilateral noise standard in September 2001. The US claims that the mere threat of the EU regulation entering into force has cost its aviation industry more than US\$2 billion in fleet depreciation and lost sales.

US Appeals FSC Tax Report

The Appellate Body is expected to rule on the WTO consistency of the US foreign sales corporation (FSC) tax system in the second half of February. A dispute settlement panel determined in September 1999 that the scheme amounted to an illegal export subsidy because it enables companies to save billions in income tax when exporting goods through subsidiaries set up in foreign countries. The EU, which brought the case, claims that the tax breaks may amount to US\$250 a year – the largest sum of money ever involved in a WTO dispute. The US appealed the verdict on 26 November 1999. A negative ruling might have an influence the congressional review of US participation in the WTO.

- The US lost another case related to the Agreement on Subsidies and Countervailing Measures when a panel ruled on 23 December that US countervailing duties imposed imports from British Steel were inconsistent with the Agreement. The US had argued that the benefits arising from government subsidies to British Steel when it was still a government-owned company justified the countervailing duties even after the company was privatised.
- India and the United States have reached an agreement that India will remove import restrictions on more than 1400 industrial and agricultural products by April 2001. About half the restrictions are to be lifted in April 2000 and the rest a year later. The Appellate Body ruled in September 1999 that, contrary to Indian claims, the restrictions could not be maintained for balance-of-payment reasons but remarked that India could be granted a longer implementation period than the customary 15 months in view of its status as a developing country. Prior to the US challenge, India had agreed with other WTO Members that the restrictions would be phased out by 2003. Some trade analysts have noted that India could counter a surge in imports through raising applied tariffs on the unrestricted products to the level of the bound tariffs it agreed to at the conclusion of the Uruguay Round.
- An interim panel ruling was issued to the parties in early January regarding the EU's challenge of the US Anti-dumping Act of 1916. Although the report is still confidential and subject to minor changes, sources said that the panel's conclusions were against the US. The EU had alleged that while the Anti-dumping Agreement only allows Members to impose anti-dumping duties when dumping occurs, the US Anti-dumping Act allows criminal proceedings against foreign companies, such as damages, fines or imprisonment. The US counters that the law is rarely used and that monetary damages or relief have never actually been awarded under it.
- A compliance report is due in February on Australia's implementation of Appellate Body ruling against its import ban on fresh, chilled and frozen Pacific salmon. The Appellate Body found in November 1998 that there was not enough scientific evidence to back Australia's claim that such imports would threaten the health of native salmonid stocks. Canada, which had brought the case, contested Australia's implementation measures and on 28 July 1999 requested WTO arbitration of Australia's compliance with the AB ruling, as well as the right to retaliate if Australia was found not to have implemented the ruling. At the request of Australia, an arbitration panel was established to examine the level of eventual Canadian trade retaliation. Canada had claimed that the Australia's trade barriers cost its salmon exporters C\$45 million in lost revenue.
- Compliance panels were established on 9 December 1999 on both Canada's and Brazil's implementation of Appellate Body rulings on the countries' subsidies to their rival aircraft manufacturers. Both subsidy schemes were ruled illegal export subsidies last August, and the two countries were given 90 days to either eliminate or substantially modify them. Each contested the others' implementation of the ruling.

Confidence-building, continued from page 4

keep questions related to labour out of the WTO. While the European Union also sought some sort of a forum to address the trade and labour linkage, it was the United States that clearly had the keenest interest, proposing a WTO working group to look into a number of sensitive questions, including child labour and respect for core labour standards (Bridges Year 3 No.8, page 14). Although US officials were careful to portray the proposed working group as only exploratory, developing countries wanted no part of it.

At Seattle, a working group on trade and labour was convened for less than an hour. The group came to no formal conclusion, but the time was sufficient to confirm that four-fifths of WTO Members were opposed to the establishment of the proposed WTO working group, as well as the joint ILO/WTO forum sought by the EU. Developing countries' suspicions were further strengthened by President Clinton's much-quoted comment to a local newspaper in Seattle that he would ultimately support trade sanctions for violations of core labour standards. While US Trade Representative Charlene Barshefsky tried to downplay the significance of the President's remark, it served as death warrant for introducing labour discussions in the WTO in any form at all.

The US continues to include labour in its wish-list for future talks, but Charlene Barshefsky acknowledged in her testimony before Congress that the US 'must address more effectively the reasons why many developing countries are suspicious of these discussions'. A proposal from future WTO Director-General Supachai Panitchpakdi could provide a venue for such discussions: he suggested in Seattle the convening of a once-off 'soul-searching' forum under the auspices of a neutral institution such as the United Nations or UNCTAD. Participants would include high-level government officials, as well as representatives of relevant international organisations such as the WTO or the ILO.

Dispute Settlement

The WTO's dispute settlement mechanism is another reason why developing countries are wary of taking on additional obligations – including environmental ones – under WTO Agreements. They see trade sanctions as a very effective weapon in enforcing WTO rulings against their restrictive trade measures because the industrialised countries are their principal export markets. They are, however, acutely aware of their own limited capacity to retaliate with sanctions to violations of WTO rules by the major players, due to the fact that their markets count only for a fraction of the overall exports of powerful trading nations. In addition, the imports are often necessary for the functioning of the local economy. Faced with this conundrum, Ecuador is currently seeking the right to retaliate in the intellectual property rights sector against the EU's continued non-implementation of the banana rulings (see separate story on page 6).

Conclusion

In the aftermath of Seattle, most WTO Members agree that confidence-building measures must be undertaken as a priority, although the details are still unclear. Beyond that, the EU and Japan continue to push for the rapid relaunch of a broad-based single undertaking. The United States has also said it wants a round to be launched this year, but has so far shown few signs of flexibility. Developing countries have limited interest in restarting the process. Their immediate concerns focus on the extension of transition periods and establishing a mechanism for the consideration of imbalances in existing WTO Agreements.

Trade and Environment, continued from page 3

The labour-environment linkage

Environmental activists may come to regret their close alliance with trade unionists in the run-up to Seattle and the ministerial itself. Rather than persuading decision-makers that the multilateral trading system must be more supportive of the environment, the demonstrations strengthened developing countries' suspicions about a quasi-automatic linkage between the environment and labour.

Commenting in January on possible ways forward after Seattle, one developing country diplomat said that developing countries would prefer a status quo – with no gains in the built-in agenda negotiations – to a wider round that could address their key interests if the price to pay was the inclusion of environmental or labour issues to the agenda (see cover story for more on labour).

If protectionist interests were not driving the trade and environment debate, many developing country delegates argue, developed countries would seek to advance the global environmental agenda through multilateral environmental agreements (MEAs), which offer more co-operative structures and measures to assist compliance than the WTO. They also point to the 'hypocrisy' of those who advocate changes to WTO rules for environmental protection but resist the conclusion of strong MEAs with effective enforcement mechanisms. At the WTO, such rules would play to the advantage of industrialised countries, while many MEAs involve costs in domestic compliance, as well as financial and technical assistance to developing country parties.

Environment in the WTO

Many trade diplomats agree that identifying 'triple-win' opportunities remains the most likely contribution the WTO can make to the trade and environment debate. Most also see the scope for that much-reduced post-Seattle.

If anything, the demonstrations – and what many saw as the US government's willingness to address the demonstrators' concerns – reinforced developing countries' resolve to keep the environment within the narrow confines of the Committee on Trade and Environment (CTE), which has not reached a concrete recommendation on any of the ten items on its agenda since the WTO's inception in 1995.

Many negotiators in Geneva doubt that the CTE will ever reach conclusions on such issues as the relationship between multilateral environmental agreements and WTO rules, or any question related to the larger principles governing the trade and environment linkage, such as discrimination based on production methods. After Seattle, many predict that such issues will only be addressed through dispute settlement rulings on specific cases. See also separate article on the CTE on page 9).

Before any significant gains in environmental matters can be envisaged in the WTO, three steps appear necessary:

- developed countries must show that they are serious about implementing existing MEAs, including technology transfer, financial assistance and benefit-sharing;
- developing countries concerns with the implementation of existing WTO Agreements must be meaningfully addressed; and, most importantly,
- labour must be de-coupled from the trade and environment debate.

Developing Countries Seek TRIMs Extensions

Eight developing countries presented requests for the extension of their transition periods for full compliance with the Agreement on Trade-related Investment Measures (TRIMs) at the Council of Trade in Goods meeting held on 24 January. Seven of them – Argentina, Chile, Malaysia, Mexico, Pakistan, Philippines and Romania – sought extensions varying from five months to seven years for protective measures in the car manufacturing sector. Colombia requested an extra seven years before lifting domestic content requirements for foreign direct investment in the food processing sector, arguing that the measures were necessary not only to protect domestic industry but also to discourage farmers from planting coca instead of food crops.

Developing countries were supposed to have eliminated TRIMs-inconsistent measures by 1 January 2000. Least-developed countries have until 2002 to phase out such measures. Under Article 5.3 of the TRIMs Agreement, the Council on Trade in Goods may extend the transition period – but does not have to do so – on request from a developing or least-developed country Member ‘which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council on Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.’

At the January meeting, the United States, the European Union and Japan urged the countries requesting extensions to start bilateral negotiations with them and others whose exports might be affected. Each case will be reviewed individually, in spite of developing countries’ argument that they should be able to address their requests directly to the Council on Trade in Goods rather than negotiate separately with all affected trading partners.

Several key demands of developing countries in the Ministerial preparatory process and at Seattle concerned extensions to implementation deadlines, most notably for the Agreement on Trade-related Intellectual Property Rights, the TRIMs Agreement, the Agreement on Customs Evaluation and the Agreement on Subsidies and Countervailing Measures. While the US in particular remained opposed to anything more than case-by-case examination of requests, the EU and Japan were closer to compromise on a blanket extension for at least some of the Agreements (see cover story).

Since the collapse of the talks, uncertainty surrounds the extensions issue in spite of a ‘gentlemen’s agreement’ reached at the 17 December General Council meeting to continue consultations among Members regarding expired deadlines and to ‘exercise restraint on the matters under consultation’. However, while agreeing to bilateral consultations on the TRIMs extensions, the US warned that it reserved its right to dispute settlement proceedings against any Member in violation of WTO Agreements.

Green-lighted Subsidies Extension Denied

Led by Malaysia, several developing countries objected to a short-term extension of the provision on non-actionable subsidies at the 20 December meeting of the Committee on Subsidies and Countervailing Measures. Article 8 of the Agreement on Subsidies and Countervailing Measures (ASCM) allows WTO Members to grant subsidies for certain types of industrial research, disadvantaged regions within regional development schemes, and

the adaptation of existing facilities to new environmental regulations, but according to Article 31 Member should have decided before the end of last year whether to extend the non-actionable nature of these subsidies ‘either as presently drafted or in a modified form, for a further period’.

Developing countries told to the ASCM Committee that all pending deadlines and lapsing provisions of WTO Agreements should be addressed together. Malaysia, Mexico, India and Indonesia also said that subsidies for development should be included in the non-actionable subsidies provision. The General Council discussed expiring provisions and transition periods at its 7 February session but did not come to a conclusion (see page 1).

CTE to Discuss Market Access at First 2000 Meeting

The Committee on Trade and Environment (CTE) will meet from 29 February to 1 March. The meeting will consider the market access cluster of the CTE agenda, which at previous CTE sessions has largely concentrated on trade barriers due to technical regulations and standards, as well as the environmental benefits of removing trade restrictions and distortions in such sectors as agriculture, energy, fisheries, forestry, non-ferrous metals, textiles and clothing, leather and environmental services.

Members may also raise any issue taken up at the CTE’s October meeting, including exports of domestically prohibited goods (such as mercury-based soaps and cosmetics manufactured in European countries for export to developing countries while domestically prohibited in the country of origin); and the relevant provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). At its October session, the CTE discussed a Secretariat paper entitled *The Relationship between the Convention on Biological Diversity (CBD) and the TRIPS Agreement: with a focus on Article 27.3(b)* (WT/CTE/W/125).

Before the Seattle talks broke down, there was a possibility that some elements of the Article 27.3(b) review, as well as the relationship between the CBD and TRIPs be included in a broad-based negotiation round. As the round never got underway, the TRIPs Council will continue to discuss the review of the patentability exemptions contained in Article 27.3(b) at its next session on 21-22 March.

The General Council has confirmed the following appointments as chairpersons of WTO bodies:

General Council: Amb. Kåre Bryn (Norway)

Dispute Settlement Body:
Mr Stuart Harbinson (Hong Kong, China)

Trade Policy Review Body:
Amb. Iftekhar Ahmed Chowdhury (Bangladesh)

Council for Trade in Goods:
Amb. Carlos Pérez del Castillo (Uruguay)

Council for Trade in Services:
Amb. Sergio Marchi (Canada)

Committee on Trade and Environment:
Amb. Yolande Biké (Gabon)

Committee on Trade and Development:
Amb. Ransford Smith (Jamaica)

UNCTAD X Reveals Continued Rift about New Round of Trade Talks

Few signs pointed to a narrowing of the gap between developed and developing countries regarding the launch of a new global trade liberalisation round at the tenth session of the United Nations Conference on Trade and Development (UNCTAD X), underway in Bangkok when this issue of Bridges went to press.

India's Commerce and Industry Minister Murasoli Maran stated forcefully that it was not in the interest of developing countries to conclude WTO treaties on investment or competition policy, and blasted efforts to bring labour or the environment into the WTO as 'backdoor protectionism'. Other developing country ministers spoke of developing countries' negative experiences with the maxim that development would follow liberalisation and adopting global rules. Malaysian Prime Minister Mahathir Mohamad called for reforms of the international financial system to reduce the volatility of footloose capital. Developed countries' continued agricultural export subsidies, as well as restrictive measures against developing countries' key exports, were repeatedly singled out as evidence of the unfairness of existing WTO Agreements. Instead of adding new issues to the trade liberalisation agenda, new talks should focus on the built-in agenda and the 'unfinished business' of the Uruguay Round, most developing countries emphasised.

Least-developed Countries

According to UNCTAD's newly-released *Least-developed Countries 1999 Report*, the world's 48 least-developed countries (about 13 percent of the world population in 1997) accounted for 0.4 percent of world exports and 0.6 percent of imports that year, representing a decline of more than 40 percent since 1980. The report recommends that the international community respond to LDCs' development needs through, *inter alia*, increased overseas assistance, debt relief, and opening markets to their exports.

In Bangkok, WTO Director-General Mike Moore renewed his plea for duty-free and quota-free market access for least-developed countries' products, but no new concessions emerged. Acceptance of the zero-duty market access initiative is the centrepiece of the LDC 'package' the Director-General is trying to put together as a start for his confidence-building effort at the WTO. Mr Moore also warned that the poorest countries could suffer the most if the round was delayed too long, because they would be left out of the various regional arrangements that stronger economies would be likely to deepen and conclude.

UNCTAD Action Plan for Globalisation for Development

UNCTAD X was to adopt a new Plan of Action for governments and the organisation itself, designed to make 'globalisation an effective instrument for the development of all countries and all people'. The draft Plan of Action (TD/L.361) stated that 'UNCTAD's major objective in the area of international trade should continue to be to assist developing countries to integrate them-selves more fully into, and derive benefits from, the international trading system'. UNCTAD should provide 'policy-analysis and consensus-building to identify more clearly the parameters of the development dimensions of the multilateral trading system' and support developing countries' capacity-building efforts in the area of international trade. Another priority would be the identification – through research, empirical evidence and development impact assessments – of the 'implications of existing and emerging multilateral trade rules for the development prospects of developing countries' (see opposite for selected highlights).

Highlights from UNCTAD's Draft Plan of Action

UNCTAD's Role in International Trade

Supporting by facilitating the development of a positive agenda for developing countries in future trade negotiations. This includes identifying which international trade policy tools are more supportive of development efforts in a globalized world.

Consensus-building on:

- Reducing tariff and non-tariff barriers in export sectors of interest to developing countries;
- Improving the level of tariff-free or reduced-tariff access to markets through national GSP schemes for all beneficiaries;
- [Maximizing market access benefits for the least developed countries] [Granting by developed countries of duty-free [and quota-free] treatment for [essentially] [all] products originating in LDCs, [and the contribution to improved market access for LDCs' exports by other developing countries,] combined with a multilateral and]*; and
- Anti-dumping and countervailing duties actions.

UNCTAD's Role in Trade and environment

Helping to ensure balance in the trade and environment agenda debate by highlighting issues of concern to developing countries and strengthening the development dimension.

Special attention should be paid to:

- Identifying policies to address major constraints faced by many developing countries in responding to environmental challenges;
- Enhancing understanding of effects of environmental requirements on developing countries' exports; and
- Promoting a broad programme of capacity-building on trade, environment and development.

Consensus-building with a view to identifying issues that could yield potential benefits to developing countries:

- Examining the economic and developmental implications of multilateral environment agreements;
- Examining ways to promote the indigenous development and transfer of environmentally sound technologies to developing countries, including through the implementation of relevant provisions in the TRIPS Agreement;
- Studying [the possible ways to include in the current intellectual property system the consideration of] ways to protect traditional knowledge, [innovations] and practices of local and indigenous communities and enhance cooperation on research and development on technologies associated with the sustainable use of biological resources;
- Examining ways to address developing country concerns in the area of exports of domestically prohibited goods;
- [Helping developing countries in enhancing understanding of the trade, environmental, including biodiversity, and developmental implications of biotechnologies, including genetically modified organisms in food and agriculture, as well as consistent, timely, transparent, science-based approaches to assessing the opportunities and risks associated with them;]*

* Brackets in the draft text denote lack of consensus among UNCTAD member governments.

Impact of Trade Sanctions and Social Labelling on Labour Standards

By Ulrike Grote

In the debate on international labour standards and globalisation there is no more emotionally evocative issue than that of child labour. This is not surprising as a quarter of a billion children aged between five and fourteen are estimated to work throughout the world, and about half of these work full-time. Inevitably, the question arises whether trade sanctions and other trade measures would help reduce the incidence of child labour and improve working conditions in developing countries. A ZEF study¹ found that trade measures are ill-suited instruments for improving the situation of child labourers in developing countries. Seventy percent of the children work in the agricultural sector. In urban centres, children are mostly employed in the informal sector and only five to seven percent are employed in the export sector. Therefore, only a very small proportion of the economy that depends on child workers is actually affected by trade sanctions.

But even if trade sanctions did improve the working conditions of a small percentage of child labourers in developing countries, they might ultimately do more harm than good. ILO research in India, as well as in Africa, found that a working child contributes on average between 20-25 percent of family income. This is a considerable proportion, which could make the difference between the family's survival and starvation. In addition, a child's working experience may even enhance the chances of his/her own and the family's survival more than a few years of formal education.

Even more importantly, a trade sanction affecting the formal sector would compel child labourers to seek employment in the unregulated, informal sector where jobs are generally more dangerous and lower paid. This is well-known from Bangladesh, where thousands of children were fired from garment factories as a result of international pressure on the industry.

Social Labelling

Social labelling² and codes of conduct are increasingly suggested and implemented as an alternative to trade sanctions. They are praised as market-based and voluntary – and therefore more attractive – instruments to raise labour standards. Codes of conduct are company statements that express a commitment to good labour practice, while social labels provide information via product labels on whether acceptable labour standards were applied in the production process, including the sensitive question of whether child labourers were employed or not.

The origins of social labelling can be traced back to the White Label initiated by a US labour union as early as 1899, declaring that clothing had been produced without women and child labourers. Nowadays, social criteria like 'no child labour', freedom of association, wage levels, working hours etc. have been developed for labels especially in the carpet market, the footwear and sports industry but also in the agricultural sector including flowers and forestry. The labels are known under names like Rugmark, Kaleen, Step, Pro-Child, Care & Fair or Reebok.

Enterprises often take the initiative to reinforce labour standards across the marketing channel as a result of public pressure. Preventive action is taken to avoid consumer boycotts and to

prevent accusations of exploitative or illegal business practices, as happened in the cases of Nike employing children or Adidas employing Chinese prisoners to make soccer balls. Today, consulting companies are increasingly hired to check on social accounting and to monitor across the marketing channel, particularly in the input sector in developing countries.

Social labelling basically addresses two market distortions: first, the market distortion on the production side in Southern countries where child labour and poor working conditions exist. The price premiums paid by consumers for the labelled product are expected to be channelled to the producers to be used for improving the working conditions of their employees. The second market distortion exists on the consumption side in Northern countries where many consumers are willing to pay higher prices, but lack information on whether a given good was produced at the cost of exploited workers or not. Social labelling can address the consumption side, especially in developed countries, because the information that the labels provide removes the distortion by internalising consumers' willingness to pay.

Even if trade sanctions did improve the working conditions of a small percentage of child labourers in developing countries, they might ultimately do more harm than good.

With these presumably positive effects on developing countries may seem puzzling that most social labelling schemes originate from major consumer markets in the North. Why have developing countries not initiated more social labelling schemes? After all, they are supposed to gain both via a reduction of child labour and an increase in producer revenue from labelled products.

We found two major reasons for this: first, some social labelling schemes pursue the removal of child labour without considering the consequences for the children concerned. Contrary to what might be expected, a ZEF study revealed that social labelling can make children and Northern producers worse off, while consumers – particularly in the North – and Southern producers benefit. The children are worse off because the danger remains – as with trade sanctions – that exporting companies will dismiss their child workers, who will then be pushed into the more hazardous jobs of the informal sector.

A second reason why developing countries have not initiated any social labelling programmes is the lack of incentives for Southern producers. While the latter could gain an increased market share for their labelled products at the cost of Northern producers, a mere threat of trade sanctions is not sufficient for them to meet the social criteria of a labelling program. Furthermore, insufficient monitoring of labelling programmes can easily lead to false labels, undermining the trust of consumers in the long run and thus causing the positive terms of trade for Southern countries to vanish.

Other problems with labelling schemes arise from the fact that these initiatives operate across different economic, political and legal environments. There are no guidelines with respect to their development, implementation or assessment. The fee for participating in a labelling scheme can also be too high to attract developing country producers. In the case of eco-labelling, where labels provide information on the environmental friendliness of a good, it has been found that companies had been pushed from the market because they could not afford to participate in the scheme.

Continued on page 16

Lomé Convention Successor Arrangement Agreed

On 3 February, the European Union and its 71 developing country Lomé Convention partners completed negotiations for a new Partnership Agreement that will gradually replace the current Lomé Convention, which expires on 28 February 2000.

The trade component of the Lomé Convention – the most comprehensive trade and aid pact between industrialised and developing nations for a quarter of a century – will be replaced by reciprocal free trade agreements that will be negotiated between the EU and regional groupings of former Lomé Convention partners by 2008. During that period, the EU will support regional integration between the Convention's African, Caribbean and Pacific members (the ACP states) in order to 'prepare them for the new trading arrangements' designed, *inter alia*, to stimulate trade between ACP states themselves. After 2008, Regional Economic Partnership Arrangements (REPAs) will gradually phase out trade barriers between the EU and the ACP groups, with the ultimate aim of arriving at reciprocal free trade at the end of a transition period that could be as long as 15 years.

In 2004, the EU will evaluate the situation of those ACP states that have decided they cannot conclude regional agreements with neighbouring countries. It will then study possible alternatives 'in order to offer these countries a new trade framework equivalent to their existing situation in compliance with WTO rules'.

The 38 least-developed ACP countries need not join the REPAs: as of 2005 at the latest, the European Union will open its markets to 'essentially all products' of all least-developed countries. This Generalised System of Preferences scheme is compatible with WTO rules as it does not discriminate between least-developed ACP members and other LDCs. Had the Seattle Round been launched, the EU was ready to offer the same market access deal to LDCs as of 2003.

Among the reasons for the sweeping changes, the EU says, was the declining share of the Convention's developing country partners in world trade, in spite of the preferential market access offered to many of their products under either the Convention itself or its special protocols on commodities such as sugar, beef, bananas or rum. Less acknowledged reasons involved the cost of the Convention to the EU, as well as its non-compatibility with WTO rules (Bridges Vol.2 No.6, page 3). Until 28 February 2000, the trade preferences were covered by a WTO waiver for the non-discrimination obligation, but other aspects of the banana protocol were successfully challenged by Latin American banana producers and the United States in 1998 (see page 7).

EU development aid to ACP countries will decline by roughly three percent over the period 2000-2005 under the new Partnership Agreement, which places great emphasis on the role of the private sector. It also contains a chapter on civil society, which promises consultations with non-governmental organisations about the 'national indicative programmes' of ACP countries, but no direct EU funding for NGOs in ACP countries.

Compromises were found for two essentially political issues: 'good governance' will not be an 'essential element' for favourable treatment, and the question of illegal immigrants will be resolved through bilateral negotiations as the need arises.

The new framework Partnership Agreement is likely to be signed Suva, Fiji, in May 2000.

EU Commission Defines Role of Precautionary Principle

Two papers released by the European Commission early this year, reveal that – in spite of proposed steps to strengthen independent scientific evaluation – the European approach to risk management remains ultimately political and inclusive of perceived public concerns.

Risk Management

On 2 February, the European Commission outlined in a Communication on the Precautionary Principle how it intended to 'apply the principle and to establish guidelines for its application'. The EU, whose precautionary approach to synthetic growth hormones in beef production was condemned by the WTO in the beef-hormone case, has also come under fierce criticism over its slow approval processes and labelling requirements for genetically-modified products in the WTO Committee on Technical Barriers to Trade.

In the Communication, the Commission says that it considers the precautionary principle a 'key tenet' of WTO Members' right to establish the appropriate level of protection of the environment, human, animal and plant health when there are 'reasonable grounds for concern' about potential hazards and 'the lack of scientific information precludes a detailed scientific evaluation'. While risk assessments should be carried out by scientists, the Commission says that the 'precautionary principle, which is essentially used by decision-makers in the management of risk, should not be confused with the element of caution that scientists apply in the assessment of scientific data'. The Commission further notes that while decision-makers need to be aware of the available scientific information, 'judging what is an "acceptable" level of risk for society is an eminently *political* responsibility'. Faced with an unacceptable risk, the Commission argues, decision-makers have a duty to find answers that take into account scientific uncertainty and public concerns.

However, the Commission says that when action is deemed necessary, measures based on the precautionary principle should be '*proportional* to the chosen level of protection; *non-discriminatory* in their application; *consistent* with similar measures already taken; and *based on an examination of the potential benefits and costs* of action or lack of action'.

Risk Assessment

In a White Paper on Food Safety adopted on 12 January, the European Commission proposed that EU governments agree to the establishment of a central European Food Authority, as well as new 'farm to table' legislation to 'bring more coherence to Community legislation covering all aspects of food products'. While the European Food Authority would focus on the 'establishment of risk assessments through scientific advice', be 'guided by the best science' and 'independent of industrial and political interests', it would leave risk management to the 'European institutions that are accountable to the European public'. Thus, decisions regarding food safety measures or legislation would still remain in the hands of national governments, the EU Council of Ministers and the European Parliament.

The Commission has invited comments on the White Paper until the end of April. Based on those, a definite legislative proposal is planned for September with a view of having the Food Authority in place by 2002.

Seattle and Sustainable Development

By Mark Halle

Among the different opinions on what happened at the Third WTO Ministerial Meeting in Seattle, one point seems to rally everyone – that Seattle changed things for good. Seattle represented the demise of the old way of preparing and conducting multilateral trade negotiations. Whatever ways are devised to take the multilateral trade agenda forward, they are unlikely to bear much resemblance with the approach followed in the past.

Trust and trade-offs

So, what reforms? It is important to preface a discussion of needed reforms with a note on how progress is made in a complex, political system such as WTO. Trade negotiations are similar in many ways to straightforward commercial negotiations. They are successful if there is an adequate level of *trust*, and they are successful if both sides are prepared to make *trade-offs*.

Seattle stood little chance from the outset, because the minimal level of trust had not been developed. They stood no chance at all when it became evident that the key players had not come prepared to make the trade-offs necessary for progress to occur. In approaching WTO reform, the governing questions are: what can be done that will rebuild the trust so badly damaged in Seattle; and how can the issues be assembled on the table in such a way that the right trade-offs become possible?

The most evident levels of distrust exist between Europe and North America (though more accurately it is Europe and several others against North America and several others). This distrust is most evident around the subject of agriculture, but it is really about the purity of the trading system. GATT was easy, because it essentially dealt with tariff barriers to the flow of manufactured goods. One of the reasons for WTO's tribulations is that it has tried to go on as if the issues – like agriculture – that it now deals with were susceptible to the same sort of treatment. They are not. Much of the motivation behind Europe's insistence that the diverse functions served by agriculture be acknowledged (the multifunctionality debate) may be protectionist, but not all of it is. Nor is agriculture the only sector characterised by multiple functions. Indeed, virtually the entire WTO agenda is made up of multifunctional issues.

Distrust is alive and well also between the rich and poor countries. The latter feel both cheated and excluded. It will now be hard to win their trust without concrete measures which both offer them a better deal and a more assured place at the table.

For all their raucousness, the NGOs would not have been able to muster such energy and visibility had they not tapped into currents, which run cold and deep in societies throughout the world. The methods and alliances of some NGOs may be deplored, but at the heart of NGO rejection of the WTO system is the widely-shared sentiment that it is up to societies – and not the forces of capital and economic self-interest - to choose the shape and character of their world. Some way will have to be found to deal with this sentiment – either by co-opting the NGOs World Bank-style, or preferably by finding appropriate means to recognize and incorporate these concerns in the workings of the multilateral trading system.

The Reform Agenda

What, then, is needed? The required action can be grouped into three categories: measures to improve transparency and participation; measures to address the impact of trade liberalization on sustainable development; and improved coherence and mutual support between the trade regime and other essential elements of the global institutional and policy infrastructure.

Transparency and Participation

Of all the reforms required of the WTO, the call for more transparency and more effective participation drew the most press. In many ways it is incredible that WTO should have got away with negotiating in (literally) smoke-filled rooms for so long after everyone else had moved on to recognize that a new world requires new institutions and new ways of taking decisions.

The WTO must come to grips with enabling effective developing country participation in the trading system, and find a way for genuine, balanced participation from legitimate civil society representatives.

But that is now over. The WTO will have to come to grips with enabling effective developing country participation in the trading system. It will have to find a way of allowing genuine, balanced participation from legitimate representatives of civil society. And it will have to operate in a way that is substantially more transparent than has been the case in the past. None of this is rocket science. Hundreds of other international organizations have grasped this particular nettle and turned it into a tasty soup. WTO's protests that it is different notwithstanding, it is not withstanding the wave of criticism levelled at it, and it is clear that its differentness has left the public indifferent.

Transparency measures will make it far more difficult for nations to say one thing to their public and another behind the locked doors of the WTO committee rooms. It will make it more difficult for them to agree a national position in public, then sell it out to commercial interests in private.

What applies to the WTO applies also, in spades, to national trade policy. The most diligent opponents of transparency in the WTO are countries that operate opaque systems back home. Those who oppose participation with the shrillest voices are from countries who discourage it at home. It is time to recognize that there is an emerging global standard (the Aarhus Convention symbolizes it) for transparency, participation and access to judicial processes which cannot be ignored. It is the basis of the new global governance.

One development which is clearly picking up momentum is the interest shown by parliamentarians. They can be counted on to play a more active role at both the national and transnational level, and can serve as a useful bridge between civil society and the WTO.

But participation requires more than an open door. It requires the capacity to walk through that door. Capacity to follow trade and to operate its rules in one's own favour is severely limited, especially in the developing world, but also in non-trade sectors in the rich countries. If there is one thing that is broadly agreed, it

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is that there must be a considerably greater effort made to build this capacity if the trading system is to operate effectively in the future.

Calls for capacity-building echoed through the halls in Seattle, and provoked a negative backlash. Desperate for something to show for its four days of work in Seattle, the developed countries hoped to look good by promising a massive increase in resources for training. While it is needed and urgent, it sounded a tad patronizing, and did not go down well with developing countries that had deployed their existing capacity *en masse* and were still denied entry to the negotiating rooms.

The fact remains, however, that building capacity within governments, civil society and the research community remains a high priority, and one area where positive action can quickly be taken.

Sustainable Development

Seattle made it clear that WTO's commitment to sustainable development remains almost wholly theoretical. A dedication to the notion is carried in the Preamble to the agreements closing out the Uruguay Round, but preambular language in a binding and enforceable legal agreement carries no more weight than such language would in a contract setting out the terms of a merger between two giant corporations. What counts is what is enforceable. The rest is for public consumption.

An examination of the texts being negotiated in Seattle before the collapse repeated the preambular dedication to sustainable development, but the legal text was disturbingly free of sustainable development commitments. So have we had no impact?

It is fair to say that the WTO is now paying for its blanket disdain of any group that was not a member state. In treating friendly and constructive forces in the same way as hostile ones, it has missed the opportunity to collaborate with the former and to move forward in a way that might have afforded it some protection from the latter.

One problem is that the WTO has never been clear about the goal that trade liberalization is intended to reach. This may be because articulating such a goal would give ammunition to those who feel that WTO should be judged by the progress it makes towards that goal. If the goal is economic growth of the GDP kind, WTO will not win broad support. The goal must be wider.

The time is right for WTO to articulate its end-purpose and that end-purpose should be sustainable development or something very similar. Sustainable development would link WTO with many other international processes, but more important it would provide the basis for developing filters in the absence of which the WTO is flying blind. Is TRIPs a good agreement or a bad agreement? The answer depends on what one believes it aims to achieve. If, however, the goal were clearly sustainable development, then TRIPs could be judged on the extent to which it advances – or impedes – the achievement of sustainable development.

There is still much work to be done in looking at the real sustainable development impact of existing WTO agreements and practices,

without even raising the issue of new agreements. Sustainable development is a factor in all of the WTO agreements, and not just in those issues covered by the Committee on Trade and Environment or those focused on the developing country interests. Sustainable development interests must be looked at in the context of all aspects of WTO's work. Ideally, all areas of WTO's work should contribute to the advancement of sustainable development.

The coming years will require a rededication of the WTO to broader goals, and an agreement to put all of its actions to the test of compatibility with these goals. The current wave of assessments is a good step in that direction, and will provide much empirical ammunition for the coming discussions with WTO. But the process should go further. It may be the only way to generate the confidence in WTO needed for the coming reforms.

Coherence

Hearing the WTO repeat like a mantra that trade liberalization is good for the environment, good for the poor, good for development, indeed just plain good was grounds enough for the Seattle riots. It has long been clear that trade liberalization *can* be good for sustainable development but only provided that trade, development and environment policies are harmonious and mutually-supportive. By and large, they are not, with the result that trade liberalization has undermined development objectives and damaged the environment.

Real compatibility among key policy sectors will not be possible until there is an equitable means of adjudicating among the different and conflicting policy objectives, and a set of principles to guide such adjudication. There is no single answer, but in respect of trade policy, it is clearly important that *frontier commissions* be set up to examine the interface between the different policy areas. This means both a heightened effort in areas such as the environment to achieve coherence among its own policies and positions, allowing the environmental community to negotiate with the trade area on a more nearly equal footing. It also means tying progress in trade liberalization to progress in other key areas – and thus achieving the trade-offs noted above.

Conclusion

Every crisis is an opportunity, and if Seattle was a disaster for the cause of liberalized trade, it was also a clarion call for change. WTO had been on a collision course with the developing countries and with social and environmental interests for some time. That they finally collided is not a surprise, although it is somewhat astonishing that the collision took place so soon and so violently.

For those who believe that the economic growth made possible by trade liberalization is a necessary ingredient of sustainable development, the debacle is the prelude to an era of exceptional opportunity (assuming that WTO does not go the hedgehog route of rolling up into a ball and aiming the bristles outwards). If we know where we would like to end up on transparency and participation, on sustainable development, and on policy coherence, it does not mean that we are clear about the best way to get there. We will need energy, creativity, and the ability to put aside old quarrels in the common search for a better outcome.

Mark Halle is the European Representative of the International Institute for Sustainable Development and the Chairman of the Board of ICTSD

WTO Rules and the Application of the Precautionary Principle

By Halina Ward

The public concern now associated with decision-making in the face of scientific uncertainty has grown considerably in recent years, but the fundamental principles of international trade law have not caught up. GATT Article XX for example – which includes environment-related exceptions to GATT rules – was written in the 1940s, at a time when ‘scientific uncertainty’ was not the key policy issue that it is today. Article XX was simply not designed to draw effective balances between trade and other policy objectives in the face of uncertainty.

The precautionary principle potentially interacts with the rules of the multilateral trading system in three main ways:

- When WTO rules have an impact on domestic regulation. Here the issue is one of finding the proper balance between trade and ‘precautionary’ disciplines. To what extent will dispute panels in the future be prepared to look inside the national regulatory process? For the WTO, the best approach to tackling precautionary measures lies with the so-called ‘deference principle’; in the idea that the WTO should accord deference to the policy choices of its Members.
- Via the link between the rules of the multilateral trading system and general principles of international law. Here the issue is to what extent the WTO rules and dispute settlement should take the precautionary principle into account on the basis that it has become a general principle of international law.
- In terms of the burden of proof applied in WTO dispute settlement. The precautionary principle tends to support a reversal of the burden of proof. The issue here is how to ensure that WTO rules do not provide incentives for exporting countries *not* to gather scientific evidence of risks associated with their exports – i.e. that there should be no presumption in favour of trade at the expense of proper science assessment.

An additional critical issue concerns the implications of the WTO rules for new agreements based on precautionary approaches, such as the biosafety protocol negotiations or the convention on persistent organic pollutants. Here the concerns are currently largely political, recently demonstrated by the row surrounding proposals from the US, Canada and Japan that a biotechnology working group be established within the WTO. Some fear that this could transfer negotiations on genetically modified organisms from the biosafety protocol to the WTO. An additional concern arises out of the insistence of countries exporting genetically modified crops that WTO rules should take precedence over any biosafety protocol. Many fear that this poses a threat to progress in clarifying the relationship between the WTO and multilateral environmental agreements.

Three areas of the WTO’s rules are particularly relevant to the precautionary principle:

- the General Agreement on Tariffs and Trade (GATT) itself (mentioned above);
- the Agreement on Technical Barriers to Trade (TBT Agreement); and
- the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The relationship between the TBT Agreement and the precautionary principle hinges on the requirement that measures be the ‘least trade-restrictive’ necessary to meet desired policy objectives, taking account of the risks that non-fulfilment of those objectives would create. A dispute currently before a WTO dispute panel over a French asbestos ban will provide a first opportunity for interpretation of this requirement within the WTO’s dispute settlement system.

Unlike the TBT Agreement, the SPS Agreement’s approach to curbing protectionism is science-based. The WTO SPS Agreement allows Members to take protective measures in the face of threat from one of a number of specific causes (e.g. disease-causing organisms) so long as certain conditions are met, including that the measure is based on a risk assessment. The Appellate Body in the *Beef Hormones* case said that there must be a ‘rational relationship’ between a risk assessment process and the measure under consideration. If this simply reflects a procedural requirement, it potentially accommodates the precautionary principle. If on the other hand it expresses a substantive requirement, it could have a ‘chilling effect’ on precautionary measures for the future.

The SPS Agreement also envisages temporary measures in cases of scientific uncertainty. In circumstances where there is inadequate scientific evidence on which to base a measure, Article 5(7) of the SPS Agreement allows Members to introduce measures under certain defined circumstances which effectively reflect a qualified approach to the precautionary principle. The substantive requirements that must be met by a measure falling within Article 5(7) were outlined by a WTO panel in the *Japan Varietals* case, including that the measure must be based on available pertinent information and that it must be reviewed within a reasonable period of time. Whether the restrictive requirements set in this case are appropriate remains to be seen.

Is the precautionary principle only relevant to the North?

The principle of ‘common but differentiated responsibility’ is familiar in the international environmental policy field, particularly in multilateral environmental agreements where funding for developing countries is often an important negotiating issue. But a real challenge is how to apply this principle in the WTO, where the related notion of ‘special and differential treatment’ has not been effectively operationalised.

The SPS Agreement places considerable emphasis on risk assessment and therefore on scientific evidence. But can it be assumed that all WTO Members have the same capacity to access and assess science? Ensuring that developing countries have access to science and risk assessment presents a huge challenge. Without that access, developing countries may have real difficulties taking advantage of the opportunities that the SPS Agreement offers for precautionary action.

Where should disputes be settled?

The interests at stake in any given dispute over the relationship between the precautionary principle and trade are likely to be the same irrespective of where the dispute is settled. But different dispute settlement processes may bring different instruments to

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bear. In the WTO, the distinguishing feature is the possibility of recourse to trade sanctions by a 'winning' complainant against the country imposing the WTO-illegal trade restrictive measure.

Choosing the WTO as the forum in cases involving environment or health and safety (as the US and Canada did in the *Beef Hormones* case) may do the WTO a disservice, by forcing its dispute settlement system to tackle cases that its rules are ill-equipped to deal with. Nonetheless, the environment and trade interface remains fraught with 'baptist/bootlegger' coalitions: there are relatively few environmental cases with no real economic interest behind the disputes as well as genuine advocates of environmental protection. For example, the potential disputes around genetically engineered food – highly significant from an environmental perspective – can from an economic perspective be seen as disputes about segmentation or non-segmentation of markets.

There is currently no rational basis for allocating jurisdiction between different tribunals. Within the WTO, one way to address the issues is to make more use of mediation and other alternative dispute resolution techniques that allow a broader range of considerations to be taken into account than in more adversarial approaches to dispute settlement.

The need for guidelines

Some people argue that guidelines need to be developed on the precautionary principle and trade to prevent it being invoked in support of protectionist measures. Others are nervous of moves to negotiate on the proper delineation of the precautionary principle in the WTO. Instead, they suggest that WTO dispute settlement panels should consider the wealth of existing material on the precautionary principle on a case by case basis.

While it might be useful for the WTO to eventually incorporate an effective set of provisions on the environment, a major challenge will be to avoid forcing the WTO effectively to make determinations on 'right' and 'wrong' on the scale from risk identification and evaluation through to risk management and science assessment.

If one accepts the argument that there is a need for simple, well thought-out, practical guidelines on the application of the precautionary principle to be developed, suggested criteria for the application of the principle might address:

- *The role of science*: that measures need to be based on a risk assessment
- *Proportionality*: that action should be proportionate to the seriousness of the risk, and moderated by the degree of uncertainty. Severely restrictive action should not automatically be justified.
- *Erring on the side of safety*: that where there is scientific uncertainty, there should be a tendency to err on the side of caution.
- *Cost-benefit analysis*: that a cost-benefit exercise of the benefits of taking or not taking action should be undertaken.
- *Review*: that action should be reviewed in the light of scientific developments.
- *Transparency*: that it is essential that measures and the processes leading up to their adoption are transparent.

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Given these open questions and adverse implications on the welfare of people, social labelling can only be judged as a second-best policy. Instead, the market distortion on the production side must be addressed through policies based on a country's own social and development conditions and goals. Very often, social labelling schemes fail to take into account local wage levels and the economic causes of child labour. The international community should think about how to assist developing countries in addressing these market distortions, but with positive means and policies such as financial and technical assistance.

There certainly is a need to eradicate the worst forms of child labour as proposed by the new ILO Convention of 1999. These include child slavery, sexual exploitation and hazardous work, including forced recruitment of children for use in armed conflicts. It is also very important that all children should have the right to an education, as recognised in the Convention on the Rights of the Child adopted in 1989 by 191 signatory countries.

However, there is an often neglected need to directly address the underlying economic conditions that lead poorer families to send their children to work. Instead of trying to influence the demand side of the child labour market – through trade sanctions or labelling programs – more attention should be paid to the supply side: the families concerned should be encouraged and enabled to send their children to school instead to work. The interrelationship between the market for schooling and that for child labour must be taken into account. Schools and other education facilities need to be made more available and access to them needs to be facilitated. If child labourers who decide to go to school cannot do so because of their age, they become permanent integrated into work life.

Other policy measures that impact the supply side of the child labour market include microfinance projects that improve family incomes and enable them to survive without the additional income of their children. Direct subsidies that cover school-related expenses, cash stipends or food programs such as free school lunches have also proven very effective in curbing the supply of child labour. With limited resources for combating child labour, it is important to carefully analyse the local causes of child labour so that alternative policy recommendations may better be evaluated.

To sum up, trade sanctions and social labelling may improve the working conditions of a small percentage of child workers in developing countries, and in marginal cases may even result in some families sending their children back to school. However, the underlying economic conditions that have led the poorer families in those countries to send their children to work must be addressed directly within the context of overall economic development policy if permanent and comprehensive solutions are to be found. The best method for eliminating child labour is not through trade sanctions or social labelling but through a greater allocation of resources toward eliminating the market imperfections that lead to the emergence and persistence of child labour in the first place.

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¹ Ulrike Grote; Arnab K. Basu and Diana Weinhold. *Child Labour and the International Policy Debate – The Education/Child Labour Trade-Off and the Consequences of Trade Sanctions*. ZEF-Discussion Papers on Development Policy, No.1, Bonn 1998.

² Arnab K Basu; Nancy H. Chau and Ulrike Grote. *Guaranteed Manufactured without Child Labour*. Oct. 1999 (forthcoming).

‘Victory for the Environment’: the Cartagena Protocol Is Based on the Precautionary Principle

‘A victory for the environment, for the international community and citizens throughout the world,’ was how Colombia’s Environment Minister Juan Mayr characterised the Biosafety Protocol adopted by 135 countries on 29 January after five years of negotiations.

The Cartagena Protocol, as the new treaty is called, will have more impacts on international trade than any multilateral environmental agreement ever concluded. Negotiated as an auxiliary agreement under the Convention on Biological Diversity, the Protocol regulates transboundary movements of bio-engineered agricultural goods with the objective of ‘ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.’

‘A breakthrough for international agreements on trade and environment’, in the words of EU’s Environment Commissioner Margot Wallström, the Protocol will allow countries to bar imports of genetically-engineered crop seeds or bulk agricultural commodities even when ‘scientific certainty due to insufficient relevant scientific information and knowledge’ is lacking on the imports’ potentially harmful effects. These provisions, contained in the Protocol’s Articles 10 and 11, codify the precautionary principle in international environmental law and may in time be tested against the WTO Agreement on Sanitary and Phytosanitary Measures, which requires trade restrictions to be based on sound science and conclusive risk assessments.

When talks on the pact broke down in Cartagena, Colombia, in February 1999, a large number of developing countries and the EU were seeking a strong agreement with a wide coverage. They were pitted against the Miami Group of six countries mainly interested in avoiding disruption and ‘red tape’ in the biotechnology trade: the United States, Canada, Australia, Argentina, Chile and Uruguay. A ‘compromise group’ (Japan, Mexico, Norway, South Korea and Switzerland) sought to reconcile the positions without weakening the Protocol’s effectiveness in protecting biodiversity.

The Cartagena meeting, which was to adopt the Protocol, floundered on three main issues: the scope of the agreement, basing decisions about imports containing living modified organisms (LMOs) on the precautionary principle and the Protocol’s relationship with other international agreements, most particularly those of the World Trade Organisation. Other key questions were also pending, including the definition of LMOs and labelling requirements (Bridges Year 3 No.2, page 11).

Scope

The Cartagena Protocol finally concluded in Montreal covers transboundary movements of two distinct categories of genetically-engineered agricultural products: LMOs intended for ‘intentional introduction in the environment’ and LMOs intended for ‘direct use as food or feed, or for processing’.

The first category includes transgenic crop seeds for planting, live fish and the like, while the second covers commodities that contain LMOs, such as corn to be processed to flour or oil.

LMOs intended for ‘intentional introduction in the environment’ are subject to a full Advanced Informed Agreement (AIA) procedure embodied in Article 10, which requires the recipient country’s express consent for such shipments. Environmental hazards from LMOs released into the environment could include pesticide-resistant weeds bred through cross-fertilisation with indigenous plants and damage to beneficial insect life, among others. There are no known dangers to human health, but consumers in many countries are concerned about the potential long-term effects of ‘novel foods’ produced with transgenic crops.

The question of bulk commodities was one of the crucial battles of the negotiations. Until late in the negotiation process, the Miami Group resisted the inclusion of these under the Protocol, claiming that biological diversity would not be affected by them, and that international food trade would be

unnecessarily disrupted if the AIA procedure had to be applied to LMO commodity movements. In Montreal, the Miami Group made a major concession: LMO commodities are covered by the Cartagena Protocol, although the recipient country’s informed consent procedure is less stringent than for LMOs intended for release in the environment.

Countries’ decisions regarding permission to import LMOs and LMO commodities must be based on a risk assessment ‘carried out in a scientifically sound manner’. The principles, methodology and points to consider in such an assessment are set out in an annex. However, an ambivalent paragraph in Annex II states that ‘lack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk’. The cost of the risk assessment will be borne by the exporter if the importing country so requires.

Labelling

Labelling was the final issue that held up the adoption of the Protocol. According to Article 18.2, LMOs intended for release in the environment must be accompanied by documentation that ‘clearly identifies them as living modified organisms; specifies the identity and relevant traits and/or characteristics, any requirements for the safe handling, storage, transport and use, the contact point for further information and, as appropriate, the name and address of the importer and exporter; and contains a declaration that the movement is in conformity with the requirements of this Protocol applicable to the exporter’.

Compromises were made on all sides with regard to labelling bulk commodities. For the first two years after the Protocol’s entry into force, exporters must provide documentation that says a shipment ‘may contain living modified organisms that are intended for direct use as food or feed, or for processing’. Parties to the Protocol will decide after that period whether more detailed information on the

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LMOs in question should be provided, 'including specification of their identity and any unique identification'.

Depending on how importers and markets react to commodities labelled 'may contain' LMOs, exporters of such products may eventually need to segregate genetically-modified seeds and commodities from non-LMO shipments. Biotechnology companies have argued that, to be effective, the entire production chain, including transport would have to be segregated. The cost of two parallel production and distribution systems could amount to billions of dollars, they say.

The Precautionary Principle and the WTO

'Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question [...] in order to avoid or minimize such potential adverse effects.' It is these words that, for the first time, spell out the 'precautionary principle' in a multilateral environmental agreement.

The legal coherence between the Cartagena Protocol and its precautionary approach and the WTO's Agreement on Sanitary and Phytosanitary Measures, which requires scientifically proven evidence of harm, remains unclear because the provisions on the relationship between the regimes seem to a large extent to cancel each other out. Abandoning a prolonged battle on an article that would have made the relationship explicit, negotiators compromised on addressing the issue in the preamble, which says that Parties to the Protocol:

- Recognise that trade and environment agreements should be mutually supportive with a view to achieving sustainable development;
- Emphasise that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements; and
- Understand that the above recital is not intended to subordinate this Protocol to other international agreements.

The Miami Group had sought an article that would specify that 'rights and obligations under any existing international agreements' would not be affected by the Protocol, thus preserving WTO Members' right to challenge potential trade restrictions as violations of the SPS Agreement.

Although the statement that 'the above recital is not intended to subordinate this Protocol to other international agreements' is likely to make countries reluctant to initiate WTO disputes against Protocol Parties' approval processes, US officials stress that the essence of the WTO/Cartagena Protocol relationship is contained in the preambular paragraph on the rights and obligations under existing international agreements, rather than the 'political statements' contained in the other two paragraphs.

For the WTO, a dispute against a Member's trade measures taken pursuant to the Cartagena Protocol would mean stepping on a minefield. The shrimp-turtle or beef-hormone cases were serene affairs compared to the vehemence that battle between trade and environment would arouse (see related article on page 15).

The Keys to Success

According to Minister Mayr, who chaired the final negotiating session in Montreal, two factors in particular helped the conclusion of the Protocol: a changed environment and an inclusive and open negotiating structure.

The changed environment was largely due the events in Seattle: first, agricultural biotechnology exporters – companies as well as governments – now realised that there was virtually no chance of opening up markets for their products through a WTO working group, which would have been likely to stress consistency with trade rules more than environmental or consumer concerns (see page 3). There was more flexibility because most agricultural biotechnology companies agreed – however reluctantly – that without internationally-agreed rules on safety, public mistrust would continue to mount and might eventually threaten all trade in their products, particularly in Europe but increasingly in other countries as well. Second, after the protests in Seattle, countries could ill afford a failure in addressing environmental and health concerns.

Minister Mayr also said that the informal setting, with five groups of countries represented by spokespersons, created an atmosphere of trust and helped ensure the transparency of the negotiation process. The presence of environment ministers at what was not officially a ministerial-level meeting provided political will, while civil society and the press present in the plenary hall put negotiators under pressure to seriously seek solutions.

The Cartagena Protocol on Biosafety will enter into force three months after fifty countries have ratified it.

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Liability Protocol for Hazardous Wastes

Parties to the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal on 10 December 1999 adopted the first liability protocol ever concluded under a multilateral environmental agreement. Green groups said they feared the treaty would incite generators of hazardous wastes to export the problem rather than minimise the production of such wastes.

Under the new Protocol, the notifier of a hazardous waste shipment must compensate for any damage that occurs before the disposer takes possession of the wastes. If the state of export is the notifier, or if no notification has taken place, the exporter is liable, but again only until the disposer has taken possession of the wastes. The minimum level of strict liability is US\$1.38 million for any one incident involving a hazardous waste shipment up to five tonnes. The minimum amount increases with the tonnage, up to a maximum of US\$41.1 million for any one incident.

Fault-based liability will exist for any person who 'caused or contributed to' damage by a lack of compliance with the Basel Convention's provisions, or by 'wrongful intentional, reckless or negligent acts or omissions'.

An 'opt-out clause' exempts Parties of liability under the Protocol if an incident occurs between countries that have a bilateral or regional liability regime that offers the same level of protection.

In spite of developing country efforts, no fund was established under the Protocol for emergencies or compensation when the notifier/exporter cannot be identified or is unable to pay.

Globalisation and Sustainable Human Development

ICTSD convened the second of a series of three regional policy dialogues in Bangkok, Thailand, from 24-26 November, 1999. The aim of the dialogues is to provide region-specific inputs for crafting new policy approaches and helping developing countries to manage their insertion in the globalisation process in a way that supports sustainable human development (SHD) objectives. The Asia Dialogue, hosted by UN-ESCAP, was convened in support of the UNCTAD/UNDP Programme on Globalisation, Liberalisation and Sustainable Human Development (for coverage of the Latin American dialogue see Bridges, Year 3, No. 8).

Participants at the dialogue stressed that significant differences remained in the capacity of different producers to respond to the opportunities produced by globalisation and trade liberalisation. In many Asian economies, the majority of producers in large and important export markets such as cotton or textiles – which receive considerable trade exposure at every stage – are small-scale, informal sector or cottage industry producers who possess few assets. A case study of the cotton market in Pakistan showed there were about 650,000 cotton farmers (out of a total of 1.3 m) who own less than 1 hectare of land each, and about 250,000 small-scale cottage industry textile weaving units. Rent distribution is adversely affected because established large-scale enterprises can respond better and faster to market-driven and regulatory measures owing to their preferential access to credit, technology and government resources. In an exercise resembling a planning commission meeting, participants reviewed figures and analysis on production conditions along the length of a production chain to assess and make recommendations on the potential of small producers to respond to changes in market or policy conditions.

Instead of policies for financial sector reform to attract bonds, equity or bank loans, participants focused on investment regimes that could stimulate the growth rate of the economy, produce equitable and efficient transformations in domestic export markets, as well as promote SHD. It was suggested that foreign direct investment that involves indigenous social capital and entrepreneurs in multinational corporation projects could be encouraged through points of merit awarded by intergovernmental organisations to companies that practice such policies. A lender of last resort, comprehensive global financial supervision and regulation, and an Asian Fund were among regional-level actions proposed to provide the poor insurance and credit against the irreversible effects that imperfect capital markets and lasting economic downturns can have on health, schooling and nutrition.

Participants noted that investment in such areas as equipment and production methods, upgrading work conditions and skills, and removal of gender biases would strengthen export prices and terms of trade. They also examined structural advantages related to the region's demography and identified health investment policies that could affect technological change, terms of trade, increase savings, and even bring about favourable adjustments to world interest rates.

Recommendations from the Asian and Latin American dialogues were presented at a parallel event at UNCTAD X. The date and venue of the Africa dialogue will be announced shortly on ICTSD's web site.

For more information on the dialogues, contact Ali Dehlavi at ICTSD, tel: (41-22) 917-8352, fax: 917-8093, e-mail: adehlavi@ictsd.ch, internet: <http://www.ictsd.org/html/dialogues.htm>

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BRIDGES Weekly Trade News Digest

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MEETINGS

WTO meetings take place in Geneva.
Dates may 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.

Feb. 28 - Mar. 1 Edinburgh	OECD Conference on GM Food Safety: Facts, Uncertainties and Assessment Contact: Helen Fisher, OECD, tel: (33-1) 4524-8097, fax: 4524-9437, e-mail: helen.fisher@oecd.org http://www.oecd.org/subject/biotech/edinburgh
Feb. 29 - March 1	WTO Committee on Trade and Environment Contact: Doaa Abdel Motaal, tel: 5873, fax: 5620
March 1-3	WTO Trade Policy Review Body: Tanzania Contact: Clemens Boonekamp, tel: 5226, fax: 5765
March 10	WTO Committee on Trade and Development Contact: Chiedu Osakwe, tel: 5250, fax: 5774
March 13-17	WTO Textiles Monitoring Body Contact: J.-P. Lapalme, tel: 5223, fax: 5765
March 14	WTO Council for Trade in Services Contact: A.-Hamid Mamdouh, tel: 5435, fax: 5771
March 15-16	WTO Committee on Phytosanitary and Sanitary Measures Contact: Gretchen Stanton, tel: 5086, fax: 5760
March 20	WTO Dispute Settlement Body Contact: Gabrielle Marceau, tel: 5519, fax: 5788
March 21-22	WTO Council for TRIPs Contact: Matthijs Geuze, tel: 5418, fax: 5790
March 23-24	WTO Committee on Agriculture Contact: Paul Shanahan, tel: 5095, fax: 5760
March 29-30	WTO Committee on Regional Agreements Contact: Jorge Viganó, tel: 5078, fax: 5774
March 29 & 31	WTO Trade Policy Review Body: Singapore Contact: Clemens Boonekamp, tel: 5226, fax: 5765
April 5	WTO Council for Trade in Goods Contact: Suja Rishikesh, tel: 5485, fax: 5770
April 10-12	WTO Textiles Monitoring Body Contact: J.-P. Lapalme, tel: 5223, fax: 5765
April 12	WTO Dispute Settlement Body Contact: Gabrielle Marceau, tel: 5519, fax: 5788
April 14	WTO Committee on Rules of Origin Contact: Eki Kim, tel: 5584, fax: 5770
April 14	WTO Sub-Comm. on Least-developed Countries Contact: Ingela Nilsson, tel: 5230, fax: 5774

PUBLICATIONS

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United Nations Conference on Trade and Development. 2000. World Commodity Report. United Nations. Geneva/New York

Ward, Halina and Brack, Duncan (eds). 1999. Trade, Investment and the Environment. Royal Institute of International Affairs/Earthscan Publications. London

WTO. 2000. WTO Director-General's Report to General Council on Consultations After Seattle (PRESS/166). WTO. Geneva

ON-LINE RESOURCES

OECD Website on Biotechnology and Food Safety News features and information on OECD's work on the subject, FAQs and links. URL: <http://www.oecd.org/subject/biotech/>