

### The Battle Between Environmental Co-operation and Trade Embargoes Flares Up with Possibility of Tuna Dolphin III

Perhaps by coincidence, several fisheries issues currently dominate the trade and sustainable development debate. First, two of the best-known trade and environment conflicts are flaring up again: the tuna-dolphin disputes of the early 1990s and the landmark WTO shrimp-turtle case (see page 7 on the latter). Second, the WTO's Trade and Environment Committee is discussing fisheries subsidy reductions, which proponents claim present one of the most evident win-win-win solution to advance trade, environmental and development concerns in tandem (see page 9). In addition, a new dispute is brewing between the European Union and Chile regarding swordfish, and whaling is pitting Japan against the United States and other members of the International Whaling Commission (see separate articles on pages 11 and 17).

#### The Twists of the Tuna Dolphin Saga

The famous GATT tuna-dolphin disputes involved US import embargos against tuna caught with encircling purse seine nets. The use of such nets was forbidden in the US by the Marine Mammal Protection Act, which also prohibited imports of tuna caught from countries that allowed purse seine fishing (primary exporters), as well as re-exports of purse seine-caught tuna from third countries. In 1991 and 1994, GATT panels condemned both import bans, in rulings in favour of Mexico – a primary exporter – and the EU, prohibited from exporting processed Mexican tuna to the United States. The panel's main argument was that the embargoes discriminated between imports of a 'like product' on the basis of non-product-related production methods (PPMs), i.e. the manner in which the tuna was caught.

Although the panel reports were never adopted, they caused a storm in North American environmental circles, and ultimately led to the negotiation of an Agreement on the International Dolphin Conservation Programme (IDCP) between countries that fish for tuna in the Eastern Tropical Pacific Ocean. Unlike anywhere else, in that region dolphins swim with yellowfin tuna, and large numbers of them used to drown in the encircling nets. The Agreement sets mortality limits and other conservation measures, but does not forbid the use of purse seine nets.

The US consequently developed a new 'dolphin-safe' label and qualification standards that correspond to the Agreement's provisions. On 12 April 2000, it also ended the more than a decade-old embargo on Mexican yellowfin tuna after the National Marine Fisheries Service made an 'affirmative finding' on Mexico's bona fide implementation of the IDCP.

Litigation continues in US courts over both measures. With regard to changing the dolphin-safe standard, the Earth Island Institute and nine other conservation organisations have brought a law suit against the Department of Commerce, claiming that the new criteria would weaken the effectiveness of dolphin protection, which is the ultimate aim of the Marine Mammal Protection Act. While the 'pre-IDCP' dolphin-safe standard required the tuna to be caught without purse seine nets, tuna caught with such gear would qualify for the 'IDCP-adjusted' label if no dolphins were observed killed or seriously injured in fishing operations.

The plaintiffs won their case in a California District Court, which ruled in April 2000 that the Department of Commerce had issued the new standard with insufficient consideration of preliminary stress studies on the effects of chase and encirclement on dolphins. Regretting the court's ruling, Secretary of Commerce William Daly said in April that the US had negotiated an 'effective international agreement' with other tuna fishing nations, supported by many environmental groups. He added that the US could not 'unilaterally protect dolphins from fishing practices in the high seas'. The Department of Commerce has since appealed the ruling, but for the moment the old dolphin-safe standard applies. The appeals process is likely to take until mid-2001.

In a separate law suit brought by the same group of conservation organisations, a final ruling on the legality of lifting the import embargo is pending in the US Court of International Trade (CIT). Last April, these organisations alleged that ending the import ban would cause irreparable injury from the likely extinction of three depleted dolphin stocks, and sought a temporary restraining order until the CIT's final ruling on the embargo. This motion was denied on 18 April in an opinion where the CIT argued that the plaintiffs had 'not submitted any evidence that changing the status quo by lifting the embargo on Mexican tuna caught in the Eastern Pacific

Ocean will increase the number of dolphin mortalities to the extent that extinction is a possibility'.

The CIT sided with the government's argument that 'any continuation of the embargo once an affirmative determination is made would have a deleterious effect on the continuation of the International Dolphin Conservation Programme', and concluded that the issuance of an injunction against lifting the ban 'could deal a great deal more harm than good' if it were to result in the IDCP's dissolution. Thus, at least until a final ruling to the contrary, the embargo against Mexican tuna is no longer in force.

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### Mexican Reactions

Mexican authorities have issued two strongly-worded statements on the developments above. When the new dolphin-safe standard was ruled illegal, a government press release called on the US to spare no effort in overturning the decision, including taking the case to the Supreme Court. Defending its environmental record under the IDCP, the Mexican government called the California Court's ruling not only 'totally unfounded', but also a potential threat to the protection of ecosystems and the environment in general.

On 6 August, three Mexican government departments announced that they were seeking 'urgent political consultations' with the United States 'in order to ensure the compliance of the commitments signed by the United States in the Agreement on the International Dolphin Conservation Programme'. The Mexican government stresses that it has undertaken great efforts to reduce dolphin kills in tuna fishing, and that these efforts have been recognised by the US, which has not fulfilled its own obligations under the Programme. It notes that continued lack of market access – estimated at 'millions of dollars' in lost revenue – is 'fostering the proliferation of unsustainable fishing methods' and jeopardising progress made over the last decade.

'Mexico's policy has been to seek multilateral solutions to the conservation and management of migratory fish resources, to prevent protectionist commercial interests disguised as ecological measures, and to promote a long-term vision, which takes into consideration the development, sustainability and maintenance of tuna fishing,' the statement concludes.

### Towards Tuna-Dolphin III?

The two sides are likely to meet in September under the auspices of the IDCP, but the Mexican statement underlined that the government reserves its right to WTO dispute settlement proceedings should the 'political consultations' not bear fruit. Another option would be for Mexico to withdraw from the IDCP.

Mexico probably has a better chance of making its case under the IDCP than the WTO. First, there is no import embargo on Mexican tuna for the moment. Second, the government's dolphin-safe tuna label is not obligatory for the sale of tuna products in the US. The Mexican tuna industry's problem is more subtle: even without a formal embargo, few canners, importers or supermarket chains buy tuna that does not qualify for the 'dolphin-safe' label because of consumer pressure. That is why the Mexican government is concentrating its efforts on pressuring the US to reinstate the new standard, which does allow purse seine catches according to the provisions of the IDCP. But even if that view carries the day, it will be an uphill battle: conservation lobby groups have already secured a commitment from several major tuna distributors to stick to the old dolphin-safe criteria. Nothing prevents them from using a different label and even using it as an additional sales incentive.

The International Dolphin Conservation Programme, which has made real gains in dolphin mortality reduction, offers a more likely avenue for increased market access, if US consumers can be convinced that international co-operation is ultimately the most effective way of protecting the global commons. According to US government figures, dolphin mortalities fell from 15,550 to 3,716 during the first year that a voluntary international agreement was in force, although this might have been helped by the US import ban then in force. The agreement was a precursor to the binding IDCP, which has led to further mortality declines during the last two years. The CIT recognised this when it ruled against delaying the embargo's end: it was the conclusion of an international regime that led to a precipitous decline and stabilisation of dolphin mortalities, and if the international programme fell apart, dolphins in the Eastern Pacific Ocean would be left with no protection, the court wrote. Elsewhere, the CIT cited the government's argument that continuing the embargo would damage the United States' ability to conduct foreign policy, 'particularly with respect to establishing environmental regimes'. The Mexican government, for one, is likely to agree.



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# Global Doubts

By Amartya Sen

Francis Bacon distinguished between two different contributions that doubts can make, in his essay on *The Advancement of Learning*, published in 1605, nearly 400 years ago. “The registering and proposing of doubts has a double use,” Bacon said. One use is straightforward: it guards us “against errors.” The second use, Bacon argued, involved the role of doubts in initiating and furthering a process of inquiry, which has the effect of enriching our investigations. Issues that “would have been passed by lightly without intervention,” Bacon noted, end up being “attentively and carefully observed” precisely because of the intervention of doubts.

The constructive value of doubts applies not only to science and to academic studies in general, but also to the assessment of public policy. Take the current debates on globalization, which have been so active in recent years – not just in Seattle or Washington, D.C., but also in less organized protestations in Bangkok and Jakarta and Mexico City and Abidjan, and elsewhere. The case for global trade and worldwide use of modern technology and finance is strong – very strong. And yet we cannot begin to understand the intellectual content of these disputes without addressing the reasons that inspire the doubts and disputations.

Unfortunately, we frequently encounter a dialogue of the deaf here. Those who blame globalization for all evils are ready to turn their doubts into indictments which propose summary rejection, and which then get translated into over-simple slogans. Those, on the other side, who believe that the anti-globalization rhetoric is ill founded, tend immediately to dismiss it as foolish – or worse. The two sides face each other like ships passing at night.

We have to question both sides. Opponents of globalization may see it as a new folly, but it is neither particularly new, nor, in general, a folly. It is largely an intensification of the processes of interaction involving travel, trade, migration, and dissemination of knowledge that have shaped the progress of the world over millennia. The polar opposite of globalization is persistent separatism and relentless autarky. There is a worrying image of seclusion that has been arrestingly invoked in many old Sanskrit texts in India (I know of four such texts, beginning about two and a half millennia ago, but there are undoubtedly many more references to the same concern). This is the story of a frog that lives its whole life within a well and is suspicious of everything outside it. This “kupamanduka” – the well-frog – has a world view, but it is a world view that is entirely confined to that well. The scientific, cultural, and economic history of the world would have been very limited had we lived like such well-frogs. This is an important issue, since there are plenty of well-frogs around – and also, of course, many attorneys of well-frogs.

The more immediate point, however, is that there is extensive evidence that the global economy has actually brought prosperity to many different areas of the globe. The productive and economic contributions of global integration can scarcely be denied. But we also have to recognize the enormous inequalities that exist across the globe and often within each country. Doubts about global economic relations come from different ends of the globe, and

they are in this sense “global doubts” – not just an assortment of local opposition. We have to examine the manifest inequalities and disparities that give these global doubts the political salience they undoubtedly have. What is needed is not a rejection of the positive role of the market mechanism in generating income and wealth, but the important recognition that the market mechanism has to work in a world of many institutions. We need the power and protection of these institutions, provided by democratic practice, civil and human rights, a free and open media, facilities for basic education and health care, economic safety nets, and of course, provisions for women’s freedom and rights – a neglected area which is only now beginning to receive the attention it deserves.

Let me give a few quick examples. First, a well-functioning market economy does not obviate the need for democracy and civil and political rights. The latter not only give people more freedom to live the way they would like (without being bossed around), they also allow people to have more voice to demand that their interests not be ignored. The fact that no famine has ever occurred in a democratic country with a free press and regular elections is only one rudimentary illustration of this connection. It is not surprising that the demand for democracy and for civil and political rights became much stronger in East and Southeast Asia as the economic crisis of 1997 developed and spread. Voice, as Albert Hirschman has discussed so well,

is the alternative to exit. There is, of course, no basic conflict between economic globalization and the fostering of democracies. But quite often global capitalist institutions show distinct preference for orderly autocracies over the adversarial politics of democratic governance and the activist use of human rights.

To take a second issue, the ability to participate in the market economy is radically influenced by social arrangements for education, health care, microcredit, land reform, and other public policies. Furthermore, the sharing of the benefits of the market economy also depends on social institutions. This applies even to very prosperous countries. Take the deprivation of disadvantaged groups in the United States, for example African Americans. It is often claimed that even though African Americans as a group are poorer than American whites, they are typically many times richer than people in the developing world. And so they are in income per head. But in terms of the probability of surviving to mature ages, African Americans in the United States fall behind the population of many Third World regions, including substantial parts of China and India. For this the blame is often put exclusively on death from violence, but the higher mortality rate of African Americans continues well beyond the ages when this can make any real difference. Lack of medical insurance has a role to play here, and so has the breakdown of inner-city education and other social arrangements. The unprecedented economic boom that the American economy has enjoyed has not resolved these problems.

Third, there is now overwhelming evidence that women’s empowerment through schooling, employment opportunities, et cetera, have the most far-reaching effects on the lives of all – men,

*Continued on page 4*



*Global Doubts, continued from page 3*

women, and children. It reduces child mortality; it cuts down health hazards of adults arising from low birth weight; it increases the range and effectiveness of public debates; and it is more influential than economic growth in moderating fertility rates. We can see its influence in the halving of the fertility rate of Bangladesh in less than two decades, and in the fact that while some districts of India have quite high fertility rates, others with more gender equity already have fertility rates lower than the United States and Britain. The reach of social institutions that work for gender equity is astonishingly large.

There is also a related point of great importance which John Kenneth Galbraith has made very forcefully. The role of institutions has to be assessed in terms of the “countervailing power” they exercise over one another. Asymmetric power in one domain can be checked by a different configuration of forces in another domain. All this – and more – was discussed in Galbraith’s book *American Capitalism*, first published in 1954. I remember reading it as a college student in Calcutta, in a coffee house, while trying to resist being evicted by the waiter on the not unreasonable ground that I could not hog a chair and finish reading an entire book while consuming only one cup of coffee. On that occasion, I got through using only the countervailing power of my voice and determined immovability, but in general we need an institutional balance more far-reaching than that. Distribution of power in the world relates closely to institutional plurality.

This applies even to the institutional basis of world trade and finance, which includes, among other arrangements, such institutions as the World Trade Organization, the World Bank, the International Monetary Fund, and so on. It is necessary to reexamine the balance of power in the running of the different institutions that make up the global architecture. The present institutional architecture was largely set up in the middle 1940s, on the basis of the understanding of the needs of the world economy as interpreted in the Bretton Woods Conference, held just as the Second World War was coming to an end. That framework did help to foster trade and development, but not much distributional equity – either in the economic or in the political sphere. The world was, in fact, very different in the 1940s, when the bulk of Asia and Africa was still under colonial rule of one kind or another, when the tolerance of insecurity and of poverty was much greater (even the West had just emerged from a massive depression and a very destructive war), and when there was little understanding of the huge global prospects of democracy, economic development, and human rights in the world. The world of Bretton Woods is not the world of today.

Even within the existing global architecture, the substantive policies followed by the principal institutions can make a big difference. For example, the recent changes in the policy priorities of the World Bank, with a much greater involvement with economic security and social development, has been undoubtedly influential. The existing institutions can address the global doubts more fully, and the United Nations can also play a very big role in forcing attention on these concerns. The UN has, of course, been kept in a state of financial precariousness particularly by member countries failing to pay their dues. There has also been a persistent attempt by some politicians to use ill-judged attacks on the functioning of the United Nations, trying their best to make a molehill out of a real mountain. But the mountain is there, and the UN can play a most important part in the institutional balance in global economics and politics, provided it gets the support it deserves.

The real debate on globalization is, ultimately, not about the efficiency of markets, nor about the importance of modern technology. The debate, rather, is about the inequality of power, for which there is much less tolerance now than in the world that emerged at the end of the Second World War. There may or may not be significantly more economic inequality today (the evidence on this is conflicting, depending on the indicators we use), but what is absolutely clear is that people are far less willing to accept massive inequalities now than they were in 1944. The global doubts partly reflect this new mood, and it is, to a great extent, the global equivalent of the within-nation protests with which we have been familiar for quite some time. The global doubts have something in common with the spirit of an old American song – a variant of a defiant verse composed originally by Leadbelly:

*In the home of the brave, land of the free,  
I will not be put down by no bourgeoisie.*

Attacks on globalization come from different quarters, in dissimilar styles, with disparate grumbles. It is not at all difficult to reject many of the criticisms that have been made, and it is right that rejectable points should be repulsed. But there is a basic need to recognize that despite the big contributions that a global economy can undoubtedly make to global prosperity, we also have to confront the far-reaching manifestations of global inequality.

Many years ago, in the 1950s, when the present phase of globalization was in its infancy, an English friend of mine told me, after visiting India, that he was struck by the fact that the language of trade and commerce was so different in different countries. He had gone to a candy shop in New Delhi to buy sweets for his children and found two glass jars full of candies, prominently displayed in the shop. One described the contents, in bold letters, as “Superior,” and the other said, also in bold letters: “Inferior.” My English friend was not yet ready for such plain speaking; he would have expected the second jar to be called “regular,” or “standard,” or something like that.

In the growing intolerance of inequality on which the global doubts draw, there is something of a similar inclination to recognize and react to disparities – not only in terms of affluence but also in terms of power. What may have looked like “regular” or “standard” inequality in 1944 appears more and more as an intolerable imposition of inferiority on hundreds of millions of people. This recognition does not, of course, validate all the slogans on the placards and posters of antiglobalization rhetoric. Nor can it be seen as an invitation to become well-frogs. Nor, indeed, does it obviate the need for critical examination of institutional reform and policy initiatives.

There can be no holiday from scientific scrutiny in answering questions. But in deciding on what questions to ask, what problems demand attention, we cannot ignore the voices of concern – and of humanity. We cannot, to use Francis Bacon’s words, let these broader doubts pass “lightly without intervention.” The significance of the global doubts lies in the themes, not in the theses. These doubts may often take a critically destructive form, but their ultimate importance is constructive. We cannot ignore that importance any more than we can neglect the positive contributions of globalization.

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## Implementation and Transparency Issues Make Slow Progress in WTO's General Council

The WTO's General Council continued its discussion of outstanding implementation issues on 3 July. A first meeting on the topic, held on 22 June, left both participants and observers perplexed as to what the end result of the three scheduled sessions would be (Bridges Year 4 No.5, page 2).

In June, the main substantive issue was developed countries' minimalist implementation of their obligations under the Agreement on Textiles and Clothing. In July Members addressed other areas identified by developing countries for 'immediate action', i.e. to be agreed before the launch of a new round of multilateral negotiations. High priorities among these – outlined in paragraph 21 of the 19 October 1999 draft Ministerial Declaration – are controversial demands for changes in developed countries' implementation of anti-dumping, subsidy and intellectual property rules, and the extension of transition periods under the TRIPs, TRIMs and Customs Valuation Agreements.

The July meeting, which wrapped up the first special session, confirmed that few breakthroughs can be expected from the review process, at least at the formal General Council sessions, where virtually no interaction takes place. Instead of dialogue, industrialised country delegates listen as developing countries highlight their long-standing concerns and demands about the implementation of existing WTO Agreements – already clearly stated in the preparatory process before the failed Seattle Ministerial Conference. In addition to better market access for their textiles, restricting recourse to anti-dumping measures tops the agenda for many developing countries (see also Bridges Year 3 No.8, pages 1 and 4).

Given the lack of response from OECD countries, enthusiasm about the review's usefulness is decidedly on the wane, although the more optimistic commentators point out that substantive negotiations rarely take place in General Council sessions. They express hope that through mandated informal consultations between the special sessions, General Council Chair Kåre Bryn may come up with an 'implementation package' that addresses some of the less controversial issues raised by developing countries.

Many developing countries – at least in their official statements – continue to insist that implementation concerns must be adequately addressed before starting a new broad-based round of trade liberalisation negotiations. This view is particularly strongly held by the Like-minded Group (India, Egypt, Pakistan and Malaysia). Some other developing countries such as Chile, for instance, hold less far-reaching ambitions for the implementation review, which they would like to see more geared towards deliverable outcomes, including an agreement on transition period extensions under the TRIPs and TRIMs Agreements (see related article on page 6).

Among OECD countries, the EU for one has already made clear that the more serious implementation demands – particularly those requiring changes to existing Agreements – can only be addressed through a new round of trade negotiations. And another major player, the United States, has shown no evidence of a change of heart about opposing changes in textiles liberalisation, anti-dumping or intellectual property protection in any context.

The second special session on implementation, scheduled for 18-19 October, will 'begin by acting on the results of the discussions and consultations', and move on to consider issues under Paragraph 22 of the draft Declaration, which calls on the General Council to conduct a full review of difficulties faced by Members in implementing the WTO Agreements.

A third session, which is to 'take appropriate action where possible', is slated for 18-19 December. Further meetings may be held in 2001.

In addition to the special session on implementation concerns, the General Council held two regular meetings in July. On 17 July, Members addressed internal transparency, which rose to the forefront during the Seattle Ministerial, where several African and other developing country delegations complained bitterly of being sidelined in the negotiations. According to trade diplomats present at the 17 July General Council meeting, practically all Members agree on the principle of decision-making by consensus rather than by vote, and most admit that informal consultations among delegations are necessary. Nevertheless, the Like-minded Group criticised a Chair's text presented by Ambassador

Bryn, which described the informal decision-making process employed by WTO Members. The Group saw the text as a premature attempt to formalise decision-making procedures over which there is not yet full agreement. The Chair's statement was adopted, however, although Members agreed that the internal transparency debate was not over, and consultations are expected to continue.

Among the points to keep in mind in conducting group consultations, Ambassador Bryn listed the following: Members are advised of the intention to hold such consultations; Members with an interest in the specific issue under consideration are given the opportunity to make their views known; no assumption should be made that one Member represents any other Member except where the Members concerned have agreed on such an arrangement; and the outcome of such consultations is reported back to the full Membership expeditiously for their consideration.

On 21 July, delegates engaged in a debate on whether consultations should go forward on external transparency, i.e. WTO's policy with regard to non-governmental entities. Mexico, India, Hong Kong, Cuba and Uruguay argued against, saying that there were more important issues for the General Council to address first, including implementation and internal transparency. Chair Bryn said he would start consultations with Members in the fall based on proposals already submitted. Most such proposals have come from the United States, the European Union and Canada, which generally support greater civil society access to the multilateral trading system.

Elements of the external transparency debate involve document derestiction and non-state actors' participation in WTO activities, in particular dispute settlement proceedings (see page 7). According to the Chair's summary of consultations held thus far, most Members consider that the WTO's current document circulation and derestiction policies are working reasonably well, and therefore significant changes are unlikely. He noted, however, that there was scope for the speedier release of some documents, such as minutes of meetings and Secretariat background notes.

**Lack of dialogue  
dims enthusiasm  
for the General  
Council's special  
sessions on  
implementation.**

### Goods Council Stalls on ACP Waiver Request

The WTO's Council for Trade in Goods on 7 July postponed consideration of the waiver for the new Partnership Agreement requested by the European Union and the 55 developing country WTO Members in Africa, the Caribbean and the Pacific which were party to the Lomé Convention (the ACP countries). Costa Rica, Ecuador, Guatemala, Honduras and Panama refused to start consideration of the waiver request because the Partnership Agreement remains silent on market access for bananas (Bridges Year 4 No.4, page 4).

Unlike the Lomé Convention, the Partnership Agreement does not contain a special protocol on bananas, and the five Latin American countries have said that they will block talks on the waiver request until the EU spells out the missing details. The EU says bananas were deliberately not included in the Partnership Agreement so as not to prejudge ongoing negotiations on the reform of the EU's banana import regime (see page 8).

The Partnership Agreement needs an exemption from the most-favoured nation obligation (GATT Article I.1) because it proposes to continue the preferential tariffs in force under the Lomé Convention, which expired on 29 February. As of January 2008, new 'economic partnership agreements' – to be negotiated during the transition period – will gradually lead to reciprocal free trade between the EU and ACP countries, and no WTO waiver will be necessary. For the present, however, the impasse over the waiver request means that the tariff preferences under the Partnership Agreement could be challenged in dispute settlement proceedings as they technically violate the obligation to grant equal market access to 'like products' from all WTO Members.

### Multilateral Nature of TRIMs Extension Grants Questioned

The Goods Council took no decisions with regard to the requests for extension of compliance deadlines under the Agreement on Trade-related Investment Measures (TRIMs) tabled by Argentina, Chile, Colombia, Malaysia, Mexico, Pakistan, the Philippines, Romania and Thailand. Most of the demands, which vary from five months (Chile) to seven years (Argentina, Colombia and Pakistan), concern investment restrictions in the automotive sector.

The General Council adopted a decision on 8 May, which preserves the case-by-case approach to extension requests, but instructs the Chair to 'pursue consultations with interested delegations in order to facilitate the process and reinforce the multilateral character of the exercise'. The decision also notes that exemption decisions should take into account 'the development, financial and trade needs of the country in question'. Speaking on behalf of the Association of Southeast Asian Nations, Malaysia told the Goods Council that some Members were attempting to impose bilateral conditionalities that went beyond TRIMs requirements in exchange for their approval of extension requests (see related story on page 8).

However, according to the Goods Council Chair, Ambassador Perez del Castillo of Uruguay, progress has been made in consultations between delegations. Other trade sources said that Chile's and Romania's requests were close to approval. The US is reportedly close to a deal with Mexico, while the EU has reached agreement with the Philippines. The requests for long extensions are likely to require several more rounds of consultations.

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### CTD Meets on Implementation, Technical Co-operation

In meetings held on 28 June and 10 July, the WTO's Committee on Trade and Development (CTD) discussed the report of a seminar on implementation issues, as well as technical co-operation and document derestriction.

The seminar, held on 26 June, covered, *inter alia*, practical aspects of implementation (focusing on TRIPs, Customs Valuation and TRIMs); policy perspectives on implementation, and developing countries' difficulties in the pursuit of their WTO rights. Members heard presentations from representatives from a number of organisations, including the World Customs Organisation, the UN Conference on Trade and Development, the World Bank and the academic community. Some delegates expressed frustration with the seminar's structure and content and were unsure of what to draw from it. Others emphasised the need to move beyond the restatement of known positions at the General Council's special sessions on implementation (see page 5).

On other matters, the Committee mandated the Secretariat to prepare an update of a 7 March 2000 Chair's report on special and differential treatment of developing countries (WT/COMTD/W/66) based on information from other WTO bodies.

The Secretariat presented an interim evaluation report on technical co-operation, and Members agreed to hold a special CTD session in September to consider discussions held during the WTO's 'Days of Reflection on Technical Co-operation' on 18 and 19 July.

Document WT/COMTD/W/65 on the 'Participation of Developing Countries in International Trade: Recent Developments and Trade of the Least Developed Countries' was derestricted, but delegates considered that any general decision by the Committee on document derestriction should await the conclusion of the General Council's deliberations on the issue (see page 5). At the suggestion of Zambia, Members agreed that the CTD would give further thought on how best to proceed with work on the transfer of technology.

In related news, a July meeting between the six international agencies involved in the Integrated Framework for Trade-related Technical Assistance to Least-developed Countries – the WTO, the International Trade Centre, the IMF, UNCTAD, UNDP and the World Bank – decided on a series of measures to enhance the programme's efficiency. Many developing countries have voiced their disappointment in the lack of concrete results from the multilateral initiative established in 1997. The agencies agreed, *inter alia*, to support a 'mainstreaming process' to facilitate the integration of trade, trade-related technical assistance, and capacity-building into LDCs' national development strategies. They also established a steering committee with representatives from both LDCs and donor countries to help ensure proper oversight, policy guidance, adequate funding and ownership of the IF. An Integrated Framework Trust Fund (IFTF), administered by UNDP, was established for the purpose of 'mainstreaming trade and trade-related assistance into development architecture.' The six agencies hope to raise US\$20 million toward IFTF initiatives between 2001 and 2003.

The next regular meeting of the Committee on Trade and Development is scheduled for 27 October.

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## Dispute Settlement Corner

## Shrimp-Turtle: the Return?

Another conflict over marine resources is reviving: according to the US State Department, Malaysia has filed a formal request for consultations under Article 21.5 of the Dispute Settlement Understanding with regard to US implementation of the 1998 WTO ruling on the shrimp-turtle case. The countries agreed in December 1999 that Malaysia could request compliance proceedings later than 30 days after the expiry of the 'reasonable period', as required by DSU Article 22.6. The 22 December agreement specifies that both parties may appeal eventual compliance panel findings (Bridges Year 4 No.1, page 5).

Together with other plaintiffs in the shrimp-turtle case, Malaysia has maintained throughout that good faith implementation of the WTO ruling would require the US to lift entirely the embargo on marine shrimp caught without turtle excluder devices (TEDs). Prior to the WTO compliance deadline, US guidelines for implementing Section 609 on sea turtle protection required all marine shrimp imports to come from countries that do not harm endangered marine turtles during fishing operations. For countries where sea turtles and shrimp co-exist, this meant that the only way to export shrimp to the US was through a State Department certification that the country had a sea turtle protection programme comparable to that of the United States. In practice, this amounted to an obligation of exporting countries to have and enforce legislation mandating the use of TEDs on their shrimp trawlers.

The Appellate Body ruled in 1998 that the US turtle protection legislation in itself was justified under GATT Article XX(g), but said its implementation was discriminatory, *inter alia*, because it denied access of 'TED-caught' shrimp from non-certified countries. In response, the US changed the implementation guidelines to include a 'shipment-by-shipment' exemption. The criteria for the exemption are strict enough for only one fishery in Brazil to have fulfilled them to date.

The Malaysian action follows a long-awaited ruling by the US Court of International Trade (CIT) on the legality of the shipment-by-shipment exception. The CIT confirmed on 19 July 2000 its preliminary finding of April 1999 that the guidelines violated Section 609 'on its face'. The changed guidelines were challenged by US conservation groups, who alleged that shipment-by-shipment certification was contrary to Congressional intent in passing Section 609, because the exception offered weaker sea turtle protection than nation-by-nation certification (Bridges Year 4 No.1, page 5). The plaintiffs have announced their determination to force the government to terminate shipment-by-shipment certification based on the CIT ruling.

The CIT did not, however, require the government to change the new guidelines. Instead, it wrote that 'given the facts and circumstances of this case, which obviously transcend purely domestic concerns, this court is unable to conclude that the government's position currently is not substantially justified'. The CIT added that the government professed 'continuing commitment' to 'prevent the extinction of sea turtles wherever they exist on the earth [...] consistent with both its national and other, international obligations'. The State Department has not yet announced whether it will appeal the ruling.

## The Systemic Issues Paradox

At least three key issues of the WTO's aborted review of the Dispute Settlement Understanding (DSU) have been or are likely to be settled through panel proceedings. Panels have already ruled on amicus briefs and the sequencing steps in the compliance/retaliation procedure, and the EU has announced it will seek a dispute settlement panel on the WTO-compatibility of the so-called carousel legislation if and when the US announces changes to EU products affected by trade sanctions.

There is paradox in all these issues reaching the dispute settlement system, as several Members have been at pains to stress that only Members have the authority to change dispute settlement rules or to deliver interpretative statements regarding the meaning of existing rules. During the DSU review – and at the release of controversial dispute settlement rulings – many Members have berated panels and the Appellate Body for usurping powers that properly belong to the Members alone. And yet, because the DSU review did not conclusively address these systemic questions, conflicts involving them continue to be addressed by panels or the Appellate Body.

In June, Bridges reported on Members' misgivings about the Appellate Body's ruling that the AB could accept friend-of-the-court briefs. The finding was included in a report that condemned US countervailing duty practices with regard to British Steel. A large number of Members had already voiced similar concerns when the Appellate Body ruled in 1998 that panels had the right – but not the obligation – to accept unsolicited briefs from non-governmental sources (Bridges Vol.2 No.8, page 8).

Another controversial finding was delivered when a dispute settlement panel ruled on 17 July that an arbitration panel alone could decide both whether a Member had implemented dispute settlement rulings properly and – in case it had not – what the level of injury suffered by the plaintiff was. This ruling was embedded in a report that looked into whether the United States had violated the DSU when it ordered customs bonds to be levied on EU products before a compliance panel had confirmed that the EU's implementation of the banana ruling still violated WTO rules (WT/DS165/R). Although the panel found for the EU in this specific dispute, the Union is seriously considering an appeal of the systemic verdict, mainly because an arbitration under DSU Article 22.6 cannot be appealed, while the findings of a compliance panel under Article 21.5 can.

The carousel approach to trade sanctions was another sticking point of the DSU review. The United States maintains that nothing in the agreement prevents a country from changing the products under trade sanctions, as long as they correspond to the amount set by WTO arbitrators. This view has been contested by the EU and a number of other Members, who sought an amendment that would clarify that all changes to retaliation lists must be multilaterally approved. The question gained in urgency when the US passed legislation in May that not only allows but actually requires the Trade Representative to change retaliation lists every six months. The EU has said that it will seek a panel on the issue as soon as changes are announced in products under sanctions in the beef and banana disputes (Bridges Year 4 No.4, page 6).

## Dispute Settlement Briefs

- On 27 July, the DSB established a panel on India's investment restrictions in the automotive sector. The US alleges that India's local content and import-export balancing requirements violate TRIMs Article 2, as well as GATT Articles III and XI of GATT 1994. These articles deal with national treatment and quantitative restrictions obligations. The EU, Japan and Korea reserved their third-party rights.

Several developing country Members lashed out at the United States for going ahead with dispute settlement proceedings in spite of the 8 May General Council decision to consider extension requests multilaterally and the December 1999 agreement to exercise 'due restraint' with regard to TRIMs, TRIPs or Customs Valuation disputes until consultations on extension requests were complete. The US countered that it had preserved its WTO rights under both decisions, adding that India had not notified the incriminated measures to the WTO, nor had it formally asked for an extension for TRIMs compliance. India pointed out that if General Council decisions did not prejudice a Member's rights then those decisions had no value. See also related story on page 6.

- Dispute settlement consultations are also underway with the Philippines and Romania for similar restrictions, although both countries have submitted formal extension requests to the Goods Council. And, in early June, the US initiated consultations with Argentina and Brazil with regard to alleged violations in patent and test data protection under TRIPs (Bridges Year 4 No.4, page 5).
- EU member states have told the European Commission to continue negotiations on reforming the EU's banana import regime on the basis of tariff rate quotas and import licenses distributed on a 'first come first served' basis. Talks on basing licenses on a historical reference period have broken down as Ecuador disagrees with other Latin American producers and the US on which period should be chosen. So far, all Latin American producers have also opposed the proposed 'first come' option.

The Commission is to report to EU member states by October on the likely impact of a banana import regime based only on tariffs. A tariff-only regime would be WTO compatible in form, but the EU and the plaintiffs disagree on the amount of the tariff preference for ACP bananas, which currently have guaranteed import quotas, as well as duty-free access to EU countries. Ecuador is the only Latin American producer to have expressed interest in a tariff-only system until now. The banana dispute has also become entangled with the request for a WTO waiver for the new Partnership Agreement between the EU and ACP countries (see page 6).

- The final panel report on Canada's complaint over France's import ban on white asbestos on 25 July confirmed a widely-leaked interim finding that the ban was justified under Article XX(b), which allows WTO Members to take measures 'necessary to protect human, animal or plant life or health' even when such measures violate other GATT provisions. The report will be released to the public as soon as it is available in all WTO languages, probably in mid-September.

## TRIPs Council Remains Divided on Key Issues

The WTO Council for Trade-related Aspects of Intellectual Property Rights (TRIPs) met from 26 to 30 June over an agenda primarily focused on the review and implementation of the TRIPs Agreement.

In their second meeting of the year, Council Members discussed several controversial topics, including the review of Article 27.3(b), which addresses patentability exclusions for biological organisms. According to diplomatic and WTO sources, discussions focused more on the review's scope and procedures than on substantive debate over the provisions of Article 27.3(b). No concrete decisions emerged on either subject.

Developing countries remain much more interested in reviewing the substance of Article 27.3(b) than in discussing either its implementation or review procedures. The governments of many developing countries seek greater flexibility in creating *sui generis* systems of intellectual property protection and may push for the exclusion of all life forms from intellectual property laws (Bridges Year 4 No.2, page 3). India brought up the need to harmonise the TRIPs Agreement with the Convention on Biological Diversity (CBD). Most developing countries back this proposal, in particular with regard to protection of traditional knowledge, access to genetic resources and benefit-sharing arrangements. A long-standing request for TRIPs Council observer status from the CBD Secretariat is still pending. See related article on page 9.

Some developing countries, such as India and Pakistan, are currently supporting a proposal to allow the compulsory licensing of essential medicines under Article 27.3(b) in the context of the implementation discussions at the General Council. At its June meeting, the TRIPs Council extended observer status on an *ad hoc* basis to the World Health Organisation, thus providing some scope for progress on the essential medicines issue through increased collaboration and consultations between the two intergovernmental bodies. This promises to be an uphill battle as the pharmaceutical industry in the US and the EU is adamantly against giving more latitude to compulsory licensing than TRIPs Article 31 already confers. In the run-up to the Seattle Ministerial, many OECD countries, and the US in particular, were extremely reluctant to open the TRIPs Agreement for renegotiation. A future issue of Bridges will carry an article on TRIPs and essential drugs.

During discussions on geographical indications, a conflict arose between countries that wish to restrict stronger protection of geographical indications to wines and spirits and others – including Switzerland, Cuba and several other developing country Members – that seek to extend additional protection of geographical indications to other goods.

Discussion on the overall TRIPs implementation review, called for under Article 71.1, slowed to a halt as countries endlessly debated procedural concerns. 'There was no resolution about how to move forward,' a participant observed. 'The Chair will have to take a very active role in the fall to see where there is room for discussion and compromise.'

The next meeting of the TRIPs Council will be held from 21-22 September 2000.

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## CTE: No Meeting of the Minds on MEAs, Biopiracy and Fisheries Subsidies

The Committee on Trade and Environment (CTE) met from 5-6 July at for to consider issues related to the relationship between the multilateral trade and environment regimes. Switzerland's proposal (WT/CTE/W/139) that WTO Members adopt an 'interpretative decision' to clarify the respective competence of WTO Agreements and multilateral environmental agreements (MEAs) generated a host of comments. Among the proposal's supporters, Iceland and Canada said that clarification should not be left to the WTO dispute settlement system. Norway suggested focusing on the content, not the form, of a potential clarification, and set out several general premises to guide future discussions. Canada said that addressing the WTO/MEA interface should be pursued both in the WTO and UNEP (acting on behalf of MEAs and working cooperatively with the WTO). Japan suggested that Members bring forward examples of arbitrary or discriminatory application of trade measures in MEAs.

In contrast, Australia, New Zealand and the US, as well as Hong Kong, India, Brazil, Malaysia and Pakistan cautioned against exaggerating concerns as no trade measure taken pursuant to an MEA has ever been challenged in the WTO. These countries felt that clarification was not necessary because the WTO already provides a sufficient framework to facilitate mutual supportiveness with MEAs. In an interesting coincidence, most of the legal experts attending an American Bar Association seminar on the WTO concurred on 19 July that, for the foreseeable future, trade and environment conflicts would be settled through the WTO's dispute settlement system rather than a clarification of the WTO/MEA relationship (see related comment on forum shopping on page 12).

### Traditional Knowledge, Bio-piracy and TRIPs

India presented a paper on the protection of biodiversity and traditional knowledge (WT/CTE/W/156-IP/C/W/198), which called for international action to counter bio-piracy and to promote benefit sharing in cases where the use of genetic resources is legitimate. International action should cover issues such as the source of the genetic resources and an undertaking that laws and regulations of the country of origin have been respected, India argued. Brazil, Cuba, Malaysia and Peru endorsed the need for international action. The US, however, noted that the examples in India's paper had been successfully addressed, saying it was not sure it accepted that there was a phenomenon that could be termed 'bio-piracy'.

India's paper also stressed the need to harmonise the TRIPs Agreement and the Convention on Biological Diversity (CBD) so that patent applicants would be required to disclose the source of origin of genetic resources. Japan admitted that the TRIPs Agreement was not adapted to deal with the collective nature of traditional knowledge, and Switzerland, Norway and the EU agreed that it was important to ensure compatibility between the TRIPs Agreement and the CBD. They warned, however, that the relationship between the two agreements should not be isolated from the general debate on the relationship between the WTO and MEAs.

Other CTE documents of interest to the debate on access to genetic resources and intellectual property rights include the Secretariat's paper on TRIPs Article 27.3(b), which presents case studies of *sui generis* intellectual property rights systems and legislation for CBD implementation (WT/CTE/W/125), and an FAO statement clarifying the range of options concerning the legal status of the revised International Undertaking on Plant Genetic Resources (WT/CTE/W/146).

### Fisheries Subsidies: the Ultimate 'Win-Win'?

A paper by the United States, which sets out a framework for identifying perverse fisheries subsidies, gave rise to a lively discussion (WT/CTE/W/154). New Zealand, Iceland, Australia, Argentina, Chile, Hong Kong, Peru and others supported the proposal to eliminate fisheries subsidies, emphasising the 'win-win' nature of the initiative: good for the environment and good for trade. Chile noted the importance of subsidy reduction for development as well as environment, as trade in fisheries products is a significant sector in many developing countries (see article on page 11 on Chile's conflict with the EU regarding swordfish). Argentina stressed the need to take into account that artisanal fisheries were different from industrial fisheries.

Japan asked for concrete examples of harmful fisheries subsidies in order to contribute to the understanding of what, if any, subsidy-related problems existed in this sector. Along with heavy fisheries subsidisers Korea and the EU, Japan said that discussions in the CTE should await results of ongoing work in APEC, the FAO and OECD, as a 'comprehensive factual analysis' of fisheries management and fisheries subsidies was important. New Zealand, Argentina, the US and others said that there was a clear role for the WTO to tackle the subsidies-related dimensions of over-fishing and overcapacity. In addressing the serious problems affecting many fisheries, Australia said the CTE should not debate the respective roles of fisheries management and subsidy reform; clearly there was a need for action on both fronts. The CBD Secretariat also called on the CTE to advance work on the potential 'win-win' opportunities arising from eliminating trade restrictions and distortions in the fisheries, forestry and agricultural sectors.

### Precaution and Domestically Prohibited Goods

The European Commission's paper on the precautionary principle (WT/CTE/W/147-G/TBT/W/137) received a mixed welcome. Originally released in February 2000, the paper has been widely circulated in different fora, including the Codex Alimentarius (see Bridges Year 4 No.3, page 13). At the CTE, several Members said that while they shared common ground on a number of issues raised in the paper, they had concerns about potential misuse of the concept to justify protectionism. Japan noted the lack of consensus on the precautionary approach with respect to food safety and inquired about the relationship between the precautionary principle and the SPS Agreement. Japan and Hong Kong also noted the need to clarify the issue of the burden of proof with respect to the use of the concept of precaution.

Members requested the Secretariat to prepare a study on trade in domestically prohibited goods (DPGs) based on recommendations included in Bangladesh's new paper on its national experience in this area, as well as recommendations to advance work in the CTE on DPGs (WT/CTE/W/141). Brazil, the EU, Egypt, Hong Kong, India, Japan, New Zealand, Norway, Pakistan, Switzerland and Thailand supported Bangladesh's recommendations to move the discussions forward by increasing transparency and technical assistance related to trade in DPGs.

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## Assessing the Environmental Effects of Free Trade: CEC Organizes First Public Symposium

By Scott Vaughan

The question at the heart of the trade-environment debate remains simple enough: what are the environmental impacts of free trade?

The public is clearly worried that unprecedented rates of global economic expansion – fuelled partly by trade liberalization – and unprecedented rates of global environmental degradation are related. They argue that a possible correlation between environmental quality and free trade, direct or indirect, is grounds enough to stop any new trade initiatives until the environmental consequences of existing trade commitments are clearly understood, and adequate policy responses are put in place to minimize environmental costs, and maximize environmental benefits.

Given the public profile of the trade-environment debate, it is surprising that only tentative or hypothetical observations have thus far been made linking environmental impacts to international trade; all the more surprising in light of recent advances in environmental assessments. In the last decade, environmental impact assessments have become more accurate and encompassing, built upon rigorous and comprehensive environmental data sets, baselines and aggregated indicators. They have become more robust with geographic information systems and various mapping techniques, as well as ecological, economic and other models. Underlying these and other approaches, environmental impact assessments are grounded on the clear recognition that they are legitimized by full transparency, and the early and regular input of the public.

Many of the techniques of environmental impact assessments guide current efforts to assess the environmental effects of free trade. At the same time, environmental effects arising from project-specific plans like new factories, dams or electricity transmission lines present altogether different methodological challenges from assessing macroeconomic policy initiatives like trade policy reform. This distinction between project-specific and policy-related environmental impacts means that a lot more work needed to get assessment methodologies right.

Although differences exist in methodological approaches, experience now suggests that two complementary areas warrant close scrutiny. First, what are the effects of trade policy reform – for instance, NAFTA, the Uruguay Round or the proposed FTAA – on domestic and international environmental policies? Does trade policy alter environmental policies, and if so, how? Questions arising from this *policy-to-policy* inquiry include whether free trade sparks a “race to the bottom” in domestic environmental regulations, fuelled by a bid to attract foreign investment and jobs, or whether countries that maintain high environmental standards face investment and job losses to countries with lower environmental laws (called the “pollution haven” effect).

And second, what is the relationship between actual trade flows and environmental quality? For example, does a trade-related shift in the composition of a domestic economy from, for example, forestry products to textiles or telecommunications alter the environmental “profile” of that economy, expressed for example in pollution per unit of output, or pollution per unit of export? And with trade-induced changes in the economy, what can one say about the overall environmental characteristics of a new economy, as opposed to an old one? Is it cleaner, dirtier, or much the same?

For the past five years, the North American Commission for Environmental Cooperation (CEC) has concentrated on developing a methodology to assess the environmental effects of trade. Indeed, this work remains the underlying reason for the creation of the Commission in 1994: when people began looking at the proposed NAFTA, they wanted to know how that agreement would affect North America’s environment. They asked if hard-fought domestic environmental laws would be constrained by new trade disciplines and arbitration.

By late 1999, the Commission released its *Final Analytical Framework*, setting out a linear method of analysis to help assess the environmental impacts of NAFTA. The Framework represents the most comprehensive guide developed to disentangle complex, dynamic links between changing trade-related economic activity and indicators of environmental quality. Although the Framework has been developed for the NAFTA context, it is being used to examine other trade accords, including the WTO and the FTAA.

The Framework is the product of many hands, including environmental non-governmental organizations, industry, labor and consumer groups, research institutes and representatives of the three NAFTA parties, Canada, Mexico and the United States.

The next, and most important, phase of the Commission’s work involves inviting the public to put the Analytical Framework to work. In late 1999, a public Call for Papers was issued, and the response of organizations and individuals from North America and beyond was impressive.

On 11-12 October, 2000, the Commission will host the first North American Symposium on assessing the environmental effects of free trade, in Washington, DC. Fourteen original papers, selected from responses to the Call for Papers, will be presented. The authors of these papers are largely from non-governmental groups based in Canada, Mexico and the United States, as well as from two international organizations (ECLAC and the OECD). For the first time in the Commission’s existence, concrete answers will be examined about NAFTA’s environmental consequences. The WTO’s Seattle meeting served as a reminder of the deep public interest in such answers, as well as the transparency and accountability of the process leading to them.

The Symposium will be chaired by Dr. Pierre Marc Johnson, former Prime Minister of Quebec, and will bring together roughly 300 people. The Symposium will examine to what extent NAFTA has altered key pollution indicators such as air and water quality; and the extent to which domestic environmental laws have changed in their design, stringency or enforcement, and whether such changes are linked to NAFTA. It will also examine whether a race to the bottom can be observed, and whether certain sectors have changed production location because of differences in the cost of environmental regulations and subsequent competitive effects. Finally, the Symposium will look into newer issues, including whether assessing environmental effects of trade in services differs from assessing trade in goods.

For more information, please consult the CEC home-page at [www.cec.org](http://www.cec.org); to register contact [ahorsman@cceamt.org](mailto:ahorsman@cceamt.org).

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## The Swordfish in Peril: the EU Challenges Chilean Port Access Restrictions at the WTO

By Marcos Orellana Cruz

The European Union announced in July that it would request the establishment of a panel to hear its controversy over swordfish with Chile during the next meeting of the WTO's Dispute Settlement Body in September, 2000. Chile, in turn, invoked the dispute settlement provisions of the United Nations Law of the Sea Convention (UNCLOS) and invited the EU to the International Tribunal for the Law of the Sea (ITLOS). The EU rejected the ITLOS jurisdiction, but agreed to the formation of an Arbitral Tribunal according to the United Nations Law of the Sea Convention.

With two jurisdictional fora hearing the swordfish case, the potential for contradictory or incompatible decisions increases. At the crossroads of the different branches of international law that bear a role in the controversy, namely international environmental law, the law of the sea, and international economic law, lives the swordfish (*Xiphias Gladius*), migrating through the waters of the vast Pacific Ocean.

These few paragraphs intend to raise only some of the relevant matters that will be debated in the adjudicative proceedings. The swordfish case will undoubtedly call for detailed analysis over many other dimensions of law and policy relating to highly migratory species, the precautionary principle, public participation in international proceedings, and the legality of subsidies afforded to the EU fishing industry, to name only a few. This article will only introduce the basic facts of the dispute and briefly elaborate on the issue of port access.

### The Threat to the Marine Environment

The plundering of the seas by the Spanish fleet is an ongoing story with a new chapter: the illegal, unreported, and unregulated fishing for swordfish in the South Pacific. EU fishing fleet have been responsible for undermining conservation efforts of coastal states and fishing communities around the world, such as in Canada, Morocco, Argentina, or Namibia. The destructive practices of the EU fleets have been well documented in other cases, including the recent dispute between Spain and Canada, which reached the International Court of Justice in 1995.

After bringing about the collapse of the cod, turbot, or tuna stocks in other regions, EU fleets have now targeted the swordfish, which migrate across the waters of the Pacific Ocean. In its current fishing operations over the Nazca Ridge in the Southeast Pacific, the EU fleet is failing to enforce minimum conservation measures such as, *inter alia*, failing to report its captures to the Food and Agriculture Organization and failing to prohibit fishing on the swordfish's nesting and spawning grounds. Furthermore, the capture of sharks and highly-migratory leatherback turtles through unselective gear, coupled with the capture of large numbers of juveniles, places the EU in a difficult position before its international obligations to prevent harm to the high seas ecosystem.

### Chilean Measures for Protecting the Swordfish Fisheries

In what is now Chile, there is archeological evidence that pre-Colombian indigenous peoples harvested the swordfish, and small-scale artisanal fishery continues to this day. To ensure the sustainability of the resource, Chile has enacted swordfish

conservation measures, such as regulating gear and limiting the level of fishing by denying new permits.<sup>1</sup> Currently, about 90 percent of swordfish fishing permits have been awarded to artisanal fishers, who enjoy exclusive rights to fish swordfish in the adjacent 120 n.m. from the coast. Chile has also set a minimum size of 106 cm for individual species,<sup>2</sup> which effectively desincentivates fishing operations in the spawning and nesting areas of the swordfish. Finally, Art. 162 of the Chilean Fisheries Law does not allow for the operation of factory ships within its Exclusive Economic Zone (EEZ).

### The EU's WTO Challenge and the Issue of Port Access

The EU's current challenge before the WTO deals with the Chilean denial of port access to the EU's fishing fleet. In fact, acting on the authority of Art. 165 of its Fisheries Law, Chile has effectively prohibited the utilization of its ports for the landing and service to the EU longliners and factory ships that disregard minimum conservation standards.<sup>3</sup> This rule impedes the EU re-export of fresh/chilled fish to the markets of the United States.

The EU claims that the Chilean measure restricting access to its ports violates GATT Article V, which provides for the free transit of goods along the Members' territories. Chile contends that the GATT/WTO does not restrict its sovereignty over its ports

under international law, and demands that the EU enacts and enforces conservation measures for its fishing operations in the high seas, in accordance with UNCLOS.

The controversy opens a complex debate over the applicable law regarding port access. The International Court of Justice (ICJ) in the Nicaragua case noted that it is 'by virtue of its sovereignty that the coastal State may regulate access to its ports'.<sup>4</sup> The point remains whether GATT Article V may be regarded as *lex specialis*, limiting the general rights of a coastal state over its ports. In this respect, it must be pointed out that Article V has never been applied to issues regarding fisheries or port access, which are matters ruled by the customary law of the sea and by bilateral treaties of 'Friendship, Commerce, and Navigation'. It is also questionable whether all WTO Members agreed to open their ports during the Uruguay Round. In fact, the EU seems to stretch its interpretation of GATT Article V, betting on changing the international law on port access through the back door offered by the trade regime.

The legal issue regarding port access is further complicated by the fact that Article 23(3) of the 1995 United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (not yet in force) provides that a State may prohibit landings when it finds that the catch has been taken in a manner which undermines the effectiveness of multilateral conservation and management measures on the high seas. Although Chile has not signed the agreement, it has undertaken efforts to enact multilateral conservation measures for the marine environment under the auspices of the Permanent Commission for the South Pacific (CPPS). The members to the CPPS (Colombia, Ecuador, Peru, and Chile) have, since 1952, taken the lead for the crystallization of the Exclusive Economic Zone as a norm of international customary law. Last February, in the Galapagos Islands, the CPPS concluded an agreement, which will enable the

*Continued on page 12*

**The EU seems to be betting on changing international law on port access through the back door offered by the trade regime.**



*Swordfish, continued from page 11*

enactment of conservation measures for marine living resources in the high seas, including highly migratory species. This agreement was signed in Santiago de Chile on August 14, 2000.

Thus, the stage is set for a discussion over the applicability of the GATT Article XX(g) to trade related environmental measures taken pursuant to multilateral environmental agreements (MEAs). Article XX(g) which provides an exception to core trade obligations for measures adopted for the conservation of exhaustible natural resources, has been considered by several GATT/WTO decisions, including among others the disputes over US reformulated gasoline, tuna-dolphin and shrimp-turtle. In this regard, it would be interesting to debate the extent to which production and process methods (PPMs) could provide a legitimate basis for discriminating against illegal, unreported and unregulated fisheries.

### High Seas Fisheries Law

The progressive development of the law for the seas and of international environmental law, coupled with the need to provide effective protection to the global commons, has strongly qualified the traditional freedom of fishing in the high seas. Indeed, the law of fisheries on the high seas is moving away from the absolute open-access regime in place during the last centuries, which was premised on the inexhaustible nature of marine resources. Back in 1974, the ICJ already highlighted that 'the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.'<sup>5</sup> Still, with new technologies and highly subsidized fleets, there now are simply too many boats after too few fish.

### Conclusion

The biggest losers in this controversy are the swordfish, the marine turtles, the sharks, and the other threatened species by-caught and discarded, as well as the artisanal fishers dependent on fish protein for food security and livelihoods. Therefore, instead of engaging in WTO panel proceedings, and to avoid irreparable harm to the swordfish stocks, the EU and the CPPS should honor their UNCLOS obligations and negotiate in good faith an agreement for the establishment of conservation measures. This conservation agreement should at least include the duty to assess the stocks and to report captures, a prohibition to use destructive gear and to fish juveniles in their nesting and spawning grounds, as well as the use of vessel monitoring systems, the allocation of quotas at precautionary levels, the presence of scientific observers on board vessels, the rights to board and inspect the vessels, and the elimination of subsidies which artificially render destructive and unsustainable fishing practices profitable.

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### ENDNOTES

- <sup>1</sup> RES N°2616 (DO Jan. 6, 2000)
- <sup>2</sup> RES N°406 (DO April 4, 1997), as amended by RES N°1639, (DO Nov. 28, 1998).
- <sup>3</sup> D.S. N°598, (DO Nov. 25, 1999)
- <sup>4</sup> Military and Paramilitary Activities (Nicaragua v. U.S.), 1986, I.C.J. 14 at 111.
- <sup>5</sup> Fisheries Jurisdiction Case (United Kingdom v. Iceland) ICJ Reports 1974, 3 at 72.

### Forum Shopping?

The reasoning behind the European Commission's decision to bring the swordfish dispute to the WTO sheds light on the debate on the relationship between the trade and environment regimes in the WTO's Trade and Environment Committee (CTE).

In 1996, the CTE recommended that Members resolve disputes on trade measures taken pursuant to an MEA through the dispute settlement mechanisms available under the MEA. The EC, a great supporter of a clarification of the WTO/MEA relationship, acknowledges this in its 1999 Trade Barriers Regulation Committee Report (TBR): '... it is the Community's policy to apply, in a first instance, to dispute settlement bodies under the auspices of a multilateral environmental agreement (MEA) rather than revert to WTO proceedings under the Dispute Settlement Understanding (DSU). *The political aim is to avoid the undermining and weakening the credibility and effectiveness of MEAs by allowing them to be bypassed or even circumvented via the WTO route*' (author's emphasis).

Why then is the EC reluctant to use the dispute settlement system at UNCLOS, and instead take this dispute to the WTO? Chile and the EC are party to UNCLOS, and Chile has expressed a preference to solve this dispute within UNCLOS. The EC's TBR outlines the reasoning behind the policy change:

- the dispute is mainly about a jurisdictional problem concerning Chile's interpretation of its Exclusive Economic Zone, and not an environmental dispute;
- a positive judgment for the EC can be enforced under the WTO through the possibility to impose retaliation measures;
- the WTO has tighter time limits to solving the dispute.

The TBR notes that while a positive ruling by UNCLOS Arbitrators would ease the burden of making a case later at the WTO, it would not provide a practical solution because, unlike GATT Article V, UNCLOS has no obligations on their parties to allow free access to their ports. The WTO is recommended because 'it would be difficult to justify in front of the complainant the choice of a dispute settlement procedure [UNCLOS] which, even when successful, would have no consequences in terms of removal of the impugned trade barrier'.

Thus the EC has outlined the problems with the relationship between MEAs and the WTO in the trade and environment debate: UNCLOS, which actually has a powerful compulsory and binding dispute settlement system compared to most other MEAs, cannot grant the EC the remedy it seeks; cannot decide on a dispute within the WTO's strict time limits; nor can it allow for retaliation if there is non-compliance.

If the EC is willing to bring a case to the WTO that could undermine UNCLOS, then other WTO Members, who are not as supportive of clarifying the MEA relationship, may also ignore the CTE's recommendation. It seems that the critics of the Committee on Trade and Environment may have been correct in surmising that the CTE has only been a talk shop – and a talk shop where no one has been listening. In the next few months, the EC may wish to review its policy on the potential swordfish dispute and decide whether it is politically astute to risk the balance of the CTE for rights to transship swordfish.

*Risa Schwartz, a Canadian-based lawyer who specialises in trade and environment issues, wrote this comment for BRIDGES.*

## Human Rights Bodies Gear Up on TRIPs

By Peter Prove and Miloon Kothari

In a move warmly welcomed by many civil society organizations, the UN Sub-Commission on the Promotion and Protection of Human Rights on 17 August 2000 adopted a resolution on 'Intellectual property rights and human rights'.

This was a leading step in a recent flurry of activity by international human rights bodies on the issues of intellectual property rights and the TRIPs Agreement. In addition, the UN Committee on Economic, Social and Cultural Rights (the UN Committee on ESC Rights) has committed itself to holding a 'day of general discussion' on intellectual property and human rights on 27 November 2000. That debate is likely to lead to the drafting of a 'general comment' by the Committee on this topic.<sup>1</sup>

These interventions by the international human rights community come in the midst of the ongoing review of the controversial article 27.3(b) of the TRIPs Agreement by the WTO Council on TRIPs, and on the brink of the anticipated general review of the TRIPs Agreement mandated by Article 71.1.

The Sub-Commission's resolution<sup>2</sup>, which was adopted without a vote, noted the links between human rights and intellectual property<sup>3</sup>, but declared that "since the implementation of the TRIPs Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, ...there are apparent conflicts between the intellectual property rights regime embodied in the TRIPs Agreement, on the one hand, and international human rights law, on the other".

The right to benefit from the protection of the moral and material interests resulting from one's own scientific, literary or artistic production is a recognized human right pursuant to article 27.2 of the Universal Declaration of Human Rights and article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (albeit subject to limitations in the public interest). However, taken together, the major international human rights instruments, "place a discernible emphasis on the interests that humans have in the diffusion of knowledge."<sup>4</sup>

### Main Points of the Resolution

The key human rights identified by the Sub-Commission as being at threat under the TRIPs regime include the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination.<sup>5</sup>

In its resolution of 17 August, the Sub-Commission:

- reminded all Governments of the primacy of human rights obligations over economic policies and agreements, and requested them to integrate into their legislation and policies, provisions, in accordance with international human rights obligations and principles, that protect the "social function of intellectual property";
- called upon the WTO, and particularly the Council on TRIPs during its ongoing review of the TRIPs Agreement, to take fully into account the existing State obligations under international human rights instrument;
- asked the UN Secretary-General to provide a report on this question at the Sub-Commission's next session in August 2001.

Making a link between biodiversity concerns and human rights concerns, the Sub-Commission also commended the Conference of Parties to the Convention on Biodiversity (CBD) for its decision to assess the relationship between the CBD and the TRIPs Agreement.

### Human Rights Should Guide the Development of Intellectual Property Rights

In a paper presented at a WIPO panel discussion on 'Intellectual property and human rights' in November 1998, Dr. Peter Drahos (Herschel Smith Senior Research Fellow, Queen Mary Intellectual Property Research Institute, London) had already made the observation that intellectual property rights (IPRs), being subject to adjustment according to economic circumstances and being generally limited in duration, lack the characteristics of fundamental

human rights. As subordinate or "instrumental" rights, Dr. Drahos suggested that IPRs "should serve the interests and needs that citizens identify through the language of human rights as being fundamental. On this view, human rights would guide the development of intellectual property rights; intellectual property rights would be pressed into service on behalf of human rights." It is precisely because information has become the primary resource, he said, that exploitation of information through the exercise of IPRs affects interests that are the subject of human rights claims. Dr. Drahos

concluded by noting that "the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded lawyers", and he called for a dialogue between the human rights community and the intellectual property community.<sup>6</sup>

### Workshop Takes a Deeper Look at Key Issues

Two days after the passage of the resolution, the UN Committee on ESC Rights and the International NGO Committee on Human Rights in Trade and Investment organised an informal workshop, the second half of which dealt with intellectual property and human rights and particularly focused on the TRIPs Agreement. Participants included members of the Committee on ESC Rights, representatives of several UN and other multilateral agencies (including WIPO, UNCTAD and the WTO), NGOs and academics.

The discussion on intellectual property, TRIPs and human rights was launched by Dr. Drahos, presenting a further paper in which he noted that although the history of the implementation of TRIPs is relatively recent, "we have some evidence that should make us suspicious of arguments that continuing to globalise and ratchet up standards of intellectual property will serve human rights interests."<sup>7</sup> He referred in particular to the impacts on markets in food and health. "Clearly", he said, "the interest in health of all people has not to date been met in relation to the production of drugs for people in developing countries by a market system that relies significantly on patents to generate investment in drug research", for the simple reason that "the direction of patent-based research is determined by ability to pay." He concluded that the same trend was likely to be manifested in relation to genomics. He

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noted also that the price effects of global intellectual property standards on health and food products inevitably result in higher prices than those prevailing without protection.

With regard to the impact of globalized IPRs on the capacity of international institutions to provide public goods to developing countries in the agricultural sector, Dr. Drahos referred to the experience of the Consultative Group on International Agricultural Research (CGIAR), which necessarily uses biotech tools to undertake its research mission. Increasingly such tools fall under proprietary control. A CGIAR investigation had revealed that in nearly half of the cases in which CGIAR centres were using proprietary biotechnology, “they were uncertain whether the results of their research could be applied freely (or at all)”.<sup>8</sup>

Finally, Dr. Drahos referred to the impact of global IPRs on the human right to education, drawing attention to the price impacts of globalizing copyright standards on educational texts, particularly in developing countries.

Dr. Drahos portrayed the TRIPs Agreement as a prime example of “business sovereignty over regulatory standard setting”. He said that the goal of the human rights community should be “to make those involved in intellectual property begin to think about intellectual property rights systematically in relation to human rights values and law”, by:

- becoming active in the intellectual property standards setting process, and
- promoting the development of linkages between those institutions responsible for the administration and interpretation of intellectual property rights and those that have responsibility for human rights.

In a warning against “snappy sloganeering”, however, he said that calls “for an end to patents on life...do little to advance regulatory solutions to the problems of agricultural diseases, some of which will require a biotech solution and may in part need to be funded via the patent system.”

The workshop discussions, which were also informed by presentations by Mr. Simon Walker of the Office of the High Commissioner for Human Rights and Ms. Kristin Dawkins of the Institute for Agriculture and Trade Policy, were seen as a constructive preparation for the Committee on ESC Rights’ further consideration of this issue, and for its drafting of the ‘general comment’ on intellectual property and human rights.

### Human Rights Concerns about TRIPs

The extraordinary level of activity by international human rights bodies on this rather technical aspect on international economic law is founded on increasingly widespread concerns in human rights circles about the social impacts of the enhanced regime of IPR protection under TRIPs.

Amongst other aspects of the current interpretation and implementation of the TRIPs Agreement which have raised serious human rights concerns are the following:

- The implementation of the TRIPs Agreement has resulted in the restriction of access to patented pharmaceuticals for citizens of developing countries, as has been highlighted by analysis by the World Health Organization, Médecins sans Frontières and others – raising obvious implications for the enjoyment of the right to health.

- The ‘pirating’ of indigenous and traditional knowledge and designs for commercial exploitation by others pursuant to IPRs, contrary to both human rights law and the spirit of intellectual property law, is nevertheless flourishing under the TRIPs regime. Unlike the Convention on Biological Diversity, the TRIPs Agreement does not explicitly protect the interests of indigenous and local communities.
- The establishment and expansion of plant variety rights and intellectual property protection of genetically modified organisms hold serious implications for food security, and the enjoyment of the right to food.
- Stronger intellectual property protection under TRIPs also tends to impede technology transfer to developing countries, particularly through the imposition of higher prices for protected technologies, thereby presenting an obstacle to the universal right to enjoy the benefits of scientific progress and its applications, and to the realization of the right to development.
- The larger ethical issues surrounding human genome mapping and patenting also carry implications for the human right to self-determination.

Intellectual property law is founded upon the attempt to balance the interests of the originator/author (or IPR holder) with those of consumers and the general public. A human rights analysis helps to sharpen the view, shared by some sectors of the intellectual property law community, that implementation of the TRIPs Agreement has upset that balance in favour of intellectual property right holders.

The current levels of activity on this issue in the human rights bodies shows that they are intent upon making their voices heard and injecting a human rights perspective into this policy discussion.

*Peter Prove is Assistant to the General Secretary of the Lutheran World Federation, and Miloon Kothari is Coordinator of Habitat International Coalition.*

### ENDNOTES

<sup>1</sup> A ‘general comment’ by the Committee on ESC Rights is an authoritative interpretation of the relevant international human rights law under the International Covenant on Economic, Social and Cultural Rights.

<sup>2</sup> E/CN.4/Sub.2/RES/2000/7

<sup>3</sup> Article 27.2 of the Universal Declaration of Human Rights (UDHR) and article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) both declare a right to “protection of the moral and material interests resulting from any scientific, literary or artistic production” of which one is the author – subject, however, to limitations in the public interest.

<sup>4</sup> Drahos, P., *The Universality of Intellectual Property Rights: Origins and Development*, published in *Intellectual Property and Human Rights*, WIPO publication No. 762(E), 1999

<sup>5</sup> UDHR article 27.1 and ICESCR article 15.1(b); UDHR article 25.1 and ICESCR article 12; UDHR article 25.1 and ICESCR article 11; and ICESCR article 1. Also article 1 of the International Covenant on Civil and Political Rights (ICCPR), respectively.

<sup>6</sup> See note 4 above.

<sup>7</sup> Drahos, P., *Human Rights, Globalisation and Intellectual Property Rights*, unpublished paper presented at informal workshop on 19 August 2000.

<sup>8</sup> Report of the CGIAR Panel on Proprietary Science and Technology, Technical Advisory Committee Secretariat, FAO, 1998, xiv.



## Toward a Level Playing Field in Organic Farm Trade

By Gunnel Axelsson Nycander

It is a common perception that rising environmental standards put Third World exporters, especially small and medium-sized enterprises, at a competitive disadvantage. This may or may not be a fair general picture. There are, however, areas where developing countries seem to have a definitive competitive advantage. Organically grown products, which generally command premium prices, may be the most important example.

The world market for organic products consists almost exclusively of the EU, the US and Japan. It amounts to approximately US\$13 billion, of which about 15 percent is traded internationally. The annual growth rate is estimated at 20-25 percent. Once the infrastructure for certification and market channels is in place, many developing countries have great export potential because conversion to organic farming entails no major changes in agricultural practice for the large number of farmers who, for lack of funds or other reasons, use few chemical inputs.

Lately, however, some disturbing questions have arisen: Are developing countries given a fair chance to compete on the growing markets for organic products? Or are they largely excluded, not because their goods are inferior, but because import regulatory systems and bureaucratic requirements are too burdensome and poorly adapted to their conditions? Are emerging norms discriminatory? And are the concerns and particularities of producers taken into account in rule-making?

### Guarantees to Consumers

The growth of the organic product market depends on credible consumer guarantees that products labelled as 'organic' are produced according to certain standards. Such guarantees have been gradually developed by the International Federation of Organic Agricultural Movements (IFOAM), which represents market actors, including farmers, consumers and environmental NGOs. The guarantee system encompasses production standards and a system to accredit bodies, which inspect farmers according to these standards. This internationally-harmonised system facilitates trade. In future, an IFOAM label will complement the individual labels issued by different inspection bodies.

In parallel to the private system, several countries have implemented laws to regulate production, sales and trade in organic goods in order to protect consumers from dishonest marketing, and to ensure fair competition among producers. The EU's Council Regulation 2092/91, introduced in 1991, was the first such initiative, and a number of exporting countries have followed suit, largely as a means to secure continued access to the EU market. The US and Japan are also in process of developing laws, the import requirements of which are yet to be seen, although the Japanese draft suggests their import regime will to a certain degree resemble the EU model. In addition, Codex Alimentarius adopted international guidelines in 1999. These are not binding, but may have a great influence on lawmakers.

According to Regulation 2092/91, only products that have been produced and supervised in accordance with the Regulation may be marketed as organic within EU. The regulation, especially the

rules governing imports from non-EU countries, has proven to be extremely complicated. In essence, there are two ways to import organic goods to the EU.

### *The 'front door'*

As a main rule, article 11 (1) governs products coming from countries that are 'listed' by the European Commission. A country is added to the 'list' once the authorities in the exporting country have produced evidence that they can guarantee that any organic product exported to the EU fulfils requirements equivalent to those of the Regulation. The exporting country's government must, *inter alia*, adopt a national standard for organic production, supervise and approve inspection bodies (private or official), and set up a system to issue official certificates. Once the EU has assessed and approved a country, it is the exporting country that guarantees that the products fulfil the EU requirements.

At present, five countries are listed: Argentina, Australia, Israel, Hungary and Switzerland, with the Czech Republic following soon. About 20 countries have applied for being listed and a larger number of countries have signalled interest, but

not come back with complete applications (supposedly because they were discouraged by the demanding requirements). Some Eastern European countries, along with a few OECD countries, are most likely to become listed the next few years. No Sub-Saharan country in Africa has applied.

A basic problem with the listing procedure is that organic farmers in non-listed countries may be discriminated against. Organic producers in countries which lack a functioning state administration, or where the state does not feel it has the resources to develop the necessary legal and administrative framework for organic farming, are excluded from the 'front door' even if their products meet the EU requirements for cultivation.

### *The 'back door'*

When the Regulation was introduced, it was soon evident that the process of approving countries was so slow that it threatened imports. An exceptional way of approving imports was therefore added, article 11 (6), known as the 'importer derogation' or the 'back door'. The exception was to be limited to a certain time period, but has since been extended several times, presently to 2004. Today, the majority of imports still come through the 'back door'.

According to article 11(6) imported organic products may be marketed as such if the importer can furnish the relevant authorities in the member state with satisfactory proof that the product was produced and inspected in accordance with the EU rules. The responsibility for import approval is thus placed on the member states.

The 'back door' procedure entails much more paper work for exporters, importers and inspection bodies. In contrast to the 'front door' procedure, specific import permissions need to be obtained for each export contract. Another problem is that in practice 'back

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door' rules are applied differently in different member states. The result is arbitrary decisions, uncertainty among exporters and importers, and distorted trade.

### **Problems**

A case study on Uganda, which has very good organic export potential, showed that organic exporters face a lot of constraints, many of which have to do with high costs and bottle necks in the early phase of market development. The EU import regime exacerbates a number of these problems not least through the confusion and uncertainty faced by authorities' and exporters' who lack information on which rules apply. Several exporters have also experienced severe delays in obtaining the necessary import licenses, even to the degree that customers were lost. Reports from other countries tell of shipments totally blocked and eventually sold as conventional products (at a much lower price).

According to UCIRI (an organisation of almost 3000 small farmers in Southern Mexico with 15 years of experience of exporting organic coffee to Europe), ever-changing and tightening requirements are forcing several smaller organisations to give up exports to the EU. They add: '[...] our main concern is that the new regulations create more interest in paper work than in the actual ecology. Instead of curbing possible fraud they only increase the possibilities of fraud.'

The most acute difficulties for Third World exporters arise from accreditation requirements and uncertainty regarding group certification. The fundamental problem is the lack of harmonisation, or at least peaceful co-existence, between the official and the private systems for inspection and certification.

### **Accreditation**

Accreditation – or quality control of bodies that perform inspection, tests or certification – is becoming more widespread but has not yet broken through in all areas. In the food inspection area, for example, there still are very few accredited certification bodies in most European countries. Since 1 July 1999, all bodies inspecting organic production must conform to European standard EN 45011 (or equivalently, ISO65). This standard covers the inspection organisation's structure and procedures and places strict demands on the documentation of procedures. The guarantee that the bodies conform to the EN standard can either be given by an official accreditation organisation, or in the case of EU members and 'listed' countries, by the 'competent authority' in the country. The requirement has created acute problems for organic exporters in developing countries where accredited certification bodies are virtually non-existent due to the process's length and cost.

IFOAM has developed an accreditation system – carried out independently by the International Organic Accreditation Services – specifically for organic farming. Unlike the EN or ISO standards, this system focuses on production rather than product certification, and it applies not only to the structure and processes of the inspection bodies but also to practical supervision activities. IFOAM's request that this accreditation system should be deemed equivalent to EN 45011 has been coolly received by the European Commission and some national authorities. They argue that accreditation should be left to national accreditation organisations, and that competition between different accreditation bodies in the same country should be avoided. Moreover, some are generally sceptical about sector-specific certification programs, such as IFOAM or the Forestry Stewardship Council. In practice, however,

IFOAM accreditation is accepted by several member states. And on many markets retailers think IFOAM provides the best guarantee that production inspections are carried out thoroughly.

In view of its cost and only partial relevance for organic production – and the fact that accreditation is not yet mandatory for inspecting such key consumer concerns as food safety – EN 45011 accreditation is perhaps not the most appropriate requirement for organic product imports to the EU. Least of all should it be the exclusive requirement.

### **Group Certification**

According to the EU rules, each farmer has to be inspected annually. In developing countries, where many farmers cultivate small plots of land, such a system is unpractical and excessively expensive. Therefore, group certification based on internal control systems with assigned staff and responsibilities is practiced in most developing countries. The grower groups may range from less than a hundred to several thousands small-scale producers who co-ordinate marketing and thus simplify the control of product flow. IFOAM has developed criteria for grower group certification, which require annual internal inspections of all operators, as well as an annual inspection of the group by an external inspection body. The proportion of farmers that must be externally inspected varies depending on the number and size of the operations involved, as well as the degree of uniformity, the production system and the management structure.

The EU regulation – developed for European conditions – does not give clear room for accepting group certification. In practice, member states treat group certifications differently, again creating uncertainty among producers and in many instances causing shipments to be delayed or stopped.

### **Conclusions**

In a WTO and TBT context, one may wonder whether the discriminatory aspects of emerging import regulatory systems on organic commodities, including the EU's, are 'least trade-restrictive'. For instance, the recently introduced EU-label, which may only be used on foodstuffs produced within the Community, may result in undue restrictions to imports.

The Swedish International Development Authority (Sida) has looked into the potential problems for Third World exporters. Sida fears that its EPOPA programme, which supports certification and export of organic products from Africa, is threatened by the EU rules. Otherwise, the trade implications of Regulation 2092/91 have attracted very little attention beyond technical experts and are rarely put in the broader trade and sustainable development context where they rightly belong.

If the promotion of organic farming everywhere were the overall objective of Regulation 2092/91, the EU would logically adapt its requirements to national and regional conditions, promote international trade, and take into account the concerns of farmers and consumers world-wide. These and other aspects of trade in organic products, an area of immense potential for developing countries, will be well-served by more research and dialogue.

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### Controversy Intensifies on Whaling

The 41-nation International Whaling Commission held another controversial annual meeting on 3-6 July in Adelaide, Australia. As in previous years, the meeting pitted 'pro-whalers' Norway and Japan against those against, most notably Australia, New Zealand, the UK and the US.

#### A Step Closer to Lifting the Moratorium?

The Commission, set up 50 years ago to monitor international whaling activities, imposed a moratorium on commercial whaling in 1986. With a few nations, such as Korea, abstaining, the 'anti-whalers' supported by Greenpeace and other conservation organisations carried the day over the objections of the two primary whaling nations, as well as the High North Alliance, a non-governmental association of whalers from Norway, Canada, the Faroe Islands, Greenland and Iceland. The moratorium was set to run until the adoption of an international management regime that would set sustainable quotas and other rules for whaling activities. The regime is yet to be agreed, but whaling nations' calls for lifting the moratorium are growing louder every year. They claim that certain minke and grey whale populations are now so abundant that they actually threaten the stability of some fish stocks. The clash has spilled over to the CITES arena, where the conservation status of these whale populations was one of the issues most bitterly fought over last April (Bridges Year 4 No.3, page 10 and No.2, page 9).

In spite of its serious divisions, the IWC decided in Adelaide to speed up drafting the new management regime, ideally in time for adoption at the IWC's next meeting in 2001. Whaling nations hope the regime will 'legalise' and expand the scope of the whaling they currently carry out under 'scientific' or 'traditional rights' quotas. Others believe that new rules could make inspection and verification procedures more efficient and thus close some of the ban's loopholes, which they claim Norway and Japan are exploiting. They also point out that the moratorium will not be automatically lifted once the management regime is adopted.

Japan hailed as a victory of 'science over emotion' the IWC vote, which failed to gain the 75 percent majority needed for the establishment of a whale sanctuary – or non-hunting zone – in the Southern Pacific. Japanese Commissioner Minoru Morimoto called the Australian proposal 'absurd and doomed to fail from the start'. Instead of calling for Japan to resign from the IWC, Mr Morimoto said Australia should leave the Commission rather than insist on changing it from a regulatory body into a conservation organisation. Australia said it would resubmit the sanctuary proposal to the Commission's next meeting in 2001 in London.

#### Japan Defies US Sanction Threat

Japan added to the controversy when it sent a fleet to the Northwestern Pacific on 29 July to hunt not only the minke, but also the larger Bryde's and sperm whales, which have not been caught for years. It again claimed that capture of the species was necessary for scientific research on the whales' habitat, population and migration patterns, and that Bryde's and sperm whale populations had recovered enough for catches to resume. The species are protected under the US Marine Mammal Protection Act, and the Clinton Administration has raised the possibility of trade sanctions against Japanese fishery products and other goods if the hunts continue. Japan has defiantly predicted a victory in the WTO if the US takes unilateral action.

### Is Momentum Gathering for a New WTO Round?

An impressive number of economic and political entities have issued calls for a new round of WTO negotiations in the recent months.

For instance, the Rio Group, made up of 19 Latin American and Caribbean countries, said at the end of its June Summit, that a new round should be started 'immediately', with an emphasis on reducing developed countries' barriers to trade in agricultural products. Also in June, finance and trade ministers of OECD countries announced that they were 'determined to work towards the launch as soon as possible of an ambitious, balanced and broad-based WTO round of multilateral trade negotiations reflecting the needs and aspirations of all WTO Members.' Just a week earlier, APEC trade ministers had reaffirmed their strong commitment to an 'early launch of a new round of multilateral trade negotiations and to work to achieve their collective objectives with respect of the WTO.' These ringing statements were topped by the G-8 Summit, held in July in Okinawa: 'We are firmly committed to the launch of a new round of WTO negotiations with an ambitious, balanced and inclusive agenda, reflecting the interest of all WTO Members.'

Judging by this quasi-unanimity, a new round of full-blown trade liberalisation should be just around the corner. That is without counting on two thus far immovable facts: there is no more agreement now than a year ago on the exact ingredients of a putative 'new round' and a core group of developing countries is holding firm onto its demand that implementation of existing Agreements be adequately addressed before talks are started on launching another cycle of liberalisation.

In fact, most of the statements cited above paper over serious disagreements between their members. APEC, for instance, remains divided over whether investment, anti-dumping and labour standards should be included. Similarly, OECD countries continue to have widely diverging objectives for any new talks, as do the G-8. On agriculture alone, there continues to be little meeting of the minds in groups that include the EU (or its key governments), Japan, the US, Australia and other Cairns Group members.

Many developing countries continue to be suspicious, not least because the frequent calls for 'inclusiveness' have not translated into action during the ongoing WTO review of developing countries' implementation concerns (page 5). The joint communiqué of the G-15 Summit in Cairo in June stated that the multilateral trading system 'must take into account the development dimension in multilateral trade negotiations. There is need to strengthen such instruments as Special and Differential Treatment provisions and to make them operational so as to promote the interests of developing countries. Special attention should be given to addressing the problems faced by developing countries in the implementation of their WTO obligations. [...] The growing protectionist tendencies in the industrial countries manifested, *inter alia*, by attempts to introduce non-trade issues in multilateral trade negotiations and the application of non-tariff barriers, anti-dumping duties and anti-subsidy investigations need to be checked. [...] We express concern at unilateral trade measures being resorted to on grounds of environmental protection. Non-trade issues such as labour standards, proposed by some developed countries, shall not be introduced in, or linked to the WTO Agenda.'

The New Round might not be quite around the corner, after all.



## African Trade and Sustainable Development Seminar Identifies Capacity-building Priorities

Convened by the International Centre for Trade and Sustainable Development (ICTSD) and ENDA Tiers Monde, 80 representatives of trade and environment ministries, civil society and academia from Western and Central Africa met from 13-14 July in Libreville, Gabon, to discuss trade and sustainable development in the region. The meeting was held back-to-back with a WTO Regional Seminar on Trade and Environment.

### The Challenge

The challenges faced by most Central and Western African countries remain formidable. The worldwide globalisation and liberalisation process has not to date led to their integration in the world economy, and Africa's share of international trade keeps decreasing. The continent's exports consist mainly of primary agricultural commodities and raw materials and, without a real diversification of national economies, terms of trade are likely to deteriorate further.

Western and Central African countries are currently preparing for the upcoming WTO negotiations, as well as negotiations on a new trading relationship with the European Union as foreseen in the Cotonou Agreement signed last June. These negotiations are slated to start in 2002.

Participants at the ICTSD-ENDA workshop debated nine specific themes that are particularly relevant in this context:

- The WTO Agreement on Agriculture: options to support food security in Sub-Saharan Africa;
- The WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and the OAU Model Law on Community Rights and Access to Genetic Resources;
- The impacts of the Cotonou Agreement (on trade relations between the European Union and ACP countries) on African economies and trade;
- Intra-regional trade and regional integration: lessons from the West African Economic and Monetary Union;
- Utilisation of forestry resources in the Congo Basin (exemplified by Cameroon) and international standard setting (certification);
- Restrictions in the access to European markets due to import standards (exemplified by Côte d'Ivoire);
- Utilisation of fisheries resources and sustainable development (exemplified by Senegal);
- The impacts of treaties related to greenhouse gas emissions reductions and the expansion of international 'emissions rights' on sustainable development in Africa.

### Capacity-building Geared to African Priorities

Discussions that followed presentations highlighted the impact of trade rules on food security, public health, the sustainability of resources and, more generally, on economic growth and poverty eradication. Participants stressed the importance of continued African input in the elaboration of standards and rules governing international trade relations.

In view of future negotiations, it is essential to reinforce African capacities at both regional and national levels. Participants noted, however, that capacity-building should not be limited to assisting Africa in understanding and implementing WTO Agreements, as international technical co-operation programmes too often do. Rather, the strategic objective must remain reinforcing African

countries' capacity to better define their trade policies, according to national and regional priorities and interests, and ways to better apply those policies at the level of the multilateral trading system. In this perspective, participants identified three fundamental components of capacity-building:

- The importance of investing in knowledge and research, and of protecting traditional knowledge. In the first place, this implies setting up better research and information systems on African environmental resources and recognising the value of traditional knowledge, but also a better use of existing scientific knowledge. The development of knowledge and research are vital for harnessing environmental capital for sustainable development throughout the continent, as well as for achieving a more prominent place in international negotiations and the multilateral trading system.
- The promotion of dialogue between the actors involved in natural resources utilisation and sustainable development. These include in particular socio-professional associations representing the interests of such groups as farmers, foresters, local communities, fishermen and livestock growers; state and local authorities; and civil society and business organisations.

An improved dialogue on the different facets of sustainable development, and on African negotiating positions at the international level, would allow the establishment of better resource conservation standards, taking into account the different interests at stake without harming sustainability. Similarly, a democratic dialogue between actors would strengthen Africa's credibility and add the weight to its positions in international fora.

- Building African countries' negotiating capacity: this requires above all a deeper understanding of what is at stake in negotiations, and better links with research and information systems. African countries should also reinforce their presence at international negotiating fora, and take a more active role in discussions at the World Trade Organisation, the International Standardisation Organisation, the Codex Alimentarius Commission, the United Nations Food and Agriculture Organisation and other intergovernmental decision-making bodies. There is also a need for improved communication between various decision-making entities and the different national actors involved. And finally, African countries should develop greater solidarity, take advantage of potential synergies and focus on the elaboration of common positions at different levels ranging from the Organisation on African Unity and the African Group at the WTO to various regional integration processes, such as the West African Economic and Monetary Union.

### ICTSD's Regional Trade and Sustainable Development Workshops

The Libreville meeting was the third co-organised by ICTSD in connection with a WTO Regional Seminar on Trade and Environment. The previous ones took place in Santiago de Chile in September 1998 and in Harare, Zimbabwe, in February 1999. A fourth regional workshop is planned from 30 November to 1 December in Chiangmai, Thailand, again back-to-back with a WTO seminar for government representatives.

For more information and copies of papers presented at the meeting, please contact ICTSD or consult the ICTSD Dialogues website at <http://www.ictsd.org/dialogueweb/Dialogues/dialogue-archive.htm>

## ICTSD Review and Governance Changes

The four years since the founding of the International Centre for Trade and Sustainable Development in 1996 have brought great changes in the way the multilateral trading system relates to civil society concerns, to developing country interests, and to sustainable development more broadly. The level of engagement and expertise of NGOs and others in civil society, from countries across the economic spectrum, has grown dramatically. ICTSD has played a central role in enabling these developments, expanding from a core group of collaborating organisations and individuals to a network of more than 7,000 individuals and organisations in 200 countries.

Recognising these changes, ICTSD's General Assembly has reviewed the Centre's role in the changing trade and sustainable development environment. The review focused on ICTSD's governance, mission and programme strategy, and involved audience and stakeholder consultations; independent external assessments; and a marketing study to identify the priorities of ICTSD's audiences and to determine how the Centre could better serve them. A full list of those consulted and the consultants' reports are available upon request (ictsd@ictsd.ch), and will shortly be posted on our website (www.ictsd.org).

Winding up the review process, ICTSD's General Assembly took the following decisions and resolutions on 5 May 2000:

- ICTSD will have a more broadly representative *governance* structure, expanded membership and changed roles of ICTSD's governing bodies.
- ICTSD should continue to focus on sustainable development and the *trade policy process*, with particular emphasis on the *development dimension* and the participation of *civil society*.
- ICTSD should promote *transparency* and *multi-stakeholder participation* in the international trade regime as a means of advancing sustainable development, with particular emphasis on capacity development and partnering in regional initiatives.
- ICTSD should continue to provide *high-quality, credible information and non-partisan facilitation* to all key actors in the trade policy process.

### Changes to Governance Structure Will Enhance Legitimacy

Under ICTSD's current governance structure, an Executive Board made up of its founding members (CUTS, FFLA, IISD, SCDO and IUCN) takes decisions on policy, direction and oversight. The Programme Advisory Board (PAB), made up of key organisations, meets as needed to provide additional programmatic direction. Similarly, a Trade Advisory Council (TAC) made up of leading individuals from academia, the private sector and the trading system meets as needed to provide independent evaluation of the Centre's programmes and activities.

Two primary changes will be made to ICTSD's governance structure as a result of decisions at the May 5<sup>th</sup> General Assembly. First, the roles of the PAB and TAC will be carried out by a newly-formed 'Stakeholder Forum', with 30 organisation members. Second, ICTSD's General Assembly will expand from its current composition of five founding organisations to a Governing Board of thirteen newly-elected individual members serving in their personal capacities. The election will be carried out by the existing Executive Board, voting from a list of nominees that includes nominations by members of the PAB and TAC. The goal of voting in both bodies is to ensure an appropriate balance in terms of geography, gender, and stakeholder representation, while ensuring a predominant orientation towards civil society and developing country interests. It is anticipated that these changes will make the Boards both more actively engaged in the Centre's mission and activities, as well as more broadly representative of the Centre's constituency.

The next General Assembly meeting will be held in early September, at which time the new board members will be voted into office. We value your comments, and contributions related to our governance structure and processes.

The International Centre for Trade and Sustainable Development (ICTSD) implements its programme of information, dialogues and research through partnerships with institutions around the globe.

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### MEETINGS

WTO meetings take place in Geneva.  
All WTO phone and fax numbers start with (41-22) 739.  
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Dates may change, please contact the WTO for confirmation.  
[http://www.wto.org/english/news\\_e/news\\_e.htm#WhatsOn](http://www.wto.org/english/news_e/news_e.htm#WhatsOn)

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|-----------------------------------|--|
| September 11-15<br>Lyon, France   | 13 <sup>th</sup> Session of the Subsidiary Bodies to the UN Framework Convention on Climate Change<br>Contact: UNFCCC Secretariat, tel: (49-228) 815-1000, fax: 815-1999, e-mail: <a href="mailto:secretariat@unfccc.de">secretariat@unfccc.de</a> |
| September 18-21<br>Rome, Italy    | 26 <sup>th</sup> Session of the FAO Committee on World Food Security<br>Contact: <a href="mailto:Barbara.Huddleston@fao.org">Barbara.Huddleston@fao.org</a>  |
| September 21-22                   | WTO Council for Trade-related Aspects of Intellectual Property Rights<br>Contact: Peter Ungphakorn, tel: 5412, fax: 5458   |
| September 22                      | WTO Committee on Trade and Development<br>Contact: Chiedu Osakwe, tel: 5250, fax: 5774   |
| September 22-23<br>Cambridge, MA  | International Conference on Biotechnology in the Global Economy: Science and the Precautionary Principle<br>Contact: Derya Honca, Harvard University, e-mail: <a href="mailto:Derya_Honca@KSG.harvard.edu">Derya_Honca@KSG.harvard.edu</a>         |
| September 26                      | WTO Dispute Settlement Body<br>Contact: Gabrielle Marceau, tel: 5519, fax: 5788  |
| September 27                      | WTO Committee on Agriculture<br>Contact: Peter Ungphakorn, tel: 5412, fax: 5458  |
| September 28-29                   | WTO Committee on Agriculture – Special Session (negotiations)<br>Contact: Peter Ungphakorn, tel: 5412, fax: 5458   |
| October 5-6                       | WTO Council for Trade in Services – Special Session (negotiations)<br>Contact: Nuch Nazeer, tel: 5393 fax: 5458  |
| October 2-6<br>Rome, Italy        | FAO Technical Consultation on Illegal, Unreported and Unregulated Fishing<br>Contact: D. Douman, (39-0) 675-051, e-mail: <a href="mailto:FI-Inquiries@fao.org">FI-Inquiries@fao.org</a>  |
| October 9-20<br>Geneva            | 47 <sup>th</sup> Session of the Trade and Development Board<br>Contact: UNCTAD Office of the Secretary of the Board, tel: (41-22) 907-5007, fax: 907-0056  |
| October 9-11                      | WTO Textiles Monitoring Body<br>Contact: J.-P. Lapalme, tel: 5223, fax: 5765   |
| October 10                        | WTO General Council<br>Contact: Bernard Kuiten, tel: 739-5676, fax: 5777   |
| October 11-12<br>Montreal, Canada | NAFTA/CEC Symposium on Understanding the Linkages Between Trade and the Environment.<br>Contact: Andrew Horsman, tel: (1-514) 350-4300, fax: 350-4314, e-mail: <a href="mailto:ahorsman@ccemtl.org">ahorsman@ccemtl.org</a>                        |

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WTO. 2000. Trade and Environment Material on the WTO Site. Contains, *inter alia*, a complete set of the *Trade and Environment Bulletins* prepared by the Secretariat on CTE meetings. [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_e.htm)