

BRIDGES NETWORK

BIORES

Analysis and news on trade and environment

VOLUME 7, ISSUE 2 - JUNE 2013



Regulating trade in natural resources

NATURAL RESOURCES

The role of the WTO in the era of increased resource scarcity

HAZARDOUS CHEMICALS

Trade under the Minamata Convention

FISHERIES

The broader implications of reforming Europe's fisheries



International Centre for Trade
and Sustainable Development

BIORES

VOLUME 7, ISSUE 2 - JUNE 2013

BRIDGES TRADE BIORES

The leading authority on news and analysis emerging from the trade and environment nexus.

PUBLISHED BY

ICTSD

International Centre for Trade and Sustainable Development

Geneva, Switzerland

www.ictsd.org

PUBLISHER

Ricardo Meléndez-Ortiz

EDITOR-IN-CHIEF

Andrew Crosby

MANAGING EDITOR

Andrew Aziz

EDITORS

Andrew Aziz and Malena Sell

ADDITIONAL SUPPORT

Sofia Baliño, Georges Bauer, and Affan Mian

DESIGN

Flarvet

LAYOUT

Oleg Smerdov

To join the BIORES Editorial Advisory Board, write to us at biores@ictsd.ch

BIORES welcomes all feedback and is happy to consider submissions for publication. Guidelines are available upon request. Please write to biores@ictsd.ch

NATURAL RESOURCES

- 4 **International trade in an era of relative resource scarcity**
Gilles Carbonnier

HAZARDOUS CHEMICALS

- 8 **One nation under GATT: The trade regime under the new Minamata Convention on Mercury**
Pieter Leenknecht

FISHERIES

- 14 **Will EU fishery reform lead the way in fighting back overcapacity and overfishing?**
Aimee T. Gonzales

SPECIAL MEETING REPORT

- 16 **Climate Pact Deadline Looms as Negotiators Gather in Bonn**

WORLD TRADE ORGANIZATION

- 18 **WTO Appellate Body rules against Canada in renewable energy case**

WORLD TRADE ORGANIZATION

- 20 **EU seal ban under the microscope once again in Geneva**

- 22 **The newsroom**

- 24 **Publications and resources**

Regulating trade in natural resources



Natural resources hold a near and dear place in the hearts of nations. It is the natural bounty of a country – the tangible value of a nation state based on where its borders lie. Over millennia, wars have been fought over these resources and colonies have been established to efficiently exploit them abroad.

Ripped from the earth, cut from the forests, and hauled in from the sea, these most basic building blocks of the planet's economy can have a significant bearing on a country's fiscal well-being. But by many recent accounts, accessing these resources is becoming increasingly challenging. Indeed, industries engaged in raw material extraction and transportation now have to travel further afield, use increased amounts of energy, and create more pollution in their daily operations.

From mineral extraction to global trade regulation to fisheries management, the present and future challenges as well as possible ways of addressing these challenges are explored in this second issue of the year.

Gilles Carbonnier, a professor at the Geneva-based Graduate Institute of International and Development Studies, looks at the ways in which the multilateral trading system can help manage trade in natural resources in a time where scarcity is placing unprecedented pressure on the system.

Carbonnier expresses concern that the WTO is not fully equipped to effectively address concerns arising from increased resource scarcity. He calls on the organisation to place a higher priority on addressing countries' increased use of export restrictions.

Mercury and its compounds are highly toxic heavy metals used in products such as fluorescent lamps, thermometers, and a number of medical devices or released as by-products in other extractive industries. Pieter Leenknecht, a Belgian diplomat and expert on the issue of mercury trade, delves into the trade implications of the landmark Minamata Convention on Mercury and offers one of the most in-depth articles on the subject to date.

Leenknecht looks carefully at the negotiation process that led to the conclusion of the agreement and explores how Party and non-Party members will be affected after implementation.

WWF International's Aimee Gonzales offers an analysis of the EU's current efforts to overhaul its fisheries industry and looks at the broader connections to Europe's approach to fisheries under the Doha Round.

In particular, Gonzales questions the apparent inconsistency between Brussels' call for a prohibition on certain capacity-enhancing subsidies at the WTO and what has emerged during the recent overhaul process of the Common Fisheries Policy.

As usual, we also offer a roundup of the most salient news, analysis, and resources emerging from the trade and environment nexus. We take great pleasure in hearing from our readers, so please feel free to drop us a line with your comments, critiques, or suggestions.

The BioRes Team

NATURAL RESOURCES

International trade in an era of relative resource scarcity

Gilles Carbonnier

What is the role of the multilateral trading system in today's era of increased resource scarcity?

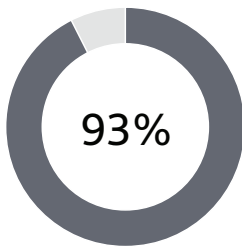
The turn of the Millennium marked a shift towards higher commodity prices and greater price volatility, as a result of high demand for natural resources from emerging economies combined with export restrictions and financial speculation. A recent Chatham House report highlights that, over the past decade, the global consumption of coal and iron ore grew by five to ten percent a year. Annual growth was closer to two percent for oil, copper, wheat and rice.^① Fast growth in demographic heavyweights and the rise of large middle classes in an increasing number of middle-income countries are likely to remain a major commodity price driver for years to come. Global demand for food is expected to grow by 70 percent from 2010 to 2050, while global energy demand is forecasted to be one-third higher by 2035 according to the International Energy Agency. A recent study shows that real commodity prices for energy and non-energy resources have actually been on the increase for the past six decades, notwithstanding short-term boom/bust episodes and medium-term cycles, with real prices being particularly low in the 1990s and early 2000s.^② The boom in unconventional oil and shale gas appears as a game changer and shall exert a significant impact on energy prices, notwithstanding powerful constituencies advocating for export restriction to keep domestic prices low in producer countries (e.g., shale gas in the United States) and serious climate and other environmental concerns.

As the world has entered an era of relative resource scarcity, an increasing number of bilateral and regional trade agreements include deals on strategic resources aimed at securing the uninterrupted supply of strategic goods. This heightens shortage risks for other importing countries that are not part of the deal and poses a serious challenge to the multilateral trading system, inherited from a previous era of relatively low commodity prices associated with resource abundance.

Export protectionism

Over the past decade, a growing number of countries have introduced export restrictions on food, energy, and mineral products. While primary commodity exporters had long levied export duties for fiscal purposes or to promote the domestic transformation of raw materials, things look different this time: between 2007 and 2011, over thirty countries imposed export restrictions on agricultural goods out of food security and price concerns. Such trade restrictions may be responsible for up to half of the food price hikes of 2007-2008.

The post-World War II GATT and post-Cold War WTO were established with the primary objective of addressing import protectionism. Notwithstanding the prohibition of quantitative restrictions on exports (and imports) under GATT Article XI, the negotiations focused primarily on setting binding limits on import tariffs and non-tariff measures, and on export subsidies. In contrast, export duties have not been explicitly dealt with under GATT, which, in addition, allows for exceptions to the general rule of eliminating quantitative export restrictions. In its 2010 World Trade Report, the WTO underlined that multilateral trade rules had not been designed to regulate trade in natural resources and were not always adequate to respond to sectoral specificities.^③ However, general WTO principles do provide a framework for limiting trade wars in the resource sector, and there are specific provisions that are particularly relevant to trade in natural resources.



Percentage of global rice production consumed by producer countries.

When it comes to the recent food price crisis, assessing the extent to which trade-related measures mattered is no easy task. The specific impact of abnormal climatic events, trade restricting measures and financial speculation remains a contested issue and may greatly vary from one commodity to another. The 2008 rice crisis offers a few important insights in this regard. The price of a metric ton of rice increased from US\$393 in January 2008 to more than US\$1,000 in April-May 2008, and then fell back to US\$550 by the end of the year. According to rice experts, the market fundamentals did not justify such a price boom and bust. Despite drought affecting a few producing areas, there was no shortage of rice on world markets. Speculation on rice futures markets remains very limited, contrary to the situation prevailing in other markets (e.g., wheat or oil). The major actors on the rice market are sovereign states and private traders. The largest rice futures market, hosted at the Zhengzhou Commodity Exchange, is tightly regulated under the China Securities Regulatory Commission. Financial market speculation cannot be pointed to as the main culprit, although the indirect impact of speculation in other commodity markets cannot be dismissed. Rice can be a substitute for wheat, the price of which had peaked from US\$196 in May 2007 to US\$440 in March 2008, (i.e., a few months before rice). In addition, the concomitant oil price hike had a severe impact on the price of fertilisers and other agricultural inputs.

The price of a metric ton of rice increased from US\$393 in January 2008 to more than US\$1,000 in April-May 2008, and then fell back to US\$550 by the end of the year.

Trade policy actually did play a central role in the rice crisis. Producer countries consume about 93 percent of the global rice production domestically, leaving a relatively marginal portion for cross-border trade. By early 2008, India and Vietnam, the second and third largest rice exporters, announced export restrictions soon followed by others, while China introduced an export surcharge. Shortly thereafter, the government of the Philippines announced its resolve to import the required quantity of rice to satisfy domestic consumption at a price as high as US\$1,100 a tonne. These measures and official announcements, combined with a lack of transparency on stocks and production levels, led to panic buying and hoarding that sent prices skyrocketing. Since 2009, rice prices have stabilised at approximately between US\$500 and US\$600 a tonne, whereas the price of wheat has remained more volatile, with a renewed increase from mid-2010 onward. Policy responses to the 2008 rice crisis include efforts by Association of Southeast Asian Nations (ASEAN) countries to increase transparency and exchange of information on production and stocks, which seems to ward off rice from price volatility affecting other commodities.

In sum, export restrictions –or their mere announcement –combined with a lack of transparency and trust between major players were the key ingredients in the 2008 rice crisis. The extent to which such temporary export restrictions may have been justified under international trade law remains untested; however, their legality appears questionable, given that there was no critical shortage of rice. In any case, the WTO dispute settlement mechanism would have been much too slow to address such a sudden crisis unfolding over less than a year.

Export restrictions on exhaustible resources

In a context of resource scarcity, what should the role of the WTO be in providing a sense of security regarding strategic supplies? The January 2012 Appellate Body decision related to Chinese export restrictions on various raw materials is the first ruling directly dealing with the conditions that may justify export restrictions under the WTO.

The dispute was brought up three years earlier by the European Union, Mexico, and the United States against export quotas and export duties imposed by China on certain raw materials (e.g., bauxite, manganese, zinc). The Appellate Body broadly confirmed the July 2011 panel decision against China, referring to GATT Article XI:2(a) and Article XX(g) in addition to specific provisions of China's WTO accession protocol, which oblige the country to eliminate all export duties. Article XI:2(a) allows for a temporary waiver to the general prohibition of quantitative restrictions: export bans and restrictions can be "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products" that are deemed essential to the exporting country. It thus applies first and foremost to renewables. Article XX(g) deals with specific measures relating to the conservation of exhaustible resources, "if such measures are made effective in conjunction with restrictions on domestic production or consumption." The decision of the WTO Appellate Body sets an important precedent not only with regard to the ongoing trade dispute over Chinese export restrictions on rare earths, but more generally to forthcoming export restrictions concerning dwindling non-renewable resources.

From a resource economics perspective, the price of exhaustible resources like rare earths is bound to peak sooner or later as the reserves are depleted. The basic Hotelling rule states that in a competitive market, the price of an exhaustible resource must increase at the same rate as the discount rate. The simple model must, of course, be expanded to account for technological progress that affects demand through efficiency gains or substitutes. Following this logic, export restrictions delay future prohibitive price hikes by constraining current consumption. More importantly, they send critical political signals and provide useful market incentives. The Chinese decision to restrict rare earths exports sent shockwaves worldwide, leading importing countries to consider reopening domestic mines, investing in alternative technologies and boosting recycling efforts with a view to reducing what had become an alarming dependence on Chinese rare earths. The enforcement of the WTO Appellate Body decision tends to delay the price increase and associated market incentives. While unrestricted exports keep prices low in the short to medium term, they may lead to more abrupt price hikes over the long run, leaving a shorter time span to develop alternative products and technologies. Export restrictions on exhaustible resources whose reserves are getting scarce can provide early warning signals and incentives for timely reactions.

From a resource economics perspective, the price of exhaustible resources like rare earths is bound to peak sooner or later as the reserves are depleted.

Governing trade in natural resources

How pivotal should the WTO be in improving the global governance of food, energy, and minerals? Each commodity market presents its own characteristics with different key players and specific regional and global organisations pursuing different, potentially conflicting, objectives. Enhancing transparency by providing reliable information on stocks and flows is critical to enable importing and exporting countries as well as investors to take early action and avoid panic moves. The WTO could provide greater transparency on export restrictions with tighter rules on early notifications and consultations involving all interested parties. Member states could also clarify the interpretation of relevant WTO disciplines, in particular with regard to the temporary application of export restrictions for the sake of preventing or relieving critical shortages of primary commodities deemed essential to exporting countries. It has further been suggested to seek a deal under which importing countries would commit to reduce tariff escalation on processed goods against binding commitment from exporting countries not to impose trade restrictions on primary commodity exports.⁴

Concluding Remarks

The WTO is not equipped to effectively address the many tensions accruing from increased commodity scarcity, even if the organisation allows striking a balance between the legitimate concerns of producer and consumer countries in some instances, for example via temporary export restrictions deemed essential for national security or environmental protection. It is essential to strengthen the global institutional architecture dealing with food and energy, which comprises a myriad of bilateral, regional and global arrangements ranging from informal, voluntary initiatives to systematic data exchange and oversight via the building and sharing of emergency stocks and the clarification of binding rules related to export restrictions. There is no one-size-fits-all solution: each commodity market has its own characteristics with different players and specific risks and vulnerabilities. The growing nexus between water, food, and energy however requires factoring the complex interactions between various commodity markets into the analysis with a view to identifying critical bottlenecks and devising early risk management strategies.

Today, the WTO should address export restrictions as a matter of priority. At the very least, an effective multilateral trading system is expected to contribute to avoiding harmful panic moves when not justified by market fundamentals (e.g., the 2008 rice crisis). Even if the Doha Round stalemate does not bode well for rapid advances on the options highlighted above, this should not prevent progress on greater transparency and effective early consultations. Principled and yet pragmatic multilateralism must contain the current tendency to address resource scarcity concerns through bilateral, exclusive deals.

-
- ❶ Lee, Bernice *et al.* (Chatham House Report, December 2012). Resources futures.
 - ❷ Jacks, David (2013). From Boom to Bust: A Typology of Real Commodity Prices in the Long Run. NBER Working Paper 18874.
 - ❸ WTO (2010). World Trade Report 2010: Trade in Natural Resources.
 - ❹ Bellmann, Christophe and Marie Wilke (2012). Trade Policies for Resource Security : Rethinking Export Restrictions. In Melendez-Ortiz, R. *et al.* (eds), *The Future and the WTO: Confronting the Challenges*. Geneva: ICTSD, pp. 197-205.



Gilles Carbonnier
Professor of Development
Economics, Graduate Institute of
International and Development
Studies, Geneva.

HAZARDOUS CHEMICALS

One nation under GATT: The trade regime under the new Minamata Convention on Mercury

Pieter Leenknecht

Exploring the trade implications of the groundbreaking new international treaty on mercury.

In the early, slippery, and snowy Geneva hours of Saturday 19 January 2013, some 140 nations successfully concluded negotiations on a global, legally-binding UN instrument "to protect the human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds." Never before in human history did an international treaty address the adverse consequences of exposure to a heavy metal. The supply-side focus under the new mercury instrument, baptised the Minamata Convention, and the trade regime more specifically, allowed for some suspense and controversy into the very last negotiating days and deserves our particular attention. It does so in its own right – for a close-up study of the particular devices chosen – and for what it reveals in terms of superpower psychology.

The Party/non-Party conundrum

Article 3 of the Convention deals with the global sources of mercury supply: primary mining (i.e., the mining of mercury as a mineral in itself rather than as an accidental release in the process of the extraction of other minerals) and trade in freshly mined or recycled mercury. Parties commit themselves to import and export mercury only insofar as the importing Party has provided its written consent or equivalent thereof for that transaction to take place, and on the condition that this toxic substance will be stored and used by the importing Party in a way allowed under the Convention (Art. 3.6(a) and 3.7). For trade with non-Parties, a functionally equivalent system was worked out. The importing non-Party has to certify that it has measures in place to ensure the protection of human health and the environment, and that it complies with the Convention's provisions in terms of storage and sound management of mercury waste (Art. 3.6(b)); the exporting non-Party has to certify that its mercury does not stem from sources forbidden under the Convention (i.e., a primary mine operating beyond its stipulated phase-out date, or excess mercury from decommissioned chlor-alkali plants) (Art. 3.8). The non-Party essentially makes up for a few basic tenets that Parties have to respect under the new multilateral instrument anyhow and thus helps to avoid the creation of parallel markets, "mercury leaks" and other classical perverse effects of trade diversion.

The success of the latter, however, is entirely premised on the success of the Convention itself: only if enough nations sign and ratify the Minamata Convention will outsiders become more and more isolated and unable to merely continue trading amongst themselves. Through their trade with insiders, abiding with Article 3's strictures, they will soon see themselves compelled to *de facto* comply with most of the instrument's core requirements. In order to create an incentive to spur hesitating nations into ratifying, numerous delegations such as Switzerland, Colombia, and a choir of voices within the EU – to name but a few – had expressed at some point or another during the negotiations a reluctance to treat non-Parties functionally equivalent, and sometimes advocated an outright ban of mercury exports to non-Party countries. That position was vehemently opposed by a few countries, mainly the United States and Canada, and chiefly and summarily dismissed by the duo as incompatible with obligations under the multilateral trade regime, notably the Most Favoured Nation clause and the prohibition of quantitative restrictions under the WTO agreements – *inter alia* GATT Articles I, XI and XIII.

This North American attitude seems to exhibit a very cautious approach, and perhaps, as some world trade watchers themselves might claim, an overly and needlessly cautious one. In the first place, WTO Agreements seem to leave ample scope to the members of the organisation for differentiated treatment between their various multilateral trading partners, provided a sound and not arbitrarily discriminating justification is given in terms of the protection of health, environment, or the conservation of exhaustible natural resources, to mention but the most immediately relevant exceptions under Article XX GATT to the general rule of free and unfettered trade. Moreover, in specific WTO agreements such as the TBT Agreement, the existence of a relevant international agreement in a field such as health or the environment creates, for the national standard based upon it, a rebuttable presumption of compatibility with international trade in terms of not creating an unnecessary obstacle to it (Art. 2.5 TBT). It would be hard not to consider the Minamata Convention such a relevant international agreement.

The question should not only be about what Minamata can do for the WTO, but about what the WTO can do for Minamata.

Arguably, quite a few Mercury negotiators may have been deterred by the somewhat litigious nature of the discussion above. They may justifiably have resisted taking the risk of seeing their multilateral environmental agreement dragged into the court of WTO dispute settlement, with an uncertain outcome for specific aspects of the newly crafted trade regime under Article 3 of the Minamata Convention. Yet, they also may have overlooked an important element in this game of ping-pong between treaty regimes, especially in light of the potentially substantial overlap in the respective memberships: that the question should not only be about what Minamata can do for the WTO, but about what the WTO can do for Minamata.

A waiver is a relatively easy instrument in the WTO toolbox that can temporarily suspend certain obligations under the multilateral trade agreements through simple agreement in the organisation's General Council. If it can serve to grant exceptional trade preferences to a flood-stricken Pakistan, which it has come to do, it is hard to imagine how a requested suspension of unhindered trade would be denied in the case of a highly toxic metal that by now has come to be a universally recognised threat to human health and our environment. Interestingly, a senior EU official mentioned in the margins of the penultimate mercury negotiating round in Punta del Este, Uruguay, that few of his counterparts were enthusiastic about making a key part of the prospective UN treaty depend on the mercy of an external WTO body giving its blessing to it afterwards. Yet the reverse is equally true: the trade regime of the Minamata Convention as it eventually took shape, with its many allowable use exemptions, prior informed consent mechanisms, phase-outs and other intricacies may well constitute a leap of faith – and of patience – for a multilateral trade community used to dealing with relatively straightforward things, such as customs nomenclatures, tariff lists and quotas. Far more complicated than an all-out ban on mercury exports out of the space covered by the Convention, in any event.

The least problematic solution from a WTO legal point to view, short of the highly unlikely outcome of creating its very own Mercury Agreement under the umbrella of the WTO Agreements instead of under the UN, would have probably been for the Minamata Convention to completely ban all imports and exports, among Convention Parties and between Convention Parties and non-Parties alike from an agreed starting date. Such an ambitious plan was clearly a bridge too long for the Mercury negotiators at this point, however. A host of phase-outs, exceptions and exemptions was needed to accommodate countries – not exclusively developing countries – and processes – think of the conservation of certain vaccines – that do not as of yet have a mercury-free alternative readily available. One of the strengths of the Convention, inspired by the hugely successful Montreal Protocol on substances that deplete the ozone layer, is for many observers precisely found

in its dynamic character, leaving ample room, *inter alia*, for later amendments to the annexes with mercury containing products and processes to be phased out, in function of technological evolution and new findings.

Constructive unilateralism?

At least as interesting from a trade perspective is the alternative that the Minamata Convention provides to importing Parties and non-Parties who wish to opt-out from the written consent requirement that comes with each single trans-border commercial transaction involving elemental mercury. Article 3.7 allows for such importing countries to provide instead a "general notification" setting out under which terms and conditions that country provides its consent. Likewise, Article 3.9 allows such a Party, when it imports mercury from a non-Party, to waive the certification on allowable sources normally provided by the latter, provided that the importing Party respects certain more general conditions: maintaining "comprehensive restrictions on the export of mercury," having "domestic measures in place to ensure that imported mercury is managed in an environmentally sound manner", notifying the secretariat of the Minamata Convention of its decision not to ask for certification at every single import transaction, "including information describing its export restrictions and domestic regulatory measures, as well as information on the quantities and countries of origin of mercury imported from non-Parties." The first paragraphs of Article 4 of the Convention, on Mercury-added products, present a solution in the same vein: instead of halting manufacture, import or export of such products (think of mercury thermometers or certain light-saving bulbs), a Party may "implement different measures or strategies to address" such listed products, but only "if it can demonstrate that it has already reduced to a *de minimis* level the manufacture, import and export of the large majority of products listed (...) and that it has implemented measures or strategies to reduce the use of mercury in additional products not listed" in the relevant annex to the Convention. A series of similar, additional conditions concludes Article 4.2.

In each of these instances, the alternative rabbit came out of the US hat: a provision entirely tailor-made to its precise domestic statutory situation was eventually approved in the last stretch of the negotiations in order to thwart a complete stalemate. In the United States' defence, it must be admitted that some of these trade-facilitating proposals had been aired long before but had been somewhat suppressed in the course of the negotiations, during which a text proposal clearly bearing an EU-and-others signature stamp had been used as the negotiating base.

The US insistence on these alternatives and its aversion towards the slightest perceived impediment to a smooth and unfettered stream of commerce fits a long tradition in which the country[...]has preferred to address trade-related issues with environmental implications at the WTO.

More generally speaking, though, the US insistence on these alternatives and its aversion towards the slightest perceived impediment to a smooth and unfettered stream of commerce fits a long tradition in which the country, and even more so the country's legislature, has preferred to address trade-related issues with environmental implications at the WTO rather than in international environmental regimes. At the same time, the country carries the weight of a highly disreputable track record in terms of international environmental governance: not less than nine environmental treaties were negotiated and signed by it over the last three decades but never ratified. The lesson Guri Bang draws from the US' embracing of the WTO's TRIPS Agreement and dumping of the UN Convention on Biological Diversity (CBD) – that TRIPS provided international cooperation

that fulfilled US needs better than the CBD did, because it more or less reflected already existing domestic law – must have been in the mind of the American Mercury negotiators, as they have clearly heeded this call in Articles 3.9 and 4.2.

The latter two provisions indeed offer a carbon-copy of the US domestic legislative situation, which is characterised by two substance-specific Federal Acts. One addresses the management of mercury-containing and rechargeable batteries, another one regulates long-term storage, prohibits sale, distribution or transfer of mercury by federal agencies, and installs into the bargain a ban on exports from the US of elemental mercury taking effect as from January 1, 2013! That ban is qualified by a number of “essential use exemptions,” among which figures the case in which an importing country where the mercury will be used “has no other source of elemental mercury available from domestic supplies” and offers a range of health and environment related guarantees in terms of sound management, storage and non-diversion. The subsequent paragraph goes on stipulating that “nothing in this subsection affects, replaces, or amends prior law relating to the need for consistency with international trade obligations” - in all its mysterious brevity, it reads more like a religious creed than like a statement of fact.

A long series of more general federal and state level pieces of environmental legislation completes the list of US requirements that mitigate mercury exposure, regulate the substance, standardise its use in products and processes, and document its global trade flows and sources. Clearly, the fundamentals, in terms of awareness and action-orientation on protection from mercury, seem to be solidly engrained in the US domestic legislative agenda: the Mercury Ban Act came into being much thanks to the commitment of legislators such as then Senator Obama, and no sizeable specific lobby in either of the Congress' Houses seems to deny or downplay the issue of mercury exposure as such. The surprise decision in February 2009 by the US to join the worldwide drive to work towards the now concluded Mercury Convention was not only the decisive tipping point that made the intergovernmental negotiation process take off altogether, it was also one of the very first significant decisions of the Obama Administration after the President took the oath.

Ironically, therefore, the country with the most explicit export ban on Mercury in domestic law worldwide – except maybe for the EU Member States, who have similar provisions – was reluctant enough to sign up for unambiguous multilateral trade restrictions so as to insist on a “unilateral carve-out” for itself in the new Convention. Ironically, too, the EU Member States, who were in equal measures reluctant to grant that carve-out until the very last moment, would probably be the only ones among the Convention's prospective Parties (except for the US itself naturally) qualifying under the conditions of the American-tailored carve-out. It is unlikely they will use it.

A genuine novelty here is the time-limited nature of the carve-out. Article 3.10 stipulates that the alternative to the written consent regime in the case of import from a non-Party (Art. 3.9) will only be available until the conclusion of the second meeting of the Conference of the Parties (COP-2), that is roughly three to four years into the operation of the Convention. At that point in time, the carve-out will cease to exist unless the US – provided it will have become a Party to the Convention – is able to convince half of the Parties to decide otherwise.

This is an elegant way for the US to “call the bluff” on the veracity of its ratification related intentions. In fact, many an international negotiator has by now become irritated by the way multilateral environmental agreements bear the hallmark of US negotiators, only to be left non-ratified by that very same country and nevertheless keeping that textual US DNA forever woven into its body. This is often perceived as being to the detriment of a more forceful regime, or at least of one more likeable to the other delegations. The Kyoto Protocol and the Convention on Biological Diversity provide eloquent cases. The elegance of the solution elaborated in the Minamata Convention is to effectively tackle that problem. It lies, additionally, in the fact that all the while waiting for US ratification to happen or not, the trade regime under the Convention is fully articulated and operational, this in marked contrast with the proposals informally floated by other

delegations earlier on, which suggested – for the same reasons of calling the US bluff – to leave the trade regime with non-Parties undecided until the first or second COP. Such a move would not only have created undesired legal uncertainty in the trading world, as many rightly conceded; moreover, it would have given the US Congress, uncertain of having its “trade-friendly blueprint” ever approved by the COP, rather a disincentive than an incentive for ratification. The current solution provides for that incentive, and for an additional one through the more liberal voting regime to keep the carve-out alive after COP-2: only a simple majority is necessary, whereas for any other amendments in the Convention a three-quarter supermajority is required⁹. The second tenet of the carve-out (Article 4.2 on mercury-added products) is less affected by the sword of Damocles: it is not automatically doomed barring approved renewal, but will nevertheless be subject to a review process, as far as the “progress and effectiveness” of the measures taken under it are concerned.

A last note on US superpower psychology cast in the text of the Convention: both Articles 3.9 and 4.2 seem to be written with the idea of the US as a Convention Party in mind. The last tenet of the carve-out, Article 3.7, however gives a right to a non-Party under the Mercury Convention: the permanent and non-perishable right “to revoke its general notification at any time”. This red carpet treatment for non-Parties is a legal curiosity indeed – and a safety net for the US, just in case Congress would eventually fail to deliver on the ratification promise?

Epilogue - the G2's other half

Mentioning superpower psychology and global negotiations naturally begs the question as to China's attitude in this supply side story. Contrary to the US, China is in fact still a major source of mercury demand, supply, and emissions worldwide. Especially in the wake of a certain self-reliance (massive use of locally mined mercury) enjoyed by this major global emitter, it made very much sense to the other negotiators to bring the Middle Kingdom on board of a global agreement as legally “biting” and as intrusive as possible. Conversely, one would rightly assume that this status gave China much negotiating clout and a voice to be reckoned with. One is also aware of how much the country is attached, for historical reasons, to a concept of sovereignty with, as a non-negligible undercurrent, a strong aversion to interference with its internal affairs. To complicate things further, domestic regulation on the substance in this demographic giant and emerging economy is clearly still in its infancy, and so may very well be the awareness of the pollution problem surrounding it.

At the same time, the constructive and all in all transparent Chinese approach to the intergovernmental negotiating process, even further reinforced towards the final stages, was apparent and praised by many as contributing to the overall success of the negotiations. A noticeable and significant breakthrough in the middle of the last Geneva week of the process was offered by way of a Chinese “package deal” proposal on a host of key supply side issues which found its way pretty much unscathed into the Convention's agreed text. Two components of it deserve to be especially highlighted here.

First of all, a ban on new primary mercury mining, and, at least as importantly, a phase-out period of maximum 15 years for existing mines was fixed. Much against the desire of non-governmental pressure groups present throughout the negotiations however, China managed to have these phase-out periods take their starting point at the entry into force of the Convention for each specific Party (which in turn depends on that Party's ratification speed) rather than at the signature of the Convention. The latter would have placed the bar at the same level for all and would have discarded any temptation of Party-driven delaying tactics. Be that as it may, accepting the deadline in itself was an important Chinese concession.

Secondly, in limiting the free movement and manufacture of mercury-added products, China proposed and obtained an Annex in which most such products face a phase-out date of 2020 with limited exemptions, all in all very close to the generalized 2018 deadlines championed by an earlier joint proposal by the EU, Japan, and Jamaica, and remarkably in sync with the EU's own domestically fixed phase-out dates. Moreover, and in spite

of what could have been expected from China's introductory statements to the last negotiating week, all Chinese-proposed phase-out dates were resolutely phrased in a non-differentiated way for developed, emerging, and developing Parties alike. The repeatedly declared affection for "common but differentiated treatment" as "the cornerstone of any multilateral enterprise" was merely relegated to the Convention's preambular language eventually. In the bigger picture, the silhouette of an increasingly confident emerging power appears.

The difference in negotiating styles and approaches between today's two economic giants is striking. A certain Chinese *bravura* and eagerness to play the multilateral game was pervasively present, including in a certain degree of posturing before arrival in both landing zones mentioned above. There had been statements about closure of mines simply not being in the books, or about phase-out dates of 2030 for certain mercury-added products as constituting the only possibility given the lack of domestic regulation to that end. They were summarily abandoned as soon as a global package emerged that would lead to a Convention text acceptable to all negotiating partners.

No China-specific exemption on primary mining, much dreaded in some western circles, did thereby materialise. The contrast could hardly be starker: a Chinese strategy of sophisticated but resolute multilateralism versus a US approach of embedded unilateralism, hell-bent on writing precisely such insular language for itself into the margins of the new multilateral instrument's trade regime. A little cosy, tailor-made nest for unilateral activism; somewhere in the remote background arguably justified caution, but nevertheless also a palpable taste and feel of ambiguity vis-à-vis environmental multilateralism itself.

This difference should however not trick the observer into misbegotten value judgments. After all, each party may well have followed the best paying strategy in terms of coping with its own domestic institutional set-up. The Chinese focus on the actual intergovernmental negotiations' dynamics and its direct outcomes for all may be logical given the role of its omnipotent executive, which in reality seals both the deal and the ratification of it; the US negotiators' more cascaded thinking is likely to be the soundest approach for bringing on board in a later stage an easily irritable legislature. In order to deliver a truly global and effective regime against mercury pollution, all these thoughtfully crafted bits will help.

❶ Article 26.3 of the Convention.



Pieter Leenknecht

Deputy Permanent Representative to UNEP for Belgium and deputy head of mission at the Belgian Embassy in Nairobi, Kenya. The author writes this article in his own name; none of the views expressed should be attributed to either the Embassy or his employer, the Belgian Ministry of Foreign Affairs

FISHERIES

Will EU fishery reform lead the way in fighting back overcapacity and overfishing?

Aimee T. Gonzales

Following an ambitious first draft for fishery reform in the EU, countries risk clawing back progress. The risks would be enormous – the EU now faces a unique opportunity to end overfishing and restore fish stock, rather than continue overexploiting of its domestic fisheries and fisheries abroad.

Subsidies to the fishing sector have been identified as one of the main drivers of overcapacity and overfishing. The need for reform has been widely recognised as a global concern in various multilateral and regional fora and processes, including at the WTO and UN Conference on Sustainable Development in Rio in June 2012.

Currently, the EU is undertaking a “once in a decade” review of the EU policy framework called the Common Fisheries Policy (CFP) for managing the domestic fisheries and fishing activities beyond EU waters. The CFP reform package comprises a new basic regulation, a regulation on markets, and a communication on the EU Maritime and Fisheries Fund (EMFF) – an external policy that will allocate subsidies from 2014 up to 2020.

The EU is among the top three global subsidisers along with China and Japan. Current estimates put EU fishing capacity at two to three times greater than what the EU waters can sustainably produce. Past attempts at reform have brought some positive changes, particularly a ban on subsidies for the construction of new vessels. However, the 2011 European Court of Auditors report revealed that “overcapacity” continues to be one of the main reasons for the failure of the Common Fisheries Policy. Huge subsidies are still being maintained in the EU without effective capacity controls or reductions.

EU risks extending subsidies that lead to overcapacity

Globally and in Europe, there is increasing pressure for economies to be built on resource efficiency, sustainability, and competitiveness. This is a challenge across many sectors, but nowhere more so than in fisheries, which stumbles from crisis to crisis.

In December 2011, the European Commission tabled a draft proposal on the EMFF regulation. Whilst it could still be greatly improved, NGOs welcomed the Commission's proposal to end subsidies for buying boats and engine replacement. In addition, the proposal also called for increased funds to promote income diversification for fishermen and boost the sustainable development of coastal communities; the Commission's proposal is currently under review by the Fisheries Committee of the European Parliament. At the time of writing, the EMFF rapporteur Alain Cadec, a French Conservative, is leading the discussion on finding compromise on amendments received from various Members of the Committee. Individual amendments and compromise amendments will be put to a vote at the Fisheries Committee on 10 July. A vote on the file in plenary is scheduled for the fall.

Some of the proposals on the table in the Fisheries Committee of the Parliament are worrying. A number of the proposed amendments are in direct conflict with the EU's submitted position on fisheries subsidies in the WTO negotiation on fisheries subsidies in the Rules Negotiation Group under the Doha Development Agenda.

These amendments as well as current draft compromise amendments introduce several measures that would directly finance EU fishing fleets. They include subsidies for modernisation, engine replacement and even the re-introduction of aid for the construction of new boats.

If adopted, Parliament would contravene the commitments the EU made at the 2002 World Summit of Sustainable Development, the 2010 conference of the Convention on Biological Diversity in Nagoya and the Rio+20 Summit in 2012. Moreover, it would undermine the EU's role in international trade negotiations where it agreed to prohibit certain forms of subsidies that contribute to overcapacity and overfishing.

Inconsistency with position at WTO

The European Commission submitted a proposal to the Rules Negotiation Group in the WTO calling for the prohibition of subsidies for the construction of new fishing vessels and the renovation of existing vessels. The Commission emphasised its determination to make a simple, transparent and comprehensive proposal that addresses the problem of overfishing. It further stated that "It seems therefore obvious that the most effective way of addressing this problem is to ban the most problematic subsidies, i.e. those that relate to capacity in the context of the construction of new vessels and treatment of subsidies given for the modernisation of existing vessels. The guiding principle must be that public aid can under no circumstances contribute to overcapacity."

The 2002 Common Fisheries Policy reform banned aid to vessel construction, which allowed the EU to become a positive and constructive global player in support of disciplining fisheries subsidies. If the aforementioned amendments introducing subsidies for fleet modernisation and renewal are accepted by Parliament, this would imply a major step back also for the EU's role at the WTO and also in other global and regional fora where fisheries subsidies reform is currently being discussed or negotiated.

It is difficult to anticipate the outcome of the Fisheries Committee vote on the EMFF. The Greens have been warning against a potential unholy alliance between the powerful Conservatives and Socialists to support proposals for aid to build new boats. Certain MEPs also tend to support their national government positions to provide funds to measures that maintain or promote overcapacity. This is true for the French, Italian, and Portuguese parliamentarians, for example, who want to provide income and job security for their catching sectors.

WWF along with other NGOs – including Birdlife Europe, Greenpeace, Oceana, Ocean 2012, Pew, Seas at Risks – believe that aid to boat construction and fleet modernisation is not the optimal solution to achieve sustainable fisheries in the EU. Governments are free to assist their fishing communities in ways that are properly rational to their socio-economic goals. If they are interested in improving the incomes of fishers, then direct aid works better. If they are interested in improving the catch, this can be achieved by improving the management system. If the objective is to improve small scale fisheries' comparative advantage *vis a vis* industrial fisheries, then allocation of fishing opportunities based on environmental and social criteria can be used. Finally, if the goal is to simply protect uncompetitive traditional communities from social dislocation, Member States can apply social safety nets and transitional arrangements, rather than provide subsidies linked to production.

The EU has shown decisive leadership in global fora on responsible environmental management. Standing firm against unsustainable types of aid in the Common Fisheries Policy reform would show consistent EU leadership in fighting against subsidies that lead to overcapacity and overfishing.



Aimee T. Gonzales
Fisheries and Trade Manager,
WWF International

Special meeting report

CLIMATE PACT DEADLINE LOOMS

AS NEGOTIATORS GATHER IN BONN

Pressure is building as negotiators eye the 2015 target date for delivering a post-2020 climate pact.

The looming 2015 deadline for clinching the terms of a new global climate pact hung in the air in Bonn, Germany this month as delegates gathered to discuss the timeline for future negotiations. Christiana Figueres, executive secretary of the UN Framework Convention on Climate Change, began the 29 April-3 May conference by underscoring the urgent need for countries to begin moving forward on a deal. Figueres noted that that global carbon dioxide levels in the atmosphere have now passed the important threshold of 400 parts per million (PPM).

Negotiators moved swiftly onto issues aimed at increasing countries' emissions-reduction commitments and moving toward a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all parties by 2015. The meeting in Bonn took place under the auspices of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), the negotiating body that was established to develop such a climate agreement.

General areas of discussion focussed on the ADP's dual mandate to draw up a new international agreement, applicable to all countries, for adoption by 2015 and entry into force from 2020; and to identify and explore ways to close, before 2020, the "ambition gap" between current global climate action and what is needed to keep global temperatures from rising more than 2°C above pre-industrial temperatures.

Delegates discussed potential formulas aimed at resolving disputes between rich and poor countries on the equitable sharing of the burden of curbing greenhouse gas emissions as part of the ADP. Although there was no mention of "equity" in the Durban Platform, there is a growing consensus that steps toward the 2015 international climate change agreement have to incorporate some reference to the concept. Many observers are carefully watching to see how equity – embodied in the concept of common but differentiated responsibility (CBDR) – will factor into this post-Kyoto climate pact. At Bonn, developing countries stressed that developed countries have made inadequate progress in combating climate change and appear unwilling to keep promises to take the lead in cutting emissions. Developing countries called for global cooperation on technology transfer and capacity building.

Another issue to draw traction in Bonn was the idea of a "Spectrum of Commitments" proposed by the United States. In essence, the concept suggests that every country determines its own national "contribution" to curbing global climate change and present it to the international community. A "spectrum" of various commitments would thus emerge, which could be included in some sort of formal agreement. The idea drew some interest from delegates, but remains vague.

"Parties may be looking at different target types," said Figueres. "They will not all be using the same metrics."

In order to increase ambition over time and ensure that collective action will keep countries within the 2°C temperature threshold, the concept of a "Ratchet Mechanism" was introduced at the meeting. Many participants noted that the mechanism was a good idea because the current ambition gap exists because of a bottom-up pledge system and a tardy review system.

The new process would enable countries to increase their emissions-reduction pledges over time, and will be integrated into a system of periodic review and a robust set of accounting, measurement, reporting, and verification rules. According to the UN, there was a broad agreement among delegates in Bonn that any new accord should have flexibility to ratchet up curbs on emissions, without a need for further negotiations, if scientific findings about floods, droughts, and rising sea levels worsen in coming years.

The gap between the US and China on establishing the 2015 pact remains profoundly wide. The US previously failed to ratify the Kyoto Protocol, based on the lack of binding emissions cuts for rapidly growing economies such as India and China – the latter of which recently overtook the US as the world's biggest emitter of carbon. The US says it wants 2015 commitments to be based on national promises of action, while China wants far more binding *commitments* by the rich. Other developing countries suggested that a deal should have mechanisms linked to GDP per capita so that governments in emerging nations would make bolder actions as their economies grew.

The brief meeting in Bonn, attended by some 600 delegates and 200 observers, served as a warm-up meeting for further discussions in 2013. It is the first time negotiators have met since last December's eighteenth Conference of the Parties (COP 18) in Doha, Qatar. Many observers attending the COP noted the positive down-to-business that coloured the meeting, but cautioned that the sense of urgency needed to clinch an ADP deal by 2015 was absent.

Still, Doha was notable for closure of the ad hoc working groups on Long-term Cooperative Action (LCA) and the Kyoto Protocol (KP), after the planned adoption of a second – though much less ambitious – phase of the Kyoto Protocol. Countries also established a rough timeline for how they intend to work on striking a new global climate treaty under the ADP negotiations and set up plans to address future "loss and damage" in developing countries that may arise as a result of climate change – ranging from a rise in sea levels to severe weather events.

The timeline for negotiating a climate agreement by 2015 was refined in Bonn and will continue to transform as negotiators make progress on some issues and encounter obstacles in others. Already, China has shaken up the climate world by announcing a dramatic change in its approach to climate change.

For the first time, Beijing has said it will place a ceiling on greenhouse gas emissions starting in 2016. The move marks a significant departure from the status quo, where China and other emerging economies have insisted that rich countries take the lead in reigning in emissions.

The news will likely change the tone of negotiations when delegates meet next from 3-14 June for longer and more in-depth discussions at the UNFCCC's annual mid-year negotiating session in Bonn.

WORLD TRADE ORGANIZATION

WTO Appellate Body rules against Canada in renewable energy case

Canada has lost its appeal of the WTO ruling against the province of Ontario's renewable energy support scheme.

The WTO's highest court has confirmed that the local content requirement in the Canadian province of Ontario's feed-in tariff (FIT) programme for renewable energy is inconsistent with international trade rules, officials announced on 6 May.

Brussels and Tokyo had argued that the FIT system, which was established under the Ontario Green Energy Act of 2009, violates international trade rules by requiring participating electricity generators to source a minimum quota of goods and services from Ontario - in the case of wind, 25 percent, and for solar projects, 60 percent.

The complainants had said that this "local content requirement" was a barrier for foreign competitors looking to get a foothold into the Ontario market. However, Ontario officials had said that the measure aims to encourage the production of clean energy by incentivising producers to use electricity derived from renewable sources.

The Appellate Body result confirmed an earlier panel ruling that was issued last December, while revising a few specific points from that decision. Canada had filed its appeal to the case in February, citing certain points of law and legal interpretation that it wished WTO judges to review.

Canada insisted that the Ontario scheme should qualify for an exemption from certain trade rules relating to government procurement under the General Agreement on Tariffs and Trade (GATT).

Under the government procurement exclusion, a country can exempt itself from GATT requirements if the regulation or programme involves a government making purchases for its own needs and not for commercial resale.

"The Appellate Body supports the panel's conclusions that local content requirements accord preferential treatment to products made in Ontario by requiring the purchase or use of products from domestic sources, which is prohibited in the illustrative list of the [Trade-Related Investment Measures, or TRIMS] Agreement, and therefore places Canada in breach of its national treatment obligation under [the General Agreement on Tariffs and Trade, or GATT] Article III and TRIMS Agreement Article II," the report said.

Furthermore, the WTO judges also "[reject] Canada's rebuttal that the local content requirements should be considered as government procurement which can be exempted from the national treatment obligation," the findings continued, referring to one of the main arguments that Ottawa had made in its case.

Parties respond to the ruling

The dispute (DS412 and DS426) had been a particularly high-profile one for the global trade arbiter, in light of its potential to elucidate the extent to which governments can help their domestic producers and suppliers in promoting renewable energy - particularly given the number of other countries designing their own clean energy support schemes.

"Today's ruling is good news for everyone caring about clean energy and the environment: it has been made clear that use of quality, cost-effective technologies should not be

hampered by protectionist measures," said EU Trade Spokesman John Clancy in a statement. "The EU supports the promotion of renewable energy but considers this must be done in a manner consistent with international trade rules."

Japanese officials similarly welcomed the result. "Japan considers this ruling can be highly evaluated from the viewpoint of preventing protectionism in the renewable energy sector, which can be regarded as a major growth industry," Toshimitsu Motegi, Japan's Minister of Economy, Trade, and Industry said.

Canadian federal officials, for their part, have said that they will comply with the ruling. However, it remains unclear how or when the Government of Ontario - which falls under a separate jurisdiction - will comply.

"Canada will comply with its obligations," a Canadian Government official told Bridges. "But the specifics on how that might be and the implications of the ruling would be a matter for the Government of Ontario to respond to."

Because countries can only be represented at the WTO in a federal capacity, the Government of Ontario could not represent itself in Geneva. And while the Canadian federal government is obligated to implement the Appellate Body ruling, it cannot compel the province to change its policy.

"We have no legislative power to do anything specifically about the programme," the official said.

Ontario has not yet issued a statement on how it plans to comply with the ruling, but underscored its commitment to the green energy initiative. "Our renewable energy sector has already created over 31,000 jobs and leveraged billions of dollars in investment," Ontario Energy Minister Bob Chiarelli told CBC News, Canada's national public broadcaster.

Recurring topic

The topic of how governments can support their renewable energy sectors while meeting their international trade obligations is set to play out in another WTO dispute in the coming months. In mid-February, the US filed a complaint over a local content requirement in India's national solar programme, which Washington claims discriminates against foreign equipment manufacturers relative to their domestic counterparts. That case is currently in the consultations phase - the first stage in dispute settlement proceedings.

New Delhi, for its part, raised its own questions last month about Washington's support to US renewable energy producers. "India is concerned that some of these subsidy schemes have provisions relating to local or domestic content requirements, which raises issues of consistency" with parts of the GATT, TRIMS, and SCM Agreements, New Delhi said in a notification filed with the Committee on Subsidies and Countervailing Measures.

In light of the growing global demand for energy, and the burgeoning questions of how these relate to current and future trade rules, WTO Director-General Pascal Lamy recently called for increased dialogue at the global trade body on the relationship between the two subjects.

WORLD TRADE ORGANIZATION

EU seal ban under the microscope once again in Geneva

The emotionally-charged debate over the WTO compatibility of the EU's ban on seal product imports had its second hearing late last month. The panel is expected to release its findings by late-summer.

The debate over the European Union's ban on seal product imports ramped up on 29-30 April in Geneva, as the WTO dispute panel tasked with the case held its second hearing on the emotionally charged issue. The development came just days after the Luxembourg-based European Court of Justice – in separate proceedings – issued its own ruling last Thursday upholding the controversial measure.

Both cases revolve around a 2009 European Commission (EC) regulation which banned the sale of seal products in all EU member states. Proponents of the ban argue that the commercial sealing operations targeted by the measure are “inhumane,” imposing pain and emotional distress on the animals that cannot be consistently avoided. The ban, they say, is necessary on the grounds of public morality, specifically with regards to animal welfare.

The ban has been challenged at the WTO by Canada and Norway (DS400, 401), who have argued that the prohibition is unjustified, and also unfairly discriminates against their industries relative to sealing that takes place in certain EU member states. Ottawa, for instance, argues that Brussels' regime blocks 90-95 percent of Canadian seal products, while allowing in “virtually all” Greenlandic seal products and all Swedish and Finnish seal products.

Oslo, for its part, also argues that the EU ban actually makes it difficult for Norway to sustainably manage marine resources. With harp seals being a top predator in the marine food chain, Norway says, ecosystem management principles dictate that sometimes it may be necessary to reduce the population of these predators.

A previous WTO hearing had been held in February on the subject, which drew several animal rights activists and sealing advocates alike to the global trade body's Geneva headquarters. However, this week's hearing, which was also open to the public, attracted a noticeably smaller crowd.

Evidence of inhumane process?

At this week's WTO proceedings, both sides clashed strongly over the reliability of the evidence each side was citing to prove – or disprove – whether seal hunting can be conducted in a humane manner.

“The complainants' scientific case is built upon a false premise,” the EU said. “Indeed, the complainants' contention that seals can be killed consistently in a humane way is entirely dependent on their unfounded claim that both shooting and the use of the hakapik [a type of club used in seal hunting] are, themselves, effective and reliable killing methods.”

The EU showed video footage to demonstrate the point that sealers cannot always tell if a stunned seal is conscious or not when they are hooked by gaffs and then dragged onto a boat. Canada, however, argued that video evidence has not proved to be reliable, and that some of the other evidence cited by the EU comes from studies that were conducted with financial support of animal welfare groups, and were produced by “veterinarians with limited prior experience with seals.”

In the question-and-answer period later, Canada also noted that while video footage can be used to show evidence of bad practice, as the EU had done, it could also be used to provide evidence of good practice, which was not included. It may have been, "in Hollywood parlance, 'left on the cutting room floor'," Canada said.

Exceptions return to the fore

The EU Seal Regime does allow seal products to be sold on the bloc's market in three circumstances: those products that come from hunts conducted by indigenous peoples, known as the IC exception; products from hunts that are conducted with the goal of sustainable management of marine resources (SRM or MRM exception); and those products that are brought in by tourists.

The IC and marine resource management exceptions had come under fire during the previous hearing, and were again raised this week. Canada, Norway, and various third parties have argued that since the ban aims to protect seals, it should apply in all circumstances.

"It is not... sufficient for the EU to explain just that it bans Norwegian products to protect public morals or animal welfare. It must also show that its decision to carve out products from Greenland and the EU is more than a political choice," the Norwegian statement said.

In response, the EU said on Monday that these exceptions "reflect the outcome of the balancing of the welfare of seals and other interests, which is part of the standard of morality that the EU Seal Regime as a whole seeks to uphold." Specifically, those exceptions do not raise "the same moral concerns as the products of commercial hunts."

Canada, however, asked later in the hearing how the IC exception was developed, noting that Canada's Inuit are on record saying that they were not "meaningfully consulted" and are unhappy with the current measure.

With regards to the marine resources management exception, Norway also highlighted during the question-and-answer sessions the difference between small-scale and large-scale hunts. If the benefit for humans and other animals outweigh the suffering of seals in smaller hunts, Norway argued, then it should be no different for large-scale sealing. The EU, however, argued in response that "scale is relevant" and that "size does matter."

Less trade-restrictive alternative?

The parties also debated whether or not there was a less trade-restrictive alternative to the EU's seal regime that might still meet the same objectives.

Canada, for instance, had outlined a certification and compulsory labelling scheme that would, it says, be rooted in an animal welfare standard. Ottawa argues that this standard would exceed the one used within EU member state Britain in deer hunting – a practice that, it argues, is comparable to seal hunts.

Norway has also suggested three alternatives that, it argues, would be less restrictive, "but would contribute to a greater extent than the EU Seal Regime to the EU's legitimate objectives regarding animal welfare and sustainable resource management."

However, the EU argues that the complainants' proposed alternative measures "would fail to make an equivalent contribution to those objectives because seals cannot be killed humanely on a consistent basis." While the complainants have said that their measure would provide more protection, given the exceptions in the EU seal regime, Brussels argues that it would actually be "more trade restrictive."

The WTO dispute panel reviewing the cases is expected to release a report by late summer. The European Court of Justice case, meanwhile, might not yet be over. Under EU law, the complainants are entitled to bring an appeal before the ECJ within two months of the ruling, focusing only on points of law.

The newsroom

Be sure to visit ictsd.org/news/biores regularly for breaking trade and environment news

EU-China solar row escalates

The Sino-European spat over trade in solar panels escalated in late May, with officials in Beijing warning that Brussels' planned anti-dumping duties could have severe implications for their bilateral relationship.

Tensions have been running high since reports in early May said that Europe plans to impose duties on Chinese solar panels. The provisional duties are set to average 47 percent.

The duties are expected to be approved by early June. The Commission must then determine whether to alter - or revoke - the final duties by December.

The anti-dumping duties are the result of an EC investigation that was launched in response to a complaint by the EU Pro Sun coalition.

Shen Danyang, a spokesman for China's Commerce Ministry has warned that imposition of duties would "seriously damage" their bilateral relationship.

Top US court backs Monsanto in patent case

Farmers may not use a patented seed for more than one planting, the US Supreme Court ruled on 13 May. The heated case saw Monsanto square off with a farmer who used the company's seeds without compensation.

Indiana farmer Vernon Hugh Bowman has been ordered to pay Monsanto close to US\$84,000 in damages.

The farmer regularly purchased the Monsanto product for his first planting, but wanted a lower-cost option for his riskier second planting. He chose instead to purchase commodity soybeans instead of the more expensive seeds from a Monsanto-authorized dealer.

Bowman argued that he was not violating the company's patent because he had already purchased the progeny seeds and therefore Monsanto no longer held a claim over the product. The argument, however did not win over the Supreme Court justices, who ruled unanimously against the farmer.

Argentina files complaint over EU biodiesel

Trade ties between Buenos Aires and Brussels hit a snag in May, with Argentina filing a new WTO challenge against the EU over policies on the importation and marketing of biodiesels and the bloc's support of its biodiesel industry.

In its 15 May complaint Argentina specifically refers to support schemes within the 27-country group for its domestic biodiesel sector. Buenos Aires is also concerned that some EU measures geared at promoting renewable energy, along with a system for reducing greenhouse gas emissions, could be in violation of WTO rules.

The implementation of these measures at the member state level could also be in breach of the EU's WTO obligations, Argentina says. The policies at issue are applied by the EU and by member states Belgium, France, Italy, Poland, and Spain.

Argentina and the EU have spent much of the past year at loggerheads on a range of trade and investment issues.

Brazil's Azevêdo chosen as next WTO head

Roberto Carvalho de Azevêdo has won the position of WTO Director-General, officials announced on 8 May. Azevêdo - who has spent the past five years as his country's ambassador to the global trade body - will be the organisation's first chief from Latin America and only the second in its short history from a developing country.

The victory was welcomed by Brazilian President Dilma Rousseff, who called the news a win for the WTO. Azevêdo will take office on 1 September, after the term of current Director-General Pascal Lamy ends on 31 August.

The WTO will be holding its Ninth Ministerial Conference in the Indonesian province of Bali in early December, giving the incoming trade chief just a few short months to get settled into his new role.

WTO members are currently working to prepare a small package of deliverables from the Doha Round negotiations in time for December's conference.

Energy issues a priority for WTO chief

The WTO is in need of a constructive and forward-looking discussion on trade and energy issues, Director-General Pascal Lamy told participants at a workshop on 29 April.

Such an approach, he explained, is necessary if the 159-member body wishes to participate effectively in the future of global energy governance.

Lamy was one of several presenters at the WTO's Geneva headquarters to emphasise the crucial role of renewables in helping supply the planet's growing demand for energy while reducing adverse environmental impacts.

Lamy noted that countries urgently need to begin discussing the trade implications of ramping up renewable energy in order to ensure success.

"A discussion on the trade-related aspects of measures to promote clean energy, which is both rooted in political reality and informal, remains almost completely absent from the WTO," the Director-General said.

Brussels says no to carbon permit "backloading"

A European Commission plan to delay the auctioning of 900 million carbon permits hit a major snag on 17 April, as EU parliamentarians voted narrowly against the measure.

Prices of the permits – which underpin the EU's Emissions Trading System (ETS) – fell to their lowest on record following high-profile vote.

Supporters had argued that the backloading scheme is essential for the survival of the ETS, at least until a long-term solution can be found. Opponents, however, had warned that delaying permit auctions could have the adverse effect of increasing energy costs and undermining confidence in the overall programme.

Under the EU ETS, limits are set on emission levels from factories and plants within the 27-member bloc. These companies can then buy allowances to offset these emissions, and trade whatever surplus permits they have. In recent years, however, the EU carbon market has struggled with the persistently low prices of these permits, which have fallen precipitously.

Post-2015 process inches forward in Bali

Efforts to develop a global development framework beyond 2015 – the completion date of the Millennium Development Goals (MDGs) – moved forward in late March, with a high-level group holding its final formal meeting in Bali, Indonesia.

This 27-member High-Level Panel of Eminent Persons on the Post-2015 Development Agenda was formed last July by UN Secretary-General Ban Ki-moon.

The panel agreed in Bali on the need for a new development agenda that is developed with broad global participation.

In addition to the Bali meeting, the Open-Ended Working Group of the UN General Assembly on Sustainable Development Goals met for the first time in New York from 14-15 March.

The outcomes of the two processes – which cover a wide range of issues related to sustainable development – are expected to be merged in September this year, when both groups report back to the UN General Assembly.

EU mulls biodiesel anti-dumping duties

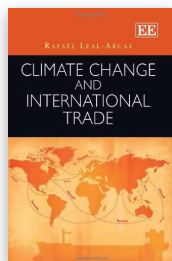
The European Commission is considering possible anti-dumping duties on imports of biodiesel from Indonesia and Argentina, according to unnamed sources cited by Reuters.

The investigation was launched by the Commission last year, in response to a request by the European Biodiesel Board (EBB), which represents manufacturers accounting for over a quarter of EU biodiesel production.

The EBB has claimed that the two countries, which together make up 90 percent of biodiesel imports into the EU, maintain higher export taxes for the raw materials used to produce biodiesel than on biodiesel itself. The group argues that the practice discourages raw material exports in favour of biodiesel exports.

The news comes shortly after Argentina filed its own complaint at the WTO against the EU and some of its member states over allegedly unfair trade practices involving the importation and marketing of biodiesel, as well as the subsidisation of the 27-country bloc's domestic market.

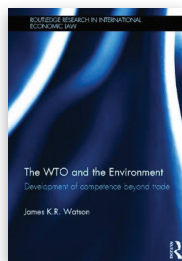
Publications and resources



Climate Change and International Trade – Edward Elgar Pub – April 2013

This book examines the interface of climate change mitigation and international trade law with a view to addressing the question: How can we make best use of the international trading system experience to aim at a global climate change agreement? The book contributes to developing the architecture for a post-2012 global climate agreement and, in doing so, seeks and proposes new approaches to climate change mitigation by linking it to the international trade system. The author suggests the adoption of a bottom-up approach to climate change negotiations by using the evolution of multilateral trade agreements as a model for reaching a global climate treaty.

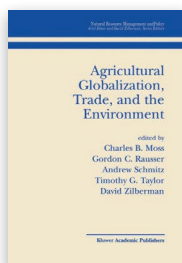
The book can be found at <http://bit.ly/XhCJJx>



The WTO and the Environment: Development of Competence Beyond Trade – Routledge – October 2012

This book is a review of the development of the WTO dispute resolution procedure and the power and influence it has gained over the practises of the member countries as well as in other international treaties. The book addresses the development of environmental competency in the WTO and examines the arguments of those who oppose WTO rule-making with impacts on the environment. The WTO's interactions with multilateral environmental agreements are considered and WTO cases including the 2011 US/Mexico tuna dispute and the US sea turtles decision are analysed in detail.

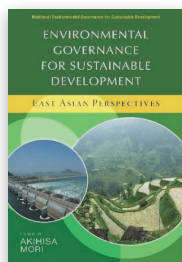
This book can be found at <http://bit.ly/RyFz0D>



Agriculture Globalization Trade and the Environment: Natural Resource Management and Policy – Springer – October 2012

This book explores a number of different issues, including the operation of the tariff-rate quotas established under the Uruguay Round Agreement, the implications of sanitary and phytosanitary restrictions on trade, and the growing controversy over genetically modified organisms. In addition, several chapters analyse the interaction between agricultural trade and environmental concerns. In the face of falling agricultural prices and increasingly liberalised agricultural trade, the agricultural policy scene is extremely complex, both locally and globally. The arguments and analyses presented in the book are intended to highlight several issues that must be considered in the continuing debates on agricultural policy.

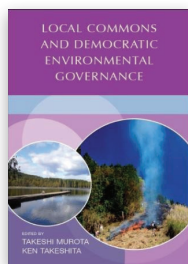
This book can be found at <http://bit.ly/Y2qaPq>



Environmental Governance for Sustainable Development: East Asian Perspectives – UN University Press – March 2013

In order to advance sustainable development globally, the author of this book says it is vital to change the course and mode of conventional economic growth in the East Asian region. The volume gives attention to the evolution of multilevel environmental governance in the East Asian region, including both Northeast and Southeast Asia. It examines how effective emerging environmental governance and policy have been and addresses the underlying causes of local, national, regional and global environmental challenges.

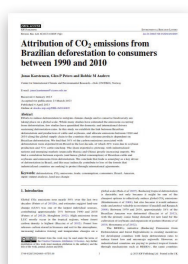
This book can be found at <http://bit.ly/ZDHd9R>



Local Commons and Democratic Environmental Governance – UN University Press – March 2013

This book argues that the rising tide of globalisation poses a direct threat to the viability of small communities worldwide. The publication advances the idea of collaborative governance as an integration of open and closed commons. Taking into consideration the dimension of conflict resolution, it studies examples of governance structures in various countries around the world to develop a new type of democracy toward multilevel environmental governance that involves the public, private and commons spheres. The book explores the essential role of local commons in providing an axis of resistance to increasing environmental devastation and social inequality toward creating a sustainable future for local communities as well as society at large.

This book can be found at <http://bit.ly/ZDyrbW>



Attribution of CO2 Emissions from Brazilian Deforestation to Consumers Between 1990 and 2010 – CICERO – January 2013

Efforts to reduce deforestation in order to mitigate climate change and to conserve biodiversity are taking place on a global scale. This study establishes a link between Brazilian deforestation and production of cattle and soybeans, and allocates emissions between 1990 and 2010 along the global supply chain to the countries that consume products dependent on Brazilian deforestation. The authors find that 30 percent of the carbon emissions associated with deforestation were exported from Brazil in the last decade, primarily due to soybean production and cattle ranching. The paper concludes that trade is emerging as a key driver of deforestation in Brazil, and this may indirectly contribute to loss of the forests that industrialised countries are seeking to protect through international agreements.

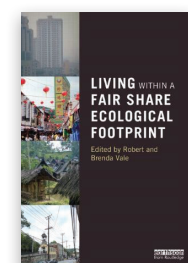
The paper can be found at <http://bit.ly/ZgkkAc>



China's distant-water fisheries in the 21st century – University of British Columbia – March 2013

This report conservatively estimates the distant-water fleet catch of the People's Republic of China for 2000–2011, using a newly assembled database of reported occurrence of Chinese fishing vessels in various parts of the world and information on the annual catch by vessel type. Given the unreliability of official statistics, uncertainty of results was estimated through a regionally stratified Monte Carlo approach, which documents the presence and number of Chinese vessels in Exclusive Economic Zones and then multiplies these by the expected annual catch per vessel. The authors found that China, which over-reports its domestic catch, substantially under-reports the catch of its distant-water fleets.

The report can be found at <http://bit.ly/XyUypL>



Living Within a Fair Share Ecological Footprint – Routledge – March 2013

This book argues that the impact of humanity on the earth is already overshooting the earth's capacity to supply humanity's needs. The publication focuses on solutions to this problem by showing what it is like to live within a fair earth share ecological footprint. The authors describe numerical methods used to calculate this, concentrating on low or no cost behaviour change, rather than on potentially expensive technological innovation. They show what people need to do now in regions where their current lifestyle means they are living beyond their ecological means, such as in Europe, North America, and Australasia.

This book can be found at <http://bit.ly/YA2x4r>

EXPLORE THE TRADE AND SUSTAINABLE DEVELOPMENT
WORLD FURTHER WITH ICTSD'S BRIDGES NETWORK

BRIDGES

Trade news from a sustainable development perspective
International focus - English language
www.ictsd.org/news/bridges

BIORES

Analysis and news on trade and environment
International focus - English language
www.ictsd.org/news/biores

BRIDGES AFRICA

Analysis and news on trade and sustainable development
Africa focus - English language
www.ictsd.org/news/bridges-africa

PUENTES

Analysis and news on trade and sustainable development
Latin America and Caribbean focus - Spanish language
www.ictsd.org/news/puentes

МОСТЫ

Analysis and news on trade and sustainable development
CIS focus - Russian language
www.ictsd.org/news/bridgesrussian

PONTES

Analysis and news on trade and sustainable development
International focus - Portuguese language
www.ictsd.org/news/pontes

桥

Analysis and news on trade and sustainable development
International focus - Chinese language
www.ictsd.org/news/qiao

PASSERELLES

Analysis and news on trade and sustainable development
Francophone Africa focus - French language
www.ictsd.org/news/passerelles



International Centre for Trade and Sustainable Development

Chemin de Balexert 7-9
1219 Geneva, Switzerland
+41-22-917-8492
www.ictsd.org

BIORES is made possible through generous
contributions of donors and partners
including

**DFID - UK Department for International
Development**

**SIDA - Swedish International
Development Agency**

**DGIS - Ministry of Foreign Affairs
Netherlands**

Ministry of Foreign Affairs, Denmark

Ministry of Foreign Affairs, Finland

Ministry of Foreign Affairs, Norway

Ausaid, Australia

BIORES also benefits from in-kind
contributions from its contributing partners
and Editorial Advisory Board members.

BIORES accepts paid advertising and
sponsorships to help offset expenses and
extend access to readers globally. Acceptance
is at the discretion of editors.

The opinions expressed in the signed
contributions to BIORES are those of the
authors and do not necessarily reflect the
views of ICTSD.

Material from BIORES can be used in other
publications with full academic citation.

Price: €10.00
ISSN 1996-9198

