# REGIONAL FISHERIES ORGANIZATIONS AND THE WORLD TRADE ORGANIZATION:

## COMPATIBILITY OR CONFLICT?

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**Front cover photograph**: Emptying the fish on the deck of a beam trawler.

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# REGIONAL FISHERIES ORGANIZATIONS AND THE WORLD TRADE ORGANIZATION:

## COMPATIBILITY OR CONFLICT?

by Richard G. Tarasofsky[1]

*Credit*: 1999 Trend Magazine

**Protester against WTO, Seattle, Washington, USA, 1999**

## TABLE OF CONTENTS

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# EXECUTIVE SUMMARY

The interaction between trade measures adopted by regional fisheries organizations (RFOs) and the rules of the World Trade Organization (WTO) contains possibilities for both compatibility and conflict. Many RFO trade measures are meant to be "consistent with international law" or "consistent with the rules of the WTO", which encompasses both the substantive WTO rules as well as the exceptions provided for by WTO law. There has yet to be a WTO dispute over a measure stemming from a multilateral environmental agreement (MEA) or an RFO, and one cannot, therefore, be certain how these will be treated by the WTO. Nonetheless, the WTO jurisprudence to date offers important indications as to the scope provided for by WTO rules for environmental measures.

This report assesses the RFO/WTO relationship by identifying the types of trade measures used or potentially used by RFOs; assessing the potential for conflict between RFOs and WTO by examining the relevant WTO rules and the jurisprudence; and delving deeper into the legal considerations and possible scenarios involving WTO challenges of RFO measures. On this basis, a set of conclusions and recommendations are offered.

Trade measures used, or potentially used, by RFOs aim to achieve various purposes, the most important of which is to ensure compliance with their conservation and management regimes. As such, most trade measures are aimed at combating illegal, unreported and unregulated ("IUU") fishing. These measures include:

- **Requiring specified documentation on catches, from all vessels, as a condition of landing or transshipments.** Several RFOs have documentation requirements as a condition of landing or transshipments, e.g. the Bluefin Tuna Statistical Document Program of the International Convention for the Conservation of Atlantic Tunas (ICCAT) and the Catch Documentation Scheme (CDS) of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The participation of all fishing States in the documentation schemes is encouraged, even if they are non-parties. Similar documentation requirements can also apply to exports, e.g. in the case of the CCAMLR CDS.

- **Prohibiting landings and transshipments (to RFO parties) from particular vessels.** Some RFOs have also adopted trade measures aimed at particular vessels that are determined to be in non-compliance with their conservation and management measures, e.g. the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific. The targets of such trade measures include vessels from both parties and non-parties, in particular, "flag of convenience" vessels.

- **Trade-restrictive measures, such as import bans, against parties or non-parties, in fish products covered by an RFO.** A few RFOs, e.g. the Commission for the Conservation of Southern Bluefin Tuna and ICCAT provide for trade-restrictive measures to be taken against States, with the aim of ensuring compliance with their conservation and management measures.

- **Certification and labeling schemes.** Some RFO treaties contain provisions that may lead to additional trade measures, e.g. the adoption of certification and/or labelling schemes such as that developed under the auspices of the Inter-American Tropical Tuna Commission.

The General Agreement on Tariffs and Trade (GATT), revised in 1994, is the primary WTO instrument addressing the issue of trade in goods. GATT requires that all WTO member states be granted equal trade advantages for "like" products (Article I); treat "like" imported products no less favourably than those produced domestically (Article III); and, with few exceptions, not restrict the quantity of exports or imports (Article XI). Trade measures applied by and in support of RFOs, which seek to discriminate in favour of goods produced in accordance with their conservation and management aims, are potentially in conflict with these provisions. If they were to be found to go against one of those provisions, the question would arise as to whether these measures would be covered by the general exceptions to GATT provided for in Article XX, which includes trade measures aimed at protecting human, animal or plant life or health or measures "relating to the conservation of exhaustible natural resources".

The WTO Agreement on Technical Barriers to Trade (TBT Agreement) is also relevant to some RFO trade measures. There is a presumption of conformity with the TBT Agreement if mandatory technical regulations (e.g. RFO documentation requirements) and voluntary standards (e.g. government sponsored voluntary ecolabelling schemes) are internationally agreed. Countries may depart from internationally agreed standards, but then the TBT Agreement establishes a set of criteria to ensure that the regulations or standards do not constitute "unnecessary barriers to trade". Two key issues are relevant to RFOs. One is whether RFO standards are "international standards". A second is whether the TBT disciplines cover certification and labelling schemes that are based on "non-product related production and processing methods (i.e. those that are not related to the actual physical characteristics of the end product in trade). If they are covered, then some certification and labelling schemes based 'sustainable' production requirements may come into conflict with the TBT Agreement.

In line with WTO procedures, specific disputes concerning an RFO trade measure would necessarily be brought by individual WTO member states against one or more other member states in response to the implementation of that trade measure by those states. In other words, such disputes would involve actions by parties to the RFO rather than the RFO itself. The most likely source of such a challenge would be WTO members that were not parties to the RFO, as parties would have played a role in shaping the development of the RFO trade measures.

The relevant WTO jurisprudence has mainly concerned the provisions of GATT. There is insufficient judicial experience with the TBT Agreement to know how the tests in that Agreement would be applied in the context of RFOs. Based on past cases, such a WTO challenge of an RFO trade measure would likely turn on the interpretation and application of GATT Article XX. Some general issues that a WTO dispute settlement panel might consider in adjudicating this include: the multilateral basis for the trade measure (e.g. the extent to which it reflects a global consensus); whether affected fishing States can participate in the RFO; the manner in which decisions to establish trade measures are taken; and the design of the trade measure. On this basis, most RFO trade measures should be able to survive WTO challenges. There is a global consensus, reflected in several instruments, on the necessity for such measures; most RFOs are open to all fishing States; most RFOs take decisions by consensus, while

allowing for opting out; and the design of most trade measures is done through dialogue with affected countries and in consideration of the needs of developing countries. In addition, most RFO trade measures have been developed after efforts to deal with a serious environmental problem - for example, the significant decline of certain fisheries - have failed. They have been developed as a result of a multilateral process, in which, in general, all fishing nations have had an opportunity to participate. They tend to be tailored to the particular species in question and are subject to review.

Despite the results of the assessment in this study, that most RFO trade measures appear to be compatible with WTO law, some key challenges remain, which should be addressed both by the WTO and by MEAs and RFOs.

- The WTO, MEAs, RFOs, and other relevant international institutions, such as the United Nations Environmental Programme and Food and Agriculture Organization, should co-operate to establish a coherent legal framework that ensures the integrity of all multilaterally agreed trade measures in support of sustainable development, and the "mutual supportiveness" called for during the United Nations Conference on Environment and Development (UNCED). The result should be an unequivocal affirmation that MEAs, including RFOs, are the primary bodies that are competent to decide on the appropriateness of trade-related environmental measures. The WTO's role would be limited to providing advice to MEA processes on the design of trade measures, while WTO adjudication would only take place to test whether the implementation of an MEA trade measure was an inappropriate exercise in trade protectionism. Such an outcome would be an appropriate division of labour between MEAs and the WTO that would enhance sustainable development. This general relationship between the WTO and MEA trade measures is currently being considered within the WTO Committee on Trade and Environment, to which both CCAMLR and ICCAT have made presentations, and is subject to negotiations under the Doha Development Agenda (DDA). It remains uncertain as to whether positive results will emerge from these negotiations.

- The international community should affirm the legitimacy of certification and labelling based on non-product-related related PPMs. In principle the WTO should be called upon to establish appropriate rules to ensure the consistency of these instruments with WTO, however at present achieving a positive result in the WTO seems politically unfeasible. Therefore, it is unlikely that such a result will be possible under the current DDA negotiations. In the short term, States and NGOs should maintain the practical status quo of continuing to develop and improve these schemes, while simultaneously devising a strategy aimed at the WTO and other international bodies to create the political conditions and an appropriate negotiating forum that will lead to a legal confirmation of the use of such certification and labelling.

- The WTO should affirm basic sustainable development principles provided for in UNCED, such as the precautionary principle, although it should not seek to determine the content of these principles, since it has no such competence or expertise. Resolution of disputes involving such principles should involve consultations with MEA or RFO secretariats, as well as possible requests for Advisory Opinions from the International Court of Justice.

- RFOs should provide for effective means for parties to resolve conflicts and disputes before they escalate to the point where trade measures are imposed, and provide as much multilateral guidance as possible on how their members should implement trade measures pursuant to RFO decisions.

- RFOs and the CBD Secretariat should co-operate to establish greater synergy between each other's processes, for example, through capacity-building and financial assistance, so as better to tackle the root causes of non-compliance with fisheries conservation measures. Further areas of such synergy include the application of the precautionary principle, and the use of incentive measures, such as labelling.

## BACKGROUND AND INTRODUCTION

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. WTO's agreements - or rules - are negotiated and signed by the bulk of the world's trading nations and are intended to help ensure that trade flows as smoothly, predictably and freely as possible. Regional fisheries organizations (RFOs) are affiliations of nations which co-ordinate efforts to manage fisheries in a region. RFOs may focus on certain species of fish (as in the case of the Commission for the Conservation of Southern Bluefin Tuna) or have a wider remit related to living marine resources in general within a region (as does the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), for example). This report examines the relationship between the rules and regulations of RFOs and the rules of the WTO. It seeks to identify possibilities of compatibility or conflict, and makes recommendations on how to minimize conflicts.

RFO measures relating to trade (hereafter often referred to as "trade measures") are to be found in three repositories. Firstly, trade measures are contained within the RFO treaties themselves. For example, the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific ("Driftnet Convention") contains prohibitions on the imports and landing of fish caught using driftnets. A second, and more common, source of trade measures is the decisions and/or recommendations taken by the RFO commissions and, thirdly, RFO trade measures are contained in the various global instruments adopted to strengthen or reinforce RFOs.

The relationship between the WTO and multilateral environment agreements (MEAs) in general has been on the international agenda for over 10 years, and compatibility between the two sets of rules is still uncertain. Indeed, the effort to achieve mutual supportiveness is likely to continue for some time to come. The debate over the WTO-MEA interface generally relates to global MEAs - in other words the debate is about coherence at the global level. Although trade measures stemming from regional agreements present a sub-set of the general WTO/MEA problematique, this is not necessarily so for RFOs, most of which are open to any State fishing within the area covered by the treaty, including those from outside the region.

To date, there has not been a WTO dispute over a measure stemming from an MEA or an RFO. Although one cannot, therefore, be certain how these will be treated by the WTO, recent WTO jurisprudence involving environmental issues sheds some light on how some of its relevant provisions will be interpreted. However, that insight can be taken only so far, since most trade measures adopted so far by RFOs have been aimed at improving compliance with their conservation and management measures, and there is relatively little experience in the WTO in addressing trade policy in the context of compliance with other treaties.

The first chapter of this report describes the types of trade measures used or potentially used by RFOs; the second chapter assesses the potential for conflict between RFOs and WTO, including by examining the relevant WTO rules and the jurisprudence; the third chapter delves deeper into the legal considerations and possible scenarios involving RFO measures which could be challenged at the WTO; and the final chapter draws some conclusions and makes some recommendations.

## TYPES OF TRADE MEASURES USED OR POTENTIALLY USED BY RFOs

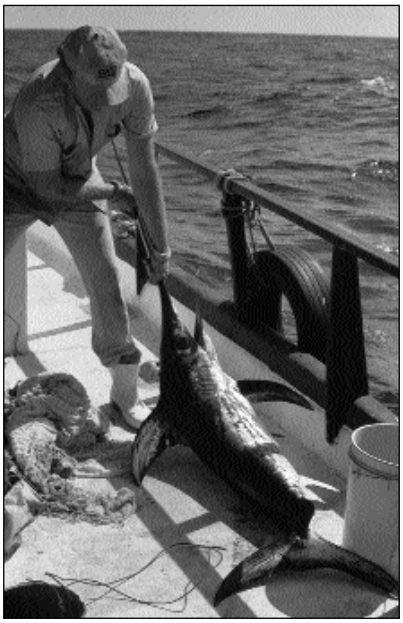
Trade measures used, or potentially used, by RFOs aim to achieve various purposes, the most important of which is to ensure compliance with their conservation and management regimes. As such, most trade measures are aimed at combating illegal, unreported and unregulated (IUU) fishing. These measures include:

- **requiring specified documentation** on catches, from all vessels, as a condition of landing or transshipments;
- **prohibiting landings and transshipments (to RFO parties) from particular vessels**; and
- **enacting trade-restrictive measures, for example import bans, against parties, or non-parties,** in fish products covered by an RFO.

Further detail on these measures is given in the following sections.

### Requirements for specified documentation

Several RFOs have documentation requirements as a condition of landing or transshipments. The first was the International Convention for the Conservation of Atlantic Tuna (ICCAT). The ICCAT Bluefin Tuna Statistical Document Program (BTSD) was initiated in 1992.[i] Initially for frozen bluefin products, the Program was extended to fresh products in 1993.[ii] In 2000, it was decided to establish statistical document programmes for Swordfish *Xiphias gladius*, Bigeye Tuna *Thunnus obesus*, and other species managed by ICCAT, modelled on the BTSD Program.[iii] On 7 May 2000, the Catch Documentation Scheme (CDS) of CCAMLR became operative.[iv] It applies to all catches of *Dissostichus* spp. (i.e. both Patagonian Toothfish *D. eleginoides* and Antarctic Toothfish *D. mawsoni*), whether taken as by-catch or as a result of targeted fishing.[v] The Southern Bluefin Tuna Statistical Program was adopted in 2000 under the auspices of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT). Finally, the Indian Ocean Tuna Commission (IOTC) adopted a recommendation that, by 1 July 2002, or as soon as possible thereafter, all Bigeye Tuna, when imported into the territory of a contracting party, be accompanied by an IOTC Bigeye Tuna Statistical Document (IOTC *Resolution 01/06*).



*Credit:* © WWF-Canon/James W. Latourette

Swordfish *Xiphias gladius*

The objectives of the CCAMLR CDS appear representative, these being to:

- provide the Commission with information necessary to meet the management objectives of its Convention;

- identify the origins of toothfish entering the markets of contracting parties;
- determine whether toothfish harvested in the Convention Area imported into contracting parties was caught in a manner consistent with CCAMLR conservation measures; and
- reinforce the conservation measures already adopted by the Commission.[vi]

The participation of all fishing States in the documentation schemes is encouraged, even if they are non-parties.[vii] For example, CCAMLR has specifically invited to participate several countries which have been identified as importing toothfish caught in the CCAMLR area or providing ports and landing facilities to vessels that may have been engaging in IUU fishing and/or also flag States of vessels fishing the CCAMLR Area.[viii] Furthermore, CCAMLR *Resolution 15/XIX* calls on Convention parties to discourage their flag vessels authorized to fish for Patagonian Toothfish from using the ports of States that are not implementing the CDS.

While the documentation schemes described provide that no catches of covered species may be landed in the port of a party or transshipped to its vessels unless accompanied by valid documentation[ix], similar requirements entailing specific documentation can apply to exports.[x] The particular schemes detail the information required to be documented, but typically this includes the name of the country issuing the document; name of the exporter and importer; area of harvest of the fish in the shipment; the year the fish were caught; type of product and total weight; and point of export.[xi] An official of the flag State must validate the documentation.[xii] A number of verification methods are prescribed. For example, the CCAMLR CDS calls for examination of the documentation by Customs authorities; physical inspection of any shipment; co-operation between the flag State and the importing State; and Vessel Monitoring Systems.[xiii] Inspections of fishing vessels intending to land or transship species covered by the scheme is also required.[xiv]

## Prohibition of landings and transshipments from particular vessels

Several RFOs have adopted trade measures aimed at particular vessels that are determined to be in non-compliance with their conservation and management measures.[xvi] The targets of such trade measures include both vessels from parties and non-parties, in particular, "flag of convenience" (FOC) vessels. (Flag of convenience vessels are generally considered to be those that are registered in a different country to that where the ship is beneficially owned.) Some of the more prominent examples of these types of measures are discussed below.

The Driftnet Convention was adopted under the auspices of the South Pacific Forum Fisheries Agency, and aims to protect the stock of Albacore *Thunnus alalunga* in that region. To reinforce the complete prohibition on driftnet fishing, the Convention allows parties to take measures "consistent with international law" to prohibit the landing of driftnet catches and prohibit the importation of any fish or fish product caught using a driftnet.[xv] In 1991, the UN General Assembly adopted, without a vote, *Resolution 46/215* on *Large Scale Pelagic Drift-net Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas*, which called for a complete moratorium on all large-scale pelagic driftnet fishing on the high seas by 31 December 1992. This had the effect of adding global legitimacy to the substantive objective of the regionally-agreed trade measure.

As another example, Article 15 (3) of the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean states that parties shall, in accordance with the measures agreed by the Commission,

> "…adopt regulations in accordance with international law to prohibit landings and transshipments by vessels flying the flag of non-parties to this Convention *where it has been established* that the catch of a stock covered by this Convention has been taken in a manner which undermines the effectiveness of conservation and management measures adopted by the Commission."

In some cases, RFOs have reversed the normal burden on non-parties, so that they need to prove they are in compliance with the conservation requirements of the RFO. For example, ICCAT *Recommendation 98-11* provides that a non-contracting party, entity or fishing entity which has been sighted in the ICCAT Convention Area *will be presumed* to be undermining ICCAT conservation measures.[xvii] If such a vessel voluntarily enters a port of a contracting party, the Recommendation stipulates that the vessel should not be permitted to land or transship until an inspection has been conducted, for example of its documents, log books, fishing gear and catch on board.[xviii] Where a vessel from a non-party to CCAMLR, identified by the CCMALR Commission as engaging in IUU fishing, voluntarily enters the port of a contracting party, the vessel is not to land or transship any fish species covered by the Convention until an inspection has taken place.[xix] If CCAMLR species are found, then the catch is not to be landed or transshipped, unless it is established that the fish were caught outside the applicable Convention Area or in compliance with relevant RFO conservation measures.[xx]

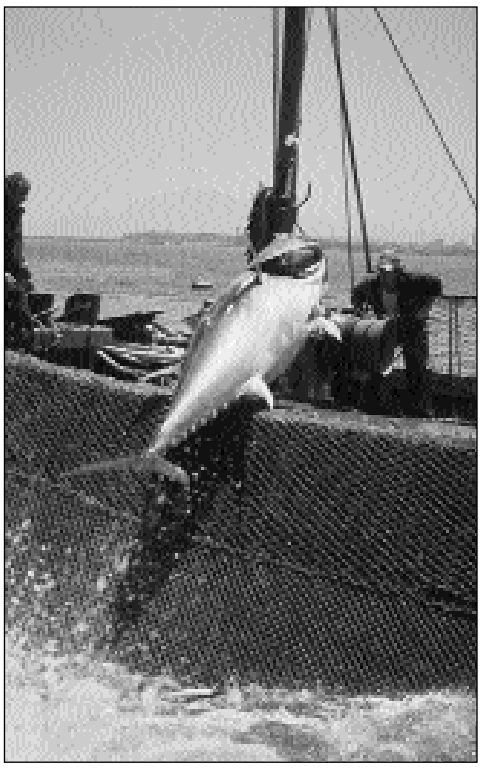
Some RFOs also state that vessels of parties are not to receive transshipments of fish from the vessel of a non-contracting party that has been sighted fishing in the convention area and where there are grounds for believing that the vessel was fishing contrary to the convention or its conservation measures.[xxi] Other RFOs go even further, in that the mere sighting of non-parties in the convention area is sufficient to presume engagement in activities that undermine conservation measures.[xxii] Furthermore, ICCAT calls for parties and co-operating non-parties to take every possible action, consistent with their relevant laws, to urge their importers, transporters and other concerned business people to refrain from engaging in transactions and transshipments of tunas and tuna-like species caught by vessels carrying out IUU fishing in its Convention Area and other areas.[xxiii]

The problem of FOC (flag of convenience) or FONC ("flag of non-compliance") vessels contributing to IUU fishing has been addressed by some RFOs. For example, the IOTC calls on its parties and co-operating non-parties to urge their importers, transporters and other concerned business people from transacting in and transshiping tuna and tuna-like species caught by vessels carrying out FOC activities, and to urge the general public from purchasing fish harvested by such vessels.[xxiv] The IOTC Secretariat is also instructed to prepare possible measures, including trade-restrictive measures, to prevent or eliminate FOC activities. CCAMLR parties and co-operating non-parties are to develop ways to ensure that the export or transfer of fishing vessels from their State to a FONC State is prohibited and are to prohibit landings and transshipments of fish and fish products from FONC vessels.[xxv]

## Enacting of trade-restrictive measures against States

A few RFOs provide for trade-restrictive measures to be taken against States, with the aim of ensuring compliance with their conservation and management measures. For example, the 2000 Action Plan of the Commission for the Conservation of Southern Bluefin Tuna *Thunnus maccoyi* provides that the Commission is regularly to identify non-members whose vessels have been catching Southern Bluefin Tuna (SBT) in a manner that diminishes the effectiveness of the CCSBT conservation and management measures.[xxvi] The Action Plan goes on to permit the Commission to impose trade-restrictive measures "consistent with members' international obligations on SBT products in any form" against such non-members. As a result, the Commission has recently decided to notify Belize, Cambodia, Honduras and Equatorial Guinea that their vessels have been identified as acting in a manner which diminishes the effectiveness of the conservation and management measures for Southern Bluefin Tuna. Thus, the groundwork for potential trade measures against these countries has been laid.

ICCAT has taken this concept the furthest, by actually imposing trade measures against States. Two of its Resolutions, aimed at ensuring the effectiveness of its conservation programme, mandate the Commission to recommend that parties take non-discriminatory trade-restrictive measures, "consistent with their international obligations", for Atlantic (Northern) Bluefin Tuna *Thunnus thynnus* products from non-parties whose vessels have been fishing in a manner that diminishes the effectiveness of the relevant conservation recommendations.[xxvii] Accordingly, trade bans on imports of Northern Bluefin Tuna and its products in any form have been established against Belize, Honduras, and Panama.[xxviii] The ban against Panama was lifted in 1999, after Panama took substantial steps to bring its fishing practice in line with ICCAT requirements, including by ceasing authorization of the registration of any bluefin tuna-fishing vessel for operations in the ICCAT area, and by becoming an ICCAT contracting party.[xxix] In addition, the Commission has recommended that trade measures be taken against parties which exceed their catch limits during any two consecutive management periods.[xxx] Thus, an import ban on Northern Bluefin Tuna was imposed on Equatorial Guinea in 1999.[xxxi] The ban against Honduras mentioned above was in place for more than two years after Honduras acceded to the Convention in 2001.[xxxii]



*Credit:* © WWF-Canon /Jorge Bartolome

**Tuna fishing with *almadrabas* (traps) in Spain - this Mediterranean style of fishing is used to catch Northern Bluefin Tuna**

In respect of *Dissostichus* spp., parties to CCAMLR are not to take trade measures inconsistent with their international obligations against vessels of contracting parties engaged in IUU fishing.[xxxiii] CCAMLR is empowered to adopt trade

measures, aimed at contracting parties, "consistent with the World Trade Organization", to ensure that trade does not encourage IUU fishing or otherwise undermine CCAMLR's conservation measures which are consistent with the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[xxxiv]

## Other trade measures and issues

The afore-mentioned measures constitute specific steps taken by RFOs. There are also measures contained in RFO treaties themselves that can, potentially, lead to parties taking additional trade measures for the purpose of achieving RFO objectives. For example, some RFOs provide for the use of "quality marks".[xxxv] These provisions may be a basis for parties to develop certification and labelling schemes, multilaterally or unilaterally. So far, RFO quality marks have not been used extensively as market-based instruments designed to influence consumer behaviour, with the exception of the International Dolphin Conservation Program (IDCP), under the auspices of the Inter-American Tropical Tuna Commission (IATTC). This programme was established by the Agreement on the International Dolphin Conservation Program (AIDCP). A key element of the programme is a voluntary certification and labelling scheme, based on a system for tracking and verifying tuna harvest in accordance with specified elements.[xxxvi] A set of procedures for using the "AIDCP Dolphin-Safe" labels has been agreed, should States choose to implement the scheme.[xxxvii]

*Credit:* © WWF/Stephen Dawson

**Hector's Dolphin *Cephalorhynchus hectori* entangled in fishing net**

Another key trade-related mechanism is the use of the precautionary approach, or principle, in setting RFO standards. Although the precautionary approach is not directly applied by any RFOs in decisions to apply trade measures, it does form the basis of some conservation measures,[xxxviii] compliance with which might be reinforced by trade restrictions. The relevance of the precautionary principle to the subject of this report is discussed further in the following chapters.

A trade-related issue that is dealt with in some RFOs is the reduction of fishing capacity.[xxxix] Although placing quotas and limitations on fishing efforts are not trade measures, *per se*, the reduction of fishing capacity can have implications for the subsidy regimes of some countries, which is now an important topic in WTO discussions.[xl] However, since such measures are so far undeveloped in RFOs, and the discussion is still only in its incipient phase in the WTO, they will not be further analysed in this report.

# THE RELATIONSHIP BETWEEN RFO TRADE MEASURES AND THE WTO

This chapter will examine the relationship between RFO trade measures and the WTO, on the basis of the legal instruments, the applicable WTO jurisprudence, and relevant international processes.

## Key WTO instruments and jurisprudence

### *Agreement Establishing the World Trade Organization*

The 1994 *Agreement Establishing the World Trade Organization* was developed during the Uruguay Round, a series of trade negotiations among 125 countries spanning seven and a half years. The Agreement specifies the purpose of the WTO, its functions, structure, and legal status, and provides for a Secretariat. The preambular text states that parties to the Agreement recognize that,

> "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, **while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development**".

The WTO's rules - or agreements - are also the result of negotiations between its members. The current set of agreements is the outcome of the 1986–94 Uruguay Round negotiations. Among the functions of the WTO outlined in the *Agreement Establishing the World Trade Organization* are the facilitation of implementation of the Uruguay Round Agreements and the furthering of their objectives; the provision of a forum for negotiations among WTO members; and the administration of a mechanism for settling disputes.

### *The General Agreement on Tariffs and Trade (GATT)*

The original General Agreement on Tariffs and Trade, now referred to as "GATT 1947", provided the basic rules of the multilateral trading system from 1 January 1948 until the World Trade Organization entered into force on 1 January 1995. The 1986–94 Uruguay Round negotiations included a major revision of the original GATT. "GATT 1994" is now the agreement under the WTO that deals with trade in goods (whereas WTO as a whole also covers other aspects of trade, such as services and intellectual property).

GATT 1994 sets out the main WTO rules that have a specific bearing on trade in goods, thereby providing the basis for multilateral trade in the same. The two fundamental principles of GATT are reflected in its Articles I and III, both of which are intended to enhance and protect liberalized trade among party nations. According to the "Most-favoured Nation" (MFN)

obligation, expressed in GATT Article I, member nations must unconditionally grant all other member nations equal trade advantages for like products. In other words, there is to be no discrimination in the way one member State treats other member States in relation to matters covered by GATT. The fundamental GATT principle enshrined in Article III is known as the "National Treatment" obligation. This obligation ensures that members of GATT treat imported products no less favourably than "like" domestic products, so as to allow domestic and imported products to compete on an equal basis.

Other substantive GATT requirements of relevance to RFO trade measures are contained in Articles V and XI. Article V (2) guarantees freedom of transit through the territory of each WTO member State, "via the routes most convenient for international transit". This provision might apply to vessels of a WTO member State seeking to land their catch in another member State before transporting it on to a third State. Article XI of GATT prohibits, with certain very specific exceptions, quantitative restrictions on the import and export of products. This latter provision has been germane to most environmental disputes within GATT/WTO.

The requirements of the GATT Articles outlined above have a bearing on RFO conservation measures that distinguish between countries, create differences between imported and domestic products, restrict landing or transshipment rights, or create import or export restrictions. However, there is an additional consideration, namely that requirements of the GATT Articles mentioned are subject to the conditions of GATT Article XX, which outlines a set of general exceptions to GATT's substantive requirements. The most relevant parts of Article XX read as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...
>
> (b) necessary to protect human, animal or plant life or health;...
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement,
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption."

Articles I, III, and XI of GATT would be likely to apply to many of the restrictions and other requirements relating to the importation of fish products described in the previous chapter, but the question is whether the provisions of these Articles would be covered by the general exceptions provided for under GATT Article XX. This is further examined in the following chapter of this report (**Processes and likely outcomes**...).

### *The WTO Agreement on Technical Barriers to Trade (TBT Agreement)*

The TBT Agreement comprises disciplines (i.e. rules) for setting and enforcing technical standards, so as to reduce restrictions on international trade. The Agreement fosters the harmonization of technical requirements by favouring the use of international standards. The TBT Agreement distinguishes between a "technical regulation", which "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions"[xli] and compliance with which is mandatory; and "standards", which are similar to technical regulations, except that compliance is not mandatory.[xlii] In principle, an RFO instrument can include both technical regulations and standards. For example, many RFO trade measures designed to support compliance, including documentation systems such as the CDS, are binding and therefore might be considered as "technical regulations". Other provisions, such as encouraging port States to use vessel monitoring systems to verify where catches were taken, might be considered as "standards".

When a WTO member adopts, or expects to adopt, technical regulations for a product, it is required to participate, within the limits of its resources, in efforts to set international standards for that product.[xliii] If "relevant international standards" exist, then members must use these as a basis for their technical regulations, unless these standards would be "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".[xliv] Article 2.2 of the TBT Agreement explicitly recognizes the protection of "human health or safety, animal or plant life or health, or the environment" as legitimate objectives. A technical regulation for legitimate objectives that is based on international standards is "rebuttably presumed not to create an unnecessary obstacle to international trade".[xlv] The key issue in relation to RFOs is whether their rules would be considered "international" standards. Although the Agreement does not define what is meant by "international standards", the TBT Committee has adopted a Decision, which provides some guidance.[xlvi] These criteria include transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and taking account of developing country concerns.

Technical regulations and conformity assessment procedures must obey the MFN and National Treatment obligations (see pages 7-8).[xlvii] In addition, such regulations "shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".[xlviii]

Proposed technical regulations that are not based on international standards and that may have a significant effect on trade are to be communicated to other WTO members through the WTO Secretariat, so as to allow them to provide comments.[xlix] To date, no notifications of technical regulations based on RFO rules have been received by the WTO Secretariat, suggesting either that WTO members consider these as "international standards", or that they do not have a significant effect on trade. It could also be that the notification requirements are not being fully complied with.

In the case of "standards", the Code of Good Practice for the Preparation, Adoption and Application of Standards, annexed to the WTO Agreement on Technical Barriers to Trade, is to be followed if the standard is established by a central government standardizing body.[l] If the standard is set by a non-governmental organization (NGO), reasonable efforts are to be taken

*Credit*: © WWF-Canon/Edward Parker

**MSC-certified mackerel, caught using handlines, Cornwall, UK**

by governments to ensure that these comply with the Code.[li] As with the mandatory technical regulations, the Code expresses a preference for international standards.

Certification and labelling programmes operated by governments, such as the case of certification and labelling stemming from AIDCP (see page 6), would be considered "standards" for the purposes of the TBT, since they are not mandatory. Other certification programmes operational in the fisheries sector, such as that of the Marine Stewardship Council (MSC), would also be considered as standards.

The most controversial aspect of certification and labelling is whether voluntary initiatives involving "non-product-related production and processing methods" are covered by the TBT Agreement. Non-product-related production and processing methods (PPMs) are those PPMs that do not form part of the physical characteristics of the end-product. For example, the subject of Principle 3 of the MSC Principles and Criteria would be likely to be considered a non-product-related PPM, since it relates to an intangible aspect of fishery. It states,

> "The fishery is subject to an effective management system that respects local, national and international laws and standards and incorporates institutional and operational frameworks that require use of the resource to be responsible and sustainable."

If non-product-related PPMs are indeed covered by the TBT Agreement, then some of the disciplines in the Code of Good Practice might interfere with voluntary certification and labelling schemes that are based on such PPMs. These disciplines include the non-discrimination in relation to "like products" and the avoidance of unnecessary obstacles to international trade,[lii] depending on how these terms are interpreted. So far, there is no consensus as to whether such PPMs are indeed covered by the TBT Agreement.

### *Relevant GATT/WTO jurisprudence*

#### *GATT provisions*

The rulings in several WTO disputes have been based on interpretation of most of the GATT provisions already referred to but, so far, there is no WTO jurisprudence on Article V. The European Communities (EC) did file a complaint based on Article V against Chile, in 2000, because Chile was denying port facilities to European ships carrying Swordfish.[liii] However, that case was settled before a WTO panel was convened to adjudicate it.[liv]

It is perhaps noteworthy that a significant percentage of GATT/WTO cases pertaining to GATT Articles I, III, XI, and XX have concerned disputes over fish, which reflects the important international nature of the fisheries trade. None of these cases have directly involved a conservation measure adopted by an RFO; indeed, no cases directly based on an MEA have been heard by the WTO. However, in all these cases, GATT and WTO panels have indicated a preference for the use of multilaterally agreed trade measures to achieve environmental objectives, rather than trade measures taken unilaterally.

The WTO's Dispute Settlement Body establishes panels and an "Appellate Body" to hear cases and adjudicate disputes. The Appellate Body is a standing body, composed of independent experts, whereas panels are made up on a case-by-case basis. Once a case has been heard by a panel, a plaintive member involved in a dispute may appeal against the panel ruling to the Appellate Body, which reviews questions of law, but cannot re-open questions of fact. In all environmental cases concerning GATT Articles I, III and XI, the panels and Appellate Body quickly found that the environmental provisions at issue had violated one or more of those Articles. Accordingly, all the cases have turned on the application of Article XX, the interpretation of which has evolved over time.

Disputes involving the afore-mentioned provisions date back to the 1980s,[lv] however it was the well-known 1991 **Tuna-Dolphin Case** that triggered worldwide concern about potential incompatibilities between the international trade regime and environmental conservation.[lvi] That case concerned US import restrictions imposed on Mexican tuna caught using purse-seine nets, which, it was found, violated GATT Article XI - and were not otherwise allowed in accordance with exceptions provided for under GATT Article XX. Particularly difficult for the conservation community was the rationale used in interpreting GATT Article XX. Specifically, the ruling panel found that Article XX (b) (see page 8) could not be used to justify trade measures taken in respect of the environment, beyond national jurisdiction. The ruling in this case also followed the rulings of previous cases, namely that the word "necessary" in Article XX (b) was to be interpreted as requiring the "least trade-restrictive" measure, meaning that a measure could not be maintained if an alternative measure existed that was less trade restrictive. Finally, the panel ruled that "relating to", in Article XX (g), meant that the measure had to be "primarily aimed at" the conservation of natural resources. As a result of this finding - that the US import restrictions failed when tested for conformity with GATT - conservationists became alarmed that many other environmental measures, both unilateral and multilateral, risked being found GATT-incompatible. However, GATT/WTO jurisprudence was to develop considerably over the next 10 years, such that many environmental measures stood a better chance of being saved by Article XX. This trend began with the second Tuna-Dolphin Case,[lvii] involving a secondary boycott imposed on Mexican tuna that was processed in third countries, which reversed the jurisdictional limitation on Article XX (b) and the interpretation of Article XX (g) applied in the first Tuna-Dolphin Case (that "relating to" equated to "primarily aimed at").

Following a set of WTO cases that further developed the interpretation of Article XX, the WTO decision in the first **Shrimp-Turtle Case**, in 1998, is especially important.[lviii] The dispute involved a US import ban on shrimp caught in a manner that was considered to endanger sea turtles, i.e. that did not involve the use of "turtle excluder devices" required of US fishers. The Appellate Body in that case found that the US measure was covered by Article XX (g), in that it aimed to conserve turtles (which fell within the definition of "natural resources"). However,

the measure did not meet the requirements expressed in the chapeau of Article XX because, the Appellate Body determined, *inter alia*, that the US action aimed to influence the environmental policies of other countries in such a way that they should essentially adopt the same standards as the USA. This "imposition" of US policy was considered to be "arbitrary or unjustifiable discrimination between countries". Another factor leading to this WTO ruling against the USA was the fact that the USA had not sought to find a multilateral solution to the environmental problem at the root of the dispute.

*Credit:* Scott Eckert/WWF-UK

**Loggerhead *Caretta caretta* caught in a shrimp trawl net**

This case was important because, among other things, it consolidated a trend of interpreting Article XX in such a way that it became less difficult for an environmental measure to pass the "tests" in GATT Article XX (b) and (g): however, the more significant tests are now to be found in the chapeau of Article XX. What this means is that the WTO is leaning away from assessing whether a measure is truly an environmental one, and focusing more on whether it considers the measure to contain unjustifiable discrimination or trade protectionism (see text of chapeau of Article XX, page 8) .

In 2000, the dispute was revisited in the WTO, as Malaysia complained that the USA was not properly implementing the previous ruling of the Appellate Body.[lix] The gist of Malaysia's complaint was that the USA was still imposing an import ban on shrimp from Malaysia. However, in a very significant ruling, both the judging panel and Appellate Body dismissed the Malaysian complaint. They both found that the USA had met its obligation to seek solutions, in good faith, with involved countries, by attempting to initiate a multilateral agreement on the conservation of sea turtles, even though no actual agreement had been concluded. Malaysia had argued that the USA was obliged actually to *conclude* a multilateral agreement, an argument that the panel and Appellate Body dismissed as unreasonable. Moreover, after finding that the revised US regulations were sufficiently flexible to take account of legitimate differences in other countries, the panel indicated that the import ban could stand based on the following:

> "The Appellate Body Report [in the first shrimp case] found that, while a WTO member may not impose on exporting members to apply the same standards of environmental protection as those it applies itself, this member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own."[lx]

The Appellate Body ruling affirmed this sentiment.

Further significant developments arose out of the rulings in the **Korea Beef**[lxi] and **Asbestos Cases**,[lxii] which contained a revised interpretation of the term "necessary" in Article XX, which appears in paragraphs (b) and (d). While affirming that a measure having a negligible impact on trade is more likely to be deemed "necessary", a balancing test has been created whereby several factors are examined. These include the "contributions made by the compliance measure to the enforcement of the law or regulation at issue, the importance of common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[lxiii] Thus, as expressed by the Appellate Body in the Asbestos Case, "the more vital or important [the] common interests or values" pursued, the easier it is to make the determination that the measure is "necessary" to achieve the stated ends.[lxiv] Finally, the actual application of Article XX (d) in the Korea Beef Case is instructive. In that case, the Appellate Body affirmed the panel's approach of investigating alternative, less trade-restrictive, measures to address illegal activities similar to those that Korea was seeking to combat in this case.[lxv] Once it found that such alternative measures existed, the burden shifted to Korea to demonstrate that an alternative measure was not reasonably available.[lxvi] In that case, the Appellate Body upheld the panel's finding that Korea had not discharged this burden, and, therefore, the measure Korea chose was disproportionate to the objective.[lxvii]

### *TBT Agreement*

There have been no cases yet that decided the applicability of the TBT Agreement to certification and labelling schemes involving sustainable management. However, the recent decision in the **Sardines** Case[lxviii] is instructive in indicating how the portions of the TBT Agreement relating to international standards are to be interpreted.

The case concerned a challenge from Peru to an EC regulation requiring that only products prepared exclusively from fish of the species *Sardina pilchardus (Walbaum)* be marketed as "preserved sardines". Peru, which exports a different sardine, *Sardinops sagax*, claimed that its sardine exports were being hindered by virtue of the EC rules, which did not permit it to use the term "preserved sardines" on its labels. Unlike the EC regulation, the Codex Alimentarius Commission of the United Nations Food and Agriculture Organization (FAO) and World Health Organization (WHO) adopted a standard for preserved sardines, covering 21 fish species, including *Sardinops sagax*.

The EC argued that the Codex standard was not an international standard because it was not adopted by consensus. Reference was made to the definition of "standard" under Annex 1.2 of the TBT Agreement. The explanatory note to that provision states, somewhat confusingly, that "standards prepared by the international standardization community are based on consensus", but that the TBT Agreement also covers "documents that are not based on consensus". Thus, the panel ruled that consensus was not required, and the Appellate Body agreed. The EC appealed against the panel ruling that the international standard, Codex Stan 94, was not used "as a basis for" the EC regulation, as called for in Article 2.4 of the TBT Agreement. The Appellate Body ruled that the presence of a contradiction between the international standard and the technical regulation would reveal that the standard was not used as a basis for the regulation. In this case, the contradiction was found in the fact that the EC regulation effectively prohibited preserved fish products from 20 species of fish other than *Sardina pilchardus* from being marketed with the appellation "sardine", whereas the Codex Stan 94 permitted such marketing for those 20 species.

A further issue concerned the question of who should bear the burden of proving, as stated under Article 2.4, that "such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", thereby allowing for deviation from using international standards as a basis for their technical regulations. The Appellate Body held that this provision was not an "exception", whereby the burden automatically shifted to the respondent, but rather was part of the case that the complainant had to meet. Once a *prima facie* case had been made, the Appellate Body averred, the respondent must then rebut the presumption in order to succeed. Thus, in this case, Peru had to prove that Codex Stan 94 was both an effective and appropriate means for fulfilling the legitimate objectives of the EC Regulation, which were market transparency, consumer protection and competition. The Appellate Body stated that, to be "effective", Codex Stan 94 had to have the capacity to accomplish all three of these objectives, while to be "appropriate" it had to be suitable for the achievement of all three. The Appellate Body upheld the panel's finding that Peru had made a *prima facie* case in this regard.

*Credit:* © WWF-Canon/John E. Newby

**Sardines**

The implications from the Sardines Case for the TBT Agreement and labelling are several. Firstly, the importance of international standards has been affirmed in the TBT context, as well as the obligation to base standards on established international standards. Secondly, it appears that the Appellate Body will not shy away from interpreting the content of these standards. Thirdly, it would appear that the Appellate Body, in engaging in such substantive analysis of the meaning of the term used to identify a product, might also do so if the product is identified in accordance with environmental criteria. Naturally, without a ruling directly on that point, it is difficult to know the extent to which this approach will extend to labelling that goes beyond the formal name. Finally, it should be noted that the Sardines Case concerned a mandatory regulation; a label based on a voluntary standard might not be subject to such close scrutiny, since the requirements for standards are less stringent than for regulations.

## Key international processes and instruments that address the relationship between WTO and environmental measures

### *UN Conference on Environment and Development (UNCED) and the World Summit on Sustainable Development (WSSD)*

Both the Rio Declaration and Agenda 21, adopted at UNCED in 1992, addressed the interface between trade and the environment.[lxix] The key messages were based on an affirmation that both trade liberalization and environmental protection were necessary for sustainable development. As such, there was consensus at UNCED that an open economic system was necessary; environmental measures based on an international consensus were preferred; and that trade measures to achieve environmental objectives may sometimes be necessary, but should be based on certain principles so as to avoid trade distortions. These messages were reaffirmed at the UN Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21 ("Rio+5"), held in June 1997, with the caveat that Agenda 21 was not yet being fully implemented and that the benefits of the Uruguay Round to developing countries were less than expected.[lxx]

Trade and the environment was also a dominant theme in the run up to WSSD, held in 2002. Although very controversial, little substantive progress was made on the relationship between WTO and environmental rules. The Plan of Action of the WSSD called for the ratification, accession and implementation of the Straddling Stocks Convention and the FAO Compliance Agreement.[lxxi]

Although UNCED, Rio+5 and the WSSD did not specifically address the relationship between RFOs and the WTO, they are broadly relevant to the subject of this report in two main ways. Firstly, by discouraging unilateral trade measures, these meetings appear to have enhanced the legitimacy of trade measures adopted in multilateral fora, such as RFOs. The major caveat is that such measures should not constitute arbitrary or unjustifiable discrimination or disguised restrictions on international trade. Secondly, these assemblies established that trade and environmental regimes should be mutually supportive in order to achieve sustainable development. This is the benchmark against which current and future negotiations ought to be measured.

### *World Trade Organization*

As indicated previously, the WTO not only comprises a set of agreements, but is also a forum for continuous negotiations among members. Thus, the interface between trade and environment has been extensively discussed in the WTO, most prominently in the Committee on Trade and Environment (CTE), but also in other technical committees, as well as within the governing body, the Ministerial Conferences.

Despite the fact that environmental issues have been discussed in a variety of contexts since the WTO was established, little in the way of substantial progress has so far been achieved in the WTO as a whole, with the exception, perhaps, of the evolution of the interpretation of Article XX by the Dispute Settlement Body. In particular, the WTO has not yet dealt with the core of

the conflict between trade and environmental rules, which is the definition of "like products". Environmental measures often seek to distinguish between two products on the basis of their PPMs, for instance by giving more favourable treatment to an end product with a less environmentally-harmful PPM. Thus, in the environmental policy context, goods and services would not be "like" if their PPMs had different impacts on the environment. However, in political discussions within WTO, the conventional wisdom has been that treatment must be identical if the end products are the same, i.e. "like".

### *Committee on Trade and Environment (CTE)*

The WTO Committee on Trade and Environment has not focused specifically on RFOs to any great extent, although CCAMLR and ICCAT have made presentations to the CTE.[lxxii] However, the CTE has spent considerable time discussing the general relationship between MEAs and WTO rules. Although no formal consensus has so far been reached, the 1996 CTE Report to the Ministerial Conference did contain some useful points. It stated that multilateral solutions, based on international co-operation and consensus, were the best and most effective way to tackle trans-boundary or global environmental problems.[lxxiii] It noted that a mutually supportive relationship between WTO rules and MEAs involves respect being afforded to both.[lxxiv] Indeed, the CTE stated the following:

> "Trade measures based on specifically agreed-upon provisions can also be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem."[lxxv]

The CTE report further stated:

> "A range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs. That includes the defined scope provided by the relevant criteria of the "General Exceptions" provisions of GATT Article XX. This accommodation is valuable and it is important that it be preserved by all."[lxxvi]

Regarding dispute settlement, the CTE noted that, although WTO members had the right to address disagreements within the WTO system,

> … "if a dispute arises between WTO members, [or] parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA."[lxxvii]

Another area of discussion within the CTE has been the use of eco-labelling. However, the bulk of the discussion has been over the compatibility of independent voluntary certification and labelling schemes with the TBT Agreement. Eco-labelling schemes stemming from RFOs, such as the AIDCP, would not be "independent" in this sense, in that they would involve governments. There has been some discussion of eco-labelling involving governments, such as the European Union (EU) "Eco-label", but no consensus on whether or not it is compatible with

WTO rules. Within the FAO, the Committee on Fisheries, at its 25th meeting in February 2003, agreed to the convening of an Expert Consultation on the Development of International Guidelines for Eco-labelling of Fish and Fisheries Products from Marine Capture Fisheries in October 2003.

The applicability of the precautionary principle is a topic of relevance to RFO trade measures that has been discussed in the WTO. To date, it remains uncertain whether such measures based on the precautionary principle would be upheld in the event of a WTO challenge. The experience in 2000, when the EC Communication on the Precautionary Principle was submitted to several WTO bodies, including the CTE, is instructive.[lxxviii] Arguing that the precautionary principle is a principle of international law, the EC indicated that it related to decisions regarding the environment, as well as to human, animal or plant health. The Communication expressed the view that each member had the right to establish the level of protection that it deemed appropriate and that the precautionary principle was a key tenet of EC policy, particularly in relation to risk management and assessing acceptable levels of risk. The Communication further stated that measures based on the precautionary principle should be: proportional; non-discriminatory; consistent; should involve a cost-benefit analysis of action versus inaction; should be subject to review - and capable of assigning responsibility for the production of necessary scientific evidence. In the discussion that followed presentation of the Communication, Japan and Hong Kong (China) noted that there was a need for clarification of who bore the burden of proof when precautionary measures were taken. This affirms the level of ambiguity over whether or not the precautionary principle fits with WTO rules.

### *Doha Ministerial Declaration*

The Doha Ministerial Declaration, adopted at the WTO Ministerial Conference in November 2001, gave WTO members a mandate for negotiations on a range of areas. Environmental issues are accorded an unprecedented amount of attention in the Declaration. Most relevant to the issues in this report are the negotiations on the relationship between WTO rules and MEAs, certification and labelling, and fisheries subsidies.

An entire chapter on trade and environment is included in the Declaration (paragraphs 31 – 33). Negotiations are foreseen on "the relationship between existing WTO rules and specific trade obligations set out in MEAs", but these are not, it is stated, to prejudice the WTO rights of any member that is not a party to an MEA in question. Later on, the Declaration states that the outcome of the negotiations on trade and environment are not to "add to or diminish the rights and obligations of members under existing WTO agreements... nor alter the balance of these rights and obligations...". This language suggests that the outcome of these negotiations will not result in any meaningful modification of the WTO, and may actually be a step backwards from the original mandate of the CTE, agreed in Marrakesh, in 1994 - where actual reform on the trading system was a potential outcome. So far, the negotiations have largely concerned the scope of the mandate; little substantive progress has been achieved.

Although there has been some progress in the negotiations on the reduction of fisheries subsidies, it is too early to predict a successful outcome.

By the Fifth WTO Ministerial Conference, which will be held in Cancún, Mexico, from 10 to 14 September 2003, ministers are to have agreed whether or not negotiations are to take place on certification and labelling. It does not appear that there is sufficient political support for this step, given that few members have so far made interventions on this topic. This political context may mean that the issue is better off not being the subject of negotiations, in that it is difficult to foresee a positive outcome to the ambiguities in the TBT Agreement. In addition, the WTO CTE is to give particular attention to the topic of labelling requirements for environmental purposes, although no particular guidance is provided (see page 16).

Although the European Commission had sought to include the clarification of WTO rules and the precautionary principle in the new round of negotiations,[lxxix] the Doha Declaration does not provide for any examination of the precautionary principle. The only potential implication for the precautionary principle is a statement in the preamble to the Declaration, recognizing members' rights to take measures to protect human, animal or plant life or health, so long as these do not distort trade or contravene WTO rules. However, even if this were to include measures based on the precautionary principle, it is unclear what the legal force of this statement is. Since Doha, EU Trade Commissioner, Pascal Lamy, wrote to US Trade Representative Robert Zoellick, on 14 November 2001, to assure Mr. Zoellick that the EU will not seek to alter the balance of rights and obligations of WTO members with respect to precaution.[lxxx]

## PROCESSES AND LIKELY OUTCOMES OF A WTO DISPUTE INVOLVING AN RFO MEASURE

This chapter will examine more closely various scenarios for potential WTO disputes. It attempts to shed some light on the processes and likely outcomes of a WTO dispute involving an RFO measure.

### General description of potential claimants and the WTO dispute settlement procedure

Should a WTO challenge against an RFO measure be initiated, in all likelihood, it will be as a result of a complaint by a WTO member that is a non-party to the RFO. Although, in principle, members of RFOs that are members of the WTO retain the legal right to take a claim in the WTO, the more likely scenario is that an RFO member would seek to resolve their disputes within the RFO itself. Nonetheless, it is possible that a member who is unsuccessful in reaching its objectives within an RFO may seek redress in the WTO. This scenario may occur, in particular, where the RFO itself does not contain effective mechanisms for resolving disputes.

The WTO dispute settlement procedure is very powerful mechanism for two main reasons.[lxxxi] Firstly, it is a "compulsory" process, in so far as a single WTO member can trigger it against any other WTO member. Secondly, its rulings can have economic consequences. The process for launching a complaint begins with a requirement that the parties to a dispute consult with each other. If consultations fail, a panel is established at the request of one of the parties, unless there is a consensus in the Dispute Settlement Body not to do so. In the event that the disputing parties do not agree on panel members, the Director-General selects the panel members that are to hear the case. A standard set of terms of reference for the panel is applied, unless there is agreement by the disputants to the contrary. In hearing the case, the panel considers oral and

written submissions by the parties to the dispute, as well as interventions from other WTO members. The panel may also request outside expert opinions, as it considers appropriate. Indeed, expert opinions have been sought in some of the environmental and fisheries cases heard to date.

In the event that the panel finds that a measure is WTO-inconsistent, it usually recommends that this measure be withdrawn. Once the panel has completed its report, the Dispute Settlement Body adopts it, unless there is a consensus not to do so or if one of the parties to the dispute launches an appeal. If the panel has found in favour of the complainant, and the respondent does not bring the inconsistent measure into compliance, the complaining party may seek compensation or suspend WTO concessions in relation to the respondent. As indicated (see page 11), the panel report can be appealed against to the Appellate Body. The Dispute Settlement Body adopts the reports of the Appellate Body, unless there is a consensus not to do so.

One continuing point of controversy concerns the ability of NGOs to submit *amicus curae* briefs to panels. (An *amicus curae* brief is one filed with a court by an organization that has an interest in a case, even though it is not directly involved in the case as a plaintiff or as a defendant.) The Appellate Body has allowed panels to receive such briefs and, after considerable debate inside the WTO, it established criteria related to submission of such briefs. In the Sardines Case (see page 13), some *amicus* briefs were found to be admissible, including from a WTO member, but several members remain opposed to the acceptance of *amicus curae* briefs from NGOs.

It is important to note that a WTO challenge of an RFO measure would not be made against the RFO, or against an RFO trade measure, *per se*. Rather, the WTO challenge would be against the implementation of the measure taken by a member. A ruling against an RFO measure in this context would, therefore, not automatically invalidate the RFO measure itself but, for all intents and purposes, it would weaken it. Indeed, the result would be to place RFO members who are also members of the WTO in the undesirable position of not being able to fulfil the obligations of both treaties at the same time.

## General assessment of potential conflict between RFOs and WTO rules

As mentioned above, to date there has been no WTO dispute involving an RFO measure. Indeed, since only the WTO, through its political organs or the Dispute Settlement Body, can provide an authoritative interpretation of the WTO, the content of this section is somewhat speculative. Nonetheless, based on the preceding description of the relevant instruments,[lxxxii] disputes, and international discussions, it would appear that the following potential areas of friction exist between RFOs and WTO rules:

- use of import prohibitions, including landing and transshipping prohibitions;
- certification and labelling aimed at the consumer market; and
- application of the precautionary principle in the development of conservation and management measures.

However, it also appears that some conditions may help to mitigate against WTO challenges to RFO measures. These conditions relate to the extent to which there is a multilateral basis for trade measures; whether the decision-making process is transparent; and the extent to which a measure takes account of the interests of individual States. Several specific considerations arise in these regards.

### *The extent of multilateral basis for a trade measure*

Measures specified in treaty texts are clearly multilaterally agreed. The Driftnet Convention, for example, allows parties to take measures "consistent with international law" to prohibit the landing of driftnet catches within their territory, to prohibit the processing of driftnet catches in facilities under their jurisdiction, and to prohibit the importation of any fish or fish product, whether processed or not, which was caught using a driftnet.[lxxxiii] A more recent example of such a multilaterally agreed measure enshrined in the text of a regional fisheries treaty is contained in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, which allows the development of "procedures which allow for non-discriminatory trade measures to be taken, consistent with the international obligations of the members of the Commission [for this agreement], on any species regulated by the Commission, against any State or entity whose fishing vessels fish in a manner which undermines the effectiveness of the conservation and management measures adopted by the Commission."[lxxxiv] Sometimes, however, a treaty is not specific about taking trade measures, but its language and objectives create the basis for action in this direction. For example, Article IX of ICCAT provides that parties are to take "all action necessary to ensure the enforcement of this Convention." Similarly, Article 6 (3) (i) of the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean provides that its Commission shall adopt measures, in accordance with international law, to promote compliance by vessels flying the flag of non-parties with the measures agreed by the Commission. Article IX (2) (i) allows the Commission to take "such other conservation measures as [it] considers necessary for the fulfilment of the objective of this Convention". In other words, these general treaty provisions provide a legal basis for a further category of measures, which are those that are adopted by RFO treaty organs (e.g. RFO commissions). Treaty organs have adopted most of the trade measures discussed. Of these, some "require" that trade measures be adopted and implemented,[lxxxv] some merely recommend them.[lxxxvi] Many such measures are legally binding[lxxxvii] and, even if not, they tend to be influential, and create an expectation that they will be implemented.

Many of these measures reflect an increasing global consensus on addressing compliance issues, which may reinforce their legal and political status. This consensus is also reflected by various global instruments that provide for them. To the extent that such global rules are binding on the parties to a WTO dispute, a WTO dispute panel is required to consider them.[lxxxviii] The most important of these global rules are discussed below.

- The **UN Fish Stocks Agreement** (UNFSA) is the most significant. It entered into force in 2001 and provides for significant support for the efforts of RFOs in effective management and conservation of fish stocks. The Agreement states that RFOs may take measures "consistent with this Agreement and international law" to deter activities of non-party vessels that undermine the effectiveness of RFO conservation and management

measures.[lxxxix] Port States are also permitted to prohibit landings and transshipments where the catch has been taken in a manner that undermines the effectiveness of RFOs.[xc] UNFSA also affirms the centrality of the precautionary approach to the conservation and management of fish stocks.[xci]

- The focus of the **FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas** is on the responsibility of like States to ensure their vessels comply with international conservation and management measures. "International" in this case includes reference to rules adopted under RFOs.[xcii] Article VIII requires parties to encourage non-parties to accept the Agreement and to adopt laws and regulations consistent with it. Parties are also required to co-operate, in a manner consistent with the Agreement and international law, to ensure that vessels of non-parties do not engage in activities that undermine the effectiveness of international conservation and management measures.

- The **FAO Code of Conduct for Responsible Fisheries**, a non-legally binding instrument adopted in 1995, provides that States should ensure compliance with and enforcement of conservation and management measures. At the same time, the Code of Conduct stipulates that international trade in fish and fisheries products should be in accordance with the principles, rights and obligations established in the WTO Agreements.[xciii] In addition, the Code of Conduct expresses support for the application of the precautionary approach[xciv] as well as measures to ensure compliance.[xcv]

- The **International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing** was adopted by the FAO in 2001. Although not legally binding, this instrument is significant because of the detail of its provisions. Illegal fishing is defined as including the conduct of vessels flying the flag of States that are parties to RFOs, but which contravene the conservation and management measures adopted by such RFOs, and to which the States are bound.[xcvi] "Unregulated fishing" is fishing within the area of application of an RFO that is conducted by a vessel without nationality, or flying the flag of a State not party to the RFO, in a manner that is inconsistent with, or contravenes the conservation and management measures of, that RFO.[xcvii]

  The Plan of Action provides detailed guidance for taking trade- and trade-related measures, both in relation to port States and to internationally agreed market measures. Article 56 provides that, where a port State has clear evidence that a vessel granted access to its ports has been engaged in IUU fishing, the State should not allow the vessel to land or transship fish in its ports. Furthermore, Article 63 allows States to consider developing within RFOs port State measures that build on a presumption that non-party vessels, that have not agreed to co-operate with the applicable RFO, may be engaged in IUU fishing. That provision goes on to stipulate that port State measures may include prohibiting landings and transshipments, unless the vessel can establish that the catch was taken in a manner consistent with the conservation and management measures of the applicable RFO.

  The Plan of Action also provides that its stipulations relating to "internationally agreed market-related measures" be implemented in accordance with the principles, rights and obligations established under the WTO.[xcviii] Article 66 provides that States should take all

steps consistent with international law to prevent fish caught by vessels identified by RFOs as engaging in IUU fishing from being traded or imported into their territories. RFOs should identify these vessels through "agreed procedures in a fair, transparent and non-discriminatory manner". The Article goes on to state that trade-related measures should only be used in exceptional circumstances, or where other measures have proven unsuccessful, and only after prior consultation with interested States. Furthermore, unilateral trade-related measures are to be avoided. The emphasis on multilateralism is affirmed in Article 68, which calls for the adoption by RFOs of multilaterally agreed trade-related measures, consistent with the WTO, to prevent, deter, and eliminate IUU fishing.

The Plan of Action provides for the adoption of multilaterally agreed catch documentation and certification, as well as for other multilaterally agreed import and export controls or prohibitions, that may supplement trade bans and/or trade-related measures to reduce or eliminate trade in fish and fish products derived from IUU fishing.[xcix] Certification and documentation requirements are to be standardized, to the extent feasible, to avoid unnecessary burdens on trade.[c] Furthermore, Article 69 provides that stock or species-specific trade-related measures may be necessary to reduce or eliminate the economic incentive for vessels to engage in IUU fishing, although this does not specify whether RFOs are the appropriate bodies to develop these measures.

- The potential impact of the **Convention on Biological Diversity** (CBD) should be noted in this context. States that are parties to both RFOs and the CBD might seek to ensure synergies at the regional and national levels. Thus, some CBD trade-related requirements - such as applying the precautionary approach; controlling harmful processes and activities, which may include trade flows; using incentive measures aimed at conservation and sustainable use (e.g. labelling); and controlling alien invasive species - may become increasingly relevant to the further development of RFOs. So far, this has not occurred to any great extent, but some RFOs might be moving in this direction. Ultimately, the status of trade-related measures of the CBD vis-à-vis the WTO will need to be addressed in the overall context of the relationship between MEAs and the WTO.

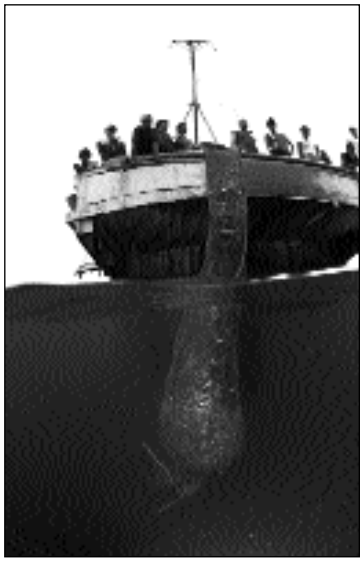
### *Who can participate in an RFO?*

The question of who can participate in an RFO goes to the issue of whether the RFO is inherently discriminating against non-parties by virtue of exclusivity, potentially making it more vulnerable to WTO challenge. Many RFO treaties place no legal limits on which States may become party.[ci] However, RFOs adopted under the auspices of the FAO tend to open their membership to members of the FAO, while non-FAO members may be admitted as members if approved by a two-thirds' majority of the members of the relevant RFO commission.[cii] . In the case of the Convention for the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, parties may, by consensus, invite new members to accede once the Convention enters into force.[ciii] All parties to an RFO can generally participate in the decision-making process involving the development of trade measures since they all tend to be represented on the commissions. Some RFOs also encourage interested non-parties to become co-operating entities or, at least, to participate in meetings as observers.[civ] Thus, it would appear that most RFO trade measures would not be considered as inherently discriminatory on the basis of participation.

### *The manner in which treaty organs take decisions to develop trade measures*

The manner in which the treaty organ takes its decisions to develop trade measures is related to the extent to which the measures reflect a multilateral consensus. Although this issue has not yet come up in a WTO dispute, the jurisprudence suggests that the WTO may give less deference to a decision-making process which does not adequately take account of the interests of its members or which otherwise appears arbitrary or unjustifiable.

It would appear that most RFO organs take their substantive decisions by consensus, with a possibility of individual members opting out.[cv] One exception appears to be the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, which provides that the Commission may take decisions by majority vote, if a consensus cannot be achieved.[cvi] In that event, such decisions are binding on all members. There is, however, a possibility for a member who opposes the measure to seek review by panel if the decision is inconsistent with the Convention itself, with UNFSA, or with UNCLOS, or if it unjustifiably discriminates against the member concerned. Many RFO decisions relating to other matters (e.g. use of gear, allotment, etc.) can be taken by majority vote,[cvii] although in practice such decisions tend to be taken by consensus.[cviii] Finally, many RFOs have established compliance committees, which, together with scientific and statistical bodies, provide a process and scientific basis for the taking of decisions. Thus, the manner in which RFOs take these decisions appears to reflect a true multilateral consensus that is scientifically sound.



*Credit:* © WWF-Canon/Jürgen Freund

**Trawler catch, Borneo, Malaysia**

A further related consideration is whether the decision to adopt a trade measure is taken after alternative means have failed. For example, ICCAT first notifies countries of their infractions and requests their co-operation with the Commission in implementing the conservation measures. Only after these fail to improve fishing activities does the Commission recommend taking trade measures.[cix] This would help affirm the lack of effective alternatives to trade measures.

### *The design of the trade measure*

A key issue that has emerged in the WTO jurisprudence is that surrounding the question of whether a trade measure has been designed to target a specific environmental problem or, rather, to influence the environmental policies of other countries. One way in which this has been assessed has been to examine the extent to which a trade measure offers flexibility, in particular to take account of the situations of other countries. RFO trade measures aimed at promoting compliance do not offer flexibility *per se*, in that, once non-compliance is found, the trade sanction applies. However, as mentioned above, many RFOs allow non-party States to be

represented during the negotiations on the development of conservation measures and otherwise offer possibilities to be involved without becoming full parties.[cx] There have been instances where trade measures have not been imposed if, through dialogue with the States concerned, it was found that a State was moving towards compliance.[cxi] In addition, many RFO treaties contain requirements that the special needs of developing countries are to be taken account of in RFO decision-making.[cxii] Furthermore, RFO trade measures are so far primarily aimed at vessels, not at countries – as such, the aim, at least in the first instance, is not to influence the environmental policies of other countries, but the actions of individual vessels. All this suggests that the design of RFO trade measures tends to offer sufficient flexibility so as not to be considered arbitrary or discriminatory by the WTO.

## Possible scenarios for WTO challenges - general and specific

### *General scenario: WTO challenge by a member of an RFO*

A WTO challenge by a State that is a member of an RFO is not likely, given the political consequences such a State might suffer. Such a challenge is not impossible, however, since WTO rights are not extinguished by virtue of joining on RFO. Indeed, it is plausible that this might occur in the case of any WTO member opting out of an RFO conservation measure or being in the minority when a decision is taken with no chance of opting out and then potentially suffering trade consequences as a result of not complying. In practice, such objections to a conservation measure are very rare indeed, and in ICCAT, for example, they have not yet led to any trade-related controversies.[cxiii] However, in its comments on the presentation made by the ICCAT Secretariat to the CTE in 1998, Brazil argued that the catch limits under ICCAT were unfair in that they applied quotas designed for the northern Atlantic to fisheries in the southern Atlantic.[cxiv] According to Brazil, this approach did not take account of the differences in geographic, developmental, social, commercial, and environmental conditions between the northern and southern Atlantic. Even if Brazil's arguments have merit, the WTO would be an inappropriate place to lodge a complaint, in so far as the WTO is not competent to assess the appropriateness of catch limits. Placing catch limits are not, *per se*, a trade issue – rather, the trade implications could arise out of measures taken to ensure compliance with the catch limits. This distinction could be difficult to maintain during a WTO dispute. Thus, a WTO panel dealing with this trade measure could be placed in the undesirable position of having to assess the merits of substantive decisions taken by another international body. So far, Brazil has not launched a WTO case on this matter.

### *General Scenario: WTO challenge by an RFO non-party*

More likely than the scenario just described is a WTO challenge to an RFO trade measure by a State which is not a party to that RFO. In such a case, the non-party could contend that it had suffered an adverse economic consequence of the measure. In addition to the WTO-specific legal considerations described, a WTO dispute panel would also be obliged to consider other applicable rules of international law.[cxv] These rules could include those of UNFSA, if both States were party to that agreement, which, as discussed, allows RFOs to establish trade measures. Another relevant rule of international law dictates that States have a duty to co-operate in good faith over the management of fishery resources in areas beyond their jurisdiction.[cxvi] A further rule of international law obliges States to ensure that activities within

their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction.[cxvii] Therefore, even though a fishing State may not be party an RFO and thus, strictly speaking, would not be bound by its rules, that party would still have a duty to co-operate in good faith with the RFO parties in managing those fisheries. As such, in the case of this particular scenario, the WTO should examine the extent to which RFO parties and the complainant State had each attempted to co-operate on fisheries management. Although this might be difficult to determine in practice, any attempts by RFOs to establish co-operative relationships with non-parties might be useful indicators. Possible actions by RFOs might include setting up a special status for co-operating non-party States, as ICCAT has done, or allowing some RFO schemes, such as the CCAMLR CDS, to be open for accession by interested States, as stand-alone agreements.

### *WTO challenge of a refusal to import or land a shipment from a particular vessel*

At the outset, it should be noted that none of the environmental cases before GATT or WTO, so far, have involved restrictions of particular shipments; rather, they have focused on trade restrictions directed against countries. However, a refusal to import or land a shipment from a particular vessel might, depending on the circumstances, give rise to a challenge under GATT Article V or XI.

If the trade restriction is based on non-compliance with substantive measures, then the case may turn on the application of Article XX (d). In addition, the importance of conserving threatened fish species may also help tilt the balance of interests to be applied in the "necessity" test in favour of the RFO trade measure. The respondent in this case could seek to rely on GATT Article XX (b) and (g). A robust scientific consensus on the conservation status of species concerned could usefully be applied to meet the tests in both sub-paragraphs, as well as the virtual certainty that the RFO conservation and management measures apply to both domestic and imported products. It should be recalled that the Shrimp-Turtle Case involved management measures to control shrimp fishing with a view to conserving sea turtles. This suggests that the biological criteria for such measures falling within Article XX also include measures aimed at by-catch. Furthermore, it remains to be tested whether Article XX (g) covers only conservation measures that have a biological basis or whether it can also include those measures that seek to control the supply of fish so as to influence the market price.

Given the established methodology, the legal analysis would turn on the chapeau of GATT Article XX. Factors relating to a multilateral consensus, as described on page 20-22, may apply to the case, as may the argument that the trade measure was applied against vessels, rather than against countries, which may be used to show that the trade measure was not aimed at influencing the policies of another country.[cxviii] However, the more difficult cases might arise where the RFO has allocated fishing rights amongst its members so as, *de facto,* to deprive non-parties of the right to fish; any non-party vessel who does engage in such fishing would automatically be subject to trade measures. It is unclear how a WTO dispute settlement panel would respond, although it would be likely to weigh the factors listed above, including the openness of the RFO to new members, the methods of decision-making, and the design of the trade measures.

In cases where the vessel must discharge a presumption that it has engaged in activities that undermine the effectiveness of an RFO, the WTO panel may consider whether the presumption can reasonably be discharged by examining the particular respondent's legal procedures in such cases, perhaps on a comparative basis. Although the FAO Plan of Action on IUU Fishing places the burden of proof on the port State,[cxix] the focus of examination of a WTO panel would be on the particular RFO measure in question.

Any country seeking to mount a challenge might also consider arguing that the TBT Agreement had been violated by the trade measure. As mentioned in the section "**The WTO TBT Agreement**" (page 9), even if such documentation requirements or conservation measures are deemed "technical regulations" within the TBT Agreement, no WTO members have made TBT notifications on these measures. In any event, as mentioned above, given the presumption that measures based on international standards conform with the TBT Agreement, the key issue may be the extent to which a regional standard can be considered an "international" one. There is no experience in this.

### *WTO challenge based on a country ban*

Were a non-RFO party to challenge a country-ban, based on GATT Articles I, III, V or XI, a similar analysis of GATT Article XX as that described in the scenario above (..."refusal to import or land a shipment"...) might be invoked by the respondent country. Were the case to involve a trade measure aimed at enforcing compliance, the respondent might point to a statement made by the Appellate Body in the Korea Beef case, namely that a ban is an instrument that can achieve total compliance. Similar arguments related to the "necessity test" in Article XX (d), as well as the applicability of Article XX (b) and (g) could be made. As in the previous scenario, the case would be likely to turn on the results of application of the tests in the chapeau of Article XX. In addition to many of the arguments already mentioned, especially those regarding the application of the ruling in the latest Shrimp-Turtle Case, the panel might consider the extent to which there had been efforts made in good faith to conclude agreements with the States involved. It might also focus on whether such bans have ever been lifted and, if so, under what circumstances.

### *WTO challenge based on an eco-label originating from an RFO*

To date, there is only one instance of a certification and labelling scheme aimed at consumers emerging out of an RFO, the "Dolphin-Safe" certification system under AIDCP, which was adopted under the auspices of the Inter-American Tropical Tuna Agreement. The potential exists that other schemes may also be developed. Even though this scheme is voluntary, some exporters of fish products that are not certified or labelled may consider launching a WTO challenge on the basis that the label offers certified products an unfair trade advantage. Such an argument could conceivably be based on GATT Article III, or potentially, the TBT Agreement. As regards the GATT-based challenge, the first Tuna-Dolphin Case also involved a challenge by Mexico to the US label declaring tuna products to be "dolphin-safe". The panel found that since this labelling programme was voluntary and since it did not restrict the sale of tuna products or establish any requirements necessary to receive any advantages from the government it did not violate GATT.[cxx] Thus, it does not seem as if a challenge based on GATT would be successful.

As noted in ***Key WTO instruments and jurisprudence***, an argument could be made regarding the TBT Agreement. So far, there has been no WTO dispute based on a standard under the TBT Agreement and, as already mentioned, a key issue still unresolved, is the extent to which non-product-related PPMs are covered by the TBT Agreement. If they are covered, it would further need to be determined whether a standard developed regionally could be considered an international standard. Application of one of the key tests in the decision of the TBT Committee containing criteria for determining whether standards are international suggests that this is possible, since the AIDCP is open to all States.[cxxi] However, given the lack of jurisprudence in this area, it is difficult to be certain how such a case would be resolved in the WTO.

### *WTO challenge based on using the precautionary principle*

A complaint could be based on the use of the precautionary approach by RFOs. As already indicated, the precautionary principle has proved a controversial subject of debate within the WTO. Although the precautionary approach, or principle, is not used as a basis for deciding RFO trade measures directly, it is the basis of some of the conservation and management measures which such trade measures are designed to support. In addition, the Southern Bluefin Tuna Case appears to lend support, albeit somewhat inconclusively, to the presence of the precautionary approach in UNCLOS.[cxxii] In the only WTO dispute that considered the precautionary principle, the Appellate Body ruled that the principle could not override WTO law, although that case concerned only the WTO Agreement on Sanitary and Phytosanitary Measures.[cxxiii] Therefore, a WTO member might launch a complaint, perhaps on the basis of GATT Article XI, which would mean that the ultimate ruling in the case would turn on the application of Article XX.

*Credit:* © WWF-Canon/Wil Luijf

**Southern Bluefin Tuna *Thunnus maccoyii***

It is difficult to speculate how a WTO panel would handle the arguments on the precautionary principle in this context. For example, how would the precautionary principle fit into the balance of interests which are to be considered in interpreting the term "necessary", in Article XX (b) and (d)? Based on the jurisprudence, measures based on the precautionary principle may meet the tests in those sub-paragraphs, as well as in XX (g), so long as there was a substantive connection between the measure and the objectives of those sub-paragraphs, i.e. relating to protection of "human, animal or plant life or health", or "the conservation of exhaustible natural resources". It may also be likely that, by virtue of emanating from an RFO, a measure based on the precautionary principle would also meet the tests in the chapeau of Article XX. In the absence of any directly applicable jurisprudence, it is difficult to be confident of any such results, particularly since the burden will be on the member whose measures are challenged to demonstrate that the tests in Article XX have been met.

## CONCLUSIONS AND RECOMMENDATIONS

This study has shown that, on the basis of the current WTO jurisprudence, most trade measures emanating from RFOs should be able to survive WTO challenges. To date, most RFO trade measures have been developed after efforts to deal with a serious environmental problem - for example, the significant decline of certain fisheries - have failed. They have been developed as a result of a multilateral process, in which, in general, all fishing nations have had an opportunity to participate. They tend to be tailored to the particular species in question and are subject to review.

Phrases such as "consistent with international law" or "consistent with the rules of the WTO" are used in many of the RFO and global instruments that give rise to trade measures. These encompass both the substantive WTO rules as *well as the exceptions provided for by WTO law*. The key question is: will these exceptions serve to ensure that these trade measures can be effectively implemented? Given the evolution of interpretation of GATT Article XX - with the chapeau increasingly becoming the decisive provision; the tests in the sub-paragraphs becoming easier for environmental measures to meet; the expansion of the "necessity" test to include a range of factors; and the most recent ruling in the Shrimp-Turtle Case - the answer is most likely to be affirmative. Some difficult issues remain, however, which should be addressed both by the WTO and by MEAs and RFOs, and these are itemized below.

- The WTO, MEAs, RFOs, and other relevant international institutions, such as the United Nations Environment Programme (UNEP) and the FAO, should co-operate to establish a coherent legal framework that ensures the integrity of all multilaterally agreed trade measures in support of sustainable development. Although WTO jurisprudence has recently become more positive, it is important to cement this through strong political statements, so as to achieve maximum buy-in. Thus, while WTO negotiations currently in the framework of the Doha mandate may yield some solutions, they will not be likely to tackle all of the problems and will fall short of achieving the degree of "mutual supportiveness" called for at UNCED. The result should be an unequivocal affirmation that MEAs, including RFOs, are the primary bodies that are competent to decide on the appropriateness of trade-related environmental measures. Such an outcome would be an appropriate division of labour between MEAs and the WTO. The WTO's role would be limited to providing advice to MEA processes on the design of trade measures, while WTO adjudication would only take place to test whether the implementation of an MEA trade measure was an inappropriate exercise in trade protectionism. The unlikeliness of this result flowing from a WTO process suggests the importance of establishing a venue outside the WTO, but which includes all relevant international institutions and stakeholders.

- The international community needs to affirm the legitimacy of certification and labelling based on non-product-related PPMs. These tools are growing in importance and impact in achieving sustainable development, and may become more common in the framework of RFOs. In principle, the WTO should be called upon to establish, in co-ordination with other relevant international bodies, appropriate rules to ensure the consistency of these instruments with WTO but, at present, achieving a positive result in the WTO seems unfeasible. Therefore, a short-term recommendation should be for States and NGOs to

continue with the *status quo* with regard to establishing certification and labelling schemes. Although this might entail some amount of uncertainty, it is preferable to negotiations that lead to a reduction in the use of such instruments. At the same time, however, States and NGOs need to devise a strategy aimed at the WTO and other international bodies (e.g. MEAs, UNEP, FAO, RFOs) to create the political conditions and an appropriate negotiating forum that will lead to a legal confirmation of the use of such certification and labelling. The forthcoming FAO expert consultation on the issue may provide a first step towards this end.

- The WTO should affirm basic sustainable development principles provided for in UNCED, such as the precautionary principle, although it should not seek to determine the content of these principles, since it has no such competence or expertise. Resolution of disputes involving such principles should involve consultations with MEA or RFO secretariats, as well as possible requests for Advisory Opinions from the International Court of Justice.

- RFOs should take several actions to avoid the risk of the WTO undermining its trade measures. One is to provide for effective means for parties to resolve conflicts and disputes before they escalate to the point where trade measures are imposed. Secondly, RFOs could seek to ensure that they provide as much multilateral guidance as possible on how their members impose trade measures pursuant to RFO decisions. As an example of how this might work, non-party vessels could be provided with guidelines for demonstrating that their catches were caught in accordance with the rules of the RFO, for those RFOs that place the burden of proof on the vessels. Finally, RFOs and the CBD Secretariat should co-operate to establish greater synergy between each other's processes, for example, through capacity-building and financial assistance, so as better to tackle the root causes of non-compliance with fisheries conservation measures. Further areas of such synergy include the application of the precautionary principle, control of alien species, and the use of incentive measures, such as labelling.

## FOOTNOTES/REFERENCES

[1] Barrister and solicitor, Berlin, Germany.

[i] Recommendation 92-1.

[ii] Recommendation 93-3.

[iii] Recommendation 00-22.

[iv] CCMALR Conservation Measure 10-05 (2002)

[v] See Explanatory Memorandum on the Introduction Catch Documentation Scheme (CDS) for Toothfish *Dissostichus* spp., available on www.ccamlr.org/English/e_cds_1999/e_cds2k_p3.htm.

[vi] See Preamble of CCAMLR Conservation Measure 10-05 (2002). See also Preamble, ICCAT Recommendation 92-1 for similar objectives.

[vii] See Resolution 14/XIX, Catch Documentation Scheme: Implementation by Acceding States and Non-Contracting Parties, and Policy to Enhance Co-operation between CCAMLR and Non-Contracting Parties and Para 5.6 of the Southern Bluefin Tuna Statistical Document Program. Article 3 of ICCAT Recommendation 93-3 explicitly calls on the Executive Secretary to urge non-parties to ensure that their government validation of the requisite documents meets the ICCAT standards. Furthermore, Paragraph d of Resolution 94-5 on the Effective Implementation of ICCAT BTSD Program requests non-parties which are major importing countries of bluefin tuna to co-operate with the implementation of the Program and to provide to the Commission data obtained from such limitation.

[viii] Described in Lack, M. and Sant, G. (2001). Patagonian Toothfish: Are Conservation and Trade Measures Working? *TRAFFIC Bulletin* 19(1): 15, *et. seq*.

[ix] See e.g. Para 3 of CCAMLR Conservation Measure 10-05 (2002).

[x] See Paragraph 8 of CCAMLR *C*onservation Measure 10-05 (2002).

xi See e.g. Appendix to ICCAT Recommendation 92-1.

xii See, e.g. Article 3.1 of the SDTSD.

xiii See also Resolution 17/XX

xiv See. E.g. CCAMLR Conservation Measure 10-03 (2002).

xv E.g. Article 2 of IOTC Resolution 99/02 on Calling for Actions against Fishing Activities by Large Scale Flag of Convenience (FOC) Longline Vessels.

[xvi] Article 3(2).

[xvii] Article 1. See also Paragraph 3 of CCAMLR Conservation Measure 10-07 (2002), Article 5 of NAFO Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO ("NAFO Compliance Scheme") (NAFO/GC Doc. 97/6), and Articles 1 and 2 of IOTC Resolution 01/03. The latter states that non-contracting party vessels that *give rise to grounds for believing that*

*these vessels are fishing contrary to IOTC conservation or management measures shall be presumed* to be undermining IOTC conservation and management measures.

[xviii] Article 2 of ICCAT Recommendation 98-11. See also Article 9 of NAFO Compliance System and Paragraph 10 of the Scheme to promote compliance by non-contracting party vessels with Recommendations established by the North-East Atlantic Fisheries Commission.

[xix] Conservation Measure 10-07 (2002). See also Paragraph 11 of the Scheme to promote compliance by non-contracting party vessels with Recommendations established by the North-East Atlantic Fisheries Commission.

[xx] See Paragraph 5 of CCAMLR Conservation Measure 10-07 (2002). See also, Article 3 of ICCAT Recommendation 98-11 and Article 10 of the NAFO Compliance Scheme.

[xxi] See, e.g., Resolution 01/03.

[xxii] See, e.g. Paragraph 6, CCAMLR Conservation Measure 10-07 (2002), Paragraph 4 of the Scheme to promote compliance by non-contracting party vessels with Recommendations established by the North-East Atlantic Fisheries Commission, and Paragraph J of Part I of the NAFO Compliance and Enforcement Measures (NAFO/FC Doc. 03/1A).

[xxiii] E.g. Article 2, ICCAT Resolution 99-11 on Further Actions against IUU. See also Article 3 IOTC Resolution 99-02.

[xxiv] Recommendation 99/02.

[xxv] Resolution 19/XXI.

[xxvi] Article 2.

[xxvii] Resolutions 94-3 and 95-13.

[xxviii] see Recommendations 96-11 and 96-12.

[xxix] Recommendation 99-9.

[xxx] Recommendation 96-14.

[xxxi] Recommendation 99-10.

[xxxii] Recommendation 01-15

[xxxiii] Paragraph 16, Conservation Measure 10-06 (2002).

[xxxiv] Paragraph 19, Conservation Measure 10-06 (2002).

[xxxv] e.g. Paragraph 68 of the IUU Plan of Action. See also Article 7(e).Convention on Fisheries Cooperation Between African States Bordering on the Atlantic Ocean

[xxxvi] Article V(1)(f).

[xxxvii] Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification, 20 June 2001.

[xxxviii] See, e.g. various CCAMLR resolutions on precautionary catch limits or the Agreement on Adoption of a Precautionary Approach adopted by the Council of the North Atlantic Salmon Conservation Organization, June 1998. . See also Southern Bluefin Tuna (Jurisdiction and Admissibility) Award, 4 August 2000, International Tribunal of the Law

of the Sea, which appears to lend credence that the precautionary principle is part of the customary international law of the conservation of marine living resources.

[xxxix] See, e.g. Article 10 (2), Western and Central Pacific Ocean fish Stocks Convention.

[xl] see Doha Declaration, Paragraph 28.

[xli] Annex I, Article 1, TBT Agreement.

[xlii] Id.

[xliii] Article 2.6.

[xliv] Article 2.4.

[xlv] Article 2.5.

[xlvi] Decision Of The Committee On Principles For The Development Of International Standards, Guides And Recommendations With Relation To Articles 2, 5 And Annex 3 Of The Agreement, Second Triennial Review Of The Operation And Implementation Of The Agreement On Technical Barriers To Trade, G/TBT/9,13 November 2000.

[xlvii] Articles 2.1 and 5.1.

[xlviii] Article 2.2.

[xlix] Article 2.9.

[l] Article 4.1.

[li] *Id.*

[lii] Paragraphs D and E.

[liii] In parallel, Chile filed a complaint against the European Union before the International Tribunal for the Law of the Sea, claiming that the EU was not complying its conservation requirements (see http://www.itlos.org/news/press_release2000/press_release_43_en.pdf).

[liv] The case before the International Tribunal for the Law of the Sea was also settled (see Press Release ITLOS/Press 45, 21 March 2001).

[lv] See Canada-USA fisheries disputes, e.g. Prohibition of Imports of Tuna and Tuna Products from Canada, adopted on 22 February 1982, BISD 295/91.

[lvi] US - Restrictions on Imports of Tuna, Report of the Panel, 30 ILM (for 1991), 1598

[lvii] US Restrictions on Imports of Tuna, 16 June 1994, GATT Doc. DS29/R.

[lviii] USA - Import Prohibition of Certain Shrimp and Shrimp Products, 6 November 1998.

[lix] USA - Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to article 21.5 by Malaysia, adopted on 21 November 2001, WT/DS58/AB/RW.

[lx] Paragraph 5.103.

[lxi] Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Hereinafter Korea – Various Measures on Beef), WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001

[lxii] European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, adopted on 5 April 2001, WT/DS135.

[lxiii] Paragraph 164, Korea Beef case.

[lxiv] See paragraph 172 of the Asbestos case, and WTO Document WT/CTE/W/203.

[lxv] See Paragraph 168.

[lxvi] Paragraph 173.

[lxvii] Paragraph 174.

[lxviii] European Communities - Trade Description of Sardines, WT/DS231/R, 29 May 2002 and WT/DS231/AB/R, 26 September 2002.

[lxix] See Principle 12 of the Rio Declaration:

States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

See also Chapter 2 of Agenda 21, especially paragraph 2.22.

[lxx] See Paragraph 29.

[lxxi] See Paragraph 31(b).

[lxxii] Presentations were made in 1998 and 2000.

[lxxiii] Paragraph 171.

[lxxiv] Paragraph 171.

[lxxv] Paragraph 173.

[lxxvi] Paragraph 174(ii).

[lxxvii] Paragraph 178.

[lxxviii] World Trade Organization, WT/CTE/W/147, G/TBT/W/137, 27 June 2000, Committee on Trade and Environment: communication from the European Commission on the precautionary principle. Submission by the European Communities.

[lxxix] European Commission, DG Trade: Precaution in the WTO - EC position paper, 24 July 2001. Available at http://europa.eu.int/comm/trade/miti/envir/prec.htm

[lxxx] Multilateral Environment Agreements and Precaution. Correspondence from Pascal Lamy to USTR Robert Zoellick, Benny Haerlin, Greenpeace International, Brussels, November-December 2001. Available at http://europa.eu.int/comm/trade/miti/envir/ustr.htm.

[lxxxi] See WTO Dispute Settlement Understanding for these and other points in this paragraph.

[lxxxii] See also Caroline Dommen, Fish Scales Fisheries, International Trade and Sustainable Development, A Reference Guide to Legal Frameworks, (Geneva: International Centre for Trade and Sustainable Development, 108 pp), unpublished paper, 2001, on file with the author.

[lxxxiii] Article 3 (2).

[lxxxiv] Article 25 (12).

[lxxxv] E.g. CCAMLR Conservation Measure 10-05 (2002) on the CDS uses mandatory language in its operative provisions.

[lxxxvi] E.g. ICCAT Recommendations typically state that the Commission "recommends" that Parties "require" a specified action to be taken.

[lxxxvii] See, e.g., Article IX (6) (b), which speaks of conservation measures becoming binding on all members..."; Article VIII (2) of ICCAT, which stipulates that certain recommendations are to become "effective for all Contracting Parties...".

[lxxxviii] See, e.g., Venezuela Gasoline case, which affirms the applicability of the Vienna Convention on the Law of Treaties in interpreting WTO law. Article 31(c) of that treaty includes "any relevant rules of international law applicable in the relations between the parties" as one of the means of interpretation of treaties.

[lxxxix] Articles 17(4), 20(7) and 33(2).

[xc] Article 23(3).

[xci] Article 6 and Annex II.

[xcii] Article I(b).

[xciii] Article 6.

[xciv] E.g. Article 6.5.

[xcv] E.g. Article 6.10.

[xcvi] Article 3.1.2.

[xcvii] Article 3.3.1.

[xcviii] The reference to the WTO only in this section does raise the suggestion that the previous provisions on port State control do not need to comply with the WTO. Another interpretation, however, might be that there was no concern that the port State control provisions might be incompatible with the WTO, and thereby, there was no need to mention it.

[xcix] Article 69.

[c] Article 76.

[ci] See, e.g., Article XIV of ICCAT, which allows any State which is a member of the UN or any Specialized Agency of the UN to become a signatory. CCAMLR allowed the States participating in the Conference which adopted the Convention to become the original signatory States, but provides that any State may accede to the Convention if they have an interest in research or harvesting activities in relation to the marine living resources to which the Convention applies (Article XXIX).

[cii] See, e.g., Agreement establishing the Asia-Pacific Fishery Commission and the Agreement Establishing the General Fisheries Commission for the Mediterranean.

[ciii] Article 35(2).

[civ] See, e.g.. ICCAT Resolution 96-11 which instituted trade bans against Believe and

Honduras, at the time both non-parties, but yet encouraged both countries to participate in ICCAT meetings.

[cv] See, e.g. CCAMLR Article XII (1), although see also Article IX (6) (c), which allows for members to opt out if they choose. Similarly, see Article 17 of the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, as well as Article 23, which also allows for an opt out possibility.

[cvi] See Section 6.

[cvii] See, e.g., Article II (2) of the Agreement for the Establishment of the General Fisheries Commission for the Mediterranean.

[cviii] Interview with Adolfo Lima, ICCAT Secretariat, 17 June 2002.

[cix] Communication from the Secretariat of the International Commission for the Conservation of the Atlantic Tunas and the, WT/CTE/W/87,16 July 1998.

[cx] E.g. ICCAT Resolution 94-6 on Co-ordination with non-contracting parties, which establishes a category of "Co-operating Non-Parties."

[cxi] Interview with Adolfo Lima, ICCAT Secretariat, 17 June 2002.

[cxii] See, e.g. Article 21 of the Convention on the Conservation and Management of Fishery Resources in the Southeast Atlantic Ocean.

[cxiii] Interview with Adolfo Lima, Executive Secretary of ICCAT,17 June 2002.

[cxiv] Communication from Brazil, WT/CTE/W/95, 31 July 1998.

[cxv] The WTO Appellate Body has affirmed that the WTO should be interpreted according to the Vienna Convention on the Law Treaties.

[cxvi] See, g. Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1972. See also Article 63, 64 and 118 of the UN Convention on the Law of the Sea.

[cxvii] See Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. See also the International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reps (1996) to, 226, at paragraph 29.

[cxviii] As in the Tuna-Dolphin and Shrimp-Turtle cases.

[cxix] Article 56.

[cxx] Para. 5.42.

[cxxi] Article XXIV and Article XXVI of the AIDCP allows for signature and accession by any State bordering on the Agreement Area of whose vessels fish for tuna in the Agreement Area.

[cxxii] New Zealand v. Japan; Australia v. Japan: Requests for provisional measures, International Tribunal for the Law of the Sea, Order of 27 August 1999, available on www.un.org/Depts/los/ITLOS.

[cxxiii] European Communities Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted on 16 January 1998.

TRAFFIC, the wildlife trade monitoring network, works to ensure that trade in wild plants and animals is not a threat to the conservation of nature. It has offices covering most parts of the world and works in close co-operation with the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

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