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WORLD TRADE ORGANIZATION

Topic: *Challenge of U.S. Endangered Species Act (Shrimp/Turtle Case)*
Venue: World Trade Organization (WTO), Appellate Body Ruling
Contact: To view the full reports of the Appellate Body and the Dispute Settlement Body, see the WTO's website at www.wto.org/wto/dispute/distab.htm. For those without Internet access, contact Dion Casey at (202) 546-4996, ext. 391, or by e-mail at dcasey@citizen.org.

On October 12, 1998, the Appellate Body of the WTO handed down a decision against section 609 of the U.S. Endangered Species Act, which prohibits the import of shrimp from nations that do not require all their shrimp trawlers to employ turtle-excluder devices (TEDs) in their nets. The Appellate Body upheld the lower WTO panel's ultimate determination: that the U.S. law amounted to "arbitrary and unjustifiable discrimination."¹ While upholding the lower panel's conclusion, the WTO's Appellate Body did limit somewhat one of the most egregious aspects of the lower panel decision. The lower panel had ruled that any measure that limited free trade was inherently illegal under GATT rules, with none of GATT's exceptions applicable. The Appellate Body admitted that this tautology would eviscerate the exceptions altogether. Another aspect of the Appellate ruling that has gotten some attention is the declaration that consideration of *amicus curiae* ("friend of the court")

briefs filed by non-governmental organizations (NGOs) was not necessarily prohibited by GATT rules. Despite attempts to amplify this aspect as a breakthrough for transparency, in fact the Appellate Body ruled that *amicus* briefs would only be allowed at the discretion of governments involved in a dispute if submitted attached to government submissions.

Background: Four nations, India, Pakistan, Thailand, and Malaysia, challenged at the WTO the portion of the 1989 U.S. Endangered Species Act provisions prohibiting shrimp imports from nations that do not require shrimp fishing techniques that safeguard endangered sea turtles from drowning in shrimp nets. Passed in response to the alarming decrease in endangered sea turtle populations, it expanded the rules covering U.S. shrimp fishers (who complied using inexpensive "trapdoor" devices in nets called Turtle Excluder Devices) to all shrimp sold in the U.S. market, whether domestic or imported.

Lower Panel Decision: The panel concluded that section 609 was inconsistent with GATT Article XI and could not be justified under GATT Article XX exceptions.² Also, the lower panel had received briefs from three groups of NGOs, but specifically ruled that they were out of order, and refused to consider them.³

Appellate Body Ruling: WTO Legality of Turtle Protection Measure: The Appellate Body held that Section 609 of the Endangered Species Act, as applied, amounted to both unjustifiable and arbitrary discrimination. The Appellate Body directed the U.S. to bring its law into conformity with its GATT obligations. Thus, the U.S. can repeal the law; change the law to meet WTO terms; or keep the law in place as is and pay compensation to the winning countries (for instance in the form of increased tariffs on U.S. goods entering those countries).

While the Appellate Body narrowed the lower panel's holding that no measure limiting free trade, could be permitted even under GATT's Article XX General Exceptions,⁴ it still ruled that the U.S. law was not covered by the Exceptions because of the way it was implemented.⁵

The problem the WTO found with the U.S. implementation of the law is that the U.S. determined whether a country's shrimp could enter the U.S. according to whether that country's fishermen were using the Turtle Excluder Devices that had become the U.S. means for complying with the policy. The U.S. did so because the use of TEDs had proved to be the only cost effective means for full compliance. Yet, the Appellate Body rejected this sort of regulatory discretion, noting that it required "other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels," and held that "it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal..."⁶ From an enforcement perspective, this notion effectively results in the allowance of an environmental goal, but severely limits the possibility of its enforcement.

The Appellate Body also found instances of what it labeled discrimination. For instance, it noted that the U.S. had negotiated pacts on turtle protection with some, but not all, countries. Thus, the Appellate Body concluded, the imposition of a ban would discriminate against some countries.⁷

The Appellate Body also ruled that the different time periods different countries had to

implement the policy -- even though the difference was caused by a court ruling -- resulted in discrimination. (Fourteen Caribbean and western Atlantic nations had three years to adopt TEDs, while a 12-29-95 Court of International Trade ruling had required world-wide implementation within five months.) The Appellate Body ruled: "[T]his does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States...bears responsibility for acts of all its departments of government, including its judiciary."⁸

Finally, the Appellate Body found that the process for nations to certify their compliance with Section 609 was neither transparent nor predictable.⁹ It noted that the State Department gives applicants for certification no formal opportunity to be heard, issues no written decision explaining its reasons for approval or denial, and provides countries that are denied certification no procedure for appeal. Thus, the Appellate Body held that this process denied applicants basic fairness and due process. This aspect of the ruling has been received with some irony considering NGOs and other groups have long criticized the WTO for not being transparent, predictable or accessible to them.

Amicus briefs: the Appellate Body noted that the U.S. had attached the three briefs to its submission and thus the briefs were "at least *prima facie* an integral part of that participant's submission."¹⁰ Thus the Appellate Body admitted the three briefs as part of the U.S. submission. However, the Appellate Body did not say that briefs submitted independently would be permitted: "[A]ccess to the dispute settlement process of the WTO is limited to Members of the WTO. . .access is not available. . .to individuals or international organizations, whether governmental or non-governmental. . . . Only Members. . .have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel."¹¹

This WTO process contrasts sharply with the rule in the United States court system in which any interested group can submit an *amicus curiae* brief. The U.S. rule recognizes that amici will often have a unique perspective and that their interests will not be otherwise represented. For example, in a case before the U.S. District Court in Massachusetts, the National Foreign Trade Council sued the Commonwealth of Massachusetts, arguing that a law penalizing companies doing business with Myanmar (formerly Burma) is unconstitutional. The European Union (EU), though not a party to the case, was allowed to submit an *amicus* brief which was specifically cited in the court's decision.¹²

Another limitation to the WTO approach is that interested parties with views that diverge from their governments' have no way to submit their view. For example in the 1997 WTO case involving the EU ban of meat grown with artificial growth hormones, Public Citizen, a U.S. NGO, submitted a brief supporting the EU position. That brief was returned to Public Citizen by the WTO dispute panel with a note admonishing the group for submitting unsolicited information. Obviously, as the party challenging the E.U. law, the U.S. would not have included Public Citizen's brief in its own submission.

Political: The WTO Appellate ruling is unusually politically savvy for a WTO decision. For instance, in an effort to placate what had been intense environmental group protest of the lower panel ruling, the Appellate Body makes several non-binding comments with no legal weight, such as: "We have *not* decided that the protection and preservation of the environment is of no significance to the Members of

the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should."¹³

While the U.S. Trade Representative's office attempted to use these rhetorical offerings to announce it had a victory with the ruling - despite having lost its appeal - this charm strategy did not work on environmental groups. For example, Charles Arden Clarke of World Wildlife Fund International's trade research unit noted that the decision "denies individual countries the right to restrict trade even when species, in this case sea turtles, are endangered and the complainant countries have signed international environmental agreements to protect them."¹⁴ David Schorr, director of World Wildlife U.S.'s sustainable commerce unit, said that the decision proved the WTO is "simply not competent to decide issues that require a mature balance between liberalized trade and other legitimate policy goals."¹⁵

Topic: *Challenge of U.S. Forest Protection Rule (Asian Longhorned Beetles)*
Venue: World Trade Organization (WTO)
Contact: To see the text of the U.S. Department of Agriculture's September 18, 1998 rule in the Federal Register, visit the Journal of Commerce's web site at www.joc.com/web_index.htm. For more information on the rule, contact Mr. Ronald Campbell, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road, Unit 140, Riverdale, MD 20737-1236; Tel.: (301) 734-6799.

On November 11, 1998, Hong Kong filed a WTO complaint against the United States over a new Animal and Plant Health Inspection Service (APHIS) rule requiring solid wood packing materials from China and Hong Kong to be heat treated, fumigated, or treated with preservatives before being exported to the U.S.¹⁶ APHIS adopted the rule in response to recent infestations of the Asian Longhorned Beetle traced to pallets, crates, and other wooden packing materials from China and Hong Kong.¹⁷

The rule, which applies to shipments that leave China and Hong Kong after December 17, 1998, also requires shippers to certify that their wood packing materials have been treated.¹⁸ The cost of treating wooden pallets for the beetles has been estimated at between \$3 and \$27 per pallet.¹⁹

The beetles, which face no natural predators in the U.S., cannot be eradicated by pesticides once they have infested a tree.²⁰ The only way to get rid of

them is to uproot affected trees and burn them.²¹ APHIS officials already have had to uproot and burn thousands of trees in the Brooklyn, New York, area after discovering an infestation of the beetles.²²

The beetles favor hardwood trees, including maples, poplars, elms, willows, evergreens, and fruit trees.²³ APHIS officials estimate that if left unchecked, the beetles would cause damage exceeding \$41 billion.²⁴ Besides such financial damage, APHIS officials also noted damage to the aesthetic value of street and backyard trees; however, they could not determine this value and, thus, did not include it in their total damage estimate.²⁵ U.S. Department of Agriculture officials predict that if the beetles begin to infest U.S. forests, the damages could be as high as \$138 billion.²⁶

The U.S. included Hong Kong in the ban, even though the Asian Longhorned Beetle is not native to Hong Kong, because "about half of the mainland's

[China's] exports to the United States come through Hong Kong. . . .²⁷ Hong Kong officials claim the ban is discriminatory because Chinese exports to the U.S. go through other nations that are not covered by the ban.²⁸ They also claim that the U.S. provided neither a scientific justification for the ban nor a risk assessment as required by WTO Sanitary and Phytosanitary rules.²⁹

Chinese officials have also criticized the rule, but China is not a member of the WTO, and thus

cannot file or join in a complaint.³⁰ U.S. officials estimate that up to half of China's exports to the U.S., which totaled \$62.6 billion in 1997, could be affected by the ban.³¹ In fact, the U.S. is the biggest export market for China, accounting for 40 percent of all Chinese exports.³² China maintains a trade surplus with the U.S., exporting to the U.S. five times more than it imports from the U.S.³³

STANDARDS

Topic: *OMB Circular No. A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*

Venue: Office of Management and Budget (OMB)

Contact: For more information, write: Executive Office of the President, Office of Management and Budget, Washington, D.C. 20503, or call the Office of Information and Regulatory Affairs at (202) 395-3785. For a copy of circular A-119, visit www.whitehouse.gov/WH/EOP/OMB/html/circulars/a119/a119.html, or, for those without access to the Internet, contact the OMB at (202) 395-9068 or (202) 395-7332, or contact Dion Casey at (202) 546-4996, ext. 391, or by e-mail at dcasey@citizen.org.

OMB circulars are instructions to federal agencies regarding federal policy. The OMB issued Circular No. A-119 (the "Circular") on February 10, 1998, and will not review its effectiveness for three years. Because it implicates all of the regulatory activity covered in *Harmonization Alert*, we are reviewing it here for your information.

This Circular "directs agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical," in order to "reduce to a minimum the reliance by agencies on government-unique standards."³⁴ If a federal agency promulgates its own standard rather than using a "voluntary consensus standard," it must submit a report to the OMB explaining its reasons for doing so.³⁵ The OMB's stated goals in using voluntary consensus standards include: "Encourag[ing] long-term growth for U.S. enterprises and promot[ing] efficiency and economic competition through harmonization of standards," and "[f]urther[ing] the policy of reliance upon the private sector to supply Government needs for goods and services."³⁶

Under the Circular, if a voluntary consensus

standard exists, a federal agency must address it in the rulemaking process, and if the agency decides not to use the standard, its decision may be challenged in court as arbitrary and capricious. The Circular defines "voluntary consensus standards" as "standards developed or adopted by voluntary consensus standards bodies, both domestic and international."³⁷ "Voluntary consensus standard bodies" are "domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures," and encompass the following attributes: (i) openness; (ii) balance of interest; (iii) due process; and (iv) an appeals process.³⁸ Organizations accredited by the American National Standards Institute (ANSI) are **presumed** to qualify as voluntary consensus standards bodies.³⁹ ANSI is a private organization that certifies private voluntary standards developing organizations (SDOs) if their operating procedures meet certain criteria.⁴⁰ It currently accredits over 175 such SDOs.⁴¹

The OMB Circular applies to "any executive department, independent commission, board, bureau, office, agency, Government-owned or controlled corporation or other establishment of the Federal

Government,⁴² including the Food & Drug Administration (FDA), U.S. Department of Agriculture (USDA), Environmental Protection Agency (EPA), Consumer Products Safety Commission (CPSC), and National Highway Traffic Safety Administration (NHTSA), the federal agencies responsible for most of this country's health, safety, and environmental regulation. The Circular applies to all standards-developing activities, including those related to health, safety, and the environment.

The Circular poses several potential problems. First, it relies heavily on ANSI-accredited SDOs, many of which have little or no consumer-interest participation. In September, 1998, ANSI's Consumer Interest Council completed a survey of 104 ANSI-accredited SDOs to determine consumer interest participation in their standards development process.⁴³ According to Dr. R. David Pittle, Vice President and Technical Director of Consumers Union, speaking at the Standards Summit in Washington, D.C., on September 23, 1998 (co-sponsored by ANSI and the National Institute of Standards and Technology), the survey showed limited consumer participation in most of the SDOs. Unfortunately, ANSI officials refused to release the survey to *Harmonization Alert*. And, while the survey and several supporting documents are posted on the Consumer Interest Council's web page, they are available only to members of ANSI or the Consumer Interest Council. In fact, of the 65 documents posted on the Consumer Interest Council's web page, none are accessible by the public. A password is needed to access all the documents.⁴⁴

Furthermore, the Consumer Interest Council itself, which one would expect to have consumer-perspective representatives, is staffed almost entirely by representatives of large corporations and the federal government. The Consumer Interest Council Membership Roster includes representatives from the Toy Manufacturers of America, Inc., Ameritech, Polaroid Corporation, Underwriters Laboratory, 3M, J.C. Penney, IBM, the American Textile Manufacturers Institute, the FDA, and the USDA.⁴⁵ Moreover, in keeping with the secrecy shrouding the rest of the ANSI web site, the full list of Consumer Interest Council members is available only to members of ANSI and the Consumer Interest Council.⁴⁶ Ironically, the Consumer Interest Council's background information on its web page reads, "The CIC facilitates the representation of consumers' interest in the voluntary standards process and enhances the effectiveness and credibility of the ANSI Federation."⁴⁷ The ANSI background page lists ANSI's guiding

principles as "consensus, due process, and openness."⁴⁸

Another potential problem with the Circular is its inclusion of unspecified international organizations in its definition of "voluntary consensus standards bodies." It is difficult to gauge the level of consumer participation in all such international SDOs, or even to determine which international SDOs will qualify under the Circular. However, two international SDOs which almost certainly will qualify, the Codex Alimentarius Commission ("Codex"), which develops international food safety standards, and the International Organization for Standardization (ISO), historically have been dominated by corporate interests, although official representation is through governments. One study found that twenty-six percent of all participants on Codex working committees represented business interests while less than one percent represented consumer interests.⁴⁹ The list of corporations with formal roles as members of country delegations at Codex includes Nestle, Coca-Cola, Bayer, Monsanto, Pfizer, Kraft, BASF, Pepsico, M&M Mars, Dupont, Shell, Tyson Foods, Hershey, and Dole.⁵⁰

The ISO is a body made up of industry representatives that, until a few years ago, developed technical standards (e.g. the standard size for a light bulb) for industry.⁵¹ However, it recently began producing environmental standards under a program called ISO 14000.⁵² Yet, citizen's groups, and even government officials, have been excluded from ISO's standards-developing process. In fact, according to a report for the European Environment Bureau, ISO's standards drafting committee is "made up principally of executives from large international corporations, national standards-setting firms and consulting firms."⁵³ Furthermore, according to the report, the ISO "has belatedly invited delegates from governments and citizen's groups; but has used this invitation, and the limited participation that ensued, to claim an openness while ignoring their substantive input."⁵⁴

Under OMB Circular No. A-119, federal agencies still must comply with the democratic process required by the Administrative Procedure Act (APA) when promulgating a standard. The APA requires federal agencies to provide "notice and comment" rulemaking, which means agencies must publish proposed rules (or standards) in the Federal Register, provide an adequate time period for interested parties to comment on the proposal, and address the issues raised by all such parties in the final rulemaking. The Circular, however, forces agencies to use voluntary consensus standards created by both domestic and international SDOs, with little or no consumer interest

participation, as the starting point for government standards. *Harmonization Alert* will attempt to keep its readers aware of proposed standards based on

international and voluntary standards so interested parties can use the APA process to comment.

LABOR

- Topic:** *Occupational Safety and Health; Labor Rights (U.S. Department of Labor Finds Mexican Maquiladora Plant and Mexican Officials Violated Mexican Labor, Health, and Safety Laws)*
- Venue:** U.S. Department of Labor (DOL), Bureau of International Labor Affairs (ILAB), National Administrative Office (NAO)
- Contact:** For the text of the North American Agreement on Labor Cooperation (NAALC) and the reports on violation claims, contact Information Officer, National Administrative Office, ILAB, Room C-4327, U.S. Department of Labor, Washington, D.C. 20210, or the NAO Information Center at (202) 501-6653, ext.21. The report on the freedom of association claim is also available at www.dol.gov/dol/ilab/public/media/reports/nao/pubrep9702.htm.

In a case brought before the United States Department of Labor (DOL) under provisions of the NAFTA labor side agreement, the DOL's National Administrative Office (NAO) found that the Han Young factory, which assembles truck chassis for Hyundai Corporation, in Tijuana, Mexico, repeatedly violated Mexican freedom of association, health, and safety laws. The DOL also found that Mexican officials did little to punish or remedy these violations.

The NAO was established by the North American Agreement on Labor Cooperation (NAALC), the labor side agreement to NAFTA, to review claims that NAFTA countries were failing to enforce certain categories of their domestic labor law. However, the NAO has no enforcement powers. Thus, when it finds the country did not uphold its labor laws, the NAO is limited to recommending ministerial consultations between the U.S. and Mexico or Canada.

Several labor unions, including the United Steelworkers of America, the United Auto Workers, and the Canadian Auto Workers, and an NGO, the International Labor Rights Fund, filed a NAALC complaint against Han Young on October 30, 1997, alleging Han Young management had repeatedly refused to correct numerous health and safety violations at the factory and had waged a campaign of intimidation against workers who tried to form an independent union.

Han Young employees testified that prior to a

union vote, the general manager announced that Han Young would bring in fifty replacement workers and fire the union supporters;⁵⁵ twelve workers who openly supported an independent union were fired, and one was physically attacked by a manager; and such harassment continued with more union supporters being fired.⁵⁶ The independent union still won the election. However, the Tijuana Conciliation and Arbitration Board (CAB), a government body that hears labor complaints, nullified the election results on procedural grounds.⁵⁷ The Mexican Federal Government intervened after high-profile political protests from U.S., Canadian, and Mexican Congressional members, and ordered a new election. The independent union again won, despite further intimidation attempts by Han Young management.⁵⁸

In its report, the NAO stated, "Han Young's apparent efforts to influence the workers' union organization efforts through coercion, intimidation, and other means, appear well substantiated. . . ."⁵⁹ However, the NAO's sole responsibility under the NAALC is to determine if a country's actions are consistent with the NAALC. The NAO found that the Tijuana CAB's actions were inconsistent with Mexico's obligation under the NAALC to enforce its labor laws on freedom of association. In making this finding, the NAO noted that "not one independent union had been registered or had obtained collective bargaining rights in Tijuana and only one other exists

in the entire maquiladora sector.”⁶⁰ Thus, the NAO recommended ministerial consultations with Mexico.

In a report made public August 11, 1998, the NAO also found that the Han Young factory had repeatedly violated Mexican health and safety laws, and that Mexican authorities had done little to remedy the situation. Several factory workers testified to numerous violations at the Han Young plant, including failure to provide safety shoes and glasses, chemical-resistant gloves, respirators, and face shields; lack of proper ventilation; puddles of water on the floor below high tension cables; leaking toilets and no toilet paper; and faulty cranes that repeatedly dropped tractor trailer chassis while they were being worked on.⁶¹ The workers also complained of respiratory illness, loss of hearing and vision, and the frequent occurrence of burns and broken bones.⁶²

Mexican authorities performed a health and safety inspection of the Han Young factory on June 16, 1997, cited the company for forty-one health and safety violations, and ordered corrective action for twenty-three of the violations, but did not order the company to pay any fines.⁶³ On September 5, 1997, Mexican authorities conducted a follow-up inspection and found six of the violations remained unabated, but still did not order Han Young to pay any fines.⁶⁴

In January, 1998, after several workers narrowly avoided severe injury when one crane dropped a chassis and another swung out of control, forty-five workers went to the Secretariat of Labor and Social Welfare (STPS) and demanded another inspection of the factory. On January 27, 1998, STPS officials inspected the plant again and, finally, fined the company about \$9,000.⁶⁵ However, the NAO reported that it was unable to determine if that fine was ever collected.⁶⁶

The NAO also raised questions about the efficacy of the inspections conducted by Mexican authorities and noted that serious health and safety violations remained unabated at the factory even after being cited by inspectors.⁶⁷ Furthermore, the NAO noted that although Mexican law provides for the doubling of fines for unabated violations, Mexican authorities did not double the Han Young fines.⁶⁸ For these reasons, the NAO recommended ministerial consultations with Mexico.

This case is one of few in which a pro-labor finding resulted. It is highlighted by NAFTA supporters as evidence that the NAFTA labor side agreement is a success. Meanwhile, Han Young workers continue to work in the dangerous factory.

NAFTA SPS COMMITTEES

On October 15, 1998, the Office of the United States Trade Representative (USTR) and the U.S. Department of Agriculture (USDA) held a public meeting at the USDA offices in Washington, D.C., to update the public on work being done in the several NAFTA Sanitary and Phytosanitary (SPS) Technical Working Groups (TWGs), and to solicit comment on proposed agenda items for the next meeting of the NAFTA SPS Committee, scheduled for November 4, 1998.

These NAFTA groups work to harmonize national regulations in all areas of food safety, including pesticides, labeling, inspection, additives,

veterinary drugs, and animal health. According to John Payne, the U.S. Trade Representative's Director of Sanitary and Phytosanitary issues, NAFTA TWGs are required to follow Administrative Procedure Act (APA) notice and comment procedures (publication in the *Federal Register* followed by at least 30 days for public comment) if they change a U.S. regulation of general applicability.⁶⁹ Meetings of the TWGs are not required to be open to the public by either NAFTA or the APA, but Mr. Payne stated that some, but not all, of the TWGs do hold public meetings.⁷⁰ Following is a list of the TWGs and their contact persons, and a brief summary of their recent work and upcoming plans.

TWG: *Fish & Fishery Product Inspection*

Contact: Dr. Philip Spiller, U.S. Food & Drug Administration, Office of Seafood, 1110 Vermont Avenue, NW, Suite 1110, Washington, D.C. 20005; Tel.: (202) 418-

3133; Fax: (202) 418-3198; E-mail: PCs@cfsan.fda.gov.

This TWG is trilateral. It currently is working on negotiating a Mutual Recognition Agreement (MRA) on seafood inspection between the U.S. and Canada, developing criteria for a seafood equivalence determination, and discussing approaches for Hazard Analysis and Critical Control Point (HACCP) training and accreditation. Its future work plans include continuing MRA and equivalence discussions with Canada and Mexico and developing a joint protocol on properly conducting audits of inspection systems. The TWG meets annually. Its last meeting took place March 4-5, 1998, in San Antonio, Texas, and its next meeting is scheduled for March, 1999, in Mexico.

In an interview after the October 15 public meeting, Dr. Spiller said the Canadian seafood inspection system was in many ways superior to FDA's system, perhaps because of the importance of seafood exports to Canada's economy. Dr. Spiller was worried more about Canada finding the FDA system equivalent than the FDA finding the Canadian system equivalent. However, he stated that Mexico's seafood inspection system was nowhere near to being equivalent to either the Canadian or the FDA's system.

To determine whether the Canadian system is equivalent to the FDA's, FDA officials will analyze Canadian laws and regulations, and conduct audits of Canadian inspectors to determine if they find violations in circumstances where an FDA inspector would find violations. FDA officials also will determine whether Canadian officials enforce Canadian laws and regulations effectively. If the FDA certifies the

Canadian system as equivalent, FDA inspectors will not have to re-inspect imports of seafood from Canadian processors that have been inspected and passed by Canadian inspectors. In effect, Canadian inspectors will be acting as agents of the FDA in Canada. However, the FDA will retain its authority to inspect any particular shipment of seafood imported into the U.S.

The USDA has long certified the Canadian meat inspection system as equivalent. However, many problems have resulted from this certification. On February 18, 1993, William J. Lehman, a USDA Import Meat Inspector assigned to the U.S.-Canada border, testified about these problems before a U.S. House of Representatives subcommittee. He said that Australian beef, which was subject to more stringent inspections than Canadian beef and subject to quotas and a four-cent-per-pound tariff, was being routed through Canada to avoid these limitations.⁷¹ He also stated that the USDA imposed no penalty on Canadian trucks that refused to stop at the border for paper inspections.⁷²

When told of these problems with the Canadian meat inspection system, Dr. Spiller said that if FDA certified the Canadian seafood inspection system as equivalent, nothing could stop unscrupulous seafood processors from committing fraud. However, he went on to say that FDA officials would do everything in their power to ensure that similar abuses would not occur with seafood imports.

TWG: *NAFTA Sanitary and Phytosanitary Committee*

Contacts: John Payne, Director of SPS Issues, Office of the USTR, Executive Office of the President, 600 17th Street, NW, Washington, D.C. 20506; Tel.: (202) 395-9558; Fax: (202) 395-4579; E-mail: jpayne@ustr.gov. Lloyd Harbert, Director, Food Safety and Technical Services Division, Foreign Agricultural Service, U.S. Department of Agriculture, Room 5545-S, 1400 Independence Avenue, SW, Washington, D.C. 20250; Tel.: (202) 720-1301; Fax: (202) 690-0677; E-mail: harbert@fas.usda.gov.

The NAFTA SPS Committee addresses trade issues involving sanitary and phytosanitary measures affecting the import and export of agricultural products

among the NAFTA member countries (Canada, Mexico, and the U.S.). It is the general SPS committee overseeing the work of all the TWGs.

TWG: *Animal Health*

Contact: Dr. Tom Walton, Acting Deputy Administrator, APHIS, Veterinary Services, U.S. Department of Agriculture, Room 320-E, 1400 Independence Avenue, SW, Washington, D.C. 20250; Tel.: (202) 720-5193; Fax: (202) 690-4171; E-mail: Tom.Walton@usda.gov.

This TWG is trilateral (includes Mexico, Canada, and the U.S.). It currently is working on harmonizing veterinary biologics licensing processes, standardizing import policies, and establishing a regional approach on transmissible spongiform encephalopathies (TSEs), also known as mad cow disease, among the three NAFTA nations. Its future work plans include: the harmonization of diagnostic

services, certification of a common approach for disease-free zones recognition, emergency preparedness, and proper evaluation of the veterinary services within NAFTA nations. The TWG's last meeting took place July 6-9, 1998, in Boston, Massachusetts, and its next meeting is scheduled for April, 1999, in Canada.

TWG: *Dairy, Fruits, Vegetables, and Processed Foods*

Contacts: Dr. Terry Troxell, Director of Program & Enforcement Policy, U.S. Food & Drug Administration, Center for Food Safety & Applied Nutrition, Office of Plant & Dairy Foods & Beverages, HFS-300, 200 C Street, SW, Washington, D.C. 20204; Tel.: (202) 205-5321; Fax: (202) 205-4422; E-mail: ttroxell@bangate.fda.gov.
Jack Mowbray, U.S. Food & Drug Administration, Center for Food Safety & Applied Nutrition, Office of Plant & Dairy Foods & Beverages, HFS-305, 200 C Street, SW, Washington, D.C. 20204; Tel.: (202) 205-1731; Fax: (202) 205-4422; E-mail: jmowbray@bangate.fda.gov.

This TWG currently includes only Canada and the U.S. It is working on harmonizing the Canadian and U.S. potato grading systems and discussing the equivalence of the Canadian and U.S. Grade A dairy inspection systems. Its future work plans include fully

integrating Mexico into this TWG and continuing equivalence discussions with Canada. The TWG's only meeting took place in November, 1997, and it has not set a date for its next meeting.

TWG: *Food Additives & Contaminants*

Contact: Dr. Alan Rulis, U.S. Food & Drug Administration, Office of Pre-Market Approval, CFSAN, HFS-200, 200 C Street, SW, Washington, D.C. 20204; Tel.: (202) 418-3100 or 1-202-205-4057; Fax: (202) 418-3131; E-mail: arulis@bangate.fda.gov.

This TWG is trilateral. It currently is working on harmonizing U.S. and Canadian food additive regulations and discussing issues and positions for the

Codex Committee on Food Additives & Contaminants (CCFAC). Its future work plans include developing joint (U.S.-Canada) positions for the CCFAC,

exploring the potential for joint reviews of food additives petitions, and encouraging greater Mexican participation in the TWG. The TWG's last meeting

took place January 19-20, 1998, in Mexico City, and its next meeting is scheduled for this fall in Ottawa.

TWG: *Labeling, Packaging, & Standards*

Contact: Elizabeth Campbell, U.S. Food & Drug Administration, Office of Food Labeling, HFS-155, 200 C Street, SW, Room 1832-A, Washington, D.C. 20204; Tel.: (202) 205-5229; Fax: (202) 205-4594; E-mail: ecampbel@bangate.fda.gov.

This TWG officially involves only Canada and the U.S., but Mexico participates informally. It currently is working on harmonizing nutrition labeling, nutrient content claims, health claims, trans fatty acid labeling, fortification policy, allergen labeling, dietary supplements, and organic labeling, and developing

positions on food labeling issues for Codex. Its future work plans include continuing its current work and revising standards of identity to be more consistent among the NAFTA nations. The TWG last met March 31-April 1, 1998, and will meet next in March, 1999.

TWG: *Meat, Poultry, & Egg Inspection*

Contact: Dr. John Prucha, Assistant Deputy Administrator, Domestic and International Policy, Food Safety and Inspection Service, U.S. Department of Agriculture, Room 4816-S, 1400 Independence Avenue, SW, Washington, D.C. 20250; Tel.: (202) 720-3473; Fax: (202) 690-3856; E-mail: John.Prucha@usda.gov

This TWG is trilateral. It currently is working on achieving and maintaining equivalence in meat, poultry, and egg inspection systems, exchanging information on foreign systems and establishment reviews, and recognizing Mexico's poultry inspection system as equivalent. Its future work plans include

harmonizing inspection procedures, examining health certificates, and addressing technical inspection matters. The TWG's last meeting took place March 23-26, 1998, in Monterrey, Mexico, and its next meeting is scheduled for November, 1998.

TWG: *Pesticides*

Contact: Marcia Mulkey, Office of Pesticide Programs, U.S. Environmental Protection Agency, Mail Code 7501C, 401 M Street, SW, Washington, D.C. 20460; Tel.: (703) 305-7090; Fax: (703) 308-4776; E-mail: mulkey.marcia@epa.gov. See also the TWG's web site at www.epa.gov/oppfead1/international/naftatwg.

This TWG is trilateral and consists of an Executive Board, Secretariat, Technical Subcommittees, and Project Teams. It currently is working on developing categories of trade irritants and a procedure and priority scheme for their resolution, harmonizing environmental fate, toxicology protocols,

protocols for field trials, and residue chemistry guidelines, and initiating review and work sharing on two new biopesticides (a semiochemical and a microbial). Its future work plans include completing two new joint reviews of reduced risk pesticides, re-evaluating and re-registering older chemical pesticides,

and harmonizing policies on formulants and data requirements for microbials. The TWG last met June

8-10, 1998, in Mexico City, and will meet next in June, 1999, in the U.S.

TWG: *Plant Health, Seeds, & Fertilizers*

Contacts: Alfred Elder, Deputy Administrator, APHIS, Plant Protection Quarantine, U.S. Department of Agriculture, Room 302-E, 1400 Independence Avenue, SW, Washington, D.C. 20250; Tel.: (202) 720-5601; Fax: (202) 690-0472; E-mail: Alfred.S.Elder@usda.gov. Alan Green, APHIS, Plant Protection Quarantine, U.S. Department of Agriculture, 4700 River Road, Unit 136, Riverdale, MD 20737; Tel.: (301) 734-4384; Fax: (301) 734-7639; E-mail: Alan.S.Green@usda.gov.

This TWG currently is working on harmonizing Japanese beetle regulations, developing a harmonized approach to Asian and European genetic modification, determining equivalency of Greenhouse

certification, and recognizing accredited laboratories for seed certification. Its future work plans include recognizing private laboratories. The TWG last met in October, 1998. No future meeting has been scheduled.

TWG: *Veterinary Drugs & Feeds*

Contact: Dr. Robert Livingston, Food & Drug Administration, Center for Veterinary Medicine, 7500 Standish Place, Rockville, MD 20855; Tel.: (301) 594-5903; Fax: (301) 594-1831; E-mail: rlivings@bangate.fda.gov.

This TWG involves Canada and the U.S. only. It currently is working on harmonizing methods, discussing equivalence of registration systems, and coordinating with corresponding Codex activities. Its

future work plans include determining equivalence of analytical methods for drug residues and integrating Mexico into the TWG. The TWG last met in 1995 and has not scheduled any future meetings.

UPCOMING MEETINGS/EVENTS

Event: *U.S. Codex Committee on Methods of Analysis (CCMAS) Meeting*

Date: November 10, 1998; 9:00 a.m. - 11:00 a.m.

Location: Food and Drug Administration (FDA), Room 1409, 200 C Street, SW, Washington, D.C.

Contact: U.S. Codex Office, Room 4861, South Building, Washington, D.C. 20250-3700; Tel: (202) 205-7760; Fax: (202) 720-3157; E-mail: uscodex@usda.gov.

Subject: U.S. delegates to Codex committees schedule these meetings to inform the public about the committee's agenda and proposed U.S. positions on the issues, and to receive comments from interested parties on these issues.

Event: *U.S. Codex Committee on Natural Mineral Water (CCNMW) Meeting*
Date: November 10, 1998; 11:15 a.m. - 12:15 p.m.
Location: FDA, Room 1409, 200 C Street, SW, Washington, D.C.
Contact: U.S. Codex Office, Room 4861, South Building, Washington, D.C. 20250-3700;
Tel: (202) 205-7760; Fax: (202) 720-3157; E-mail: uscodex@usda.gov.

Event: *U.S. Codex Committee on Food Labeling (CCFL) Meeting*
Date: November 17, 1998; 1:30 - 4:30 p.m.
Location: FDA, Room 1813, FB-8, 200 C Street, SW, Washington, D.C.
Contact: U.S. Codex Office, Room 4861, South Building, Washington, D.C. 20250-3700;
Tel: (202) 205-7760; Fax: (202) 720-3157; E-mail: uscodex@usda.gov.

Event: *Pesticide Regulations Conference*
Dates: December 1-3, 1998
Location: Washington, D.C.
Contact: Laura Dowe, Government Institutes, 4 Research Place, Ste. 200, Rockville, MD 20850; Tel: (301) 921-2345; or visit www.govinst.com/edusched/trainsched.html.
Subjects: Include the Food Quality Protection Act's (FQPA) effects on pesticide regulation, pesticide labeling, and the future of pesticide regulation.

Event: *Organization for Economic Cooperation and Development (OECD) Seminar with Representatives of Civil Society*
Date: December 2, 1998
Location: Paris, France
Contact: Charles Arden-Clarke, Trade and Investment Unit, WWF International, 1196 Gland, Switzerland; Tel: 41 22 364 9001; Fax: 41 22 364 8219; E-mail: caclarke@wwfnet.org.
Subjects: OECD officials are convening this one-day seminar with representatives of civil society to exchange views on a multilateral framework for investment, including the Multilateral Agreement on Investment (MAI). The seminar will focus on four issues: (1) nondiscrimination and investment protection; (2) sovereignty; (3) labor and the environment; and (4) the overall structure of a multilateral framework for investment. Participants can contribute written submissions on any of these issues. OECD officials invited Charles Arden-Clarke to nominate up to ten NGO representatives to attend the seminar.

Event: *Codex Regional Coordinating Committee for Latin America and the*

Caribbean

- Dates:** December 8 - 11, 1998
Location: Centro de Conferencias de la Intendencia Municipal de Montevideo, Montevideo, Uruguay
Subjects: Include food certification and inspection, economic integration and harmonization of food legislation, and acceptances of Codex standards and maximum residue limits for pesticides in foods by countries in Latin America and the Caribbean. Other topics include food safety matters of interest to the region, consumer participation in Codex, and risk analysis.
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- Event:** *Codex Committee on Food Import and Export Certification and Inspection*
Dates: February 22 - 26, 1999
Location: Hilton on the Park Hotel, 192 Wellington Parade, East Melbourne, Australia
Subjects: Include guidelines for the development of equivalence agreements regarding food import and export inspection systems, recommendations for food import control systems, and issues relating to the judgment of equivalence.
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- Event:** *Codex Committee on Fresh Fruits and Vegetables*
Dates: March 1 - 5, 1999
Location: Secretaria de Comercio y Fomento Industrial - TORRE SECOFI, Calle Alfonso Reyes, No. 30, Hipodromo Condesa, 06140 Mexico City, Mexico
Subjects: Include consideration of draft Codex standards for pineapples, grapefruits, asparagus, oranges, and papaya.
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- Event:** *Codex Committee on Fats and Oils*
Dates: March 8 - 12, 1999
Location: London, England
Subjects: Agenda not yet available.
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- Event:** *Codex Committee on Food Additives and Contaminants*
Dates: March 22 - 26, 1999
Location: The Hague, Netherlands
Subjects: Agenda not yet available.
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- Event:** *Codex Committee on Pesticide Residues*
Dates: April 12 - 17, 1999

Location: The Rembrandtzaal, the Nederlands Congresgebouw, Churchillplein 10, The Hague, Netherlands

Subjects: Include consideration of dietary intake of pesticide residues, food consumption and exposure assessment, residues of pesticides in food and animal feeds, establishment of Codex priority lists of pesticides, and problems with pesticide residues in food in developing countries.

Event: *Codex Committee on General Principles*

Dates: April 19 - 23, 1999

Location: Paris, France

Subjects: Agenda not yet available.

Event: *Codex Committee on Food Labeling*

Dates: April 26 - 30, 1999

Location: Ottawa, Canada

Subjects: Agenda not yet available.

Event: *Public Comment Period*

Venue: Free Trade Area of the Americas (FTAA) Government Committee on Civil Society (GCCS)

Contact: Send comments to: Chairman of the Committee of Government Representatives on Civil Society Participation, c/o Tripartite Committee (Ref. Civil Society), United Nations Economic Commission for Latin America and the Caribbean (ECLAC), 1825 K Street, NW, Suite 1120, Washington, D.C. 20006; Fax: (202) 296-0826; E-mail: eclac@tmn.com. Comments must identify the person and/or organization, with their address, that is presenting the point of view, contain an executive summary of not more than two pages, and be written in one of the official FTAA languages - English, Spanish, French, or Portuguese.

Subject: The GCCS is soliciting public comment from representatives of civil society, including labor, environmental, consumer interest, academic, and business groups on issues related to the FTAA process.

Deadline: March 31, 1999

NOTES

1. World Trade Organization, "United States - Import Prohibition of Certain Shrimp and Shrimp Products," *Report of the Appellate Body*, Oct. 12, 1998, at 76.

2. *Id.*, at 5.
3. *Id.*, at 35.
4. Article XX reads in relevant part: “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 Member of measures: (b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;” *Report of the Appellate Body, supra* note 1, at 41.
5. *Report of the Appellate Body, supra* note 1, at 75.
6. *Id.*, at 64-65 (emphasis original).
7. *Id.*, at 65.
8. *Id.*, at 71.
9. *Id.*, at 73.
10. *Id.*
11. *Id.*, at 35-36 (emphasis original).
12. See Michael S. Lelyveld, “Massachusetts Sanctions Struck Down,” *Journal of Commerce*, Nov. 4, 1998, 1A.
13. *Id.*, at 75.
14. John Zarocostas, “U.S. Loses Appeal on Saving Sea Turtles,” *Journal of Commerce*, Oct. 14, 1998, 1A, 3A.
15. *Id.*
16. See Douglas P. Norlen, “Hong Kong Registers WTO Complaint Over U.S. Wood Crate Ban; Canada to Follow,” *Bureau of National Affairs*, Nov. 18, 1998.
17. See 63 Fed. Reg. 50,099.
18. See Norlen, *supra* note 24.
19. See Tom Baldwin & P.T. Bangsberg, “USDA Acts Ahead of Pallet Ban,” *Journal of Commerce*, Nov. 17, 1998.
20. See Tom Baldwin, “Bug Casts Giant Shadow,” *Journal of Commerce*, Sep. 28, 1998.
21. See 63 Fed. Reg. at 50,101.

22. *See id.*
23. *See* Baldwin, *supra* note 28.
24. *See* 63 Fed. Reg. at 50,106.
25. *See id.*
26. *See* Baldwin & Bangsberg, *supra*, note 26.
27. 63 Fed. Reg. At 50,101.
28. *See* Norlen, *supra* note 24.
29. *See id.*
30. *See* P.T. Bangsberg, "China Criticizes 'Unfair' Beetle Ban," *Journal of Commerce*, Sep. 22, 1998.
31. *See* Baldwin & Bangsberg, *supra* note 26.
32. *See* Liz Sly, "China Calls U.S. Trade Restrictions Over Beetle Unfair, Might Retaliate," *Chicago Tribune*, Sep. 16, 1998.
33. *See id.*
34. OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-119, Feb. 10, 1998, at 3.
35. *Id.*, at 5.
36. *Id.*, at 3.
37. *Id.*, at 4.
38. *Id.*
39. Interview with OMB official, 10/28/98.
40. AMERICAN NATIONAL STANDARDS INSTITUTE, *Accreditation of American National Standards Developers, in PROCEDURES FOR THE DEVELOPMENT AND COORDINATION OF AMERICAN NATIONAL STANDARDS*, available on ANSI's web site on the Internet (as of Oct.28, 1998) at: www.ansi.org/public/library/std_proc/anspro/accred_asd2.html#Criteria_Acc.
41. AMERICAN NATIONAL STANDARDS INSTITUTE, *An Introduction to ANSI*, available (as of Oct. 28, 1998) at: www.ansi.org/public/about.html.
42. *Id.*, at 5.

43. AMERICAN NATIONAL STANDARDS INSTITUTE, CONSUMER INTEREST COUNCIL, *Documents*, available (as of Oct. 27, 1998) at www.ansi.org/reports/master.asp?room=7.

44. *See id.*

45. AMERICAN NATIONAL STANDARDS INSTITUTE, CONSUMER INTEREST COUNCIL, *CIC Membership Roster*, available (as of Oct. 27, 1998) at www.ansi.org/rooms/room_7/public/roster.html.

46. *See id.*

47. AMERICAN NATIONAL STANDARDS INSTITUTE, CONSUMER INTEREST COUNCIL, *About the ANSI Consumer Interest Council*, available (as of Oct. 28, 1998) at www.ansi.org/rooms/room_7/public/cicbkgr.html.

48. *An Introduction to ANSI*, *supra* note 49.

49. NATALIE AVERY, MARTINE DRAKE, AND TIM LANG, *CRACKING THE CODEX: AN ANALYSIS OF PARTICIPATION ON CODEX ALIMENTARIUS COMMISSIONS WHICH SET INTERNATIONAL FOOD STANDARDS*, (1993) at 1.

50. *Id.*, at 19.

51. Benchmark Environmental Consulting, *ISO 14001: An Uncommon Perspective - Five Public Policy Questions for Proponents of the ISO 14000 Series* (Nov., 1995), report produced for the European Environment Bureau, at 11.

52. *See id.*

53. *Id.*, at 13.

54. *Id.*, at 11. One of the five questions asked in this report is “Can ISO 14001 become an international trade standard without operative participation from governments or NGOs?” The answer is “Yes.” *Id.* The report also notes, “Decision-making in ISO is by member associations and firms. Other participants, while they may be invited and are recorded as ‘participants’ in a ‘consensual’ decision-making process, do not have voting rights.” *Id.*, at 12.

55. *See* U.S. National Administrative Office, Bureau of International Labor Affairs, *Public Report of Review of NAO Submission No. 9702*, April 28, 1998, at 5.

56. *See id.*, at 4.

57. *See id.*

58. *See id.*

59. *Id.*, at 18.

60. *Id.*, at 19.

61. *See* U.S. National Administrative Office, Bureau of International Labor Affairs, *Public Report of Review of NAO Submission No. 9702 - Part II: Safety and Health Addendum*, August 11, 1998, at 2, 28-29.

62. *See id.*, at 2.

63. *See id.*, at 3.

64. *See id.*, at 3-4.

65. *See id.*, at 4.

66. *See id.*, at iii.

67. *See id.*, at 42.

68. *See id.*

69. Telephone interview with John Payne, Jan. 25, 1999.

70. *Id.*

71. *See* Testimony of William J. Lehman before the House Energy and Commerce Committee, Subcommittee on Commerce, Consumer Protection, and Competitiveness, on Food Safety as it Relates to the North American Free Trade Agreement, Feb. 18, 1993.

72. *See id.*