Results of the Negotiations of the Biosafety Protocol:
Issues and Perspectives

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THE RESULTS OF THE NEGOTIATIONS ON THE BIOSAFETY PROTOCOL - ISSUES AND PERSPECTIVES
Discussion Notes for the Round Table of May 2, 2000

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INTRODUCTION

The conclusion of the negotiations on the Biosafety Protocol (BP) of the Convention on Biological Diversity in Montréal in January 2000 has had four main results:

1. A so-called Advance Informed Agreement (AIA) will be compulsory for exporters of those Living Modified Organisms (LMOs [the more common term GMOs is not used in the Protocol]) which are to be intentionally introduced into the environment, such as seeds or live fish.

2. The BP and the WTO are to be "mutually supportive" (Preamble).

3. The precautionary approach has been given an importance which is almost unprecedented in an international convention because it is mentioned in the preamble as well as implicitly in two operational articles (10.6 and 11.8).

4. The parties have agreed to reach a decision regarding identification or labelling requirements of food, feed and processing products within two years after entry into force of the BP.

The negotiations which led to the conclusion of this protocol have been exceptionally arduous. After six meetings of a Biosafety Working Group between 1996 and 1999, negotiations broke down at the subsequent Extraordinary meeting of the Conference of the Parties in February 1999 in Cartagena. After this setback three Informal meetings (Montréal, Vienna, Montréal) and a subsequent "resumed" Extraordinary meeting (Montréal) were necessary until a compromise solution was achieved in the early hours of January 29, 2000.

The compromise consists basically in the fact that the relationship between the BP and the WTO has been left undecided in the preamble, i.e. a potential hierarchy

between the two agreements is left open to interpretation. Furthermore, environment and health proponents are satisfied to see that the precautionary approach has been included, while at the same time the group of countries most interested in exporting LMO food, feed and processing products (the so-called Miami group consisting of the US, Canada, Argentina, Australia, Uruguay and Chile) managed to avoid for the time being a requirement for a distinctive LMO labelling and segregated marketing channels.

DISCUSSION POINTS

1. IMPORT RESTRICTIONS AND LABELLING OF *FOOD, FEED AND PROCESSING* (FFP) PRODUCTS

The labelling question was difficult to negotiate because of its specific implications and obligations. It was the last one to be settled and resulted only in a temporary solution through Art. 18.2.(a) which requires that LMO FFP products carry a "may contain" LMO identification and a contact point for further information. A time frame of two years after the date of entry into force of the BP was established for settling this issue. At the level of marketing these FFP products there is a considerable degree of uncertainty with regards to their consumer acceptability in many countries, and about the cost of establishing two separate distribution channels.

Issues: Could a compulsory national LMO FFP labelling scheme be WTO compatible (i.e. compatible with the TBT agreement's non-discriminatory obligation?) - and if yes under what conditions?

Does international law provide for a right of information for the public with regards to LMO FFP products ,[1] and if yes, are WTO rules restraining this right?

2. POTENTIAL PROBLEMS OF COHERENCE BETWEEN BP AND WTO RULES

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[1] The 1985 UN Guidelines for Consumer Protection (UN Res. 39/248) calls for "access of consumers to adequate information to enable them to make informed choices according to individual whishes and needs" ("Genetically Modified Organisms and the WTO," M. Stilwell and B. Van Dyke, Consumer's Choice Council/CIEL, 1999, Wahshington DC, p. 18, note 11).

The BP's Advance Informed Agreement (AIA) procedure for those LMOs which are to be released intentionally into the environment will be based on a new mechanism of the Convention on Biological Diversity, the Biosafety Clearing-House. Exporters have to provide a risk assessment to the importers who subsequently will have to reach a decision about approving the import (such a decision may be based on the Precautionary Approach, see below). The burden of proof for this risk assessment is placed on the exporter whereever the AIA applies (it doesn't apply to LMO FFP crops and products).

Issue: Is the Protocol's AIA burden of proof procedure WTO compatible or could it be challenged as a Technical Barrier to Trade?

3. IS THE BIOSAFETY PROTOCOL SUBORDINATED TO THE WTO?

This was perhaps the most contentious issue because it has far-reaching political implications and institutional ramifications. The only way to solve this conflict between the LMO exporters and most of the other Parties at least for the time being consisted apparently in the following two clearly contradictory statements at the end of the preamble: "...this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements." "...the above recital is not intended to subordinate this Protocol to other international agreements." The reason for this difference of opinion lies in the fact that the two agreements deal differently with scientific uncertainty: the Convention on Biological Diversity gives a considerable importance to the precautionary approach, whereas the WTO has based its approach on quantitative risk assessment methodologies.

Clearly, the question of the relation between the BP and the WTO has not been resolved in spite of the lengthy and intense negotiation process. At stake here are the interests of the LMO exporting countries and the biotechnology industries on one hand, and a widespread resistance to LMOs in food products especially in Europe on the other hand. These opponents are allied with proponents of Southern interests who defend traditional farming methods, and who argue that developing countries often lack information and technical capacities to deal with modern agricultural techniques. The Preamble of the Protocol has established a framework for future negotiations by stipulating that "...trade and environment agreements should be mutually supportive with a view to achieving sustainable development."

Issue: Does international law provide guidelines for the interpretation of a (non-)hierarchical relationship between the BP and the WTO in the context of this Preamble?

4. SCIENTIFIC UNCERTAINTY AND EVOLUTIVE INTERPRETATION IN THE CONTEXT OF INTERNATIONAL BIOTECHNOLOGY REGULATIONS

The jurisprudence of international trade law has integrated the concept of *evolutive interpretation* through the WTO Appellate Body's judgement in the *Shrimp-Turtle* case. The Body has concluded "...that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary' " (Emphasis as original).[2] Marceau also draws attention to following statement of the 1996 *Japan-Taxes on Alcoholic Beverages* Appellate Body Report: "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind."

Issue: To what extent is the practice of evolutive interpretation likely to influence jurisprudence in the international regulation of biotechnologies and other issues of scientific uncertainty?

5. THE BIOSAFETY PROTOCOL AND ITS IMPACT ON THE DEVELOPMENT OF THE PRECAUTIONARY PRINCIPLE

The Precautionary Principle (PP) has undergone an evolution over the past few years. Lack of scientific certainty is the starting point for its application. Over the years the PP has become more operationalized. Among others, see:

1992: Principle 15 of the 1992 Rio Declaration simply stated that this "shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

1994: Art. 5.7 of the SPS Agreement emphasizes provisional measures: "...Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

2000: Art. 11.8 of the BP for the first time covers environmental and certain health concerns related to environmental aspects of the import of LMOs and potentially opens the door for an import ban.

On Febr. 2, 2000, the EU published a report [3]which in Art. 6.2. goes a step further in the operationalization of the principle: "All interested parties should be involved to the fullest extent possible in the study of various risk management options.... and the procedure be as transparent as possible."

Finally, the Union of Concerned Scientists addresses risks which are not even under consideration: "Some risks may be missed simply because the understanding of physiology, genetics, and evolution, among other disciplines, is limited...Indeed the set of concerns with virus-resistant crops could hardly have been anticipated five to ten years ago... and the mechanisms are still not understood. This reinforces the conclusion that risk assessment of transgenic plants is still in its infancy s a science." (This in spite of the fact that the study doesn't even look at health issues, it is limited to

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[2] Gabrielle Marceau, "A Call for Coherence in Internatioan Law - Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement," Journal of World Trade, Vol. 33/5, October 1999, pp. 87-152.

[3] "Communication from the European Commission on the precautionary principle, COM(2000)1

the environment.)[4]

The European Union has been a pioneer in the legal application of the PP. Originally confined to environmental issues, the PP has more recently found an expanded use also with regards to health issues. There is no doubt its application will soon be still further expanded to include the domain of food safety. In the EU the principle has now achieved the status of a legitimate rule of law ("valeur de véritable règle de droit")[5].

Issues: How can international law contribute to operationalize the concepts of public participation and transparency?

To what extent does the Protocol's precautionary approach potentially apply to LMO food-related health issues (Art. 4) rather than only to environmental aspects of public health?

To what extent is an expansion of the PP's applicability from the environment to health issues to be expected at the global level?

6. PREPARING THE FOUNDATIONS FOR A NEW INTERNATIONAL ECONOMIC AND ENVIRONMENTAL ARCHITECTURE: BIOSAFETY PROTOCOL QUO VADIS?

At his keynote address in Bangkok on February 16, 2000, on the occasion of UNCTAD X, WTO Director General Mike Moore said: "We have heard a good deal about a new international architecture. As a practical man - and possibly the only head of an international organization to have worked as a builder's laborer - I know that architecture can be very beautiful, but that underneath it all, it needs solid foundations. This is our task and our challenge."

At his speech in New Delhi on January 10, 2000, Mike Moore said: "Clichés about coherence between the institutions must become a working reality. We must adapt." Indeed, this notion of coherence is presently the subject of much intergovernmental debate: "The multilateral trading system's expanded mandate and "bindingness", in return, elevated the need for coherence between its rules and those of other national, regional and international systems."[6]

Where should the responsibility for determining jurisdiction be placed in crosssectoral domains like trade and environment, or in the harmonization of

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[4] Jane Rissler and Margaret Mellon, "The Ecological Risk of Engineered Crops," MIT Press, Cambridge MA and London UK, 1996, 168 p., p. 69.

[5] Christine Noiville, "Principe de precaution et OMC: le cas du commerce alimentaire", Journal du droit international, 2000 No. 2, forthcoming, p. 2 of print sheet.

[6] Gabrielle Marceau, op. cit. p. 94.

international standards and consumers' rights to know? "There is currently no rational basis for allocating jurisdiction between different tribunals - for example multilateral environmental agreements, the WTO, and the International Court of Justice."[7]

The WWF's Expert Panel on Trade and Sustainable Development has demonstrated ways of reconciliation which are less adversarial than the WTO's dispute settlement procedures. It has developed a framework based on the six main principles of efficiency, equity, good governance, stakeholder participation and responsibility, international cooperation, and ecosystem integrity. It is an approach which emphasizes dispute prevention by building trust and pursuing common objectives.[8]

Issues: How can abuse of the Precautionary Principle be prevented?

How is independent expertise[9] assured, given that industry is far better represented in the standard-setting Codex Alimentarius Commission than scientific institutions and "real" NGOs (the vast majority of the accredited "NGOs" are in fact industry associations)?

How can a consensual allocation of jurisdiction between the WTO and UN organizations be achieved?

What should be the guiding principles for the development of international law in this crosssectoral domain?

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[7] Halina Ward, "Science and Precaution in the Trading System," Seminar Note presented jointly by the Royal Institute of International Affairs (London, UK) and the International Institute for Sustainable Development (Winnipeg, Can.) during the WTO Ministerial Conference in Seattle, p. 6

[8] Matthew Stilwell, "Applying the EPTSD Framework to Reconcile Trade, Development & Environmental Policy Conflicts," WWF International EPTSD Working Paper, Sept. 1999, p. 5.

[9] Christine Noiville, op. cit. p. 12.