The Cartagena Protocol on Biosafety: An analysis of results

AN IISD BRIEFING NOTE

Aaron Cosbey
Interim director, Trade and Investment, IISD

and

Stas Burgiel
Writer, *Earth Negotiations Bulletin*, IISD

IISD
INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT
INSTITUT INTERNATIONAL DU DÉVELOPPEMENT DURABLE

The International Institute for Sustainable Development is an independent, not-for-profit corporation headquartered in Winnipeg, Canada. IISD receives financial support from the governments of Canada and Manitoba, governments of other countries, UN agencies, and the private sector. IISD's mission is to champion innovation, enabling societies to live sustainable.

Published by the International Institute for Sustainable Development

International Institute for Sustainable Development
161 Portage Avenue East, 6th Floor
Winnipeg, Manitoba
Canada
R3B 0Y4

Tel.: (204) 958-7700
Fax: (204) 958-7710
E-mail info@iisd.ca
Internet: http://iisd.ca

Trade and Investment at IISD
Aaron Cosbey, Interim Director
2619 2nd Avenue NW
Calgary, Alberta
Canada
T2N 0H9

Tel.: (403) 270-2700
Fax: (204) 270-2694
E-mail: acosbey@iisd.ca
Trade and investment Web pages: http://iisd.ca/trade

The Cartagena Protocol on Biosafety: An analysis of results

AN IISD BRIEFING NOTE[1]

Introduction

When, on January 29, 2000, negotiators from over 130 countries checked out of their Montreal hotel rooms carrying agreed final text of an international agreement on biosafety, nobody was more surprised than the environmental community. Betting had been heavy that the meeting would fail, as had the earlier negotiations in Cartagena, foundering on the rocks of heavy commercial interests and conflict with the system of international trade rules.

What happened in Montreal? How strong is the resulting Cartagena Protocol? What does—and doesn't—it do? And what do the results mean for other trade-related multilateral environmental agreements, and their relationship with the WTO? This briefing paper tries to answer these questions.

Background

A detailed history of the Protocol's negotiations can be found on IISD's *Linkages* Web site at http://www.iisd.ca/biodiv/excop/, which has links to daily reports and final summary reports from all the relevant meetings and consultations, as well as excellent background summaries. These were produced by IISD's *Earth Negotiations Bulletin*. *ENB*'s coverage of the meetings and the expertise of its staff are the basis for much of this paper.

The Cartagena Protocol is a protocol of the Convention on Biological Diversity (CBD), Article 19.3 of which provides for Parties to consider the need for and modalities of a protocol on the safe transfer, handling and use of living modified organisms (LMOs) that may have an adverse effect on biodiversity. The deadline for completing negotiations, begun in 1996, was originally late 1998, but was extended to early 1999 after it became clear that more time was needed. An Extraordinary Meeting of the COP (ExCOP) in February 1999 in Cartagena de

[1] This paper could not have been written without the substantial assistance of Howard Mann and a number of other generous and invaluable reviewers: Richard Ballhorn, Paola Bettelli, Langston James Goree VI (Kimo), John Herity, Konrad von Moltke, Beat Nobs, Robin Rosenberg, Risa Schwartz, Sabrina Shaw, Matthew Stilwell and Wanhua Yang. The authors alone are responsible for any errors or omissions.

Indias, Colombia, was supposed to adopt the completed Protocol. But despite intense negotiations delegates were not able to reach agreement. The main areas of contention centred on trade issues.

The failure of Cartagena sent shockwaves through the environmental community, which has repeatedly managed to face down difficult negotiations and come out in the end with agreement. To many, it seemed one more example of the perils of the clash between trade and environmental objectives at the international level, and boded ill for ongoing work in other trade-related multilateral environmental agreements (MEAs). The ExCOP suspended its meeting and agreed to resume at a later date. The Montreal meetings—the resumed ExCOP—were seen by many as the last chance for a Protocol.

The agreed text of the Protocol will be opened for signature in Nairobi in May. The Protocol will then enter into force after 50 countries have ratified it, a process that may take several years. Even when the Protocol is ratified, however, entry into force will be less significant without the participation of the major exporters of the products of biotechnology.

The Issues

The major issues of debate in the negotiations boiled down to the scope of the Protocol, the precautionary principle, the relationship to other agreements, and liability. The following two sections explain how these issues divided the five major negotiating groups, and what the results of the Protocol meant for each. This section briefly introduces the issues.

Scope: The central question here, more or less resolved by the time of Montreal, was whether the Protocol should cover a class of LMOs known as LMO– FFPs—LMOs that are intended for direct use as food or feed, or for processing. In this class fall such widely traded commodities as genetically modified corn, soy, wheat, canola and tomatoes. Those opposed to including commodities in the Protocol had argued that commodities, since they are not intended for introduction into the environment, pose no threat to biodiversity and should not be the subject of a protocol to the CBD. LMOs intended for introduction into the environment, on the other hand—such as seeds and microorganisms—can mutate, migrate and multiply, and therefore may pose unexpected threats to native species. Others argued that it was impossible to ensure that LMO– FFPs would not be introduced to the environment, whatever the intent. They also argued that the Protocol should take into account the human health risks of LMO– FFPs, which the negotiators seem to have understood to mean human health risks from biodiversity impacts and direct contact (allergenic reactions), rather than risks on food safety grounds.

It had been agreed by Cartagena that LMO– FFPs would fall under the Protocol's scope. The tough negotiations then concerned whether they would fall under the scope of the Protocol's Advance Informed Agreement (AIA) provisions. Those opposed argued that subjecting such a massive volume of traded goods to an AIA procedure would be unworkable. Another set of scope issues debated in Montreal concerned the treatment of pharmaceuticals for humans—most of which are products of biotechnology but which are covered by other agreements and pose few threats to biodiversity—and treatment of LMOs in transit or destined for "contained use" in facilities with special safety procedures to prevent release to the environment.

Science and Precaution: The precautionary principle says that in some cases—particularly where the costs of action are low and the risks of inaction are high—preventive action should be taken, even without full scientific certainty about the problem being addressed.[2] In practice this gives governments a fair amount of discretion in setting environmental policy. They must decide in the face of uncertainty how high the risks are likely to be (often the risks are difficult to express in dollar terms, such as risks to biodiversity and human health), how these compare with the costs of action, and what types of actions, if any, are justified. After establishing that Parties could take a precautionary approach to deciding what restrictions they might put on the import of LMOs, the real negotiations thrashed out how to operationalize the principle of precaution. Some feared that the precautionary principle could be an excuse to restrict trade in harmless goods, to protect domestic producers. They argued that such restrictions had to be based on sound science and rigorous risk assessment. Others argued that the sound-science argument itself was an excuse to limit the use of an established principle of international environmental law.

The Relationship to Other International Agreements: The other agreements in question include the Law of the Sea, international transit and transportation arrangements, and international health agreements that address human pharmaceuticals. But the body of law foremost on everyone's minds was the multilateral system of trade rules embodied in the WTO. Since even before the creation of the WTO in 1995 there has been debate about what would happen if

---

[2] The principle is widely used in international environmental law and is, some contend, a principle of customary international law (See, for example, P. Sands, *Principles of International Environmental Law*, Vol. I (Manchester University Press 1995), p. 212; J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law," in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law* (Kluwer, 1996) 29, p. 52.). For a brief discussion of how it relates to trade and sustainable development issues, see Halina Ward, "Science and Precaution in the Trading System," Winnipeg: RIIA / IISD, 2000, <http://iisd.ca/pdf/sci&precaution.pdf>.

the trade-related provisions of an MEA were challenged in the GATT/WTO or (more likely) if a country were challenged for implementing an MEA in a trade-restrictive way. The answer is uncertain; both are international law, both are signed by a large number of nations. The WTO rules are liked by those whose major concern is protectionism masquerading as environmental protection. They set a tough standard for environmental regulations seeking to restrict trade. Those whose major concern is protection of the environment, particularly those involved in negotiating MEAs, do not like the idea of trade lawyers sitting in judgment of environmental regulations. In previous MEA negotiations, the argument has boiled down to whether to insert a "savings clause"—a clause stating that nothing in the agreement shall alter the rights and obligations of Parties under existing international law. The intent of a savings clause is to establish that in the case of conflict the existing WTO rules will trump those of the MEA.

Liability and Redress: The issues here are straightforward, if hard to settle. The question is whether, and in what form, to create a liability and redress mechanism for any damage resulting from the transboundary movements of LMOs. In some form this would involve the exporter, or an insuring agent, to pay for damages resulting from the import of its product. Proponents of such a provision argued convincingly that if it were eventually exercised, then by definition there must have been a need for it. If it were never exercised, there would have been no harm done in including it. The question of "whether" had more or less been settled by the time of the Montreal meeting, leaving just the questions of "how" and "when."

The Major Groups: A Who's Who of the Negotiations

Five major groups had emerged by the final days of the Cartagena meetings. They included the Miami Group (Argentina, Australia, Canada, Chile, the United States and Uruguay); the Like-Minded Group (the majority of developing countries); the European Union; the Compromise Group (Japan, Mexico, Norway, Singapore, South Korea, Switzerland and, in Montreal, New Zealand); and the Central and Eastern European bloc of countries (CEE).

The Miami Group

The Miami Group represents the major exporters of genetically modified (GM) seed and crops, and the developed countries among them have some of the world's most advanced biotechnology industries. The group's interest was to enable free trade of such GM products without burdensome bureaucratic approval procedures, and without allowing room for protectionist trade barriers masquerading as environmental protection.

In Cartagena the Miami Group's aim was to keep LMO–FFPs outside the scope of the Protocol's AIA procedure. They argued that goods traded in these volumes were not amenable to AIA[3], and that since such products were safe for consumption and not intended for introduction into the environment, their biodiversity impacts were minimal. The group supported a "savings clause" within the agreement, and sought to limit the use of the precautionary principle and socio-economic considerations in decision-making. Given existing trade frictions, the group was keen to ensure that decisions should be based on risk assessments and "sound science." The U.S. and Canada recently won a major dispute in the WTO against an EU ban on hormone-treated beef, arguing that the ban was not based on scientific evidence, while the EU argued that it was justified by the precautionary principle (among other arguments). As well, EU member states have recently blocked U.S. and Canadian requests for regulatory approvals of certain LMOs. This has raised suspicions in the Miami Group that those states might use the Protocol to justify WTO-inconsistent trade measures.

The U.S. and Canada have also been in recent tussles with the EU over its plans to impose mandatory labelling of LMOs. As such, the Miami Group did not want provisions in the Protocol that might be used to defend those elements of the regulations they regard as unfair.

The Like-Minded Group

The Like-Minded Group emerged from the G-77 / China (a developing country negotiating coalition) to distinguish itself from the three developing countries in the Miami Group. The largest negotiating group (measured by the number of countries, population and biodiversity), the Like-Minded Group included countries ranging from those with no domestic regulatory structures, legislation or biotechnology industries to those with fairly developed systems. They supported a strong Protocol, in light of the unknown effects of LMOs on the environment and human health, and given the need to protect countries without adequate regulatory or institutional capacity to effectively handle LMO imports. They were also concerned that they might become guinea pigs for field trials of LMOs

The Like-Minded Group called for a comprehensive scope, including LMO–FFPs, arguing that seeds and other LMO products intended for consumption might actually be planted in many developing countries. As well they argued for the Protocol to take into account human health and socio-economic considerations. They also argued for comprehensive identification and documentation requirements on LMO imports. The Like-Minded Group supported a strong

[3] Monsanto estimates that in 1999 over 32 million hectares of land was sown with its GM seed in North America alone.

statement of the precautionary principle, and was the prime backer of tough and concrete text on liability and redress.

The European Union

The EU negotiated as a common bloc throughout the biosafety negotiations. Given public outrage over food safety scandals such as mad cow disease, dioxin-tainted chicken and others, the EU strove for a strong Protocol including coverage of risks to human health. EU ministers were under intense pressure and scrutiny from the public and the press, who had so recently flexed their muscles to great effect at the WTO's failed Seattle Ministerial.

On scope, the EU had pushed for inclusion of LMO-FFPs, while acknowledging that they might merit special treatment under the AIA procedure. They also supported alternative considerations for contained use, transit and pharmaceuticals for humans. On these issues their position generally fell somewhere between those of the Miami Group and the Like-Minded Group. The EU also supported visible identification and documentation for LMOs, given the EU desire to identify GM products through labelling. The EU objected to the inclusion of a savings clause, arguing that it would threaten decisions to deny LMO imports on environmental grounds. The EU instead supported the inclusion of a non-discrimination provision, stating that countries would not discriminate among domestically produced LMOs and those being imported. They also argued for strong language on the precautionary principle and, before Montreal, on human health.

The Compromise Group

The Compromise Group originated during the final days of the Cartagena negotiations with the specific intent to bridge the major gaps between the other negotiating groups by developing compromise positions and alternative formulations. The Group did have joint positions supporting a comprehensive scope and the precautionary principle, although they acknowledged internal difference about the savings clause. While their positions influenced the overall balance of interests on the key issues, the group's contribution to the negotiation dynamics was important in and of itself. The group's inclusion of countries with high levels of biodiversity as well as those with advanced biotech industries provided additional cache for addressing the range of concerns of developed and developing countries.

CEE

Also emerging as a separate negotiating bloc during the final days of Cartagena, the CEE generally reflected a middle-of-the-road position. With general support for including LMO-FFPs, the precautionary principle and preambular references

to other international agreements, the CEE focused primarily on the practicality and applicability of various proposals. The CEE did not represent a divergent position in its own right, often falling in line either with the EU (particularly those states in line for EU membership) or the Like-Minded Group.

Key Elements of the Protocol

The Advance Informed Agreement Procedure

This procedure is the backbone of the Protocol. As noted below, however, it only applies to a small percentage of traded LMOs. The Party of export is obliged to notify (or ensure notification) in writing to the Party of import, before the first intentional import of any given type of LMO. The Party of import then has 90 days to acknowledge receipt of the notification, and advise that it intends to proceed with the Protocol's decision procedure, or according to its domestic regulatory framework.

The decision procedure works as follows. A risk assessment must be carried out for all decisions made (see discussion below). Within 90 days of notification, the Party of import must inform the notifier that either it will have to wait for written consent, or that it may proceed with the import without written consent. If the verdict is to wait for written consent, the Party of import has 270 days from the date of notification to decide either to:

- Approve the import, adding conditions as appropriate, including conditions for future imports of the same LMO;
- Prohibit the import;
- Request additional information, or;
- Extend the deadline for response by a defined period.

The Protocol establishes an Internet-based Biosafety Clearing-House, to which all decisions must be relayed. The first meeting of the Parties will elaborate procedures and mechanisms to help Parties make such decisions.

Five types of LMOs are not subject to the AIA:

- Most pharmaceuticals for humans;
- LMOs in transit to a third Party;
- LMOs destined for contained use;
- LMO– FFPs (discussed below), and;
- LMOs that have been declared safe by a meeting of the Parties.

These exclusions (particularly the exclusion of LMO– FFPs) mean that the AIA covers only a small percentage of traded LMOs—basically, only those destined for direct introduction to the environment of the importer, such as seeds and microorganisms.

LMO– FFPs

LMO– FFPs are not subject to the AIA procedure that covers other LMOs, but are covered by a separate, less restrictive, procedure outlined in Article 11. Parties making a final decision about the domestic use of an LMO must notify the other Parties of the decision through the Biosafety Clearing-House.

Thus, while the AIA procedure lays first responsibility on the Party of export to notify its intent to export, the procedure for LMO– FFPs lays first responsibility on potential importers to develop and announce regulations proactively. The result is less onerous for the exporters, who will not have to wait for the Parties of import to respond to their notifications. As well, exporters of LMO– FFPs do not face the burden of proof established for exporters of other LMOs, who may have to conduct and finance risk assessments in support of their notifications.

Shipments of commodities, however, that contain, or may contain, LMO– FFPs must be identified as such in their accompanying documentation. The details of this procedure still remain to be worked out, and are supposed to be settled within two years after the Protocol enters into force. Such shipments must also be accompanied by a list of other information, including the identity and relevant traits and characteristics of the LMOs, any requirements for safe handling, storage, transport and use, and information about the importers and exporters. These requirements are helpful to countries that are enacting domestic labelling schemes for LMOs and products thereof. But they are unwelcome for exporters, who will be forced either to segregate LMO and non-LMO commodities, or to label all exports “may contain LMO– FFPs” and likely pay the penalty in lower prices.

The threat of costly mandatory segregation made the provision on documentation and identification the last to be settled in the Montreal negotiations. Those in favour of labelling and segregation saw the result as disappointing, given that no hard rules will likely be developed for two years after the Protocol’s entry into force. The Miami Group had fought for this time frame, arguing that segregation is not currently feasible. But others argued that the growth trend for LMO–FFPs in world trade would mean that in two years’ time segregation would be even less feasible—that market realities would make the issue moot.

Relationship to the WTO

The final text does not settle the question of how the Protocol relates to the WTO and other international agreements. In fact it looks like a conflict postponed, rather than a conflict avoided.

The Miami Group got what it wanted. The text states that "this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreement." The EU also got what it wanted. The next paragraph of text states that, "the above recital is not intended to subordinate this Protocol to other international agreements."[4] And the Like-Minded Group got what it wanted: both statements appear in the preamble, not in the main text. It is not clear where this compromise leaves the Protocol relative to the WTO.

The question of primacy of one set of rules over another, however, is only important if the two sets of rules conflict. In the case of the WTO vs. an MEA, it might also be important in determining where an MEA-related trade dispute would be heard. On the first question, there seems to be no conflict between WTO rules and the Cartagena Protocol provisions. In fact, the wording of the two preambular passages would suggest that both the WTO rules and the Protocol have to be read as mutually supportive and not conflicting. As we will see below, this point becomes important in the context of the Protocol's precautionary provisions.

Conflict may well arise, though, over how Parties implement the Protocol's provisions. For example, a Party with a small amount of scientific evidence might decide to ban imports of GM tomatoes, arguing that it is allowed to do so under Article 11's precautionary principle provisions. Assuming the GM tomato exporter agreed that the Protocol was not being breached it could still argue that the Party was violating WTO rules. Recall that Parties' WTO rights and obligations are still in force.

This takes us to the question of where such a dispute would end up. While the WTO's Committee on Trade and Environment has expressed its preference for disputes arising from an MEA to be settled within the MEA, serious trade-related disputes under this Protocol would almost certainly end up in the WTO. The complainant in the example above is, after all, claiming that WTO rules, not Cartagena rules, are being violated.[5] Most Parties would probably be loath to

---

[4] The language here is similar to that found in the preamble of the Rotterdam Convention on hazardous chemicals and pesticides: "understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements…".

[5] The Cartagena Protocol itself has no dispute-settlement mechanism, meaning that the CBD's mechanism applies—a resort to the International Court of Justice. The Protocol's language on

create the kind of conflict a WTO case would engender, and Article 34 (Compliance) does commit the parties to establish mechanisms to address non-compliance presumably, among other things, to avoid such scenarios. But all this might matter little if important commercial interests were at stake.

Notwithstanding the fact that WTO rules still apply and the WTO will probably be the forum for settling serious trade-related disputes, the "not subordinate" language in the Protocol is important for two reasons. First, it sets a precedent, being the strongest such language yet from an MEA. If a conflict *were* to arise between WTO rules and the Protocol, at least there would be ambiguity about which would prevail. Second, were a dispute over the implementation of the Protocol to be brought to the WTO, it would be very difficult (some suggest politically impossible) for the dispute panel to ignore the Protocol's wording.

It can be argued, though, that a WTO dispute panel would have to consider the Protocol's provisions even without the "not subordinate" language. It is common practice for panels to use non-WTO law, including MEAs, to help interpret WTO law.[6] In fact, it is argued in the next section that in some respects the Protocol is now the framework within which LMO trade will be judged in the WTO.

Science and Precaution

The Protocol contains a strong version of the precautionary principle.[7] Article 1 (Objective) states that the objective of the Protocol is to be pursued "in accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development." Parties also reaffirm their commitment to the precautionary approach in the preamble. More important, that commitment is put into practice in Article 10, which describes the procedure by which parties decide how to react to proposed imports of LMOs. Paragraph 6 states that "lack of scientific certainty … shall not prevent [a] party from taking a decision, as appropriate, with regard to the import of the living modified

---

compliance (Article 34) centres on cooperative procedures to encourage compliance, such as provision of advice or assistance, rather than on a system of litigation.

[6] For example, the Appellate Body in the WTO's Shrimp-Turtle case, in trying to define "natural resources," looked to the 1982 United Nations Convention on the Law of the Sea; the Convention on Biological Diversity; the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

[7] While the text never refers to the precautionary principle (the preambular reference is to the *precautionary approach*), this does not change the fact that the principle is clearly incorporated in the Protocol. The wording in Articles 10 and 11 is a direct derivative of Principle 15 of the Rio Declaration on Environment and Development. And, while the precautionary principle is similarly never referred to in the SPS Agreement, the Dispute Panel in the WTO U.S.-EU Beef-Hormone case argued that, "the precautionary principle has been incorporated and given a specific meaning in Article 5.7" of the Agreement.

organism in question…." Similar wording appears in Article 11, which covers the special case of LMO–FFPs. In other words, the precautionary principle can be used in deciding whether to prohibit or restrict import of LMOs.

But what exactly does this mean, if the provisions of the WTO's Agreement on Sanitary and Phytosanitary Measures (SPS) are also in force, as per the preambular language? The SPS Agreement, like the Protocol, spells out what procedures signatories must follow in restricting trade in the face of scientific uncertainty. Its requirements are stricter in a number of ways than those of the Protocol. Among other things, it obliges members, in setting levels of protection, to:

- Take into account economic factors such as "the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks";
- "Take into account the objective of minimizing negative trade effects," and;
- "Avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."

These are fairly onerous obligations, and clearly balanced toward protecting commercial interests from unfair discrimination. All these obligations (and the others found in the SPS Agreement) are in force for a Party as it exercises the precautionary principle in making its decisions under the Protocol.[8]

The central question, then, is: does the Protocol in any respect change the Parties' ability to exercise the precautionary principle? It does, by better defining that principle in at least the following ways:

- The SPS does not spell out exactly what a risk assessment entails, but the Protocol does so in detail in Annex II.
- The SPS does not mention risk management, but only risk assessment. The Protocol (in Articles 15 and 16) makes it clear that both exercises are necessary, defining the latter as the gathering of the data, and the former as the building of a regulatory regime based on that data. It further sets out some guidance in creating that regime; for example, asking Parties to try to ensure that any LMO should undergo an appropriate period of observation

[8] Note that we assume here that the SPS Agreement is the applicable WTO law for trade in LMOs. This is likely the case, but it is not a settled issue.

commensurate with its life-cycle or generation time before it is put to its intended use.

- The Protocol explicitly allows Parties to take into account socio-economic considerations in making their decisions, whereas the SPS says nothing on the subject.
- The Protocol is specific about the process for review of decisions in the light of new evidence (Article 12), whereas the SPS is ambiguous about how to treat measures adopted provisionally in the face of uncertainty.
- The provisions in Article 15 go some distance toward laying the onus on the exporter to establish the harmless nature of the LMO in question. Paragraphs 2 and 3 state that the party of import may require the exporter to carry out the risk assessment, and it may require the notifying party to foot the bill.[9] Again, on this question, the SPS is silent.

The significance of the Protocol's precautionary provisions seems to be that they fill in some of the gaps in the SPS Agreement. They enrich the SPS by adding details that help operationalize the precautionary principle in the context of LMOs. This gives real meaning to the preambular recognition that trade and environment agreements should be mutually supportive. Here, an environmental agreement is in effect giving specificity to a trade agreement.

As well, the Protocol arguably establishes the precautionary principle as a principle of international environmental law, and perhaps—since it can be used based on human health and socio-economic considerations—of customary international law. The WTO's Beef-Hormones Appellate Body declined to take a position on this question, noting that precaution's status as a principle of general or customary international law was "less than clear." It is clearer now.

Liability

Liability is another issue postponed, but this time explicitly so. Mindful of the fact that it took 10 years to draft an agreement on liability and redress in the Basel Convention (which deals with trade in hazardous waste), negotiators agreed not to spend time negotiating this issue in Montreal. Article 27 commits the first meeting of the Parties to put in place a process to elaborate rules and procedures on liability. It sets a period of four years for completion of this task.[10]

---

[9] These are two separate rights. Presumably, the Party of import could have the risk assessment done by a third party and require that the notifier pay the bill.

[10] It is not clear whether this means that at the end of four years the rules themselves will be in place, or just the process for elaborating the rules.

The commitment to include such a provision is an important environmental achievement. But the champagne will have to wait at least four years; a meaningful mechanism in the end is not a foregone conclusion.

Analysis and Conclusions

The success of the Cartagena Protocol took many people by surprise, but perhaps in retrospect the odds makers should not have been so certain. Scant months before the meetings in Montreal the WTO had shocked the world by failing to launch a new round of trade negotiations in Seattle. Among the causes for Seattle's failure was powerful concerted public protest against the elevation of commercial interests over other social-policy concerns, including the environment. Also responsible was a negotiating process that did not take serious account of the interests of most of the WTO's developing country members. So soon after Seattle, and in the glare of public attention generated by activist NGOs, key governments clearly had no desire to undermine progress on a treaty that so directly aimed to protect the environment and build capacity in developing countries—and certainly not in the name of trade interests.

The informal consultations between Cartagena and Montreal also contributed to Montreal's success, as did their chair, the president of the ExCOP, Colombia's Minister for the Environment Juan Mayr, who strove for transparency and democracy in the proceedings. By the time of Montreal, all the major groups seemed more willing to talk to each other. As well, Switzerland's chairing of the LMO–FFP contact group, Canada's chairing of the scope contact group and Cameroon's chairing of the relationship with other international agreements contact group were key to reaching the compromises necessary to conclude the negotiations.

Mayr was innovative in creating an unusual negotiating procedure for the informals—the "Vienna setting."[11] Two representatives from each of the five major groups sat at the table and spoke for their respective groups, unless there was a need to proceed otherwise. It was widely agreed that this novel process helped facilitate progress on the key issues. Given the WTO's difficulties in Seattle with a process that created strong resentment among the Members, it is interesting to note the example of the CBD—not so much the Vienna setting itself as the ability to innovate to fit the needs of the situation.

Montreal's unexpected success will have powerful and wide-reaching effects. First, for other MEAs in process, Cartagena had been a disaster. After always somehow pulling off difficult and protracted negotiations at the last minute (the

[11] So called because it was first used in the Austrian informal consultation in Vienna.

Kyoto Protocol and the Convention to Combat Desertification spring to mind), negotiators were shocked to find that failure was indeed conceivable. The success in Montreal puts some life back into the MEA negotiation process in time for important meetings of the CBD and the Framework Convention on Climate Change in 2000.

It is also important that the Protocol broke new ground with strong "not subordinate" language, though as noted above its articulation is only slightly stronger than that of the recent Rotterdam Convention. While this paper argued that there might be no conflict between the Protocol and WTO law, the ambiguity left by the preambular language is still troubling. There will probably be conflicts in the implementation of the Protocol, the precautionary provisions being a likely battleground. Perhaps the most valuable potential result of the "not subordinate" language in the text would be a heightened sense of urgency. A WTO dispute over trade measures taken pursuant to this Protocol would be a no-win situation, with unacceptable casualties on both the trade and environmental sides. It is hard to imagine a sharper spur to collaborative preventive action.

From an environmental perspective, one of the highlights of this Protocol must be its treatment of the precautionary principle. Even though the strong provisions in the Protocol are limited by the strictures of the WTO SPS Agreement, it is an important precedent to have the principle so fully elaborated in an international agreement. The text makes it clear that there are times when restricting trade is appropriate for the public good, even when there is a "lack of scientific certainty." As well, the precautionary principle's treatment in the Protocol will make it much harder to argue that it is not a principle of customary international law. And it is noteworthy that the burden of proof is put on the Party of export and notifier, who can be required to conduct and/or finance a risk assessment. Perhaps most interesting is the way in which the Protocol's precautionary provisions actually inform and supplement those of a trade agreement.

The Cartagena Protocol overall is a mixed package. Some of the tougher issues have been postponed until a later date, and others remain unsettled through ambiguity. But the progressive elements of this agreement—the strong elaboration of the precautionary principle prime among them—make it a strong addition to the body of international environmental law. It is also welcome as a signpost on the road to more enlightened trade policy-making. The failure in Seattle, the denial of fast-track negotiating authority in the U.S., the death of the OECD efforts to conclude an investment agreement, and now the Cartagena Protocol—these are all about making trade and investment policy reflect a better balance between commercial interests and other public policy objectives. But

while most of these events were roadblocks against undesirable outcomes, what happened in Montreal was an exercise in road-*building*. Though we have far to go, the Cartagena Protocol may be the closest we have come yet to reconciling trade and environmental objectives.