Abdication of Responsibility for Biosafety in the Name of Free Trade

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1. Introduction

Negotiations on biosafety, or safety in modern biotechnology, have been carried out under the Convention on Biological Diversity (CBD) since 1996 but are now stalled. There are now moves by some countries in the OECD member (industrialized) countries to take up the issue of trade in genetically engineered or modified organisms (GMOs) in the World Trade Organization (WTO). Since what distinguishes GMOs from other commodities of plant, animal or microbial origin is that they may pose risks to the environment and to human health different from the non-modified commodities, it will still be the safety aspect of genetic engineering (biosafety) that would figure even in the WTO forum.

I have been dealing with the issues of biodiversity and biosafety since 1991, when I got involved in negotiating the CBD . I became Co-Chairman (with Mr Veit Koester of Denmark) of the scientific panel (Panel IV) established by UNEP in 1993 to explore the issue of biosafety. I then served as the spokesperson of the African Group in the negotiations for a Biosafety Protocol, which are still going on. In February 1999 in Cartagena, Columbia, the majority of the members of the G-77 and China created the Like-Minded Group and chose me as its chief negotiator. I have, therefore, followed these developments over the whole process. I believe that any Southern negotiator in either the trade agreements and negotiations under WTO, or in environmental agreements and negotiations in any forum, could benefit from a brief summary of the perspective my experience has given me on this issue.

I will divide this brief summary into 2: a very brief description of the development of the contending trends, and a brief description of the interplay between trade and safety in the negotiations for a Biosafety Protocol.

2. The Contending Trends in the Negotiations for a Biosafety Protocol

Already in 1992, when the negotiations on the CBD were finalized, the world had become aware that modern biotechnology (genetic engineering) could pose risks to the environment and human health [Article 8 (g) and 19.3 of CBD]. But also already in 1992, it had become clear that the United States of America was going to fight those who wanted safety, because this was regarded as a stumbling block to its commercial interest. The United States of America, feeling confident of both a continued leadership in genetic engineering, and a determination to control the global market in genetically engineered products, refused to make it possible to access these products even for purposes of biodiversity conservation, without paying royalties. Therefore, when access to technology was considered in Articles 16.1-16.4, the United States of America insisted on the inclusion of the acceptance of patents and other intellectual property rights as a precondition. It was this insistence by the United States of America that led to the introduction of Article 16.5. This Article states that Parties recognize that patents and other intellectual property rights may influence the implementation of the Convention, and such rights should be made supportive of the objectives of the Convention and not be allowed to go counter to it. The implied criticism of patents and other intellectual property rights was so repugnant to the United States of America that it contributed substantially to its refusal to ratify the CBD.

In 1993, UNEP established a Panel of Experts (Panel IV) to explore the need for and modalities of a Biosafety Protocol and to make its recommendations. The USA was included. The USA delegation kept insisting that all genetic engineering did was mix genes from different individuals, which is what sexual reproduction does, and which is thus as old and as well tried as life itself. This is the basic thinking behind 'substantial equivalence': when my wife's genes and my genes mix to give us a child, that is considered the same as when the scientist, at the same time, introduces the gene for snake venom into the egg that will became our child. Our venomous child would then be considered substantially equivalent to my wife and me. Suppose the child bites my wife while suckling?

In spite of the efforts of the USA to scuttle the process of initiating negotiations for a Biosafety Protocol, and in spite of its non-ratification of the CBD, it was included as a negotiating partner for biosafety by the 1995 decision of the Conference of the Parties of the CBD, which took place in Jakarta.

It is this trend which has continued throughout the biosafety negotiations and ended up in their collapse in Cartagena, Columbia, in February 1999.

In the first negotiation session for a Biosafety Protocol, the G-77 and China failed to make any headway because Argentina kept voicing the same position on issues as did the USA. But in Cartagena, together with Chile and Uruguay, Argentina joined a newly created group consisting also of the USA, Canada and Australia, called the Miami Group. This made it possible for the members of the G-77 and China to become united again and focus on what is

important to the South. The newly united South gave itself the name, the Like-Minded Group.

In 1992 and since then, Europe and the other OECD members have been taking a more inclusive attitude with regards to the use of modern biotechnology, and a more realistic view of the risks involved than the USA did. Nevertheless, the whole of the OECD was motivated to use the power vacuum created globally by the collapse of the USSR to push globally for their political and socio-economic views, especially their Thatcher-Reagan version of " free trade". That is why they all pushed for the creation of the WTO. But now, Europe seems to have second thoughts about the suitability of the WTO for fully dictating the norms of trade in GMOs. Thus, there is a wish by Europe to prevent the subjugation of the Biosafety Protocol to the WTO agreements, and to introduce the essentials of trade into the Biosafety Protocol.

The thinking in the Like-Minded Group is that safety is paramount since most things unsafe tend to be tried out in developing countries. Southern natural environments are hotter and more biodiversity-rich and thus very different from those of the North. Therefore, if biosafety is subsumed by the trade agreements of WTO, this global body would not have adequate sensitivity for safety in the marginalized South.

It is a clash among these trends of thinking that paralyzed the negotiations in Cartagena in February 1999. The effort to revive the biosafety negotiations got off to a good start in the informal consultations, which took place in Vienna in September 1999. Formal negotiations have now been scheduled for January 2000.

3. Trade in Biosafety?

It seems that many OECD countries are pushing for the inclusion of trade in GMOs to be considered in the Seattle meeting of WTO in November-December 1999. What makes trade in GMOs different from trade in other commodities is the biosafety dimension. The bringing-in of the WTO institutionally must, therefore, be in order to make the safety rules that govern genetic engineering come under this institution and confront the Biosafety Protocol negotiations with a *fait accompli*, or with the threat thereof. This will direct the outcome of the negotiations towards enhancing the Thatcher-Reagen version of free trade even at the expense of safety.

In the following paragraphs we shall look at the specifics of what the USA and, in general, the Miami Group wants in strengthening the WTO. We shall also look at what the European Group wants in continuing to push for "free trade" without subjugating the whole of biosafety under the WTO agreements. In contrast, we will see that what the South (the Like-Minded Group) wants is to deal with safety and trade as sectors that must be developed in their own rights, so that if trade and safety clash, states retain the flexibility to decide for, or against, one or the other based on their national interests and capabilities. To do this we will go through the controversial issues in the draft Biosafety Protocol under negotiation.

3.1 Free Trade and the WTO

There are three important provisions in the negotiating draft to consider in this context:

Article 31 states:

> *The provisions of this Protocol shall not affect the rights and obligations of any Party to the Protocol deriving from any existing international agreement to which it is also a Party, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.*

This Article [based on Article 22.1 of the CBD] would effectively subjugate the Biosafety Protocol to the World Trade Organization agreements, despite the qualifying phrase at the end. Legitimate domestic steps to protect human health and the environment, taken by a Party according to the first part of Article 2.4, would then be liable to reversal by the WTO under the threat of trade sanctions authorized by the Disputes Settlement Mechanism. It could be argued that, since the provision is the same as Article 22.1 of the CBD, it should be left in place. It should, however, be pointed out that the CBD came before the WTO agreements, and it is thus appropriate that the Biosafety Protocol become updated and deal with the safety problems created by those agreements. In the opposite direction, the Miami Group wants to delete the words "except where ... biodiversity" because they do not regard the present text as enough of a subordination clause.

Paragraph 2 of Article 22 states:

> *The Parties shall also ensure that measures taken to implement this Protocol do not create unnecessary obstacles to international trade.*

This paragraph stipulates that safety measures shall not "create unnecessary obstacles to trade". It does not invoke "existing international agreements", meaning WTO agreements, to determine what are "unnecessary obstacles to trade" and it is thus softer than Article 31.

Article 22.1, which was introduced by the European Group, states:

> *The Parties shall ensure that measures taken to implement this Protocol, including risk assessment, do not discriminate unjustifiably between or among imported and domestically produced living modified organisms.*

The Miami Group, understandably, sees this whole Article 22 as an effort to establish a set of trade rules under the Biosafety Protocol and outside the WTO. The Miami Group, therefore, wants the entire Article 22 deleted. It will be recalled that the European Union introduced this Article into the draft protocol.

For the Like-Minded Group, the provisions of Article 22 are also objectionable, though not to the same extent as those of Article 31.

The last clause of Article 2.4 is also on trade (Article 2 contains General Provisions). It states that any more stringent protection than is required by the Protocol can be taken, provided

that it does not clash with "other obligations under international law", i.e. under the WTO agreements. This would mean that, in the event of a clash, trade rules would prevail. This may look benign since it is only the additional protection that can be affected, not what the Protocol has explicitly allowed.

But many members of the Like-Minded Group have warm tropical or semi-tropical environments which are both much more biodiversity rich, and more suitable for harbouring organisms that cause health problems than the harsher Northern environments, and therefore this clause could have serious implications for the South where the necessity for more protective action is thus higher.

If we were to imagine that Article 31 could be deleted without the deletion of Article 22, we can assume that the European Group would be happy to have the last clause of Article 4.2 also deleted since this deletion would strengthen the trade rules created by Article 22 by enabling these to remain independent of, and thus counterbalance, the WTO.

It should be pointed out, however, that this "alternate" trade provision would also subjugate safety to trade, though to a lesser extent.

3.2 Confidential Information

Technical information which is important for the commercial operations of a firm is often not disclosed, but kept confidential.

In much of the South, the confidentiality of information is not an issue that has to be given priority attention. Article 18.3 requires that each Party has "procedures to protect such [confidential] information ...". Putting such procedures in place and keeping them functioning requires money. A Party's development priorities may, owing to demands from more pressing needs, not yet be the putting of such procedures in place. It may be acceptable, however, that if such procedures are in place, an importing party should treat information received from an exporter/exporting party in the same way as it does domestic confidential information.

But, even if cost were not an issue, why should a country focus on, and deploy its meager trained human resources in, a sector which is the priority of only some other countries, and the wealthiest countries at that? Even the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement of the WTO (Article 39) does not impose such a requirement. The Miami Group, who wanted to delete Article 22 of the Draft Protocol because it would create a new trade regime, will have to argue against themselves to defend Article 18.3.

In substance, the Miami Group's position on this issue also goes beyond the TRIPs criteria which essentially seek to protect information that has commercial value because it is secret, and thus needs to be kept away from competitors. In Article 18.6 all other countries agree that the following information "shall not be considered confidential":

i. Name and address of the notifier (exporter)
ii. A general description of the LMO
iii. A summary of the risk assessment of the effects on the conservation and sustainable

use of biodiversity, taking also into account human health

iv. Any methods and plans for emergency response.

The Miami Group, however, insists that this information "shall not generally be considered confidential". The Group's demands for confidential information treatment far exceeds any existing law, and makes a mockery of the United States of America's demand in the WTO for transparency in the trade of transgenic agricultural products.

3.3 Non-Parties

The USA knows that without being Party to the CBD it cannot be a Party to the Protocol. Therefore, it is insisting that trade with non-Parties be possible (Article 21), and is resisting any attempt to bring it within the ambit of the Protocol's obligations. A number of countries from the South had earlier wanted a provision that prohibits trade with non-Parties, as in the Montreal Protocol on Ozone-depleting Substances. The compromise scheme being proposed by the negotiating draft "encourages" Parties to enter into trade agreements with non-Parties which are "consistent with the objectives of this Protocol" and provided that such agreements "do not result in a lower level of protection than that provided for by this Protocol".

The USA is adamantly against this, insisting that its obligation should remain as only being "compatible with the objective" of the Protocol. The rest of the world, even the South, feels the USA should not be left out, but that its safety standards and responsibilities towards the rest of the world which it targets as its market should be as good as what the Protocol requires. The USA does not want this.

3.4 Socio-Economic Considerations

Article 24 as presently drafted, does not enable the inclusion of socio-economic considerations in risk assessment. It seems that it is the fear of the Miami Group that the ability to include socio-economic variables in risk assessment would favour the efforts of the Europeans who want trade rules outside the WTO (see section 3.1 above).

Even the provision that "Parties, in reaching a decision on import, may take into account, ... socio-economic considerations ..." in Article 24.1 is predicated by the proviso "consistent with their international obligations", which is obviously meant to invoke WTO trade rules and influence decision-taking. The current negotiating draft of the Biosafety Protocol has left out a provision on import substitution which the South had wanted to keep. The wording was:

> *"A Party that intends to produce, using a living modified organism, a hitherto imported commodity, shall notify the affected Party or the Party likely to be affected sufficiently in advance to enable the affected Party to undertake appropriate measures for conservation of potentially affected biological diversity. The Party substituting such product shall provide financial and technical assistance to the affected Party for undertaking these measures if the affected Party is a developing country."*

If the OECD is to honour its commitments under Agenda 21 and the CBD, this text has to be

re-instated into the Protocol. But both the Miami and European Groups are seeing this wording as a potential instrument in their trade wars. When two elephants fight, the grass gets trodden under.

3.5 Scope of the Biosafety Protocol

When the CBD was negotiated, the participating governments saw the Advance Informed Agreement (AIA) procedure (Article 19.3 of the CBD) as the mechanism for ensuring safety in the transboundary movement of GMOs. This mechanism has the following essential elements:

a. Notification by making available accurate and complete information to the country of import and by taking full responsibility for the completeness and accuracy. This is to be done by the Party of export or to be required by law of the Party of export that it must be done by the exporter.

b. A risk assessment to evaluate possible consequences in the Party of import together with an evaluation of all information is to be undertaken.

c. An explicitly written consent or refusal is to be given by the National Competent Authority of the Party of import to the National Competent Authority of the Party of export.

d. A regulatory system in each Party is to ensure that the AIA procedure is strictly observed.

The Miami and European groups and the other OECD countries (the Compromise Group) in the Biosafety Protocol do not want the AIA procedure to be followed when dealing with GMOs used as pharmaceuticals, under containment (the term "contained use" itself is broadly defined), and in transit.

They argue that pharmaceuticals are adequately regulated outside the Biosafety Protocol. But this may be true only to the extent that pharmaceuticals can be dangerous to human health on an immediate cause-and-effect relationship. It is not so on their impact on changes to the nature of human cells or to the nature of the many associated micro-organisms. These pharmaceuticals will also inevitably come into contact with the open environment. What changes would they induce? What changes would they induce, for example, on soil bacteria?

The OECD groups argue that GMOs under containment (i.e. surrounded by barriers meant to prevent contact with the outside world) cannot come in touch with the open environment. But, though it sounds credible to argue that a well-managed laboratory can be safe most of the time, it would be naïve to assume that, for example, a genetically modified yeast will always be confined to the brewery precincts. It is only the desire for trade at any cost that is the motive behind this insistence on exempting from the AIA procedure GMOs designed for contained use.

GMOs in transit can be accidentally released into the environment of the transit country. Ideally, therefore, the transit country should give its consent through the AIA procedure. The countries of the North all argue that this would kill trade. The minimum substitute for the AIA procedure should be a detailed notification including information on risk management. But even this is being resisted.

The only category of GMOs all countries seem to agree should go through the AIA procedure are those meant for planting in the field or for application on the soil, in the mine, or in open waters (i.e. "intentional introduction into the environment").

Perhaps the most blatant disregard of the interests of the South is shown by the Miami Group who are insisting that GMOs meant for food, feed and processing (commodities) move about completely unregulated, and the AIA procedure should not apply to them. They suggest that they will put information on the GMOs that they release into the environment on a web site and it is up to countries to notify themselves by referring to this web site. Of course, they do not say how those countries can, if they do not want a particular GMO, prevent it from coming into the country since the Miami Group also insists that they will not label their GMOs. While consumer pressure is growing for labelling in the US, and Australia has agreed to domestic consumer labelling, these Miami Group countries are still against any international legal obligation under the Protocol that would require labelling.

The Miami Group is joined together by the commonality of being global grain exporters. Grain travels within a developing country unprocessed. It is cleaned at home and often processed at home, or in a small village mill. All this makes it certain that grain will be spilt, and grow and pollute any genome (genetic make-up) of the same or related species. Worst still, there is nothing to stop farmers from planting the imported seed in their fields. Therefore, for developing countries, commodities have to be regulated by the AIA procedure. If this is not done, the AIA will have no value for a developing country. This is because what the AIA procedure is meant to regulate, i.e. imported genetically modified seed for planting, can come into the country intended for food without going through the AIA procedure.

4. Why Seattle?

The United States of America, Canada and Japan want to raise the issue of GMOs in the WTO meeting in Seattle. I believe that they are doing this so that:

1. The USA can fight it out with Europe in a forum where its influence is supreme;
2. The OECD can fight the South in a forum which reduces the multitudes of voices of the disadvantaged of the world to the trickle that is their combined economic power; and
3. The dimensions of safety can be reduced to refer only to the conditions that please those that are in global control of wealth and power.

The Southern strategy in Seattle should thus be to keep safety considerations in the fora where life is what counts. Even if poverty were to be accepted globally, condemnation to a state of growing risks to life should be rejected. The safety of GMOs should be considered under the CBD with the maximum meaningful participation especially of the poor and the powerless of the South. The effort of the South and those in the North who cherish peace to enjoy their affluence and those who cherish justice and wish a better life for all should thus be to keep GMOs out of Seattle.