

By Carolyn Raffensperger

New Biotech Protocol Modifies Trade Rules

In the wake of the rocky World Trade Organization negotiations in Seattle late last year, neither international trade nor the treaties which govern global affairs will remain the same. The public outcry made clear that trade must not, among other things, undermine national sovereignty, particularly in the area of environmental protection.

A prime example of the impact of Seattle is the new Cartagena Protocol on Biosafety, which was completed January 29 in Montreal. The protocol focuses on transboundary movement of any "living modified organism" resulting from biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity. In adopting the protocol, the delegates of the 128 parties to the Convention on Biological Diversity signed at the Earth Summit established a new benchmark for how the world community should balance trade and the environment.

Most importantly, the protocol marks the first time that the precautionary principle has been embedded in the body of a treaty, rather than appearing as hortatory language in a preamble, making the principle not simply a goal but a matter of international law. In the area of biosafety, at least, policies that react to adverse impacts are no longer the norm. The precautionary principle is now the international default setting. As the 1992 Rio Declaration states, "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific cer-

tainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

As part of the precautionary approach, the treaty creates an "advance informed agreement" procedure to protect countries that import food or animal feed containing living modified organisms. The treaty allows importers to "avoid or minimize potential adverse effects of living modified organisms on the conservation and sustainable use of biological diversity" by limiting the importation of these organisms even when there is insufficient relevant scientific information about the extent of potential adverse effects.

The protocol was signed three days after the European Union issued a key statement on the precautionary principle. The EU asserts that, like other WTO members, it has the right to establish the level of protection for the environment and health of humans, animals, and plants that it deems appropriate — noting it will defend the right to use the precautionary approach internationally.

These two documents shore up the precautionary principle in international law and put the world on notice that each country has the sovereign right to determine health and safety standards for its people. Although a signatory, the United States is not a party to the Biodiversity Convention and thus could not participate directly in the Montreal talks. But five treaty parties — Argentina, Australia, Canada, Chile, and Uruguay, all large food exporters which, along with the United States, account for more than 90 percent of the world's genetically modified crops — vigorously opposed the protocol because of trade concerns and worked to weaken some of its key provisions.

Even though the group was successful at getting the negotiations postponed because of trade concerns at the original negotiating session, in Cartagena, Colombia, in February 1999, and forcing several compromises in Montreal, the final language of the agreement apparently puts the protocol on an equal footing with the treaties governing the World Trade Organization. That means that trade agreements cannot be used in derogation of those rights — although, as often happens with diplomatic documents, the language also says that par-

ties to the treaty are not relieved of other international obligations, presumably meaning the WTO regime.

The precautionary principle will be front and center again this March, when a treaty on "persistent organic pollutants" will be discussed in Bonn, Germany. Now that the principle has been solidified in international law by virtue of the Cartagena Protocol, the necessary force to include it in the body of the POPs treaty should be sufficient to further extend the reach of the principle into global environmental and public health matters.

The negotiations in Bonn will refine the relationship between precaution and sovereignty, since the POPs treaty will apply not just to trade in questionable commodities but to countries that use them within their own borders even though they may affect other countries' environments. The POPs accord should establish that countries are obligated to abide by minimum international standards, based on a precautionary approach, on the use of persistent pollutants domestically and in trade, but retain a sovereign right to set higher health and welfare standards under the principle.

As the issues of precaution and national sovereignty unfold, the old charge of using the precautionary principle as an unfair barrier to trade will surely arise again. It is protectionist: it protects the environment. However, such a "protectionist" stance based on sovereign concerns can also provide trade opportunities. For instance, a restriction on beef hormones, which the EU has used, opens up a marketing opportunity for beef raised without hormones.

The success of the precautionary principle in responsibly limiting trade of items that can damage the environment as well as promoting trade of things that benefit public welfare will depend on how much intellectual capital we invest in grappling with the limits of science to predict harm, methods for coming up with safer alternatives to harmful activities, and democratic processes for setting goals for the kind of world we want to live in.

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