

Food and Biotechnology

Reflections on the Biosafety Protocol Negotiations in Montreal
January 2000

by *Mark S. Winfield, Ph.D.*

Introduction

At 5AM Saturday, January 29, representatives of more than one hundred and thirty countries, gathered in Montreal adopted a Protocol on Biosafety under the United Nations Convention on Biological Diversity (CBD). The early morning conclusion of the Extra-ordinary Conference of the Parties to the Convention brought three years of negotiations on the Protocol to a close.

Although the Protocol suffers from a number of significant gaps and ambiguities, its conclusion represents a major achievement for countries and societies around the world concerned about the impacts of modern biotechnology on their well-being. The outcomes of the biosafety negotiation also have significant implications for the future relationship between international trade and environmental protection agreements.

The Road To Montreal

The development of the Protocol was mandated through the CBD, completed at the Rio Conference on Environment and Development in 1992. The drafters of the Convention were conscious of the looming commercialization of genetically engineered crops, fish, animals and microorganisms, and the potential threat that this could pose to the environment and human health.

The actual negotiations on the Protocol began in July 1996, and following six negotiating sessions, were to have been concluded at an Extra-Ordinary Conference of the Parties to the Convention in Cartagena, Colombia in February of last year.

However, the negotiations in Colombia collapsed in the face of intense opposition from a group of six countries (Canada, the United States, Australia, Uruguay, Chile and Argentina) called the Miami Group. The Miami Group emerged from the Cartagena meeting with two major objectives with respect to the Protocol: the exemption of transboundary movements of modified organisms that are commodities for use in food, feed or processing from the rules established through the Protocol; and the subordination of the Protocol to the World Trade

Organization (WTO) rules regarding international trade.

These six countries had invested heavily in agricultural biotechnology, and wanted to ensure that the Protocol did not permit countries to refuse imports of genetically engineered foods and other products on anything other than the extremely restrictive rules established by the WTO. An attempt to restart the negotiations in Vienna in September 1999 again failed in the face of the Miami Group's intransigence.

Despite being the first developed country to sign the Convention on Biological Diversity, Canada was the Miami Group's chief public spokesperson from its formation. Moreover, in an obvious attempt to shut down the Biosafety negotiations altogether, Canada spearheaded efforts to begin parallel WTO discussions of the international rules for the movement of genetically modified organisms at the November 1999 Seattle WTO Meeting. This effort was ultimately unsuccessful, due to interventions by the European Union Environment Ministers.

The stakes in Montreal, consequently, were very high. If the Miami Group succeeded in its efforts to subordinate the Protocol to the WTO rules, or prevent the completion of the Protocol altogether, it would be almost impossible for countries to say no to imports of genetically modified foods without facing punitive trade sanctions. It would also set a dangerous precedent for subordination of future international environmental agreements to the WTO.

The Montreal Negotiations

The delegations actually began gathering in Montreal on the 19th of January, and informal discussions began on the 20th. The process was chaired by Juan Mayr, the Colombian Minister of the Environment, and Chair of the Cartagena Ex-COP. The process operated on the basis of the so-called 'Vienna process,' where negotiations took place in contact groups, in which each of the five camps into which the negotiating process had split (the Miami Group; the European Union (EU); the Central and Eastern European (CEE) Group; the Compromise Group (made of up of non-EU, non-Miami Group OECD Countries including Switzerland, Norway, New Zealand, Mexico, Korea, and Japan); and the Like Minded Group (LMG) (developing countries), had two spokespersons. The focus of the negotiations was the so-called Cartagena text, the draft Protocol proposed by Chairman Mayr, and left on the table at the Colombia meeting.

Each contact group was lead by a neutral chair nominated by Chairman Mayr. Initially, only two contact groups were established, and their focus throughout the first week was on the issues of scope (articles 4 & 5), and commodities (articles 9 and 15), respectively.

The dynamics in two groups were quite different. The scope group focussed on three major issues: the status of Living Modified Organisms (LMOs) in transit; the status of LMOs intended for contained use; and the status of LMOs which are human pharmaceuticals, under the Protocol. Each of these issues had been raised by the Like Minded Group in relation to the Cartagena text. The Group was sometimes challenged by the difficulty of maintaining consistent positions among its large number of members.

The working group on commodities focussed on proposals put forward by the Compromise Group and the Chair to include a provision in the Protocol which would require that countries post notices on a electronic clearing-house when they approved the commercial use of an LMO which might ultimately be exported from their country, as use as food, feed or processing (i.e. commodities). Potential countries of import could then post notices indicating that they would require advanced informed agreement before imports of such LMOs would be permitted. Proposals had also been made by the Compromise Group and Chairman Mayr regarding the establishment of requirements for documentation when LMOs which are commodities are subject to transboundary movement.

These proposals by the Chair and Compromise group were a significant move away from the Cartagena text. This had included, at the Miami Group's insistence, an outright exemption from the protocol of movements of LMOs which were intended for direct use as food, feed or processing.

The dynamic within the commodities group was characterized by a continuous stream of interventions by the Miami Group, with Canada usually acting as spokesperson, to limit, weaken, and qualify any provisions that might be included in these clauses. Most of these interventions were rejected by the other members of the Contact Group, whose irritation with the Miami delegation grew over the week.

The formal opening plenary for the resumed Ex-Cop was on the morning of Monday January 24. Chairman Mayr made a very strong speech to the delegates, emphasizing that the public around the world wanted a Protocol, that public trust in the biotechnology industry was collapsing, and that no delegation wanted to be the one seen to be responsible for the failure of the talks. After this brief session, the discussions returned to the Vienna process contact groups. "Wanted" posters for Canadian Environment Minister David Anderson were handed out to delegates as they entered the opening plenary by Friends of the Earth, and it is reported that formal diplomatic complaints were made to the Canadian delegation regarding his absence.

The Ministers arrived for a dinner with the Chairman on Wednesday night. Approximately 40 were reported to be in attendance. Canadian Minister Anderson was a late confirmation, with his decision to attend being announced on Monday afternoon.

The Minister's dinner was followed by a 10PM plenary, at which it was reported that the Scope contact group was reaching some resolution. The Chairman therefore moved to establish a new Contact group, to deal with the issue of the relationship between the Protocol and other agreements. Prior to the Montreal meeting, the Chairman and the Compromise Group had proposed text on this issue which would remove the clause from the existing text (Art 31) stating that the Protocol did not alter existing rights and obligations under other agreements except where there was a serious threat to biological diversity, and the non-discrimination clause (Art 22). These were to be replaced with statements in the preamble to the effect that trade and environmental agreements should be mutually supportive, that the Protocol did not affect the rights and obligations of parties under other agreements, and that the preceding phrase was not to be interpreted as creating a hierarchy between the Protocol and other agreements.

The plenary the following afternoon provided some of the most dramatic moments of the negotiations. The scope contact group reported that it was near closure on scope issues, having agreed to clauses permitting parties to establish requirements re: transits of LMOs through their territories and contained uses of LMOs under their domestic law, rather than have such movements subject to the Protocol's Advanced Informed Agreement (AIA) procedure. A statement was also agreed to that LMOs which are human pharmaceuticals and are dealt with under other relevant agreements or organizations, were outside of the Protocol. This does not appear to require coverage elsewhere specifically in relation to biodiversity protection. [1](#)

The contact group on commodities had reached some conclusions but deadlocked (Miami Group vs. everyone else) regarding the application of the precautionary principle to decision-making re: transboundary movement of LMOs for food, feed and processing, and regarding documentation and safety measures for such LMOs.

The Chair of the contact group on the relationship to other agreements had tabled his own proposed text, similar to the Ex-Cop Chair's text, although the second preambular paragraph, stating that the Protocol did not affect parties' rights and obligations under other agreements, was stronger than the Ex-Cop Chair's text.

Chairman Mayr indicated that he believed that the key trade-offs would occur around the issues of the relationship to other agreements and the application of the precautionary principle to decision-making regarding LMOs. He suggested that the contact group dealing with the relationship to other agreements issue begin to deal with the issue of the precautionary principle as well.

The Chairman then opened this discussion by conducting a go-around of each of the five groups regarding their views on the Chair of the contact group's text on relationship to other agreements, and his own Cartagena text on the precautionary principle. The latter included a

statement that parties may make decisions to protect biodiversity, taking into account effects on human health, in the absence of full scientific certainty, directly in the Protocol's provisions regarding decision-making on imports of LMO's (Art 8.7).

Each of the groups indicated its support for Chairman Mayr's text on the precautionary principle, and either his text or the Chairman of the relationship to other agreements contact group's similar text, regarding the relationship to other agreements. The exception was the Miami Group, which stated, with Canada acting as spokesman, that it wanted a WTO override clause in the Protocol, and that a reference to the precautionary principle in the operational clauses of the Protocol was not acceptable. For the first time in Montreal, the split between the Miami Group and the rest of the world on these two key issues was made clear in a public forum.

The Chairman responded by indicating his intention to proceed with his proposal regarding the continuation of the work of the contact group on these two issues. The Miami Group then again intervened, with Canada acting as spokesman, demanding that discussions of an additional eight issues be reopened. These included trade with non-parties, socio-economic issues, bi- and multi-lateral agreements in lieu of the Protocol, risk assessment and management, and illegal movements. This prompted very negative reactions for all of the other groups. The Like Minded Group indicated that it had a list of issues it would like to re-open too, and that its list could be very long if need be.

A proposal by the Chair to set up a very small working group to deal with these outstanding issues was ignored by the Miami Group. The plenary was then adjourned by the Chair so he could consider his next move.

Immediately following the adjournment of the plenary, Canada hosted a press conference. This featured a very aggressive defence of the Miami Group's actions by the leadership of the Canadian delegation, including Minister Anderson. There were strong statements to the effect that the inclusion of the precautionary principle in operational provisions of the Protocol was not acceptable to Canada. The response from the press and Canadian and international NGO's attending the press conference was extremely negative. Canada was portrayed in the press the following day as favouring trade over biosafety and placing the negotiations at risk.

The plenary was reconvened by the Chair at 10PM in the evening. It was reported by the Chair that the bulk of the new issues raised by the Miami Group in the afternoon were now largely resolved. The Chair then indicated that he would call no more informal plenaries. Rather, he stated that a formal plenary would convene at 10AM Friday morning for the purpose of the adoption of the Protocol. He further stated that it was clear that the negotiations had come down to two issues; the relationship to other agreements; and the application of the precautionary principle to decision-making within the Protocol. The Chairman then gave the parties until early morning Friday to come to a negotiated resolution on these issues. If the parties did not reach a conclusion by his deadline, he indicated that he would table his own text on the outstanding issues, for adoption by the Conference of the Parties. This was seen to effectively threaten the Miami Group with a vote of the Parties, which it would likely lose 132 to 5.

The final plenary was repeatedly delayed over Friday. During the afternoon, Minister Anderson gave a number of interviews to the press, in which he re-stated the points made Thursday regarding the importance of trade, the benefits of biotechnology, and the unacceptability of an operationalized precautionary principle.

The final plenary was convened to adopt the Protocol at 5AM Saturday morning. The Chair's text regarding the relationship to other agreements was placed in the preamble, and the operational clauses on this issue deleted; references to the precautionary principle as a basis for decision-making were included in the clauses dealing with both LMOs for deliberate release to the environment and commodities. With respect to the documentation, the Protocol included a provision that commodities which may contain LMOs carry documentation stating that they "may contain LMOs," with further requirements to be negotiated within two years.

These outcomes were widely seen as a defeat for the Miami Group. There are reports that the EU and the LMG threatened the adoption of the Protocol without the Miami Group in the early

hours of Saturday morning, and that the Miami Group conceded on the key points following discussions with the White House around 3AM. Canada's role in these final stages is unclear. Some reports indicate that Canada, and Minister Anderson in particular, played an important part in moderating the views other members of the Miami Group and bringing them to agreement. Other reports state that Canada was the last member of the group to concede to the need for compromise.

Analysis and Assessment

The Protocol

The Protocol is a significant step forward. It contains some important victories for the non-Miami Group world and civil society. These include the absence of a WTO override clause, and the inclusion of references to the precautionary principle as a basis for decision-making, including with respect to commodities.

However, the Protocol also suffers from some significant ambiguities and weaknesses. The issue of dispute resolution remains unresolved. The Protocol contains no dispute resolution mechanism of its own, other than to state that it is not the dispute resolution mechanism under the CBD. It appears Parties may still be able take disputes to the WTO. The question of how the WTO will regard the Protocol if they do is uncertain, although it would be difficult for it to ignore such a major international agreement.

The provisions regarding commodities are an advance over the Cartagena text, and must be seen as a significant defeat for the Miami Group. However, the provisions suffer from a number of problems. Questions must be raised about the practicality of the mechanism for notice of potential exports of LMOs, particularly on the part of developing countries. In fact, some parties of export may find, in a few years, that they wish that they had agreed to a simple AIA system for commodities rather than the complex and likely confusing arrangement ultimately included in the Protocol.

It is also important to note that the mechanism is only as good as the regulatory systems of the parties of export, as it is triggered by their regulatory decisions. Some potential parties of export already have fairly liberal regulatory systems, and may be moving toward wide exemptions for commodity LMOs. This would mean that there may be no regulatory approval decisions posted regarding LMOs for potential export.

The provisions of the Protocol regarding trade with non-parties are very weak, only requiring that such trade be consistent with the objectives of the Protocol. This leaves significant potential for abuse. The clauses regarding multilateral and bilateral agreements as substitutes for the Protocol were also retained, at the insistence of the EU. This unfortunately leaves open the possibility of less developed Parties being pressured to surrender their rights under the Protocol through such agreements.

A clause was included on socio-economic impacts, with specific reference to impacts on indigenous peoples. However, it is limited to risk management, and is subject to other international obligations, which may limit its utility in relation to the WTO. Provision was not made for a social or cultural impact assessment regarding the introduction of an LMO, or the consequences of such impacts for the conservation and sustainable use of biological diversity.

In a broader context, the Protocol can be seen as a third defeat for the WTO/globalization agenda in little more than a year, following the abandonment of the Multilateral Agreement on Investment and the collapse of the Seattle WTO Ministerial meeting. The attendance of so many environment Ministers from around the world was clearly intended to re-assert that the Protocol was a matter of environmental protection, not trade.

Canada's Role

Canada's performance throughout the development of the Protocol was poor. Canada ended up positioned as the lead spokesperson for a very small group of countries that found itself at odds with the rest of the world on the Protocol's content. As in other recent international environmental negotiations, such as those around the Basel Convention on the Transboundary Movement of Hazardous Wastes, and the United Nations Economic Commission for Europe Convention on Long-Range Transport of Air Pollution Protocol on Heavy Metals, Canada's role emerged as one of 'negative leadership.'

In the case of the Biosafety Protocol, Environment Canada and Health Canada lost control of the file to Foreign Affairs and International Trade and Agriculture and Agri-Food early on, and were never really able to regain control. The consequences for Canada's international environmental reputation were severe.

Among the few redeeming features of Canada's performance in the negotiations were the efforts of some individual members of the delegation. Most notably, one member of the delegation acted as Chair the Contact Group on Scope, and played a significant role in bringing the different sides together.

In general, the Miami Group handled the process poorly. It constantly took steps that reinforced its isolation from the rest of the world, often for no apparent significant reason. This behaviour built up a degree of ill-will with other delegations that apparently reached a breaking point in the early hours of January 30.

Ultimately Canada ended up taking a position that made little from a trade perspective, as it tended to reinforce, rather than allay fears on the part of other countries that the Miami Group members were attempting to force them to accept products they didn't want. At the same time, the empirical basis of the Canadian position - the alleged impossibility of segregation of exports of LMO from non-LMO commodities - was placed in doubt by the apparent ability of the Canadian grain industry to respond to such demands when they existed in the marketplace. Finally, in proposing arrangements for the review of the imports of LMOs, including commodities, that were weaker than Canada's existing domestic regulatory regime, Canada's position had the potential to undermine its own domestic system in the event of external challenges in the future.

NGOs

The performance of Canada's non-governmental organizations in Montreal meeting was outstanding. The organizing on the ground by Biotechnology Action Montreal, Greenpeace Canada and the Council of Canadians was extraordinarily successful. These groups were also very effective in communicating to the press and other delegations the unhappiness of Canadians regarding the Government of Canada's position on the Protocol. Friends of the Earth Canada was very effective in this role as well. Coordination between Canadian and international NGOs generally was smooth and effective. WWF International, for example, made some very helpful alterations to its policy statements re: socio-economic impacts, when concerns were raised regarding its initial position by the aboriginal representative on the Canadian delegation.

The NGO workshops on Saturday the 22nd were extremely successful, attended by about 500 continuously during the day. The afternoon demonstration included about 1,000 participants, and the evening session with Chee Yoke Ling, Maude Barlow and Jeremy Rifkin drew 800 in the hall and with 250 more outside. Unfortunately, except for the Saturday demonstration, the delegates saw none of these events, although many of the southern delegations were impressed by the determination needed to stay out in -45 windchill for several hours to protest against the actions of one's own government.

The victory for Canada's civil society organizations was especially significant, in that it represented a defeat of two of the major policy directions of the Government of Canada of the past decade - trade liberalization and the promotion of biotechnology. It also reinforced the belief that, in a democratic society, there are limits to how far public policy can become

disconnected from public opinion.

The Author is Director of Research with the Canadian Institute for Environmental Law and Policy. He was Chair and Co-chair of the Biotechnology Caucus of the Canadian Environmental Network from 1995-1998. He has been a CEN delegate to the Government of Canada Advisory Committee on the Protocol since its formation in 1995, and was a Non-Governmental Organization representative on the Canadian delegation to the first, third, and final, Montreal, negotiating sessions on the Protocol.

Endnotes

1. A review of other international arrangements regarding LMOs completed by the secretariat after the first, July 1996, negotiating session had indicated that other agreements and organizations do not address the biodiversity aspects of the transboundary movement of such LMOs.