

WTO'S EC-BIOTECH RULING AND DEVELOPING COUNTRIES

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Aggrieved by the European Communities' (EC) resistance since October 1998 in approving the growing/selling of GM crops/products under its pre-market approval procedures, three countries, viz. United States, Canada and Argentina (separately) requested consultations with the EC (as required under the Dispute Settlement Understanding of the World Trade Organisation before requesting for the establishment of a Panel¹) in May 2003². The complaining parties were also aggrieved by the ban that certain EC members had placed with respect to growing and selling of GMOs. In June 2003 these consultations took place but ultimately failed to reach any mutually satisfactory solution.

Subsequently, in August 2003 these three countries requested the establishment of Panel to examine the matter. Acting on this request the Dispute Settlement Body (DSB) established a single panel (which is possible under the DSU³) towards the end of August 2003. In February 2004, the composition of the Panel⁴ was decided. Several countries⁵ had reserved their rights to participate in the Panel proceedings as Third Parties.

The Panel proceedings began in March 2004. In February 2006, the Panel issued its interim report to the Parties. None of the Parties requested for review of the interim report. In May 2006, the Panel issued its final report to the Parties. After the adoption of the Panel's report by the DSB, it was published in November 2006⁶. The challenged EC measures were found to be violating certain WTO rules enshrined in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

This paper analyses the scope and reach of the Panel decision in Section I. In Section II, the paper highlights the key findings by the Panel and important arguments and counter-arguments. It also examines the likely implications of such findings – as well as the reasoning and interpretation adopted by the Panel in reaching such findings – on developing countries' biosafety framework and related strategy. Section III presents the conclusion in a larger perspective.

I. Scope and Reach of the Panel's Decision

¹ Under Article 4 of the Understanding on Rules and Procedure Governing the Settlement of Disputes (DSU).

² All the consultations took place bilaterally with EC i.e. US and EC, Canada and EC, and Argentina and EC. Similarly the three separate complaints were made before the Panel, but the WTO rules allow to club together similar complaints, if no disputing parties object. The Panel in the end came out with one report for all the three disputes.

³ Article 6 and 9 of the DSU.

⁴ Mr. Christian Haberli (Chairperson), Mr. Mohan Kumar and Professor Akio Shimizu (Members)

⁵ Australia, Brazil, Chile, China, Colombia, El Salvador, Honduras, Mexico, New Zealand, Norway, Paraguay, Peru, Chinese Taipei, Thailand, Uruguay.

⁶ WT/DS291/R; WT/DS292/R; WT/DS293/R (All the three disputes are merged as one report)

According to the WTO jurisprudence, any Panel decision is binding only on the Parties to the dispute and does not have any wider binding implications. Secondly, there is no practice in the WTO whereby the earlier decisions are binding on any subsequent decisions, like that is followed in certain municipal laws such as that in India. However, the Panel decision may carry persuasive value for subsequent disputes. Importantly, the Panel itself made certain clarifications⁷ (*as stated in the Box 1*) before presenting their Conclusions and Recommendations, which are important to note in making any inference regarding the scope of the Panel decision.

BOX 1

VIII. CONCLUSIONS AND RECOMMENDATIONS

The issues before the Panel concerned the alleged failure of the European Communities to reach final decisions regarding the approval of biotech products from October 1998 to the time of establishment of the Panel on 29 August 2003, and the WTO-consistency of prohibitions imposed by certain EC member States with regard to specific biotech products after these products had been approved by the European Communities for Community-wide marketing.

In light of this, the Panel did *not* examine:

- Whether biotech products in general are safe or not.
- Whether the biotech products at issue in this dispute are "like" their conventional counterparts. Although this claim was made by the Complaining Parties (*i.e.*, the United States, Canada and Argentina) in relation to some aspects of their complaints, the Panel did not find it necessary to address those aspects of the complaints.
- Whether the European Communities has a right to require the pre-marketing approval of biotech products. This was not raised by the Complaining Parties.
- Whether the European Communities' approval procedures as established by Directive 90/220, Directive 2001/18 and Regulation 258/97, which provide for a product-by-product assessment requiring scientific consideration of various potential risks, are consistent with the European Communities' obligations under the WTO agreements. This was not raised by the Complaining Parties.
- The conclusions of the relevant EC scientific committees regarding the safety evaluation of specific biotech products. These were not challenged by the Complaining Parties, although they did challenge the scientific basis for some of the questions and objections made by various EC member States. In light of this, the Panel, in consultation with the Parties, sought advice from a number of scientific experts.

Therefore, it is very clear that the Panel did not rule whether GM Products are safe or not and that whether the biotech products are "like" their conventional counterparts, which could have bearing on "labeling" of GMOs. The Panel neither reviewed the WTO-consistency of the EC approval procedures for GM products nor did it ruled on the right of the Members to regulate GM products. That means the WTO Members remains free to consider possible risks of GM products before giving it approval. The right of the members in this regard remains unhindered. The flexibilities available in the WTO agreements for this purpose remain intact. Furthermore, certain Panel interpretations may not be taken as "well settled" in absence of any appeal as well as

⁷ Para 8.2 and 8.3 of the Panel Report

viewing the fact that the Panel constitutes of “trade experts” and not “jurisprudence experts” as in the Appellate Body⁸.

II. Key findings, interpretations, and their implications

Key Findings

There were three types of EC measures that were challenged by the complainants before the Panel, alleging inconsistency with the WTO Rules, namely,

1. General EC moratorium on approval of biotech products
2. Various product-specific EC measures related to the approval of biotech products
3. Various EC Members’ safeguard measures prohibiting the import and/or marketing of specific biotech products

In order to be covered under the SPS Agreement the challenged measure has to be either (1) a SPS Measure or (2) a measure relevant to the operation of SPS Measures⁹. In case of SPS measure, *inter alia*, the tests of Article 2.2 and Article 5.1 of the SPS Agreement would apply. In other words, SPS measures need to be based on “scientific principle” and be backed by “sufficient scientific evidence” and hence “risk assessment” is necessary. However, in the second case, Article 8 and Annex C of the SPS Agreement become relevant, which does not provide for any risk assessment.

Once the Panel reached to the conclusion that there was a general *de facto* moratorium in force in the EC between June 1999 and August 2003 (when the Panel was established¹⁰), the next question before the Panel was whether the said moratorium is a challengeable measure under the WTO rules i.e. whether it is a “SPS measure” (within the meaning of Annex A(1) read with the Article 1 of SPS Agreement) or a measure relevant to the operation of SPS measure.

After hearing the parties, the Panel concluded that the *de facto* general moratorium was not a SPS Measure but was concerned with the operation of the SPS measures. Therefore, although general moratorium can be challenged for its consistency with the SPS Agreement, the test would be that of the Article 8 and Annex C (*See Box 3 for the text*), which *inter alia* obliges members to complete the operation of SPS measures “without undue delay”.

The panel found that the *de facto* general moratorium on GMO approvals lead to “undue delay” in approval of certain GM product and hence the EC is in breach of Annex C(1)(a), and consequently it has violated Article 8 of the Agreement (see below for the interpretation).

⁸ Palmer, A. (2007)

⁹ Palmer, 2007 (unpublished)

¹⁰ It may be noted that the EC lifted the general moratorium before the Panel ruled on it.

Similarly, the Panel held that challenged product-specific EC measures were also “measures relevant to the operation of SPS Measures” and found that the product-specific delays amounted to “undue delay” with in the meaning of Annex C(1)(a) and hence violative of Article 8.

As far as the third category of the challenged EC measures were concerned, the panel found that the national bans as “safeguards measures” were SPS measures within the meaning of Annex A(1) and Article 1 of the Agreement. As it was a SPS measure, the panel looked into whether it was based on risk assessment under Article 5.1 and hence stands the test of Article 2.2 of the SPS Agreement (*See Box2 for the text*). The Panel found that the bans were not based on risk assessment and hence violated Article 5.1 and Article 2.2 of the Agreement. The Panel rejected the argument put forward by the EC that there was “insufficient” scientific evidence and hence the measure could be justified under Article 5.7 of the SPS Agreement. The Panel held that there was sufficient scientific evidence in order to carry risk assessment; hence such bans cannot be maintained under Article 5.7.

BOX 2

Article 2

Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.
2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

Article 5

*Assessment of Risk and Determination of the Appropriate Level
of Sanitary or Phytosanitary Protection*

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

(emphasis added)

Key interpretations and their likely implications

Undue delay

BOX 3

Article 8

Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

ANNEX C

CONTROL, INSPECTION AND APPROVAL PROCEDURES¹¹

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
 - (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

...

(emphasis added)

On the question of whether there was “undue delay” in the approval procedure of EC (in maintaining the general moratorium or that related with product-specific approvals), the Panel observed, based on ordinary meaning of the terms, that according to the Article 8 read with Annex C(1)(a) first part, “the approval procedure be undertaken and completed with no unjustifiable loss of time”¹². It found that both the “reasons of delay” and “its duration” were relevant factors in determining whether a Member has “unduly delayed” the approval of a GM product¹³. First there should be a delay and then it should be established that the delay was unjustified. In other words, if there was a delay but there was a legitimate reason or justification for such delay it would not be violating the Article 8 and Annex C of the SPS Agreement.

The Panel opined that the determination of “undue delay” had to be made on case-by-case basis taking into account the facts and circumstances of a case. It also observed that

¹¹ Control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification.

¹² Para 7.1495 of the Panel Report

¹³ Para 7.1496 of the Panel Report

it was neither possible nor useful to attempt to define the reasons which would render a given delay “undue” and those which would not render it “undue”¹⁴.

Given the facts and circumstances of the present case, the Panel specifically rejected the two pleas put forward by the EC for justifying the delay in the completion of approval procedure, viz., (a) plea of awaiting legislation amendments to come into force; and (b) plea of “evolving science” and application of a “prudent and precautionary approach”¹⁵.

Most importantly, although the Panel disapproved the “general moratorium” in the present case, it did not rule that every moratorium could be held to be causing “undue” delay in approval procedure. The following observation of the Panel makes it very clear.

...we wish to note that our conclusion above should not be construed to mean that it would under no circumstances be justifiable, in the light of the provisions of Annex C(1)(a), first clause, to delay the completion of approval procedures by imposing a general moratorium on final approvals of biotech products. We consider that there may conceivably be circumstances where this could be justifiable. For instance, if new scientific evidence comes to light which conflicts with available scientific evidence and which is directly relevant to all biotech products subject to a pre-marketing approval requirement, we think that it might, depending on the circumstances, be justifiable to suspend all final approvals pending an appropriate assessment of the new evidence. The resulting delay in the completion of approval procedures might then be considered not “undue”¹⁶.
(*emphasis added*)

Furthermore, according to the Panel, delays caused due to any new information or that caused by extreme events beyond a Member’s control, such as natural disasters, civil war or an unexpected overload might be justified¹⁷. Furthermore, delays caused due to actions and omissions of the applicant would also not be taken as ‘undue’ delay by a Member¹⁸.

Implications

In light of the above-explained interpretation of “undue delay” by the Panel, it can be said that the existing flexibility for Members to legitimately delay approval procedure for a GM product, whether or not through a general moratorium, remains intact. Moratorium *per se*, is not inconsistent with the WTO rules.

The Panel specifically mentions “new scientific evidence” as legitimate cause for procedural delay. For instance, it may be possible that in future disputes the scientific findings about genes by the researchers involved with a human genome project that “genes appear to operate in a complex network, and interact and overlap with one another

¹⁴ Para 7.1497 of the Panel Report

¹⁵ Para 7.1530 of the Panel Report

¹⁶ Para 7.1532 of the Panel Report

¹⁷ Para 7.1500 of the Panel Report

¹⁸ Para 7.1497 of the Panel Report

and with other components in ways not yet fully understood¹⁹,” could justify moratorium till the scientific uncertainty is removed. According to the United States National Human Genome Research Institute – that organized the said human genome project – these findings will challenge scientists “to rethink some long-held views about what genes are and what they do”²⁰.

Therefore, it would be prudent for governments to prioritise scientific investigations pertaining to environment and health safety vis-à-vis GM products. This is particularly important because most developing countries are rich in biodiversity, including agrobiodiversity and are also centre for origin for most crops.

There may also be other developing country-centric reasons that could justify any ‘delay’ in their GM approval procedure, which may be explored as research assignments. For instance, whether the delay due to lack of human resources (e.g. scientific expertise) and/or physical resources (e.g. equipments, adequate lab facilities) to conduct risk assessment (or to scrutinize the trail data submitted by the applicant) be taken as a legitimate reason? Similarly, whether, in cases where risk assessment is required to take into account “relevant economic factors,” the delay could be justified on the ground of absence of any agreed model, formula or scope of dependence on such factors?

There may also be inadequacy in physical and human resources in post-release measures related with GM products, such as detection and analysis of GMOs, inspection, monitoring, handling of GMO materials, quarantine, issues related to segregation, identity preservation etc. If such inadequacies were prevailing, then most of the conditions that are generally attached to the approval of GM products would not have any meaning.

Therefore, there may be many genuine reasons that could justifiably cause delay in GM approval procedures in developing countries, which cannot be said to be violative of WTO rules, particularly the SPS Agreement. However, developing countries would need to be cautious, because such measures could be alleged “protectionist” at the WTO forum. The WTO Members desired “the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade”²¹.

The “negative effect on trade”, if any, however, need to be construed in larger light of the Agreement Establishing WTO, wherein the Members recognized that “their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the

2007 ¹⁹ Caruso, D; *A challenge to gene theory, a tougher look at biotech*, New York Times, 1st July

²⁰ *ibid*

²¹ Fourth Preambular paragraph of the SPS Agreement

environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”²² (emphasis added). This “objective of sustainable development” has also been recalled by the WTO Members in Decision on Trade and Environment, which is included in the WTO’s legal text i.e. The Results of the Uruguay Round.

It may further be submitted that the basis of the SPS Agreement is mere an exception in form of Article XX(b) of GATT (General Agreement on Tariffs and Trade) and hence the Preamble of the Agreement Establishing WTO should carry more weight than that of the SPS Agreement. In other words, the objective of “adopting and enforcing SPS measures in order to minimize their negative effects on trade” need to be seen in the larger “objective of sustainable development” and in the event of any conflict between the two the latter should prevail.

Relevance of MEAs and precautionary principle in interpreting WTO agreements

As stated earlier the Panel found that the national safeguards measures maintained by certain EC members in form of bans were not based on risk assessment and hence violated the SPS Agreement. The plea that “relevant scientific evidence is insufficient” and hence such safeguard measures could be maintained by virtue of precautionary principle enshrined in Article 5.7 was also rejected by the Panel. The Panel was of the view that there existed sufficient scientific evidence in order to conduct risk assessment, basing this to the fact that the risk assessment was already conducted at the EC level.

The EC has argued that certain treaties like Convention on Biological Diversity (CBD) and the Biosafety Protocol (BSP) as well as general principle of law such as precautionary principle need to be taken into account while interpreting the WTO agreements including the SPS Agreement. The crux was that the precautionary principle enshrined the Biosafety Protocol, of which EU is a party would be able to justify the “bans” that certain countries had put up on GMOs, where there is “scientific uncertainty”.

On the contention of EC and pursuant to Article 3.2 of the DSU (that the WTO agreements are to be interpreted in accordance with customary rules of interpretation of public international law), Panel considered Article 31 of the Vienna Convention on the Law of Treaties (*See the text in Box 4*), which provides for general rule of interpretation, including customary rules.

BOX 4

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

²² First Preambular paragraph of Marrakesh Agreement Establishing the World Trade Organisation.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(emphasis added)

The Panel considered Article 31(3) (c) and agreed with EC that the treaties such as CBD and BSP would qualify as ‘relevant rules of international law’ and examined whether these are “applicable in the relations between the parties” in order for it to take into account for the purpose of interpretation. This gave rise to question of what is meant by the term “the parties”, which after logical deduction the Panel came to following conclusion:

“... "party" means "a State which has consented to be bound by the treaty and for which the treaty is in force". It may be inferred from these elements that the rules of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force. This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members.”²³ *(Footnote deleted)*.

The Panel further says: “In relation to the present dispute it can thus be said that if a rule of international law is not applicable to one of the four WTO Members which are parties to the present dispute, the rule is not applicable in the relations between all WTO Members”²⁴ *(emphasis added)*.

This means that the WTO Panel can take into account for the purpose of interpretation of WTO agreements, only those other rules of international law of which all the WTO members are parties. This would also mean that in interpreting any multilateral

²³ Para 7.68 of the Panel report

²⁴ Para 7.71 of the Panel report

agreement of the WTO, even plurilateral agreement of the WTO would not be taken into account. Therefore, the Panel found treaties such as CBD and BSP not to be taken into account because all the Members of the WTO are not parties to these.

The Panel, however, refrained from taking any position as to what will happen in a dispute where all the parties to the dispute are parties to applicable relevant rules of international law (say for e.g. BSP) and all such parties argue that such rules of international law should be taken into account in interpreting a multilateral WTO agreement. In this regard, the Panel observed:

“Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account”²⁵.

That means in a case where the parties to dispute are parties to CBD/BSP and all of them argue before the panel to take into account the international rules contained in CBD/BSP while interpreting SPS Agreement, the conclusion of the Panel may differ from that of the present case. In such a case it would be interesting to note how the Panel harmoniously constructs provisions of BSP and SPS Agreement so that both the agreements are implemented in mutually supportive manner, especially the resolution of SPS’ “insufficient scientific evidence” vs. “scientific uncertainty” of BSP.

As far as the precautionary principle is concerned, the Panel agreed to take into account if such principle is found to be general principle of international law. The EC asserted that precautionary principle has by now become a full-fledged general principle of international law. EC informed that since World Charter of Nature (1982), where the principle was first recognized it has been subsequently incorporated into various international conventions on the protection of the environment for instance, Rio Declaration, UNCBD and UN Framework Convention on Climate Change. More so, in the field of GMOs, the Biosafety Protocol has clearly relied on the precautionary principle in the decision to restrict or prohibit imports of GMOs in face of scientific uncertainty²⁶.

The EC also put forward the examples of many national laws such the Australia, Switzerland and New Zealand which have recognized precautionary principle in their national GM approval systems, and also India where the Supreme Court has applied the principle as one of “the salutary principles which governs the law of environment”²⁷.

²⁵ Para 7.72 of the Panel report

²⁶ Para 7.78 of the Panel report

²⁷ Para 7.79 of the Panel report

The US on the other hand strongly denied that precautionary principle has become a rule of law or can be taken as a general principle or norm of international law. This is because the principle does not have a single, agreed formulation. The US considers precaution as an “approach”, rather than a “principle” of international law²⁸.

The US submitted that precaution does not fulfill any of the requirements to become a rule of customary international law for the following reasons²⁹:

- (i) it cannot be considered a "rule" because it has no clear content and therefore cannot be said to provide any authoritative guide for a State's conduct;
- (ii) it cannot be said to reflect the practice of States, as it cannot even be uniformly defined by those who espouse it; and
- (iii) given that precaution cannot be defined and, therefore, could not possibly be a legal norm, one could not argue that States follow it from a sense of legal obligation.

More so, according to the US, even if a precautionary principle were considered a relevant rule of international law under Article 31(3)(c) of Vienna Convention, it could not override any part of the SPS Agreement³⁰.

After considering the above-said arguments of the Parties and the observation of the Appellate Body in the *EC – Hormones*, the Panel concluded that it is still not settled whether Precautionary Principle is a recognized principle of general or customary international law. It observed that till date there has been no authoritative decision by an international court or tribunal³¹. More so, the Panel did not find it prudent to take any position on the issue in order to dispose the impugned legal claims³².

The Panel also considered whether other rules of international law could be considered in the interpretation of the WTO agreements even if such rules does not fall under the ambit of Article 31(3)(c) of Vienna Convention i.e. if they are not applicable in the relations between the WTO Members. This issue was examined because the EC had argued that in the *US – Shrimp*, the Appellate Body interpreted WTO rules by reference to treaties which were not binding on all parties to the dispute. According to the EC, the Appellate Body had invoked treaties (including CBD) in support of the arguments made by the US, even though it was not party to it³³.

The Panel observed that in order to interpret a treaty term “in accordance with the ordinary meaning”, in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would

²⁸ Para 7.81 of the Panel report

²⁹ Para 7.82 of the Panel report

³⁰ Para 7.83 of the Panel report

³¹ Para 7.88 of the Panel report

³² Para 7.89 of the Panel report

³³ Paras 7.90 and 7.91 of the Panel report

not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do³⁴. In the present dispute, the Panel, however, did not find any of the provisions of CBD or BSP to be necessary or appropriate to be relied upon for interpreting the WTO agreements at issue³⁵.

Implications

In light of above-said, the WTO Panel giving a light treatment to multilateral environmental agreements (MEAs), such as CBD and BSP, is a serious concern from the perspective of international environmental jurisprudence. This is a harbinger of a serious international jurisprudential imbalance that is developing between “trade & commerce”, on the one hand, and “environment and health”, on the other. One would also have to examine whether the Vienna Convention aids in the harmonious construction of multilateral trade agreements and MEAs so that both are implemented in a mutually supportive manner. More so, developing countries need to be very cautious, because the said international jurisprudential imbalance tends to distort the domestic jurisprudential balance between trade and environment/health. One would also wonder as to how with such jurisprudential imbalance one can achieve the “objective of sustainable development” through a rights-based approach.

The international community needs to rethink about the enforceability of MEAs. If the concept of “World Environment Organization” is politically heavy can an international Dispute Settlement Mechanism be crafted for enforcing MEAs in order to generate jurisprudential counter-pressure, which in turn could rectify the emerging imbalance?

III Conclusions

As we saw that the scope and reach of the Panel decision is very limited, the developing countries need not bother much in considering their biosafety strategy to safeguard their environment and public health. Certain interpretations by the Panel do tend to narrow down the policy space for taking up measures like “moratorium” and “bans” with respect to import and approval of GMOs, there are windows available for them.

The most worrying part of the Panel report is the treatment given to CBD and BSP at the WTO forum. There seems to be some ambiguity also, which the developing countries should endeavour to get clarified. The Vienna Convention would need to be examined in light of it providing any help for “harmonious construction” for multilateral trade agreements and environmental agreements. The growing jurisprudential imbalance between trade & environment at the international level need also to be addressed should the international community want to aspire for the objective of sustainable development.

³⁴ Para 7.92 of the Panel report

³⁵ Para 7.95 of the Panel report

Today it is an observable phenomenon that the trade and economic interest is setting the main law/policy framework and social sector such as environment and health are being pushed as mere exception or exemptions of the trade and economic framework. The onus lies on the social sector to invoke such exceptions and exemptions for which the proponents are required to generate evidences, which at times become a time-taking and money-consuming exercise.

While a significant energy of the social sector is wasted in adopting the evidence-generation mode, the trade & economic policy is being steered on certain assumptions for which there may not be any evidence. For instance, in most countries GM technology is being viewed as necessary for addressing food insecurity by increasing agri-production. Is it based on any evidence or is mere an assumption? Developing countries need to be careful as vested interest is driving the adoption of this technology and should question every arguments / assumptions in favour of its adoption as well as conduct a logic-based cost-benefit analysis, including its socio-economic impact. The elements of the socio-economic risk assessment are still not clear. Therefore it needs to be standardized and protocol established, as an immediate strategy.

As a long-term strategy, however, developing countries need to come out of this “evidence-gathering mode” by steering establishment of a suitable global framework. Civil society has a significant role to play in this regard. Else “sustainable development” would remain a myth.

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