

The Telescope: Environment Issues On The Horizon

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The Convention on Biological Diversity

The U.S. business community should be aware that a seemingly harmless international treaty, the Convention on Biological Diversity (CBD), has the potential to cause major impediments to the flow of international business. More than 180 nations are embracing the treaty's goals, leaving the United States among the handful of nonparticipants. A product of the 1992 Rio Earth Summit, the CBD is an international environmental treaty that established a broad framework by which national governments are able to promote the sustainable use of biological resources and the fair and equitable sharing of the benefits of genetic resources.

Although the goals of the CBD may seem reasonable, many uncertainties regarding its implementation remain. In particular, how broadly does the definition of "biological diversity" reach? Further, and perhaps most important, how will these agreements approach the concept of "risk" posed by living modified organisms (LMOs)? Finally, will parties to these agreements concur with the U.S. business community's positions on these issues given that the U.S. government is not a party?

U.S. Ratification

Although President Clinton signed the CBD in 1993, the United States has never ratified the treaty. Ratification was considered in a hearing by the Senate Committee on Foreign Relations on April 12, 1994. In general, U.S. industry supported treaty ratification. However, some senators argued against it on the grounds that the CBD might violate U.S. intellectual property laws and that the treaty's costs and procedures were uncertain. Because the United States never ratified the treaty, it must participate only as an observer. This status limits the U.S. government's opportunity to persuade the parties to the CBD to agree with U.S. positions. However, the U.S. government does not want to proceed with the ratification process without first obtaining the U.S. business community's support for the government's positions. Support from business is important because the U.S. government might very well be the lone dissenting voice among the parties on many important issues.

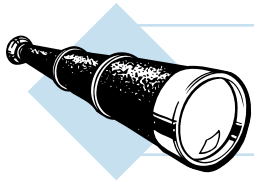
At this point it seems unlikely that the U.S. business community will have a unified position on ratification because there are simply too many competing interests to be addressed. Ratification would benefit the United States by providing the country with an opportunity to weigh in on the potential creation of an international framework on liability and redress for damage to biodiversity caused by LMOs, thus giving the United States a much more influential voice in the treaty negotiation process than it has

Precautionary Principle

One aspect of the CBD about which there is widespread agreement among U.S. industry is the CBD's endorsement of the precautionary principle. This doctrine asserts that it is more cost-effective to avoid using a technology for which there is scientific uncertainty regarding the degree of risk it poses than it is to act in the face of a risk despite any potential benefits.

There is serious concern that some parties are seeking ways to use the CBD to advance an agenda that flouts the World Trade Organization's (WTO) science-based trade rules, especially as they are applied to the regulation of food labeling and traceability. The European Union (EU) has been actively advocating the adoption of the precautionary principle in the regulatory approaches of developing countries, ostensibly hoping that the more broadly it is adopted by national governments the easier it will be for the EU to introduce the principle into international standards.

The United States has been actively attempting to thwart the EU's efforts to promote the precautionary principle internationally by touting the use of science-based risk assessments. If the precautionary principle becomes widely adopted by the CBD parties, then



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as a mere observer. The primary disadvantage to ratification would be that countries are not permitted to ratify the treaty with reservations; rather, they must ratify it as-is or reject it completely. Consequently, all ratifying parties must carry out all obligations under the treaty without exception.

Treaty Negotiations

Currently being considered by the parties under the CBD is an international liability framework that would establish rules addressing compensation for injuries to biological diversity caused by LMOs. An international liability framework would create potential liability for virtually every type of business. Remaining questions regarding what this liability framework would address include: whether the CBD should cover a broad range of activities, from transboundary movement of LMOs to other activities that may be closely associated with transboundary movement, such as handling, use, and transit of LMOs; what would be considered "damage" to biodiversity; and what type of liability would be applicable (i.e., strict or fault-based)?

Recently, parties to the CBD had the opportunity to submit their positions on these and other issues to the Secretariat. A common view expressed by many parties was that "damage" means damage to biological diversity or damage to the conservation and sustainable use of biological diversity. As far as the type of liability that should apply under the CBD, some parties have advocated the polluter-pays principle. This principle attributes primary liability for damage to the person(s) responsible for an action related to the transboundary movement of LMOs, whether the LMOs directly or indirectly caused damage. Parties are also considering a very broad range of potential persons to be held liable, including: the producer/developer/patent holder; the notifier; the exporter; the importer; and the carrier. Some parties even believe that the state should be primarily liable in cases of transboundary damage matters since the state willingly permitted the LMOs to be used in its territory. Other issues addressed by the submissions included determining who has the right to bring claims (standing), how to prove causation between damage and the transboundary movement of LMOs, and whether or not there will be a binding instrument for the rules and procedures on liability/redress.

Without resolution of these fundamental principles for implementation, it is difficult to imagine how the CBD will be able to function as a full-force treaty that carries any credibility when integrated into the laws of national governments that are parties to the treaty. Given the fact that the United States is unlikely to agree with the definitions and implementation principles that will be adopted eventually by the parties, broad international adoption of the CBD is likely to cause major trade disruptions for the United States and could even be the impetus for a serious re-evaluation of the current international standards for food safety and the environment.

socio-cultural preferences will become more influential than scientific evidence regarding the actual risk posed in standard-setting processes.

Prior to the creation of the CBD, the Codex Alimentarius Commission¹ (Codex) and the WTO addressed environmental and food safety issues arising in the context of international trade. Of concern to the business community is that the CBD will become so integrated into national laws worldwide that it will be regarded as another standard-setting body.

Because the CBD is a treaty and not technically a standard-setting body, the weight of Codex and WTO standards that cover the same territory as the CBD will become questionable and could throw the existing trade scheme into a state of disarray.

¹ The Codex Alimentarius Commission is a product of the United Nations World Health Organization and the Food and Agriculture Organization of the United Nations.

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