UNIVERSITÉ DE GENÈVE

FACULTÉ DE DROIT

Program and Overview

Table ronde / Roundtable

organized by Laurence Boisson de Chazournes and Anne Petitpierre, Professors at the Faculty of Law

Jeudi le 11 mai 2006

Thursday May 11, 2006

14.00-17.30 h

Bd du Pont d'Arve 40
Tram No. 15 or 17: "Uni Mail"
Salle No. 3050

Le droit de l'OMC, la science et la communication du risque

WTO Law, Science and Risk Communication

Présidente/Chairperson: Professor Laurence Boisson de Chazournes

1.) ***L'évaluation scientifique des risques, les autres facteurs légitimes justifiant les mesures restrictives du commerce et la communication du risque***
Science-based Risk Assessment, other Legitimate Factors Justifying Trade-Restrictive Measures, and Risk Communication

Dr. Eric Schoonejans
Observatoire International des Sciences du Vivant,
Institut National de la Recherche Agronomique, Paris

2.) ***L'étiquetage des produits alimentaires transgéniques : le droit de savoir***
Labelling Genetically Modified Food: The Right to Know

Professor Peter H. Sand
Faculty of Law, University of Munich

3.) ***Le rôle de la Convention d'Aarhus dans la communication du risque environnemental***
The Role of the Aarhus Convention in Environmental Risk Communication

Jeremy Wates
Secretary to the Aarhus Convention, Geneva

Risk communication represents one of the three elements of risk analysis, the other two being risk assessment and risk management. This element has clearly received far less attention than the other two, it is fair to say that the amount of research and general attention that risk communication as an issue is receiving in International Law is not adequate given its fundamental importance for risk analysis. The purpose of this Roundtable is to make a contribution toward a better understanding of its importance and its complexity, and to situate risk communication in the context of risk analysis and risk management.

Risk communication represents a fundamental aspect of three of the key multilateral legal instruments in the science-based assessment and management of risks that may be involved in the multilateral regulation of trade in genetically modified products: the Codex Alimentarius regarding the safety of food, beverages and feed, the Biosafety Protocol of the Convention on Biological Diversity primarily regarding threats to biodiversity, and the *'Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'* regarding public information and participation in the domain of GMOs.

The Codex Alimentarius, more than any other multilateral organization, has formalized risk communication as a clearly identifiable aspect of risk analysis. A key element of the strength of the Biosafety Protocol, on the other hand, consists in the explicit importance given to risk communication and information sharing through several of its provisions, such as Art. 7 which describes the application of the advance informed agreement (AIA) procedure, Art. 8 on notification, Art. 10 on information in the decision procedure, Art. 17 on the accuracy of information, Art. 18 on packaging and identification, Art. 20 through the Biosafety Clearing-House, Art. 21 on confidential information, Art. 23 on public awareness and participation, or Art. 26.2 on information exchange and socio-economic impacts. The Aarhus Convention, finally, is also a key international instrument on risk communication.

Conceptually speaking, risk communication can be categorized into three aspects: (1) public information; (2) risk notification among governments; (3) consultations among governments regarding preventive and precautionary measures that limit the risk as much as possible. The Roundtable will address these aspects, and participants are invited to actively enrich the debate.

Short Overview of the Presentations:

Note:
These summaries are based on the speakers' presentations but they do not in any way reflect institutional views or policies.

Science-based Risk Assessment, other Legitimate Factors Justifying Trade-Restrictive Measures, and Risk Communication

Dr. Eric Schoonejans, Observatoire International des Sciences du Vivant, Institut National de la Recherche Agronomique, Paris

The notion of transparency, which is an essential aspect of the risk communication process, needs to include the clear identification of data gaps and of areas that require more research. Furthermore, risk communication is a course of action which includes at the very least bilateral exchanges, in fact in most cases they are iterative and take place among several kinds of stakeholders. The most important other elements tend to consist of information exchanges and of consultation. It is not exaggerated to note that risk communication processes have received very little attention in the scientific risk analysis literature, and that little formalized thinking has been invested in this important domain.

Of the three standards which are recognized by the WTO's Agreement on Sanitary and Phytosanitary Measures, the Codex Alimentarius is the most explicit one which has elaborated the most detailed provisions on risk analysis. The World Organization for Animal Health (WOAH, formerly International Office of Epizootics) and the International Plant Protection Convention (IPPC) are more limited in their consideration of risk communication as an element of risk analysis, they are essentially restricting their attention in this regard to documentation requirements.

One of the key risk communication questions relates to the transmission of scientific knowledge between the scientific community and official authorities such as courts, judges, or regulatory bodies. How can the authorities be certain that the communication is fair and has taken into consideration adequately the ethical dimensions? Civil society organizations and the media also play an important role, especially by putting the specific knowledge into a wider context, and by providing a qualitative interpretation of the quantitative data supplied by the scientists. There is indeed a great shortage of credible and widely understandable information in the interface between scientific evidence on one hand and the comprehension of its societal implications and ramifications on the other hand.

This is where risk communication plays its role: it aims to reduce the lack of trust between civil society and the scientific community. This lack of trust has resulted from a number of cases where the negative impact and the severity of negative long term consequences of certain technologies were downplayed by the scientific community, for instance in cases such as asbestos, HIV-contaminated blood, CFCs, DDT or numerous other chemicals. Furthermore, there are scientific controversies which have been lingering for years without a convincing solution, such as the safety of

hormone-treated beef or genetically modified food, and the equally unresolved question as to who ought to bear the burden of proof.

The communication of the details of scientific risk assessment by the authorities is situated at the center of science-based WTO disputes. Not surprisingly therefore, we find in SPS-based WTO disputes such as *EC-Hormones* and *Japan-Apples* that the Appellate Body has emphasized the need to communicate the details of the risk assessment in compliance with SPS Art. 2.2 and 5.1.

Risk Communication, Trade Rule, or Right to Know? Labelling of Genetically Modified Food

Professor Peter H. Sand,
Institute of International Law, University of Munich

This paper reviews recent developments in three international institutions which deal with the labelling of genetically modified (*GM*, 'bio-engineered', 'transgenic') food products:

1. The Dispute Settlement Body of the World Trade Organization (WTO) established a '*Biotech Products Panel*' to resolve the ongoing transatlantic dispute over GM products between the USA, Canada and Argentina on one side (which together produce more than 80% of the world's genetically modified crops, and whose regulatory systems favour voluntary labelling), and the European Union and its member countries on the other (which require mandatory labelling of GM products). Although the report of the Panel – finalized in May 2006 – avoided a finding on the WTO-consistency of the current EU GM Labelling Regulation (on the formal grounds that it had been enacted after the dispute arose), it raised a number of related issues that will have a bearing on the legitimacy of national and regional labelling rules.

2. The Conference of Parties to the Biosafety Protocol of the Convention on Biological Diversity, which held its 3rd meeting in Curitiba/Brazil in March 2006 (Cartagena Protocol COP-MOP 3), faced a similar transatlantic conflict over the identification and documentation of cross-border shipments containing genetically modified living organisms (*LMO*s) for food, feed and processing, pursuant to article 18(2)(a) of the Protocol. While the '*Curitiba Rules*' as finally agreed require mandatory labelling for exported products clearly identified and separated as containing LMOs, they allow a six-year transition period for less specific labels saying 'may contain LMOs' in the case of bulk shipments in which the presence of transgenics has not been documented and identified from the origin. Moreover, as confirmed by the WTO Biotech Products Panel, these rules will not affect trade with non-parties to the Cartagena Protocol.

3. The FAO/WHO *Codex Alimentarius* Committee on Food Labelling (CCFL) also addressed the GM/biotechnology issue at its May 2006 session in Ottawa/Canada. Given that the Codex has since 1995 served as a benchmark authority for WTO purposes, its standard-setting process has become highly

> politicized – to the point of transatlantic gridlock, as demonstrated at the Ottawa session: All the meeting was able to accomplish in this context was the establishment of a new working group, with the timid mandate to gather information on current GM labelling standards and practices, as well as on "strategies used in communicating information to the public".

GM food product labels are part of the recent wave of *informational regulation* sometimes described as a 'post-modern' third generation of environmental law (after command-and-control, and market-based instruments). They also appear to have shifted the focus of regulatory attention, from an initial concern with novel risk communication towards a more fundamental debate over democratic governance: i.e., between the public's right-to-know, and a new 'soft paternalism' claiming to determine what citizens and consumers *need* to know.

The Role of the Aarhus Convention in Environmental Risk Communication

Jeremy Wates
Secretary to the Aarhus Convention, Geneva

The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters emerged from Principle 10 of the 1992 Rio Declaration on Environment and Development which states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The negotiations of the Convention started in 1996 and were concluded relatively speedily in Aarhus in 1998. Given that the adoption of the Convention was accompanied by intense NGO support, many observers assumed that its entry into force would take a very long time. Nevertheless, with 16 ratifications (presently 39 parties) it successfully entered into force already in 2001.

The 'participation pillar' of the Convention emphasizes in Art. 6.4. that public input must be possible before the essential environment-related decisions have been taken and some of the stakeholders are facing a *fait accompli* : "Each Party shall provide for early public participation, when all options are open and effective public participation can take place." With regards to the 'access to information pillar,' general kinds of information are not sufficient, according to Art. 7, each Party shall – except under certain exceptional circumstances - "Provide in an appropriate form

information on the performance of public functions or the provision of public services relating to the environment by government at all levels."

In the event of a threat to human health or the environment, relevant information must be disseminated by the authorities in charge "immediately and without delay." These provisions are the result of long delays in the dissemination of crucial information by the authorities in the tragedies of Chernobyl and Bhopal.

The Convention is addressing genetically modified organisms (GMOs) in the preamble, in the definitions and in a specific article. It recognizes in the Preamble the public's need for increased transparency and greater public participation in decision-making in this field. In the Definition it includes in Environmental Information "… biological diversity and its components, including genetically modified organisms, and the interaction among these elements." Finally, in Art. 6.11 it stipulates under *Public participation in decisions on specific activities* that "Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment." It should be noted that this paragraph has generated a considerable controversy, the Parties resolved to continue negotiations through an intergovernmental working group with a seven year mandate. One of the key questions to be clarified is to stipulate what exactly is binding in this context. On the other hand, Annex I, listing activities (projects) falling under Art. 6 on Public Participation does not include GMOs.

Subsequently, at the 2nd Conference of the Parties in Almaty, Kazakhstan, in 2005, an important milestone of the Convention was adopted, namely the Amendment on GMOs, which will replace Art. 6.11 once it has entered in to force through a separate ratification process that requires 75% of the votes among the Parties at the moment of entry into force. This Amendment clarifies and strengthens the participation process for GMOs, but it will be binding only for those Parties which have ratified it.

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