

*Rutgers Law School (Newark)*  
Faculty Papers

---

*Year 2002*

*Paper 14*

---

**Treaties in Collision: The Biosafety Protocol  
and the World Trade Organization Agreements**

Sabrina Safrin\*

\*Rutgers University Law School, Newark, ssafrin@kinoy.rutgers.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/rutgersnewarklwps/art14>

Copyright ©2002 by the author.

# Treaties in Collision: The Biosafety Protocol and the World Trade Organization Agreements

Sabrina Safrin

## Abstract

In the event of a conflict between the requirements of the Biosafety Protocol, a multilateral agreement governing the trade in genetically modified organisms, and the requirements of the General Agreement on Tariffs and Trade and associated agreements (collectively WTO Agreements), which treaty's requirements prevail? This question lies at the legal heart of the perceived conflict between trade globalization and environmental protection. This issue is particularly timely given the present trade dispute between the United States and European Union over the European Union's restrictions on the importation of genetically modified agricultural commodities.

In this piece, I analyze the relationship between these agreements. I conclude that while the "savings clause" language ultimately included in the Biosafety Protocol preserves countries' rights and obligations under the WTO Agreements, the Protocol and the WTO Agreements are less on a collision course than some may fear.

## NOTES AND COMMENTS

### TREATIES IN COLLISION? THE BIOSAFETY PROTOCOL AND THE WORLD TRADE ORGANIZATION AGREEMENTS

On January 29, 2000, over 130 countries adopted the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol or Protocol).<sup>1</sup> The Protocol establishes international procedures applicable to the transboundary movement of bioengineered living organisms (referred to in the Protocol as “living modified organisms,” or “LMOs”). The adoption of the Protocol marked the close of over four years of intensive, contentious, and often emotional negotiations regarding the multibillion-dollar trade in bioengineered organisms.

Human beings have genetically modified plants and animals through domestication and controlled breeding for some ten thousand years with little controversy.<sup>2</sup> Since 1973, however, modern biotechnology techniques have enabled the transfer of genes from one species to another unrelated species.<sup>3</sup> For example, genes from a flounder known to survive in frigid waters have been transferred to tomatoes to make them resistant to frost;<sup>4</sup> and genes from a natural soil bacterium (*Bacillus thuringiensis*) have been transferred to potatoes and corn to make them resistant to certain insects.<sup>5</sup>

These modern techniques and the products created by them have generated considerable debate.<sup>6</sup> Some commentators have raised ethical and religious concerns that these techniques enable human beings to play God.<sup>7</sup> Others have raised health concerns that genetic modifications might produce foods that trigger allergies.<sup>8</sup> Still others have asserted that economic considerations argue against genetically modified crops because they might disrupt small-scale farming systems and encourage monoculture.<sup>9</sup> Most important as regards the Biosafety Protocol, a multilateral environmental agreement, are environmental concerns that transgenic plants might transmit their genes to other crops or wild plants through pollen dispersal or may evolve into invasive species as their superior traits allow them to out-compete other plants.<sup>10</sup> Thus, the objective of the Biosafety Protocol

is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of

<sup>1</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 ILM 1027 (2000), available at <<http://www.biodiv.org>> [hereinafter Protocol].

<sup>2</sup> Robert Paarlberg, *The Global Food Fights*, FOREIGN AFF., May/June 2000, at 24, 25.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; CYRIL KORMOS & LAYLA HUGHES, REGULATING GENETICALLY MODIFIED ORGANISMS 7 (Conservation International, 2000).

<sup>5</sup> Paarlberg, *supra* note 2, at 25.

<sup>6</sup> *Id.* at 24; KORMOS & HUGHES, *supra* note 4, at 7.

<sup>7</sup> Paarlberg, *supra* note 2, at 27; KORMOS & HUGHES, *supra* note 4, at 8; John Stephen Fredland, Note, *Unlabel Their Frankenstein Foods!: Evaluating a U.S. Challenge to the European Commission's Labeling Requirements for Food Products Containing Genetically-Modified Organisms*, 33 VAND. J. INT'L L. 183, 187 (2000) (noting objections by the Prince of Wales that genetic modification “takes man into realms that belong to God, and God alone”).

<sup>8</sup> KORMOS & HUGHES, *supra* note 4, at 8.

<sup>9</sup> *Id.* at 7–8.

<sup>10</sup> *Id.*; David G. Victor & C. Ford Runge, *Farming the Genetic Frontier*, FOREIGN AFF., May/June 2002, at 107, 110.

biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.<sup>11</sup>

One of the most difficult and controversial issues that the negotiators of the Biosafety Protocol faced was how to deal with the relationship between the Protocol and other international agreements, particularly the General Agreement on Tariffs and Trade<sup>12</sup> and associated agreements under the umbrella of the World Trade Organization such as the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade (collectively, the WTO Agreements).<sup>13</sup> At issue was whether the requirements of the Protocol would prevail if they should conflict with the requirements of the WTO Agreements. This question lies at the legal heart of the perceived conflict between trade globalization and environmental protection. The relationship between the Biosafety Protocol and other international agreements (commonly referred to as “the savings clause issue”) was one of the last issues resolved and one of the few that, by itself, could have prevented the successful completion of the Protocol.<sup>14</sup>

In part I, I summarize key provisions of the Biosafety Protocol and the WTO Agreements and outline two principal areas of potential tension between the two regimes. I then discuss the role of so-called savings clauses in international law in part II. Part III sets forth the positions of different countries on the relationship between the Biosafety Protocol and other international agreements, explains the position of the United States government on the issue, and explores the road to a solution to the savings clause controversy. In part IV, I analyze the ultimate resolution of the issue in the Protocol and assess the portent of that resolution for future multilateral environmental agreements that implicate international trade. Finally, in part V, I assess whether the savings clause issue actually amounted to somewhat less than countries believed. This piece concludes that while the “savings clause” language ultimately included in the Biosafety Protocol preserves countries’ rights and obligations under the WTO Agreements, the Biosafety Protocol and the WTO Agreements are less on a collision course than some may fear, and the importance of the savings clause may have been overestimated by all sides to the controversy.

## I. KEY PROVISIONS AND POTENTIAL SOURCES OF TENSION BETWEEN THE REGIMES

### *Key Provisions of the Biosafety Protocol*

*Scope.* The Biosafety Protocol solely addresses living modified organisms produced through modern biotechnology techniques. It does not encompass living organisms produced through traditional breeding methods.<sup>15</sup> In addition, it does not apply to the

<sup>11</sup> Protocol, *supra* note 1, Art. 1.

<sup>12</sup> The General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194, was amended extensively in 1994 as part of the Uruguay Round. The Uruguay Round produced a “new GATT 1994,” which supersedes the “old GATT.” JOHN H. JACKSON, JURISPRUDENCE OF GATT AND THE WTO 401 (2000). For GATT 1994, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], ANNEX 1A, in WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999) [hereinafter THE LEGAL TEXTS], 33 ILM 1154 (1994).

<sup>13</sup> The Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Annex 1A, THE LEGAL TEXTS, *supra* note 12, at 59 [hereinafter SPS Agreement], regulates sanitary measures taken by member states to protect human and animal health and phytosanitary measures taken to protect plant life or health. The Agreement on Technical Barriers to Trade, WTO Agreement, Annex 1A, THE LEGAL TEXTS, *supra*, at 121 [hereinafter TBT Agreement], applies to technical barriers to trade, such as packaging, marking, and labeling requirements, that are not promulgated for sanitary or phytosanitary purposes.

<sup>14</sup> Negotiations on the Protocol were scheduled to conclude in February of 1999 in Cartagena, Colombia. These negotiations collapsed owing to irreconcilable differences between nations, including differences on whether the Protocol would include a savings clause. The Protocol was ultimately concluded and adopted nearly a year later in Montreal, Canada.

<sup>15</sup> Article 3(g) of the Protocol, *supra* note 1, defines “living modified organism” as “any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.” Article 3(i) defines “modern biotechnology” and specifically provides that it does not include “techniques used in traditional

inanimate products of living modified organisms such as corn cereal or soybean oil that might be made from genetically modified corn or soybeans.<sup>16</sup> The Protocol also expressly excludes pharmaceuticals for humans from its ambit.<sup>17</sup>

*Advance informed agreement procedure.* In large measure, the advance informed agreement (AIA) procedure represents the core of the Protocol. The AIA procedure, in effect, requires an exporter to seek the consent of the party of import<sup>18</sup> prior to the first shipment of an LMO meant for intentional introduction into the environment of that party.<sup>19</sup> The party of import then decides whether and on what conditions to permit the import.<sup>20</sup> First shipments of genetically modified seeds for planting, fish for release, and microorganisms for bioremediation are subject to the AIA procedure. LMOs that are not intended for direct release into the environment but, rather, are shipped for use as food, feed, or processing, such as bulk shipments of corn for cattle feed or for processing into corn oil, do not fall within the AIA procedure.<sup>21</sup> Because such commodities are not intended for direct release into the environment, they present little or substantially less environmental risk to the importing state. Similarly, the AIA procedure does not apply to LMOs transiting third states or destined for contained use (e.g., vials for scientific research).<sup>22</sup> The Protocol requires the importing party to base its import decision on a scientific risk assessment so as “to identify and evaluate the possible adverse effects of living modified organisms on the conservation and sustainable use of biological diversity, taking also into account risks to human health.”<sup>23</sup>

*Requirements for commodities.* The Protocol directs parties to provide a Biosafety Clearinghouse with information regarding a final decision that they have made on the “domestic use . . . of a living modified organism that may be subject to transboundary movement for direct use as food or feed, or for processing,” within fifteen days of making that decision.<sup>24</sup> This includes, for example, a final decision to permit the planting or selling of an LMO within the country when that LMO may go to another party for direct use as food or feed or for processing. In this way, parties inform each other early on of final decisions that they have made with respect to LMO commodities that may enter international commerce, which gives importing parties an opportunity to decide whether they wish to review such commodities. A developing country party or a party with an economy in transition that lacks its own regulatory framework may indicate through the Biosafety Clearinghouse that it intends to take a decision on such an LMO commodity.<sup>25</sup> As with LMOs subject to the AIA procedure, decisions on the import of commodities are to be based on a scientific risk assessment.<sup>26</sup>

*“Precaution.”* The Protocol includes “precautionary language” that applies to decisions by parties of import in cases of scientific uncertainty. That language states that

breeding and selection.”

<sup>16</sup> Pursuant to Article 4 of the Protocol, *id.*, the scope of the Protocol extends solely to “living modified organisms.” Under Article 3(h), for an organism to be living it must be a “biological entity capable of transferring or replicating genetic material.” Because products of living modified organisms such as oil and paper goods are inanimate, they fall outside the scope of the Protocol.

<sup>17</sup> *Id.*, Art. 5.

<sup>18</sup> Party of import refers to a country that is a party to the Protocol and into whose territory the living modified organism is intended for release. *Id.*, Art. 3(e).

<sup>19</sup> *Id.*, Arts. 7, 8.

<sup>20</sup> *Id.*, Art. 10.

<sup>21</sup> *Id.*, Art. 7(1), (2).

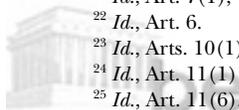
<sup>22</sup> *Id.*, Art. 6.

<sup>23</sup> *Id.*, Arts. 10(1), 15.

<sup>24</sup> *Id.*, Art. 11(1).

<sup>25</sup> *Id.*, Art. 11(6).

<sup>26</sup> *Id.*



[l]ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account the risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question . . . in order to avoid or minimize such potential adverse effects.<sup>27</sup>

*Documentation.* The Protocol sets forth different requirements for shipping documentation for different types of LMOs. Documentation accompanying shipments of LMOs meant for intentional release into the environment, such as seeds for planting, must identify the shipment as containing LMOs, as well as indicate the identity and relevant traits of the LMOs.<sup>28</sup> Documentation accompanying shipments of LMO commodities must indicate that the shipment “may contain” LMOs and that the shipment is not intended for intentional introduction into the environment, as well as specify a contact point for further information.<sup>29</sup> The Protocol provides for a future decision by the parties on “detailed requirements for this purpose.”<sup>30</sup> Finally, documentation accompanying shipments of LMOs destined for contained use, such as vials of the organisms for scientific or commercial research, must identify the shipment as containing LMOs.<sup>31</sup>

*Trade with nonparties.* The United States cannot become a party to the Biosafety Protocol unless it becomes a party to the Convention on Biological Diversity, the parent convention of the Protocol.<sup>32</sup> While the United States has signed the Convention, the Senate has not given its advice and consent to that treaty. The Protocol provides that transboundary movements of living modified organisms between parties and nonparties must “be consistent with” its objective.<sup>33</sup> Parties may enter into agreements and arrangements with nonparties regarding such transboundary movements.<sup>34</sup> Moreover, parties are to encourage nonparties both to join the Protocol and to contribute information to the Biosafety Clearinghouse.<sup>35</sup>

#### *Key Provisions of the WTO Agreements*

The core obligations for members of the world trading system have not changed since adoption of the original GATT in 1947.<sup>36</sup> Basically, the GATT requires members to give equal treatment to exports from all members and bars members from discriminating between locally produced and imported products.<sup>37</sup>

<sup>27</sup> *Id.*, Arts. 10(6) & (in slightly modified form) 11(8). The Protocol also refers to precaution in its preamble and in Article 1. Clause 4 of the preamble states: “Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development” (emphasis omitted). Article 1 on objective, quoted in text at note 11 *supra*, begins by referring to the precautionary approach of Rio Principle 15, stating that the objective is “[i]n accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development.” For the Rio Declaration on Environment and Development, June 14, 1992, see 31 ILM 874 (1992).

<sup>28</sup> Protocol, *supra* note 1, Art. 18(2)(c).

<sup>29</sup> *Id.*, Art. 18(2)(a).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, Art. 18(2)(b).

<sup>32</sup> The Protocol begins with the qualifier “The Parties to this Protocol, Being Parties to the Convention on Biological Diversity.” *Id.*, pmbl., cl. 1. Article 32 of the Convention on Biological Diversity, June 5, 1992, 31 ILM 818 (1992), provides that only nations that are parties to the Convention may become parties to its protocols.

<sup>33</sup> Protocol, *supra* note 1, Art. 24(1).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, Art. 24(2).

<sup>36</sup> David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 NYU J. INT’L L. & POL. 865, 873 (2000).

<sup>37</sup> *Id.* Article I of the GATT requires “most-favored-nation treatment” between GATT members, which precludes discrimination according to the country of origin. Article III of the GATT requires “national treatment,” which prevents members from treating imported products less favorably than domestic products. In addition, the chapeau of GATT Article XX provides that parties may not apply measures, including those necessary to protect human, animal, or plant life or health or relating to the conservation of exhaustible natural resources, in a manner that

The SPS Agreement, which was added pursuant to the Uruguay Trade Round of 1994, is the WTO agreement likely to be the most relevant to the trade in living modified organisms that present environmental risk. That Agreement regulates measures taken by member states to protect human and animal health (sanitary measures) and those taken to protect plant life or health (phytosanitary measures).<sup>38</sup> Restrictions on the import of LMOs, including bans on such imports, quarantine or testing requirements, and labeling requirements, taken by nations to protect plant, animal, or human health would fall under this Agreement.<sup>39</sup> Under the SPS Agreement, a member has a right to take sanitary and phytosanitary measures within its territory that affect trade but only if they are “based on scientific principles and . . . not maintained without sufficient scientific evidence.”<sup>40</sup> In addition, a WTO member may apply such measures “only to the extent necessary to protect human, animal or plant life or health.”<sup>41</sup>

Like the Biosafety Protocol, the SPS Agreement includes “precautionary language.” That language provides that “[i]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information.”<sup>42</sup> However, in such circumstances, a member has a continuing obligation both “to obtain the additional information necessary for a more objective assessment of risk” and to “review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”<sup>43</sup> The SPS Agreement also prohibits discrimination. Article 2.3 reiterates the threshold requirement of the GATT that SPS measures may not “arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail” and may not “be applied in a manner which would constitute a disguised restriction on international trade.”<sup>44</sup>

The TBT Agreement applies to technical barriers to trade, such as packaging, marking, and labeling requirements, that are not promulgated for sanitary or phytosanitary purposes.<sup>45</sup> This Agreement would likely apply to technical barriers to the import of LMOs imposed not to protect the environment or human health but to inform consumers or to protect a state’s culture or economy.<sup>46</sup> Under this Agreement, WTO members may not unjustifiably or arbitrarily discriminate against imports through their technical regulations and standards.<sup>47</sup> In addition, technical regulations may not “be more trade-restrictive than necessary to fulfil a legitimate objective.”<sup>48</sup>

### *Principal Areas of Potential Tension*

As several commentators have noted, the terms of the Biosafety Protocol do not appear facially incompatible with those of the WTO Agreements.<sup>49</sup> Nevertheless, nations that

arbitrarily or unjustifiably discriminates “between countries where the same conditions prevail” or that would constitute “a disguised restriction on international trade.”

<sup>38</sup> SPS Agreement, Art. 1 & Annex A(1).

<sup>39</sup> See Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 FOOD & DRUG L.J. 81, 83–85 (2000); Sean D. Murphy, *Biotechnology and International Law*, 42 HARV. INT’L L.J. 48, 79 (2001).

<sup>40</sup> SPS Agreement, Art. 2(2).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, Art. 5.7.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, Art. 2(3); Victor, *supra* note 36, at 875.

<sup>45</sup> TBT Agreement, Art. 1.5 & pmb1., cl. 5; Murphy, *supra* note 39, at 79 n.134. By their own terms, the TBT and SPS Agreements are mutually exclusive. A measure encompassed by the SPS Agreement is not covered by the TBT Agreement. TBT Agreement, Art. 1.5; SPS Agreement, Art. 1.4.

<sup>46</sup> Murphy, *supra* note 39, at 83 n.157.

<sup>47</sup> TBT Agreement, Art. 2.2.

<sup>48</sup> *Id.*

<sup>49</sup> Steve Charnovitz, *The Supervision of Health and Biosafety Regulation by World Trade Rules*, 13 TUL. ENVTL. L.J. 271, 300 (2000) (stating that the Biosafety Protocol appears compatible with the SPS Agreement); Gretchen L. Gaston & Randall S. Abate, *The Biosafety Protocol and the World Trade Organization: Can the Two Coexist?* 12 PACE INT’L L. REV. 107, 109

pressed for the inclusion of a savings clause to make clear that WTO disciplines continue to apply to trade in LMOs covered by the Protocol were concerned that, absent the inclusion of such a clause, some countries might implement the Protocol in a manner that violated their WTO obligations. They also worried that the Protocol might create ambiguities that would give a country determined to avoid its WTO obligations room to argue that those obligations did not fully apply to the trade in genetically modified organisms covered by the Protocol.<sup>50</sup> Concerns about the potential sources of tension between the two treaty regimes centered on two principal issues: (1) whether decisions by a country to prohibit or restrict the import of an LMO would be based on science, and (2) whether a country could use the Protocol either to discriminate between LMO imports from different countries or to favor its domestic industries.

As pointed out above, the SPS Agreement clearly requires that measures, including any decisions, to prohibit or restrict the import of LMOs so as to protect the life or health of animals, plants, or humans be based on science.<sup>51</sup> Yet some countries had banned or restricted the import of LMOs on the basis of political opposition and ostensibly without scientific justification.<sup>52</sup> Beginning in March 1998, the European Union (EU) suspended all future approvals of genetically modified crops, essentially barring the import of such organisms.<sup>53</sup> As a result, U.S. corn exports to the European Union plummeted by more than 90 percent in 1998 alone.<sup>54</sup> This ban even applied to genetically modified corn seed that EU scientists had determined posed no threat to the environment or to human health.<sup>55</sup>

In addition, arguments asserted in cases before the WTO indicated that some nations believed that they need not ground their SPS measures on a scientific risk assessment and could maintain such measures without sufficient scientific evidence by justifying them as an exercise in “precaution.” The European Union maintained in a 1997 case before the WTO that its ban on the import of beef from cattle treated with certain growth-promoting hormones was justified as a general exercise in precaution, notwithstanding the lack of a scientific risk assessment showing that such beef presented a risk to human health.<sup>56</sup> In a 1998 WTO case, Japan defended a variety-by-variety testing requirement for imports of certain fruits as an exercise in precaution, despite the lack of sufficient scientific evidence to support testing the efficacy of a quarantine treatment on different varieties of a fruit when that treatment had already been proven effective for other varieties of that fruit.<sup>57</sup> The WTO Appellate Body rejected these arguments.<sup>58</sup> It held that “precaution” could not excuse SPS measures that otherwise violated the requirements of the SPS Agreement, such as the

(2000) (concluding that trade measures contained in the Biosafety Protocol are compatible with WTO principles).

<sup>50</sup> The atmosphere contributing to these concerns is discussed in part III *infra*.

<sup>51</sup> See *supra* text at note 40.

<sup>52</sup> See generally Paarlberg, *supra* note 2, at 27 (European Union bans on genetically modified crops promulgated without scientific evidence of harm); Victor & Runge, *supra* note 10, at 113 (stating that “[t]he scientific evidence strongly suggests that [bioengineered] crops are safe—sometimes even safer than conventional ones”).

<sup>53</sup> Murphy, *supra* note 39, at 80–81; Paarlberg, *supra* note 2, at 27–28.

<sup>54</sup> Murphy, *supra* note 39, at 81. The European Union’s ban has engendered a loss of approximately two hundred million dollars a year in U.S. corn exports. Paarlberg, *supra* note 2, at 28.

<sup>55</sup> Murphy, *supra* note 39, at 80. The European Union also required mandatory labeling of genetically modified products. For a discussion of the EU labeling requirements and concern that such requirements might violate WTO disciplines, see Fredland, *supra* note 7.

<sup>56</sup> See discussion of the *Beef Hormone* case in text at notes 88–92 *infra*. See also Kennedy, *supra* note 39, at 92, 94, 96 (discussing lack of scientific support that the use of growth hormones presented risks to human health and the presence of much evidence to the contrary).

<sup>57</sup> Appellate Body Report, Japan—Measures Affecting Agricultural Products, WT/DS76/AB/R, paras. 10, 81 (Feb. 22, 1999) (adopted Mar. 19, 1999) [hereinafter Japan—Varietal case]. For a summary of this case, see Kennedy, *supra* note 39, at 98–99; Victor, *supra* note 36, at 911–13.

<sup>58</sup> Japan—Varietal case, *supra* note 57, para. 81; see also *Beef Hormone* case, *infra* note 90.

obligations of members to base their SPS measures on a scientific risk assessment and not to maintain such measures without sufficient scientific evidence.<sup>59</sup>

Without the inclusion of a savings clause in the Protocol, might some nations use that instrument and its “precautionary language” to justify import bans or other restrictions on LMOs without basing them on a scientific risk assessment? The precautionary language of the Protocol is different from, though not necessarily incompatible with, that of the SPS Agreement. The Protocol provides that a party may take precautionary measures “as appropriate.”<sup>60</sup> Does this wording mean that such measures must be consistent with WTO disciplines? Unlike the SPS Agreement, the Biosafety Protocol does not expressly require a party that takes precautionary measures in the face of scientific uncertainty to seek to obtain the additional information necessary for a more objective assessment of risk and to review those measures accordingly within a reasonable period of time, as required by Article 5.7 of the SPS Agreement. Does this difference amount to a modification of the requirement under the SPS Agreement for further inquiry and review?<sup>61</sup>

The WTO Agreements clearly prohibit a member from discriminating between members with respect to imports of products or favoring domestic products over imported ones.<sup>62</sup> The Protocol contains an assortment of discretionary provisions that permit a party to take certain actions, opening the door to the argument that such actions are permissible even if executed in a manner that violates the party’s other international obligations. For example, Article 10(3) of the Protocol provides that a party of import shall make a decision with respect to the import of an LMO intended for deliberate release into the environment, but does not compel a particular decisional outcome. Similarly, Article 11(4) of the Protocol provides that a party of import may take a decision on the import of an LMO intended for food, feed, or processing, again without compelling or prescribing a particular decision or outcome. Were a party to both the Protocol and the WTO Agreements to allow the import of a given LMO from one WTO member but not from another, or to permit the domestic production but not the import of a given LMO, such action would probably violate the WTO Agreements.<sup>63</sup>

Another potential risk of discriminatory conduct involves various opportunities provided by the Protocol for parties to deviate from its requirements through agreements between them or through unilateral exemption of some LMOs from the advance informed agreement procedure. Article 14 of the Protocol permits parties to enter into bilateral and multilateral agreements that would govern the trade in covered LMOs between them, in lieu of the Protocol itself, “provided that such agreements and arrangements do not result in a lower level of protection than that provided for by the Protocol.” Article 13 allows parties to specify imports of LMOs to them “to be exempted from the advance informed agreement procedure.” Thus, were a country to enter into a regional agreement exempting imports of LMOs from countries in that region from regulatory scrutiny, while it continued to subject the import of like LMOs from other countries to regulatory review, it might run afoul of the most-favored-nation provisions of the WTO Agreements.<sup>64</sup> Similarly, were a country to subject imports of LMOs to scrutiny while exempting the domestic production

<sup>59</sup> Japan—Varietal case, *supra* note 57, para. 81.

<sup>60</sup> Protocol, *supra* note 1, Arts. 10(6), 11(8).

<sup>61</sup> In the Japan—Varietal case, *supra* note 57, Panel Report, WT/DS76/R, para. 8.56 (Oct. 27, 1998), the WTO panel found that Japan’s varietal testing requirement could not be defended under Article 5.7 of the SPS Agreement because Japan had not sought to obtain the additional information necessary for a more objective risk assessment and had not reviewed its testing requirement within a reasonable period of time as required by Article 5.7. Victor, *supra* note 36, at 911–12.

<sup>62</sup> See text *supra* at notes 37, 44, 47 and *infra* at notes 82, 83.

<sup>63</sup> See text *supra* at notes 37, 44, 47 and *infra* at notes 82, 83.

<sup>64</sup> See *infra* note 83 and corresponding text.

or release of like LMOs from similar review, this practice might constitute discrimination in violation of certain WTO disciplines.<sup>65</sup>

## II. THE ROLE OF SAVINGS CLAUSES IN INTERNATIONAL LAW

Under the rules of customary international law, which are reflected in this respect in the Vienna Convention on the Law of Treaties, in the event of an incompatibility between two successive agreements relating to the same subject matter, the requirements of the later agreement prevail.<sup>66</sup> Where the later treaty includes only some of the parties to the earlier treaty, the later treaty prevails only with respect to those who are party to both agreements.<sup>67</sup> Otherwise, the earlier agreement governs.<sup>68</sup>

The presumption that, as between parties to both agreements, the requirements of the later agreement prevail over incompatible terms of an earlier agreement is overcome if the later agreement includes language that indicates that the agreement “is not to be considered as incompatible with, an earlier agreement.” When an agreement so indicates, the terms of the earlier agreement prevail over incompatible terms of a later agreement.<sup>69</sup> Such a clause is commonly referred to as “a savings clause” because, in effect, it saves provisions of the earlier agreement that would otherwise be overcome by incompatible provisions of a later agreement.

The rule that, absent a savings clause, the requirements of a later agreement prevail over incompatible terms of an earlier agreement as between parties to both agreements does not reflect a bias or a preference in international law toward later agreements or a belief that later agreements hold greater importance than agreements that preceded them.<sup>70</sup> Indeed, some of the most important and most widely adhered-to agreements are decades old.<sup>71</sup> Rather, the rule apparently reflects an assumption that, barring any way to reconcile con-

<sup>65</sup> See *infra* note 83 and corresponding text.

<sup>66</sup> Article 30, paragraph 3 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1966, 1155 UNTS 336 [hereinafter Vienna Convention], states: “When all the parties to the earlier treaty are parties also to the later treaty . . . , the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

<sup>67</sup> *Id.*, Art. 30, para. 4.

<sup>68</sup> *Id.* Article 30, paragraph 4 of the Vienna Convention is particularly important in the case of the Biosafety Protocol. The United States, which is a party to the WTO Agreements, cannot become a party to the Biosafety Protocol unless it becomes a party to its parent convention, the Convention on Biological Diversity. See *supra* note 32 and corresponding text. Until such time as the United States joins the Biosafety Protocol, treaty relations between the United States and any other nation are governed by those treaties to which both the United States and that nation are party, such as the WTO Agreements, regardless of any savings clause. Cf. David Wirth, *Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes*, 7 *RÉCIEL* 237, 241 (1998) (“As between two states, both of which are parties to the GATT/WTO regime and only one of which is a Party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, GATT/WTO obligations remain intact.”)

<sup>69</sup> Article 30, paragraph 2 of the Vienna Convention, *supra* note 66, states: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”

<sup>70</sup> See generally Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 *AJIL* 535, 536–38 (2001) (explaining that there exists no “inherent hierarchy” in international law so that treaties are in principle of equal value).

<sup>71</sup> *E.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 UST 1313, 480 UNTS 43; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 UST 2410, 610 UNTS 205; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, 1015 UNTS 163 [hereinafter Biological Weapons Convention]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 UST 1087, 993 UNTS 243 [hereinafter CITES].

flucting provisions of two treaties and absent any indication to the contrary,<sup>72</sup> the provisions of the later agreement essentially modify irreconcilable earlier provisions.<sup>73</sup>

### III. CONFLICTING POSITIONS ON INCLUDING A SAVINGS CLAUSE IN THE BIOSAFETY PROTOCOL

During the negotiation of the Biosafety Protocol, countries' positions on the savings clause issue generally divided into three camps. Some firmly held that the Protocol should clearly state that it did not alter a party's existing international rights and obligations; they therefore supported the inclusion of a savings clause, which would so indicate.<sup>74</sup> The United States and other nations constituting the "Miami Group,"<sup>75</sup> a negotiating bloc of major agriculture-exporting nations, advocated this approach.<sup>76</sup> Other nations took the position that the Protocol should remain silent on this issue. Thus, in the event of incompatibility between the Protocol and an earlier agreement relating to the same subject matter, the Protocol would prevail.<sup>77</sup> The European Union was the most ardent advocate of this position.<sup>78</sup> Most countries holding this view maintained that the Protocol would not and should not modify other agreements. They believed, however, that the Protocol need not expressly so state. Finally, some countries supported what might be characterized as a middle position; namely, inclusion of savings clause language that tracked Article 22 of the Convention on Biological Diversity. Under this approach, in the event of a conflict between the Protocol and an earlier agreement, the earlier agreement would prevail, "except where the exercise of those [earlier] rights and obligations would cause a serious damage or threat to biological diversity."<sup>79</sup> The chairman of the Biosafety Working Group (the negotiating body for the Biosafety Protocol) ultimately included this approach in his suggested compromise treaty text, which he produced during the final days of the penultimate round of negotiations on the Protocol in Cartagena.<sup>80</sup> Most developing countries accepted this approach at that time.<sup>81</sup>

#### *The U.S. Position and Rationale for a Savings Clause*

The United States early on called for the inclusion of a savings clause in the Protocol. This call largely stemmed from two concerns. First, given the breadth of biotechnology, which encompasses, inter alia, microbes, medicine, food, forests, and fish, as well as research and commerce, the negotiators faced a palpable risk of unintentionally modifying other agreements through the provisions of the Protocol. Drafting international procedures governing the transboundary movement of living modified organisms proved challenging enough. Revisiting

<sup>72</sup> See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 97 (2d. ed. 1984) (stressing that the rules in Article 30 of the Vienna Convention are residual only).

<sup>73</sup> See ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 219 (1961), who states:

Where the parties to the two treaties said to be in conflict are the same, an allegation of conflict raises a question of interpretation rather than a question of a rule of law; the parties are masters of the situation and they are free to modify one treaty by a later one.

See also Pauwelyn, *supra* note 70, at 545.

<sup>74</sup> See text *supra* at note 70.

<sup>75</sup> The Miami Group included Argentina, Australia, Canada, Chile, the United States, and Uruguay.

<sup>76</sup> See Outstanding Issues and Necessary Revisions to the Text of the Draft Protocol: Submission by the Miami Group, UNEP/CBD/ExCop/1/3, Annex III, at 17, para. 7(a) (Feb. 20, 2000), available at <<http://www.biodiv.org/doc/meetings>>.

<sup>77</sup> See *supra* note 66.

<sup>78</sup> See Package Proposal on the Text of the Draft Protocol: Submission by the European Union, UNEP/CBD/ExCop/1/3, *supra* note 76, Annex II, at 15, 16, para. 3.

<sup>79</sup> Convention on Biological Diversity, *supra* note 32, Art. 22.

<sup>80</sup> Report of the Sixth Meeting of the Open-ended Ad Hoc Working Group on Biosafety, UNEP/CBD/ExCop/1/2, at 35, Art. 31 (Feb. 15, 1999), available at <<http://www.biodiv.org/doc/meetings>>.

<sup>81</sup> The "Like-Minded Group," which was the negotiating group representing most of the developing countries, accepted the chairman's text on the savings clause issue. See Proposal on the Text of the Draft Protocol: Submission by the Like-Minded Group of Countries, UNEP/CBD/ExCop/1/3, *supra* note 76, Annex IV, at 19.

and modifying other agreements, such as those governing biological weapons and plant pests, and the delicate balances reflected in them, presented a herculean task—a task that was virtually impossible to do well. This concern extended beyond the WTO Agreements.

Second, as discussed in part I, even if the terms of the Protocol did not expressly amend earlier agreements, the United States feared that, when implementing the Protocol, countries would do so in a manner inconsistent with their obligations under the WTO Agreements (WTO obligations). The United States was concerned, for example, that some countries might discriminate against LMO imports either to favor their domestic biotechnology industries or to protect nonbiotechnology industries from competition with biotechnology ones.<sup>82</sup> Others might favor the import of LMOs from one country over those from another country in violation of WTO obligations.<sup>83</sup> Still others might take decisions restricting the import of LMOs that were not based on science.<sup>84</sup>

As the negotiations progressed, the belief of the United States and the Miami Group in the necessity for a savings clause deepened. No nation had “taken the microphone” and expressed the intention of using the Protocol to alter its other international rights and obligations. On the contrary, most nations, including those in the European Union, explicitly maintained that they had no intention of using the Protocol to do so, and formal negotiating sessions revealed virtually universal agreement that the Protocol would not and should not alter a country’s obligations under other international agreements. Behind the scenes, however, a few countries unofficially admitted that they hoped the Protocol would give them room possibly to avoid certain WTO obligations. Nations that opposed the inclusion of a savings clause did not identify a particular article or paragraph of the WTO Agreements that they desired to modify, nor did they explain which provisions of those Agreements ought not to apply to living modified organisms. Rather, various nations, confronted with a new technology and a suspicious if not fearful public, appeared to want reassurance that any decisions they might take regulating or banning the import of a living modified organism would not face challenge, even if those decisions responded to consumer fears or cultural or economic considerations, as opposed to health or environmental risks.<sup>85</sup> Given the newness of biotechnology, most nations viewed themselves as importers rather than potential exporters of bioengineered goods. Therefore, they seemed not to perceive themselves as having much to lose if the trade in bioengineered organisms was somehow exempted from WTO disciplines. In fact, some countries might gain from unfettered bans on the import of bioengineered organisms. Their nascent

<sup>82</sup> Such discrimination could implicate several WTO provisions. As indicated above, Article 2.3 of the SPS Agreement prohibits measures that “arbitrarily or unjustifiably discriminate” between countries “where identical or similar conditions prevail.” Article 5.5 of that Agreement provides that governments “shall avoid arbitrary or unjustifiable distinctions” in the levels of protection they consider to be appropriate in different situations, “if such distinctions result in discrimination or a disguised restriction on international trade.” Article 2.1 of the TBT Agreement also prohibits discrimination between imports or between imports and domestic like products. For comparable provisions of the GATT, Article III and the chapeau of Article XX, see note 37 *supra*.

<sup>83</sup> WTO obligations potentially implicated by such action include Article I of the GATT, *supra* note 37 (most-favored-nation treatment); and SPS Agreement, Arts. 2.3, 5.5; TBT Agreement, Art. 2.1; and GATT, chapeau of Art. XX (also prohibiting discrimination).

<sup>84</sup> See SPS Agreement, Art. 2.2, *quoted in text* at note 40 *supra*; TBT Agreement, Art. 2.2, *quoted in text* at note 48 *supra*.

<sup>85</sup> Numerous articles have discussed how consumer fears and trade protectionist forces have generated opposition to genetically modified organisms, particularly in Europe. See Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525 (1998) (concluding that different cultures in the European Union and the United States explain why the EU is more restrictive on meat produced using growth hormones and other novel foods but has less stringent food safety rules on traditional foods); Fredland, *supra* note 7 (discussing widespread European public disfavor with genetically modified organisms or “Frankenstein Foods”); Paarlberg, *supra* note 2, at 26–28; C. Ford Runge & Benjamin Senauer, *A Removable Feast*, FOREIGN AFF., May/June 2000, at 39, 46; Rick Weiss, *In Europe, Cuisine du Gene Gets a Vehement Thumbs Down*, WASH. POST, Apr. 24, 1999, at A1.

domestic biotechnology industries could use a period of trade protection to catch up with industry leaders and their nonbiotechnology industries could escape competition from biotechnology ones.<sup>86</sup>

The temperature regarding the savings clause issue increased with the release, on August 18, 1997, of a WTO dispute settlement body's decision in a non-LMO dispute, the so-called *Beef Hormone* case. The panel found that the ban by the European Communities<sup>87</sup> on the import of meat from cattle treated with certain growth-promoting hormones violated its obligations under the SPS Agreement and requested that the Communities bring the measure into conformity with that Agreement.<sup>88</sup> On January 16, 1998, less than a month before the fourth negotiating session on the Biosafety Protocol, the WTO Appellate Body upheld the panel's decision that the European Communities' ban violated Articles 5.1, 5.2, and 3.3 of the SPS Agreement because it was not "based on" a scientific risk assessment, as required by Articles 5.1 and 5.2.<sup>89</sup> The Appellate Body further upheld the panel's determination that the "precautionary principle" does not override Articles 5.1 and 5.2 and cannot justify a measure that otherwise violates these articles.<sup>90</sup>

If European negotiators felt that the *Beef Hormone* decision, a decision unpopular with the European public, left them with less room to compromise on the savings clause, the United States viewed the European Union's opposition to the savings clause with even greater suspicion. It appeared that the Union, having lost a case before the WTO Appellate Body, wanted to roll back that decision—which affirmed that a country's sanitary and phytosanitary measures must bear a rational relationship to an assessment of the risks presented to human, animal, or plant life or health—in hopes of securing a privilege to deny the import of a good produced through biotechnology on any or no ground in the general name of precaution. On the basis of the EC argumentation in the *Beef Hormone* case, the European Union appeared to see precaution not as serving as a legitimate and important regulatory tool expressly provided for by the WTO Agreements,<sup>91</sup> but as "an excuse of last resort."<sup>92</sup> Any decision, no matter how ill founded, could be defended simply by a vague reference to precaution.

The *Beef Hormone* case was not the only external factor affecting the biosafety negotiations. Its recent experience with mad cow disease had not only rattled Europe, but also sent tremors through the Protocol negotiations.<sup>93</sup> European representatives explained that the

<sup>86</sup> See, e.g., Chen Zhangliang, *Unlimited Prospects for Biotechnology*, KNOWLEDGE ECON. [ZHISHI]JINGJI, Dec. 1999, at 22–28, summary translated in U.S. Embassy Beijing, PRC Biotech: Top Researcher Sees Great Prospects (Jan. 2000), at <<http://www.usembassy-china.org.cn/english/sandt/biotech.html>> (the author, vice chancellor of Beijing University and one of China's most prominent biotechnology researchers and policy advisers, expresses unbounded optimism for the future of Chinese biotechnology, noting, among other things, how potential bans on genetically modified organisms for religious reasons and the European Union's four-year halt on such organisms has "serious effects on U.S. exports" and "gives China a good opportunity. . . . [to] take advantage of this . . . halt to turn China into a world power in genetically modified organisms").

<sup>87</sup> The European Communities has since become the European Union.

<sup>88</sup> Panel Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA, WT/DS48/R/CAN; paras. 9.1, 9.2 (Aug. 18, 1997) (adopted Feb. 13, 1998) [hereinafter *Beef Hormone*].

<sup>89</sup> Appellate Body Report, *Beef Hormone*, *supra* note 88, WT/DS26/AB/R, WT/DS48/AB/R, paras. 113, 114, 158(l) (Jan. 16, 1998).

<sup>90</sup> *Id.* at 45–48, paras. 25–30, & 101, para. 158(c).

<sup>91</sup> As explained by the WTO Appellate Body in the *Beef Hormone* case, *id.*, para. 29, the SPS Agreement encompasses precaution in at least three places. The first is Article 5.7 of that Agreement, see *supra* note 42 and corresponding text. The second and third are Article 3.3 and the sixth clause of the preamble to the SPS Agreement, which provide that parties may set their own level of sanitary and phytosanitary protection.

<sup>92</sup> See generally Victor, *supra* note 36, at 899–900 (noting that in the *Beef Hormone* case, the European Communities argued that, although objective studies on beef hormones showed that such hormones presented no credible risks to humans, highly publicized incidents had made European consumers wary of beef and a ban on beef was necessary to restore confidence in the market).

<sup>93</sup> In 1996 the European Union banned imports of beef from the United Kingdom because of the relationship between beef tainted with bovine spongiform encephalopathy ("mad cow disease") and a variant of the fatal

mad cow disease had fundamentally ruptured public trust in national regulators and “in science itself.” While recognizing the European Union’s political problem, the Miami Group believed that science-based risk assessment remained the best available approach to anticipating, assessing, and addressing risk and should not be abandoned in the wake of the experience with mad cow disease. By the penultimate negotiating sessions in Cartagena,<sup>94</sup> inclusion of a savings clause in the Protocol constituted a core position of the Miami Group.

*The Road to a Solution*

Finding a solution to the savings clause impasse proved elusive. Discussion of the relationship between the Protocol and other agreements had always been difficult. Environmental ministries, in particular, took a profoundly emotional view of the issue. Were environmental agreements to play second fiddle to trade agreements? Were the environment and, more broadly, traditional methods of crop cultivation and cultural preferences to be sacrificed on the altar of global trade and globalization? Any discussion of the savings clause issue quickly turned into a discussion of these emotional points rather than an examination of its legal components. For example, the negotiators of the Biosafety Protocol did not consider whether their countries’ interests under non-WTO agreements, such as the International Plant Protection Convention,<sup>95</sup> the Chemical Weapons Convention,<sup>96</sup> and the Biological Weapons Convention,<sup>97</sup> would be well served by the inclusion of a savings clause. A savings clause would ensure, for example, that bioengineered organisms that might play a role in chemical weapons or serve as a biological weapon would remain subject to the strict controls of the Chemical Weapons Convention and the Biological Weapons Convention, respectively. The decision of the Conference of the Parties to the Convention on Biological Diversity to develop a protocol on biosafety expressly provided that this instrument will “not override or duplicate any other international legal instrument in this area.”<sup>98</sup> A savings clause would make this clear and comport with the decision’s mandate. The one agreement that did receive special protection was the United Nations Convention on the Law of the Sea (LOS Convention), largely because of the efforts of the United Kingdom.<sup>99</sup> It was not that the negotiators carefully considered issues presented by the LOS Convention, especially those protecting freedom of navigation and hence the transit rights

Creutzfeldt-Jakob disease in human beings. The Union lifted the ban in 1999, but the experience created a crisis of consumer confidence in the safety of foods and the ability of European regulators to anticipate threats to human health. Murphy, *supra* note 39, at 79 n.135; see also Victor, *supra* note 36, at 899–900.

<sup>94</sup> See *supra* note 14.

<sup>95</sup> The International Plant Protection Convention (IPPC) controls pests of plants and plant products and aims at preventing their spread, especially across international borders. The IPPC of November 28, 1979, is currently in force. A revised IPPC, adopted in November of 1997, is not yet in force. An LMO that could be considered a plant pest would fall within the IPPC and its requirements, inter alia, that plant protection measures must be “necessary by phytosanitary considerations” and, under the 1997 revised IPPC, be based on a pest risk analysis. Both versions can be found online at <<http://www.fao.org/ag/guides/subject/d.htm>> (visited July 11, 2002).

<sup>96</sup> An LMO that is a toxin could fall under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 ILM 800 (1993) [hereinafter Chemical Weapons Convention], and its restrictions on the international transfer of chemicals that could be converted into chemical weapons. The Convention is available online at <<http://www.opcw.org>>.

<sup>97</sup> An LMO that is a biological weapon would be subject to the strict prohibitions of the Biological Weapons Convention, *supra* note 71.

<sup>98</sup> Decision II/5 of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/2/19, Annex, para. 5(b) (Nov. 30, 1995), available at <<http://www.biodiv.org>>.

<sup>99</sup> Article 2, paragraph 3 of the Biosafety Protocol states:

Nothing in this Protocol shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.

For the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, see 1833 UNTS 397.

of ships. Rather, countries primarily concerned themselves with the WTO Agreements and, since the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal contains a provision that preserves rights and obligations under the LOS Convention,<sup>100</sup> negotiators were prepared to replicate this language in the Protocol.

By the time of the Cartagena negotiations in February 1999, one potential resolution of the savings clause conundrum that lurked behind the scenes was the so-called PIC solution. The final negotiations on the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC) had concluded just five months earlier.<sup>101</sup> That agreement resolved a similar savings clause impasse by including such a clause in its preamble, together with two additional clauses. The savings clause reads: "Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection."<sup>102</sup> The first additional clause states that "trade and environmental policies should be mutually supportive with a view to achieving sustainable development."<sup>103</sup> The other states that the savings clause "is not intended to create a hierarchy between this Convention and other international agreements."<sup>104</sup> During the PIC negotiations, countries universally agreed, at least as stated publicly, that the convention would not alter rights and obligations under other agreements.

Although the "PIC solution" obtained little traction in Cartagena, midway through the final biosafety negotiations in Montreal it became the primary focus of attention. The chair of the group considering the issue proposed including the PIC language as the way to resolve the savings clause issue in the Protocol. Despite initial opposition by the European Union, the PIC approach ultimately prevailed in the final hours of the biosafety negotiations.

Following the PIC model, the Biosafety Protocol includes a straightforward savings clause in its preamble. That clause clearly expresses the rule that savings clauses are designed to enunciate. Referring to the parties to the agreement, it states: "Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements."<sup>105</sup> Two clauses accompany this language. The first states: "Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development";<sup>106</sup> and the second: "Understanding that the above recital [i.e., the savings clause] is not intended to subordinate this Protocol to other international agreements."<sup>107</sup>

#### IV. ANALYSIS OF THE OUTCOME

Nations and commentators will probably view the language of the preamble to the Protocol in one of three ways. First, some will find it confusing and inconsistent.<sup>108</sup> They may

<sup>100</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, Art. 4, para. 12, 28 ILM 657 (1989), available at <<http://www.unep.ch/basel>>.

<sup>101</sup> Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 11, 1998, 38 ILM 1 (1999), available at <<http://www.fao.org/ag/agp/agpp/pesticide/pic>>.

<sup>102</sup> *Id.*, pmb., cl. 9 (emphasis omitted).

<sup>103</sup> *Id.*, cl. 8.

<sup>104</sup> *Id.*, cl. 10.

<sup>105</sup> Biosafety Protocol, *supra* note 1, pmb., cl. 10 (emphasis omitted).

<sup>106</sup> *Id.*, cl. 9 (emphasis omitted).

<sup>107</sup> *Id.*, cl. 11 (emphasis omitted).

<sup>108</sup> KORMOS & HUGHES, *supra* note 4, at 40 (preamble language unclear); Paul Hagen & John Barlow Weiner, *The Cartagena Protocol on Biosafety: New Rules for International Trade in Living Modified Organisms*, 12 GEO. INT'L ENVTL. L. REV. 697, 707-08 (2000) (positing that the Protocol leaves unclear the relationship between its standards and any

conclude that the negotiators ultimately failed to reach an understanding on the relationship between the Protocol and other agreements and essentially “papered over” the issue. Under this view, the Protocol leaves unclear its relationship with other agreements, including the WTO Agreements.<sup>109</sup> Second, one would anticipate that those who pressed for the inclusion of the second additional clause will take the position that it essentially undoes the savings clause language that precedes it and that the Protocol, in effect, has no savings clause.<sup>110</sup> Third, some will argue that the better reading of the preambular language is that it does preserve parties’ rights and obligations under earlier agreements.<sup>111</sup> The following discussion, after providing some general analysis, advocates this third position.

#### *Significance of the Placement of the Savings Clause in the Preamble*

The first notable aspect of the approaches under the PIC Convention and the Biosafety Protocol is that they place the savings clause in the preamble, as opposed to the operative provisions of those treaties. Does this matter? Not really. As seen above, Article 30 of the Vienna Convention provides that specification by a treaty that it is subject to, or not to be considered as incompatible with, either an earlier or a later treaty means that the provisions of the other treaty will prevail.<sup>112</sup> Article 30 does not indicate where in a treaty this specification must take place. Article 31 of the Vienna Convention reflects the general principle of treaty interpretation that the preamble and annexes are part of the text of the treaty.<sup>113</sup> A savings clause is not an operative provision. It does not by itself impose an affirmative obligation upon parties. Rather, it states the relationship between the agreement and earlier agreements, specifying that the agreement does not change the earlier agreements; therefore, a party’s rights and obligations under those earlier agreements persist.<sup>114</sup> Declaratory statements reflecting the intent of the parties may be expressed either in the preamble or in the articles of the treaty.<sup>115</sup> Both the PIC and the biosafety agreements contain strong and clear savings clause language. The fact that this language appears in the preamble does not diminish its effect of stating the parties’ intention to preserve rights and obligations deriving from earlier agreements.

#### *Analysis of the Text*

The second noteworthy aspect of the PIC and biosafety approaches is the inclusion of two additional clauses in the preambles to those treaties. In the negotiations on the PIC Con-

differing standards in trade agreements); Murphy, *supra* note 39, at 78 (reaching same conclusion).

<sup>109</sup> See sources cited *supra* note 108.

<sup>110</sup> This argument is addressed in greater depth in text *infra* at notes 117–25. For a European perspective on the savings clause issue, see Margarida Afonso, *The Relationship with Other International Agreements: An EU Perspective, in THE CARTAGENA PROTOCOL ON BIOSAFETY 423* (Christoph Bail, Robert Falkner, & Helen Marquard eds., 2002).

<sup>111</sup> See, e.g., Kennedy, *supra* note 39, at 104.

<sup>112</sup> Vienna Convention, *supra* note 66, Art. 30, para. 2, *quoted in* note 69 *supra*.

<sup>113</sup> Article 31, paragraph 2 of the Vienna Convention, *id.*, provides: “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . .”

<sup>114</sup> See discussion in part II *supra*. György Haraszti nicely summarizes the purpose of a savings clause as follows:

By [the inclusion of a savings clause] the parties want to give a clear-cut expression to their opinion that they do not consider the new treaty irreconcilable to the provisions of earlier treaties, and that their intention has not been to abrogate earlier treaties. In this respect the provision . . . forestalls any disputes that might arise in connexion with the interpretation of the intention of the parties.

GYÖRGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 296 (1973).

<sup>115</sup> See *supra* note 113. See generally SINCLAIR, *supra* note 72, at 127–28, who quotes Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points*, 1957 BRIT. Y.B. INT’L L. 203, 228, as follows:

Although the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is . . . the natural place in which to look for, an express or explicit general statement of the treaty’s objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.

vention and the Biosafety Protocol, as well as in other fora, savings clauses prompted criticism, particularly by the European Union, as creating a presumption that environmental agreements were less important than trade agreements. In response, the United States argued that savings clauses did not create such a "hierarchy" but simply expressed the parties' intention to continue their existing international rights and obligations, an intention repeatedly voiced by the European Union during both the PIC and the biosafety negotiations. The two additional preambular clauses make clear that the inclusion of a savings clause does not lessen or lower the importance or status of environmental agreements.

The first additional clause reflects the view "that trade and environment agreements should be mutually supportive" in the interest of achieving sustainable development.<sup>116</sup> By the end of the biosafety negotiations, the inclusion of this statement created little controversy. While it might prove difficult to make the statement operational in all cases, the sentence captures a shared aspiration that trade and environmental policies and agreements should support each other. As the text of the Protocol unfolded after years of negotiation and discussion, it reflected an attempt to protect the environment, on the one hand, without overburdening trade, on the other. The very inclusion of a savings clause that respects trade and environmental agreements comports with this attempt and this shared aspiration.

The second additional clause, which states that the savings clause "is not intended to subordinate the Protocol to other international agreements,"<sup>117</sup> will generate greater controversy among nations and commentators. Taken on its face, the phrase simply indicates that the inclusion of the savings clause does not mean that the Protocol is of a lower rank, class, or significance than other agreements.<sup>118</sup> Indeed, a savings clause in a treaty does not reflect the junior rank, class, status, importance, or significance of that treaty any more than the absence of one reflects its senior rank or importance. Rather, a savings clause simply answers whether a party's rights and obligations under earlier agreements continue or whether such rights and obligations apply only if compatible with the provisions of the later agreement. The second additional clause captures the political sentiment expressed during the negotiations that environmental agreements are not marked by lower status, class, significance, or importance than trade agreements and that the inclusion of a savings clause in the Biosafety Protocol should not be understood as so lowering or lessening it.

One can envision, however, that some who opposed the savings clause would take the position that the second clause undermines or extinguishes it. Those taking this position would be likely to assert that savings clauses lower the rank or class of agreements that contain them and that the savings clause so lowers the Protocol vis-à-vis earlier agreements. (Under this approach, the converse would also be true. Absent a savings clause, the Biosafety Protocol would lower the rank or class of agreements that preceded it.) According to this reasoning, the second clause would essentially undo the otherwise unambiguously worded savings clause that precedes it, so that both clauses, in effect, fall out of the agreement. The agreement would therefore have no savings clause. Under the principle reflected in Article 30 of the Vienna Convention, the Protocol could then be interpreted and understood as incompatible with or as modifying parties' obligations under earlier agreements.<sup>119</sup> In the event of a conflict between the Protocol and an earlier agreement,

<sup>116</sup> See *supra* note 106 and corresponding text.

<sup>117</sup> See *supra* note 107 and corresponding text.

<sup>118</sup> The principal definition of the verb "subordinate" is "[t]o put in a lower rank or class." WEBSTER'S II NEW RIVERSIDE DICTIONARY 685 (1984). Synonyms for the noun "subordinate" are "inferior, junior, subaltern and underling." *Id.* The adjective form of "subordinate" is defined as "[o]f lower rank or class: inferior." *Id.* Synonyms for this form include "inferior, junior, smaller, lower, insignificant, paltry, unequal to, not comparable to, lower, and minor." WEBSTER'S NEW WORLD THESAURUS 435 (Charlton Laird ed., 1974).

<sup>119</sup> See *supra* note 66.

the Protocol would prevail.<sup>120</sup> In sum, were this line of reasoning to succeed, its legal effect would be the exact opposite of the express savings clause language included in the Protocol.

As a matter of customary international law reflected in Article 31 of the Vienna Convention, “[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.”<sup>121</sup> Understanding the second additional clause to undo the savings clause would require a tribunal to ignore the clear, ordinary, and unambiguous meaning of the savings clause and would violate the duty to interpret a treaty in good faith. International tribunals, like domestic ones, are loath to interpret treaty provisions in such a way that they extinguish each other, let alone produce the opposite result of what the treaty plainly states.<sup>122</sup> As the British-American Claims Commission, adjudicating a claim between the United States and the United Kingdom involving the Treaty of Ghent, stated:

Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. . . . We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do.<sup>123</sup>

The second additional preambular clause provides an opportunity to raise questions about the effect of the otherwise clear savings clause and therefore, to some degree, muddies the waters around the savings clause. However, in keeping with customary rules of treaty interpretation, a tribunal would be unlikely to adopt a novel interpretation of the second additional clause that extinguishes or otherwise guts the plain and clear savings clause language of the Biosafety Protocol.<sup>124</sup> To do so would not only contradict that otherwise clear language, but also, as discussed above, fly in the face of customary rules of treaty interpretation. Furthermore, because a dispute involving the savings clause would probably arise with respect to a trade restriction that implicates WTO disciplines and hence would fall within the WTO mechanism for the settlement of disputes, the most likely tribunal to consider the impact of the savings clause language would be a WTO disputes panel or the WTO Appellate Body.<sup>125</sup> One would anticipate that such a body would not disregard customary rules of treaty interpretation that preserve WTO disciplines in favor of an interpretation that does not. After all, such tribunals preside over the WTO

<sup>120</sup> *Id.*

<sup>121</sup> Vienna Convention, *supra* note 66, Art. 31, para. 1.

<sup>122</sup> Under general rules of treaty interpretation, a treaty must be construed to give meaning and effect to all its terms. This rule is referred to as the principle of effective interpretation (*l'effet utile* or *ut res magis valeat quam pereat*). Pursuant to this rule, a treaty provision should not be interpreted so as to nullify the effect of another provision of that treaty. Gabrielle Marceau, *A Call for Coherence in International Law*, J. WORLD TRADE, NO. 5, 1999, at 87, 127 n.132 (citing, inter alia, [1966] 2 Y.B. Int'l L. Comm'n 219, UN Doc. A/CN.4/SER.A/1966/Add.1; Corfu Channel case (UK v. Alb.), Merits, 1949 ICJ REP. 4, 24 (Apr. 9); Territorial Dispute (Libya v. Chad), 1994 ICJ REP. 6, 24 (Feb. 3)); cf. SINCLAIR, *supra* note 72, at 120 (“It is often said that the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable.”).

<sup>123</sup> Cayuga Indian Claims (U.S./Gr. Brit.), 20 AJIL 574, 587 (1926), *quoted in* MCNAIR, *supra* note 73, at 384–85.

<sup>124</sup> Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that WTO tribunals are to interpret the WTO Agreements “in accordance with customary rules of treaty interpretation.” WTO Agreement, *supra* note 12, Annex 2, THE LEGAL TEXTS, at 354, 33 ILM at 1226. *See, e.g.*, United States—Standards for Reformulated and Conventional Gasoline, *infra* note 139, at 23 (refusing to interpret a treaty so as to reduce whole clauses to inutility). *See generally* Marceau, *supra* note 122, at 95, 115–28.

<sup>125</sup> While nations have brought numerous cases under the WTO dispute settlement mechanism, they have generally refrained from invoking the corresponding mechanisms of multilateral environmental agreements. For example, no nation has yet brought a case under the dispute settlement mechanism of the Convention on Biological Diversity, which Article 32 of the Biosafety Protocol incorporates by reference as its own such mechanism. Similarly, no cases have been brought under the dispute settlement mechanisms of either the Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 UNTS 293, or the Basel Convention. The WTO Secretariat’s Annual Overview of the State of Play of WTO Disputes, WT/DSB/26/Add.1 (2001), is available online at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)>.

Agreements and likely consider the rights and obligations contained therein worthy of continuation.

*The Biosafety Savings Clause Approach and Future Environmental Agreements*

What do the PIC and biosafety approaches portend for future multilateral environmental negotiations? Countries, such as the United States, will continue to evaluate whether a savings clause is needed on the basis of a convention-by-convention appraisal. Where it proves difficult to envisage that the convention could be used to alter existing international rights and obligations, countries may not press for the inclusion of a savings clause. Where, however, countries see a need for a savings clause in a multilateral environmental agreement, such clauses will probably continue to be moved to the preamble, at least for the near future.<sup>126</sup> Placing such clauses in the preamble does not reduce their effect but does make them politically more palatable.

With respect to environmental agreements that regulate trade, the first of the additional preambular clauses, which states that environmental and trade agreements “should be mutually supportive,”<sup>127</sup> is likely to find its way into other such agreements.<sup>128</sup> It may mark an emerging desire to view trade and environmental agreements less as headed on a collision course and more as reflecting important international objectives that can peacefully cohabit in international law.<sup>129</sup> As for the second additional preambular clause, which indicates that environmental agreements do not belong to a lower class than trade agreements, such a provision will probably appear in future environmental agreements as well.<sup>130</sup> Negotiators may find the political comfort of having such a clause to outweigh the drawback of creating some confusion or question among commentators with regard to the relationship between successive agreements.

Savings clauses play an important role in international law. They are neither rare nor extreme.<sup>131</sup> Those who opposed a savings clause and insisted on the second additional preambular clause may face difficulty if they should seek a savings clause in a future agreement without simultaneously including additional language that indicates that the savings clause does not subordinate the agreement to other agreements or create a hierarchy. The rhetoric in the PIC and biosafety negotiations that demonized savings clauses as setting up a

<sup>126</sup> For example, the recently concluded International Treaty on Plant Genetic Resources for Food and Agriculture, adopted on November 3, 2001, *available at* <<http://www.fao.org/biodiversity/cgrfa>>, includes a savings clause in its preamble. That clause reads: “Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements” (emphasis omitted).

<sup>127</sup> *See supra* text at note 106.

<sup>128</sup> Inspired by the precedents set by the Biosafety Protocol and the PIC Convention, the savings clause language in the International Treaty on Plant Genetic Resources for Food and Agriculture, *supra* note 126, is preceded by an additional preambular clause, which states: “Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security” (emphasis omitted).

<sup>129</sup> *See, e.g.*, RECONCILING ENVIRONMENT AND TRADE (Edith Brown Weiss & John H. Jackson eds., 2001); Jenny Bates & Debra S. Knopman, *After Seattle*, 17 ENVTL. F., Jan.–Feb. 2000, at 30, 30 (headnote) (“Following the collapse of the World Trade Organization meeting in December, the false choice between increased trade and a healthier environment needs to be debunked. We should seek both of these closely intertwined, often mutually supportive goals.”).

<sup>130</sup> In this connection, the savings clause included in the International Treaty on Plant Genetic Resources for Food and Agriculture, *supra* note 126, is followed by a second additional preambular clause, which states: “Understanding that the above recital [the savings clause] is not intended to create a hierarchy between this Treaty and other international agreements” (emphasis omitted).

<sup>131</sup> Examples of savings clauses include, to name but a few, Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, Art. 8, 33 ILM 1328 (1994), *available at* <<http://www.unccd.int/convention/menu/php>>; Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 73(1), 21 UST 77, 596 UNTS 261; Convention Establishing the European Free Trade Association, Jan. 4, 1960, Art. 37, *at* <<http://secretariat.efta.int>>; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, Art. 7(1), 21 UST 2517, 330 UNTS 3. Most of these, as well as other, examples of savings clauses can be found in THE TREATYMAKER’S HANDBOOK 217–21 (Hans Blix & Jirina H. Emerson eds., 1973).

hierarchy of importance in international law could seep into other negotiations, to the dismay of international lawyers.<sup>132</sup> Unfortunately, international lawyers and negotiators may find it more difficult to resolve the substantive issue of whether the parties actually intended to modify their existing international rights and obligations in the event of an unanticipated conflict between successive agreements. Instead, the issue may be reframed into the overarching and perhaps unanswerable question of which set of important international goals reflected in a series of treaties, such as those affecting trade, human rights, law enforcement, the environment, and so on, holds greater import.

#### V. A COLLISION IN THE MAKING?

As the dust begins to settle on the Biosafety Protocol, I wonder whether the savings clause issue amounted to somewhat less than met the eye. Customary rules of treaty interpretation, like rules of statutory interpretation, seek to understand treaties as compatible with each other.<sup>133</sup> A finding of conflict is one of last rather than first resort. As Ian Sinclair points out, the concept of “relating to the same subject matter” [in Article 30 of the Vienna Convention] must be construed strictly.<sup>134</sup> Moreover, for a conflict to exist, the provisions in question must impose mutually exclusive obligations,<sup>135</sup> which means that instances of irreconcilable conflicts will not often take place.<sup>136</sup> Thus, even without a savings clause, a WTO tribunal (or any international tribunal for that matter) would be reluctant to find incompatibility between the Biosafety Protocol and the WTO Agreements.<sup>137</sup> It would do its best to interpret the agreements in question so as not to conflict.<sup>138</sup>

Does the presence of a savings clause materially diminish the efficacy of the Protocol as feared by its detractors? No. A multilateral protocol governing the international trade in living modified organisms exists. Both the WTO Appellate Body and the WTO Committee on Trade and Environment have encouraged countries to seek to resolve multilateral environmental issues through negotiation.<sup>139</sup> I would anticipate, therefore, that with respect to

<sup>132</sup> During the negotiation of the International Treaty on Plant Genetic Resources for Food and Agriculture, for example, some nations opposed the inclusion of a savings clause (which would ensure the preservation of rights and obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly known as the TRIPS Agreement, WTO Agreement, *supra* note 12, Annex 1C, THE LEGAL TEXTS, at 321, 33 ILM 1197 (1994)) on the ground that such a clause would establish a “hierarchy.”

<sup>133</sup> Marceau, *supra* note 122, at 127 n.131 (citing, inter alia, C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 1953 BRIT. Y.B. INT’L L. 401); Pauwelyn, *supra* note 70, at 550 (“international law recognizes a presumption against conflict”).

<sup>134</sup> SINCLAIR, *supra* note 72, at 98.

<sup>135</sup> Jenks, *supra* note 133, at 426 (“A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.”); Marceau, *supra* note 122, at 127 n.131; Wirth, *supra* note 68, at 242; see also SINCLAIR, *supra* note 72, at 97 (noting that the chairman of the committee that drafted the text that ultimately became Article 30 of the Vienna Convention stated, when introducing that text: “In the view of the Drafting Committee, the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility . . .”); cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §114 cmt. a (1987) (U.S. courts should interpret a statute, if they have a reasonable option of doing so, in a manner that is consistent with U.S. international obligations).

<sup>136</sup> Pauwelyn, *supra* note 70, at 550 (“In most cases, potential conflicts can be ‘interpreted away’”); sources cited *supra* note 135.

<sup>137</sup> See generally Pauwelyn, *supra* note 70, at 551 (noting that the WTO has adopted a strict definition of conflict that recognizes conflict only when one legal obligation prevents the fulfillment of another legal obligation, but objecting to this approach).

<sup>138</sup> See *supra* note 135. Marceau, *supra* note 122, at 127 n.131, notes that the possibility of conflict between a WTO provision and a provision of another treaty was addressed briefly in the WTO Appellate Body Report, Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/AB/R & Corr. 1, DSR 1998: III, 1033 (adopted Apr. 22, 1998), which concluded that there was no “irreconcilable” conflict between Argentina’s Memorandum of Understanding with the International Monetary Fund and Article VII of the GATT 1994.

<sup>139</sup> Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, paras. 166–72 (Oct. 12, 1998) (adopted Nov. 6, 1998) [hereinafter Shrimp/Turtle case]; World Trade Organization, Report of the Committee on Trade and Environment, WT/CTE/W/40, para. 171 (Nov. 7, 1996) (supporting multilateral solutions based on international cooperation and consensus as the best way for governments to tackle problems of a transboundary or global nature); cf. Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 27 (Apr. 29, 1996) (adopted May 20,

parties to both the WTO Agreements and the Biosafety Protocol, the WTO Appellate Body would accord the requirements of the Protocol significant respect.<sup>140</sup> The Protocol, for example, requires that a party importing an LMO for deliberate release into that country's environment, such as seeds for planting or fish for release, perform a risk assessment prior to the first import.<sup>141</sup> It is difficult to imagine that a WTO tribunal would find that a country's nondiscriminatory requirement of such a risk assessment violated its WTO obligations.

As for concern that the inclusion of a savings clause diminishes the Biosafety Protocol, it bears noting that to date not a single multilateral environmental agreement or government action taken to implement such an agreement has been found to violate the WTO Agreements.<sup>142</sup> Such formidable multilateral environmental agreements as the Convention on the International Trade in Endangered Species of 1973, the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol) of 1987, and the Basel Convention of 1989<sup>143</sup> preceded the Uruguay Trade Round of 1994 and the agreements that emerged from that round.<sup>144</sup> As indicated in Article 30 of the Vienna Convention, the Uruguay Round agreements would prevail in the event of a conflict between them and the earlier environmental agreements.<sup>145</sup> Despite considerable legal commentary on whether the trade provisions of these agreements violate WTO rules and concern that a challenge to such agreements could happen any day,<sup>146</sup> no government has filed a complaint challenging such multilateral environmental agreements or actions taken by another government pursuant to such agreements.<sup>147</sup> If anything, the operations of these trade-related multilateral environmental agreements appear remarkably unaffected by the later-in-time Uruguay Round agreements. For example, since the 1994 Uruguay Round, there have been at least three meetings of the Conference of the Parties to CITES, nine meetings of the Open-ended Working Group of the Parties to the Montreal Protocol, three meetings of the Conference of the Parties to the Basel Convention, and two sessions of the Legal Working Group of the Basel Convention.<sup>148</sup> A review of the re

1996) (noting that the United States did not reveal what, if any, efforts had been taken "to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil"); GATT Panel Report, United States—Restriction on the Imports of Tuna, *reprinted in* 30 ILM 1594 (1991) (submitted to the parties Aug. 16, 1991) (unadopted panel report expressing the desirability of a multilateral framework to protect dolphins because they roam the waters of the high seas).

<sup>140</sup> See Charnovitz, *supra* note 49; see also Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 464–65 (1996) (observing that "[i]f the World Trade Organization were to rule, for example, that the Convention on International Trade in Endangered Species or some other equally popular agreement violated the provisions of the trade agreements, popular acceptance of the World Trade Organization would probably decline" (citations omitted)).

<sup>141</sup> Protocol, *supra* note 1, Arts. 7, 15.

<sup>142</sup> See WTO Secretariat, *supra* note 124.

<sup>143</sup> CITES, *supra* note 71; Montreal Protocol, *supra* note 125; Basel Convention, *supra* note 100.

<sup>144</sup> The Uruguay Round produced a "new GATT 1994," see *supra* note 12.

<sup>145</sup> See *supra* note 66.

<sup>146</sup> See, e.g., Steve Charnovitz, *Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341, 347–48 & n.56 (1997) (citing over sixteen articles and books on the potential clash between the WTO Agreements and various multilateral environmental agreements); Ann Rutgeerts, *Trade and Environment: Reconciling the Montreal Protocol and the GATT*, J. WORLD TRADE, No. 4, 1999, at 61. Some commentators posit that, under the principle of *lex specialis derogat generalis* (the special rule prevails over the general), environmental agreements involving a specific sector of the trade regime like the Montreal Protocol and the Basel Convention would prevail over the "more general" WTO Agreements. Rutgeerts, *supra*, at 67; Wirth, *supra* note 68, at 242–43; Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?* 26 ENVTL. L. 841, 912–13 (1996). However, the principle of *lex specialis derogat generalis*, by its own terms, requires an analysis of the rules at issue. Thus, as between two treaties, the requirements of one treaty may be more specific on a given subject, while the requirements of the other may be more specific on another subject. It would be inaccurate to conclude that the Biosafety Protocol is more specific in toto than the WTO Agreements. For example, the WTO Agreements are quite specific on the issue of discrimination between nations, while the Protocol is largely silent on this point.

<sup>147</sup> See text *supra* at note 142.

<sup>148</sup> These reports are available online at <<http://www.wcmc.org.uk/CITES/eng/cop>>, <<http://www.unep.org/ozone>>, and <<http://www.unep.ch/basel/meetings/cop1-4>>. See also Report of the Legal Working Group of the Basel Convention, UNEP/CHW/LWG/2/8 (Oct. 19, 2000) (considering the relationship between the Basel Convention and the then draft agreement on persistent organic pollutants, but giving no similar consideration to the relationship between the Basel Convention and the Uruguay Round agreements); Report of the 18th Meeting of

ports of those meetings reveals no evidence of a change in their activities, including the quantity and nature of their decisions, in light of the Uruguay Round.<sup>149</sup> These reports do not indicate that the Uruguay Round affected such environmental agreements, as commentators feared.

Now, let us assume for a moment that the Protocol contains no savings clause. Would its omission materially diminish the applicability of WTO disciplines to the international trade in LMOs? No. Despite the concerns of some participants during the negotiations that the inclusion of precautionary language in the Protocol might alter the disciplines of the SPS Agreement, the ultimate wording on precaution does not do so. That language merely says that countries, in the face of uncertainty, may take decisions “as appropriate.”<sup>150</sup> It does not say what those decisions may be or sanction a decision that violates other provisions of the Protocol or any other agreement. Moreover, given the strong science-based risk assessment provisions of the Protocol,<sup>151</sup> that language certainly does not extinguish the obligation of countries under the SPS Agreement to base their sanitary and phytosanitary measures on scientific principles and to conduct scientific risk assessments.<sup>152</sup> Even without a savings clause, WTO tribunals, in particular, would seem constitutionally unlikely to jettison WTO disciplines, such as the requirements under the SPS Agreement that sanitary and phytosanitary measures be based on scientific principles.<sup>153</sup> This observation is especially compelling when one recalls that the Protocol requires science-based risk assessment.<sup>154</sup>

These considerations are not to suggest that the inclusion of a savings clause does not help those countries that sought to leave no ambiguity as to the continued applicability of WTO disciplines to the trade in LMOs. As indicated earlier, some perceived a palpable risk that, for economic and cultural reasons, countries would attempt to use the Protocol to justify trade restrictions on LMOs that violated WTO disciplines.<sup>155</sup> In addition, as discussed in part I, the Protocol contains various discretionary provisions that enable parties to take certain actions and decisions, which may prompt some to argue that parties may take such actions and decisions pursuant to the Protocol even if in so doing they violate their other international obligations.<sup>156</sup> For example, if a party to both the Protocol and the WTO Agreements made a decision allowing the import of a given LMO from one WTO member but not from another, such action would likely violate the WTO Agreements.<sup>157</sup> Similarly,

the Open-ended Working Group of the Parties to the Montreal Protocol (Nov. 24, 1998), *available at* <<http://www.unep.org/ozone/18oewg-rpt.html>> (considering the implementation of the Montreal Protocol in light of the Kyoto Protocol to the UN Framework Convention on Climate Change, but giving no similar consideration as to the implementation of the Montreal Protocol in light of the Uruguay Round agreements). Similarly, the United States, for example, does not appear to have amended the Endangered Species Act or any of its statutes implementing CITES or other multilateral environmental agreements to which it is party when it joined the 1994 Uruguay Round agreements. For U.S. implementing legislation, see Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4813 (1994) (codified at 19 U.S.C. §3501 (2000)).

<sup>149</sup> See sources cited in note 148 *supra*.

<sup>150</sup> Protocol, *supra* note 1, Arts. 10(6), 11(8).

<sup>151</sup> *Id.*, Art. 10, para. 1 (requiring risk assessment for decisions on LMOs subject to the AIA procedure), Art. 15, paras. 1, 2 (requiring that risk assessments under the Protocol be carried out in a scientifically sound manner), Art. 16, paras. 1, 2 (linking risk management measures to risk assessments), Annex III, para. 3 (setting forth methodology for risk assessments, including that they be done in a scientifically sound manner), Art. 11, para. 6(a) (identifying risk assessment as the basis for specified parties to make import decisions on LMOs intended for food, feed, or processing).

<sup>152</sup> SPS Agreement, Arts. 2.1, 5.1, 5.2.

<sup>153</sup> The first three cases involving violations of the SPS Agreement to have completed the WTO dispute settlement process (the Beef Hormone case, *supra* notes 88–92; Australia—Measures Affecting Importation of Salmon, *infra* note 169, para. 166; Japan—Varietal case, *supra* note 57) indicate that WTO tribunals attach tremendous importance to the requirement that a WTO member base its sanitary and phytosanitary measures on scientific risk assessment. In all three cases, the failure of the defending nation to base its SPS measure on a scientific risk assessment played a key role in the WTO Appellate Body’s determination that each nation had violated the SPS Agreement. Victor, *supra* note 36, at 872.

<sup>154</sup> See *supra* note 151.

<sup>155</sup> See the discussion in part I *supra* and text at p. 615.

<sup>156</sup> See text *supra* at notes 62–65.

<sup>157</sup> See text *supra* at note 64.



if a country entered into a regional agreement that permitted it to import LMOs from countries in that region without regulatory scrutiny, while imports of like LMOs from other countries were subjected to regulatory review, it might contravene the most-favored-nation provisions of the WTO Agreements.<sup>158</sup> Finally, if a party, in the face of scientific uncertainty, took “precautionary measures” to restrict the import of an LMO pursuant to Articles 10(6) or 11(8) of the Protocol, but did not seek to obtain further scientific information and review its measures accordingly, as required by Article 5.7 of the SPS Agreement, it would likely be in violation of the latter provision.<sup>159</sup>

Under general rules of treaty observance, such discretionary provisions must be implemented in a manner consistent with the party’s other international obligations, even without a savings clause. A party, after all, is free to exercise its discretion in a manner that fully comports with all of its international obligations and, under the basic principle of *pacta sunt servanda*, is expected to do so.<sup>160</sup> General discretionary provisions in the Protocol that contemplate, but do not compel, a certain decision or action do not irreconcilably conflict with other treaties and do not constitute *carte blanche* for countries to disregard their other international obligations, including those under the WTO Agreements.<sup>161</sup> The inclusion of a savings clause, however, leaves no ambiguity on this point. The savings clause cautions parties to implement the Protocol in a manner consistent with their other international rights and obligations and may therefore reduce the likelihood of disputes between nations.

As mentioned above, the *Beef Hormone* decision received much attention during the biosafety negotiations. In light of the Biosafety Protocol, would the WTO Appellate Body have reached a different decision if the *Beef Hormone* case had involved a ban on beef derived from genetically modified cattle as opposed to hormone-enhanced cattle? I believe not. First, since the Protocol does not regulate the products of living modified organisms, it would not assist a country that sought to ban meat derived from genetically modified cattle.<sup>162</sup> Second, the Appellate Body found that the European Communities’ ban on hormone beef violated the SPS Agreement because the Communities did not base its ban on a risk assessment.<sup>163</sup> Like the SPS Agreement, the Protocol requires science-based risk assessment.<sup>164</sup> Thus, it would be difficult to use the Protocol to defend a measure that similarly lacked grounding on a risk assessment. Third, the Appellate Body found that references to a “precautionary principle” would not override the explicit wording of Articles 5.1 and 5.2 of the SPS Agreement and that the concept of precaution has been incorporated into, *inter alia*, Article 5.7 of the SPS Agreement.<sup>165</sup> Similarly, even absent a savings clause, the Biosafety Protocol’s general, ambiguous, and qualified “precautionary language” hardly appears to override the explicit science-based risk assessment requirements found in both the SPS Agreement and the Protocol; nor would it override the precautionary provisions of the SPS Agreement. Indeed, although the “precautionary language” in the Protocol was tailored to the subject matter of that agreement, it is difficult to see how good faith implementation of that language and the precautionary language of the SPS Agreement could be sub-

<sup>158</sup> See text *supra* at note 64.

<sup>159</sup> See, e.g., *supra* note 61.

<sup>160</sup> The basic principle regarding the observance of treaties, *pacta sunt servanda*, is reflected in Article 26 of the Vienna Convention, *supra* note 66, which states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Moreover, under the principle of effective interpretation, the provision of one treaty should not be interpreted so as to nullify the effect of another treaty. Marceau, *supra* note 122, at 127 n.132; see also *supra* note 136.

<sup>161</sup> See *supra* notes 135, 136.

<sup>162</sup> See *supra* note 16.

<sup>163</sup> *Beef Hormone*, *supra* note 89, paras. 113, 158(l).

<sup>164</sup> See *supra* note 151.

<sup>165</sup> *Beef Hormone*, *supra* note 89, paras. 29, 30, 158(c).



stantively inconsistent.<sup>166</sup> Precaution is not a substitute for science but is to be exercised as part of a science-based system. Both the Protocol and the SPS Agreement reflect this fact by requiring science-based risk assessment,<sup>167</sup> as well as by providing for the taking of some measures, as appropriate, where sufficient relevant scientific information is unavailable.<sup>168</sup>

Ultimately, a WTO tribunal's decision on whether a country has violated its WTO obligations with respect to restrictions on the import of LMOs may depend on, and be tailored to, the facts of a particular case. Unlike the negotiators of the Protocol, who lived in a realm of hypotheticals, a WTO tribunal would have the benefit of a fact pattern before it. When the fact pattern indicates that a party's purported environmental or health decision or measure derives from a protectionist impulse or stems from cultural preferences rather than from bona fide health or environmental concerns, a WTO tribunal would be inclined to view such actions with suspicion and disfavor. When, however, a party bases its restriction on the import of an LMO on a scientifically grounded environmental or health concern, that restriction would presumably pass WTO muster.

For example, both a WTO panel and the Appellate Body found Australia's restriction on the import of fresh or frozen salmon to violate the SPS Agreement on the ground that the ban constituted a disguised restriction on trade.<sup>169</sup> The facts in that case revealed that Australia did not impose the ban, which was designed to protect its pristine waters from twenty-four fish-borne diseases, in comparable situations, such as the import of ornamental fish and fish bait.<sup>170</sup> In addition, the evidence indicated that a set of draft rules that would have permitted the importation of certain ocean-caught salmon was modified to prohibit such imports after objections from the Australian salmon industry.<sup>171</sup> In the *Reformulated Gasoline* case, the WTO Appellate Body found that U.S. rules on reformulated gasoline unjustifiably discriminated against gasoline imports and constituted a disguised restriction on international trade in violation of GATT Article III:4 because such rules imposed more stringent compliance obligations on foreign refiners than they did on U.S. refiners.<sup>172</sup> Evidence in that case revealed that a desire to assist the U.S. domestic oil industry contributed to the rules' more favorable treatment of U.S. refiners.<sup>173</sup> In fact, a rule that would have subjected foreign refiners to essentially the same requirements as U.S. refiners met strong congressional opposition.<sup>174</sup> Trade restrictions on LMOs that appear based on cultural preferences rather than environmental or health risks similarly seem likely to fail a WTO challenge under the

<sup>166</sup> See Charnovitz, *supra* note 49, at 300 (precautionary language of Protocol appears potentially consistent with precautionary language of SPS Agreement).

<sup>167</sup> See *supra* notes 151 (Biosafety Protocol), 40 (SPS Agreement).

<sup>168</sup> See *supra* notes 27 (Biosafety Protocol), 42 (SPS Agreement).

<sup>169</sup> Panel Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R, para. 8.159 (June 12, 1998), Appellate Body Report, WT/DS18/AB/R, para. 177 (Oct. 20, 1998) (adopted Nov. 6, 1998); Victor, *supra* note 36, at 907–08.

<sup>170</sup> *Australia—Measures Affecting Importation of Salmon*, *supra* note 169, Appellate Body Report, paras. 163, 167, 169.

<sup>171</sup> *Id.*, para. 170.

<sup>172</sup> United States—Standards for Reformulated and Conventional Gasoline, *supra* note 139, at 6, 25, 28–29. Under the 1994 U.S. gasoline rules, which were designed to reduce pollution from gasoline combustion, U.S. refiners could demonstrate their compliance with the new rules by using individual baselines based on a refinery's 1990 data. Foreign refiners, in contrast, had to demonstrate their compliance based on the more costly and stringent statutory baseline for compliance. *Id.* at 5–6.

<sup>173</sup> *Id.* at 27–28 (explaining that the United States did not consider it feasible to require its domestic refiners to incur the physical and financial burdens entailed by immediate compliance with the statutory baseline but disregarded such considerations when it came to foreign refiners). Christopher John Duncan, *Reconciling U.S. Regulatory Procedure with the WTO Reformulated Gasoline Decision*, in RECONCILING ENVIRONMENT AND TRADE, *supra* note 129, at 185, 196–99.

<sup>174</sup> United States—Standards for Reformulated and Conventional Gasoline, *supra* note 139, at 6 (explaining that the U.S. Environmental Protection Agency prepared a rule that would have enabled foreign refiners to use individual baselines but that Congress enacted legislation denying funding for its implementation). Duncan, *supra* note 173, at 189–90 (noting that opposition to this rule came particularly from members of Congress with ties to the oil industry).

SPS Agreement because such bans lack scientific justification, and the WTO rules do not take purely consumer preferences into account.<sup>175</sup>

On the other hand, trade restrictions based on bona fide environmental or health concerns will probably survive a challenge before the WTO. The Appellate Body, for example, recently upheld France's ban on the importation and marketing of asbestos.<sup>176</sup> Endorsing the panel's finding that "the ban was legitimate because WTO rules allow countries to restrict trade where necessary to protect human health or the environment," the Appellate Body stressed that "health considerations must be taken into account" when interpreting rules under the WTO Agreements.<sup>177</sup> The overall character of a case may thus anticipate its outcome.

## VI. CONCLUSION

Despite its defects, the Biosafety Protocol represents a significant achievement. Over one hundred nations from all parts of the world, reflecting vastly different perspectives and concerns, came together and peacefully agreed on modalities to approach a watershed technology. While the savings clause language ultimately included in the Biosafety Protocol preserves countries' rights and obligations under the WTO Agreements, these treaties are not as bound on a collision course as some may fear, and all sides to the controversy may have overestimated the importance of the clause. Perhaps the real significance of the Protocol lies less in what it says about its relationship to other agreements than in what it says about the potential capacity for comity among nations in the face of a watershed technology.

SABRINA SAFRIN\*

<sup>175</sup> Murphy, *supra* note 39, at 83–85.

<sup>176</sup> Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, paras. 162, 168 (Mar. 12, 2001) (adopted Apr. 5, 2001).

<sup>177</sup> Environment News Service (ENS), *WTO Upholds French Ban on Asbestos* (Mar. 13, 2001), available at <<http://ens.lycos.com>>. In the Shrimp/Turtle case, *supra* note 139, paras. 134, 145, 186, the WTO Appellate Body ultimately upheld the use of GATT Article XX(g) (which permits measures for the conservation of exhaustible natural resources) to restrict trade in shrimp caught in a manner that threatens endangered sea turtles. The Appellate Body, however, found that the United States was applying its otherwise legitimate measure to protect sea turtles in a manner that discriminated between member states. *Id.*, paras. 184, 186. The Appellate Body stressed that its decision that the United States was applying its legitimate environmental measure in a discriminatory way should not be understood as indicating "that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is." *Id.*, para. 185. It further exhorted:

We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

*Id.*

\* Assistant Professor of Law, Rutgers University Law School, Newark. The author served as an attorney-adviser with the United States Department of State, Office of the Legal Adviser, and was legal counsel to the U.S. delegation during the negotiation of the Biosafety Protocol. The views, perceptions, and opinions expressed in this piece are solely those of the author and do not reflect those of the U.S. Department of State, the United States government, or the government of any other country. The author would like to thank Dean Stuart Deutsch, Jeremy L. Hirsh, David Van Hoogstraten, David Wirth, the Environmental Law Institute, and the Open Society Institute Individual Projects Fellowship for their assistance. Any errors are hers alone.



**bepress Legal Repository**