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Global Business & Development Law Journal

Volume 14
Issue 1 *Symposium: Biotechnology and International Law*

Article 9

1-1-2001

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Recommended Citation

Alberto Szekely, *Modified Organisms and International Law: An Ethical Perpective*, 14 Pac. McGeorge Global Bus. & Dev. L.J. 129 (2001).
Available at: https://scholarlycommons.pacific.edu/globe/vol14/iss1/9

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Modified Organisms and International Law: An Ethical Perspective

*Amb. Alberto Székely**

I would like to provide a critical look at the emerging international legal regime governing modified organisms in international trade. I will refer to this matter in the context of the great concerns that were originally expressed from the socialist corner of the world and went largely unheard in the recent international negotiations on the matter, even when apparently the last to notice were precisely those whose concerns were disdained. Anybody who is acquainted with the literature on the subject knows that biosafety is a subject that sparks all sorts of radical, passionate responses, which for some are inspired on delicate ethical considerations, and for others the mere result of ignorance and ecological terrorism.

For me, the topic of biosafety in international law remains a case of deception and deceit, where the powerful interests of a few have prevailed over the interests of humankind at large, and, what is worse, with the connivance and complicity of most of the world's governments.

During the golden era of codification and progressive development of international environmental law, the international community was able to agree on certain important principles which are of direct relevance to the topic of this symposium. However, since that time some of these principles seem to have been clearly forgotten when applied to the realm of biosafety.

The United Nations General Assembly adopted at least seven major Resolutions supporting the principle of "permanent sovereignty over natural resources."[1]

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1. *See* Right to Exploit Freely Natural Wealth and Natural Resources, G.A. Res. 626 (VII), U.N. Doc. A/PV.411 (VII) (1952); Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17 (1962), 57 A.J.I.L. 710 (1963); Permanent Sovereignty Over Natural Resources, G.A. Res. 2158 (XXI), U.N. GAOR, 21st Sess., 1478th plen. mtg., U.N. Doc. A/6518 91966 (1966); Permanent Sovereignty over Natural Resources of Developing Countries, U.N. Res. 3016 (XXVII), U.N. GAOR, 27th Sess., Supp. No. 30, at 48, U.N. Doc. A/8730 (1972); Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, G.A. Res. 3129 (XXVIII), U.N. GAOR, Supp. No. 30A, U.N. Doc. A/9030/Add.1 (1973); Permanent Sovereignty Over Natural Resources, G.A. Res. 3171 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1974), 13 I.L.M. 238 (1974).

The historical Resolution 1803/XVII of 1962 declared four crucial provisions:

(1) that "[t]he rights of peoples and nations [not States] to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned";
(2) that "[t]he exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities";
(3) that "[t]he free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality"; and
(4) that "[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of international peace."[2]

This principle also found its way into many equally historic international treaties, thus, incorporating it into hard law even as a specific human right. Article I paragraph 2 of both the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, provided that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[3]

At Stockholm in 1972, the United Nations Conference on the Human Environment adopted in its Declaration Principle 21:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[4]

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2. Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

3. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 61 A.J.I.L. 870 (1967); International Covenant On Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360 (1967).

4. United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416.

This was the first attempt to balance the above principle of autonomy over self-disposal of one's own natural resources with the responsibility not to cause damage to the environment, which has now undeniably become a principle of customary international law.

More than a decade and a half followed with intense international activity to enshrine that principle in numerous general, regional, sub regional and bilateral treaties. In keeping with the Stockholm mandate, a sort of review conference was programmed to take place in 1992. A preparatory World Commission on Environment and Development was created to organize the event, which ultimately concluded a major environmental law convention with the idea for the United Nations Conference on the Law of the Sea. The conference was also supposed to consider the adoption of other international instruments urgently needed to deal with the most important and threatening environmental concerns of the international community such as deforestation, climate change, and biodiversity.

The road to the 1992 Rio Conference on Environment and Development was suspended and detoured by two unexpected international developments, which arrested or cancelled the promise of the so-called "Earth Summit" held for many people around the planet. First was the crumbling of the Soviet bloc in Eastern Europe and its impact on the dramatic change in the balance of political forces in the international arena, particularly in the United Nations. Second was the emergence of neo-liberalism and globalization as the commanding concept and force behind the new international economic order, based on free markets and on the generation of wealth at all costs. These developments significantly cooled the interest of both developed and developing countries alike in engaging in further international environmental obligations. Such commitments were now perceived as undesirable hindrances to a State's ability to compete in the world market.

The rather poor Rio Declaration, the largely weak Conventions on Climate Change and Biodiversity, as well as the ridiculous "Declaration on Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests," were the meager results of a Summit which signaled the decay in the codification and progressive development of international environmental law. Particularly, the Biodiversity Convention failed to become the international legal instrument that would ensure the conservation of the world's living natural wealth as would have been expected. In the end, it became a successful vehicle for developed countries to secure access to the biodiversity of developing countries, gained through the deceitful offer of access to technology.

Since then, a major struggle has taken place between two variables, environment and development, which, in the letter of the law created by millions of pages in international documents, are supposed to be reconciled. In the sustainability arena, however, many would allege that the environmental variable has consistently lost ground.

Nature itself, however, has returned with a vengeance. As had already happened in 1985 with the initially weak Convention for the Protection of the Ozone Layer, and at least in the field of climate change and as a response to the first threatening effects felt from global warming, the international community felt compelled to move ahead, albeit modestly, through the adoption of additional protocols and schemes. The turn came to the Biodiversity Convention that has now been supplemented by the Cartagena Protocol on Biosafety, adopted in January of 2000.[5] To start with, I must confess to you that I have been truly amazed at the irresponsibly naïve reaction expressed by the NGO community to this recent development.

Even for Greenpeace, who thought the Protocol was a major defeat for the United States, the results of the session in Montreal seemed a striking contrast, and something to welcome and be celebrated, particularly in light of the breakdown of the negotiations in Cartagena in February 1999. Many observers felt the adopted Protocol, through supposedly hard law provisions that were apparently unthinkable a few months before, had created a regime that would advance the adherence to the "precautionary principle" and to the procedure of the advance informed agreement, as well as subjecting transboundary movements of Genetically Modified Organisms (GMO) to more or less mandatory risk assessments–all of which had been staunchly resisted by the United States and the other members of the "Miami Group."[6]

Strangely, many failed to appreciate the grave implications of the following: the Protocol's exclusion of pharmaceuticals for humans; the mischievous and tricky handling of the relationship between the Protocol and international trade agreements, such as the WTO (and its Preamble); and the transit, contained use, and movements of living modified organisms intended for direct use as food or feed, or for processing, but actually subjected to a separate, weaker regime. Some critics would say that even the washed-down versions of the precautionary principle of the advance informed agreement procedure and the risk assessment provisions in the Protocol are meaningless. This is particularly true if one takes into account the almost total lack of capacity, financial and human resources and know-how in the vast majority of developing countries. The lack of *even the most elementary national laws and regulations* in this area will result in the inability of developing countries to take advantage of these provisions, which were formulated, at least in part, to protect those very countries.

A careful expert legal reading of the negotiated text of the Protocol yields four observations: (1) the precautionary principle was shamefully twisted around and reversed upside down; (2) the "advance informed agreement" concept simply does not correspond to the "previous informed consent" of the Convention; (3) not only the matter of liability was postponed, but the question of State responsibility was

5. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (2000).

6. Canada, Argentina, Chile, Uruguay, and Australia

totally overlooked; and (4) "risk assessment" does not mesh with the concept of "environmental impact assessment" that should have prevailed. All these matters were easily swallowed by many in the NGO community for a lack of competent international legal expert advise.

Thus, I am sorry to say, the quality in the meaning and drafting of the Protocol does not herald the beginning of a reversal of the trend, about which I have been writing more or less extensively, where I pointed with alarm at what I chose to call a "worrisome expertise" among contemporary diplomats "in drafting a new generation of soft law provisions aimed at preventing any semblance of enforceable obligations, that one would certainly not want to see become widespread in other international legislative efforts."[7] This is not exactly a popular subject in diplomatic or academic circles, by the way.

My interest in the international regime governing living modified organisms (LMOs) is, however, broader than the very limited scope of the Cartagena Protocol, which was basically restricted to transboundary movements. After the Protocol, we are left with the very scant provisions in Articles 8(g), 17, and 19/3 and 4 of the Biodiversity Convention.

My concern has to do with some more fundamental ethical considerations regarding the trend in the contemporary development of international law in this field, or rather the lack of such development. This lack of development results from the overruling of the slightest modicum of basic human consideration for the social victims, particularly in developing countries, in favor of the commercial interests of the largest and most powerful corporations in the world.

A biosafety regime is badly needed to control the very science, business, marketing, and economics of modifying living organisms, as well as transboundary shipments. The current "regime" is designed by multi-million dollar corporations to take over world agricultural production by replacing biological agriculture and traditional varieties of staple crops through a myriad of highly questionable schemes, including the use of genetic engineering to program the extermination of seeds in the second generation (which forces farm workers to buy new seeds each year). Another method used is the creation of dependency through the initial offering of cheap seeds and agrochemicals until the farm workers lose their traditional systems of seed supply, soil fertilization, and pest control. Once such dependency is secured, prices are elevated to compensate for the previous subsidies involved in the low prices offered to hook the buyers. Following that, the corporations involved make the seeds increasingly dependent on agrochemicals, which they sell. This practice ultimately produces inherent adverse consequences for the environment.

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7. *See* Alberto Székely, *Compliance with Environmental Treaties: The Empirical Evidence. A Commentary on the Softening of International Environmental Law*, 91 A.S.I.L. PROC. 234, 235 (1997).

Despite the Convention, the biotechnology businesses take genetic information from anywhere they please to patent it and profit from it, hence, denying any benefits to the local indigenous communities that developed the varieties in the first place. Hundreds of cases of biopiracy proliferate on a daily basis. Northern countries continue to commit incredible injustices against Southern countries. For instance, small farm workers in India, the original producers of basmati rice, are losing their market in favor of the United States just because U.S. companies have had the money and the audacity to patent basmati rice. On the basis of the WTO Trade Related Aspects of Intellectual Property Rights Agreement, which hinders "third" parties from producing, using, offering for sale, selling or importing patented products, those companies can block the export of any basmati rice from India or Pakistan. These matters need international regulation on the basis of principles of the international legal order. We are left to wrestle with the following dilemma: should we go back to the Sixties and Seventies track of an international law as a vehicle to protect the common interests, rights, and heritage of humankind, or should we be accomplices to a new international legal system that makes a mockery of the principle of "permanent sovereignty over natural resources" and, consequently, of the international law we inherited from the previous generation of international jurists and diplomats?