The Cartagena Protocol 2000, the Transnational Movement of Living Modified Organisms, and WTO Law

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Abstract

The Cartagena Protocol is a binding instrument which relates to other international instruments such as WTO Agreements in terms of LMOs transboundary movement control. Both the Protocol and some WTO Agreements allow parties to create some measures related to trade restriction in order to protect human life or health, animal, plant and biodiversity from the possible adverse effects arising from LMOs but some criteria on how to regulate the measure are different and overlap. The issues of scientific evidences, risk assessment, risk management and precautionary approach in the Protocol are in concern because they may contrary to the principle of non discrimination which is a crucial concept of international trade. This essay examines the disputes between the Protocol and WTO Agreement and tries to propose a compromise.
between both instruments in terms of the interpretation of the provisions to achieve effective results in practice.

I Introduction

In the circumstances of the increasing in the world’s population, the struggle of food causes natural resources scarcity. The lack and loss of biodiversity and the extinction of some species are the significant concern of every country because human are depended on environment and other species³. Living Modified Organisms (LMOs) technologies are introduced to solve this problem in order to slow the decay of existing resources, replacement and development of higher quality of the existing resources. LMOs, as new technologies are in concern of their possible impact whether to harm people or environment or not i.e. do the transgenic crops release harmful substance to ecosystems in the form of genetic combinations?⁴

Since it cannot be denied to refuse using LMOs technologies, therefore it is necessary to create mechanisms for preparedness and prevention of hazards that may arise. The Convention on Biodiversity was created on its objective “to be pursued in accordance with its relevant provisions, is the conservation of biological diversity. The sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all

⁴ Ibid 18
rights over those resources and to technologies, and by appropriate funding”6. The
convention does concern about conservation and sustainable development and also states
about the acquisition and utilization of LMOs in its article 8(G) which put the obligation
to the parties “to establish or maintain means to regulate, manage or control the risks
associated with the use and release of LMOs resulting from biotechnology which are
likely to have adverse environmental impacts that could affect the conservation and
sustainable use of biological diversity, taking also into account the risks to human health”
as appropriate.6 To comply with the convention, On 29 January 2000, the Conference
of the Parties to the Convention on Biological Diversity introduced an agreement to
the Convention known as the Cartagena Protocol on Biosafety.7 Main objective of its
protocol concerns about the safe of transfer, handling and utilization of LMOs and
creates the obligation for each party to ensure an adequate level of protection that may
have adverse effects on the conservation and sustainable use of biological diversity.8 It
should be noted that LMOs in the Protocol are GMOs that have not been processed and
may survive if release into the environment. This Protocol concerns only LMOs which
is not the lifeless products acquired from GMOs.9 Since the enforcement of the Protocol
in 2003, it leads tension to WTO agreements which related to biotechnology products
such as GATT, the SPS Agreement, the TBT Agreement and the TRIP Agreement.10

5 Convention on Biological Diversity 1992 art 1
6 The Convention entered into force on 29 December 1993. It is the only international
instrument which mentioned about biodiversity matter.
7 Secretariat of the Convention on Biological Diversity, ‘About the Cartagena Protocol:
Information’ < http://bch.cbd.int/protocol/background/> accessed on 17/3/2554
8 the Cartagena Protocol 2000 art 1 and 2
9 P.G Gayathri and Reshma R. Kurup ‘Reconciling the Bio Safety Protocol and the WTO
Regime: Problems, Perspectives and Possibilities’(2009) 1 (3) American Journal of
Economics and Business Administration p.236
english/tratop_e/spse/spsaagreement/ebt_e/c8s1p1_e.htm> accessed on 18 March 2011
Regarding the key measures provided by the Protocol in protecting LMOs in the form of GMOs products ban and trade restrictions raises the issue about trade barrier. It is also the issue of how to justify and operate the precautionary principle, risk assessment, risk management and scientific uncertainty which would be argued that these mechanisms can be the excuses of the importing government in order to protect domestic products, on the other hand, restrict the foreign products.

The study will briefly examine the history of the Protocol and its contents and explore the related provisions of WTO Agreements in both compatible and incompatible manners then will analyze the conflicts between the Protocol and the WTO Agreements. Finally, the essay will seek a possible solution in a way to encourage the use of safe LMOs in trade regime, in the same time to protect human, animal and plants life. As our obligation is to conserve the environment for the next generation according to Mr. Hidenori Murakami speech which said on behalf of the President of the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) that “It is our responsibility to pass on to the next generation life in harmony with nature and the wealth of biodiversity on our planet.”

II The Overview of the Cartagena Protocol on Biosafety

The Protocol was adopted in January 2000 from the pursuance of Article 19

paragraph 3\textsuperscript{12} of the Convention on Biological Diversity\textsuperscript{13} under the negotiation among contracting parties of the Convention on Biodiversity of the United Nations Environment Program (UNEP). It is an MEA with gives authority to the parties in order to create their own discretionary power to set up a standard on protecting an adverse effect from transboundary movement of LMOs through the legal instruments in accordance with the precautionary principle enshrined in Principle 15 of the Rio Declaration\textsuperscript{14}. The precautionary principle adopted in the Protocol will ‘not exceed the scope of the CDB, not override or duplicate any other international legal instrument in this area and will be effective and seek to minimize unnecessary negative impacts on biotechnology research and development and not to hinder unduly access to and transfer of technology’\textsuperscript{15}. The Protocol has developed some significant legal binding instruments in many respects with the purpose of governance the export and import of LMOs conveying as follow;

1. The introduction of the Advance Informed Agreement (AIA) procedure in Article 7, apply prior to the first intentional transboundary movement of LMOs. It requires the exporter to inform in writing to the importer in advance about the information related to LMOs and the importer has ninety days to consider

\textsuperscript{12} Article 19 (3) of the Convention ‘The parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any LMO resulting from biotechnology that may have an adverse effect on the conservation and sustainable use of biological diversity’


and make the decision based on the risk assessment which may accept, refuse, request more information, extend the date of importing the LMOs into its jurisdiction or give a condition such as restriction measure\textsuperscript{16}.

2. Likewise AIA, the provision of ‘risk assessment’ encourages parties to take a risk assessment carried out in a scientifically sound manner and recognize in its techniques in accordance with the Annex III for the purpose of evaluating a possible adverse effects on the conservation and sustainable use of biological diversity and human health.\textsuperscript{17} The evaluation of the risk assessment based on the information provided by the importer in article 8 or other available evidence that can prove the adverse effect\textsuperscript{18}.

3. Moreover, the protocol also encourages parties to regulate their own ‘risk management’\textsuperscript{19} to fulfill the objective of the protocol. This measure comes from the concept of its necessary for the parties to take awareness of preventing risk arise from unintentional LMOs movements. The Protocol does not provide any peculiar guideline on how to manage the risk, therefore it is omitted for each party to create its own measure as the country think suitable, nonetheless, it should be also consistent with the objective of risk management which is to regulate, manage and control risk based on risk assessment mechanism\textsuperscript{20}. The procedure of risk management should weigh between the assessment of

\begin{itemize}
\item \textsuperscript{16} Ibid [20]
\item \textsuperscript{17} Ibid [422-424]
\item \textsuperscript{18} the Cartagena Protocol 2000 art 15
\item \textsuperscript{19} the Cartagena Protocol 2000 art 16
\end{itemize}
the potential risk and the degree of protection.  

4. The Protocol also enshrines the ‘precautionary approach’ due to the lack of scientific certainty and the potential adverse effect from LMOs. This approach was introduced by the Decision II/5 of the Conference of the parties which believed that the parties of the protocol should take into account of the precautionary approach when making a decision. The precautionary approach, unlike the preventive approach, will apply when scientific evidences are equivocal and the possible impact remains unclear, particularly it may take longer time to show adverse results.

According to these measures, the Protocol does not impact only on an environmental issue but also to the international trade. Because the member of WTO are automatically bound by trade agreements which restrict imports such as the General Agreement on Tariffs and Trade 1994 (GATT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the Agreement on Technical Barriers to Trade (TBT Agreement). Inevitably, the centre for this issue is on international trade restriction which both the Protocol and WTO agreements are setting to deal with it directly, unfortunately, the contents of the two instruments are

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23 Ibid [66]

24 Ibid [67-69]
either overlap and could lead to conflict in terms of trade barriers.

III  The Overview of International Trade and Its Principles Relates to the Environment

There is a link between international trade and environmental protection, some concepts are compatible but some are overlap. However both are essential, what is sought to is how to balance the two objectives.\(^{25}\) Since the General Agreement on Tariffs and Trade 1994 (GATT) was adopted by the Trade Negotiations Committee of the Uruguay Round, the promotion and liberalization of free movement of goods and service between states has been introduced as an objective of international trade package.\(^{26}\) Notwithstanding, the liberalization of free trade cannot override the protection of our environment as Patricia Birnie and others express an opinion on their work that ‘International policy does not seek to give free trade priority over environmental protection, but neither does it endorse any general exception for environmental purposes. Recognizing the potential for conflict, what is sought is balance between the two objectives.’\(^{27}\) Even the entire concept of drafting this package may not directly preserve the environment but the concept regarding environmental issue also include in preamble of the 1994 Marrakesh Agreement Establishing the World Trade Organization which states that ‘the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in manner consistent with their respective needs and


\(^{26}\) Patricia Birnie and others, *International Law & the Environment* (3rd edition, Oxford University Press 2009) 753

\(^{27}\) Ibid 755
concerns at different levels of economic development’.28

(i) **The Principle of Liberalization on Free Trade**

The framework for trade liberalization based on the principle of non-discrimination (PND) developed by the WTO has two significant concepts: national treatment and most favoured nation.29

‘National treatment rule’ included in Article III of GATT applies broadly to all domestic measures must be applied in the same manner to the imported products30 that means when products have been imported from another parties to a member state, they must be treated by regulations no matter taxes, charges or any requirement of the importing country, no less than the treatment of domestic products.31 The two most significant cases related to this rule are *Japan Shochu and Asbestos* which the WTO Appellate Body ruled that ‘there can be no one precise and absolute definition of what is like’.32 Nevertheless, the general principle of Article III ‘seeks to prevent members from affecting the competitive relationship, in the marketplace, between the domestic and imported products involved, so as to afford protection to domestic production’.33

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28 The preamble of the 1994 Marrakesh Agreement Establishing the World Trade Organization
33 Ibid 758
‘Most favoured nation rule’ can be explained by the equal treat between their trading partners by providing the same conditions to all import and export countries in terms of ‘like goods’. This rule, included in Article I, demonstrates the equality of treatment of like products from all contracting parties by providing unconditional treatment no matter customs charges, duties rules, regulations, and taxes. The landmark case related to this rule is the Belgian Family Allowances Case which a GATT dispute-settlement panel ruled that ‘the charge on foreign goods was illegal under GATT Article I and that even internal charges cannot discriminate between like products on the basis of distinctions between the production conditions in different countries’. In order to make an effective recommendation, the WTO established a Committee on Trade and Environment (CTE) in 1995 which has an objective on ‘the need for rules to enhance the positive interaction between trade and environment measures for the promotion of sustainable development’.

(ii) **The General Exceptions of the Principle of Liberalization on Free Trade General Agreement on Tariffs and Trade (GATT)**

Although GATT’s objective aims to promote the free trade and eliminate the discrimination on international trade relation but it is also awaken in environmental concern. As states in Annex XX, it permits the parties for making an exception from

36 Ibid 757
free-trade for the purpose of human, animal or plant protection and the exhaustible natural resources conservation as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

…. (b) necessary to protect human, animal or plant life or health;
…. (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

It is necessary for the party who desires to conserve the environment and protect human, animal and plant must consider the seriousness of the issue compare to the violation of GATT provision inevitability. In practice, it is believed to be difficult because GATT does not provide the framework to comply with this provision for resolving the dispute between environmental concern and free trade development.

38 General Agreement on Tariffs and Trade, 1947/1994 artXX(b),(g)
40 Patricia Birnie and Alan Boyle and Catherine Redgwell, International Law & the Environment (3rd edition, Oxford University Press 2009 ) 760
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

Apart from GATT, the WTO agreement associates with trade and environment is the Sanitary and Phytosanitary Measures (SPS Agreement). Its provisions are similar to the Protocol because it deals with GMOs but the agreement has narrowed the scope of risks covered in the agreement, it does concern only risks arise from diseases and pests\(^1\). The concept of risk management, trade restriction on labeling and packaging are also the measures of the agreement handled with GMOs food safety.\(^2\) However, the agreement does not include risk management. The SPS Agreement was developed by the WTO Appellate Body in *EC-Hormones case* that article 2.2 and 5.1 of the Agreement ‘encourages the decision-maker to take into account the rational relationship to scientific evidence and a risk assessment which based on scientific information with caution in the face of scientific uncertainty’.\(^3\) The SPS Agreement clarifies Article XX (b) of GATT in order to deal with the standard of domestic regulation in adopting measures where necessary to protect human, animal or plant and reaffirm that no member state should be prevent from adopting or enforcing such measures which subject to the requirement of non discrimination among member state or create unnecessary trade barriers and the measures must based on science, risk assessment and transparency\(^4\).

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1. See Annex A of the SPS Agreement.
Agreement on Technical Barriers to Trade (TBT Agreement)

Measures which are not cover in the SPS Agreement may fall within the scope of the TBT Agreement because it applies to most of the product from GMOs i.e. industrial and agricultural products. The agreement urges member “to recognize that no country should be prevent from taking measures necessary to ensure the quality of its exports, or for the prevention of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or disguised restriction on international trade…” This agreement also illustrates the important of Article XX(b) of GATT. It deals with the technical regulation measures which need to meet the international standard and that measures do not provide in SPS Agreement. The technical regulation adopted by each state shall be meet the principle of non-discrimination as provided in Article 2 (1) and also meet the objective of its provision without establishing any unnecessary obstacle to trade (Article 2 (2)).

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIP Agreement)

The main objective of TRIP Agreement is to provide the appropriateness between the creator or producer and user of the intellectual property and also ensure the right of each government in protecting its public health, nutrition and public

46 Agreement on Technical Barriers to Trade, Preamble
IV The disputes from the crash between the Cartagena Protocol and the WTO agreements

The Protocol gives a definition of ‘Living modified organism’ in Article 3 which means ‘any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology’ and defines ‘Transboundary movement’ as ‘the movement of a LMO from one Party to another Party, save that for the purposes of Articles 17 and 24 transboundary movement extends to movement between Parties and non-Parties’. So LMOs relates to international trade in order to transfer

from one country to another for commercial purpose and LMOs can be considered to be *like product* under the WTO Agreement as well. Consequently, the procedure to ban or restrict LMOs trading must be fall within both the Cartagena Protocol and the WTO Agreements because the member parties to the Protocol are also the parties to the WTO Agreements. Otherwise, if the party applies the Protocol only, it may be excused failing to comply with the WTO Agreements. No scientific justifications for banning or restricting GMO products, may lead to inconsistent with non-discrimination principle of GATT.50

The largest market share in exporting LMOs comes from GMO products. GMO products are also from the process involving the technology relates to the exploitation of LMO51 which the modest development is called genetic engineering or biotechnology52. The countries that prefer the promotion of international trade may argue that since the introduction of GMOs in the environment and world market, no threat have been found to the biodiversity and human health53 and no certain scientific indicate the adverse effect from using GMOs so it should not be subjected to the Protocol. Apart from that argument, it is affirmed by the WTO Panel in the *EC-Biotech Case* which refused the application of precautionary approach to the case where the disputants are not party to

50 Grant E.Isaac, ‘The WTO and the Cartagena Protocol: International Policy Coordination or Conflict?’(Current Agreement, Food & Resource Issues, 4 November 2003) p.120<http://ageconsearch.umn.edu/bitstream/45734/2/isaac4-1%5b1%5d.pdf> accessed 18 March 2011
the agreement.\textsuperscript{54} There are some critics arise from the crash of both instruments as follow;

\textbf{(i) The Problem on scientific aspect and precautionary approach}

The introducing of LMOs into the environment as direct use or indirect are now well known but some critics are put into concern and raise awareness in fulfill the objective of safe environment and trade regime. In the Second World Conservation Congress put its concern about LMOs into two points;

1. The significant numbers in reduction of biodiversity loss caused by GMOs; and
2. The capacity of GMOs in acquiring food security

From these concerns, the solution is to recognize the ‘absence of information relate to the effects of the GMOs’ and try to apply the precautionary approach in these measures.\textsuperscript{55} The precautionary approach relates to scientific evidences which the Cartagena Protocol allows parties to restrict trade even there is no sound scientific evidences to prove the safety of LMOs transboundary movements while SPS Agreement urges state not to be prevented by any measure unless there is sufficient scientific evidences.\textsuperscript{56} If the importing country use its discretion to restrict the LMOs exporter based on uncertain scientific evidence, it will violate the WTO Agreement especially SPS Agreement.

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Article 10 (6) of the Cartagena Protocol guides the party to restrict LMOs trade exporter by state that:

‘Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of 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 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 as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects’.  

This provision definitely can be understood that even lack of scientific certainty regarding the potential adverse effects of LMOs, it shall not prevent the party of import to do any measure to avoid or minimize the potential effects. What will happen if the PSP Agreement has been applied to the same circumstances? The PSP Agreement narrows the restriction on international trade for the purpose of human, animal, plant life or health protection which provides in Article 2(2) that ‘… the measure is based on scientific principles and is not maintained without sufficient scientific evidence…’ This provision is regulated contrary to the Protocol which means that the party of importer who want to apply the measure to restrict trade need to show sufficient scientific evidence or according to the scientific principle. The SPS Agreement tries to release the strictly language of Article 2(2) by introducing the precautionary principle in Article 5.7 where relevant scientific evidences are insufficient. Anyway, in order to use precautionary principle, Ruth Mackenzie suggests that ‘the member need to meet four conditions:

\[57\] the Cartagena Protocol art 10(6)
1. The measure need to be adopted provisionally;
2. Adopted on the basis of available pertinent information;
3. The decision-maker seeks to acquire the adjunct information for a more purpose of risk assessment;
4. Review the measures in a period of time’.\(^{58}\)

However, the WTO Appellate Body interpreted how to apply Article 5.7 in *Apples case* (2003) where the dispute arisen because the United States complaint against Japan in quarantine restrictions on importing apples to Japan based on the reason that Japan needed to protect against fire blight spread. The Appellant Body guided how to apply article 5.7 of the SPS Agreement that in order to create any trade restriction for the purpose of potential risk to human and environment, it triggered by the ‘insufficiency of scientific evidence’ not the ‘existing of scientific uncertainty’.\(^{59}\) Moreover the WTO Appellate Body reaffirmed in the *Hormones case* that ‘precautionary approach is not yet customary international law so it cannot be replaced the specific provision of the SPS Agreement’\(^{60}\) and insisted that the risk assessment must be based on sufficient scientific evidences.\(^{61}\) It can be understood that even the scientific evidence in hand which involve to the risk arises from GMOs cannot be enough to use the trade restriction by apply a

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precautionary approach. This is contrary to the Cartagena Protocol, which scientific uncertainty can lead to justify a precautionary approach.\[62\] What will be the result of this conflict? How does the decision-maker use its discretion in order to operate the trade related measure based on scientific evidences? If we analyze the Protocol and the SPS Agreement precisely, the Protocol enriches the Agreement in the context of precautionary principle i.e., the agreement does not provide exactly the risk assessment and has no provision on risk management on the other hand the Protocol does in Annex III ‘Risk Assessment’, article 15 and also states about the ‘risk management’ in Article 16. It shows that trade Agreements and environmental agreement should be mutually supportive.\[63\] Even it is unable to prove that the biotechnology is safe but by using precautionary principle, we can delay the unknown technology into the environment because it is able to prove that adverse effect may possible to occur.\[64\]

(ii) The Problem of the Role of Socio-Economic Concept in Risk Assessment and Risk management

The SPS Agreement allows the member parties to develop their measures relate to trade restriction on the basic of sufficient scientific evidence or based on the

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economic aspect, but avoids to consider the socio-economic concept because it is too subjective to be accepted.\textsuperscript{65} However, it is also found on the risk assessment under the SPS Agreement which includes scientific and socio-economic concern differs from the affect on animal, plant life or health or the affect to human. The sufficient scientific evidences relate to risk assessment is a fundamental obligation of the Agreement in assess the possible risk when lack of scientific evidence to prove safety\textsuperscript{66} and in order to create any measure based on risk assessment, the SPS Agreement allow members to consider the economic factor if the affect relates to animal or plant but regardless if it affects to human and health.\textsuperscript{67} In contrast, the member of the Protocol must consider the socio-economic concern if the LMOs impacts the conservation and sustainable use of biological diversity as provide in Article 26\textsuperscript{68}. This conflict was solved by Article 26 (1) which suggests parties to apply this provision ‘consistent with their international obligations’.\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{65} Grant E. Isaac, ‘The SPS Agreement and Agri-food Trade Disputes: The Final Frontier’ (2004)\textsuperscript{1} Estey Center Journal of International Law and Trade Policy Vol.5 p.50 < http://ageconsearch.umn.edu/bitstream/23847/1/05010043.pdf> accessed 8 March 2011
\item \textsuperscript{66} WTO, ‘SPS Agreement Training Module: Chapter 8 current Issues’ < http://www.wto.org/english/tratop_e/spse/spss_agreement_cbt_e/c8s1p1_e.htm> accessed on 18 March 2011
\item \textsuperscript{68} Article 26 (1) of the Protocol ‘The Parties in reaching a decision on impact under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligation, socio-economic considerations arising from the impact of LMOs on the conservation and sustainable use of biological diversity to indigenous and local communities’
\end{itemize}
(iii) The Problem of the restriction on imports and bans

The Protocol encourages parties to use their discretion to set market access bans which they think it is appropriate to take that measure for preventing adverse effect caused by transboundary movement of LMOs. This can recognize as a trade barrier which contrary to the free market and non-discriminate principles of the WTO purpose. 70

The core principle of the Protocol is AIA procedure which provide wide discretionary power for the import state to determine the possible adverse effect which may arise from the LMOs when lack of scientific evidence or information to prove their safety. In the case of unsatisfied evidence, the party of the Protocol can use the measures under article 10 such as restriction on use, packaging and labeling requirements or even import ban but these decisions must be relied on the facts that (i) the exporter failed to assure the compliance of these provision or (ii) the decision of the importer based on the risk assessment which showed the serious result caused by those products. 71 On the other hand, the import bans produced by WTO such as GATT, the PSP Agreement, and the TBT Agreement are very strictly, as the import parties must manifestly present that the import bans:

1. based on a reasonable ground;
2. meet an objective of legitimate policy;

70 Grant E. Isaac, ‘The WTO and the Cartagena Protocol: International Policy Coordination or Conflict?’ (Current Agreement, Food & Resource Issues, 4 November 2003)p.120< http://ageconsearch.umn.edu/bitstream/45734/2/isaac4-1%5b1%5d.pdf > accessed 18 March 2011
3. are no other measures to achieve the objective of the policy than this method and;

4. are not arbitrary or violate the non-discrimination principle.\textsuperscript{72}

Failure to meet the four criteria may lead to a breach of the international trade agreements. It may conflict to the import ban under Article 10 of the Protocol is Article XI of GATT\textsuperscript{73} which the affected party may seek to justify such measure.\textsuperscript{74} Moreover, trade bans can violate the non discrimination principle under the provision of GATT and TBT Agreement if the importing country treated the like product in an inconsistent practice contrary to the principle.\textsuperscript{75} However, as provide in GATT Article XX, the measures violate free trade can be justified if (b) it is necessary to protect human, animal or plant life or health and (g) it relate to the conservation of exhaustible natural resources.\textsuperscript{76} The measure provides in Article XX (b) must be ‘necessary’. The word ‘necessary’ was described by the Appellate Body in the EC-Asbestos case which it is a mean to achieve the value of the end pursue and ‘\textit{the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is}’.

\textsuperscript{72} Ibid [861]

\textsuperscript{73} Article XI of GATT states that ‘No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party’.


\textsuperscript{75} Ibid [879-884]

\textsuperscript{76} Ibid paras.885-886
less restrictive of trade than a prohibition'.

Apart from GATT, Article 2 of the PSP Agreement and Article 2.2 according to Article 2.5 of TBT Agreement also provide consistent provision to GATT XX (b) which require the assurance that the measures against free trade may not more restrictive than necessary. Therefore if such measures are claimed to challenge the legitimacy of these issues under the PSP Agreement and TBT Agreement, the importing countries can apply these provisions to justify their decisions by demonstrate the counterpoise concepts between the need to restrict LMO trade and the ‘necessary’ to preserve the environment or protect human, animal or plant life or health from LMOs threatening.

(iv) The Problem in enforcing the provision, which one is prevalent?

As can be seen from above arguments, there are the overlap between the Protocol and the WTO Agreements, which one should prevail? From the Preamble of the Protocol reminds the parties to recognize ‘that trade and environment agreements should be mutually supportive with a view to achieving sustainable development and Emphasize that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements’. This is the

79 Ibid [888]
80 See the Preamble of the Cartagena Protocol on Biological Diversity
solution of the negotiation on ‘saving clause’ propose by the Miami Group on the debate of contracting parties when drafting the protocol. From this statement, it creates more problem because if it is read together with the next statement proposed by EU that ‘the above recital is not intended to subordinate this Protocol to other international agreements’. The wording from the Preamble seem to be reconciled between the environment and international trade but Aaron Cosbey addresses in an IISD Briefing Note that the language ‘not subordinate’ in the Protocol has two significant meaning; ‘first, it sets a precedent, being the strongest such language yet from an MEA. If a conflict was to arise between WTO rules and the Protocol, at least there would be ambiguity about which would prevail. Second, were a dispute over the implementation of the Protocol to be brought to the WTO, it would be very difficult for the dispute panel to ignore the Protocol’s wording’.

Although it seems to be conflict from its wording but it should be notable that the Status of the Protocol and the WTO Agreements can be recognized as treaties which have the same subject matter, therefore in order to apply the treaty, it has to follow the provision of Article 30 (3) of the Vienna Convention on the Law of Treaties 1969.

81 P.G.Gayathri and Reshma R.Kurup explain the ‘saving clause’ as if the later agreement includes a saving cause which indicates that such agreement is not to be considered as incompatible with an earlier agreement. See further detail in P.G Gayathri and Reshma R. Kurup ‘Reconciling the Bio Safety Protocol and the WTO Regime: Problems, Perspectives and Possibilities’(2009) 1 (3) American Journal of Economics and Business Administration <http://www.scipub.org/fulltext/ajeba/ajeba13236-242.pdf > accessed 8 March 2011
83 Ibid.
84 Article 30(3) of the Vienna Convention on the Law of Treaties 1969 “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”.
From this provision, the Protocol was adopted later than the WTO Agreement so the WTO Agreements should apply in consistent with the Protocol and it can be considered that the Protocol should prevail. Apart from this application, if the conflict arises where both parties are WTO member and not be part of the protocol party. The best way to develop the relationship and solve the problem which dispute relate to environmental concern on the one hand and international trade on the other hand is to interpret in accordance with the Marrakesh Agreement which states that ‘while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development’.  

So the WTO panel can apply the Protocol in consideration of the situation to counterpoise the importance of environmental and human concerns and the trade promotion as a mutual support mechanism.

V Conclusion

Biodiversity loss and the extinction of some species caused by LMOs indicate the sign of a real threat to the world. The Cartagena Protocol on Biological diversity designed some significant approaches according to the precautionary principle to control the delay of possible adverse effect caused by LMOs technologies until the exporting countries can ensure the safety of using these products.  


measures developed under the Protocol may have numerous impacts on the international trade regime but mankind does not want the prosperity without the safety of life and a green world, in other word, mankind also does not want to live longer but poverty and hunger. Therefore, it is important to strengthen both concepts in conciliative way. Even the Protocol fails to clearly state how to use discretionary power of member parties in order to make the appropriate measures or processes (such as the risk assessment, the risk management and trade restriction) not contrary to non-discrimination principle of the international trade but it should be realized that its preamble ensures that ‘trade and environment agreements should be mutually supportive with a view to achieving sustainable development’. Moreover Article 14(1) of the Protocol also expresses the mutual support between the safe environment and international trade that ‘Parties may enter into bilateral agreements and arrangements regarding international transboundary movements of living modified organisms, consistent with the objective of this protocol and provided that such agreements and arrangements do not result in a lower level of protection than that provided for by the Protocol’. Therefore even the conflicts of both instruments arise from the different perspective but they can be handled by the mutually beneficial objectives and taking into account the right and obligation under the international law regime based on the good faith principle.

88 Ibid.240.
Bibliography


journals> accessed 18 March 2011


