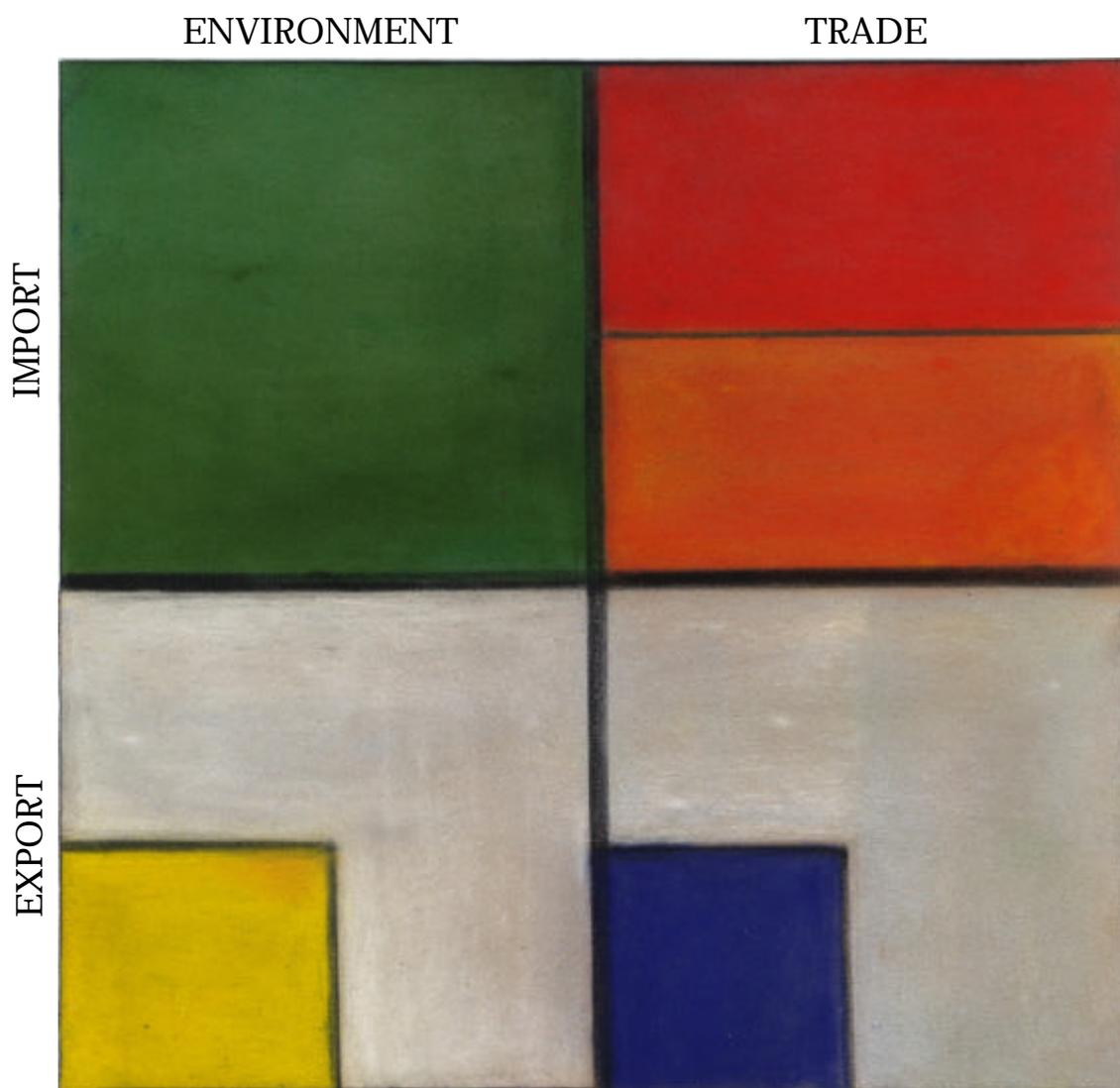


Brave New Biosecurity

Realigning New Zealand's Approach to the Cartagena Protocol



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Cover Illustration: This artwork, donated to the Sustainability Council, is further explained on p 35.

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Executive Summary

- The Cartagena Protocol is a treaty designed to enhance biosecurity by providing for prior consent to international shipments of living GMOs – known as Living Modified Organisms (LMOs). It is motivated by concern to protect biodiversity and also carries significant trade implications.
- The Protocol has the potential to deliver two important upgrades on New Zealand's existing biosecurity:
 - Requirements for labelling that would identify those LMOs not intended to be a part of a shipment, which could otherwise escape detection; and
 - A new liability regime to provide compensation for any harm resulting from importing an LMO, when redress would otherwise generally not be available.Such provisions (currently under negotiation) are brave new biosecurity in response to a new world in which the range of LMOs on offer will include threats such as organisms carrying pharmaceuticals, plastics, or sterility characteristics.
- At the time Government considered ratifying the Protocol in September 2004, the balance of officials' advice leaned towards deferment. Ministers however announced they had decided to ratify:
 - "Because New Zealand is a good international citizen"; and because
 - "We are committed to comprehensive biosecurity";
 - "We support people being informed about what's imported and exported"; and
 - "To ensure the best interests of New Zealand and other agricultural exporters are taken into account in the development of the Protocol".
- In May 2005 officials from the Ministry of Foreign Affairs and Ministry for the Environment submitted their proposed negotiating positions for a Protocol meeting in Montreal. The proposed positions narrowed the focus to the pursuit of not just trade interests, but largely ones that depend on New Zealand becoming a significant LMO exporter, and were approved.
- At those Montreal negotiations, New Zealand was the strongest opponent of measures that would provide for:
 - effective prior informed consent of LMO contaminated shipments; and
 - effective sanctions for any harm caused and non-compliance.New Zealand was one of only two nations to reject a series of proposed framings of the labelling provisions that are required to properly operationalise the Protocol, and it alone questioned whether a liability regime was required at all.

Labelling

- While the Protocol carries clear measures for handling intended shipments of LMOs, unintended LMO contaminants in food and feed are a critical point of negotiation. New Zealand supports requiring labelling for "intended" content, but not for the "actual content" of such shipments. The concern underlying the position is that this may impose testing costs on conventional (non-LMO) exporters. However, given persistent consumer resistance to LMO contamination, such testing is increasingly becoming routine.

- A focus on such risks to exporters in official documentation has been at the expense of examining risks on the other side of the equation – the damage that could result from unintended imports of LMOs. Labelling requirements are a core biosecurity question with important environmental and economic dimensions.
- Mainstream institutions recognise that new forms of LMOs in particular pose environmental risks that differ from other organisms. Prior informed consent requires that labelling specify the actual content. Labelling is a vital aid to checking a free flow across the border of unintended LMO contaminants.
- In economic terms, conventional food producers are exposed to financial damage from LMO contaminants entering the supply chain – domestically and through re-export. Even if it is assumed New Zealand becomes a significant exporter of LMOs, it is likely that the balance of trade interests alone favours New Zealand supporting strict labelling rules for unintended LMO contaminants.

Liability

- There are well documented financial risks arising from LMO contamination of conventional food products. Uncertainty surrounds the potential magnitude of environmental harm due to the lack of knowledge of environmental effects.
- New Zealand's approach to liability under the Protocol has been to relitigate the need for such rules and to seek to delimit their scope. A concern expressed in official documents is that if the Protocol were to set liability rules, it would force New Zealand to change its domestic law. This law currently provides a de facto subsidy for LMO operators via relief from liability for the more serious risks.
- If considered in an international context, the national interest question is the overall balance of risk to New Zealand parties – financial risks from importing LMOs, versus the risk of claims for harm caused to others. The balance of advantage overwhelmingly favours New Zealand supporting strong liability arrangements if it does not become a significant LMO exporter. As in the case of labelling rules, even if the nation were to develop an LMO export industry, binding liability arrangements under the Protocol are still likely to be in New Zealand's interest. They would also support the principles advanced at the time of ratification.
- An assumption implicit through the official documentation is that New Zealand will become a significant exporter of LMOs. This is just one possible scenario for agricultural development, and ministers state that they are agnostic as to the desirability of LMO exports emerging, yet other scenarios are largely unexplored.
- Moreover, there is no systematic analysis of the overall balance of risk with respect to imports and exports, and between trade and environment considerations. The Sustainability Council's analysis is that key positions being taken are very likely to work against the balance of New Zealand's interests.
- The stakes are therefore not simply that New Zealand fails to back important environmental protection measures. Current negotiating positions are antagonistic to biosecurity procedures New Zealand will want to depend on in future to protect the integrity of its food products and access to premium export markets. Further, New Zealand's willingness to use blocking tactics in Protocol negotiations is impairing the ability of the other nations to obtain such protection.

PART I – Origins of the Current Approach

1. The Protocol’s Promise

The Cartagena Biosafety Protocol¹ is an international treaty designed to achieve informed consent prior to export of Living (genetically) Modified Organisms (LMOs)² in order to better safeguard the environment and human health. As a protocol to the United Nations Convention on Biodiversity, it is motivated by concern over the potential impacts of LMOs on biodiversity. The Ministry of Foreign Affairs and Trade (MFAT) describes it as “one of the most complex and important pieces of international environmental legislation”.³

The Protocol’s preamble makes clear its precautionary intent with respect to scientific risk assessment⁴ and Article 2.2 follows on by setting as a core objective:

The Parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.

Although the Protocol’s focus is effects on biodiversity, it is a core instrument for biosecurity more generally. While New Zealand already has legislation requiring prior approval of any LMO shipped to this country, the Protocol has the potential to deliver two important upgrades:

- Domestic law requires only that LMOs “knowingly” imported are approved and declared.⁵ The Protocol however puts the onus on the exporting party rather than the importer, which of itself provides incentives for biosecurity. More importantly, it carries the potential to require labelling that would compel the sender to appropriately screen for unintended LMOs contained in the shipment, prior to dispatch. Given the range of LMOs now under development – including plants carrying pharmaceuticals, plastics, and sterility characteristics – such measures would become vital tools to help check on an “unseen” gradual flow of “unintended” LMOs that would otherwise tend to escape formal assessment procedures.

¹ Its full title is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Frequently used acronyms in this document include: LMO = Living Modified Organism; MFAT = Ministry of Foreign Affairs and Trade; MFE = Ministry for the Environment; NRC = US National Research Council.

² All LMOs are genetically modified organisms. The distinction relates essentially to whether the organism is living and capable of reproducing.

³ MFAT, Annual Report 2004, www.mfat.govt.nz/about/oppu/annualreport/annreport.html.

⁴ The preamble begins with a recital stating: “Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development ...”.

⁵ HSNO s 109 (1) (c) makes it an offence to import LMOs without prior authorisation only if the party “knowingly” imported the organism.

- Such unintended imports could cause harm in three ways:
 - By becoming established species and damaging natural or managed environments;
 - Damaging human health through ingestion of LMOs not intended for consumption; and
 - Damaging New Zealand food producers through becoming unintended components of this country's exports, when at present, premium markets generally reject products with any detectable level of LMO contamination.The Protocol offers the prospect of compensation for such harm through the ability to better trace the source of the LMO and a new liability regime, when redress would otherwise tend not to be available.

The Protocol is brave new biosecurity in response to a new world in which the range of LMOs on offer will be greatly expanded and some new types will carry risks of a wholly different order to seed and plant varieties traded today.

Other nations, and developing countries in particular, stand to gain at least as much in biosecurity terms, as few have adequate domestic arrangements. However, as the Protocol would place additional obligations on LMO commodity exporters in particular, those nations currently exporting LMOs or envisaging becoming LMO exporters see potential trade costs as well as biosecurity benefits.

The Protocol was not fully formed at the time it came into effect on 11 September 2003. The main outstanding issues to be resolved are disciplines required to ensure the objectives are achieved. These include: the forms of labelling to apply to exports, liability provisions, and compliance issues.

New Zealand signed the Protocol on 24 May 2000, soon after the final text was completed, joining 102 other nations. While MFAT noted that negotiation of the Protocol was difficult and very nearly collapsed, it also noted that "New Zealand participated fully in the negotiation of the Protocol ...".⁶ More importantly, then Environment Minister Marian Hobbs stated after the text was completed that:

the coalition Government has been able to achieve its goals at the biosafety conference.

...

We wanted a protocol to come out of [the conference] rather than another failure but we wanted a 'more green' position than had been taken in the past.

...

There's been a compromise between trade and the environment and I am pleased they will be on the same footing."⁷

Ratification at that time seemed to be more or less a formality.

⁶ MFAT, *Cartagena Protocol on Biosafety: Priority of Work on Ratification*, 9 June 2003, p 7.

⁷ Marian Hobbs, *Environment Minister Pleased with Montreal Outcome*, Media Statement, 30 January 2000. MFAT later stated "New Zealand's objectives for negotiating the Protocol were mostly met by the final text." MFAT, *Cartagena Protocol on Biosafety: Priority of Work on Ratification*, 9 June 2003, p 8.

2. Officially Dubious - Lead up to Ratification

By 25 August 2003 however, when New Zealand decided to attend the first meeting of the parties as an observer, the Cabinet noted that:

this would give New Zealand the opportunity to consider whether the outcomes of the first meeting changed the balance of New Zealand's interests in joining the Protocol ...⁸

MFAT officials thus simply monitored developments as an observer at the first meeting of the parties to the Protocol held during February 2004 in Kuala Lumpur. When seeking approval for a New Zealand position to take to the meeting, MFAT noted that “we propose to continue to work closely with a core group of like-minded agricultural trading countries that share our concerns regarding some of the implementation matters to be considered at [the meeting]”.⁹ The note later stated that “These issues include: identification (labelling) of shipments that do or could contain LMOs (e.g., grain or seed shipments), compliance machinery, and liability and redress arrangements.”¹⁰ The labelling requirements were identified as “critical to the agricultural exporting countries which are concerned not to place overly onerous requirements on their exporters”.¹¹

Having observed at this first meeting of the parties, officials then began the process of working through whether or not New Zealand should ratify by September 2004 so that it could participate fully at the second meeting of the parties in May 2005.

As a part of this process, a public consultation document was issued in June 2004. What was extraordinary about the document was the paucity of analysis provided. At a meeting of stakeholders convened by MFAT prior to submissions being received, the document was roundly drubbed as an inadequate basis for consultation. Parties ranging from Federated Farmers and AGCARM to NGOs complained of the lack of detail provided.¹² For example, just nine sentences addressed the issue of the liability regime proposed under the Protocol.

Similarly surprising was the absence of background documents reporting on the issues ratification raised. MFAT officials stated at the stakeholders meeting that there were no Government papers of any significance covering the issues ratification raised, beyond the consultation document and those the Sustainability Council had already obtained by that time under the Official Information Act (cabinet briefings concerning the first meeting of the parties).

⁸ MFAT, *Biosafety Protocol: Ratification Process and Plan*, 3 October 2003, p 1. Note that an earlier paper of 22 August 2003 had also pointed to the difficulty of ratifying in time for the first meeting, as the date for the meeting had been brought forward.

⁹ MFAT, *Cartagena Protocol on Biosafety: First Meeting of the Parties*, 9 February 2004, p 3.

¹⁰ MFAT, *Cartagena Protocol on Biosafety: First Meeting of the Parties*, 9 February 2004, p 4.

¹¹ MFAT, *Cartagena Protocol on Biosafety: First Meeting of the Parties*, 9 February 2004, p 5.

¹² As a consequence of the lack of analysis provided by the Ministry, individual organisations were required to each prepare their own analysis of a complex subject in rather little time.

Given the relatively short interval between when submissions were received on 16 July 2004 and the need for the cabinet paper to be with ministers by the end of August, it was less of a surprise when MFAT reported in September that neither were there supporting documents to the cabinet paper that addressed the issue of whether or not New Zealand should ratify.¹³

That cabinet paper provided limited analysis of the underlying issues and the main section of the paper was largely given over to a summary of pros and cons for ratifying or not ratifying. It did not give a firm view on the way forward, providing recommendations allowing for either ratification or a deferment of ratification. What stood out was that the views of individual departments involved in its preparation were outlined in an annex – an unusual feature in a cabinet paper. Deferment was recommended by: Ministry of Economic Development, The Treasury, Department of Justice, and the Ministry for Research, Science and Technology. The Ministry of Agriculture and Forestry went further, recommending the Protocol not be ratified at any point.¹⁴

Consistent with the alternate recommendations provided, the departments authoring the paper (MFAT and the Ministry for the Environment (MFE)) expressed no definitive view. However the balance of pros and cons listed for the options leaned towards deferment. The conclusion to the paper then focused on uncertainties ratification would involve and finished by pointing to the views of other departments advocating a deferral.

Officials thus arguably set the preconditions for deferment - through individual departmental recommendations, the balance of the information provided in the cabinet paper, and the absence of background documents on complex underlying issues. Deferral would also have been in line with the stances of a number of other major agricultural exporters (including the US and Australia) which were clearly not going to ratify very soon, if at all.¹⁵

¹³ Jane Coombs, MFAT, personal communication, 17 September 2004.

¹⁴ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, Annex 1, p 19-20.

¹⁵ MFAT had noted that “Neither the United States nor Australia will ratify in the foreseeable future” – see MFAT, *Report of NZ Participation at the first meeting of the parties to the Cartagena Biosafety Protocol, February 23-27 2004*, 31 March 2004, p 2.

3. High Ground - Rationale for Ratification

Like most other observers, officials appeared to receive something of a surprise when the Cabinet decided to ratify.¹⁶ The rationale for ministers taking a different approach was set out when the New Zealand Government announced its decision in September 2004.¹⁷ The opening two justifications were:

We are ratifying the protocol because New Zealand is a good international citizen and we are committed to comprehensive biosecurity.

Next came the further principled justification that:

We support people being informed about what's imported and exported. It can be seen as an extension of border biosecurity.

Last of the four offered was the following:

Ratification allows us to ensure the best interests of New Zealand and other agricultural exporters are taken into account in the development of the protocol. It means we have an inside track in helping determine international practice for governing trade in these products and will have an active voice in the future development of the protocol.

The content and ordering of the points in this announcement is of interest because we understand it is consistent with the Cabinet's ultimate view of the position New Zealand should take on ratification. As noted above, departments essentially favoured deferment and it was also the case that when business and science organisations submitted to MFAT on the question, they were overwhelmingly against ratification, with only NGOs in favour.¹⁸ It was the ministers around the Cabinet Policy Committee in particular that saw matters differently and decided to ratify in any case.

Turning back to the cabinet paper, it had indeed listed as an advantage of ratification that New Zealand may gain greater influence over the evolution of the Protocol (the fourth rationale). However, officials had not put great weight on this and had also noted that "The current membership is dominated by importing countries. In such an environment it may not always be possible for New Zealand delegations to protect our interests".¹⁹ This is therefore not a likely motivation (on its own) for Cabinet to go against the weight of official advice.

What then of the other three principles listed at the opening of the announcement stating the country would ratify:

¹⁶ The ratification decision is reported in: Cabinet Policy Committee, *Cartagena Protocol on Biosafety: Consideration of Ratification Supplementary Information*, Minute of Decision, 8 September 2004, p 2.

¹⁷ Marian Hobbs, Minister for the Environment, *Government to ratify Cartagena Biosafety Protocol*, Press Release, 16 September 2004. Announcement is reproduced in Appendix 1.

¹⁸ MFAT, *Summary of submissions about New Zealand's stance on ratification of the Cartagena Protocol on Biosafety*, 27 July 2004.

¹⁹ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, to Cabinet Policy Committee, 30 August 2004, p 7. MFAT, *Report of NZ Participation at the first meeting of the parties to the Cartagena Biosafety Protocol, February 23-27 2004*, 31 March 2004, p 5.

- “Because New Zealand is a good international citizen”; and because
- “We are committed to comprehensive biosecurity”; and
- “We support people being informed about what’s imported and exported”?

Remarkably, none of these three rationales were listed in the cabinet paper as reasons for ratification.

- There was no mention whatsoever of New Zealand being a good international citizen, the first principle. The only reference to this concept in the paper is in the negative when officials distance themselves from the notion and note: “Our non-participation **would be criticised by NGO groups who regard the Protocol as...** a mark of our ‘global citizenship’” (emphasis added).²⁰
- With respect to the second principle, comprehensive biosecurity, the cabinet paper states that “Officials assess that the Protocol would not offer any further significant protection than already exists under New Zealand’s current rigorous biosecurity regime administered through the HSNO and Biosecurity Acts.”
 - Later the paper nonetheless notes that “ratification provides for notification and advice in the event of illegal or unintentional imports from other Parties”.
 - However MFAT and MFE distance themselves in the main part of the paper from the other major improvement in biosecurity the Protocol could be expected to offer – an effective liability regime, one that set clear economic incentives for those shipping to New Zealand to comply. The paper notes only that “**NGO stakeholders consider** New Zealand would benefit from participation in a liability and redress scheme if one is agreed in the future by Parties” (emphasis added).²¹
- Neither does the cabinet paper list support for informed consent as a potential reason for ratification. The closest it comes is the statement that “ratification would signal New Zealand’s support for the Protocol’s objectives” – rather than any specific endorsement of the principle of informed consent.²²

While it is surprising that officials did not list three of the four rationales for ratification that ministers ultimately relied on, the real concern is the virtual absence of reference to these in official documentation since that time. In an announcement five months later confirming that ratification had taken place, only one of the four original reasons was cited - the ability to ensure New Zealand’s trade interests are taken into account.²³ The two sentences explaining this justification were copied directly from the September announcement, but there was no reference to the other principles.

²⁰ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, p 8 and 9. Only in Annex IV to the paper (p 2) is reference made to an allied but different concept of assurance of adequate standards: “Ratification of the Protocol would demonstrate our commitment to the international community ... for adequate standards to facilitate trade in LMOs”.

²¹ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, p 3, 6 and 6 respectively. Only in Annex IV do officials themselves state this “may” give New Zealand access to redress otherwise unavailable.

²² MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, p 6.

²³ Marian Hobbs, *NZ Ratifies Cartagena Protocol on Biosafety*, Media Statement, 24 Feb 2005.

4. “Shame” - The Drama in Montreal

The submergence of the original principles was to become critical when MFAT and MFE submitted for approval their proposed negotiating stance for the second meeting of the parties and there was no mention of the other three justifications. That May 2005 document instead listed eight “general principles” on which the delegation should base its stance.²⁴ Four of the eight focus exclusively on matters relating to New Zealand protecting its interests as an agricultural trader and are purely defensive in nature. These are:²⁵

- “Avoid undue compliance costs being imposed on producers/exporters.”
- “Ensure decisions of Parties are consistent with other international agreements and can not be applied in a manner that would constitute a disguised restriction on trade.”
- “Encourage the participation of the key LMO producers and exporters”
- “Ensure that decisions of Parties are consistent with New Zealand’s policy approach to GMOs to ‘proceed with caution while preserving opportunities’.”

Moreover, they collectively carry the sense that the trading interests being targeted are those of LMO exporters not yet in existence. For while the delegation is to encourage LMO exporting nations to join the Protocol, there is no reference to the strong concerns of New Zealand exporters currently servicing markets that demand GM Free produce who seek protection from incoming LMO contamination.

The other four principles are at best neutral guidelines for implementation. Yet because they offer so little that is not self-evident, it is hard to see why they would be included as principles unless they are meant to signal an approach of limiting the scope of tools and procedures to be utilised under the Protocol. These four are:

- “Promote the balanced and effective implementation of the Protocol”
- “Ensure measures are science-based and scientifically justified, practical, meaningful and achievable.”
- “Ensure measures are focused on what is necessary to meet the objective of the Protocol.”
- “Ensure any new measures are grounded in practical experience.”

None of the above carries any sense of the broader aspirations that motivated the development of the Protocol or the first three rationales New Zealand gave for ratifying it. Instead the paper focuses almost exclusively on the trade-related issues, and implicitly reinterprets the Government’s *raison d’être* for ratifying as follows:

The ability to better influence the Protocol from within the membership of the Protocol, and in particular **to ensure the perspective of agricultural exporting**

²⁴ MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005, p4. The paper stated that each of the specific positions proposed “is underpinned by the guiding principles”.

²⁵ MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005, p3 and 4.

countries ... is taken into account in the ongoing development of the Protocol, **were key considerations highlighted when the Government announced its intention to ratify the Protocol.** [Emphasis added]²⁶

The paper stated in summary that New Zealand's ratification offers the potential "to ensure decisions are consistent with the broader trade policy interests of agricultural exporting countries".²⁷

Having adopted this selective interpretation of the ratification announcement, and derived principles to match, the document then:

- Anticipates the major decisions that would come forward and proposes clear responses; and
- Signals the intention to take a discordant line, relative to the positions it was understood would come forward from most other signatories.

With respect to the latter point, the paper stated:

As the New Zealand delegation will have very little like-minded support, given the predominance of agricultural importing countries within the Protocol, it will be important for the delegation to have clear instructions to protect New Zealand's key interests, and **flexibility and authority to break consensus if key New Zealand concerns are not able to be accommodated.**²⁸ [Emphasis added]

The significance of this foreshadowed break of consensus is illustrated by earlier advice from MFAT that "it is unusual to resort to this approach except in extreme circumstances".²⁹

Once approval was given for this and the other proposed positions, ministers fully owned them and were bound to defend them in Parliament and the media, as they did when the drama in Montreal was relayed back to New Zealand.³⁰

The New Zealand delegation to the second meeting of the parties acted as the greatest single obstacle to the development of measures that would provide for effective prior informed consent of LMO contaminated exports, and the most ardent opponent of effective sanctions for any harm caused and non-compliance.

- Of the 119 parties to the Protocol in attendance, New Zealand was one of only two nations³¹ to object to a series of proposed compromise framings of the labelling provisions that were the key objective of the meeting and are required to meaningfully operationalise the Protocol. New Zealand's vote was decisive as it

²⁶ MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005, p3.

²⁷ MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005, p3.

²⁸ MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005, p4.

²⁹ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, Annex IV, p 5.

³⁰ Whether MFAT officials exercised this mandate over-zealously in places is another matter.

³¹ The other was Brazil, which adopted a similar position to New Zealand.

appears that if just one country had objected, this would have been insufficient to prevent adoption;³²

- New Zealand alone questioned whether a liability regime was required at all.

New Zealand was not just a little out of step with other parties. Only Brazil came close to matching New Zealand's profile as a consensus blocker. Although the details did not make the pages of most major papers, New Zealand was pilloried in the reports on the negotiations that were filed. "Brazil and New Zealand held the talks hostage as they repeatedly blocked consensus"³³ and "Brazil and New Zealand were successful in blocking the birth of an effective global regime ..."³⁴ were two sentences from the opening paragraphs of such reports. The photographs transmitted back from the closing day of the meeting with NGO observers holding signs reading "Shame New Zealand" were however perhaps the most vivid and direct commentary to circle the globe.

For those who understood the history (especially the European Union negotiators), what further raised the temperature was that a few months earlier in March it was also New Zealand that had blocked initiatives to move away from the requirement for consensus decision-making.³⁵ In so doing, New Zealand secured a position from which it had the ability to launch a blocking strategy on development of the Protocol that it had formally joined just a few weeks before the Montreal meeting.

MFAT also reported that it had succeeded in buttressing this position for future meetings:

By insisting on putting square brackets around the proposed voting procedure, we have ensured that consensus will continue to apply until such time as Parties may agree to lift these brackets. The EU expressed strong disappointment at this outcome.³⁶

³² MFAT reported that "The President concluded that as two parties had formally objected, the decision could not be adopted". MFAT, *Cartagena Protocol on Biosafety, Report of Second Meeting of the Parties (MOP2)*, 6 June 2005, p 6.

³³ The South North Development Monitor, *Brazil, New Zealand Block Decision on Documentation of GMOs*, Lim Li Ching and Lim Li Lin, 4 June 2005.

³⁴ Financial Express (India), *Brazil New Zealand Block LMOs Proposal*, 5 June 2005.

³⁵ The South North Development Monitor reported that: "Because decisions at the MOP are usually taken by consensus, Brazil and New Zealand were successful in derailing the talks, and thus, no decision was adopted on Article 18.2(a). The issue of decision-making also came up during discussions on the rules and procedures for the meetings of the Compliance Committee set up under the Protocol. The Committee, in its earlier meeting in March, had proposed that decisions could be taken by a two-thirds majority, provided that all efforts to reach consensus have been exhausted. However, New Zealand objected to this proposal, and the decision on the rules of procedure for the meetings of the Compliance Committee was adopted by MOP2 with the paragraph on voting remaining in square brackets. This unresolved issue is also reflected in the rules of procedure for the adoption of decisions by the Conference of the Parties to the Convention on Biological Diversity, the parent convention of the Cartagena Biosafety Protocol, which remains in square brackets." From: *Brazil, New Zealand Block Decision on Documentation of GMOs*, Lim Li Ching and Lim Li Lin, 4 June 2005.

³⁶ MFAT, *Cartagena Protocol on Biosafety, Report on Second Meeting of the Parties (MOP2)*, 12 July 2005, p 6. In the same paragraph, MFAT also reported it had succeeded in delimiting the scope of the Protocol's compliance committee.

5. Yes Minister?

Analysis of the written record therefore leaves a fundamental question of how to square events at Montreal with the stated intent of New Zealand's ratification. The first question is what was the real driver to ratify?

It is not consistent with the record of the Cabinet's decision that ministers decided to ratify Cartagena principally in order to get inside the tent and block development of the Protocol. In February 2004, officials cautioned against trying to turn the negotiations on the grounds of lack of human resources.³⁷ While they noted seven months later when Cabinet was deciding whether or not to ratify that such an approach was a possible course of action, they also hinted that it may not succeed if attempted.³⁸ More significantly, it does not match at all the Sustainability Council's understanding of the tenor of ministers' discussions. In any case, if the intent had been to block the development of the Protocol, there was nothing compelling the Government to make such a strong public statement citing positive principles when announcing its decision. It could simply have issued a bland release and let stand unchallenged the text officials had provided in the cabinet paper.

Alternatively, could ministers have gone against advice from officials and unexpectedly decided to ratify for reasons that were not clear and officials then made the best of the decision and developed policy to match the unexpected outcome? This is also answered by the announcement that set clear and coherent principles, even if the Cabinet paper in general did not anticipate these.³⁹

The simplest and most compelling explanation is that set out in the announcement. Ministers went against advice from officials because they:

- see value in being a good international citizen,
- want comprehensive biosecurity, and
- support the intent of the Protocol to provide importing countries with prior informed consent,

such that *together with* the benefit of being able to

- ensure the best interests of New Zealand and other agricultural exporters are taken into account,

they saw a better course of action and that this broader perspective was later not kept to in development of the May negotiating position. This is consistent with the

³⁷ In February 2004, officials stated: "The logistics of a New Zealand delegation operating effectively to protect all our interests in the current environment of the MOP2 would be challenging, particularly given that all decision taken would be binding on us." MFAT, *Report of NZ Participation at the first meeting of the parties to the Cartagena Biosafety Protocol, February 23-27 2004*, 31 March 2004, p 5.

³⁸ Due to consensus blocking being overruled by the chair. MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, p 8.

³⁹ While it could be argued that the announcement was simply a press release and should be given less status, which would understate the role of such documents and the care that is put into shaping them. For example, in the paper MFAT and MFE prepared seeking clearance for the May negotiating positions, they cited the ministerial announcement, rather than the Cabinet paper officials had prepared, as the reference point for their stance.

Sustainability Council's understanding that the senior ministers who championed ratification in September 2004 did so primarily on the basis of positively directed principles.

The second part of the question then is: Where were the same ministers when approval was being sought for the May negotiating position? The short answer is that they were not formally consulted during the development of the cabinet paper. Only then Foreign Affairs Minister Phil Goff and then Associate Environment Minister David Benson-Pope were involved. Certification accompanying the paper states that it "did not need consultation with other ministers".⁴⁰

Why the senior ministers who championed the Protocol were not consulted is an important question. However, once the paper setting the Montreal position was before a cabinet committee, it takes a fairly significant objection for a paper not to go through as presented. Given their huge workloads, senior ministers and their staff can also easily miss the significance of a shift in stance for one meeting in a series, and the full impact of what was being proposed would have taken some time to understand.

The more important question though is what was driving the reinterpretation of the Government's stance to the Protocol? Certainly there were external pressures to adopt an approach consistent with other major agricultural trading nations, which was openly noted in February 2004:

Should New Zealand ratify by the time of [the Montreal meeting], we also need to be aware that there will be high expectations on the delegation to look after the interests of agricultural trading nations.⁴¹

However, there are only a few agricultural trading nations that are significant cultivators of LMOs⁴² and it is New Zealand's alignment with those supporting LMO development that is the interesting feature of its stance. In an interview on RNZ's *Morning Report*, one of the members of the Malaysian delegation, Gurdial Singh Nijjar, stated that:

New Zealand is largely seen as reflecting the interests of some rather powerful countries which are involved in GMO development but who are not parties to the conference.⁴³

What this alignment was born of is not discernible from the public record. At the time of completing negotiation of the Protocol text in 2000, New Zealand supported:

⁴⁰ The cabinet paper is signed out by the two ministers and the certification is signed out by Phil Goff with the box ticked that specifies "did not need consultation with other ministers". *Consultation on Cabinet and Cabinet Committee Submissions*, CAB 100/2002/1, attached to MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005.

⁴¹ MFAT, *Report of NZ Participation at the first meeting of the parties to the Cartagena Biosafety Protocol, February 23-27 2004*, 31 March 2004, p 5

⁴² Just four nations account for 99% of the area under GMO cultivation: The United States, Canada, Argentina and China.

⁴³ Radio New Zealand, *Morning Report*, 31 May 2005. See also: The South North Development Monitor, *Brazil, New Zealand Block Decision on Documentation of GMOs*, Lim Li Ching and Lim Li Lin, 4 June 2005.

- Environment and trade interests being “on the same footing”;
- The “precautionary principle” being used under domestic laws to determine acceptance or otherwise of an LMO; and
- Provisions for liability and redress.

The basis for a change from this to the current approach is unclear.

What is clear, however, is the lack of analytical capacity being devoted to the complex and multi-disciplinary issues the Protocol raises and that this is at least an important factor in sustaining the position. Discussions with a number of the officials involved in the policy development process point to there being significant time constraints and revolving personnel unfamiliar with technical issues or the deeper context of a set of negotiations. However, these discussions also reinforce the impression gained from scrutiny of the documentation that the deeper problem is a process of policy development that lacks a formal analytical framework such that significant gaps, flaws and institutional biases - as identified in the following sections - have not been picked up.⁴⁴

The overall result is a policy approach that is in conflict with the broader principles announced by Government at the time it decided to ratify the Protocol. Neither does it appear to advance positions representative of the community.

- An August 2005 poll of New Zealanders (rural and urban) showed 75% favoured New Zealand remaining a GM Free Food Producer;⁴⁵
- In a July 2003 survey of New Zealand farmers, half believed the nation should not adopt agricultural GMOs;⁴⁶ and
- Close to 80% of New Zealanders favoured preservation of the zero tolerance approach to GM contamination of conventional seed imports when questioned in August 2005.

When responding to concerns raised over the positions taken in Montreal, Marian Hobbs stated that the New Zealand Government had no pre-determined vision with respect to LMO development.

We don't export any GM products, and the government has no position on whether we should or shouldn't in the future. That should be determined by the normal rules of the market and consumer demand ...⁴⁷

⁴⁴ Personal communications, based in particular on discussions at MFAT's offices, 8 February 2006.

⁴⁵ See poll conducted by DigiPoll for the Sustainability Council as detailed in: *75% Support NZ Remaining a GM Free Food Producer*, Media Statement – 16 August 2005. Rural and urban support for maintaining GM Free Food Producer status and zero tolerance to GM contamination of seed imports was almost identical in both cases.

⁴⁶ AERU, *Farmer Views on the Use of Genetic Engineering in Agriculture*, Lincoln University, July 2003. <http://www.lincoln.ac.nz/aeru/publish/aeru258.htm>

⁴⁷ Release by Environment Minister Marian Hobbs, *Greens and NGOs distort NZ approach*, 3 June 2005. Former Agriculture Minister, Jim Sutton, has also stated that “If you want to use this method, then you have to convince the 80 per cent of New Zealanders who are willing to consider GM but who have concerns about issues raised, and, in the absence of good answers about those questions, see no reason to have GM here”: to South Canterbury Federated Farmers, September 2002.

So the key questions in the wake of the stance taken at Montreal are:

1. How would New Zealand's stance change if it were framed on broader principles, especially those announced at the time the decision was made to ratify,⁴⁸ and was genuinely agnostic to genetic modification as an agricultural development strategy?
2. What positions should be specified for future meetings of the parties, the first to take place in March?

The balance of this paper focuses on these questions with respect to labelling and liability.

⁴⁸ The four principles stated at the time of the decision to ratify may be summarised as:

1. Be a good international citizen;
2. Favour measures supporting comprehensive biosecurity;
3. Support people being informed about what's imported and exported;
4. Ensure the best interests of New Zealand and other agricultural exporters are taken into account in the development of the protocol.

PART II – Issues Analysis

6. May Contain ... Inadequate Information - Labelling

New Zealand Blocks Labelling Rule Compromise

How to identify and document shipments containing genetically modified commodities (pursuant to Article 18.2(a)) was the key matter to be resolved, and the driver for the main Montreal meeting. These commodities are known under the Protocol as "living modified organisms that are intended for direct use as food or feed, or for processing" (LMO-FFPs). Other LMOs that are intended for release are covered by separate and more demanding procedures requiring Advance Informed Agreement.

Resolving this matter is critical as it goes to the core principle that underlies the Protocol – to secure advance consent to the transboundary movement of LMOs and thus best protect the environment and human health. While there is general agreement on the need to fully label shipments that intentionally contain LMO-FFPs, it is the issue of prior notification with respect to LMO contaminants that was at stake. New Zealand was well aware of the intended direction of the parties on this question at the time it considered whether or not to ratify, with officials reporting that: "It is likely that Parties will adopt binding decisions in the future requiring more detailed identification and documentation."⁴⁹

The issue was hotly debated during the completion of the original Protocol text and to secure resolution at that time, the majority of countries were forced to accept that documentation accompanying LMO-FFPs would simply identify that the shipment "may contain" LMOs and are not intended for intentional introduction into the environment. The intention since this time however had been, as Article 18.2 (a) of the Protocol records, to develop more detailed requirements for labelling within two years of it coming into force.

The best account we have seen of the implications of positions taken by negotiating parties is provided by the *South North Development Monitor*, as follows:⁵⁰

The majority of Parties had wanted the MOP to require that documentation accompanying shipments of LMO-FFPs clearly state that they contain LMOs and to also provide further details of their identity. In addition, they were keen to ensure that only LMOs approved in the importing countries are shipped to them.

⁴⁹ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 3.

⁵⁰ The South North Development Monitor, *Brazil, New Zealand Block Decision on Documentation of GMOs*, Lim Li Ching and Lim Li Lin, 4 June 2005. The *Earth Negotiations Bulletin* also provides a useful account of the individual moves by parties during discussions on this topic at MOP2. See day by day and summary reports at www.iisd.ca/biodiv/bs-copmop2/.

Brazil and New Zealand, on the other hand, merely wanted the "may contain" language to remain, and were unwilling to compromise on this issue. **This position means that shipments of commodity grains need not be segregated nor tested before leaving the country of export. Shipments of commodity grains can consist of mixtures of non-LMOs, approved LMOs and even unapproved LMOs, because of contamination by experimental LMOs** [emphasis added]. This allows "global genetic pollution to escape unnoticed and unscathed", as Ethiopia, which was the Chair of the Africa Group, explained.

The recent discovery of an unapproved and experimental genetically engineered maize, Bt 10, which had been inadvertently grown and exported commercially from the US, is a case in point. In response to this, the European Union took emergency measures to prevent its entry, by requiring a certificate accompanying shipments of corn gluten and brewers' yeast that expressly states that those shipments do not contain Bt 10. This in effect requires the testing of shipments before export.

Because Parties were keen to secure agreement on this very important issue, most were willing to compromise and accepted that in some specific cases, the "may contain" language could remain, provided that some detailed information, such as the identity of the LMOs that are or might be in the shipment, were also given. Negotiations had already begun to proceed in a Contact Group on this basis in late night and early morning sessions over the week.

However, from the start, Brazil and New Zealand seemed intent on merely blocking and delaying the negotiations. Over three late night negotiating sessions, various versions of a draft decision were discussed and at each turn, rejected by the two countries. At times, Peru and Mexico also actively supported and advanced the Brazilian and New Zealand positions.

By the last Contact Group session which went on till three in the morning of 3 June 2005, even intense negotiations within the "Friends of the Chair" (Malaysia, Ethiopia, Brazil, New Zealand and the EU) failed to yield any results, despite the majority of countries being prepared to compromise beyond their respective bottom lines.

Many delegates were perplexed by New Zealand's stance as it does not commercially produce or export GMOs.

Exactly why the New Zealand delegation took these positions has not been disclosed. While the Sustainability Council has obtained copies of all the papers submitted to ministers in respect of the Montreal negotiations, key sections of text were withheld by MFAT under the Official Information Act. This included all text covering the proposed negotiation positions on this issue, and two of the three and half pages of related commentary, such that no substantive reasoning is available.⁵¹

However, the general motivation was expressed to the Cabinet at the time officials were reporting on whether or not New Zealand should ratify in September 2004:

It should be possible to implement the Protocol in a way that is consistent with WTO obligations, but There is a risk that these countries will interpret the Protocol or

⁵¹ The Sustainability Council has requested that the Ombudsman review the extent of these deletions, and whether all documents covered by the request were released.

use annual Meetings of the Parties to further their position of **limiting GM technology** and move away from the approach in WTO forums.⁵² [Emphasis added]

In particular:

Some [parties] may use the Protocol, and its expression of precaution, to **try to block trade in LMOs**.

...

[text withheld] Protocol to **try to undermine the SPS [Sanitary and Phytosanitary Agreement]** by developing a parallel regime for the transboundary movement of goods currently covered by the SPS regime but without the key disciplines of the SPS Agreement.⁵³ [Emphasis added]

Or, as Marian Hobbs stated:

We don't export any GM products, and the government has no position on whether we should or shouldn't in the future. That should be determined by the normal rules of the market and consumer demand - not by **arbitrary trade restrictions set through the Cartagena Protocol**.⁵⁴ [Emphasis added]

Officials' concern that the Protocol could "undermine" the SPS agreement is misplaced. The Protocol only covers living GMOs and can not affect all other forms of goods traded subject to it. The Protocol does however allow nation states to adopt, if they wish, processes for assessing whether or not to accept the import of particular LMOs that are more risk averse than the SPS would provide for, or is set as the minimum by the Protocol. To that extent, the Protocol is a complement to the SPS regime, but one that could indeed limit its ability to act as the ceiling on standards for environmental risk assessment. It thus addresses the issue of who gets to set the processes that will determine what level of risk is acceptable?

In the more considered National Interest Analysis attached as Annex IV to the September 2004 cabinet paper, it is noted that:

The Protocol is a considered balance between trading interests and conservation standards. Although a Party may take action that is more protective of the conservation and sustainable use of biological diversity than that called for in the Protocol, any such action must be consistent with the objectives and provisions of the Protocol and in accordance with that Party's other obligations under international law.⁵⁵ [Emphasis added]

This is also the outcome Marian Hobbs stated she was pleased New Zealand had helped to achieve when the Protocol text was finalised in 2000:

⁵² MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 4.

⁵³ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 7.

⁵⁴ Release by Environment Minister Marian Hobbs, *Greens and NGOs distort NZ approach*, 3 June 2005.

⁵⁵ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, Annex 4, p 3.

The Precautionary Principle, which will allow domestic laws to apply to the importation of living modified organisms (LMOs), is enshrined in the heart of the document. There's been a compromise between trade and the environment and I am pleased they will be on the same footing.⁵⁶

LMOs Pose Different Environmental Risks

A problem the lead ministries⁵⁷ appear to have with this “considered balance” and “compromise” is scepticism, ranging through to outright denial, that there are actually risks attached to LMOs that are different to those posed by non-GM counterparts or alien species. MFAT and MFE noted as one of the risks of ratifying that:

New Zealand would be associated with the underlying premise of the Protocol, that LMOs pose an inherent risk to biodiversity which is different to the risk presented by other organisms that are considered pests and diseases.⁵⁸

At the same time MAF stated:

MAF opposes New Zealand ratifying the Protocol because it considers that ratifying the Protocol:

....

- falsely indicates that New Zealand supports the false, scientifically unsound, premise that LMOs are fundamentally different from other new organisms.⁵⁹

That such views persist in official circles is a matter of concern given the positions expressed by mainstream governmental and scientific bodies. It is not the purpose of this paper to fully document the nature of the environmental risks LMOs pose (as these can be explored in the references cited below⁶⁰) but the following serves to illustrate that the types of risks that will need to be assessed are indeed different, and significant in their potential scope and scale.

⁵⁶ Marian Hobbs, *Environment Minister Pleased with Montreal Outcome*, Media Statement, 30 January 2000.

⁵⁷ Not all departments share the perspective of those quoted here. The Ministry of Research Science and Technology for example states that it “supports the objectives of the Protocol” and recently published a forward looking review of biotechnology which noted that “Current genetic modifications are usually not efficient, controlled or precise, and may result in unanticipated disruptions to other genes or the transgenes”. See MoRST, *Biotechnologies to 2025*, January 2005, p 123; and MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 20.

⁵⁸ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 7; and MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 7.

⁵⁹ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 19.

⁶⁰ Royal Society of Canada Expert Panel on the Future of Food Biotechnology, *Elements of Precaution. Recommendations for the Regulation of Food Biotechnology in Canada*, 2001; National Research Council, *Environmental Effects of Transgenic Plants. The Scope and Adequacy of Regulation*, 2002; L.L. Wolfenbarger and P.R. Phifer. “The Ecological Risks and Benefits of Genetically Engineered Plants.” In: *Science*, Vol 29, December 15 2000; Ecological Society of America, *Genetically Engineered Organisms and the Environment: Current Status and Recommendations*, November 2004.

The US National Research Council (NRC), a part of the US National Academy of Science, is one such body and is based in the country leading LMO development. It believes that there is inadequate baseline monitoring of agricultural and natural ecosystems to allow for the potential impacts of commercialised GM crops to be assessed⁶¹ and further notes:

Our experience with the few herbicide-tolerant and insect- and disease-resistant varieties that have been commercialised to date provides a very limited basis for predicting questions that need to be asked when future plants with very different phenotypic traits are assessed for environmental risks.⁶²

For example, with respect to the use of GM crops for the production of pharmaceutical proteins, currently being field trialled in the US, the NRC warns:

The introduction of such transgenes poses the potential for environmentally associated risks of a wholly different order than those associated with existing transgenic crops. If such a transgene moves into a wild relative, there could be widespread environmental dissemination of the pharmaceutical substance or other non-food substances that could have impacts on wildlife as well as microbial populations.⁶³

The NRC's assessment indicates the sheer novelty of LMOs in the pipeline: ranging from plants that produce pharmaceutical proteins for human and animal remedies (as above) through to plants engineered to provide industrial feedstock

A result of officials' scepticism is that they tend to see questions that at very least have a strong environmental component as "essentially trade measures", and part of historical trade differences rather than a new threat. MFAT for example reported that:

While the Biosafety Protocol is an instrument aimed at environmental protection, the documentation requirements for shipments of Living Modified Organisms (LMOs) intended for use as Food, Feed or Processing (FFP) ... **are essentially trade measures, and as such potentially a tool for trade protection rather than environmental protection.**⁶⁴ [Emphasis added]

Trade-Related Risks for New Zealand from Unintended LMOs

However, even if trade-related issues alone are considered, the case for New Zealand opposing labelling for unintended LMOs is far from clear.

MFAT's principle concern appears to be that in strengthening the labelling requirements from documentation based on the "intention" of the shipment to "the actual content" of the shipment, all New Zealand agricultural exports "would have to be labelled 'may contain genetically modified organisms' or alternatively require

⁶¹ National Research Council, *Environmental Effects of Transgenic Plants. The Scope and Adequacy of Regulation*, 2002, p. 218.

⁶² Ibid, p. 220.

⁶³ Ibid, p. 246.

⁶⁴ MFAT, *Cartagena Protocol on Biosafety, Report on Second Meeting of the Parties (MOP2)*, 6 June 2005, p 2.

guaranteed purity through costly testing. This would have a profound impact on New Zealand agricultural trade and on global agri-food trade more generally.”⁶⁵

Tougher labelling requirements may indeed trigger additional testing for all food exports. However this is just a starting place for analysis:

- A first point to note is that testing for LMOs prior to shipment can be expected to increasingly become a routine requirement, rather than an obligation the Protocol alone would trigger. The gathering trend for customers to vet products for purity is forcing producers to undertake testing to ensure standards are being met, regardless of whether the buyer later tests again. Drivers for such testing are the EU regulations requiring traceability of LMOs and the minimum standards set by major purchasers. For example, a grouping of European supermarkets has specified the EurepGAP⁶⁶ standard and this has become the de facto minimum for a range of fruit export crops from New Zealand.
- It is then important to consider how likely it is that New Zealand will become a significant grower of LMOs and the types that could cause most concern if they found their way into non-GM exports.
- Linked to this is consideration of the types of conditions likely to be placed on cultivation to mitigate the unintended transfer of LMOs.

There is essentially no mention of these issues in Protocol-related cabinet papers over the past two years. The most serious reporting gap, however, is with respect to consideration of the other side of the trade equation – costs to New Zealand arising from the unintended import of LMOs.

New Zealand has already had three recognised incidents of unintended LMO imports causing losses. Each arose from contaminated corn seed⁶⁷ and each involved costs of one half to a million dollars.⁶⁸ In the case of a Gisborne-based company’s shipment to Japan being rejected due to 0.05% GM contamination. Losses of around \$500,000 were traced back to contaminated corn seeds imported from the US.

These however are small sums compared to what could happen in the future. Corn is being used in well over half the development projects under way to engineer the production of pharmaceuticals and other substances from crops. So called “biopharming” is envisaged as a cheaper means of production and if corn is not the plant of choice, the work most often utilises other food plants.⁶⁹

Field trials of early biopharming LMOs are being conducted in the US under special conditions designed to mitigate the opportunities for biopharma corn to mix with food

⁶⁵ MFAT, *Cartagena Protocol on Biosafety, Report on Second Meeting of the Parties (MOP2)*, 6 June 2005, p 3.

⁶⁶ www.eurep.org

⁶⁷ Maize and sweetcorn seed.

⁶⁸ Pacific Seeds, 2002; Sunrise Coast, 2003; and Corsons Grains, 2004. For details see: Sustainability Council, *Seeding Purity*, September 2004.

⁶⁹ Union of Concerned Scientists, *Pharma and Industrial Crops: The Next Wave of Agricultural Biotechnology*, December 2002, p 6

crops. As an early indication of the potential for such mixing of drugs and food to occur in commercial production, already there have been two reported contamination cases of this from field trials.⁷⁰ Further, the Federal Drug Administration, which oversees the approval of GM plants in the United States, has stated that under field testing such experimental GM plants could cause contamination in non-GM commercial food crops before the safety of the new LMO had been assessed.⁷¹

If corn seeds imported to New Zealand are in the future contaminated with biopharma drugs, and these are then re-exported (as happened with the Gisborne contamination), the losses would extend far beyond rejection of the product. With food accounting for over half New Zealand's export income, it takes little imagination to envisage the scale of damage to Brand New Zealand that could result from such an event that undermined trust in the integrity of New Zealand's food.⁷² Broad-brush headlines and consumer fears could trigger switches away from New Zealand goods that had no direct linkage with the product subject to the contamination.

A declassified paper prepared in March 2003 by Canada's Department of Agriculture and Agri-Food commenting on this concern even with respect to existing food LMOs stated:⁷³

Consumers are becoming more worried that they can't distinguish between GE and non-GE products.

...

These concerns could precipitate a loss of confidence in the integrity of the Canadian food system, which could be very disruptive to the domestic system as well as Canada's ability to export to demanding markets.

New Zealand would seem less likely than many other jurisdictions to give regulatory approval for the outdoor cultivation of crops designed to produce pharmaceuticals from corn seed. It would then be less likely (proportionately) to be facing claims for damages due to the presence of pharma LMOs. So the balance of advantage for New Zealand in this example would seem to be very much on the side of the Protocol having strong requirements for labelling on not just intended content, but actual content. Pharma crops are just one example of the potential threats new forms of LMOs pose, right from the time of field experimentation. Scenario modelling is required to fully illuminate the scope and scale of individual risks and provide

⁷⁰ New York Times, *US to Divulge More about Modified Crops*, June 2, 2004. See also Grocery Manufacturers of America, *GMA Says Stringent FDA and USDA Bio-Pharma Regs Needed to Maintain Food Supply Purity*, media statement, February 6, 2003.

⁷¹ "As the number and diversity of field tests for bioengineered plants increase, the likelihood that cross-pollination due to pollen drift from field tests to commercial fields and commingling of seeds produced during field tests with commercial seeds or grain may also increase. This could result in low-level presence in the food supply of material from new plant varieties that have not been evaluated through FDA's voluntary consultation process ...". FDA, *FDA Proposes Draft Guidance for Industry for New Plant Varieties Intended for Food Use*, , November 19, 2004.

⁷² For a discussion of the potential impacts flowing on to the wider economy, see: Reserve Bank of New Zealand and the Treasury, *The macroeconomic impacts of a foot-and-mouth disease outbreak: an information paper for Department of the Prime Minister and Cabinet*, 2003.

⁷³ Agriculture and Agri-Food Canada, *Adapting to Emerging Concerns in the Introduction of Genetically Engineered Products*, March 5 2003.

estimates of expected costs involved. However, on present indications, the balance of costs and benefits seems very likely to favour strong labelling.

The Protocol should be the frontline mechanism for tracing any harmful product and then obtaining redress for harm. A change to domestic legislation can not as readily ensure the costs of testing for unintended LMOs are placed on those creating the risk for New Zealand, and certainly can not establish an international liability regime of the form being contemplated.

So on the narrow basis of trade interests alone, and assuming New Zealand became a significant LMO exporter, a preliminary review suggests New Zealand should be a supporter of strong labelling requirements, not an ardent opponent.

Who Decides What is an Acceptable Level of Risk

Returning to the earlier question of “who gets to determine what level of risk is acceptable”: when even the availability of information required to undertake a conventional assessment⁷⁴ is in serious doubt, the issue of who sets the process for decision-making is critical.

There is no objective standard as to what is an acceptable level of risk. Nor is there an objective process for “quantifying” risk: it is determined through evidence of what is, and judgements about what might be. The Environmental Risk Management Authority (ERMA) observes that:

... the way individuals and communities perceive risk affects the way that they respond to situations that they perceive as risky and consequently the level of risk that they are prepared to accept (or tolerate) in any particular circumstance. Some researchers have found that risk analysts tend to consider only two components of risk – the likelihood of the event occurring, and the size of the event should it occur. The lay public, however, tends to consider risks within a much broader context, and takes into account a wide range of factors.⁷⁵

Bearing in mind the first and second principles Government cited for its decision to ratify (being a good international citizen and supporting comprehensive biosecurity), these strongly favour supporting the position that importing nations set the processes for assessing the risks associated with LMOs, within the confines of the Protocol and applicable international law. Otherwise, New Zealand is left arguing that parties other than those importing nations have a superior ability to make judgements about what level of risk developing countries in particular should shoulder in absence of an adequate information base to conduct conventional risk analysis.⁷⁶ While the decisions

⁷⁴ Conventional risk assessment requires as inputs that the scope of effects is known and the probability of those effects occurring is known.

⁷⁵ ERMA, *Approaches to Risk*, December 2002, p. 11.

⁷⁶ The Royal Society of Canada notes with respect to absence of evidence: ‘... the claim that “there are no known adverse health or environmental effects” associated with a particular technology can mean very different things. It can mean that rigorous and intensive scientific investigation of the potential harms that might be induced by the technology has failed to show any of those harms (and, in the best case, provided a reliable explanation why the harmful effects do not or will not occur). At the other extreme, this claim might mean simply that no

those nations make may, in the medium term, not be directly linked to conventional risk analysis, that does not make them “arbitrary”.

This leads to the derived principle that the ultimate risk bearers should be able to set a floor on the level of risk they accept when there is inadequate information available. Aligning this with the third of the Government’s stated reasons for ratifying (to support people being informed about what's imported and exported), it is clear importing nations can only exercise a judgement about the level of risk of a proposed shipment if they are notified in advance of its actual contents through appropriate documentation.

Labelling for Accidental Contamination and Problems with Thresholds

The Sustainability Council suggests the following requirements should be specified with respect to Article 18.2(a), as proposed by the New Zealand Institute for Gene Ecology (NZIGE). (Which shipments would qualify for exclusions or lesser requirements we have not addressed at this time):

Shipment of products containing LMOs should at the minimum contain the following information:

1. The transformation event codes of the LMOs;
2. Taxonomic and common name, the gene modifications inserted, information on the host as well as the donor organisms; and
3. Any requirements for safe handling, storage, transport and use.

Documentation for LMOs containing multiple or "stacked" events must identify each of the events; any stacked derivative cannot be assumed to be equivalent to either parent organism and must be documented as a distinct LMO.⁷⁷

NZIGE also notes that “Whether LMOs are present by design or by accident has no bearing on their ability to threaten human health or the environment”. While there has been considerable discussion on setting thresholds below which a declaration for a particular LMO would not be required, this is a poor approach to the problem of accidental low-level contamination.

As detailed in the Sustainability Council publication, *Seeding Purity*, prevention is the first response and can be addressed through economic incentive structures and a range of quality control procedures that are low or no cost to the economy to implement.⁷⁸ These measures represent the front line in effective biosecurity.

These measures will not always succeed however. At the point they fail, and there is a need to determine what concentration of an LMO is to be recognised under the

studies to determine if the harmful effects occur have been carried out, in which case the claim is simply an admission of ignorance. In the first instance the claim would be “evidence of absence” (of risk); in the later instance it would be simply a veiled admission of the “absence of any evidence” relevant to the question.” *Elements of Precaution. Recommendations for the Regulation of Food Biotechnology in Canada*, 2001, p. 198.

⁷⁷ NZIGE, *Submission to Ministry of Foreign Affairs and Trade concerning the second meeting of the Parties to the Cartagena Protocol on Biosafety*, 22 April 2005.

⁷⁸ Sustainability Council, *Seeding Purity*, September 2004.

Protocol, the clear first best approach is to set the labelling requirement at the limit of reliable detection. This is proposed because it:

- Maximises the protection of the environment and human health;
- Automatically tracks, and motivates, changes in technology which have been progressively improving the ability to detect trace contaminants. (Only what is the accepted industry standard for reliable detection need vary over time);
- Avoids having to set either a confusing array of thresholds to cope with different levels of risk posed by different LMOs, or else an awkward “one size fits all” compromise.
- Is consistent with the demands of the overwhelming majority of wholesale buyers in northern Europe and the more affluent Asian nations that demand no detectable LMO contamination in food product, and so should allow for a uniform labelling regime that serves both conservation and commercial requirements;
- The cost to obtain the data is no higher than is required for a threshold; and
- Promotes maximum transparency.

New Zealand has considerable experience to offer the parties in this respect, having run such a zero tolerance regime for LMO contaminants in imported seed for three years.

A useful addition to the Protocol would be provisions designed to facilitate testing for new types of LMOs present in the environment. Current testing methods require knowledge or assumptions about the genetic structure of LMOs being screened for. The Protocol could be augmented to require parties to ensure that at the point an LMO is approved for field trialling, details of its genetic structure must be made available for testing labs to access on an open source basis. This would overcome the current reliance on guessing structures not disclosed.⁷⁹

There is no industry at present based on the export of LMOs from New Zealand and so there is no industry sector to disadvantage through the above approach - only a prospective path of development which, as officials note, has time to adapt to such arrangements and:

⁷⁹ “It is incumbent on regulatory authorities to test for the unexpected in the food chain and thus be innovative in designing primers. In all cases, it is recommended that primers be designed for all known indicator sequences and that the primer pairs be used to amplify small fragments to reduce the likelihood of a recombination event having interrupted the expected DNA fragment. Ignoring these precautions could have serious implications for regulators who need to detect registered [LMOs], but even more serious consequences could derive if contamination by unauthorised [LMOs] that result from cross-fertilisation, accident or with intent to evade detection, were overlooked.” *Is confidence in the monitoring of GE foods justified?*, Trends in Biotechnology, Jack A. Heinemann, Ashley D. Sparrow, and Terje Traavik, May 2004.

Therefore it is possible for the LMO export sector in New Zealand to develop in a way that is consistent with the Protocol.⁸⁰

In other words, there is no conflict between the first three principles on which the New Zealand Government based its decision to ratify, and the fourth relating to protecting New Zealand's trading interests.⁸¹ If New Zealand follows all the announced principles, they can deliver outcomes which do not require any significant trade-off of one principle for another. Further, if they had been followed at Montreal, New Zealand would have been in accord with what the great majority of the parties were seeking on the key issues.

⁸⁰ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, Annex 4, p 6.

⁸¹ It is also consistent with protecting other agricultural trading nations' interests to the extent that one can reasonably assume New Zealand's advocacy for them is with respect to the high level architecture of global trade, rather than concern for one particular means of agricultural production.

6. Making Good for Harm Caused - Liability

Liability policy is the other main area in which New Zealand was out of step with the overwhelming majority of parties to the Protocol. New Zealand's position is significant for this reason and because misunderstandings surrounding this issue appear to be acting as a key support for the overall approach being advanced by officials. The Ministry of Justice, for example, recommended deferring ratification essentially on the basis that the Protocol was likely to set up a liability regime which would be "inconsistent with the Government's domestic policy on liability and extremely difficult to reconcile".⁸²

"No Instrument"

Although liability provisions were not completed at the time the Protocol was agreed in 2000, article 27 commits signatories to a process of developing "rules and procedures" to address "damage resulting from transboundary movements of living modified organisms".⁸³

Such international regimes, dedicated to a particular risk, have been put in place across a number of industry sectors.⁸⁴ Prior to New Zealand ratifying the Protocol, the parties met in March 2004 and set a programme to develop a suitable regime in line with the article 27 requirement that this be completed within four years.

The position the Cabinet approved negotiators to take to Montreal with respect to liability matters was summarised as follows:

Ensure good process is followed in the appropriate elaboration of international rules and procedures in the field of liability and redress, including through a gaps analysis and consideration of national models of legislation.

Resist [the meeting] locking parties into a decision to establish a separate liability and redress regime under the Protocol prior to assessing the need for such a regime.⁸⁵ [Emphasis added]

⁸² MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, Annex 1, p 19.

⁸³ Article 27 states: "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavor to complete this process within four years."

⁸⁴ For example, international civil aviation and international marine passenger transport. A Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, was adopted in November 2002 that specifies minimum liability for passenger death and baggage; Part 205--Aircraft Accident Liability Insurance, Chapter II--Office of the Secretary, Department of Transportation, Aeronautics and Space, sets minimum insurance requirements for civil aircraft in US airspace and this sets a de facto global minimum standard.

⁸⁵ MFAT and MFE, *Cartagena Protocol on Biosafety: New Zealand Negotiating Position of the Second Meeting of the Parties: 30 May - 3 June 2005*, 3 May 2005, Annex 1, Detailed Negotiating Instructions, p 17.

At the May meeting, the New Zealand delegation advanced a number of positions aimed at limiting the effect of liability rules – such as limiting the scope of claims.⁸⁶ However, the one that seemed to encapsulate New Zealand’s stance was the proposal to add a sixth outcome to the list of potential framings for the liability regime. The five already on the table (from pre-circulated papers) outlined options ranging from a regime that would be fully legally binding through to non-binding provisions.⁸⁷ When the New Zealand delegation proposed a further option of “no instrument” (meaning no agreement at all), this suggestion was greeted with open laughter.⁸⁸

New Zealanders heard of these developments through Malaysian delegate, Gurdial Singh Nijar, who told *Morning Report*:⁸⁹

So all of these options were on the table and then suddenly the New Zealand delegation suggested that actually we should have none of those. That means no document of any kind - voluntary, binding, provisional and so on.

He described this stance as “shocking” and was further dismayed that New Zealand should seek to revisit so “late in the day” whether a separate liability regime was required.

The Cartagena Protocol provides for rules and procedures [for liability] to be developed in respect of living modified organisms - the world has already accepted that there is a need to develop rules and procedures.⁹⁰

Environment Minister Marian Hobbs argued that New Zealand’s stance had been misinterpreted and that:

We're not saying no - we're saying please can we have an analysis before we jump straight into a liability regime.⁹¹

However, it was not that the subtlety of New Zealand’s caveat - “first assess the need for a liability regime” - was lost on delegates. It was that the intent of the move was abundantly clear in the context of the negotiations, and the caveat failed to provide a credible veil.

⁸⁶ “On issues for further consideration relating to scope, NEW ZEALAND proposed an additional option limiting the scope of damage to the authorized use at the time of import” International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 9 No. 315, *Highlights of The Ad Hoc Group on Liability and Redress: 27 May 2005*, 30 May 2005.

⁸⁷ The five pre-circulated options were:

1. Legally binding agreement
2. Legally binding agreement plus interim measures
3. Non-binding agreement
4. Two stage - non-binding, then binding agreement
5. Combination of non-binding and binding agreement

⁸⁸ Gurdial Singh Nijar, Personal Communication, 29 May 2005, and reported in: Sustainability Council, *Foreign Affairs' Stance on GM Liability Provokes Laughter at Talks*, Media Statement 31 May 2005. MFAT negotiators put a different colouring on the event when reporting to Wellington stating that “Our intervention requesting the inclusion of the option of no instrument was reasonably light and was greeted with knowing laughs from most delegations”. Email of 30 May 2005 entitled Biosafety liability: NZ position, identities withheld.

⁸⁹ Radio New Zealand, *Morning Report*, 31 May 2005.

⁹⁰ NZPA report, 31 May 2005.

⁹¹ NZPA report, 31 May 2005.

It is clear that currently there is extremely little, if any, practical ability to obtain redress for damage caused by an LMO when the harm arises as a result of its having been imported. Officials had reported as much in August 2004, stating that such redress was “not currently available to New Zealand”.⁹² So by the time of the Montreal meeting there was no credible basis for requesting a “gaps analysis”.⁹³ It is also clear that at the point New Zealand ratified the Protocol, the parties had already made a commitment to develop a liability and redress regime specific to the transboundary movement of living GMOs. In questioning these premises, the New Zealand delegation was transparently pursuing tactics designed to delay and relitigate. The further argument, developed by officials and advanced by Marian Hobbs in defence of this position was:

“Are living modified organisms any more dangerous than nuclear energy: are they any more dangerous than certain chemicals? ... New Zealand is asking: why a separate regime for this new technology?”⁹⁴

This form of “don’t look here, look over there” argument is equally deficient. It makes no attempt to address the core issue of what reform is required to enable damaged parties to have at least a reasonable prospect of obtaining redress. Pursued to its logical conclusion, it holds that no liability regime can be devised for any environmental threat, anywhere, unless other exposures of equal or greater risk are also covered - a completely unnecessary hurdle, and one promptly contradicted by a fellow minister within a fortnight:

New Zealand has played a key role in negotiating an international treaty protecting the Antarctic environment, Foreign Minister Phil Goff announced today. The treaty requires anyone who causes an environmental accident in Antarctica to take action to clean up the pollution and prevent further environmental damage.⁹⁵

Forms of Argument

An apparent motivation for the ‘delay and relitigate’ approach was pointed to by officials in September 2004 in the following terms:

⁹² “The possible imposition of a liability regime in the future may enable New Zealand to seek redress in the event that New Zealand suffers from harm as a result of a transboundary movement with another party. This would provide a redress not currently available to New Zealand.” From: MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, Annex IV, National Interest Analysis, p 3.

⁹³ MFAT states that it ultimately called for a prior review of the “effectiveness of” rather than the “need for” a regime (that its negotiating instructions provided for), and that this is materially different, notwithstanding that such redress is “not currently available to New Zealand”.

⁹⁴ NZPA report, 31 May 2005. Officials took a slightly different tack advocating work to see “whether there is a need for a separate liability and redress regime for harm to biodiversity from LMOs compared with potential harm from other sources”.

⁹⁵ Foreign Minister Phil Goff, *NZ Leads Agreement to Protect Antarctica*, Press Release, 15 June 2005. Note that the new regime for example excludes liability for damage resulting from acts of terrorism; XXVIII Antarctic Treaty Consultative Meeting, *Report of the Working Group on Liability, Final Report*, 17 June 2005.

It is possible that the Parties will adopt a liability regime based on a GM/non-GM distinction. This would create an inconsistency with New Zealand's current policy on liability, which is that it is not sound in principle to implement a liability regime that treats GM and non-GM activities differently. **This could only be reconciled through legislative change in New Zealand.**⁹⁶ [Emphasis added]

... the prospect of resiling from New Zealand's domestic policy position, which was subject to robust analysis, seems undesirable.⁹⁷

Officials had also earlier stated that:

... singling out LMOs in this way could have a negative impact on activities in New Zealand that involve the transboundary movement of LMOs.⁹⁸

In other words, a Cartagena liability regime would mean domestic producers of LMOs would have to meet effective liability law not only with respect to claims from overseas (on products), they would also ultimately be faced with effective liability provisions for LMOs cultivated and consumed within New Zealand. The regulatory asymmetry between the domestic and international law could not credibly persist.

As indicated above, responses to a series of Official Information Act requests by the Sustainability Council to MFAT confirmed that officials had prepared no background documents to underpin their stance for Montreal beyond the cabinet paper that sought approval for proposed positions. Thus with respect to liability matters, they were relying on (and in essence transferring) the thinking from earlier work led by the Ministry of Justice and MFE in the context of an amendment to domestic legislation - the Hazardous Substances and New Organisms Act (HSNO). In a paper to the Cabinet in February 2003 in respect of that law change, officials delivered the following statement that has set the basis for government policy ever since:

... within the range of GM activities, [existing] liability rules will be effective in some cases and will be less effective in others.

...

This result is the same for non-GM activities – liability rules will sometimes be effective and sometimes will not – for the same reasons that apply in the GM context. For this reason **there does not appear to be a principled basis for devising a special liability regime solely on the basis of a GM/non-GM distinction.**⁹⁹ [Emphasis added]

Yet New Zealand law has explicitly distinguished between GM and non-GM organisms on the basis of risk since 1996. HSNO requires that all GMOs are assessed by ERMA prior to any release, as Parliament considered they had a potential to cause harm that differs from their non-GM counterparts. Against this, the above proposition

⁹⁶ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, Cabinet paper of 30 August 2004, POL (04) 224, p 6.

⁹⁷ MFAT and MFE, *Cartagena Protocol on Biosafety: Consideration of Ratification*, paper to Cabinet Policy Committee, 30 August 2004, Annex 1, p 19.

⁹⁸ MFAT, *Public Discussion Paper: Cartagena Protocol on Biosafety: Consideration of New Zealand decision on ratification*, May 2004.

⁹⁹ Ministry of Justice and MFE, *Government Response to the Royal Commission on Genetic Modification: Legislative changes for New Organisms – Paper 5: Liability Issues for GM*, February 2003, p 3.

is a slightly more sophisticated expression of the “don’t look here, look over there” argument. It now implies that unless liability law for non-GMOs in New Zealand is changed, such that there is the same level of cover for this too, then it is wrong to set liabilities specific to GMOs.¹⁰⁰

The argument fails to engage with the body of evidence that shows a substantial scale of financial harm that is new and merits action. Consumer markets demonstrably discriminate between GM and non-GM products. Growers, harvesters, wholesale buyers and retailers are in turn exposed to financial losses arising from LMO food materials being mixed with non-GM foods. In markets such as Northern Europe and Japan, any detectable level of LMO content in foods generally leads to product rejection and consequent losses.¹⁰¹

Whether that loss is triggered by widely agreed scientific findings or simply perceptions about LMO contaminants in absence of adequate scientific investigation, it is the presence of LMOs that has caused very significant levels of financial damage. Indeed, the most costly food product recall in US history resulted from LMO contamination – genetically modified Starlink corn being mixed with conventional corn – which led to payments of US\$115 million to growers alone.¹⁰²

The principles at stake are internalisation of costs and availability of just compensation. If the concern domestically is that non-GM activities can also cause harm, then the clear remedy is to ensure effective liability provisions extend to this too.

Subsidy

The cabinet paper provided no study of specific liability scenarios – ones that would reveal at what point common law actions are ineffective; how laws could be reformed to instead incentivise precaution and provide compensation to those that do suffer losses as a result of customer discrimination; and how the scale of financial harm can easily exceed the level of claims generally associated with conventional agriculture. When the paper does confront the issue of strict liability as a remedy for such harm, the basis for rejection is driven by an argument that is fundamentally flawed:

Imposing the more stringent standard of strict (or absolute) liability may deter activities that are socially beneficial and, consequently, stifle innovation and economic growth contrary to government policy.¹⁰³

¹⁰⁰ This thinking was set out in an MFE discussion paper issued in the leadup to the cabinet paper and stated: “A more onerous liability regime may also disadvantage investors in GM technology compared to those investing in equally risky non-GM technology, leading to inefficient investment decisions.” MFE discussion document on proposed amendments to HSNO, 2002, p 64.

¹⁰¹ See Sustainability Council, *Seeding Purity*, September 2004; and Simon Terry Associates and Mitchell Partnerships, *Community Management of GMOs II*, May 2005.

¹⁰² For a discussion on the impacts of the Starlink contamination, see: USDA, *Impacts on the U.S. Corn Market and World Trade*, Feed Yearbook 2001, William Lin, Gregory K. Price, and Edward Allen, p 40-48.

¹⁰³ Cabinet paper, Government Response to the Royal Commission on Genetic Modification: Legislative changes for New Organisms – Paper 5: Liability Issues for GM, February 2003, p 4.

In stating this, the paper effectively proposes that in assessing what is “socially beneficial”, one need not account for damage to third parties, who are a part of that society. However, if an activity cannot itself sustain the full costs which it imposes on society, including the risk that it will impose damages, then it will have a negative impact overall – a social disbenefit. This is the basis of the polluter pays principle, which New Zealand has subscribed to through ratification of the Rio Treaty on Environment and Development,¹⁰⁴ as further detailed in Appendix 2.

The willingness of the cabinet paper to contemplate a blanket subsidy (via relief of LMO developers and users from full liability for the costs their activities impose on society) is not supported by reference to any established economic principles. A de facto subsidy arrangement of this form is inconsistent with the standard minimum requirements for economic efficiency in the dynamic as well as the static allocative sense.¹⁰⁵

In 2003, ministers ultimately insisted that a distinction was made between liability rules applying to GMOs and non-GM production. It was however a very weak¹⁰⁶ set of liability provisions, such that HSNO imposes liability only if an activity is not carried out in accordance with an ERMA approval.¹⁰⁷ MFAT claims incorrectly however that “New Zealand’s current regime does not distinguish between harm caused by GM as opposed to non-GM organisms”.¹⁰⁸ The Ministry of Justice also advances the variation that New Zealand law offers no precedent for development of a regime focused on GMOs alone because “the aim of [HSNO liability law] is to increase incentives to take precautions and comply”.¹⁰⁹ In other words, it suggests the intent of the law should be looked to, rather than its effect.¹¹⁰

New Zealand is currently regarded by the international biotechnology community as something of a soft touch with respect to LMO liability, as the following paragraph from one of its major journals outlines.

¹⁰⁴ Principles 13 and 16.

¹⁰⁵ That is, a general subsidy would subvert the efficient choice of investment projects by private agents, because the profitability of GMO projects would be artificially raised relative to the returns available from normal competitive activities; and it would subvert the efficient allocation of society’s scarce resources by diverting them from more socially-profitable activities into the subsidised GMO activity.

¹⁰⁶ There is no statutory liability for damage arising from unexpected adverse effects or inadequate regulatory control of known risks, such as pollen drift or unintended seed mixing. Common law actions offer little hope of third parties receiving compensation in such circumstances. For further description, see Chen Palmer & Partners and Simon Terry Associates, (2001) *Who Bears the Risk*, and Sustainability Council, *The New Frontiers: Biotechnology Liability Law Reform*, paper to the Biotechnology Law Conference, 20 February 2003.

¹⁰⁷ See HSNO s124G, Civil liability: “(1) A person is liable in damages for any loss or damage caused by any act or omission of the person while: (a) developing, field testing, importing, or releasing a new organism **in breach of this Act**: ...” [emphasis added].

¹⁰⁸ MFAT, *Cartagena Protocol on Biosafety, Report on Second Meeting of the Parties (MOP2)*, 12 July 2005, p 4.

¹⁰⁹ MFAT Legal Division email of 30 May 2005.

¹¹⁰ Even if the intent is considered, as the ministry states that a key driver for the law was precaution, this must also imply a risk of harm arising from GMOs that is not attributed to non-GM organisms.

For the biotechnology industry, one attractive aspect of the new regulations is their unique civil-liability provisions. In many countries, anti-biotech groups have stalled field tests of genetically engineered crops by filing lawsuits or winning injunctions based on claims of possible harm to the environment. In New Zealand, legal action doesn't paralyse GMO research and development.¹¹¹

Evidence that this position will leave New Zealand increasingly isolated irrespective of developments within the Protocol comes from a number of jurisdictions. As Governments around the world are progressively given cause to address the regulations required for this relatively new technology, the question of who pays for any damage arising has proven key. In the UK, Denmark, Austria, Norway and Germany, it has been fully accepted that innocent third parties should be able to obtain redress through mechanisms that deliver compensation whether or not the operator kept to the conditions set for the activity. Each country has devised, or has committed to devising, legal mechanisms to give effect to this.¹¹²

The International Context is Different

Instituting an implicit subsidy for LMO development and use (by way of deliberately not introducing strict liability at the time law is being made in anticipation of use of a new technology) is one thing at a purely domestic level. It represents a transfer of wealth from those who suffer losses arising from LMOs, to LMO developers and users.¹¹³ This is an internal transfer that, while poor economics, is something governments of nation states are at least constitutionally empowered to facilitate.

However, once the frame of reference shifts to the international context, the domestic policy can not just be templated across - as was implicit in the negotiating mandate for the Montreal meeting. The question is no longer whether it is best to advantage LMO developers in New Zealand by allowing them to avoid paying for damage caused in certain circumstances. In straight commercial terms, it is a question of the balance of risk to New Zealand parties - the potential financial harm from importing LMOs versus paying for harm caused to others. The balance of advantage clearly favours New Zealand supporting strong liability arrangements if it does not become a significant LMO exporter. For the reasons detailed with respect to labelling, even if it does become a significant LMO exporter, it is likely that the national interest is still best served by a binding liability regime.

With respect to Government's stated principle of being a good international citizen, making good harm caused is a policy consistent with this. With respect to the second principle of comprehensive biosecurity, a binding liability regime under the Protocol would plug an important gap in New Zealand's biosecurity. Assuming adequate

¹¹¹ Nature Biotechnology, *New Zealand: Green Haven for Biotech*, Stephan Herrera, February 2005.

¹¹² See: The Financial Times, *Farmers get go-ahead to plant GM maize in UK*, Mar 10, 2004; Austrian Gene Technology Act 1994; Norwegian Gene Act, April 1993, at <http://www.bion.no/lov/lov-19930402-038-eng.pdf>; European Commission, *Commission authorises Danish state aid to compensate for losses due to presence of GMOs in conventional and organic crops*, 23 November 2005; and *Bundestag Passes Stringent Law on Genetically Modified Crops*, Deutsche Welle, 18 June 2004.

¹¹³ As Government is at no point legally bound to pick up these costs.

labelling is ultimately provided for under the Protocol, it would incentivise care in the shipment of unintended LMOs and provide the ability to extract redress in ways that can not be achieved through reform of New Zealand legislation alone.

The balance of interests and the stated policy principles therefore favours New Zealand supporting strong liability arrangements. This would be in line with New Zealand's original stance during negotiation of the Protocol's text in 2000:

New Zealand supported developing countries' calls for provisions on liability and redress ...¹¹⁴ The negotiators reached a compromise whereby a liability regime will be elaborated within four years of the first meeting of the parties. This could take the form of a binding 'liability protocol'.¹¹⁵

At this stage it is important to point out that determining who pays for damage caused is not a trade restriction issue. It is about identification of the responsible agent, should recompense be required. The link to trade more generally is that effective liability law is a key component of moral trade.¹¹⁶ MFAT's depiction of it as a "de facto trade barrier"¹¹⁷ for exporters demonstrates the importance of getting the underlying economics straight, for the absence of effective liability law is a de facto subsidy. Its imposition corrects for the subsidy exporters otherwise receive.

Form of Liability Regime

The form of liability arrangements that should be advanced is a key issue. New Zealand has previously clearly recognised the need for binding arrangements for such international agreements so that they are legally enforceable and are thus effective incentives for prevention of damage. With respect to the Antarctic Treaty liability regime, the New Zealand Government noted:

Imposing a legal obligation to pay compensation creates an incentive to make sure [prevention and clean-up] measures are taken.¹¹⁸

The following are basic features required if such a binding liability regime is to be fully effective in incentivising prevention and avoiding burdening innocent parties. The requirements are listed in summary form only, with references to the sources which set out in depth the rationales for each.

- **Liability is clearly allocated to the party or parties that caused the damage**, so as to most effectively incentivise prevention. Thus liability is joint and several. If

¹¹⁴ The remainder of sentence was withheld under the Official Information Act by MFAT.

¹¹⁵ MFAT, *Biosafety Ratification: Process and Plan*, 3 October 2003, Annex 1, p 14.

¹¹⁶ It can also be seen as facilitating trade more generally, as it provides necessary reassurance to those who would otherwise be reluctant to import certain goods or goods from certain exporters.

¹¹⁷ MFAT, *Cartagena Protocol on Biosafety, Report on Second Meeting of the Parties (MOP2)*, 12 July 2005, p 5.

¹¹⁸ Foreign Minister Phil Goff, *NZ Leads Agreement to Protect Antarctica*, Press Release, 15 June 2005.

Governments carry the risk, this does not provide nearly the same incentive and even special purpose funds generally carry only weak incentives.¹¹⁹

- **Liability is uncapped:** Capped liabilities represent a transfer of wealth from innocent parties to those undertaking risk activities.¹²⁰
- **Insurance is compulsory:** Different instruments are likely to be required for different levels of cover and it may be that individual operators are required to assume risk only to a specified level, while special purpose funds and/or governments agree to underwrite residual risks.¹²¹
- **A strict liability standard prevails:** Where the liability regime specifies defences that will mitigate liability, the financial risks these involve should be clearly allocated to special purpose funds and/or governments.¹²²
- **The scope of damage includes:** environmental damage, financial damage, and damage to human health. Claims may be made for a defined period after the discovery of harm, rather than the time of the event to allow for latent effects to emerge.¹²³
- **Claimants are able to bring claims** in their own Courts or in a neutral tribunal, so as to facilitate access to justice at reasonable cost.

¹¹⁹ See Appendix 2 and Chen Palmer & Partners and Simon Terry Associates, *Who Bears the Risk*, October 2001, Chapters 4 and 9.

¹²⁰ Chen Palmer & Partners and Simon Terry Associates, *Who Bears the Risk: GMOs and Liability*, September 2001, Chapters 4 and 5; Sustainability Council, *The New Frontiers: Biotechnology Liability Law Reform*, paper to the Biotechnology Law Conference, 20 February 2003.

¹²¹ Sustainability Council, *Insurability, Financial Fitness and GMOs*, September 2003.

¹²² Chen Palmer & Partners and Simon Terry Associates, *Who Bears the Risk: GMOs and Liability*, September 2001, Chapters 4 and 9; Sustainability Council, *Insurability, Financial Fitness and GMOs*, September 2003.

¹²³ Simon Terry Associates and Mitchell Partnerships, *Community Management of GMOs II*, May 2005, Section 4.1.

8. Conclusion

The Cartagena Protocol has much to offer an island nation that seeks strong biosecurity to protect its trade, food and environment. The principles announced in support of it at the time Government ratified are clear and each can be pursued without having to compromise New Zealand's interests.

Post-ratification, positions have been developed that conflict with these principles. While the positions are often framed as process concerns, rather than statements of preferred outcomes, their intent and effect is clear.

An assumption implicit through the official documentation is that New Zealand will become a significant exporter of LMOs. This is just one of a number of possible scenarios for agricultural development,¹²⁴ and ministers state that they are agnostic as to the desirability of LMO exporters emerging at all. The issues surrounding the Protocol are complex and require in depth analysis of the alternatives before policy positions are set but the information on the public record indicates this has not occurred.

The current approach gives very little weight to risks arising from importing LMOs, including effects on conventional food producers and potential environmental effects – both of which could be very significant. Moreover, there is an absence of systematic analysis of the overall balance of risk with respect to imports and exports, and between trade and environment considerations. The Sustainability Council's analysis is that key positions being taken are very likely to be against the balance of New Zealand's interests – and will clearly be if it does not become a significant LMO exporter.

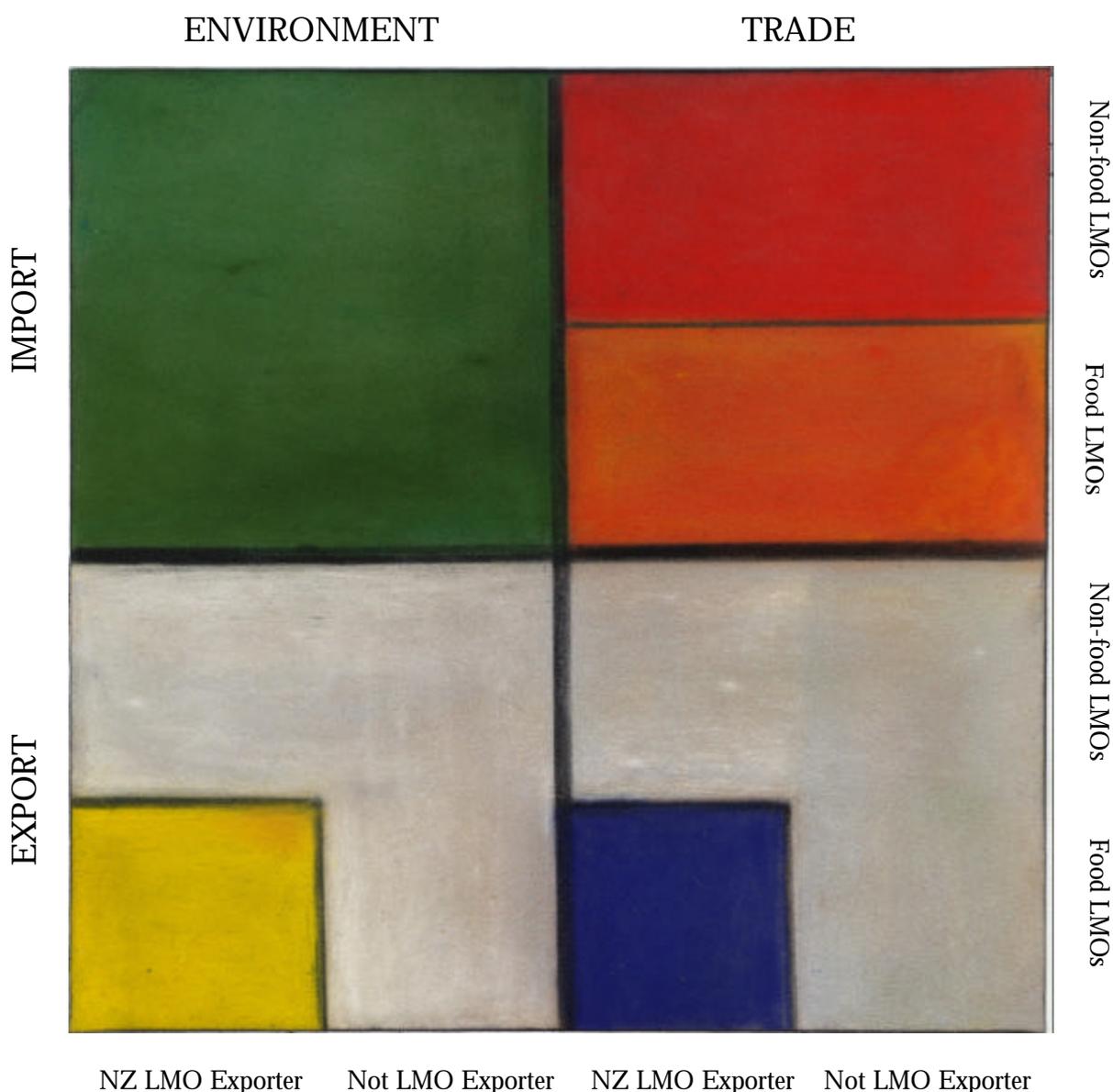
The stakes are therefore not simply that New Zealand fails to back important environmental protection measures. Current negotiating positions could undermine biosecurity procedures New Zealand will want to depend on in future to protect the integrity of its food products and its access to premium export markets. Further, New Zealand's willingness to use blocking tactics in Protocol negotiations is impairing the ability of the other nations to obtain such protection.

Even within an assumption that New Zealand becomes a significant LMO exporter, there is a need to examine the expected balance of risk, based on the types of LMOs in question and the volumes of LMOs being imported and exported. This requires scenario modelling to illuminate the scope and scale of the risks. However, on present indications, the balance of interests seems likely to still lie well on the side of strict measures surrounding unintended LMO transfers.

¹²⁴ A MoRST review notes: "Between 2008 and 2013, there are likely to be two key technological approaches for producing crop varieties with desirable, complex and controlled output traits, like enhanced nutritional value or drought resistance. These will be genetic modification and marker-assisted selection technologies (so-called "smart breeding"). With the known uncertainties of consumer acceptance of GM technologies, this presents the possibility of a "fork in the road", where markets (say, by region or by sector) may choose one production path over the other." MoRST, *Biotechnologies to 2025*, January 2005, p 12-13.

There is a need to reset the frame of reference in which New Zealand’s approach to the Protocol is being developed. The diagram below provides a simplified map of the territory and the cross-cutting issues. It sets up four main quadrants – environment and trade on one axis, and import and export activities on the other. Each quadrant is then divided into four parts to account for two major variables in the analysis: whether New Zealand will become a significant exporter of LMOs or not, and the potential impacts of activities involving food LMOs on the one hand and non-food LMOs on the other.

It is the blue box that has become the focus of official documentation – the square that covers trade implications under the assumption that the nation becomes a significant exporter of food LMOs. The challenge before Government is to ensure that especially the little-explored territory in the top half of the diagram is mapped and evaluated for risk such that Government has an all-points assessment and assumptions are explicit.



Note: “NZ LMO Exporter” is shorthand for New Zealand becomes a significant LMO exporter, and “Not LMO Exporter” is shorthand for New Zealand does not become a significant LMO exporter

The Protocol is a tool with unique potential to effectively address biosecurity risks arising from LMOs. A realignment of New Zealand's approach is required to secure the best from it and to achieve consistency with the principles on which ratification was based.

Recommendations:

- 1. Labelling:** Government supports labelling of shipments such that importing nations are appropriately informed as to the scope and scale of LMOs present, including unintended contaminants.
- 2. Liability:** Government supports the development of a binding liability regime under the Protocol and that liability be: strict; uncapped; clearly allocated to the parties that cause harm; backed by compulsory insurance; and covering environmental damage, financial damage, and damage to human health.
- 3. Analytical Capacity:** In recognition that the Protocol is "one of the most complex and important pieces of international environmental legislation", additional resources be devoted to research of key issues that bear on New Zealand's approach to development of the Protocol, and that Government requires all significant assumptions underlying the reasoning to be set out in policy papers concerning the Protocol.

Appendix 1: Related Government Press Releases

Government to ratify Cartagena Biosafety Protocol

Hon Marian Hobbs, 16 September 2004

The government will ratify the Cartagena Protocol on Biosafety, Environment and Associate Foreign Minister Marian Hobbs announced today. Public consultation on ratification attracted more than 1200 responses, mostly in favour.

"We are ratifying the protocol because New Zealand is a good international citizen and we are committed to comprehensive biosecurity," Marian Hobbs said.

New Zealand will join more than 100 countries that have ratified the protocol. The Cartagena Protocol to the Convention on Biological Diversity regulates international trade of certain types of genetically modified organisms known as living modified organisms (LMOs).

"We support people being informed about what's imported and exported. It can be seen as an extension of border biosecurity," Marian Hobbs said. "By working with countries that have ratified we are protecting our future trade.

"Ratification allows us to ensure the best interests of New Zealand and other agricultural exporters are taken into account in the development of the protocol. It means we have an inside track in helping determine international practice for governing trade in these products and will have an active voice in the future development of the protocol.

"We already have law covering the importation of organisms that come within the protocol so there'll be no change in the case-by-case way we deal with GMOs imported or used in New Zealand. Regulations will be put into place to ensure that New Zealand exporters of LMOs meet identification, reporting and other requirements of the protocol."

New Zealand signed the protocol in May 2000 and will ratify next year, following completion of Parliamentary processes.

The Cartagena Protocol came into force on 11 September 2003. The first formal meeting of the parties was in February, which New Zealand attended as an observer. New Zealand aims to attend the next meeting in June 2005 as a party to the protocol.

The consultation took place over six weeks in June and July. A document summarising the responses can be found at:

www.mfat.govt.nz/foreign/env/biosafety/submissionsindex.html

NZ Ratifies Cartagena Protocol on Biosafety

Hon Marian Hobbs, 24 February 2005

New Zealand has ratified the Cartagena Protocol on Biosafety, which regulates international trade in certain types of Genetically Modified Organisms known as "Living Modified Organisms" or LMOs, Environment Minister Marian Hobbs said today.

New Zealand's ratification means 114 countries had now ratified the protocol, Marian Hobbs said.

"New Zealand is not currently trading in LMOs, except for research purposes. However, our ratification will ensure we can participate fully in this new multilateral approach to managing the potential risks of LMOs," she said.

New Zealand deposited its instrument of ratification to the Cartagena Protocol on Biosafety today with the United Nation's Secretary General in New York. This means the Protocol will enter into force for New Zealand on 25 May.

"Ratification allows us to ensure the best interests of New Zealand and other agricultural exporting nations are taken into account in the development of the Protocol," Marian Hobbs said. "It means we have an inside track in helping determine international practice for governing trade in these products, and that we have an active voice in the future development of the protocol."

New Zealand will participate as a full member, with voting rights, at the next meeting of parties to the protocol in May 2005.

The decision to ratify was taken after an extensive public consultation in mid 2004. An Order in Council under the Imports and Exports (Restrictions) Act 1988 will ensure New Zealand can comply with the requirements of the Protocol.

"New Zealand already had rigorous controls in place covering importation of LMOs. The Order in Council addresses a number of requirements in the Protocol in respect of exporters," Marian Hobbs said.

NZ Leads Agreement to Protect Antarctica

Hon Phil Goff, 15 June 2005

New Zealand has played a key role in negotiating an international treaty protecting the Antarctic environment, Foreign Minister Phil Goff announced today.

“The treaty requires anyone who causes an environmental accident in Antarctica to take action to clean up the pollution and prevent further environmental damage. If a polluter does not take clean up action, then compensation can be claimed,” Mr Goff said.

New Zealand chaired negotiations for the treaty, which sets out a regime for response action and compensation in the event of environmental accidents in Antarctica. It was adopted overnight at a conference in Stockholm.

“This agreement brings an end to 12 years of negotiation. It’s a vital step forward in protecting the pristine environment of the Antarctic.

“New Zealand’s role in chairing the negotiations reflects our special interest in Antarctica, and the importance we place on its environment.

“Prevention and clean-up measures are crucial in the event of an environmental accident. Imposing a legal obligation to pay compensation creates an incentive to make sure such measures are taken,” Mr Goff said.

The treaty was negotiated by the 45 member countries of the 1959 Antarctic Treaty, made up by the majority of countries conducting Antarctic activities. Negotiations began in 1993, and have been chaired by New Zealand since 1999.

<http://www.mfat.govt.nz/foreign/antarctica/treaty/antarctictreaty.html>

Appendix 2. Polluter Pays and Liability

Three objectives should guide design of liability law:

- i. Provide compensation for victims;
- ii. Incentivise operators to take due care;
- iii. Provide correct economic incentives for investment.

These objectives are addressed in the following principles Government committed to through the Rio Declaration:

“13. States shall develop national laws regarding liability and compensation for the victims of pollution and other environmental damage. ...”

“16. National authorities should endeavour to promote the internalisation of environmental cost and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution ...”

It is clear that principle 13 targets objective 1, compensation for victims, and this objective is uncontested in the literature.

Principle 16 advances the “polluter pays” principle and in doing so covers the other two objectives. It relies on financial disciplines incentivising “correct” behaviour. This includes both due care and an optimal level of investment. It is a market mechanism for simultaneous delivery of objectives 2 and 3.

A general principle in the economics literature is that, wherever possible, economic agents should both (i) be able to appropriate at the margin the economic value which they create, and (ii) face the full marginal costs of their activities.

Unless firms face the full marginal social costs of their activities, they will have the incentive to over-expand those activities at the cost of the wider economy. At the limit, this may mean that activities which ought not to be undertaken at all – and which would not be undertaken if those responsible had to bear the full costs – can be privately profitable. The process of “internalising” costs which otherwise would fall on third parties is a necessary precondition if market mechanisms (that is, voluntary transactions among private parties) are to lead to socially efficient outcomes.

GM will in general be just one means to a particular outcome that is being sought. Whether the objective is higher crop yields, stronger wood, or better medical cures, GM will be just one means to the end. To the extent the full costs of the activity are not internalised, GM production routes are being subsidised. They are being given an undue advantage over other potential solutions.

Claims for damages resulting from use of GMOs form part of the full cost of selecting GM technology to meet a particular objective. Those full costs will only be known ex post. However, when this risk is transferred to a third party, the consideration paid to the insurer or broker then represents the best present day estimate of the risk weighted cost.

By paying for the present day cost of the risk, the GM operator is internalising that cost. If the operator does not pay that cost, it does not go away. It sits with either the taxpayer or the victim, depending on the circumstance. They may not pay an insurance premium today, but they are implicitly carrying a contingent liability on their accounts.

So rather than insurance premiums “equat[ing] to a penalty on a particular activity or product, disadvantaging those wishing to trade in the field”, as the Royal Commission put it, insurance represents an opportunity to shed risk and quantify costs that are already present. Only by arguing that insurance costs should be socialised, not internalised, could premiums be described as a “penalty”.

Similarly the following statement from a Ministry for a Environment discussion document miscasts the nature of the problem.

“A more onerous liability regime may have negative impacts. Depending on the strength and design of the regime, it may create a disincentive for investment in GM and GM-based innovation. ... A more onerous liability regime may also disadvantage investors in GM technology compared to those investing in equally risky non-GM technology, leading to inefficient investment decisions.”¹²⁵

Requiring operators to carry the full financial risks of their technology is not a question of being “onerous”. Failure to make GM operators fully liable amounts to an implicit subsidy. The issue is not whether a new regime would be “more onerous”, it is about what would properly internalise the costs of production for GM and any other activity that similarly may not be adequately covered by current law. A regime can only be onerous in the sense that it requires the operator to carry the full risks of damages claims in a way that is inefficient.

If we compare two projects of “equal riskiness”, with one of them a GM project and the other non-GM, and if both projects face liability regimes that are appropriately designed to ensure compensation for injured parties and to incentivise the taking of due care, then there is no presumption that the resulting investment decisions are “inefficient”.

The cabinet paper that advised Government on the framing of the liability regime also advanced a related argument.

“Imposing the more stringent standard of strict (or absolute) liability may deter activities that are socially beneficial and, consequently, stifle innovation and economic growth contrary to government policy.”¹²⁶

The issue clearly is what definition of “socially beneficial” is to be adopted. If an economic activity can not itself sustain the full costs which it imposes on society, then it should not be undertaken. Obviously, if there are benefits as well as costs that are external to the firm, such that overall its activity is socially beneficial, there may be

¹²⁵ MFE discussion document on proposed amendments to HSNO Act, 2002, p 64.

¹²⁶ Government Response to the Royal Commission on Genetic Modification: Legislative changes for New Organisms – Paper 5: Liability Issues for GM, Cabinet paper, February 2003, p4.

individual cases that merit individual subsidy. However, there should not be a blanket subsidy in this respect.

The willingness of the Royal Commission, the MFE discussion paper, and the February Cabinet paper to contemplate such blanket subsidies, via potential relief of GM firms from full liability for the costs their activities impose on society, is not supported by reference to any established principles. A subsidy arrangement would be inconsistent with New Zealand's international commitments under the Rio Declaration, and with the standard minimum requirements for economic efficiency in the dynamic as well as the static allocative sense.¹²⁷

The simple but important principle at stake is that any activity which, when properly costed, faces "the practical consequence ... that the costs and risks of engaging in the activity were prohibitive", ought not to proceed.

This is not to say that Government should never subsidise an activity that is unprofitable in order to allow it to proceed. The argument is simply that if Government wishes to pursue a particular policy of industry assistance, the assistance should be targeted and transparent by way of explicit subsidy, and Government should be fully accountable for the decision.

¹²⁷ That is, a general subsidy would subvert the efficient choice of investment projects by private agents, because the profitability of GM projects would be artificially raised relative to the returns available from normal competitive activities; and it would subvert the efficient allocation of society's scarce resources by diverting them from more socially-profitable activities into the subsidised GM activity.