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To: Katie McGinty
From: Molly Olson
Re: Biodiversity Convention
Date: 9 December 1992

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Clinton/Gore and the Biological Diversity Convention

Clinton has said that he would have negotiated a Biodiversity Convention the U.S. could sign.

There is a clear expectation by the Environment groups who supported Clinton/Gore in the election, that the treaty will be signed. The Green Group's initial drafts of advice to the new Administration indicate that they see this issue is a high priority for the new Administration in the first 100 days.

159 Nations and the European Community have already signed the Biodiversity Convention, and two Governments have ratified it. 30 ratifications are required to bring the Convention into force.

The refusal of Bush to sign this Convention at Rio was widely interpreted as the clearest signal of the lack of international environmental leadership from the U.S. at the Earth Summit in Rio.

There is an urgent need for an effective international instrument to encourage protection of the world's threatened biological diversity.

The U.S. biotechnology industry is acknowledged as the world leader with an expected 4 billion in sales in 1992 and the prospect of over ten times that amount by the end of the decade (Porter, 1992).

Porter notes that "...it should not be assumed that the industry's judgement [regarding the BD Convention] was based on adequate understanding of the text and its negotiating history, or that its position necessarily advances the best interests on the industry itself... the industry's assessment of the legal effects of the agreement on IPR is inaccurate in every case."

Indeed European and Japanese biotech companies did not see dire consequences resulting from its ratification, nor did the British BioIndustry Association, and the Italian Industry association's director-general said he could find no basis for the U.S. refusal to sign. (Porter)

The principle objections to the Convention relate to intellectual property rights (IPR's), biotechnology, and maintenance of equitable and open access to native resources.

Intellectual Property Rights

The BD Convention creates obligations for the Parties concerning the access to native resources on sovereign land, transfer of technology and intellectual property rights. Language in Article 16 dealing with "access to and transfer of technology", could, it was alleged by the Bush Administration, force companies to give up patented technologies or trade secrets.

However, the U.S., in the last negotiating session obtained a major concession on this point by inserting a sentence in Article 16 paragraph 2 which reads " In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the **adequate and effective protection** of intellectual property rights."

The term "adequate and effective protection" was strategically chosen by U.S. negotiators because it had become a term of art in international trade law. It was inserted by the U.S. in a number of agreements including TRIPS, Bilateral IPR Agreement, Sec 301 Omnibus Trade and Competitiveness Act 1988, (Porter). Standards on issues of greatest concern to the U.S. biotechnology industry, including patentable subject matter, terms of protection, transitional protection and compulsory licensing, are all included in U.S. definitions of "adequate and effective protection".

Countries like India and Brazil as well as other developing countries involved in the negotiations clearly understood their acceptance of this sentence in Article 16 was a major concession to the United States.

Although India tried to neutralize the effect of this concession by requiring that its implementation must be consistent with later paragraphs relating to access to and transfer of technology, the net result was that the requirement for "adequate and effective protection" was left unaffected. The Convention protects the rights of IPR by requiring that the transfer of technology must be on mutually agreed terms.

As a matter of equity it is important to consider the countries from which the genetic materials are sourced, and knowledge and resource owning groups and individuals in these countries (indigenous peoples, traditional owners, shaman). Whereas the U.S. property rights are well recognized in law, those of indigenous and local people are not always recognized and fairly compensated.

Dr Brian Boom of the New York Botanical Gardens has noted that folk healers who have passed down through generations the knowledge of which plants work best against disease can point

company scientists to the right plant and save them weeks of unproductive exploration...but this knowledge has a value and deserves compensation." (Browning) The Biodiversity Convention attempts to redress these problems by putting in place provisions protecting national sovereignty of genetic resources.

The Convention protects the rights of technology owners by requiring the transfer of technologies on mutually agreed terms, consistent with the protection of IPR's.

Loss of Scientific Access

Under the current situation, with virtually all developing countries having signed the Convention, there is a risk that the U.S. will be left out in the cold with regard to access to developing country's genetic resources. Already a scientist has had permits to conduct research revoked, based specifically on the fact that the U.S. did not sign the BD Convention (Boom, 1992).

Central American Presidents have resolved to pass laws restricting the use of resources in their countries (Intl Env Reporter, 6/17/92). The loss to the biotech industry in the form of scientific access was not Acknowledged by the U.S. government when the U.S. did not sign the Convention.

Some Options for Consideration in Determining Clinton/Gore Administration Policy:

- 1) **Is the Biodiversity Convention too flawed to sign as is, and should the U.S. maintain the current position of not signing the Convention, and initiate negotiations for amendments to facilitate U.S. signature ?**

Pro's

The current language in the BD Convention is not as clear as it might be on some important issues such as IPRs. The opportunity to re-negotiate a clearer convention would potentially overcome some of the gray areas of ambiguity and perhaps make implementation in the long term more effective.

Con's

This approach would associate Clinton/Gore with the failed policies of the Bush Administration. The environment movement has a clear expectation that Clinton/Gore will break from the Bush approach and provide international leadership on the BD Convention.

In spite of the U.S. absence, the Biodiversity Convention is moving ahead quickly.

If an attempt were made to re-negotiate the treaty, it may prove difficult to reach agreement on a more specific and satisfactory treaty because of the divisions between the developing and developed countries on the contentious issues.

If the re-negotiations fail to reach agreement, the U.S. will have been responsible for blowing the opportunity not only at Rio, but for the foreseeable future. Without the international momentum of UNCED, it could take decades to hash-out the basics of a BD Convention that meets the need of the North and South.

The Bush Administration is widely perceived to have negotiated the BD Convention in "Bad Faith". In the final negotiating session last May the U.S. negotiators gained major concessions on these key issues. According to one U.S. observer, the U.S. came with a list of "final demands". The Netherlands government, on behalf of the European Community, asked if these were really final and if accepted by the other countries would the U.S. sign. The U.S. negotiators said yes and the concessions were made to accommodate the U.S. position.

2) Should the U.S. sign the Biodiversity Convention as it stands ?

Pro's

Signing the convention would be one of the clearest and easiest domestic and international signals that the new Administration could give of renewed international environmental leadership. This is the very issue on which Bush was perceived to have isolated the U.S. from world action at the Earth Summit.

In spite of U.S. absence, restrictions on the access to genetic resources are now legitimized. As one of the few non-signatories to the Convention, the U.S. may be seriously disadvantaged in achieving access to the biodiversity resources of developing countries.

By not being a Party to the Conference, we are in a weakened position to defend the interests of the biotech industry.

Con's

A European Community Commission proposal which would guarantee legal protection for patents of living organisms was delayed, based on its incomparability with the text of the BD Convention which the EEC has signed. The U.S. has some of the strongest patent laws in the world, and signing the Convention could

potentially:

- 1) subordinate IPR to Technology transfer, and
- 2) be used to weaken the draft TRIPS agreement in GATT.

Is there an opportunity for clarifying the Convention from the U.S. perspective through implementing procedures, statements of clarification, and protocols ?

Bearing in mind that it is a framework convention, U.S. concerns could be picked up when negotiating implementing procedures and protocols. This appears to be the approach that many nations have taken. The U.S. is currently participating on all four of the expert panels. It is the only country to be on all four panels, and it is the only non-signatory country participating in the panels.

All proposals to weaken IPRs during the Convention were discarded, but the "adequate and effective protection" compromise remains.

On signing the Convention the U.S. could issue a statement of clarification detailing the U.S. understanding of the language of Article 16. It could include the understanding that intellectual property rights are fully protected and this Convention, in our view does not allow or permit agreements of technology transfer that compromise IPRs. At a Conference of the Parties, the U.S. could work with other countries to obtain acceptable clarification on the provisions for funding mechanisms.

There could also be an agreement to negotiate a biotech protocol where some of the important issues could be worked out.

Political Climate

A key question is whether the climate to negotiate a new BD Convention is better now than in Rio in order to get more harmony between the North and South. Many would say no. Without the momentum of the Earth Summit, the impetus to successfully conclude the negotiations on contentious issues such as intellectual property rights is difficult to imagine.

The major difficulties with the Treaty are political, not necessarily poor drafting. It reflects the very real gulf between the developed and developing world on key issues. It would appear that this gulf remains, and a re-opening of the Convention may not achieve any greater consensus than has already been achieved.

However, this could be considered.

The other option is to sign the Biodiversity Convention, and through a process of engaging the developed and developing world in further dialogue on the contentious issues, seek to find the needed common ground to strengthen sensitive areas of the Convention over time, as good will develops.

This could be achieved through the negotiation of strong protocols and procedures within the Convention, and if and when sufficient common ground is found -- through selected amendments to the Convention itself.

Precedents

The U.S. has managed to achieve its identified negotiating objectives in order to participate in the international oil spill liability regime.

In any treaty not everyone gets all of its wants and has to build for the future. During the MARPOL Annex V negotiations the U.S. would have liked to have seen a more specific treaty, but decided to build on the MARPOL Annex V foundation.

Follow-up Action

* The Transition Team in the State Department should include some key skilled environmental staff and they should be asked to review the advice that was available to the Bush Administration on this issue. This advice should be reviewed in the context of a positive Clinton/Gore approach to the conservation of biological diversity, but with an awareness of the concerns about weaknesses perceived in the Convention.

* State Transition should seek advice as to why major trading competitors in the biotech field such as Japan and Europe signed the Convention, and whether they have reviewed the weaknesses.

* The new Administration could begin a dialogue with the Biotech industry, particularly those in favor of the Convention. If proceeding to sign, the new Administration could identify a mechanism to engage biotech industry and environmental organizations in support for the Convention and refining of weaknesses through discussions on potential protocols and guidelines.

Molly Olson
7 December 1992