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Excerpts

Biotechnology

COMMENTARY: CARTAGENA PROTOCOL ON BIOSAFETY MOP-3

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The third Meeting of the Parties (MOP-3) to the Cartagena Protocol on Biosafety was held in the week immediately prior to COP-8 to the Convention on Biological Diversity (CBD) in Curitiba, Brazil. From the opening speeches by the Governor of the state of Parana -- which has declared itself free of living modified organisms (LMOs) -- and the Deputy Minister of Brazil's federal environmental ministry, which recognises and supports the use of a number of LMO varieties in commercial agriculture, it was clear that this meeting was seen as an opportunity for many to express strongly held beliefs on all sides of the issue. Nonetheless, the tone of MOP-3 overall was one of collaboration and consensus development. While surprising many who had been at MOP-2, this tone and outcome provided hope to many who have worried about the future of CBD processes. This commentary briefly reflects on four points that received primary attention throughout the meeting.

Article 18 implementation

One of the most important mandates coming into MOP-3 was the need to come to agreement on key elements of the implementation of Article 18's requirements regarding the various labelling requirements applied to LMOs being imported for purposes of food, feed and processing, for contained use and for introduction into the environment. After being completely deadlocked on this issue in MOP-2, Parties were able to come to decisions on the points of labelling, identification, packaging and transportation of LMOs, although only in the final minutes of the meeting **[see below** Bridges Trade BioRes, 17 March 2006, http://www.ictsd.org/biores/06-03-17/story1.htm)**]**.
In the end, the three decisions relating to Article 18 represented a clear compromise from both sides on several points, most especially Article 18.2(a) dealing with LMOs imported for food, feed and processing.

From a trade perspective, these developments appear to offer mixed impacts. From the industry perspective on the one hand, the labelling requirements may briefly create an additional cost for developers, who will have to develop labels for their existing products and intra-company protocols to address labelling requirements. Experience with other labelling requirements for products, wastes and other items has show that in the longer term, however, the cost will be relatively limited, applying only when new products are created, or existing situations change. Similarly, from the perspective of the importing country, the primary impact will be the provision of information, possibly leading to end-product labelling for consumers. The impact of this decision is expected to promote the interests of those who wish to limit LMO use and trade. Again, however, based on experience with other situations, such labelling may have other impacts, including setting clearer procedural standards, thus making it easier to obtain permission to import LMO substances. Moreover, product labelling often has the effect of acclimatising local governments and consumers to the presence and consumption of LMOs -- conditioning the market for such products.

More importantly, these decisions appear to represent a movement to a more active negotiating approach by the Protocol Parties, who continued to be deadlocked on many points throughout the contact group process, but were able once directly pressured by the imminent end of the talks to negotiate more flexibly and achieve a collectively acceptable solution. Many potential explanations are suggested to underlie this change. The simplest may be that, over the past few years (following COP-6, at which 'hardball' tactics led to a stalemate on the issue of invasive species that continues to haunt the CBD), national delegations have developed a stronger dependence on getting advice and approval from home governments, particularly from foreign affairs ministries. Another possibility, however, is that (again as a result of the problems in COP-6) countries have been trying to take harder-line positions, in the hopes that this approach will reap stronger results. After they failed to do so in MOP-2, however, national delegations may have arrived at Curitiba under relatively clear orders to resolve the Article 18 issues as completely as possible.

In the immediate term, the strongest pressure is on Parties to the Protocol whose national legislation and administrative systems will have to be redrafted or reviewed to conform to this decision. Given that the Protocol specifically allows countries to impose 'stricter' provisions, each country is under pressure to take two high-level actions: (1) to confirm that their national legislation is at least as strict as the various decisions; and (2) to come to a national policy and legal decision regarding whether stricter measures are needed, and if so what those measures may be. One critical need will be an analysis of what the term 'stricter' means in the context of a specific labelling provision; and how each country's national legislative provisions and judicial interpretations of labelling requirements and other controls can be ensured to conform to WTO requirements.

Capacity-building

Although a relatively divisive issue at MOP-1, capacity-building was generally approached in a co-operative way at MOP-3. One of the key reasons for this shift was completion of the Global Environment Facility's evaluation of its five-year multimillion-dollar project providing capacity-building to 142 countries for Protocol implementation. This critical input received particular attention in light of the recently adopted GEF Resource Allocation Framework, coupled with the current problems with GEF replenishment. As a consequence, the question of how countries will develop the technological and administrative capability to implement the Protocol has taken on a heightened urgency, difficulty and importance. The GEF evaluation was well accepted, with many countries endorsing future capacity building work at the global level, so long as it fully reflects the recommendations of the GEF evaluation.

In addition to its substantive contribution to the MOP deliberations on this topic, this positive result demonstrated the value of professional monitoring & evaluation processes as tools for encouraging confidence of both donors and assisted countries. Given the breadth of the need for additional capacity at the national and regional levels, one key concern is the possibility of overlap as the number of donors involved increases. In addition, as funding sources tighten, a greater emphasis on regional cooperation (with or without formally harmonised regional standards) is developing.

Compliance

The work of the Compliance Committee embodied the most important, comprehensive and detailed analytical recommendations provided to the MOP. Chaired by Veit Koester, the Committee raised a wide range of concerns, including matters of procedure (some text remains bracketed in the Committee's Rules of Procedure) and Protocol administration (the five-year review of the operations and effectiveness of the Protocol is due to begin before the next MOP). The Committee's most important concerns, however, focused on the relative sluggishness of national development needed for full and formal implementation of the Protocol, with particular attention to national legal frameworks, administrative capacity, national reporting and the Biosafety Clearing House. These points were identified by both developed and developing country Parties to be the most critical issues facing the Protocol, and to bear an integral relationship to the problem of capacity development needs, as described above.

Financial Mechanism

Finally, concern about the changes in the financial mechanism (GEF) was a very strong theme running through this meeting. This point, too, is integrally related to the capacity building issue, and the resulting limitation on Parties' ability to develop and implement necessary national legislation and institutions. The omni-coverage of the GEF Biosafety Framework and

Implementation Projects (currently in their final phases) has demonstrated to most countries the important role that the GEF can serve in supporting the achievement of the Protocol's mandate. Consequently, the Resource Allocation Framework (RAF) and questions about the amount of the Fund's replenishment have raised serious concerns within the MOP about the prospects for implementation of the basic Protocol framework. Despite the RAF's conversion to national prioritisation and disposition of GEF funds, the MOP decisions on the GEF focused entirely on asking GEF to adopt funding priorities, commit more funds, etc. The MOP's recognition and adoption of the recommendations of the GEF evaluation report (mentioned above) regarding future project design and implementation, suggests a strong orientation to effectiveness and efficiency in the utilisation of GEF funds.

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CONSTRUCTIVE AMBIGUITY SAVES LMO LABELLING DISCUSSIONS AT MOP-3

While countries at the third Meeting of the Parties (MOP-3) to the Cartagena Protocol on Biosafety -- convening from 13-17 March in Curitiba, Brazil -- managed to resolve most agenda items relatively quickly, negotiations on documentations requirements for shipments of living modified organisms (LMOs) proved highly contentious, requiring many hours of negotiations in contact and 'friends of the Chair' groups. The discussions saw deep divisions between a number of Latin American countries, while New Zealand -- which had been one of the strongest opponents of stringent documentation requirements at MOP-2 -- appeared to play a much less prominent role. The final decision clearly constituted a compromise, with some parts left vague enough to accommodate the differing interests.

Parties widely welcomed the agreement on documentation requirements reached in Curitiba and expressed relief that this thorny issue, which had repeatedly bogged down the negotiations of the Protocol itself, had been resolved. While many civil society groups also cautiously welcomed the agreement, they attacked the biotech industry and the trade interests of some Parties for blocking progress towards more stringent requirements. The key question for the future implementation and effectiveness of the Protocol will now be whether the labelling decision is sufficiently broad to persuade biotech exporting non-Parties to join the pact.

"may contain" versus "contain" -- leaving the options open

In a second attempt after their failure to agree at MOP-2, Parties managed to finalise a decision to elaborate further on documentation requirements for LMOs for use in food and feed and for processing (LMO-FFP). These negotiations had been mandated under Article 18.2(a) which only required LMO-FFPs to be labelled as "may contain" LMOs and as not intended for release into the environment. Much of the debate again focused on the use of

"contain" versus "may contain", with biotech importers, in particular the African countries, advocating the former while biotech exporters pushed for the latter. In the end, the decision provides for two options, as proposed by Brazil early on the negotiations. Thus, in cases where the identity of the LMO is known "through means such as identity preservation systems", the shipment should be labelled as containing LMO-FFPs. In cases where the identity is not known, the "may contain" label would continue to apply. In both cases, exporters would be required to provide the common scientific or where available commercial names of the LMOs as well as the transformation event or unique identified code.

These provisions apply to LMO-FFPs that are "in commercial production and authorised in accordance with domestic regulatory frameworks". The decision leaves open whether these frameworks refer to those of the exporting or importing countries, and how they would cover countries that do not have a regulatory framework in place. Also, given that the trigger for the "contain" label was not further elaborated, the choice of which of the two labelling options to apply is likely to largely rest with the exporter.

An initial proposal by Brazil to require "contain" labelling of all shipments by 2010 was watered down by deciding to review experiences gained with the documentation requirements at MOP-5 "with a view to considering a decision" at MOP-6 to require the "contain" label.

Indirect references to accidental presence of LMOs

The provisions on documentation requirements are further qualified by "acknowledging" that the expression "may contain" does not require listing of LMOs of species "other than those that constitute the shipment". This article marked a compromise on the question to what extent the rules should also cover the 'adventitious' (i.e. accidental, non-intentional) presence of LMOs in shipments. In particular the African countries have been advocating strongly in favour of the broader scope, which would effectively shift the burden of testing for accidental presence to the exporting countries. The EU would have liked to see at least a reference to thresholds that may be adopted on a national basis for adventitious presence to provide multilateral backing for its exiting domestic legislation. These proposals where met with opposition by New Zealand and Brazil -- both major players in the push for further agricultural trade liberalisation.

The final wording seemed vague enough to allow for different interpretations that suited the different interests. Some felt that adventitious presence was not covered by the rules while others interpreted the provision as applying to the accidental presence of all LMOs. Most non-governmental observers took the view that adventitious presence would be covered for LMOs of the same species (such as different types of genetically modified soy), but not for other species (such as GM corn in GM soy shipments).

Mexico concerned over trade with NAFTA parties

A last-minute intervention by Mexico in the closing plenary had threatened to derail the talks and the plenary had to be suspended several times to allow for further informal consultations. Mexico, along with Paraguay, had been pushing for less stringent documentation requirements and for shifting much of the information sharing to the Biosafety Clearing House. Many observers attributed this position to Mexico's concerns over how the provisions would impact its trade with the US and the trilateral agreement on documentation requirements reached with the US and Canada -- all partners in the North American Free Trade Agreement (NAFTA) -- prior to MOP-1.

To accommodate Mexico's concerns, a new paragraph was inserted in the decision to address trade with non-Parties. The text notes that "transboundary movement of LMOs between Parties and non-Parties shall be consistent with the objective of the Protocol", adding that the "specific requirements set out in [paragraph 4 outlining the documentation requirements] do not apply to such movement". The new provision also calls on Parties to "encourage non-Parties to adhere to the Protocol". While the immediate implication of this provision appears somewhat unclear, many delegates felt that the paragraph simply reiterates what is already known, namely that the Protocol's provisions are not obligatory for non-Parties, and was in fact superfluous.

Emphasis on capacity building

At the insistence in particular of some Latin American countries, the final decision places strong emphasis on the need for capacity building to help developing countries to implement and benefit from the documentation requirements. This emphasis reflects the interests of biotech exporting developing countries, such as Brazil and Paraguay, which have pointed to their limited capacities to implement the labelling rules. Trade considerations are also likely to underlie these concerns, with some countries fearing that the cost of putting systems in place to comply with the Protocol's provisions could place them at a competitive disadvantage vis-à-vis countries that are not Parties to the Protocol, notably the US, Canada and Argentina.

Changing of the guard?

Discussions at MOP-3 witnessed a marked shift in negotiating dynamics compared to previous meetings. While Brazil and New Zealand had largely led the charge against stringent documentation requirements at MOP-2, this role now fell to Paraguay, Peru and Mexico. Brazil, which had drawn up the initial draft text on which the final decision was based, was widely lauded for its spirit of compromise, while New Zealand appeared to be taking an increasingly constructive backseat in the talks. Speculations were rife over Brazil's change of position. Some attributed their stance to the lengthy internal consultation process that had preceded the talks, a stronger stance

of the environment ministry and the political stake in concluding the negotiations in Curitiba. Other more cynical voices saw trade motivations as the driving force behind this shift, speculating that Brazil might be counting on gaining a competitive advantage, in particular vis-a-vis other Latin American countries, by being able to put in place systems that will allow Brazilian exporters to segregate biotech from conventional products.

Other issues at MOP-3

In relation to documentation requirements for LMOs for contained use and introduction into the environment (Article 18.2 b and c), Parties took up the question of whether to use a stand-alone document to provide the required information, as advocated in particular by Norway. While the Parties in the end agreed to postpone a decision on this question until the next MOP, they explicitly recognised Parties' right to require such documents, thereby providing some breathing space for countries that have implement or are planning to implement such a system. Given that similar discussions have also taken place under Article 18.2(a), progress on this issue under any of the subparagraphs is likely to be linked.

Regarding the need for standards on the identification, handling, packaging and transport practices in LMO trade (Article 18.3), Parties simply agree to gather further information from Parties and relevant international bodies on existing rules and standards for discussion at MOP-4 and MOP-5.

Parties furthermore agreed to change the MOP meeting schedule from annual meetings to meetings every two years. MOP-4 will be held in conjunction with the ninth Conference of the Parties (COP) to the Convention on Biological Diversity, the date and venue of which will be discussed at COP-8, convening from 20-31 March also in Curitiba.

Additional Resources - Documents of MOP-3 are available here: http://www.biodiv.org/doc/meeting.aspx?mtg=MOP-03

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