

IN BRIEF

Biosafety Protocol: ten years on and lagging far behind

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Ten years after the Cartagena Protocol on Biosafety (Biosafety Protocol) was adopted, the Parties to the Protocol met in Nagoya Japan (11-15th October 2010) to adopt a new Treaty, the 'Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety' (Supplementary Protocol). This new Treaty will need to be ratified by at least 40 Parties to the Biosafety Protocol before it can come into effect. Its consequent implementation will take place within the overall framework of the Biosafety Protocol in an integrated manner.

The Supplementary Protocol is very different from the campaign fought for by developing countries, concerned scientists, small-holder farmers and NGOs. Instead of an international civil liability regime that establishes rules and procedures for redress on the part of third parties for damage arising from GMOs, the Supplementary Protocol comprises of a set of administrative measures that Parties to such a Protocol would need to legislate for and implement. An international civil liability regime would have provided recourse for damage caused by GMOs by establishing rules that would have: identified the persons liable for the damage caused; provided redress for the harm caused; defined the scope of damage; provided for strict liability; addressed issues concerning access to justice; jurisdiction of the courts and so forth. In sharp contrast, the Supplementary Protocol merely creates a set of international administrative rules, which places the responsibility on the Parties to take measures to clean up the environment in the case of damage to biodiversity arising, and seek redress from the person causing the damage. Similar administrative measures already exist in South Africa's



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Genetically Modified Organisms Act. If South Africa were to ratify the Supplementary Protocol, only minor amendments may be necessary, but no new legislation will have to be passed to implement the Supplementary Protocol.

Nevertheless, the existence of the Supplementary Protocol does signal the willingness of the international community to acknowledge that GMOs cause harm to biodiversity and that measures have to be taken to clean up. Third parties who suffer damage as a result of GMOs will have to continue to rely on domestic 'tort' or 'delict' law for redress.

The Biosafety Protocol is young and poorly evolved. It lags, in many respects, far behind national biosafety discourses and the reality in several developing countries. For instance, one of the key issues the Parties addressed during the Nagoya meeting concerned risk assessment and risk management. At a previous Meeting of the Parties in Bonn during 2008, the Parties established an ad hoc technical expert group (AHTEG) on risk assessment and risk management in an open, transparent and equalitarian manner. This group produced three guidance documents for conducting risk assessments of different types of GMOs: GM mosquitoes; GM crops with stacked traits and GM crops engineered for abiotic stress tolerance. At the Nagoya meeting, these documents were heavily contested by several Parties, including its 'guidance' value. Subsequently, the Parties decided to further subject these guidance documents to scientific review and require new documents to be produced for consideration at the next meeting of the Parties to be held in India in 2012. Conflicts in the scientific community are indeed foreseeable concerning such guidance documents, with pro-biotechnology scientists surely packing the future work of the AHTEG with a view to watering down precautionary recommendations. In the interim, Malaysia is set on releasing GM mosquitoes into the environment later this year, stacked genes proliferate agricultural fields in several countries including South Africa, Monsanto's GM drought tolerant maize is awaiting approval in the US, the same variety is being field tested in South Africa and is about to be rolled out in four further African countries: Uganda, Kenya, Tanzania and Malawi. The commercialisation in the US of the first ever GM animal, namely GM salmon, is a significant development - but remained outside of the Nagoya talks. The issue was instead, relegated to a side-event hosted by Greenpeace.

Article 26 of the Biosafety Protocol deals with the right of a Party to the Protocol to take into account socio-economic considerations arising from the impact of GMOs on biodiversity, especially with regard to the value of biodiversity to indigenous and local communities. The work under the Biosafety Protocol on socio economic considerations have, to date, been restricted mainly to capacity building of developing countries to assess socio-economic risks to biodiversity. A Co-ordination Meeting recommended to the Nagoya meeting that an expert group on socio-economic considerations be established with a view to developing criteria and guidance to assist Parties in taking socio-economic considerations into account. The European Union and several other countries opposed this rather constructive recommendation. Despite a valiant struggle by the Africa Group, the Parties, in a compromise move, decided to merely establish online forums and hold a workshop on socio-economic considerations.

The contentious issue of the documentation that should accompany bulk shipments of GMOs transported around the globe for the purposes of food, feed and processing, was postponed until the COP MOP to be held in 2014.

Further decisions were also taken on issues concerning public awareness, education and participation, capacity building, the roster of experts, monitoring and reporting and so forth. None of these are



forward looking or ground breaking. A Strategic Plan for the furtherance of the implementation of the Biosafety Protocol was also adopted. This work is concentrated in five key areas: capacity building, compliance and review, information sharing and outreach and cooperation.

The Biosafety Protocol has certainly been useful in providing Parties with an international reference point in crafting national biosafety regimes. However, to a large extent, this value at least in Africa is being superseded by regional initiatives to harmonise biosafety laws, an issue that the ACB has long since opposed. Parties certainly do have access to an international space for information exchange and the constructing of further rules and procedures to elaborate the Protocol in an attempt to ensure its effective implementation. However, there is a huge disconnect between the rather timid, insipid and potentially dated work of the Protocol and the huge biosafety challenges presented on the domestic level in many countries, like South Africa. Certainly, for NGOs like the ACB who work tirelessly on the immediacy of biosafety, the Biosafety Protocol, unfortunately, does not offer us much. Indeed, we are currently far more effective in shaping our own national and regional biosafety agendas than we are in lobbying governments at the international level.

Decisions taken by the Parties in Nagoya can be downloaded at www.cbd.int