



The First Meeting of the Parties to the Cartagena Protocol on Biosafety¹

Robert Falkner²

The Cartagena Protocol on Biosafety, the first international treaty dealing with trade in genetically modified organisms (GMOs)³, was adopted in January 2000 and entered into force in September 2003. As it stands, the agreement is not fully operational. Many contentious issues were unresolved in the final round of the biosafety negotiations, including rules on identification of GMOs in trade, capacity building for developing countries, compliance and enforcement mechanisms as well as rules on liability. These and other issues were left to be addressed by successive meetings of the parties over the next few years. At the first such meeting, held in early 2004 amid growing controversy over GMO trade, the parties took important steps towards implementation of the protocol. This profile briefly reviews the outcomes of the First Meeting of the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) serving as the Meeting of the Parties (MOP) to the Cartagena Protocol on Biosafety (COP/MOP-1), which took place from 23 to 27 February 2004 in Kuala Lumpur, Malaysia.

The Cartagena Protocol on Biosafety

The Cartagena Protocol is the result of nearly four years of, at times acrimonious, negotiations between GMO exporting and importing nations. What started as a relatively unnoticed set of meetings of scientific and regulatory experts in 1996 was soon catapulted into the limelight of the global trade-environment conflict, mainly due to the growing politicisation of agricultural biotechnology in the late 1990s [Falkner 2004]. Developing countries' fears about biotechnology and the European Union's precautionary stance on GMOs in agriculture provided the main impetus for creating stringent international rules that allow importing nations to scrutinise, and potentially reject, international GMO shipments. The small but powerful group of GMO exporters, comprising the United States, Canada, Argentina, Australia, Chile and Uruguay, opposed these rules but eventually accepted a compromise agreement in 2000 [Bail, Falkner and Marquard 2002].

¹ Text submitted to *Environmental Politics*.

² Lecturer, London School of Economics, and Associate Fellow, Sustainable Development Programme, Royal Institute of International Affairs (Email: r.falkner@lse.ac.uk).

³ While the Cartagena Protocol speaks of living modified organisms (LMOs), the more widely used term genetically modified organisms (GMOs) is used for the purpose of this discussion.

The Cartagena Protocol's key regulatory mechanism is that of advance informed agreement (AIA), which requires GMO exporters to provide detailed information on the organism in question and to seek the importing nation's prior approval before any transboundary movement takes place [Gupta 2001]. Importing nations are to carry out risk assessment before reaching a decision, and in doing so can invoke the precautionary principle. A simplified procedure applies to agricultural commodity shipments, which may need to be identified as containing GMOs, a provision that is to be specified by the parties to the agreement within two years of entry into force (Article 11). The protocol also contains provisions on capacity building and the creation of a Biosafety Clearing House (BCH), which serves as the central portal for information on national biosafety regulations, domestic GMO authorisations and GM content in shipments.

Between the adoption of the protocol in 2000 and its entry into force in 2003, an Intergovernmental Committee for the Cartagena Protocol (ICCP) met three times to prepare for the first meeting of the parties. While the ICCP could not take binding decisions on the development of the protocol, it nevertheless helped to get the Biosafety Clearing House off the ground and made recommendations on a large list of outstanding issues. When COP/MOP-1 met in February 2004, an ambitious work programme had thus been set. But whether the first meeting of the parties would succeed in reaching key decisions on operational and institutional aspects of the treaty was far from clear.

Handling, Transport, Packaging and Identification of GMOs

The question of how to identify GM content in agricultural commodity shipments was the final stumbling block that nearly derailed the biosafety talks had it not been for a last minute compromise reached in the final hours of the last negotiation round in January 2000. It therefore came as no surprise that the trade-related discussions on handling, transport, packaging and identification (HTPI) once again proved to be highly contentious at COP/MOP-1. Few expected the meeting in Kuala Lumpur to resolve the long list of HTPI issues that are essential to making the protocol fully operational. In the end, the parties discussed various options for implementing the protocol's documentation requirements (Article 18), decided to establish an open-ended technical expert group on identification requirements for agricultural commodities and adopted terms of reference for its work. COP/MOP-1 put in place interim solutions but many of the critical issues will have been decided by the next meeting of the parties.

As before, the documentation requirement for bulk commodity shipments pitted GMO exporters against potential importer nations. Two questions proved particularly controversial: what kind of information exporters have to supply, and in what form this information is to be provided. With regard to the former, the majority of the parties demanded full information including the names of GMOs concerned and their unique identifiers. The European Union and most developing countries view this as an important condition for carrying out risk assessment of GM commodity imports. In

contrast, industry groups and the delegations representing exporter interests were keen to keep the required information to a minimum, and argued for maintaining the existing requirement merely to state that shipments 'may contain' GMOs. This, they argued, would allow importing nations to consult relevant information on authorised GMOs in exporting nations supplied through the Biosafety Clearing House. On the question of how this information is to be provided, the GMO exporting nations rejected demands for the introduction of separate documentation in favour of the use of existing commercial invoices to indicate the presence of GM content in shipments.

Because most of the GMO exporting nations have not yet ratified the agreement, they were able only to express their reservations about HTPI proposals but not to influence the negotiations. Brazil, however, emerged as the main proponent of exporter views at COP/MOP-1, signalling a broader shift in perspective among many Latin American countries. In the end, the Kuala Lumpur meeting was unable to resolve these questions. As an interim solution, COP/MOP-1 decided to request the use of commercial invoices until the question of a stand alone document is finally decided, but merely "to urge" parties to ensure that the precise name and the transformation event code of the GMO, and possibly its unique identifier, be declared in accompanying documentation.

Compliance Mechanism

In principle, all parties to an international treaty should have an interest in strong compliance mechanisms, to ensure full implementation and to prevent free-riding by the few at the cost of the many. In practice, though, multilateral environmental agreements contain only 'soft' mechanisms that seek to facilitate implementation through creating transparency and providing assistance. The possibility of taking stronger, even punitive, measures remains the exception in MEAs. Environmental treaty-making has thus developed a practice of creating compliance mechanisms that are non-judicial, participatory and of a facilitative nature. These procedures aim at preventing disputes arising from instances of non-compliance and at clarifying the application of MEA rules and provisions.

At COP/MOP-1 in Kuala Lumpur, developing countries expressed concerns about proposed language that sought to strengthen the biosafety protocol's compliance mechanism. The most outspoken opposition to strong compliance rules came from the group of GMO-exporting nations, most of which, however, as non-parties were not able to influence the negotiations. The draft negotiation text prepared by ICCP was littered with unresolved issues in square brackets. Among them were the questions of who would be entitled to initiate the compliance procedure; in what capacity the members of the compliance body - the Compliance Committee - would be serving; what information they would be able to consider, and from whom; and what measures could be taken against non-compliant countries.

As the Kuala Lumpur meeting entered the negotiation phase on these sensitive issues, the European Union pushed for the adoption of strong provisions that included the right of all parties to trigger the compliance procedure and the possibility of taking

sanctions against persistently non-compliant parties. While some elements of the EU's proposal provoked strong objections - developing countries in particular were concerned that they might be faced with punitive measures where non-compliance results from a lack of capacity to implement - it nevertheless forced the talks into higher gear.

In the end, the parties agreed a set of decisions that provided for a stronger compliance mechanism than many had expected at the start of the meeting. They established a Compliance Committee, consisting of 15 government-nominated members reflecting a regional balance, who will serve "objectively and in a personal capacity". Any party can bring a case of non-compliance where it is itself concerned, or "which is affected or likely to be affected, with respect to another Party". The Compliance Committee shall consider relevant information by the parties but can also take into account information from other sources. In cases of non-compliance, it is COP/MOP that takes decisions on what measures are to be taken. These may include the provision of assistance, issuing a caution and publishing the case through the Biosafety Clearing House. On the highly contentious question of whether stronger measures can be invoked in cases of persistent non-compliance, the parties failed to reach a consensus and left the issue for COP/MOP-3 to decide.

Liability and Redress

A key demand by the Like-Minded Group of developing countries in the biosafety negotiations was the creation of a system for liability and redress. Developing countries wanted to ensure that clear rules existed on who can claim compensation from whom and for what types of damage GMOs may cause to the environment, human health and socio-economic interests. The demand was rejected by the developed nations, and Article 27 of the Cartagena Protocol instead declared that COP/MOP-1 is to "adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress", which is to be completed within four years. The scene was therefore set for an uncontroversial decision by COP/MOP-1 to decide on the procedural rules for elaborating a liability regime. The Kuala Lumpur meeting agreed terms of reference for an open-ended ad hoc working group of legal and technical experts that is to present its final report and proposed international rules and procedures by 2007.

However, the discussion in Kuala Lumpur revealed once again the gulf that persists between proponents and opponents of a liability regime. Countries representing biotechnology industry or export interests expressed concerns about, *inter alia*, the ability to define incidents of damage caused by GMOs, and clearly to establish those that are legally responsible for paying compensation; the threat of co-mingling and adventitious presence of GMOs in commodity shipments, which might give rise to liability claims; and how responsibility is to be allocated among the wide range of actors involved in international GM trade, including export and import authorities, biotechnology firms, commodity traders, seed companies and farmers.

Capacity Building and Other Issues

The need for capacity building in developing countries was widely recognised in the biosafety negotiations and remained uncontroversial during the preparations for COP/MOP-1. The Cartagena Protocol provides only a loose framework for international capacity-building efforts. Article 22 merely stipulates that “Parties shall cooperate in the development and/or strengthening of human resources and institutional capacities in biosafety” and refers to “existing global, regional, subregional and national institutions and organizations” as well as private sector involvement as vehicles for capacity-building.

The challenge for the parties is now to establish greater coherence among the flurry of capacity building activities that have been started over the last few years. International organisations such as the Global Environment Facility (GEF), bilateral donor agencies, regional networks, NGOs and industry groups have all offered their support to developing countries in building technical, scientific and regulatory capacity, causing concern about potential duplication, incoherence and even competition between these initiatives.

The three ICCP meetings between 2000 and 2002 made good progress on creating a framework for interim guidelines for internationally coordinated capacity building in biosafety. Based on the ICCP’s recommendations, COP/MOP-1 adopted interim guidelines on a Roster of Experts; decided on an action plan; and agreed a coordination mechanism, the functions of which will be discharged by the Executive Secretary.

The only time discussion on capacity building became more heated was when the group of African countries questioned the involvement of the private sector, arguing that industry ought to be seen as part of the problem, not part of the solution. Similarly hostile reactions to the involvement of industry groups in the negotiations and implementation of the treaty flared up on other occasions, too, but had little impact on the outcome of the Kuala Lumpur meeting. They served as a reminder, however, of just how politicised international biosafety governance has become.

Other decisions taken by COP/MOP-1 include:

- guidance on the financial mechanism for the protocol, which includes an obligation on non-parties to provide a clear political commitment towards becoming parties if they wish to receive financial support the GEF.
- modalities of operation of the Biosafety Clearing House, which was put on a permanent footing after its initial pilot phase was deemed a success.
- guidelines on monitoring and reporting by the parties, including a format for interim national reports on the Protocol’s implementation;
- other issues to facilitate implementation.

Conclusion

In the face of continued controversy over GMO regulating, the first meeting of the parties to the Cartagena Protocol was a significant step forward. The fact that most GMO exporting nations, including the United States, Canada and Argentina, have yet to ratify the agreement gave the existing parties an opportunity to take some strong decisions on implementing the biosafety treaty. Whether the Cartagena Protocol can provide a working system of biosafety governance is to be seen. Future meetings of the parties will have to add more components to the treaty – including more specific rules on GMO identification in trade, compliance and liability – in order to make it fully operational. But in taking further decisions over the next few years, the parties will have to balance the desire to strengthen the protocol with the need to encourage ratification by some of the world's largest agricultural trading nations.

References

Bail, C., R. Falkner and H. Marquard, eds. (2002). *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development?* London, RIIA/Earthscan.

Falkner, R. (2004). "Trading Food: The Politics of Genetically Modified Organisms." In: *Trade Politics*. 2nd edition. Ed. by B. Hocking and S. McGuire. London, Routledge: 249-260.

Gupta, A. (2001). "Advance Informed Agreement: A Shared Basis for Governing Trade in Genetically Modified Organisms?" *Indiana Journal of Global Legal Studies* 9(1): 265-81.