Brazil, New Zealand block decision on documentation of GMOs

Montreal, 4 June 2005 (Lim Li Ching and Lim Li Lin) – Negotiations under the Cartagena Protocol on Biosafety collapsed on the issue of documentation requirements for bulk shipments of genetically engineered commodities, after five days of intense and controversial talks. Two countries – Brazil and New Zealand – held the talks hostage as they repeatedly blocked consensus.

The Second Meeting of the Parties (MOP 2) to the Cartagena Protocol was held in Montreal on 30 May-3 June. The meeting was supposed to take a final decision on the detailed requirements for how to identify and document shipments of genetically engineered commodities. This issue was the main work of this meeting.

These commodities are known in the Biosafety Protocol as "living modified organisms that are intended for direct use as food or feed, or for processing" (LMO-FFPs). Because of the intransigence of Brazil and New Zealand, both of which are Parties to the Protocol, no decision on the issue was adopted at the meeting.

The Cartagena Protocol is an international law that regulates the transboundary movement of genetically engineered organisms. It entered into force on 11 September 2003.

Article 18.2(a) of the Protocol deals with the detailed requirements in the documentation that should accompany shipments of LMO-FFPs. This same topic had been among the most contentious issues during negotiations for establishing the Cartagena Protocol and was in fact the final issue to be decided at the meeting that adopted the Protocol in Montreal in 2000.

The disagreements on it had then almost caused the negotiations to break down when major exporter countries tried to exclude these commodities altogether. These countries and their allies – the US, Canada, Australia, Argentina, Uruguay and Chile – called themselves the Miami Group. These countries are not, as yet, Parties to the Protocol.

As a compromise, in order to obtain agreement on the whole Protocol text, the other countries were forced to accept that documentation accompanying LMO-FFPs must clearly identify that the shipment "may contain" LMOs and are not intended for intentional introduction into the environment.

MOP 2 should have taken a decision on the detailed requirements for this purpose, as Article 18.2(a) had a mandate to do so no later than two years after the Protocol's entry into force (i.e. by September 2005) and this was the last MOP that could have adopted such a decision. Already, the meeting of the Open-Ended Technical Expert Group that had met in March had ended without agreement, and the draft decision that was forwarded to MOP 2 was in fact a controversial revised Chair's text on which there was no consensus.

The fact that no decision was adopted at MOP 2 leaves open the question as to whether the mandate of Article 18.2(a) to take a final decision will expire. No meeting will be held before September 2005, when the mandate lapses. However, Brazil, which would be the next host of the third meeting of the parties (MOP 3) in March 2006, clearly indicated that it was willing to continue discussions on this issue at MOP 3. Other countries also made similar references to continuing negotiations on this issue at MOP 3.

The lack of adoption of a decision also leaves open the question as to which version of the draft text would be the basis of the negotiations at MOP 3. Up to eleven versions of various texts pertaining to the decision were on the table. Usually, in such situations, the basis for negotiations reverts back to the last agreed text by all Parties.

The delegate from Ethiopia, in his closing statement, invited all delegates from developing countries in the meantime to design through their national legislation strict requirements for the documentation accompanying shipments of LMO-FFPs, instead of waiting till MOP 3 for a further decision to be taken on the issue.

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. These steps would help to ensure that the burden of assessing the LMO content of a shipment is placed on the exporter, not on the importer, many of which are developing countries that lack the necessary resources and regulatory and monitoring capacities.

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. 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.

In addition, New Zealand was adamant that any references to thresholds for adventitious (accidental) or technically unavoidable presence of LMOs should be deleted. This despite the relevant paragraph in the draft text being limited to one that "notes" that such thresholds may be adopted at a national level.

New Zealand could however not give any substantive reason for this objection, apart from insisting that the trigger for documentation requirements should not be the unintentional or adventitious presence of LMOs, but should be limited to the intended (and not actual) content of the shipment. So much so that the exasperated Co-Chair of the Contact Group said, "I will continue to push you until I get a good explanation, which I haven't heard so far". Given the lack of explanation from New Zealand, there were suspicions that this was only a tactic to block the negotiations, leading another Party to ask, "Why should one Party prevent the COP-MOP from adopting a decision?"

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 Co-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.

Brazil and New Zealand are Parties to the Biosafety Protocol and hence were very active during the negotiations, particularly during the Contact Group discussions, when GMO producers and exporters such as the United States, Canada, Australia and Argentina could not actively participate in the discussions as they are non-Parties.

Many delegates were perplexed by New Zealand's stance as it does not commercially produce or export GMOs. This led them to question New Zealand's ideological free trade stance, apparently without due regard for environmental or human health concerns, and to ask whose interest this position benefited. The two main negotiators from New Zealand were officials from the Ministry of Foreign Affairs and Trade.

Brazil was "once upon a time… a member of the Like-Minded Group of Developing Countries" during the Protocol negotiations, the Ethiopian delegate nostalgically recalled. However, domestic developments including the approval of commercialized plantings of genetically engineered soya, have clearly led it to break ranks with the Group, which had fought so hard to protect the environment, health and socio-economic interests of developing countries in the face of intense pressure from industry and the main exporters and producers of genetically engineered organisms.

The Ethiopian delegate asked if this was “a rift that we have to take into future consideration when we deal with Brazil” and whether better protection for developing countries will continue to be “undermined by Brazil”.

Because the Contact Group was unable to come to any consensus on the draft decision, the last text was sent to the larger Working Group on the last day of the meeting, with many square brackets.

NGOs attending the meeting, outraged by the behaviour of Brazil and New Zealand in stalling the negotiations, carried out a silent protest outside the Working Group meeting room, holding up placards with the words “Shame New Zealand, Shame Brazil”, reflecting the mood of most of the delegates. A Brazilian NGO representative, in a closing statement, stressed that “the delegation from Brazil does not represent the real interests of the Brazilian people”.

During the Working Group discussion, the divisions persisted, with Brazil even adding that with respect to the types of document that could accompany shipments of LMO-FFPs, reference to a stand-alone document, a separate annex to a commercial invoice and documentation as required by domestic regulatory framework, should all be now bracketed. This would leave only the options of a commercial invoice and other documents required or utilized by existing documentation systems.

The relevant paragraph had actually been previously agreed to in the Contact Group discussions, and reflected the majority of countries’ views, which particularly favour a stand alone document, so that the competent authority responsible for biosafety can more easily gain access to and have oversight over the document.

In an attempt to bridge the divide, the Swiss delegation then introduced a non-paper which was a text that sought to balance the competing interests. The Swiss proposed that the non-paper should be adopted in its entirety without any amendments. Despite reservations from Brazil and New Zealand, this was eventually taken up by the Chair of the Working Group and forwarded to the Plenary as a Chair’s text.

During the final Plenary, Brazil and New Zealand again rejected the Chair’s text outright. Many other Parties and regional groupings, including the Africa Group and the EU, were willing to accept the compromise as a decision to be adopted by MOP 2 even though it was well below what they had hoped to achieve in this meeting.

To break this deadlock, the Asia and Pacific Group suggested that the MOP revert back to an earlier draft of the decision which better reflected their interests. That particular text would have required exporters to provide a clear statement that the LMOs have been approved in the Party of import, and to specify what LMOs have been used to constitute the mixture.

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 strongly to this proposal, and the decision on the rules of procedure for the meetings of the Compliance Committee was adopted by MOP 2 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.

But, in actual fact, the rules of procedure allow decisions of subsidiary bodies to be taken by a simple majority vote, and the Compliance Committee can be considered to be such a subsidiary body.

A Friends of the President group had been set up to come to agreement on the decision on the rules of procedure for the meetings of the Compliance Committee. The contentious issues were whether or not voting could take place in the event of no consensus, whether or not the Compliance Committee can include in its agenda “other matters related thereto”, whether the Compliance Committee should meet in open or closed sessions, and the issue of conflict of interest by members of the Compliance Committee.

New Zealand was adamantly insisting on certain positions without providing adequate or logical reasoning for their position. New Zealand’s stance reportedly mirrored exactly the position of the US State Department, in letters sent to various members of the Compliance Committee.

Other decisions were adopted by MOP 2, including on operations and activities of the Biosafety Clearing House; notification; other scientific and technical issues; documentation requirements for LMOs for contained use, intentional introduction into the environment, and for any other LMOs within the Protocol’s scope; capacity-building; risk assessment and risk management; and socio-economic considerations.

MOP 2 also noted the report of the first meeting of the Open-ended Ad Hoc Working Group on Liability and Redress and its conclusions. The Working Group had met for three days prior to MOP 2, from 25-27 May 2005.

At the first Meeting of the Parties (MOP 1) in Kuala Lumpur in 2004, a clear process to develop an international liability and redress regime for GMOs was adopted. The decision from MOP 1 stipulates that five working group meetings will be held over three years, in order to enable the MOP to fulfill the requirements of Article 27 of the Biosafety Protocol, including completing its mandate by 2008.

At the Working Group meeting in Montreal, the options for the elements of a liability regime were further elaborated. During discussions on the choice of instrument, New

Zealand suggested a zero option or no liability regime. One of the five options already on the table was for a non-binding instrument, but New Zealand successfully added a sixth option of no instrument. This stance was so out of step with the seriousness accorded by other countries to a liability regime, and to the work that the international community is embarking on, that it provoked widespread laughter in the room, given the incredulous suggestion by New Zealand that the three-year work programme of the Working Group to develop an international liability regime should effectively aim at agreeing no liability rules at all.

Nonetheless, and more importantly, inter-sessional work will be carried out between now and the Working Group's next meeting in February 2006. Countries and other stakeholders were invited to submit draft text to the Secretariat three months before the next meeting. The Co-Chairs of the Working Group, from the Netherlands and Colombia, will meet before then to develop a draft text on liability and redress, based on the submissions received.

The biosafety talks were also overshadowed by the Canadian Government's refusal or delay in issuing visas to a number of delegates from developing countries who had intended to participate in the meetings, including some government representatives from Ethiopia (the chair of the Africa Group) and Iran, and civil society representatives from India and Togo. The Canadian delegation and officials from capital met with some delegates from Africa to discuss the issue, and gave their promise that such incidences would not happen again. +