

THE BIOSAFETY PROTOCOL: CARTAGENA AND BEYOND

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INTRODUCTION

The Biosafety Protocol negotiation conducted under the 1992 Convention on Biodiversity is one important arena in which the debate over the future of trade in genetically modified organisms (GMOs) is taking place. Even though the United States is not a party to the Biodiversity Convention, and therefore cannot become a party to the Biosafety Protocol, the United States has a substantial interest in the proceedings because this multilateral agreement would regulate trade in GMOs, a market in which the United States leads the world. American exporters of agricultural commodities will have to conform to the import requirements of its trading partners who become parties to the protocol. Therefore it has been important to U.S. negotiators to protect the environment, thus addressing the concerns of trading partners, without subjecting American exporters to unnecessary trade restrictions. From the perspective of the U.S. government, the failure to reach agreement at Cartagena was preferable to accepting the final proposal put forward in the final moments of the session. That proposal would have imposed unwarranted restrictions on trade through unworkable procedures.

The discussion here will highlight several reasons why negotiations at Cartagena stalled and will explain the U.S. position on key issues. An Afterword takes another look at the Cartagena negotiations from the perspective of the Biosafety Protocol adopted at Montreal in January 2000.

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I HISTORICAL BACKGROUND

The seeds of the negotiations on a biosafety protocol were planted in the Biodiversity Convention adopted in Rio de Janeiro in 1992. The language of the treaty, adopted after much debate, strongly prejudiced deliberations regarding the need for a protocol and made negotiations a virtual certainty.¹ The language of the agreement states:

The parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.²

Following entry into force of the Biodiversity Convention, a decision could have been made by the parties to “consider the need for” and then to reject a protocol negotiation. The U.S. position, prior to the decision by the parties to the convention to negotiate a protocol, was that pursuit of a multilateral environmental agreement setting up a protocol to regulate international trade in GMOs was unwise and unnecessary. Ten years of experience with GMOs had not produced a reason to believe that these products present a significant threat to the environment. In the absence of evidence of environmental danger presented by GMOs, the United States believed that it would be an unwise use of the organizational and monetary capital of the Biodiversity Convention immediately to pursue agreement on an international biosafety protocol. It seemed reasonable that issues other than biosafety should receive priority. For example, if conservation of biodiversity is the primary goal, would not invasive species, where severe damage to the environment is unquestioned, be of more concern than GMOs? At several meetings prior to the Second Conference of the Parties in Jakarta in 1995, the United States suggested that negotiations were not warranted—or that, at the least, a careful evaluation of its necessity should be undertaken. Debates over the wisdom and mandate for protocol negotiations did take place at organizational meetings of the Biodiversity Convention, prior to its entry into force, in Geneva and in Nairobi; at the first Conference of the Parties in Nassau,

¹ See Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

² *Id.* art. 19.3.

Bahamas, in 1994; and at an experts' meeting in Madrid, which followed the meeting in the Bahamas.

Nevertheless, representatives of parties to the convention met in Jakarta in 1995 to develop a framework for negotiations, to set a timetable and to identify the elements to be negotiated. The key issue to emerge at the Jakarta meeting was the wisdom of an international system of advance informed agreements (AIA) for agricultural products. Such a system could have required exporters to obtain consent from an importing country for agricultural goods on a shipment-by-shipment basis. The United States worried that the AIA could place severe restrictions on food trade without providing importing countries any ability to take steps to protect their environment. The dispute over the AIA continued to hang over the negotiations for the next three years, including the meeting in Cartagena, where, even after working steadily for many days and nights, negotiators were unable to agree on a text embodying an AIA for the proposed protocol. The AIA debate was central to the inability to conclude an agreement at Cartagena.

II

WHY NEGOTIATIONS STALLED

Why did the negotiations at Cartagena lead to a stalemate? The short answer is that too many countries had fundamentally different views on key issues. Wide gaps existed on all major issues. The expectation that Cartagena would be the final round of negotiations proved to be simply premature. Early sessions leading up to Cartagena had failed to get beyond posturing over the most basic issues. Governments had announced positions, but had not fully examined their implications. They had not engaged in trying to bridge key differences on such major issues as the AIA, requirements for labeling and documentation, the treatment of nonparties to the agreement, the scope of the protocol (whether pharmaceuticals and laboratory reagents would be covered), and the relationship of the protocol to other international agreements, including those under the World Trade Organization (WTO). Additionally, minor but important issues, like the general principles of risk assessment and procedures for risk management and emergency situations, had not been resolved. In sum, no basic issues had been resolved prior to the arrival of delegates in Cartagena.

In addition, the negotiation of a biosafety protocol with potential impacts on trade, agriculture, food safety, and the science sector, as well as on the environment, had to involve more than the representatives of biodiversity or environmental interests that tended to dominate the early stages of the negotiations, ultimately requiring wide-ranging coordination across governmental agencies. Such coordination had not been completely achieved by the time of the Cartagena meeting.

From a strategic perspective, the most important development in the negotiations was the formation of the “Miami group” (launched at a meeting in Miami in the summer of 1998), which included Argentina, Australia, Canada, Chile, the United States, and Uruguay. These six developed and developing countries emerged as a unified bloc on key provisions of the protocol, adopting a position reflecting the point of view of agricultural exporters and diverging from the perspective of other participating governments. In the making of multilateral environmental agreements, consensus is usually required to conclude an agreement. At Cartagena, the negotiations had reached the point where consensus simply was not possible because the Miami group would not cede its economic interests to an agreement that was unworkable. At the same time, the Miami group had its own vision of a protocol to control risks to biodiversity and to sustain agricultural trade.

III ISSUES IN DISPUTE

Talks became deadlocked over the key issue of the design of the AIA system. The unified position of the Miami group meant that other countries would finally have to take into account the effect that the proposed AIA would have on agricultural exporters. As noted earlier, under the primary proposal, still on the table at Cartagena, each shipment of agricultural commodities—whether intended for use as food or feed or in further processing—could have been subjected to the AIA’s permit system before it could be traded. The Miami group’s position with respect to the AIA reflected the primary goal of the convention and of the protocol negotiation, namely, protection of biodiversity. The Miami group believed that the AIA should focus on those GMOs that were intended for introduction into the environment, e.g., seeds for planting or fish for release, rather than

on foodstuffs intended for processing. The Miami group considered this focused approach to be more workable than a system to regulate all GMOs and that it would actually help an importing country to focus on its biodiversity concerns. Throughout the negotiations, the United States resisted subjecting all trade in agricultural products to the AIA system.

As part of their opposition to a comprehensive AIA system, the United States and others argued that governments have the ability to make decisions domestically regarding imports of any GMOs; a multilateral agreement establishing an all-encompassing international AIA regulatory regime was not wise, workable, or necessary. Any system put in place through a multilateral agreement would be very difficult to alter. Other countries defended the comprehensive approach by pointing to the inability or incapacity of some developing countries to manage trade and to control the import of genetically modified food and seeds.

In response, the Miami group argued that the protocol would do little to change a country's ability to police porous borders. They questioned whether a comprehensive multilateral agreement was in fact the best solution, even from the point of view of those developing countries. The Miami group pointed out that, in time, there was a significant likelihood that developing countries would adopt biotechnology and become growers and exporters of genetically modified seeds and other foodstuffs, with a corresponding shift in interests with respect to the AIA system. Specifically, developing countries would then have to assume the onerous exporter obligations that had been proposed under the comprehensive AIA. In the meantime, the human and financial resources required to manage a comprehensive AIA system could have done great harm to a nation's ability actually to obtain food. By the end of the negotiations, the comprehensive version of the AIA was no longer a realistic option. However, in recognition of the desire of some countries to address the issue of GMOs more broadly, the Miami group proposed requirements for broad-based information sharing on genetically modified products, including those intended for food and for processing.

Negotiations were also deadlocked over a second and related issue, namely, the standards with reference to which a government should be allowed to block imports. This issue was played out in the debate over whether the protocol was intended

to change rights and obligations under the WTO, including the requirement of a science-based rationale for restricting trade. In early negotiating sessions, all negotiators stated that they had no intention of changing existing international rights and obligations. The Miami group and several other countries favored a recording of that intention in a “savings clause,” to ensure consistency with the WTO’s science-based standard. The European Union balked at the inclusion of such a clause and, in addition, proposed adoption of language enshrining a “precautionary principle” which would permit a country to take action, including restricting trade, even in the absence of a scientifically based rationale (such actions would be contrary to obligations under the WTO rules). The United States and other members of the Miami group objected to this latter language, finding in it evidence of the intent of some countries to obviate WTO rules in the case of GMOs.

A third issue where divergence of opinion prevented agreement was the shipping documentation requirements for genetically modified foodstuffs. The plan insisted upon by the European Union would have required the identification of genetically modified grains in shipments of commingled agricultural commodities. Such identification, if at all workable, would have been costly and would have raised significant trade issues. The Miami group opposed these requirements, which closely mirrored the European Union’s two-year-old requirements for consumer labeling that have yet to be implemented.

CONCLUSION

The United States’ position with regard to the stalled negotiations in Cartagena was that no agreement is preferable to a bad agreement. It is this author’s view that a reasonable agreement, capable of being implemented and actually helpful in protecting biodiversity, was possible in Cartagena. Such an agreement would have included an AIA for seeds and other products to be introduced into the environment, would not have changed WTO rules for science-based import decisions, and would have included a commitment by all parties to information sharing, particularly with regard to product approval.

AFTERWORD

Almost a year after Cartagena, negotiators traveled to Montreal to attempt, once again, to complete work on the protocol. From January 21 through January 28, 2000, governments met to try to find common ground. In the final hours of the final day of negotiations, an agreement was reached. All sides proclaimed that they had achieved their objectives. In Montreal, most negotiators were satisfied to have completed the process with an outcome that was regarded as a reasonable compromise. In the compromise agreement the Miami group, including the United States, accomplished a significant number of its objectives on key issues. The AIA was not applied to foodstuffs or commodities. A clearinghouse mechanism was established to share information on product approval, risk assessment, and domestic regulatory frameworks. Negotiators agreed on a "savings clause," clarifying the relationship between the protocol and the WTO by stating that the Biosafety Protocol does not change a nation's rights and obligations under the WTO.

Language on the role of precaution in decision-making was also adopted. Further complicated by translation of the agreement into different languages, the language on the role of precaution has been interpreted in a number of ways by different commentators, including those who would like to read some aspect of the precautionary principle into it. However, the agreement requires all decisions under the protocol to be based on a scientific risk assessment and appears crafted with the intent not to allow decisions that would be contrary to a country's WTO obligations. Regardless, important differences of interpretation remain which may affect countries' decisions whether to sign the agreement. Consideration of detailed requirements for shipping documentation of commodities was put off for several years to allow for market rather than government-mandated solutions to develop.

The product that ultimately emerged from Montreal was far superior to anything seriously considered in Cartagena. It remains to be seen whether the protocol will significantly alter the short-term GMO debate which is so deeply affected by European public opinion. Right now, the market is speaking louder than any rules-based approach, as importers and manufacturers try to respond to consumer preferences. The Biosafety Protocol does not, however, reinforce the current situation. Rather, it suggests

that measures such as an information clearinghouse and a limited AIA will ultimately create a framework for effectively addressing safe trade in GMOs. This framework could actually work over time to raise confidence in the GMO technology and to begin to persuade government officials and consumers, even in Europe, of the safety of GMO products.