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Kenya's Approach To Liability And Redress

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African countries have been called upon by the African Union to equip themselves with the necessary human and institutional capacities to deal with Biosafety issues within the framework of the implementation of the Cartagena Protocol on Biosafety.[1]

The Member States of the African Union were also urged at the last meeting that in abiding by the provisions of the Cartagena Protocol, to use the African Model Law in Biosafety prepared by the AU Commission as a basis for drafting their national legal instruments in Biosafety, taking into account their national peculiarities, in order to create an harmonized Africa-wide space and system in Biosafety for the regulation of Genetically Modified Organisms movement, transportation and importation in Africa.

Kenya ratified the Protocol in January 2000 and the Protocol came into force on 11 September, 2003.

Under the Protocol process however the negotiations for an effective system of liability and redress with regards to GMOs and their products is still a subject of debate.

This couples with issues of labeling and traceability and the uncertainty of these matters seems to support strongly the precautionary approach in

- Regulating the transit of GMOs
- Restriction of GMOs to contained use in laboratories
- Subjecting all GMO for use in pharmaceuticals to Advance Informed Agreement(AIA)

[1] Decision on the Report of the Interim Chairperson on the Africa-Wide capacity Building in Biosafety.(Doc.EX/CL/31(III))

The most puzzling thing about the debate for strict liability regime is that either side has very strong credible arguments for their case. There are those who believe that GMO are absolutely harmless and that they should be taken as safe unless proved otherwise. (The Substantial Equivalence test). Then there are those who have ratified the Cartagena Protocol and therefore support the Precautionary Principle which considers a GMO crop or product as risky unless it is proved to be safe.

Kenya supports the precautionary principle in its environmental protection and sustainable development. The principle in accordance with the Kenyan law is that:

> "Where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[2]

The need to protect human health and the environment from the possible adverse effects of products of modern biotechnology and the great potential that modern biotechnology has in the promotion of human-well being in food, agriculture and health care are the two diverse sides of the same coin. Nobody is clear as of now how to address these two aspects of modern biotechnology. The confusion therefore must be addressed by all stakeholders so that the policy makers as well as the law makers will have a foot to stand on once they make their decision which either way could have far wider repercussions on the survival of the nation.

The introduction on the Protocol states that the Cartagena Protocol creates an enabling environment for the environmentally sound application of biotechnology, making it possible to derive maximum benefit from the potential that biotechnology has to offer, while minimizing the possible risks to the environment and to human health. This indeed should be our guiding star.

[2] The Environmental Management and Co-ordination Act, 1999.

The Objective of the Protocol is as follows:

> "In accordance with the precautionary approach in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements."

In Applying the precautionary principle the protocol first and foremost advocates for the application of the Advance Informed Agreement (AIA). This enables a country to allow the importation of a GMO/LMO only after it has obtained all the necessary information about it and carried out a risk assessment to evaluate the likelihood of harm to human health, to agricultural systems and to the environment as well. This may take into account the socio-economic impacts as well. A risk assessment has therefore to be undertaken before the green light to import is given by the country of import. Silence means permission has not been granted. Lack of capacity for risk assessment should be used as deterrent against such importation. Silence may connote lack of capacity or systems for testing. This then would be the strict application of the precautionary principle as espoused by the existing Kenyan law.

This strict application to the precautionary principle would not apply to GMOs meant for contained use.

The Protocol in its preamble recognizes the limited capabilities of many countries, particularly developing countries, to cope with the nature and scale of known and potential risks associated with living modified organisms and for this reason the polluter pay principle comes in handy.

The Kenyan law stipulates that:

> "..the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this act or any other applicable law."
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> "pollution means any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to cause contravention of any condition, limitation, or restriction which is subject to a licence under this act."

The adverse effect of LMOs may not be considered as pollution in the strict application of the above definition but the concept is still applicable when it comes to the introduction of LMOs into the environment although meant for beneficial use but due to their unstable chemical properties they may turn out to be harmful. Who pays for the consequences? The Kenyan law seems to favour the producer or manufacturer of such LMOs and this may require ensuring in our laws that the manufacturer or exporter of such LMO is adequately insured to cover such eventualities.

Within two years from now the Parties to the Protocol must decide on the details of labeling that may be required for LMOs.[3] It is important for the public to be informed with regards to the use and application of GMOs and leave the choice to the user. There are however those who fear that LMOs have received such bad publicity that labeling them may impact trading of such commodities negatively. The public are however not foolish and while the need to know everything may not be a human Right nevertheless concealing information in order to influence the public choice of a product is immoral and unethical.

[3] Cartagena Protocol on Biosafety article 18.2 (a)

The Standards act expects certain high quality standards to be kept and when it comes to food such standards should ensure that what is put out for human consumption is not poisonous or dangerous to their health. If it is then such information should be provided on the package so that a person may make a choice as to the risk they maybe taking.

Who is liable to pay for the damages caused by a LMO. The answer seems to be obvious that the developer of such an LMO, the importer or the one who releases it for public use should become liable to pay compensation and once this is made clear, as well as information about the product exposed to the public or the environment then the debate on LMOs would be a thing of the past.

Article 27 provides that:

> "the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analyzing and taking due account of the ongoing processes in international law on these matters, and shall endevour to complete this process within four years."

As we go into negotiation in February 2004, in Kenya there is no doubt in our policy which way we should be going as our laws have paved the way. In order to come up with a clear liability and redress regime then we must ensure that the following are done:

1. The Precautionary principle measures as practically seen in a simple AIA process,
2. The for public participation supported by adequate information as too benefits and accompanying risks if any
3. The polluter pays concept enshrined in such agreements
4. Adequacy of insurance cover in case of reparation or compensation.

THANK YOU