

Liability and redress in the Biosafety Protocol

When things go wrong, who covers the damage and who is responsible for redress and recall? If a GMO harms the environment or a farmer's livelihood, or human health, who should pay compensation and be responsible for the legal consequences?

Article 27 of the Biosafety Protocol commits to "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" and endeavours "to complete this process in four years". The ICCP is for the first time addressing this issue which has been highly contentious during previous Protocol negotiations. Because there is no comprehensive liability regime for GMOs delegates must address the problem with reference to existing national, regional and international liability legislation.

Many countries from Africa, Latin America and Asia are concerned about the potential for irreversible damage to their environment and risks to the health of their citizens from GMOs which are produced and developed outside their control and which have never been tested in their specific environments. Countries are also concerned about economic damage to their export markets from contamination by GMOs since many of these markets have not approved GMO imports. Disasters such as the chemical explosion in Bhopal, India demonstrate that liability rules need to be established from the outset and, indeed, the majority of EU governments now recognise the need for liability rules for GMOs.

Learning from mistakes

A cursory overview of problems with GMOs indicates the urgent need for national and international liability laws. Insurance companies maintain their policy of no coverage for GMOs, because they feel unable to sufficiently assess the risks involved. This is based not only on lack of experience but also on the lack of sound scientific methodology for assessing environmental and health risks.

Some initial problems have become apparent over the past years:

- In Mexico strains of genetically modified crops are contaminating locally adapted maize varieties, even though cultivation of GMO maize is prohibited in this country. Mexico is the Centre of origin and diversity of maize -- one of the world's most important staple crops. Contamination by these new Bt genes poses a severe threat to the diversity and the genetic integrity of the world's most important source of maize varieties and puts future maize plant breeding and future food security at risk.
- In Brazil, where planting of genetically modified soybeans is illegal, massive smuggling of Monsanto's Roundup-Ready soybeans into the country has raised huge problems for farmers and exporters, who serve the growing export market of non-GMO soybean products. Monsanto aggressively promotes the use of RR-beans and its accompanying pesticide Roundup, but refuses any liability for the spread of this illegal GMO. The costs of these illegal operations are borne by Brazilian Farmers and the Brazilian public.
- In Europe, during recent planting seasons, unapproved genetically modified strains of maize and rape seeds have been detected in conventional seed stocks. Only in some cases were the companies responsible held liable.

- In Canada genetically modified rape seed (canola) has been in wide use for three years. Uncontrolled spread of the varieties and recombination in the fields has led to multiple herbicide resistant plants which reseed the next year. This poses a serious problem to both conventional and organic farmers. The companies responsible for this new emerging weed are not held liable to farmers for the costs of their control. Worse still, farmers, who face problems with GMO contamination also face legal prosecution by Monsanto for not paying royalties on these patent protected GMO traits.

The Starlink Experience– a proof of the need for clear liability rules

Probably the most interesting example regarding liability and redress is the case of genetically modified "Starlink" corn owned by Aventis CropScience in the USA. The US Environmental Protection Agency approved StarLink only for animal feed, not for human ingestion, because the Bt (*Bacillus Thuringiensis*) Cry9C gene it contained was considered to potentially trigger allergic reactions in consumers.

In September 2000 results of tests (initiated by a small NGO – not by the US food authorities or company) showed that taco shells, a common corn food product, tested positive for traces of 'StarLink'. This revelation, followed by further testing of more food products, created chaos in the US food and grain industry and hurt American farm exports. More than three hundred products had to be recalled from US grocery stores and restaurants because of StarLink contamination. Several companies temporarily halted milling operations after StarLink was found in their facilities and even cereal giant, Kellogg's, was forced to shut down production at one of its plants.

Even though StarLink was grown on less than one percent of US maize fields, this GMO was found to have contaminated more than 10% of that year's corn harvest due to co-mingling of the commodity in storage and production. Aventis had to start huge buy-back operations. Testing programmes had to be established at all levels of the production chain. Starlink was also found in seeds. The US Department of Agriculture itself bought seeds worth about \$20 million from small companies whose conventional seed stock had been contaminated by Starlink.

While these domestic efforts to contain the spread of Starlink were taking place, corn which had the potential to be contaminated with Starlink was still being exported to many countries with no appropriate, additional checks and with the full knowledge of US authorities.. When Starlink turned up in Japan, one of the most important markets for US corn, the Japanese government immediately implementing testing procedures for Starlink in all imports, as did Canada. However other countries, such as Mexico, did not have the technology or same protective measures.

The recall of StarLink GE maize cost companies all along the food chain – from grain elevators and food processors to grocery stores – hundreds of millions of US dollars.

The full extent to which Aventis will be held responsible for the damage that occurred, still remains to be decided by US lawyers and courts. Consumers who believed they suffered allergic reactions to Starlink have filed lawsuits against major food companies. Commodity companies such as Cargill and ADM intend to hold Aventis responsible and pay for their StarLink-related expenses. Farmers in some states – backed by state legal officials – are bringing claims for lost profits against Aventis.

In March 2002, a federal judge ruled in favour of a US \$9 million class action lawsuit on behalf of consumers against several major food companies that sold Starlink contaminated food products.

Further legal wrangling is expected over responsibility for unauthorised uses of StarLink maize. Government officials say Aventis failed to ensure the restrictions which were part of the approval to grow this modified maize, such as field buffers to prevent cross pollination, were in place. It is not clear how costs will be divided between Aventis, the seed companies who licensed the StarLink technology and insurers involved.

Aventis has since decided to sell its beleaguered Crop Science division to Bayer but the issues of liability and costs are still unresolved. Estimates of the total cost range from hundreds of millions of dollars to one billion US Dollars. It is important to note that the recall was based on a precautionary approach and did not specifically involve any proven damage to human health or the environment. In comparison to a more grave GMO contamination scenario, the case of Starlink contamination can be viewed as a comparatively minor case.

Hence important questions arise:

- What would have happened in a case like this, if immediate damage to human health or the environment had been involved?
- What if the company responsible for the contamination is not as wealthy as Aventis, one of the worlds leading agro-chemical multinationals?
- Why did Aventis and the US government tolerate exports of potentially dangerous goods, while they were recalling them within the USA?
- Why did Aventis not compensate companies, farmers and consumers outside the USA?
- What would have been the reaction to this case if the contamination had originated in a smaller country with no comparable science, technology, or logistical infrastructure? What would have been the implications for farmers and their products in the world market?

What can liability rules cover?

The types of damage that need to be considered under a civil liability regime include: loss of life or personal injury; loss of or damage to property; and loss of profit. In addition adverse effects to commonly held goods such as the environment, human health and biodiversity must be considered and regulated.

Industry claims that liability should only apply for defective products and that this should be dealt with under national rather than international laws. The developing world, on the other hand, firmly believes that international rules are necessary.

Who should be liable?

The main discussions have focussed on whether, and to what extent, responsibility should lie with the exporting country or importing country. Many countries in Asia, Africa and Latin America, such as India, Colombia and Ethiopia expect that the country which exports the GMOs should take responsibility for any harm. They also maintain that the Protocol should allocate responsibility to the companies developing, producing and exporting the GMOs.

Greenpeace demands:

- An international liability regime with comprehensive rules on corporate liability as well as liability of exporting countries
- These rules must cover all damage resulting from GMOs: from export or import, development, handling or use of GMOs and products derived from GMOs. The standard of liability should be absolute.
- Damage must at least cover loss of life, personal injury, and adverse effects to both private property and the common environment. It must also cover all costs of restoring damage to the environment, loss of, or damage to, property, and loss of profit.
- A private organisation or an association with a legal interest in the matter should explicitly have the right to bring claims on damage resulting from GMOs and claim compensation.
- Exporting countries and companies must be liable for the products they export and the proprietors of GMOs have to guarantee their liability through insurance.
- There should be no exemptions or financial ceilings for liability for activities involving GMOs nor should there be a time limit, since many risks associated with GMOs are of a long term nature.

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