

The Industry 'Compact'

by Duncan Currie, Greenpeace International

The genetic engineering industry has a voluntary arrangement, a 'Compact' whereby the six GE-producing companies (Monsanto, DuPont/Pioneer, Syngenta, Dow AgroSciences, Bayer, BASF) would in theory provide compensation for cases of significant damage to biological diversity, on terms provided in the Compact. This is in addition to and separate from the recently concluded Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. There are a number of objections to this Compact.

Firstly, it is unacceptable for compensation for damage to biodiversity to be dependent on a voluntary private scheme. This is contrary to fundamental principles of good governance and transparency. Such privatisation of obligations to correct and compensate for damage biodiversity is unacceptable.

Secondly, it should be noted that the proposed Compact does not in any way address traditional damage or other damage other than damage to biological diversity as defined in the Compact. So many incidents of damage, such as to farmers alone, will not be covered.

Thirdly, in practice, the Compact would exclude virtually all eventual claims. Its unacceptably high standard of proof, its failure to properly incorporate the precautionary and ecosystem approaches, its heavy reliance on a baseline, and its list of exemptions, including risks which have been assessed, misuse of an LMO, and risks which have been authorised or permitted by States, as well as Act of God, means that it is extremely unlikely to yield any actual compensation except in the most extreme and narrow of circumstances.

No importing State can accept these exceptions. A State should assess all possible risks in order to protect its environment and comply with the Protocol. But if a State does so under the Compact, and those assessed risks are

eventually responsible for damage to biological diversity, the damage will be exempt from coverage under the Compact. This defense fundamentally undermines the objectives of the Protocol. Risk assessment is at the heart of the Protocol and is legally required by it.

Its standard of proof of 'clear and convincing evidence'¹ is far too rigorous. It is far higher than the standard of 'balance of probabilities' and, in face of scientific difficulties of proof, is highly unlikely to result in a finding of liability. This very strict standard requires a "degree of proof that will produce in the mind of the decision maker firm belief or conviction as to the truth of the allegations sought to be established". This is a completely inappropriate standard for proving environmental damage. It is used in the United States in cases such as medical, family court or cases involving personal liberty or punitive damages.² This has been held by the California Supreme Court to require evidence "so clear as to leave no substantial doubt" and 'sufficiently strong to command the unhesitating assent of every reasonable mind.'³ Another interpretation is that it requires proof that the claim is "highly probable and free from serious doubt."⁴ Yet another is that the evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence "...such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established."⁵ In the case of GMOs any of these standards could very well prove impossible.

The claimant must also prove that damage "would not have occurred but for the release of a specific LMO by one or more members of this Compact"⁶. The standard imposes an immense evidentiary burden and reliance on the detection and traceability of specific GMOs from the incident to damage. Such requirements are unrealistically stringent, taking into account the capacity of many

claimants to gain expert scientific evidence and testimony and the extreme difficulty of tracing and proving to such a high degree of certainty that a specific GMO, release or incident was the cause of damage.

The burden of proof should be on the defendant, under the user pays principle and the precautionary approach and the standard of proof should be on the balance of probabilities. Without these, and with the exclusions that

are at present in the text, the importing States should be under no illusion: their chances of recovery under the Compact would be exceedingly slim.

There are other problems, but these issues alone mean that the Compact cannot substitute for a backup fund and robust financial security provisions.

Footnotes: see page 4

International rules on GMO damage finalised

by Lim Li Lin, Third World Network

The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress was completed and adopted in the early hours on Monday, 11 October by the negotiating group that had been charged to complete the negotiations. The Conference of the Parties serving as the Meeting of the Parties (COP-MOP) to the Cartagena Protocol on Biosafety, to which the liability and redress Protocol is supplementary to, opened its 5th meeting (11-15 October 2010 in Nagoya, Japan) to news of the successful completion of negotiations.

The Supplementary Protocol is expected to be adopted at the final plenary of the COP-MOP on Friday, 15 October. The legal contact group that was set up to ensure legal clarity and consistency to the draft treaty finished its work on Tuesday, 12 October.

The negotiations of the Supplementary Protocol took more than six years, with ten negotiating sessions, and other preparatory meetings. However, having a substantive international liability and redress regime to address damage resulting from genetically modified organisms (GMOs) is actually ten years overdue.

When the Cartagena Protocol was adopted in January 2000 in Montreal, developing countries had wanted substantive provisions on liability and redress to be included in the Cartagena Protocol itself. During the Cartagena Protocol negotiations, many civil society observers and developing country delegates supported the “No liability, no Protocol” campaign.

However, liability and redress issues proved too contentious to resolve, and the compromise that was agreed to was to negotiate on liability and redress at a later stage, after the entry into force of the Cartagena Protocol. This process began in earnest in 2005.

The name of the Supplementary Protocol reflects the contribution of two countries which have contributed to the process: Nagoya, Japan where the negotiations of the Supplementary Protocol were completed, and will be

adopted; and Kuala Lumpur, Malaysia where the first COP-MOP was held in 2004 where the mandate of the first negotiating group was adopted, and where two negotiating meetings were held (and were supposed to be completed).

It was also Malaysia, during the negotiations of the Convention on Biological Diversity (the parent treaty of the Cartagena Protocol), that had introduced the biosafety issue to ensure that conservation and sustainable use of biodiversity would not be threatened by genetic engineering and GMOs.

The negotiations were difficult and were heavily opposed by those with an interest in the production and export of GMOs – the biotechnology industry, biotechnology scientists and non-Parties to the Cartagena Protocol who had also actively worked to water down and block the Cartagena Protocol negotiations.

Developing countries and some developed countries like Norway on the other hand, had always maintained that an international regime to deal with damage caused by GMOs was necessary because of the unique risks of GMOs and their transboundary nature, and in order to ensure that those responsible would be held liable. This is necessary to prevent damage to biological diversity, the environment and people, particularly in poor countries. In cases where damage does occur, a liability regime should ensure that financial resources are made available to enable or compensate for necessary measures to redress the damage.

At times, it appeared that there would be no agreement on the Supplementary Protocol. In particular, the issue of the nature of the liability regime had been very difficult to resolve. Most developing countries wanted to have a binding international regime that would set substantive rules on civil liability whereby victims of damage from GMOs can turn to national courts for redress.

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Instead, the Supplementary Protocol is an "administrative approach" whereby responses measures are required of the operator (person or entity in control of the GMO) or the competent authority if the operator is unable to take response measures. This would be in a situation where damage has already occurred, or when there is a sufficient likelihood that damage will result if timely response measures are not taken.

However, countries can still provide for civil liability in their domestic law and the first review of the

Supplementary Protocol (five years after its entry into force) will assess the effectiveness of domestic civil liability regimes. This could trigger further work on an international civil liability regime.

Much has been left to countries to determine and implement at the national level. This reflects the lack of consensus of countries in the negotiations. The process to truly ensure that there is justice when damage to people and the environment occurs is still a long and winding road.

GM Canola Contamination - A Call for Action in Nagoya 2010

by Martin J. Frid, Consumers Union of Japan

The problem: Wild-growing genetically modified canola plants have been found at many locations around Japan on numerous occasions. The first investigations by concerned citizens started in 2004. Results from the National Institute for Environmental Studies (NIES) confirmed the initial findings in a 2005 report.

The spilling occurs mainly near harbours and by roads leading from the harbours to food oil companies. Japan's importing companies and food oil companies that make canola oil, as well as the transport companies involved, are all directly responsible for the contamination of native canola (including rape seed, natane).

Many plants of related species are eaten traditionally in Japan. Local food manufacturers, farmers and consumers – who want to eat healthy and safe food – are the victims if genetically modified canola

continues to spread and grow in Japan.

The solution: The issue is getting serious, and consumer organizations are calling for an end to imports of genetically modified canola. GM crops that can contaminate local plants should never be imported. Meanwhile, strict rules for liability and redress are needed to deal with contamination issues that arise from trade with the genetically modified crops. The rules must be legally binding with effective compliance at the local and national level.

Activists have met with representatives from both food oil companies and trucking companies. Requests have been made for improving the handling practices, including better designs for the trucks. Spilling cases should be dealt with immediately, and any genetically modified canola plants growing wild in Japan should be exterminated.

Local action, global effects: In different places around Japan, local groups have gathered to pick up and destroy the wild-growing canola plants. They also bring a simple test kit that makes it possible to quickly check if the plants are GM or not.

For example, over 100 people gathered on June 7, 2009 in Mie Prefecture with No GM Chubu Association to pick and eliminate these unwanted plants from their neighborhoods and roads. Over a thousand canola plants were collected all day long by the activists. Of 208 plants tested, 126 were found to be GM varieties. A few plants had mutated and were resistant to several types of herbicides.

GM activists in Japan, including Amagasa Keisuke from No! GMO Campaign, has written extensively about this issue, and travelled to meet farmers and activists in other countries to explain the problem. Consumer groups are hoping that many others will join the campaign in solidarity. They also point out that this is not just an issue that relates to canola but could happen to any crop that is genetically modified and imported.

Full documentation:

<http://www.nishoren.org/en/>

ECO is currently being published at fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP5) in Nagoya, Japan and coordinated by the CBD Alliance.

The opinions, commentaries, and articles printed in ECO are the sole opinion of the individual authors or organisations, unless otherwise expressed.

SUBMISSIONS: Welcome from all civil society groups.

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Dysfunctional Philanthropy: African responses to the Gates Foundation's "Green Revolution in Africa"

side event by Travis English & Phil Bereano, AGRA Watch

On October 12, 2010, representatives from the Seattle based group 'AGRA Watch' joined colleagues from South Africa and Kenya to critique the actions of the Gates foundation and its Alliance for a Green Revolution in Africa (AGRA) colluding with industry to promote GMOs and pressure African countries to legalize them. Professor Phil Bereano moderated the event.

Nearly 40 people heard panelists Daniel Maingi of Kenyan Biodiversity Coalition, Mariam Mayet of the African Centre for Biosafety, and Travis English of AGRA Watch. Attendees included many of the representatives implicated from the Kenyan Government, AGRA, ISAAA, Croplife International, WEMA, US State Department, and several others with close ties to industry.

Travis English began by first providing evidence showing that there is no reason to believe AGRA is actually an African led organization. He illustrated the funding patterns of the Foundation/AGRA and their strong connections to Monsanto directly and through their grantees.

Daniel Maingi presented the maize import scandal of last summer when South Africa followed its laws as well as the Cartagena Protocol providing notification off the export but Kenya did not notify, do a risk assessment or issue an Advance Informed Agreement. Indeed, many GMOs appear to have been brought into Kenya, without approval.

Mariam Mayet highlighted three projects illustrating the problems caused by the Gates Foundation's involvement in African agriculture. Firstly, WEMA, "Water Efficient Maize for Africa" is supported with \$47 million from the Gates Foundation, taking place in several countries. While the mantra used to be concern for the starving Africans, it now appears to be droughts and climate change. However, other scientists say that the large number of genes involved means 10-20 years will be needed for any development of drought tolerant maize.

Secondly, GE Sorghum which is also funded by money from the Gates foundation is supposed to have increased Vitamin A levels etc. The application for contained use has been thrown out twice by the pro-GE South African government. Industry institutions have been involved in this project but no farmers.

And thirdly, the Gates Foundation is also involved in non-GE work that presents problems. "Increasing the value-chain" is the slogan with which soy crop production is promoted in Mozambique. However this directly undercuts the business of small farmers in South Africa who sell soy to Mozambique in conjunction with Cargill.

Discussion was very lively with industry and government advisors alleging that we had distorted facts, and were callous towards poverty and hunger. An Ethiopian delegate pointed out that other approaches should also be receiving support, and Prof Jack Heinemann of New Zealand, a participant in writing the ISTAAD report, noted that process was the largest review of ag for the developing world and found little role for GE.

Footnotes for: The Industry 'Compact'

1 Clause 2.4: xlix. Standard of Proof: The Standard of Proof is clear and convincing evidence for each element of a Claim, including Damage to Biological Diversity, Causation, and Recourse, and for defences. Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the decision maker a firm belief or conviction as to the truth of the allegations sought to be established. The level of proof required to satisfy that standard is more than that required under a preponderance of the evidence, but less than that required for proof beyond a reasonable doubt. Other fact issues, including determination of Proportional Responsibility, shall be determined by the preponderance of the evidence standard. The burden of demonstration that the Standard of Proof, or where permitted, the preponderance of the evidence standard, has been met will be borne by: (a) a State with respect to the Claim, (b) a Member with respect to a defence, or (c) a Member with respect to establishing Proportional Responsibility.

2 Such as in Colorado: CC §3294.

3 *Sheehan v Sullivan* (1899) 126 Cal. 189, 193, 58 P. 543.

4 See *Matter of C.G.*, 637 P.2d 66, 77 n.12 (Okla. 1981), which required "clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established" and see *State ex rel. Oklahoma Bar Association v. Flaniken* 2004 OK 6, 85 P.3d 824 (Supreme Court Oklahoma) (using the same test, but in relation to reasonableness of attorneys fees).

5 *In the Matter of J.L.E.*, 2005 Tenn. App. LEXIS 384.

6 Clause 2.4.xi.