

Account of the Liability and Redress Negotiations at COP-MOP 4

The Fourth Meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP 4) held from 12-16 May 2008 in Bonn, Germany was dominated by discussions on liability and redress. While COP/MOP 4 could not achieve its mandate to adopt an international regime on liability and redress in the context of the Protocol, a political compromise was arrived at, which could pave the way for a legally binding international regime in the future.

The key issues of the negotiations on liability and redress at COP-MOP 4 were:

- Choice of instrument
- Debate on the voluntary compensation scheme proposed by industry
- Substantive deliberations on operational texts

Prior to the COP-MOP 4, delegates had convened for regional consultations and in the Friends of the Chair Group established at the Fifth Meeting of the Working Group of Legal and Technical Experts on Liability and Redress at Cartagena in March 2008, to continue negotiating an international regime on liability and redress. Pursuant to Article 27 of the Protocol, the Meeting of Parties was required to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures for liability and redress resulting from transboundary movements of living modified organisms. The MOP was required to endeavour to complete this process within four years.

A Contact Group on Liability and Redress, co- chaired by Jimena Nieto of Columbia and René Lefeber of the Netherlands was established to meet throughout the COP- MOP 4, with the mandate to negotiate and arrive at decisions on liability and redress.

Choice of Instrument

Negotiations in the Contact Group on Liability and Redress mainly revolved around the choice of an instrument for liability and redress under the Cartagena Protocol on Biosafety.

The delegates debated the following options: non- legally binding guidelines; a legally binding regime; and a two-step approach consisting of developing one or more non-binding instruments, evaluating the effects of the instruments, and then considering developing one or more legally binding instruments. Some delegates opposed a legally binding regime, underscoring the lack of time and the complexity of such a regime. Many supported a legally binding instrument to encompass civil liability, while some proposed only making the administrative approach legally binding.

A legally binding liability regime is required to address the issues raised by cell technology that intervene in cell architecture, genetic composition and balance and that can create radical new proteins and compounds with unpredictable, possibly harmful effects on life forms. It is a fact of biology that pollen will follow and with that genes will flow. The interests of justice and equity also demands that there exists a clear binding framework for compensation to the injured party should harm occur.

Malaysia, leading the Like- Minded Group of about 80 countries (India being one) came out strongly for a legally binding instrument based on the administrative approach, with an enabling clause on civil liability. Civil liability refers to the liability of a private entity (an individual, agency or company) for damage suffered by another private entity, where claims are brought before a national court by the private entity that suffered the damage.

Though countries like Japan, Brazil and Peru offered strong resistance against a legally binding civil liability regime, a compromise could finally be worked out after a week of exhaustive negotiations and bilateral consultations.

A compromise proposal was mooted by the like- minded group of countries led by Malaysia and to which about 80 countries have lent their support. This proposal is aimed

at providing guidelines on liability and redress setting out minimum core elements that can be integrated in domestic law and a reference to the guidelines in the legally binding regime. It has a legally binding provision on enforcement of domestic judgments as well as for foreign judgments under domestic law. It also has a review process, with the possibility of making other elements on civil liability legally binding on the basis of experience gained.

Negotiations on the compromise proposal witnessed extreme highs and lows during the five day Conference, with one delegate referring to it as a “roller coaster ride”. Japan and Brazil were not ready to proceed on the basis of this proposal with concerns being expressed that the binding provisions might infringe on states’ sovereign right to determine national laws and policies. There was particularly much opposition to the provision regarding enforcement of foreign judgements.

Malaysia held its ground through the intense debates and negotiations maintaining that the delegates would be failing the international community if an agreement on liability and redress could not be achieved. While most of the countries of the Like-Minded Group including other Asian, Latin American and African countries actively backed up Malaysia with their arguments in favour of a legally binding regime, the Indian delegation chose to remain mostly silent supporters to the Proposal.

A compromise could finally be worked out after closed door and bilateral consultations long into the night on the 15th. Negotiations at the Contact Group concluded with it being decided to establish a Group of the Friends of the Co-Chairs, Ms. Jimena Nieto (Columbia) and Mr. René Lefeber (the Netherlands) which would meet in early 2009 to further negotiate and work towards legally binding international rules and procedures in the field of liability and redress.

Industry's Voluntary Compensation Scheme - the 'Compact'

The Contact Group on Liability and Redress keenly debated the proposed voluntary scheme advanced by industry to avoid legally binding measures. This industry scheme, referred to as the 'Compact' was first proposed at the Working Group Meeting held in March, 2008 at Cartagena by Mr. Thomas Carrato of the Global Industry Coalition on behalf of BASF, Bayer CropScience, Dow AgroSciences, DuPont, Monsanto and Syngenta. The Compact is a contract, a legally binding voluntary commitment among Members active in plant biotechnology who choose to sign the instrument and who qualify for Membership. These entities agree that if their bio-technology derived products cause actual damage to biological diversity, the responsible member will provide recourse for that damage, under the terms and conditions of the contract.

COP- MOP4 witnessed much debate on this Compact. Malaysia has come out very strongly against the Compact and has been supported by many Latin American and African countries. Civil society has opposed this scheme on the ground that “it is unacceptable for an international legally binding instrument to be dependent on a voluntary private scheme. This is completely contrary to fundamental principles of good governance and transparency”¹. The main disadvantage of the 'compact' scheme lies in the fact that the definition of 'damage' has been narrowed down significantly, with the companies placing themselves in the position to judge and to determine what constitutes damage. It, therefore, becomes possible for the companies to escape liability in cases where the government or other agency has assessed the risks, despite the occurrence of damage. This severely constraints the scope for redressal and makes the concept of liability and redress superfluous.

Also, under the Compact, the right to make a claim rests only with a Party to the Protocol; thereby, imposing considerable limitations on the right to redress. Gene Campaign is in favour of the approach taken under the Basel Convention, where the person who may bring claims is not specified. By implication, the right to bring claims rests with any person who suffers damage; this would cover individuals, entities, the

¹ GreenPeace Briefing, “Overview of the Current Text under Negotiation on Liability and Redress under the Cartagena Protocol on Biosafety”, May 2008.

State itself under the provisions of the Protocol as well as under general rules of International law on State responsibility. Also, 'interest' of the affected party should be given a broad interpretation to include public interest or *actio popularis* as well, thus giving a right to non- governmental organisations.

The voluntary scheme of the companies, called the 'compact' has been proposed by six major genetic engineering companies: Monsanto, Dow, Bayer, Syngenta, DuPont and BASF. Some or almost all of these companies have histories of environmental contamination and the notorious reputation of not paying for the disasters which they have unleashed. While Malaysia has come out strongly against the 'compact' and has been supported by other countries in Latin America and Africa, the Indian delegation has been rather reticent in coming out against the industry proposed compact. This position is extremely regrettable since it is in India where the poor of Bhopal suffered from one of the world's worst industrial disasters as a result of negligence during the poison gas leaks from the Union Carbide pesticide plant in Bhopal in 1984. Dow, one of the proposers of the compact, acquired Carbide's liabilities when it purchased the company in 2001. But, till date, it refuses to address its liabilities in Bhopal - or even admit that they exist.

Gene Campaign advocates a system of compulsory insurance, rather than a voluntary fund, to cover liability arising from GMOs. Compulsory insurance have been mandated by the Convention on Civil Liability for Oil Pollution Damage, 1969 and the Basel Protocol on Liability and Compensation Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal. Elaborate rules exist under these international conventions for States to ensure that the person/s potentially liable take out the compulsory insurance and provide adequate evidence of the insurance or other cover.

Substantive Operational Text

Taking up from the negotiations in the Working Group Meeting of March, 2008, a draft substantive operational text could be worked out at MOP4, on which basis further negotiations would proceed. This text consists of three parts: working towards legally

binding provisions; working towards non-legally binding provisions on civil liability; and other provisions.

1. Working towards legally binding provisions :

This part contains two sections; the first section on the administrative approach has four subsections on state responsibility, scope, damage and the primary compensation scheme.

The subsection on state responsibility contains two alternative operational texts setting out that the rules and procedures will not affect the rights and obligations of states.

The subsection on scope contains headings on:

(a) functional scope, specifying the LMOs referred to are intended for direct use as food or feed or for processing, destined for contained use, and intended for intentional introduction into the environment; and that the rules apply to intentional and unintentional transboundary movement of LMOs;

(b) geographical scope, stating the rules and procedures apply to areas within the limits of national jurisdiction.

(c) limitation in time, containing alternative texts, the first proposing the application to cases of damage once the rules and procedures have been implemented in domestic law and the other starting with the entry into force of these rules;

(d) limitation to the authorization at the time of the import of the LMOs; and

(e) non-parties, stipulating that national rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of LMOs from non-parties.

The subsection on damage contains a definition of damage to conservation and sustainable use of biological diversity, with bracketed text with regard to: damage to human health, consequential loss to a state, and loss of income. The provision on

valuation of damage remains bracketed in its entirety. The provision on causation sets out that a causal link must be established between the damage and the activity in question in accordance with domestic law.

The subsection on the primary compensation scheme contains headings elaborating elements of the administrative approach based on allocation of costs of response measures and restoration measures, and additional elements of an administrative approach, including: exemptions or mitigation; recourse against a third party by the person who is liable on the basis of strict liability; limitation of liability both with regard to time and amount; and coverage.

The second section on the civil liability approach contains the revised proposal of the Like-Minded Friends led by Malaysia. It has a bracketed chapeau setting out that parties may or may not develop a civil liability system or may apply their existing one in accordance with their needs to deal with LMOs. It further sets out that nothing in these rules and procedures shall prejudice the right of parties to have or develop their own domestic law or policy in the field of civil liability and redress for damage from transboundary movements of LMOs consistent with the Biosafety Protocol and the supplementary protocol on liability and redress. It invites parties to ensure that their national civil liability rules specifically provide for damage resulting from transboundary movements of LMOs.

The next provision provides that any law or policy shall include, *inter alia*, the following elements, taking into account the guidelines on civil liability to be annexed to the supplementary protocol on liability and redress:

- damage;
- standard of liability, that may include strict, fault-based or mitigated liability;
- channeling of liability;
- financial security, where feasible or compensation schemes;
- access to justice or the right to bring claims; and

- procedural rules that provide for due process.

The provision dealing with enforcement of foreign judgments says that these shall be recognized and enforced in accordance with the applicable rules of procedure of domestic courts governing the enforcement of foreign judgments within the scope of the supplementary protocol and the annexed guidelines on civil liability. It further sets out that this provision does not require any change in domestic law and does not in itself constitute a treaty on reciprocal enforcement of foreign judgments. It invites parties whose domestic law requires bilateral reciprocity agreements for recognition of foreign judgments to extend their domestic law for reciprocal enforcement to parties not presently covered by it. The alternative formulation simply foresees that parties may, in accordance with domestic law, recognize and enforce foreign judgments arising from the implementation of the guidelines on civil liability.

The final provision foresees that the guidelines shall be reviewed no later than three years after the entry into force of this instrument, with a view to consider elaborating a more comprehensive binding regime in civil liability or making the guidelines binding, in the light of experience gained. Following a first reading, those provisions remain heavily bracketed.

2. Working towards non-legally binding provisions on civil liability (guidelines):

This part contains similar operational texts as the part on the administrative approach. It contains sections on state responsibility, scope, damage, causation, and the primary compensation scheme. The last section contains subsections on civil liability with headings on: the standard and channeling of liability maintaining the options of strict liability, mitigated strict and fault-based liability; the provision of interim relief; and additional elements of civil liability, including: exemptions or mitigation, recourse against third parties by the person who is liable on the basis of strict liability, joint and several liability, apportionment of liability, limitation of liability in regard to both time and amount, and coverage.

3. Other provisions: This part contains sections on the supplementary compensation scheme, settlement of claims and complementary capacity-building measures. The supplementary compensation scheme contains subsections on residual state liability and the supplementary collective compensation arrangements. The section on settlement of claims contains subsections on civil procedures, a special tribunal (such as the Permanent Court of Arbitration), and standing/right to bring claims. The section on complementary capacity-building measures contains alternative provisions on general capacity-building measures, one more concise and the other more detailed. It also contains a provision on possible institutional arrangements for capacity building.

Civil Society Position on Substantive Components of a Liability and Redress Regime

Gene Campaign advocates the adoption of a legally binding regime under the Protocol, which is a position taken by many countries participating in the Contact Group on Liability and Redress in the ongoing negotiations. We, the civil society groups, recognize the need for a liability regime specifically tailored to address the issues raised by cell technology that intervene in cell architecture, genetic composition and balance and that can create radical new proteins and compounds with unpredictable, possibly harmful effects on life forms.

With respect to the substantive components of a liability and redress regime, we are opposed to some of the positions contained in operational text on which COP-MOP 4 has decided to negotiate towards developing a legally binding regime.

Geographical Scope- We are specifically opposed to the provision which limits the geographical scope of damage to areas within limits of national jurisdiction. Gene Campaign in its position paper “Liability and Redress for GM Crops: A Developing Country Perspective” has advocated that a liability and redress regime should be able to address the question of damages to areas which are not the object of real property rights, such as common/ community lands and the community should have the statutory right to seek reparation for the damage caused which may have consequences for their traditional

livelihoods, economy, socio- cultural life, indigenous knowledge systems and their applications etc. To address this, apart from damage in areas under national sovereignty, the regime should also cover damage in areas beyond any national jurisdiction- that is, common lands. The precautionary principle needs also to be applied to the introduction of GEOs in the high seas.

Definition of Damage: The narrow definition of damage proposed by the operational text is unacceptable. It only includes damage to conservation and sustainable use of biological diversity, with bracketed text with regard to damage to human health, consequential loss to a state, and loss of income.

Because of the peculiar nature of LMOs and the limited knowledge and experience with such products, we believe in the need for giving the term ‘damage’ the widest possible interpretation. Environmental damage is central to a liability and redress regime for LMOs, given that the Biosafety Protocol is an environmental law treaty. However, as recognized in Article 26 of the Protocol, socio- economic aspects constitute an important concern of Member States and in fact some of the main impacts of the introduction of LMOs in agriculture may turn out to be the socio- economic aspects related to livelihood concerns. Similarly, risks to human and animal health which also fall within the scope of the Protocol need to be considered as a number of LMOs end up directly or indirectly in the food and feed chain.

Also unlike other damages, in the field of biology, damage may not be immediately visible and evidence of harm can surface many years after. In such cases, absolute proof of damage should not be limited to what is immediately apparent but should be anticipated from the occurrence of a primary event. In the case of transgenics, their detection in unintended organisms and locations should be regarded as constituting damage.

Channeling of Liability

With respect to channelling of liability, we strongly recommend that liability should be channeled in accordance with the 'Polluter-Pays' principle. All activities must internalize all the costs, and it is only equitable that the industries and activities connected with the use of LMOs are not an exception to such a principle. While the 'Polluter Pays' principle should prevail, the State, under whose jurisdiction or control activities involving LMOs are carried out, cannot escape inclusion in the liability. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration both recognise the general duty of States for transboundary harm.

Standards of Liability

It is a legal principle that a strict liability regime should be implemented when the need to protect the public and provide effective compensation outweighs the need to establish the moral culpability of the defendant.

There is a growing respectable scientific concern that LMOs are intrinsically hazardous. Even if the incidence of any harm occurring may be low, the magnitude of the harm, once it takes place, could be incredibly great, with long term and short term impacts on other crops and species, ecosystems, human and animal health and socio- economic effects.

In recognition of the intrinsically hazardous nature of LMOs, Gene Campaign, supports the adoption of a strict liability regime for damage from LMOs. In addition to strict liability, we recommend adoption of absolute liability zero tolerance legislation for contamination in centers of origin and genetic diversity. Gene flow and contamination in these centres of origin and genetic diversity could lead to irrepressible loss of traditional plant varieties and agricultural diversity, having grave consequences for food security.

Causation and Burden of Proof

Causation is the link that the law establishes between an event, action or omission and specific damage. It would be difficult to apply the generally followed legal tests to establish causation in the context of LMOs, because of the complexities of their

interactions with the receiving environment and the possible timescales involved. In case of LMOs, damage may be too diffused to be traceable, although having the potential to be significant, long term or wide spread. Various countries have tried to overcome this difficulty in establishing causation in case of LMOs/GEOs by adopting the approach of reversal or reduction of the burden of proof in that causation is presumed until the defendant can demonstrate otherwise. Solutions also lie in tort case law itself, where precedents have demonstrated that it is not necessary that the event which is immediately connected with the consequences is proximate and that farther from it is too remote.

Standing/ Right to Bring Claims

Gene Campaign advocates that an NGO acting in the general interest (*actio popularis*) serves a fundamental civil purpose, fulfilling capacities for which the government is incapable. NGOs are the vessels through which the affected parties' concerns are communicated and as such, should have the right or the standing to bring a claim for damages on behalf of those directly or indirectly affected by damage from LMOs.

Limitation in Time

In the case of damage caused by LMOs, the time limit should take into consideration the fact that the harmful effects may only manifest themselves after a long period. Damages due to the biological activity of LMOs, or due to the fact that the organisms themselves are living and may reproduce, may only appear after several generations from the (unintentional or intentional) release of the LMO.

Right to Information

In recognition of the right to information of consumers, farmers and others, we, the civil society groups support the incorporation of provisions in a liability and redress regime to achieve the same. We, thus, advocate proper labeling, which confers consumer right of choice to accept or reject a product. It should also be made mandatory that farmers

cultivating GE crops are to be provided with full information about possible effects by those introducing them.

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