SPECIAL REPORT

An International Liability Regime for Biotech Food

*By Prof. Lucas Bergkamp**

In February 2004, government officials from around the world met in Kuala Lumpur to discuss issues relating to an international treaty, the Biosafety Protocol. This treaty, which was concluded in Cartegena in 2000 by the parties to the Convention on Biological Diversity, is aimed at protecting against the risks arising from the products of biotechnology, so-called "living modified organisms" or "LMOs," which have the capacity to reproduce. Most LMOs are biotech foodstuffs, such as soy and maize. One of the proposals the meeting adopted involves a process that should lead to an international liability regime for damage caused by LMOs. Unfortunately, the contemplated biotechnology-specific liability regime will not contribute to the protection of biodiversity and may have adverse side effects on food production and trade.

The Polluter Pays Principle

There is general agreement that the 'polluter pays principle' should apply, but ambiguities over the meaning of the phrase cast doubt on its utility. The polluter pays principle – the idea that those who cause pollution should be forced to pay for damage or harm caused to others – is one of those rare occasions where environmental activists and economists agree – at least in principle. A liability regime, if designed properly, may prevent damage to the environment and humanity: if polluters are required to bear the full cost of their actions, they may decide to scale down their activities or develop technologies which entail relatively less pollution. In either case, its proponents argue, the world would experience less pollution and liability would thus make the world a better place.

The problem is that, in practice, 'pollution' is interpreted differently by different groups. To economists and lawyers, there are certain clear instances of pollution, such as when a person who has an established right to clean air or water has that right violated by the actions of another. To the environmentalist, however, pollution often has a much wider meaning, encompassing almost any activity that *might* have a negative impact on the environment. This wider definition would, if uniformly applied, restrict all forms of economic activity, indeed al forms of activity (and, taken to its logical extreme, all forms of inactivity). In practice, environmentalists use it to justify the selective culling of specific industries and activities that they regard as undesirable.

Environmentalists have been pushing for the creation of a liability regime for damage caused by LMOs, invoking the "polluter pays" principle as a justification, with the intention that this should end any further debate. But, according to environmentalists, all genetically modified organisms are themselves pollution! Their position, of course, cannot be supported by facts and does not reflect science.

Biodiversity Loss

In reality, LMOs are not a known cause of biodiversity loss, the key problem the Biosafety Protocol attempts to prevent. Nor do they adversely affect human health. To the contrary, the available scientific evidence confirms that LMOs so far introduced have not caused any harm to the environment or to humans. They even have had benefits. On the environmental side, they have increased yields and thereby reduced pressure on wilderness; they have also reduced the need for other inputs, such as fertilisers and pesticides. On the human front, LMOs have increased the availability of food – quantities are up and prices are down – thereby improving nutrition, which is a key determinant of health.

That is not to say that we do not have a problem of loss of biodiversity. We do, but real causes of biodiversity loss will not be addressed by the proposed regime, because they have nothing to do with biotechnology. The root causes are problems such as conversion of land for agriculture, legal and illegal logging, and the like. Many of these problems involve government failure or government decisions to permit destruction of natural resources. An effective liability regime that would provide causes of action for these problems would therefore be inconvenient and potentially embarrassing for governments. The undue focus on biotechnology has served as a subterfuge and allowed governments to avoid having to deal with the real issues. Whatever may be convenient for governments, however, we should not forget that if liability is intended to prevent biodiversity loss, the only option is a regime imposing liability for such losses, irrespective of the causes.

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Damage Caused by LMOs?

Advocates of an international liability regime for biotechnology claim that cross-pollination, whereby the pollen of a genetically modified crop propogates other varieties of the same species, results in "contamination" or "genetic pollution". But others may view such cross-pollination as natural or even beneficial, especially where it confers useful traits on crops grown by other farmers.

Modern legal systems incorporate an objective adjudication process. However, there is no objective legal standard by which such cross-pollination could be labelled "damage" per se. It may well be that occasionally "organic" plants may acquire genetic traits from LMOs. But the evidence suggests that no actual harm is done by this. Any "harm" is purely subjective in nature and results from the fact that organic certification bodies have chosen to define "organic" as being "biotech or GM Free."

True, non-organic produce may command a higher price in the market. Cross-pollination with LMOs may cause crops not to be deemed organic and thus no premium price can be charged by the farmer. Indeed, this is the only real damage that has actually resulted from LMOs. However, whether such economic loss should be recoverable in liability actions is controversial. More importantly, the organic farmer has no right to be free from cross-pollination, which is an entirely natural phenomenon, and even if he suffered compensatable damage, there would be no unlawful act on the part of the LMO farmer and thus no tort. If an organic farmer wants to avoid cross-pollination with LMOs, he should take appropriate measures to protect against this risk.

Surely, liability should not turn on one's subjective judgement as to what constitutes "damage" or on claims to rights that are inconsistent with the regulatory regime. As a reverse application of such liability, it would be equally valid to demand that organic farmers be held liable if their crops or practices resulted in the "contamination" of conventional or modified crops – for example if their failure to use pesticides resulted in an outbreak of crop-eating insects or other pests adversely affecting neighbouring crops.

Adverse Side Effects of Biotech Liability

The selective imposition of liability on biotechnology products is not only ineffective but also positively harmful. Unfortunately, precedents show that liability judgements do not necessarily reflect scientific evidence, and courts or arbitrators can make mistakes. Furthermore, where liability attaches to "biodiversity damage," the mere uncertainty created by this ill-defined notion will impose significant costs on potentially liable companies, who will be forced to spend resources to assess the current condition of biodiversity in areas where they operate so they can fend off claims when they are inevitably sued for causing damage. These companies will also want to take measures to avoid having their products associated with "biodiversity damage".

Moreover, liability would likely be combined with an insurance or financial security regime, neither of which comes free. Thus, an international biotech liability regime would produce disincentives for business to engage in biotechnology, an economically and socially useful activity that is already regulated extensively in many jurisdictions. Conventional non-biotech food production would not incur these costs, and thus gain a competitive advantage.

The contemplated liability regime may not only affect food production but also food trade. It would discourage importing LMOs (e.g. seeds) into countries that have ratified the BSP. This, in turn, would deprive significant parts of the world's population of the benefits of LMOs. Since developing countries have more to gain from LMOs than developed economies, it would hurt the poor disproportionally.

A Better Alternative

Indeed, the Convention on Biological Diversity contemplates the adoption of such a cause-neutral regime, but its parties were side-tracked by misguided demands of environmental activists to focus exclusively on a liability regime for companies who produce and disseminate biotechnology products.

If liability is intended to prevent any and all biodiversity losses, the BSP parties should consider a regime that imposes liability for such losses, irrespective of the causes. Of course, there are alternatives to liability regimes and the relative strengths and weaknesses of each option in the specific situation should be compared carefully before any choice is made. But also if a neutral liability regime is adopted, we would need to determine how to value and quantify these losses, and identify the "victims" who may sue for such losses, which are no small issues. But in the least, the starting point would be the right one: he who causes biodiversity damage will have to pay.

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