



Liability and Redress on Biosafety

Towards the Development of Rules at National and International Levels

Dr Philippe Cullet

School of Law, School of Oriental and African Studies (SOAS), London
&
International Environmental Law Research Centre (IELRC), Geneva

pcullet@ielrc.org
www.ielrc.org

Biosafety Forum on Liability and Redress, Kuala Lumpur, 29/8/2006

IELRC.ORG



Scope of biosafety legal regimes

- A complement to incentives provided for the development of biotechnology (for instance, patents)
- A part of a comprehensive biotechnology legal regime addressing environmental, health and socio-economic issues
- An effective biosafety regime includes:
 - Regulation of GMO dissemination into the environment
 - Liability/criminal sanctions in case of harm



Need for a liability regime for biosafety

- Aims of a liability regime:
 - Compensation where harm takes place
 - Prevention of harm (ensuring actors act responsibly)
 - Implementation of precautionary principle
- Link with patent regime providing incentives for GMO development
 - Patent liability



Other avenues to achieve similar aims

- Criminal sanctions
 - For instance: Council of Europe Convention on the Protection of the Environment through Criminal Law, 1998
- Dis/Incentives for introduction of GMOs through use of biosafety clauses in intellectual property law



National and/or international regimes?

- Need for the adoption of an international regime where transboundary impacts
- Need for the adoption of a national liability regime that
 - Addresses domestic issues
 - Complements the international regime
 - Provide a framework to address problems that may arise with non-parties to the Biosafety Protocol



Need for a separate liability regime

- International level
 - State responsibility an insufficient response in case of environmental harm
 - Existing international liability regime are sectoral – little prospect for an international liability convention
- National level
 - General framework usually insufficient
 - Existing national laws indicate that a separate regime is feasible and necessary



Existing civil liability regimes provide appropriate starting point

- States have consistently adopted a similar set of principles to address environmental harm through civil liability
- Biotechnology's harm may not be clearly established yet but the central role of the precautionary principle in biotechnology regulation confirms the need to follow existing principles



Basic principles for an international liability regime

- Strict liability
- Liability channeled exclusively to the person commercialising/exporting
- Limitations may be placed on amount and duration (with subsidiary state responsibility)
- Payment to prescribed limit supported by insurance



Principles (ctd)

- Different types of damages covered such as:
 - Environment
 - Health
 - Socio-economic (e.g., loss of organic certification)



Domestic level: example of Switzerland

- Adoption of a biosafety law as part of an overall compromise on the development of biotechnology
- Like in most other countries, environmental law is sectoral, complemented by an umbrella Environmental Protection Act (1983)
- Proposal to adopt an amendment to EPA to address biosafety. Parliament made the conscious choice to adopt a separate biosafety law, for reasons including the need to adopt a separate liability regime to address specificities of biotechnology



Swiss liability regime – main features

- The ‘person subject to the notification or authorisation requirement’ is liable for damages caused
- Strict liability where injured party is consumer or farmer
- Environmental harm to be compensated
- Environmental damage to common lands: Local government allowed to claim damages
- Burden of proof simplified in favour of affected party
- Prescription of 30 years from time GMO marketed or occurrence of event causing damage (3 years from time party becomes aware)
- Compulsory insurance may be imposed by central government



The Swiss regime in perspective

- Switzerland, a small country surrounded by several other countries, yet adopting a national comprehensive biosafety law
- Switzerland, a country hosting some of the major MNCs interested in the development of biotechnology as well as a strong organic farming constituency and anti-GMO lobby groups
- The gene technology act shows that a balanced legal regime including a strict liability regime is possible in all countries



Conclusions

- A liability and redress regime is a necessary part of a balanced biosafety legal regime
- The adoption of a liability does not imply that harm will occur but provides incentives to ensure all actors act responsibly
- A binding liability regime needs to be adopted at both the national and international levels
- The adoption of an national regime does not need to be linked to the adoption of an international regime