

**LIABILITY & REDRESS
UNDER THE CARTAGENA
PROTOCOL ON BIOSAFETY:
OPTIONS FOR DEVELOPING
COUNTRIES**

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1. INTRODUCTION

- LIABILITY & REDRESS: NO SUBSTANTIVE PROVISION IN THE CPB
- ART 27 DEALS WITH PROCESS FOR NEGOTIATING
- PROCESS ESTABLISHED BY MOP1
- WORKING GROUP SET UP – WITH TOR
- MUST COMPLETE ITS WORK BY 2007
- CLEAR

WG HAS BEEN MEETING

- ALL PROPOSALS COLLECTED UNDER A FRAMEWORK DOCUMENT
- THESE REFLECT DIFFERING – OFTEN CONFLICTING VIEWS – OF COUNTRIES
- STILL AT EARLY STAGE
- NEGOTIATIONS NOT STARTED YET

ISSUE: BINDING OR NOT?

- DEVELOPED COUNTRIES POSITION – MUST CLARIFY CONCEPTS BEFORE ANY DISCUSSION ON L& R
- DEVELOPING COUNTRIES POSITION – READY TO DISCUSS ELEMENTS OF A BINDING REGIME
- IN MEANTIME TRADE IN GMOS CONTINUING
- SOME LIABILITY ISSUES ALREADY EMERGED – RICE CONTAMINATION, STARLINK

OVERALL APPROACH

- LAW CAPTURES POLICY CHOICES
- THIS DEPENDS ON VALUES AND INTERESTS SOCIETY WISHES TO ADVANCE
- LAW THEN ARTICULATES THIS POLICY IN A SPECIFIC FORM

BROAD POLICY

- CONSIDER THE OVERALL GOAL OF THE CPB
- CONSIDER POLICY RE: ELEMENTS
- CONSIDER IN CONTEXT OF NATURE OF HARM ACCOMPANYING NEW TECHNOLOGY
- ALSO PURPOSE OF THE JUSTICE SYSTEM – FOR EVERY GRIEVANCE THERE MUST BE AN EFFECTIVE REMEDY : *ubi jus ibi remedium*

OVER-RIDING GOALS OF THE CPB

- BALANCING COMPETING INTERESTS
 - a. PROTECTION OF PUBLIC & ENVIRONMENT
 - b. PROTECTION OF INDUSTRY AND GOVT'L POLICY: NOT STIFLE INNOV, DRIVE AWAY INVESTORS, DISCOURAGE TRADE
- INTERESTS REFLECTED IN ARTS 16(1), 8(G), 19(3)

PRECAUTIONARY APPROACH

- CENTRAL PARADIGM
- RATIONALE
- L ONLY WHERE CAUSAL LINK ESTABLISHED BETWEEN GMO/ACTIVITY AND HARM – IN LAW AND FACT

ESTABLISHING LIABILITY

- STANDARD TO ADOPT

FAULT-BASED, OR

STRICT LIABILITY

FAULT BASED - NEG

■ 3 ELEMENTS

- DUTY OF CARE

- BREACH OF DUTY

- DAMAGE RESULTING

DUTY OF CARE

- MUST IDENTIFY WRONGDOER
- ON FOLLOWING FACTORS
 - FORSEEABILITY OF HARM
 - PROXIMITY OF R/S BETWEEN PARTIES
 - CONSIDERATIONS OF FAIRNESS & REASONABLENESS
 - POLICY CONSIDERATIONS TO DENY/LIMIT LIABILITY

DUTY OF CARE (DOC)- CONTD

- DIFFICULTY ID WRONGDOER
APPLYING THESE FACTORS IN GMO
DAMAGE CASE
- ESP IF SPREAD BEYOND INTENDED
RECIPIENT ENVIRONMENT
- *MONSANTO V SCHEIMESER* –STRICTLY
LIABLE FOR PATENT VIOLATION
- WHAT IF OTHERS CONTAMINATED BY
HIS FIELD? IMPACT ON TRADE IN GM
SEEDS?
- IF INDETERMINATE CLASS HARMED?
- OUTCOME PREDICTABLE?

BREACH OF DUTY –STD OF CARE

- FAILED IN HIS CONDUCT
- LOOK AT REASONABLENESS OF CONDUCT
- FACTUAL ASSESSMENT
- OTHER BASES TO DECIDE:
 - PROBABILITY OF RISK
 - GRAVITY OF DANGER
 - SOCIAL UTILITY and
 - BURDEN OR DIFFICULTY IN TAKING PREVENTIVE MEASURES.
 - MAY MEAN DAMAGE BUT NO LIABILITY CAN BE ESTABLISHED.

DAMAGE

- MUST BE REASONABLY FORSEEABLE
- IF NOT THEN NO LIABILITY ALTHOUGH VICTIM

BURDEN OF PROOF IN FAULT SYSTEM

- ON VICTIM
- ONEROUS IN GMO DAMAGE-COMPLEX, TECHNICAL
- Must know complete process in production of gmo, circumstances of creation, testing/distribution
- all./most within knowledge of producer?
- Covered by trade secrets?
- DAVID v. GOLIATH SCENARIO?

TIMELAG IN HARM SHOWING UP

- BETWEEN INTRO AND DAMAGE
- MANY PEOPLE INVOLVED DOWN THE CHAIN?
- IF TIME LIMIT – TOO LATE?
- CORRECT PARTY DISAPPEARED?

FAULT SYSTEM

- UNCERTAINTY?
- ARBITRARINESS?
- SO VICTIM – GOT COMPLAINT BUT NO REMEDY
- COST EFFECTIVE?
- DELAY IN OBTAINING COMPENSATION

STRICT LIABILITY

- ONLY SHOW:
 - DAMAGE
 - DEFECT IN GMO
 - CAUSAL LINK BETWEEN THE TWO
- CONDUCT OF WRONGDOER
IRRELEVANT
- CRUCIAL: GMO AND ACTIVITY IN
RELATION TO IT

STRICT LIABILITY NOT ONLY FOR DANGEROUS GOODS PER SE

- EXAMPLE: PRODUCT LIABILITY IN ADVANCED COUNTRIES IS STRICT
- BABY TEAT & SUCKING ON IT – DANGEROUS?!
- POLICY REASONS WHY IMPOSED

POLICY AND PRACTICAL REASONS

- BETTER CONSUMER PROTECTION,
 - PROFITEER TO BEAR LOSS,
 - RAISING SAFETY STANDARDS,
 - EASIER FOR VICTIMS TO OBTAIN REMEDY
- ROYAL COMMISSION REPORT ON CIVIL LIABILITY & COMPENSATION FOR PERSONAL INJURY – UK (PEARSON REPORT)

HOW DANGER ESTD?

- LOW PROBABILITY OF OCCURRENCE V HIGH MAGNITUDE OF HARM
- IS GMO HARM IN THIS CATEGORY?
- VIEWS OF SWISS RE (p. 7 of paper)

PREC PRINCIPLE & STRICT L

- PREC ONLY WHERE HARM SCIENTIFICALLY UNCERTAIN
- THEN REGULATOR CAN MAKE DECISION
- SO DOES NOT DEAL WITH CARE OF MANUF – AS IN FAULT SYSTEM
- ONLY – ACTUAL PERFORMANCE & CONDITION OF PRODUCT
- THIS AKIN TO STRICT L

IMPLEMENTING PREC

- SHIFTING BURDEN OF PROOF
- *EC – ASBESTOS DISPUTE AT WTO*
- EFFECT OF SHIFTING

STRICT LIABILITY IN NATIONAL LAWS – not exhaustive

- *Norway: Gene Technology Act, Act 38 of 2 April 1993*
- *Switzerland: Law on Genetic Engineering, 2003*
- *Austria: Gene Technology Act (510 of 1994), amended in 1998 and 2002*
- *New Zealand: Hazardous Substances and New Organisms Act 1996*
- *Germany: the Gene Technology Act 1990*

STRICT L IN SUPRA-NATIONAL REGIMES

- *Lugano Convention*
- *Legislation of the European Union (EU)*
- *EU Liability Directives: Directive 85/374 as amended by Directive 1993/34 – deals with product liability inc agri products*

Based on submissions to WG

- Brazil, Egypt, the EU (with a limited number of defences and combined with a fault-based liability scheme), India, Liberia, Norway (possible combination with fault needs further discussion), Palau, Slovenia, Sri Lanka, Switzerland, and Uganda. This represents 10 out of the 22 country that responded in English. The EU represents another 35 countries.
- Further, in the on-going negotiations on redress and liability, strict liability was the preference for the African Union – representing some 33 countries; as well as a large number of the 17 countries that constitute the Mega-diverse Group of Countries.

DEFENCES TO STRICT LIABILITY

- strike a fair balance between the interest of the producer and that of the user. A sort of trade-off - for imposing strict liability.
- Defence: 'Development risks' and 'state of the art' : Difference between the 2
- Not consistent with strict liability – but there for policy reasons

ARGUMENTS against DEFENCE IN STRICT L

- OTHERWISE NO COMPENSATION FOR VICTIMS - *Thalidomide* disaster cases.
- STRICT LIABILITY DESIGNED TO DEAL WITH THESE IN NEW CUTTING EDGE TECHNOLOGY . NO GUINEA PIGS FOR NEW PRODUCTS.
- NOT AVAILABLE IN CONTRACT. SO WHY HERE?
- PROFITEER BEAR THE RISK OF LIABILITY. CAN INTERNALIZE COST IN THE PRICING OF THE PRODUCT.
- THE EXCLUSION OF THIS DEFENCE IN THE PRODUCT LIABILITY LAWS FOR PHARMACEUTICAL PRODUCTS NOT STIFLED PRODUCT INNOVATION.
- MAY EVEN SPUR THEM TO INVEST MORE ACTIVELY IN SAFETY RESEARCH

Arguments for

- UNJUST AND INAPPROPRIATE SOCIAL POLICY - IN HIGH TECHNOLOGY DEVELOPMENT AREAS - LIKELY TO BE UNKNOWN HAZARDS, ALWAYS TECHNOLOGICAL IMPROVEMENTS. DONE ALL POSSIBLE - EVEN CONFORMED WITH STANDARDS IMPOSED. REALLY POWERLESS TO AVOID LIABILITY.
- THIS WOULD DISCOURAGE INNOVATION AND STIFLE RESEARCH.
- WITHOUT THIS DEFENCE, INSURANCE COVER UNOBTAINABLE OR A HIGHER PREMIUM. MAKE BUSINESS UNCOMPETITIVE ESPECIALLY VIS-À-VIS COUNTRIES WHERE THIS DEFENCE IS AVAILABLE.

BURDEN FOR DEFENCE

- ON DEFENDANT
- EASY TO SHIFT
- VICTIM STILL IN DIFFICULT POSN

REASONABLENESS TEST

- APPLICABLE
- REASONABLY
UNDISCOVERABLE RISKS
- SO CONDUCT IMPORTANT
- SHOULD NOT BE FOR STRICT L
- FOR POLICY REASONS –
INCLUDE?

DEFENCE & PREC

- DID HE TAKE INTO ACCOUNT PREC APPROACH IN CONSIDERING POSSIBLE ADVERSE EFFECTS?

DEFENCE: COMPLIANCE WITH LEGAL REQUIREMENTS

- DEFENDANT MUST HAVE
NO CHOICE
- DIRECT CAUSAL LINK
BTWN DEFECT &
COMPLIANCE

DEFENCE: LIMITATION

- TIME LIMIT FOR BRINGING ACTION
- CUT-OFF DATE
- GMO – HAS LONG TIMELINE FOR HARM TO MANIFEST?

OTHER DEFENCES

- *force majeure*;
- intentional intervention by a third party;
- act of God;
- war and hostilities;
- compliance with a compulsory measure by a public authority

CAUSATION – ESTABLISHING THE CAUSAL LINK

- DIFFICULTY IN FAULT SYSTEM: MANY CAUSES, DAMAGE LONG TIME TO SHOW, SOURCE OF DAMAGE FAR
- LONG CHAIN
- INVOLVE COMPLICATED, COMPETING EXPERTS
- ESTABLISH MATERIAL CAUSE OF HARM-PROBLEM

TO OVERCOME PROBLEMS



- NO NEED TO SHOW FAULT - ONLY PRODUCT CAUSED HARM NOT PRODUCER
- INTERMEDIATE EXAM NOT EXCUSE L OF PRODUCER
- ID LARGE RANGE OF DEFENDANTS

NATIONAL LAWS

- *Austria Law on Genetic Engineering*
- *Germany: Gene Technology Act*

DAMAGE

- NARROW OR BROADER TERMS AS REFLECTS THE INTEREST : POLICY CHOICE
- *The EU:*
 - damage to the conservation and sustainable use of biodiversity;
 - traditional damage; and
 - damage to human health.
- *Canada:* damage to biological diversity; human health? if arises from adverse effects on biological diversity

DAMAGE - CONTD

- *The Lugano Convention* – COMPREHENSIVE
 - personal injury, loss or damage to property, and,
 - loss or damage by impairment of the environment including loss of profits resulting from the properties of GMOs.
 - cost of preventive measures - after incident: to prevent/minimize loss or damage.
 - pure environmental damage: costs of measures of reinstatement.
 - Reinstatement' = reasonable measures to restore or reinstate damaged or destroyed components of the environment, or to introduce - where reasonable - the equivalent of these components into the environment.

DETERMINING THE WRONGDOER

- Who is liable?
- NATIONAL LAWS: Switzerland, Norway.
- Submissions made to WG: US – who caused the harm; EU: depends on activity; Ethiopia: holder of permit to commercialise.
- If more than one? Joint & several
- Additional tiers: in situations

THE FORM OF THE REGIME TO BE DEVELOPED

- AN INTERNATIONAL
ARBITRAL REGIME
- A TRANSNATIONAL REGIME;
- A CIVIL LIABILITY REGIME;

An international arbitral regime

- submit dispute to an international arbitration body.
- Parties are States not private actors.
- Have detailed claims procedure; or simple - most of the key issues and features of the tribunal to be established by the ad hoc tribunal to which the dispute is referred.
- The key procedural issues and features to be dealt with in respect of an international arbitral regime include:

contd

- Jurisdiction
- Applicable law
- enforcement

A Transnational Regime

- facilitate private parties
- claims in national courts.
- establish the process
- rely on pre-existing national, and generally accepted international rules on private international law
- common procedures but no internationally recognized standards for determining jurisdictions; and no internationally accepted procedures to instruct courts on how to choose the applicable law. The court will do that applying its own laws and procedures.

Civil Liability Regime

- establish rules and substantive standards for the adjudication of disputes.
- Cases brought in national courts.
- National and the international legal standards for liability and redress will be harmonized.
- So establish clear rules to determine jurisdiction, set internationally recognized legal standards on the applicable law. Provide for recognition and enforcement of judgments. And provisions on access to justice and non-discrimination.