

Article 18(2)(a): The Trojan Horse of the Biosafety Protocol

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“The “may contain” labels flood the feed sector. Even transboundary movements which could pass as GM-free under existing legislation for LMO-FFPs are labelled as “may contain”. Grain trade and important ports are leading in this clever move which actually ridicules the Protocol” Christine Von Weitsacker¹

When the Cartagena Protocol on Biosafety (“Biosafety Protocol”) was adopted in the small hours on the morning on the 29 January 2000 in Montreal, Canada, delegates had little time to reflect on the implications of the last minute concessions that had been made to Argentina, concerning what would later become the infamous and highly contested “Article 18(2)(a)”.² What had just been conceded was breathing space for the cartel of international grain traders³ to continue with their unrestricted, free trade in GMOs/ bulk shipments of grains, oilseeds and pulses contaminated by GMOs.

Bulk shipments of maize, Soya and canola account for over 98% of the global trade in GMOs. The bulk commodity trade in GM and non GM trade constitutes some 200 million tonnes of cereals, 30 million tonnes of rice, more than 70 million tonnes of oilseeds and more than 7 million tonnes of pulses. At that time, none of the countries negotiating the Biosafety Protocol had put in place biosafety systems, quite apart from not having the resources required to regulate or exercise any regulatory control over GMO varieties on a case-by-case basis (as the Biosafety Protocol) envisages. This is still the case today for most developing countries.

Article 18(2)(a) also enabled the United States Agency for International Development (USAID) and the World Food Programme (WFP) to continue exporting to poor countries and those torn apart by civil strife, war and/or illegal occupation, shipments of GMOs, without a documentation trail recording the transgenic lines and quantities contained in the food aid shipments. Such documentation would also have assisted with the compilation of statistical information to track and monitor the quantities of GM food aid being sent to various countries over a given period of time.

The reason for all of this is that Article 18(2)(a) enabled bulk shipments of commodities exported from GM producing countries to all carry the meaningless label -“may contain” GMOs.

Article 18(2)(a) thus dealt a severe blow to the stance of importing countries that the Protocol require full and detailed documentation to accompany bulk shipments being exported to them by GM producing countries like the US, Canada and Argentina. Most certainly, such truthful documentation in the hands of importing countries in favour of

biosafety, threatened to bring the “business as usual” *de facto* illegal trade in GMOs to an end.

The saving grace though was that Article 18(2)(a) was meant to be operational only for a limited period of time-until the first meeting of the Parties, in February 2004, in Kuala Lumpur, Malaysia, at which time the Parties to the Protocol were required to thrash out the detailed requirements for documentation to accompany bulk shipments of GMOs.

Undermining the Biosafety Protocol: The Rot sets in

“Four companies belonging to the same international grain trader cartel control the world grain trade: Cargill, ADM, Bunge and Louis Dreyfus. These companies are both importers and exporters. In the Southern Cone of Latin America, these companies control the entire production chain, from the silos, grain elevators to the ports. ...These companies also process the grain, thereby controlling the entire corn and soya trade system.” Red por una America Latina Libre de Transgenicos⁴

Several industry groups actively and consistently lobby to undermine the Biosafety Protocol in favour of protecting the multi billion dollar international trade in GM grains and oilseeds. These groups include Croplife International, led by BASF, Bayer CropScience, Dow AgroSciences, DuPont, Monsanto, and Syngenta; the Global Industry Coalition (GIC) and the International Grain Trade Coalition (IGTC). Key members of the IGTC represent the commercial grain, feed and processing interests from the main GMO exporting countries-the United States, Canada and Argentina.⁵ The IGTC is also comprised of the biotechnology industry, including the key players: Monsanto Company, Syngenta Crop Protection, Syngenta Seeds, Dow AgroSciences, Pioneer Hi-Bred, owned by Dupont, and so forth.⁶

During 2003, Dennis Stephens from the Canadian Grain Council wrote a prescription for the resolution of Article 18(2)(a) in order to “avoid unnecessary disruptions in commodity trade”. Already then, Stephens encouraged *exporters* (that is, international grain traders) to use Article 24 of the Protocol to bring about greater clarity to documentation requirements for grain destined for food, feed and processing.⁷ Article 24 of the Protocol is concerned with the rights of Parties to enter into **free trade agreements and arrangements** with non-Parties. Non-Parties of the Protocol include the major GM producing countries/exporters of agricultural commodities, including the US, Canada and Argentina.

The IGTC has always made its position clear: that it would not accept measures that obliged exporters or importers to describe the GM content in bulk shipments.⁸ Stooping even lower, the IGTC even opposed the meaningless “may contain” requirement!⁹

The writing was thus on the wall. Immediately prior to the first Meeting of the Parties, the news broke that Mexico, a Party to the Protocol, had entered into a trilateral agreement concerning documentation requirements, with the United States and Canada-two non-Parties to the Protocol¹⁰. The trilateral agreement is remarkably similar to the

model proposed by both Stephens, the IGTC and what would later emerge-a model proposed by the grain exporting countries themselves.¹¹ The trilateral agreement in essence, firmly puts in place, a system that would allow unfettered entry into Mexico - a centre of origin of maize where contamination of its landraces had already taken place by GM maize imported from the US no less- large quantities of various GM maize varieties irrespective of whether these had been approved in Mexico. Hundreds of thousands of tons of GM maize would thus continue to stream into Mexico, without there being any documentation to record the individual GM varieties or quantities being imported.

Industry Double Standards

“Segregation of non-biotech grains and oilseeds is essentially an extension of the handling process for speciality grains and oilseeds, which has been in place for some time” USDA¹²

It is a matter of historical record that negotiations to thrash out the documentation requirements for Article 18(2)(a) did not result in the resolution of the issues at COP MOP1 in Kuala Lumpur in 2004,¹³ utterly broke down at COP MOP2 in Montreal, Canada in 2005¹⁴ and continued thereafter, to be extremely controversial at intervening export group meetings.¹⁵ The integrity of the Biosafety Protocol was thus seriously in jeopardy and pressure mounted on Brazil, the host of COP MOP3, who together with New Zealand, caused the failure in Montreal, to broker a deal for the resolution of Article 18(2)(a). Indeed, Brazil feverishly held informal consultations with government delegations, industry, NGOs and farmers and put on the table, early in the negotiations at COP MOP3, a compromise text, which would later be utterly watered down by Mexico, acting on behalf of the IGTC.

Grain traders continued to insist that:

- it is impossible to keep varieties (events) totally separate;
- co-mingling occurs in each link of the supply chain;
- adventitious or technically unavoidable presence of GMOs will occur in *all* transboundary shipments of *all* commodities (both GMOs and non GMOs) shipped from countries having GMOs in commercial production;
- non GMO shipments from non GM countries are exposed to adventitious presence of GMOs in the global transportation and handling systems¹⁶

However, this position is not based on truthful facts, as discovered by research uncovered by pro-biosafety activists¹⁷.

Monsanto has in fact established a system in which more than 95% of the grain elevators in two Southern Brazil states (Rio Grander de Sul and Santa Catarina) test the genetics of soyabean that pass through it for purposes of verifying whether Monsanto's trait had been used to enable it to collect royalties.¹⁸ Monsanto has detained shipments of soyabeans from Argentina, in Europe and the United Kingdom to test samples there for the same

purpose of collecting royalties!¹⁹

A survey conducted of 1,194 grain elevators in the US by the American Corn Growers Foundation (ACGF) found that nearly 24% reported that they are requiring segregation of GM maize from conventional maize varieties and over 12% reported offering premiums for non-GM varieties.²⁰

According to Pioneer Quality Crop Systems, Pioneer Hi-Bred a Dupont company, Pioneer was moving towards segregation and identity preservation for “complex reasons.” It is not simply driven by GM/non GM, but it is part of an ongoing drive for efficiency, testing and brand protection.”²¹

According Cargill, it is through Identity Preservation²² systems that “US agribusiness will be able to maintain its competitive advantage in the marketplace....Technology is allowing industry to offer, and consumers to demand, ever increasing value-added qualities without relaxing expectations of quality and performance.”²³

Even in South Africa, a small GM producing country, a quiet revolution has been taking place within the food industry concerning segregating and preserving the identity not only of GM varieties from their conventional counter parts but also, of the individual GM events within and between different GM varieties and species.²⁴

Indeed, the top four soya and maize importing countries-the European Union, China, Japan and South Korea all require clear identification and documentation for the import of bulk shipments of GMOs. These countries require a strict approval process for the use of any GMO and enforce zero tolerance for unapproved GMOs.²⁵ Crucially, only a handful of the main GM varieties grown in the world are approved for the import in all of these countries, let alone in the majority of the countries importing maize and soyabeans from the US and Argentina! This means that grain exporters ensure that shipments to certain countries contain only the GM varieties specifically approved in these countries but grain traders are not prepared to do the same for the rest of the world.

Agreement reached at last, but bilateral and free trade rule

The Third Meeting of the Parties (MOP3) that took place in Curitiba, Brazil during March 2006 did eventually result in agreement on Article 18(2)(a).²⁶ According to CropLife, the agreement leaves intact, the meaningless “may contain” label and merely “adds to this requirement ...a list of the biotech events that may be contained in the shipment.”²⁷

The agreement reached does two things: first, it provides interim documentation requirements for the next 6 years for trade in GMOs *between Parties* to the Protocol. Second, it expressly excludes these new requirements from applying to the trade (transboundary movement) between Parties and non- Parties, pursuant to bilateral, multilateral or regional *agreements or arrangements*, which Parties are entitled to

conclude and as provided for by Article 24 of the Protocol.

In regard to the documentation requirements *applicable between Parties*, two scenarios are provided.

Scenario one: In cases where the identity of the GMO is known through means such as identity preservation systems, then the shipment must be identified as “contains” GMOs.

Scenario two: In cases where the identity of the GMO is not known through means such as identity preservation systems, then the shipment can be labelled as “may contain” GMOs.

In regard to both scenarios, certain additional information must now be given about the GMO.²⁸ However, the agreement makes an important concession to industry that the “may contain” only requires a listing of the species that constitute the shipment. In other words, shipments of wheat will not have to be labelled “may contain” GMOs, even if it has been contaminated with GM canola. At the same time, a shipment of non-GM maize does not have to list adventitious presence of GM maize in that shipment because such adventitious presence does not “constitute the shipment.” In other words, the “may contain” label is not triggered by adventitious presence of GMOs. This implies that the contamination of the world’s food supply can continue, unless domestic legislation of all importing countries, rectifies this by way of requiring zero tolerance for unapproved GMOs and setting an extremely low threshold for adventitious presence of approved GMOs in non-GMO shipments.

It is worthwhile to note that these new measures really only apply to exports from Brazil at the moment, as the only major exporter of GMOs who is also a Party to the Protocol. These measures are to be reviewed and a new decision taken in 6 years time.

Had the agreement reached in Curitiba taken the issue no further, these new measures would have applied also to non-Parties, through its domestication in national laws. Regrettably, this is not the case. At Mexico’s insistence, these measures are expressly excluded from applying to “such movements” -such trade- between Parties and non-Parties. This express exclusion does several things:

First, it creates a disincentive for any of the grain exporting countries such as Argentina, Canada and others who may join this club later, to ratify the Protocol. Second, and astonishingly, the Protocol, (part of international law), has created a claw-back clause and loophole for exporting countries not to comply with any documentation requirements that may be part of the domestic laws of importing countries. This can easily be done by ensuring that bilateral and/or free trade agreements waive compliance with such domestic law on the grounds that the Protocol itself excludes such measures from applying to such trade. Such bilateral and free trade agreements pursued by governments by grain producing countries are beneficial only to the IGTC cartels and at the expense of contamination of global food supply.

While it is conceded that under international law, none of the provisions of the Protocol including these new measures would be binding on non-Parties. However, the exclusion goes beyond this international law position, because it expressly permits the waiver in free trade agreements, of domestic measures that implement the agreement reached on documentation.

11 Christine. von Weitsacker, *Documentation Requirements under Article 18.2.a and some of their many Layers of Dynamic Complexity*, prepared for the Workshop on Capacity Building and Exchange of Experiences as related to the implementation of Paragraph 2 of Article 18 of the Protocol on Biosafety, Bonn Germany, 2004.f

22. For a summary of key issues and challenges under the Cartagena Protocol on Biosafety including Article 18(2)(a), see Robert Falkner and Aarti Gupta *Implementing the Biosafety Protocol: Key Challenges Sustainable Development Programme*, November 2004 Chatham House.

3 Such as Cargill, Archer Daniel Midlands, Louise Dreyfuss and so forth.

44. *Who Should Pay the Cost of Documentation, Segregation and Storage of LMO-FFPs?* Red por una America Latina Libre de Transgenicos Curitiba, Brazil, March 15th 2006 www.ralt.org

5 The North American Export Grain Association, Canada Grains Council and the Chamber of Grain Exporters of the Argentinean Republic, to name a few.

6 See further, International Grain Trade Coalition (IGTC) <http://www.gmwatch.org/profile1.asp?PrId=333&page=I>

7 Dennis, Stephens. Canadian Grains Council *The Biosafety Protocol: Documentation and International Trade* Cartagena Protocol on Biosafety: From Negotiation to Implementation Historical and New Perspectives as the World marks the Entry-into-force of the Protocol CBD News Special Edition (undated) but before COP-MOP.1 23-27 February 2004, held in Kuala Lumpur, Malaysia.

8 International Grain Trade Coalition Notice to Traders number 6.

9 The ICTG has actively sought to water-down a requirement that such shipments are described as “may contain” GMOs, unless the exporting country does not have any GMO of that species (for instance, it would not apply to a shipment of wheat that may contain GM canola OR that the shipment contains more than 95% GMOs (in other words, a shipment of 5% of GMOs should not be accompanied by documentation that describes the shipment as “may contains.” International Grain Trade Coalition Notice to Trade Documentation Requirements for Shipments of LMOs for Food, Feed or Processing effective 11 September 2006.

10 The North American Free Trade Agreement Commission for Environment

Cooperation (NAFTA CEC) recommendations versus the US-Canada-Mexico trilateral agreements: implication for the implementation of Article 18 of the Biosafety Protocol, Greenpeace www.greenpeace.org

[11](#) See Greenpeace's critique of the trilateral agreement between the, US, Canada and Mexico in United States' assault on multilateralism continues: The Case of Model Agreements Pushed by Miami + Group www.greenpeace.org

[12](#) USDA-ERS 2000 "Segregating non-biotech crops: what would it cost?"

[13](#) Martin Khor and Lim Li Lin Biosafety Protocol Takes Bold Moves, Third World Network Doc. TWN/Biosafety/2004/E www.twinside.org.sg.

[14](#) Lim Lin Ching and Lim Li Lin Report of MOP2: Brazil, New Zealand block decision on documentation of GMOs, Third World Network Briefing Paper I for MOP3 www.twinside.org.

[15](#) Lim Li Ching and Lim Li Lin Report of Article 18(2)(a) experts' meeting Controversial Revised Chair's text now proposed as one option for further consideration at COP 3, Third World Network Briefing Paper 2, Briefings for MOP3 www.twinside.net,

[16](#) Klaus Schumacker on behalf of the International Grain Trade Coalition Existing Documentation Systems and their possible use to implement the requirements of paragraph 2 of Article 18 of the Biosafety Protocol-LMOs intended for direct use as food, or feed, or for processing (paragraph 2(a) of article 18) Workshop on Capacity Building and Exchange of Experiences as Related to the Implementation of Article 18 of the Biosafety Protocol, held in Bonn, Germany 2004.

[17](#) News about Testing, Segregation and Identity Preservation from the mouths of seed companies, grain traders and others Compiled by Third World Network, with the help of Greenpeace and Ecoropa Distributed at MOP3, Curitiba, March 2005 <http://www.genet-info.org>

[18](#) UBS Investment Research on Monsanto, p12, 22 November 2005.

[19](#) "Argentina Helping EU Soy Importers Fight Monsanto Lawsuits" Dow Jones Newswires, 9 February 2006.

[20](#) American Corn Growers Foundation, 2004, 'New National Survey of Over One Thousand Grain Elevators Shows Twenty-Four Percent Require GMO Corn Variety Segregation. Twelve Percent Report Offering Premiums for Non-GM Corn.'

[21](#) Jim Houser, Pioneer Quality Crop Systems, Pioneer Hi Bred (a Dupont company) from page 19 of the proceedings from a workshop sponsored by Pew Initiative on Food and Biotechnology and Economic Research Service of the U.S Department of Agriculture, 'Knowing where it's going: Bringing food to market in the age of genetically modified

crops' September 11, 2001, <http://pewagbiotech.org/events/0911/marketing-summary.pdf>

22 Identity Preservation means to “maintain the genetic integrity and characteristic of a particular crop.”

23 Ruth Kimmelshue, Cargill, from page 13 of the proceedings from a workshop sponsored by Pew Initiative on Food and Biotechnology and Economic Research Service of the U.S Department of Agriculture, ‘Knowing where it’s going: Bringing food to market in the age of genetically modified crops’ September 11, 2001, <http://pewagbiotech.org/events/0911/marketing-summary.pdf>

24 Mariam, Mayet, Case Study: South Africa’s traceability and segregation systems for GM grains Briefing Paper 4, Briefings for MOP3, Third World Network www.twinside.net

25 Import laws and dumping grounds, Greenpeace, paper handed out at MOP3 www.greenpeace.org.

26 For a detailed analysis of the agreement, see Lim Li Lin and Lim Li Ching Analysis of the MOP 3 Article 18.2(a) Decision, Third World Network, South-North Development (SUNS) Number 5992, March 2006 and *Cartagena Protocol on Biosafety-3rd Meeting of the Parties (MOP-3)* T&E Info Exchange http://www.trade-environment.org/page/infoxch/CPB_MOP3.htmj

27 ‘Key decision on documentation requirements for GMOs taken in Brazil’ Croplife, Belgium, press release, 20 March 2006.

28 The information that must be provided include details that the GMOs are not intended for intentional introduction into the environment, the common, scientific and, where available, commercial names of the GMOs, the transformation event code of the GMOs or, where available as a key to accessing information in the biosafety clearing house (BCH), its unique identifiers code and the internet address of the BCH for further information.