To the Chairperson
Compliance Committee of the Cartagena Protocol on Biosafety
Care of the Secretariat of the Convention on Biological Diversity
413 St. Jacques Street
Suite 800
H2Y 1N9 Montreal
Quebec
Canada
By fax: +1 514 288 6588
secretariat@cbd.int

CC: Minister Tina Joemat-Pettersson
Minister of Agriculture, Fisheries and Forestry
Department of Agriculture, Fisheries and Forestry
Private Bag X250
PRETORIA
0001
Fax: (012) 321 8558

CC: The Registrar: Genetically Modified Organisms
Department of Agriculture, Fisheries and Forestry
Private Bag X250
PRETORIA
0001

Johannesburg, 6 August 2009

RE: Formal complaint to the Compliance Committee of the Cartagena Protocol on Biosafety on the non-compliance of the South African Government to this treaty

Dear Chairperson

The African Centre for Biosafety (ACB) is a South African NGO deeply concerned with biosafety in South Africa and on the African continent. We have, over the years, been involved in the revision and improvement of South Africa's biosafety regime and have actively participated in decision making on Living Modified Organisms (LMOs) through our interrogation of LMO permit applications. We have also been attending meetings held under the auspices of the United Nation's Convention on Biological Diversity for several years now, with regard to the negotiations concerning the Cartagena Protocol on Biosafety. The ACB is a highly respected activist organisation, which has provided credible, reliable and timely information to the public on GMOs and biosafety in South Africa and the region as whole, spanning more than five years. This work can be found on the ACB's website at www.biosafetyafrica.org.za.

South Africa became a Party to the Cartagena Protocol on Biosafety (Biosafety Protocol) on the 14th August 2003, and the treaty was entered into force on 12th November 2003.[i] As of that date, the various obligations contained in the Biosafety Protocol become binding on South Africa, including important obligations for it to comply with the extensive and clear provisions dealing with transparency and open sharing of information, through the Biosafety Clearing House.

However, to date, the South African government has failed to comply with any of these obligations under the Biosafety Protocol. The South African government has approved a large number of GMO permits since the Biosafety Protocol became binding on South Africa, yet it has not made any attempt to supply the barest minimum of the information required to be posted to the Biosafety Clearing House as required by the Protocol (see amongst others article 20.3 of the Protocol).[ii] We have called upon the South African government on numerous occasions to remedy its non-compliance, as is more fully set out below, but it has to date, failed to remedy its default.

In the circumstances, the South African government has fallen short of complying with its obligations under the Biosafety Protocol to 'promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking also into account risks to human health,' as specified in article 23.1(a) of the protocol.[iii]

In this document, the ACB sets out in detail how the South African Government has consistently exhibited extreme reluctance in sharing relevant information concerning LMOs and how our government has failed to fulfil the obligations it has incurred as a Party to the Biosafety Protocol. We hereby urge the Compliance Committee to receive and consider this information, and call upon South Africa to comply with its obligations, within a clearly specified period of time and to inform the other Parties to the Protocol of our complaint and the actions that have been taken. The relief we are seeking in this submission is set out more fully below.

The ACB is aware that the procedures set out in item III (a) and (b) of decision BS-I/7 of the First Meeting of the Parties to the Cartagena Protocol on Biosafety do not provide any regulations concerning information sent to the Compliance Committee by non-party members to the Protocol, and consequently, that the Compliance Committee lacks the mandate to consider such submissions.[iv] However, the report on the fifth meeting of the Compliance Committee in Kuala Lumpur on 19-21 November 2008 states that the Committee 'agreed that in the event of allegations received from non-Party sources concerning the state of compliance of a Party, the Committee may invite the Party concerned to indicate, if the Party so wishes, to the Committee to consider the information received with a view to providing advice and assistance to that Party, as appropriate.'[v] We would like the Committee to do so in regard to the formal compliant ACB s lodging in this document.

Structure of complaint

This submission begins by describing the numerous ways in which the South African government has denied the ACB access to information regarding decisions made on LMOs to which ACB is legally entitled to, in terms of national legislation and the Biosafety Protocol. We point out in particular, the failure on the part of the South African government to notify the ACB as an interested party, of decisions made in respect of LMO permit applications to which the ACB has objected, thereby prejudicing the ACB's right to appeal. We also outline the paucity of information provided with regard to LMO approvals in published notices as well as on the government's website and so forth.

Thereafter, the document provides information of the results of a study commissioned by a Ministerial advisory committee, regarding public participation in LMO decision making in South Africa. The study has concluded that the Genetically Modified Organism Act of 1997 violates our Constitutional Right to public participation and fair administrative procedures. The recommendations made in this report are also outlined.

We provide information on the numerous efforts made by the ACB to officially address the reluctance of the South African Government in information sharing on LMO decision making.

Thereafter, we set out the grounds upon which we contend that the South African government is in non-compliance with the minimum disclosure requirements pertaining to the Biosafety Clearing House, of the Biosafety Protocol.

The document concludes with a set of actions which ACB requests the Compliance Committee to undertake in order to address this non-compliance issue.

South African Government's refusal to comply with the Biosafety Protocol

Within the South African Government, the Department of Agriculture (now the Department of Agriculture, Fisheries and Forestry) is the National Competent Authority responsible for ensuring that all provisions and obligations relating to the Cartagena Protocol are complied with and diligently implemented.[vi] The Registrar: Genetically Modified Organisms, working within this Department, is tasked with issuing LMO permits and keeping and maintaining records concerning LMOs. The ACB has been tireless in its efforts to access information from the Registrar concerning LMO applications and decisions made with regard to such applications. Unfortunately, the Registrar has been very unhelpful in sharing information with the ACB and the government's website has a paucity of information. For example, minutes of the Executive Committee responsible for making decisions on granting LMO permits are only published on the website several months after these meetings are held.[1] In addition, the link to the South African Biosafety Clearing House has not been functional for over a year now.[vii] We deal with this issue in more detail below.

According to the South African Genetically Modified Organisms Act (Act 15 of 1997) and accompanying Regulations, the ACB has the right to be notified on decisions made on LMO permits, as well as to appeal these decisions. The regulations stipulate that an appeal should be lodged within 30 days from the date upon which the appellant was notified in writing of the decision or action concerned. The Registrar is also forced to do so according to the Promotion of Administrative Justice Act (PAJA), Act 3 of 2000, which requires that an Administrator must give adequate notice of any right of review or internal appeal.[viii] However, to date, the Registrar has failed to provide such written notifications to ACB as well as to other interested parties.

Applications for approvals concerning LMO activities are only made public through notices published in major national South African newspapers, which applicants are required to do according to article 6.1. and 6.2. of the Genetically Modified Organisms Act Regulations.[ix] However, decisions made on LMO permits for import and export, or contained use, are exempted from this requirement.[x]

Notices published do not only fail to inform the public adequately because of their limited circulation, they also provide minimal information on the LMOs that applicants propose to release.[2] Apart from giving a full description of the LMO concerned, notices only contain limited information on the proposed trial release, such as the area and the environment in which trials are to take place. However, the information thus provided is insufficient for the general public to engage with or prepare a response, as it fails to inform on, amongst others, specific areas where releases are proposed, field trials undertaken, pollen spread, seed dispersal, vegetative spread of the LMO, foreign genes and gene products, resistance, human and animal health, environmental impact and protection, socio-economic impacts, pathogenic and ecological impacts, and risk assessments.[xi]

1. For instance, the minutes of the meetings of the Executive Committee held on 12 May 2009 and 21 July 2009 have all not been published on the website of the Department of Agriculture to this date (6 August 2009). The minutes of the Executive Committee meeting held on 3 March 2009 were only published on the website in the beginning of August 2009.
2. By only publishing notices in major South African newspapers, the Department of Agriculture fails to, per example, inform illiterate or unsophisticated people who might be affected by releases of LMOs described in these notices.

The only way for ACB to obtain access to any of the above mentioned information at any stage in the permitting process is by submitting a formal request using the Public Access to Information Act (PAIA).[xii] This is a costly[3] and time consuming exercise for the ACB, a small NGO, let alone for the lay man or woman in the street or rural village. Responding to such a request on the part of the Registrar, can take up to 30 days, with a possible extension of another 30 days being at the disposal of the Registrar, in terms of article 26.1 of the GMO act.[xiii] Although the government has responded to ACB's PAIA requests, except in two cases, where information was refused out-right,[4] the supplied information is so paltry that the ACB is seriously prejudiced in making a full and proper biosafety assessment of the application. Taking into account that the comment period for objections to a permit application is typically 30 days and the maximum period for lodging an appeal to any application being granted by the Executive Committee is only 30 days after notification of this decision, this gives ACB very little to no time to prepare an informed submission.[xiv]

We are aware that the Department of Agriculture has been drafting revised guidelines for lodging appeals and that these have been approved in principle by the Executive Committee.[xv] However, these revised guidelines have not been made available to the public for comment, nor has the public been afforded any opportunity of making inputs and comments. We are therefore, unable to comment on whether such revised guidelines will ease lodging appeals by interested parties. In any event, there is currently no obligation on the Registrar to inform the ACB of any decision taken with regard to LMO applications, even in circumstances where the ACB lodges objections. This situation is compounded by the non-availability of information on the government's website and the extreme lateness of postings of the minutes of the meetings of the Executive Council. This is showcased by the recent approval of a permit application for a GM grapevine, to which ACB objected. ACB was not notified of this approval and was only informed of the approval through the minutes of the Executive Council meeting of 3 March 2009, which were published on the website of the Department of Agriculture in the beginning of August 2009.[xvi]

The above mentioned problems around accessing information on decision-making on LMO's have been addressed by a Ministerial advisory body, the National Environmental Advisory Forum (NEAF). This body was set up in terms of the National Environmental Management Act (NEMA), Act 107 of 1998, to provide advice to the Minister of Environmental Affairs and Tourism on any matter concerning environmental management and governance.[xvii] In 2007, NEAF commissioned a study to "assess the extent and nature of public participation in GMO decision making in South Africa".[xviii] NEAF published its report and findings in March 2008 after it had undertaken extensive consultations with stakeholders in South Africa, including a stakeholder workshop. This study highlights a number of shortcomings in this public participation process.

In addition to issues raised in this submission already, the study shows how the current provisions in the Genetically Modified Organisms Act fail to provide adequate notice of the right to request reasons furnished for final decisions on permit applications. It also points out that the procedures set out in the Genetically Modified Organisms Act are in conflict with the National Environmental Management Act, as the GMO act does not adhere to the environmental management principle that participation in environmental governance should be promoted. The study concludes that current provisions in the Genetically Modified Organisms Act (15) of 1997 are inadequate, unfair and not in accordance with the South African Constitution.[xix] In other words, the Act violates our Constitutional Right to public participation and fair administrative procedures.

3. The entire system is paper-based rather than electronic, so any information is photocopied at a premium and the cost of copying and postage of volumes of often illegible pages are born by the persons requesting the information.
4. The first case concerned information regarding a permit application of the Council for Scientific and Industrial Research (CSIR), which applied to work with sorghum in a contained facility. This permit was denied. CSIR appealed and the permit was granted on appeal on condition that certain additional information be supplied, such as further info on gene flow. The ACB had objected to the permit and made a presentation at the appeal. The CSIR has now supplied the info requested t the registrar and it's this additional information which has been denied to ACB. The second case related to MON810, which has been banned in several European countries, while South Africa has had this on the market for over a decade. When MON810 was banned in France the Executive Council decided to do a review on. ACB requested this review and has been denied access to this. Both cases related information which should be publicly accessible.

On the basis of this study, NEAF formulated a set of recommendations to improve the public participation in decision making on LMO's. The most important recommendation is to reform the Regulations under the Genetically Modified Organisms Act so as to, amongst others, improve the public notification process, ensure public access to detailed information on permit applications before final decisions on these applications are made, and provide proper notification to all participants in the decision making process on LMOs on any permitting refusal or approval as well as on their right to appeal a permitting decision.[xx]

The ACB has addressed the problems around accessing information on decision-making on LMO's in formal letters to the former South African Minister of Agriculture and Land Affairs, Ms. Lulama Xingwala (dated 14 January 2009), as well as to the newly appointed Minister of Agriculture, Fisheries and Forestry, Ms. Tina Joemat-Pettersson (dated 5 June 2009). Please find a copy of these letters included in annex 1 and annex 2. In this communication we respectfully requested that the Department of Agriculture fully comply with the requirements as set out in the Cartagena Protocol. We also urged the Department to take measures to implement the NEAF's recommendations on public participation within the GMO Act.

We have only received acknowledgement of receipt of the letter set to Ms. Lulama Xingwala and we did not receive any further correspondence on this matter. In addition, ACB also met with the Registrar on the 2nd April 2009 to address and resolve this issue. Unfortunately, this meeting did not lead to any improvement regarding information sharing by the Department of Agriculture either. As the South African government has failed to address this issue, we see no alternative but to lodge a complaint with the Compliance Committee under the Biosafety Protocol so as to resolve this matter.

Non-compliance with minimum disclosure requirements for information to the BCH

Of particular concern to the ACB is the non-compliance of the South African government with the Cartagena protocol on the following issues:

1. Decisions regarding LMO's are not being posted regularly and in a timely manner to the Biosafety Clearing House (BCH). 13 decisions regarding LMOs have been posted while the South African government has granted 1521 permits since the Cartagena Protocol entered into force.[xxi] This is non-compliance with the minimum disclosure requirements for information to the BCH as set out in the following articles:

   a) **Article 10.3 and 20.3(d)**: final decisions regarding the importation or release of LMOs (i.e. approval or prohibition, any conditions, requests for further information, extensions granted, reasons for decision).
   b) **Article 11.4, 11.6 and 20.3(d)**: final decisions regarding the import of LMOs intended for direct use as food or feed, or for processing that are taken under domestic regulatory frameworks or in accordance with annex iii.
   c) **Article 11.1**: final decisions regarding the domestic use of LMOs that may be subject to transboundary movement for direct use as food or feed, or for processing.
   d) **Article 6.1**: decisions by a Party on regulating the transit of specific LMOs.

2. Not a single risk assessment has been posted to date. This constitutes non-compliance with article 20.3 of the Protocol, which requires that summaries of risk assessments or environmental reviews of LMOs generated by regulatory processes and relevant information regarding products thereof should be disclosed through the BCH.

3. Maize seed exported to Kenya from South Africa was found to be contaminated with MON810 in early 2008. This variety is not approved in Kenya. The contamination was not posted to the BCH as required by article 25.3, which states that illegal transboundary movements of LMOs should be reported to the BCH.

Conclusion and intervention sought from compliance committee

In order to properly address the above outlined issues of non-compliance of the South African Government with the Cartagena Protocol on Biosafety, the ACB respectfully requests of the Compliance Committee the following:

1. To receive and consider the information provided in this document, as stipulated in article 25 of the report on the fifth meeting of the Compliance Committee in Kuala Lumpur, 19-21 November 2008.[xxii]

2. To invite the South African government:

   a) To develop a compliance action plan for achieving compliance in regard to the minimum information required to be posted to the Biosafety Clearing House as stipulated in this protocol within a timeframe to be agreed upon between the Committee and the South African Government;
   b) To submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol.

3. To report to the Conference of the Parties serving as the meeting of the Parties on efforts made by the South African Government on non-compliance to return to compliance with regard to submitting the minimum information required to be posted to the Biosafety Clearing House and maintain this as an agenda item of the Committee until adequately resolved.

4. To widen its mandate in order to consider submissions from non-Parties to the Committee and to adopt the procedures set out in decision BS-I/7 of the First Meeting of the Parties to the Cartagena Protocol on Biosafety relating to the notification of members and the distribution of information for submissions of non-party members.

We trust that the Compliance Committee will honour our request and take measures to address the non-compliance of the South African Government to the Protocol during the sixth meeting, 4-6 November 2009 in Montreal, Canada.[xxiii] ACB is more than happy to provide the Committee with any additional information, as it has a long track record of its struggle with ensuring compliance with the Biosafety Protocol on the part of the South African government. We trust that the Committee will resolve this matter of non-compliance expeditiously, so that ACB can continue its work with regard to promoting the safe transfer, handling and use of living modified organisms to conserve South Africa's unique biodiversity as well as to secure the health of South African citizens.

Yours Sincerely

Mariam Mayet
Director African Centre of Biosafety

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