

WHO SHOULD PAY FOR THE COSTS OF THE STARLINK SCANDAL?

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The US is exporting a variety of genetically engineered corn that has not been approved for human consumption in the US. StarLink was grown in 1998 on about 10,000 acres in the US, some 250,000 acres in 1999, and more than 350,000 acres in 2000. Who will pay for the costs to farmers, country elevators, distributors, food processors, retailers, exporters, and overseas entities in the corn-products food chain, to rid the global food supply of this potential allergen? What can importing countries do?

Although the Cartagena Protocol on Biosafety is not yet in force, signatories may wish to take action now to prevent the import or demand compensation for costs they may incur as a result of having already imported a variety of genetically-engineered corn from the United States that has not been approved for human consumption.

International Legal Issues

According to customary international law, states do have a duty under customary international law to ensure their actions do not cause harm in other states. This common law principle was extended to international environmental pollution in the 1941 "Trail Smelter" arbitration and is further elaborated in the 1972 Stockholm Declaration and the 1992 Rio Declaration, as well as several rulings of the International Court of Justice (ICJ). In 1996, the ICJ issued an advisory opinion regarding the legality of nuclear weapons noting that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now a part of the corpus of international law relating to the environment."

This would seem to indicate that the US government is liable for what could be characterized as reckless and negligent failure to ensure the segregation of corn it has not approved for human consumption – because it could cause allergies – from corn that is destined for human use. The corn in question contains the *Bacillus thuringiensis* subspecies *tolworthi* Cry9C protein and the DNA necessary to produce this protein. There is evidence that Cry9C is heat stable and resistant to degradation in gastric juice, the two most important indicators of allergenicity. This corn is marketed with the trade name "StarLink," a product of the Aventis CropScience company. But because the US commodities system is not prepared to keep bulk grains separated, StarLink corn has been distributed throughout the US domestic and export markets. Independent DNA testing has found the StarLink protein in a variety of consumer products in the US and in Japan, where recent legislation sets a zero tolerance for the import of unapproved agricultural products. In the absence of an effective segregation system, the US approval itself could be considered reckless and negligent.

Negligence is bad enough. How about intentional harm? Once the contamination was discovered (not by government inspectors, but by non-governmental organizations opposed to genetically-engineered foods), the US Department of Agriculture moved to get rid of the unwanted product by officially approving StarLink for export – placing the burden on importing countries to object to StarLink imports and to test their current supplies. Also, the US Environmental Protection Agency (EPA), which regulates StarLink as a plant pesticide, has published notice domestically that Aventis is seeking an exemption for StarLink's Cry9C DNA and the Cry9C protein, to allow its appearance in human foods as well as animal foods. This approval is subject to a public comment period and a final ruling by the EPA. The US may hope these actions will be construed by the courts as immunization from liability; could they not also be construed as willful and intentional disregard for public health and international law?

It would be interesting to learn what the International Court of Justice (ICJ) might think about the United States' StarLink-related acts of both omission and commission. The ICJ could become involved in two ways.

First, inter-governmental bodies authorized by the United Nations Charter can ask the ICJ to render an advisory opinion on relevant legal matters. For example, the World Health Organization or the United Nations' food safety body, known as the Codex Alimentarius Commission, could ask the ICJ for an advisory opinion on the legality of exporting a potential allergen banned in the country of origin. But human health is not the only consideration. All corn cross-pollinates freely. Any StarLink grain that may be planted rather than eaten could result in genetic drift, affecting related varieties of plants and adjacent ecosystems – a matter of particular concern to those regions that are centers of diversity for maize. The Conference of the Parties to the Convention on Biological Diversity could test whether it qualifies as an "authorized" body under the UN system, and ask for an ICJ advisory opinion on the environmental issues.

Secondly, the Convention on Biological Diversity (CBD) stipulates that disputes that cannot be settled otherwise may be submitted to the ICJ. A dispute could easily arise, if parties choose not to import co-mingled US corn or seek compensation and redress from the US if they already have inadvertently done so. Although the US is not party to the CBD, it is a signatory, which establishes an obligation on the US to not undermine the objectives of the CBD. In such a case, the ICJ could be asked to settle the matter judiciously.

Compensation and Redress

Access to compensation may become important in countries where efforts to identify and segregate StarLink corn from corn destined for human consumption will become extremely costly. Under customary international law, states have the right to seek compensation from another state responsible for the damages – whether to persons, property, the environment, or economic. While states have shown themselves, over time, to be reluctant to invoke international liability claims against other states, there have been cases in which compensation was negotiated "without reference to legal liability" – such as when the US paid Japan \$2 million in 1944 as compensation for injuries caused by nuclear testing in the Marshall Islands. Countries also have the right to impose civil liability on private actors – such as Aventis – in their own courts or in the courts of the country where the act was done.

In the United States, efforts to segregate StarLink after co-mingling are expected to cost between \$100 million and \$1 billion. The United States Department of Agriculture is attempting to buy back crops from farmers who planted StarLink seed on some 315,000 acres this year, for re-sale to animal feedlots, dry-mill ethanol producers (as wet-milling generates a by-product that re-

enters the human food system), or other industrial uses. Aventis has said it will reimburse the US government for the costs of this buy-back program. However, the buy-back from farmers represents only a small portion of the total costs to be incurred in post-harvest reclamation throughout the food system.

So far, three multi-million dollar recalls of taco shells found by anti-GMO activists to contain StarLink corn have been announced by the Kraft, Safeway and Western Family companies, while the US Food and Drug Administration has posted a recall on 297 brand-name corn products. StarLink is costing Archer Daniels Midland (ADM) at least \$10,000 a day for extensive testing and monitoring of corn shipments at its processing plant in Decatur, Illinois. Elevators whose shipments test positive for StarLink are losing as much as \$15,000 or more in extra freight costs as well as lower prices from the animal feed operations that eventually accept them. Corn futures prices have slipped on the Chicago Mercantile Exchange based on fears that the continuing StarLink corn controversy will hamper the potential to make good on ambitious targets for U.S. corn exports.

Who will pay for all of these economic disruptions? Attorneys in the US are preparing for massive liability litigation, as affected parties all sue each other seeking recovery of their damages. Because StarLink's registration with the EPA was limited to animal feed and industrial use, injured parties could seek to hold Aventis responsible for the failure to segregate. Many farmers claim that Aventis failed to advise them of the requirement to sell their StarLink crops only for animal feed and other uses than human consumption. Others claim the company failed to warn them of the need to plant 660-foot buffer zones of non-StarLink corn around their StarLink fields, to avoid genetic pollution. Cross-pollination between adjoining crops could constitute actionable trespass where StarLink's DNA invades neighboring fields and deprives non-StarLink producers, especially those who are certified organic, access to markets. No doubt anticipating an onslaught of lawsuits, Aventis is attempting to get farmers to sign a notice, backdated to April 2000, indicating they were aware of the segregation obligations; those who do not sign may not be eligible for the buy-back program underwritten by US taxpayers.

However, the situation also opens markets for non-StarLink producers, an opportunity that other agricultural countries are striving to fulfill. Japan, which usually buys about 30 percent of US corn exports worth some \$1.5 billion, has asked the US to ensure that shipments do not include StarLink. Some Japanese companies, however, are looking elsewhere – to China, South Africa and Argentina – for supplies, even if it has to pay a premium price. The European Union, too, is questioning whether the US can distinguish between approved and non-approved products. The US has sent delegations to both Japan and Europe to try to calm importers' concerns about Starlink contamination.

Last year, the world's first global class action suit was filed in US federal court against Monsanto and other agribusiness corporations on behalf of all farmers everywhere. The suit contends that Monsanto hastened the introduction of genetically engineered organisms into markets without sufficiently assessing environmental or human health impacts, and that the corporations deliberately sought to create a cartel in order to monopolize the global corn and soybean markets. The suit is brought by a coalition of prominent law firms specializing in antitrust litigation on a contingency basis, meaning they will only be paid if they win. A victory would hold Monsanto and the other companies liable for environmental damages, negative consequences to public health, and any costs incurred by farmers around the world resulting from genetic contamination.

Need for a Biosafety Liability Regime

The Cartagena Protocol on Biosafety postpones the start liability negotiations until two years after entry into force, and even then it could take years to reach an agreed regime. But ironically, it may be the private sector that cannot wait. According to Swiss Re Life and Health, one of the giant Swiss insurance companies, "Genetic engineering is changing the risk profiles of the pharmaceuticals, agricultural and nutritional sectors permanently, without it being possible to predict the risk potential... the decisive factor is not whether it is dangerous, but rather how dangerous it is perceived to be."

Numerous international agreements have been negotiated to deal with liability and compensation that may be caused by other risky business. For example, in the case of oil pollution at sea, liability rests with the private sector, backed up by an international oil pollution compensation fund. In the case of nuclear damage, the duty to compensate rests on the operator of the nuclear installation, exonerating all other parties who may have been involved in the development of this high-risk form of energy. The Convention on International Liability for Damage Caused by Space Objects places the liability on states, but only for personal injury and not damage to or loss of property. Under the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel Protocol), the liability lies with the carrier, shipper, or other party found to be at fault. Where fault cannot be proven, strict liability is placed on the exporter for transportation incidents or on the disposer should damages occur after receipt. All potentially liable parties are required to carry insurance, bonds, or other financial guarantees covering liability in advance.

Do any of these models properly allocate the liability for environmental, human health or socio-economic damage that may be caused by GMOs? In cases in which signatories properly implemented the Biosafety Protocol and damage resulted nonetheless, there may be one answer. What about cases in which signatories may not properly follow the global biosafety rules? And what about cases involving non-parties?

It will be years before the parties to the Cartagena Protocol on Biosafety negotiate a liability regime. The experience with StarLink suggests it would be prudent to begin the effort immediately. Meanwhile, existing international law provides ample scope for states to seek compensation and otherwise defend themselves from StarLink contamination and resulting economic dislocation.