II-12.1: The French ban on GMOs declared illegal by the French Council of State. Yet, the interdiction will be perpetuated, Ministers said.

Lorraine Boris, Junior Editor

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MAIN INFORMATION

On November 28th, 2011, the French Council of State ruled that the ban on GMOs established by several ministerial decrees in December 2007 and February 2008 is not valid. The main reason for this decision is the lack of sufficient proof given by the French government that GMOs represent a high threat for public health or the environment. Yet, the French Ministers of Agriculture and Environment declared on January 13th, 2012, that the same prohibition will be adopted.

CONTEXT AND SUMMARY

At the end of the year 2007 and the beginning of 2008, the French government issued two ministerial decrees. The first one suspended the use and sale of Monsanto's corn GMO seed, MON810, which was until this moment the only one allowed and cultivated in France. MON810 includes a gene making the crop resistant to certain destructive insects. The second one made the cultivation of this seed illegal. This seed was indeed highly criticized by the French High Council on Biotechnologies, and it was believed to be toxic for rodents. The threat that the cultivation of this seed would represent was deemed to high by the French Minister of Agriculture, which consequently issued the two controversial decrees.

Monsanto, and several other companies appealed against these decrees, arguing that the government abused its prerogatives. The decision on the legality was left to the French Council of State, the competent court. Therefore, on November 28th, 2011, the Council of State declared the two decrees invalid and canceled them, arguing that the government did not bring out sufficient proof that these products bear with them a dangerous and urgent threat for the environment. The current Ministers for Agriculture and Ecology immediately announced that the French government will try to find a solution and a way to perpetuate this ban, and did find one on January 13th, 2012.

This decision is no real surprise, since the Council of State merely took up the reasoning of the European Court of Justice in a judgment of September 8th, 2011, in which the Court declared that no Member State could render a GM product illegal, unless it would represent an important risk to the environment, public or animal health. Indeed, even though the European Commission would rather support States' independency on deciding whether or not they want to authorize GMOs. However, no agreement between the Member States could be met on how to organize subsidiarity for GMOs, which explains why the European Court of Justice is still legitimate to intervene.

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BRIEF COMMENTARY

As such, the decision of the European Court of Justice decision sets up a criterion, which is very typical of European reasoning. The burden of proof has to be borne by the State, and, in the case of

GMOs, the proof is hard to bring out since there is today still not enough experience and hindsight to assess the environmental impact of GMOs. If the French government wants to perpetuate the ban of GMOs in France, it must adopt a new safeguard clause in accordance to a procedure deemed fair by the ECJ. Details on how the ban will be perpetuated are still to be published, yet, it seems that the application of the French precautionary principle becomes even harder for environmental issues.

The interpenetration of environmental law in other legal fields is again visible in this case. But what is also very striking is how difficult it seems to assess rationally the future impact of an agricultural seed which will not only produce specific products, but which will have an impact on the environmental matrix in which it is sowed. Currently, the supervision of the effects of Monsanto's products on the environment is made by the European Agency for Food Safety. In France, the High Council for Biotechnologies is the agency responsible for this supervision. Monsanto must provide the French and European agencies with environmental reports every year. In France, the Scientific Council of the HCB then analyses the report, and issues some recommendations so that Monsanto's report become more accurate.

Yet, the time needed between these recommendations and their incorporation in the new report is of two years. On top of that, the HCB's technical recommendations are not mandatory. For instance, in its recent report, Monsanto avoided to study the impact of the MON810 in the Spanish valley of the Ebre, in which, the previous year, some indication of a potential emergence of resisting insects were observed. It will thus take at least two years to assess whether or not something observed in 2009 has, in 2012, developed into a system-modifying environmental change. Needless to say that other methodological practices have been criticized by the HCB. Indeed, the mere logic of letting the monopolistic company provide the information to the supervising authority inherently creates underlying conflicts of interests. Since independent reporting on the environmental impact of a genetically modified product costs between 3 and 5 million Euros – according to Gilles-Eric Seralini, a French expert in this field – currently, no other scheme can be implemented. As a matter of fact, even the European Ombudsman's Office stated, in December 2011, that environmental monitoring in Europe is subject to certain conflict of interests, as revolving-doors practices still exist in this field.

On top of that, the reasoning of the ECJ, in which the burden of proof of a potential environmental risk is borne by the government does not seem especially appropriate as it would mean that the governmental agencies, representatives of a logic of public interest, have the means to gather information independently and to implement coercive measures. They would actually become regulatory agencies. And even so, they should have the means to be able to predict the effects of the modification of seeds on the biosphere at a certain scale, which is unlikely to be thoroughly reproduced and anticipated.

Indeed, the perception of the environment in the eyes of legal reasoning is dubious. The interconnections between different species and/or soils are inherent to the reality of the environment, allowing it to function under a matrix scheme. Thus, any modification in the soil does not solely lead to a modification of the product of the seed, but also of the surrounding environment, on the insects for example, but further, on the surrounding fields and soils, undergrounds etc., for the environment is boundless. The notion of environment can difficultly be reduced to areas, plots of land conceptually extracted from their own environment and therefore can also difficultly be reduced to a strict materialistic approach. In the environmental field in particular, space can only be conceived as a whole – unless it is reduced to the surrounding. Therefore, the incompatibilities between different layers of time is even more blatant, for the present perpetuation of a parceled out understanding of the environment is only likely to develop itself into more division, and will not be able to bring the long-term harmonious and prolific environmental production which is the underlying dream of a mechanistic approach of the question.