

Harvesting Royalties for Sowing Dissent? Monsanto's Campaign against Argentina's Patent Policy

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Berne Declaration
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“Monsanto has shown that it continues to be a national embarrassment,” Argentine Agriculture Secretary Miguel Campos declared at a press conference in Buenos Aires in June 2005. The reason of his anger were the lawsuits which US seed selling company Monsanto had filed against European soy importers in the Netherlands and in Denmark a few days ago. Therein, Monsanto accuses the Dutch firm Cefetra, the Danish company Danish Lokale Andel as well as the American global company Cargill of illegally importing from Argentina genetically modified Roundup Ready soy which is resistant against the herbicide Roundup (glyphosate) owned by Monsanto. The multinational has a patent on this genetic resistance in Europe and now insists on its right to control the production, processing, sale, and import of the patented gene within European borders. By taking legal action, it claims compensation from the accused soy importers – apparently in recompense for the loss of royalties in the export country Argentina, where the RR gene could not be patented. In doing so, Monsanto is bringing a long-smouldering conflict about patent rights between the company and the Argentine government to international public attention. NGOs fear that this procedure will now enable Monsanto to assert rights of property not only to RR seeds but also to products derived from those seeds. And in addition to fundamental concerns about the social and environmental consequences of industrialised soy monocultures in Latin America as well as about their significance for these countries’ food sovereignty, critical observers now increasingly address the changes in commercial policy that may result from a patent-based monopoly status of a company. Does the granted patent license Monsanto to control the import of soy beans, soymeal, or soy pellets into Europe? Are deregulation tendencies in the state faced with the increasing power of the patentees? What impact does Monsanto’s Roundup Ready patent have on the political sovereignty of a developing or industrialising country whose main export product is directly affected by this patent? Observers, however, are faced with processes running behind closed doors and not being laid open to the public – be it for protection of the accused or due to the firm’s own order of prohibition. The present article therefore aims at throwing further light on the pending lawsuit and at exploring its possible outcomes in their political consequences.

Argentina's Agricultural Export Industry and Roundup Ready Soy

Roundup Ready soy is a key factor in Argentina's economic policy as well as in its discharge of debts policy. 25% of its export income are made from overseas sales of soy and the same percentage of its debt service charges is paid off with tax revenues from the export sector.¹ Soy production thus appears today as an important vehicle to find a way out of the economic crisis. Critics, however, vehemently point to the obvious environmental and social damages resulting from this forced production. "You can hear no more birds on the fields today, there is deathly silence. And it shows how much Argentina's landscape has changed during the last years," reported, for instance, Adolfo Boy, professor of agronomy from Rosario and member of the NGO Grupo de Reflexion Rural, on his last lobbying tour through Europe. Capital-intensive but labour-extensive soy production has exhausted the soils and driven tens of thousands of farmers from the land. The statistics reflect these negative developments: 15.2 million hectares of acreage, more than half of the agriculturally used area, are already planted in genetically modified soy, another 4 million hectares shall be added by 2010, according to government plans.²

Today, soy plays the same role in Argentina as bananas in Ecuador, oil in Venezuela, or coffee in Nicaragua. Conspicuous, however, is the predominant cultivation of genetically modified varieties. In the context of the structural reforms in Argentine agriculture and the high world market prices on agricultural products during the 1990s, the introduction of GM seeds fell on fertile ground. In 1996, the *Secretaria de Agricultura, Ganaderia y Pesca* (SAGPyA) granted Monsanto the commercial cultivation of RR soy. The sale was effected by various licensees, above all by the trading company Nidera which is established in the Netherlands. Soy appeared to be attractive not merely because of the prospering world market prices but also because Monsanto offered the seeds to farmers free of charge and at a slightly higher sales price compared to conventional seeds. The corresponding glyphosate also could be purchased cheaper than, for example, on the North American market.

Monsanto's effort to obtain a patent on Roundup Ready soy in Argentina remained unsuccessful. The official reason given by the Argentine government refers to national and international legislation according to which the company filed its patent application extemporaneously, i.e., after the legally set one-year period following the first filed application world-wide had expired. In its fight for the patent, Monsanto went as far as to Supreme Court where, however, in 2001 it had to admit defeat. So finally, the multinational took recourse to the existing plant variety protection law whose tradition allows farmers to cull seeds for their own use. On an international level, Argentina signed the 1978 *Act of the Convention for the Protection of New Varieties of Plants* (UPOV) which provides limited protection of varieties of plants and allows free re-use of seeds for replanting. Yet it was precisely this patent-free situation which truly accelerated the victorious march of the GM crop: While farmers in North America had to pay

¹ Cf. Liliane Joensen et al. *Argentina: A Case Study on the Impact of Genetically Engineered Soya*. London 2005, p. 10

² Cf. Miguel Altieri/Walter Pengue. *Genetically Engineered Soybeans: Latin America's New Colonizer*. The Seedling, 2006, p. 1

royalties for the RR patent, the fattest profit margins for years belonged to Argentine soy farmers. Conversely, Monsanto quickly advanced to dominating the market. Various NGOs judge this to be a wise move by Monsanto in order to flood the Argentine market with genetically modified seeds.³ From Argentina, finally, GM soy illegally entered Brazil, Paraguay, and Bolivia – countries that have only recently legalised the commercial cultivation of GM soy.

The Hunt for Royalties

Even after years of lobbying, Monsanto has not managed to move the Argentine government to a patent law modification in favour of the multinational company. It was not least under the pressure of US farmers that Monsanto has made repeated efforts to collect royalties on GM soy. In 1999, the company began to sell the seeds by means of contracts which charge “extended royalties”. Under this system, Argentine farmers are obliged to pay 2 dollar plus taxes for every 50 kg-bag of seeds saved for replanting. Although this practice contravenes the Seed law the Argentine government does not intervene. Monsanto itself defends the system on the grounds that it helps cover the company’s investments into research and development.

In 2001, Monsanto’s patent on glyphosate finally expired, and the company saw itself confronted with cheap derivatives from China. With concern it further observed the spread of illegal seed sale, known in Argentina as the practice of “bolsas blancas”. According to estimates by the SAGPyA, only 20% of the soybeans cultivated in Argentina are grown with seeds purchased from authorised dealers. Almost a third of the seeds is saved by farmers for replanting, while over half is bought on the black market.⁴ In January 2004, therefore, Monsanto announced that the firm would withdraw from the soy business in Argentina; the sale of GM soy seeds and a country-specific research and development program were stopped. The Argentine Secretariat of Agriculture responded by publishing a legal draft, on the basis of which a technology compensation fund should be initiated. For the financing of the fund, a sales tax per bag was proposed which would flow back to the seed selling companies – in recognition of their rights of invention.⁵ Leftist NGOs denounced the proposal as a masked “farmer tax” in favour of Monsanto. The farmers, in turn, regarded it as yet another mechanism designed to curtail their rights to save seeds for replanting. They received support from the industry and from the office of state revenues, both of which rejected the draft on the grounds that this new tax would hamper the development of Argentina’s agricultural production for years. The proposal of a technology fund was dropped.⁶

As Monsanto had not achieved the desired success by exerting pressure on the soy exporting companies, nor by negotiating with Argentinian farmers

³ Cf. *Soja, Soja und nochmals Soja...*: Interview mit Lilliane Joensen (see www.gen-ethisches-netzwerk.de/gid/TEXTE/ARCHIV/PRESSEDIENST_GID164/LANDWIRTSCHAFT164.HTML)

⁴ Cf. Taos Turner. *Argentina to Fight Monsanto in Court*. Dow Jones, USA from 1.7.2005 (see http://money.cnn.com/services/tickerheadlines/for5/200507011624DOWJONESDJONLINE001149_FORTUNE5.htm)

⁵ Cf. Marcela Valente. *Argentina: Monsanto and farmers battle over GM seeds*. Inter Press Service from 10.2.2004

⁶ Cf. *Monsanto’s royalty grab in Argentina*. Grain, 2004 (see www.grain.org/articles/?id=4)

organisations in the provinces of Santa Fé, Cordoba, and Buenos Aires, the conflict escalated in summer 2005. Since the beginning of the year already, Monsanto had had freighters with Argentine soymeal cargo detained in the ports of Denmark, the Netherlands, England, and Spain in order to control their goods. In Italy, the same enterprise remained unsuccessful as the state denied Monsanto the right to detain freighters. Monsanto's purpose was to prove that the freighters carried Roundup Ready soy and that the shipment to Europe, where the examined goods are protected by patent, was thus equivalent to illegal import. In June 2005, the company struck another blow and sued the two import enterprises Danish Lokale Andel (DK) and Cargill (USA/DK) at the Danish High Court and the firm Cefetra (NL) at the Dutch Rechtbank s' Gravenhage. In the meantime, there have been six further cases of import companies being taken to court.⁷ Monsanto explained its strained recourse to legal action as follows: "Monsanto reserves the right to begin legal actions on the assumption of uncovering imports from Latin America of unlicensed Roundup Ready soy in countries where the said technology is protected by intellectual property rights."⁸ At the same time, however, the company makes clear that it would prefer a local agreement in Argentina to a legal process.

The two lawsuits are, to our knowledge, the first instances to document a patentee's attempt at controlling the import of agricultural products at the borders, i.e., its attempts, based on its monopoly rights, at regulatively intervening in the trade of raw materials. For this reason, it is worth examining more closely the lines of reasoning introduced in these processes: What are the arguments given by the parties involved? What fundamental considerations are they based on? And what are the possible effects of this case on the interconnection between trade and patent rights?

Patents on Plant Genes and the Question of Their Scope

Monsanto's charge foots on patent EP 546090 granted by the European Patent Office in 1996 which encompasses genetically modified plants that have been made resistant to the company-owned herbicide glyphosate. If the company succeeds at the European courts in obliging the soy importers to compensation payments,⁹ this would have crucial consequences for Argentina's soy economy. Thus the costs incurred for the importers would probably be passed on to the Argentine farmers. There would further be the risk of sales problems and of a sudden drop in prices. Argentine Secretary of Economy, Felisa Miceli, recently estimated that soy sales in the amount of 3.6 billion dollar were in danger.¹⁰ The agricultural association Sociedad Rural Argentina (SRA) therefore believes that the soy farmers have hardly any choice but to give in. The Argentine government, however, took the offensive and at the end of January 2006 petitioned the

⁷ Cf. *European Commission supports Argentina in Monsanto battle*. MarketWatch (DowJones) vom 10.08.2006 (see www.marketwatch.com ; search: soy, Argentina)

⁸ *Seeds of dispute*. The Guardian, UK from 22.2.2006 (see business.guardian.co.uk/story/0,,1715329,00.html)

⁹ Monsanto demands a fee between 15\$ and 18.75\$ per ton (the current trade price being at 178\$ per ton). Cf. *ibid.*

¹⁰ Cf. *European Commission supports Argentina in Monsanto battle*. MarketWatch (DowJones) from 10.08.2006 (see www.marketwatch.com ; cf. footnote 7)

involved European courts to be acknowledged as a third party in the processes. "The lawsuits," Argentine Agricultural Secretary Campos said, "endanger fair trade and call into question Argentina's ability to exercise its sovereign rights."¹¹ In March, moreover, the Argentine government applied to the European Commission for support in the lawsuit as well as for an examination of the legality of Monsanto's practices. The Commission was asked to clarify in particular whether the company's legal action could be considered an abuse of its monopoly-based dominant market position.¹² A month later, the Ambassador of Argentina in Brussels presented to the EU Commissioner of Agriculture his government's legal argumentation for Argentina's defence in the process against Monsanto.¹³ In this, the following consideration is of central importance: The patent right which the company owns on the RR gene does not cover either soy beans as an export good or products derived from the soy bean, such as soymeal. The argument is based on a formulation in the EU-Biotech Directive (Art. 9) according to which the protection by patent extends "to all material [...] in which the product is incorporated and in which the genetic information is contained and performs its function."¹⁴ The goods controlled by the customs officers in Denmark and the Netherlands was soymeal, i.e., a product obtained from RR soy seeds. These exported by-products however, including the soy beans themselves, are shipped to Europe not for cultivation purposes but for consumption and industrialisation purposes. The RR gene can develop and perform its genetic function (the resistance to glyphosate) only when the soy seed is cultivated and treated with the herbicide, which is in the varieties cultivated in Argentina. The claim to patent rights to the products exported to Europe is therefore untenable – thus Argentina's argumentation. The crucial point of the statement is the following: The patent right merely includes the function of the resistance to glyphosate and does not encompass the gene *per se*. Claiming rights of property to the products that are exported to Europe would mean illegally extending the patent right from RR seeds used for multiplication purposes to products obtained from RR seeds. In the case of soy this would include a tremendous range of foods. The claims of the Monsanto patent refer not only to the gene but also to the method by which the plants are produced. According to Article 8 of the Biotech Directive, such protection rights on processes extend "to biological material directly obtained through that process and to any other biological material derived from the directly obtained biological material through propagation or multiplication [...]". The crux here: "Biological material", by definition of Article 2 of the Biotech Directive, only refers to material "capable of reproducing itself or being reproduced in a biological system." Soymeal obviously cannot reproduce

¹¹ *Monsanto stops more Argentine soy in Europe*. Reuters from 8.2.2006 (see www.genet-info.org)

¹² Cf. *Argentina asks EU to intervene in dispute with Monsanto*. Reuters from 8.3.2006 (see www.genet-info.org)

¹³ Cf. *Legal Grounds for the Submission of the Argentine Government in the Ongoing Lawsuits over the Exports of RR Soybeans to Denmark and Netherland*. Unpublished Argumentation Paper by the Argentine government. April 2006

¹⁴ Art. 9, Directive 98/44/EC of the European Parliament and of the Council from July 6 1998, on the Legal Protection of Biotechnological Inventions

itself. Monsanto's claims to extend protection on processes to soymeal are thus untenable.

This position taken by the Argentine government is also being put forward by well-known patent law specialists both from Latin America and Europe.¹⁵ Carlos Correa, lecturer at the *Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico* in Buenos Aires, even considers the process as a purely strategic operation, as a means for Monsanto of exerting pressure on the Argentine government to make it succumb and change the law to the multinational's taste.¹⁶ In his view, the European import enterprises are not much more than subsidiary victims. More importantly, he points out, the case will demonstrate in what ways conflicts between multinational companies and the nation states where they operate will be solved in the future.

In addition, the Argentine government has recently received an appraisal from the Internal Market and Services Directorate General of the European Commission wherein the responsible legal experts support the arguments of the Argentine government and reject the claim to patent rights on the imported soy derivatives. This appraisal is currently being sent to all European customs offices. The company Monsanto, on the other hand, is far from abandoning its campaign against Argentina's patent policy and instead plays down the significance of the appraisal: "We are not aware of any official document, but even if it is confirmed, the development of the present cases should not be effected."¹⁷ Such composure is understandable: The appraisal has no binding effect on the national courts, nor has the European Commission been involved in the lawsuit cases up to now.

The Consequences of the Lawsuit

Should Monsanto win the case contrary to expectations, this will have far-reaching effects on the agricultural market. To the Berne Declaration, the spokeswoman of Cargill said that the outcome of the case "significantly can impact trade." To date, legal conflicts concerning patent rights have never been to the fore in the agricultural market – quite contrary, for instance, to the trade in pharmaceutical products. This can be put down to the fact that in most countries, genetically produced useful plants have been patentable only for a few years and that their cultivation and trade has assumed international dimensions only within the last few years. So this concerns a legal field where there are yet hardly any landmark verdicts pointing the way. Monsanto's lawsuit against the soy importers constitutes a precedent which lays new foundations for the interpretation of the Biotech Directive as well as for the international agricultural market. Should Monsanto win, this might provoke a similar situation in the food sector as in the medication sector where patents on pharmaceutical products have forced up prices and rendered products almost inaccessible for the poorer classes.

¹⁵ E.g. by Carlos M. Correa: cf. Correa. *La disputa Monsanto vs. Argentina sobre soja transgénica*, in: *Le Monde Diplomatique* from August 2006

¹⁶ Correa. *La disputa*, p. 6

¹⁷ Monsanto-spokesman Federico Ovejero in: *European Commission supports Argentina in Monsanto battle*, MarketWatch (DowJones) from 10.08.2006 (see www.marketwatch.com ; cf. footnote 7)

Within the WTO there have been efforts in recent years to remove or at least reduce tariff and non-tariff trade barriers. If, however, the patentee's protection rights extends from useful plants to derived products (like soymeal, for instance), private companies will thereby be entitled to establish new trade barriers. As we know, the patentee has the explicit privilege to control or to prohibit the import of patented products (in case he has obtained a patent in the country of import). By effect of the WTO agreements, the state has accordingly lost the possibility of prohibiting imports of, say, apples in order to protect the internal industry. The patentee of a patented apple, on the other hand, is now free to prohibit import for the assertion of his monopoly rights. Control of trade thus passes from states to patentees.

One might well reply by saying that it will never come to all that as Monsanto's chances of winning the case are, according to juridical appraisals, not very big. But the problem of seed selling companies gaining increasing control over the international market remains an issue of general concern – for the following reasons:

1. With the present lack of legal clarity before a verdict has been reached, Monsanto's lawsuit even now creates a negative environment for the export of soy from Argentina. With the uncertainty of the soy importers that have been taken to court, Monsanto has already achieved one first goal. The company will probably make every effort to protract the processes, in the hope of wearing down both the state of Argentina and the traders. These tactics can be successful even if Monsanto in the end loses the case. It is the same system as a "bluff" in playing poker: Monsanto gives the impression of having a good hand and so forces the others to surrender.
2. To assume Monsanto's defeat before court in this case does not mean that other cases are equally bound to fail. Each case needs to be considered separately regarding the claims made in the patent as well as the traded products. Thus there are patents which explicitly include derived products. In its patent on maize with a high oil content (EP0744888), the concern Du Pont has expressly included in the claims the oil obtained from the maize as well as its use for feed, cooking or industrial uses. After a protest from Greenpeace and Misereor, the patent was rejected in its entirety in 2003; but the concern will continue trying to extend their claims in this direction. Also, a case may take a different turn if the imported product might be used not only for food and as animal feed but also as seeds.
3. Theoretically, control of the import of agricultural products is an option open not only to patentees but also to owners of varieties protection rights according to the 1991 *International Convention for the Protection of New Varieties of Plants* (UPOV). This Convention also includes into the breeder's rights the authorisation of the export or import of protected varieties. Each contracting party can here extend this authorisation to products obtained through the unauthorised use of harvesting material of the protected variety (Art. 14.3).
4. This case also highlights how attractive the terminator technology might turn out to be for those concerns that cannot obtain their patent rights as

globally as they desire. If they succeed in only handing out sterile seeds and if farmers thus have to buy new seeds every year, then seed selling companies will no more depend on patent rights to assert their claims with the farmers. This demonstrates the ways in which a politically authorised right (like the right to replanting) can be undermined by a new technology. Such technologies therefore need to be examined in terms not only of their environmental effects but also of their socio-economic consequences before they are authorised.

The case of Monsanto vs. Argentina constitutes a model case of a multinational concern trying with various actions to form the existing law of a state to suit its own interests. It goes without saying that a patent law which meets Argentina's needs is not the kind of patent law which Monsanto desires. And it is very much to Argentina's credit that the state has to date persevered in its position and is willing to fight for its concerns even at the European courts. It is a struggle both for food sovereignty and for political sovereignty.