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Business as a regulatory leader for risk governance? The compact initiative for liability and redress under the Cartagena Protocol on Biosafety

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In March 2008, the six world leading agro-biotechnology companies, presented a private, international instrument for liability and redress to cover the environmental damage caused by genetically modified organisms. The proposal was rejected by governments, who instead adopted a binding supplementary liability and redress protocol to the Cartagena Protocol on Biosafety, with no content transfer from the business initiative. Elaborating on this case study, it is explained how powerful business proposals can turn into a policy failure. Business conflicts are identified as one major explanatory factor. The fragmentation of business interests and the lack of business support for the six major firms' initiative have discredited the role of corporations as regulatory leaders. Business unity is found to be a decisive, necessary condition for the endorsement of corporate proposals by policymakers.

Keywords: agricultural biotechnology; biosafety; business actors; Cartagena Protocol; Compact initiative; genetically modified organisms; liability and redress; Nagoya–Kuala Lumpur Protocol

The global cultivation of agricultural genetically modified organisms (GMOs) is increasing, reaching 125 million hectares worldwide for modified seeds in 2008 (Clive 2008). Consequently, several regulatory frameworks have been put in place to manage the environmental and health risks related to this new technology. GMO contamination is one of these risks, defined as the undesirable presence of GMOs in the environment and/or in agricultural and/or food products. GMO contamination occurs when unauthorised GM varieties are introduced into the environment or when authorised ones are used inappropriately. It can be the consequence of the illegal planting of GMOs,

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adverse gene flows from one field to another or incidental combinations occurring all along the agricultural products' supply chain. GMO contamination can have a direct impact on *in situ* biodiversity by modifying the wild flora and fauna through crossbreeding or insect resistance (Losey *et al*. 1999). At the food product level, it can be responsible for serious allergies and health disorders, in particular in the case of unauthorised, and consequently not tested, GMO varieties (Kuiper *et al*. 2001).

Such a risk requires forms of environmental governance that are meant to prevent and deter GMO contamination rather than cure recorded contamination incidents. GMO contamination is hardly a reversible phenomenon, in particular when it has affected *in situ* biodiversity. This is why the Parties to the Cartagena Protocol on Biosafety (CPB), an international agreement adopted in 2000 under the Convention on Biological Diversity (CBD) to regulate the risks linked to GMOs, have recently adopted an international instrument for liability and redress in the case of GMO contamination (often referred to in this article as L&R): the Nagoya–Kuala Lumpur Protocol (NKLP). The purpose of this instrument is to ensure remediation as well as compensation for damages caused by GMOs while creating a precedent for GMO contamination deterrence.

Interestingly, the intergovernmental discussions on the NKLP have begun to address the possibility of entrusting corporations with L&R regulations, rather than governments. While the NKLP was discussed, the six world leading agro-biotechnology companies, i.e. Monsanto, BASF, Syngenta, Dow AgroSciences, Dupont/Pioneer and Bayer Cropscience, proposed in March 2008 to establish a private contractual mechanism for L&R. According to these firms, this mechanism, called 'Global Compact' (Anonymous 2008a), was meant to prove that their products were safe and demonstrate that they could stand behind GMOs and ensure remediation and compensation in case of contamination (Anonymous 2008b). The proposal is particularly interesting as it echoes current debates among scholars studying global environmental politics as to the capacity of global firms to become providers of environmental regulations. It is also embedded in a broader policy trend, at the international level, of collaboration with corporations for sustainable development. It is no coincidence that this initiative draws its name from the United Nations Global Compact initiative launched by the United Nations (UN) Secretariat in 2000 to engage corporations under the UN universal principles. Therefore the 'Global Compact' initiative of the six biotech firms – which is referred to as the 'Compact', to avoid confusion with the UN scheme – is an interesting case study to test the role of business as a regulatory leader for environmental risk governance.

This discussion proceeds in four parts. Firstly, the analytical frame of the study is presented. Current debates on the role of corporations in the literature on global environmental governance are reviewed. In particular, two scenarios are drawn from this literature concerning the conditions under which business actors could be policy leaders. These scenarios are labelled as follows:

'corporations versus environmental non-governmental organisations (ENGOs)' and 'business conflicts'. Secondly, the general context of the case study is presented. Current data on GMO contamination shows that most of the damage associated therewith is still to come. Moreover, GMO contamination is a difficult issue to handle, as demonstrated by the lengthy negotiation process of the NKLP. Thirdly, the above-mentioned scenarios on the potential involvement of corporations as regulatory leaders are tested. The content of the business proposal was rapidly subjected to increasing criticisms formulated by ENGOs. More interestingly, several conflicts appeared within the business community regarding the proposal. Finally, the fourth part illustrates how, during the negotiations, business conflicts were underscored by national delegates as the most significant weakness of the Compact initiative. In fact, governments did not even engage in discussing the content of the proposal. In conclusion, business unity is found to be a *necessary*, although not *sufficient* condition, for corporate proposals to be adopted by states. Methodologically, the case study relies on an extended literature review on the topic, documentation on the negotiations published in the *Earth Negotiation Bulletin* (ENB) and on fieldwork observations and interviews conducted during the third and fourth Conferences of the Parties to the CPB (COPMOP3 and COPMOP4).

Businesses as regulatory leaders in global environmental governance

Many theoretical approaches can be useful to picture the role of business in environmental governance (Falkner 2003, Newell 2005).[1] The two dominant ones in particular propose different scenarios regarding the potential role of business as regulatory leader. Originating from the literature on global environmental governance in general, they have both been applied to international biosafety governance. These two approaches are therefore particularly useful to investigate why the six leading agro-biotechnology firms were unable to influence the negotiation of the NKLP.

Several authors, inspired by international political economy, consider corporations to be skilful policy leaders, unified in their opposition to environmental regulations (Levy 2003, Newell and Glover 2003, André 2005, Levy and Newell 2005, Burgiel 2007, Clapp 2007). According to them, corporations perceive environmental protection as incompatible with economic development. Firms are often reluctant or even hostile to new environmental legislations, working hard to keep issues off the agenda. Moreover, business lobbies are highly integrated and have great power – organisational, financial, and discursive in particular – to oppose legislations. Often, corporations play the 'jobs versus environment' card, threatening governments with compulsory redundancy. Business power is also increased by structural factors such as an economic crisis. As governments lack funding, they are inclined to entrust businesses with environmental regulations, which, in consequence, take the form of weak, voluntary instruments. However, all of these authors recognise

that business preferences are not always dominant in environmental governance. What they propose is a 'business versus ENGOs' scenario. In particular, they note that ENGOs are important countervailing forces to business power, asking corporations to comply with environmental rules. The dynamism of ENGOs is to be scrutinised in detail to assess the overall potential of business to be a regulatory leader.

While the 'business versus ENGOs' scenario has covered several environmental issues, many of the above-mentioned authors have investigated the case of biosafety in detail. All of these scholars have underscored the great political power of the biotechnology industry (Newell and Glover 2003, Andrée 2005, Burgiel 2007, Clapp 2007). In their studies of international negotiating processes towards biosafety regulations – in particular the adoption of the CPB – they have reported that ENGOs have had from a medium (Andrée 2005, Burgiel 2007) to very limited influence on the result of the negotiations (Newell and Glover 2003, Clapp 2007).

The second scenario for the influence of business on environmental politics, that of 'business conflicts', has been recently developed by scholars mainly inspired by the pluralist theory of international relations (Amoore 2000, Falkner 2008, Vormedal 2008, Bled 2009, Orsini 2011, Andrée 2011, Tienhaara *et al.* 2012, p. 47). They recognise that the so-called private sector includes a wide variety of actors, whose interests diverge when facing similar issues. The logic of profit takes numerous shapes, including a 'business case' for environmental regulations: 'Many more (*business leaders*) now believe that green is lean and profitable' (Braithwaite and Drahos 2000, p. 268 quoted in Tienhaara *et al.* 2012). The social relations that take place within a corporation, across different corporations or between corporations and governments, determine firms' varied and sometimes opposed positions. Three sub-factors have been indicated as particularly relevant (Falkner 2008): (i) the position of companies in the commercial supply chain – determining their links with consumers; (ii) their level of internationalisation – defining their sphere of influence; (iii) their capacity to innovate – linked to their control of expertise. For these authors, ENGOs also play a strong role in international environmental politics, but their overall impact is a secondary factor. Governments are primarily driven by their economic interests, and business unity makes a difference in orienting the final negotiation outcomes towards weak, medium or strong environmental regulations.

Again, the 'business conflicts' scenario has been applied to several environmental issues and in particular to biosafety. Advocates of the scenario have underlined the sensitive tensions between the numerous industrial sectors involved in GMO production and commercialisation (Falkner 2008, Andrée 2011, Orsini 2011). For them, several binding provisions have entered the CPB – in particular on GMO documentation – due to the fragmented state of business interests at the end of the negotiations (Falkner 2008).

Both approaches provide different explanations of the level of business power in environmental policymaking in general and in biosafety issues in

particular. In this particular field, the literature suggests an evolution from strong business power at the early stages of the negotiations to business conflicts towards the end – this is visible when one looks at the publishing dates of the above-mentioned studies on the biosafety negotiations. Applied to the Compact initiative, the 'business versus ENGOs' approach predicts that corporations become the main players in L&R for GMOs, compared to weaker ENGOs. Indeed, firms already have great influence on L&R disputes, as demonstrated in the Schmeiser case, for instance. In this case, Monsanto initiated the trial and was successful in demonstrating that the Canadian farmer was responsible for the presence of GM canola seeds in his fields. Even if Schmeiser managed, after 10 years of legal procedures, to avoid the payment of penalties, the case demonstrated the difficulty for farmers to invoke liability mechanisms against corporations, while firms benefit from strong patent law enforcement (Lee and Burrell 2002, pp. 521–523). In other cases of GMO contamination, in particular in developing countries, the only way to avoid the supremacy of business in L&R rules has been through societal protests and pressures for adapted governmental rules. These protests often ride the wave of the bad reputation of the biotechnology sector. Overall, the acceptance of the Compact arguably depends on the dynamism of the ENGOs opposed to the corporatisation of environmental governance.

Conversely, the supporters of the 'business conflicts' scenario underline that a wide variety of businesses are concerned with GMO contamination issues and pursue diverse objectives regarding L&R. For example, biotechnology companies might not want to support a strict L&R regime as this would infer that their products were potentially dangerous. Conversely, grain traders might look for guaranties when transporting GM seeds. Consequently, the Compact initiative might not mirror the interests of the entire business community, compromising its acceptance on a broader scale. Business unity, as the main driver of the political role of corporations, is far from being achieved in L&R negotiations, and representativeness is likely to be an issue for governments. Depending on their economic interests, states defend opposite positions, leading to weak as well as strong provisions on L&R.

Both interpretations give interesting insights. Before examining their relevance to the Compact case study, it is useful to understand the phenomenon of GMO contamination, as well as the negotiations linked to the issue.

Elaborating liability and redress instruments for GMO contamination

How, where and why GMO contamination is occurring

Knowledge on the risks of GMO contamination at the global level is still fragmented. Only two sources of information are currently available on this issue. The first is managed by the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS). APHIS provides a list of the major incidents – 19 in total – of non-compliance with its

biotechnology regulations from 1995 to 2011.[2] To remedy these cases of GMO contamination, the service asked the companies responsible for the non-compliance to ensure the destruction of the unwanted material, in addition to either providing remediation, paying civil penalties, or sponsoring training conferences on compliance with APHIS rules, depending on the specific case at hand. The list of GMO contamination cases established by APHIS is an interesting starting point for the study of this phenomenon, but it has some geographical limitations, covering only the United States.

A second initiative has been undertaken specifically to document GMO contamination worldwide. It involves two ENGOs – GeneWatch UK and Greenpeace International – which jointly launched, in 2005, a genetically modified (GM) contamination register.[3] The register provides information on all incidents involving GMOs – authorised and non-authorised varieties – that have been publicly documented. In 2010, the register archived more than 250 incidents worldwide. Despite its broad scope, the initiators of the register recognise its incompleteness and are working to improve knowledge on GMO contamination cases.

Current debates on damage caused by GMOs draw on these registers but have also been heightened by high-profile cases of GMO contamination. Three of these are relevant to illustrate the main channels of GMO contamination: GMO flows, illegal GMO planting and the accidental release of GMOs.

A famous case of GMO flows is the 1998 Schmeiser vs. Monsanto trial. Percy Schmeiser, a Canadian farmer, was sued by Monsanto for infringement of its patent on GM canola seeds. Such seeds were found in Schmeiser's harvest of conventional seeds. As GM seeds were legally available only after purchase from Monsanto, the agro-biotechnology company decided to denounce the use of its patent-protected variety. Monsanto won the case, but the penalties were cancelled as Schmeiser had proven that GM canola seeds could also be found in his non-canola commodities, which had no sense commercially as the seeds were resistant to Roundup but had no added commercial value.[4]

While the Schmeiser case was debated, the first international contamination by a transgenic variety – Starlink corn – was publicised in Canada in 2001. Starlink corn was approved in the United States for animal consumption and industrial uses but forbidden for human consumption. In Canada, none of these uses were authorised. However, traces of Starlink corn seeds were found in several food products sold in North America, and several cases of allergies and health troubles linked to the GM variety were declared. Three hundred products were recalled from the shelves, creating economic costs estimated at more than US$1 billion (Dufault 2006, p. 116). Illegal or accidental plantings are suspected to have caused the commingling of GM and non-GM seeds.

A third case of GMO contamination was publicised in August 2006, when the US Department for Agriculture announced that American rice exports were contaminated with Liberty Link rice, a GM variety developed by the multinational corporation, Bayer CropScience, which had never been granted

authorisation to commercialise the product. The contamination was discovered five years after the accidental release of Liberty Link rice seeds during field tests of the variety. In 2008, Greenpeace International estimated that 63% of American exports were contaminated. The total cost of the incident was evaluated at between US$741 million and US$1285 million, considering the number of economic sectors relying on rice seeds (Greenpeace International, n.d.). Trials were initiated by farmers to obtain compensation from Bayer CropScience, Riceland Foods and Producer Rice Mill, the three firms linked to the dissemination of the GM variety. Three months after the incident, the US authorities started to negotiate the sale of new American rice harvests and decided to authorise the Liberty Link rice for commercialisation to calm things down.[5]

The cases described above[6] demonstrate that GMO contamination can give rise to three types of damage: commercial damage, health damage and damage to biodiversity. To date, only commercial and health damage has gained media attention. The aim of the L&R instrument is to make environmental remediation easier. Moreover, both authorised and non-authorised GM varieties are involved in causing damage. Governments had all these elements in mind when they started negotiating an international agreement on the issue.

The L&R negotiations under the Cartagena Protocol: governmental options

The first draft of the CPB was formulated as early as 1996 by the Ethiopian government and already included an article on L&R for GMOs (Damena 2002, p. 366). However, progress on the topic was difficult considering, among other problems, the *de facto* preventive character of the measures to be taken. In 1996, the development of agro-biotechnology was still recent and GMOs were not marketed yet (Falkner 2002, p. 5). After arduous discussions, article 27 of the CPB established the procedure for further negotiations on the issue, asking the COPMOP1 to adopt a process to elaborate the appropriate international rules and procedures on L&R within four years (Cartagena Protocol on Biosafety 2000, art.27). While the CPB entered into force in September 2003, the negotiations on L&R had to be concluded by COPMOP4 in May 2008.

As programmed in article 27, the COPMOP1 created a working group (WG) on L&R for GMOs contamination in 2004. The negotiating procedure chosen was inductive: all possible elements of the final agreement first had to be listed before combining them into an international regime. Progress was slow but sensitive. In 2005, the WG discussed the main elements of article 27. In 2006, it elaborated a 60-page draft on the possible options for the regime. This draft was enriched in 2007 during the third meeting of the WG, leading to the creation of a 76-page document specifying the possible options for L&R. Two important decisions had to be made: the choice of the legal nature of the instrument to be adopted (binding or voluntary agreement) and the legal approach it had to follow. Two main legal approaches were discussed: civil liability – consisting of international requirements for resolving L&R disputes through the existing

national court systems – and the administrative approach – in which cases of damage are resolved by a competent national authority (for a thorough explanation of these negotiating points see Jungcurt and Schabus 2010).

Governments were highly divided along three lines, depending on their preferred nature and legal approach for the agreement. The first line divided GMO exporters – i.e. the United States, Argentina, Brazil and Canada, the four world leaders – from all the other countries. GMO exporters were indeed less keen on adopting strong L&R clauses, as it could potentially slow down international trade in GMOs. Most of these countries were not CPB Parties – with the notable exception of Brazil – and were consequently less directly involved in the L&R negotiations, but still exercised indirect pressure. Another divide separated developing and developed countries on the legal approach to favour. Developing countries favoured a civil liability approach, so that victims of GMO contamination, in particular farmers, were able to directly ask for compensation through national courts. In contrast, developed countries thought that using the traditional court system meant opening the Pandora's Box of biotechnology issues. Therefore, they opted for an administrative approach, whereby L&R options would be implemented at a domestic level with the development of new specialised national agencies. Moreover, several of them – including the European Union (EU) – already had L&R legislations in place, compatible with the administrative approach, and did not wish to go through a substantial revision of their legislation. The disadvantage of the administrative approach for developing countries is that it requires substantial capabilities and resources to be effective (Jungcurt and Schabus 2010, p. 202). Finally, a third divide opposed countries that had a strong biotech industry from those without one. For instance, Norway has had a much stronger stance than the EU or Switzerland – two governmental actors with powerful biotech industries – being the only developed country to support the civil liability approach.

Negotiating tensions peaked when the two co-chairs of the L&R WG set out a draft for a binding administrative approach coupled with voluntary guidelines on civil liability, and announced its adoption before it was actually discussed and adopted by the Parties (Friends of the Earth International 2008). This created a major backlash and impeded governments from reaching an agreement on a unique option for the L&R governance scheme. Just as the intergovernmental discussions were stuck in what looked like an institutional deadlock, the six world-leading agro-biotech companies presented an initiative they believed could resolve the international controversy on L&R for GMOs.

Biotechnology companies as policy drivers to cover GMO damage?

When firms propose to solve an intergovernmental deadlock: the Compact

During the fifth L&R WG, on 17 March 2008, the floor was given to CropLife International, a business non-governmental organisation (NGO) specialising in biotechnology. The organisation presented to the Parties a contractual system,

called 'Global Compact', put together by the six world-leading agro-biotechnology companies to cover the hypothetical damage caused by their products.

The announced objective of the Compact was to promote the safety of GMO products. CropLife International indeed wanted to send a positive message in answer to the question often addressed to its members: 'If your products are so safe, then why don't you stand behind them?' (Anonymous 2008b). Strategically, the biotech industries also wanted to propose their own regulatory solution to the L&R problem – a privately managed compensation scheme. By doing so, they hoped to weaken demands for a governmental legally binding agreement (Jungcurt and Schabus 2010, p. 205). Indeed, the biotechnology industry has always been against the establishment of any governmental L&R scheme for GMOs as it considers GM seeds as substantially equivalent to non-GM ones. Its main strategy has consequently been to propose a private instrument (the Compact) rather than to lobby for any weak regulatory scheme, even if endorsed by states and/or recognising governmental responsibility.[7]

At first glance, the Compact demonstrated how corporations could take the lead in shaping international environmental standards. The governmental dilemma to choose between binding or voluntary measures and between civil or administrative legal approaches was potentially solved as corporations were themselves organising recourse for potential damages. The Compact was going beyond self-commitment by proposing an extended binding regulatory framework covering the costs of arbitration and recourse. The big six agro-biotechnology firms, however, failed to convince national governments and the Compact was soon set aside from the governmental negotiation process. The following paragraph tests the explanatory value of the 'business versus ENGOs' and 'business conflicts' scenarios to explain the policy failure of these powerful business actors.

Problems with the content: the ENGOs' response to the Compact

The firms involved in the genesis of the Compact invested time in presenting their project during the L&R negotiations. They circulated 'questions and answers' concerning their proposal (Anonymous 2008b), and organised a corresponding side event (CropLife International n.d.). They presented the Compact as an agreement between states and corporations that covered the damages caused to biodiversity by unauthorised GMOs. In the case of litigation, the plaintiff would provide a fully documented submission (with measured and assessed damage exceeding a period of 25 years) detailing the litigation. The Technical Committee, composed of members of the Compact would then decide on remediation and, if appropriate, compensation. If, after 90 days of discussions and remediation, no solutions were found, the assessment process would be conducted by the Permanent Court of Arbitration. Table 1 summarises the main points of the Compact.

Table 1. The main provisions of the NKLP compared to the Compact and ENGOs' proposals.

	Compact	ENGOs	NKLP
Legal nature	Private contract	International binding regime	International rules to implement a domestic administrative approach
Legal approach	Arbitration	Civil liability	Administrative approach
Scope	Narrow States are liable Fault-based liability Damage to biodiversity to be measured and assessed Authorised GMOs	Broad Operators are liable Strict liability Damage to biodiversity and health Includes both authorised and non-authorised GMOs	Broad Operators are liable Possibilities for fault-based or strict liability All significant diverse effects including damage to biodiversity and human health Includes both authorised and non-authorised GMOs
Causation	Release of a GMO as direct and proximate cause Damage to be proven for a period of 25 years Several exceptions	Preventive measures needed	Preventive measures possible Causation not fully specified
Recourse	Renouncement of other modes of recourse Remediation rather than compensation Financial limitations for compensation	Socio-economic consideration: need of financial facility for weak actors (developing countries, ENGOs, local communities, etc.)	Remediation and compensation Financial clauses to be defined
Processing of claim	Submission by states examined by the technical committee composed of members of the Compact. After 90 days of discussions the assessment process can be made through the Permanent Court of Arbitration	Possibility for farmers, indigenous and local communities and consumers to ask for compensation	Not specified

Information on the Compact was delivered in a tense atmosphere.[8] Several ENGOs wanted to film the side event, but the organisers refused and asked the CBD Secretariat to help them manage any flood of protest. During and just after the presentation, several criticisms were expressed regarding the content of the proposal. One ENGO representative declared that the Compact had at least three weak points: (i) authorised products were not covered; (ii) damages had to be proven over a period which was far too long; and (iii) the Compact was disconnected from any other L&R system.[9] Soon, a joint statement was circulated by 13 ENGOs warning governments that corporations were becoming the judge of their own trials as experts entitled with the evaluation of the damage were to be designated by firms. Moreover, the text presented too many exemptions to compensation, a restrictive definition of 'incident', an unclear procedure, as well as no possibility for farmers, consumers, indigenous and local communities to have recourse to justice, as the agreement was meant to be signed only by states. For ENGOs, the Compact was equivalent to an 'empty gesture' (Friends of the Earth International *et al.* 2008). In contrast, they were advocating an international, binding regime based on civil liability. The main claims formulated by ENGOs, based on their submissions to the CBD Secretariat, are detailed in Table 1.

These critics were quite eager to raise governmental opposition to the Compact and underlined how the content of the initiative corresponded poorly to several governmental expectations on L&R for GMOs. For instance, the proposal did not include authorised varieties, socio-economic considerations or preventive measures, all clauses that were defended by developing countries but also by Norway or the EU. More importantly, the ENGOs' criticisms formulated against the Compact were only the tip of the iceberg: the business proposal was also examined with suspicion by corporations.

ENGO criticisms: the tree hiding in the forest of business conflicts

While ENGO criticisms were expressed against the Compact, the proposal was also highly debated within the business community – among and between the various economic sectors concerned with GMO management.

Within the biotechnology sector, the six enterprises involved in the Compact were in discussions for 18 months without reaching any agreement on the concrete details of the proposal.[10] Negotiations were still under way in parallel to governmental negotiations and a new version was presented during the first meeting of the co-chairs, following the COPMOP4. The difficulties in elaborating the text illustrate the diversity of positions among these firms, and explain why they made no attempt to include other biotechnology companies in the drafting of the Compact. Despite the sponsorship of CropLife International, the proposal was neither presented to nor adopted by the wide range of biotechnology enterprises gathered under the organisation. Furthermore, the initiative was not presented to the Global Industry Coalition (GIC),

the main business lobbying coalition interested in the negotiations of the CPB, whose members mostly come from the biotechnology sector.[11] None of the four submissions the GIC presented to the CBD Secretariat on the topic of L&R mentioned the Compact.

Some employees of the firms involved in the Compact were not even aware of the initiative: one representative of one of the six biotech companies, from a subsidiary in a developing country, was not consulted before the presentation of the proposal and only discovered the existence of the Compact when the announcement was made during the working group. Yet, this representative had at least two criticisms of the Compact. The first one concerned the timing of the proposal: 'it is not the right moment'; the second one was regarding the exclusion of socio-economic impacts from its scope. This business representative concluded: 'There are going to be some problems and industry people have to find an answer to them. It is not just the risk of GMO flows but also the dangers of monocultures. These persons have consulted neither with my country nor with other countries. They will have these kinds of problems anyway'.[12] His exclusion from the project was due to his being assigned to a developing country.[13] A representative from Dupont confirmed that several biotechnology companies had subsidiary firms in developing countries but that they did not have the necessary resources to be involved in international decision-making.[14] In fact, the firms responsible for the Compact are transnational corporations whose headquarters are situated in Northern, developed countries. They are far from representative of the broad range of agro-biotechnology developers. The Compact tends to dissuade small companies from joining the initiative as 'financial capacity, stewardship and rigorous risk assessment' are required to become a member of the Compact (Anonymous 2008b).

Regarding the other industrial sectors concerned with GMO contamination, the insurance sector has so far also been cautious in participating in any L&R scheme for GMOs. It has expressed concerns regarding the calculation of the costs related to GMO contamination: the high level of indeterminacy of the risks of GMOs and of associated compensation levels has dissuaded firms from insuring those risks (Spaeter 2004, Executive Secretary of the CBD 2006). Moreover, non-economic factors have intervened in the political decisions of the insurance industry, in particular civil society concerns regarding GMOs. This is what Swiss Re, a leading global re-insurer, explained: 'A technology considered scientifically safe which the public nevertheless perceives as a threat poses a real challenge for the insurance industry as regards the definition of the covered loss and estimation of the expected claims' (Busenhart and Baumann 2003). Insurers have been more cautious regarding the regulation of GMOs compared with biotechnology companies, as recorded in the minutes of a workshop held on the issue of L&R for GMOs in Switzerland in 2003: 'Bearing in mind that nobody has been harmed by GMOs so far, one representative of the biotechnology industry insisted on the liberal FDA (*American Food and Drug Administration*) practice as the only reasonable one. Some insurers,

however, pointed out that labelling and product stewardship, including the segregation of GM products from traditional ones, may help to avoid commingling losses and build confidence' (Epprecht 2004).

The GM transporters were also left out of the Compact. The International Grain Trade Coalition (IGTC), a coalition of grain traders following the Cartagena Protocol's negotiations did not take part in the Compact. The organisation studied the text and may have agreed with some of its points. However, no formal agreement was reached between the two industrial sectors (biotechnology and grain trade): 'Our lawyers did not sit around the same table to see what would be possible'.[15] This quotation shows that the conclusion of an agreement between biotechnology firms and grain traders would probably include economic bargaining. Again, grain traders have traditionally been more cautious with regard to GMOs and look for warranties when transporting GM seeds (Convention on Biological Diversity 2004, 2005). For instance, just after the Liberty Link rice controversy, the American rice federation announced its opposition in principle to GMO rice due to the strong economic impacts of the GMO contamination (USA Rice Federation n.d.). Again, no mention of the Compact was found in the two submissions the IGTC sent to the CBD Secretariat on the issue of L&R.

There have been numerous business conflicts in relation to the Compact. A brief analysis of the business conflicts taking place reveals that the big biotech corporations probably drafted their proposal to exclude smaller biotech competitors from L&R rule-making; to promote the safety of their products even if they are not covered by the insurance industry; and to insist on a voluntary mechanism while grain traders were more inclined to adopt binding rules. The next section develops governmental discussions on the Compact to assess if ENGOs or business conflicts are the main explanations behind this policy failure.

Business conflicts as a primer for ENGO criticisms: intergovernmental rejection of the Compact

To assess which scenario is more relevant to explain the failure of the Compact to solve international L&R efforts, we first provide the broad picture of the negotiation process and the adopted text, and then provide a detailed focus on governmental discussions of the Compact.

The discussions of the fifth L&R WG, in which the Compact was presented, hardly refer to the initiative. The industry proposal is reduced to a potential supplementary mechanism for financial compensation (Earth Negotiations Bulletin 2008a). Moreover, while the report of the fifth WG was 'welcoming' of the Compact, Norway and Palau underlined that this reference was highly disproportionate with regard to the way governments had been discussing the industry initiative (Earth Negotiations Bulletin 2008b). Following the fifth L&R WG, the Parties to the COPMOP4 meeting agreed to reconvene negotiations on L&R, this time in the context of four

Friends of the Co-Chairs' Meetings that were convened in February 2009 and February, June and October 2010. Discussions restarted on the binding agreement with an administrative approach and voluntary guidelines for civil liability. A new draft of the Compact was presented to the first Meeting of the Friends of the Co-Chairs but was not discussed at all by the Parties (Earth Negotiations Bulletin 2009). During the second Meeting of the Friends of the Co-Chairs, the negotiations of a draft decision for the COPMOP started and reference was made to the Compact. However, the Parties decided to 'note' rather than 'welcome' the Compact (Earth Negotiations Bulletin 2010). This is where process tracing of the Compact discussions ends as the two final Friends of the Co-Chairs' Meetings were closed and not covered by the ENB. However, what remains of the Compact in the final agreement is insignificant. A very broad reference to industry is made in the text of the decision submitted to the COPMOP5 for the adoption of the Protocol, without clear mention of the Compact: 'Noting *initiatives by the private sector* concerning recourse in the event of damage to biological diversity caused by LMOs' (emphasis added, COPMOP5 decision BS/11 2010). Moreover, governments have opted for a legally-binding international agreement for nationally-based L&R legislations. Table 1 presents the main provisions of the adopted text.

If we want to look closer at how governments dealt with the Compact, we can analyse the main intergovernmental discussions on the proposal, which started during COPMOP4 when the following phrasing was submitted for negotiation: *The COPMOP welcomes the private sector initiative to provide for a contractual compensation mechanism covering in the event of damage to biodiversity caused by living modified organisms [GMOs].*[16] The Parties immediately reacted to this proposal. Peru underscored that the private sector referred to in this phrasing did not actually represent the whole sector, but rather the six big transnational companies, all part of the biotechnology sector. Peru proposed instead to mention that the initiative came from one type of industry. The EU reinforced Peru's position by confirming that the initiative did not involve the whole range of private sector actors. India, Ethiopia, Japan, Malaysia and Palau supported the declaration of Peru and the EU, while Colombia and New Zealand recognised the positive step forward represented by the Compact.

To clarify the debate, the Brazilian government proposed a synthesis of the preceding interventions. While countries agreed that the initiative had to be recognised, the wording 'to welcome' meant, in the UN language, 'to agree with its content and its format'. This interpretation was still to be discussed in an appropriate way. Brazil's preoccupation with the Compact was likely connected to the development of small enterprises in various developing countries. In other words, how could these companies become involved in this initiative? How did these ideas work with regard to the diversity of actors involved in industrial activities? How could these concerns be integrated into the current discussion of the Parties? There was a need to clarify the terms of

the discussions. Switzerland proposed to welcome the effort that business actors had made in elaborating a proposal, rather than welcoming its content. The EU suggested that the Compact served as a complementary financial mechanism in the case of double compensation. After several minutes of debate, a reference to the Compact was drafted but, as developed above, no precise elements of the initiative were included in the official negotiating documents on L&R.

It is particularly interesting that no mention of the content of the proposal – and criticism formulated by ENGOs – was made during these discussions. Rather, governments mainly discussed the lack of representativeness of the Compact. In the following negotiation meetings, trade-offs were dealt with by the different categories of states mentioned above, that is, GMO exporters, developing countries or biotech owners. These lines are highly connected to business interests, but this time on a national basis, including the wide range of business interests present worldwide. As countries were divided along these lines, ENGOs were able to step into the breach. Signs of their influence are visible with regard to the scope and the causation provisions of the agreement, even if the administrative approach was chosen instead of civil liability. Ironically, the ENGOs' task may have been facilitated by the Compact initiators, as 'some argue that it was the leadership from the private biotech sector, by agreeing to subject its industry to civil liability to ensure a generally liberalized market in LMOs (*GMOs*), that made it possible for States to accept the current draft of the Supplementary Protocol' (Telesetsky 2011, p. 5).

Conclusion

The analysis of the international discussions of the Compact for L&R under the NKLP sheds light on the reasons why big corporations failed to take the lead on this issue. The lack of representativeness of the initiative is the major explanatory factor for its abandonment by governments. The 'business versus ENGOs' scenario is less convincing than the 'business conflicts' one. This is not to say that governments would have accepted the proposal if drafted by a greater number of corporations coming from other sectors – like insurance or the grain trade. They would also have had to agree on its content. But business inclusiveness is found to be a *decisive necessary condition* – even if not a *sufficient* one – for corporations to take the lead on regulatory instruments. Without business unity, negotiations are sent back to classical bargaining processes in which business interests are expressed with great variety, opening the way for ENGO claims.

However, the six large corporations involved have more to say on this matter. Now that the NKLP has been adopted, it is noteworthy that the corporations promoting the Compact propose to use it as a complement to the binding agreement (CropLife International 2010). One lawyer for the biotech industry even explains that the 'now-in-place historic industry Compact' may

'precede the eventual ratification (*or failure to ratify*) (emphasis added) of the NKL Protocol' (Redick 2010). Firms have had little political power in the NKLP negotiations but could have a strong material power over its implementation: 'time will tell if L&R for damages caused by LMOs will be governed primarily by public actors concerned with preserving both biodiversity and sovereignty or largely by private multinational actors concerned with preserving open markets' (Telesetsky 2011, p. 6). It seems that governments now see the Compact as a first step towards making the risks associated with biotechnology insurable (Earth Negotiations Bulletin 2010, Jungcurt and Schabus 2010, p. 205), and therefore do not see it as part of the main solution for L&R, but this will only happen if the Protocol enters into force after the fortieth ratification (in September 2011, it was signed by 34 Parties).

The study also leads to broader practical and theoretical implications. The first practical conclusion highlights one condition under which business could become a more convincing regulatory leader, namely, unity. The case of the Compact reveals that governments are unlikely to accept business proposals that do not encompass a broad variety of corporations. This variety is defined in terms of origin (firms from developed or developing countries), size (differentiating multinational companies from small- and medium-size ones) and sector (in our case these sectors are mainly agro-biotechnology, insurance, seed transport, food processing and retail).

A second practical conclusion is related to the relationship between governments and firms in environmental decision-making. In our case study, governments decided to reject the corporate initiative. However, this does not mean that their national interests are completely disconnected from economic imperatives. Actually, the indeterminacy of several clauses of the agreement is likely due to economic pressures. Yet, countries are mostly sympathetic to the proposals that favour their domestic economy, rather than transnational corporate interests. The reaction of Brazil is a good illustration of such a relationship, in which a government prefers to block a particular business initiative that poorly corresponds to the capacities of its small-sized, developing country companies. With the growing negotiation power of emerging countries such as Brazil and India, such concerns are likely to grow in importance for environmental governance.

Regarding theoretical results, the case study calls for better accounts of business diversity in global environmental governance. The analysis refines the understanding of the mechanisms through which business conflicts have an impact on political processes. Business conflicts are significant obstacles to successful business leadership, not so much because they impede firms' acting collectively but mainly because they are perceived as a lack of representativeness by national governments. Business conflicts therefore have an impact on the legitimacy of business as an international actor. The above analysis opens a new research window for clarifying the impacts of business conflicts on international policymaking.

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Notes

1. We limit this literature review to the specific domain of environmental politics, as theoretical debates on business power in this field are particularly relevant in our case and have been particularly dynamic in the last decade. For an overview of business power in global governance in general, some comprehensive studies have been conducted by May (2006) and Fuchs (2007). Both share similarities with the 'business versus ENGOs' scenario, focusing on business as a unitary actor.
2. http://www.aphis.usda.gov/biotechnology/compliance_history.shtml [Accessed 9 March 2011].
3. http://www.gmcontaminationregister.org/ [Accessed 9 March 2011].
4. http://www.percyschmeiser.com/ [Accessed 9 March 2011].
5. http://www.aphis.usda.gov/biotechnology/compliance_history.shtml [Accessed 9 March 2011].
6. Another unresolved case is the GM contamination of the Oaxaca Mexican State maize. This case is important as the region is also the primary centre of natural genetic diversity for this crop.
7. This is not to say that there has been no attempt by the transnational companies mentioned in this study to lobby their respective delegations to foster a weak regulatory framework or a framework for state responsibility. However, this has only been their second-best strategy, which is not covered here.
8. Author's own observation.
9. Interview, ENGO representative, 13 May 2008.
10. Interview, representative of one of the Compact firms, 13 May 2008.
11. Interview, representative of CropLife International, 13 May 2008.
12. Interview, representative of one of the Compact firms, 13 May 2008.
13. *Ibid.*
14. Interview, 29 March 2006.
15. Interview, representative from the IGTC, 14 May 2008.
16. This phrasing, as well as the following reactions by national Parties, are transcripts of fieldwork observations (COPMOP4, May 2008), not official quotations. Any inaccuracy remains the sole responsibility of the author.

References

Amoore, L., 2000. International political economy and the 'contested firm'. *New Political Economy*, 5 (2), 183–204.

Andrée, P., 2005. The genetic engineering revolution in agriculture and food: strategies of the 'Biotech Bloc'. *In*: D.L. Levy and P.J. Newell, eds. *The business of global environmental governance*. Cambridge, MA: MIT Press, 135–166.

Andrée, P., 2011. Civil society and the political economy of GMO failures in Canada: a neo-Gramscian analysis. *Environmental Politics*, 20 (2), 173–191.

Anonymous, 2008a. A Compact (Contractual Compensation Mechanism) concerning recourse in the event of damage to biological diversity caused by living modified organisms. Execution text version 4, 5 May, document circulated by CropLife International, COPMOP4.

Anonymous, 2008b. A Compact (Contractual Compensation Mechanism) concerning recourse in the event of damage to biological diversity caused by living modified organisms. Questions & Answers, 29 April, document circulated by CropLife International, COPMOP4.

Bled, A., 2009. Business to the rescue: private sector actors and global environmental regimes' legitimacy. *International Environmental Agreements: Politics, Law and Economics*, 9 (2), 153–171.

Burgiel, S.W., 2007. Non-state actors and the Cartagena Protocol on Biosafety. *In*: M.M. Betsill and E. Corell, eds. *NGO diplomacy: the influence of nongovernmental organizations in international environmental negotiations*. Cambridge: MIT Press, 67–101.

Busenhart, J. and Baumann, P., 2003. The insurability of ecological damage. Technical Communications, Swiss Reinsurance Company.

Cartagena Protocol on Biosafety, 2000. Cartagena Protocol on biosafety to the Convention on Biological Diversity. Text and annexes, Montreal.

Clapp, J., 2007. Transnational corporate interests in international biosafety negotiations. *In*: R. Falkner, ed. The international politics of genetically modified food: diplomacy, trade, law. Basingstoke: Palgrave Macmillan, 34–47.

Clive, J., 2008. Global status of commercialized biotech/GM Crops. Brief 39, ISAAA Board of Directors.

Convention on Biological Diversity. 2004. Liability and redress (article 27). Compilation of views submitted in response to questionnaire on liability and redress for damage resulting from transboundary movement of LMOs. UNEP/CBD/BS/TEG-L&R/1/INF/1.

Convention on Biological Diversity, 2005. Liability and redress under Cartagena Protocol on Biosafety. Compilation of views submitted on the matter covered by Article 27 of the Protocol pursuant to the recommendation of the meeting of the Technical Group of Experts on Liability and Redress. UNEP/CBD/BS/WG-L&R/1/INF/1.

COPMOP5 decision BS-V/11, 2010. International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.

CropLife International, 2010. CropLife International supports outcome of Cartagena Biosafety Protocol discussions – Negotiations support technological innovation while protecting biodiversity and international trade [online]. Press release, 15 October. http://www.seedquest.com/news.php?type=news&id_article=11400&id_region=&id_category=39&id_crop=[Accessed 6 January 2011].

CropLife International, n.d. A contractual compensation mechanism ('Compact'). Side event presentation, COPMOP4.

Damena, W., 2002. Liability and redress. *In*: C. Bail, R. Falkner and H. Marquard, eds. *The Cartagena Protocol on Biosafety: reconciling trade in biotechnology with environment and development?* London: Earthscan and the Royal Institute of International Affairs, 366–370.

Dufault, E., 2006. Demi-tour: une approche sociologique des revirements de politique étrangère, le cas de la politique environnementale canadienne. PhD Thesis, Université du Québec à Montréal.

Earth Negotiations Bulletin, 2008a. Fifth open-ended ad hoc working group on liability and redress highlights, 9 (434), 19 March.

Earth Negotiations Bulletin, 2008b. Summary of the fifth meeting of the open-ended ad hoc working group on liability and redress in the context of the Cartagena *Protocol on biosafety*, 9 (435), 22 March.

Earth Negotiations Bulletin, 2009. First Friends of the co-chairs highlights, 9 (456), 27 February.

Earth Negotiations Bulletin, 2010. Summary of the second meeting of the group of the Friends of the co-chairs on liability and redress in the context of the Cartagena *Protocol on biosafety*, 9 (495), 15 February.
Epprecht, T., 2004. International Biotechnology Forum November 2003. Conference report, Swiss Re Centre for Global Dialogue.
Executive Secretary of the CBD, 2006. Financial security to cover liability resulting from transboundary movements of living modified organisms. UNEP/CBD/BS/WG-L&R/2/INF/7.
Falkner, R., 2002. Negotiating the biosafety protocol: the international process. In: C. Bail, R. Falkner and H. Marquard, eds. The Cartagena Protocol on Biosafety: reconciling trade in biotechnology with environment and development? London: Earthscan and the Royal Institute of International Affairs, 3–22.
Falkner, R., 2003. Private environmental governance and international relations: exploring the links. *Global Environmental Politics*, 3 (2), 72–87.
Falkner, R., 2008. Business power and conflict in international environmental politics. Basingstoke: Palgrave MacMillan.
Friends of the Earth International, 2008. Summary of the main discussions on liability and redress under the Cartagena Protocol. Friends of the Earth International, Washington Biotechnology Action Council, Evangelisher Entwicklungsdienst, Ecoropa, Fundacion Sociedades Sustantables, Greenpeace international, Genethical Network, Third World Network, Econexus, No ! GMO campaign, Institute for Sustainable Development, Canadian Biotechnology Action Network, Grupo de Reflexion Rural. 2008. Don't allow the biotech industry to privatize international public law! NGO statement on the biotech industry 'Compact' on compensation for damage, Bonn, Germany, 12 May.
Fuchs, D., 2007. Business power in global governance. Boulder, CO: Lynne Rienner.
Greenpeace International, n.d. Risky business. Briefing on the report into economic and regulatory impacts from the unintended release of genetically engineered rice varieties into the rice merchandising system of the US.
Jungcurt, S. and Schabus, N., 2010. Liability and redress in the context of the Cartagena Protocol on Biosafety. *Review of European Community and International Environmental Law*, 19 (2), 197–206.
Kuiper, H.A., *et al*., 2001. Assessment of the food safety issues related to genetically modified foods. *The Plant Journal*, 27 (6), 503–528.
Lee, M. and Burrell, R., 2002. Liability for the escape of GM Seeds: pursuing the 'victim'? *The Modern Law Review*, 65 (4), 517–537.
Levy, D.L., 2003. A neo-Gramscian approach to corporate political strategy: conflict and accommodation in the climate change negotiations. *Journal of Management Studies*, 40 (4), 803–829.
Levy, D.L. and Newell, P.J., 2005. The business of global environmental governance. Cambridge, MA: MIT Press.
Losey, J.E., Rayor, L.S. and Carter, M.E., 1999. Transgenic pollen harms monarch larvae. *Nature*, 399 (6733), 214.
May, C., 2006. Global corporate power. Boulder, CO: Lynne Rienner.
Newell, P., 2005. Business and international environmental governance: the state of the art. *In*: D.L. Levy and P.J. Newell, eds. *The business of global environmental governance*. Cambridge, MA: MIT Press, 73–104.
Newell, P. and Glover, D., 2003. Business and biotechnology: regulation and the politics of influence. IDS Working Paper, 192, 46p.
Orsini, A., 2011. Thinking transnationally, acting individually: business lobby coalitions in international environmental negotiations. *Global Society*, 25 (3), 311–329.

Redick, T., 2010. Completion of Nagoya-Kuala Lumpur supplementary protocol on liability and redress to the Cartagena Protocol on Biosafey. *Southeast Environmental Law Blog*. 12 October.

Spaeter, S., 2004. L'incidence des régimes de responsabilité environnementale sur les comportements de prévention et d'assurance des firmes. *Revue économique*, 55 (2), 227–245.

Telesetsky A., 2011. The 2010 Nagoya-Kuala Lumpur supplementary protocol: a new treaty assigning transboundary liability and redress for biodiversity damage caused by genetically modified organisms. *The American Society of International Law*, 14 (41), 1–11.

Tienhaara, K., Bled, A., and Falkner, R., 2012. Global corporations: continuities and changes in business power. *In*: F. Biermann and P. Pattberg, eds. *Global environmental governance reconsidered: new actors, mechanisms, and interlinkages*. Cambridge, MA: MIT Press, 45–67.

USA Rice Federation, n.d. The announced discovery of genetically modified rice [online]. http://www.usarice.com/index.php?option=com_content&view=article&id=474&catid=84%3Aindustry-news-releases&Itemid=411.

Vormedal, I., 2008. The influence of business and industry NGOs in the negotiation of the Kyoto Mechanisms: the case of carbon capture and storage in the CDM. *Global Environmental Politics*, 8 (4), 36–65.