

THE BT TALONG DECISION: AN ASSESSMENT

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OBJECTIVES

- ① isolate and explain the legally significant points in the Bt Talong Decision
- ② explain the implications of the decision on future GMO use
- ③ present views on the role of the scientific community in GMO regulation in the Philippine setting

THE BT TALONG DECISION

**INTERNATIONAL SERVICE FOR THE
ACQUISITION OF AGRIBIOTECH
APPLICATIONS, INC. VS.**

**GREENPEACE SOUTHEAST ASIA
PHILIPPINES, ET AL.**

G.R. No. 209271, 209276, 209301 and 209430

8 December 2015

BRIEF BACKGROUND

- ❖ This is the case wherein the field testing by the University of the Philippines Los Baños of an eggplant genetically modified to exhibit resistance to certain pests was permanently enjoined by the Supreme Court.
- ❖ The genetically modified eggplant is referenced in the decision as “Bt talong”.

PRELIMINARY ASSESSMENT

- ❖ The Bt Talong Decision was really an indictment of the manner by which the Philippine government had been regulating the use of GMO's during the past dozen years or so.
- ❖ The Bt Talong Decision was not a ruling to absolutely prohibit the use of GMO's.

PRELIMINARY ASSESSMENT

Underlying the conclusions reached in the BT Talong Decision was the recognition that the use of GMO's could not be prohibited outright by the Supreme Court without legislation to that effect, and the decision was really a directive for the government to issue rules on the granting of permits for the use of GMO's that incorporated pertinent aspects of existing environmental laws and regulations.

DISPOSITIVE PORTION

“WHEREFORE, the petitions are DENIED. The Decision dated May 17, 2013 of the Court of Appeals in CA-G.R. SP No. 00013 is hereby MODIFIED, as follows:

“1. The conduct of the assailed field testing for *Bt talong* is hereby PERMANENTLY ENJOINED;.....

DISPOSITIVE PORTION

“... 2. Department of Agriculture Administrative Order No. 08, series of 2002 is declared NULL AND VOID; and

“3. Consequently, any application for contained use, field testing, propagation and commercialization, and importation of genetically modified organisms is TEMPORARILY ENJOINED until a new administrative order is promulgated in accordance with law.”

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NEW REGULATION

- ❖ What the BT Talong Decision means is that no contained use, field testing, propagation, commercialization, and importation of genetically modified organisms – or no GMO use, in short – can be permitted by the government until a new administrative mechanism for the regulation and licensing of such activities is adopted.
- ❖ Moreover, the Supreme Court explicitly required that the new administrative mechanism must be “in accordance with law”.

NEW REGULATION

...must be in accordance with what law?

- ❖ National Biosafety Framework
- ❖ Law on Environmental Impact Statements
- ❖ all other pertinent environmental laws

NEW REGULATION

Excerpts from the Bt Talong Decision

“We find that petitioners simply adhered to the procedures laid down by DAO 08-2002 and no real effort was made to operationalize the principles of the NBF in the conduct of field testing of *Bt talong*. The failure of DAO 08-2002 to accommodate the NBF means that the Department of Agriculture lacks mechanisms to mandate applicants to comply with international biosafety protocols. ...

NEW REGULATION

Excerpts from the Bt Talong Decision

“.... Greenpeace's claim that BPI had approved nearly all of the applications for GMO field trials is confirmed by the data posted on their website. For these reasons, the DAO 08-2002 should be declared invalid.”

NEW REGULATION

Excerpts from the Bt Talong Decision

“Significantly, while petitioners repeatedly argued that the subject field trials are not covered by the EIS law, EO 514 clearly mandates that concerned departments and agencies, most particularly petitioners DENR-EMB, BPI and FPA, make a determination whether the EIS system should apply to the release of GMOs into the environment and issue joint guidelines on the matter.”

NEW REGULATION

Excerpts from the Bt Talong Decision

“All government agencies as well as private corporations, firms and entities who intend to undertake activities or projects which will affect the *quality of the environment* are required to prepare a detailed Environmental Impact Statement (EIS) prior to undertaking such development activity. ...

NEW REGULATION

Excerpts from the Bt Talong Decision

“... An environmentally critical project (ECP) is considered by the EMB as ‘likely to have significant adverse impact that may be sensitive, irreversible and diverse’ and which ‘include activities that have significant environmental consequences.’

...

NEW REGULATION

Excerpts from the Bt Talong Decision

“... In this context, and given the overwhelming scientific attention worldwide on the potential hazards of GMOs to human health and the environment, their release into the environment through field testing would definitely fall under the category of ECP.”

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“The Rules (of Procedure for Environmental Cases) likewise incorporated the principle in Part V, Rule 20, which states:

“PRECAUTIONARY PRINCIPLE

“SEC. 1. *Applicability.* — When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it. ...

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

“SEC. 2. *Standards for application.* — In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.”

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“Under this Rule, the precautionary principle finds direct application in the evaluation of evidence in cases before the courts. The precautionary principle bridges the gap in cases where scientific certainty in factual findings cannot be achieved. By applying the precautionary principle, the court may construe a set of facts as warranting either judicial action or inaction, with the goal of preserving and protecting the environment. ...”

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“... This may be further evinced from the second paragraph where bias is created in favor of the constitutional right of the people to a balanced and healthful ecology. In effect, the precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the *status quo*. An application of the precautionary principle to the rules on evidence will enable courts to tackle future environmental problems before ironclad scientific consensus emerges.”

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“For purposes of evidence, the precautionary principle should be treated as a principle of last resort, where application of the regular Rules of Evidence would cause in an inequitable result for the environmental plaintiff — (a) settings in which the risks of harm are uncertain; (b) settings in which harm might be irreversible and what is lost is irreplaceable; and (c) settings in which the harm that might result would be serious. . . .”

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“... When these features — uncertainty, the possibility of irreversible harm, and the possibility of serious harm — coincide, the case for the precautionary principle is strongest. When in doubt, cases must be resolved in favor of the constitutional right to a balanced and healthful ecology.

Parenthetically, judicial adjudication is one of the strongest fora in which the precautionary principle may find applicability.”

PRECAUTIONARY PRINCIPLE

Excerpts from the Bt Talong Decision

“Assessing the evidence on record, as well as the current state of GMO research worldwide, the Court finds all the three conditions present in this case — uncertainty, the possibility of irreversible harm and the possibility of serious harm. ”

PRECAUTIONARY PRINCIPLE

Assessment

In my opinion, there was no need for the Supreme Court to have made the foregoing pronouncements on the precautionary principle because its declaration that DAO 08-2002 was null and void was enough to justify the conclusions reached in the BT Talong Decision. ...

PRECAUTIONARY PRINCIPLE

Assessment

... For me, the Supreme Court's discourse on the precautionary principle is what the legal profession calls "judicial legislation".

PRECAUTIONARY PRINCIPLE

Assessment

Cartagena Protocol ...

Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects.

Supreme Court Rules ...

When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.

The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

PRECAUTIONARY PRINCIPLE

Assessment

With the release of the BT Talong Decision, we bear witness to the Supreme Court jumping the gun on Congress and administrative rule-makers by applying the precautionary principle without the rule-makers first making any normative policy decisions on how the precautionary principle should be applied to GMO's.

PRECAUTIONARY PRINCIPLE

Assessment

At any rate, the Supreme Court gave us a glimpse of how applications for GMO use under the new administrative mechanism may be assessed in light of the precautionary principle as implemented in the Rules of Procedure for Environmental Cases and the BT Talong Decision.

PRECAUTIONARY PRINCIPLE

Assessment

To merit approval, an application for GMO use must avoid being placed under any of the following three (3) categories:

- (1) where the risks of harm are uncertain;
- (2) where the harm might be irreversible and what is lost is irreplaceable; and
- (3) where the harm that might result would be serious.

CHALLENGES AND RECOMMENDATIONS

GMO proponents and government regulators now face a formidable challenge to come up with an administrative mechanism that not only complies with the National Biosafety Framework and other pertinent laws, but also incorporates a mechanism that can translate scientific data and literature on a contemplated GMO use into findings that are comprehensible to and perhaps even verifiable by our courts when the latter engage in a risk assessment of a proposed GMO use.

CHALLENGES AND RECOMMENDATIONS

Reforms should also be geared towards making findings of administrative agencies on the matter of GMO use fit for the *prima facie* conclusive effect that is usually accorded to such findings under our current laws.

CHALLENGES AND RECOMMENDATIONS

For the biotech industry, another formidable challenge is to anticipate and conduct further research on the uncertainties and dangers that the Philippines' precautionary principle paradigm would likely contemplate, and then publish the results of these studies in a manner that could be easily translated into the information that the new administrative rule on GMO use would require.

CHALLENGES AND RECOMMENDATIONS

Its own pronouncements on the precautionary principle should challenge the Supreme Court to come up with an elaboration of the rule on the precautionary principle that addresses the shortcomings of our traditional methods of presenting evidence. I believe that the “hot tubbing of experts” method employed in the BT Talong case, wherein expert scientists were made to testify and answer questions all at the same time, does not lend itself to a fair assessment of hard scientific facts when these are presented before our courts.

CHALLENGES AND RECOMMENDATIONS

After all these efforts are undertaken – preferably in a simultaneous manner – and it is realized that science cannot address or dispel all the fears and uncertainties associated with GMO use in an economically viable way, then the scientific community should work with our rule-makers to craft and adopt policies and methodologies consistent with the precautionary principle that would rationalize the said principle's application such that not every uncertainty is met with a ban on GMO use.

CHALLENGES AND RECOMMENDATIONS

In other words, the government and all stake holders must find a way to translate scientific data and relevant theories, as well as the lack thereof, into legally admissible and comprehensible parameters, lest every case involving scientific data and theories become a virtual minefield of uncertainty, which would only work to the detriment of our country's advancement in the much neglected fields of pure and applied scientific research.

CHALLENGES AND RECOMMENDATIONS

Practitioners of the law must realize that mankind needs the kind of scientific advancements such as the development of GMO's, which represent cutting edge science that expand the reaches of our knowledge and know-how. ...

CHALLENGES AND RECOMMENDATIONS

... On the other hand, practitioners of the natural and applied sciences must also realize that the laws that they have to deal with in perpetuating their discoveries and innovations are meant to protect and serve the very people that their discoveries and innovations were meant to benefit. ...

CHALLENGES AND RECOMMENDATIONS

... Both sides should also accept the fact that in the same way that the law, by itself, cannot solve all of society's problems, science cannot likewise provide all the answers that society seeks every time they are needed.

CHALLENGES AND RECOMMENDATIONS

Bridge the communication and information gaps between the law and science in the Philippines

Thank you!