

## **Litigation on double standards in agribusiness**

Pesticides have become an essential part of food and fiber production in industrial agriculture. Together with fertilizers, machinery, and genetically modified crops, they are part of a development to replace labor-intensive farming while increasing yields. However, contrary to what is often argued by its proponents, industrial agriculture, with its narrow focus on cash crops, does not necessarily provide people with reliable access to nutrition. Instead, rising input costs of technology and specialized knowledge put farmers in a position of dependency and at risk of exposure to hazardous chemicals. Moreover, the use of pesticides by plantation workers and farmers in countries where protective equipment and training are not widespread or easily available, poses a health and environmental threat to pesticide users and their communities. Lack of understanding of the pesticide labels leads users to overspray and fail to use appropriate protection. In addition, the absence of proper disposal mechanisms risks creating soil and water pollution. The widespread and inadequate use and disposal of pesticides thus affects a number of human rights, including the rights to life, health, food, water and sanitation, and closely related, the right to a clean, healthy and sustainable environment.

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### **Global players and global health risks of pesticide use**

The agrochemical market is dominated by a few companies that own seeds and so-called “plant protection products.” Possible future mergers and acquisitions can lead to even higher concentrations of market power. Recently, Bayer (Germany) announced that it will take over Monsanto (U.S.). At the same time, Syngenta (Switzerland) is being bought by ChemChina (China), and Dow Chemical (U.S.) is merging with Du Pont (U.S.). Another major company in this field is BASF (Germany).

The World Health Organization (WHO) says that pesticide poisoning affects 3 million people and accounts for 20,000 unintentional deaths a year. The hazards of pesticide use, however, disproportionately impact people across the Global South, and it is estimated that 99% of all fatal pesticide poisonings take place in developing countries. This is often due to the absence of effective regulatory regimes and a lack of training, which significantly increases the risk

of exposure to toxic chemicals. The 2013 report “Costs of Inaction” of the United Nations Environment Programme estimated that the health cost of pesticide use in Africa is greater than the total official development assistance to general health care (excluding HIV/AIDS) in the region.

Pesticides can cause both acute and chronic effects. Acute effects, such as headaches, itching and even death can occur after exposure to a single dose of pesticide. Chronic diseases can develop through repeated, small doses of pesticide over a long period of time. Chronic effects known to be caused by pesticide exposure include cancer, reproductive disorders and hormonal disruption. Finally, pesticides have environmental effects, such as their toxicity to aquatic organisms or bees.

Women and children are particularly exposed to the dangers of pesticide poisoning. Women absorb more pesticides through the skin than men and are therefore particularly vulnerable to poisoning if they cannot protect themselves sufficiently. During pregnancy and breastfeeding, women may pass on the chemicals in pesticides to their children. Children are uniquely vulnerable to the harmful effects of these chemicals. Because they are smaller and still developing, the substances have a greater effect on their bodies. Their metabolisms are also faster, so they absorb substances more quickly. If children have contact with pesticides during certain stages of growth, they may stunt or permanently impact their development.

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## **Banned in Europe, but sold in India, Mexico and elsewhere**

Bayer and Syngenta continue to sell pesticides in the Global South that have long been barred from the European market. For example, Bayer sells the pesticide Larvin, that contains the active ingredient Thiodicarb, in India and Mexico. This chemical has, however, been banned in the European Union since 2007. The decision was taken in Brussels due to the particular risks Thiodicarb posed to young children, birds and the environment, as well as insufficient information on the dangers to humans in general and to groundwater.

Syngenta continues to sell the active ingredient Paraquat in countries like India and the Philippines. Meanwhile, due to its high toxicity – especially if misused – Paraquat has been disapproved for use in Switzerland since 31 December 1989. In 2007, the Court of First Instance of the European Union annulled an earlier approval of the ingredient by the European Commission, which effectively led to a European ban on Paraquat.

The continued sale of such pesticides in countries where farmers and plantation workers do not have easy access to appropriate protective equipment violates the International Code of Conduct on Pesticides Management as well as company internal Stewardship Policies. Art. 5.2.5 of the International Code of Conduct calls upon companies to take a product off the market if they are unable to guarantee that use of the product will not result in unacceptable consequences. A similar measure is also a requirement for Bayer operations: in its Stewardship Policy, Bayer CropScience announces that “[s]ales must be stopped and products have to be recalled when handling or use pose an unacceptable risk for the environment or human health.”<sup>1</sup> There have been multiple attempts to include Paraquat in the Rotterdam Convention. Once a chemical is included, a “decision guidance document” containing information concerning the chemical and the regulatory decisions to ban or severely restrict it for health or environmental reasons, is circulated to all Parties. Vetoes have so far obstructed such inclusion.

There are glaring regulatory differences not only in the approval of active ingredients and pesticides products, but also in the implementation of protective measures. For example, EU Directive 2009/128 ordered Member States to set up certification systems for professional users of pesticides. Certain pesticides can therefore be purchased only by those certificate-holders, which status requires specific training, also stipulated by the EU Directive. This system makes the EU market enormously different to the situation in India, where anyone can enter a store in the small villages in Punjab and purchase highly hazardous pesticides.

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## Potential of pesticides litigation

Organizations such as the Pesticide Action Network (PAN) have actively advocated for changes in pesticide management since the early 1980s, both at the grassroots level of communities as well as in international policy arenas at the United Nations. Activists from PAN have achieved important milestones, such as the global ban of the pesticide Endosulfan under the Stockholm Convention on Persistent Organic Pollutants. At the same time, transnational agrochemical corporations continue to increase the distribution of pesticides, particularly in the Global South where countries like India are explicitly viewed as growth markets. Moreover, health and environmental impacts are increasingly documented, and more often than not, left without a remedy.

Complementary legal action can hold pesticide companies accountable for health and environmental damage due to pesticides. Litigation can contribute to placing

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<sup>1</sup> Key Requirement 8.16, in: Bayer CropScience, “Bayer Product Stewardship Policy and Key Requirements.”

checks on, and restricting the power held by, these transnational companies in the global industrial agricultural system. It can enable communities and their governments to make independent choices and devise policies that take into account people's health and the environment. In coordination with social movements, trade unions and farmer associations on the ground, legal proceedings can support the emancipatory struggle of plaintiffs, petitioners, and their communities in demanding their rights and their agricultural vision.

The language of the law and the format of legal proceedings can provide an impetus to that struggle as well as alternative vocabulary, such as a rights discourse and the notion of entitlement. The role of farmers and plantation workers as rightsholders can trigger existing dynamics, while hearings can provide a forum and occasion for public debate. Legal interventions can draw attention to the forms in which European agrochemical companies disregard the human and environmental impacts of their products, while expanding their businesses abroad. Moreover, litigation can demonstrate the double standards that are applied in the corporate policies and practices concerning the distribution and use of pesticides in Europe, compared with the reality in India and the Philippines.

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## **Addressing double standards in pesticides registration**

In July 2014, the Indian government undertook an effort to review the registration of 66 chemical pesticides. The registration of these particular pesticides was under scrutiny due to their highly hazardous nature – the pesticides are already banned in other countries throughout the world, also in the European Union. Nevertheless, several of these pesticides are manufactured and sold in India by European corporations Bayer CropScience (selling e.g. Thiodicarb, Deltamethrin) and Syngenta (Paraquat, Atrazine), who can no longer sell the products in their home countries due to bans.

These European companies benefit from the lax regulatory structures and lack of resources (e.g. laboratories and inspections) in developing countries such as India. When their products become banned in the European Union and developed nations, they can continue to profit by selling them in developing markets without the same, stringent rules. For example, Atrazine is a controversial pesticide manufactured by Syngenta. The EU banned Atrazine in 2004 because unacceptably high levels were found in groundwater, and Syngenta could not show that this contamination could be prevented. The pesticide is an endocrine disruptor and suspected to cause cancer in humans, yet the Indian Expert Committee again recommended that its use in India continue.

Indian organizations filed a so-called public interest litigation (PIL) petition with the High Court of Delhi in June 2016 asking for the cancelation of the registration of these pesticides. The PIL states that given the reality of how these pesticides are actually used (e.g. without appropriate protective equipment, lack of proper disposal, etc.) banning the most dangerous pesticides from India is even more critical. ECCHR supported this petition by compiling information on banning decisions and restrictions in the European Union.

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## Obligations of pesticides companies

Obligations for pesticides manufacturers can be found in a number of sources, most relevant is the International Code of Conduct on Pesticides Management. To manage the global risks associated with pesticide use, in 1985, the Food and Agriculture Organization (FAO) of the United Nations developed the International Code of Conduct on Pesticide Management. The Code applies to governments and pesticide companies alike, and industry actors have fully endorsed the Code.

The pesticide industry should rely on the Code, particularly when operating in countries that have not yet established, or are unable to effectively operate, regulatory control over commercial pesticide activity (Art. 3.2). Where relevant standards cannot be met and pesticide use presents an unacceptable risk to the public, the Code requires pesticide companies to halt sale of these products. While the Code was initially merely a voluntary instrument, by now the Code's obligations have gained some binding force, as they are incorporated, for example, in the German Plant Protection Act, calling upon the government to take the Code into account in its export controls.

The Code calls on the pesticide industry to supply only pesticides that are appropriately labeled for each specific market (Art. 3.5.1) and constantly review their labeling practice and determine whether changes are required (Art. 3.5.6). The pesticides industry also has obligations in relation to the training of farmers and plantation workers on the use of pesticides and the promotion of suitable protective equipment. Furthermore, Art. 5.5.1 of the Code requires industry actors to ensure the availability of appropriate protective equipment. In collaboration with the government, industry should ensure that independent post-registration surveillance and monitoring studies are conducted to determine the fate of pesticides and their health and environmental effects under operational conditions (Art. 4.5).

In addition to the specific responsibilities on pesticides management laid down in the Code, pesticide companies also have responsibilities to respect human rights.

The UN Guiding Principles on Business and Human Rights emphasize that corporations have an obligation to prevent, mitigate and remediate human rights impacts and to conduct due diligence. This specifically includes the possible impacts that may be linked to business relationships such as suppliers and distributors (Principle 13). ECCHR's interviews with dealers, distributors, and sales managers suggest that Bayer and Syngenta fail to take the monitoring of health and environmental impacts seriously. Given their close ties to their distributors, including weekly visits by sales representatives and even occasional visits from staff from the parent company headquarters, the companies are in a position to influence the sales practices. According to UN Guiding Principle 19, the companies have the responsibility to exert this influence. Instead, even according to their own distributors, companies seem to prioritize the promotion of (new) products instead of providing the farmers with information about precautionary measures.

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## **Scientific limits proving causation in individual cases of health problems: the precautionary principle**

Despite many studies linking the use of pesticides to a number of health problems, ranging from nausea and headaches to cancer and Parkinsons, there are very few successful legal cases in which pesticides manufacturers have been held liable for the harmful consequences of their products. The problem for a legal claim is the scientific challenge to prove a causal link between a particular health problem and a single pesticide. Many farmers and plantation workers though suffer from a variety of recurring or chronic symptoms after using multiple pesticides over long time periods. The difficulty of proving causation can be overcome by applying the precautionary principle. A globally accepted definition of this idea comes from the Rio Declaration that states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Principle 15).

This principle has already been successfully used in India. For example, the pesticide Endosulfan became highly controversial due to its toxicity, bioaccumulation (its capacity to be absorbed into living organisms faster than it can be expelled) and role as an endocrine disruptor (meaning it can interfere with the hormone system in mammals causing, amongst other things, cancerous tumors, mental impairment and physical mutations/ birth defects). In 2001, the State of Kerala banned aerial spraying of Endosulfan within the State. The order was challenged by the Pesticide Manufacturers and Formulators Association of

India in 2002. Relying on the precautionary principle, the High Court of Kerala upheld the order:

*“[I]t is not the function of this Court to decide an issue which is essentially a matter for Technical experts to decide...We have, therefore, decided to choose the lesser evil and, purely as a precautionary measure, to impose a temporary ban on the use of Endosulfan.”<sup>2</sup> (Thiruvankulam Nature Lovers Movement v. Plantation Corporation of Kerala (2002), High Court of Kerala).*

A global ban on the manufacture and use of Endosulfan was subsequently negotiated in April 2011, under the Stockholm Convention that focuses on the elimination of so-called persistent organic pollutants.

The precautionary principle was incorporated in a number of EU directives and regulations.<sup>3</sup> The EU Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) refers to the principle several times in its preamble and assures in Article 1(3) that the Regulation is “underpinned by the precautionary principle”. The Pesticides Regulation 1107/2009 concerning the placing of “plant protection products” on the market, contains a reference to the precautionary principle in Article 1(4):

*“The provisions of this Regulation are underpinned by the precautionary principle in order to ensure that active substances or products placed on the market do not adversely affect human or animal health or the environment. In particular, Member States shall not be prevented from applying the precautionary principle where there is scientific uncertainty as to the risks with regard to human or animal health or the environment posed by the plant protection products to be authorised in their territory.”*

The precautionary principle was already applied, for example, in the decision of the Court of First Instance of 11 July 2007 in which it annulled the authorization for use of Paraquat in the European Union.<sup>4</sup>

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<sup>2</sup> (2002) O.P. Nos. 20716/2002, 17026/2002, 16300/2002 & 29371 of 2001, paras. 6-10.

<sup>3</sup> “Considerations on the application of the Precautionary Principle in the chemicals sector. Final Report,” August 2011, Milieu Ltd., the T.M.C. Asser Institute and Pace for DG Environment of the European Commission under Study Contract No. ENV.D.3/SER/2010/0083rl.

<sup>4</sup> Judgment ECLI:EU:T:2007:217, para.262.

## **Overcoming evidentiary challenges: reverse burden of proof**

Jurisprudence in Argentina is leading the way towards a reversal of the burden of proof in civil pesticide-injury cases, in order to overcome the evidentiary challenge for those suffering health problems, which could be attributed to the use of pesticides. In the case of *Urrucha v. Arrata*, in 2013, the plaintiffs are the wife and two children of the deceased Rubén Osterrieth, who was an agricultural worker in the Province of Buenos Aires. One part of his job was weeding some areas of his employer's property with glyphosate, which Mr. Osterrieth used to transport in a special backpack and applied without wearing a face mask. On 5 December of 2005, he again weeded parts of the mentioned property with glyphosate. After several days of this work, on December 13<sup>th</sup>, he started to show signs of intoxication such as nausea, vomiting and extreme perspiration as well as breathing difficulties. He was therefore admitted to a hospital, where he died as a result of the intoxication on 19 December 2005.

The National Chamber of Appeals in Labor Affairs quoted the obligation of employers under the Argentinean Law on Hygiene and Security to train and supply employees with adequate measures to protect their health. The judges also referred to international standards the defendant had violated, such as recommendations by the ILO and the EU. The chamber then focused on the fact that Argentinean national law also provided for an obligation on employers to take precautionary measures to prevent accidents and to guarantee the full enjoyment of the employees' right to health. From this regulatory framework, the chamber concluded not only that the burden of proof for compliance with the precautionary measures obligations lay with the employer, but also that the employer had to prove that there was *no* causal relationship between this failure to comply and the established harm.

In the case at hand, the court concluded that the defendants had failed to prove that they had complied with the aforementioned obligations as employers. Given the defendants' failure to do so, and their failure to establish a different cause for the worker's death, the court confirmed a sufficient correlation between the employer's wrongdoing and the worker's death.

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## **Proper information: Litigation on advertisement and labelling**

In an exceptional lawsuit, a court in France considered the company's failure to provide proper information relevant for granting a claim to compensation. In 2004, Paul François, a French farmer, inadvertently inhaled *Lasso* pesticide,



commercially manufactured and sold by Monsanto, when cleaning his sprayer tank on his farm. While opening the tank of the sprayer he was accidentally sprayed in the face, quickly losing consciousness. Afterwards he began experiencing memory loss, constant headaches, nausea, vertigo and stammering, among other neurological problems. He was forced to stop working for a year. In May 2005, more than a year after the accident, medical tests showed that his body still contained traces of monochlorobenzène, a solvent that makes up 50% of Lasso. According to the International Chemical Safety Card, monochlorobenzène may cause “somnolence, headaches, nausea and loss of consciousness.” François filed a legal claim against Monsanto in France. He successfully argued that if Monsanto had actually labeled the product *Lasso* correctly, showing that it contained monochlorobenzène (and what the health effects were), then he would have taken extra and special care in his handling of the product. The court held that as a result of not properly labeling the pesticide, “Monsanto is responsible for Paul François’s suffering after he inhaled the *Lasso* product ... and must entirely compensate him.”

The case shed light on the singularity of the system of pesticides assessment. Essentially, regulator tests are conducted only on the active ingredients – those that kill the plants or insects – and not on other chemical ingredients that are added to improve the effectiveness of the active ingredients. However, some of these non-active molecules (not fatal to weeds/insects) can actually be toxic to humans. This is what happened in the case of François: he was affected by monochlorobenzène, a solvent that makes up half of *Lasso*, in combination with its active (plant-killing) ingredient, anachlore.

While it may be difficult to hold pesticides manufacturers liable for individual health consequences, there has been successful litigation placing checks on the information that companies are sharing with the users of their products. For example, Monsanto has faced judicial consequences for spreading false and misleading information asserting that its products are environmentally sound and beneficial in particular ways. In 1996, Monsanto was found guilty by the New York Attorney General of false advertising regarding the safety of its product, *Roundup* (active ingredient Glyphosate). Monsanto was fined 50,000 USD as well as ordered to recall all false advertising material from the market. The following statements were considered false and misleading: “Remember that environmentally friendly Roundup herbicide is biodegradable. It won't build up in the soil so you can use Roundup with confidence along customers' driveways, sidewalks and fences ...” and “Glyphosate is less toxic to rats than table salt following acute oral ingestion.”

Recently, Syngenta had to pay a penalty of 1.2 million USD to the Environmental Protection Agency in the United States for an incorrect label. A governmental officer confirmed that “Misabeled pesticides are dangerous because they may display incorrect warnings and application instructions.”<sup>5</sup> In India, Bayer CropScience faces potential charges for misbranding its hazardous pesticide *Nativo 75 WG* in its distribution in India. Activists filed a petition to the Ministry of Agriculture in New Delhi to call for criminal investigation of both the subsidiary, Bayer CropScience India Ltd and the parent company, Bayer CropScience AG in Germany. Pesticides need to carry warnings of the particular risks for people and the environment. In Europe, Bayer sells *Nativo* with the mandatory warning statement that it is “suspected of damaging the unborn child.” But no such warning is provided once it is exported to India. Nor are customers informed about the necessary protective equipment for skin and eyes. Failure to provide necessary warnings constitutes the criminal offense of misbranding under the Indian Insecticides Act. The lack of warning aggravates the heightened risk for women as they tend to absorb pesticides through their skin more easily than men. Worryingly, the women can pass the toxic chemicals on to the next generation through the placenta and in breast milk. ECCHR supported the petition with its legal expertise.

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## Promises and pitfalls of pesticides labels

No doubt, labels are an important source of information for pesticides users. Labels can warn farmers regarding the toxicity of the chemicals, the need for protective clothing, and provide other recommendations for use, such as waiting periods before re-entering a field that has been sprayed. The importance of labels is repeated in the FAO Guidelines on Good Labelling Practice that point out that the label is sometimes the only contact between the manufacturer and the end user of the product. Indeed, the revised Guideline actually requires that labels are written so that users cannot only read but also understand it. Also the industry association CropLife International emphasizes that the goal of a good label is to “ensure safe and effective use” and similarly Syngenta’s Code of Conduct promises that its products carry “clear end user instructions concerning safe

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<sup>5</sup> EPA, “EPA Requires Syngenta to Label Pesticides Accurately”, 8 May 2014, available at <http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/a1bd726f96e6963985257cd2006308b0!OpenDocument> [last accessed 2 July 2015]. And: Stephen Davies, “Syngenta to pay \$1.2 M for selling misbranded pesticides”, available at: <http://www.agripulse.com/Syngenta-to-pay-for-selling-misbranded-pesticides-09162016.asp> [last accessed 10 October 2016].

storage, use and disposal.”<sup>6</sup> In many countries, labels are viewed as legal documents that convey essential safety information and use recommendations.

Still, it would be misguided to put too much confidence in the accuracy and adequacy of labels. While they are necessary, a survey carried out by ECCHR provides clear indications that good labels are not enough to communicate all essential safety information to farmers. A sales manager for Syngenta India in Bathinda reported that he knows that 30-40% of the farmers do not understand the labels due to language problems or other issues. One farmer thought that all pesticides are equally dangerous to the human health and that therefore it is not necessary to read the instruction leaflets.<sup>7</sup> Other farmers simply admitted that they had never read the instruction leaflet of a particular pesticide.<sup>8</sup> This means that any real effort to ensure that farmers and plantation workers are protected should go beyond proper labelling.

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## **Intervention at the United Nations: Panel of Experts of the FAO and WHO**

In October 2015, ECCHR submitted a complaint to the Food and Agriculture Organization and World Health Organization of the United Nations on the marketing of hazardous pesticides by Bayer and Syngenta in Punjab/India. The report found that pesticides are sold without adequate labels, without available protective clothing, and without proper training of the farmers and dealers. Pesticide companies are called upon to voluntarily integrate the standards in the International Code of Conduct into their business practices. Civil society is invited to monitor observance of the Code and submit Ad Hoc Monitoring Reports to the FAO/WHO Panel of Experts. In their yearly meeting, the Panel of Experts reviews the reports and makes recommendations for appropriate follow-up actions.

This little-known mechanism is now being used for only the third time. The FAO and WHO will assess companies’ adherence to the Code during its annual meeting of the Panel of Experts on Pesticide Management in Geneva in April 2017. The Ad Hoc Monitoring procedure gives the Panel of Experts the chance

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<sup>6</sup> “We will carefully identify hazards, assess risks associated with the use and alert users of consequences from misuse of a product on the product package, leaflet and label. Products carry clear end user instructions concerning safe storage, use and disposal”, in: Syngenta, “The Syngenta Code of Conduct”, 2016, p.25, available at: <http://www4.syngenta.com/who-we-are/corporate-governance/code-of-conduct> [last accessed 10 October 2016].

<sup>7</sup> Interview with Farmer 20; 13 March 2015 (PM); Baja Kana.

<sup>8</sup> For example, one farmer had been using Confidor (Bayer) for 10 years and never read the instruction leaflet, interview with Farmer 4; 14 March 2015 (PM); Bhotna.

to make use of the occasion to strongly advocate for improvement of company behavior and the bettering of the lives of thousands of farmers. The FAO emphasizes the value of the monitoring mechanism. However, its effectiveness is disputed. First, the mechanism is not widely known and is under-used; to date only three monitoring reports have been submitted. Second, NGOs that have participated in the monitoring mechanism have observed how the Panel of Experts has consistently failed to effectively address evidence of noncompliance by pesticides manufacturers. More effective results are needed, otherwise the current system is at risk of becoming obsolete.

The UN Guiding Principles on Business and Human Rights, as adopted by the Human Rights Council in 2011, offer a relevant benchmark against which the effectiveness and adequacy of the Ad-Hoc Monitoring procedure can be assessed. The relevant standard for the assessment of a functioning non-judicial remedy is principle 31 of the UN Guiding Principles on Business and Human Rights, according to which a set of qualities is considered as essential elements for a non-judicial grievance mechanism to be effective: legitimacy, accessibility, transparency, and predictability.

Based on the experience with the mechanism, ECCHR recommends the following improvements for the Ad Hoc Monitoring procedure:

- Define FAO/WHO responses to the inactivity of stakeholders.
- Publish all preparatory material prepared by the FAO Secretariat online before the meeting of the Panel of Experts.
- Provide a clear assessment if company behavior identified in a complaint is in violation of the Code and publish an official statement in that regard.
- Define competences of the FAO to engage in follow-up activities after an Ad-Hoc Monitoring procedure was concluded.
- Create a database with older cases and their outcomes.
- Supervision of compliance and follow-up steps by FAO at next JPPM meeting.
- Increase visibility of the Code.

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## The myth of “safe use”

The pesticide industry has developed the concept of “safe use”: which rests on the belief that pesticides are “safe” when certain precautions for their use are met. These precautions include following directions on the labels, wearing appropriate personal protective equipment (PPE), careful storage, responsible disposal, and following good agricultural practices for mixing, loading and

application.<sup>9</sup> However, even if companies were to give full effect to their commitments to promote training and PPE, in our view “safe use” would still not be guaranteed for the farmer, their families, plantation workers, the community or the environment, for it seems to rely on several assumptions and it is difficult to ensure that these assumptions are valid.<sup>10</sup>

First, “safe use” guidelines seem to assume that users have access to information, whether through labels and/or training. Second, they apparently assume that the retailers, through whom most users obtain their safety information, are also adequately trained. Third, they assume that farmers are able to put into practice such “safe use” measures, which necessitates access, resources, literacy and other factors that are unlikely to be present in every situation. However, even if PPE were available for purchase, farmers or plantation workers might find the cost of such equipment prohibitive.<sup>11</sup> Further, even if every user had the appropriate PPE, some may choose not to use it due to discomfort, particularly in the hot and humid climate of Punjab or the Philippines. Lastly, even if farmers bought and used it, its effectiveness in reducing exposure would be limited depending on the quality, the material, and its maintenance. It is particularly important that all of this is considered within the context of rural and remote areas where the capacity of the medical system to deal with health effects may be limited, compared to more developed countries where such products are sold.

Based on the interviews conducted by ECCHR in rural areas of Punjab and the south of the Philippines, it seems unlikely that users will be able to completely avoid exposure to pesticides that they work with. Recent research has demonstrated that many of the acute and chronic health effects of pesticide exposure can be triggered even at low doses, especially if this low exposure is long-term.<sup>12</sup> It should be noted, though, that companies do not even seem to adhere to their own commitments on “safe use” and the industry’s interpretation of the International Code of Conduct on Pesticides Management and FAO Guidelines.

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<sup>9</sup> E.g. Guidelines for the Safe and Effective Use of Crop Protection Products, CropLife International.

<sup>10</sup> Pesticides Action Network International, “Eliminating Hazardous Pesticides: advancing agroecology for harm prevention”, September 2012.

<sup>11</sup> The Berne Declaration documented similar views on PPE costs in their September 2007 Ad-Hoc Monitoring Report entitled “Pesticide users at risk.”

<sup>12</sup> Laura N. Vandenberg, et. al, “Hormones and Endocrine-Disrupting Chemicals: Low-Dose Effects and Nonmonotonic Dose Responses”, *Endocrine Reviews*, 2012 33:3, 378-455. See also <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/pests/code/hhp/en/> [last accessed July 2015].

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## Extraterritorial obligations of pesticide-exporting states

The pesticide *Nativo* contains the active ingredients Tebuconazole and Trifloxystrobin. Bayer CropScience produces the pesticide in Germany and exports to India where it is repackaged and marketed by Bayer CropScience Ltd. At registration of the active ingredient in the EU, Tebuconazole was classified as: suspected to be toxic to reproduction. Accordingly, the warning “suspected of damaging the unborn child” is mandatory in Europe. However, this information doesn’t exist on products bought in India, even in the year 2016. The label also doesn’t provide information on the safe application of the product, symptoms of poisoning, first aid, necessary protective equipment, disposal or warning against re-use.

Under the German plant protection law, pesticides may only be exported if the container is labeled with warnings necessary for the protection of human health. The German authorities are obliged to control compliance with the law and intervene when a violation is suspected. In light of the lack of information on the end product in India it is questionable whether the warning was on the exported containers. Therefore, ECCHR filed a complaint to the competent plant protection service of the chamber of agriculture of North Rhine-Westphalia due to the possible violation of national export rules. Besides imposing a fine the plant protection service can also take measures to prevent or end violations of the law. It can especially prohibit the export of *Nativo* without adequate warning. This prohibition is sufficient for Germany to comply with its obligations under UN Guiding Principle 25, which requires states to implement effective remedies to those affected by human rights abuse.

The German authorities have to observe activities abroad of companies situated here and intervene in cases of human rights violations. According to the Code of Conduct of the FAO (Art. 3.4), pesticide exporting countries have to ensure that good trading practices are followed in the export of pesticides, especially with countries that have not yet established adequate regulatory schemes. In the past, the UN Human Rights Committee unambiguously asked Germany to set out clearly the expectation that all businesses domiciled in its jurisdiction respect human rights standards throughout their operations.<sup>13</sup> In his latest report after his visit to Germany, the United Nations Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of

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<sup>13</sup> UN Human Rights Committee, “Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106<sup>th</sup> session, 15 October to 2 November”, 12.11.2012, CCPR/C/DEU/CO/6, Para. 16.

hazardous substances and wastes expressed his deep concern regarding the double standards that currently exist.

*“Although many highly hazardous pesticides are banned or restricted in the European Union because their safe use cannot be guaranteed, European businesses continue to produce them, sometimes specifically for export and use in non-European Union countries without adequate legislation or enforcement of existing laws, creating unmanageable risks and a high likelihood of grave impacts to human rights.”<sup>14</sup>*

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## What is needed?

- Corporations should be held accountable for the negative impacts of the distribution of their pesticide products and particular attention must be drawn to the responsibility of the European headquarters of agrochemical corporations, especially in the case of double standards
- Reversal of the burden of proof: if a company did not adhere to the internationally and nationally recognized standards for pesticides management, it should be assumed that a health injury was caused by a sprayed pesticide, unless the company can prove an alternative cause
- Governments (both in the home state and in the host state) should enforce existing legislation that envisions sanctions if companies engage in the distribution and sale of pesticides in violation of legal provisions e.g. on the adequacy of warnings and the availability of appropriate protective equipment
- Pesticides-exporting countries should collect and record data on export of pesticides and assess the extent of any possible effect on human and animal health and/or the environment
- The right to health and the right to a healthy environment should be put at the center of the public debate about the distribution and use of pesticides
- Regulation should be based on the precautionary principle instead of the myth of safe use: existing pesticide registrations should cease when nonchemical methods or less hazardous pesticides can be substituted
- Highly hazardous pesticides should be banned

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<sup>14</sup> UN-Special Rapporteur on Hazardous Substances, UN-Doc. A/HRC/33/41/Add.2, para. 121.

- Communities should be strengthened in their continuous quest for, on the one hand, heightened transparency regarding the risks and, on the other hand, remedies for damage incurred as a consequence of the use of pesticides
- Pesticides industry should respect the ‘right to know’ as well as the ‘right to comprehend’ and withdraw all pesticides products with inadequate labels; in addition, companies should train dealers, distributors and salespersons who sell their products to market them responsibly
- Pesticide industry should refrain from selling pesticides if the availability of adequate protective equipment cannot be guaranteed and offer effective and adequate disposal schemes
- The so-called external costs of chemical-based agriculture should be taken into account: the health problems suffered by pesticides sprayers and their communities, adequate compensation for their medical costs and loss of earnings, as well as remedies needed to maintain a clean environment.

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