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## AFTER 9 YEARS OF PROCEDURE, THE FRENCH SUPREME COURT PUTS A FINAL END TO THE HIGHLY PUBLICIZED BEE CASE. AN INSIDER'S CHRONICLE

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In a decision dated May 30, 2012, the Cour de Cassation (French Supreme Court) wrote the final chapter of the long legal and media saga in which the world leading chemical and agrochemical company has been accused of being at the origin of the abnormally high death rate observed among the bee population in France, following vehement complaints by bee-keepers. This decision upholds the judgment rendered on September 2, 2010 by the Toulouse Court of Appeals that exonerated Régent TS, a seed-coating product manufactured by BASF Agro.

As legal counsels of BASF Agro, we have waged this long battle from the inside. Time has come to take a look back at what can be referred to as an epic adventure. Why and how did this case come to court and what lessons can be learned?

A first investigation was launched in May 2002 by the Public Prosecutor of Saint-Gaudens acting on the basis of a report from the General Directorate for Food concerning field observations reporting an abnormally high death rate among the bee population in the Midi-Pyrénées region (Southwest of France) caused by prohibited imported products mixed up with white spirit and tooth paste.

A list of authorized substances used in the manufacture of seed-coating products protecting crops against pest insects was annexed to the investigation file. Fipronil, a substance used in the manufacture of Régent TS, was included in that list.

Under the pressure of UNAF, a minority bee-keeper association, and the Confédération Paysanne, the agricultural union of the extreme activist José Bové, a first investigating judge – who requested his transfer to another court later during the procedure – decided, in agreement with the Public Prosecutor, to open a separate judicial investigation focusing exclusively on fipronil in order to determine whether this substance could be responsible for the abnormally high death rate among the bee population.

In fact, for the civil parties<sup>[1]</sup>, this second investigation was a golden opportunity to continue the fight they had engaged against another product that was in competition with Régent TS and for which they had already obtained a ban from the French authorities, i.e. Gaucho, a seed treatment product manufactured and

marketed by the Bayer Group, the other German chemical and agrochemical giant.

The investigating judge appointed experts whose name had been suggested by the lawyer of the civil parties, without taking into account the publicly known close relationships between UNAF and these experts who regularly participated as guest speakers to UNAF's annual meetings.

Unsurprisingly, these "experts" found that fipronil was responsible for the abnormally high death rate among the bee population, thereby causing the indictment of BASF Agro and Bayer CropScience, the former owner of this chemical substance, and of their respective corporate officers.

The first investigation was still ongoing and finally led to the conviction of the importers of the prohibited products and mixtures whose toxicity for bees was of course indisputable.

The indictment of BASF Agro and Bayer CropScience in February 2004 unleashed an unprecedented media storm.

No other environmental case had ever been so much commented in newspaper columns, radio programs and TV newscasts. The two chemical and agrochemical giants were described as the gravediggers of humanity during a countless number of months.

TV shows and newspaper articles endlessly repeated a saying ascribed to Albert Einstein – who in fact never pronounced these words –: "If bees were to disappear, man would only have a few years to live".

Philippe de Villiers<sup>[2]</sup>, who never misses an opportunity to step into a populist battle, resurfaced and made the rounds of TV shows to promote his new book entitled "When bees die, Man's days are numbered".

Other unlikely characters, so far unknown to the general public, such as François Veillerette, the founder of the "Movement for the Protection and Respect of Future Generations", and Professor Belpomme, surfed on the media wave by making multiple "catastrophic predictions" and spreading "medieval fears", as per the terms used by Mrs. Catherine Hill and Professor Maurice Tubiana in an article published in the French newspaper Les Echos<sup>[3]</sup> on August 20, 2004.

BASF Agro and Bayer CropScience continued to produce all available studies establishing that fipronil was harmless for bees and even obtained its approval at the European level in the framework of the so-called chemical substance approval procedure introduced by EC Directive 91/414.

The new investigating judge appointed independent experts with the required skills in eco-toxicology.

The charges against BASF Agro, Bayer CropScience and their corporate officers

were eventually dismissed and full dismissal was confirmed by the Toulouse Court of Appeals on September 2, 2010.

The decision rendered on May 30, 2012 by the Cour de Cassation – that rejected the appeal lodged by the civil parties against the judgment of the Toulouse Court of Appeals – has definitively closed this case.

What lessons can be drawn from this spectacular case on the underpinnings of our society, on the role played by politicians and on the situation of our judicial system?

First, environmental cases are unfortunately polluted by a general sense of hostility against companies allegedly driven only by an unrestrained quest for profits and showing no interest to other considerations. Even though we live longer in an increasingly protective society, an undercurrent of distrust towards advances in science has been instilled into minds by those who spread “medieval fears”, as denounced by Mrs. Hill and Professor Tubiana.

In the mainstream media, few scientific journalists are asked to analyze and comment data concerning a product called into question by consumer protection associations or environmental organizations, sometimes called “Green Khmers” when they caricaturally defend a thesis that is not supported by any scientific evidence.

Politicians’ fear of a media hype that they do not control is a second important concern. The Director of a Ministry Cabinet will tell you that his/her job is to do politics, which requires him/her to heed public opinion during election periods. Even though the product in question has been authorized in 70 countries, including France, after 10 years of scientific studies and testing for a global cost of more than 200 million Euros, the Minister will have no other choice but to withdraw such product, only on a temporary basis so they say, to avoid providing a platform to Mr. Bové or his followers a few weeks ahead of the elections.

The resulting sense of uncertainty felt by companies is one of the main reasons that explain the deindustrialization of our country. What company would be foolish enough to conduct R&D activities on GMOs in our country? And even worse... to take the risk of manufacturing in France the products developed through such activities?

This political behavior also drives to despair the experts appointed within independent governmental agencies whose opinions are not followed by Ministers. We have all the tools of a modern State but we continue to operate as an authoritarian State where primacy is given to politicians, that is to say to short-term electoral considerations.

Fortunately, we are lucky enough to have an independent judiciary. Mistakes can be made along the way (who has never made a mistake?), hesitations can delay

the outcome of a procedure (but time usually eases passions). Yet, experience teaches that, after several – sometimes chaotic – years of procedure, there is generally one judge or one Public Prosecutor with acute awareness of his/her role to get the case back to the right track without worrying about public opinion.

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[1] The French system offers people having suffered injury, as a result of another's violation of the law, the possibility of taking advantage of criminal proceedings to claim compensation. When such people join the criminal proceedings, they are referred to as "parties civiles".

[2] A far-right French politician

[3] France's leading economic and financial daily newspaper

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