INTERNATIONAL CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE: LESSONS LEARNED

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ABSTRACT

This paper is based on the mandate in the Biosafety Protocol that the Article 27 liability and redress process must take due account of the international processes in liability when addressing the issue in relation to LMOs. None of the existing environmental liability instruments have entered into force and most are considered “dead letters.”

The paper presents the main reasons why international environmental liability instruments are not accepted by the countries that negotiate them, including:

- **Heavy financial burdens** imposed by the regimes, especially affecting small and medium sized businesses;
- **Difficulty of obtaining insurance** under the negotiated provisions;
- Differences between the international instrument and national laws and the reluctance of countries to change their national liability systems; and
- **Fears of trade disadvantages** vis-à-vis trading partners that do not sign on.

The author notes that negotiation of such regimes can be time consuming and costly and countries sometimes fail to appreciate that international systems cannot substitute for functioning national systems which are necessary in all cases. The author identifies some lessons to be learned, including the need to adequately consult and involve the industries concerned and the insurance sector.

The author notes that LMOs are not in the same category of risk as activities addressed by existing regimes (e.g., oil pollution, radioactive substances, transport of hazardous materials, etc.). She also states that environmental liability instruments may stand a better chance of success where the risks and foreseen damages are known and clearly identifiable, which is not the case with LMOs.

The author concludes by proposing a novel approach of negotiating an international instrument for environmental liability limited to creating unified procedures for access to foreign courts and enforcement of judgments.

This paper is part of the Compilation of Expert Papers concerning Liability and Redress and Living Modified Organisms (2nd Ed. January 2006), published by CropLife International as a contribution to the Article 27 process under the Cartagena Protocol on Biosafety. The content of the paper is wholly the opinion and responsibility of the author. CropLife International does not necessarily endorse or agree with any of the assertions, analysis or conclusions presented. The complete Compilation may be downloaded at:

Dear Delegate,

The topic of liability and redress is an important part of the discussions underway in connection with the entry into force and implementation of the Cartagena Protocol on Biosafety (the Protocol). CropLife International is the global federation representing the plant science industry. It supports a worldwide network of regional and national associations in 87 countries. It is led by companies such as BASF, Bayer CropScience, Dow AgroSciences, DuPont, FMC, Monsanto, Sumitomo and Syngenta, which continually reinvest in agricultural research and development. As such, it has a keen interest in the topic of liability and redress.

Article 27 of the Protocol required that the Parties, at their first meeting:

‘adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years.’

In order to make a positive contribution to the Article 27 process, in 2004 CropLife International commissioned the preparation of independent papers by legal experts with substantial experience, at both the national and international levels, in the fields of liability and redress, regulation of biotechnology, and environmental law.

The authors were asked to address the following questions:

- What is the experience to date with the negotiation of international liability instruments in the environmental field and what are the lessons learned of relevance to the Article 27 process?

Dr. Katharina Kummer Peiry, a Swiss lawyer specializing in international law and policy, explored this question based on her direct experience with the negotiation of international environmental instruments, including in her role as Chair of the Committee of the Whole of the UNEP Working Group that elaborated the Basel Protocol on Liability.
• How do existing civil systems address traditional damage that may be caused by the transboundary movement of LMOs?

Professor Lucas Bergkamp, a leading European practitioner, lecturer and author on the topic of international environmental liability law, has analysed this important question based on his extensive experience with, and analysis of, the topic over many years.

• How has the issue of liability and redress for damage to biodiversity been addressed to date and what are the best approaches and practices?

Laura van der Meer has examined the various approaches to liability for environmental harm at the international and national levels, based on her experience as an environmental lawyer practicing in the United States and Europe, and has provided case study examples of how some countries have addressed this issue.

• What analysis should be done at the national level when countries consider the issue of liability and redress in connection with LMOs?

Rachel G Lattimore, a U.S. lawyer focused on animal- and plant-based biotechnology regulation and legal challenges, identified a series of questions that can assist countries to analyse effectively their existing national situations with respect to liability and redress as a critical basis for governmental decision-making on this topic.

• What would be the implications for countries if they were to adopt the liability provisions proposed in the Third World Network (TWN) and Organisation of African Unity (OAU) Model Laws at the national level?

Stanley H. Abramson has analysed the TWN and OAU liability provisions based on their combined experience with international and national environmental regulation and compliance and legal challenges before courts and administrative agencies.

• How would the scenarios presented at the Rome experts’ meeting be handled under existing laws and regimes at the national or international levels?

Prof. Bergkamp has evaluated selected hypothetical situations discussed in Rome in terms of state responsibility as well as civil liability. In addressing civil liability, he considered liability and redress both for traditional damages as well as damage to the environment.

Each of these papers remains relevant now that the liability and redress process under the Protocol is underway. To complement these papers, however, CropLife International asked Ms. Van der Meer to produce a brief set of questions and answers concerning the interrelationship between the Protocol process and the liability process taking place under the Convention on Biological Diversity, as well as the key issues and concepts that are emerging in both processes. That paper has been added to this publication.
To ensure the independence of all of the papers, CropLife International proposed, and the experts agreed, to prepare the commissioned papers without consultation with CropLife International or any other organisation, association or company. In an effort to challenge their own thinking and conclusions, the authors engaged in a peer-review process through which they each reviewed the others’ papers and offered comments, criticisms and suggestions. Individual authors remained free to accept or reject suggestions offered by their peers.

At the conclusion of their peer review process, the authors presented CropLife International with the final papers, which were included in this publication without editing or alteration of any kind. Accordingly, the content of the papers shared in this publication is wholly the opinion and responsibility of the authors; CropLife International does not necessarily endorse or agree with any of the assertions, analyses or conclusions presented in these papers.

We hope that you find these papers useful in considering the issue of liability and redress at the national level as well as in connection with the Protocol and Convention liability processes. We invite you to contact CropLife International if you have any questions about this publication.

Yours sincerely

Christian Verschueren
Director General
International Civil Liability for Environmental Damage: Lessons Learned

Katharina Kummer Peiry

Article 27 of the Cartagena Protocol requests Parties to analyze and take into account other international processes on liability when addressing the issue in relation to LMOs. International civil liability regimes for damage relevant to the environment are operational in the fields of nuclear materials and oil pollution from ships, dating from the 1960s and 1970s. In the past two decades, a number of additional civil liability regimes were adopted both at the global and at the European levels, mostly addressing damage caused by potentially hazardous substances. However, none of these has as yet entered into force, as they have not received a sufficient number of ratifications. Most are beginning to be considered “dead letter”. This paper looks at possible causes, and attempts to set out lessons to be learned from these experiences that could be relevant for the Biosafety Protocol discussions on this issue.

1. The Basel Protocol on Liability and Compensation: A Case in Point
At its adoption in December 1999, the Protocol on liability and compensation to the Basel Convention on hazardous wastes was hailed as a crucial achievement in addressing civil liability for environmental damage at the international level. It was the first civil liability protocol ever concluded in the framework of a global environmental treaty. As such, it was considered important not only on its own merits, but also as a potential model for liability negotiations under other environmental treaties. During the 1990s, there was a tendency to look to the liability negotiations under the Basel Convention when considering equivalent negotiations under other environmental treaties. The supporters of launching liability negotiations quoted the Basel Convention as a positive precedent, while the detractors claimed that it was not worth investing in liability negotiations as long as it was unclear whether the Basel negotiations would ever yield results.

The negotiations did yield results. However, the Basel Protocol, which had raised high hopes at the time of its adoption, may now be destined to join the ranks of its predecessors: four years after its adoption, it has been signed only by 13 of the Convention’s 158 Parties. Of these, only three are developing countries. Only one country, Ethiopia, has acceded to the Protocol.1

Key provisions of the Basel Protocol
The Basel Protocol establishes the following essential rules and principles regarding civil liability for damage resulting from transboundary movements of hazardous wastes:

• Coverage of traditional damage2 as well as environmental damage3 occurring during a

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2 For discussion of this concept, see related article, L. Berkamp “Liability and Redress: Existing Legal Solutions for Traditional Damage”.
3 For discussion of this concept, see related article, L. van der Meer “Environmental Liability Regimes: Approaches and Best Practices”.
transboundary movement of hazardous wastes (Article 2):

- Traditional damage includes loss of life, personal injury, loss or damage to property, and loss of income directly deriving from an economic interest in the environment

- Environmental damage includes the costs of reinstating the environment and of preventive measures. Damage that cannot be assessed in monetary terms (“purely environmental” damage affecting the intrinsic value of the environment) is not covered.\(^4\)

- Coverage of damage that occurred during transboundary movement, i.e. from the point of departure to the point of arrival (Article 3).

- Strict liability (i.e. liability regardless of whether or not the person is at fault) to be applied to the responsible operator; determination of the person responsible at any given moment (Article 4)

- Fault-based liability (i.e. liability only where the person is at fault) to be applied to persons other than the responsible operator who caused or contributed to damage by illegal, negligent or reckless acts (Article 5)

- Obligation of the person in operational control at the time of the incident (who may or may not be the responsible operator) to take mitigating measures (Article 6)

- Right of recourse of the liable person (Article 8)

- Financial limits and time limits for bringing a claim (Articles 12 and 13)

- Obligation of potentially liable persons to establish insurance, bonds or other financial guarantees (Article 14)

- Procedural provisions (Article 17 et seq.)

**Slow and difficult negotiations**

The Basel Protocol on liability took nearly ten years to negotiate.\(^5\) Its “parent” treaty, the Basel Convention, was adopted in 1989. There had been considerable pressure for including liability provisions into the text of the Convention. This concept was finally abandoned mainly due to lack of time, and due to opposition by an important faction of the negotiating states. The same approach was chosen as in the Biosafety Protocol negotiations: an enabling provision was included, requesting Parties to consider the issue further. At the time, this was heavily criticized, with some actors maintaining that the absence of substantive liability provisions rendered the Convention meaningless. Pressure from developing countries and NGOs kept the issue on the agenda, and work on a protocol on civil liability started soon after the adoption of the Convention. Based on a draft prepared by the

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\(^4\) For a discussion of the types of damage in the context of the ECE Protocol on Liability for damage to international waterways (the relevant provision of which has been adapted from that of the Basel Protocol), see A. Antypas and S. Stec, Towards a liability regime for damages to transboundary waters by industrial accidents, in ELM 2003, p. 295 et seq.

interim secretariat and an experts’ working group, the first Conference of the Parties in 1992 established a second working group with the mandate of elaborating the protocol. The initial aim, set by the Conference in 1994, was to finalize the protocol by 1995, but this soon proved unrealistic. The second working group on liability and compensation held 10 meetings between 1993 and 1999. Mainly because of fundamental controversies over key issues, the negotiations were difficult, and progressed very slowly. Due to financial constraints, the negotiating group normally met only once a year. Real progress was not achieved until June 1998, after nearly 8 years of negotiations. The Basel Protocol was finally adopted by the 5th meeting of the Conference of the Parties in December 1999.

The contentious issues

The following issues were among the most contentious, and were resolved only at the end of the negotiation process:

- Scope of application: Even though there was agreement that the protocol should apply only to damage occurring during transboundary movement of hazardous wastes, there was considerable debate over the starting and the ending point of applicability, and over applicability in relations with non-Party transit states. On the first point, a compromise was reached to cover damage from the starting point to the end point of the transboundary movement, but allowing a Party to unilaterally exclude the part of the movement taking place in its territory. On the second point, transit countries were given certain rights in the Prior Informed Consent procedure (the equivalent of Advanced Informed Agreement in the Biosafety Protocol).

- Channeling of liability: There was a diversity of proposals as to which person should be primarily liable. The main options remaining at the end were (1) the person in operational control of the wastes at the time of the incident, and (2) the notifier or exporter. A compromise was eventually found to use a combination of the two approaches.

- Financial limits of liability: There was disagreement as to whether a financial “ceiling” should be introduced, and if so, how this should be determined. Developing countries in particular considered a financial limit to be acceptable only if a compensation fund were established. A “ceiling” was eventually included, but the details were only finalized two years after the adoption of the Protocol, through amendment of the relevant Annex.

- Insurance and other financial guarantee: The main controversies included the issue of requiring a minimum coverage for compulsory insurance, and the question whether legal action can be brought against the insurer. Both these questions were ultimately answered in the affirmative.

- Establishment of a fund to provide compensation in cases where this is not available under the protocol (so-called second-tier liability): This was the major dividing issue and nearly led to the break-up of the negotiations during the last session prior to adoption. Developing countries saw it as an essential element of the future protocol, whereas developed countries were strongly opposed to the concept. As a compromise, the protocol contains an enabling provision mandating the Conference of Parties to keep the issue under review.

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2. Other international agreements on civil liability relevant to the environment

As noted above, there are operational civil liability regimes for two subject areas relevant to the environment: nuclear damage, and damage caused by oil spills from ships. Both have been in force for many years. The first consists of a number of interrelated treaties adopted between 1960 and 1988, and further developed through several amendments in the 1990s. The main components of the second are the Oil Pollution Convention of 1969 and the Fund Convention of 1971, both further developed through amendments and new protocols in the 1990s and 2000s. Under the Fund Convention, a compensation fund of the type discussed in the Basel negotiations is operating. It is interesting to note that prior to the adoption of this regime, the shipping industry had established its own compensation schemes to cover damage resulting from oil spills.

A new generation of civil liability regimes relevant to the environment emerged in the late 1980s and the 1990s. Like the Basel Convention, these treaties took years to negotiate. The most elaborate is the Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, adopted under the auspices of the Council of Europe in 1993. It covers a wide range of activities defined as dangerous, and applies to damage regardless of whether or not there is a transboundary dimension. Two treaties address liability for damage resulting from transport of dangerous goods: the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), negotiated under the auspices of the UN Economic Commission for Europe (UN/ECE), and the global 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, negotiated under the auspices of the International Maritime Organization. As noted above, none of these is in force today, and it appears increasingly unlikely that they will ever become operational.

The latest addition to international civil liability legislation addressing environmental damage is the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, adopted under the auspices of the UN/ECE in Kiev in May 2003. This is a Protocol to two UN/ECE Conventions that address transboundary effects of industrial accidents and protection of transboundary watercourses, respectively. Contrary to previous liability negotiations, the insurance industry was given an active role, and helped to find realistic solutions particularly on the issues related to financial guarantee. There seems to be some hope that this regime might be more viable than its predecessors. On adoption, the Protocol was signed by 22 countries of the UN/ECE region, which seems a reasonably good start. It remains to be seen whether ratifications will follow.

All of these regimes establish essentially the same rules and principles as the Basel Protocol. In general, they establish a regime of strict liability, and channel liability to one clearly identifiable actor. The definition of damage is similar to that of the Basel Protocol. Most regimes provide for financial limits and time limits for bringing a claim, as well as a minimum level of compulsory insurance or other

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8 See A. Antypas and S. Stec, ibid.

9 The UN/ECE Region covers Eastern Europe including the Central Asian Republics, Western Europe, and North America.
financial guarantee. Finally, they provide for unified procedures, equal access to courts for nationals of other party states, and mutual recognition of court decisions.

3. Country surveys: What prevents states from adhering to international regimes on civil liability for environmental damage?

With few exceptions, the record of international civil liability regimes for environmental damage to date is poor in terms of entry into force and implementation. This has given rise to some soul-searching by the international organizations under the auspices of which the regimes were negotiated. Surveys were undertaken to identify the reasons for member states’ failure to adhere to the respective treaties. Results of such surveys are available for the 1989 CRTD Convention\textsuperscript{10}, the 1993 Lugano Convention\textsuperscript{11}, and the 1999 Basel Protocol\textsuperscript{12}. In all the surveys, the following obstacles to becoming Parties to these treaties were identified by participating states:

- Heavy financial burden imposed by high financial limits of liability and high thresholds for compulsory insurance, especially on small and medium enterprises; resulting increase in the price of the goods concerned

- Difficulty of obtaining insurance coverage under the provisions of the civil liability treaty

- Discrepancy between the international treaty and national civil liability legislation, making it impossible for states to adhere to the treaty without substantive revision of their national legislation. Examples where national laws of the participating countries differ from the international regimes include the scope of the damage covered (e.g. inclusion of environmental damage); the definition of dangerous activities and hence the scope of activities covered; time limits for bringing a claim, the requirement and financial threshold of compulsory insurance, and financial limits of liability.

- Failure of the treaty to attract support from a minimum number of states; i.e. a state does not want to accept the obligations of the treaty unless a minimum number of other states do likewise, for fear of suffering trade disadvantages

4. Lessons to be learned

What are the obstacles to ratification and entry into force of civil liability regimes?

In this author’s view, a number of factors contribute to the difficulties encountered in the negotiation, as well as in ratification and entry into force, of international civil liability regimes. Some of these have also been identified in the country surveys.


- It would appear that a specific liability regime for a subject area where there is a multitude of operators, activities and substances is complex and therefore difficult to negotiate and equally difficult to implement. This may in part explain the relative success of the regimes on civil liability for oil pollution and for radioactive substances, compared to the regimes on hazardous substances and “activities dangerous to the environment”: the former apply to one substance and a generally limited number of activities and operators, while the latter apply to a large number of substances and to a relatively wide range of activities and operators.¹³

- In establishing unified financial limits and thresholds for insurance, it is not possible to take the different financial situations in different countries sufficiently into account. What may be an acceptable financial burden in one country is considered excessive in another. In the context of the European conventions, it is interesting to note that the issue of the heavy financial burden was most often raised by Eastern European countries with economies in transition.

- In some cases, the negotiating process did not provide sufficient involvement and consultation of the industry sectors concerned, in particular the insurance sector. Accordingly, the practical aspects of future implementation were not sufficiently taken into consideration. The 1989 CRTD, for example, was not negotiated by the members of UN/ECE with observer participation, but prepared by the International Institute for the Unification of Private Law (UNIDROIT), a specialist body. In the case of the UN/ECE Liability Protocol, this flaw was avoided by including representatives of industry, in particular the insurance sector, as active partners in the negotiations. Arguably, one reason for the relative success of the international civil liability regime for oil pollution damage is that it built on an existing industry scheme and had the support of the industry sector concerned.

- The complexity of the issue of civil liability, and the fundamental differences between the many different domestic systems, make it very difficult for an international civil liability regime to accommodate the particularities of each country’s national legislation, as the list of obstacles appearing in the various country surveys shows. The resulting discrepancies will make it difficult for a country to adhere to the international regime. A related problem is that some countries have broad liability legislation applicable to a range of activities, rather than special provisions for each activity, and are not in a position to adapt their entire liability regime to the international rules for a single type of activity.

- The precedents show that many states are generally very reluctant to subscribe to international civil liability regimes, in particular those states that have an elaborate national civil liability regime in place and are reluctant to make fundamental changes to it¹⁴. Attempts to reconcile the different national systems make the negotiations difficult and contentious, and they often turn out to be very lengthy and costly exercises.

- By contrast, countries that do not have any national civil liability legislation to cover environmental damage tend to push for an international civil liability regime, in the hopes that

¹³ For a similar observation see P. Lawrence, ibid., p. 254; IMO Document LEG 87/11/1 (8 August 2003): Monitoring the Implementation of the HNS Convention - Papers discussed at the Special Consultative meeting of the HNS Correspondence Group in Ottawa, 3-5 June 2003.

¹⁴ See also S.D. Murphy, Evaluation of an International Liability Regime for the WHO Framework Convention on Tobacco Control (paper elaborated for the WHO Secretariat, February 2001).
this will fill the gap. This does not take into account the fact that an international civil liability regime serves to unify national provisions on certain issues, and is thus a supplement to, not a substitute for, national legislation. International civil liability regimes address a number of key issues, leaving other issues to be addressed by national legislation.\textsuperscript{15} Thus a country that has nothing in place will find it difficult to make full use of an international regime.

In addition to these factors that can generally be identified for the existing civil liability treaties relevant to the environment, there is a specific constraint for a future liability regime in the framework of the Cartagena Protocol. Management of LMOs is not in the same category as the activities addressed by existing regimes - oil pollution, management of radioactive substances, and transport of hazardous chemicals -, which are recognized as being potentially hazardous. In these cases, the damage is generally known and can be marked with figures, and a causal link to the relevant activity can be established. By contrast, it has not as yet been scientifically established what damage, if any, is caused by LMOs.

**What are the potential success factors for a liability regime?**

It would appear that international civil liability regimes as an instrument to address environmental damage have the best chance of becoming operational if the following requirements are met:

- Known and clearly identifiable risks and damages
- Limited number of operators, activities and substances
- Support of the industry sectors concerned, involvement from the start of the negotiations (including the insurance sector)
- Existing national civil liability regimes of the participating countries; ideally featuring sufficiently similar provisions that the unifying rules of an international regime can be applied without fundamental changes

Even if these conditions are met, the negotiation of an international civil liability regime can be very time consuming and costly, and there is the danger that it will never enter into force, as the precedents show. In the area of management of LMOs, where at least the first two requirements are not met, this danger is even greater. A novel avenue to addressing some of the problems identified might be the elaboration of an international regime that is limited to addressing the unification of procedures, access to foreign courts, and mutual recognition of judgments, without establishing substantive rules. If this option were chosen, considerable effort would at the same time need be put into developing the national civil liability legislation of future parties to the Cartagena Protocol to allow them to address the issues in a way that is adjusted to their particular situation with regard to LMOs, and in line with their existing legal system.

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\textsuperscript{15} See e.g. Article 19 of the Basel Protocol: “All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Protocol shall be governed by the law of that court (...)”