Liability and Redress: Existing Legal Solutions for Traditional Damage

Professor Lucas Bergkamp, Hunton&Williams

ABSTRACT

Professor Bergkamp argues that the scope of the Biosafety Protocol does not cover traditional damage (i.e. personal injury or health damage, and property or other economic damage).

This type of damage should be handled by existing liability mechanisms and regimes, including international arbitration institutions or national courts of the jurisdictions where defendants and claimants reside.

The author also demonstrates that adequate mechanisms exist for the handling of damage claims, and therefore questions the need and desirability of an international liability instrument.

He also calls for capacity-building in states that do not have adequate general civil liability regimes.
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
The Parties to the Cartagena Protocol on Biosafety (BSP) are considering the issue of liability and compensation for damage resulting from transboundary movement of living modified organisms (LMOs). The concerns of some proponents of a BSP liability instrument relate not only to potential damage to biodiversity, but also to perceived risks of LMOs causing personal injury or health damage, and property or other economic damage (hereafter referred as “traditional damage”).

In this author’s view, given the objectives of the Convention on Biological Diversity and the BSP, such damage is not covered by the BSP.¹ Nevertheless, concerns about traditional damage have been raised in connection with the Article 27 process. This paper therefore discusses how concerns relating to traditional damage already are handled by existing liability mechanisms and regimes. Part 1 discusses existing international institutions and mechanisms to resolve claims through arbitration. Part 2 discusses the availability of national courts and the operation of private international law to ensure the availability of courts in a cross-border context. Part 3 reviews the applicable substantive law of national liability systems. Part 4 describes the selection of applicable substantive law in the cross-border context.

¹ For more detailed discussion, see related article, L. Bergkamp “Analysis of the Applicability of Existing Civil Law to the Rome Scenarios,” Part V.
1. Multiple Mechanisms Exist for Arbitration and Enforcement of Awards

Claims for traditional damage alleged to have been caused by LMOs can be addressed through awards granted by international arbitration institutions, which, as detailed in footnote 2 below, exist throughout the world. Arbitration mechanisms are available to the parties to a dispute to obtain an effective and efficient resolution of their dispute. These mechanisms are alternatives to actions before courts, and are often preferred by the parties as they tend to be cheaper and more flexible and specialized arbitrators may be more knowledgeable on the issues than all-round judges.

The Convention on Biological Diversity (CBD), the parent convention to the BSP, makes arbitration available to the Parties to the Convention\(^1\) through the procedure set forth in Article 27. When ratifying the CBD, Parties may choose that disputes, if negotiations and mediation are unsuccessful, be settled through an arbitration procedure set forth in Annex II to the CBD. These procedures apply also to claims under the BSP.\(^2\) Arbitration can be the exclusive means of settling disputes, or an optional means in addition to proceedings before the International Court of Justice.\(^3\) Arbitration can be an efficient means of resolving claims between states. As only states have a right of action in such proceedings, private claimants have to persuade their governments to file for arbitration. This provides an additional filter and allows governments to sort colorable claims from weak or frivolous claims. Like international arbitration institutions, national arbitration institutions are able to provide effective remedies in respect of traditional damage allegedly caused by LMOs. Such institutions exist in a large number of countries throughout the world.\(^4\)

Pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958), awards issued by arbitration bodies, subject to very limited exceptions, can be enforced easily in the courts of countries that have ratified the convention.\(^5\)

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\(^1\) The Parties to the Convention are the states that have ratified the Convention.

\(^2\) Many international conventions provide for arbitration. However, states often do not take full advantage of these procedures. This is a general issue that should be analyzed and better understood so that the effectiveness of international arbitration procedures can be improved.

\(^3\) Cf. UNEP/CBD/BS/COP-MOP/1/9/Add.1 Part H).

\(^4\) There are many arbitration bodies operating at the international and national levels. In the US, where many biotechnologies reside, the American Arbitration Association, among many other organizations, provides international arbitration services. See http://www.adr.org/index2.1.jsp. In Europe, international arbitration is handled by many bodies, including the International Chamber of Commerce in Paris. See http://www.iccwbo.org/index_court.asp. In South America, the Interamerican Arbitration Commission links most South and Central American arbitration centres. See http://www.ciac-ciac.org/quienes.html.

\(^5\) The New York Convention has been ratified by Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia,
Through these institutions and mechanisms, claimants are able to obtain redress.


In addition to international and national arbitration bodies, claims for alleged damage from LMOs also may be brought before the national courts of the jurisdictions in which defendants and claimants reside. In the plausible scenario that both the claimant and defendant reside in one country, as in the case of claims brought against importers, national courts would often be the most appropriate and most efficient and effective way to adjudicate the claims.

Where the claimant is based in one jurisdiction and the defendant in another, however, the first question is in which courts can claims be brought? Principles of international private law (which is national law applying to cross-border disputes and other relations between private parties) will designate the court or courts having jurisdiction over the dispute. International private law thus operates to ensure that claims recognized under national liability regimes also can be exercised in a cross-border context.\footnote{International private law, Strikwerda explains, is aimed at regulating the problems that result from differences in legal systems and transboundary disputes. Strikwerda L. Inleiding tot het Nederlandse Internationaal Privaatrecht. Fifth Edition. Groningen: Wolters-Noordhoff, 1997, p. 20.} In addition, national jurisdictional and standing rules, including the rules of the US, where many biotechnology companies are based, generally allow foreign claimants to sue in their court system.

\footnote{(Footnote cont’d from previous page.)
Bosnia and Herzegovina, Botswana, Cambodia, Brazil, Brunei, Darussalam, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Georgia, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, Iceland, Indonesia, Iran (Islamic Rep. of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Mali, Lesotho, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mauritania, Mauritius, Netherlands, Mexico, Monaco, Mongolia, Morocco, Mozambique, Nepal, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia and Montenegro, Singapore, Slovakia, Switzerland, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Ukraine, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia, and Zimbabwe.}
Judicial jurisdiction involving parties from two or more countries often turns on the residence of the parties.\textsuperscript{1} Courts that may have jurisdiction under the rules of an applicable international private law typically include (1) the courts of the claimant's residence (\textit{forum actoris}), (2) the courts of the defendant's residence (\textit{forum rei}), (3) the courts of another country, such as the place where the relevant act was done or damage occurred, or where the relevant good, e.g. real estate, is located (\textit{forum rei sitae}), and (4) the court agreed by the parties. While the \textit{forum actoris} rule is not widely applied, the \textit{forum rei} rule is internationally generally accepted.\textsuperscript{2} In other words, under international private law, a claimant, if he cannot sue before the courts of his own country, can generally avail himself of the courts of the place where the defendant resides. This rule applies irrespective of the nationality of the claimant. Thus, generally, international private law generally accommodates foreign claimants on the same footing as domestic claimants. This is also true in the US, where many biotechnology companies are incorporated.\textsuperscript{3}

3. Existing Substantive Law in National Systems Would Govern Most Disputes
Given the availability of national courts to adjudicate claims, a second issue relevant to assessing the need and desirability of an international instrument covering traditional damage related to LMOs is whether and, if so, to what extent, the applicable substantive law of national systems allows recovery of such damage.

The principles reflected in virtually all current national civil liability regimes\textsuperscript{4} cover personal injury and property damage and damage to economic interests.\textsuperscript{5} As one leading casebook puts it, “any one who suffers damage

\textsuperscript{1} Nationality is only rarely a ground for judicial jurisdiction. Strikwerda L. o.c., p. 240.

\textsuperscript{2} Strikwerda L. o.c., p. 240.

\textsuperscript{3} Under the Constitutional doctrine of “alienage jurisdiction,” federal courts have jurisdiction over cases “between A State, or the Citizens thereof, and foreign States, Citizens or Subjects.” Pursuant to this doctrine, federal courts have been empowered to hear any case in which “an alien is a party.” See Section 11, Judiciary Act of 1789. See Born GB. International Civil Litigation in United States Courts. Third Edition. The Hague: Kluwer Law International, 1996, p. 25.

\textsuperscript{4} Civil liability regimes set forth the rules that determine under which conditions a claimant is entitled to a remedy (monetary compensation, injunctory relief) as against an actor who has infringed his rights, including contractual or extra-contractual rights.

\textsuperscript{5} Damage to economic interests refers to damages (such as lost profits) resulting from acts that do not cause physical injury.

may look to the law for redress." In the words of the authors of an authoritative comparative law analysis, “both the law of contract and the law of tort entitle people to claim compensation for the harm they suffered.”

National liability regimes, both statutory and case law-based, include within their general scope damages caused by LMOs. These regimes include fault (or negligence) liability regimes, which deal with wrongfully inflicted damage, and strict liability regimes, which do not require fault or negligence.

Fault liability regimes are particularly relevant to the concerns expressed by proponents of a BSP liability and redress regime. The concept of fault or wrongfulness liability, otherwise described as personal responsibility for damage, is based either on the notion of personal fault or negligence with regard to a thing, e.g. in controlling or guarding it, or the notion of vicarious liability for the thing’s “fault.” This concept is found in most, if not virtually all, common and civil law legal regimes, as well as other regimes.

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3 In common law jurisdictions, liability systems tend to be based chiefly on the principles set forth in court decisions. In civil law jurisdictions, liability statutes often play a more prominent role.

4 Different jurisdictions often have different mixes of fault and strict liability.


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liability is not concerned with the inadequate quality of the product or with the thing, but turns on whether injury is caused due to the irresponsible or undesirable conduct of a person. The conduct’s quality must fall below a reasonable standard, which is morally characterized as implying fault. Fault liability is a concept that can be applied to conduct in any situation. It thus concentrates on acts or omissions and asks whether such conduct falls below a reasonable standard. As such, fault liability serves as a “safety net” to control all possible irresponsible, careless, or undesirable acts, including acts involving LMOs.

Although most national liability regimes center on fault (“culpa”), in many jurisdictions, this safety net is supplemented with “pockets” of strict liability, a concept that has drawn the attention of some proponents of a BSP liability and redress regime. Strict liability regimes are an exception to the general rule of fault liability, and, accordingly, apply only to specifically circumscribed categories of activities or situations. These activities include (but are not limited to) manufacturing and distributing defective products, keeping dangerous animals, handling dangerous substances, and engaging in other dangerous activities. Where it is established that certain activities impose relatively great risks on others, the trend is toward the imposition of strict liability. Strict liability is created in various ways, including specific statutes, the use of rebuttable presumptions of fault, irrebuttable presumptions of responsibility, or the elimination of defenses. Note, however, that the WHO, the OECD, the EU Commission, and scientific bodies in countries such the

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1 Product liability was “invented” in the US, and from there spread throughout the world. For an overview of European product liability regimes, see Hodges C. Product Liability, European Laws and Practice. London: Sweet & Maxwell, 1993, p. 6.


3 In October 2001, the Commission released the results of EC-sponsored research on GMO Safety. The Commission press release issued on this occasion states that this research “has not shown any new risks to human health or the environment, beyond the usual uncertainties of conventional plant breeding. Indeed, the use of more precise technology and the greater regulatory scrutiny probably make them even safer than conventional plants and foods; and if there are unforeseen environmental effects - none have appeared as yet - these should be rapidly detected by our monitoring requirements.” EC-Sponsored Research on the Safety of Genetically Modified Organisms - A Review of Results. EUR 19884, http://www.europa.eu.int/comm/research/quality-of-life/gmo/index.html. Commission of the EC. Press Release: Commission Launches Roundtable on GM Safety Research. IP/01/1391 (9 October 2001). Biotech food’s safety has also been confirmed by the UK Royal Society. Royal Society of Science.

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UK, Australia, and New Zealand have confirmed and continue to confirm that biotechnology and the products made therewith are not dangerous per se. It is not the biotechnology process as such that might make LMOs potentially dangerous.

Of course, LMO products can be defective in terms of their design, manufacturing or accompanying instructions. In that case, however, any damages caused by LMOs are recoverable under strict product liability regimes. Strict product liability regimes, which apply to all LMOs that are deemed products, are widespread.

Compensable damage under these regimes generally include property damage, personal injury/health damage, and, to varying degrees, also damage to other economic interests, including possessory interests.

4. International Private Law Determines Applicable Substantive Law in the Cross-Border Context
In cases filed in national courts involving parties from more than one country, principles of international private law will designate the substantive law to be applied in the case. The options are the claimant’s law, the defendant’s law, or the law of the place where the relevant act was done or the damage occurred.

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2 The only activity involving LMOs which the scientific community has recognized as inherently dangerous is the handling of pathogenic bacteria and viruses. This activity is subject to strict containment standards in virtually all nations.

3 For purposes of liability law, possessory interests are often distinguished from property interests. Where there is physical injury to, for instance, a natural resource such as a park, the owner, who has a property interest in the park, suffers traditional damage. A lessor operating a hotel on the land, however, has a possessory interest; he may suffers harm due to lost profits if travelers stay away from the area. This type of harm is not necessarily compensable under national liability regimes.

Under modern international private law, which, according to many scholars, had its origins in medieval Italy,¹ a further principle has evolved. This principle is known as the “favoritism principle.” Pursuant to this principle, the applicable law is the law that is most favorable to the claimant. Although favoritism has been criticized for lack of objectivity and neutrality, this principle has become part of the international private law of the United States² and many European jurisdictions. The favoritism principle, of course, is very favorable to a claimant who will obtain the maximum benefit available under any possibly applicable law regime. In respect of claims before US courts, this principle implies that claimants may be able to invoke the law that serves them best, i.e. typically the law that provides for the largest amount of compensation. As the US is home to many biotechnology companies, it should be noted in particular that US law is particularly attractive to claimants, as it allows foreign claimants to avail themselves of the US court system,³ including the very favorable rules on (1) discovery,⁴ which apply also extra-territorially, (2) trial by jury, and (3) damages, including possibly generous awards for pain and suffering,⁵ and punitive damages.⁶ ⁷ In short, principles of international private law, which deal with both the procedural aspect of identifying available courts and the substantive aspect concerning applicable law, generally ensure that claims can be exercised in a cross-border context.

5. Conclusion
Based on the analysis summarized above, this paper concludes that traditional damage, including damage allegedly caused by LMOs, is already adequately covered by existing international and national legal systems. In terms of remedies, adequate institutions and mechanisms exist for the

¹ Strikwerda L. o.c., p. 33.
² In the US, Robert A. Leflar has been a strong proponent of the principle.
⁴ Discovery is process through which claimants can force defendants to disclose information and produce documents relevant to their claims.
⁵ Under US tort law, claimants are entitled to recover for emotional harm (“pain and suffering”) resulting from wrongfully inflicted physical or, in some instances, emotional, injury.
⁶ Punitive damages are additional damage awards, above and beyond the claimant’s actual damage, that are designed to serve as punishment for the defendant’s behavior or a deterrent against similar future acts.
handling of claims, whether through arbitration or filing a legal suit, in respect of traditional damage allegedly caused by LMOs. The substantive rules of national systems are broad enough to cover any traditional damage that might be caused by LMOs. Where traditional damage arises in a cross-border context, international private law principles resolve issues of jurisdiction and applicable law.

Thus, even if it were within the scope of the BSP, an additional BSP liability instrument to cover traditional damage is not necessary. In those relatively rare cases that states do not have adequate general civil liability regimes, the solution is not the creation of an international LMO liability regime, which in any event hinges critically on national law structures for effective implementation. Rather, the solution is capacity building for establishing adequate national liability regimes.

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1 The problem may not be the lack of adequate substantive law, but problems with enforcing the law due to inadequate judicial systems, corruption, etc.