TOWARDS A LIABILITY AND COMPENSATION REGIME UNDER THE BIOSAFETY PROTOCOL[1]

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I. INTRODUCTION

Starting in February 2004, the world's governments have begun crafting liability provisions to compensate and redress damages that may be caused by imports of genetically engineered grains and other organisms with altered DNA. These liability provisions will supplement the Cartagena Protocol on Biosafety (CPB), which was adopted on January 29, 2000. Liability provisions were not included in the original draft of the CPB, but CPB Article 29 requires signatories to begin crafting such rules at their first meeting and to complete the process in four years.

Liability provisions for the CPB should be crafted to provide maximum environmental protection. Other environmental treaties have incorporated features such as strict liability,[2] recovery for both direct and indirect damages, and statutes of limitations[3] which toll[4] until latent harms are discovered. These features are important in environmental liability regimes to ensure that contracting states will benefit fully from international agreements. The international community is experienced in creating liability provisions for environmental treaties. By borrowing principles from similar agreements the signatories should be able to develop liability rules for the CPB quickly.

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[1] This paper is a summary version of a longer work by Gurdial Singh Nijar, Legal Consultant to Third World Network who also serves on the Faculty of Law, University of Malaya. Edited by Kristin Dawkins and Neil Sorensen of the Institute for Agriculture and Trade Policy, the complete paper discusses the Space Objects Convention, the Convention on Civil Liability for Oil Pollution and the Basel Protocol on Liability from the Transboundary Movement of Hazardous Wastes (and their implications for the liability rules for the CPB.) The complete paper by Gurdial Singh Nijar can be found at: http://www.tradeobservatory.org/library/uploadedfiles/showfile.cfm?FileName=Developing_a_Liability_and_Redress_Regime_unde.pdf

[2] Because this paper is intended for a broad audience, some common legal terms will be defined throughout. According to Black's Law Dictionary (the pre-eminent English-language legal dictionary), *strict liability* means: "Liability that does not depend on actual negligence or intent to harm ,but that is based on the breach of an *absolute duty to make something safe*. Strict liability *most often applies either to ultrahazardous activities* or in products-liability cases." (emphasis added). BLACK'S LAW DICTIONARY 417 (7th ed. 1999).

[3] Black's Law Dictionary defines *statute of limitations* as: "A statute establishing a time limit for suing in a civil case, based in the date when the claim accrued (as when the injury occurred *or was discovered*) " (emphasis added). *Id*. at 1422.

[4] A statute of limitations *tolls* when it is stopped temporarily from running, for example, because the potential plaintiff does not yet know of the harm which has occurred. Black's Law Dictionary defines *toll* as follows: "2. (Of a time period, esp. a statutory one) to stop the running of; to abate <toll the limitations period>." *Id.* at 1495.

The CPB is not the first environmental agreement of its kind. Three previous international environmental agreements provide useful guidance for the development of a liability regime for Cartagena, including:

- *The Convention on International Liability for Damage Caused by Space Objects* (hereinafter "Space Objects Convention"), which deals with damage from spacecraft,
- *The Basel Protocol on Liability and Compensation Resulting from Transboundary Movement of Hazardous Wastes* (hereinafter "Basel Protocol"), which deals with international trade in hazardous wastes, and
- *Convention on Civil Liability for Oil Pollution Damage* (hereinafter "CLC"), which deals with damage caused by oil spills.[5]

The Space Objects Convention addresses liability for damage caused by the launching of spacecraft. The liability problems surrounding spacecraft are similar to those which surround genetically modified organisms (GMOs): in both instances, new technology gives rise to the potential for widespread, unanticipated environmental damage.[6] A further similarity is that both spacecraft and GMOs are produced by relatively few countries, but create potential for harm throughout the world. The international trade in hazardous wastes is another area in which developed nations (waste exporters) may benefit at the expense of environmental damage to less-developed countries (waste importers). The Basel Protocol's regulation of the hazardous waste trade is particularly important because many developing nations lack robust domestic environmental regulations, and prior to the Basel Protocol waste-exporters were able to take unfair

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[5] For readers unfamiliar with locating international agreements: The United Nations publishes *The United Nations Treaty Series*, a compendium of international treaties. Treaties are submitted to the U.N. for inclusion in the *Series*, and the full text of each treaty is published for reference. Citations to treaties in this document take the form NN U.N.T.S. PPP, where U.N.S.T. stands for *United Nations Treaty Series*, NN is the volume number in which the treaty is found, and PPP is the page number within the volume on which the treaty begins. The U.N.S.T. is available in hard-copy at many libraries, or may be searched on-line at http://untreaty.un.org/English/access.asp (last accessed Feb. 12, 2004).

Citations for the three treaties discussed most often in this document are:

- Convention on the international liability for damage caused by space objects, Mar. 3, 1972, 961 U.N.T.S. 187 (hereinafter "Space Objects Convention"),
- Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal *at* http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf (last visited Feb. 13, 2004) (hereinafter "Basel Protocol"). [Note: this protocol has not yet been published in the U.N.T.S. It is available on-line.]
- International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 (hereinafter "CLC").

[6] *See, e.g., Scientific Findings and Elements of a Protocol: Report of the Independent Group of Scientific and Legal Experts on Biosafety* (1996) *at* http://www.twnside.org.sg/title/bios-cn.htm (last visited Feb. 13, 2004) (more information regarding this source may be obtained from: Third World Network, 228 Macalister Road, 10400 Penang, Malaysia, Tel:6-04-2266159, Fax: 6-04-2264505).

advantage of this regulatory gap.[7] The CLC, addressing environmental damage from traffic in oil, is a good example of a liability regime for a lucrative commodity trade which poses severe environmental threats. All three agreements are instructive for the development of a liability regime for the CPB.

II. SUGGESTIONS FOR THE DEVELOPMENT OF BIOSAFETY LIABILITY RULES

A. A strict liability regime is appropriate

Strict liability is an appropriate and commonplace liability regime for "ultrahazardous"[8] activities such as transboundary movement of GMOs.[9] Several other multilateral environmental treaties adopt a strict liability regime with regard to harm resulting from new, untested technology with the potential for large-scale environmental disruption.[10]

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[7] That is to say that waste producers in developed countries would not be able to dispose of their waste cheaply at home, because developed countries may have environmental regulations which make waste disposal an expensive business. If waste producers can sell their waste to less developed countries which have less stringent environmental regulations, they essentially circumvent their own domestic environmental regulations at the expense of the waste importing country. Environmental regulations are difficult and expensive to develop, and may not be top domestic priorities for smaller or less developed nations. International environmental treaties play a valuable role in that they can stand in place of domestic environmental regulations which small countries may not be able to develop easily on their own.

For a discussion of the global trade in hazardous waste, see UNEP, Environmental Data Report 345 (1991), pp. 335-336 documenting that 20% of the global trade in hazardous waste goes from developed to developing countries.

[8] Black's Law Dictionary defines *ultrahazardous activity* as follows:

> An undertaking that cannot be reasonably performed safely even if reasonable care is used while performing it, and for which the actor may face strict liability for any harm caused; esp., an activity (such as dynamiting) for which the actor is held strictly liable because the activity (1) involves the risk of serious harm to persons or property, (2) cannot be performed without the risk, regardless of the precautions taken, and (3) does not ordinarily occur in the community. Under the *Restatement (Second) of Torts*, determining whether an activity is abnormally dangerous includes analyzing whether there is a high degree of risk of harm, whether any harm caused will be substantial, whether the exercise of reasonable care will eliminate the risk, whether the activity is a matter of common usage, whether the activity is appropriate to the place in which it occurs, and whether the activity's value to society outweighs its dangerousness. Restatement (Second) of Torts § 520 (1977).

BLACK'S LAW DICTIONARY, 5, 1524 (7th ed. 1999).

[9] Strict liability is featured in the CLC, the Space Objects Convention, and the Basel Protocol. *See* CLC, *supra* note 4, art. III, 973 U.N.T.S. at 5; Space Objects Convention, *supra* note 4, art. II, 961 U.N.T.S. at 189; Basel Protocol, *supra* note 4, art. 4. Strict liability is not out of place in a multilateral international treaty – strict liability regimes exist in countries around the globe, within a wide variety of legal systems. *See* GURDIAL SINGH NIJAR, LIABILITY AND COMPENSATION IN A BIOSAFETY PROTOCOL (1997). (This source is available for purchase from the publisher, Third World Network, at http://www.twnside.org.sg/title/prot-cn.htm (last visited Feb. 13, 2004). The ISBN for the published paper is 983-9747-26-6.).

[10] Other examples of strict liability for technology-based, hazardous activity include: for air transportation: 1929 Warsaw Convention for the Unification of Certain Rules relating to International Transportation by

There is growing evidence that the harm resultant from a GMO accident could have catastrophic results – causing irreparable harm to agricultural ecosystems, crops, export earnings, indigenous knowledge systems and threatening food security.[11] This qualifies any activity relating to GMOs as ultrahazardous.[12] Strict liability will deter reckless behaviour in the development and marketing of GMOs.

Some agreements adopt a two-tiered approach to liability.[13] Liability for ultrahazardous activity which is *non volenti* – where the victim has not agreed to risk the injury by his or her own conduct – should be strict. For example, farmers whose fields and crops are contaminated through horizontal gene transfer have not voluntarily assumed a risk. Thus, liability for horizontal gene transfer should be strict. For activity which is less hazardous, or where the injured party has voluntarily accepted risk, liability may be fault-based.

A two-tier approach to liability is appropriate for the CPB. Strict liability should apply to all "ultrahazardous" activity and to all *non-volenti* harms, such as horizontal contamination. Fault-based liability is acceptable where activity is less dangerous or where the injured party has assumed risk.

B. Damage which should be recoverable

i. Environmental damage

There are two facets of liability for environmental damage. In one class of cases, environmental damage will result directly in lost profits to private parties. This kind of case might arise, for example, when GMO contamination injures an individual farmer's ability to earn a living from his or her land. When environmental damage can be shown to have caused direct economic harm, the damage should clearly be recoverable. [14]

In other cases, a country's environment or natural resources may suffer damage without direct, immediate economic harm. Examples of this second kind of damage might include: damage to publicly owned or communally held environmental resources;

Air; for nuclear power: The Vienna Convention on Civil Liability for Nuclear Damage, 1963, Brussels Convention on the Liability of Operators of Nuclear Ships, 1962, Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960, The Convention Supplementary to the Paris Convention of 1960, 1963; and for space flight of course the Space Objects Convention.

[11] *See supra* note 6.

[12] See also *supra* note 8. The factors listed from the Restatement of Torts in determining whether an activity is "ultrahazardous" indicate that trade in GMOs should qualify.

[13] The Space Objects Convention uses a two-tier liability approach. *See* Space Objects Treaty, *supra* note 4, art. II & III, 961 U.N.T.S. at 189-90. The Basel Protocol also adopts a two-tiered approach. *See* Basel Protocol, *supra* note 4, Art. 4-7. The CLC adopts a generally strict liability regime, with some provision made for exoneration based on lack of fault. *See* CLC, *supra* note 4, art. III, 973 U.N.T.S. at 5.

[14] The Basel Protocol, for example, covers damages which include "Loss of income directly deriving from an economic interest in any use of the environment . . . ." Basel Protocol, *supra* note 4, art. 2(c)(iii); *See generally* BRUCE HURWITZ, STATE LIABILITY FOR OUTER SPACE ACTIVITIES, 14-18.

damage to resources which are valuable but not currently being exploited; and damage such as loss of biodiversity, which will adversely affect a country's natural resources in the long run but which may not have immediate, direct economic impact. These kinds of damages to the long-term health of a country's environment must also be recoverable.

Recovery for environmental damage must include the reasonable cost of environmental restoration.[15] The cost of preventative measures taken to prevent future harm must also be recoverable.[16] In some cases environmental restoration may be impossible – damage done by GMOs may be irreversible. Calculating damages in such cases will be difficult. National laws of various countries may provide some guidance in calculating damages for both kinds of situations.

ii. Soci-economic damages

Article 26 of the CPB allows parties to take the socio-economic impacts of GMOs into account when making decisions or enacting domestic laws related to the CPB. Article 26(2) specifies that GMO impact on indigenous and local communities merits special attention. Introduction of GMOs may have an adverse effect on traditional agricultural systems and practices of such communities.[17] A liability regime should allow recovery of socio-economic damage, particularly that suffered by local and indigenous peoples. Calculating a dollar amount for cultural damage may be difficult. Damage to traditional agricultural practices, however, is a type of economic damage which should be amenable to calculation. Small farmers, fisher folk, and local populations and communities must be taken into account when liability rules are developed.

iii. Life, health, and property

Damage to life and property, and personal injury to individuals, should all be recoverable losses under the CPB. These are fundamental damages, which any liability regime should address. The CPB also seeks to protect "human health." Article II(2) lists risks to human health alongside concerns for biodiversity as primary purposes of the agreement. Article IX(8) lists concern for human health again in its discussion of the Precautionary Principle. Given the CPB's repeated stress on human health concerns,[18] this language should be interpreted broadly to encompass non-physical injury and illness, and also health impairments to the population which are indirectly caused by GMO accidents.

iv. Illegal transboundary movements

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[15] Basel Protocol, *supra* note 4, art. 2(c)(iv).

[16] *Id.*, art. 2(c)(vi). The CLC also allows the costs of preventative measures to be recovered. CLC, *supra* note 4, art. IX, 973 U.N.T.S. at 8.

[17] Article 8(j) of the Convention on Biological Diversity acknowledges that these practices have a salutary beneficial effect on the conservation and sustainable use of biodiversity.

[18] The Cartagena Protocol is not the first treaty to focus on the broad issue of human health as an environmental concern: the Space Objects Convention is also concerned with threats to human health. *See* Space Objects Convention, *supra* note 4, art. I(a), 961 U.N.T.S. at 189.

Article 25(1) of the CPB defines "illegal" transboundary movements to be those which do not conform to domestic measures passed to implement the Protocol. Article 25(2) provides that recovery of damages will be allowed for such illegal transboundary movements. Damages in the case of an illegal movement include costs of repatriation of the GMOs to the exporting country, or destruction of the imported GMOs. Allowing for recovery of these costs is an explicit requirement of the CPB, so any set of liability rules must allow for this kind of recovery. Additionally, the fact of an illegal transfer should strengthen a plaintiff's case for environmental, health, or socio-economic damages.

C. Remedies

i. The injured party should be restored to its position before the harm

The CPB liability provisions should allow an injured party to be restored to its position before the harm caused by transboundary movement of GMOs. As discussed above, this may include repatriation or destruction of GMOs,[19] recovery of lost profits,[20] the cost of preventative measures[21] and compensation for long-term environmental damage.

ii. There should not be liability caps

Harms caused by GMOs could be colossal in magnitude.[22] Particularly for *non-volenti* harms – harms where the injured party has not assumed risk – it is unfair to allow the injured party less than a full recovery. *Non-volenti* harms are precisely those for which strict liability is imposed; therefore, strict liability should not be accompanied by recovery caps.[23] The CPB must ensure that the handful of GMO producing countries are responsible for whatever damage their products cause abroad,[24] by allowing full recovery for injured parties.

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[19] CBP, art. 25.
[20] *See supra* note 14 and accompanying text.
[21] *See supra* note 15 and accompanying text.
[22] *See supra* note 11 and accompanying text.
[23] Some treaties allow liability caps for strict liability, but no caps where fault can be shown. The Basel protocol and the CLC take this approach. Under the CLC, there is no limit for liability based on fault. However, for claims based on strict liability, the owner of a ship is entitled to limit his or her liability but the amount of the limitation is fixed. CLC, *supra* note 4, art. IV(1),(2), 973 U.N.T.S. at 5-6. The Basel Protocol uses a similar system: no limit for fault-based liability; for strict liability, the financial limits are determined by domestic law (the Protocol does, however, impose minimum bounds for liability limits). Basel Protocol, *supra* note 4, art. 12 and annex B. There is no limit to the amount of compensation recoverable under the Space Objects Liability Convention. *See* Space Objects Convention, *supra* note 4, 961 U.N.T.S. at 187.
[24] *See supra* note 7 and accompanying text (discussing other international environmental treaties which protect against environmental exploitation). A mere handful of manufacturers will be the primary beneficiaries of the GMO trade, and that it is unjust for them to reap the profits of their trade without bearing the risk as well.

iii. There must be a compensation fund

An international fund for payment of damages which may otherwise not be recoverable should be part of the CPB.[25] The fund should be accessible when the responsible party is insolvent, and, if liability caps are imposed, when such caps are reached but do not fully compensate for the damage sustained. A biosafety compensation fund should be funded by both the biotechnology industry and countries which benefit from the export of GMOs.

iv. There must compulsory insurance for trade in GMOs

Financial guarantees must be in place to assure that injured parties will be able to recover for harms caused by GMOs. Compulsory insurance or bonds for those who trade in GMOs should be made part of the Cartagena liability rules.[26] The Cartagena Protocol should require GMO traders to offer proof of insurance as a prerequisite for trading activity.[27]

D. Breaches of duty for under the protocol

Because a strict liability regime should be adopted for all or most harm due to transboundary movement of GMOs, parties will often only need to show damage and causation, and not breach of duty, in order to recover.

For transboundary movements which are illegal under the CPB, breach of duty will be an issue. Under the Biosafety Protocol, exporting States have an obligation to notify an importing state and obtain advance consent for introduction of GMOs. According to Article 8.1, the Party of Export must notify the importer State or require the exporter to notify. The domestic laws of a country will most certainly reflect these provisions in the CPB. Any transboundary movement in violation of the notification principles will then be illegal under Article 25(1) of the Protocol. The first duty of a State in breach then is to make reparation. The content of this duty of reparation was stated by the Permanent Court of Justice in the *Chorzow Factory* Case as follows:[28]

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[25] The liability cap provisions in the CLC are only available when a compensation fund exists to cover damages. CLC, *supra* note 4, 973 U.N.T.S. at 6. This structure is a strong incentive for the creation of such funds.

[26] The CLC makes insurance mandatory for all ships carrying more than 2000 tons of oil as cargo. CLC, *supra* note 4, art. VII, 973 U.N.T.S. at 7. The Basel Protocol mandates insurance coverage and also sets minimum coverage limits. Basel Protocol, *supra* note 4, art. 14.

[27] The CLC contains detailed provisions on the insurance requirement, including rules about proof of insurance and the right of each state which is a party to the treaty to ensure that insurance given by other states is valid. *See* CLC, *supra* note 4, art. VII, 973 U.N.T.S. at 7-8.

[28] Case Concerning the Chorzow Factory (Germany v. Pol.), 1928 P.C.I.J. (ser A) No. 17, at 47.

> The reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

So the parties must be restored to the position before the breach. The affected party (the State) can request the State of origin to dispose the GMO by repatriation or destruction as appropriate [Article 25(2)]. The cost must be borne by the latter State.

E. Parties

i. Liability of states

The state of export is liable for illegal transboundary movements, according to Article 25 of the CPB. Illegal transboundary movements will occur primarily as a result of a state's breach of its obligation to notify (or to require notification by the exporter) under Article 8, so state liability in these cases make sense.

ii. Liability of private parties

Several private parties will come in contact with GMOs during their life cycle. In most circumstances, joint and several liability should be imposed on a variety of parties.[29] Private parties should be free to enter into agreements by which they contractually assume risk and apportion liability.[30]

Joint and several liability will result in a just apportionment of risks. For example, in cases where the GMO is inherently flawed, so that it will cause damage even when properly used and contained, common products liability theory says the manufacturer should be liable.[31] When damage results from an incident during transportation – a "spill" or the like – then liability should be imposed on the transporter. Simple apportionments of liability such as these fail to consider the chain of actors, including producers as well as exporters, importers and brokers, who will benefit from a trade in GMOs: those who benefit from the trade in GMOs must all share the risks contemplated by the Protocol. It is important to note that imposition of liability on the end user (e.g., a small farmer) will often be unfair. These users will have relied on information supplied

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[29] The CLC imposes liability jointly and severally when an accident involving two or more tankers occurs. *See* CLC, *supra* note 4, art. IV, 973 U.N.T.S. at 5. The Space Objects Convention imposes joint and several liability when two or more parties act together to launch a space object. Space Objects Convention, *supra* note 4, art. V, 961 U.N.T.S. at 190. The strict liability article in the Basel Protocol provides joint and several liability in the case that two or more parties are responsible for damage. Basel Protocol, *supra* note 4, art. 4(6).

[30] The Space Objects Convention makes an explicit allowance for parties which may be jointly and severally liable to negotiate for apportionment of liability. Space Objects Convention, *supra* note 4, art. V(2), 961 U.N.T.S. at 190.

[31] *See supra*, note 1 (discussing that strict liability often applies in product liability cases).

by a producer or broker to make safety assessments, they will benefit less from GMO usage than will GMO producers, and they will have less economic power.

The CPB should allow for claims against any one or more of the following for damage resulting from a GMO as applicable:

- The State of export if damage results from the deliberate introduction of a GMO into the environment (following the formulation of the Biosafety Protocol) of the country of import, in breach of the obligation to notify, or require the exporter to notify in accordance with Article 8 of the Biosafety Protocol.
- The manufacturer of the GMO if the harm is caused by the properties of the GMO, the genetic modification and the conditions under which the GMO is introduced and continues to remain in the received environment.
- If the damage results from the failure to provide an adequate system of safety, such as physical barriers, then the operator responsible for this default.
- In all other cases, any one or more of the following: the manufacturer of the GMO, the exporter, the country of export and anyone else responsible for putting the GMO in circulation into the environment.

iii. Parties who may act as plaintiffs

Any injured party should have standing to bring a claim.[32] Plaintiff parties could include individuals, businesses, and other public or private bodies, including states, which have suffered injury.[33] There is no reason to limit the standing of any injured party to bring a claim, and without such a reason all injured parties should be allowed to bring suit and recover.

F. Statute of limitations

The statute of limitations for bringing the claims under the CPB must not be an undue barrier to recovery by a plaintiff.[34] The statute of limitations for GMO pollution or damage should be long enough to allow at least two generations of the GMO to reproduce, so that the long-term effect of a GMO can be ascertained before a claim is brought. The statute of limitations should also "toll"[35] until damage is discovered, since some harms may not be apparent at the moment of an incident of contamination.

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[32] The Basel Protocol, for example, does not place limits on who may bring a claim. *See* Basel Protocol, *supra* note 4.

[33] The CLC contemplates claims by any of these parties. *See* CLC, *supra* note 4, art. I(2) (defining "person") and art. VI(1)(a) (contemplating that "person[s]" will have claims for damage under the CLC), 973 U.N.T.S. at 4, 7.

[34] The CLC and the Space Objects Convention both provide explicit statute of limitations provisions. *Id.*, art. VIII at 8; Space Objects Convention, *supra* note 4, art. X, 961 U.N.T.S. at 191.

[35] The Space Objects Convention uses the rule that the statute of limitations tolls until the harmed party knew or should have known about the damage. *See Id.*; *See generally supra* note 3 (explaining what it means for a statute of limitations to *toll*).

G. Structural and procedural provisions

Claims made under the CPB should be brought in national courts. Substantive law in each signatory country must be enacted which will allow for recovery under the CPB.[36] The alternative to use of domestic courts is the creation of an international body to try cases which arise under the agreement, but use of such an international body is expensive and procedurally complex. Jurisdiction should exist:[37]

- where the damage is suffered, or
- where the incident giving rise to damage occurred, or
- where the defendant resides, or
- where the defendant's principle place of business is located.

Because substantive provisions for recovery under the CPB will be created in the national courts of each signatory state, motivation for forum-shopping will be minimized.[38]

III. CONCLUSION

The CPB is a strong environmental treaty, and liability rules should be developed with environmental protection in mind. The CPB is guided by a need to protect the environment from the unknown effects that GMOs may have. Furthermore, the CPB is designed to impose restrictions on exporters of GMOs so that the few parties who produce GMOs, and stand to benefit from their widespread use, will also bear the responsibility of potential harm. A final important feature of the CPB is that it recognizes the need to protect not only the natural environment, but also the social and economic fabric of local and indigenous communities which may be affected by the introduction of foreign GMOs.

Strict liability is appropriate for transboundary GMO trade because of its ultrahazardous nature. Costs recoverable under the CPB must include direct and indirect damage resulting from harm to the environment (including environmental restoration costs and the costs of measures to prevent future harm);socio-economic damage (with special focus on damage to indigenous and local communities); damage to individual life, health, or property, as well as general damage to the health of a population as a whole; and,

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[36] The CLC requires member states to ensure that their courts can entertain claims under the treaty. CLC, *supra* note 4, art. IX, 973 U.N.T.S. at 8. The Basel Protocol also requires that member states allow their courts to hear claims, and further stipulates that domestic courts shall hear claims in a non-discriminatory manner. Basel Protocol, *supra* note 4, art. 10.

[37] *Id*., art. 17.

[38] *Forum shopping* is the practice of strategically choosing the most favorable court in which to file a lawsuit. Standardization of laws among signatory parties will simplify plaintiffs' decisions about where to file a case and may prevent defense lawyers from convincing a court to dismiss a case so that it can be brought in a different (and possibly more defense-friendly) forum. Black's Law Dictionary defines *forum shopping* as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." BLACK'S LAW DICTIONARY, 666 (7th ed. 1999).

particularly in the case of an illegal transboundary movement, the cost of repatriation or destruction of the GMO at issue. To ensure full recovery for these damages, there must be no liability caps which would limit damage awards, and there must be mandatory insurance for GMO traders and an international compensation fund to compensate victims when recovery is otherwise unavailable. All injured parties should be able to bring claims, and the statute of limitations should not be an unreasonable barrier to suit.

The other international agreements discussed herein serve as guides during the formation of liability rules for the CPB. This should allow the Parties to quickly develop a regime which serves to protect the environmental and serves to protect parties who are non-exporters of GMOs from potential harm.