Economic Loss Caused by GMOs in the Netherlands

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I. General liability or other compensation schemes

1. Introduction

There are no specific rules on liability or compensation of damage relating to GMO crops. Obviously, there have been some proposals originating from stakeholders that liability issues should indeed be dealt with and that some compensation scheme should be put in place.[1] No political action has been taken until now. Therefore, the common rules of private tort law apply. 1

Dutch law distinguishes between fault-based liability for wrongful acts, on the one hand, and strict liability, on the other. In Dutch law, fault-based liability for wrongful acts is codified in art. 6:162 *Burgerlijk Wetboek* (Civil Code, BW): 2

1. A person who commits a wrongful act vis-à-vis another person, which can be imputed to him, is obliged to repair the damage suffered by the other person as a consequence of the act.
2. Save grounds for justification, the following acts are deemed to be wrongful: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct seemly in society.
3. A wrongful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.

As the first paragraph of art. 6:162 BW suggests, fault-based liability consists of two main elements: the wrongfulness of the act itself, and imputability of the act to the person acting. According to the second paragraph of art. 6:162 BW, there are three categories of wrongful acts: infringement of subjective 3

[1] See *Coëxistentie Primaire Sector – Rapportage van de tijdelijke commissie onder voor-zitterschap van J. van Dijk; commissiepartijen: Biologica, LTO Nederland, Plantum NL en Platform Aarde Boer Consument*, The Hague, November 2004.

rights (e.g., property and physical inviolability), acts contrary to a statutory duty, and acts contrary to *maatschappelijke betamelijkheid* (i.e., the standard of conduct seemly in society). The category of acts contrary to the standard of conduct seemly in society is by far the most important, especially when the injured party cannot make a claim on the basis of a direct infringement of his property right or physical inviolability. According to case law, a great many factors determine wrongfulness in a concrete case, e.g., foreseeability of the loss (also described as the chance of a loss occurring as a result of the act), the degree of blameworthiness, the costs of avoiding the loss, the nature of the damage, and the relationship between the injured party and the injurer. A prima facie wrongful act is considered not to be wrongful whenever *force majeure*, self-defence, or a statutory provision justifies it.

4 The second element, that of imputability, is divided into three alternative grounds for imputation, the first of which is currently the most important: the person can be blamed for his act (*schuld*, i.e., fault, blameworthiness), or his act or its cause must be imputed to him, either on a statutory basis, or plainly because the *verkeersopvattingen* (i.e., an unwritten source of legal and moral opinion, as it is expressed in case law) demand it. So, according to the third paragraph, tortious liability is incurred not only in a case of subjective fault, but also in a case of objective 'answerability'. The scope of this 'answerability', as an alternative for a 'fault', remains unclear.

5 As far as strict liability is concerned, there are, generally speaking, two main categories of strict liability: strict liability for wrongful acts of other individuals, and strict liability for objects and substances. The former category includes strict liability for employees and for agents, while the latter includes liability for defective movable objects, buildings and structures, product liability, and liability for the inherent risks of hazardous and noxious substances.

6 From the above-mentioned it follows that Dutch law starts by addressing the issue of wrongfulness rather than with the question whether the infringed interest is protected by tort law. Dutch tort law tends not to exclude purely economic interests from protection. Practically speaking the specific case at hand is decisive for the outcome: sometimes the courts conclude that the act or omission was wrongful with regard to the infringed economic interest, and sometimes they conclude that there was no wrongful act. Therefore, pure economic interests as such enjoy protection under tort law just as much – in theory at least – as life, limb, and property. In short, 'economic damage' resulting from GMO presence in traditional crops may be compensated if the respondent is held to have acted (imputably) wrongfully vis-à-vis the claimant.

2. Causation

(a) Which criteria apply with respect to the establishment of the causal link between the alleged damage and the presence of the GM crop concerned?

According to Dutch law, a two-stage test must be applied. First, the well-known *conditio sine qua non* ('but for') test is applied. According to this requirement there is a causal link between the damage and the GMO presence if the GMO presence was a necessary condition for the existence of the damage. In other words: without the presence there would not be any damage. 7

Obviously, this requirement is too extensive; without any further delimitation too many causal links between the GMO presence and the damage would be seen as the cause of the damage. Therefore, if the first test is met a second is applied: the imputation test. The test is laid down in art. 6:98 BW, which reads: 8

> "Compensation can only be claimed insofar as the damage is related to the event giving rise to liability in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event."

The test was further developed in case law. For instance, the Dutch Supreme Court decided that for the establishment of the causal link it was also necessary that the damage was reasonably imputable to the act (or omission as the case may be).[2] This requirement was thus called the requirement of "reasonable imputability". For a specific damage caused by (in the sense of: *conditio sine qua non*) an unlawful action to be imputable, there are a number of relevant factors that have to be balanced. In general, the damage should not be too exceptional as a result of that unlawful action nor in such a distant relation with it, that it cannot reasonably be imputed to the liable person. 9

The aforementioned case law has been codified in art. 6:98 BW. However, art. 6:98 BW identifies only two of many factors that decide imputation: the nature of the damage and the nature of the liability. Although foreseeability of the damage is not mentioned in art. 6:98 BW, it surely is an important factor as well. As far as the nature of the damage suffered is concerned, both case law and doctrinal writing are inclined to stretch the limits of causal connection very far whenever bodily harm is involved, somewhat less far when damage to property is involved, and the least far in the case of loss related to neither of the former two categories (i.e., pure economic loss). 10

It must be stressed that before the 'reasonable imputability test' can be invoked, in principle the *conditio sine qua non test* should be met first. There are, however, specific conditions under which the requirement of *conditio sine qua non* does not apply: 11

[2] *Hoge Raad* (HR) 20. 3. 1970, *Nederlandse Jurisprudentie* (NJ) 1970, 251, *Waterwingebied*.

- In the case of alternative causation; and
- In the case of two independent concurring causes where each has the ability to bring about the entire damage.

12 In the case of GMO crops, first it must be determined whether the presence of GMOs in crops causes any damage to human health. Otherwise it cannot be said that the presence of GMOs in crops is a *conditio sine qua non* for the damage. To answer this question in the more general sense, scientific research was instigated. The Dutch government was one of the financiers for the realization of this research project. The research was reported in an article which is still pending publication.[3] Until those results are published, the question about the causal link will remain very uncertain. This is also the reason why there is no case law concerning this matter i.e. because there is no evidence that GMOs are harmful to human health. If the results of the research do point out that GMO crops are in fact harmful to human health, the Dutch government will have to take measures in response thereto.

(b) How is the burden of proof distributed?

13 No specific statutory rules or case law are applicable. Therefore the general principles apply. As a starting point the burden of proof lies on the claimant. This rule is laid down in art. 150 RV (*Wetboek van Burgerlijke Rechtsvordering*, Code of Civil Procedure). The claimant has to prove the facts underpinning his claim regarding the wrongful act committed. There are two exceptions to this general rule. Firstly, when reasonability and equity desire a different distribution of the burden of proof. For example: under specific circumstances arising when the respondent can more easily obtain the documents needed. Secondly, when an exceptional statutory rule desires a different distribution. For example: art. 6:195 concerning misleading commercials.

14 With regard to the burden of proof concerning causation, the Dutch Supreme Court (*Hoge Raad*) has in recent years developed the so-called *omkeringsregel*, the 'reversal rule'. In a number of decisions the *Hoge Raad* has stated that, if an act which constitutes a wrongful act is known to create a risk that a specific damage will occur, and if this risk subsequently materialises (so the damage occurs), the causal link between the damage and the act is presumed present, unless the respondent proves otherwise. This rule has been applied, for instance, in traffic accident cases and medical malpractice cases. If this reversal rule is indeed as general a rule as it seems to be, the risk of unknown causes of damage might rest with any respondent who could have caused the damage. However, the exact scope and effect of the reversal rule are still unclear. In recent cases, the extent has been limited to cases in which the risk that materialized was of a certain specific nature that could be associated easily to the wrongful act. Hence, the rule is easily applied to contamination of a neighbouring crop if the contaminating substance is easily associated with a specific

[3] See www.vrom.nl/pagina.html?id=23102.

GMO crop in the area. It is unlikely, however, that it can be applied in a case where a GMO-farmer has acted wrongfully by not taking precautionary measures against migrating pollen dispersal and a drop in profits experienced by all corn producing farmers results after negative publicity. Although there may be evidence of the intermediate cause of negative publicity with respect to corn as such, the market price mechanisms ruling corn trade are far too complicated to say that a drop in profits in corn farming is typically associated with negligent GMO-farming.

(c) How are problems of multiple causes handled by the general regime?

When different persons are liable for damage caused to one claimant, there 15
is a plurality of debtors. The main rule is that all the debtors are liable for an equal share unless they are liable for an unequal share as a result of a statutory provision, usage or contract (art. 6:6 (1) Civil Code). With regard to concurrent tortious acts of two or more persons that concurrently cause the entire damage, art. 6:102 Civil Code states that they are jointly and severally liable. Furthermore, art 6:166 Civil Code provides for joint and several liability in the event that a concerted action causes the wrongful damage.

In the case of multiple uncertain causes, art. 6:99 Civil Code provides the fol- 16
lowing. When the damage may have resulted from two or more events, each of which a different person is liable for and it has been determined that the damage may have been caused by at least one of these events, each one of these persons is liable and therefore liable to repair the damage, unless he can prove that the damage is not a result of the event for which he is liable. Hence, the burden of proof is reversed. The Supreme Court has applied this rule extensively in the *Des-dochters* case (HR 9-10-1992, NJ 1994, 535). In this landslide case six women who where injured by a drug claimed compensation from ten different manufacturers of that drug. The women could not prove whether the drug had been marketed by any of the producers (but given their market share it was rather likely that the drug in fact originated from one of them). The Supreme Court decided that all ten producers of the drug were jointly and severally liable. It can be said that this rule also includes uncertain causation.

3. Standard of liability

(a) In the case of fault-based liability, what are the parameters for determining fault and how is the burden of proof distributed? Does it make any difference if there are clearly established statutory rules defining the required conduct for GMO agriculture?

Fault-based liability for unlawful acts is based on art. 6:162 BW (Civil Code). 17
Fault-based liability consists of four elements: there must be an unlawful act, the act must be imputable to the actor, there must be damage and there must be a causal link between the damage and the act.

18 First, as said, there must be an unlawful act. Art. 6:162 Civil Code defines three acts as unlawful: the infringement of a subjective right, an act or omission violating a statutory duty (e.g., importing a banned GMO-product), or conduct contrary to the standard of conduct seemly in society. This last category of so-called "conduct contrary to the unwritten standard of conduct seemly in society", the so-called *maatschappelijke betamelijkheid*, is the most important one. It can be considered a residual category: whenever the injured party cannot base his claim on either of the first two categories, this last one is his last alternative. Because of its broad scope, many claims are based on this category.

19 Second, the person that committed the unlawful act has to be imputable. For this element the unlawful act must result from his fault (fault-based liability), or from a cause for which he is answerable according to law or common opinion (strict liability). This will be described in the following question. To determine whether there is blameworthiness, theoretically a distinction must be made between the actor and the act. First it must be determined whether the act was unlawful. When that is determined, the actor must be judged. Could and should he have acted in a different way? In other words: would a reasonable person have acted in the same way? As said, this distinction is made in theory, in practice, however, the actor and the act cannot easily be isolated. Thus, in most cases the actor will be considered to have been blameworthy if the act in itself is wrongful.

20 Third, there must be damage. According to art. 6:95 Civil Code, damage consists of patrimonial damage and non-patrimonial damage. Patrimonial damage includes incurred costs and loss of profit (art. 6:96 Civil Code). Death, personal injury, property damage and pure economic loss are on an equal footing in this regard.

21 With regard to non-pecuniary loss the following is relevant. The injured party may only claim non-patrimonial damage in one of the situations mentioned in art. 6:106 Civil Code. Firstly, if the liable party had the intention to cause immaterial damage. Secondly, if the injured party has a physical injury, if his reputation or his honour is damaged, or if his person is harmed in any other way. Thirdly, if the reputation of a person who passed away is damaged (only if that person would, were he alive, have also had the right to compensation for damage to his reputation).

22 The final requirement is that there must be a causal link between the act and damage. This consists of a two-stage test. First, as a rule there must be *conditio sine qua non* (but for test). This test determines whether the act was a necessary condition for the damage. Second, there is the 'reasonable imputability test': it must be reasonable to impute the resulting damage to the act that caused it.

23 The burden of proof is distributed in the same way as described supra. The claimant must prove the existence of the wrongful act. This task consists of proving all four elements as described. This general rule has two exceptions: when reasonability and equity desire a different distribution of the burden of proof and secondly, when an exceptional rule desires a different distribution.

(b) To the extent a general strict liability regime (or a specific strict liability regime, either due to its broad scope or by analogy) may be applicable, please describe its requirements for establishing liability. Is there still a set of defences available to the actor (for instance 'acts of God', wrongful acts or omissions of third parties, etc.)?

24 There are two main categories of strict liability: strict liability for unlawful acts of other individuals and strict liability for defective objects and substances. Strict liability for unlawful acts of other individuals includes liability of children, subjects and representatives. Strict liability of defective objects and substances include mobile objects, buildings, dumps, animals and substances.

25 Here, there may be two relevant sources of liability. Vicarious liability (art. 6:170 Civil Code) and strict liability for hazardous substances (art. 6:175 Civil Code).[4]

(i) Vicarious liability

26 Art. 6:170 Civil Code defines the liability for tortious acts committed by employees. According to subsection 1 of this article, liability for employees lies on the person in whose service the subject fulfils his duties, if the possibility of committing a mistake was increased by the assignment to fulfil the duty and this person had control over the conduct of the subject.

(ii) Hazardous substances

27 Art. 6:175 Civil Code defines the liability for hazardous substances. Liability rests on anyone who uses or keeps the dangerous substance in his profession or business. As follows from the criteria of art. 6:175, non-professional possessors cannot be held strictly liable.

28 Art. 6:175 Civil Code may be relevant if it is generally acknowledged that the GMO crop poses a specific, inherent and serious threat to life and limb and this risk materializes. Hence, this strict liability can only be applied to inherent dangers of substances which are scientifically proven at the time of the damaging event or exposure. This is not (yet) the case.

29 Art. 6:175 Civil Code creates a strict liability for dangerous substances used or kept in the course of a business or trade. The article defines a dangerous substance as a substance of which it is known that it has such properties as to

[4] See generally *W.H. van Boom/C.E. du Perron*, The Netherlands, in: *B.A. Koch/H. Koziol* (eds.), Unification of Tort Law: Strict Liability (2002) 227–255.

pose a special danger of a serious nature to persons or things. Such a 'special danger' is posed in any case (according to the article) by substances which are explosive, oxidative, flammable, or poisonous as defined in specific public law legislation. We do not think that according to the current state of science GMOs as such can be considered dangerous substances. This may depend, however, on the specific case and the specific dangers the GMOs may pose to persons or things. The Ministry of Justice has taken the position that GMO crops are unlikely to be filed under 'dangerous substances' in the sense of art. 6:175 Civil Code.[5] Whether this will also be the courts' position, remains to be seen.

30 Liability arises if the 'special danger' materializes. Since the danger is defined as being 'to persons or things', compensation of *pure* economic loss cannot be based on this article. Hence, we believe that even if GMOs were to be considered as dangerous substances under art. 6:175 Civil Code, a mere drop in turnover as a result of the absence of consumer confidence in crops neighbouring GMO crops would not file as compensable damage.

31 According to art. 6:178 Civil Code liability on the basis of art. 6:175–177 Civil Code is excluded, inter alia, in the following situations:

a) the damage is the result of armed conflict, civil war, revolt, riots, insurgence or mutiny;
b) the damage is the result of a natural event of a exceptional, unavoidable and irresistible nature;
c) the damage is solely caused by following an order or regulation of the government;
d) the damage is intentionally caused by a third party;
e) the damage is (the result of) a nuisance, pollution or any other consequence for which no liability would have existed on the basis of the general principles of tort law if the defendant had caused it intentionally (so the damage is considered an ordinary burden that one has to carry).

(c) Does your jurisdiction provide for special rules applicable to cases of nuisance or similar neighbourhood problems?

32 According to art. 5:37 Civil Code, an owner of a piece of land is not allowed to cause nuisance like noise, vibrations, foul odours, smoke, etc. in a way that would cause a wrongful act in accordance with art. 6:162 Civil Code. This article has two aspects. First, it is not permitted for an owner of a piece of land to use his property in a way that causes wrongful nuisance to neighbours (the offensive function). This is a limitation of his property rights. On the other hand, the owner of a piece of land does not have to put up with wrongful nuisance

[5] See *Notitie Ministerie van Justitie – Aansprakelijkheid voor schade in het kader van coëxistentie van gg-gewassen en conventionele en biologische gewassen*, in: Coëxistentie Primaire Sector – Rapportage van de tijdelijke commissie onder voor-zitterschap van J. van Dijk; commissiepartijen: Biologica, LTO Nederland, Plantum NL en Platform Aarde Boer Consument, The Hague, November 2004, B57.

from any neighbour (the defensive function). However, art. 5:37 Civil Code is not considered to hold a strict liability position. In fact, nuisance can only be considered to be wrongful in accordance with the requirements laid down in art. 6:162 Civil Code. In other words, either an infringement of a subjective right or an act or omission violating a statutory duty, which is imputable to the actor can be a source of tortious liability for nuisance. According to a steady line of case law, liability depends on factors such as: the extent of the risks, the possibility and cost of taking precautionary measures, the nature and extent of the use of the land, prior use of land, etc.[6]

Thus, the presence of GMOs in crops owned by a neighbouring farmer may 33 under specific circumstances amount to a wrongful act. Then the presence of GMOs by a neighbouring farmer can indeed be seen as wrongful nuisance. With regard to the position of the claimant, nuisance can only lead to a claim for compensation if the nuisance was in fact an imputable tortious act of the respondent.

4. Damage and remedies

(a) How is damage defined and measured? In what way is pure economic loss handled differently to other types of losses, if at all?

According to art. 6:95 Civil Code, damage consists of patrimonial damage and 34 non-patrimonial damage. Patrimonial damage includes loss suffered and loss of profit (art. 6:96 Civil Code).

The victim of the wrongful act has a right to compensation for patrimonial 35 damage when the evidence of a wrongful act is established. Furthermore, there must be a causal link between the damage and the wrongful act (art. 6:98 Civil Code); only damage which is related to the event giving rise to the liability of the debtor in such a way that it can be imputed to the debtor as a result of this event is claimable. For non-patrimonial damage (non-pecuniary loss), there is an extra condition: the injured party may only claim non-patrimonial damage in one of the situations mentioned in art. 6:106 Civil Code.

As such, pure economic loss is not special under Dutch law (see supra, Intro- 36 duction). If the conduct of the respondent is held to be wrongful and all the requirements laid down in art. 6:162 BW have been met, then there is liability. Liability may include pure economic loss. No specific thresholds apply with regard to pure economic loss. Having said that, it may well be possible that the court may consider the respondent not to have acted tortiously vis-à-vis the claimant on the basis that the claimant's interest was of a purely economic category. This depends on the case at hand.

[6] See also, *Notitie Ministerie van Justitie* (supra fn. 5) B57 ff.

(b) Is the loss of a farmer whose customers only fear that his products are no longer GMO free (e.g. because of GMO cultivation in his vicinity) also recognized as compensable, or is proof of actual admixture required?

37 Although there are no court decisions on this matter, we feel that the loss of a farmer whose customers only fear is that his products are no longer GMO free will not easily be compensated under tort law. We think that a court would prefer the proof of a wrongful act or omission leading to admixture. Having said that, it is theoretically speaking possible that a GMO-farmer can be held liable for, e.g. not informing neighbouring farmers of his GMO-activities – thus depriving them of the possibility to take precautionary measures. In that case, the liability can also cover pure economic losses such as a sudden drop in turnover. Dutch law does not set actual admixture or interference as a formal prerequisite for liability, so in effect the adjudication of compensation for pure economic loss is feasible. Whether compensation is granted may depend on the specific facts of the case.

(c) Where does your legal system draw the line between compensable and non-compensable losses?

38 There is no clear cut answer to this question, as much will depend on the specific case at hand. Dutch law does not work with pre-set circles of meritorious claims. According to art. 6:98 Civil Code a causal link between the damage and the act of the debtor is required. This causal link is established if the damage is related to the debtor's act giving rise to his liability in such a way that it can be imputed to him. In the example only one of the crops in a region is actually contaminated, but consumers fear that the entire region is affected. This fact can be of influence with the establishment of the causal link, but it cannot directly determine whether damage is compensable or not. Hence, Dutch law leaves much leeway to the courts to cater for the specific needs of the case at hand.

(d) What are the criteria for determining the amount of compensation in general, and how would this apply to the kind of cases covered by this study?

39 To determine the amount of compensation in pure economic loss cases, the courts are inclined to calculate the *real* costs incurred and the *plausible* drop in profits. In the so-called 'cable case' the Supreme Court decided that the claimant had to prove the extent of his damage by proving the actual and irreversible drop in turnover.[7] The claimant could not claim the profit he usually made on the production over the five hours he was cut off from energy supplies, but he had to show that the interruption was not redressed afterwards (e.g., by working overtime).

[7] See HR 18-4-1986, NJ 1986, no. 567. For further details, see, e.g., *W.H. van Boom*, Pure economic loss in the Netherlands – the case study, in: *M. Bussani/V. Palmer* (eds.), Pure Economic Loss in Europe (2003) 171-522 with further references.

(e) Is there a financial limit to liability, or is there any rule to mitigate damages once liability is established?

In principle, compensation is *in full*. Reduction of the amount can be based on the contributory negligence of the claimant (art. 6:101 Civil Code).[8] 40

Apart from contributory negligence, there are two ways to limit the statutory obligation to pay damage compensation. First, there is art. 6:109 Civil Code. Art. 6:109 BW reads: 41

1. The judge may reduce the obligation to repair damage if awarding full reparation would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the legal relationship between the parties, and their respective financial capacities.
2. The reduction may not exceed the amount for which the debtor has covered his liability by insurance or was obliged to maintain such a cover.
3. Any stipulation derogating from paragraph 1 is null and void.

According to art. 6:109 Civil Code the court may reduce the statutory obligation to pay compensation. This discretionary power can be used in the unlikely event that full compensation would lead to a clearly unacceptable outcome. This discretionary power is hardly ever used, but it may be used, e.g. if unabated compensation would render the respondent insolvent. It is assumed that the decision to reduce the amount due is based not only on the concrete financial consequences of full liability, but also on the degree of blameworthiness, the nature of the liability (fault-based or strict liability?), and the possibility of a cascade of claims.[9] 42

Second, maximum liability amounts (ceilings, caps) can be set by legislation (art. 6:110 Civil Code). This is done to avoid the situation when the damage compensation exceeds the amount that can be covered by insurance. There is no legislation imposing a limitation with regard to GMO liability. Hence, in a given case only the court can reduce the amount of compensation in accordance with art. 6:109 Civil Code. 43

(f) Are operators under any general or specific duty to obtain liability insurance or to provide for other advance cover for potential liability?

There is no general or specific statutory duty on 'operators' to take out liability insurance, although specific public law legislation does enable local authorities to oblige some operators to take out some form of insurance or a bank 44

[8] On art. 6:101 Civil Code, see, e.g., *W.H. van Boom*, Contributory Negligence under Dutch Law, in: *U. Magnus/M. Martín-Casals* (eds.), Unification of Tort Law: Contributory Negligence (2004) 129–148.

[9] See *A.S. Hartkamp*, Verbintenissenrecht; deel I – De verbintenis in het algemeen [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht] (11th ed. 2000) no. 494.

guarantee for clean-up cost related to ultrahazardous activities.[10] In practice, this does not seem to apply to GMO-farmers.

(g) Which procedures apply to obtain redress in such cases?

45 Not applicable.

(h) Are there any general compensation schemes that may be applicable in such cases, and how do they operate?

46 Not applicable.

II. Sampling and testing costs

1. Are there any specific rules in your jurisdiction which cover costs associated with sampling and testing for GMO presence in other products, either in the case of justified suspicion of GMO presence or in the case of general monitoring?

47 No, there are no specific rules concerning the covering of sampling and testing costs. Costs associated with sampling and testing for GMO presence in other products are seen as patrimonial damage, see art 6:96 Civil Code subsection 2 under b. These costs are incurred to assess damage and liability. As a result of this, sampling and testing costs for GMO presence in products are covered by damage compensation. As a condition there must be a causal link between the act and the eventual damage.

2. If there are no specific provisions, are there industry-based rules? Or do general rules apply?

48 According to good Dutch tradition, stakeholders are usually stimulated to solve their problems and reconcile their opposing interests with private agreements (covenants) rather than by lobbying for legislative intervention. In principle, covenants are private law agreements between the parties involved. Recently, the *Convenant Coëxistentie* was signed, on the basis of which some GMO crop tests are currently being performed.

49 Generally speaking, the covenant intends to bring all stakeholders concerned together with the goal of arranging a compensation scheme outside the tort system and based on mutual agreement. The gist of the arrangement – which has not yet been elaborated into concrete rules – is that all parties concerned will try to set up an information and damage mitigating system (including monitoring and mitigation of admixture and nuisance) and that compliance with the voluntary regime should suffice (in other words: compliance should render immunity from liability). Parties have in principle agreed that some sort of fund should be set up to compensate residual damage. Note that these words have not yet been transposed into action.

[10] *Besluit financiële zekerheid milieubeheer*, in: *Staatsblad* 2003 no. 71, based on art. 8.15 *Wet milieubeheer*.

Although covenants do not have the status of law, acts or omissions in contravention of covenants may amount to wrongful behaviour if the covenant has been accepted throughout the agricultural industry. In that case the covenant may amount to a standard of behaviour seeming in that part of society (which is relevant for the application of art. 6:162 Civil Code). This strongly depends on the specific facts of the case and the level of compliance within the industry with the covenant.[11] 50

3. Are such costs recoverable only if the tests prove actual GMO presence, or even without such outcome?

Such costs are recoverable under tort law, even if the test does not prove actual GMO presence. In this case although there is no admixture damage, the costs can still be recovered provided that liability of the GMO-farmer is established. For example: a farmer has used some GMO in his crops in breach of a statutory ban, and consequently the GMO crop is suspected of having contaminated other crops of an adjacent farmer. The farmer pays for testing his crop and he claims the cost of these tests from the GMO-farmer. The test reveals that no admixture has occurred and customers have kept on purchasing the products of the claimant. Hence, the farmer does not suffer any damage, but the GMO-farmer is still liable for breach of a statutory provision. If the test proves GMO presence but no admixture the respondent GMO-farmer can be held liable for the expenses incurred in connection with the test. The basis for this claim is art. 6:96 Civil Code: the claimant is to be reimbursed for the reasonable cost of assessing liability and possible damage even if the wrongful act turns out not to have caused damage.[12] 51

III. Cross-border issues

1. Special jurisdictional or conflict of laws rules

No, there are no special jurisdictional or conflict of laws rules in force or planned in the Dutch jurisdiction. 52

2. General rules of jurisdiction and choice of law

This is to be answered according to the general rules for jurisdiction and applicable law in tortious liability. According to the general rules of private international law (notably the Brussels I Regulation art. 1, 2 subsection 1 and art. 59 or 60) and dependant on whether the defendant is a natural person or a 53

[11] See *Notitie Ministerie van Justitie* (supra fn. 5) B56 ff.
[12] See HR 11. 7. 2003, NJ 2005, no. 50.

juristic person, the courts of the country where the respondent has his permanent address usually is competent. As far as the applicable law is concerned, usually the second question can be answered by the *Wet Conflictenrecht Onrechtmatige daad* (wrongful act conflicting law-act). According to the general principles of private international law, the *lex loci delicti* will apply.[13]

[13] See, generally, *Wet Conflictenrecht Onrechtmatige daad* (Statute on the private international law aspects of tortious liability) art. 3 subsection 1.