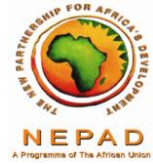




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LIABILITY & REDRESS: THE SUPPLEMENTARY PROTOCOL TO THE CARTAGENA PROTOCOL ON BIOSAFETY

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INTRODUCTION

The Nagoya - Kuala Lumpur Supplementary Protocol (SP) on Liability and Redress to the Cartagena Protocol on Biosafety was agreed to by the 5th series of the Conference of Parties serving as the Meeting of Parties (COP/MOP 5) in Nagoya, Japan, in October 2010. The Supplementary Protocol was developed to address Article 27 of the Cartagena Protocol, which called for the elaboration of international rules and procedures in the field of liability and redress for damage resulting from trans-boundary movements of living modified organisms. The Supplementary Protocol will be opened for Signature from 7 March 2011 to 6 March 2012 and shall enter into force on the ninetieth date after the date of deposit of the fortieth instrument of ratification, acceptance or accession.

This policy brief discusses some salient provisions of the Supplementary Protocol and highlights some of the challenges the Parties faced in negotiating the Supplementary Protocol.

ADMINISTRATIVE APPROACH for Addressing DAMAGE FROM LMOs

The Supplementary Protocol establishes an administrative approach for addressing liability and redress concerns relating to Living Modified Organisms (LMOs). An administrative approach does not necessarily involve adjudication by the courts. All matters are dealt with administratively-usually by a designated national competent authority or regional body delegated to act by several national competent authorities. The aim is to ensure fast and adequate preventive, response and remedial measures where there is damage caused by LMOs. The approach operates at the national level and gives the national authority the competence to directly address operators responsible for activities that pose a threat to the environment. The competent authority may request the operator to provide information on imminent threats to the environment in order to take preventive action or remedial action if damage has already occurred. The approach also allows for intervention before damage has occurred. Under the administrative approach, the competent authority may take the necessary measures itself and seek compensation for the costs from the operator.

CIVIL LIABILITY

During the negotiations, Parties agreed to develop a legally binding SP based on an administrative approach including a provision on civil liability. Civil liability is the liability of an entity for damage sustained by another private entity. Civil liability is governed by internal or national law, and claims are brought before a national court by the private entity that suffered the damage.

It had been argued by some Parties that there was a need to develop internationally binding civil procedure in the context of living modified organisms that would create uniformity as it was noted that courts of different

countries have different civil procedure rules. Parties that opposed the formulation of internationally binding civil procedures argued that most of the Member states already had in place civil rules and procedures within their jurisdictions and therefore, there was no need to create internationally binding procedures

After protracted negotiations, it was agreed that Article 12 states that parties shall provide for response measures relating to damage to biodiversity by LMOs in their domestic law by either applying existing domestic laws and/or by developing civil liability rules and procedures specifically for this purpose. When developing a domestic civil liability regime, each Party will in accordance with their domestic law address issues relating to damage, standard of liability including strict or fault based liability, channelling where appropriate and right to bring claims. (Legal channelling means that liability is exclusively concentrated and allocated to a pre-defined party).

DEFINITION OF DAMAGE

The definition of “Damage” was central in the negotiations. During the negotiations, some Parties preferred a broad and inclusive definition while others preferred a simple definition. The broad definition it was argued would include matters relating sustainable use of biological diversity, conservation of biological diversity, costs of preventive and response measures, socio-economic considerations, traditional damage and human health. (Traditional’ damage includes death, personal injury including negative impacts on health, & damage to property & economic interests). Those who preferred a simple definition proposed that the definition of damage should be limited to damage to biological diversity (or damage to the conservation and sustainable use of biological diversity) and damage to human health – but only to the extent that it arises from adverse effects on biological diversity.

After protracted negotiations, Parties agreed to [a compromise between the two positions and define damage as an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health. The damage has to be measurable or otherwise observable and significant. The process of determining whether damage has occurred should wherever possible take into account scientifically established baselines that is recognized by a competent authority and should also take into account any human induced or natural variations. The determination of a “significant” adverse will be determined by the factor such as the long-term or permanent change, the extent of the qualitative or quantitative changes that adversely affect the components of biological diversity; the reduction of the ability of components of biological diversity to provide goods and services; and the extent of any adverse effects on human health in the context of the Protocol.

DEFINITION OF “OPERATOR”

The definition of “operator” was also highly contentious because it dealt with the channelling of liability. The SP definition of “operator” is broad and includes the permit holder, the person who placed the living modified organism on the market, the developer, the producer, the notifier, the exporter, the importer, the carrier or the supplier. This list is indicative of possible operators that should be determined at the national level, thus Parties can provide a definition that is more or less inclusive in their domestic law when implementing the SP. During the negotiations, there was a clear divide on whether the definition should be narrow, so that only those responsible for the risk assessment can be held liable, or broad, to include every person in the supply chain. It was felt that a broad definition targeting normal commercial activities could inhibit trade and utilization of crop technology. Conversely, others felt it was essential that damage stemming from all aspects of trans boundary

movements of LMOs is covered, whether the damage occurs at the transit, handling, or usage stage. It was, however, decided that the definition of operator should include both the person in direct and indirect control of the LMO. This was understood to capture both the person that is in operational control of the LMO when the response measures are required (e.g. the carrier) as well as the person responsible for damage due to the intrinsic properties of the LMO (i.e. the developer or producer).

SCOPE

The Supplementary Protocol applies to living modified organisms: intended for direct use as food or feed, or for processing; destined for contained use (for example for research in a laboratory); and those intended for intentional introduction into the environment.

During the negotiations, it emerged that the Parties had different understandings of the contentious “products thereof” that were not included in the Protocol --- e.g., processed materials made from living modified organisms (e.g., corn oil from genetically engineered corn). While mention of 'products thereof' was eventually removed from the operative text of the Supplementary Protocol, the report of the meeting recorded an understanding that Parties may apply the Supplementary Protocol to damage caused by processed materials that are of living modified organism-origin, provided that a causal link is established between the damage and the LMO in question.

The compromise to record the understanding in the final report of COP/MOP 5 was important as it allowed for the exclusion of “products thereof” in the scope of the Supplementary Protocol.

FINANCIAL SECURITY

The right of Parties to provide for financial security in their domestic laws is enshrined in the Supplementary Protocol. Financial security ensures that, if for any reason, the responsible party cannot pay for the damage caused by an LMO, there will be some alternative means available to do so. To this end, Article 10 provides that Parties retain the right to provide for financial security in their domestic law. Any provision of financial security should be consistent with the Parties’ rights and obligations under international law. The Supplementary Protocol further provides that Parties shall request the Secretariat to undertake a comprehensive study on matters relating to financial security.

The COMPACT

In response to Article 27 of the Cartagena Protocol, CropLife International, a group of six leading plant biotechnology companies comprising, BASF, Bayer CropScience, Dow Agrosciences, DuPont, Monsanto and Syngenta, presented “the Compact” as an alternative mechanism to the development of a liability and redress regime. The Compact is a binding contractual voluntary private sector mechanism that will remedy actual “damage to biological diversity”. The Compact came into effect in 2010 and during the negotiations the Parties agreed to note in the report the initiative by the private sector concerning recourse in the event of damage by living modified organisms.

CONCLUSION

The adoption of the Nagoya-Kuala Lumpur Supplementary Protocol is a milestone by the Parties to Protocol. It establishes an administrative procedure for addressing damage to biological diversity caused by the trans-boundary movement of an LMO. In preparing to ratify this Supplementary Protocol, Parties should note that domestic law will be central to the implementation of that administrative approach. It is therefore important that Parties undertake a comprehensive review on laws relating to liability and redress within their respective jurisdiction as this will form the basis implementing the requirements of the SP at the national level.

This is the first of a series of policy briefs to be developed by the African Union/NEPAD - African Biosafety Network of Expertise (ABNE) addressing Legal/Policy aspects of modern biotechnology. *This policy brief is targeted for regulators and decision makers.*

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