


NAGOYA – KUALA LUMPUR SUPPLEMENTARY PROTOCOL (N-KL SP)
ON
LIABILITY AND REDRESS

RATIFICATION & IMPLEMENTATION


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Global Industry Coalition (GIC)

- Represents companies engaged in plant science, seed production, agricultural biotechnology, food production, animal agriculture.
- Coordinates input from private sector developers and users of biotechnology on all issues under Cartagena Protocol on Biosafety (Protocol).
- Is truly “global” – with industry partners in over 25 countries (including CropLife Asia).
- Is a recognized “observer” organization for global industry within the Protocol implementation process.
- Closely coordinates with industry stakeholders, including the grain and seed trades.
- Is led by CropLife International (Sarah Lukie, Executive Director).



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Negotiations on Liability and Redress

- 2004: COP-MOP establishes an Open-Ended Ad Hoc Working Group on liability and redress, as mandated by art 27;
- 2005-2008: Working Group meets five times, but no consensus on a final text;
- 2008: COP-MOP 4 (Bonn) agrees to work on an administrative system and certain legally binding provisions on liability and redress; establishment of a Group of the Friends of the Co-Chairs Concerning Liability and Redress;
- 2009-2010: four meetings of the Group of the Friends of the Co-Chairs. Group agrees that legally binding provisions should take the form of a supplementary protocol to the Cartagena Protocol;
- 15 October 2010: adoption of the **Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress.**

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GIC Position on Ratification

- The GIC fully supports ratification of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability & Redress (N-KL SP).
 - The N-KL SP sets forth an administrative approach to response in the event of damage, which is the most appropriate approach for any damage to the environment or to biological diversity, regardless of the industry or technology causing the damage, but especially for this highly regulated technology.
 - The N-KL SP incorporates a clear definition of and the critical role of a science-based determination of “damage” .
 - The N-KL SP is consistent with guiding principles advocated by industry in the negotiations on liability and redress and embodied in The Compact.

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GIC Position on Implementation

- Implementation of the N-KL SP will be a complex process for each ratifying Party.
- For example, there are **18** separate references in the N-KL SP to the application of *domestic law*.
- To begin the process, implementation of the N-KL SP requires careful analysis of “*domestic law*” by each Party to answer two fundamental questions:
 1. Does *domestic law* already meet the specific mandates of the N-KL SP? **If yes, the Party may choose to apply existing *domestic law*.**
 2. Does *domestic law* cover the many issues left to *domestic law* by the N-KL SP? **If no, the Party either must or may, as set forth in the N-KL SP, amend or develop *domestic law* to address those issues.**



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GIC Position on Implementation (continued)

- In considering the applicability of domestic law, or the development of new domestic law, the GIC recommends that the Parties consider:
 1. the principles for efficient and fair resolution of claims of damage that guided industry in participating as observers through the course of the negotiations of the N-KL SP;
 2. the characteristics of workable liability & redress systems compiled by industry in preparation for those negotiations; and
 3. The Compact, which works as a guidance since it provides examples of reasonable and practical provisions that address the issues left by the N-KL SP to *domestic law* or not covered by the N-KL SP at all.



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Guiding Principles for Efficient & Fair Resolution of Claims of Damage

- Protection of biological diversity as a “public good” by the State.
- Science-based evidence and decisions.
- Responsibility channeled to the “operator” who caused the damage.
- Legal due process for those against whom claims for damage to biological diversity are made.
- Independent unbiased decision-makers.
- Respect for the existing country’s legal system. Where there is developed law, there is no reason to change basic approaches to liability and redress in relation to this new and relatively safe technology.
- Practical and fair application.
- Social responsibility: enabling the use of more sustainable technology that is essential to food and agricultural security while appropriately protecting biological diversity.

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Characteristics of a “Workable” System

- Clear scope and definitions – in this case, those already set forth in the N-KL SP should be incorporated into domestic law:
 - Damage;
 - “Significant” adverse effect; and
 - Response measures.
- A definition of “operator” under domestic law that holds persons in operational control responsible.
- The requirements of both factual and legal causation.
- Appropriate defenses to protect against unfair imposition of responsibility.
- Response measures which are consistent with the N-KL SP definition and focused on remediation.
- Reasonable financial and time limitations for claims.

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“The Compact - A Contractual Mechanism for Response in the Event of Damage to Biological Diversity Caused by the Release of a Living Modified Organism”

- **Private Sector Initiative = Voluntary Binding Contract:** Each Member of the Compact agrees that it will timely respond to damage to biological diversity caused by the release of an LMO by that Member.
- **Designed to be a fair, accessible, and efficient system:**
 - Fully developed, clearly defined and self-contained process;
 - Any W.T.O. or U.N. Member can initiate a claim supported by science-based evidence;
 - Timely resolution of a claim administered by the Permanent Court of Arbitration; and
 - Qualified neutrals make all decisions and have access to independent experts.
- **Technology Provider Is Responsible for Its Own LMO:** Compact Members can be responsible for responding under the Compact even when responsibility might fall to others in the supply & use chain under otherwise applicable law. There are clearly defined defenses, such as misuse.
- **Complements N-KL Supplementary Protocol with a Form of Financial Security:** The Compact assures both access to those who release LMOs and their ability to pay.
- **An Option for States:** States choose whether to seek redress under the Compact. The Compact provides States with a meaningful opportunity to seek Response under the Compact in lieu of other redress mechanisms that may be available to the State.

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The Compact: current status

- The Compact is fully operational.
- Completion of the Advisory Committee, with the first meeting targeted for February 2012.
- Compact website will be operational www.biodiversitycompact.org end of October.
- No actual cases, but Compact remains a guidance in implementation of national liability systems related to biodiversity.
- The Compact continues to be involved in regional outreach meetings on liability and redress.

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The Compact's Relation to the N-KL SP

- The Compact provides an example of a workable mechanism that affords financial security, consistent with principles underlying insurability and of domestic business and corporation laws, enabling a fair and effective means for remedying damage to biodiversity.
- The Compact also provides examples of reasonable and practical provisions that address the issues left by the N-KL SP to domestic law or not covered by the N-KL SP at all, including:
 - *Considerations and Elements in Determining Damage;*
 - *Causation;*
 - *Channeling of Responsibility;*
 - *Defences;*
 - *Misuse;*
 - *Time & Financial Limitations;*

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GIC Position on Implementation

- The State should be prepared to implement the N-KL SP upon ratification:
 1. Any amendments to domestic law or new legislation necessary or appropriate to implement N-KL SP should be in place at the time of ratification.
 2. The capacity to administer and respond to an allegation of "damage" must be in place:
 - a. Infrastructure and processes to receive and administer claims, to manage notifications, to investigate and assess damage, and to implement or manage response measures.
 - b. Technical capacity to make the required scientific determinations.

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Main articles of N-KL SP

- Art 2: use of terms: definition of ‘damage’;
- Art 3: scope: ‘damage to biological diversity’;
- Art 4: causation;
- Art 5: response measures;
- Art 7-8: time limits and financial limits;
- Art 10: financial security ‘compliance with international obligations’;
- Art 12: relation to civil liability ‘limited to material and personal damage’.

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N-KL SP Mandates

For “damage”, as defined in Art. 2, Parties shall:

- Provide in *domestic law* for rules and procedures to address “damage”, and to do so, provide for response measures in accordance with the Supplementary Protocol. Art. 12.1
- Use existing law or develop new law or apply a combination to provide adequate rules and procedures in domestic law on civil liability to address personal injury or property damage associated with “damage”. Art. 12.2
- Implement response measures in accordance with *domestic law*. Art. 5.8.
- Require operators to inform the competent authority of and evaluate damage, and take appropriate response measures. Art. 5.1
- Identify responsible operators, evaluate damage, and determine which response measures should be taken by the operator. Art. 5.2

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N-KL SP Mandates (continued)

Parties shall:

- Provide and inform the operator of remedies in accordance with *domestic law*, including the opportunity for administrative or judicial review of decisions regarding evaluation and response measures. Art. 5.6

Parties shall not:

- Limit or restrict any right of recourse or indemnity that an operator may have against another person. Art. 9

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N-KL SP Determinations

In accordance with domestic law, Parties shall:

- Determine which persons or activities are included as “operators” – defined generally as a person in direct or indirect control of the living modified organism Art. 2.2(c)
- Establish a causal link between the damage and the LMO. Art. 4

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N-KL SP Discretionary Determinations

Parties may:

- Implement response measures. Art. 5.4
- Recover the costs of evaluating damage and response measures from the operator. Art. 5.5

Parties may in their *domestic law*:

- Provide for situations in which the operator may not be required to bear the costs of response measures. Art. 5.5
- Provide for any exemptions or mitigations (defences) they deem appropriate. Art. 6

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N-KL SP Discretionary Determinations (continued)

Parties may in their *domestic law*:

- Provide for relative and for absolute time limits and for the commencement of time periods. Art. 7
- Provide for financial limits for recovery of costs and response measures. Art. 8
- Address financial security, consistent with international rights and obligations and taking into account the last 3 preambular paragraphs of the Protocol. Art. 10.1

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Implementation guide

- CLI has developed a detailed implementation guide;
- The main purpose is assisting countries that do not have existing systems to deal with damage to biological diversity;
- The N-KL SP relies heavily on domestic law; this implementation guide provides detailed text proposals, which can be considered in developing new domestic law;
- The implementation guide is being finalised and will be made public in a few months.

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Thank You!

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