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**LIABILITY AND REDRESS IN THE CONTEXT OF PARAGRAPH 2 OF ARTICLE 14 OF THE
CONVENTION ON BIOLOGICAL DIVERSITY**

Note by the Executive Secretary

INTRODUCTION

1. Article 14, paragraph 2, of the Convention on Biological Diversity (CBD) provides for the following:

“The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.”

2. In the context of the above, the Conference of the Parties kept “liability and redress” under review starting from its fourth meeting in 1998. Some of the major activities undertaken since the first review, include: (i) the development by the Secretariat of possible elements of liability and redress in international environmental law that might be taken into consideration to address the issue of liability under the Convention (UNEP/CBD/COP/4/20); (ii) the submission of information on national, international and regional measures and agreements on liability and redress applicable to damage to biological diversity by Parties, Governments, and relevant international organizations, which was synthesized and made available by the Secretariat (UNEP/CBD/COP/5/16) and (UNEP/CBD/COP/6/12/Add.1); (iii) the convening of a group of legal and technical experts that identified issues relevant to liability and redress in the context of Article 14, paragraph 2 of the Convention (UNEP/CBD/COP/8/27/Add.3); and (iv) the preparation of a synthesis report by the Secretariat on technical information relating to damage to biological diversity and approaches to valuation and restoration of damage to biological diversity, as well as information on national/regional measures and experiences (UNEP/CBD/9/20/Add.1).

* UNEP/CBD/COP/12/1/Rev.1.

3. The multi-year programme of work for the Conference of the Parties for the period 2011-2020 adopted by the Conference of the Parties at its tenth meeting in October 2010, identified liability and redress, in item (b) (vii) of decision X/9, as one of the issues that could be addressed at the twelfth meeting of the Conference of the Parties.

4. Accordingly, the Executive Secretary has prepared the present note to facilitate the review of the item by the twelfth meeting of the Conference of the Parties. Section I of the note draws the attention of the Conference of the Parties to developments within the Convention on Biological Diversity and the United Nations Environment Programme (UNEP) as they are relevant to the subject of liability and redress; and section II suggests elements for a draft decision.

I. RELEVANT DEVELOPMENTS IN THE FIELD OF LIABILITY AND REDRESS

A. *Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*

5. Liability and redress for damage resulting from the transboundary movements of living modified organisms was one of the issues left for future consideration when the Cartagena Protocol on Biosafety was adopted in January 2000. Article 27 of the Protocol required the Conference of the Parties serving as the meeting of the Parties to the Protocol to adopt, at its first meeting, a process for the elaboration of liability and redress rules. Accordingly, the process of elaborating rules on liability and redress was established in February 2004 by the first meeting of the Parties to the Cartagena Protocol on Biosafety and ended in October 2010 when the fifth meeting of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol adopted the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.¹

6. The Nagoya – Kuala Lumpur Supplementary Protocol is a treaty intended to supplement the Cartagena Protocol on Biosafety. Its objective, as stated in its first article, is to contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health by providing international rules and procedures in the field of liability and redress relating to living modified organisms.

7. The Supplementary Protocol defines “damage” as an adverse effect on the conservation and sustainable use of biological diversity that is measurable and significant.² According to Article 2, paragraph 1 of the Supplementary Protocol, the terms used in the Convention on Biological Diversity (as defined in its Article 2) apply to the Supplementary Protocol. While the Supplementary Protocol defines “damage” as an adverse effect on biological diversity, one still needs to turn to the Convention in order to find a definition for “biological diversity”. The definition of “biological diversity” in the Convention on Biological Diversity is broad and includes “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”. Damage to biological diversity may therefore mean measuring adverse effects to the ‘variability among living organisms’, which is a concept new to the field of liability and redress.

¹ The Supplementary Protocol was opened for signature at United Nations Headquarters in New York from 7 March 2011 to 6 March 2012. By the closing date, it had been signed by 51 Parties to the Cartagena Protocol on Biosafety. By the time the present document was finalized, 25 Parties to the Cartagena Protocol had deposited their instrument of ratification, acceptance, approval or accession to the Supplementary Protocol.

² Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress, 2010, Article 2(b) https://treaties.un.org/doc/Treaties/2010/12/20101215%2005-26%20PM/Ch_27_8_c.pdf

8. A number of international civil liability treaties include environmental damage as part of the scope or concept of damage that they cover. While environmental damage includes damage to biodiversity, the latter is not well explored. Article 14, paragraph 2 of the Convention on Biological Diversity represents the first step towards highlighting the issue of liability and redress for damage to biological diversity. However, the inclusion and definition of “damage to biological diversity” in the Nagoya – Kuala Lumpur Supplementary Protocol marks a significant step in the development of the concept in international law of liability and redress.³

9. The Supplementary Protocol also provides for an indicative list of factors that should be used to determine the significance of an adverse effect. Adverse effect or damage to the conservation and sustainable use of biological diversity needs to be measurable and significant. Scientifically-established and recognized baselines are highlighted as important means to measure damage and to differentiate between human and natural induced variations. On the other hand, a significant adverse effect is expected to be determined on the basis of factors such as the long-term or permanent change, the extent of quantitative and qualitative changes, 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. It may also be noted that most of the factors included in the Supplementary Protocol were also highlighted, in 2005, by the Group of Legal and Technical Experts on Liability and Redress in the context of paragraph 2 of Article 14 of the Convention on Biological Diversity (hereinafter referred to as, ‘the Group of Experts’). The Group of Experts had arrived at a number of pertinent conclusions including the following:⁴

- (a) Change may not necessarily equal damage;
- (b) To qualify as damage, the change needs:
 - (i) To have an adverse or negative effect;
 - (ii) To be present over a period of time, that is, it cannot be redressed through natural recovery within a reasonable period of time;
- (c) Baselines are needed against which to measure change;
- (d) Other methods are needed for measuring change where baselines are not available;
- (e) The need to distinguish between natural variation and human-induced variation;
- (f) The issue of thresholds of significance of the damage.

10. Once the threshold of significant damage has been met, the need for response measures arises. The Supplementary Protocol defines “response measures” as reasonable actions to: (i) prevent, minimize, contain, mitigate, or otherwise avoid damage, as appropriate; and (ii) restore biological diversity. It specifies an order of preference in carrying out restoration actions. Accordingly, in the event of damage, the priority should be to restore the biological diversity to the condition that existed before the damage occurred, or its nearest equivalent. Where the competent authority determines that restoring the biological diversity to the condition that existed before or to its nearest equivalent is not possible, the next preference should be to undertake restoration, by, inter alia, replacing the components of biological

³ Biosafety Technical Series No.3: Review of Issues, Instruments and Practices Relevant to Liability and Redress for Damage Resulting from Transboundary Movements of Living Modified Organisms, Montreal: SCBD, 2012. p. 21
http://bch.cbd.int/protocol/cpb_technicalseries/cpb-ts-03-en.pdf

⁴ The report of the Group is contained in document UNEP/CBD/COP/8/27/Add.3, 18 October 2005. Also of relevance are the Secretariat’s synthesis report on technical information relating to damage to biological diversity and approaches to valuation and restoration of damage to biological diversity, as well as information on national/domestic measures and experiences, document UNEP/CBD/COP/9/20/Add.1, 20 March 2008, <https://www.cbd.int/doc/meetings/cop/cop-09/official/cop-09-20-add1-en.pdf>

diversity lost with other components of biological diversity for the same or other type of use, either at the same or other appropriate alternative location.⁵

11. Restoration of biological diversity is also envisaged in Article 14, paragraph 2 of the Convention. The Group of Experts recognized the availability of various categories of restoration measures. It suggested that, where feasible, primary restoration (restoration to baseline conditions) should be the preferred approach and other complementary methods of restoration and/or monetary compensation may be considered only where primary restoration is not possible or reasonable. This conclusion by the Group of Experts is again consistent with the provision and definition of “response measures” agreed to, five years later, by the Parties to the Cartagena Protocol on Biosafety as reflected in Article 5 and Article 2, paragraph 2 (d) of the Supplementary Protocol.

B. UNEP Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment

12. UNEP prepared guidelines on liability and compensation for environmental damage after convening, over several years, a number of advisory expert groups and consultative and intergovernmental meetings.

13. At its eleventh special session in February 2010, UNEP’s Governing Council/Global Ministerial Environment Forum adopted the “Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment”.⁶ The Governing Council affirmed that the guidelines were voluntary and did not set a precedent for the development of international law.

14. The Guidelines state that their objective is to provide “guidance to States regarding domestic rules on liability, response action and compensation for damage, taking into account the “polluter pays” principle.” (Guideline 1)

15. The term “damage” is defined to mean loss of life or personal injury and loss of or damage to property “arising from environmental damage”⁷ (paragraphs 2 (a) and (b), Guideline 3). It also includes pure economic loss, costs of reinstatement measures, costs of preventive measures and environmental damage itself. “Environmental damage”, in turn, means an adverse or negative effect on the environment that is measurable and significant. The Guidelines include factors to assist in determining whether an effect is significant.

16. Guideline 4 would require the operator to take prompt and effective response action should an incident arise during an activity dangerous to the environment. The term “response action” is defined in Guideline 3 to mean “preventive measures and reinstatement measures”, both of which are also defined terms. Furthermore, the definition of “incident” includes an occurrence that causes damage or “creates a grave and imminent threat of damage” (paragraph 5, Guideline 3).

17. Guideline 4 also suggests enabling the competent public authority to order the operator to take specific response actions that it deems necessary. The competent public authority may also take such action

⁵ Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress, 2010, Article 2, paragraph 2 (d).

⁶ Annex to decision SS.XI/5 B, Proceedings of the Governing Council/Global Ministerial Environment Forum at its eleventh special session, UN doc. UNEP/GCSS.XI/11 (3 March 2010)

⁷ The Nagoya – Kuala Lumpur Supplementary Protocol does not cover traditional damage as such. However, Parties could provide for civil liability concerning material or personal damage that is associated with damage to the conservation and sustainable use of biological diversity, taking also into account risks to human health, see Article 12, paragraph 2.

itself or authorize a third party to take such action and recover the costs from the operator where the operator fails to take response action or such action is unlikely to be effective or timely. The Guidelines propose that liability should be channelled to the operator and the standard of liability for damage caused by activities dangerous to the environment should be strict (Guideline 5). The Guidelines also suggest possible grounds on which an operator may be exonerated from liability. Two such possible grounds are where the activity was authorized or where the damage was caused by an activity “which was not likely to cause damage according to the state of scientific and technical knowledge at the time that the activity was carried out.” (paragraphs 2 (a) and (b), Guideline 6)

18. It is important to note how some of the elements of the guidelines are essentially similar to some of the provisions of the Supplementary Protocol and the conclusions of the Group of Experts. For example, in all cases, damage needs to be measurable and significant in order to trigger response action; and preventive and reinstatement measures constitute response action or measures.

II. SUGGESTED ELEMENTS FOR A DRAFT DECISION

19. In light of the information summarized in section I above, the Conference of the Parties may wish to:

(a) Take note of the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress;

(b) Take note also of the UNEP’s Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment;

(c) Recognize the relevance of some of the provisions and approaches of the Supplementary Protocol to the issue of liability and redress in the context of Article 14, paragraph 2 of the Convention;

(d) Invite Parties to take into account, as appropriate, provisions and approaches of the Supplementary Protocol, the UNEP Guidelines and the Synthesis report on technical information relating to damage to biological diversity and approaches to valuation and restoration of damage to biological diversity, as well as information on national/domestic measures and experiences (UNEP/CBD/COP/9/20/Add.1), in their efforts to develop or adjust national policy, legislation, guidelines or administrative measures concerning liability and redress for damage to biological diversity;

(e) Request the Executive Secretary to examine how some of the relevant provisions and approaches of the Nagoya – Kuala Lumpur Supplementary Protocol may be adapted for a possible development of guidelines on liability and redress and addressing damage to biological diversity in the context of Article 14, paragraph 2 of the Convention, taking also into account the UNEP Guidelines and the synthesis report referred to in paragraph (d) above, and make the information available to the Conference of the Parties at its fourteenth meeting;

(f) Decide to review this item further at its fourteenth meeting on the basis of the information that is to be made available by the Executive Secretary in accordance with paragraph (e) above and taking also into account any new developments in the adoption and implementation of response measures for damage to the environment in general and to biological diversity in particular, including restoration and compensation.

