

# The international liability and redress regime regarding environmental damage caused by cultivation of genetically modified crops—links with the Environmental Liability Directive

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## Key terms

- GM crops

They are crops genes of which have been modified to get desired traits such as herbicide resistance and pesticide resistance.

GM maize in the EU

Potential benefits

- Environmental risks/environmental damage

Increased amount of pesticides that are sprayed in the field; the loss of biodiversity in an agroecosystem

Discussion on a case-by-case basis

- Cultivation of GM crops

## International legal framework



## International obligations of the EU

### Legal principles



- The precautionary principle
- The public involvement principle

### Legal measures



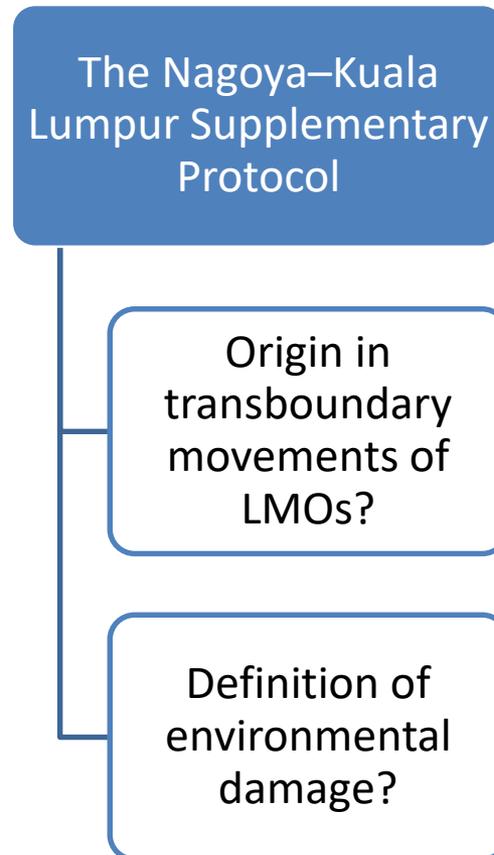
- General obligations
- The advance informed agreement procedure
- The obligation of information disclosure
- The handling, transport, use and identification measures
- Measures addressing unintentional transboundary movements of LMOs
- Measures addressing illegal transboundary movements of LMOs
- Liability and redress rules**

## Research questions

To what extent is the Environmental Liability Directive implementing the international obligations in the field of liability and redress on environmental damage caused by cultivation of GM crops?

- I. How can the Supplementary Protocol and the Environmental Liability Directive apply to environmental damage caused by cultivation of GM crops?
- II. What are the key elements of the administrative approaches in the two legal instruments? And; What are their commonalities and differences?

## Applicability



## Liability and redress rules in international law: Applicability

- “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.” (Paragraph 2 of Article 14 of the Convention on Biological Diversity)
- “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years.” (Article 27 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity )

## Liability and redress rules in international law: Applicability

- “The objective of this Supplementary Protocol 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.**” (Article 1 of the Nagoya–Kuala Lumpur Supplementary Protocol)
- “This Supplementary Protocol applies to **damage resulting from living modified organisms which find their origin in a transboundary movement.** The living modified organisms referred to are those: (a) Intended for direct use as food or feed, or for processing; (b) Destined for contained use; (c) Intended for intentional introduction into the environment.” (Article 3(1) of the Nagoya–Kuala Lumpur Supplementary Protocol)
- “This Supplementary Protocol applies to **damage that occurred in areas within the limits of the national jurisdiction of Parties.**” (Article 3(5) of the Nagoya–Kuala Lumpur Supplementary Protocol)

- “Damage” means **an adverse effect** on the **conservation and sustainable use of biological diversity**, taking also into account risks to human health, that:
  - (i) Is **measurable** or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent authority that takes into account any other human induced variation and natural variation; and
  - (ii) Is **significant** as set out in paragraph 3 below
- (Article 2(2)(b) of the Nagoya–Kuala Lumpur Supplementary Protocol)

## Applicability



## Applicability

The Environmental Liability Directive shall apply to:

(a) environmental damage caused by any of the **occupational activities listed in Annex III**, and to any imminent threat of such damage occurring by reason of any of those activities;

(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent. (Article 2(1) and 2(2) of the Environmental Liability Directive)

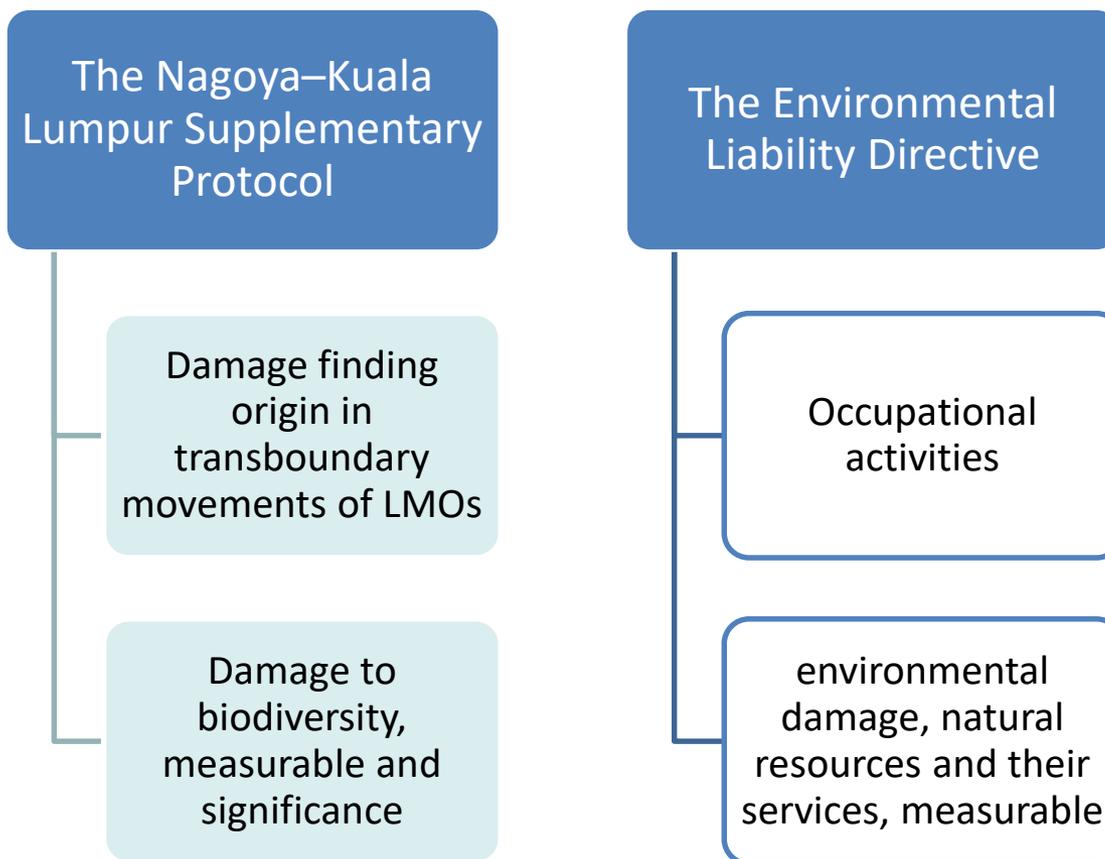
**Any deliberate release into the environment, transport and placing on the market of genetically modified organisms** as defined by Directive 2001/18/EC of the European Parliament and of the Council. (Article 11, Annex III to the Environmental Liability Directive)

## Applicability

- “Environmental damage” means damage to protected species and natural habitats, water damage, and land damage;
- “damage” means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

(Article 2(1) and 2(2) of the Environmental Liability Directive)

## Applicability: interim conclusion



## Administrative approaches: the Nagoya–Kuala Lumpur Supplementary Protocol

- Binding administrative measures
  - In the event of damage:
    - Operators shall be required by parties to
      - (a) Immediately inform the competent authority;
      - (b) Evaluate the damage; and
      - (c) Take appropriate response measures.
    - The competent authority shall
      - (a) Identify the operator which has caused the damage;
      - (b) Evaluate the damage; and
      - (c) Determine which response measures should be taken by the operator.
- (Article 5 (1) and (2) of the Nagoya–Kuala Lumpur Supplementary Protocol)

## Administrative approaches: the Nagoya–Kuala Lumpur Supplementary Protocol

- When there is a sufficient likelihood that damage will result:
  - the operator shall be required to take appropriate response measures so as to avoid such damage.
  - the competent authority may implement appropriate response measures, including, in particular, when the operator has failed to do so.”

(Article 5 (3) and (4) of the Nagoya–Kuala Lumpur Supplementary Protocol)

## Administrative approaches: the Nagoya–Kuala Lumpur Supplementary Protocol

- Costs and expenses
  - The competent authority has the right to recover from the operator
  - the costs and expenses of, and incidental to, the evaluation of the damage and the implementation of any such appropriate response measures
  - Parties may provide, in their domestic law, for other situations in which the operator may not be required to bear the costs and expenses (Article 5(5) of the Nagoya–Kuala Lumpur Supplementary Protocol)

## Administrative approaches: the Nagoya–Kuala Lumpur Supplementary Protocol

- Determination of response measures by the competent authority
  - Decisions should be reasoned
  - Such decisions should be notified to the operator.
  - Domestic law shall provide for remedies, including the opportunity for administrative or judicial review of such decisions.(Article 5(6) of the Nagoya–Kuala Lumpur Supplementary Protocol)

## Administrative approaches: the Nagoya–Kuala Lumpur Supplementary Protocol

- Domestic law
    - Response measures shall be implemented in accordance with domestic law.”
- (Article 5(8) of the Nagoya–Kuala Lumpur Supplementary Protocol)

## Administrative approaches: the Environmental Liability Directive

- The binding administrative approach
  - When there is an imminent threat of environmental damage:
    - the operator shall, without delay, take the necessary preventive measures.
    - operators are required by MS to inform the competent authority of all relevant aspects of the situation, as soon as possible, when such damage is not dispelled by preventive measures taken by the operator
    - The competent authority may, at any time:
      - (a) require the operator to provide relevant information
      - (b) require the operator to take the necessary preventive measures;
      - (c) give instructions to the operator; or
      - (d) itself take the necessary preventive measures.
- (Article 5(1)-(3) of the Environmental Liability Directive)

## Administrative approaches: the Environmental Liability Directive

- When environmental damage happens,
  - the operator shall
    - without delay, inform the competent authority of all relevant aspects of the situation:
    - take all practicable steps and the necessary remedial measures
  - The competent authority may
    - require the operator to provide supplementary information;
    - take, require the operator to take or give instructions to the operator concerning practical and remedial measures;
    - itself take the necessary remedial measures.

(Article 6 of the Environmental Liability Directive)

## Administrative approaches: the Environmental Liability Directive

- Cost

- The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive.
- The competent authority shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under this Directive. However, the competent authority may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified.

(Article 8(1)-(2) of the Environmental Liability Directive)

## Administrative approaches: the Environmental Liability Directive

- Determination of remedial measures by the competent authority
  - The operator shall identify and submit remedial measures
  - The competent authority makes decisions according to Annex II

(Article 7(1)-(2) of the Environmental Liability Directive)

## ADMINISTRATIVE MEASURES

	The Nagoya–Kuala Lumpur Supplementary Protocol	The Environmental Liability Directive
Types of measures	Response measures for damage likely to happen; for damage	Preventive measures; remedial measures;
Sequences	Operators; Competent authorities	Operators; Competent authorities
Concrete measures	Determined by competent measures	Determined by competent measures
Costs	Polluter pays	Polluter pays

## Conclusions

- Many similarities—influence of the Environmental Liability Directive on the conclusion of the Nagoya Kuala-Lumpur Supplementary Protocol
- A good model for implementing the Nagoya Kuala-Lumpur Supplementary Protocol
- Differences due to conflicting interests among negotiating parties—thus there are additional requirements; extra measures are needed



**Thanks for your attention.**