Book reviews

International Liability Regime for Biodiversity Damage: The Nagoya-Kuala Lumpur Supplementary Protocol

Akiho Shibata (ed)

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A landmark event that coincided with the adoption of the United Nations 1992 Rio Declaration on Environment and Development was the signing ceremony for the Convention on Biological Diversity (CBD) which entered into force on 29 December 1993. Considered an historic commitment by the international community to bring into operation an international legal instrument for the conservation and sustainable use of the earth's biological diversity and for the fair and equitable sharing of the benefits arising from the use of genetic resources, the convention's field of application was expanded, over time, by two additional protocols. In 2000 the Cartagena Protocol on Biodiversity was adopted and entered into force in 2003 with the aim of ensuring the safe handling, transport and use of living modified organisms (LMOs) resulting from modern biotechnology. Article 27 of this Protocol instructed the Conference of the Parties (COP) under the CBD, and serving as the Meeting of the Parties (MOP) under the Protocol, to develop an international liability and redress regime for damage resulting from the transboundary movement of LMOs. The adoption of the Nagoya-Kuala Lumpur Supplementary Protocol to the CBD followed in 2010 to realise the instruction in article 27 of the Cartagena Protocol.

The international liability regime established by the Supplementary Protocol is examined in the work under review in fifteen chapters which the editor has organised in three parts. Part I covers the history and context of the Supplementary Protocol; Part II the civil liability approach adopted by the Protocol; and Part III the challenges and implications in the implementation of the liability regime. The chapters in Part I by Akiho Shibata, René Lefeber, and Jimena Nieto Carrasco, provide useful and explanatory introductory material on the legal framework under which negotiations for the Protocol

were conducted, together with the administrative approach to liability, which is a key feature of the Protocol and has been based on the designation of national public authorities responsible for prevention and redress coupled with the civil liability for the operator, a matter the parties to the Protocol are entitled to address in accordance with their existing domestic law on civil liability (see article 12 of the Protocol). The significance and implications of this approach are further discussed and analysed in Part II in chapters by René Lefeber, Alejandro Candeira, Reynaldo Alvarez-Morales, Gurdial Nijar, Elmo Thomas, Mahlet Kebede, Rodrigo Lima, Worku Yifru, and Kathryn Garforth.

What deserves special mention with regard to Part II, is chapter 8 where the authors (Thomas and Kebede) deal with the African negotiators' perspective on the administrative approach and civil liability regime established by the Protocol. It appears from this chapter that the Africa group deemed the administrative approach to liability inadequate and preferred a single binding liability regime under the Protocol. The concerns of the Africa group with the approach followed in the Protocol arose from a range of factors, such as the absence of functioning and competent national authorities and national biosafety frameworks in many African countries; the onerous task in these circumstances of following and establishing the causal link between the damage and the LMO and in pursuing the responsible operator; and the absence of civil liability regimes in the legal systems of many African states appropriate for securing the type of redress envisaged in the Protocol. It is also argued that by pursuing liability and redress through national mechanisms, diverse approaches are encouraged which may compromise the protection persons suffering damage should be afforded. Moreover, since we are dealing with liability arising from the transboundary movement of LMOs, international cooperation, as opposed to national responses, should be the preferred method of enforcing an international legal instrument of this nature. Therefore, the authors of this chapter are of the view that 'a legally binding instrument on civil liability system (sic) would allow the development of harmonized rules and procedures across jurisdictions. It would also address the gaps existent (sic) in many African civil liability laws that fail to address damage resulting from LMO's (sic)' (130). This may come across as somewhat over-optimistic. African states are, after all, not in the fore-front when it comes to the domestic implementation of their treaty obligations or the harmonisation of treaty and domestic law. And even international conventions, once ratified, are dependent on functioning and competent national institutions for their implementation and enforcement on the domestic level.

Many of the problematic issues pointed out by the different approaches to liability and redress relate to the political, social, and economic sensitivities surrounding LMOs in general, and their transboundary movement in

particular. That a compromise was reached in the form of the Supplementary Protocol is in itself an achievement and as the chapters in Part III point out, much still depends on the future interpretation and implementation of the Protocol. In this Part, Dire Tladi draws attention to the opportunities for re-interpretation and re-imagination of the Protocol's provisions; Edward Brans and Dorith Donkelmans introduce the commonalities and differences between the Supplementary Protocol and the EU Environmental Liability Directive of 2004 and point to some pertinent issues regarding the implementation of the Protocol into EU law; Eriko Futami and Tadashi Otsuka explain the Japanese approach to the implementation of the Supplementary Protocol; and Thomas Carrato, John Barkett and Phil Goldberg introduce and explain the initiatives taken by leading agricultural biotechnology companies to prevent harm and provide redress and how these initiatives can be used to complement the objectives of the Supplementary Protocol.

The value of this collection of essays, skillfully put together by the editor, Akiho Shibata, lies in the fact that it is the first of its kind to provide an in-depth and wide-ranging analysis of the subject matter. The usefulness of the material is further enhanced by the fact that several of the authors acted as co-chairs or leading negotiators in the law-making process and are therefore in a position to bring their experience to bear on the contents. Four appendices add further value, namely the text of the Supplementary Protocol (Appendix 1); the 2010 international rules and procedures for liability and redress (Appendix 2); excerpts on liability and redress from the report of the Fifth Meeting of the Conference of the Parties in 2010 (Appendix 3); and the Core Elements Paper submitted by the co-chairs of the ad hoc Working Group at its fifth meeting in 2008 (Appendix 4).

At the time of writing the Supplementary Protocol had twenty-eight ratifications with very few African states amongst them (Burkina Faso, Guinea-Bissau and Uganda). Forty ratifications are needed for the Supplementary Protocol to enter into force. With this in mind, it should be recalled that both the 1972 Stockholm Declaration (principle 22) and the 1992 Rio Declaration (principle 13) have urged the international community to develop both international and national law regarding liability and compensation for the victims of pollution and other environmental damage. The results thus far have not been encouraging. The efforts of the International Law Commission, which commenced in 1978, have gone no further than two sets of *draft* articles, namely the 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities and the 2006 Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities. Previous treaty-making attempts in the area of liability and compensation for harm have been equally disappointing. The Basel

Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and Their Disposal, adopted in 1999, has still not attracted the required number of ratifications to bring it into force, and the same is true of the 1993 Lugano Convention on Civil Liability and the 2003 Kiev Protocol on Civil Liability. The benefits and risks of the current technological advances in the field of LMOs, the growing global market in these commodities, and perhaps most importantly, the innovative liability regime adopted in the Supplementary Protocol could save the Nagoya-Kuala Lumpur Supplementary Protocol from suffering the same fate.

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