Conference Structure

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Key Documents and References

Most of the key documents, including the PDF version of this PPT presentation, are downloadable from:
<http://www2.kobe-u.ac.jp/~akihos/en/grenoble2013_e.html>

Documents and references on the web include:


Introduction: Shibata and NKL-SP

1. Shibata as “Professor-Diplomat”:
   Always a professor of international law since 1995
   “Advisor” to Japanese Foreign Ministry 2001-2010
   “Legal negotiator” for Japanese delegations 2001-2010

2. NKL-SP negotiation: 2004-2010
   Japan’s involvement only from 2007 (3rd WG)
   Japan as the largest importer of GM crops and the leader of scientific and industrial application of biotech.
   Liability negotiation extremely complex: Shibata’s support.

   Today: Objective and academic examination with the knowledge of inside stories
   * Practice-oriented IL education at GSICS, Kobe U.
PART I: Salient Features of NKL-SP (2010)

The negotiation and the adoption of the Supplementary Protocol on Liability and Redress were conducted within the legal framework of CBD and Cartagena Protocol. LMOs include genetically modified organisms (GMOs).

PART I: Salient Features of NKL-SP

- NKL-SP: Art. 1 Objective: “…to contribute to the conservation and sustainable use of biological diversity…by providing international rules and procedures in the field of liability and redress relating to living modified organisms”
- NKL-SP at a glance:
  - Core obligation: Art. 5 and Art.12 (1) first half: obligation to establish domestic legal system to address biodiversity damage by requiring the operators to take response measures.
  - Far-reaching “response measures” (Art.2 (2)(d)).
  - Controversial “financial security” (Art.10) and civil liability (Art.12 (2)) provisions.
PART I: Salient Features of NKL-SP

• Liability regime specific to LMOs? Yes, and NKL-SP does have a few characteristics that arise from it being applicable to LMOs. Cf. Definition of “operator”; the discussion whether to include “LMOs and products thereof” in the scope.

• But because there are fundamentally different perceptions towards LMOs, NKL-SP keeps a fair distance from potentially divisive issues related to LMOs themselves. The particularities of LMOs being the cause of biodiversity damage have become less of the issue in establishing the liability regime.

PART I: Salient Features of NKL-SP
1. Liability for damage to biological diversity

• First-ever global treaty to recognize the concept of “damage to biodiversity”:
  (1) Convention on Biological Diversity (CBD, 1992): Art. 2: definition of “biological diversity” and “sustainable use”; Article 14 (2): liability for “damage to biological diversity” for future examination
  (2) Cartagena Protocol: LMOs that may have adverse effects on the conservation and sustainable use of biological diversity; Art.18: “significant adverse effect”.
  (3) NKL-SP (2010): Art.2 (2)(b) : “Damage means an adverse effect on the conservation and sustainable use of biological diversity, taking also account risks to human health, that: (i) is “measurable” and (ii) “significance”.

PART I: Salient Features of NKL-SP
1. Liability for damage to biological diversity

CBD Art. 2:
“Biological diversity” means 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.

“Sustainable Use” means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

PART I: Salient Features of NKL-SP
1. Liability for damage to biodiversity

• A closer look at biodiversity damage:
  (1) NKL-SP defines the damage in its degree (significance) and its quality (measurability or observability).
  (2) Use of scientifically-established baselines recommended.
  (3) Factors to determine “significance” include: long-term change; beyond natural recovery; reduction in providing goods and services; and effects on human health.

BUT no specifics as to:
(1) What constitutes biological diversity (beyond definition in CBD);
(2) What constitutes effects on conservation and sustainable use of biodiversity;
(3) Whether “biodiversity” is the same as “environment”.
PART I: Salient Features of NKL-SP

1. Liability for damage to biodiversity

• Complemented by domestic law in determination of damage:
  ✓ NKL-SP: Art.3 (6): “Parties may use criteria set out in their domestic law to address damage”.
  ✓ EU: Environmental liability directive applies only to protected areas and species, not to biodiversity generally.
  ✓ Japan: Effects of LMOs only upon native wild fauna and flora.

• The role of “damage” in administrative approach to liability:
  ✓ Damage functioning as “a trigger” for administrative actions.
  ✓ Definition of damage as “limits” to administrative discretion.
  ✓ No provision on “valuation” of damage needed.

PART I: Salient Features of NKL-SP

2. Administrative approach to liability

• NKL-SP as the first international liability regime based on an administrative approach: Its Essence
  ✓ The operator’s primary liability (or consequent obligation after causing damage) is to take response measures, rather than to pay monetary compensation. (Art. 5 (1), Art. 12 (1))
  ✓ The operator’s liability is incurred in relation to the administrative organ of the government, rather than in relation to the victim of damage. (Art. 5 (2) (4) and (5))
  ✓ The operator’s liability will be pursued in most cases within the administrative apparatus, rather than in the courts, and most likely by applying administrative laws and procedures, rather than civil or tort law. But see Art. 5 (7).
PART I: Salient Features of NKL-SP
2. Administrative approach to liability

- What is a “liability” regime under international law?
- Various uses of the term “liability” and related terms
  - 1972 Stockholm Declaration on Human Environment:
    Principle 21: “responsibility” to ensure not to cause transboundary environmental damage; Principle 22: “liability and compensation” for victims of environmental damage.
  - Dupuy: Liability as encompassing concept to describe obligations to make monetary compensation, including reparation for wrongful acts.
  - IDI: “responsibility” for states; “liability” for non-state actors.
  - ILC: “international liability” for injurious consequences of acts not prohibited by international law (1978-)
  - Treaty practice: monetary compensation for damage.

PART I: Salient Features of NKL-SP
2. Administrative approach to liability

- “Liability” regimes under treaty practice:
  Cf. 1963 Nuclear damage; 1969 Oil pollution; 1972 Space object damage; 1999 Basel Liability Protocol
  → Fairly consistent practice: liability as monetary compensation for damage.
  → State liability only in space object and others are all civil (or operator’s) liability: civil liability imposed by domestic laws and enforced by domestic courts.
  → Scope of “damage” has expanded to include “the cost of reinstatement measures to restore the damaged environment”. (Basel Liability Protocol Art. 2 (2) (c))
PART I: Salient Features of NKL-SP
2. Administrative approach to liability

• NKL-SP: Different “liability” regime from previous international treaty practice

Q1: Do we have to call this regime a “liability” treaty?
   → During the negotiation, Japan requested to delete the phase “liability and redress” from the title of the Supplementary Protocol.

Q2: Which is the real objective: fourth preambular paragraph or Art. 1?
   → During the negotiation, the Co-Chair, supported by Japan, proposed an objective article mentioning only “response measures”.

PART II: Its Significance and Challenges

• “Liability occlusion”: Problems facing civil liability regimes
  ✓ Most recent civil liability treaties not attracted support in the form of ratifications.
  ✓ ILC’s work wandering over the concept of “liability”
  ✓ Rio Principle 13 (1992) enthusiasm faded?
PART II: Its Significance and Challenges

• Can the NKL-SP’s new approach to liability be Saviour of international environmental liability regimes?
• NKL-SP must pass two examinations:
  (1) Does the NKL-SP’s new approach to liability have general international legal basis, so that it can be a precedent in future liability regimes?
  (2) Would the NKL-SP be quickly ratified by Parties to enter into force and be implemented domestically, so that it will (soon) become a part of positive legal order?

PART II: Its Significance and Challenges
1. ILC’s “liability” discussion and NKL-SP

• ILC’s “Allocation of Loss”: fundamental tenets
  (1) Two-folds system: victim compensation and liability for environmental damage

Principle 3 Purposes:
  The purposes of the present draft principles are:
  (a) To ensure prompt and adequate compensation to victims of transboundary damage; and
  (b) To preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.
PART II: Its Significance and Challenges
1. ILC’s “liability” discussion and NKL-SP

(2) Liability for environmental damage → Principle 5 on “Response measures”
cf: Victim compensation → Principle 4 on prompt and adequate compensation and Principle 6 on international and domestic remedies.

Principle 5 Response measures
Upon the occurrence of an incident involving a hazardous activity which results … in transboundary damage:

(b) The State of origin, with the appropriate involvement of the operators, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology:

PART II: Its Significance and Challenges
1. ILC’s “liability” discussion and NKL-SP

(3) Whose liability? ‘operator’ or State?
NKL-SP: operator’s liability based on polluter-pays principle.

*During the negotiation, there was a proposal for State’s (exporting country’s) subsidiary liability, but it was deleted early in the negotiation.

ILC Allocation of Loss Principle 5: (b) “The State of origin, with the appropriate involvement of the operator, shall ensure that appropriate response measures are taken…”.

(d) The State affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage.”

→ Preference for State liability?
No, operator’s “primary role” is recognized.
PART II: Its Significance and Challenges

1. ILC’s “liability” discussion and NKL-SP

• Tentative Conclusion:

NKL-SP’s basic legal structure of liability regime can be said to be founded on the ILC’s fundamental tenets of liability regime as “allocation of loss” in that:

1. It is based on a clear distinction of environmental (biodiversity) damage from traditional damage to persons and property;
2. The liability is understood as taking positive action of response measures to mitigate the damage and restore the damaged environment (biodiversity);
3. The channeling of liability should take into account the specific circumstances, but the operator should have the primary role.

2. Domestic implementation and NKL-SP

1. Operator’s liability must be implemented and enforced under domestic laws of Parties.

2. Challenges facing many Parties in striving for such efforts, since the NKL-SP establishes (1) a new concept of administrative approach to liability; (2) the concept of biodiversity damage; and (3) the detailed response measures by operators.

3. In light of its novelty, NKL-SP does allow certain flexibilities (=differences) in its implementation. NKL-SP would be more effective if it enters into force, even with some variant implementing domestic laws.
PART II: Its Significance and Challenges

2. Domestic implementation and NKL-SP

The Core Challenges and Possible Solutions

Many challenges relate to the threshold of biodiversity damage. Related questions: same as “environmental damage”? A situation “where sufficient likelihood that damage will occur”? Solution?: Art.3 (6): criteria to address damage under domestic law.

Many challenges relate to the identification of liable operator and possible defence and the role of governments Solution?: Art.2(2)(c) “any person in direct or indirect control” and “as determined by domestic law”; how to provide legal stability for private operators; the problem of financial security.
PART II: Its Significance and Challenges
2. Domestic implementation and NKL-SP

The Core Challenges and Possible Solutions

Many challenges relate to the nature and scope of response measures. Far-reaching measures including “replacement of biodiversity”.

Solution?: Art.2(2)(d): “reasonable”; Art.5(2): competent authority to “determine” the measures to be taken; Art. 5(5): domestic law to provide “situations where operators are not required to bear the costs”; Art.5 (8): implemented in accordance with domestic law.

Cartagena Protocol (as int’l law) and Japanese Cartagena Law (as domestic law)

(1) International law and its implementing domestic law

In Japan, international law, including treaties, will have the force of law in Japan if the treaty is ratified by and entered into force for Japan, without any implementing legislation. However, usually and especially for environmental treaties with detailed rules and procedures, an implementing domestic legislation for treaties will be enacted. Thus, when Japanese government negotiates and concludes an environmental treaty, it examines carefully whether its content is consistent with not only the Constitution, but also the fundamental legal system and legal thinking of Japan.

(2) Cartagena Protocol and Japanese Cartagena Law

Japan’s Cartagena Law is the implementing legislation for CP. Thus, the Law implements all obligations under the CP. On the other hand, where the CP “authorizes” something (cf. application to GM pharmaceuticals) or recognizes certain discretion (determination of risks to biodiversity), the Japanese law may determine these issues independently. Such independent determinations among Parties may lead to difficulties in effective implementation of the treaty, and COP decisions may try to harmonize the domestic implementation.
Japanese Cartagena Law (JCL) and the NKL-SP

(1) Basic Structure of JCL

JCL covers all LMOs as defined in CP and applies, irrespective of their foreign or domestic origin, to a comprehensively defined “use or other acts” involving LMOs undertaken in Japan. JCL defines broadly “the possibility of loss to biological diversity” as adverse effect and authorizes the competent authority to direct the users, etc to take all necessary measures (including recovery of LMOs) to prevent such effect.

Thus, the content of the Supplementary Protocol based on administrative approach is basically in line with the JCL. It is expected that the JCL, with only minor adjustments, will be the implementation legislation for SP.

(2) Two basic points to note when applying JCL for SP

① The concept of “biodiversity damage” under SP will be interpreted and implemented under JCL’s concept of “adverse effects on biological diversity” (more significant ones).

② The concept of “operator” under SP will be interpreted and implemented under JCL’s concept of “User and others.”

(3) How to implement “biodiversity damage”:

(a) Retain the concept of “(adverse) effects to biological diversity” and the specific example of such effect as “impairment to the preservation of species or populations of wild fauna or flora” under the JCL. Apply the “Implementing guidelines on Evaluation of Adverse Effects on Biological Diversity” (No.2, 2003) to determine the “significant adverse effects” for which additional restoration measures may be ordered.

(b) Although JCL and its guidelines apply to adverse effects only on “wild fauna and flora”, it is allowed under Art.3 (6).

(4) How to implement “operators”:

(a) The JCL’s concept of “User and others” includes not only actual users of LMOs but also those who import them for use in Japan, those who export them to cause others to use them (including domestic administrator of the exporters), and those who received the approval or confirmation of the use.

(b) SP’s Art.2(2)(c), Art.5 (1) and (2) allow these persons to be “operators”.

(c) Usually, under JCA, in accordance with the new “Response Measures Plan” submitted by applicants, CA will order the “Approval Recipient”.


Japanese Cartagena Law (JCL) and the NKL-SP

(5) How to implement “Response Measures”:
Regarding “response measures”, the SP includes not only containment and mitigation of damage, but also restoration measures. JCL needs to be amended to allow the competent authority to order the operator, when the prevention failed and “significant adverse effect to biological diversity” occurred, to “restore the original conditions within a reasonable time, or if restoration of the original condition is extremely difficult, take any alternative measures that may be necessary” (Art. 23 of Japan’s Antarctic Environmental Protection Law), or a similar stipulation to that effect.

(6) How to implement Art.12 (2) (3):
Parties shall, with the aim of providing civil liability law for material or personal damage associated with the biodiversity damage, either apply or develop civil liability law.

Japanese general civil law (tort law) is applicable to any material and/or personal damage, and allows to pursue liability of wrongdoer as long as all the necessary conditions provided in the law are satisfied. These damage, however, may not necessarily be associated with the biodiversity damage.

This provision cannot be interpreted as requiring separate treatment of traditional damage “associated with biodiversity damage” under civil liability law. Since this obligation is only to “aim” for providing such civil liability rules, it does not need to be implemented immediately.
Specific obligations and authorizations under the NKL-SP

(7) How to implement Art.10 (1):
Parties retain the right to provide, in their domestic law, for financial security. This right must be exercised in a manner consistent with the rights and obligations under international law, taking into account the final three preambular paragraphs of the Protocol. (It is doubtful whether this provision provided a legal authority under the treaty. But even it was so:)

JCL does not specifically provide for the authority to impose financial guarantee against “users and others.” I am not sure whether Japan will make use of such authority towards LMOs uses.

(8) How to implement Art.12 (1):
Parties may apply or develop civil liability law to address biodiversity damage.

Under the current Japanese general civil law (tort law) and its jurisprudence, it would be both legally and politically difficult to cover “biodiversity damage.”

Merci!

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