

‘Imminent Threat of Damage’:

The need for its inclusion in international and national liability and redress regimes for damage resulting from GMOs

The Note by the Executive Secretary ‘The concept of imminent threat of damage and its legal and technical implications’ (UNEP/CBD/BS/GF-L&R/3/INF/2) provides an overview of the concept and its application or use in existing multilateral environmental agreements, regional and national provisions, and legal cases. This TWN paper complements the Note by exploring further the legal bases for the concept of imminent threat of damage, providing examples from the multilateral, regional and national levels, as well as an example of the application of the concept in a particular legal case.

We summarize here some of the conclusions that can be drawn on reading both the documents, as well as some general conclusions:

- 1) The concept of imminent threat of damage is a widely used and accepted concept in multilateral, regional and national laws, particularly those related to environmental matters and/or dealing with liability and redress. Criteria to ensure proportional measures in response to the magnitude of the imminent threat of damage could be established.
- 2) The concept of imminent threat of damage is integral to and cannot be separated from the overall legal purpose of dealing with damage – ensuring that preventive measures are taken to protect the environment, human life or property.
- 3) The concept of imminent threat of damage is in line with the precautionary principle or

approach that underpins the Cartagena Protocol on Biosafety.

- 4) The concept of imminent threat of damage functions to prevent damage and thus contributes to the realization of the objective of the Cartagena Protocol on Biosafety and the implementation of Parties’ core obligations to prevent or reduce the risks of LMOs to biological diversity, taking also into account risks to human health.
- 5) The concept of imminent threat of damage provides an early threshold for response action, preventing damage from occurring and potentially avoiding even more costly measures that would incur if the preventative action had not been taken.
- 6) The concept of imminent threat of damage would not act as a barrier to trade, as the Cartagena Protocol on Biosafety and WTO Agreement on the Application of Sanitary and Phytosanitary Measures both require that decisions on import have a rational and informed basis and are linked to specific and case-by-case scientific risk assessments. These agreements also provide for the application of the precautionary approach in decision-making.

Given the above, the concept of imminent threat of damage should therefore be included in the Supplementary Protocol and Guidelines on Civil Liability and Redress.

Legal Bases: Imminent Threat of Damage

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I. Existing Legal Documents

A. Multilateral agreements and arrangements

1. The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, calls upon the Parties to ensure that “in the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected”.¹
2. The Framework Convention for the Protection of the Marine Environment of the Caspian Sea defines environmental emergency as a situation that causes damage or poses an imminent threat of pollution or other harm to the marine environment of the Caspian Sea and that result from natural or man-made disasters. In addition, the Framework Convention also provides that in the event of an environmental emergency, or imminent threat thereof, the Contracting Party of origin shall ensure that the Contracting Parties likely to be affected, are, without delay, notified at appropriate levels.²
3. The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides that the Parties should adhere to the precautionary principle to take all appropriate measures to prevent, control and reduce water-related disease and that preventive actions should be taken to avoid outbreaks and incidents of water-related disease and to protect water resources used as sources of drinking water.³
4. The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972, made a declaration towards the preservation and enhancement of the human environment; a declaration that they shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea; and to adopt appropriate

means to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres.⁴

B. Regional and national provisions

1. The Environmental Damage Act of Germany which is an Act serving to implement the Directive of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage defines “imminent threat of environmental damage” as a sufficient likelihood that environmental damage will occur in the near future. It also provides definitions for preventive measures, damage control, and remedial measures. The said Act provides a clear mandate that in the event of an imminent threat of environmental damage, the responsible party must promptly take the necessary preventive measures. Further, that the competent authority shall monitor the responsible party to ensure that the necessary preventive, damage control and remedial measures are taken.⁵
2. England’s 2009 regulations on Environmental Damage (Prevention and Remediation)⁶ as well as Scotland’s Environmental Liability Regulations of 2009⁷ mandate the operator that causes an imminent threat of environmental damage, or an imminent threat of damage to take all practicable steps to prevent the damage and to make necessary notification to the enforcing authority.
3. The Protocol for Sustainable Development of Lake Victoria Basin Preamble defines emergency as a situation that causes or poses an imminent threat of causing serious harm to a Partner State or other States and that results suddenly from natural causes, such as floods, droughts, landslides or earthquakes, or from human conduct, such as industrial accidents or inland water transport accidents. It adheres to several principles among which are the principle of prevention to cause harm to members, the principle of prior notification concerning planned measures, and the principle of prevention, minimization and control of pollution of watercourses so as to minimize adverse effects on fresh water resources and their ecosystems including fish and other aquatic species and on human health.⁸

C. Cases

In the case concerning the pulp mills on the River Uruguay⁹, the Court recalled that the dispute before the Court had arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay, on the River Uruguay.¹⁰

Facts of the case included the following:

On 4 May 2006, Argentina filed in the Registry of the Court an Application instituting proceedings against Uruguay in respect of “the authorization, construction and future commissioning of two pulp mills on the River Uruguay”, with reference in particular to “the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river”. Immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court.¹¹

Argentina asked for the provisional measures in order to ensure that Uruguay would not undertake the construction of works.

Uruguay stated that it had “fully complied with the 1975 Statute of the River Uruguay” and that Argentina’s request was unfounded.

The Court was of the view that the attainment of the objective of optimum and rational utilization of the river requires “a balance between the Parties’ rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other”.¹²

The Court was of the opinion that Argentina had not established its contention that Uruguay’s decision to carry out major eucalyptus planting operations, to supply the raw material for the mill, has an impact not

only on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river.¹³

The Court observed that Article 41 obliges the Parties to adopt, within their respective legal systems, rules and measures “in accordance with applicable international agreements” and “in keeping, where relevant, with the guidelines and recommendations of international technical bodies”, for the purposes of protecting and preserving the aquatic environment and of preventing pollution.¹⁴ It noted that this obligation requires the Parties to act with due diligence in respect of all activities which take place under their jurisdiction and control¹⁵. The Court noted that “the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute”. Article 40 defines pollution as “the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects”.

In the Court’s view, there was nothing to demonstrate that the very decision by Uruguay to authorize the construction of the mills posed an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river.¹⁶

Therefore, the Court found that the circumstances were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.¹⁷

II. Use of the concept of “imminent threat of damage” in international and regional agreements and guidelines

Convention on Access to Information, Public Participation in decision-Making and Access to Justice in Environment Matter, Aarhus, Denmark, 25 June 1998

Article 5

Collection and Dissemination of Environmental Information

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

Act serving to implement the Directive of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (2007).¹⁸

§ 2

Definitions

5. Imminent threat of environmental damage: means a sufficient likelihood that environmental damage will occur in the near future;

6. Preventive measure: means any measure taken in the case of an imminent threat of environmental damage with a

view to preventing or minimising that damage;

7. Damage control measure: means any measure taken to immediately control, contain, remove or otherwise manage the relevant contaminants and other damage factors concerned in order to limit or prevent further environmental damage and adverse effects on human health or any further impairment of natural resource services;

8. Remedial measure: means any measure serving to remedy environmental damage in accordance with the special regulations;

§ 5

Threat prevention obligation

In the event of an imminent threat of an environmental damage, the responsible party must promptly take the necessary preventive measures.

§ 7

General obligations and powers of the competent authority

(1) The competent authority shall monitor the responsible party to ensure that the necessary preventive, damage control and remedial measures are taken.

(2) With regard to the obligations under §§ 4 to 6, the competent authority may require the responsible party to

1. provide all necessary information and data on an imminent threat of environmental damage, on a suspected imminent threat or on a damage that has occurred, along with the responsible party's own assessment,
2. take the necessary preventive measures,
3. take the necessary damage control and remedial measures.

The Environmental Damage (Prevention and Remediation) Regulations 2009 of England

PART 2

Preventing environmental damage

13.—(1) An operator of an activity that causes an imminent threat of environmental damage, or an imminent threat of damage which there are reasonable grounds to believe will become environmental damage, must immediately—

- (a) take all practicable steps to prevent the damage; and
- (b) (unless the threat has been eliminated) notify all relevant details to the enforcing authority appearing to be the appropriate one.

The Environmental Liability (Scotland) Regulations 2009

Preventive measures

10.—(1) In the event of an imminent threat of environmental damage caused by an activity, the operator of that activity must without delay take the necessary preventive measures.

(2) If, notwithstanding the taking of preventive measures, an imminent threat of environmental damage remains, the operator must as soon as practicable notify the competent authority of the circumstances of the threat.

(3) In the absence of any notification by an operator, if a competent authority has reasonable grounds for believing that there is an imminent threat of environmental damage it may require an operator to provide information about the threat.

(4) The competent authority may, at any time—

- (a) require an operator to provide it with such additional information as may be required by it following notification of a threat under paragraph (2); or
- (b) require an operator to take the necessary preventive measures.

(5) Where an operator—

- (a) fails to comply with the requirements of paragraph (1) or (4)(b);
- (b) cannot be identified; or
- (c) is not required to pay the costs in accordance with these Regulations, the competent authority instead of the

operator may itself take preventive measures.

(6) Failure by an operator to comply with any of the requirements of paragraphs (1) to (4) without reasonable excuse is an offence.

Framework Convention for the Protection of the Marine Environment of the Caspian Sea

I. General Provisions

Article 1. Use of Terms

"Environmental emergency" - a situation that causes damage or poses an imminent threat of pollution or other harm to the marine environment of the Caspian Sea and that result from natural or man-made disasters;

III. Prevention, Reduction and Control of Pollution

Article 13. Environmental Emergencies

3. The Contracting Parties shall cooperate for the setting up of early warning systems for industrial accidents and environmental emergencies. In the event of an environmental emergency, or imminent threat thereof, the Contracting Party of origin shall ensure that the Contracting Parties likely to be affected, are, without delay, notified at appropriate levels.

Protocol for Sustainable Development of Lake Victoria Basin Preamble

Article 1

Definition of Terms

"Emergency" means a situation that causes or poses an imminent threat of causing serious harm to a Partner State or other States and that results suddenly from natural causes, such as floods, droughts, landslides or earthquakes, or from human conduct, such as industrial accidents or inland water transport accidents;

Article 4

Principles

c) the principle of prevention to cause harm to members whereby Partner States shall individually and jointly take all appropriate measures to prevent environmental harm rather than attempting to repair it after it has occurred;

d) the principle of prior notification concerning planned measures whereby each of the Partner States shall notify other Partner States of planned activities within its territory that may have adverse effects upon those other States;

i) the principle of prevention, minimization and control of pollution of watercourses so as to minimise adverse effects on fresh water resources and their ecosystems including fish and other aquatic species and on human health;

Article 15

Prevention of Significant Harm to Neighbors

1. A Partner State shall, when utilizing the resources of the Basin in its jurisdiction, take all appropriate measures to prevent significant environmental harm to other Partner States.

Article 16

Monitoring and Precautionary Measures

1. Each Partner State shall, within its jurisdiction, monitor activities and natural phenomena with a view to determining the potential risk they pose to the resources of the Basin and its people.

Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes

Article 4

General Provisions

1. The Parties shall take all appropriate measures to prevent, control and reduce water-related disease within a framework of integrated water-management systems aimed at sustainable use of water resources, ambient water quality which does not endanger human health, and protection of water ecosystems.

Article 5

Principles and Approaches

(a) The precautionary principle, by virtue of which action to prevent, control or reduce water-related disease shall not

be postponed on the ground that scientific research has not fully proved a causal link between the factor at which such action is aimed, on the one hand, and the potential contribution of that factor to the prevalence of water-related disease and/or transboundary impacts, on the other hand;

(e) Preventive action should be taken to avoid outbreaks and incidents of water-related disease and to protect water resources used as sources of drinking water because such action addresses the harm more efficiently and can be more cost-effective than remedial action;

Declaration of the United Nations Conference on the Human Environment

Principle 7

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Principle 24

International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing.

Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, Aarhus, Denmark, 25 June 1998; available at:

<http://www.unece.org/env/pp/treatytext.htm>

² Framework Convention for the Protection of the Marine Environment of the Caspian Sea; available at:

<http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=03F9720701BA631BB435890B49EA1EC0?id=TRE-001396&index=treaties>

³ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; available at: <http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE001306.txt>

⁴ Declaration of the United Nations Conference on the Human Environment; available at:

<http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=97&ArticleID=1503>

⁵ Act serving to implement the Directive of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage; available at: <http://faolex.fao.org/docs/pdf/ger75685E.pdf>

⁶ The Environmental Damage (Prevention and Remediation) Regulations 2009 of England; available at:

<http://faolex.fao.org/docs/pdf/uk86272.pdf>

⁷ The Environmental Liability (Scotland) Regulations 2009; available at: <http://faolex.fao.org/docs/pdf/uk90918.pdf>

⁸ Protocol for Sustainable Development of Lake Victoria Basin Preamble; available at:

<http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=03F9720701BA631BB435890B49EA1EC0?id=TRE-002034&index=treaties>

⁹ International Court of Justice, Case Concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay), Summary of the Judgment of 20 April 2010; available at: <http://www.icj-cij.org/docket/files/135/15895.pdf>

¹⁰ *Ibid.*, at paragraphs 25-47.

¹¹ *Ibid.*, at paragraphs 1-24.

¹² *Ibid.*, at paragraph 175.

¹³ *Ibid.*, at paragraph 180.

¹⁴ *Ibid.*, at paragraph 195-196.

¹⁵ *Ibid.*, at paragraph 197.

¹⁶ *Ibid.*, at paragraphs 233-266.

¹⁷ *Ibid.*, at paragraphs 1-24.

¹⁸ This Act serves to implement Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Official Journal of the European Union No L 143, p. 56).