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Memorandum of Advice

**To:** Chief Isaiah Jacobs, Community Leader,

Doro Gowon Community

**From:** Amara Ojiaka (Esq)

Grace Legal Practitioners & Solicitors

**Subject:** Legal Options Available to Doro Gowon Community under International Environmental Law

**Date:** May 1st, 2020

**Introduction**

Based on the factual scenario presented, the modified grains sent by the Chadian Government to the Doro Gowon Community appears to have caused damaged to the flora and fauna (plants and animals) within the community. As a result of this, it is clear that this matter borders on the **‘Conservation of Biodiversity’**.

The term **‘biodiversity’** is derived from two words which are; **‘bios’** meaning **‘life’** and **‘diversity’** meaning **‘various’**. Therefore, **biodiversity refers to all plants and animals as well as all biological forms that exist on earth.[[1]](#footnote-1)** These plants and animals contribute to the balance and adequate functioning of the ecosystem and serve as a vital source of food and livelihood for man. For example; the people of Doro Gowon relied on farming as a means of income. Hence, it must be properly conserved. Conservation in this sense connotes protection, preservation and careful management.

Following the importance of biodiversity, the international community has developed a legal framework for its conservation. This legal framework is referred to as the **Convention on Biological Diversity** (“CBD”).

This convention is designed to protect and preserve biodiversity. It has 3 core objectives as set out in **Article 1**. They are as follows:

1. Conservation of biological diversity.
2. Sustainable use of the components of biodiversity.
3. The fair and equitable sharing of benefits resulting from the utilisation of genetic resources including; access to genetic resources, appropriate transfer of relevant technologies and funding.

The convention has two protocols or supplements known as the **Cartagena Protocol on Biosafety to the Convention on Biological Diversity** (“the Cartagena Protocol”) and the **Nagoya Protocol on Access and Benefit Sharing to the convention on Biological Diversity** (“the Nagoya Protocol”). The Cartagena Protocol is ***concerned with the handling, transport and use of ‘living modified organism’ resulting from modern technology that may have an adverse effect on biological diversity; taking into account risks to human health***. The Nagoya Protocol, on the other hand, is concerned with ***the fair and equitable use of genetic resources as well as to ensure the transfer of relevant technology to contribute to the conservation of biological diversity and the sustainable use of its components.***

However, the issues imminent in the facts presented may be resolved under the provisions of the Cartagena Protocol.

**Issues for Determination**

The aforementioned facts present five (5) legal issues for determination.

1. Whether the modified grains (MXZ19) exported to the Doro Gowon Community may be categorised as a living modified organism.
2. Whether there are applicable laws under International Law that address the transportation of living modified products/organisms.
3. Whether there is any procedure prescribed by applicable international laws for the transportation of such modified grains.
4. Whether the Chadian Government can rely on their sovereignty to escape liability for damage caused by their geothermal project to the Doro Gowon Community.
5. What remedies are available to the Doro Gowon Community for the damage suffered.

**Resolution of issues/ Discussion**

**Whether the modified grains (MXZ19) exported to the Doro Gowon Community is a living modified organism.**

Yes. MXZ19 is a living modified organism.

**Article 3** of the Cartagena Protocol defines a living modified organism as *any living organism that possesses a novel composition of genetic model material obtained through the use of modern technology.*

From the facts thereof, an analysis carried out by the ABUAD Clean and Green Club revealed that due to the ‘modifications’ of MXZ19 the soil became virulent, thus resulting in the death of the crops as well as driving away beneficial insects.

Therefore, MXZ19 is a living modified organism and as such the protocol stipulates a procedure for its safe transfer without causing harm to the environment.

**Whether there are applicable laws under International Law that address the transportation of living modified products/organisms.**

This issue is resolved in the affirmative.

International Law provided for the **Convention on Biodiversity** that is set out to conserve biodiversity, ensure the sustainable use of biodiversity as well as promote the fair and equitable sharing of genetic resources.

The convention has two (2) protocols. The Cartagena Protocol and the Nagoya Protocol. The Cartagena Protocol is concerned with the safe handling, transport and use of living modified organism resulting from modern technology that may have adverse effects on biological diversity; taking into consideration human health specifically focusing on transboundary movement while the Nagoya Protocol is concerned with the fair and equitable sharing of benefits resulting from the utilisation of genetic resources.

However, the facts are centred on the Cartagena Protocol. The **Preamble,** **Article 1 and Article 11(8)** of the said protocol states that all states must adopt the precautionary principle postulated in **Article 15** of the **Rio Declaration on Environment and Development** which states that to protect the environment, the precautionary approach should be applied by states according to their capabilities. The principle suggests that ***scientific certainty regarding the extent of the adverse effect of a living modified organism on conservation or sustainable use of biological diversity, also taking into account risks to human health, shall not prevent a state from taking preventive measures.***

The scope of the protocol according to **Article 4** covers ***transboundary movement, transit, handling and use of all living modified organism that may have an adverse effect on the conservation and sustainable use of biodiversity.***

In line with the above, it is evident that the Cartagena Protocol is the applicable law as the matter between the Chadian and Nigerian government deals with the transboundary movement, transit, handling of the MXZ19 (a living modified organism) that had adverse effects on the conservation and sustainable use of biodiversity within the Doro Gowon Community.

**Whether there is any procedure prescribed by international law for the transportation of such modified grains.**

Yes. The Cartagena Protocol employs the **Advanced Informed Agreement** (“AIA”) as set out by **Article 7.**

The purpose or essence of the procedure is to ensure that before a living modified organism is imported into a country for the first time for international introduction into the environment, the party of import;

1. is notified about the proposed import.
2. receives full information about the living modified organism and its intended use.
3. has an opportunity to assess the risks associated with the living modified organism and decide whether or not to import it.

**Article 8** states that the party of export must notify the party of import in writing furnishing the party of import with necessary information on the nature and effect of the living modified organism. Upon receipt of notification, the Party of import shall acknowledge receipt of notification within ninety days (90 days).

The acknowledgement shall state:

(a) The date of receipt of the notification;

(b) Whether the notification, prima facie, contains the information referred to in Article 8;

(c) Whether to proceed according to the domestic regulatory framework of the Party of import or according to the procedure specified in **Article 10**. [[2]](#footnote-2)

The decision procedure encapsulated in **Article 10 (3)** states that within two hundred and seventy days (270 days) of the receipt of the notification, the country of import must communicate its decision in writing to the notifier and Biosafety Clearing House[[3]](#footnote-3);

(a) Approving the import, with or without conditions, including how the decision will apply to subsequent imports of the same living modified organism;

(b) Prohibiting the import;

(c) Requesting additional relevant information following its domestic regulatory framework or Annex I within the stipulated time

It is pertinent to note that according to **Article 8 (5)** where are the party of import has failed to communicate its decision within two hundred and seventy days (270 days) this does not imply consent by the country of import.

**Article 12** provides for the procedure for review which shall apply before its 1st international transboundary movement.

In applying this principle of law to the facts, the Chadian Government did not adopt the AIA procedure hence, the Nigerian government was not given ample time to make a decision. Lack of prior notification robbed the Nigerian government from fully accessing the risk associated with the modified grains. More so, the Nigerian Government was unaware of the modifications made to the grains.

Therefore, the transboundary movement of MXZ19 was illegal and contrary to the provisions of the Cartagena Protocol.

**Whether the Chadian Government can rely on their sovereignty to escape liability for damage caused by their geothermal project to the Doro Gowon Community.**

This issue is resolved in the negative.

**Article 3** of the **Convention on Biodiversity** states that **States by the Charter of the United Nations and the principles of international law, have the sovereign right to exploit their resources according to their environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.**

This means that states are entitled to exploit their resources but must not do so at the expense of states beyond their national jurisdiction. More so, at international law, there is the preventive principle which enjoins states to prevent damage occurring within their jurisdiction by putting an end to harmful activities that may cause irreversible consequences.

Preventive measures include carrying out an **Environmental Impact Assessment** (“EIA”). **Article 14** reiterates this by providing for EIA’s which introduces appropriate environmental Impact Assessment procedure designed to mitigate the adverse effect of proposed projects on the environment where it is likely that such project may have such effect.

Concerning the facts, the Chadian Government, although empowered by their sovereignty to address their electricity issues, ought to have done so without causing damage to another state outside their national jurisdiction. Also, the adverse effects of the geothermal project could have been prevented if the Chadian Government carried out an EIA.

**What remedies are available to the Doro Gowon Community for the damage suffered.**

The Doro Gowon may submit to **Arbitration** or the jurisdiction of the **International Court of Justice.** They may be entitled to damages or compensation for their loss.

Per **Article 27** of the **Convention on Biodiversity,** where a dispute arises regarding the interpretation and application of the convention, the party concerned shall seek a solution by **negotiation**. Where this fails they may jointly seek the intervention of a third party via **mediation**. Where this fails again, they must submit to compulsory **arbitration** or the jurisdiction of the **International Court of Justice**. The parties may also submit to conciliation where this fails.

**Conclusion/Advice**

Upon careful analysis of the imminent issues and the legal responses to these issues, this legal practitioner concludes that the Doro Gowon Community has a legal standing against the Chadian government.

On this note, this legal practitioner advises the Doro Community to report to the case to the Nigerian Government who would then take this up with the Chadian Government utilizing the provisions of the **Convention of Biodiversity** and the **Cartagena Protocol on Biosafety to the Convention on the Biological Diversity** as discussed above.

The Nigerian Government on behalf of the Doro Gowon Community may sue for the failure of the Chadian Government to notify them before the transportation of MXZ19 to give than time to assess its potential risk to human health and the conservation and sustainable use of biodiversity under the applicable laws mentioned.

**References**

Damilola Olawuyi, The Principles of Nigerian Environmental Law (Afe Babalola University Printing Press)

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, <https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> (accessed April 29,2020).

The Convention on Biodiversity, <https://www.cbd.int/doc/legal/cbd-en.pdf> (accessed April 29, 2020)

1. According to Article 2 of the Convention on Biodiversity, biodiversity is the variability that exists among living organisms from all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part which includes diversity within species of ecosystems. [↑](#footnote-ref-1)
2. See Article 9 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity,<https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> (accessed April 29,2020). [↑](#footnote-ref-2)
3. See Article 20, the Biosafety Clearing-House facilitates the exchange of scientific, technical, environmental and legal information on living modified organisms as well as assisting parties in implementing its obligations. [↑](#footnote-ref-3)