COMPOS MENTIS CHAMBERS

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To: Doro Gowon Community

From: Buchi Ofulue Esq.
(17/LAW01/300)

Subject: International Legal Instruments Governing Biodiversity, Transportation of Living Modified Organisms (LMO) and Remedies for Doro Gowon Community

Date: 29th April, 2020

Legal Issues

1. Whether the Chadian Government can rely on their sovereignty to escape liability for damage caused by the geothermal project to the Doro Gowon Community
2. Whether the Chadian Government is liable for the damage caused by their Genetically Modified grains to biodiversity in Doro Gowon Community

Issue I:

Whether the Chadian Government can rely on their sovereignty to escape liability for damage caused by the geothermal project to the Doro Gowon Community. This issue is resolved in the negative because the principle of sovereignty does not automatically preclude regulation of activities that pose potential risk of significant harm to the environment and this underlies the rationale for the precautionary and preventive principle under the Convention of Biological Diversity (CBD).

Rule Applicable to Issue I:

According to Article 3 of the Convention of Biological Diversity, the principle of international environmental law is that States have the sovereign right (sovereignty)[1] to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.

[1] Sovereignty connotes that all States are equal and their territory must be respected by other states such that a domestic issue will not necessarily attract international intervention.

However, the principle of sovereignty is not absolute as such sovereign states will be liable for damage to biodiversity caused by their act. This principle is seen in the **Trails Smelter Arbitration Case** where it was noted that "the duty to protect other states against harmful acts by individuals from within its jurisdiction at all times is the responsibility of a State". Thus, where the Trail Smelter which was a Canadian Corporation domiciled in Canada polluted air in Washington, United States and the US sought damages from Canada, the arbitration panel held that the Canadian authority was liable and damages was to be paid to the US.

It is important to note that the CBD is primarily founded on the Prevention and Precautionary Principle. The Prevention Principle places an obligation on each State to prohibit activities that could cause significant harm to the environment.[2] On the other hand, the Precautionary Principle requires that scientific uncertainty should not automatically preclude regulation of activities that pose a potential risk of significant harm to biodiversity.[3]

Thus, the CBD proactively provides in Article 14 for Environmental Impact Assessment[4] procedures for proposed projects likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.[5] Furthermore, parties are to introduce arrangements that ensure that the environmental consequences of their programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account, and notify other States where activities within their jurisdiction will affect the biodiversity in another jurisdiction, amongst other things.

Article 1 of the Espoo Convention defines environmental impact assessment as a national procedure for evaluating the likely impact of a proposed activity on the environment. The convention taking into cognizance the interrelationship between economic activities and environmental impact. Thus, it sets the obligations of parties to assess the environmental impact of certain activities at an early stage of planning.

[2] Damilola Olawuyi. Principles of Environmental Law at page 264
[3] Ibid pg266
[4] See also the "Espoo Convention"
[5] Article 14 of the Convention on Biological Diversity

The procedure for environmental impact assessment is set out in Article 4 of the Espoo Convention. It provides that environmental impact assessment documentation is to be submitted to competent authorities, and the EIA documentation is to contain at a minimum:

- A description of the proposed activity and its purpose;
- A statement of the reasonable alternatives including a no-action alternative;
- Information on the environment likely to be significantly affected and alternative sites;
- The potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
- A description of mitigating measures to keep adverse environmental impact to a minimum;
- An explanation of predictive methods and underlying assumptions as well as the relevant environmental data used;
- An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
- Where appropriate, an outline for monitoring and management programs and plans for post-project analysis; and
- A non-technical summary, including a visual presentation.

Under article 3 of the Espoo Convention, the party of origin shall, for the purposes of ensuring adequate and effective consultations notify any Party which may be an affected Party as early as possible and no later than when informing its own public about the proposed activity. The affected party is to respond to the Party of origin within the time stipulated in the notification, acknowledging receipt of the notification, and indicating whether it intends to participate in the environmental impact assessment procedure.

CBD further emphasizes two modes of conservation namely *in-situ* and *ex-situ* conservation. *In-situ* conservation means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domestication or cultivated species, in the surroundings where they have developed their distinctive properties. *Ex-situ* conservation on the other hand, means the conservation of components of biological diversity outside their natural habitats.

Article 23 establishes a Conference of the Parties to review the implementation of this Convention amongst other things. Under articles 27, where a dispute arises regarding the interpretation or application of the Convention, the parties concerned shall seek solution by negotiation. If they cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party. If these fails, they may accept compulsory arbitration or submission of the dispute to the International Court of Justice, failing which the dispute will be submitted to conciliation unless the parties agree otherwise.[6]

Application of the Principle of law to issue 1

In the instant case, the Chadian State is sovereign and have the right to execute the geothermal project independent of any other nation's interference. However, as seen in the Trails Smelter Arbitration case (supra) a sovereign State will be liable for damage caused to the environment of neighboring states. Therefore, the level of interference of another sovereign state's intervention in a project like the Chadian government's geothermal project is the level to which it would[7] or could[8] cause harm to the environment of the other state.

The scenario does not expressly state that there was no Environmental Impact Assessment for the geothermal project, however, this can be inferred as no report whatsoever was submitted to the Nigerian Government to participate or seek their consent in the geothermal project in line with articles 3 and 4 of the Espoo Convention. In fact, the minister of Mines and Power submitted the geothermal project proposal to the Security Council of Chad Republic alone which is in contravention with the standards of EIA. If the EIA was conducted, the reduction in fishing activities and irrigation in the Doro Gowon community would have been mitigated.

Therefore, relying on the Precautionary Principle and Preventive Principle, sovereignty cannot be a defense for the damage caused.

[6] Op cit 296
[7] Preventive Principle
[8] Precautionary Principle

Issue II:

Whether the Chadian Government is liable for the damage caused by their living modified grains to biodiversity in Doro Gowon Community. This issue is resolved in the affirmative because the Chadian government failed to notify the Doro Gowon Community that they were sending Living Modified grains to them in line with the Advanced Informed Agreement procedure contained in the Cartagena Protocol.

Rule relating to issue II:

The principle of law is that where a country exports living modified organisms to another country which causes damage to biodiversity, that exporting country will be liable for the damage.[9]

The Cartagena Protocol is a supplementary agreement to the CBD which aims to ensure the safe handling, transport and use if living modified organisms (LMOs) resulting from modern biotechnology that may have diverse effects on biological diversity, taking also into account risks to human health and specifically focusing on transboundary movements.[10]

Biodiversity has been defined as the variability of life in all its forms, levels and combination within the ecosystem. Article 2 of the Convention on Biodiversity Diversity defines it as 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.

Article 3 of the Cartagena Protocol defines LMO as any living modified organism that possess any novel genetic material obtained through the use of modern technology.

The protocol has elements of the precautionary principle which admits that lack of scientific certainty due to insufficient relevant information and knowledge regarding the extent of potential adverse effect of an LMO on biodiversity shall not prevent a party of import from taking a decision as appropriate with regard to the import of the LMO in question in order to minimize such potential adverse effect.[11]

[9] See generally, the Cartagena Protocol
[10] Article 1 and 4 of the Cartagena Protocol
[11] Article 10 and 18 supra

The Cartagena Protocol sets out the procedure to be followed by the exporting country before an LMO is exported. This procedure is the Advanced Informed Agreement (AIA) and is set out in article 7 of the protocol. The AIA is designed to ensure that before an LMO is imported into a country for the first time for intentional introduction into the environment, the part of import of import:

a. Is notified about the proposed import;
b. Receives full information about the LMO and its intended use; and
c. Has the opportunity to assess the risks associated with that LMO and to decide whether or not to allow the import.

Under article 19 the Government is required to designate competent national authorities and national focal points to act on its behalf with respect to the Protocol. It further establishes a Biosafety Clearing House under article 20 whose functions include facilitating the living modified organisms; and assisting Parties to implement the Protocol, while taking into account the special needs of developing country Parties as well as countries that are centres of origin and centers of genetic diversity.

Application of Rule to Issue II:

In the instant case, the scenario admits that the grains were "modified", therefore, it falls within the definition of LMO above. Therefore, the Chadian Government was meant to follow the AIA procedures stipulated in article 7 of the Cartagena Protocol. They failed to notify the Nigerian Government through the National Focal Point to enable them make scientifically sound risk assessment in line with Article 15 of the Protocol.

The lack of compliance of the Chadian Government therefore makes them liable for the adverse effect of the genetically modified grains on biodiversity such as the ground beetles, ladybugs, and praying mantis as well as the soil which has become virulent.

Conclusion

My advice to the Doro Gowon community on issue one is that the Chadian Government cannot rely on their sovereignty to exculpate themselves from liability for the damage caused by their geothermal project because the Prevention and Precautionary Principle precludes them from doing

so. Consequently, the community should promptly bring the notice of the damage caused to their environment to the Nigerian Government who will instute the action on their behalf. Solution to the dispute would be by negotiation. If they cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party. If these fails, they may accept compulsory arbitration or submission of the dispute to the International Court of Justice, failing which the dispute will be submitted to conciliation unless the parties agree otherwise.

My advice to the Doro Gowon community on issue two is that the Chadian Government is liable for the damage to their natural grains, natural parasites and soil. Therefore, the representatives of the community should inform the Nigerian Government about the adverse effect of the LMO to biodiversity in their community. The Nigerian Government will bring an action on their behalf against the Chadian Government at the International Court of Justice. Alternatively, the Nigerian Government can negotiate with the Chadian Government.