



# THE BCH III PROJECT

**The Supplementary Protocol on  
LIABILITY and REDRESS in brief**

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# Basic concept

- Liability and Redress

## **Liability** in legal terms

- is the state of being legally responsible for something or answerable in law.
- It concerns both civil and criminal laws

A criminal action is a prosecution of an individual for violating a provision of the criminal code. The penalty that a defendant faces in a criminal action may include prison time, a fine, or other terms.

A civil action is a lawsuit seeking monetary damages for injury or loss that the party suing (the plaintiff) alleges the party sued (the defendant) caused. A defendant who loses in a civil action does not face the risk of prison or fines.

- Liability is an obligation that a law attach to a person to provide compensation or to take redress measures for damage resulting from an action for which this person is deemed to be responsible

# Basic concept

- Liability and Redress

## **Liability** in legal terms

- 2 types of Liability exist:

1

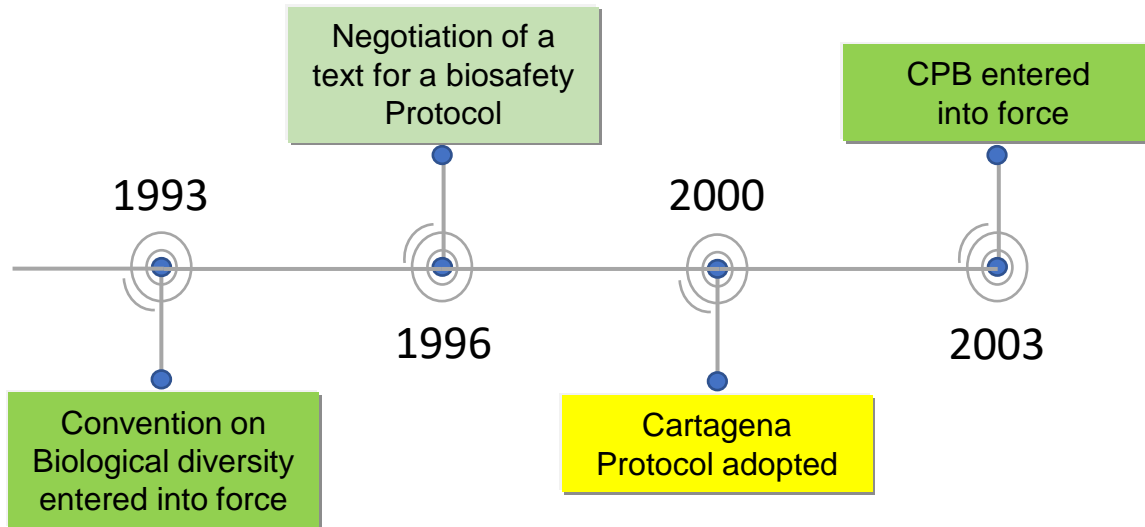
**Fault based Liability**: The plaintiff must prove that the defendant's conduct was either negligent or intentional

2

**Strict Liability**: The plaintiff must prove that it was the defendant's object that caused the damage. E.g. **Product liability** is the area of Law in which those who make products available to public are held responsible for the injuries those products cause

# Origin of the Supplementary Protocol

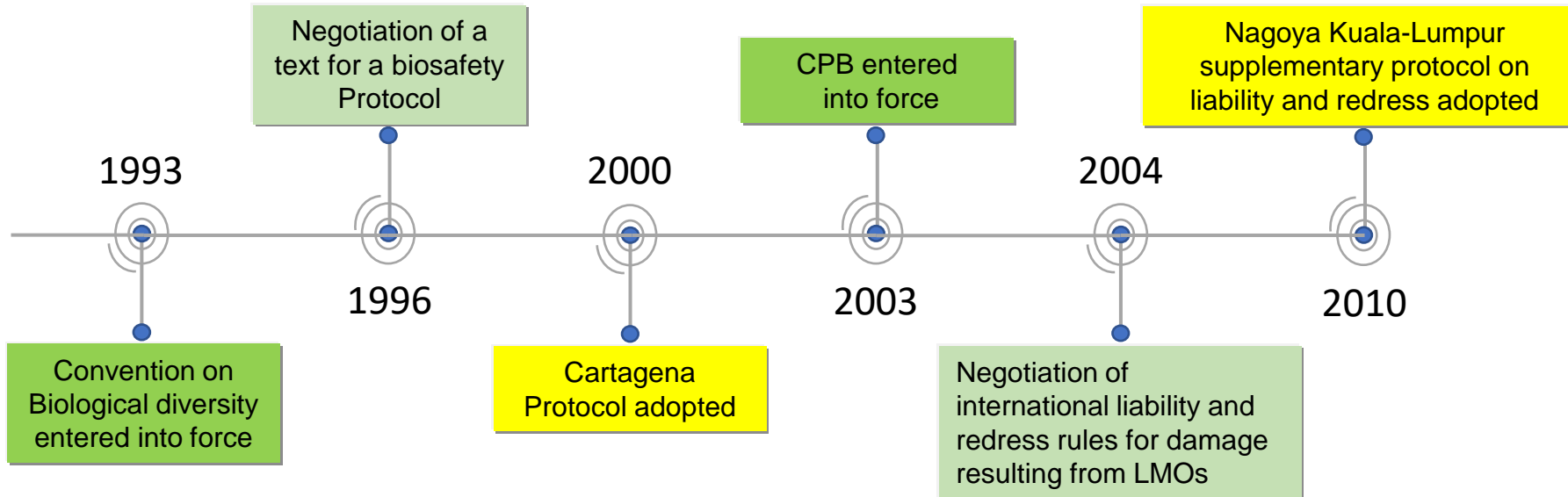
- Historical overview



- There were some contentious issues that of the negotiators of the CPB were not able to agree on and finalize at the time of adopting the protocol. They however agreed to examine them after the adoption and subsequent entry into force of the protocol. One of these issues was the issue of liability and redress.

# Origin of the Supplementary Protocol

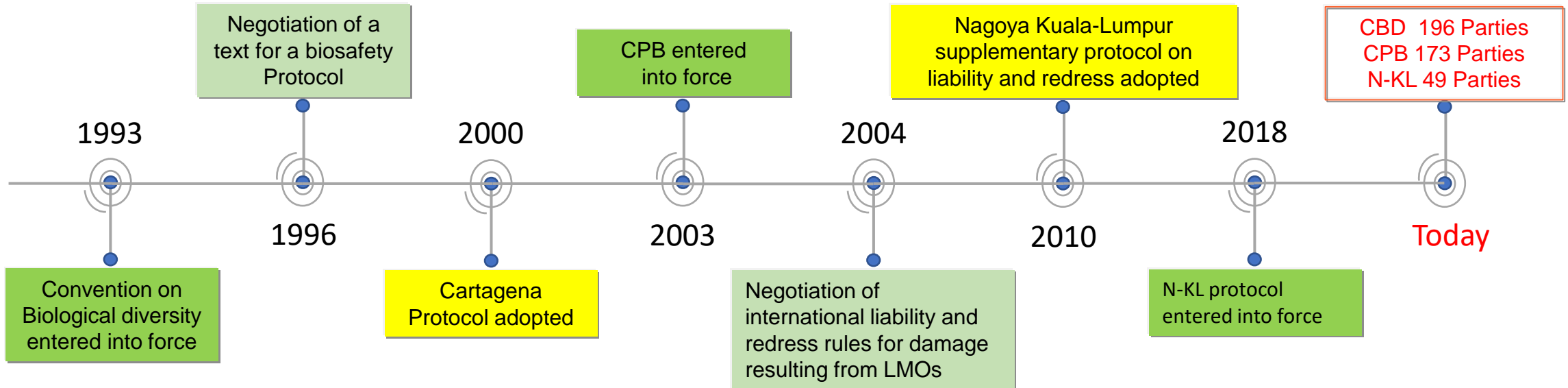
- Historical overview



- At their first meeting held in Feb 2004, parties to the CPB decide to embark on negotiation to elaborate on international rules in the field of liability and redress for damage that may results from LMOs. These negotiations took place since and came to a conclusion in October 2010.

# Origin of the Supplementary Protocol

- Historical overview



The N-KL supplementary protocol on liability and redress emerged and was adopted on 15 October 2010 by the fifth meeting of COP-MOP held in Nagoya Japan and entered into force in 2018. As of today, the CBD has 196 parties, the CPB has 173 parties and then-KL has 49 parties.

# The supplementary Protocol

- Objective

## N-KL Protocol

**Art.1** Contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health, **by providing international rules and procedures in the field of liability and redress relating to living modified organisms.**

- According to the Cartagena Protocol on Biosafety, a “living modified organism” or “LMO” is any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology (Cartagena Protocol on Biosafety Article 3(g)). This definition also applies to the Supplementary Protocol.

# The supplementary Protocol

- Objective

CPB  
Protocol

**Art.1** Contribute to ensuring an adequate level of protection in the field of the **safe transfer, handling and use of LMOs from modern biotechnology** that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.

CBD  
Convention

**Art.1** the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.



# The NG-KL supplementary Protocol

- Approach to liability and redress

Administrative approach

How, when and who should take response measures **Art. 5**

The Nagoya – Kuala Lumpur Supplementary Protocol delineates two pathways to dealing with damage:

Definitions of damage and response measures **Art. 1**

- Empowers the competent authority to address damage resulting from LMOs administratively by determining and imposing which **response measures** are to be taken by **operators**, without initial recourse to courts or the intervention of a judicial authority.

# The NG-KL supplementary Protocol

- Approach to liability and redress

Administrative  
approach

- Additionally, it has an enabling article on civil liability.
- It provides that Parties may apply or develop additional civil liability rules for damage, but does not require Parties to do so.

Civil Liability  
approach

Continue to apply their existing domestic law on the subject and/or establish rules to deal specifically with the matter

**Art. 12**

# The NG-KL supplementary Protocol

Art. 2

- Definitions

- **Damage:** *Adverse effect on the conservation and sustainable use of biological diversity taking into account human health that is*

*Measurable or observable*

*Baselines where available*

*Significant*

•The inclusion of such qualifiers as ‘or observable’ and ‘where available’ softens the otherwise stringent requirement of science-based proof of damage.

# The NG-KL supplementary Protocol

Art. 2

- Definitions

- **Damage:** *Adverse effect on the conservation and sustainable use of biological diversity taking into account human health that is*

*Measurable or observable*

*Baselines where available*

*Significant*

*Long-term or permanent change*

*Extent of the qualitative or quantitative changes affecting biodiversity components*

*Reduction of the ability to provide goods & services*

*Extent of any adverse effects on human health*

# The NG-KL supplementary Protocol

Art. 2

- Definition

- **Damage**

- **Response measures:** Reasonable actions to

A. Prevent Minimize Contain Mitigate Avoid

B. Restore biological diversity in the **following order of preference**

1. The condition that existed before the damage occurred

2. *Its nearest equivalent*

3. with other components of biological diversity for the same use

4. *For another type of use*

5. *At the same location*

6. *At alternative location*

# The NG-KL supplementary Protocol

Art. 2

- Definition

- **Damage**

- ***Response measures***

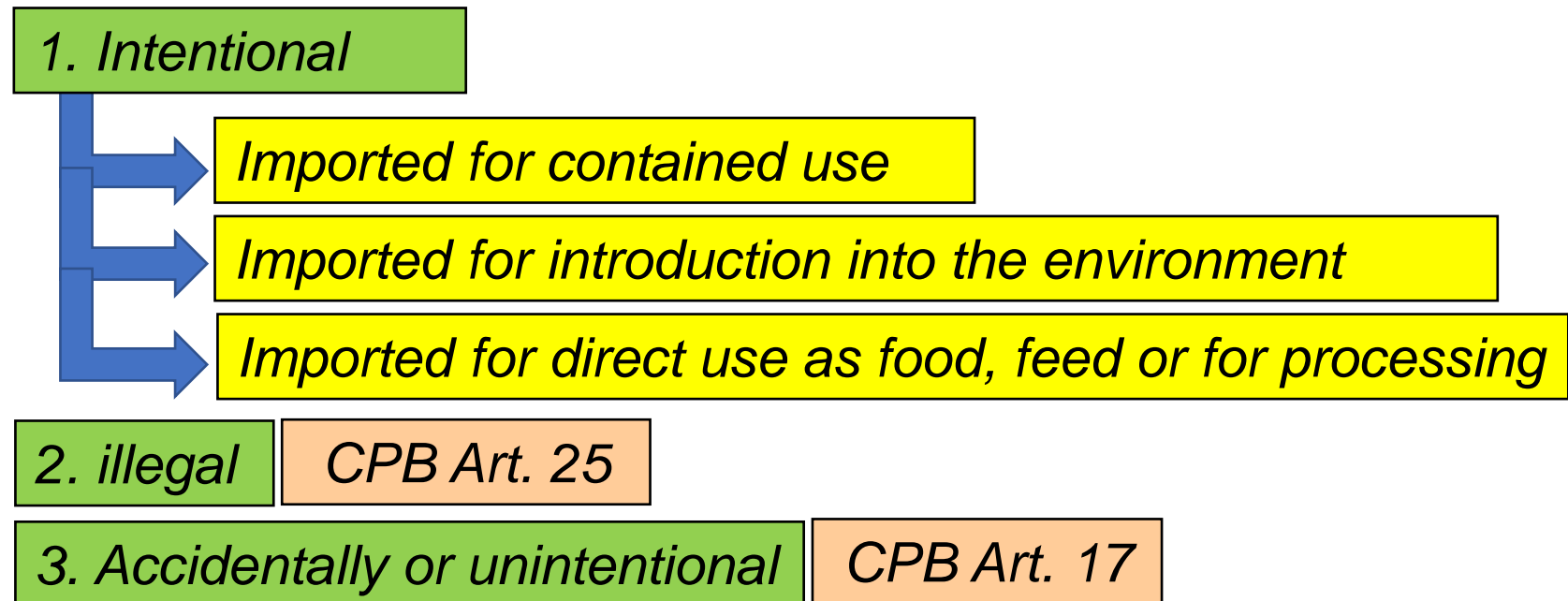
- ***Operator***: means any person in direct or indirect control of the living modified organism which could, as appropriate and as **determined by domestic law**, include, *inter alia*, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier.

The determination of who the specific operator might be in any given circumstance is left to domestic law.

# The NG-KL supplementary Protocol

- Scope

- *Damage to Biological Diversity resulting from Living Modified Organisms*
- *which find their origin in a transboundary movement*



# The NG-KL supplementary Protocol

- Scope

- **Damage** to Biological Diversity resulting from Living Modified Organisms
  - which **find their origin in a transboundary movement**

*Resulting from a transboundary movement of LMOs that started after the entry into force of this Supplementary Protocol for the Party*

**Temporal**

*Occurred in areas within the limits of the national jurisdiction of Parties.*

**Geographical**

- *Domestic law implementing this Supplementary Protocol shall also apply to damage resulting from transboundary movements of living modified organisms from non-Parties.*



# The NG-KL supplementary Protocol

Art. 4

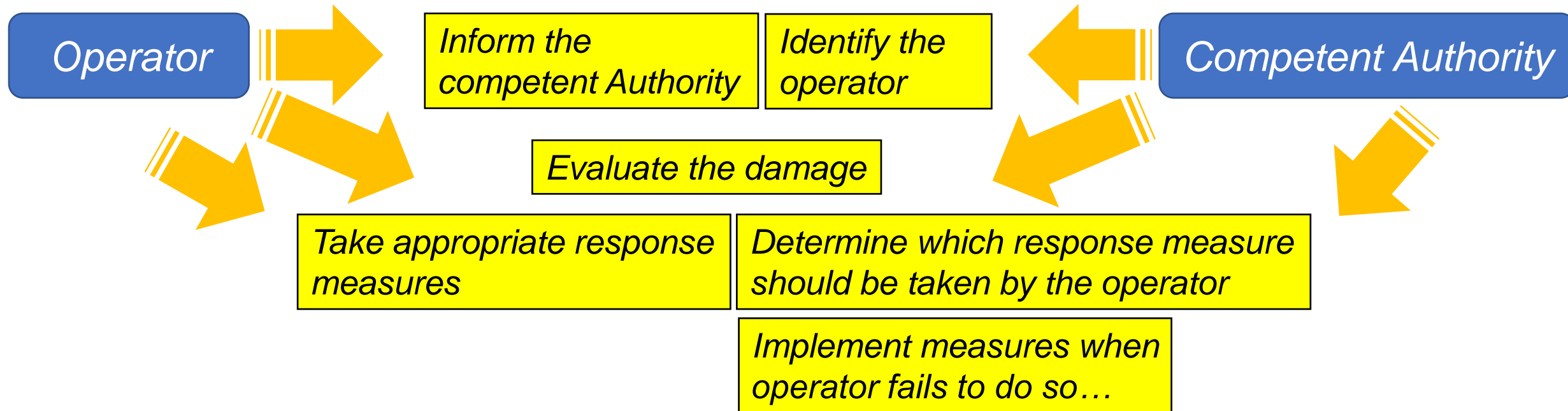
- Causation

- A causal link shall be established between the damage and the living modified organism in question in accordance with domestic law.
- It emerged during the negotiations of the Supplementary Protocol that Parties to the Protocol hold different understandings of the application of Article 27 of the Protocol to processed materials that are of living modified organism-origin. One such understanding is that Parties may apply the Supplementary Protocol to damage caused by such processed materials, provided that a causal link is established between the damage and the living modified organism in question.

# The NG-KL supplementary Protocol

Art. 5

- Response measures



- The competent authority has the right to recover from the operator the costs and expenses of the evaluation of the damage and implementation of response measures.
- The decisions of the competent authority requiring the operator to take response measures should be reasoned; and they should be notified to the operator, along with available remedies.

# The NG-KL supplementary Protocol

- Implementation and relation with civil liability

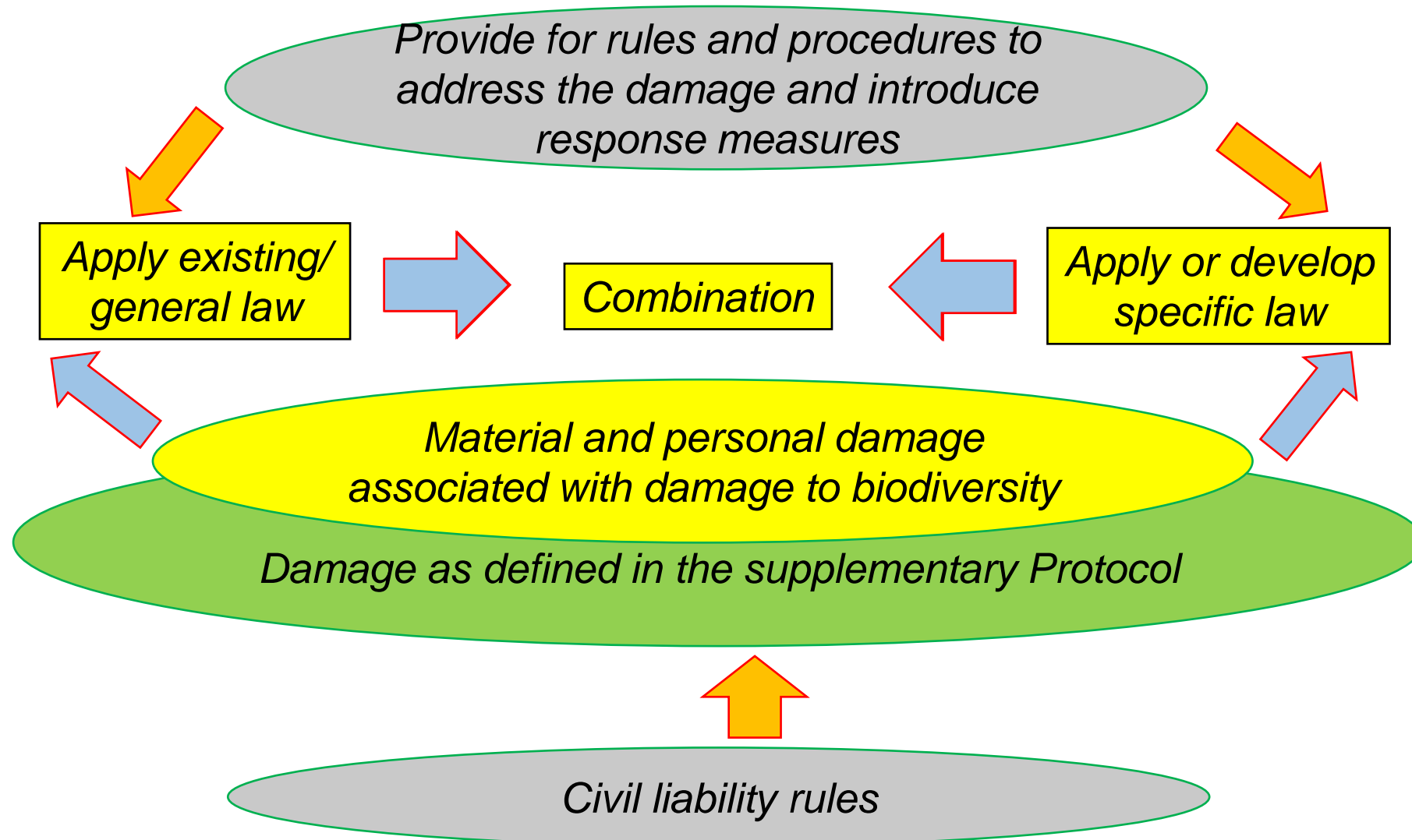
Art. 12

- the Protocol contains optional provisions concerning the development of domestic civil liability rules. Civil liability rules are usually implemented by judicial authorities, as opposed to response measures under the Supplementary Protocol, which can be imposed by an administrative authority.

# The NG-KL supplementary Protocol

- Implementation and relation with civil liability

Art. 12



# The NG-KL supplementary Protocol

- Exemptions, limits and financial security

The Supplementary Protocol contains a number of provisions that are optional. For example, it provides that Parties may address in their domestic regimes the following issues:

- Exemptions from liability, including for act of god, or force majeure, act of war or civil unrest (Article 6).
- Parties may for example exempt operators from the obligation to take response measures if the damage is the result of force majeure, acts of war or civil unrest. Such exemptions are common in rules on liability and redress.

# The NG-KL supplementary Protocol

- Exemptions, limits and financial security

The Supplementary Protocol contains a number of provisions that are optional. For example, it provides that Parties may address in their domestic regimes the following issues:

- Relative or absolute time limits to liability, including for actions related to response measures (Article 7).
- When adopting time limits to liability, it may for example be possible to exempt operators from taking response measures in case of damage resulting from a transboundary movement of living modified organisms that started before a certain date.

# The NG-KL supplementary Protocol

- Exemptions, limits and financial security

The Supplementary Protocol contains a number of provisions that are optional. For example, it provides that Parties may address in their domestic regimes the following issues:

- Financial limits for the recovery of costs and expenses related to response measures (Article 8).
- Financial limits may serve to make risks foreseeable and acceptable. Financial limits also serve to make risks insurable.

# The NG-KL supplementary Protocol

- Exemptions, limits and financial security

The Supplementary Protocol contains a number of provisions that are optional. For example, it provides that Parties may address in their domestic regimes the following issues:

- Financial security, through obliging the operator to maintain insurance to the extent of his maximum liability, to guarantee adequate compensation for damage (Article 10).
- This could for example entail the obligation on operators to insure their operations to increase the operator's financial ability to take response measures in case of damage.



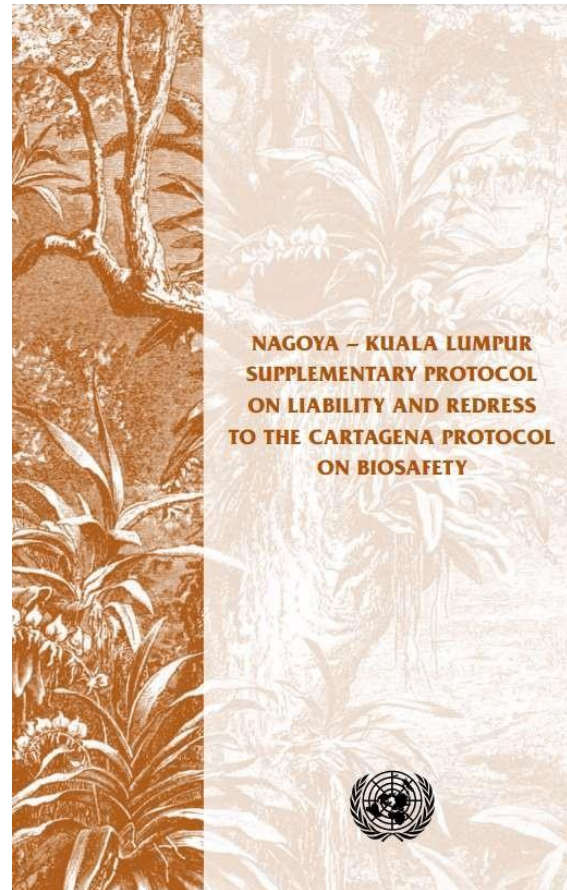
# The NG-KL supplementary Protocol

- Role of the Biosafety Clearing House
  - Maintain data on activities involving LMOs and operators;
  - Maintain criteria on monitoring and evaluation of damage to biological diversity and human health;
  - Maintain a mechanism for notifying and consulting with affected or potentially affected states in the event of incidents (Art. 17 of the CPB);
  - Inform operators of their obligations and available remedies as well as laws and regulations;
  - Make available information on incidents of damage to biological diversity and appropriate response measures taken or to be taken.

# The NG-KL supplementary Protocol

- Role of the Biosafety Clearing House
  - Make available information on incidents of illegal transboundary movements (art. 25 of the CPB)
  - Promote public awareness and education concerning damage to biological diversity resulting from LMOs and act as Source for information on the likelihood of occurrence of damage (art. 5.3 of the supplementary protocol)

# Questions and discussions



Thank you !

For more information, please email

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