



Africa Regional Capacity Building Workshop on Nagoya Protocol on Access and Benefit Sharing (ABS), Traditional Knowledge (TK) and Nagoya Kuala Lumpur Supplementary Protocol on Liability and Redress of Bio-safety (NKLSP)

Background

In furtherance to announcement made by the Honourable Prime Minister of India Dr. Manmohan Singh during 2nd Africa India Forum Summit (AIFS-II) held in Addis Ababa during the year 2011 and during COP 11 in Hyderabad on 16 October 2012 on South-South Cooperation, to further strengthen the collaboration between India and Africa, the Ministry of Environment and Forests, Government of India is hosting the above capacity building workshops on (i) Nagoya Protocol on Access and Benefit Sharing (ABS) and Traditional Knowledge (TK); and (ii) Nagoya-Kuala Lumpur Supplementary Protocol on Liability & Redress to be held on 11-13 February, 2013 in Bengaluru, India.

The event is being organised by Ministry of Environment and Forests (MoEF), Government of India in collaboration with Ministry of External Affairs (MEA), Government of India. The National Biodiversity Authority (NBA) a statutory body of the MoEF is co-ordinating the efforts of the two Ministries. The workshop will bring together government officials, scientists, policy makers, academia, civil society and other relevant stakeholders with expertise in the specific areas of focus at one platform, for learning and sharing the experiences with respect to implementation of Nagoya Protocol on ABS, TK and Supplementary Protocol on Liability and Redress and facilitating compliance to the Cartagena protocol on biosafety besides identifying options for early ratification of the Nagoya Protocol on ABS and the NKLSP.

Both India and Africa are mega diverse regions rich in biodiversity and are also centres of origin/diversity of several crops. Hence, implementation of the provisions of the CBD and its Protocols is of particular importance to both India and Africa.

The Nagoya Protocol on Access and Benefit Sharing and the Biological Diversity Act in India

India had enacted the Biological Diversity Act in 2002 to give effect to the provisions of the CBD including those relating to ABS. The Nagoya Protocol on Access and Benefit Sharing (ABS) has been adopted under the aegis of the Convention of Biological Diversity (CBD) during the tenth meeting of the Conference of Parties to the CBD, (CBD – CoP10) held in Nagoya during October 2010.

Another related pioneering initiative taken up by India is the preparation of Traditional Knowledge Digital Library (TKDL), a computerized database of documented Traditional Knowledge available in ancient Indian systems of medicine, to address concerns relating to biopiracy from India. Currently

the National Biodiversity Authority is implementing a UNEP-GEF MoEF project on **“Strengthening the Implementation of the Biological Diversity Act and Rules with focus on its ABS provisions”**.

With a strong institutional, legal and policy framework, India is well positioned to play an important role in setting the global agenda for biodiversity in the UN Decade of biodiversity 2011-2020, with this background, India is willing to share its experiences, especially relating to ABS and traditional knowledge, with the African countries, thereby contributing to better understanding of issues and promoting effective implementation of Nagoya Protocol on ABS and related national provisions within the African region.

The Nagoya Protocol provides a strong basis for greater legal certainty and transparency to both providers and users of genetic resources. By promoting the use of genetic resources and associated traditional knowledge and by strengthening the opportunities for fair and equitable sharing of benefits from their use, the protocol attempts to create incentives to conserve biological diversity, sustainable use of its components, and further enhance the contribution of biological diversity to sustainable development and human well-being.

Issues for discussion

With the adoption of the Nagoya Protocol, there is a need for countries to either examine their existing domestic ABS measures, or to undertake development of new national level measures to implement the provisions of the Nagoya Protocol. In either case, there is a need to understand the various complex implementation challenges posed by the Nagoya Protocol. These challenges *inter alia* include: Objective (Article 1), Scope (Article 3), Access (Article 6), Fair and Equitable Benefit Sharing (Article 5), TK related provisions, relationship with other instruments (Article 4), Monitoring and tracking (Article 17), User measures (Article 15, 16), Global multilateral benefit sharing mechanism (Article 10), and Capacity building (Article 22).

The capacity building workshop provides a good opportunity to share country level experiences relating to ABS, deliberate on some of the implementation challenges of Nagoya Protocol mentioned above, and also possibly discuss the approach to the issues which are on the agenda of the 3rd meeting of the Intergovernmental Committee on Nagoya Protocol (ICNP-3).

Status of ratifications

The Nagoya Protocol on ABS will enter into force 90 days after its 50th ratification. As on 4th February, 2013, 92 countries have signed the Nagoya Protocol, of which 14 countries have ratified the same. These countries includes: Albania, Ethiopia, Fiji, Gabon, India, Jordan, Lao People's Democratic Republic, Mauritius, Mexico, Micronesia (Federated States of), Panama, Rwanda, Seychelles and South Africa. Out of the 14 countries, five are from the African region and six are from the Asia-Pacific region.

Nagoya-Kuala Lumpur Supplementary Protocol on Liability & Redress

The Cartagena Protocol on Biosafety (CPB) is the first international regulatory framework for safe transfer, handling and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity including risks to human health. The Protocol was negotiated under the aegis of Convention on

Biological Diversity (CBD). The Protocol was adopted on 29th January 2000 and came into force on 11th September, 2003. As on date 164 countries are Parties to the Protocol. India ratified the protocol on 17th January, 2003.

The Conference of Parties serving as Meetings of the Parties (COP-MOP) to the Cartagena Protocol on Biosafety held at Nagoya, Japan in October 2010 has adopted the Nagoya Kuala Lumpur Supplementary Protocol (NKLSP) on Liability and Redress to the CBP after six years of intense negotiations.

The Supplementary Protocol fulfils the commitment set forth in Article 27 of the CPB to elaborate international rules and procedures on liability and redress for damage to biodiversity resulting from trans boundary movements of LMOs.

In view of the complex issues involved and variability in the legal systems in several countries, the Supplementary Protocol provides for a lot of flexibility to put in place rules and procedures on liability and redress in the event of damage from LMOs in accordance with the domestic law.

The Important Elements of the Supplementary Protocol on Liability and Redress that could be discussed in the Workshop in order to improve understanding and expedite ratification by Parties is outlined below:

Objective: The Supplementary Protocol aims to contribute to the conservation and sustainable use of biodiversity by providing international rules and procedures for liability and redress in the event of damage resulting from LMOs. The Supplementary Protocol reaffirms the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development and recognizes the need to provide for appropriate response measures where there is damage or sufficient likelihood of damage, consistent with the CPB.

The Scope of the Supplementary Protocol applies to damage resulting from LMOs which find their origin in a transboundary movement. It applies to damage resulting from any authorized use of LMOs as well as illegal and unintentional transboundary movement that started after the Supplementary Protocol has come into force. The domestic law implementing the Supplementary Protocol shall also apply to damage from transboundary movements from non-parties.

Response Measures: The Supplementary Protocol specifies the measures that need to be taken in response to damage resulting from LMOs that find their origin in a transboundary movement. In the event of damage or sufficient likelihood of damage to biological diversity, a Government, through a competent authority, would require the person in control of the LMO, i.e. the operator, to take appropriate response measures, or would take such measures itself with a right of recourse against the operator.

Financial Security: The right of Parties to provide for financial security is also enshrined in the Supplementary Protocol. Financial security is important to ensure that, if for any reason, the responsible party cannot pay for the damage caused by an LMO, there will be some means available to do so.

Time Limits / Financial Limits/ Right to Recourse: The right of Parties to provide for time limit, financial limit and right to recourse in their domestic law is enshrined in Articles 7, 8 and 9 of the Supplementary Protocol.

Choice of Instrument: The Supplementary Protocol takes an “administrative approach” whereby responses measures are required of the operator (person or entity in control of the LMO) or the competent authority if the operator is unable to take response measures. This would cover situations where damage has already occurred, or when there is a sufficient likelihood that damage will result if timely response measures are not taken. However, countries can still provide for civil liability in their domestic law.

Obligations:

1. The **focus** of the Supplementary Protocol is to support Parties in their efforts to address damage to biological diversity including human health resulting from living modified organisms by providing some essential elements that may be taken into account at the national level in developing or implementing legislative, administrative or judicial rules or procedures relevant to liability and redress. Parties are required to provide, in their domestic law, for rules and procedures that address damage. This requirement does not necessarily entail the enactment of a new law. It can be fulfilled by applying existing domestic law.

2. The **central obligation** that a Party to the Supplementary Protocol assumes is to provide for response measures in the event of damage resulting from living modified organisms. The Supplementary Protocol defines “**response measures**” as reasonable actions to (i) prevent, minimize, contain, mitigate, or otherwise avoid damage, as appropriate; and (ii) restore biological diversity. The operator or the competent authority, as the case may be, is also expected to undertake actions following a specified order of preference as part of the response measures for the restoration of biological diversity.

3. In that regard, Parties to the Supplementary Protocol have to:

- (a) Require the appropriate operator, in the event of damage, to (i) immediately inform the competent authority; (ii) evaluate the damage; and (iii) take appropriate response measures.
- (b) Make sure that the competent authority (i) identifies the operator which has caused the damage; (ii) evaluates the damage; and (iii) determines which response measures should be taken by the operator and provides reasons for such determination.
- (c) Require the operator to take appropriate response measures where there is sufficient likelihood that damage will result if timely response measures are not taken.
- (d) Put in place a requirement whereby the competent authority itself may implement appropriate response measures, in particular in situations where the operator has failed to do so, subject to a right of recourse by the competent authority to recover, from the operator, costs and expenses incurred in relation to the implementation of the response measures.

4. **“Operator”** according to the Supplementary Protocol, means any person in direct or indirect control of the living modified organism. The determination of who the specific operator might be in any given circumstance is left to domestic law.

5. Article 4 of the Supplementary Protocol requires that a **causal link** shall be established between the damage and the living modified organism in question in accordance with domestic law. This would mean that:

- *Burden of proof lies with competent authority which must have the necessary skills to evaluate whether the adverse effect may be considered “significant”.*
- *A direct correlation needs to be established between the damage and a particular LMO or LMOs.*
- Possibility of multiple sources of damage.

6. The **cost of response measures** may be covered by providing financial security mechanisms which may include insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees. In addition, the supplementary protocol provides for additional **supplementary compensation scheme** through insurance, supplementary compensation funds and private sector initiatives.

7. Supplementary Protocol also provides that a **comprehensive study on financial security** will be undertaken following the entry into force of the Supplementary Protocol to address, inter alia:

- Modalities of financial security mechanisms
- Assessment of environmental, economic and social impacts of such mechanisms, particularly on developing countries
- Identification of appropriate entities to provide financial security

Status of Signatories/ Ratifications/Accessions:

The NKLSP on liability and redress was opened for signature at the United Nations Headquarters in New York from 7th March, 2011 to 6th March 2012. As of date 51 countries are signatories to the Supplementary Protocol and 12 countries namely Albania, Bulgaria, Czech Republic, Ireland, Latvia, Lithuania, Mexico, Norway, Spain, Sweden, Switzerland and Syrian Arab Republic have ratified / acceded the NKLSP. The Protocol will enter into force on the ninetieth day after the date of deposit of the 40th instrument of ratification, acceptance, approval or accession, of the signatory countries. Of these, 3 countries are from Asia Pacific region and 11 are from the Africa region.

Why India is Hosting this Workshop

Government of India hosted the sixth meeting of parties to the Cartagena Protocol (CoP-MoP-6) and the eleventh meeting of Conference of Parties to the CBD (CoP-11) in Hyderabad, India, between 1-19 October, 2012. With this it assumed the Presidency of the CoP until CoP-12.

Government of India through the Ministry of External Affairs, Ministry of Environment and Forests and National Biodiversity Authority is organising this workshop to fulfil the three mandates. First, to

further the collaboration between India and Africa, as agreed to Under AIFS-II, second, to share its experiences in implementing various provisions on issues related to ABS, TK and biosafety with experts from African region as well as to learn from them and third, to fulfil its obligation as the CoP-11 President to forward an inclusive agenda on capacity building, awareness raising using the South-South Cooperation platform.

Objective of the workshop

To share and exchange experiences on issues related to Access and Benefit Sharing, Traditional Knowledge and Liability and Redress in the context of biosafety between India and Africa.

The Workshop

The workshop will cover the following issues:

- ✓ *Review and exchange of ideas on issues related to ABS, TK and biosafety related issues;*
- ✓ *Assessment of national level preparedness to implement the provisions of the Nagoya Protocol and the Supplementary Protocol on Liability & Redress including the capacity and technical needs and support early entry in force of the protocols;*
- ✓ *Identification of legal and regulatory requirements in relation to bioprospecting ABS and issues related to biosafety in general and liability and redress in particular;*
- ✓ *Identify means to promote regional cooperation on issues of ABS, TK and biosafety.*

The participants

The National CBD, ABS and Biosafety focal points from the Africa region and representatives of indigenous local communities have been invited for this workshop. The nominations have been called for through the respective National Focal Points in the Africa region.
