
EXPERTS' RETREAT: PROMOTING LAWS FOR BIODIVERSITY DEFINING PRIORITIES, ACTIONS AND PARTNERSHIPS

11 October 2014, 12:00 – 18:00
Korea Traditional Food Culture Experience Centre
Gangwon Province, Republic of Korea



OUTCOME REPORT

The 'Experts' Retreat: Promoting Laws for Biodiversity' was held in the margins of the 12th Conference of the Parties to the United Nations Convention on Biological Diversity (CBD) by the International Development Law Organization (IDLO), in partnership with the CBD Secretariat, Swiss Federal Office for the Environment (FOEN), ABS Capacity Development Initiative, and United Nations Environment Programme (UNEP)

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The International Development Law Organization, in collaboration with the CBD Secretariat, the Swiss Federal Office for the Environment, the ABS Capacity Building Initiative, and UNEP hosted the

Experts' Retreat: Promoting Laws for Biodiversity Defining Priorities, Actions and Partnerships

In the margins of the CBD COP 12 on 11 October 2014
at the Korea Traditional Food Culture Experience Centre, Gangwon Province, Republic of Korea



Globally, the rule of law has been increasingly recognized as key in achieving important environmental and sustainable development goals. However, debate has been lacking on the role law can play specifically to support the achievement of biodiversity objectives. The 'Experts' Retreat: Promoting Laws for Biodiversity' provided an opportunity for a focused discussion with legal experts, CBD Parties, UN specialized agencies and other relevant organizations, and civil society representatives to review the latest challenges, opportunities and innovations on legal approaches to biodiversity.

The Retreat built on the work undertaken by IDLO in partnership with the CBD Secretariat under the 'Legal Preparedness for Achieving the Aichi Biodiversity Targets', which has been engaging with national lawyers and global experts to generate knowledge and guidance on using law to achieve biodiversity goals and support CBD Parties. It also followed up on the debate started at WGR15 in June 2014, where the Roundtable on 'Legal Preparedness for NBSAPs Implementation and Mainstreaming: a Forum for Peer-To-Peer Knowledge Sharing on Country Experiences' gathered the legal community to promote peer-to-peer experience sharing by CBD Parties on promising country experiences with biodiversity laws.

The discussions at the Retreat were action-oriented, and focused on defining priorities and forging partnerships to inform and support the implementation of the Strategic Plan for Biodiversity and designing more effective legal assistance to CBD Parties. These discussions have continued throughout and beyond the CBD COP 12.



AGENDA

WELCOME ADDRESS

Ms. Hélène Molinier, Program Manager, Global Initiatives, IDLO

VIDEO PRESENTATION

Available by clicking at this [link](#)¹

OPENING REMARKS

Ms. Elizabeth Mrema, Director, UNEP-DELC

BREAKOUT SESSION ON SPECIFIC ISSUES:

Introduction: Ms. Yolanda Saito, IDLO

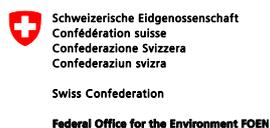
- **Implementation of the Nagoya Protocol (Aichi Target 16)**
Moderated by Dr. Andreas Drews, ABS Capacity Development Initiative, and Prof. Jorge Cabrera, Centre for International Sustainable Development Law (CISDL)
- **Mainstreaming & Economics of Biodiversity (Aichi Targets 2, 3 and 20)**
Moderated by Mr. John Tayleur, UNEP-WCMC
- **Protected Areas and Other Conservation Measures (Aichi Target 11)**
Moderated by Mr. Harry Jonas, Natural Justice

PLENARY REPORT BACK

Moderated by Dr. Kaspar Sollberger, Swiss Federal Office of the Environment

CONCLUDING REMARKS

Mr. Olivier Rukundo, on behalf of the CBD Executive Secretary
Dr. Fabiano de Andrade Correa, IDLO



¹ Video available at: <https://vimeo.com/108604853>, password: IDLO2014.

EXPERTS' RETREAT: PROMOTING LAWS FOR BIODIVERSITY

Defining Priorities, Actions and Partnerships

Organized by the International Development Law Organization (IDLO), in collaboration with the Secretariat of the Convention on Biological Diversity (CBD Secretariat), the Swiss Federal Office for the Environment (FOEN), the ABS Capacity Building Initiative, and the United Nations Environment Programme (UNEP)

EXECUTIVE SUMMARY

Awareness has been growing globally that commitment to building strong laws and institutions will be key to making progress in achieving biodiversity goals.² However, practical guidance has been lacking to assist Parties in their efforts to use law to implement the Strategic Plan for Biodiversity and its Aichi Biodiversity Targets. An Experts' Retreat was hosted alongside the 12th Conference of the Parties to the CBD to bring together the international legal community working on biodiversity issues for a focused discussion on *priorities, actions and partnerships* needed to provide effective support to Parties.

Priorities, Actions and Partnerships

The Retreat was a culmination of two years of work under the Legal Preparedness for Achieving the Aichi Biodiversity Targets Initiative, launched by the IDLO and CBD Secretariat in 2012. The Initiative began its work by scoping out knowledge on the legal issues faced by Parties resulting in a new body of knowledge with resources and practical guidance now available to inform action by Parties. In 2014, the Initiative, with the support of the Swiss FOEN, focused on placing Parties at the center of this work, hosting a Roundtable³ at WGR15 for peer-to-peer sharing of country experiences, which paved the way for the present Experts' Retreat to host focused technical discussions at COP12.

Delegates from CBD parties, international and regional organizations, civil society and academia

engaged in small group breakout discussions at the Retreat, as well as further meetings during COP 12. These discussions focused on three key themes: Nagoya Protocol, mainstreaming and economics of biodiversity, and protected areas and other effective conservation measures.

The discussions put into evidence that further work is needed in order to fulfil the gaps in legal knowledge and capacity in this area. Clear priorities going forward were defined as highlighted in the summaries below.



² At the 12th Meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD COP 12), Parties noted the need for legal and policy frameworks and called for partnerships at all levels support the implementation of the Strategic Plan for Biodiversity 2011-2020. CBD COP 12

Decision XII/1. See also CBD, Global Biodiversity Outlook 4, 2014.

³ IDLO, Roundtable on Legal Preparedness for NBSAP Implementation and Mainstreaming – Event Outcome Report, 2014.

Nagoya Protocol

Priorities, Actions and Partnerships

- COP MOP 1 of the Nagoya Protocol highlighted the need for capacity building on legal, policy and administrative measures to implement the Protocol;
- "Success" will require legal and policy reform processes that go beyond legal drafting – to ensuring political will and coordination, involvement of the private sector and indigenous and local communities (ILCs);
- More work is also needed to mainstream access and benefit sharing (ABS) issues within the broader sustainable development agenda.
- Countries have expressed the need for tailored legal approaches that carefully assess what issues to regulate, and how to do it.
- IDLO's Initiative has been working with the ABS Capacity Development Initiative through training courses to build capacity of national lawyers to advise their governments on the legal challenges being faced in implementing the Nagoya Protocol, and a call has been made for IDLO to expand this work to build up a global network of Nagoya Protocol and biodiversity lawyers. Discussions are ongoing on how to follow up on this call with different countries and partner organizations.

Mainstreaming and Economics of Biodiversity

Priorities, Actions and Partnerships

- Several attempts are being made to i) strengthen National Biodiversity Strategies and Action Plans (NBSAP) as a mainstreaming tool, including the work undertaken by UNEP's World Monitoring and Conservation Centre (WCMC), and ii) biodiversity valuation through initiatives such as UNEP's Economics of Ecosystem Services and Biodiversity (TEEB) UNDP's BioFIN Initiative, and the WAVES partnership hosted at the World Bank. However, greater attention to the legal foundations of these efforts is necessary to ensure more sustainable and effective outcomes;
- Policy instruments in NBSAPs need legal support to hold authorities accountable, and biodiversity and ecosystem valuation efforts could benefit from cross-sectoral legal assessments to enable informed choices of innovative mechanisms translating policy advice into concrete action by governments;
- UNEP and IDLO are jointly developing plans to build up tools and capacity, and provide

direct technical assistance to countries, as announced during WGRI-5;

- Conversations have been started about using IDLO's 'legal preparedness' methodology on the work being undertaken at country level by the initiatives mentioned above, with several countries expressing need and interest in such work.

Protected Areas and Other Effective Conservation Measures

Priorities, Actions and Partnerships

- The priority under the global debate on Target 11 is the need for recognition of more diverse forms of measures beyond strict protection areas, combining needs for conservation with incentives for sustainable development;
- A range of legal tools exist to meet Target 11, and countries have flexibility to choose which best fit their national circumstances;
- Further, the current lack of consensus and understanding on what constitutes "OECM" leaves open the danger for low value conservation measures to qualify while failing to promote the best approaches that balance conservation and development;
- Priority actions recognized include the need to share and promote the range of legal tools available to support different types of PAs, including community protocols promoted by organizations such as Natural Justice and UNEP, and to host proactive debates towards a clearer definition of the concept of OECMs;
- Following from COP 12, the issue was further discussed at the World Parks Congress (in Sydney, Australia) and a decision was taken to establish a Task Force to further think through these issues in the near future.

The Experts' Retreat opened up a global conversation to put into evidence and convene action on the need for more legal support for the achievement of the Aichi Biodiversity Targets, as well as partnerships and joint efforts by countries, organizations and civil society. The Retreat discussions call upon the international community to further engage in finding innovative legal solutions that can translate global commitments into transformative action on the ground.

EXPERTS' RETREAT: PROMOTING LAWS FOR BIODIVERSITY

Defining Priorities, Actions and Partnerships

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BACKGROUND AND OVERVIEW

Attention to law is key for achieving sustainable development, considering that legal barriers can block progress at the same time that enabling legal frameworks can unlock opportunities and lead to more just and equitable outcomes. Recognition has been growing that the advancement of the rule of law at the national and international levels is essential for sustainable development.⁴ This recognition has been reflected in a proposed stand-alone “Rule of Law” target in the latest proposal for the Sustainable Development Goals (SDGs) released by the Open Working Group in June 2014. The text recognizes the need to promote rule of law and access to justice, including effective, accountable and transparent institutions, participatory and representative decision-making and public access to information.⁵ The importance of the rule of law for environmental matters more specifically has also been recognized by

the international environmental community.⁶ However, specifically in the biodiversity sphere, despite growing awareness,⁷ the discussion still needs to be further advanced.

Since 2012, IDLO's Global Initiative on *Legal Preparedness for Achieving the Aichi Biodiversity Targets* has been working in partnership with the CBD Secretariat to build knowledge, awareness and capacity of legal practitioners on the legal aspects of implementing the Strategic Plan for Biodiversity. Through research, capacity building and knowledge exchange with legal practitioners and policy makers around the world, the work of the Initiative has been gathering evidence of how law makes an effective contribution to biodiversity, through:

- i) the creation, implementation and enforcement of **strong legal frameworks** that enable the translation

information, public participation, accountability, transparency, liability for environmental damage, fair and just enforcement, and human rights and its importance to reduce violations of environmental law and to achieve sustainable development.

UN Environmental Assembly, Preliminary Background Note, 3 June 2014. On the occasion of the 1st Session of the United Nations Environment Assembly in 2014, a Global Symposium on Environmental Rule of Law was held and focused on environmental justice and sustainable development. Participants emphasized, among other issues, that achieving sustainable development will require greater focus on development of laws and policies that can balance protection and sustainable use of the environment, and also the importance of capacity building, transparency, public participation, accountability, good governance and justice in environmental matters.

⁷ For instance, the 7th Trondheim Conference on Biodiversity highlighted the need for legal and governance arrangements, as well as active coordination between sectors and appropriate safeguards as means to further implementation of the Strategic Plan for Biodiversity. See Seventh Trondheim Conference on Biodiversity, “Ecology and Economy for a Sustainable Society”, Co-Chairs Report, June 2013.

⁴ Rio+20 Outcome Document, the Future We Want, para. 10: Declaration of the High Level Meeting of the UNGA on the Rule of Law at National and International Levels, A/RES/67/1, 30 November 2012, para. 7.

⁵ Proposed SDG 16 includes Target 16.3: *promote the rule of law at the national and international levels, and ensure equal access to justice for all.*

⁶ UNEP, *Advancing Justice, Governance and Law for Environmental Sustainability*, 2012, page iv. Held at the margins of Rio+20, UNEP's World Congress on Justice, Governance and Law for Environmental Sustainability gathered high-ranking representatives of the judicial, legal and auditing bodies of countries around the world, which have affirmed “the role of law as an indispensable tool on the path towards sustainable development and greener economies”, as well as stated that “without adherence to the rule of law, without open, just and dependable legal orders the outcomes of Rio+20 will remain unimplemented.”

See also: UNEP, *Decisions Adopted by the Governing Council/Global Ministerial Environment Forum at its first Universal Session, Decision 27/9: Advancing justice, governance and law for environmental sustainability*, UNEP/GC.27/17, followed up on this issue and recognized the term ‘environmental rule of law’, including issues such as adequate and implementable laws, access to justice and

- of international biodiversity goals into national priorities and mechanisms;
- ii) the establishment and proper functioning of **responsive and accountable institutions** at all levels; and
 - iii) the **empowerment of people**, especially the most vulnerable and marginalized groups, to benefit from the opportunities arising from biodiversity for their livelihoods, and to uphold their rights related to the environment and their sustainable economic development.⁸

Countries and organizations worldwide have been developing and adopting legal approaches and solutions to address a growing range of biodiversity challenges, which are contributing to achieve more clear, stable, sustainable and equitable outcomes for biodiversity and people. It is now timely to connect these efforts and discussions and to define a new focused agenda to promote effective legal responses supporting CBD parties to implement the Strategic Plan and achieve the Aichi Biodiversity Targets.

As part of this Global Initiative, an Experts' Retreat was held on Saturday October 11th, in the margins of the twelfth Conference of the Parties to the Convention on Biological Diversity (CBD COP 12). It built on the discussions of IDLO's Roundtable held in the margins of the fifth Ad Hoc Open-ended Working Group on the Review of Implementation of the Convention (WGRI-5) in June 2014 in Montreal, in which over sixty representatives of CBD parties and organizations shared experiences on building legal preparedness for implementing National Biodiversity Strategies and Action Plans (NBSAPs).⁹

The purpose of the Retreat was to bring together select representatives from CBD Parties, UN specialized agencies and other relevant organizations, civil society as well as eminent legal experts for a focused discussion on:

- i) the latest global dialogues and developments on the rule of law for sustainable development, and outcomes of the IDLO-SCBD Legal Preparedness for Achieving the Aichi Targets Initiative;
- ii) the gaps in legal knowledge and capacity and sharing of innovative legal responses being

- developed by CBD Parties and relevant organizations; and
- iii) the definition of actions and partnerships to devise effective legal solutions to address key biodiversity challenges at the national level.

In order to advance the recognition of the role of law for biodiversity goals, the Retreat provided a briefing session on the status of international debates on rule of law and sustainable development issues. The Retreat also aimed at promoting a focused debate, and therefore hosted breakout session in which participants were divided into three thematic groups. The themes of the breakout session were chosen according to pressing issues that have emerged under the two years of work undertaken by the Initiative as areas in which more focused legal work is needed. Participants in each of the groups engaged in lively discussions on challenges and gaps, achievements and innovations, and how to further provide legal support for the implementation of the CBD Strategic Plan. A plenary report back session updated the broader audience on the discussions in each group and was followed by a moderated debate.



The Retreat was an invite-only event and targeted at bringing together the legal officers and experts present at COP 12, including representatives from CBD parties international organizations, civil society and academia. A list of participants is included in Annex I of this report. The outcomes of the Retreat were also reported back to the broader audience at COP 12 in an official side-event held by IDLO and partners at the Alpensia Convention Centre on 16 October 2014.

⁸ IDLO, Legal Toolkit for Legal Preparedness for the Aichi Biodiversity Targets, forthcoming 2014.

⁹ Roundtable of Legal Preparedness for NBSAP Implementation and Mainstreaming: a Forum for Peer-to-Peer Knowledge Sharing

on Country Experiences, 21 June 2014, ICAO Headquarters, Montreal.

OPENING REMARKS

The Retreat opened with a luncheon briefing session to inform attendees on the outcomes of the Global Initiative and recent global developments in defining the contribution of law for achieving biodiversity and more broadly sustainable development goals.

Ms. H el ene Molinier, Program Manager, Global Initiatives Division of IDLO, provided welcoming remarks, highlighting IDLO's perspective on biodiversity as not simply an environmental issue but a development issue linked to justice, equity, access to rights and connected to economic and social fields, like agriculture, livelihoods, energy and minority rights. She provided an overview of the Initiative's achievements and growth since its launch in 2012, pointing out that the first challenge faced by IDLO was to raise awareness and understanding on why and how law can be key for achieving the Aichi Targets. The Initiative's work began by collaborating with national lawyers and global experts to document promising laws that are relevant for achieving different biodiversity goals related to the Aichi Targets. Compilations and analysis of this research will be made available in the form of four scoping papers and Toolkits on Legal Preparedness to be released at the end of 2014.



Ms. Molinier updated participants on IDLO's commitment beyond research, to build capacity of national lawyers and directly assist countries to address their legal challenges on biodiversity. Attendees learned about the inaugural capacity-building course delivered in partnership with the ABS

Capacity Development Initiative in July 2014. During the course, 15 legal practitioners from the African, Caribbean and Pacific (ACP) regions strengthened skills and knowledge to build their capacity to advise their own governments on the legal challenges being faced in implementing the Nagoya Protocol. Ms. Molinier called on partners and countries to work with IDLO to expand this work to build up a global network of Nagoya Protocol and biodiversity lawyers.

Ms. Molinier also stressed IDLO's approach to move beyond the practice of hiring short-term consultants to draft biodiversity laws, offering a new vision of legal preparedness - a collaborative country-led process to put coherent legal systems in place capable of leading to transformative and lasting change. She renewed IDLO's commitment to the legal preparedness process, and called on partners and countries to collaborate with the Initiative in its next phase of work aimed at directly assist countries to develop tailored and innovative legal frameworks to support the implementation of the Strategic Plan and the Aichi Biodiversity Targets.

The welcoming remarks were followed by a keynote address by Ms. **Elizabeth Mrema, Director of UNEP's Division of Environmental Law and Conventions (UNEP-DELIC) providing a substantive overview on the latest global dialogues on the rule of law for the environment.** Ms. Mrema highlighted the evolving concept of Environmental Rule of Law, and the work undertaken by UNEP in organizing a number of preparatory meetings leading up to the 2012 World Congress on Justice, Governance and Law for Environmental Sustainability in Rio de Janeiro, Brazil, where this concept was firstly coined. Subsequently, during UNEP's first universal session of its Governing Council/Global Ministerial Environment Forum (GC/GMEF), held in February 2013, the Environmental Rule of Law was recognized for the first time in an intergovernmental document through a decision on advancing justice, governance and law for environmental sustainability.¹⁰ The decision noted the importance of an independent judiciary in the adjudication of environmental disputes, emphasized environmental auditing as an important element in ensuring transparency and accountability, as well as justice as an intrinsic element of environmental sustainability, and recognized that violations of environmental law have the potential to undermine

¹⁰ UNEP Decision 27/9: Advancing justice, governance and law for environmental sustainability, UNEP/GC.27/17, 2013.

sustainable development and the implementation of environmental goals and objectives.

Ms. Mrema also provided an update on the outcomes of the recent Environmental Rule of Law Symposium, held alongside the first Session of United Nations Environmental Assembly (UNEA), in June 2014. The Symposium was organized with a view that environmental law is a foundation for environmental sustainability, and the full realization of its objectives is ever more urgent vis-à-vis growing environmental pressures. It took note of the violations of environmental law that can undermine the achievement of all dimensions of sustainable development and environmental sustainability. Bringing together key stakeholders, the event discussed the ways and means by which the further development and implementation of Environmental Rule of Law can help ensure just and sustainable development outcomes, including adequate and implementable laws, access to justice and information, public participation, accountability, transparency, liability for environmental damage, fair and just enforcement, and human rights. Among the many outcomes of the Symposium, participants discussed the key role of the Environmental Rule of Law for sustainable development, considering that law, coupled with strong implementing institutions, is essential for societies to respond to increasing environmental pressures in a way that respects fundamental rights and principles of fairness, including for future generations.



Ms. Mrema concluded by noting some areas related to the biodiversity agenda that need consideration in the context of rule of law, such as: i) both substantive and procedural law issues like rights to resources (genetic resources and associated traditional knowledge), the right to participation in decision making, right of access

to information regarding biodiversity, obligations (of governments and users of the resources), equity (fair distribution of benefits), among others; ii) strong institutions to ensure the effective management, monitoring and tracking of some of the issues related to access to the resources and their utilization; iii) effective enforcement mechanisms to ensure justice prevails in the event of breaches of law; and iv) cross cutting issues like capacity building and technical assistance, and appropriate legal frameworks to regulate areas such as the Nagoya Protocol.

BREAKOUT SESSIONS

Following the opening session, a two-hour breakout session was held to facilitate in-depth and focused debate. Attendees were invited to join thematic groups to share and discuss the most pressing legal challenges and innovations in the national implementation of the Aichi Biodiversity Targets, and to explore how further innovative legal responses can be designed to address the identified challenges. The themes for the breakout sessions were aligned with the main areas in which legal challenges have been identified and substantial work has been completed by IDLO through its Global Initiative, and through a series of pre-COP 12 consultations with participants and advisors:

- Building Legal Frameworks to Implement the Nagoya Protocol (Aichi Target 16),
- Mainstreaming and Economics of Biodiversity (Aichi Targets 2, 3 and 20),
- Protected Areas and Other Conservation Measures (Aichi Target 11).

Tailored guiding questions for each Breakout Session were proposed around four main issues:

- What have been the main legal achievements in this area?
- What are the gaps, challenges and barriers?
- What is needed to fill these gaps or further promote more achievements?
- What partnerships are needed to promote the most effective legal solutions to address key biodiversity challenges at the national level?

Participants chose a breakout group based on their practical experience and expertise, and their active engagement contributed to a dynamic exchange of

views. The discussions were led by expert moderators that provided a general overview on the themes and key questions for consideration.



The expected outcomes of the sessions were to recall the main challenges, identify innovative legal solutions, and pave the way to new partnerships and programming opportunities to provide focused support to CBD parties to build up their legal preparedness for biodiversity at the national level.

Breakout Group 1: Building Legal Frameworks to Implement the Nagoya Protocol

With the entry in force of the Nagoya Protocol on October 12, 2014, countries are now faced with the challenge of developing new or amending existing administrative, legislative or policy measures to meet the obligations set out in the Nagoya Protocol. The challenge is immense, requiring laws and lawyers to consider a wide range of cross-cutting issues from natural resource governance, intellectual property law, health, contract and commercial law, indigenous rights, dispute resolution mechanisms, environmental protection, amongst others. Innovative legal solutions are urgently needed to assist CBD Parties to achieve the global commitment under Aichi Biodiversity Target 16, that the Nagoya Protocol is in force and operational, consistent with national legislation by 2015. With the first half of the Target now achieved, the focus now falls on the question of how to make the Nagoya Protocol operational at the national level.

The pressing nature of this issue was reflected in the high number of participants this group gathered. Discussions were framed around the understanding that no one-size-fits-all solution exists but valuable

lessons may be learned by examining other relevant experiences with:

- ABS-related national measures developed prior to the adoption of the Nagoya Protocol;
- Newly enacted measures (since the adoption of the Nagoya Protocol) including those that are still in draft form; and
- Various ongoing processes and approaches taken by countries in developing administrative, legislative and policy measures to implement the Nagoya Protocol.

Reviews of country efforts conducted by IDLO's Initiative and partner agencies like the ABS Capacity Development Initiative highlight some common challenges, including *inter alia*:

- Establishment or designation of appropriate institutions to support the implementation of the Nagoya Protocol (designation of competent national authorities, check points etc.);
- Scope of application of the national measures and legal status of genetic resources and associated traditional knowledge (TK);
- Modalities and procedures for granting/ obtaining Prior and Informed Consent (PIC);
- Modalities and approaches for negotiation and implementing mutually agreed terms (MAT); and
- Approaches in developing effective mechanisms to meet the compliance and monitoring obligations under the Nagoya Protocol.
- Also of note, are regional-level legislative and policy developments that provide guidance in relation to the implementation of the Protocol (i.e. the European Union Regulation on the Implementation of the Nagoya Protocol and the African Union Guidelines for the Coordinated Implementation of the Nagoya Protocol on ABS currently being developed).

This group was moderated by Dr. Andreas Dews, from the ABS Capacity Development Initiative, and Prof. Jorge Cabrera, from the Centre for International Sustainable Development law. Among the main points of discussion and conclusions, the following can be highlighted:

- **Political will and institutional coordination are essential** for the buy in from key decision makers regarding the implementation of the Nagoya Protocol.
- **Having an ABS law is just the first step** in the process of implementation. Ensuring that the law can be enforced and that it will work on the

ground is key. Examples of "early" ABS legislations developed in the late 1990s and early 2000s where implementation was too burdensome and not functioning were noted.

- There is a need to mainstream ABS within the broader sustainable development agenda and this issue is key to bring decision makers on board. This presents the **challenge of framing ABS legislation in a way that highlights its potential contribution to promoting sustainable development objectives**, such as the creation of green jobs.
- Knowing what to regulate is important. With the advance of science and the sharing and the availability of electronic information on the properties of genetic resources, there is a **need to carefully assess what is being regulated and how the regulation can cover all the possible scenarios**. Understanding how the Research and Development process takes place is critical for the establishment of a functional ABS regulation.
- It is **crucial to involve the private sector** at the onset; and understanding business models is in this regard crucial.
- Indigenous and local communities (ILCs) must participate in the implementation of the Nagoya Protocol. **Support is needed to raise awareness and create capacity within ILCs about the rights and obligations under the Protocol** and how national measures will be applied.



Breakout Group 2: Mainstreaming and Economics of Biodiversity

Mainstreaming biodiversity across sectors and society and recognizing the value of ecosystem services is one of the main challenges faced by CBD Parties as they work towards the implementation of the Strategic

Plan. Actions to be taken include: reciprocal mainstreaming of biodiversity and development into NBSAPs, national poverty reduction and development strategies, and the sustainable development agenda (Aichi Target 2); further recognition of the economic value and benefits of biodiversity for society (Aichi Target 3); and securing new and additional financing sources (Aichi Target 20).

Countries and organizations worldwide are taking action to achieve these goals, for example by putting in place economic incentives and financing mechanisms. These actions aim to foster a creative/green economy and sustainable businesses, and promote strategies to better synergize international financing. Such measures include linking biodiversity and climate change mitigation; applying (legal or voluntary) biodiversity safeguards to financing; economic valuation of ecosystems and biodiversity, and natural capital accounting. The lack of supportive governance and legal frameworks can create roadblocks to progress in these efforts, while coherent legal and policy measures can catalyze and make their outcomes more effective and sustainable.

Given the broad scope of these issues, progress to date has been limited, but the moment is timely to advance. WGRI 5 recently defined modalities and milestones for the achievement of Aichi Target 3, proposing steps at national levels to identify harmful incentives for elimination phase out or reform, and implementation of positive incentives.¹¹ National and sub-national policies enshrined in law and made effective through legal approaches have much to contribute to these processes. In fact, lessons learned are emerging from IDLO programming and research with country experiences,¹² which demonstrate that, among other issues:

- Countries can use a range of legal measures to mainstream biodiversity considerations across sectors, including environmental impact assessment (EIA) or other forms of impact assessments, taxation and revenue laws, access to information, property laws, land planning and others;
- Establishing enabling legal frameworks can build confidence and buy-in for the creation of mechanisms such as Payment for Ecosystem Services (PES), biodiversity offsets, fiscal and

¹¹ WGRI 5 Document UNEP/CBD/WGRI/5/4/Add.1.

¹² IDLO, Legal Aspects of Aichi Biodiversity Target 3: a Scoping Study, 2014.

market based approaches for biodiversity, as well as unlock opportunities for promoting a green economy and sustainable businesses;

- Defining clear legal mandates for institutions at national and local levels can contribute to overcoming impasses between ministries, spread awareness and empower authorities to mainstream biodiversity considerations across sectors and support implementation of legal measures;
- Legal empowerment of people, especially the most vulnerable populations and those that depend on biodiversity for their livelihoods can lead to more sustainable use of biodiversity and a better integration of biodiversity concerns in economic activities.

The above suggests that biodiversity laws and adequate governance structures can play an important role by providing the certainty and incentives for governments and people to work together towards building a green economy and promoting sustainable development. While there is no one-size-fits-all solution, the exchange of experiences among countries and organizations is of utmost importance to identify what has been successful and could be replicated, what are the most pressing challenges, and what partnerships could be forged to provide coherent support to countries.



These issues provided a background for a lively exchange of views and debate moderated by Mr. John Tayleur, from UNEP-WCMC. Among the main considerations and points raised, the following can be highlighted:

- Mainstreaming: biodiversity is important for driving ownership by diverse and often powerful

sectors, but also for identifying new sources of financing and spreading the fiscal load across sectors. **NBSAPs can be an important way to mainstream biodiversity.** One participant cited recently concluded (yet unpublished) studies that reviewed 26 NBSAPs developed after 2010 and examined among other things how issues related to legal preparedness are reflected, as well as the need to develop new legislation. Many of the NBSAPs did not address or articulate legal issues, while some included a review of biodiversity-related legislation horizontally as implementation goals. Participants commented that **if policies needed for successful mainstreaming are not supported by law they will face difficulties**, such as holding parliaments accountable for their achievement. Law will not solve everything but is an important enabler to mainstream biodiversity, binding different sectors and holding them accountable.

- **Other types of tools are available to mainstream biodiversity**, with EIAs and different types of economic valuation of biodiversity and national capital accounting among the most promising. Participants noted that these tools can be included in both policy and legal instruments. Example of policy approaches include UNEP's Economics of Ecosystems and Biodiversity (TEEB) and EIA procedures in some countries that integrate biodiversity values. While these approaches appear promising, participants agreed that **if their outcomes are not included or reflected in some form of document with legal force they will be less effective.**
- Balancing development and biodiversity conservation and sustainable use was cited as a challenge. **Legal innovations such as on protected areas (PA) and other types of conservation governance that is compatible with development will be important.**
- The question was raised whether it would be better to have dedicated laws for biodiversity, cross-cutting laws, or embed biodiversity considerations into sectoral laws. Participants discussed the importance of these approaches and commented that **cross cutting laws such as introducing provisions on EIA are instrumental, but laws on specific sectors related to biodiversity are needed.** It was emphasized that if only Environment Ministries are concerned with biodiversity it will be difficult to implement the CBD Strategic Plan. Thus, **legal approaches have a role in mainstreaming biodiversity across sectors**

and making it legally binding to consider biodiversity in decision-making.

- The issue of having rights related to the environment and biodiversity recognized in national Constitutions was cited as important to allow the justiciability of these sectors against violations. At the same time, participants pointed out that in many countries where the Constitution and legal system contain innovative provisions that recognize the right of nature itself and value of biodiversity, the focus shifts to **challenges of ensuring effective implementation and enforcement**. An example of this challenge is the need to build institutions capable of implementing the law, as the Ministries of the Environment often have limited budgets and resources and would benefit from more tools to mainstream biodiversity into other sectors.
- **On the legal support for implementing biodiversity incentives, public procurement, green businesses, offsets and reform of subsidies were addressed.** Participants emphasized that these issues face challenges both in terms of political will, but also on legal spheres such as tax and administrative law. Examples were cited of countries where legislation on offsets is very strict, requiring compensatory measures, but **implementation and capacity building are a challenge**. The need for greater legal education and capacity building was noted.
- Other common legal challenges considered were **conflicting laws, and the importance of looking at implications of different laws on different sectors and ministries**. Further, the issues of equivalence was noted, referring to the fact that there may be very different interpretations of implementation even in different regions of a country that undermine the level playing field theoretically generated by national legislation.
- **Lack of legal certainty was agreed by many participants as one of the most important legal barriers for biodiversity incentives.** Law and legal preparedness were cited as missing links, capable of bringing certainty to all relevant stakeholders. This includes the private sector, which has an important role to play in providing financing resources and achieving Targets 3 and 20.
- Considering all the issues discussed, the need to seize every opportunity when legislation is being revised or new legislation is being written has been underlined in order to address these challenges and create enabling mechanisms that will support successful initiatives for mainstreaming and biodiversity incentives.

Breakout Group 3: Protected Areas and Other Conservation Measures

Aichi Biodiversity Target 11 reaffirms and emphasizes the need for a nuanced understanding of **Protected Areas (PAs) and Other Effective Area-Based Conservation Measure (OECMs)** - one that focuses not simply on strict preservation areas, but of sustainable landscapes and seascapes. **Aichi Biodiversity Target 11 calls for 17% of terrestrial and 10% of marine areas to be conserved by 2020 through systems of PAs and OECMs.** It stipulates that the Target should be reached with due regard to the following qualitative aspects: ecological representativeness, areas of particular importance for biodiversity and ecosystem services, management equity and effectiveness, connectivity conservation, and integration into wider landscapes and seascapes.

Research undertaken by IDLO, IUCN, Natural Justice and other partners illustrates that many CBD Parties have an array of pre-existing legal instruments to increase and improve their systems of PAs and OECMs. However, **some of these legal frameworks are not as effective as they might be**, particularly in the context of Target 11. A range of deficiencies include: weak legal and institutional frameworks, lack of information to facilitate coherent land use planning, systems of governance and management that suffer from a deficit of equity and effectiveness, and the lack of diversity of conservation measures, such as in transboundary contexts.

These factors are often compounded by pressures of encroachment or degazettement of PAs for economic and industrial activities and governments' perceived economic costs of increasing PAs and OECMs coverage to areas that could otherwise be used for other economic activities. In addition, government-managed PAs are, for a variety of reasons, often viewed unfavorably by indigenous peoples and local communities, as they limit some of their livelihood activities.



While target 11 explicitly envisages areas outside of PAs contributing directly, and with equal weighting, to the overall target, **there is no clear legal or technical definition of what constitutes an OECM¹³. It is urgent to lift the ambiguity around this terminology**, to provide guidance to countries on how they could develop alternative conservation systems but also to bring certainty in the measurement of the progress around this target.

Economic development and the effects of climate change are adding new complexities to existing social and ecological systems. These weaknesses, gaps and new challenges require serious and sustained attention, hence the need to increase the capacity of those involved in the governance and management of PAs and OECMs. Notwithstanding the above constraints and pressures, this is a time of opportunity for the achievement of Aichi Biodiversity Target 11, for the following reasons:

- The advances in theoretical and practical approaches to landscape, seascape and transboundary conservation provide added opportunities to integrate PAs and OECMs into larger land and resource use plans in various sectors such as agriculture, forestry and mining.
- There are opportunities in the area of national and regional land use regulations that can contribute to ecological representativeness, connectivity conservation and the establishment of areas of importance for biodiversity. These objectives can be achieved through a range of different legal and quasi-legal instruments and approaches, including national conservation and sustainable use legislation, land use planning legislation, voluntary conservation agreements, and community-based conservation.
- The IUCN PA governance types and management categories provide options to achieve the overall terrestrial and marine PA targets. In this regard, new and innovative approaches such as payments for ecosystem services (PES), access and benefit-sharing (ABS), reducing emissions from deforestation and forest degradation (REDD) with REDD+ including the role of conservation, sustainable management of forests as well as enhancement of forest carbon stocks, and

voluntary conservation agreements are potentially useful.

- There are renewed efforts to identify marine areas of ecological/biological significance beyond national jurisdiction.
- Attention should be given to improving and making better use of existing instruments. Most PAs-related laws comprise core elements that can be strengthened, including ensuring the participation of all concerned groups; taking into account traditional knowledge and conventional scientific information; strengthening management, monitoring, and enforcement capacity; modernizing financial accounting; and insisting on broader conservation planning as part of sustainable development.
- Consideration should be given to non-conservation legal tools, such instruments could include land-use planning and development control laws, including coastal development and zoning; sustainable use laws in agriculture, fisheries, forestry, and water management, as well as laws on public finance, economic incentives and disincentives; and, where applicable, use of innovative market mechanisms such as PES, conservation banking, biodiversity offsets, and tradable development rights.

Building on those considerations, the breakout group also produced a **fruitful discussion moderated by Mr. Harry Jonas, from Natural Justice. The main conclusions reached by the group can be summarized as:**

- **More thought is needed with regard to transboundary systems.** There are many challenges and opportunities when addressing transboundary biodiversity conservation. They involve complicated legal and institutional arrangements but also complex governance structures, involving government agencies, NGOs, local communities and indigenous people. Successful creation and management of transboundary conservation areas entails strong legal cooperation as it is impossible to develop a unified a set of rules to regulate them. The laws of each countries concerned, such as civil law, criminal law, the scope of powers of the legal enforcement officers continue to apply to the

¹³ "While Aichi Target 11 explicitly includes "other effective area-based conservation measures", at present there is neither a clear definition of what these measures are, nor comprehensive

information on the total area covered by such measures' (Bertzky et al., 2012; Woodley et al., 2012).

parts of the protected area which are under that country's sovereignty. Therefore it is important to build a set of good governance and management practices but also to identify effective dispute resolution mechanisms to support conservation efforts.

- **There is a challenge and need to further address the concept of OECMs**, to develop a workable definition that leads to greater legal recognition for *bone fide* conservation measures outside PAs and which also guards against the inclusion of activities that lead to an overall net loss of biodiversity, such as industrial agriculture. Indeed, unless clear guidance is given on this issue, conservation law and policy will continue to inappropriately and/or inadequately recognize the great diversity of forms of conservation and sustainable use of ecosystems. There is a need to define what are the constituent elements of these measures and make sure they also safeguards the rights of indigenous peoples and local communities.
- There was a **call for further improving information on area-based conservation**, such as community-conserved areas and the role of community protocols as legal instruments.
- **Issues of governance, lack of effectiveness of PAs and encroachment were also cited as needing further improvement.** Indeed, there are many forms of PAs with various legal status. They englobe public parks, private nature reserves or public-private partnerships, which address various needs such as protection of endangered species, research or eco-tourism. While some countries have set a common set of rules whether these areas are managed by government staff or private companies, in many countries regulations and funding for conservation activities differ depending on the status.

PLENARY REPORT BACK AND CLOSING REMARKS

After the breakout session, the group reconvened in plenary and **Dr. Kaspar Sollberger, from FOEN, facilitated a report back discussion.** Moderators from each of the three groups presented the main conclusions and findings from their focal area, and participants had the opportunity to make final comments and follow-up recommendations. There was agreement that while progress has been made in

advancing the legal agenda for biodiversity, a significant amount of work remains to be done to address the lack of legal knowledge and support for CBD parties in this field.

In closing the discussion, **Mr. Olivier Rukundo, Senior Policy Advisor, convened a message to participants drawing on the outcomes of discussions held between IDLO and the CBD Executive Secretary, Mr. Braulio Ferreira de Souza Dias in preparation for the retreat.** He highlighted that the rationale for the Legal Preparedness Initiative within the CBD Secretariat was the realization that for the implementation of the Strategic Plan and the achievement of the Aichi Targets there was a need for greater capacity for developing legal frameworks and capacity. IDLO was selected as the organization to fulfil this task. The Initiative evolved into finding key areas where legal work was needed, the Nagoya Protocol being the first one. It was key understand further at what stage countries were with regards to ABS legislation, and to further develop legal tools to help countries implement the obligations under the Protocol. The discussions are ongoing and it is necessary to continue identifying pressing issues countries are facing in the implementation of the CBD and to address them by providing legal support. In this regard, Mr. Rukundo stressed that collaboration between IDLO's Initiative and the Secretariat should continue, and reinforced that activities under this Initiative should be expanded.



Finally, **Dr. Fabiano de Andrade Correa, from IDLO, closed the meeting thanking participants for their active contribution to the Retreat.** He mentioned that awareness and recognition of the importance of the rule of law for sustainable development has substantively evolved in the international scenario, citing examples of the Rio+20 outcomes and the current discussions of the SDGs. At the same time, he noted that at the outset of IDLO's Global Initiative in

2012, IDLO's strategic focus was on raising awareness and providing evidence for stakeholders to recognize the relevance of using legal approaches for biodiversity, as this debate and awareness were lacking. Two years down the road, he recognized that the debate has moved beyond this initial stage. IDLO has built up knowledge in this area and established a global network of legal practitioners - including senior experts and junior researchers, undertook research shared in the form of publications that helped define priorities and point out legal barriers and exchange of experiences to develop solutions, provided capacity building tools and activities, and now is at the stage of reaching out to countries to work on the ground at the national level to build up a new generation of biodiversity laws.

Recognizing that this must be a collaborative task, he made a call for action and partnerships to advance this issue, highlighting the need to further raise awareness of challenges, successes and capabilities in terms of legal preparedness to achieve the Strategic Plan for Biodiversity. In this regard, he noted that collaborations and innovative approaches will be fundamental to put together the pieces of this puzzle. He finished by pointing out that the conversations started at the Retreat would be continued and reported back to the broader community at COP 12 in an official side event to take place on 16 October 2014.

CONCLUSION AND NEXT STEPS

The outcomes of the Experts' Retreat clearly demonstrated that these discussions are part of a broader and ongoing debate that is necessary to understand and address the legal challenges and innovations to achieve the Aichi Targets, as well as to forge partnerships that will enable further assistance to CBD parties in their national efforts. The Global Initiative for the Legal Preparedness for Achieving the Aichi Biodiversity Targets will continue being the global convener for the international legal community working on biodiversity issues and engaging with CBD Secretariat and international agencies, as well as with national stakeholders. As discussions in the Report Back Session put in evidence, there is space and potential for events with a legal focus such as this Retreat to become part of the official CBD calendar and ultimately an integral part of the work towards the achievement of the CBD Strategic Plan.



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ABOUT IDLO

IDLO enables governments and empowers people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.

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