

DESIGNING FUTURE JUST LAWS ON BIODIVERSITY

TRAINING MATERIALS FOR GOVERNMENT OFFICIALS
AND PARLIAMENTARIANS

PREPARED FOR THE 11TH MEETING OF THE PARTIES TO THE
CONVENTION ON BIOLOGICAL DIVERSITY

HYDERABAD

OCTOBER 2012



About the World Future Council (WFC)

The World Future Council brings the interests of future generations to the centre of policy making. The Council consists of up to 50 respected personalities from all five continents. They come from governments, parliaments, the arts, civil society, science and the business world. The Council addresses challenges to our common future and provides decision makers with effective policy solutions. In-depth research underpins advocacy work for international agreements, regional policy frameworks and national lawmaking. In close collaboration with civil society actors, parliamentarians, governments, business and international organisations we identify and spread "best policies" around the globe. The World Future Council is registered as a charitable foundation in Hamburg, Germany, where its head office is located. Additionally, we have staff working in Brussels, London, Washington D.C. and Johannesburg.

World Future Council

Mexikoring 29, 22997 Hamburg, Germany

Tel: +49 40 30 70 914-0/fax: +49 40 30 70 914-14

Email Info@worldfuturecouncil.org/web www.worldfuturecouncil.org

About the Centre for International Sustainable Development Law (CISDL)

The mission of the CISDL is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law. The CISDL is an independent legal research centre that collaborates with the McGill University Faculty of Law and also works with a network of developing countries' faculties of law. The CISDL is engaged in six primary areas of sustainable development law research including: trade, investment and competition law; natural resources law; biodiversity and bio-safety law; climate change and vulnerability law; human rights and poverty eradication in sustainable development law; and health and hazards in sustainable development law. As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal brief in English, Spanish and French. The CISDL hosts academic workshops, dialogue sessions, legal expert panels, law courses and seminar series and conferences. It provides instructors, lectures and capacity building materials for developing country governments and international organizations in national and international law in the field of sustainable development, and works with countries to develop national laws to implement international treaties in these areas.

Centre for International Sustainable Development Law

3644 Peel Street, McGill Faculty of Law, Chancellor Day Hall, Montreal, Quebec, Canada H3A 1W9

Tel: +1 514 398 8918/fax +1 514 398 8197

Email secretariat@cisdl.org/ web www.cisdl.org

Authors

Jorge Cabrera and Frederic Perron-Welch, CISDL Biodiversity & Biosafety Law Programme

Alexandra Wandel, Plarent Ruka, World Future Council

ACRONYMS & SHORT FORMS

ABS	Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization
BL	Biodiversity Law
CBD	Convention on Biological Diversity
CBDR	Common but differentiated responsibilities
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on Migratory Species
COP	Conference of the Parties
FAO	Food and Agriculture Organization of the United Nations
ILA	International Law Association
IPPC	International Plant Protection Convention
ITPGR	International Treaty on Plant Genetic Resources for Food and Agriculture
NDA	The Nature Diversity Act of Norway, referring to Act of 19 June 2009 No. 100 relating to the management of biological, geological and landscape diversity
NEPA	The National Environment Protection Act, 2007
NGOs	Non Governmental Organizations
Ramsar	Convention on Wetlands of International Importance for Waterfowl
SANBI	South African National Biodiversity Institute
UNCLOS	United Nations Convention on the Law of the Sea
UPOV	International Union for the Protection of New Varieties of Plants
WHC	UNESCO World Heritage Convention

INTRODUCTION

Future Just laws must embody the highest standard of sustainability, respect for human rights, and respect for the environment. They should, in both intention and effect, work to defend the interests of future generations in a pragmatic manner based on principles of justice and sustainability. This training material presents an approach to drafting and preparing a Future Just biodiversity law for a technical audience, with the aim of supporting national focal point officials or other government officials tasked with preparing biodiversity legislation.

The training materials were written recognizing that many of users will be from countries that have not developed comprehensive biodiversity laws, but do have measures in place to protect biodiversity using sectoral approaches (e.g. wildlife, wetlands and protected areas legislation). Thus, they propose a process for drafting a Future Just biodiversity law which includes determining the existence of relevant laws, collecting relevant information on biodiversity, and deciding upon the substance of the legislation. In addition, it emphasizes the need for an ongoing review, feedback and learning process once the law is adopted.

The training begins with guiding principles for drafting legislation. These principles are drawn from existing biodiversity laws at the national level and practical experience in implementing the CBD. Concrete examples are provided to illustrate some of the procedural and substantive elements. First, it presents basic principles relevant for the drafting of environmental laws in general. After that, guiding principles for the process and the substantive issues to be addressed are presented, taking into account the particularities of this field of environmental law. Principles for monitoring implementation are discussed. Last, it is proposed that the process should also be guided by international sustainable development law principles and a table with relevant questions for decision makers is included.

Finally, the content and drafting process should be consistent with the legal, social, economic and environmental conditions of a country and take into account all relevant international obligations, in particular, but not limited to, the Convention on Biological Diversity (CBD). Other relevant treaties could include, depending on the State, the Convention on International Trade in Endangered Species (CITES), Convention on Migratory Species (CMS), Convention on Wetlands (Ramsar), International Plant Protection Convention (IPPC), International Union for the Protection of New Varieties of Plants (UPOV), and FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), UNESCO World Heritage Convention (WHC), and the UN Convention on the Law of the Sea (UNCLOS).

TABLE OF CONTENTS

INTRODUCTION.....	4
TABLE OF CONTENTS.....	5
MODULE ONE: GUIDING PRINCIPLES FOR DRAFTING.....	6
MODULE TWO: USE OF SUSTAINABLE DEVELOPMENT LAW PRINCIPLES.....	9
CHECK-LIST FOR DECISIONMAKERS.....	13
EXAMPLES OF EXEMPLARY POLICIES.....	14
CONCLUSIONS.....	17
ENDNOTES.....	19

MODULE ONE: GUIDING PRINCIPLES FOR DRAFTING

Countries have worked to implement the provisions of the *Convention on Biological Diversity*¹ (CBD) since its adoption and entry into force in 1992/1993. Because the CBD is a framework treaty with mainly aspirational goals, it has been difficult to objectively measure whether parties have implemented its provisions by law, policy or other measures. Given the global community's failure to meet the 2010 Biodiversity Target, it appears that States did not do nearly enough to implement the terms of the CBD in substance and effect. From the perspective of future justice, the global extinction of biodiversity is utterly detrimental to the rights of future generations. It is clear that all countries need guidance on how to achieve conservation, sustainability and intergenerational equity in law.

Ongoing negotiations since the adoption of the CBD have led to greater clarity on how its terms should be interpreted. Greater legal clarity to the provisions of the CBD has been brought by the adoption of three Protocols: the *Cartagena Protocol on Biosafety*² (Cartagena Protocol) and its *Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress*³ (Nagoya-Kuala Lumpur Protocol), and the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits resulting from their Utilization*⁴ (Nagoya ABS Protocol) as well as with the adoption of several Guidelines on topics such as Biodiversity and Tourism,⁵ Indigenous Peoples,⁶ Invasive Alien Species,⁷ Sustainable Use,⁸ Biodiversity Impact Assessment,⁹ and The Ecosystem Approach.¹⁰ Designing biodiversity laws and policies to benefit future generations will require a holistic implementation of the vision of the CBD.

1. Fundamentals of Drafting

The following principles should guide the drafting process. Some are also relevant for the definition of the content.

- ⇒ Assess the nation's biodiversity and biological resources, identify current impacts on domestic and transboundary biodiversity and ecosystems, locate drivers of biodiversity loss and evaluate the possibilities for halting biodiversity loss.
- ⇒ Establish clear goals in advance to inform and inspire the provisions of the Biodiversity Laws and Policies. The development of goals provides relevant guidance for the selection and drafting of the instruments and mechanisms to be included in the law in accordance with a country's vision and priorities.
- ⇒ Ensure that a broad set of stakeholders, including government officials from the key government ministries (incl. environment, agriculture, forests, transport, fisheries, trade, finance, economics etc) and representatives from indigenous, academic, peasant, civil and private sectors, participates in the drafting of the biodiversity law.
- ⇒ Identify certain domestic policy areas and laws that might be counterproductive for the biodiversity. Such areas need to be addressed in the law or repealed accordingly through other laws or instruments.
- ⇒ Identify existing international obligations, including any relevant CBD decisions and guidelines, and existing domestic laws and policies in place relating to biodiversity. A specific legal analysis of the issues to be addressed in the biodiversity law vis à vis the rest of the existing legal framework is a common feature in designing good laws and policies, including through the identification of loopholes and areas where enabling clauses are needed to allow future development of regulations and policies. Among the international conventions relevant for biodiversity conservation and sustainable use are: Ramsar; Convention on Migratory Species; Convention to Combat

Desertification; CITES; UNESCO Convention; UNCLOS; ILO Convention; any relevant regional or bilateral environmental instruments, etc.

2. Substantive Legal Aspects

In addition to the procedural aspects, the following substantive issues should be assessed and considered in order to their inclusion in the Biodiversity Law.

- ⇒ Establish strong governance over components of biological diversity with national, regional and local biodiversity commissions/units with participatory, transparent, and accountable decision-making.
- ⇒ Integrate biodiversity into all policies and actions and including linkages to other policies, such as those concerning climate change, forestry, land use, agriculture and marine management policies.
- ⇒ Establish balance and linkages between measures undertaken to fulfil CBD objectives on conservation, sustainable use and access and benefit sharing arising out of the utilization of genetic resources.
- ⇒ Implement all the relevant biodiversity related obligations (International Treaty on Plant Genetic Resources for Food and Agriculture, Ramsar, CITES, etc) in a synergistic manner, including by obtaining appropriate information on relevant COP decisions and other developments.
- ⇒ Ensure comprehensiveness of the biodiversity law (content and scope covers most of the relevant CBD provisions), taking into consideration the existent legal framework governing biodiversity.
- ⇒ Outline the roles and responsibilities of all relevant stakeholders, including government, business and citizens, in halting and reverting biodiversity loss in the interest of current and future generations.
- ⇒ Establish *in-situ* and *ex-situ* biodiversity conservation measures, including protected area management and ecosystems protection.
- ⇒ Create schemes that enable, integrate and reward the sustainable use of biodiversity, such as payment for ecosystem services.
- ⇒ Develop an appropriate set of instruments to monitor compliance with the general objectives, addressing key topics such as invasive species.
- ⇒ Protect, promote and ensure fair and equitable benefit sharing from the use of traditional knowledge, innovations and practices pertaining to biodiversity.
- ⇒ Recognize the role of indigenous peoples and local communities in biodiversity management and conservation.
- ⇒ Include the following interpretive principles for statutory interpretation and implementation:
 1. Precautionary Principle: If there is a risk of serious or irreversible damage to biodiversity, lack of knowledge shall not be used as a reason for postponing or not introducing management measures.
 2. Ecosystem approach: Any pressure on an ecosystem shall be assessed on the basis of the cumulative environmental effects on the ecosystem now and in the future.
 3. Preventive approach: Preventing harm by limiting activities like the use of chemicals and alien invasive species to prevent deleterious effects to biodiversity.
- ⇒ Implement an access and benefit-sharing regime meeting, at minimum, the terms of the *Nagoya ABS Protocol*.

- ⇒ Establish safeguards to protect biodiversity from the risks of genetically modified organisms, respecting the provisions of the *Cartagena Protocol on Biosafety* and the *Nagoya- Kuala Lumpur Supplementary Protocol on Liability and Redress*.
- ⇒ Develop mechanisms to provide for awareness raising, education, incentives and technology transfer, such as public awareness raising and education and training programmes in schools and universities to increase knowledge, valorization, skills and experience necessary to address biodiversity challenges.
- ⇒ Create mechanisms for public participation and access to justice in the development and implementation of the biodiversity law, including instruments to provide feedback from the different stakeholders.
- ⇒ Include information mechanisms, including research measures need to be included to ensure timely and up to date information on the state and trends of biodiversity in co-ordination with international and regional bodies to adjust to new challenges and inform the public

3. Additional Tools for Implementation, Monitoring and Revision

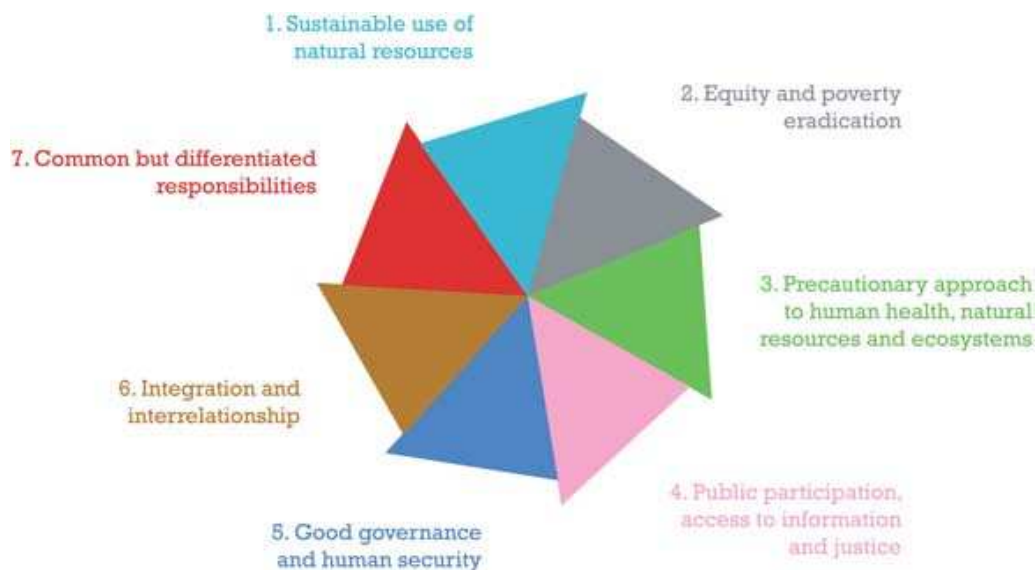
Some of the substantive elements and components of the BL relate to implementation, monitoring and review of the Law (a continual learning process). The following tools should be considered in order to promote the appropriate implementation and monitoring (and consequent revision) of the law.

- ⇒ Create innovative financing mechanisms that are integrated laws or policies to ensure the effective long term implementation of the law and CBD objectives. These mechanisms can serve the following strategic objectives:
 1. Promoting payment for ecosystem services;
 2. Undertaking environmental fiscal reforms including innovative taxation models and fiscal incentives;
 3. Exploring opportunities presented by promising innovative financial mechanisms such as markets for green products, business-biodiversity partnerships and new forms of charity;
 4. Integrating biodiversity and ecosystem services into the development of new and innovative types of international development finance, taking into account the costs of conservation.¹¹
- ⇒ Establish strong legal measures and an appropriate institutional structure with the power to oversee implementation. Sanctions and penalties should be created for non-compliance because strong governance can ensure the sustainable use of biological diversity.
- ⇒ Ensure the participation of a broad set of stakeholders in implementation, monitoring and revision of the biodiversity law, including government officials from key government ministries and representatives from indigenous, academic, peasant, civil and private sectors.
- ⇒ Create a review or update process for the law or policy and collect information on progress in implementation of the law and the status of biodiversity.
- ⇒ Develop targets in line with the five goals of the Strategic Plan for Biodiversity 2011-2020 and its 20 Aichi Biodiversity Targets agreed upon at COP 10 to the CBD.

MODULE TWO: USE OF SUSTAINABLE DEVELOPMENT LAW PRINCIPLES

Seven sustainable development law principles can be distilled from the international processes on sustainable development and the hundreds of international treaties signed in the past 40 years.¹² Those tasked with drafting laws or policies should use them as a guide to ensure that the needs of future generations are taken into account.¹³ They help focus attention on optimal sustainable development objectives and outcomes of the law or policy, as well as on governance structures and processes to ensure effective implementation.¹⁴

The 70th Conference of the International Law Association elaborated these seven principles in the “Declaration of Principles of International Law Relating to Sustainable Development” (the ILA Principles) in 2002 as a definitive tool to inform the formulation of law and policy. The ILA Principles provide the most current benchmark of important principles of international law on sustainable development. The principles, many of which were present in the Brundtland Report (1987) and the 1992 Rio Declaration, are the central principles of most international treaties related to sustainable development. They were adopted by decision-makers at the 2002 World Summit on Sustainable Development (WSSD) and provide a valuable compilation of principles against which laws and policies on biodiversity can be assessed. They are shown in the following diagram¹⁵ and are discussed in greater length below.



The seven principle methodology assists in crafting policies and laws that show a truly integrated approach to sustainability, foster respectful cooperation, equitable participation, and fair sharing of resources and benefits of economic, scientific and technological progress. This is particularly appropriate given that the ILA Principles are consistent with the 2002 *Johannesburg Plan of Implementation* of the *World Summit on Sustainable Development*. The Principles help to focus decision-makers’ attention on expected outcomes as well as on governance structures and processes conducive to their effective implementation.¹⁶

1. Sustainable use of natural resources

Countries have the duty to sustainably use their natural resources, particularly when those resources span national boundaries. This stems from their sovereign right to manage their own natural resources, and their responsibility to ensure that activities within their jurisdiction or control do not cause significant environmental damage elsewhere. The sustainable use of natural resources should contribute to the development of peoples, with particular regard for indigenous peoples, and to nature conservation and environmental protection.¹⁷

This duty is reflected in the CBD and is elevated in importance because biodiversity is a common concern of humankind and underlies the planet's life support systems. States are responsible for conserving their biodiversity and using their biological resources in a sustainable manner. Parties are required under Article 6 to take two general measures that relate to sustainable use:

- a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt existing strategies, plans or programmes that reflect relevant measures set out in the CBD
- b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies

Furthermore, Article 10 requires Parties to take five specific measures to support the sustainable use of components of biological diversity:

- a) integrate consideration of the conservation and sustainable use of biological resources into national decision-making
- b) adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity
- c) protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements
- d) support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced
- e) encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources

2. Equity and poverty eradication

The principle of inter-generational and intra-generational equity is central to the attainment of Future Justice and sustainable development. While the present generation has a right to use and enjoy the resources of the Earth, it is also under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit – in its broadest meaning – of future generations. The right to development must be implemented so as to meet developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes exercising the duty to co-operate for the eradication of poverty, as well as the duty to co-operate for global sustainable development and the attainment of equity in the development opportunities of developed and developing countries.¹⁸

3. Precautionary approach to health, natural resources and ecosystems

The precautionary approach to human health, natural resources and ecosystems requires that where there are threats of serious or irreversible damage, lack of full scientific certainty is not used as a reason for postponing cost-effective preventative measures. This requires States, international organizations and non-governmental actors, in situations of scientific uncertainty, to avoid activities that may cause significant harm. It includes ensuring accountability for harm caused, planning based on clear criteria and well-defined goals, consideration of all possible means to achieve an objective when completing an environmental impact assessment, and establishing an appropriate burden of proof on the proponent of activities which may cause serious long-term or irreversible harm. Decision-making processes should always endorse a precautionary approach to risk management and the adoption of appropriate precautionary measures in particular. Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. The CBD adopts a precautionary approach to biodiversity through biosafety, EIA, and national planning.

4. Public participation, access to information and justice

Public participation and access to information and justice require states to ensure that individuals have access to appropriate, comprehensive and timely information concerning sustainable development that is held by public authorities and the opportunity to participate in decision-making processes as well as effective access to judicial and administrative proceedings, including redress and remedy. It is a basic condition for responsive, transparent and accountable governments, the active engagement of civil society organizations ensuring the vital role that women have in sustainable development. Public participation is based on the effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. This is dependent upon access to appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, access that does not impose undue financial burdens upon the applicants and that gives due consideration for privacy and adequate protection of business confidentiality. Empowerment depends on access to effective judicial or administrative procedures to challenge measure and claim compensation and includes non-discriminatory access for those in other countries that are affected by transboundary harm.

5. Good governance and human security

The principle of good governance commits States and international organizations to adopt democratic and transparent decision-making procedures and financial accountability, to take effective measures to combat official or other corruption, to respect the principle of due process in their procedures, and to observe the rule of law and human rights. Civil society and non-governmental organizations also have a right to good governance by States and international organizations, while non-state actors should be subject to internal democratic governance and to effective accountability. Furthermore, good governance requires full respect for the principles of the Rio Declaration, the full participation of women in all levels of decision-making and corporate social responsibility and socially responsible investments for a fair distribution of wealth among and within communities.

6. Integration and interrelationship

The principle of integration and interrelationship provides the context for international law on sustainable development by emphasizing the interdependence between economic development, social and human rights, and environmental priorities in international law. The Rio Declaration on Environment and Development states that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." The 2002 Johannesburg World Summit on Sustainable Development overtly recognised that human rights and social development priorities also constitute an integral part of this balance. To respect this principle, States may seek to resolve overlaps or perceived conflicts between economic, social and environmental concerns either through the activation of existing institutions or the establishment of new ones that can balance the competing goals. It is essential that sustainable development be implemented at all sectors of society and governance.

7. Common but differentiated responsibilities

The principle of common but differentiated responsibilities (CBDR) is a manifestation of general principles of equity. States and other relevant actors have a common responsibility for the achievement of global sustainable development and protection of the environment, but each stakeholder's differing circumstances must be taken into account when examining their contribution towards those goals. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment; and international organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should also be a part of this global partnership. Corporations owe responsibilities pursuant to the polluter-pays principle. Differentiation of responsibilities must also take into account the economic and developmental situation of the State, in recognition of the special needs and interests of developing countries and of countries with economies in transition, particularly least developed countries and those affected adversely by environmental, social and developmental considerations. Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, and should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

The CBD recognises CBDR in the preamble and operative text. In the preamble, the Parties acknowledge that special provision is required to meet the needs of developing countries, including the provision of new and additional financial resources and appropriate access to relevant technologies, and note the special conditions of the least developed countries and small island States in this regard. Further, the Parties also recognize that economic and social development and poverty eradication are the first and overriding priorities of developing countries. Key provisions of the CBD are tempered by language recognizing various limitations, such as "in accordance with its particular conditions and capabilities" (Article 6) and "as far as possible and as appropriate" (*inter alia* Articles 7, 8, 9, 10, 11). Furthermore, the CBD recognises differentiated responsibilities on research and training (Article 12), access to and transfer of technology (Article 16), and the handling of biotechnology and distribution of its benefits (Article 19). Lastly the CBD prescribes differentiated provision and use of financial resources (Article 20) and the financial mechanism (Article 21).

CHECK-LIST FOR DECISIONMAKERS

Sustainable Use of Natural Resources	<ul style="list-style-type: none"> • Does the law/policy help to ensure that the Earth's scarce resources will be used in a more sustainable way? • Does it help to address a common concern of humankind (e.g. biodiversity)? • Does it respect natural areas, artefacts and traditional knowledge, all of which are the common heritage of humankind?
Equity and Poverty Eradication	<ul style="list-style-type: none"> • Does the law/policy help to address pressing poverty and human rights challenges? • Does it demonstrate respect among generations by including provisions that take into account the needs and aspirations of future generations of life? • Does it promote respect within the present generation of life, by promoting social justice, equity for all peoples, an end to gender discrimination, respect for the rights of indigenous peoples and local communities, eradication of poverty and less discrimination among species?
Precautionary Approach to Health, Natural Resources and Ecosystems	<ul style="list-style-type: none"> • Does the law/policy promote prevention and precaution in the face of scientific uncertainty about a threat of serious or irreversible harm? • Does it place the burden of proof for demonstrating that a project or activity is safe, or that risks are reasonable, on the proponent of the venture? • Where there is insufficient scientific evidence, does it ensure that those most affected by a project can set the acceptable level of risk or threat?
Public Participation, Access to Information and Justice	<ul style="list-style-type: none"> • Does the law/policy provide for public consultation and genuine engagement, in both its design and implementation? • Does it specifically provide for transparency and access to information for concerned citizens, local communities, and others who might be affected? • Does it provide avenues for appeal and redress for citizens, communities and others?
Good Governance and Human Security	<ul style="list-style-type: none"> • Does the law/policy establish adequate institutions to ensure transparent, prompt, effective and fair implementation of its provisions? • Does it promote peaceful resolution of conflict, and help to ensure that human beings are able to live in freedom from fear, and freedom from want? • Does the law/policy include provisions to ensure that its intentions are not thwarted by corruption, bribery or unethical conduct, and provide appropriate penalties for abuse of rights or for misimplementation?
Integration and Interrelationship	<ul style="list-style-type: none"> • Does the law/policy integrate social justice and environmental protection into economic development plans and projects? • Does it ensure that development decision-making takes environmental and social impacts into account, providing for mitigation, modification or cancellation if necessary? • Does it provide or enhance benefits for the environment, and the society?
Common but differentiated responsibilities	<ul style="list-style-type: none"> • Does the law/policy take into account historical and other inequalities, including who has benefited from past activities and policies, when imposing obligations, and provide avenues to redress such inequalities where possible? • Is the law/policy appropriate and well-adapted to the society or region's present level of technology, scientific knowledge, human/financial resources, cultural values and traditions? • Does the law/policy avoid placing inappropriate burdens on vulnerable groups, or imposing costs on those least equipped to bear them?

EXAMPLES OF EXEMPLARY POLICIES

Costa Rica and Japan: Establishing Clear Legislative Goals, Purposes and Objectives

The Costa Rica Biodiversity Law 1998 creates a legal framework in line with the principles and themes outlined in the CBD, beginning by setting one of its goals as promoting the conservation and sustainable use of biodiversity and ensuring the fair and equitable sharing of benefits derived there from.¹⁹ The law aims to respond to this goal in an integrated and inter-related manner. This includes recognising the inherent value of nature, generally applicable principles of law, objectives, and criteria for applying the law.²⁰ It covers both the concept of tangible elements of biodiversity, as defined by the CBD, and intangible elements such as individual or collective knowledge, innovation and practices. It puts into effect sustainable development principles, like the precautionary principle. Other elements include the expansion of the pre-existing payment for environmental services program.

The *Japanese Basic Act on Biodiversity*²¹ was adopted to guide the review of existing laws²² and aims to promote the conservation and sustainable use of biodiversity, realize a society in harmony with nature, and clarify responsibilities of business, citizens and private bodies in addition to national and local governments. Its key principles are (a) preventive and adaptive approaches; (b) the importance of a long-term viewpoint and (c) the linkage with global warming measures. The Act requires national and regional governments to develop biodiversity strategies. Other elements include the promotion of biodiversity friendly business activities, prevention of damages from alien species, rational use of biodiversity, maintaining diversity of wildlife species, prevention of damage from alien species, prevention of global warming (by conserving forests, wetlands and grassland to fix CO₂), promotion of science and technology, surveys, improvement of public understanding, promotion of Environment Impact Assessment, pertaining to biodiversity at the stage of planning business plans, and ensuring international coordination and promotion of international cooperation.²³

Costa Rica's Biodiversity Law 1998: An Integrated Approach to Meeting the CBD Objectives

Best practices derived from the 2010 Future Policy Award review of the Biodiversity Law include:

- The law's comprehensive nature, which looks at the full implementation of the CBD.
- It addresses most of the relevant provisions of the CBD, and allows officials to develop further regulations and instruments for the implementation of its provisions.
- It provides a balance and link between conservation, sustainable use and fair and equitable sharing of benefits arising from the utilization of genetic and biochemical resources.
- It guarantees equity, protection of rights of indigenous peoples and local communities, and participation in the decision making process (including the right to participate and over their knowledge)
- There are expanded and progressive interpretations of several CBD provisions (e.g. biochemicals in ABS scope and exotic/invasive species in the biosafety framework).
- Incentives and technology transfer provisions are incorporated.
- A set of guiding principles and objectives for interpretation and implementation is included, including the precautionary approach, conservation, and sustainable use.
- Strong institutions are put in place to secure the conservation, sustainable use of biodiversity as well as the fair and equitable benefit sharing.
- Awareness raising and education have a considerable importance and weight in the design of the law.

The South African National Biodiversity Institute

The objectives of South Africa's *National Environmental Management: Biodiversity Act, 2004*²⁴ (NEMBA) are the management and conservation of South Africa's biodiversity within the framework of the *National Environmental Management Act, 1998* (NEMA), the protection of species and ecosystems that warrant national protection, the sustainable use of indigenous biological resources, the fair and equitable sharing of benefits arising from bioprospecting involving indigenous biological resources, and the establishment and operation of a South African National Biodiversity Institute (SANBI).

SANBI has a number of functions, including the monitoring of biodiversity in South Africa, particularly species listed as threatened, protected, or invasive, as well as the impact of any GMOs released into the environment. It also acts as an advisory and consultative body on biodiversity-related matters to government authorities and other biodiversity stakeholders. SANBI also manages the National Botanic Gardens of South Africa, and must establish and maintain *ex situ* collections of plants in national botanical gardens and in herbaria, and establish collections of animals and micro-organisms in appropriate enclosures.

Additional duties include establishing facilities for horticulture display, environmental education, visitor amenities and research and collecting, generating, processing, coordinating and disseminating information about biodiversity and the sustainable use of indigenous biological resources. This involves establishing databases on biodiversity and its sustainable use as well as promoting research on indigenous biodiversity and the sustainable use of indigenous biological resources. SANBI is also tasked with coordinating programmes for the rehabilitation of ecosystems and the prevention, control or eradication of listed invasive species. Lastly, it must assist the Minister of Environmental Affairs in exercising legislated powers pertaining to biodiversity, including advice on listed ecosystems, implementation of the Act and any international agreements, identification of bioregions and the contents of any bioregional plans, management and conservation of biological diversity, sustainable use of indigenous biological resources, and management of, and development in, national protected areas.

Norway: integrating biodiversity considerations into decision making process.

The *Nature Diversity Act* lays out a broad framework for sustainable, participatory and precautionary management of biodiversity. It promotes the principle of "integration and interrelationship" by connecting the protection of diversity with support for human well-being and recognizing the importance of historical and cultural landscapes in the preservation of diversity. This includes a variety of instruments including provisions on nature protection and sustainable use of diversity, such as Priority Species and Selected Habitat Types. These instruments reflect that nature is constantly changing, allowing the NDA's administrators to use tools beyond rigid nature conservation (i.e. protected areas) to protect biodiversity.

The Act enables the authorities to give clear signals on which species and habitat types are most important to safeguard, among other things through the provisions relating to knowledge-based management. The Act improves coordination of efforts to safeguard biological, geological and landscape diversity, since sectors that put pressure on or utilise natural resources will be required to give weight to objectives and principles (e.g. the precautionary principle, assessment of cumulative environmental effects and the user-pays principle) and rules on selected habitat types in their management activities. The procedural rule in Chapter II section 7 stating that "decisions shall state how the principles have been applied in an assessment" makes the application of the principles in public decision-making transparent and in effect making it possible to control and check the development in each sector. Failure to comply with this duty can lead to the decision being invalid if there is reason to believe that the failure to comply has influenced the decision.

Norway and Japan: Comprehensive Approaches to Biodiversity Regulation

The *Act relating to the management of biological, geological and landscape diversity (Nature Diversity Act)*²⁵ (NDA) of 2009 is the primary legislation for protecting biodiversity in Norway and is meant to implement the Convention on Biological Diversity in a holistic way. Its established purpose is “to protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sami culture”.²⁶ This is a very comprehensive goal and exposes the main driving factors behind the law.

The NDA has more precise definitions than the CBD. It defines ‘biological diversity’ broadly as “ecosystem and species variability and intra-species genetic variability, and the ecological relationships between ecosystem components” and defines ‘biological, geological and landscape diversity’ in an exclusive manner: “all diversity that is not largely a result of human interference”.²⁷ It also defines a ‘habitat type’ as a homogeneous environment including all plant and animal life and environmental factors that operate there, or special types of natural features such as ponds, habitat islands, and special types of geological features²⁸ and an ‘area with specific ecological functions’ as one that fulfils an ecological function for a species, such as a spawning, nursery or larval drift area, migration route, feeding, moulting or overwintering area, display ground or mating area, breeding area, overwintering area or habitat, the delimitation of which may change over time.²⁹

The Japanese *Basic Act on Biodiversity* is unique for a number of reasons. First, it overrides all other inconsistent legislation and thus mainstreams biodiversity into all other policies. It adopts a primarily preventive approach (prevention of chemical pollution, alien species, global warming) and a long-term viewpoint. It implements the concept of *Satoyama*, or sustaining and restoring bio-cultural landscapes that exemplify the ideal of living fruitfully in harmony with nature. The respective responsibilities of national and local businesses, citizens, and private bodies are clear. The law integrates local efforts with those occurring through national and regional biodiversity strategies. It promotes Environmental Impact Assessments on biodiversity and promotes international co-operation and coordination. Japan’s approach to biosafety is also exemplary in that it implements the Cartagena Protocol in a holistic manner rather than by trying to adapt other laws to try and comply with its terms.

CONCLUSIONS

Designing future just and sustainable laws on biodiversity is possible and necessary and can be simplified through the application of principles of international law on sustainable development and best practices derived from national experiences with implementation. To simplify the task of creating legislation that protects the environment, the rights of future generations and pursues sustainability, a checklist for decision-makers is provided above.

The objective of this paper is to assist countries in implementing these terms in a holistic and future just manner by laying out guiding principles and key features, as well as by highlighting exemplary cases of implementation.

The authors identified key aspects of a future just biodiversity law in module one above. These were distilled from their experience in the field of biodiversity law, the above country case studies and the application of principles of international law on sustainable development. For those countries looking to prepare new legislation or revise existing legislation, the following were identified as fundamental: assessment of biodiversity and biological resources, including identifying impacts on biodiversity and ecosystems, drivers of biodiversity loss and possibilities for halting loss of biodiversity; establishing clear goals in advance to inform and inspire the provisions of laws and policies on biodiversity, thus providing guidance for the selection and drafting of instruments and mechanisms; ensuring that all relevant stakeholders are involved, including those from key government ministries, civil society and indigenous and local communities; identifying policy areas and laws that negatively affect biodiversity; identifying existing international obligations, including relevant COP decisions, as well as existing laws and policies on biodiversity; and undertaking a legal analysis of issues in light of the existing legal framework.

The substantive aspects of a future just biodiversity law should include: establishing strong governance over the components of biodiversity; integrating biodiversity into all policies and actions and establishing linkages between policies; establishing balance between measures undertaken to fulfil the three CBD objectives; implementing all relevant biodiversity related obligations in a synergistic manner; ensuring the comprehensiveness of the law; outlining the roles and responsibilities of all relevant stakeholders; recognizing the key role of indigenous peoples and local communities; establishing both *in-situ* and *ex-situ* conservation measures; creating incentive schemes for the sustainable use of biodiversity and ecosystems; developing instruments to monitor compliance; protecting, promoting and ensuring the sharing of benefits relating to the use of traditional knowledge, innovations and practices; including the precautionary principle, ecosystem approach and preventive approach as interpretive principles; implementing an ABS regime that meets the terms of the Nagoya Protocol and UN Declaration on the Rights of Indigenous Peoples; establishing safeguards to protect biodiversity from the risks posed by genetically modified organisms in accordance with the Cartagena Protocol and Nagoya-Kuala Lumpur Supplementary Protocol; developing mechanisms for awareness raising, education, incentives and technology transfer; creating mechanisms for public participation and access to justice; and including information mechanisms in co-ordination with international and regional bodies to adjust to new challenges and inform decision-makers and the public.

Lastly, tools must be put in place to ensure implementation, monitoring and revision of the law when necessary. The tools identified include: creating innovative financing mechanisms to ensure the long term success of the law and related CBD objectives; establishing strong legal measures and a suitable institutional structure with the power to oversee implementation, including sanctions and penalties for non-compliance; creating a review or update process that includes collecting information on progress in implementation and the status of biodiversity; ensuring the participation of a broad set of stakeholders in implementation, monitoring and revision; and developing targets and implementing measures to further the five goals of the CBD Strategic Plan for Biodiversity 2011-2020 and meet its 20 Aichi Biodiversity Targets.

In conclusion, we urge all countries engaged in reversing the loss of biodiversity to adopt ambitious legal and policy measures that effectively safeguard the environment, respect human rights, and embody the highest standards of sustainability. The principles, examples and analysis provided in this paper provide a starting point and should serve as guidance to those countries seeking to engage meaningfully with one of the most complex issues of our time. Valuable lessons can be learned from the experiences of other countries in implementation. Countries will need to assess how the information provided can be best applied given their particular social, economic and ecological context. That remains to be determined by national decision-makers, preferably through an open and transparent process which engages with all segments of society in a respectful manner. Only by engaging its people can any nation hope to forge a future that secures the rights of future generations.

ENDNOTES

- ¹ *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (entered into force 29 December 1993). Online at <http://www.cbd.int/doc/legal/cbd-un-en.pdf> [hereinafter “CBD”].
- ² *Cartagena Protocol on Biosafety*, 29 January 2000, 2226 U.N.T.S. 208 (entered into force 11 September 2003) [hereinafter “Cartagena Protocol”].
- ³ *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*, 15 October 2010, Annex to UN Doc. UNEP/CBD/BS/COP-MOP/5/17. Online: http://bch.cbd.int/protocol/NKL_text.shtml. [Hereinafter “Nagoya-Kuala Lumpur Protocol”].
- ⁴ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 29 October 2010, UN Doc. UNEP/CBD/COP/DEC/X/1. Online: cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf [Hereinafter “Nagoya Protocol”].
- ⁵ Guidelines on Biodiversity and Tourism Development, COP Decision VII/14.
- ⁶ *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, COP Decision VII/16; and *The Teikarihwaieri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*, COP Decision X/42.
- ⁷ Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species, COP Decision VI/23.
- ⁸ Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, COP Decision VII/12.
- ⁹ Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment, COP Decision VIII/28.
- ¹⁰ The Ecosystem Approach, COP Decision VII/11.
- ¹¹ The strategic objectives are part of the Goal 4 of the Strategy for Resource Mobilization adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting held in with the COP 9 Decision IX/11.
- ¹² See “Declaration of Principles of International Law Relating to Sustainable Development” of the 70th Conference of the International Law Association (ILA), adopted at 2002 World Summit on Sustainable Development (WSSD).
- ¹³ World Future Council, “Seven principles for future just law making: How to develop policies that build future justice” online: http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/Justice_leaflet_Web_RGB_LD_-_AS.pdf
- ¹⁴ Maja Göpel, “Formulating Future Just Policies: Applying the Delhi Sustainable Development Law Principles” (2010) 2 Sustainability 1694, online: <<http://www.mdpi.com/2071-1050/2/6/1694/pdf>>; Marie-Claire Cordonier Segger and Rajat Rana, “Selecting Best Policies and Law for Future Generations: Legal Working Paper and Worked Examples” Online: <http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/Best_Policy_Principles080508.pdf>.
- ¹⁵ World Future Council, Seven principles for future just law making: How to develop policies that build future justice. Online: http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/Justice_leaflet_Web_RGB_LD_-_AS.pdf.
- ¹⁶ Maja Göpel, “Formulating Future Just Policies: Applying the Delhi Sustainable Development Law Principles” (2010) 2 Sustainability 1694. Online: www.mdpi.com/2071-1050/2/6/1694/pdf; Marie-Claire Cordonier Segger and Rajat Rana, “Selecting Best Policies and Law for Future Generations: Legal Working Paper and Worked Examples” Online: http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/Best_Policy_Principles080508.pdf.
- ¹⁷ ILA Declaration, Principle 1.
- ¹⁸ ILA Declaration, Principle 2.
- ¹⁹ Ibid. at Article 1.
- ²⁰ Ibid. at Articles 8-11.
- ²¹ The Basic Act on Biodiversity 2008.
- ²² OECD, Environmental Performance Review: Japan 2010.
- ²³ The Basic Act on Biodiversity 2008 at Article 3.
- ²⁴ *National Environmental Management Biodiversity Act* [No. 10 of 2004] (7 June 2004, South Africa). Online: South African Government Information <<http://www.info.gov.za/acts/2004/a10-04/index.html>>.
- ²⁵ Norway, *Act of 19 June 2009 No. 100 relating to the management of biological, geological and landscape diversity* (Nature Diversity Act).
- ²⁶ Nature Diversity Act art. 1.
- ²⁷ Ibid, Section 3(c) and (i).
- ²⁸ Ibid, Section 3(j).
- ²⁹ Ibid, Section 3(r).