

Constitution of India and Environmental Governance: Administrative and Adjudicatory Process

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Protocols under the Convention on Biodiversity 1992

In this session we return to the protocols and the Convention on Biological Diversity. While the international legal arrangement under the Convention on Biological Diversity, CBD for short, gave the framework at the global level, the 2 protocols under enquiry here keep the flesh and blood to the particular frame.

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USE OF BIODIVERSITY, INCLUDING HUMAN HEALTH (A.4)

- **ADVANCE INFORMED AGREEMENT - SEPARATE SET OF PROCEDURES EVOLVED FOR LMOs, (i) THAT ARE INTENTIONALLY TO BE INTRODUCED INTO THE ENVIRONMENT AND (ii) THOSE THAT ARE INTENDED TO BE USED DIRECTLY AS FOOD OR FEED OR FOR PROCESSING - DESIGNED TO PROVIDE, NECESSARY INFORMATION NEEDED TO ENSURE THAT THE IMPORTING PARTIES, AN OPPORTUNITY AND CAPACITY TO ASSESS RISKS THAT MAY BE ASSOCIATED WITH THE LMO, BEFORE ENTERING INTO THE AGREEMENT - LEADING TO, AN INFORMED DECISION, WHETHER OR NOT TO ACCEPT LMO IMPORTS, BESIDES EQUIPPING ONESELF TO HANDLE THEM IN A SAFE MANNER**
- **PRINCIPLE OF PRECAUTION TO BE EMPLOYED IN THE ENTIRE PROCESS**
- **BIOSAFETY CLEARING HOUSE SET UP, TO FACILITATE PARTIES TO EXCHANGE INFORMATION**



We will start with the first protocol, the Cartagena Protocol of 2000, The Biosafety Protocol. Although this particular Protocol, like the next one, was supposed to have been made in the year 2000, it came into effect only from the year 2003 when the required number of parties who affixed their signature and ratified it started undertaking their obligations thus.

And so in each and every legal arrangement we have a particular area mentioned of a

kind of a commitment made by the parties who are going to undertake those obligations but that commitment in the form of a signature need have to result in a particular minimum number of subscriptions in the form of ratifications to bring that into effect and so the year of operation or it refer is quite different from the year when it is made.

The Convention under Article 19 referred to cooperation in research in biotechnology and equity in sharing of benefits on mutually agreed terms. It provided for conservation and sustainable use. As underlined principle requiring to have an advanced informed agreement about the parties, so as to ensure that this safe transfer, handling and use of any Living Modified Organism, LMO for short. also refer to as Genetically Modified Organisms or GMOs that are the result of the application of the biotechnology. So, the protocol is designed to give effect to this particular provision of CBD as to require equity in sharing of benefits of research and in evolving effective safeguards to ensure biosafety aspects in particular.

This was actually a concern, to address that we have this Protocol. It applies to transboundary movement, transit, handling and use of all LMOs, Living Modified Organisms, resulting from modern biotechnology, that may have adverse effects on the conservation and sustainable use of biodiversity, including human health.

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- PROVISIONS MADE FOR CAPACITY-BUILDING AND PROCEDURES FOR COMPLIANCE BY ALL THE CONCERNED - PUBLIC AWARENESS & PARTICIPATION, AN IMPORTANT COMPONENT OF THIS PRESCRIPTION AND PROCESS
- PARTY OF IMPORT MAY, AT ANY TIME, IN THE LIGHT OF NEW SCIENTIFIC INFORMATION, REVIEW AND CHANGE ITS DECISIONS
- IN SUM : A LEGAL DEVICE ENVISAGED FOR ENABLING HUMANITY TO DERIVE BENEFITS OF MODERN TECHNOLOGY, WITHOUT, AT ANY TIME, COMPROMISING ON SAFETY, SECURITY AND INTEGRITY OF THE RESOURCE, BY PUTTING IN PLACE ADEQUATE AND EFFECTIVE SAFEGUARDS, ANCHORED TO THE PRINCIPLE OF PRECAUTION



For this purpose, there is a requirement under this new law of the parties entering into what is referred to an Advanced Informed Agreement, with the normal contractual arrangement, but an agreement has to be entered into well beforehand, before this technology transfer takes place and it comes up with 2 set of procedures.

One for LMOs, one set for those that are intentionally to be introduced into the environment through research, collaborative research or whatever from one country to another and second those that are intended to be used directly as food or feed or for processing and that is designed to provide necessary information needed to ensure that the importing parties have an opportunity and a capacity to assess.

The risk that may be associated with the Living Modified Organisms before entering into an agreement, whether it is safe, whether it is good for health, hygiene, wellbeing, human health and similarly as to the rest of the environment and all this would ultimately need to an informed decision, whether to get into that arrangement or not to import at all.

And in addition, once you get into that kind of an arrangement you should have to ascertain that whether I have facilities available to handle in a safe manner. So it does not just transfer any commodity from one country to another, it exactly transfer of genetic material and transfer of that material for technological processes and their application and that would require quite a bit of caution to be exercised.

And so, the principles that is applied here is a principle of precaution in the entire process. And for this purpose, under this international arrangement, a Biosafety Clearing House is set up to enable the parties to exchange information in the manner as prescribed here.

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II. NAGOYA PROTOCOL ON ABS, 2010



- ENTERED INTO FORCE ON 12 OCT. 2014 - 124 PARTIES BY 2019
- GIVES EFFECT TO A.15 AND ONE OF THE OBJECTIVES OF CBD, NAMELY, FAIR AND EQUITABLE SHARING OF BENEFITS, DERIVED OUT OF THE USE OF GENETIC RESOURCES (GRs - EXPRESSION USED TO DESCRIBE EVERY POSSIBLE ASPECT OF A BIORESOURCE AND ITS COMPONENTS-) - REAFFIRMS THE SOVEREIGN RIGHT OF STATE OVER ITS NATURAL RESOURCES - STIPULATES THAT THE AUTHORITY TO DETERMINE ACCESS TO GRs VESTS WITH NATIONAL GOVTs. - RECOGNISES AND INCENTIVIZES PRACTICES AND TRADITIONS OF CONSERVATION OF BIODIVERSITY - ILLUSTRATIVE OF VALUING BIODIVERSITY AND ECOSYSTEM SERVICES; ACCESS, SUBJECT TO PRIOR INFORMED CONSENT (PIC) OF THE PROVIDER COUNTRY, THROUGH A BILATERAL AGREEMENT ON MUTUALLY AGREED TERMS (MAT), ON SHARING OF BENEFITS THAT MAY RESULT FROM THE USE OF GRs
- ESTABLISHES A CLEAR FRAMEWORK FOR ACCESSING GRs AND ASSOCIATED KNOWLEDGES AND IN SHARING OF BENEFITS ARISING FROM THEIR USE



There is also a provision made for building of capacity in working these out and procedures for compliance by all the concerned. A lot of importance is given to making the people aware; making the people involved, participate as an important component of this prescription and the process because people should be in the know of things of what is that they are going to consume.

What is that you are going to be put to application in the public domain and then only it should become easier for them to take a clear informed decision in that regard, a lot of caution taken. The party of import, despite all of this reserves this right. If there is a new scientific information about the risks or the horrors or the harms that are involved in the application of biotechnology with regard to this, then whatever decision it has taken earlier it can review and change its decision even if it had agreed to such an agreement earlier, it is part and parcel of this particular right.

It is kind of a safeguard that signs which is evolving over a period of time may come up with new discoveries that something which was considered harmless earlier has become harmful now and so I should be able to revise the earlier decision. And so, in sum this is a legal device that has been contemplated for enabling humanity to derive benefits of modern technology.

Because biotechnology has a lot of benefits and there should be an enabling arrangement to facilitate humanity to derive maximum benefits out of it. But while doing so under no circumstances it should compromise on safety, security and

integrity of the very resource itself and also the humanity and serve our purpose. This arrangement provides adequate and effective safeguard measures which is anchored to the principle of precaution. That is in brief, this international protocol on biosafety.

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- **BENEFITS TO BE SHARED MAY BE MONETARY OR NON-MONETARY (- ANNEX.: LIST OF NON-EXHAUSTIVE LIST OF BENEFITS), TO CONTRIBUTE TO THE CONSERVATION AND SUSTAINABLE USE OF BIODIVERSITY AND ITS COMPONENTS**
- **EXCLUSIONS AND EXCEPTIONS: HUMAN GRs; GRs USED AS COMMODITIES (- AS THOSE IN NORMAL USE); GRs FROM AREAS BEYOND NATIONAL JURISDICTION (-LIKE, HIGH SEAS, ANTARCTIC REGION ETC,-); GRs LISTED IN ANNEX-I OF INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE,2001 (-ITPGRFA-) AND GRs THAT THE HOME COUNTRY DETERMINES AS NOT REQUIRING A PIC**
- **ABC OF ABS: - OBLIGATIONS OF ACCESS BENEFIT SHARING (- LIKE, MONETARY, IN THE FORM OF ACCESS FEES, LICENCE FEES, MILESTONE PAYMENTS, ROYALTY ETC., OR NON-MONETARY, IN THE FORM OF,**



We now move on to the other one the Nagoya protocol for Access and Benefit Sharing, ABS. The year of arrangement was 2010 and as I was mentioned earlier it came into force with a necessary number of parties subscribing to it on 12th October, 2014. As of now they have about 124 parties to arrangement. This arrangement, the protocol gives effect to Article 15 of CBD.

And also, one of its objectives, namely fair and equitable sharing of benefits that are derived out of the use of genetic resources, GR for short. This is an expression that is used to describe every possible aspect of a bioresource and its components. It reaffirms the sovereign right of a state over its natural resources and that it stipulates that the authority to determine access to GRs vests with national governments.

It recognizes and incentivizes practices and traditions of communities of people and also of everyone who is putting that into application of conservation of biodiversity and this is one international legal arrangement which illustrates valuing biodiversity and ecosystem services.

When you say biodiversity is invaluable, now there is one mechanism whereby its value is going to get determined through this particular process. Access for anyone is subject to what is referred to as a Prior Informed Consent, PIC for short by the provider country. So even if outsiders want to access your resource you have to enter

into the Prior Informed Consent and an agreement which will incorporate this.

And this agreement should be on mutually agreed term. It is called as MAT between the provider and the one who is going to access it on. What are the terms? The terms are with regard to the sharing of benefits that you may get out of the use of this genetic resource which is the source from the providing country. And so, this establishes a clear framework for accessing the genetic resources and the knowledges associated with it and in Sharing of Benefits Arising from their use.

So, the basic idea behind this is if anyone wants to access the resource or the traditions, practices and knowledges associated with it, he cannot take it free. So, this is one way of preventing biopiracy. Second one, when it takes it, it should be on a certain set of terms, mutually agreeable to the parties, so that equity is done. Benefits that have derived is shared and is not appropriated by the one who derives benefit to extreme to the one who provides that. That is the idea behind this particular arrangement

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TRANSFER OF TECHNOLOGY, SHARING RESULTS OF RESEARCH, CAPACITY-BUILDING ETC.,) AND COMPLIANCE

- **MONITORING COMPLIANCE:** PARTIES REQUIRED TO DESIGNATE ONE OR MORE EFFECTIVE CHECK POINTS , FOR COLLECTION OF INFORMATION AT ANY STAGE OF R&D, INNOVATION, PRE-OR POST-COMMERCIALISATION (- LIKE, THE PATENT OFFICE, CUSTOM AUTHORITIES, RESEARCH FUNDING AGENCIES ETC.,)



And the sharing of benefits as it is mentioned here will be in terms of money or it maybe even in non-monetary terms and there is an annex that is added to this particular Protocol which comes up with a clear list of, a non-exhaustive list of benefits to contribute to the conservation and sustainable use of biodiversity and its

components. So, look at the objective here. One is, there should be equity.

There shall not be any unjust enrichment for one. First take an advantage of a resource and knowledges associated with it to derive some benefit for himself, to share it and another one is that benefits that are shared is not something that is going to be squandered away by the one who got it, they share in it, the provider. It should be put to use for conserving the very same thing and for sustainably using that particular resource to provide per linear benefits. There are certain exceptions to this.

That this arrangement is not possible with regard to human genetic resources, it is both unethical and illegal. And, so you cannot get into this ABS arrangement at all on human genetic resources or genetic resources that are used as commodities in the normal use on a day to day affair. We use rice as a food and this is normally being treated as a commodity in our day to day affairs. This cannot be subject of matter of sharing of benefits.

This is a normal thing. We should allow it that way and it does not come under this particular arrangement or genetic resources that are derived from the areas beyond national jurisdiction like high seas, Antarctic. For that there should be a separate kind of an arrangement. Anyway, it is national governments are not the ones who is going to decide out how to use it and things like that exclusively by themselves.

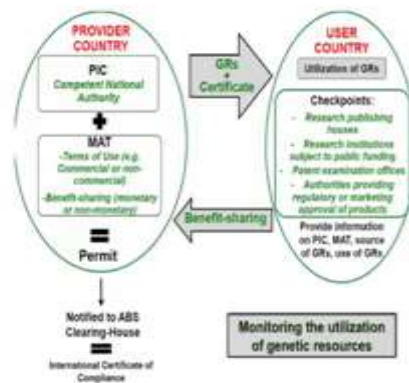
Genetic resources annexed in international treaty on Plant Genetic Resources for Food and Agriculture, ITPGRFA for short. A separate arrangement an international treaty entered into in the year 2001. Those subjects are also kept out in this list because it is a separate arrangement for which separate Access and Benefit Sharing arrangement is worked out on plant genetic resources used for food and agriculture.

So these are excluded, the rest of it can come under this and genetic resources that the home country determines as not require a prior for concern, because you as a sovereign nation you can determine some of the resources that need have to be excluded from that maybe for health reasons, for the benefit of community or people or anything like that or any public purpose.

The government has the power to decide that they do not require to come under this particular arrangement. So, what is in brief, the ABC of the Access and Benefit Sharing mechanism? One is the obligation of the access A, Access to Share Benefits. Then the second one is the obligation to share benefits, B and C the obligation to comply with these recognitions.

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MONITORING THE UTILIZATION OF GRs



So, accessing, sharing benefits and complying with these obligations is the ABC of ABS, very simple. And to ensure that there is some kind of oversight in ensuring that these arrangements are done properly, transparently, openly and this is made known, you have an oversight in the form of monitoring compliance provision. And here every party to this arrangement is required to designate one or more effective, what are referred as, check points.

For collection of information at any stage of R and D, innovation, pre or post commercialization, like in each country there are what are called as a patent office, what may be called as check point or a custom authority or a research funding agency. These maybe designated by the national government as the check point. It checks what is the kind of an arrangement, how is it going to be effectuated. And so, store house of information to be made available for this information, this is the one that you do a kind of a monitor in the entire process.

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- PROVIDES, FOR GLOBAL MULTILATERAL BENEFIT SHARING MECHANISM (GMBSM), TO ADDRESS BENEFIT SHARING OVER GRs IN A TRANS-BOUNDARY SITUATION – TO SUPPORT CONSERVATION AND SUSTAINABLE USE OF BIODIVERSITY, GLOBALLY- STILL BEING EVOLVED
- PROVIDES, SUPPORTIVE MECHANISMS FOR IMPLEMENTATION : DESIGNATION OF NATIONAL FOCAL POINTS , FOR PROVIDING INFORMATION AND FOR LIASONING WITH CBD SECRETARIAT AND COMPETENT NATIONAL AUTHORITIES FOR GRANTING ACCESS; ABS CLEARING HOUSE: A WEB-BASED INFORMATION EXCHANGE MECHANISM, TO SHARE INFORMATION , INTERALIA, ON DOMESTIC REGULATORY ABS REQUIREMENTS; CAPACITY- BUILDING , TO SUPPORT KEY ASPECTS OF IMPLEMENTATION , BASED ON COUNTRY'S SELF-ASSESSMENT OF NATIONAL NEEDS AND PRIORITIES AND TARGETED FINANCIAL SUPPORT FOR CAPACITY- BUILDING AND DEVELOPMENT INITIATIVES THROUGH GEF.



This can be put together in a tabular form. From the provider country the genetic resources need have to be transferred to the user country. The process is mentioned and from that whatever benefit that is derived need have to be shared and this entire mechanism has to be notified to the ABS Clearing House that is an International Certificate of Compliance and that constitutes monitoring the utilization of genetic resources.

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DISTINCTIVE ASPECTS OF INTERNATIONAL ARRANGEMENT

- CBD AND THE TWO PROTOCOLS: UNIQUE LAW- DIFFERENT LANGUAGE- NOTHING " IMPERIOUS" IN APPEARANCE OR "IMPERATIVE" IN NATURE- ANCHORED TO " COOPERATION AMONG NATIONS"; SIGNATURES- COLLECTIVE COMMITMENT OF LARGEST GROUPING OF NATIONS - "PEREMPTORY NORM OF INTERNATIONAL LAW"?)
- MAKES "COMMON CAUSE " OF "COMMON CONCERN"; DISPLAYS DETERMINATION OF COMMUNITY OF NATIONS TO REMAIN COMMITTED TO CONSERVE, PROTECT, SUSTAIN LIFE AND DEVELOP IN AN EQUITOUS MANNER
- CELEBRATION OF LIFE, LIFE-FORMS, ECO-SYSTEMS AND LIFE-SUPPORT
- LAW VALUES LIFE, RECOGNIZES THE STATUS, CONTRIBUTIONS, CREATES RIGHTS AND ENSURES REWARD – SOVEREIGN NATIONS, EXERCISE THE RIGHT AND ENFORCE THEM
- VISIONARY LEGAL DOCUMENT ENCAPSULATING THE PRINCIPLE OF



It also provides, it is a very ambitious arrangement, very complex arrangement and in addition to sharing of benefits with a local community, with the national governments,

it also comes up with another thing called Global Multilateral Benefit Sharing Mechanism, GMBSM to address benefit sharing over genetic resources in a trans-boundary situation so that it will not come within the jurisdiction of very single state, then you have to have an international mechanism that is being put together. But at the present stage in the year 2020, it is still being evolved and not come to fruition as yet. But there is a provision for that. It also provides for supportive mechanism. How do we implement this or that?

A supportive mechanism as being put together, there is something called as a designation of National Focal Points, what is their job? That to provide information and for coordination with the Secretariat of the Conventional Biological Diversity and competent national authorities for granting access and there is something called as an ABS Clearing House.

It is more of a web-based information exchange mechanism, to share information or domestic regulatory requirements. There is also provision for building capacity to support key aspects of implementation because something new that is happening and people need have to be informed, people need have to be equipped, people need have to be trained and for that provision has been made.

And on the basis of the needs of nations each and every country, especially developing country, and their priorities some targeted financial support is also provided for through the global environment facility.

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**SUSTAINABLE DEVELOPMENT: ADDRESSING CONCERNS OF CONSERVATION
AND DEMANDS OF DEVELOPMENT**

*** OUTSTANDING CONCERNS :**

- HUGE TIME-LAG IN WORKING OUT THE "NUTS AND BOLTS" ISSUES OF
BIOSAFETY AND ABS : 1992-2000-2010 -WHEN TIME IS THE ESSENCE, TO
ENSURE SAFEGUARDS, TIME CONSUMED IN THE PROCESS, OF LITTLE HELP IN
MAKING THE LAW EFFECTIVE

- NO INTERNATIONAL MONITORING AND ENFORCEMENT MECHANISM, TO
ENSURE COMPLIANCE- COMPARES POORLY WITH OTHER INTERNATIONAL
ARRANGEMENTS

- "ALMOST HELPLESS" , TO PARALLEL INTERNATIONAL DEVELOPMENTS,
THAT MADE IN-ROADS INTO THIS, "ALMOST UNIVERSAL LAW"- TRIPS
UNDER WTO (-ESPECIALLY CONCERNING TK); ITPGRA, 2001

- U.S. STAYING OUT- HUGE ADVERSE IMPACT ON ENSURING , "BIOSAFETY"



So, on the whole, what is this international legal arrangement about - The CBD and the 2 protocols? One can make out that is a very unique law. The language that is used here is very-very distinctively different. There is nothing imperious in its appearance or imperative in nature. It is essentially based upon cooperation among nations and the parties make a collective commitment to give effect to this.

So, it out of consent among the parties, 175 out countries and 190 out of countries as of now who have made a commitment to give effect to this arrangement and in international principles called something that has gone into the level of peremptory norm of international law. That means if a large number of nations agree on something it becomes a kind of a polestar, a guiding light from which there is no opposition, from which no violation possible.

The question is, has this biological law become such a kind of a peremptory norm? Well, there are arguments on either side. That it has become on one side and it has not been so, but still it is very valuable international arrangement. In fact, this is one arrangement which makes a common cause of common concern of loss of biodiversity and it displays the determination of community of nations to remain committed to conserve, protect, sustain life and develop in an equitable manner.

It is a law for celebration of life, life-forms and ecosystems and life support. This is a law which values life, recognizes the status, contributions, creates rights and ensures reward of sovereign nations and also of communities of people and it is the sovereign

nation that exercises that right and enforces that, clearly a visionary legal document encapsulating the principles of precaution and sustainable development.

It addresses the concern of conservation and demands of development. But all these good things have not been actually realized for a number of reasons and these are some of the outstanding concerns. There is a huge time-lag. Remember that in 1992, the framework law was evolved, but in 2002 one protocol came and in 2010 another protocol came and they are still working out the nuts and bolts aspects of it.

The time is of as such to ensure that the accelerated process of destruction and loss of biodiversity occurring, the time consumed of nearly two decades in this entire process or even more than two decades, is of very little help in making the law a very effective instrument or arresting the trend and restoring parity. Another problem with this particular arrangement is that there is semblance of an internationally monitoring.

But monitoring by itself will not do, monitoring coupled with enforcing and that does not exist. And because of that compliance is a bit of a causality and it compares poorly with other international legal arrangements. As you view this law in comparison with other laws that are developed at international level; like the trade related international property rights (TRIPS) regime under the World Trade Organization or the International Treaty on Plant Genetic Resources and Agriculture, of the year 2001, they have made certain in-roads into this particular arrangement and to that extent it has weakened the ambit, the scope and effectiveness of this law and it looks like a little bit of a helpless spectator, the more powerful other international arrangements.

Another major problem is United States which is actually the home to Bio technological applications, the biggest country which has the biggest of laboratories in this regard has decided to stay out of this design and that is a serious blow for an effective application of this law especially with regard to biosafety issue.

All said and done, a very important legal arrangement and how this has been important application at the domestic level is a subject matter of a consideration in our next session.

