



# Comparative Analysis of Nagoya Protocol and Bonn Guidelines

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## Abstract

On 12 October 2014, the Nagoya Protocol was enacted to implement the 3<sup>rd</sup> objective of the Convention (Convention on Biological Diversity) on the Fair and Equitable Sharing of benefits made from using genetic resources. In this protocol, parties are obliged to establish legislative, administrative, or political steps for the utilization of genetic resources. The Bonn Guidelines are to help Governments in the implementation of steps to enshrine access and benefit sharing in their countries. In 2002, the conference of the parties to the Convention on Biological Diversity adopted them. This paper describes the comparative studies of the Nagoya Protocol and the Bonn Guidelines. In addition, this highlights the drawbacks and users of the Nagoya Protocol and Bonn Guidelines. Then, the researcher particularly takes the basis of the doctrinal method to complete this paper.

Keywords: Comparative; Nagoya Protocol; Bonn Guidelines; Drawbacks; Doctrinal Method

## Chapter 1

### Introduction

#### 1.1 INTRODUCTION

On 12 October 2014, the Nagoya Protocol was enacted to implement the 3<sup>rd</sup> objective of the Convention (Convention on Biological Diversity) on the Fair and Equitable Sharing of benefits made from using genetic resources. In this protocol, parties are obliged to establish legislative, administrative, or political steps for the utilization of genetic resources. As -widely known, the three main objectives of the Convention (Convention on

Biological Diversity), 1992 are to conserve biological diversity, utilization of its components sustainably, and fair and equitable sharing of benefits.<sup>1</sup> Finally, it targets to prevent bio-piracy. Without getting prior consent from or giving compensation to the people or the country where the resource has been initially discovered, it is made by the country to raise commercial activities or the academic purpose of genetic resources. It is pertinent to the utilization/use of genetic resources. It is simplified as any non-human genetic resource. Utilization comes under the research and academic development of genetic resources and biochemical compositions of genetic resources. This protocol covers both academic and commercial activities on genetic resources. It extends that the provider countries have the right to control accessing genetic resources within their jurisdiction. The key goal is to reconstruct the provider countries having control over the genetic resources.

Two categories of provider country:

1. An aboriginal country where the resource grows in situ, i.e. a country in which the resource (genetic resources) grows in its natural place.
2. An aboriginal country where the resource (genetic resource) grows ex-situ, i.e. a country in which the resource grows beyond its natural place. A country that comes under this category should obtain the resource (genetic resource) from an aboriginal country under the Convention (CBD).

The user has the responsibility to reveal that the genetic resource thereby conducting research was legally made in consonance with the Nagoya Protocol. For the implementation of this, a user should:

1. Obtain the PIC (prior informed consent) of a providing country;
2. Give a fair and equitable sharing of the benefits that come from the use of genetic resources. It is done through mutually agreed terms. The benefits cover both the commercial and non-commercial, including the exchanging of data or a transfer of IPR (Intellectual Property Rights).

If the resources have been accessed in consonance with the provisions of the protocol by the user not to show the process, the utilization of that genetic resource must be stopped. The result of this protocol is to make it illegal to conduct research and development on a genetic resource that cannot be accessed in consonance with the protocol. For instance, The Nagoya Protocol fully entered into force in the EU on 12 October 2014 under EU Reg. 511/2014. The rules for the implementation of Reg. 511/2014 regarding the registration of the collection of genetic resources, monitoring user compliance, and best practices, entered into force on 9 November 2015 under EU Reg. 2015/1866.

The Bonn Guidelines are to help Governments in the implementation of steps to enshrine access and benefit sharing in their countries. In 2002, the conference of the parties to the Convention on Biological Diversity adopted

<sup>1</sup> Convention on Biological Diversity, Rio De Janeiro, 5 June, 1992, 31 IL, Mat.818(1992),Art. 1.

them. The main purpose is to assist countries as providers and users of genetic resources to adopt access and benefit-sharing procedures effectively. Despite being voluntary, the Guidelines are symbolized as a prime step for the adoption of the ABS provisions of the CBD.

The Guidelines help in the development and adoption of state steps to make a clear framework that assists access to genetic resources and promotes that the benefits coming from the users are divided fairly and equitably.

The Guidelines have two main aims:

1. To help countries as providers in establishing their own state legislative, administrative, and policy steps for ABS such as suggesting the constituents that should help a PIC procedure.
2. To help providers and users in the clarification of MAT, by giving instances of what constituents should be made in these agreements.

The Bonn Guidelines provide for users and providers of genetic resources in two stages:

1. Governments develop their national ABS measures;
2. Institutions and Individuals are looking to negotiate ABS agreements, such as PIC and MAT.

The Guidelines stress the need for any potential user of genetic resources to seek the PIC of the resource provider.

Legal certainty, Access to genetic resources facilitating at a minimum cost, transparency on the restrictions on access to genetic resources on the ground stage and not to run counter to the goals of this convention are the basic principles of an effective PIC system. The Transparent establishment of CNAs (Competent National Authorities) who can give PIC, Procedures for making PIC from the CNAs, clearly mentioned timing and deadlines, Specifications of utilization, and Mechanism for consultation of relevant stakeholders.

## CHAPTER 2

### NAGOYA PROTOCOL ON ACCESS AND BENEFIT SHARING

#### 2.1 Benefit-sharing

Concerning benefit sharing, each party is obliged to take legislative, administrative, or policy measures to promote those incentives that come from the use of genetic resources, and subsequent application and commercialization are divided fairly and equitably with the agreed party.<sup>2</sup> Benefits listed under the Protocol include monetary and non-monetary benefits and are almost a verbatim repetition of benefits listed in the Bonn Guidelines.<sup>3</sup> Additionally, the Protocol prescribes collaboration and cooperation in technical and scientific research and development (R&D) programs, which preferably take place in and with the participation of provider parties.<sup>4</sup> On this point, entering technology and transfer of technology to developing countries should be promoted.<sup>5</sup> The basic paradigm that maintaining the potential of discovering valuable genetic resources stimulates conservation and sustainable use is now explicitly complemented by the obligation to encourage the flow of benefits toward conservation and sustainable use.<sup>6</sup> Parties must collectively participate in capacity development, building, and structuring of human resources and institutional ability.<sup>7</sup> Therefore, developing country parties should conduct capacity self-assessments to identify their national needs and priorities.<sup>8</sup>

#### 2.2 INDIGENOUS AND TRADITIONAL KNOWLEDGE

Indigenous that take genetic resources and traditional knowledge interconnected to genetic resources enjoy extensive consideration within various provisions of the Protocol. First, where communities have the traditional right to take use of genetic resources or access traditional knowledge, parties should adopt measures ensuring that PIC and involvement for access is made from such communities.<sup>9</sup> Second, incentives taken from the use of genetic resources or traditional knowledge taken by communities must be equally divided in a fair and equitable way.<sup>10</sup> Third, Parties, feasible participation of aboriginal shall establish devices to make aware the users of traditional

<sup>2</sup> Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefit, A rising from their Utilisation to the Convention on Biological, Diversity, Nagoya, 29 October 2010, available at <http://www.cbd.int/cop10/doc/>, Accessed on 30 January 2024)

<sup>3</sup> Art 5.4 and annex (Monetary and Non Monetary Benefits), See also Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits

<sup>4</sup> Nagoya Protocol, note 19 above, Art. 23.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid at Art 9.

<sup>7</sup> Ibid at Art 22.1

<sup>8</sup> Ibid at Art 22.3

<sup>9</sup> 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, note 19 above, At 6.2 and 7. Additionally parties specify criteria and/or processes from obtaining PIC and involving communities, Art. 6.3(f)

<sup>10</sup> Ibid at Art. 5.2 n 5.5.

knowledge about their duties.<sup>11</sup> Such obligations can be laid down in community protocols, minimum requirements for NLAT. Model contractual clauses as developed by communities with the support of the party.<sup>12</sup> Fourth, in order to increase awareness of genetic resources and traditional knowledge held by communities, parties shall organize meetings of communities, establish a help desk for communities, and involve communities in the implementation of the Protocol.<sup>13</sup> Fifth, in order to enable effective participation of communities in implementation of the Protocol, capacities of communities need to be improved as well. In this regard, the Protocol emphasizes the need to increase capacities of women,<sup>14</sup> owing to their vital role in ABS processes, policy making, and implementation of bio-diversity conservation.

## 2.3 USERS

In the European Union (EU) questions of competence will have to be clarified. The EU has powers to set up its own research programmers. In relation to third countries it is called and empowered to 'promotion of cooperation in the field of Union research, technological development and demonstration with third countries and international organizations'.<sup>15</sup> ) 'This implies setting conditions for funding projects involving ABS. However, the EU lacks explicit competence to legislate in this field. Another competence basis to be considered is the one for environmental legislation.<sup>16</sup> This would however require that ABS is primarily conceived as a means to protect biodiversity. while in fact it is rather regarded as an undesired obstacle to free R&D. External trade<sup>17</sup> Due diligence rules as laid down in EU Regulation No 995/2010 concerning timber imports may be considered in that relation.<sup>18</sup> It is not mandated by the Protocol that the user state takes administrative law measures to ensure the implementation of contractual obligations. This can be left to the initiative of the contact partner on the Of course, his action must be receivable at and enforceable by user state courts. Disclosure at the patenting stage is widely recommended and was introduced by some states. However, as many products are brought to the market without implying patents and only 0.2 percent of all patents are commercially viable at all.

## 2.4 DRAWBACKS

The Protocol has a few restrictions that lessen the degree of advantage imparted to nations and networks:

- It doesn't make a difference to hereditary assets gathered before it goes into power, or unequivocally to biochemicals got from hereditary assets (see art.2 and 3)

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<sup>11</sup> Ibid Art. 12.2

<sup>12</sup> Ibid at Arti 12.1 and 12.3

<sup>13</sup> Ibid Art 21(b), (c) and (h)

<sup>14</sup> Ibid Art 22.3 and 22.5(j)

<sup>15</sup> Treaty on the functioning of the European Union, Rome, 25 March, 1957, 011 C I51/47 (9 Ma, 2008), Art. 180(b).

<sup>16</sup> Ibid at Art. 193

<sup>17</sup> Ibid at Art. 207

<sup>18</sup> Ibid at Art. 4(2).

- Enforcement instruments are powerless – eg. it just requires one vague checkpoint in client nations.
- It doesn't itself require the earlier educated assent regarding Indigenous or nearby networks, yet expects nations to create arrangements and legitimate measures for this, which will take some time.
- Prior educated assent and advantage imparting to Indigenous and neighborhood networks for access to hereditary assets held by them is to be "as per household enactment".

The Protocol accentuates state power over characteristic assets, however doesn't perceive the standard privileges of networks. This is a worry for some, indigenous and neighborhood networks, given their reliance on bio-hereditary assets for nourishment, wellbeing and so on, and their job in monitoring and improving numerous hereditary assets.

The Protocol alludes to Article 8(j) and the UN Declaration on the Rights of Indigenous Peoples in the preface. In any case, it doesn't require the upkeep of conventional information for preservation and jobs or the assurance of rights over related customary assets and terrains and waters expected to continue conventional information.

## 2.5 CASE STUDIES

### Samoa Mamala case ( USA)

In the year the 1980s, Dr Paul Cox conducted ethnobotanical studies in Samoa. He identified an interesting cure for 'yellow fever' in Falealupo village from the Mamala tree (*Homolanthus nutans*). He collected in the Falealupo forest and was sent to the US National Cancer Institute in 1986. Prostratin molecule identified as having 'potent cytoprotective activity.' But is a 'phorbol' so thought it could promote tumor growth. Further testing at NCI and Aids Research Alliance revealed it might be a potential anti-retroviral.

### INDIA

India has taken the implied measures for non-commercial research such as imminent emergencies Regulation 13, FORM – B, Approval within 45 days, Food and Agriculture for food security Notification S.O. 3232(E) 2014: Exemption 3 and 4. Research, Breeding, and Training for Food and Agriculture – food crops and forages (ITPGRFA Notification – Standard Material Transfer Agreement under the Multilateral System. Dept. Agriculture).

## CHAPTER 3

### BONN GUIDELINES AND ACCESS AND BENEFIT SHARING

#### 3.1 FEATURES OF BONN GUIDELINES

The Bonn Guidelines help the gatherings, Government, and other partners in advancing generally speaking access and advantage-sharing plans. It recognizes the methods associated with the method for gaining admittance to hereditary assets and advantage sharing. In addition, it means to help them while building up legislative, managerial, or strategy quantifies on access and advantage sharing. Plus, it arranges authoritative courses of action for access and advantage sharing. A program for limit building is under procedure to improve that creating nations are in a situation to adequately execute the rules and the comparing arrangements of the show.

The Bonn Guidelines recognize the means in the entrance and advantage-sharing procedure concentrating on the commitment of clients to solicit the earlier educated assent from suppliers. They explain the necessities for commonly concurred terms. It characterizes the key jobs and duties of clients and suppliers. It puts pressure on the importance of inclusion all things considered. They take different traits, for example, motivating forces, responsibility, implies for confirmation, and question settlement. At last, the components for consideration in material exchange understanding are distributed. It gives a demonstrative rundown of both fiscal and non-money-related advantages.

Approximately 180 nations consistently embraced these rules to give them an unmistakable and unquestionable position. It gives invites proof of a worldwide will to deal with troublesome issues that require parity and bargain on all sides for the benefit of all however they are not lawfully authoritative. The Bonn Guidelines take the more extensive structure and the imperative instrument for the all-out usage of the show. It defends the common riches on which every single human culture depends.

When creating and drafting authoritative, regulatory, or approach gauges on access and advantage offering specific reference to arrangements of CBT under Articles 8(j),10 (c),15,16, and 19 are given by these Guidelines. Agreements and different plans under commonly concurred terms for access and advantage sharing are additionally liked. It doesn't translate as changing the rights and commitments of Parties under the Convention on Biological Diversity, plan to fill in for important national enactment, deciphering to influence the sovereign privileges of States over their normal assets, relegating any rights over hereditary assets past those furnished as per the Convention, influence the rights and commitments identifying with hereditary assets emerging out of the commonly concurred terms under which the assets were gotten from the nation of starting point.

These Guidelines are deliberate in nature to control the two clients and suppliers of hereditary assets, amplify their utility, and suit a scope of uses. It plans to decrease exchange costs, to pick up the help of clients and suppliers, and to supplement the universal instruments. It plans to be checked on and appropriately modified and improved as experience is picked up in access and advantage sharing. It utilizes a scope of divisions, clients, and national conditions and purviews, rules ought to be adaptable. It advances straightforwardness in the exchange and execution of access and advantage sharing game plans.

### 3.2 PARTICIPATION OF STAKEHOLDERS

Investment of partners is the essential apparatus to ensure the effective improvement and usage of access and advantage sharing course of action. Dependent upon the situation, the various partners and their advantage can be recognized. The partners ought to be counseled and their sentiments considered while following the procedure including: when distinguishing access arranging and actualizing commonly concurred terms and in the sharing of advantages and in the advancement of a national methodology, arrangements or systems on access and advantage sharing. For the inclusion of pertinent partners including indigenous and neighborhood networks, the proper consultative game plan through delegate ought to be made.

To advance the pertinent partners, the data particularly concerning logical and legitimate guidance, with the end goal for them to have the option to take part adequately ought to be given. The help for limit working with the goal for them to be effectively occupied with different phases of access and advantage sharing plan in such a way of the improvement and execution of commonly concurred terms and authoritative course of action ought to be given. The help of a go-between or facilitator while haggling commonly concurred terms can be acquired by the partners associated with access to hereditary assets and advantage sharing. On the other hand, getting to is confined and PIC is required until a gathering lawfully decides something else. Although trying to safeguard the current rights and commitments of contracting parties, the Bonn Guidelines propose the last methodology, with PIC released by governments while assigning a skillful national power to execute this capacity. Such a two-layered methodology including governments at the national level (top down) and private people at the neighborhood one (base up) is presumed to engage justly participatory organizations having rights to control get to. The Bonn Guidelines give that allowed uses ought to be stipulated, with unanticipated and expected changes of utilization requiring a reestablished use of PIC and commonly concurred term. Even though NGOs have not been so compelled, governments have for the most part esteemed it untimely to create managing authoritative standards given the huge decent variety in ABS courses of action and given the feeling that prescriptive legitimate apparatuses would not accomplish adaptability. Organizations and research establishments have favored intentional codes as the most encouraging instruments for actualizing down-to-earth motivating forces for



additional participation, for example, innovation moves among clients and suppliers. Without far-reaching access enactment and national biodiversity systems, governments have for the most part agreed that deliberate industry measures can help with acknowledging CBD destinations. In like manner, such measures are required to enhance national law and bolster reasonable and impartial advantage-sharing. Imminent corporate codes could incorporate the various classifications of hereditary assets (plant, creature, or microbial), geological zones, or the treatment of subordinates and conventional information.

### 3.3 DRAWBACKS

The impetus to formulate multilateral guidelines, before national legislation was too prevalent, posed considerable information deficits in terms of its prospective ambit. Although the Bonn Guidelines assist parties whose regulatory capacity is limited, they are also premature to the extent that the genetic resources market remains underdeveloped. Government and Private sectors are yet fully acquainted with the novel CBD ethic sought to be exemplified by the Bonn Guidelines. PIC, as a precondition to access, encroaches upon areas such as applicable land tenure systems. Bottom-up approaches envisage the direct participation of indigenous communities and elevate their status within national contexts. Benefits are shared fairly and equitably with 'stakeholders' and not merely with 'rights' holders. IPR regimes encourage holders to share their proprietary 'rights' and indigenous communities are not precluded from customary usage on communal terms. Customary use includes spiritual and ceremonial dimensions in addition to the more strictly economic and subsistence functions.<sup>19</sup> Such innovative elements will emerge in practice before being concretized as legal standards.

### 3.4 CASE STUDIES

In the cases of *Yumbulul v. Reserve Bank of India*<sup>20</sup> and *Milpurrurru v. Indofurn Ltd*<sup>21</sup>, the tendency to view traditional knowledge as being open to unrestricted access and appropriation without consent, one may consider the unauthorized reproduction of sacred Australian Aboriginal paintings on carpets, printed clothing fabrics, garments and greeting cards and their subsequent distribution and sale that have led to claims before the Australian Courts for the protection of Indigenous rights and culture. The rich traditions of indigenous music from Ghana, the Solomon Islands, and African Pygmy communities have also been sampled by record companies and performance groups, to be later peddled as original compositions. Sacred and secret material of communities has been subjected to unauthorized use, disclosure, and reproduction, such as in the case of the sacred Coroma textiles of Bolivia and the United States Copyright has been claimed on yoga an ancient Indian tradition.<sup>22</sup> Professional

<sup>19</sup> CBD, and 80 above, para. 101. Compare also CBD, n. 3 above, Art. 10.

<sup>20</sup> (1991) 21 I.P.R. 48.

<sup>21</sup> (1994) 130 A.L.R.659

<sup>22</sup> In 2003, Bikram Choudhary, a yoga instructor in the US, obtained a copyright on his sequence of 26 yoga postures and two breathing exercises done at a room temperature of about 40 degrees Celsius. In 2005, open Source Yoga challenged Bikram's Copyright before the USA district court in Northern California.

flowerbeds and the UK Government have figured non-legitimately restricting standards and regular strategy rules per which 28 taking an interest establishments embrace to treat hereditary assets and their subsidiaries obtained preceding the passage into power of the CBD in a similar way as those procured from that point.

## Chapter 4

### CONCLUSION

The Protocol constitutes the latest ambitious approach to develop the international instrument complementing critical aspects of previous ABS instruments. In this regard, some major achievements were reached: the binding nature, a clear definition of 'utilization of genetic resources' integrating the use of bio-chemicals (despite omission of an indicative list of possible uses), obligations to ensure legal certain, facilitation of non-commercial research, obligations to ensure compliance supported by monitoring, stronger involvement of local and indigenous communities holding genetic resources and traditional knowledge, measures on increasing capacity and awareness, additional obligations on technology transfer, specific obligations on dispute settlement, the establishment of an ABS Clearing House Mechanism, and encouragement of multilateral approaches in trans-boundary situations.

However, the Protocol also suffers from several drawbacks such as ample use of debilitating qualifiers ('as appropriate', 'where applicable', 'as far as possible', and 'if available') and weak language ('endeavor', 'encourage', 'consider'. and 'promote') in central provisions, no clarification of the question of retroactivity, and no self-standing commitment of client states to guarantee advantage sharing.

Considering positive and negative features, the Protocol probably reflects what could be reached at all given the clash of interests behind it. It therefore deserves to be swiftly ratified by all states interested in the research and valorization of genetic resources and traditional knowledge with the final goal of protecting biodiversity. The actual utility of the Protocol will become visible during the implementation phase. It is suggested that states start introducing their own ABS regime.

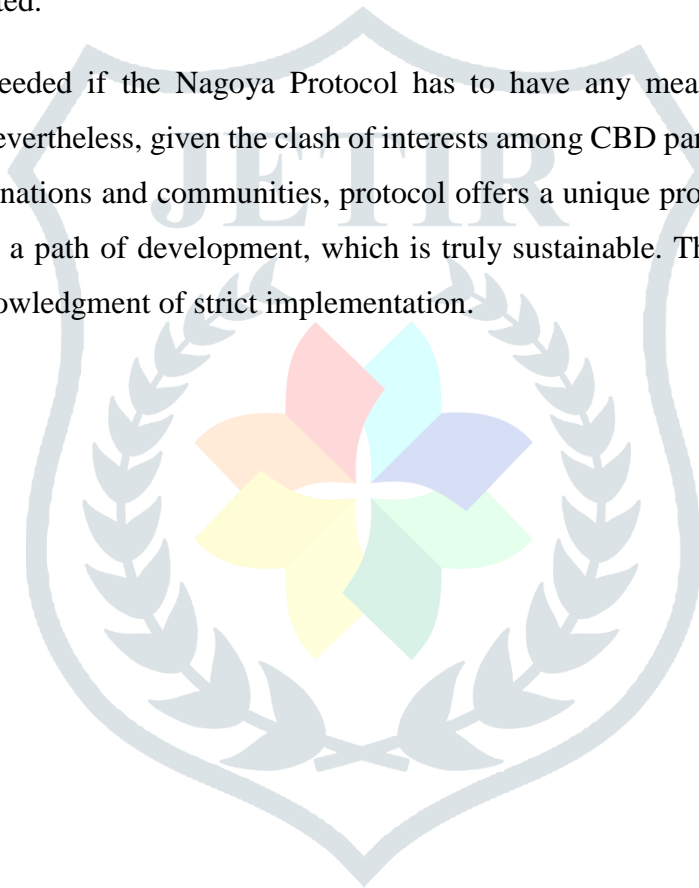
As with all international framework agreements or conventions, the CBD sets the goalposts for the conservation and sustainable use of biodiversity. The bar has been set relatively high and it is now up to the international community to provide the legal, institutional, social, economic, and political measures necessary to effectively address some of the most pressing problems identified as being at the root of the global biodiversity crisis without waiting any longer.

The notion of sustainable development is a dynamic concept and its right implementation can go a long way in promoting real development among disadvantaged regions and communities.<sup>23</sup> Without any doubt, the Nagoya

<sup>23</sup> P. Bimie, A. Boyle, International law and the Environment, Oxford University Press, 2009

Protocol epitomizes an ideal agreement based on the fundamental deep-rooted association between biodiversity and sustainable development. The protocol incorporates many of the substantive and procedural ingredients of sustainable development in the form of access on mutually agreed terms, benefit sharing, participation of indigenous communities, capacity building of women, etc. The right to development has been recognized as a prominent goal under the protocol. The protocol on the flipside gives scant regard to poverty reduction. The relationship between biodiversity protection, sustainable development, and poverty reduction has traveled a long way from just being an environmental issue to encompass social and human rights paradigms.<sup>24</sup> This assumes double significance as many of the hotspots of biodiversity also correspond with the poorest regions and communities of the world. Poverty reduction and involvement of the disadvantaged communities involvement and a real benefit are benefited.

A sharing mechanism is needed if the Nagoya Protocol has to have any measurable impact on achieving sustainable development. Nevertheless, given the clash of interests among CBD parties, any kind of agreement is a major step forward.<sup>25</sup> For nations and communities, protocol offers a unique prospect to protect and conserve biodiversity while initiating a path of development, which is truly sustainable. The Nagoya Protocol therefore merits the support and acknowledgment of strict implementation.



<sup>24</sup> India Country Strategy Paper, Government of India, 2007

<sup>25</sup> Nijar, G. S, Nagoya Protocol on Access and Benefit Sharing of Genetic Resources Analysis and Implementation Options for Developing Countries, South Centre(2011).