

STRENGTHENING AND SUSTAINING LEGAL PREPAREDNESS IN NBSAPs

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Introduction

International multilateral environmental agreements and practices continue to shape many areas of international biodiversity governance and management, while national legislation continues to set the legal framework for local decision-making and implementation.¹ Although those agreements and that practice have achieved significant success, national reports continue to highlight the continued fall in biodiversity, which is, in part, due to low levels of implementation and the ineffectiveness of existing legislation.²

Low implementation levels, weak enforcement and the ineffectiveness of legislation have been identified as having political, administrative, socioeconomic and legal causes. Serious concerns are being raised about low capacity in the areas of financial, human and technical resources and planning. Institutions are also reported to be weak. Those challenges need to be fully addressed in all discussions and forums on legal preparedness. Legal frameworks need to evolve to support changing realities and scientific discoveries and to become more coherent and effective in addressing pressing and emerging issues at all levels.

Biodiversity conservation and management occur at different levels and in different phases, namely local, national, subregional, regional and international. A variety of legislation applies to the different levels and phases, which justifies the need to address and engage various actors, diversify priorities, build support and identify and expand partnerships. Addressing and engaging various actors means identifying the diverse range of stakeholders affected directly or indirectly by biodiversity use and conservation decisions, and the specific legal framework that can best be employed to maximize their role in biodiversity conservation and management.

In that regard, countries continue to develop laws and policies aimed at ensuring the conservation and sustainable use of biodiversity, access thereto and the benefit-sharing therefrom, as well as the equitable use of traditional knowledge relating to biodiversity throughout the various levels. Countries have encountered substantive success under the Convention. However, many obstacles continue to hinder the full realization of the objectives of the Convention. This is primarily due to complexity in implementing the Convention and incorporating it into new or existing national legislation and policies.

At first glance, legal preparedness for NBSAPs may appear to be simply a matter of establishing and enshrining relevant biodiversity laws and policies in the relevant instruments. The laws and policies in terms of the legal preparedness for NBSAPs are of great significance, but they should not be the end point in efforts to attain maximum preparedness.

On closer examination, it becomes clear that legal preparedness for NBSAPs is as complex as the concept of biodiversity itself. Legal preparedness for NBSAPs extends beyond soft and hard laws to include having other basic elements in place, including institutional and professional competencies, accessible information on NBSAPs, enhanced laws and policies, coordination and integration mechanisms, ministerial and departmental levels, local levels, advisory bodies, courts and tribunals, and mechanisms for indigenous and local communities.

It also requires the enactment and adoption of clear implementation methods and accountability frameworks.

¹ Heidi Wittmer and Haripriya Gundimeda (eds.), *The Economics of Ecosystems and Biodiversity in Local and Regional Policy and Management* (London and Washington D.C., Earthscan, 2012).

²Secretariat of the Convention on Biological Diversity (2014) Global Biodiversity Outlook 4. Montréal P.13. Available from <https://www.cbd.int/gbo/gbo4/publication/gbo4-en-hr.pdf>

The present paper will now analyse the basic elements set out above, while seeking to establish the ways in which they can best be applied and involved in enhancing and sustaining legal preparedness in NBSAPs.

Basic elements for strengthening and sustaining legal preparedness in NBSAPs

A. Institutional and professional competencies

With a view to “curing” the old problems of institutional fragmentation, the present paper approaches institutional and professional competencies as a single, combined entity. The old fragmentation problems arose, inter alia, as a result of attempts to treat institutional competencies and professional competencies as separate and isolated issues.³ The presumption here is that institutions are dependent on professionals and vice versa, hence the need for a streamlined, integrated approach. Differences may exist between the two concepts, but they may not be strong enough to override the problems caused by an isolated approach.

The terms “institution” and “professionals” signify overlapping portions of isolated, interrelated and interlocked activities and responsibilities. Institutions are made up of formal rules, laws and constitutions, as well as informal norms such as codes of conduct. In biodiversity conservation, the formal and informal rules are connected by enforcement mechanisms.

Institutions and professionals are key to the conservation and sustainable use of biodiversity. However, the legal framework within which they execute their mandate is a major determinant of how well they can fully contribute to the development, implementation and revision of NBSAPs.

Conflicts and delays in biodiversity conservation occur because different institutions and individuals at different levels have different objectives. No matter how competent the institutions and professionals, it is not possible to attain conservation and sustainability at an individual or isolated level. Collaboration is crucial to avoid institutions and professionals, albeit unintentionally, working against each other. NBSAPs vary in nature and objectives and different institutions and stakeholders often need to integrate and reinforce each other.

The following table demonstrates that, for effective legal preparedness, it is necessary to involve every competent individual and institution at all levels, taking into consideration specific competencies and challenges.

Institutional levels	Competencies	Key issues for enhanced preparedness	Challenges	Way forward
Central government	National strategies, plans and programmes; regulations and legislation; coordination, information, data and technical advice; funding.	To facilitate inter-sectoral and intra-sectoral coordination and integration; capacity-building; knowledge and policy instruments; to monitor and manage change and challenges at the national	Constrained government agencies; fragmentation of institutions, laws and policies; limited skills and resources; fragmented data.	Acceptance that institutions outside central government have a clear role to play in enhancing central government strengths and weaknesses; developing successful partnerships for mainstreaming

³ Fariborz Zelli and Harro van Asselt, The Institutional Fragmentation of Global Environmental Governance: Causes, Consequence and Responses in *Global Environmental Politics* (Massachusetts Institute of Technology Press Journals, Vol. 13, No. 3, pp. 1-13).

		level; to build consensus and capacity.		biodiversity; removing impediments; curing legal fragmentation; monitoring and review; accountability. Country experiences such as the National Commission for Knowledge and Use of Biodiversity (CONABIO) in Mexico and CONEGBIO in Brazil are some of the examples of central arms-length biodiversity institutions that have enhanced and contributed to independent science-based decision-making.
Local government	Local biodiversity use and planning; on-the-ground implementation.	Link local issues with national issues and priorities; use local strategies to develop and implement national strategies; build capacity; monitor and manage change and challenges at the local level; build consensus and capacity.	Local authorities are often tied to national funding; poor local-national coordination.	Appropriate balance between local and national objectives; collaboration with other bodies; efforts to gain local community support through knowledge-sharing; monitoring and review. In this regard, practices from local Biodiversity Strategies and Action Plans in countries like Japan and Korea, and the

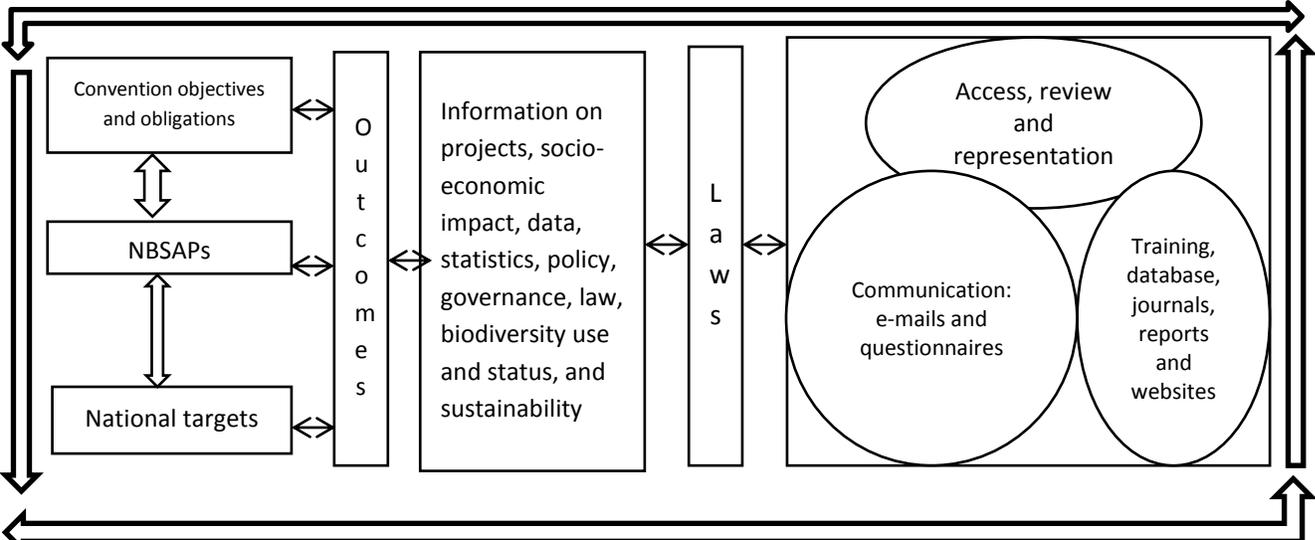
				legal framework that sets these as legal requirements, and outcomes of the 5 th Global Biodiversity Summit of Cities and Subnational Governments held in Cancun, Mexico from 9-11 December 2016 would be of use.
Regional coordinators	Assessment; identification, development and prioritization; intraregional implementation.	Reforms to ensure regional bodies have access to NBSAPs and other tools; build capacity; monitor and manage change and challenges at the regional level; build consensus and capacity.	Weak linkage with national, local and non-governmental levels of implementation.	Enhanced programme coordination; integrated implementation programmes; enhanced regional biodiversity strategies; monitoring and review.
Non-governmental organizations including private sector and entrepreneurs	Networking and community support; voluntary participation, monitoring and review.	Innovation; communication; monitor and manage change and challenges at various levels; apply conflict resolution; build consensus and capacity.	Lack of recognition of non-governmental biodiversity concerns and efforts, including concerns raised by entrepreneurs and businesses	Incentives for voluntary conservation; individualization of NBSAPs; reduced suspicion of government involvement; monitoring and review. In this regard, biodiversity offsetting program in US that promotes coalitions of government, conservation agencies and private companies and backing by US Coastal Zone Management

				Act 1972 would be a major point of reference.
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B. Accessible information on NBSAPs, related legislation, best practice and policies

While the existing NBSAPs have comprehensively addressed the most notable biodiversity issues, access to relevant information by concerned parties and stakeholders is not yet fully streamlined. The remaining gaps between available information and its relevance to set goals and objectives need to be filled in and then regularly updated.

The following table shows how access to basic information on NBSAPs could accelerate the realization of the objectives.



C. Coordination mechanisms across jurisdictions and sectors

While many NBSAPs call for action at the national level, enhanced delivery will require countries and stakeholders to collaborate much more closely on implementation. Various multilateral environmental processes have set and continue to set objectives in that regard through the adoption of a synergistic approach. Results from areas as diverse as Brazil, Mexico, Romania and the European Union, among others, are already showing, encouragingly, that enhanced coordination and cooperation can provide launch pads for strengthened legal preparedness.⁴

D. Ministerial and departmental levels

Ministries and relevant State departments play a crucial role in coordinating the development, revision and implementation of NBSAPs, as well as the overall conservation of biodiversity. The Hague Ministerial Declaration of the Conference of Parties to the Convention on Biological Diversity in 2002 underlined that critical role.⁵

Various NBSAPs, such as those submitted by Australia and Germany, are prepared and implemented by ministries in coordination with relevant departments and stakeholders. Furthermore, the Australian Environment Protection and Biodiversity Conservation Act 1999 gives the minister a mandate to

⁴ Food and Agriculture Organization of the United Nations, *Cross-sectoral Policy Impacts Between Forestry and Other Sectors: Summaries of Findings and Opinions of Participants*, Forestry Department Technical Meeting, Rome, 18–20 September 2002. Available from <http://www.fao.org/forestry/4494-02925c192f0fa9d77af9de82cd47859a6.pdf>; see also Food and Agriculture Organization of the United Nations, *Understanding Cross-sectoral Policy Impacts, Policy and Legal Aspects* (United Nations, Rome, 2003). Available from <http://www.fao.org/docrep/006/Y4653E/y4653e04.htm>.

⁵ The Hague Ministerial Declaration of the Conference of Parties to the Convention on Biological Diversity. Available from <https://www.cbd.int/doc/meetings/cop/cop-06/other/cop-06-min-decl-en.pdf>.

consider various factors and reports, and to consult with relevant departments before making any decision.⁶

As far as biodiversity issues are concerned, in general people want ministries and departments to be transparent and accountable. They expect that measures taken by ministers and other administrators will be effective, efficient and legally justifiable. A clear framework of policies, laws, strategies and instruments is essential for such purposes and should be taken into consideration throughout the NBSAP process.

E. Local and municipal levels

The local and municipal levels serve as an effective support mechanism for implementing local, national and international decisions, given their proximity to biodiversity values, especially in countries with devolved political systems such as Kenya. Decisions X/2 and X/22 of the tenth Conference of the Parties on the Strategic Plan for Biodiversity 2011–2020 and the Plan of Action on Subnational Governments, Cities and Other Local Authorities for Biodiversity (2011–2020) respectively, call for local action in the implementation of the objectives of the Convention. Furthermore, subnational biodiversity strategies and action plans (SBSAPs) are increasingly being developed at city, local, territorial, provincial and State levels.

Decision IX/28 of the ninth Conference of the Parties on promoting engagement of cities and local authorities recognizes the role that cities and local authorities play in NBSAPs and invites parties, Governments and international development agencies to support and assist cities and local authorities in encouraging and promoting practices, activities and innovations of indigenous and local communities that support the three objectives of the Convention and achievement of the 2010 biodiversity target. That call was reiterated in decision X/22 of the tenth Conference of the Parties on the involvement of subnational governments, cities and other local authorities in the revision and implementation of NBSAPs.

Considering such significant guidance from the Conference of the Parties, local bodies could contribute in the following ways:

- (i) Develop and disseminate policy tools, guidelines and programmes that facilitate local action on biodiversity and build capacity to support national Governments in implementing the Convention, as well as the NBSAPs;
- (ii) Develop awareness-raising programmes on biodiversity for local stakeholders, including businesses, local administrators, non-governmental organizations, youth and indigenous and local communities, in line with relevant local social, political and economic strategies.
- (iii) Develop and implement subnational biodiversity strategies and action plans in line with and in support of NBSAPs.

F. Advisory bodies

The role of advisory bodies is to keep under review the state of biodiversity and ecosystems and to advise institutions on appropriate measures which could be taken to combat pollution of all kinds and to protect and sustain biodiversity. That is the established practice in Mexico, Brazil, Madagascar and Hong Kong, for example, under the Advisory Council on the Environment.

Furthermore, given their diverse composition, advisory bodies are able to provide a forum for effective communication between members of the community, ministries and regulatory agencies. In addition to representing the various interests of the community and serving as focal points on biodiversity issues, members of advisory bodies are a valuable information resource for the community.

For enhanced legal preparedness, a broad range of stakeholders are involved in local policy decisions through advisory bodies, including governors, heads of institutions, researchers, planners and developers. Citizens, through their representatives, play their role effectively as advocates,

⁶ Environment Protection and Biodiversity Conservation Act of Australia 1999 (see footnote 98). Available from <https://www.environment.gov.au/epbc>.

conservationists or protestors. Regulating agencies are held accountable in approving projects in compliance with existing legislation and actions, and dispute resolution mechanisms are enhanced.

G. Courts and tribunals

Courts and tribunals have a significant role to play in enhancing legal preparedness for biodiversity conservation. Depending on the nature of the legal issues raised, courts and tribunals have differing levels of competence to assess and determine matters.

Those different levels of competence are analysed in the following table.

Role of court or tribunal	Jurisdiction	Contribution to achieving biodiversity and NBSAPs objectives
Dispute settlement	Jurisdiction to hear disputes, including those between contracting parties and parties and individuals.	To hear and determine disputes related to the conservation and sustainable use of biodiversity, as well as those related to the sharing of benefits arising from its use in accordance with the Nagoya Protocol; to hear and determine disputes related to the development, revision and implementation of NBSAPs; to hear and decide on disputes concerning access to information.
Enforcement	Jurisdiction to declare a State non-compliant with the law.	To determine the legality of legislation, policies, activities and plans related to biological resources; to ensure respect for the rights of indigenous and local communities; and to ensure compliance with due process in administrative processes.
Administrative	Jurisdiction to review decisions of administrative actors to ensure procedural and regulatory respect for administrative authority.	To review conduct related to decision-making; to determine whether a decision has been made within the timeframe stipulated by the legislation; and to determine whether affected parties were given an opportunity to respond to all issues or factual allegations, without bias or conflict of interest.
Constitutional review	Jurisdiction to invalidate acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement.	To interpret, protect and enforce the Constitution; to determine the legality of actions based on the basic values of statehood, fundamental rights, the rule of law, justice and the separation of powers; to determine the constitutionality of legislation, action plans and policies.

H. Indigenous and local communities

The crucial role of indigenous and local communities in contributing to effective protected area management and biodiversity conservation has long been recognized. Indigenous and local communities largely depend on biodiversity for their livelihoods. They also own, develop and disseminate traditional knowledge. There is broad recognition of the contribution that traditional knowledge can make to the conservation and sustainable use of biodiversity.

Decision XI/14 of the eleventh meeting of the Conference of the Parties to the Convention encourages parties to take concrete actions to facilitate participation by indigenous and local communities in the development and implementation of NBSAPs. Parties are also encouraged to establish mechanisms to ensure the effective participation of indigenous and local communities in decision-making and policy planning. Such participation can be achieved through studies of practices in community-based management of natural resources, taking into consideration the various indigenous and local practices that influence the development, implementation and amendment of various laws and policies. In turn, those laws and policies should contribute to the facilitation of consultations at those levels.

I. Accountability framework

An accountability framework is a statement establishing an obligation on institutions and their members to be answerable for all decisions made and actions taken, and a responsibility to honour their commitments to deliver on objectives, standards and plans. Accountability includes achieving objectives and goals, implementing and delivering on all mandates in accordance with all relevant rules, resolutions, legislation and objectives in a timely and cost-effective manner and reporting on progress and outcomes.

In the development, revision, implementation and monitoring of NBSAPs, it is crucial to ensure that the process is supported by a strong culture of transparency and accountability. Without a clear accountability framework, biodiversity planners lack the commitment necessary to adapt processes, realign strategies and reassign resources to meet expectations.

Accountability goes beyond internal control mechanisms. It encompasses issues such as identifying commitments to the international community, recourse to complaint and response mechanisms by key stakeholders and the transparency of various biodiversity stakeholders, including member States and local communities. The establishment of credible institutions such as tribunals and ombudsmen further enhances transparency and accountability.

An accountability framework in support of NBSAPs should guarantee participation, evaluation, transparency and feedback by stakeholders. Expectations should be predefined and clearly understood. NBSAP decisions should be made in a reasonable way with an acceptance of responsibility. The development, monitoring, implementation and revision of NBSAPs should be institutionalized.