

# The unmaking of a treaty

## The convention on biological diversity

**T**he Convention on Biological Diversity (CBD), formulated in 1992, was a toughly negotiated international treaty. Although negotiated in the global political ambience of the new unipolar world order and the first, unopposed Western victory in Iraq, the Southern negotiators displayed unusual unity and negotiation skills. The result was a fairly balanced treaty that accommodates the legitimate interests of both the South and North. But perhaps that is all that can be said of the Convention. More than a decade after its entry into force, its achievements remain volumes of repetitive documents, endless surrealistically named committees and fissiparous meetings. While the CBD process has indulged in its own virtual world, in the real one biopiracy remains unabated.

The proceedings of the recent seventh meeting of the Conference of Parties (CoP) do not leave room for much hope. The Kuala Lumpur meeting, in fact, marked another retrogressive step in terms of enforcement. The Convention unequivocally recognizes national sovereign rights over biodiversity; requires prior, informed consent for access to biodiversity; and stipulates that such access should be based on mutually agreed terms. CBD also stipulates that any commercial benefit derived from the use of biodiversity should be equitably shared with the providing country. CBD has thus made biopiracy an international offence and set the fundamental legal framework for providing access to biodiversity and benefit sharing. However, these hard-negotiated provisions of the Convention have been ingeniously undermined by the North, skilfully sidestepped by the Convention Secretariat, and blissfully ignored by the Southern Parties. As a result, species after species has been misappropriated from the bio-rich South, worked on and patented, in obvious violation of the treaty.

A centrepiece of the Kuala Lumpur meeting is the decision to develop an 'international regime' for access to biodiversity and benefit sharing. Such a decision has been the culmination of a lengthy process initiated at the third Conference of Parties. While the basis for access and benefit-sharing is clearly laid out in the Convention, this new exercise will only help Parties from the developed countries to circumvent the legally binding requirements for benefit-sharing as provided in the Convention, apart from providing an excuse for continued inaction on this count. Developing countries have, in fact, been tricked into asking for an international regime, while they should actually have been asking the CoP to review the implementation (or lack of it) of the relevant articles on Access and Benefit Sharing (ABS), especially Article 15.7. By agreeing to negotiate the international regime, developed countries hope to reopen issues that have already been settled in the Convention. For instance, they already object to calling the proposed regime a 'legally binding' one, while the Convention has already provided the legally binding provisions for ABS.

There has been an abysmal weakening of the negotiating position of the developing countries. This is especially disappointing when one considers the unusual strength maintained by developing countries in the CBD formulation negotiations. In retrospect, it was this strength that enabled the developing countries to reject totally the articles drafted by IUCN (The World Conservation Union) and their underlying notions such as states being simply 'guardians or custodians' of biodiversity (and not owners), payment of a levy to a proposed international fund for biodiversity-use within their territory, placing the principal emphasis on access to biodiversity, and so on. In its clamouring for a convention on biodiversity in the late 1980s, the key objective of the USA was to legalize free and open access to biodiversity of the Southern countries before they instituted protective measures. It was indeed a remarkable achievement of the Southern negotiators that they were able to discard the IUCN draft articles

and the notions contained therein that formed the broad Western negotiation position. It was this North–South balance of the CBD that prompted the USA, the original initiator of the convention proposal, to boycott the treaty.

Yet such unity and efficiency have withered once the treaty has come into force. Developing countries have since remained largely reactive and at best defensive. At Kuala Lumpur the G77 arrangement was not at all effective, due in part to the late decision on its chair. The half-minded Like Minded Megadiverse Countries did not have any significant technical support. The regional group meetings of Asia and Africa were largely composed of monologues.

The Conference has adopted new programmes of work on protected areas, mountain biodiversity and technology transfer. The protected areas programme is a means to achieve the 2010 target of significantly reducing the loss of biodiversity, set by the World Summit on Sustainable Development. Although the roles of indigenous and local communities are factored in, there was no departure from the exclusionary doctrine of protected areas. While the programme on technology transfer seeks to promote ways to enable the transfer of appropriate technologies to developing countries, the debate on the subject did not address the issue of how the Parties have complied with the Convention.

The West has never been comfortable with CBD's recognition of national sovereign rights over biodiversity. In a panel discussion on the sidelines of the CoP, I was surprised to hear the former Chilean ambassador Vincent Sanchez observe that the sovereignty issue had 'suddenly cropped up' in the negotiations. One wonders as to when it was that the resources, and for that matter anything else, within the territory of a nation were regarded as a global resource in a supposedly post-colonial world. The remark was suitably answered by Ambassador Ting Wen Lian, the 'dragon lady' of Malaysia, who had been the vanguard of the South in the Convention formulation negotiations.

At least for some, the global resource argument has been the result of confusing biodiversity with the subject of a prolonged debate within the parlance of the UN Food and Agriculture Organization (FAO). The subject there was the genetic resources appropriated from the South and held in the seed/gene banks in the North. Within the FAO fora the South took the lenient position of regarding these translocated genetic resources as a global resource, while the North opposed access for the South to these resources. And these resources remain untouchable to CBD too by having denied retrospective effect of CBD (Article 15.3). The CBD's sovereignty provision is simple: a country owns biodiversity within its territory. The indigenous communities have come a long way in playing a significant role in the CBD process. They have turned out in fairly good numbers and have been reasonably well organized. However, I was disappointed to see a small segment of indigenous groups being influenced by fund-wielding Western agencies in shaping their positions.

Emil Salim, who chaired the UN preparatory for the Johannesburg Summit, asked his colleagues on the podium, in desperation, at the adjournment of an inconclusive session during the critical final meeting of the committee, 'What shall we do with the US?' (The saintly Salim had forgotten to switch his microphone off and the next day NGO representatives appeared at the meeting venue wearing T-shirts printed with the quotation.) How could CBD achieve the 2010 target of substantially reducing the loss of biodiversity without bringing the country with the largest number of endangered reptilian, amphibian and fish species in the world into its ambit? Nobody has raised the issue of bringing the USA to accede to the Convention, not even the Ministerial Declaration which calls on all countries to accede to the Biosafety Protocol. It may be that delegates were not entirely unhappy not having the intimidating voice of the USA in the negotiation halls. The United States can be brought into the fold of the treaty only if a forthcoming Conference of Parties decides not to provide access to biodiversity for non-Parties.

CBD is a fair international legal mechanism available for the sustainable management of biodiversity, but its implementation depends on the strength that the countries of the South can show in future negotiations, without forgetting their own responsibilities.

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