Environmental Conservation **26** (2): 79–82 © 1999 Foundation for Environmental Conservation

COMMENT

The Convention on Biological Diversity: exposing the flawed foundations

Over five years have elapsed since the coming into force of the much heralded United Nations Convention on Biological Diversity (CBD or Convention) signed during the 'Earth Summit' at Rio de Janeiro in June 1992 (CBD 1992). Despite the warm, even euphoric welcome extended to this treaty by the environmental community, the difficulties of implementing the CBD in the last five years are unmasking and uncovering its flawed environmental foundations. The language of any legal instrument embodies and expresses the considered intentions of its creators, and may contain obligatory provisions that are legally binding. They may also contain hortatory and aspirational commitments that are not legally enforceable. The CBD rejected 'hard' environmental obligations that are legally binding for non-legal exhortations, and highly qualified 'soft' commitments. Whatever their value be as face-saving strategies for reaching agreement on the CBD, such aspirational expressions do not create a stable foundation for tough decisions in the world of realpolitik.

The implementation of the CBD in the last five years has resulted in a proliferation of bureaucracies and agencies, including a Clearing House Mechanism (CHM), A Subsidiary Body on Scientific Technical and Technological Advice (SBSTTA), an Ad Hoc Working Group on Biosafety (BSWG), and the Global Environment Facility (GEF), the designated interim institutional structure for financial mechanisms. These bodies and their multiplying staff, were created by the supreme decision-making body of the CBD, namely the Conference of the Parties (COP), at four major meetings held in 1994 (Bahamas), 1995 (Jakarta), 1996 (Buenos Aires), and 1998 (Bratislava). While many within the expanding bureaucracies and attendees at these large meetings are showering their projects with lavish praise, a number of objective reviewers examining the achievement of the CBD, are noting the paucity of what has been accomplished in the last five years (Pallemaerts 1996, p. 623; Wold 1998, p. 1).

Some of the criticisms levelled against the implementation of the CBD include the charges that the truncation of 'sustainable use' from 'conservation' has impeded the advance of sustainable development, that the different legal obligations imposed on the parties have hampered progress on substantive issues, and that the parties have failed to address forest issues (Wold 1998). Even flag-waving commentators/supporters of the CBD are expressing pained exasperation at the lack of progress. One such evaluation dealing with the problems encountered by the Fourth, and most recent, COP in 1998 was that: 'The combination of questionable organization, ineffective implementation and identity problems, combined with backroom politics and a broad issue mandate, all coincided to create a formidable array of obstacles to be overcome.' (Earth Negotiations Bulletin 1994 as updated). The result was a 'vicious cycle of chaos'. According to the same commentators:

> 'Some wonder whether difficulty in addressing the formulation of the modus operandi for the COP and other implementation issues is symptomatic of greater problems. Some distressed that, six years after Rio, the 'innocence of youth' excuse can no longer be used and the CBD is not maturing into an institution that is applying effective procedures. It has taken six years to reach a point at which implementation of the CBD is now being given full attention, and even now only the very first steps have been taken. . . .' (Earth Negotiations Bulletin 1994 as updated).

Based on, and reproducing portions of, Guruswamy (1998), this Comment will argue that the problems of implementation referred to stem from fundamental constitutive weaknesses, to which the choir of supporters and advocates of the CBD understandably, but regrettably, turn a blind eye.

First, the CBD rejects the concept of sustainable development by prioritizing economic growth over environmental protection, and allows international resources earmarked for the protection of biodiversity to be expended on economic growth that could destroy biodiversity. Second, it denies state responsibility for damage to the global commons. Finally, it repudiates the idea that the plant,

https://doi.org/10.1017/S0376892999000120 Published online by Cambridge University Press

animal, insect, and genetic resources of the world (our biodiversity) are the common heritage of humankind and that it is the responsibility of the community of nations to protect this heritage.

To begin, the Convention rejects the concept of sustainable development, which was the very *grundnorm* of the Earth Summit. Sustainable development has not been authoritatively defined, but its key attributes are identifiable. In essence, it calls for economic growth that can relieve the great poverty of the less developed countries (LDCs), based on policies that sustain and expand the environmental resource base. Consequently, sustainable development becomes environmentally sensitive development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs (World Commission on Environment and Development 1987, pp. 1–8).

Sustainable development, therefore, gives parity of status to economic growth and environmental protection. It rejects economic development and growth that is not environmentally sensitive or that which destroys the resource base. It is a new concept precisely because it embraces both development and environmental protection. But, the Convention states both in its Preamble and in critical articles dealing with the financing of the Convention that 'economic and social development and poverty eradication are the first and overriding priorities of developing countries.' (CBD 1992, Preamble, Article 20(4)). By diminishing environmental protection, the Convention effectively disowns sustainable development. The CBD goes even further than subjugating biodiversity to development, it empowers developing countries subjectively to determine what constitutes development.

This diminishing of biodiversity, and accentuation of development subjectively defined is confirmed by the financial provisions. To enable LDCs to implement the Convention, developed countries agree both to pay the 'full incremental costs' of such implementation (CBD 1992, Article 20(2)) and to transfer technology to LDCs (CBD 1992, Article 16). An examination of the commitments of developing countries, in exchange for this transfer of money and technology, is revealing. The Convention lucidly states that 'economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.' (CBD 1992, Article 20(4)). Having made the overriding principle clear, it then develops the implementing structure. The institutional structures as well as the 'policy, strategy, programme priorities and eligibility criteria relating to' access to those transferred resources and technologies will be determined by the Conference of the Parties to the Convention (CBD 1992, Article 21(1)).

Where does this leave us? In the absence of an explicit commitment to protect biodiversity, any resources transferred under the Convention could be used by a small minority of zealous developing countries to advance their own concept of economic and social development. If, for example, they decide that road building, 'reclamation' for beach development and marinas, or even the cutting down of tropical forests is necessary for economic and social development, they would be acting within the powers and privileges granted to them. While this may not have happened as yet, the mandate for doing so is clearly established by the CBD.

A somewhat foreboding omen of the future direction of the Convention is offered by its treatment of tropical rainforests. It is estimated that tropical forests are home to at least fifty per cent (50%) of plant and insect diversity (World Commission on Environment and Development 1987, p. 151; Myers 1988; Wilson 1992). Yet all references to tropical forests, contained in the earlier drafts of the CBD proposed by conservation organizations, were systematically and deliberately excised from the Convention (UNEP 1992, Article 3(2)(a)). While the four COPs meetings from 1994 to 1998 have danced around the subject, the CBD is effectively unable to deal with forests because it has no mandate to do so. The initiatives on forests do not come from the CBD but from a cluster of other organizations including the Montreal and Helsinki Processes, the Intergovernmental Working Group on Forests (IWGF), the Indo-British Initiative, The Forest Stewardship Council, The World Commission on Forests and Sustainable Development, the Center for International Forestry Research (CIFOR), and the Food and Agricultural Organization (FAO) (World Resources Institute).

Second, the Convention tilts against an emerging and developing pattern of regional customary and treaty law that, in the last fifty or so years, has sought to establish the common responsibility of humankind to protect biodiversity (Guruswamy & Hendricks 1997, pp. 102–23). Many involved in the development of international environmental law hoped that the Convention would consolidate these endeavours, and provide an instrument that dealt comprehensively, glob-

https://doi.org/10.1017/S0376892999000120 Published online by Cambridge University Press

ally, and more specifically with the nature of the obligation to protect biodiversity. Instead, the Convention contains no substantive obligation to protect biodiversity.

Although the collective obligation to protect biodiversity was seen by the United Nations Environment Programme (UNEP), the World Conservation Union (IUCN), and numerous other non-governmental organizations (NGOs) as constituting the foundations of the new treaty, the Convention rejects such an obligation and instead proclaims that states have the 'sovereign right to exploit their own resources pursuant to their own environmental policies. . . .' (CBD 1992, Article 3). In similar vein, the Convention rejects the principle that biodiversity is the natural heritage of humankind.

The natural heritage of humankind is to be distinguished from the 'common heritage of mankind' (CHM) that has been applied to the deep sea bed and the ocean floor beyond the limits of national jurisdiction (UNCLOS 1982, Articles 133, 136 & 156–69), and the outer space regime, respectively (AGASMOCB 1979, Article 11(1)). At its core, the CHM involves inclusive enjoyment and sharing of the products of the common heritage, and its thrust remains redistribution, not conservation. By contrast, the 'Natural Heritage of Humankind' refers to the biological diversity of the world, necessary for the existence and development of all humankind, that may fall within the national jurisdiction of States.

The acceptance of biodiversity as the common natural heritage would give rise to a corollary obligation to protect and preserve such a heritage. Instead, the Convention settles for an effete and legally nonbinding recitation that biodiversity is the common 'concern' of humankind. Furthermore, the attenuated affirmation that 'biological diversity is a common concern of humankind' is found only in the Preamble, even though it ranked as a Fundamental Principle throughout the drafting process (CBD 1992, Preamble; UNEP 1992).

Even when the Convention attempts to protect biological diversity by in-situ conservation, ex-situ conservation, and sustainable use in Articles 6–14, it makes sure that every obligation assumed (except those related to research, training, education, and public awareness) yields to the caveat: 'as far as possible and as appropriate'. Furthermore, Article 7, which deals with the key elements of identification and monitoring, allows each Contracting party to do such identification. This contrasts with earlier expectations and drafts that provided for the establishment of Global Lists of Biogeographic Areas of Particular Importance for the Conservation of Biological Diversity and of Species Threatened with Extinction on a Global Scale to be internationally, not nationally, determined (UNEP 1992, Articles 15 & 25).

Any obligations to protect the common heritage of humankind need not fall disproportionately on the poor and the deprived. Given the enormous disparities of wealth amongst nations, equity, fairness (Rawls 1971) and efficiency require that discharging the burden of protection should fall differentially and more heavily on the richer nations. Biological diversity is a public good that is of critical importance to all humanity, and ought to be protected by the entire international community. In the absence of a system of international government that can act to protect public goods for collective benefit, other mechanisms should be found. One fecund suggestion is to give areas of biodiversity a designated value, and pay the owner country an interest or financial allotment for the conservation or preservation of such areas (Sedjo 1988). The burden of such payments should be proportionately heavier for the richer nations.

It is also clear that the duty to preserve huge extents of forest, marsh, or coral reefs rich in biological diversity could entail daunting opportunity costs to LDCs. For example, an obligation to protect rainforests placed on LDCs is tantamount to denying those LDCs the right to cut down and develop such forests to provide land, housing, and food to their desperately poor populace. Accordingly, it becomes necessary, first, to affirm the responsibility of the entire community of nations and the nations in which biodiversity is found *in situ* (in situ nations) to protect that biodiversity.

Second, measures and mechanisms must be devised to ameliorate the costs borne by LDCs. This is not at all the same as the 'burden sharing' referred to in Art. 21(1) of the Convention. The present arrangements deny the responsibility of the community of nations and in situ nations for protecting and preserving biodiversity while asserting that any commitment by developing countries to protect biodiversity will depend on the extent to which they are bankrolled by developed countries (CBD 1992, Article 20(4)). Unfortunately, by denying that developing states have any responsibility to protect biodiversity, the Convention fails to confirm any tangible responsibility

https://doi.org/10.1017/S0376892999000120 Published online by Cambridge University Press

of the community of nations to protect biodiversity. This is a serious defect, and the second flaw of the Convention.

Third, the challenge facing the Convention was to extend state responsibility for extra-territorial harm to damage caused to the global commons (Guruswamy & Hendricks 1997, pp. 398–400). The global commons may include the critical habitats or homes of life forms physically located within the territorial jurisdiction of nation states. But such an extension of state responsibility was roundly rejected by the Convention, and its application has been strictly confined to extra-territorial damage. The Fifth Revised Draft Convention had asserted the Principle that States are responsible 'for the conservation and sustainable use of their biological resources.' (UNEP 1992, Article 3(2)(a)). While a weaker formulation of that Principle is retained in the Preamble (CBD 1992, Preamble ¶ 5), it is effectively emasculated by the assertion that States have a sovereign right over their biological resources (CBD 1992, Preamble ¶ 4).

What emerges is a deeply flawed Convention that fails at its core to live up to expectations. On the contrary, it very nearly interdicts the obligation to protect biodiversity, fails to institutionalize the principle of differentiated responsibility as hitherto understood, and rejects sustainable development. The conclusion that the Convention flounders in holding the ring between the global need for biological diversity and the sovereign right of states to control and develop their own resources is a sombre conclusion that, unfortunately, has been confirmed in the last five years.

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LAKSHMAN D. GURUSWAMY
Director, National Energy-Environment Law & Policy Institute
University of Tulsa College of Law
John Rogers Hall
3120 East Fourth Place
Tulsa, OK 74104-3189, USA

https://doi.org/10.1017/S0376892999000120 Published online by Cambridge University Press