

The 11th Conference of the Parties to the CBD: a return to normalcy in Hyderabad?

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INTRODUCTION

The 10th Conference of the Parties (COP 10) to the Convention on Biological Diversity (CBD)¹, which met in October 2010 in Nagoya (Japan), received an unusual amount of attention for a convention whose meetings normally generate limited political and media interest. Less than a year after the disappointment of Copenhagen climate talks, many people saw Nagoya as proof that environmental multilateralism was not dead, and that the UN system was still legitimate and effective, provided certain conditions were met. Indeed—officially at least—the three main goals of Nagoya were achieved: the adoption of a Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (known as the ABS Protocol); the definition of a new Strategic Plan to halt biodiversity loss by 2020; and the development of a strategy for resource mobilisation aimed in particular at increasing current levels of official development assistance (ODA) to support biodiversity protection. Upon returning from Nagoya, we nevertheless noted that “this formal success must not disguise the fact that many uncertainties remain regarding the undertaken commitments (...) [and that] tough decisions at various levels will need to be taken when implementing the bundle of decisions and commitments that have come out of COP 10. (...) Above all, the conference enabled progress to be made on some highly technical issues, while the remainder is still to be decided and negotiated not only within the CBD, but also in other fora and at other levels of governance.” (Billé *et al.*, 2010).

In this context, it is now important to analyse the challenges for the upcoming COP, which will be held in Hyderabad (India) from 8 to 19 October 2012. Its coverage looks set to be closer to what the CBD has known in the past, but it will nevertheless be a new high point in the life of the convention. The United Nations Conference on Sustainable Development, Rio+20, reinforced the feeling that the major

1. The Convention on Biological Diversity has been ratified by 192 State Parties as well as the European Union. The United States remains the only major country that has not ratified it.

international conferences were unable to initiate the changes needed, but it also left conventions on specialised subjects, such as the CBD, to find specific agreements that cannot be reached under a general heading such as sustainable development.² The next CBD COP will be the opportunity to take stock of the “Nagoya legacy”, of the way the Parties seize on it and of progress made in the different processes underway. There will be many items on the agenda³, as always, but the three main ones will be the same as in Nagoya: the Access and Benefit Sharing Protocol, the Strategic Plan 2011-2020, and the Strategy for resource mobilisation. We will examine these in turn here, adding to the list the governance of high seas biodiversity, which has emerged over the last few years as a real challenge within the CBD, raising key questions about international governance.

THE ACCESS AND BENEFIT SHARING PROTOCOL

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization, which was adopted in Nagoya after eight years of tough negotiations, aims at implementing the third objective of the Convention. Central to the relations between countries of the “North” and the “South” within the CBD, this Protocol should help to stop the misappropriation of genetic resources and associated traditional knowledge (known as biopiracy), while providing legal certainty for public and private users of such resources (Chiarolla, 2012). Ardently supported by the megadiverse countries (those endowed with very rich biological diversity) such as Brazil, the Protocol proposes an international framework to ensure that the benefits arising from the use of genetic resources by industries or researchers are shared with the country providing such resources⁴, based on prior informed consent and a contract (i.e. mutually agreed terms) signed with the State in question. With a view to linking the three pillars of the Convention, the Protocol also encourages the Parties to direct the benefits generated by this mechanism to promote activities targeting the conservation and the sustainable use of biodiversity. Opened for signature from February 2011, the Nagoya Protocol has only been ratified by six

countries to date⁵, whereas 50 ratifications are required for it to enter into force.

As the result of long and difficult negotiations that were only settled at the last minute in Nagoya, the Protocol strikes a compromise that fails to provide clear guidance on some controversial issues, including:

- the extent to which its application will concern “derivatives” of biological or genetic resources, defined as “naturally occurring biochemical compounds (...) even if they do not contain functional units of heredity” (examples include proteins, chemical substances extracted from plants for use in the development of drugs, alkaloids, flavanoids, aromas, resins, and snake venoms, etc.) (Article 2);
- the need for and the modalities of a global multilateral benefit sharing mechanism to address the sharing of benefits derived from the use of genetic resources and associated traditional knowledge “that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent” (Article 10);
- the relationship with other international instruments that concern the exchange of genetic material and benefit sharing, such as the World Health Organization (WHO) Pandemic influenza preparedness Framework for the sharing of influenza viruses and access to vaccines and other benefits (Article 4.3);
- the possibility to envisage a mechanism to monitor the use of traditional knowledge associated with genetic resources, in order to promote compliance with the applicable domestic ABS legislation (Article 16), in light of the evaluation of the effectiveness of the Protocol, which will take place four years after its entry into force (Article 31) and the negotiations underway within the framework of the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (CBD COP Decision X/1, par. 6);
- the ongoing negotiations to establish cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance (Article 30).

With only six ratifications of the Nagoya Protocol, domestic implementation efforts do not yet provide a clearer picture of the way in which national laws will flesh out the provisions of the

2. L. Chabason, pers. comm.

3. <http://www.cbd.int/cop11/agenda/> Accessed on 10/09/2012.

4. “That is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention.” See Article 5.1 and 6.1 of the Nagoya Protocol. This formulation conveys the idea that the provider country shall be a ‘qualified’ or ‘legitimate’ provider.

5. Gabon, Jordan, Mexico, Rwanda, Seychelles and Lao PDR, see <http://www.cbd.int/abs/nagoya-protocol/signatories/>. Accessed on 28 September 2012.

Protocol. However, in Nagoya, CBD Parties were instructed to continue negotiations on certain operational mechanisms, and Hyderabad will provide the opportunity to examine their progress. In this respect, the second meeting of the Intergovernmental Committee for the Nagoya Protocol⁶ (ICNP), which was held in July 2012 in New Delhi (India)⁷, adopted recommendations concerning the operation of the ABS clearing-house, cooperative procedures and institutional mechanisms to promote compliance with the Protocol, the need for and modalities of a global multilateral benefit-sharing mechanism, funding and resource mobilisation for the implementation of the Protocol, and preparations for the first meeting of the governing body of the Protocol, which is linked to its entry into force (thus, at the earliest simultaneously with COP 12 in 2014). However, the negotiations expected at COP 11 are likely to be primarily focused on procedural rather than substantial issues, such as the possibility of convening a third meeting of the ICNP prior to COP 12, and organising further intersessional work. In addition, the cross-cutting discussion about the financial needs of developing countries could condition negotiations on most other issues concerning the ratification and future implementation of the Protocol.

IMPLEMENTATION OF THE STRATEGIC PLAN 2011-2020

After the failure to meet the goal set in 2002 (“to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level”), a new Strategic Plan was adopted in Nagoya for the 2011-2020 period. Proposing 20 targets (known as the Aichi Targets) to guide national and international efforts to protect biodiversity⁸, this plan appeared as one of the major outcomes of Nagoya. Indeed, for the first time, it extended the field of action of the CBD beyond its “comfort zone” (protected species and areas, approach based on major ecosystem types, etc.) in an attempt to influence the sectors of activity with the greatest impact (especially agriculture, fisheries, and building and public works) by setting targets that concern them directly.

Two years later, Hyderabad will be the opportunity to examine developments in the implementation of the Strategic Plan, especially through the creation of national targets and the updating of biodiversity national strategies and action plans. For many of the most strategic targets, little progress is expected to have been made, as with target 6, which calls for the sustainable management of all fisheries, or target 8, which advocates bringing pollution, including from excess nutrients, to levels that are not detrimental to ecosystems functions and biodiversity. The emblematic target 3, under which economic incentives (including subsidies) harmful to biodiversity must be “eliminated, phased out or reformed”, has helped to bring harmful subsidies to centre stage, opening up potential windows of political opportunity for this issue in certain countries. However, the reform of these subsidies has a political cost that few leaders seem willing to shoulder, even in a context of public finance crisis. It also generates systemic changes (to taxation, sectors of activity, equity, etc.) of such complexity that it tends to discourage good intentions. In France, for example, the report of the *Centre d'analyse stratégique* (Sainteny, 2011⁹) has not yet had any significant political impact. Moreover, at the international level, the final declaration of Rio+20 was unable to reaffirm this goal in its entirety, covering only the fisheries sector (§ 173).

Another emblematic legacy of Nagoya, namely target 11, specifies that “by 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas (...) are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes”. Examining progress in this matter is likely to be a source of satisfaction in Hyderabad. Indeed, the last two years have seen a new wave of protected areas established throughout the world, especially in the marine environment, where at times, this movement is beginning to resemble a global competition.¹⁰ A recent report now estimates terrestrial

6. The Intergovernmental Committee for the Nagoya Protocol was set up to undertake the preparations necessary for the first meeting of the Conference of the Parties serving as the Meeting of the Parties to the Protocol.

7. *Earth Negotiations Bulletin*, Vol. 09, No. 579, <http://www.iisd.ca/vol09/enb09579f.html>

8. For an analysis of the use of global biodiversity targets as an instrument of international governance, see Billé, Le Duc, Mermet, 2010.

9. IDDRI also organised an international conference on the issue, the proceedings of which are available at the following link: http://www.iddri.org/Publications/Collections/Syntheses/PB1112_RP_compte%20rendu%20conference%20Hermes.pdf

10. See, for example, Allix, G. 2012. Des îles Cook aux Maldives, la course aux réserves marines. *Le Monde*, 29/08/2012. http://www.lemonde.fr/planete/article/2012/08/29/des-iles-cook-aux-maldives-la-course-aux-reserves-marines_1752797_3244.html?xtmc=aires_protegees&xtcr=5

and marine protected areas at 12.7% and 1.6% respectively (Bertzky et al., 2012). Satisfaction should only be relative, however, for three reasons.¹¹ First, this report also highlights a considerable lack of protection for over half of all important sites for biodiversity—including areas beyond national jurisdiction—as well as the management, governance and financial challenges facing many of these protected areas.¹² This is a far cry from an effectively and equitably managed, ecologically representative and well connected system of protected areas—something which the raw numbers will never be able to reflect. Next, as the areas claimed to be protected grow, so the debate intensifies as to what a protected area actually is, and what should be excluded from the statistics.¹³ Finally, attention may have focused too hastily on the target concerning protected areas, whereas the reference to “other effective area-based conservation measures” is beginning to be mobilised on an *ad hoc* basis by some governments in order to justify not meeting the emblematic targets of 17 and 10%.

RESOURCE MOBILISATION AND FUNDING MECHANISMS

The third pillar of the Nagoya deal, and its “weakest link”, the strategy for resource mobilisation provides for a substantial increase in funding for biodiversity by 2020 for the effective implementation of the Strategic Plan. Following the 10th Conference of the Parties, the total amount of this pledge as well as the modalities of the funding mechanisms remained to be determined. The facts were plain: there was neither a robust evaluation of the amount of funding needed (Feger, Pirard, 2011), nor a reliable estimation of the budgets currently available for biodiversity protection.

Since then, discussions have continued on these subjects. They have moved forward with the definition of a framework to monitor funding indicators related to the quantified commitments expected. Calculating funding requirements, on the other

hand, has given rise to the implementation of different methods based on the nature of the action to be undertaken, the absorption capacities of the countries concerned, and historical spending patterns, etc.—all estimations of real needs that are fundamentally impossible to assess. Among others, the calculations made within the framework of the needs assessment for the 6th Global Environment Facility (GEF) replenishment cycle 2014-2018 provides a useful indication: the implementation of initiatives needed to meet the Aichi Targets in developing countries would require a total of 74 to 191 billion dollars over the period.¹⁴

These discussions are linked to funding mechanisms, which raise difficult, controversial questions. The debates on the types of funding to be set up and the role that the “market” or “rights” should play in these are particularly intense. The terminology used has evolved largely in response to the reservations of certain States, especially members of ALBA¹⁵, about innovations considered to be inspired by neoliberalism. A consensus is therefore emerging on the use of more neutral terms. It is also likely that development agencies will continue to play a key role in structuring funding in this field, as opposed to funding mechanisms that bring in private actors through market processes. These include mitigation banks, or the widespread implementation of payments for ecosystem services based on principles equivalent to carbon markets.

It is clearly more essential than ever to put these discussions back into their context: one of an economic and financial crisis affecting traditional donor countries and limiting their capacity, or their willingness, to make quantified commitments to international funding—something that was nevertheless required by the Nagoya deal. Concerning, for example, the French pledge to increase its biodiversity funding under official development assistance (ODA) to 200 million euros by 2012, and 500 million by 2014, there are currently no reliable, official figures that can be used to determine whether the first commitment has been met, while

11. We could add that the Rio+20 Declaration only “noted” (§177) the marine part of target 11, which also illustrates the reservations that are gradually emerging.

12. As confirmed by a recent article in *Nature*, saying that over the last 20 or 30 years, of 60 protected areas studied in different tropical forests, “about half (...) have been effective or performed passably, but the rest are experiencing an erosion of biodiversity that is often alarmingly widespread taxonomically and functionally”. See Laurance et al., 2012.

13. This was illustrated recently during the World Conservation Congress organised by IUCN in Jeju, South Korea: http://www.iucnworldconservationcongress.org/news___press/press/news_releases/?10904/When-is-an-MPA-really-an-MPA.

14. See UNEP/CBD/COP11/15/Rev.2 2012. This corresponds to a total net requirement for the GEF of 7 to 17 billion dollars over the 2014-2018 period, taking into account both the fact that the GEF only funds the incremental cost of projects (generally 30 to 40% of the total cost of the project) and its “leverage effect” (on average 1 GEF dollar to 4 co-financing dollars). This range takes into account different scenarios, and the expert group set up by the Convention is considering intermediate calculations, especially according to the respective contributions of the public and private sectors.

15. The Bolivarian Alliance for the Peoples of Our America, bringing together the countries of Latin America and the Caribbean led by socialist governments.

positions remain vague for the second. Furthermore, the developed countries can easily justify themselves by the fact that the developing and emerging countries have only very partially fulfilled their own duty of quantifying their national funding requirements, which emerged from Nagoya as a precondition for any quantitative discussion on flows. Hyderabad will above all be an opportunity to take stock of efforts made in terms of both assessments of needs and of resources available, and the monitoring of commitments made in Nagoya.

THE CBD FACED WITH THE CHALLENGES OF THE GOVERNANCE OF HIGH SEAS BIODIVERSITY¹⁶

The challenges of the governance of biodiversity in areas beyond national jurisdiction have been under discussion for some 10 years now at the United Nations General Assembly (UNGA). Within this arena, States are struggling to agree on whether, in the context of the implementation of the United Nations Convention on the Law of the Sea (UNCLOS), the legal instruments in force are enough to guarantee the conservation of this area and the sustainable use of its resources, or whether it is necessary to adopt a new legal instrument. While the negotiations often seem to get bogged down there, it is within the CBD which was nevertheless long considered a minor forum for negotiation on this subject—that progress has been made in recent years on the scientific and technical aspects of high seas biodiversity conservation. The lack of a decision at Rio+20 on a possible UNCLOS implementing agreement has served, on the contrary, to reinforce the legitimacy of the CBD to tackle these questions within the limits of its mandate (Drueel, Billé, Treyer, 2011).

The first and biggest step forward was the launch of a process to identify Ecologically or Biologically Significant Marine Areas (EBSAs) in need of protection in open-ocean waters and deep-sea habitats.¹⁷ The aim is to establish a common scientific basis enabling States and international organisations to determine which parts of the high

seas and of deep sea habitats could be the object of more stringent protective measures.¹⁸ To this end, in 2008 the COP adopted seven scientific criteria to be used in this identification, and in 2010, specified that the process should be conducted through regional workshops involving, inter alia, the competent international organisations, such as regional fisheries organisations or regional seas conventions. The findings of two of these regional workshops, held respectively for the South West Pacific and for the Caribbean and the West Central Atlantic Ocean, will be submitted for approval at the COP in Hyderabad, and then forwarded to the UNGA, while the identification process continues in other parts of the world. What the UNGA will decide to do with the findings of these regional workshops and how it intends to follow up the process are not known at present.

The second major effort concerned the updating of the “Voluntary guidelines for the consideration of biodiversity in environmental impact assessments and strategic environmental assessment in marine and coastal areas” adopted in 2006, in order to include in these the specificities of the high seas. The revision began in 2009, and has led to the introduction of numerous sections concerning the high seas, which will be submitted for approval in Hyderabad and may serve as the basis for the establishment of a more binding legal framework that is currently lacking for environmental impact assessments (EIAs) in the high seas.

Thus limiting their initiatives to scientific and technical aspects, the State Parties to the CBD consider that the adoption of more stringent protective measures for Ecologically or Biologically Significant Marine Areas in the high seas or the creation of a new legally binding instrument on environmental impact assessments in this zone are not possible within this forum, as the UNGA is the historical framework for negotiating the law of the sea. Their caution is explained by the reluctance of governments negotiating at the UNGA to take into account progress made within the framework of agreements other than UNCLOS, whether global or regional. Nevertheless, the decisions adopted during the next COP (approval of outcomes of regional workshops, adoption of guidelines on EIAs) will undoubtedly have a considerable influence on purely UN discussions, which could help to give new impetus to negotiations that have been stalled for years.

16. The “high seas” is the expression commonly used to describe marine areas beyond national jurisdiction, covering both the high seas (i.e. the water column) and the seabed beyond the limits of the continental shelves of coastal States.

17. This process therefore concerns much larger areas than those situated beyond national jurisdiction, since deep sea habitats may be located within the 200 mile limit of coastal States’ exclusive economic zones. In this specific case, more stringent protective measures would be adopted by these States. In the high seas, on the other hand, the competent international organisations would need to be mobilised (International Seabed Authority, International Maritime Organization, etc.).

18. The States clearly indicated early on in the process that the adoption of more stringent protective measures for the areas identified would not be automatic. In particular, they spoke out against the systematic transformation of these zones into marine protected areas. See Drueel, 2012.

CONCLUSION

With no new strategic plan or international treaty to adopt, the 11th Conference of the Parties to be held in Hyderabad marks a certain return to normalcy in the life of the CBD, far from the spotlights that shone on Nagoya—sometimes dazzling certain euphoric observers. But this return to normalcy is inevitably accompanied by numerous difficulties that the Parties must attempt to overcome, whether it be for the ABS Protocol, the 2020 targets, or resource mobilisation. The latter, which was the shakiest point of agreement in Nagoya, is now undermining the whole of the initial deal in a context of crisis that only increases tension on a subject that is still sensitive.

But this return to normalcy does not leave the CBD unchanged. The links that the ABS Protocol has obliged the Convention to forge with other forums dealing with genetic resources and intellectual property rights¹⁹ have given it both more

visibility and more potential influence. Likewise, the way in which the Strategic Plan 2011-2020 has addressed the issues linked to the main economic sectors that impact biodiversity, or the interactions between the CBD and the UNGA on the subject of biodiversity in areas beyond national jurisdiction, have helped to make it increasingly necessary to extend the competence of the Convention. Hyderabad will therefore also be a revealing test of its capacity to assume a new status and to tackle a broader range of subjects than those traditionally found within its remit. ■

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19. The FAO International Treaty on Plant Genetic Resources for Food and Agriculture, including its multilateral ABS

mechanism, the Commission on Genetic Resources for Food and Agriculture, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concluded within the framework of the World Trade Organization, the International Union for the Protection of New Varieties of Plants, WIPO, etc.

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