

The Regime Building of the Convention on Biological Diversity on the Road to Nairobi

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I. Introduction

The United Nations Convention on Biological Diversity¹ touches upon the most basic of our daily activities: eating, drinking, clothing, housing. Where we obtain food, what quality water we drink, how we cure diseases, where we are able to enjoy recreational activities and where we obtain the most important resources such as timber, hemp, rattan, or cotton to clothe, construct and the creation of various kinds of utensils. In short, the Convention perhaps encapsulates all that we do, need or use in our day to day life.

The objectives of the Convention on Biological Diversity (to be referred to as: Convention) strive for maintaining and re-establishing the richness of nature whilst supporting our livelihoods in an equal way. In more technical terms, the three objectives of the Convention are: conservation of biological diversity, sustainable use of its components and the fair and equitable sharing of benefits arising out of the use of genetic resources (article 1).² “Biological diversity” covers the “variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of

¹ P.W. Birnie, A.Boyle (eds), *Basic Documents on International Law and the Environment*, 1995, 390 et seq.

² Articles without indication of source are those of the Convention on Biological Diversity.

which they are part; this includes diversity within species, between species and of ecosystems" (article 2). This definition encompasses the variability of life in all forms, levels and combinations.³ With its scope of application in terms of subject (*biological diversity*) and in terms of activity (*conservation, sustainable use and equitable sharing of benefits*, i.e. its objectives), the Convention covers all aspects of the relationship between human beings and the manifestations of life.

The Convention of 1992 has 175 Contracting Parties, 174 states and the European Community as a regional economic integration organization.⁴ The Convention is regarded as one of the most successful international environmental agreements. Other comparable Conventions are the United Nations Framework Convention on Climate Change of 1992⁵ which surpasses it in terms of membership, having 176 Contracting Parties⁶ and the Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification of 1994 which has up to now 145 Contracting Parties.⁷ Other international biodiversity-related conventions are far behind the Convention's number of parties. The most popular one, the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) has 156 members,⁸ the one on International Trade in Endangered Species of Wild Flora and Fauna (CITES) of 1973 has 145 members.⁹ The Convention on Wetlands of International Importance of 1971 the so called Ramsar Convention has 112 Contracting Parties¹⁰ and the

³ However, biological diversity is not the sum of all life (of all tangible biotic entities and components), but an attribute of it, its variability, c.f. L. Glowka, F. Burhenne, G. and H. Sygne (in collaboration with J. Mc Neely and L. Gündling), *A Guide to the Convention on Biological Diversity*, IUCN, 1994, 16.

⁴ As of 15 January 1999, <http://www.biodiv.org>.

⁵ Birnie, Boyle, see note 1, 252 et seq.

⁶ As of 7 October 1998, <http://www.unfccc.de>.

⁷ Birnie, Boyle, see note 1, 513 et seq. Membership as of 9 December 1998, http://www.unccd.ch/lite/submenu/ratification_sbm.htm.

⁸ Birnie, Boyle, see note 1, 375 et seq. Membership as of January 1999, <http://www.unesco.org/whc>.

⁹ Birnie, Boyle, see note 1, 415 et seq. Membership as of 11 June 1998, <http://www.wcmc.org.uk/CITES>.

¹⁰ Birnie, Boyle, see note 1, 447 et seq.; Membership as of 13 July 1998, http://www.Ramsar.org/about_cp_order.htm.

Bonn Convention on the Conservation of Migratory Species of Wild Animals only 55.¹¹

Given the numerous signatories to the Biodiversity Convention, the Convention is regarded as a success story, except perhaps for the fact that the United States of America has only signed¹² but not yet ratified the Convention. There are many speculations and analysis for why the United States has not ratified the Convention, and that is rather a subject left for another occasion.¹³

With its unique combination of both sustainable use¹⁴ and conservation,¹⁵ supplemented by socio-economic and equity considerations (sharing of benefits), its nearly worldwide validity and scope, the Convention could change the management of biological diversity (biodiver-

¹¹ P. Sands, R. Tarasofsky, M. Weiss (eds.), *Documents in International Environmental Law*, 569 et seq. Membership as of 1 October 1998, http://www.wcmc.org.uk/cms/part_lst.htm.

¹² On 4 June 1993, *International Environment Reporter* No.12 of 16 June 1993,432.

¹³ G.J. Mossinghoff, *The Biodiversity Convention and Intellectual Property Rights: Conflict or Harmony?*, Patent World No. 106, October 1998, 4 et seq.; M.D. Coughlin, "Using the Merck/INBio Agreement to Clarify the Convention on Biological Diversity", *Colum. J.Transnat'l L.* 31 (1993), 337 et seq.; V. Heins, "Macht, Demagogie und Argumentation in der globalen Umweltpolitik — das Beispiel der UN-Konvention über die biologische Vielfalt", in: V. von Prittwitz (ed.), *Verhandeln und Argumentieren. Dialog, Interessen und Macht in der Umweltpolitik*, 1996; K. Rosendahl, "Implications of the US 'No' in Rio", in: V. Sánchez, C. Juma (eds), *Biodiplomacy. Genetic Resources and International Relations*, 1994, 87 et seq.; A. Boyle, "The Rio Convention on Biological Diversity", in: M.Bowmann, C. Redgwell (eds), *International Law and the Conservation of Biological Diversity*, 1996, 33 et seq.; D.E. Bell, "The 1992 Convention on Biological Diversity: The Continuing Significance of U.S. Objections at the Earth Summit", *Geo.Wash.J.Int'l L. & Econ.* 26 (1993), 479 et seq.; S. Johnson, *The Earth Summit: The United Nations Conference on Environment and Development (UNCED)*, 1993.

¹⁴ Sustainable use means "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity...." (article 2).

¹⁵ "Conservation" is not defined in the Convention, avoiding the difficult, partly academic and partly politically sensitive issue of the relationship between conservation and sustainable use and whether the latter is part of the former or *vice versa*. See P.W. Birnie, A. Boyle, *International Law and the Environment*, 1992, 435, 447; Glowka et al., see note 3, 25.

sity), or better, biological resources¹⁶ in a revolutionary way. It could transform the way we deal with the environment and the way we live. However, this is a long-term vision: Dependent on the way in which parties to the Convention operationalise first at the international level and then foremost on the regional, national and local levels. They have to be transformed into policy and action plans, laws and regulations and ultimately — utopically — into new ways of behaviour for each and every individual on earth. This national and local implementation is a long way down the road. Farmer associations, protected area managers, land use planners, consumer groups, pharmaceutical companies, directors of botanical gardens, water supply agencies, foresters, planners of curricula, herbalists, microbiological researchers, business associations and all other stakeholders involved with biodiversity are often not aware of the Convention's existence, let alone its content and use.

Some critics argue that this is a serious limitation of the Convention and hence "has accomplished little of substance".¹⁷ However, Rome was not built in one day and the architecture of an international instrument with such a broad foundation as the one of the Convention needs careful and sound structuring and can only grow slowly. The Convention is still fairly young: It was legally binding for the first 30 ratifying Parties only on 29 December 1993. Since then, the Contracting Parties took 82 Resolutions or Decisions at four meetings of the Conferences of the Parties (COP).¹⁸ These Resolutions cover national and interna-

¹⁶ The Convention defines "biological resources" as including "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity", article 2. Whereas "biological diversity" refers to the attribute of variability, "biological resources" refer to the actual biotic material. The qualifier "actual or potential use or value for humanity" can be neglected in so far as any biotic material might be of future and therefor potential value.

¹⁷ C. Wold, "The Futility, Utility, and Future of the Biodiversity Convention", *Colo.J.Int'l Envtl.L. & Pol'y* 9 (1998), 1 et seq., (14); K. Raustiala, D.G. Victor, "The Future of the Convention on Biological Diversity", *Environment* 38 (1996), 39.

¹⁸ COP 1 was held 28 November– 9 December 1994 in Nassau, Bahamas. Report in: UNEP/CBD/COP/1/17; COP 2 was held 6–17 November 1995 in Jakarta, Indonesia. Report in: UNEP/CBD/COP/2/19; COP 3 was held 4–15 November 1996 in Buenos Aires, Argentina. Report in: UNEP/CBD/COP/3/38; COP 4 was held 6–17 November 1998 in Bratislava, Slovakia. Report in: UNEP/CBD/COP/4/26. Decisions of the COP are reproduced in one of the Annexes of the respective report of the meeting.

tional obligations moving from the general provisions of the Convention to more concrete prescriptions on how to implement the Convention. These obligations are addressed to the Contracting Parties themselves and the various institutions of the Convention (the Subsidiary Body on Scientific, Technical and Technological Advice, (SBSTTA); the Secretariat of the Convention (the Secretariat); the Clearing-house Mechanism (CHM); the Global Environment Facility (GEF), as the — interim — financial mechanism).

The COP has no mandate to decide on obligations, both in policy and law, for bodies other than those of the Convention and for its Contracting Parties, and these obligations are only international ones. Other stakeholders relevant for the conservation and sustainable use of biological diversity can be persuaded by the COP only on the basis of invitation or in an indirect way through the Contracting Parties themselves. International bodies such as UNEP or FAO, can only be invited, never requested, to mainstream the decisions of the COP into their programmes of work. With regard to the private sector and individuals and communities, those can only be reached through national or, in case of the European Union, at the regional level.

Legal means provided by the text of the Convention to give effect to the provisions on the international level are the adoption of protocols (article 28); the amendment of the Convention or protocols (article 29) or the adoption and amendment of Annexes (article 30). The only legislative activity in the context of the Convention at the moment is the negotiation of a protocol on the safe handling and use of living modified organisms, referred to as the *Biosafety Protocol*. Although this is an important issue to be regulated, it only constitutes a minor component of the Convention.

An assessment of the legislative activities within the Convention only, does not do justice to the progress of implementation of the Convention. Every decision of the COP is a legally binding interpretation of the Convention.¹⁹ Parties acting contrary to these decisions are violating the Convention. But the progress with respect to implementation of the Convention can be assessed much better in considering not only the achievements in public international law, but the whole process of the Convention. This includes the meetings of its organs, informal political culture in the process and the deliberations as both policy and legal instruments.

¹⁹ See arts 31 and 32 of the Vienna Convention on the Law of Treaties, UNTS Vol.1155 No.18232.

The Convention, its organs and their deliberations take the form of an international environmental regime shaping international environmental policy for a specific problem area, which in this case is biodiversity. The term "regime" is used in this article as defined by *Krasner*: "International regimes are implicit or explicit principles, norms, rules, and decision making procedures around which actor's expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions for actions. Decision-making procedures are prevailing practices for making and implementing collective choice."²⁰

The 82 Resolutions taken are expressions of the regime, as they provide explicit principles, norms and decision-making procedures. Still lacking are "rules" — specific prescriptions for actions. This is where strong criticism of the Convention can be made and the value of putting time and effort into the process is questioned. The authors hold the view that with the decisions of the fourth meeting of the COP, the Convention moved into a new phase. This new phase is one of regime building, and ensuring that international obligations are met through national laws and actions. The purpose of the paper is to argue this assertion. That such a regime building exercise is a distinct move from mere conception, and if you want conversations about biodiversity issues, to the willingness by parties to see more tangible effects of the Conventions intents on the ground.

This paper will focus on the development of the Convention since its entry into force. The scientific basis for action on biological diversity as well as the history of the Convention has been described in detail in a broad array of publications.²¹ The history of an international treaty is

²⁰ S. Krasner, "Structural causes and regime consequences: Regimes as intervening variables", in: S. Krasner (ed.), *International Regimes*, 1983, 2.

²¹ On biodiversity and the socio-economic conditions for the decline of biological diversity and its relevance for humankind see in particular, V. Heywood (ed.), *Global Biodiversity Assessment*, 1995, a compendium with contributions of about 2000 scientists worldwide, the reference for knowledge on biological diversity; see also E.O. Wilson (ed.), *Biodiversity*, 1988; B. Groombridge (ed.), *Global Biodiversity Assessment*, 1995.

On the history of the Convention see for example Boyle, see note 13, 35; F. Burhenne-Guilmin, S. Casey-Lefkowitz, "The Convention on Biological Diversity: A Hard Won Global Achievement", *Yearbook of International Environmental Law* 3 (1992), 43 et seq.; F. McConnell, *The Biodiversity Convention. A Negotiating History*, 1996; G. Henne, "Das Regime über die

not a primary criteria for interpreting that treaty.²² The history of a convention might have explanatory value for the dynamics in the development of the regime. It, however, draws away attention from the building of the regime in the future and is therefore not considered in this paper.

The paper will first provide a short overview of the content of the Convention as the "constitution" of the biodiversity regime, as well as an attempt to classify the Convention within the evolution of international environmental law (Section II). The first three meetings of the COP, constituting in the view of the authors the first phase of the regime-building process, are summarized in Section III. They focused on the establishment of the basic procedures, gathering of information as a basis for informed norm setting. With the fourth meeting of the COP, the biodiversity regime entered into a new phase of international and national implementation. The regime building is a permanent process of collective evolution and adaptation. The institutional design of the Convention changed considerably, increasing the chances of success of the development and governance of the regime.²³ The success will depend on how the Contracting Parties will continue to build that new but not yet well established phase of the Convention. The fifth meeting of the COP, to be held from 15 to 26 May 2000 in Nairobi, Kenya,²⁴ will show whether the new phase is successfully consolidated (Section IV).

biologische Vielfalt von 1992", in: T. Gehring, S. Oberthür (Hrsg.), *Internationale Umweltregime*, 1997, 192 et seq.; M.A. Hermitte, "La Convention sur la diversité biologique", *AFDI* 38 (1992), 850 et seq.; V. Koester, "The Biodiversity Convention Negotiation Process. And Some Comments on the Outcome", in: *Environmental Law – From International to National Law*, Centre for Social Science Research on the Environment, Aarhus University (ed.), 1997, 215 et seq.

²² Arts 31 and 32 of the Vienna Convention on the Law of Treaties.

²³ The importance of the institutional setting of regimes is stressed for example by: T. Gehring, S. Oberthuer, "Internationale Regime als Steuerungsinstrumente der Umweltpolitik", in: Gehring, Oberthuer, see note 21, 13; F. Kratochwil, J.G. Ruggie, "International Organization: A State of the Art on an Art of the State", *International Organization* 40 (1986), 753.

²⁴ Decision IV/18 para. 2 with Decision IV/16 para. 1 (UNEP/CBD/COP/4/26, Annex) in connection with a decision of the Bureau of the COP, communication by the Executive Secretary of the Convention on Biological Diversity, 24 June 1998.

II. The “Constitution” of the Biodiversity Regime: The Text of the Convention

The current section provides briefly an overview of some of the key elements and substance of the Convention. Of importance are the various articles, and the institutions that the Convention makes provision for to both elaborate and ensure the implementation of Decisions that have been agreed to by the Contracting Parties.

1. Provisions on Substance

The Convention starts off with general measures for conservation and sustainable use (article 6). Contracting Parties have to develop new or adapt existing national strategies, plans and programmes for the conservation and sustainable use of biological diversity and to integrate conservation and sustainable use into sectoral or cross-sectoral plans, programmes and policies. The latter provision strives for integration of biological diversity into governmental planning (*principle of integration*), through, what is often referred to as, a process of mainstreaming biodiversity concerns into all relevant aspects of governmental activities in terms of the various sectoral initiatives that governments are involved in.

Provisions on conservation of biological diversity can be found in article 8 on *in-situ* conservation and article 9 on *ex-situ* conservation, the latter “complementing *in-situ* measures”. This prioritisation of *in-situ* conservation brings to an end a long-lasting discussion on which method of conservation should prevail, especially with regard to genetic resources for food and agriculture.²⁵ *In-situ* conservation includes *on-farm* conservation: *In-situ* are conditions where genetic resources (material containing functional units of heredity with actual or potential value) exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties (i.e. *on-farm*), cf. article 2.

To ensure that there is a national approach to *in-situ* conservation Contracting Parties are, *inter alia*, obliged to: establish a system of protected areas and develop guidelines for that purpose; manage bio-

²⁵ R. Pistorius, *Scientists, plants and politics. A history of the plant genetic resources movement*, 1997, 20, 100.

logical resources outside protected areas in a way that ensures their conservation and sustainable use; rehabilitate and restore degraded ecosystems; provide legally for the protection of threatened species and populations. Article 8 does not only oblige Parties to the Convention to design measures for biodiversity management but also to regulate risks: both alien species threatening ecosystems, habitats or species and living modified organisms (LMOs) negatively impacting on the environment shall be controlled. With regard to LMOs, the Parties shall consider to develop a protocol on the procedures for their safe transfer, handling and use (article 19 paras 3 and 4).

Ex-situ conservation shall take place preferably in the country of origin for the components of biological diversity, a provision in favour of developing countries. Quite often plants and animals from biomes²⁶ from developing countries can be found in "Northern" botanical gardens, zoos or genebanks as a source of genetic resources for food and agriculture but are threatened or even extinct in their places of origin. *Ex-situ* conservation is meant to complement efforts in *in-situ* conservation.

The second objective, "sustainable use",²⁷ is qualified in article 10. It is more general than the provisions on conservation. Parties have to integrate consideration of the conservation and sustainable use of biological resources into national decision-making. This is similar to the general provision on governmental planning, but with a broader and more legal connotation. Plans, programmes and policies in article 6 do not necessarily include laws and regulations, whereas "decision-making" encompasses all governmental action. Amongst other things, article 10 lit.(e) obliges Contracting Parties to encourage cooperation between its governmental authorities and the private sector in developing methods for sustainable use. If taken seriously by the parties, this norm can be of far-reaching consequence, reaching out to and involving the "real" users of biological resources. Parties are further requested to support local populations to develop and implement remedial action lit.(d) in degraded areas where biodiversity has been reduced. The involvement of local people is one key criterion for successful resource management so

²⁶ A Biome is "a major portion of the living environment of a particular region, characterized by its distinctive vegetation and maintained by local climatic conditions", Glossary in: M. Baumann, J. Bell, F. Koehlin, M. Pimbert, *The Life Industry*, 1996, 199.

²⁷ Definition in article 2 of the Convention, see above note 14.

as to encourage the use of local knowledge and secure ownership and responsibility by local people.²⁸

Another key provision contained in article 10 lit.(c) is the protection and encouragement of customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. This provision takes up one of the 23 pre-ambular statements, recognizing "the close dependence of many indigenous and local communities embodying traditional lifestyles on biological resources". Article 10 lit.(c) is linked with article 8 lit.(j). This article, structurally misplaced due to a package-deal solution at the end of the negotiations, asks Parties, *inter alia*, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities with traditional lifestyles relevant for the conservation and sustainable use of biological diversity. A Party has to implement the provision "subject to its national legislation", a qualifier which gives Parties the necessary flexibility and possible loophole to water down the provision on the excuse of national specificity. Article 8 lit.(j) together with article 10 lit.(c) recognize not only the dependence of those communities on biological diversity, but their key role in natural resource management and the value of their locally adapted skills. It acknowledges the need for local solutions to the threat of biodiversity loss and encourages governments to respect and involve local communities in national action plans.

The third objective of the Convention, "the fair and equitable sharing of benefits" arises out of the use of genetic resources for both commercial gain and livelihoods. This aspect of the convention covers issues such as appropriate access to genetic resources and transfer of relevant technologies, taking into account all rights over these resources and technologies. Equitable sharing of benefits from genetic resources is a significant provision fought for by developing countries concerned about the increasing extraction of these resources by commercial and public sector institutions in the developed world. Often these institutions extracted resources without acknowledgement and even compensation to the country of origin or those which were a source of experience and knowledge on the location and use of these biological resources.

The Convention puts in place a framework for a new international regime on genetic resources that seeks to enshrine the principle of "eq-

²⁸ U. Marzik, "Völkerrechtlicher Naturschutz und nachhaltige Entwicklung in Übersee", *VRÜ* 30 (1997), 559.

uitable sharing". Arts 15, 16 para.3 and 19 paras 1 and 2 provide the key pillars for such a regime: access to genetic resources from countries which possess these resources in *in-situ* conditions are subject to prior informed consent of the Contracting Party providing such resources and shall be on mutually agreed terms. In turn for granting access, the providing Party shall participate in the scientific research based on these genetic resources. It shall make provision for a fair and equitable sharing of the results of research and development and the benefits arising from the commercial or other utilization of those resources and a transfer of technology that makes use of those resources. Communities which provide knowledge, innovations and practices relevant for the sustainable use and conservation of biological diversity should receive an appropriate benefit by agreement.

Provisions elaborating on the three objectives of the Convention are complemented by provisions on: incentive measures (article 11); research and training (article 12); public education and awareness (article 13); impact assessment and minimizing adverse impacts (article 14), including the issue of liability and redress; technology transfer (article 16); exchange of information (article 17); and technical and scientific cooperation (article 18). It should also be added that most of the provisions of the Convention have qualifiers such as "as far as possible and as appropriate" (arts 5, 7, 8, 9, 10, 11, 14), "where appropriate", "in accordance with each Contracting parties particular conditions and capabilities" (article 6), making the obligations of the Parties subject of these provisions to suit their own national specific capacities and socio-economic context.

2. Institutional Provisions

The Convention is not self-executing but is elaborated and "enforceable" through various institutions. The kinds of institutions that are provided for to assist decision making in the Convention are: the Conference of the Parties (article 23) the policy ratifying body, or the supreme decision making body; the Subsidiary Body for Scientific, Technological and Technical Advice (SBSTTA, article 25) as the scientific and technical body; a Secretariat (article 24) to run the day to day affairs

of the Convention;²⁹ a financial mechanism (article 21), a role which is held by the Global Environment Facility (GEF) on an interim basis (article 39); and a Clearing-house Mechanism (CHM) "to promote and facilitate technical and scientific cooperation" whose role is not specified in the Convention but left to the COP to be established (article 18 para.3). The latter two mechanisms are designed to assist countries in operationalising the intent of the various articles within their own countries.

The COP is the governing body of the Convention. It oversees the implementation of the Convention and has a far-reaching mandate. One mechanism to oversee implementation is the review of national reports, a key instrument of the Convention by which implementation and compliance by the Parties (article 26) can be monitored. In addition, the COP can basically take any action that may be required for the achievement of the purposes of the Convention.

COP also considers the reports of the SBSTTA. The SBSTTA is the advisory body to the COP on scientific, technical and technological matters in relation to conservation and sustainable use. This includes advice on the status of biodiversity; on measures that can be taken; on technology and know-how, on the transfer of such technology and knowledge; on scientific programmes and international cooperation in research. The COP can establish any other subsidiary bodies deemed necessary for the implementation of the Convention. A subsidiary body for implementation is currently being discussed. Since COP is the decision making body it considers and adopts protocols and amendments to the Convention and establishes cooperation with bodies of other conventions. The COP adopted numerous decisions addressed to other institutions. See Annex A for schematic representation of the institutions for the Convention resolved at the COP 1 meeting.

3. Classification of the Convention

The Convention is partly a framework treaty whose provisions do require further elaboration on the international level before they provide a clear set of norms and before compliance measures can be taken and

²⁹ The principal functions of the Secretariat are to prepare for service meetings of the COP and other subsidiary bodies of the Convention and to coordinate with other relevant international bodies.

monitored. As a framework, it seeks to establish clear policy, norms and standards for the various elements of the Convention.

Classical examples for framework provisions are article 19 para.3 (consideration of a protocol on the safe handling and use of LMO) and article 18 para.3 (establishes a Clearing-house Mechanism). A second set of provisions, however, are provisions on substance, which specify to a certain extent international obligations, for example article 8 lit.(a)–(f). It gives Parties in general enough guidance to implement the Convention on the national or local level, however, further elaboration on the international level with regard to clearly defined baselines and targets can serve to be useful in the harmonization of national action.

Other provisions, however, can be considered as self-executing on the international level: for example article 8 lit.(j) on local and indigenous skills (knowledge, innovations and practices) does theoretically not require further action on the international level as the obligations of the Parties are “subject to national legislation”. A forum for international discussion is nevertheless needed for a *common interpretation* so that Parties agree on what is sufficient for the implementation of the different provisions. These discussions have furthermore a capacity-building implication, as experiences with implementation can be shared amongst participants to the COP and allow for extrapolation as to what is “best practice”.³⁰ Every Contracting Party and different agencies and societal groups within a party can have different interpretations of what is required³¹. There is a need for an international “agreement” on what are the bare minimum standards and norms in order to fulfill the requirements of the Convention. Parties which deliberate on these issues at the COP meetings, use the regime building framework, to define these norms and standards and in so doing set certain obligations to Parties by agreement. This is the key to the whole idea of regime building, which we argue is the cornerstone of the Convention, and for that matter any other Convention.

³⁰ See S. Johnston, “The Convention on Biological Diversity: The Next Phase”, *RECIEL* 6 (1997), 219.

³¹ Different Raustiala, Victor, see note 17, 20.

III. Phase One of the Regime Building Process: The First Three Meetings of the Conference of the Parties

The first three COPs, briefly summarized in the following, formed the initial phase of the regime building process, where the basic structure of the regime was discussed and some of its foundations forged. What follows is a brief description of this process by taking a few key examples.

1. COP 1, Nassau 1994: Institutional and Administrative Matters and a Medium-Term Programme of Work

The first meeting of the Conference of the Parties took place from 28 November until 9 December 1994, within the first year after the entry into force of the Convention, as required by the text of the Convention (article 23.1). Delegates dealt mainly with those issues of text dealing with decision making processes by the Parties and administrative and institutional questions to get the machinery of the Convention running. The COP decided on the rules of procedure of the meetings of the COP and the SBSTTA (article 23 para.3; Decision (Dec. I/1),³² without agreeing, however, on the rule for voting with regard to financial measures,³³ an issue that has not been resolved up to today. COP also confirmed UNEP as the international organization administering the Secretariat (article 24 para.2 with article 40; Dec. I/4) and agreed on the financial rules for the administration of the trust fund for the Convention, a decision vital for the institution of the Convention (Dec. I/6 and Annex 1). COP 1 also established a pilot phase of the Clearing-house Mechanism (Dec. I/3).

However, the most contentious issue was the GEF as it would serve as the global facility to fund biodiversity projects mainly in developing countries. Contracting Parties could not agree at their first meeting to accept the GEF as the permanent financial mechanism to fund incre-

³² The Roman numbers, I, II, III, IV refer to the meeting of the COP, the Arabic numbers to the Decision at that meeting. Decisions are annexed to the reports of the meetings. See note 18.

³³ Rule 40 para. 1 (reproduced in: Annex III of UNEP/CBD/COP/1/17). Rule 40 foresees voting as a last resort if consensus fails, to be taken by a 2/3 majority. An exception for decision with regard to the financial mechanism, to be taken by consensus, remains bracketed.

mental costs for developing countries. The Convention requires that the mechanism "shall function under the authority and guidance of, and be accountable to, the Conference of the Parties". Convention (cf. article 39 with article 21 para.1, 2nd sentence). Developing nations and most of the non-governmental organisations at the meeting preferred to place the Conventions fund under the direct control of the COP, which did not meet the approval of donor parties, viewing a general and independent fund as the more convenient solution. As a compromise, it was decided that the GEF will continue to serve as the institutional structure to operate the financial mechanism of the Convention on an interim basis (Dec. I/2 para. 2). However, with time opposition against the GEF as the financial mechanism weakened, partly because it was restructured and it improved its functioning, and partly because developing countries recognized the unwillingness of developed countries, to fund the Convention in a different manner. However, the GEF has still not been recognised as the permanent funding mechanism to the Convention.

With regard to substantial provisions of the Convention, none of these were discussed in depth, and neither were any decisions taken. This was largely due to the fact that the COP had to agree first on a programme of work and then allow time for Parties to prepare the issues on the agenda. A three-year Medium-term Programme of Work (MTPW) until COP 4 was adopted. It provided for standing and rolling items (Dec. I/9, Annex) and was reviewed at each of the following COPs. Standing items include in particular reporting obligations of the various bodies of the Convention to the COP (Secretariat, GEF, CHM, SBSTTA) and, most importantly, national reports on the implementation of the Convention. National reports (article 26) are the only non-conflictual control mechanism for the implementation of the Convention. The MTPW distinguishes further between thematic areas and cross-cutting issues.³⁴ Thematic issues are understood in the context of the Convention as *themes of biological diversity*, such as forest biodiversity or agricultural biodiversity, whereas cross-cutting issues refer to issues common to most or all of the themes such as impact assessment, research, education etc.

While the MTPW, served to guide the work of the COP, it lacked in certain respects. The MTPW, for instance, took on boldly issues on marine and coastal biodiversity and agro-biodiversity but was rather "soft" on the question of forest. Forests are considered by some as the

³⁴ Decision I/9 (UNEP/CBD/COP/1/4, Annex, 60).

single most important repository of biodiversity, along with coral reefs and the oceans. "Failing to address forests ... is akin to failing to address coal with the climate change convention".³⁵ One would expect forest biodiversity to be high on the agenda of the COP. Instead, controversy is avoided by placing it as an agenda item under "Consideration of the future programme of work for terrestrial biodiversity in the light of the outcome of deliberations of the third session of the Commission for Sustainable Development (CSD) in 1995". This is a reflection of a long standing international controversy over forests. At the Rio Summit in 1992, a "Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests" was adopted. The title indicates the indecisiveness or better the highly formal compromise of the international community on forest issues (non-legally binding but authoritative; a statement, not principles, but: a statement of principles). The Contracting Parties, were not willing to take responsibility under the Convention for forest issues, and deferred a decision to the CSD to set up a process on forest issues. This means that the political forces opposed to a serious discussion on forests within the Convention won the day, against the wishes of those who wanted to have forests comprehensively covered by the Biodiversity Convention.

2. COP 2, Jakarta 1995: Marine and Coastal Biodiversity, Biosafety and Getting on the Track

The biodiversity regime gained real shape with regard to its substantial implementation only at the second meeting of the COP from 6–17 November 1995 in Jakarta. The second meeting did not only begin the process of substantiation of themes, but also provided a testing ground on how COP would work and make decisions on these themes. In Jakarta, the COP focused on the "conservation and sustainable use of marine and coastal biodiversity" as the main thematic area. Dec. II/10 on the conservation and sustainable use of marine and coastal biodiversity, called "Jakarta Mandate" by the Ministerial Statement on the implementation of the Convention³⁶ served in some ways as a model decision for other thematic areas. What is interesting is that the decision was, with some modifications, based on the recommendations of the first

³⁵ Raustiala, Victor, see note 17, 42.

³⁶ UNEP/CBD/COP/2/19, Appendix, para. 14.

meeting of the SBSTTA,³⁷ the advisory body to the COP. Providing a clear link and role between SBSTTA and the COP.

In terms of working out a decision and implementation plan for this theme, the COP invited bodies concerned with marine and coastal biodiversity to review their programmes with a view to improving measures and developing new actions for conservation and sustainable use. To take work forward, a intersessional mechanism to establish a programme of work was designed in the following way: 1) inputs from all Parties and other bodies to the Secretariat; 2) the establishment of a roster of experts; 3) meeting of an expert panel with experts from the roster, developing a work programme; 4) submission of the results to the SBSTTA; 5) next COP to decide on the programme of work. The appointment of an expert panel as a advisory body preparing the work of the SBSSTA was an institutional innovation for the COP. Key substantial elements that needed to be addressed were: the integrated marine and coastal area management as the overall framework; the precautionary approach as the approach to conservation and sustainable use; capacity-building and technology transfer as elements of a work programme; the incorporation of local and indigenous knowledge, user-based and community approaches.

Another important substantial decision of COP 2 was that “the ecosystem approach” should be the primary framework of action to be taken under the Convention” (Dec. II/8 para. 1), without, however, specifying what this implies in concrete terms. The decision, although not very explicit, has far reaching consequences as this approach can determine the overall strategy of how the Convention is ultimately implemented.

Additional issue were the question of biotechnology and the creation of a Biosafety Protocol. Biotechnology means “any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use,” article 2. This includes traditional biotechnology like the production of beer, bread and wine, but also modern biotechnological methods including genetic engineering. Article 19 para. 3 requests parties to consider the need for and modalities of a protocol on biosafety.

To take this issue forward, at COP 2, Parties decided to establish an Open-ended³⁸ *Ad hoc* Working Group, which reports to the COP. Its

³⁷ First meeting of the SBSTTA was held in Paris from 4–8 September 1995; Report in: (UNEP/CBD/COP/2/5).

goal was to develop "a protocol on biosafety, specifically focusing on transboundary movement, of any living modified organism resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity, setting out for consideration, in particular, appropriate procedure for advance informed agreement" (Dec. II/5). The decision to move ahead with a Biosafety Protocol was not without controversy, in particular from developed countries which saw the Protocol as a potential hindrance to the development and commercialisation of biotechnology based products.

The COP remained careful with regard to forest biological diversity but at least dedicated a decision to this theme. The decision requests the Executive Secretary to carry out a study on the links between forests and biodiversity with a view to provide input to the now CSD conceived Intergovernmental Panel on Forests which had met once before the Jakarta meeting.³⁹ A statement of the COP to the Intergovernmental Panel on Forestry (IPF) (Dec. II/9, Annex) asks for a dialogue with the IPF and requests the IPF to consider the economic benefits, environmental services and non-consumptive values provided by forest biodiversity within its mandate on methods for the proper valuing of the multiple benefits derived from forests. In the statement, it also recognizes the need for methods for sustainable forest management, which combined production, socio-economic, and environmental goals. Sustainable forest management should also take an ecosystems approach to forest management. These parts of the statement reflect the particular concern of the Convention and the representatives of governments that cover the meetings of the Convention.

On the CHM the COP decided to set up a two year pilot phase, the CHM being demand based and decentralized, working a network of active partners (Dec. II.3). A draft Memorandum of Understanding between the GEF and the Convention was not accepted by the Parties but given back to the Secretariat for further development (Dec. II/6).

With regard to access to genetic resources, the COP decided only on "preparatory tasks" for the discussion at its third meeting: complete a survey of measures by governments, including national interpretations of key terms; compile information on the social and economic valuation

³⁸ "Open-ended" can refer to both the duration of a body and the kind of participation. In the context of the Convention, "open-ended" refers to a body that has an unlimited number of representatives, i.e. every Party is invited to participate, as well as observers if not decided otherwise.

³⁹ 11 – 15 September 1995, New York (Doc.E/CN.17/IPF/1995/3).

of genetic resources, including the demand by industry for genetic resources (Dec. II/11). The industrial sector has all along contested the assumption that genetic resources will be like "green gold" and argued that expectations were exaggerated.⁴⁰ They argued that international and national efforts on policy and legislation are expensive and set up bureaucratic barriers without given the expected benefit to provider countries. The need to find decision, by COP, for acceptable way to deal with the benefit sharing issues is a result objections raised by developing countries about the way in which pharmaceutical companies from industrial countries work.

The decision on intellectual property rights (IPRs) has a more decisive tone to it than the one on genetic resources: it asks the Executive Secretary to liaise with the World Trade Organization (WTO) on the relationship between the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) of the WTO and to gain an understanding of the needs and concerns of the stakeholders with regard to IPR. A study should analyse the impact of IPR systems on conservation and sustainable use of biological diversity and the equitable sharing of benefits derived from its use (Dec. II/12).

On the important issue on the form and intervals of national reports by parties, the COP again was not very helpful in advancing implementation. The first national reports should cover the steps taken by the Parties in the implementation of General Measures for Conservation and Sustainable Use, article 6.⁴¹ As guidelines for national reporting, the COP only suggested that it include the "Executive summary; Introduction; Background; Goals and objectives; Strategy; Partners; Action; Schedule" (Dec. II/17, Annex), a rather loose framework which did not allow for structured comparison or control but gave the countries ample discretion and leeway in the manner in which they conducted their reporting.⁴²

With regard to administration, COP 2 decided to accept the offer of Canada to host the Secretariat of the Convention in Montreal (Dec.

⁴⁰ See with regard to bioprospecting activities W.V. Reid, "A New Lease on Life", in: W.V. Reid, S.A. Laird, C.A. Meyer et al., *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development*, 1993, 1 et seq.; J. Bell, "Genetic engineering and biotechnology in industry", in: Baumann, Bell, Koechlin, Pimbert, see note 26. On benefit sharing: C. Zerner, K. Kennedy, "Equity issues in bioprospecting", *ibid*, 100.

⁴¹ See above.

⁴² See below on national reporting.

II/19). Montreal won after three rounds of voting, after the withdrawal of Nairobi (Kenya) and Madrid (Spain) and a consensus between Canada and the fourth candidate, Geneva (Switzerland).⁴³ The Secretariat of the Convention is the only Secretariat of a biodiversity-related convention based in North America and furthermore not at the seat of the United Nations (New York).⁴⁴ The implications for building a biodiversity regime by having its secretariat out of easy physical reach of other conventions and bodies, is beyond the scope of this paper but might be worthwhile to examine in future.⁴⁵

In summary, decisions at the second COP were taken quite cautiously, as the COP was struggling to find its way through the Convention and is so doing preventing a situation where parties were obliged or forced to make more active commitments at the initial phases of the Conventions development. Basically all decisions taken on substance were preparatory in nature. If one were to follow *Krasner's* definition of international regimes,⁴⁶ one might say that the biodiversity regime has, apart from the text of the Convention, at this stage not as yet developed sets of principles, norms or rules for the Contracting Parties, but only decision-making procedures, institutional mechanism (rules of procedure, guidance to GEF) and national reporting criteria which are to be regarded as fairly "soft" and loose. Perhaps this phase of COP 1 and COP 2 can be described as a "preparatory phase" for the evolution of the biodiversity regime".

⁴³ UNEP/CBD/COP/2/19 para. 145.

⁴⁴ The Ramsar Convention's Bureau is based in Gland, the Secretariats of the United Nations Framework Convention on Climate Change, the Desertification Convention and the Migratory Species Convention in Bonn, the Secretariat of the World Heritage Convention (the World Heritage Centre) in Paris.

⁴⁵ Cf. Recommendation 2 (d) of the UN Task Force on Environment and Human Settlements, Report to the Secretary-General, 15 June 1998, 9, "... Every effort should be made to co-locate new conventions with other conventions in the same functional cluster ... and with institutions with which they have a particular affinity."

⁴⁶ See p. 320.

3. COP 3, Buenos Aires 1996: Agricultural and Forest Biodiversity, an Inter-sessional Process for Indigenous and Local Knowledge, Authority over GEF and Relationship with Other Processes

The workload of COP 3, which met from 4–15 in November 1996 in Buenos Aires, was considerable. Major thematic areas of focus that were discussed at this COP were issues pertaining to agricultural and forest biological diversity.

Promoting sustainable agriculture is central to achieving the objectives of the Convention: Agro-biodiversity is crucial for food security and unsustainable agricultural practices have dramatic impacts on the ecosystem and human health. In Dec.III/11, the COP established a phased, multi-year programme of activities on the conservation and sustainable use of agricultural biological diversity and decided to promote the development by Parties through national strategies, programmes and action plans that should incorporate agricultural biological diversity concerns. The programme aims at promoting the positive affects and mitigate the negative impacts of agricultural practices on biological diversity and to promote the conservation and sustainable use of genetic resources for food and agriculture. In the development of this programme of work, FAO was invited by the COP to coordinate together with the Secretariat of the Convention the review of ongoing activities and existing instruments. The decision outlines a broad and comprehensive framework for the assessment and invites for case studies. The purpose of such a review is obvious: to assess work that is currently carried out in order to avoid duplication and to identify further activities for the COP within the work programme. In Annex 1 of the Decision, the COP establishes a basis for action as it provides an overview of the impact of biodiversity on agriculture and *vice versa*.

With regard to genetic resources for food and agriculture, the COP reiterated its urgent message to the Commission on Genetic Resources for Food and Agriculture of the FAO (CGRFA) to finalize its negotiation on the International Undertaking on Plant Genetic Resources for Food and Agriculture.⁴⁷ Since 1993 governments have been renegotiating the non-binding International Undertaking on Plant Ge-

⁴⁷ Decision III/11, para. 18 and 19; Decision II/15.

netic Resources of 1983⁴⁸ in order to bring it in harmony with the Convention. The Undertaking in its 1983 version considers plant genetic resources as “common heritage of mankind”, running counter to the text of the Convention, which stipulates that, “recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments....” (article 15 para. 1). Negotiations are aimed at an agreement that is tailored for the conservation, sustainable use and access and benefit-sharing for agrogenetic resources, including farmers’ rights.⁴⁹ The COP will consider whether the “the International Undertaking should take the form of a protocol” under the Convention, once it has been revised.⁵⁰

Forest biological diversity continued to be the most conflictual thematic area within the biodiversity regime. The Intergovernmental Panel on Forests (IPF) had met three times since its conception,⁵¹ when the COP first discussed this issue. Decision III/12 affirmed that the COP will work in a complementary manner with the IPF. It requested the Executive Secretary to develop a focused work programme for forest biological diversity. And, having optional elements such as: research, co-operation, and the development of technologies necessary for the conservation and sustainable use of forest biodiversity.

Due to the political pressure by representatives of indigenous communities and non-governmental organisations, COP 3 decided to hold between its third and fourth meeting (“intersessionally”) a workshop on traditional knowledge.⁵² The aim of such a workshop was to start a

⁴⁸ International Undertaking on Plant Genetic Resources, Resolution 8/83, 22nd Session of the FAO Conference, reproduced in: CPGR/Ex1/94/Inf.1, FAO, Rome.

⁴⁹ See D. Cooper, “The International Undertaking on Plant Genetic Resources”, *RECIEL* 2 (1993), 158; K. ten Kate, C. Lasen Diaz, “The Undertaking Revisited: A Commentary on the Revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture”, *RECIEL* 6 (1997), 285.

⁵⁰ Para. 18 of Decision III/11.

⁵¹ See note 39; Second Mtg. 11–22 March 1996, Geneva (Doc.E/CN.17/IPF/1996/24); Third Mtg. 2–20 September 1996, Geneva, (Doc.E/CN.17/IPF/1997/2).

⁵² The term “traditional knowledge” is used by governments and UN bodies in the context of the Convention as an abbreviation for “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”, a phrase used in article 8 lit.(j) and throughout the Deci-

process of developing ideas and feedback for the next COP meeting on issues related to indigenous and local communities with regard to conservation and sustainable use.

As regards access to genetic resource, discussed already at COP 2 decisions on both issues (Dec. III/15 and III/17 respectively) at COP 3 by the Contracting Parties basically requested the Secretariat to collect more information on these issues, including case studies. On access to genetic resources, the COP was especially interested in information on national and regional measures and interpretations of key terms, the scope of genetic resources included and the process of preparing such measures. Access to genetic resources and benefit sharing is an issue, which is unique to the Convention. Parties cannot fall back upon deliberations and experiences in other processes. They are careful to take action and want to build international concepts and norms on national experiences.

Intellectual property rights are highly controversial within the COP. Governments in favour of a tight system of intellectual property rights, especially the United States of America, are afraid that decisions within the Convention could undermine the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) within WTO. While other countries and NGOs objecting, especially to patents on all forms of life, are finding in the Convention support for their cause. The impact of intellectual property rights on the objectives of the Convention have not yet been clarified on behalf of and discussed by the COP, both in terms of negative or positive impact on conservation and sustainable use as well as a tool for the implementation of the protection of traditional knowledge and to enhance programmes of access and benefit-sharing regime. The COP, divided on this issue, reached agreement only to call for case studies on a range of issues related to intellectual property rights (Dec. III/17, para. 1).

The issue of intellectual property rights is embedded in the broader issue of the relationship between trade and environment. The COP requested the Executive Secretary to apply for observer status in the

sions of COP 3 and COP 4 dealing with that and related articles. The term "traditional knowledge" (which is not used in the text of the Convention) is incorrect in so far as it gives the impression of remoteness in time and inertia. Innovations are, however, active as they occur continuously in the communities referred to in article 8 lit.(j), 10 lit.(c) and the Preamble, and those innovations are included in the scope of article 8 lit.(j). However, for the sake of brevity, "traditional knowledge" has been more and more used.

Committee on Trade and Environment (CTE) of WTO (Dec. III/17, para. 6). This is a first considerable step for the regime of the Convention to reach out to processes beyond the UNCED process (CSD, International Forum on Forests).

The financial mechanism was the major internal institutional issue discussed at COP 3, complemented by the question of additional financial resources. After heavy discussions, the COP adopted a Memorandum of Understanding between the COP and the Council of the GEF (Dec. III/8), formalizing the relationship between the two bodies. The GEF received additional guidance with regard to criteria for funding (Dec. III/5). The guidance related to those issues discussed at COP 3 where guidance was lacking or incomplete. The review of the GEF was due at COP 4 and a lot of time was spent on deciding the guidelines for the review of the effectiveness of the financial mechanism (Dec. III/7). The procedure calls on the Secretariat to collect information, prepare a synthesis which is then appraised by five regional representatives. The new version should be distributed to all Parties and relevant bodies for comments. On that basis, the Secretariat had to prepare a report which was presented to the regional representatives, the GEF and its implementing agencies (Worldbank, UNEP, United Nations Development Programme). A final synthesis was to be sent to the Parties three months prior to COP 4.

The complexity of the preparation of the review indicates the struggle of the COP with the GEF as the financial mechanism. Developing countries are critical of the fact that financial resources in the GEF are not "new and additional" and agreed that the GEF should continue to operate as the financial mechanism, until its review in 1999.

Other issues discussed at COP 3 include incentive measures (Dec. III/18, calling for case studies), identification, monitoring and assessment (Dec. III/10), and implementation of arts. 6 and 8 (Dec. III/9).

4. Synopsis of Phase I: Lack of Focus and Institutional Structure

At COP 3, substantial progress was made only in agriculture. Some degree of authority by COP was established over the functioning of the GEF, and some steps were taken as regards the issue of traditional knowledge.

Over the first three years, Contracting Parties more and more realised that the agendas of the COP as well as of the SBSTTA are too burdensome. This resulted in making issues difficult to follow, particularly when it came to countries which only had one or two delegates at each of the COP meetings.⁵³

In addition, Contracting Parties argued that it is often difficult to implement the provisions within a space of a year, before the next COP and SBSTTA meetings are held, as well as requiring parties to attend other working groups such as the biosafety and intersessional activities. It is also on these grounds that it was decided to extend the holding of the fourth meeting of the COP by a period of a year and a half. The bureau of the COP was also asked to trim down and arrange the agenda of the next meeting in a manner that would allow efficient use of time.

Moral of participants at the third meeting of the COP was low. Participants complained that the Convention "accomplished little of substance" ever since its entry into force.⁵⁴ The process lacked focus and did not achieve real changes.⁵⁵ The meetings of the COP were burdened with a hefty agenda that required delegates to focus on many issues.

In the final analysis, COP 3 represented a watershed. In that Parties realised how complex many of the issues under the Convention are, and to move ahead, and maintain interest and momentum, more firmer guidance from COP and its various advisory bodies needed to be presented. Parties were more interested on what could be done, than what needed to be known. Perhaps one can categorise this phase as a move from conception, positioning to finding solutions and getting down to implementing some of the key objectives of the Convention.

⁵³ The inequality in numbers raises also concerns with regard to the equality in the decision-making process between the various countries. While some developed countries attend the meetings of the COP with 10, 15 or even 20 participants, developing countries often can only afford one or two. Cf. for example List of Participants to COP 3, UNEP/CBD/COP/3/Inf.36. This phenomenon is typical to all negotiations of international environmental agreements.

⁵⁴ Wold, see note 17.

⁵⁵ Raustiala, Victor, see note 17, 40.

IV. Phase Two: The Biodiversity Regime on its Road to the 5th Conference of the Parties (Nairobi 2000)

With the fourth meeting of the COP, the Medium-Term Programme of Work came to a conclusion. The COP had before it the review of the process of the Convention. The meeting was in the authors opinion a major shift forward to the implementation of the Convention. COP 4 decided on several programmes of work for thematic areas and consolidated work on cross-cutting issues, partly with concrete time-frames and expected outputs (1.) It improved the institutional structure of the Convention, in particular by refining and clarifying the process for scientific, technological and technical advise, and initiated a process for reviewing the operations of the Convention (2.) The regime building advanced with regard to substantive norm setting as the COP for the first time decided in several areas to develop norms such as "guiding principles", "guidelines", "codes of best practices", "criteria"(3.) The regime moved from a preparatory stage to an implementation stage on the international level. National reports were due for the first time, allowing for control and review on national level implementation

In the case of norm setting and regime building the COP proceeded by redefining the approach in dealing with thematic and cross-cutting issues, and in addition it pushed for outputs that will allow the COP to both monitor implementation and guide the process of implementation through norms and standards. The section below outlines some of the main decisions at COP 4, and in so doing providing clear indications that COP 4 was moving more in the direction of implementation than conception. Some issues such as forest, and rights of indigenous peoples, continue to be tossed around, as Parties, particularly developed countries are reluctant to take on these issues directly, as they are conflictual and can compromise political and economic interest.

1. Thematic and Cross-Sectoral Issues

The COP deals on the one hand with the different thematic areas of biological diversity, by also dealing simultaneously with cross-cutting issues. These issues were to a more or lesser extent relevant for the different themes. For example, the introduction of alien species is regarded as an important issue affecting all biomes apart from agricultural biodiversity. The COP therefore specified that it be dealt with in each of the programmes of work for the thematic areas by making it a cross-cutting

issue that required special attention by COP (Dec.IV/1 Part C). The table below provides an indication of how COP 4 dealt with the various thematic and cross-cutting issues.

Ecosystem approach	Including indicators
<i>Thematic areas</i>	<i>Cross-sectoral issues</i>
Marine and coastal biodiversity	Biosafety
Agricultural biodiversity	Indigenous and local knowledge
Biodiversity of inland waters	Access and benefit-sharing
Forest biodiversity	Intellectual property rights
Dryland, Mediterranean, arid, semiarid, grassland and Savannah ecosystems	Alien Species
Mountains ecosystems	Taxonomy
	Incentive measures
	Public education and awareness
	Environmental impact assessment

a. The Use of the Ecosystem Approach and Indicators

The COP reiterated that the ecosystem approach should be a guiding principle for the implementation of the Convention and requested the SBSTTA to develop "principles and other guidance" on the ecosystem approach (Dec.IV/1 Part B para. 2). The advice of the SBSTTA will provide the basis for the COP to adopt principles and guidelines on how to implement the programme of work on the various thematic areas in a harmonized way. The distinction between the different thematic areas is scientifically difficult. Although there are big differences between "clusters" of biodiversity such as coastal and marine plants, animals and microorganisms and their functional relationship compared to one's in forest, it is difficult to draw boundaries around these areas as they are in some way or another interrelated.⁵⁶ This is quite obvious for biodiversity of inland waters which includes catchment areas and very often these are forest ecosystems. A common approach to the management of all biodiversity, which takes at the same time into account the differences of the various biomes, is important for the implementation

⁵⁶ See *The ecosystem approach under the Convention on Biological Diversity*, UNEP/CBD/COP/4/Inf.9.

of the Convention. It allows for comparison, "trans thematic" learning experiences and more efficient management.

Linked to the ecosystem approach is the question of criteria and indicators. Set against a certain baseline measure, they allow for the monitoring and assessment of ecosystem status, threats and trends of biodiversity. They are tools to establish a "pressure-state-response assessment" framework, i.e. to assess socio-economic factors or driving forces affecting biodiversity and the state of biodiversity at that moment. "Responses" are measures which are taken in order to change the current or projected state.⁵⁷ Establishing indicators will allow one to monitor the implementation of the Convention. COP 4 referred this matter to the SBSTTA to identify appropriate indicators and to link these to the ecosystem approach (IV/1 Part A, para. 4).

b. Marine and Coastal Biodiversity

Based on the report of the expert group established by Dec. II/10,⁵⁸ which was convened in March 1997, the SBSTTA3 recommended to the COP a programme of work. The COP adopted a Programme of Work for Marine and Coastal Biodiversity identifying key operational objectives and priority activities within five programme elements: integrated marine and coastal area management, marine and coastal living resources, marine and coastal protected areas, mariculture and alien species and genotypes. The basic principles guiding this programme were the ecosystem approach, the precautionary approach, the importance of science, the creation of a roster of experts, and the use of local and indigenous communities (use of their knowledge, community and user based approaches, involvement of stakeholders) (Dec. IV/5 Annex).

The activities within the five programme elements are similar in kind. They involve a review of existing efforts or instruments with the view to identify synergies and gaps; the gathering and dissemination of information; eventually research and monitoring; and, most important, the cooperation with lead partners. As we have pointed out before, the Convention cannot be implemented without the endorsement and support of these institutions working in that area on the international, national, regional or local level. The major normative products of the programme are: a.) guidelines for ecosystem evaluation and assessment; b.) criteria for the establishment and management of protected areas; c.)

⁵⁷ UNEP/CBD/SBSTTA/3/9, para. 10.

⁵⁸ See above.

guidance on criteria, methods and techniques which avoid the adverse effects of mariculture.

c. Agricultural Biodiversity

As the assessment of ongoing activities in agriculture were not finalized in time for COP 4, the COP focused on reviewing progress rather than on initiating new initiatives (Dec. IV/6). A synthesis of the assessment will be peer-reviewed at a workshop at the end of 1998, to be organized by the Secretariat, the FAO and the Netherlands. The workshop will undertake to be a stock taking exercise and identify on a preliminary basis future priorities for the programme, to be recommended to SBSTTA. Apart from the continuation of ongoing work and a reiteration to finalize the International Undertaking at the end of 1999, the decision brings two new aspects into this thematic area: Firstly, the Executive Secretary shall apply for observer status in the Committee on Agriculture of the WTO. After representation in the CTE by the Secretariat, this is the second issue that has been linked to the work of the WTO.

Secondly, the SBSTTA is asked to assess the consequences of the new technology for the control of plant gene expression and provide scientifically based advice to the COP. Para. 11 of Dec.IV/6 refers to the so called "terminator technology", which prevents seeds from germinating. This part of the decision showed that the COP is also able to react quickly to new developments and include specific requests for action in its decisions.

With regard to long-term products, the decision does not call for the development of any norms. It reaffirms that a protocol on plant genetic resources for food and agriculture might be possible. The assessment of ongoing activities will most likely lead to a roster of institutions involved in sustainable agriculture. From the case studies, guidelines on topics related to soil micro-organisms and pollinators, integrated land management practices, and so on, may be deduced. The COP requests that stakeholders begin to provide inputs on methodologies for assessments of agricultural biodiversity and tools for identification and monitoring, including: criteria and indicators (also for farming systems and agricultural ecosystems); rapid assessment techniques; incentives; and the identification of underlying causes. This can be interpreted as a preparatory exercise for the development of guidelines on this issue.

d. Biodiversity in Inland Waters

The programme of work on biodiversity in inland waters was developed in relatively short time, benefiting from the preparations of the sixth session of the CSD, focusing, *inter alia*, on freshwater, the work within the Ramsar Convention,⁵⁹ and the experiences gained within the Convention to develop such programmes.

The programme of work (Dec. IV/4, Annex I) consists of four parts:

- Assessment of the status and trends of the biological diversity of inland water ecosystems and identification of options for conservation and sustainable use. This part distinguishes clearly between the different actors addressed. It established a work plan for the SBSTTA and gives detailed recommendations to Parties on activities related to freshwater (*i.e.* on watershed management, technologies, research, monitoring and assessment, sustainable use, environmental impact assessment, alien species, genotypes and genetically modified organisms, education and awareness, collaboration with the broader watershed community, transboundary cooperation, involvement of local and indigenous communities, economic and legal instruments).
- Provision of scientific advice and further guidance to assist in the national elaboration of Annex 1 of the Convention.
- Review of methodologies for assessment of (inland water) biological diversity.
- The urgency of needed action on taxonomy.

The Decision contains a time-frame for a work programme for SBSTTA (Dec. IV/7, Annex II) and foresees the establishment of a roster of experts. Particular attention should be given to the development of rapid assessment methodologies especially related to small island states.

The programme of work is comprehensive and specific. It gives guidance to the SBSTTA and to Parties on how to implement it and clearly distinguishes between the tasks of the different actors. One major step forward to the implementation of the Convention with regard to inland water biodiversity is the relation of the Convention to the Ramsar Convention. The Ramsar Convention is an established international legal framework, and developed a strategic plan in 1997 for until the year 2002, based on the wise use principle, which in many respects

⁵⁹ See note 10.

is similar in intent to the "ecosystem approach" adopted by the COP. The COP endorsed the Joint Work Plan with the Ramsar Convention⁶⁰ as a framework for enhanced cooperation between these conventions. This is the first time the COP has adopted a decision to develop a detailed cooperative relationship with another convention. This will hopefully provide a precedent for other joint work programmes. The Convention cannot be implemented in a void but rather has to link up with other regimes covering themes or issues of the Convention. In a longer-term perspective, the Convention could integrate these other processes into its overall framework, leading to build-up a web of regimes.

e. Forest Biodiversity

The discussions on a biodiversity regime for forests are complicated by the overlapping mandate of first the Intergovernmental Panel on Forests and then, after the conclusion of its work in February 1997,⁶¹ by its successor, the Intergovernmental Forum on Forests (IFF).⁶²

Contrary to the work programme on marine and coastal biodiversity, the programme of work for forest biodiversity does not include the development of any normative results. Expected outcomes are better understanding of the issues, for example the use the ecosystem approaches in relation to forests and the role of traditional knowledge, and analysis of human impacts on forests. The most operational result might turn out to be "methodologies to advance the elaboration and implementation of criteria and indicator frameworks and the improved capacity of countries to implement these frameworks".

From a regime point of view, this programme of work appears to be still in the conceptual phase of its construction. The sub-regime on forests is nothing more than a call to provide more information and research and to hold more meetings. There is also no real commitment from Parties whatsoever, as they can withdraw their co-operation on the basis that this activity is not relevant to them (Dec. IV/7, Annex, para.2). Given the conflictual nature of forestry, agreement on clear norms and standards, as well as a programme for implementation will

⁶⁰ UNEP/CBD/COP/4/Inf. 8. Endorsement by Dec. IV/15 para. 2.

⁶¹ Fourth Mtg. from 10–12 February 1997 (Doc.E/CN.17/1997/12).

⁶² The IFF met once before COP 4, from 1–3 October 1997 (Doc.E/CN.17/IFF.1997/4). A second meeting took place in Geneva from 24 August – 4 September 1998 (Doc.E/CN.17/IFF/1997/4).

be difficult to achieve, as forest and forestry are major economic and political issues upon which many countries depend on to earn foreign exchange.

f. Other Biomes for the Future: Dryland, Savannas etc.

The programme of work for the COP foresees the in-depth consideration of dryland, Mediterranean, arid, semiarid, grassland and Savannah ecosystems at COP 5 and mountain ecosystems at COP 7 (Dec. IV/16, Annex II). With the inclusion of these ecosystems into its work, the COP covers the whole range of biodiversity themes.

g. Indigenous and Local Communities

Following the Decision of COP 3, a workshop on traditional knowledge⁶³ was held in Madrid from 24–26 November 1997. The workshop experimented with procedural innovations, having representatives of indigenous peoples as chairs of the two working groups and as members of the bureau, the governing body of the meeting. The report of the workshop, intended as a recommendation for the work programme to be adopted at COP 4, was rather a loose collection of a wish-list of all issues that needed to be addressed rather than providing useful advice to the COP on where to go next.⁶⁴

As a consequence, the Decision on the implementation of article 8 lit.(j) and related provisions (Dec.IV/9)⁶⁵ only adopts the structure from the Madrid report for work programme options (Annex to Dec. IV/9).

⁶³ For the term "traditional knowledge" see note 52.

⁶⁴ Report in UNEP/CBD/TKBD/3. Although not helpful in its concrete output, the meeting was useful to clarify points of views in preparation for COP 4 and to built capacity for indigenous peoples representatives on procedural matters.

⁶⁵ Article 8 lit.(j), dealing with the protection of, use of and sharing of benefits from innovations, knowledge and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity can in many of its aspects not be implemented separately from the provision on the protection of traditional cultural practices (Art. 10 (c)). See note 52 on the term "traditional knowledge". Their continuation is crucial for the continued innovation by indigenous and local communities. Benefit sharing with regard to knowledge related to genetic resources has to be implemented in conjunction with the

The discussions at COP 4 again did not dwell on substantive questions in relation to article 8 lit.(j) but rather went into endless circular discussions about process. As in COP 3, representatives of mostly indigenous peoples fought for an *ad hoc* open-ended inter-sessional working group to address the implementation of article 8 lit.(j) and related provisions. The working group would report directly to the COP. It will be held in conjunction with the SBSTTA. Its mandate is to provide advice to the COP on all matters related to article 8 lit.(j), in particular on the application and development of legal and other appropriate forms of protection for the knowledge of indigenous and local communities.

h. Biosafety

The *ad hoc* working group on Biosafety held four meetings before COP 4.⁶⁶ The COP had delegated most of the decision making to this body. The Working Group needed, however, political direction from COP for the finalization of its work. Governments with an interest in delaying the protocol tried to postpone the process of finalization. In the end, they did not succeed and the COP decided that the final meeting of the group and an extraordinary meeting will be held in February 1999 to adopt a Protocol on Biosafety. After its fifth meeting,⁶⁷ the working group achieved to draft a consolidated, but heavily bracketed text for negotiation at its final meeting in February 1999.

i. Access and Benefit-Sharing

The Decision on access and benefit-sharing (Dec.IV/8) contains two major developments compared to previous Decisions (Dec.II/11; III/15). Firstly, the COP established a regionally balanced panel of experts, reporting to the COP, with the mandate to develop "a common understanding of basic concepts and to explore all options for access and benefit-sharing on mutually agreed terms, including guiding prin-

provisions on access to genetic resources, i.e. arts 15, 16 para. 3 and 19 para. 1 and 2. Other articles of the Convention also overlap and impact on the implementation of article 8 lit.(j).

⁶⁶ The First Mtg. from 22–26 July 1996 in Århus; Second Mtg. 12–16 May 1997, Third Mtg. 13–17 October 1997, Fourth Mtg. 5 to 13 February 1998 (Report in: UNEP/CBD/BSWG/4/4) in Montreal.

⁶⁷ 17–28 August 1998, Report in: UNEP/CBD/BSWG/5/3.

principles, guidelines, and codes of best practice for access and benefit-sharing arrangements." The panel is a first step towards the development of international guidance, in the broadest sense of the term, for access and benefit sharing arrangements, in particular bioprospecting.⁶⁸ It is the first mechanism under the Convention that can be regarded as a direct mandate to set norms. The options for access and benefit-sharing include elements such as prior informed consent (article 15 para.4), mechanisms to provide consent, reference to the country of origin, where available, in relevant publications and patent applications; mutually agreed terms; cost efficient permitting and regulatory procedures; incentive measures for contractual partnerships (Annex to Dec.IV/8). Complementary to this task, will be an inter-sessional meeting before COP 5 to consider options for access and benefit-sharing mechanisms, which will include policy and legislation.

The second development of importance is that the COP requested the Executive Secretary to gather information on *ex-situ* collections which were acquired prior to the entry into force of the Convention and which are not addressed by the Commission on Genetic Resources for Food and Agriculture of the FAO. The access regime in the Convention does not cover genetic resources acquired before the entry into force of the Convention (cf. article 15 para. 3) making it potentially possible for countries which have acquired these resources before the Convention to exclude these resources from benefit sharing arrangements.

j. Intellectual Property Rights

There is no stand-alone decision by the fourth meeting of the COP on intellectual property rights. IPRs are indirectly dealt with by the Decision on article 8 lit.(j) and indigenous and local communities as well as by the Decision on access and benefit-sharing. IPRs are included in the mandate of the expert panel. Work on intellectual property rights cannot be carried out by the Convention in a vacuum. The Convention does not deal with intellectual property rights as such. The issue, being highly controversial, can only be discussed in relation to developments in the WTO, especially as the review of article 27 para. 3 lit.(b) of TRIPs is due in 1999, putting at stake the question of a *sui-generis* sys-

⁶⁸ "Bioprospecting" refers to the access to genetic resources in *in-situ* conditions as compared to material transfer agreement for genetic resources from an *ex-situ* collection or a user to another collection or a user.

tem for the protection of plant varieties. The COP decided to reiterate the task, but has not as yet acted upon, to undertake work that assists in developing a common appreciation of the relationship between intellectual property rights, TRIPs and the Convention (Dec.IV/15 para. 10). The COP did, however, not decide to explicitly ask the Executive Secretary to apply for observer status in the Council of TRIPs. The whole issue of intellectual property rights and how it relates to the objectives of the Convention is still in a very early stage of development in the regime. Whether it will develop further in the future is not clear, it really depends on the strength of argument and advocacy of countries that want this issue to be addressed.

k. Incentive Measure, Public Education and Awareness, and Environmental Impact Assessment

Incentive measures, public education and awareness, and environmental impact assessment (EIA) have been clustered at COP 4 as "Measures for implementing the Convention", and also dealt with as stand alone parts having their own pre-ambular statements in each part (Part A, B, C of Dec. IV/10).

These issues are being dealt with by way of requesting more information and case studies. It is important to remember that many of these issues are being dealt with by the Contracting Parties outside the framework of the Convention. These issues would inevitably fall under general programmes for environmental management that countries may be undertaking at the moment. This may explain the lack of urgency to come up with anything concrete, and rather have the matter deferred to future COP meetings.

As regards incentive measures, there was a general call for governments to use incentive measures, taking into account the ecosystem approach, and to remove or mitigate effects of perverse incentives. The decision was taken with recognition of the fact that the Secretariat of the OECD is also collecting case studies on incentive measures by their member states. Mindful of this, the COP recommended that Parties await the results of the OECD project, and asking for an analysis of the findings for the next COP by relating these to the various thematic foci.

l. Alien Species

As we have stated in the introductory remarks to this section, COP decided alien species to be a cross-cutting issue for implementation under

many of the themes of the Convention. The SBSTTA was requested to identify priority work and to examine the Global Invasive Species Programme with a view to considering action under the Convention (Dec. IV/1 Part C).

2. The Institutional Framework and Decision-making Process

On the agenda of COP 4 was the review of the medium-term programme of work, including the review of the operations of the COP and its subsidiary organs so as to undertake an overall review and consider a longer-term programme of work. This task was one of the most difficult for the fourth meeting of the COP. It was certainly one of the most contentious. The longer-term programme of work is dependent on the frequency of meetings of the COP which depends on whether there are other subsidiary bodies or institutions also preparing or implementing the decisions. This is one of the main reasons why *the Modus Operandi* of the long-term work programme and the institutions of the Convention were regarded in serious light. See Annex B for schematic representation of the new institutional arrangements for the Convention.

a. The SBSTTA

The COP decided on the *Modus Operandi* of the SBSTTA (Dec. IV/16 Annex I). There was a general recognition that the SBSTTA should play an advisory role as opposed to being a purely scientific body. Between COP 3 and COP 4 innovations such as the use of expert panels were tested. In COP 4 problems with the way in which SBSTTA worked were recognised, and since SBSTTA is an important decision making body, the way it works in future will determine how parties approve and process resolutions efficiently. Prior to decisions at COP 4 on the future workings of SBSTTA, the SBSTTA generated opinion and advice through the creation of expert panels, liaison groups, joint technical workshops for instance with the FAO, and the Secretariat (June 1997), and so on. These provided a testing ground and helped to inform how the future structure should be established.

The SBSTTA, at COP 4, was mandated to establish a limited number of *ad hoc* technical expert groups on specific priority issues that may be convened for a limited duration. It has to advise COP 5 on the terms of reference for the *ad hoc* expert group on thematic areas (Dec.

IV/16 para. 21). These experts are to be drawn from a roster established from nominations by governments (not only Parties, in order to include experts from the United States) and other bodies. *Ad hoc* technical expert groups shall be composed of no more than 15 experts with geographical representation. The roster of experts is another general institutional innovation. The experts do not only serve the expert groups but should also contribute to the preparation of decisions and the implementation of the Convention through peer reviews, clarifications, contributions to papers, participation in workshops etc. This shall increase the scientific basis for the decisions of the COP. The Secretariat has so far established rosters for experts on marine and coastal biodiversity, agro-biodiversity and biological diversity of inland waters.

Another innovation is the introduction of regional and subregional meetings for the preparation of regular meetings of the SBSTTA. This will allow for much more specific and contextual discussions on issues in the process. Their organization is, however, subject to voluntary funding.

b. The Bureau(s): Their Growing Role

Rule 21 of the Rules of Procedure of the Conference of the Parties stipulates, "that at the commencement of the first session of each ordinary meeting, a President, eight Vice-Presidents and a Rapporteur are to be elected from among the representatives of the Parties present at the meeting". They serve as the Bureau of the meeting. The officers are elected on the basis of equal geographical representation. Two from each geographical region (Africa, Asia, Western Europe and others, Latin America and the Caribbean, Eastern Europe), including representation of the Small Island Developing States. The function of the Bureau in the intervening period until the next ordinary meeting is to provide guidance to the Secretariat with regard to preparations for and conduct of meetings of the COP.

The role of the Bureau grew over time. Dec. I/4 stipulates that the Executive Director of UNEP shall select the Executive Secretary of the Secretariat of the Convention in consultation with the Bureau of the COP. Administrative difficulties between the Secretariat and UNEP were to be resolved through an administrative arrangement, to be reported to the COP through the Bureau (Dec.III/23). The Executive Secretary for instance trimmed down the much too long agenda for COP 4, arising from decisions at COP 3, in consultation and with the approval of the Bureau. As the budget of the Convention is only a por-

tion of what the work programmes would require, COP 3 and 4 recognize that the Executive Secretary might have to adjust the servicing of the programmes, with the guidance of the Bureau (Dec.III/22 para. 1; IV/16 para. 17). The Bureau decided after COP 4 on the dates of the different meetings. The Bureau shall liaise regularly with the bureaux of subsidiary bodies of the Convention (Dec.IV/16 par. a 15).⁶⁹

As the regime of the Convention gets more and more complex, the Bureau has a increasing steering and guiding role to play to and on behalf of the COP, and more crucially setting priorities by approving the agenda. The Bureau members are also expected to report back to their respective regions and to transfer the deliberations of the regional members into the Bureau. The growing role of the Bureau and its impact on the regime might be worthwhile to study further.

c. A Subsidiary Body for Implementation?

The issue of a Subsidiary Body for Implementation (SBI) for the Convention, similar to that of the Convention on Climate Change was discussed at length at COP 4. Some favoured the approach of improving the operations of existing structures, while others considered that the decision-making process would benefit from a body which surveys and reports on the implementation of the Convention. Well-prepared meetings of the COP by this body may alleviate the burden by reducing the number of issues that need decision and deliberation at each of the meetings of the COP. On the other hand, a yearly COP with a reduced agenda might well serve the same purpose.

Whereas the feeling of the stakeholders before COP 4 was that an additional body may create a burden rather than smoothen decision-making, the assessment changed at COP 4. More and more individual processes appeared to be necessary in order to be able to deal in depth with the different sub-regimes (such as on forest, on access to genetic resources, on national reporting etc.). As it was feared that these processes would end up fragmenting the regime as a whole; the idea of a subsidiary body for implementation got stronger support. The issue, however, could not be resolved at COP 4. As a compromise Parties agreed that before the next COP an inter-sessional open-ended meeting

⁶⁹ Subsidiary bodies follow the rules of procedure of the COP *mutatis mutandis*, Rule 26.5. The Chairperson is elected by the COP, the officers, however, by each subsidiary body itself. "Subsidiary body" includes committees and working groups, cf. Rule 26.1.

will be held back-to-back with SBSTTA 4 “to consider possible arrangements to improve preparations for and conduct of the meetings of the COP..., including a preparatory discussion of the item on access to genetic resources on the agenda of the fifth meeting of the COP...” (Dec.IV/16 para. 2). This meeting will be crucial in determining a role of the SBI if any at all.

d. The Clearing-House Mechanism

The objective of the Clearing-house Mechanism is to “promote and facilitate technical and scientific cooperation” (article 18 para.3). COP 1 established a pilot phase which extended its life-span up to COP 3 until the end of 1998.⁷⁰ As the Convention left the design completely to the COP, this pilot phase was necessary to explore what role the mechanism should take. Its role evolved since COP 1 and was broadened. Its role is seen to be a key instrument at promoting and facilitating the implementation of the Convention.⁷¹ Between COP 3 and COP 4, four clearing-house regional workshops were held to build capacity for countries to use and contribute to the mechanism and to explore their needs. At the end of the pilot phase, an independent review of the Clearing-house Mechanism will be undertaken.

So far, Parties designed the mechanism as a decentralized switchboard for information dissemination on policy and management as well as science and technology. The main instrument for the Clearing-house Mechanism is the Internet. The mechanism should be a network on the international, regional, sub-regional and national level of all biodiversity institutions and initiatives and stakeholders, including the private sector, and serve the needs and demands of the Contracting Parties for implementing the Convention. The Clearing-house Mechanism has an Informal Advisory Committee to guide the Secretariat as the international focal point. Every Contracting Party should have a national focal point that should be advised by a steering committee or working group to achieve broad participation of all stakeholders in the implementation process of the mechanism (Dec. IV/2 para. 3). Major content elements are country profiles, biodiversity strategy and action plans, legislation,

⁷⁰ Dec. III/4.

⁷¹ Decisions I/3, II/3, II/4, II/7, II/8, II/10, II/11, II/14, II/16, II/17, III/4, III/5, III/9, III/10, III/11, III/17, III/18, III/19, IV/2, IV/4, IV/5, IV/7, IV/8, IV/9, IV/10, IV/15, IV/16.

financial resources, national focal points, scientific and technical information.

The Clearing-house Mechanism is an example of the character of the Convention: It develops on the basis of the experiences gained. The regime is built, reviewed and adapted as the Contracting Parties go along. Its role in assisting poorer countries to implement the Convention will be crucial.

e. The Financial Mechanism

At COP 4, additional guidance was given to the COP on the issues to be discussed, and in so doing providing a broad range of issues to be financed by the GEF. However, difficulties that present themselves to the Council of the GEF will be on how to decide on those projects that are priorities for the Convention. The other result of the review of the effectiveness of GEF⁷² is that the various procedures (project preparation, procedures for approval and implementation) should be quicker, simpler, and more country-driven. The GEF as such should be more flexible and have a better way of responding to the guidance given by the COP (Dec. IV/11, Annex).

f. Regional Meetings

Until COP 4, regional meetings were held in preparation of the following COP. The character of these meetings was changed at COP 4 from being preparatory in nature to "consider ways and means of implementing the Convention and the decisions of the Conference of the Parties" (Dec.IV/16 para. 5).

The shift from preparatory to implementation oriented meetings is also an indication of the shift in the regime of the Convention. Strategy and action plans need to be implemented on a national and local level. The objectives of the Convention will be achieved only by local action and regional meetings a useful tool to share experiences on implementation with countries facing similar situations. The shift to regional implementation meetings marks a turning point for the biodiversity regime. And is perhaps more clear and incisive about its intent than ever before.

⁷² See page 338.

3. Implementation of the Convention: Norm-setting, International Cooperation and National Policy and Law

a. Setting Norms and Standards

A regime is only as good as its implementation. One can consider implementation on several levels. From a legal point of view, an international treaty with broad obligations is implemented on the international level if its norms are specific enough to allow for implementation, e.g. if the general obligation to reduce the emission of carbon dioxide is specified to be a certain percentage against a defined baseline (international implementation). This is, however, not sufficient to reach the objectives of a convention if the convention is not about international relations; rather, these international obligations have to be turned into national policy and law (national implementation) and, in the case of international organisations, into policy by these organisations (implementation by organisations). In a third step, implementation only takes place when policy and law are enforced and changes in behaviour take place.

In the Biodiversity Convention, implementation is happening simultaneously on the international and national level: many of the provisions of the COP are still far from being internationally implemented, for example the ecosystem approach still needs to be defined before it can be implemented in a realistic manner. The regime at the moment is still at an early stage of norm-setting.⁷³ COP 4, compared to other COP meetings, has only begun to define clearer procedures on ways by which norms can be developed. For instance its decisions are tend to use the following wording: "Guiding principles" shall be recommended by the SBSTTA on alien species; and further, "principles and other guidance" on the ecosystem approach⁷⁴ are to be developed. In addition other examples include its recommendations that the programme of work on marine and coastal biodiversity aims at developing "guidelines for ecosystem evaluation and assessment", including indicators, and to provide "guidance on criteria, methods and techniques" with regard to

⁷³ "Norm" in this context is used as a general term for every sentences that intends to instruct behaviour and not as defined by Krasner in his definition for "regime", see note 20.

⁷⁴ Dec. IV/1 Part C para. 2 and Part B para. 2 respectively.

mariculture.⁷⁵ The panel of experts on benefit-sharing shall develop a common understanding of basic concepts, which can serve as a common interpretation if adopted, and to explore among other things “guiding principles, guidelines, and codes of best practice”.⁷⁶

“Guiding principles”, “guidelines” etc. as objectives are examples of the general tendency in the wording of the Convention, which is indicative of its move away from the traditional regulatory approach such as the development of protocols or by making amendments to the Convention. The only possible disadvantage is that compliance with these “loose” prescriptions can be difficult to assess. It is therefore important that indicators are formulated. Indicators are quantitative measures against which aspects of policy performance can be measured.⁷⁷

b. Joint implementation with other Conventions

While the COP struggles to develop norms for the various thematic areas, it is important to note that Parties must continue to implement the Convention on the national level by National Biodiversity Strategies and Action Plans or in introducing legislation on access and benefit sharing.⁷⁸

Without the cooperation of other international processes, the Convention cannot be implemented effectively and comprehensively. In addition, cooperation with other Conventions avoids duplication and reduces the financial burden that can be incurred if the Convention were to undertake all these roles by itself. Mindful of this fact, the COP had adopted memoranda of cooperation with a variety of institutions and invited a panoply of bodies to take part in the implementation of the relevant decisions (Dec.II/13; III/17; III/21; IV/15). In this way the COP seeks to encourage joint-implementation with other parties or bodies responsible for other Conventions.

The following is a non-exhaustive overview of international conventions, institutions, processes and initiatives the institutions of the Convention and the Parties do or intend to cooperate with:

⁷⁵ Dec. IV/5 Annex, Programme element 2, Operational objective 1.3 and programme element 4, activity (a) respectively.

⁷⁶ Dec. IV/8 para. 3.

⁷⁷ UNEP/CBD/SBSTTA/3/9, para. 10.

⁷⁸ See UNEP/CBD/COP/3/15; UNEP/CBD/COP/4/23; L.Glowka, “Emerging Legislative Approaches to Implement Article 15 of the Convention on Biological Diversity”, *RECIEL* 6 (1997), 249.

Conventions	Other institutions and processes	International Initiatives
<p><i>Rio Conventions:</i></p> <ul style="list-style-type: none"> • UNFCCC • CCD <p><i>Biodiversity-related conventions</i></p> <ul style="list-style-type: none"> • RAMSAR • CITES • CMS • World Heritage Convention • UNCLOS • Cartagena Convention 	<p><i>Rio Processes</i></p> <ul style="list-style-type: none"> • CSD • IFF <p><i>Other UN bodies/processes</i></p> <ul style="list-style-type: none"> • UNEP • UNCTAD • UNESCO • Intergov. Oceanographic Commission • IMO • WIPO • FAO • FAO- CGRFA • Various UN Working Groups through Secretariat, e.g. Interagency Task Force on Forests <p><i>Non UN institutions</i></p> <ul style="list-style-type: none"> • Worldbank • WTO- CTE • WTO-Committee on Agriculture and Trade • WTO-Council on TRIPs • IUCN • World Conservation and Monitoring Center • Int. Association for Impact Assessment • DIVERSITAS • Int. Council for the Exploration of the Sea • SCOPE • OECD • OECD Mega-science Forum's Biodiversity Informatics Subgroup Initiative • World Water Council • Global Water Partnership <p>Regional processes</p>	<ul style="list-style-type: none"> • Global Invasive Species Programme • Global Taxonomy Initiative • Global Initiative on Biological Diversity Education, Training and Public Awareness (under consideration) • Programme of Action for the Sustainable Development of Small Islands Developing States • Coral Reef Initiative

c. Compliance and Control

The only possible non-conflictual mechanism to oversee the implementation of the Convention is the national reporting system. Article 26 calls upon each party to present to the COP reports on measures which each party has taken in the implementation of the provisions of the Convention and their effectiveness in meeting the objectives of the Convention. At COP 2 it was decided that the first national reports by parties will focus on measures taken for the implementation of article 6, "General Measures for Conservation and Sustainable Use", as well as the information available in national country studies on biological diversity.⁷⁹

Until the fourth meeting of the COP, Parties submitted over one hundred national reports, including interim reports.⁸⁰ The reports differed considerably both in terms of size and quality, ranging anything from a twelve page paper typed with a mechanical type writer to a glossy brochure of two hundred pages.⁸¹ The guidance given by COP 2 on how the first national reports should be structured⁸² was far too general to make any meaningful comparisons. This is of concern as national reports are the main instrument by which concrete progress on implementation can be monitored.

At the fourth meeting, the COP was to have taken a decision on the form and intervals of national reports for the future (Dec.II/17). The COP, however, was not in a position to do so. Instead, it referred the issue to the SBSTTA, requesting it to advise the COP at its fifth meeting on the form and intervals of future reports. The advice should "cover the nature of the information needed from Parties in order to assess the state of implementation.... guidelines on format, style, length and treatment with a view to ensuring comparability..." (Dec. IV/14 para. 3). SBSTTA should also make recommendations that will include a standard format to allow comparability; information that should include a report on the progress on the implementation of National Biodiversity Strategies and Action Plans, lessons learnt, gaps in capacity for policy research and analysis and technical and financial requirements and the

⁷⁹ See p. 325 and 334-335 .

⁸⁰ About 90 developing countries had received support by the GEF as "enabling activities" to develop a national biodiversity strategy and report; not all of those projects had been implemented in time for COP 4.

⁸¹ Synthesis of national reports, UNEP/CBD/COP/4/11 Rev.11, para. 3.

⁸² Dec. II/17, Annex.

use of nationally developed indicators. Parties are encouraged "to consider the participation of all relevant stakeholders in the preparation and use of national reports" (Dec. IV/14, Annex, para. 4).

The compilation of national reports can be a politically sensitive one. First, many of the reports of developing countries were written by consultants, financed by the GEF. An opportunity to engage capacity building for developing countries was lost as a result. Secondly, a lot of governments do not want critical non-governmental organizations to provide input or comment for fear of criticism, hence limiting the richness of the reports. Perhaps deferring this matter to SBSTTA was a wise decision by the COP to avoid any political conflicts at COP meetings.

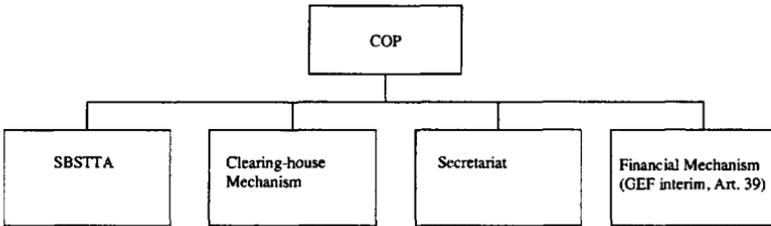
V. The Biodiversity Regime After COP 4: Conclusion and Outlook

The Convention is still far from reaching its objectives. At COP 1 and COP 2, most of the tasks were referred to the Executive Secretary, entrusted with reporting and providing information. At COP 3 and even stronger at COP 4, Contracting Parties decided on achieving their own commitments before the next meetings of the COP or referred more work to the SBSTTA. Discussions at COP were never done in haste without matters being considered in detail by SBSTTA or other working groups. Some of these decision took several rounds of discussion. For example, decisions on access and benefit sharing went through three rounds of discussion. As we have shown, many of the discussions between COP 1 and 4, were exploratory, and especially developing countries seeking to weigh the options by requesting additional information or more studies to be conducted. Parties also chose initially not to make any crucial commitments without allowing some time to get a feeling for each other's positions and where political and economic interest lie.

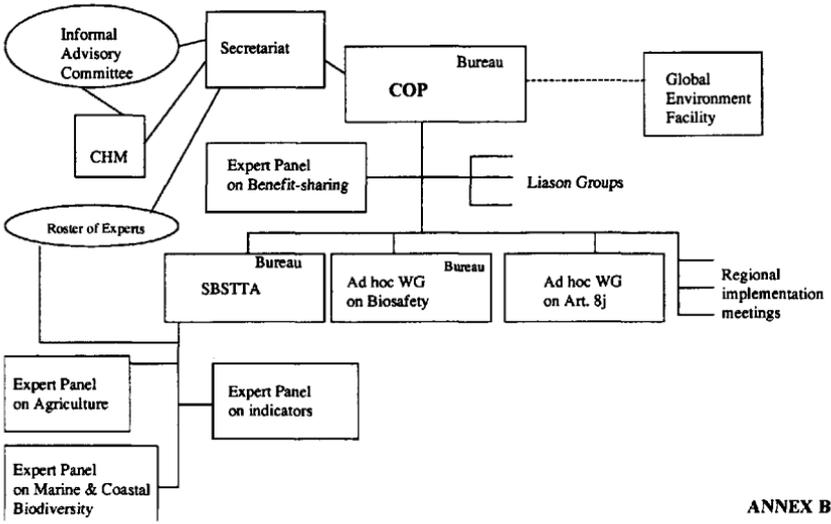
After COP 4, several programmes of work were put in place and the regime building exercise seem to have gained some structure with regard to the undertaking of the overall work programme; and the governance structure has also been refined. This we argue has taken place at two levels: in that the COP is pushing advisory bodies such as SBSSTA to come up with formulations that are couched in words that will allow the COP to find agreement on issues of substance in the form of guidelines and actions that the parties can take. Perhaps, here the role of the

SBI will become important in that it will serve to provide the COP with feedback as to how far parties have gone in adopting and implementing the Convention. There seems to be a clear attempt to push in this direction, of seeing more implemented by the adoption of guidelines and best practice models both at the international, and national levels. The more these are reflected in national legislations, or policy the more scope there is given to the regime building exercise of the Convention gaining ground.

Institutional structure in the text of the CBD



CBD institutional structure after COP 4



ANNEX B