

# The Eighth Conference of the Parties to the Convention on Biological Diversity: Summary and Analysis

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Biodiversity is the foundation of life on earth and one of the pillars of sustainable development.<sup>1</sup>

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<sup>1</sup> UN Secretary-General Ban Ki-moon in his message on the International Day for Biological Diversity, 22 May 2007.

## I. Introduction

The Convention on Biological Diversity (CBD)<sup>2</sup> is one of the so called “Rio Conventions”, together with the UN Framework Convention on Climate Change (UNFCCC)<sup>3</sup> and the UN Convention to Combat Desertification (UNCCD)<sup>4</sup>. It was opened for signature at the United Nations Conference for Environment and Development (UNCED), the so called “Earth Summit”, in Rio de Janeiro 15 years ago and entered into force on 29 December 1993. The objective of the Convention is to prevent the rapid and still continuing worldwide depletion of biological diversity. Article 2 CBD defines biological diversity as follows:

“‘Biological Diversity’ means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and ecosystems.”

This broad definition goes substantially further than previous international approaches by states concerned with the conservation of specific species or certain designated ecosystems. It includes wild and domesticated animals as well as wild and cultivated plants in terrestrial and marine or inland water ecosystems within and outside national jurisdiction.<sup>5</sup> Other aspects of the Convention that distinguish its approach from relevant prior instruments are its integrated approach – as opposed to a sectoral one – and the perception of biological diversity as a benefit in itself, i.e. without regard to whether species or ecosystems are valuable for human use (e.g. for nutrition, medicinal usage or recrea-

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<sup>2</sup> *ILM* 31 (1992), 818 et seq.

<sup>3</sup> *ILM* 31 (1992), 849 et seq.

<sup>4</sup> *ILM* 33 (1994), 1328 et seq. The full title of the Convention, United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, is hardly ever used.

<sup>5</sup> A. Kiss/ D. Shelton, *International Environmental Law*, third edition, 2004, 352. In regard to jurisdiction, however, while, by the definition in article 2 CBD, areas outside the sovereignty or jurisdiction of states are included, or at least not excluded, the Convention’s scope does not substantively extend to e.g. the high seas. According to article 4 CBD the Convention applies to components of biodiversity within areas of national jurisdiction and to activities that have an effect inside or beyond areas of national jurisdiction.

tion) or not.<sup>6</sup> While designation for human use is hence not a prerequisite for protection, the CBD attempts to instrumentalise controlled and sustainable human use of biological diversity as an incentive for enhanced protection. This method stands in contrast to treaties that seek to implement the preservation of a natural resource by strict prohibitions of any kind of human usage.

So far, eight ordinary meetings and an extraordinary one, at which the Cartagena Protocol on Biosafety to the CBD<sup>7</sup> was adopted, have been conducted. The Convention held its eighth Conference of the Parties (COP) in Curitiba (Brazil) in March 2006.<sup>8</sup> While the parties to the CBD met annually for the first three years after the Convention's entry into force, regular meetings are now held on a biennial basis. A week before the beginning of the eighth COP the third Meeting of the Parties (MOP) to the Cartagena Protocol took place at the same location.<sup>9</sup> The next COP and the fourth MOP to the Cartagena Protocol will be held in Germany.

The CBD has currently 190 parties, i.e. it enjoys quasi-universal participation. Those subjects of international law that could ratify or accede to the treaty but have not yet done so are the Holy See, Brunei Darussalam, Iraq, Somalia, and the United States. Brunei Darussalam, the Holy See, and the United States attended the eighth COP as observers. Instruments which have by their definition and objectives a global scope necessarily strive for universal participation in order to enhance effectiveness. The achievement of such an impressive rate of participation, however, signifies both the importance of the issue and the

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<sup>6</sup> However, since the regime on access and benefit-sharing is inseparably linked to the approach to conserve biodiversity, R. Wolfrum "Völkerrechtlicher Rahmen für die Erhaltung der Biodiversität", in: N. Wolff/ W. Köck, *10 Jahre Übereinkommen über die biologische Vielfalt*, 2004, 18 et seq. (27), in footnote 29 criticises the emphasis on the protection of biological diversity for biodiversity's sake by other authors.

<sup>7</sup> *ILM* 39 (2000), 1027 et seq.

<sup>8</sup> See Report of the 8th Mtg. of the Conference of the Parties to the Convention on Biological Diversity, 15 June 2006, Doc. UNEP/CBD/COP/8/31, available at <<http://www.biodiv.org/doc/meetings/cop/cop-08/official/cop-08-31-en.pdf>>, hereinafter referred to as COP8-report.

<sup>9</sup> Report of the 3rd Mtg. of the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the parties to the Cartagena Protocol on Biosafety, 8 May 2007, Doc. UNEP/CBD/BS/COP-MOP/3/15, available at <<http://www.biodiv.org/doc/meetings/bs/mop-03/official/mop-03-15-en.pdf>>.

relatively soft approach adopted by the treaty. It may be assumed that participation would be significantly lower, if parties had to accept and meet enforceable targets and timetables. With the potential exception of the United States which signed the Convention under the Clinton administration but could never get its ratification through Congress, the adopted text of the CBD, unlike many environmental treaties attempting to establish liability regimes, was not perceived as a particularly controversial treaty.<sup>10</sup> While the instruments to prevent climate change have adopted some obligations with targets and timetables for – at least some – parties in the Kyoto Protocol, the CBD lacks comparable substantive duties.

## II. The Eighth Conference of the Parties

### 1. Thematic Areas and Subjects for In-Depth Consideration

So far all conferences, with the exception of the first meeting, had one major leading issue, respectively: a so-called “thematic area” as the focus of the assembly. Marine and coastal biodiversity was the focus of the second COP, agriculture was given particular attention at the third COP, inland water ecosystems at the fourth, dry and sub-humid ecosystems at the fifth, forest biodiversity was the sixth COP’s thematic area and mountain biodiversity the seventh. In 2006 the main “new” issue of those deserving “in depth” consideration was island biodiversity. In fact, island biodiversity includes all thematic areas previously considered by the Convention because islands are necessarily surrounded by coastal areas and their ecosystems may also include forests, inland waters, dry lands, mountains, and agricultural land. Despite its comprehensive character the issue of island biodiversity is listed as a separate thematic area in addition to the preceding ones.<sup>11</sup>

With every COP new issues have been added to the agenda either as thematic areas or as issues for in-depth consideration. Once included,

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<sup>10</sup> The only issues that gave rise to concern are the concept of access to genetic resources and the sharing of benefits as well as technology transfer (arts 15 and 16 CBD), since some countries perceive this as a threat to intellectual and other property rights, see Ph. Sands, *Principles of International Environmental Law*, second edition, 2003, 519.

<sup>11</sup> See List A annexed to Decision VIII/8. on the implementation of the Convention and its Strategic Plan, COP8-report, see note 8, 191.

these issues continue to be subject to supervision and reports by working and regional groups. The process of adding onto the list of thematic areas of biological diversity on top of other established areas of interest and cross-cutting issues leads to reports like the one on the eighth COP with almost 400 pages. In terms of public awareness such extensive reports are contra-productive, since they are difficult to handle, even for researchers or non-governmental organisations with an interest in the issue. While the relevance of the different issues is not to be doubted, it is nevertheless questionable whether the broadening of the agenda and the variety of working groups enhance effectiveness and support the slowing of biodiversity loss.

In general, the CBD distinguishes between thematic areas and cross-cutting issues, e.g. liability and redress, protected areas, public education and awareness, traditional knowledge, biodiversity and climate change.<sup>12</sup> The report identifies the seven thematic areas mentioned above and refers to further 17 cross-cutting issues.<sup>13</sup>

This paper summarises some selected decisions of the catalogue of altogether 34 decisions<sup>14</sup> adopted by the parties. The majority of the presented decisions were regarded as issues for in-depth consideration by the parties and are placed in a priority position in the report as the first six ones. They refer to island biological diversity, biological diversity of dry and sub-humid lands, Global Taxonomy Initiative, access and benefit-sharing (article 15), article 8(j) and related provisions, and communication, education and public awareness (article 13).<sup>15</sup> As regards the other issues this paper only summarises the decisions on Environmental Impact Assessment, liability, and climate change. In addition to these decisions further topics discussed at the COP were *inter alia* the implementation of the Convention and its Strategic Plan (Decision VIII/8.), operations of the Convention (Decision VIII/10.), review of implementation of article 20 (financial resources) and article 21 (financial mechanism) (Decision VIII/13.), national reporting and the next

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<sup>12</sup> The circumstance that the public currently takes note of the global threat of climate change is also reflected by the decision to choose the issue "Biodiversity and Climate Change" as the focus for the International Day of Biological Diversity in May 2007.

<sup>13</sup> List A annexed to Decision VIII/8. on the implementation of the Convention and its Strategic Plan, COP8-report, see note 8, 191.

<sup>14</sup> The decisions are annexed to the COP8-report, see note 8, Annex 1, 76 et seq.

<sup>15</sup> COP8-report, see note 8, 31 et seq.

Global Biodiversity Outlook (Decision VIII/14.), and decisions on different thematic areas as well as the implementation of relevant working programmes.

## 2. Summary of Selected Decisions

### a. Island Biodiversity

As an issue for in-depth consideration and the seventh thematic area island biodiversity was given special attention by the delegates. From a biological perspective the conservation of island biodiversity is worth emphasising because some island ecosystems have a high level of endemism, i.e. they contain species that have not developed anywhere else and that no longer interbreed with related species or other varieties of what was once the same species. Many island ecosystems are particularly vulnerable in regard to alien species introduced by humans, e.g. mammals in Australia and New-Zealand (rats, cats, dogs, but also rabbits). Decision VIII/1. on island biodiversity<sup>16</sup> and its Annex which contains a programme of work emphasise that in addition to those island ecosystems with rich biodiversity some islands are “cool spots” without much diversity. However, these ecosystems are equally threatened and worth preserving. The main decision concerning island biodiversity consists of the adoption of a further programme of work. This programme presents targets and timetables. It calls for a significant reduction of island biodiversity loss by 2010. It should also contribute *inter alia* to the Strategic Plan of the CBD which was adopted at the sixth COP<sup>17</sup> and the Plan of Implementation of the World Summit on Sustainable Development<sup>18</sup> and the Millennium Development Goals<sup>19</sup>. The

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<sup>16</sup> COP8-report, see note 8, 79 et seq.

<sup>17</sup> This Strategic Plan sets the priorities and establishes general guidelines for the future in order to achieve by 2010 a significant reduction in the rate of diversity loss, see Decision VI/26. and its Annex, Report of the 6th Mtg. of the Conference of the Parties to the Convention on Biological Diversity, 27 May 2002, Doc. UNEP/CBD/COP/6/20, available at <<http://www.biodiv.org/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf>>, 304 et seq. The report is hereinafter referred to as COP6-report.

<sup>18</sup> Report on the World Summit on Sustainable Development, Doc. A/CONF.199/20, available at <[http://www.unmillenniumproject.org/documents/131302\\_wssd\\_report\\_reissued.pdf](http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf)>, 7 et seq.

<sup>19</sup> See UN Millennium Declaration, A/RES/55/2 of 8 September 2000.

Decision recommends in detail how states shall in their national programmes deal with certain identified priority issues, i.e. in particular with monitoring, partnerships, public awareness, and capacity building. In the past, the parties to the CBD adopted comparable work programmes for the other thematic areas, e.g. concerning the conservation of forest biodiversity, inland waters or coastal zones. Although such programmes draw attention to important issues, they remain only political declarations without legally binding force or enforcement mechanisms attached to them. The last 15 years showed that despite the adoption of different working programmes, member states have not achieved any considerable improvement in terms of slowing the loss of biological diversity.

### **b. Biological Diversity of Dry and Sub-Humid Lands**

Parties adopted a similar strategy containing specific goals and targets for the programme of work on the biological diversity of dry and sub-humid lands. Decision VIII/2.<sup>20</sup> emphasises the necessity to cooperate closely with the Convention to Combat Desertification in order to create synergies. Consequently, parties are *inter alia* called upon to implement the joint working programme of the two conventions. Delegates referred to the question of climate change as a particular threat to dry and sub-humid ecosystems to the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) for the development of further proposals.

### **c. Global Taxonomy Initiative**

Decision VIII/3. is entitled “Global Taxonomy Initiative: in-depth review of the programme of work for the Global Taxonomy Initiative”.<sup>21</sup> The Global Taxonomy Initiative is one of the cross-cutting issues, the progress of which is continuously reviewed by the delegates. The programme concerning the Global Taxonomy Initiative was initiated and has been carried on since the sixth COP. Parties perceive enhanced knowledge about taxonomy as one of the major elements for monitoring which in turn is crucial for measuring loss of diversity and potential success in slowing extinction rates. Only if we know what kind of biological diversity exists and set this into relation with the focus and

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<sup>20</sup> COP8-report, see note 8, 79 et seq.

<sup>21</sup> COP8-report, see note 8, 119 et seq.

methods of the Convention, can we assess whether efforts fail or lead to progress in the conservation strategies. Consequently, the parties make a reference to,

“the urgent need for timely provision of scientific names of organisms to support implementation of work under the Convention on Biological Diversity.”<sup>22</sup>

With Decision VIII/3. and its Annex parties broaden the work programme on the Global Taxonomy Initiative to include four so-called “additional planned activities”: mountain biodiversity, invasive alien species, protected areas, and island biodiversity.

#### **d. Access and Benefit-Sharing**

The provisions on access and benefit-sharing by the CBD are part of the concept by which biological resources shall be conserved.<sup>23</sup> The text of the Convention does not give any guidance on the establishment of systems for access and benefit-sharing, since access is subjected to national legislation of the member states according to article 15 para. 1 CBD. Despite the explicit acknowledgment of sovereignty over their natural resources, states shall endeavour to facilitate access and shall not impose restrictions contrary to the CBD’s objectives.

In the years following the entry into force of the Convention, the relevant COPs have intensively debated different models for access and benefit-sharing and attempts have been made to establish an international regime on access to genetic resources and benefit-sharing. The *Ad Hoc Open-ended Working Group on Access and Benefit-sharing* presents a collection of views concerning a proposal for such an international regime that is annexed to Decision VIII/4. However, at this early stage nearly all relevant questions are still left open, e.g. the legal nature of the regime, whether it shall be binding or non-binding, and the scope and conditions for the fair and equitable sharing of benefits. As a result, the Annex is no more than a first starting point for further discussion by the parties, the working groups involved in the process and stakeholders.

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<sup>22</sup> Decision VIII/3., para. 7, COP8-report, see note 8, 119.

<sup>23</sup> See Wolfrum, see note 6, 27.

In regard to the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization*<sup>24</sup> the COP welcomes any progress already accomplished and invites parties to submit voluntary reports on their experiences. Although further efforts undertaken at prior meetings of the parties are mentioned in the report, no substantive new approach or progress was agreed upon as regards the important issue of access to genetic resources and the equitable sharing of benefits resulting from the commercial use of resources.

#### **e. Indigenous Knowledge: Article 8(j) CBD and Related Provisions**

Concerning the protection of knowledge and practices by indigenous communities relevant to the conservation of biodiversity (article 8(j)), Decision VIII/5. provides for some innovations. The first novel issue concerns mechanisms to enhance the effective participation of indigenous peoples in matters relevant to traditional knowledge and biodiversity and related issues.<sup>25</sup> The parties to the CBD decided to establish a trust fund to achieve this objective which shall be entitled “Voluntary Trust Fund to Facilitate Participation of Indigenous and Local Communities in the Work of the Convention on Biological Diversity”. UNEP will administer the fund. It is the only funding mechanism within the UN which is designed for the objective to exclusively enhance participation of indigenous and local communities in CBD meetings.

The second innovative approach adopted by the parties in regard to indigenous knowledge relates to the development of elements of *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities. This idea, however, is still at its very beginning and the parties invite governments, indigenous communities and non-governmental organisations to share their views on the issue by communication to the CBD Secretariat.

Another future project in the realm of article 8(j) CBD concerns the drafting of an ethical code of conduct for ensuring respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity. To promote work on the elements that shall be addressed by the code of

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<sup>24</sup> These Guidelines were adopted as an Annex to Decision VI/24. by the sixth COP, COP6-report, see note 17, 253 et seq.

<sup>25</sup> VIII/5., Section D. and Annex, COP8-report, see note 8, 144 et seq.

conduct the *Ad Hoc Working Group on Article 8(j) and Related Provisions* is mandated with drafting a proposal.

#### **f. Communication, Education and Public Awareness**

Awareness-raising in different modes and by various methods is considered crucial for success in achieving the Convention's objectives. The parties appreciate the efforts by the Global Initiative on Communication, Education and Public Awareness (CEPA) to identify priority activities and strategies for the implementation of the initiative. The short-list of priority activities for the programme of work on communication, education and public awareness is contained in Annex II to Decision VIII/6.<sup>26</sup> This list shall serve as a framework to guide implementation of CEPA's programme of work in the short term. The list identifies the following elements as priority activities: establishment of an implementation structure for CEPA activities, assessment of the state of knowledge and awareness on biodiversity, development of key messages, implementation of media relations strategy, elaboration of tool-kits for CEPA strategies, organisation of workshops for the articulation of CEPA strategies, development of infrastructure and support for a global network, the International Day for Biological Diversity, raising of the profile of meetings of the COP and the SBSTTA, and the strengthening of formal and informal education on biodiversity.

The second issue parties considered relevant to the raising of awareness on biological diversity is the proposal to proclaim 2010 the International Year of Biodiversity. To this end the parties to the CBD drafted a resolution for adoption by the UN General Assembly at its sixty-first ordinary session. The text of the draft is appended as Annex I to Decision VIII/6.

#### **g. Environmental Impact Assessment**

Of the other decisions that *inter alia* concern the implementation of former action plans and programmes of work and the various cross-cutting issues, Decision VIII/28.<sup>27</sup> on Environmental Impact Assessment (EIA) seems worth mentioning because it elaborates voluntary guidelines on biodiversity-inclusive EIA. These guidelines follow the international best practice rules while focusing on the consideration of

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<sup>26</sup> COP8-report, see note 8, 161 et seq.

<sup>27</sup> COP8-report, see note 8, 324 et seq.

biodiversity in EIA procedure. The guidelines shall serve to strengthen and improve national systems, thereby contributing to the implementation of the CBD's objectives in the member states. For the EC member states so far the main guidance on EIA stems from the 1985 EIA Directive that was amended in 1997.<sup>28</sup> Although it seems that the guidelines elaborated under the roof of the CBD shall rather assist states with no or only rudimentary EIA legislation, the EC Directive does not take special account of biological diversity.<sup>29</sup> Its article 3 establishes a list of factors that refers to direct and indirect effects on fauna and flora but not to the special issue of biodiversity. As opposed to this, para. 2 of the German EIA-Statute<sup>30</sup> explicitly mentions biological diversity in its definitions.

#### **h. Liability**

Decision VIII/29. on the issue of liability which could be crucial for enhancing compliance as a negative incentive is very brief. Basically, legal and technical experts shall collect examples of national legislation on liability in order to prepare a synthesis report and disseminate information. It seems that the CBD is far from employing a liability regime as a tool to achieve its objectives.

#### **i. Biodiversity and Climate Change**

Since the early meetings of the COP, the parties have dealt with the relations between the CBD and other conventions, particularly, the other Rio Conventions. The explicit linkage between climate change and biodiversity seems to go further than the usual confessions to promote cooperation with the bodies of other conventions. In addition to the usual invitations to the parties to cooperate more closely with each other and the relevant institutions, Decision VIII/30., which is entitled "Biodiversity and Climate Change: Guidance to Promote Synergies among Activities for Biodiversity Conservation, Mitigating or Adapting to Cli-

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<sup>28</sup> Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, *OJ L* 073, 5 et seq.

<sup>29</sup> Only the preamble to the Directive mentions species diversity, which, according to the definition of the CBD, is only one part of biological diversity.

<sup>30</sup> Gesetz über die Umweltverträglichkeitsprüfung (UVPG), *Federal Law Gazette*, Vol. I (2005), 1757 et seq., *corrigendum* 2797 et seq.

mate Change and Combating Land Degradation”,<sup>31</sup> requests the SBSTTA to develop draft guidance on the integration of climate change response activities into the work programmes of the CBD. Furthermore the Joint Liaison Group of the Rio Conventions shall consider options for mutually supportive activities.

### III. Analysis

The work of the CBD in general and of specific meetings of the COP are difficult to assess. On the one hand, the CBD may be considered a failure because even after 15 years it has not yet managed to meet its objectives. In the decision concerning the implementation of the CBD and the Strategic Plan, Decision VIII/8., the parties note the slow progress and propose voluntary guidelines to solve the practical implementation problems.<sup>32</sup> However, there are doubts whether the list of obstacles to the implementation of the CBD, which is reproduced in List B to Decision VIII/8.,<sup>33</sup> will get any shorter in the near future and whether the slow progress can be speeded up, if the main obstacle is lack of political will and support to implement the Convention. Voluntary Guidelines are not a persuasive means to trigger a change of political priorities in member states. On the other hand, the efforts by the parties and CBD institutions manage to raise awareness and have in fact lead to the initiation of many regional and national programmes and strategies. Despite the obvious deficiencies in halting the loss of biodiversity, we do not know how much worse the situation might be without these efforts.

In any case the continuous proliferation of work due to the enlarging of the CBD’s agenda seems contra-productive. With ever more action plans, programmes of work, reports, funds and operations it seems that the “organisation” (that is not even an international organisation in the legal sense) spends a lot of time and resources on dealing with its own methods, structures and administrative matters. It is telling that the decision on the operations of the Convention is amongst the most extensive ones adopted at the eighth COP.<sup>34</sup> Although efficient work by an institution certainly requires functioning administration with different bodies and means of communication between organs, an interna-

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<sup>31</sup> COP8-report, see note 8, 346 et seq.

<sup>32</sup> COP8-report, see note 8, 184 et seq.

<sup>33</sup> COP8-report, see note 8, 191 et seq.

<sup>34</sup> Decision VIII/10., COP8-report, see note 8, 198 et seq.

tional biodiversity administration in the wider sense that is too busy administering itself may not be able to concentrate on its core function: streamlining and further developing effective methods to prevent the rapid loss of biological diversity in the near future.

