



A hard instrument goes soft: The implications of the Convention on Biological Diversity's current trajectory

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ABSTRACT

The relentless loss of biological diversity, which will have a direct impact on human society and degrade ecosystem buffers against the extremes of climate perturbation, requires a strong global governance response. Of the numerous international legal instruments relating to the protection of nature, the Convention on Biological Diversity (CBD) is the most comprehensive. This paper examines its current emphasis on global biodiversity targets to extend our understanding of its trajectory, and its evolving nature as an instrument of global governance. We review CBD documents, and early examinations of its emergent character, in the context of the distinction between hard and soft law approaches, and combine analysis on the issue of targets from the literature on development, climate change and conservation biology. We emphasise that the CBD, created as a hard law instrument with a framework character, had the clear facility to develop subsidiary hard law instruments in the form of protocols but has not significantly followed this route. We document how its approach – which has been typically 'soft', as exemplified by its focus on global biodiversity targets which are not backed up by obligations – suggests it operates de facto as policy rather than an instrument requiring state action. The adoption of global targets has parallels with other initiatives within global governance and may influence international political agendas, but they have failed to provide practical instruments for national implementation. Conditions may now exist for the CBD to develop focussed hard legal instruments in specific areas of its wide remit that support realistic targets.

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1. Introduction

Biological diversity provides the basis for ecosystem functioning and, as the Convention on Biological Diversity (CBD) asserts, *for maintaining life-sustaining systems of the biosphere*. It has provided throughout history a catalogue of quantifiable and intrinsic values, benefits and services upon which human societies depend materially, culturally, aesthetically and spiritually. Biological resources are the foundation for our food security. They play a key part in providing us with fresh water and pollution filtration and provide us with fundamental needs such as medicine and other key materials required for our welfare (Millennium Ecosystem Assessment, 2005; Secretariat of the CBD, 2010). Biological diversity also protects us from natural disasters and mitigates against the impacts of environmental change and climate perturbation (Hooper et al., 2005).

Widespread evidence demonstrates the decline in the diversity of genes, species and ecosystems the world over. The Global Biodiversity Outlook-3 published in 2010 provides a comprehensive picture of current trends. Biodiversity is being lost at unprecedented rates. One quarter of the world's plants is threatened with extinction, the abundance of vertebrates has reduced by one third in the last 30 years, forests continue to fragment and degrade, and crop and livestock genetic diversity is reducing (Secretariat of the CBD, 2010). These processes are driven by a human induced quintet of threats including land use change, overexploitation, pollution, invasive alien species and climate change (Millennium Ecosystem Assessment, 2005; Secretariat of the CBD, 2010). Further, these key pressures leading to biodiversity loss have intensified (Secretariat of the CBD, 2010). Authoritative scientific predictions describe accelerating rates of biodiversity loss and consequent climate change feedbacks. Effective biodiversity conservation interventions are an imperative for human survival and the maintenance of ecosystem processes (Rands et al., 2010; Pereira et al., 2010). Failing this we face present and future scenarios of changing diversity, abundance and distribution of species, changed structures within ecological communities, and rapid and extensive extinctions and

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the fragmentation, degradation and loss of habitats (Bakkenes et al., 2002; Pereira et al., 2010). Effects will be exacerbated by predicted changes in regional and seasonal climate patterns (Jetz et al., 2007; Thuiller, 2007; Thomas et al., 2004) with profound impacts on our current and future wellbeing.

Yet, biodiversity protection is still comparably low on the policy and regulatory agenda of global diplomacy. Attention extended to it as a global priority compares poorly with that directed at climate change and carbon emissions regulation (Gilbert, 2010). Moreover, international regulatory efforts to protect biodiversity compare poorly, in terms of the obligations imposed on states, with the global regulatory system that maintains the *distinctive legal order* of the multilateral trading system operated by the World Trade Organisation (Lamy, 2006). This priority prevails even though global trading owes its very basis to a world replete with natural resources and is dependent on fully functioning ecosystems and arrested extinction rates (Vidal, 2010).

Prior to the coming into force of the CBD a number of international laws had been established which deal with specific aspects of the protection of wildlife and ecosystems such as extending special protection to certain species, habitats or areas. These include, for example, the Convention on International Trade in Endangered Species (CITES), the Convention on Wetlands of International Importance (Ramsar), and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn).

By contrast to these narrowly focussed mandates of predecessor conventions, international negotiations were convened in the run up to the 1992 United Nations Conference on Environment and Development (UNCED), otherwise known as the Rio Earth Summit, to create an instrument that would take a comprehensive, global and coordinated approach to protect biological diversity across the globe. The approach was informed by the prevalent notion that biodiversity loss was a global concern that went beyond the scope of individual nations and required a global response (Berkhout et al., 2003; Adams, 2004) which crystallised in the establishment of the CBD. This convention establishes a shared responsibility for the conservation and sustainable use of biodiversity as well as respecting the sovereign rights of states for the conservation and sustainable use of biological resources within their jurisdiction (Preamble CBD). The CBD was amongst a number of international environmental agreements produced at UNCED, and was one of only two with convention status, the other being the United Nations Framework Convention on Climate Change (UNFCCC). In December 1993, having fulfilled the minimum number of state ratifications required for it to come into force, the CBD became an operational instrument of international environmental law (Kratzinger et al., 1994). It enjoys a high membership, with 193 parties and is upheld by the UN General Assembly as the “key international instrument on biodiversity” (UNGA, 2009).

The CBD has a wide remit, reflecting the demand from some States that it deals with not only the conservation of wild resources but also other issues which were ultimately incorporated into its objectives (Glowka et al., 1994). These comprise, in Article 1: *the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources*. As such, the biodiversity protection mandate of the CBD addresses aspects relating to the control and ownership of biological resources, encompassing issues pertaining to conservation, development and to equity between the developed and developing world. To achieve its objectives the CBD contains general requirements to cooperate between states to preserve biodiversity, create national strategies to research, monitor and protect biodiversity, establish, restore and maintain protected areas and habitats, report on national implementation of the convention, govern access to biological resources and equitably share benefits from biodiversity use. The

text also gives the CBD power to develop detailed, subsidiary hard law instruments called protocols to deal with distinct aspects of its wide-ranging and general stipulations. Regular conferences of the CBD parties are held to progress implementation and finalise agreement on subsidiary instruments and decisions: procedures which constitute what is referred to as the CBD “process”.

An analysis of the CBD’s intrinsic and projected capacity to generate effective national instruments for state implementation is required and is timely on several accounts. First, in 2010, the UN International Year of Biodiversity, we not only have clear evidence of unprecedented and relentless rates of biodiversity loss (Secretariat of the CBD, 2010), but also the CBD has been forced to acknowledge its failure to achieve its *Biodiversity Target* to substantially reduce biodiversity loss (Djoghla, 2010). Second, the CBD produced its new Strategic Plan for Biodiversity for the Period 2011–2020 (Strategic Plan) at its 10th Conference of the Parties held in Nagoya, Japan in October 2010 (CBD/COP10, 2010). This reconfirms global biodiversity target-setting as a central feature and key mechanism by which to implement CBD objectives. This paper documents the trajectory of the CBD and its commitment to targets. In so doing it examines the implications of this approach on its legal authority and its capacity to deliver measures that are useful for national implementation or which may otherwise contribute to turn the current tide of biodiversity destruction.

2. The original soft hard law instrument from UNCED

Negotiations for the CBD were fraught with conflicts concerning its core objectives and its priorities. The debate was particularly marked by the divide between North and South perspectives, primarily regarding environment and development imperatives. For industrialised states the aim was to promote *conservation*, although this key concept is not defined in the convention. Developing countries, which are the ‘collective repository’ of four-fifths of the world’s biodiversity, stressed that the goal was for the sustainable use of biological resources (McGraw, 2002, pp. 17–18) coupled with mechanisms to secure equitable financial and technological transfers. As such, the agenda for negotiation of the convention expanded to cover these crucial inter-related issues. The final product did not satisfy all key participants. Notably, the United States, which had assumed a significant role in shaping negotiations, subsequently refused to ratify the convention and is thus not a party to it (McConnell, 1996).

Prior analyses of the nature of the CBD have usefully applied approaches which distinguish between “hard law” and “soft law” (Abbott and Snidal, 2000; DiMento, 2003). By definition, conventions such as the CBD are intended to be international law and fall within the hard law category. They constitute international instruments that are regarded as prescribing binding obligations for the states that ratify them to implement the corresponding provisions in national laws or through other governmental action. Other international instruments which are not intended to be binding on states are considered as soft law. These instruments are often the result of a compromise between those States who would want to achieve binding law and those that would not (Chinkin, 1989). Soft law may nevertheless have an impact on national laws through national governments acting, in their discretion, to create policies or laws or carry out other executive action in response to them. Agenda 21 and the Rio Declaration were amongst the agreements also produced at UNCED which are regarded as soft law instruments. The Forest Principles agreement provides a further illustration. It was originally intended to be a hard law convention but negotiations failed (McConnell, 1996). The compromise resulted in its non-binding status which is evident from its somewhat neurotic full title, the ‘Non-Legally Binding Authoritative Statement Of Principles for a Global Consensus on

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