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The CBD – Key Characteristics and Implications for Implementation

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INTRODUCTION

The UN-sponsored series of world summits throughout the 1990s was an important innovation in global governance. The first of these, the 1992 United Nations Conference on Environment and Development (UNCED), provided an unprecedented forum for focusing worldwide attention and action on sustainable development. As the largest gathering of heads of state and government in human history, the UNCED also served as a crucial incentive for concluding two treaties: the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC). At the UNCED, a record 157 countries signed the CBD. Following ratification by the requisite number of countries, the CBD entered into force in December 1993.[1]

Ten years after the Convention's adoption, policy makers and academics are now taking stock of its achievements. Indeed, high-level deliberations are taking place with a view to improving the overall effectiveness of multilateral environmental agreements (MEAs),[2] which provide the legal backbone of international environmental governance – a key agenda item for the World Summit on Sustainable Development (WSSD) scheduled for August–September 2002 in Johannesburg.[3]

What is most striking about the CBD is that it reflects concessions secured by developing countries, which they had been unable to obtain in other multilateral negotiations, whether on trade, security, or even on other environmental issues such as climate change. Throughout the course of negotiating the CBD, the bargaining position of developing countries was significantly enhanced by their possession of a preponderance of the assets under negotiation. As the collective repository of four-fifths of the world's biodiversity,[4] developing countries successfully secured sovereign rights over the biological resources within their respective borders and can now better control the terms of access to these assets.

As a result, attempts by powerful State and non-State actors to create a convention aimed solely at *conserving* biodiversity were thwarted. The CBD goes beyond environmental preservation and provides for the sharing – with communities and countries of origin – of benefits arising from the *use* of genetic resources.[5] The enormous revenues derived from these resources – which are the raw material for multi-national, multi-billion dollar (US) industries in agriculture, biotechnology and pharmaceuticals[6] – raise the issue of who owns, controls and profits from the genetic information stored in species. Because the CBD addresses these economic issues, it is far more than an environmental treaty. Its cutting-edge approach to conservation has implications for intellectual property rights,

[1] Article 36 of the CBD specifies that 30 countries must depose an 'instrument of ratification, acceptance, approval or accession' in order for the Convention to enter into force. As of December 2001, 181 countries and the European Community were parties to the CBD; 12 governments – including, most notably, the USA – have signed the treaty but have yet to ratify it. For an analysis of the 'continuing significance of the US "No" in Rio', see B. Bramble and G. Porter, 'Non-Governmental Organizations and the Making of US International Environmental Policy', in A. Hurrell and B. Kingsbury (eds), *The International Politics of the Environment: Actors, Interests and Institution* (Clarendon, 1992), 313–353; D. Bell, 'The 1992 Convention on Biological Diversity: The Continuing Significance of US Objections at the Earth Summit', 26 *George Washington Journal of International Law and Economics* (1993), 479–537; and K. Rosendal, 'Implications of the US "No" in Rio', in V. Sanchez and C. Juma (eds), *Biodiplomacy: Genetic Resources and International Relations* (African Centre for Technology Studies, 1994), 87–105.

[2] See D.M. McGraw, *Options for Improving Coordination and Coherence among Multilateral Environmental Agreements* (International Policy and Cooperation Branch, Environment Canada, July 2001).

[3] In the lead up to WSSD, UNEP has convened a series of conferences and consultations involving governance experts, civil society representatives and governments (the latter culminating in a special meeting of the Global Ministerial Environment Forum held in Cartagena, Colombia in February 2002). These meetings have in turn produced a plethora of proposals for strengthening or reforming the existing international environmental architecture.

[4] Article 2 of the Convention defines biological diversity as '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 of ecosystems'.

[5] Article 1 of the Convention outlines its three main objectives: conservation, sustainable use and benefit sharing.

[6] For an extensive survey of the commercial uses of biodiversity, see K. ten Kate and S. Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing* (Earthscan, 1999).

trade, technology, human health and culture.[7] Indeed, international lawyers have characterized the CBD as part of a new generation of international legal instruments that seek to reconcile the development imperatives of the South with the environmental exigencies of the North.[8]

Ten years after the CBD's adoption, this article examines the implications of the treaty's history, as well as its core characteristics, for its current implementation and overall operational effectiveness. The CBD is a framework agreement based on three central principles: national implementation, cooperation with other agreements and post-agreement negotiation of annexes and legally binding protocols, as well as non-binding work programmes. This article will review the Convention's structure, then assess three of the key features that characterize the CBD, both as a legal and as a political document: comprehensiveness, complexity and compromise. In so doing, the article considers the implications of each of these 'three Cs' for the Convention's current implementation and, ultimately, for its overall effectiveness as a regime.

THE CBD'S CORE CHARACTERISTICS AND SOME IMPLICATIONS FOR IMPLEMENTATION

FRAMEWORK AGREEMENT

Unlike its climate change counterpart, the CBD does not contain the term 'framework' in its formal title. Despite this oversight,[9] it is widely regarded as a framework convention.[10] According to Winifred Lang:

> a framework convention sets the tone, establishes certain principles and even enunciates certain commitments . . . As a rule, it does not contain specific obligations . . . nor does it contain detailed prescriptions of certain activities.[11]

Various authors seem to equate a framework treaty with a lowest-common-denominator outcome – one which represents 'the beginning of increasingly serious and concerted attention to the problem' and which seeks to 'define a general direction' and to 'inform a process' rather than 'seek to foresee the detail in circumstances in which the words will be brought to bear'.[12]

As early as 1976, Alexandre Kiss described a framework convention as a document establishing, not substantive rules, but the institutional framework for producing such rules. Kiss writes that a framework convention

> lays down the basic principles regarding the form of cooperation and the objectives for which the institutional framework is created. The hallmark of a framework agreement, therefore, is that it is followed by additional protocols or even complementary instruments, which are related to the main instrument but are partially or completely independent.[13]

Framework versus Umbrella Conventions It is important to distinguish a framework convention from an umbrella convention.[14] Although the terms are often used interchangeably, they are different in two important respects. While both umbrella and framework agreements set out basic principles and general objectives to be further specified through subsequent instruments, these are generally regional in scope, in the case of the former, and issue-specific

[7] In addition to the 'intrinsic value of biological diversity', the CBD Preamble underscores the 'ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components' as well as its importance for 'evolution and for maintaining life sustaining systems of the biosphere'.

[8] C. Tinker, 'A "New Breed" of Treaty: the United Nations Convention on Biological Diversity', 12:2 *Pace Environmental Law Review* (1995), 191.

[9] In 1990, the Ad Hoc Group of Experts on Biological Diversity instructed the Executive Director of UNEP to convene an Ad Hoc Group of Legal and Technical Experts on Biological Diversity with a mandate to negotiate an international legal instrument, 'possibly in the form of a framework convention', for the conservation of biological diversity. Despite these instructions, the term 'framework' was not carried forward to the treaty's formal title. The author's interviews with several delegates suggest that this aspect was simply overlooked in the final rushed hours of the CBD negotiations.

[10] The CBD has been referred to as, alternately, the 'Biodiversity Framework Convention' (see P.H. Sand, 'International Cooperation: The Environmental Experience', in J.T. Mathews (ed.), *Preserving the Global Environment: The Challenge of Shared Leadership* (W.W. Norton & Co, 1991), 236–279); a 'framework convention' (see L. Glowka *et al.*, *A Guide to the Convention on Biological Diversity* (IUCN, 1994), at 14); 'largely a framework agreement' (see Sanchez and Juma, n. 1 above, at 322); or 'more than a framework convention' (McGraw interview with M.K. Tolba, New York, 25–26 April 2000). The author has only come across one important dissenting view in the literature – perhaps not surprisingly from an American negotiator (M. Chandler, 'The Biodiversity Convention: Selected Issues of Interest to the International Lawyer', 4 *Colorado Journal of International Environmental Law and Policy* (1993), 141–175.

[11] W. Lang, 'International Environmental Cooperation', in G. Sjöstedt and S. Uno, *International Environmental Negotiations: Process, Issues and Contexts* (The Swedish Institute of International Affairs, 1993), at 19.

[12] A. Chayes and A.H. Chayes, 'Adjustment and Compliance Process in International Regulatory Regimes', in J.T. Mathews (ed.), n. 10 above, at 284, 289.

[13] A.C. Kiss, *Survey of Current Developments in International Environmental Law* (IUCN, 1976), at 95.

[14] For an analysis of the relative merits of umbrella and framework conventions, see McGraw, n. 2 above.

sub-agreements (or protocols), in the case of the latter. Moreover, an umbrella convention (such as the UN Convention on the Law of the Sea (UNCLOS)) has legal ramifications for pre-existing agreements under its remit, while a framework convention only impacts subsequent agreements. It is this 'retroactivity' which essentially distinguishes an umbrella convention from a framework convention. Whereas an umbrella convention absorbs (or supersedes) related treaties, a framework convention builds upon (or supplements) existing agreements. While both umbrella and framework conventions lay the ground for future agreements (proactive), only the former has a legal impact on previous agreements (retroactive).

In conceptualizing a global biodiversity convention, several key State and non-State actors originally envisioned the creation of an umbrella convention which would harmonize existing biodiversity agreements. However, this proposal was rejected in the first round of CBD negotiations due to the 'numerous practical, political and legal obstacles' it posed.[15]

In this context, it is clear that the CBD is a framework agreement in at least three important ways.[16] First, the CBD creates a global structure to promote continued international cooperation and to support national implementation. Indeed, the CBD emphasizes national action relating to biodiversity within State jurisdictions, establishing a framework of general, flexible obligations that parties may apply through national laws and policies. Elements included in the original structure (for instance those specified in the Convention text itself) as well as a sample of subsequent bodies produced through post-agreement negotiations are outlined in box 1 overleaf.

Second, the CBD allows for its own further development through the negotiation of annexes and protocols. The contemporary 'framework-protocol' approach to multilateral environmental treaty making has proven effective in transforming the often ambiguous and 'soft' legal content of environment and/or sustainable development conventions into more precise and binding provisions.[17] For example, the Vienna Convention led to the Montreal Protocol on Ozone Depleting Substances and the UNFCCC prompted the Kyoto Protocol. The Cartagena Protocol represents the first effort to operationalize a key and contentious part of the CBD. However, the decision to address biosafety as the first protocol under the CBD[18] has been cited as powerful proof of the treaty's lack of science-based prioritizing. Indeed, the Convention's detractors dismiss it as a prisoner of its own politics rather than being based on sound science.[19]

> For many developed nations [particularly the United States], the link between biodiversity and the safety of biotechnology is contrived. Indeed, a [United Nations Environment Programme (UNEP)] study,[20] commissioned in the period preceding the formal treaty negotiations, found almost no links between the two, with those that were found tending to benefit biodiversity. However, the treaty text clearly presumes otherwise.[21]

Third, the CBD builds upon existing agreements – unlike an umbrella convention, which, as noted above, absorbs related treaties. In contrast to previous biodiversity instruments, which target specific species, sites and/or activities, the CBD adopts a broad ecosystem approach to conservation, thereby establishing a wider context for the protection of biological diversity.[22]

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[15] See Proceedings of the Ad Hoc Working Group on the Work of its First Session, *UNEP/BioDiv.1/Inf.2* (Geneva, 16–18 November 1988). It is important to note that the relationship with other conventions, which was the central issue of UNEP Governing Council Decision 14/26 for the Rationalization of International Conventions on Biodiversity, was largely ignored in later meetings. However, the matter was taken up again at the very end of the negotiations and, ultimately, was addressed in Article 22 (Relationship with Other Conventions) of the CBD. See F. Burhenne-Guilmin and L. Glowka, 'An introduction to the Convention on Biological Diversity', in A.F. Krattiger *et al.* (eds), *Widening Perspectives on Biodiversity* (The World Conservation Union and The International Academy of the Environment, 1994), 14–18.

[16] See Glowka, n. 10 above, at 1–2.

[17] The development of sub-agreements (or protocols) has at times served to reinforce, rather than resolve, many of the political tensions inherent in the original UNCED agreements (see D. McGraw, 'Multilateral Environmental Treaty-Making', in G. Boutin *et al.* (eds), *Innovations in Global Governance – ACUNS Policy Brief* (Academic Council of the United Nations System and American Society of International Law, 2000), at 7. See website available at <http://www.yale.edu/acuns/publications/Policy_Brief/index.html>.

[18] A number of protocols under the CBD have been proposed with varying degrees of support. One proposal called for a protocol based on CBD, Article 8(j); another on alien invasive species. In November 1996, the COP indicated that it would consider, among other possibilities, a revised FAO International Undertaking on Plant Genetic Resources as a protocol to the CBD (see COP Decision III/11, at para. 18 and discussion below). The eventual success of these proposals is likely to depend on political considerations, such as which groups and countries are championing a particular cause.

[19] For a presentation of scientific and political arguments against singling out biosafety as the first protocol under the CBD, see J. Vogler and D.M. McGraw, 'An International Environmental Regime for Biotechnology? The case of the Cartagena Protocol on Biosafety', in J. Vogler and A. Russell (eds), *The International Politics of Biotechnology: Investigating Global Futures* (Manchester University Press, 2000), 123–141.

[20] Ad Hoc Group of Experts on Biological Diversity, Biotechnology and Biodiversity, *UNEP/Bio.Div./SWGB.1/3* (14 November 1990).

[21] K. Raustiala and D.G. Victor, 'Biodiversity since Rio: The Future of the Convention on Biological Diversity', 38:4 *Environment* (1996), at 7.

[22] Of course, the CBD articulates new norms that could also apply to pre-existing agreements. In this sense, the CBD may have the normative character of an umbrella convention without possessing its legal status. See C. de Klemm and C. Shine, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* (IUCN, 1993); S. Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (Grotius Publications, 1985).

BOX 1: THE CBD'S OPERATIONAL STRUCTURE

The CBD explicitly provides for the establishment of the following bodies:

- pursuant to Article 40, a secretariat to administer the CBD and coordinate with other relevant bodies. Following the CBD's entry into force, a secretariat was set up by the UNEP on an interim basis in Geneva. Following a vote at the Second Conference of the Parties (COP-2), the secretariat officially established its 'permanent'[23] headquarters in Montreal in May 1996;
- pursuant to Article 17, a clearing-house mechanism to exchange and share information in support of scientific and technical cooperation;[24]
- pursuant to Articles 21 and 39, a multilateral fund to help finance implementation in developing countries, supported mainly by the Organization for Economic Cooperation and Development countries[25] and currently operated by the Global Environment Facility;[26]
- pursuant to Article 23, a COP to oversee the process of implementing and further elaborating the CBD. The COP is the main policy and priority-setting body (trying to manage an ambitious agenda); and
- pursuant to Article 25, a subsidiary body to provide the COP with scientific, technical and technological advice (SBSTTA).[27]

These permanent bodies in turn have produced a plethora of subsidiary processes, including:

- a Meeting of Parties (MOP) scheduled to begin its work around COP-6 in 2002 (assuming the Protocol has entered into force by then). In the interim, an Intergovernmental Committee for the Cartagena Protocol (ICCP) has been established;
- an ad hoc open-ended inter-sessional working group on Article 8(j) has met twice, first in March 2000 and again in February 2002, both meetings building on the work of a formal workshop on traditional knowledge (held in November 1997);
- an ad hoc open-ended working group on access and benefit-sharing (ABS) was convened in October 2001, building on the work of a panel of experts on ABS which met twice (October 1999 and March 2001); and
- ongoing rosters of experts on thematic work programmes such as marine and coastal biodiversity, forest biodiversity, agricultural biodiversity, inland waters, dry and sub-humid lands as well as cross-cutting issues such as biodiversity indicators, incentive measures, sustainable tourism, ecosystem approach, and education and public awareness.

There are at present over 300 multilateral environmented agreements (MEAs).[28] Of these agreements, approximately 30% address biodiversity, either in full or in part. Most are aimed at protecting specific species and sites as well as regulating particular activities. In addition, while the majority of biodiversity-related MEAs are regional in scope,[29] several are global. These are outlined opposite in box 2.

Among these agreements, the World Conservation Union (IUCN) identifies four major global conventions based on the criteria of 'recency' and relevancy.[30] These conventions are: the Convention on Wetlands

[23] Canada's status as host country came under pressure at COP-5 both by developing countries (calling on Canada to renew its annual US $1million contribution to the operation of the Secretariat) and by some European counties (mainly for having taken such a hard line in the biosafety negotiations) – in particular Germany (seeking to co-locate the CBD alongside the UNFCCC and United Nations Convention to Combat Desertification (UNCCD) Secretariats already established in Bonn). In addition, it has been suggested that the CBD be headquartered alongside the secretariats of other global biodiversity-related treaties (in Geneva, Bonn or Nairobi) in order to strengthen synergies and rationalize resources. The outcome of these proposals will depend largely on broader debates regarding international environmental governance (see n. 3 above).

[24] According to the CBD website, the clearing-house mechanism's mission is threefold: '[to] promote and facilitate technical and scientific cooperation, within and between countries; [to] develop a global mechanism for exchanging and integrating information on biodiversity; [and to] develop the necessary human and technological network' (see website available at <http://www.biodiv.org>).

[25] It is noteworthy that the mechanism is to function 'under the authority and guidance of, and be accountable to, the Conference of the Parties'. This language is stronger than the relevant wording in the UNFCCC, according to which the financial mechanism is to function under the 'guidance of the Conference of Parties' (UNFCCC, Article 11).

[26] The GEF was initially designated as the institutional structure to operate the financial mechanism on an interim basis, subject to the condition that it be fully restructured in accordance with the requirements of Article 21 of the CBD, for the period between the CBD's entry into force and the first meeting of the COP 'or until the COP decides which institutional structure will be designated in accordance with Article 21'. Although the GEF appeared to be the only realistic candidate, and despite having met several requirements (most notably, a more democratic and transparent system of government), COP-5 called for a second review of its effectiveness during the period from November 1996 to June 2001.

[27] In its earlier days, the SBSTTA was dubbed a 'mini-COP'. Some actors (mainly in the industrialized world) contend that the effectiveness of the CBD will depend on the extent to which the SBSTTA can provide sound scientific advice as a basis for the COP's policy decisions. Others (mainly representing developing countries which feel at a disadvantage in strictly scientific bodies, which tend to be dominated by Western-educated experts) have argued the need for a subsidiary body on implementation.

[28] See Open-Ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance, Multilateral Environmental Agreements: A Summary, *UNEP/IGM/1/INF/1* (30 March 2001).

[29] Indeed, a much greater number of regulatory arrangements (for the environment in general and biodiversity in particular) have been made under regional treaties. In the category of regional biodiversity treaties, there are more than two dozen with a general environmental focus. Some three dozen seek to conserve specific species such as fish and other marine resources (over 20), land animals (six), plants (three) and birds (one); see Sanchez and Juma, n. 1, at 297.

[30] See Glowka, n. 10 above.

BOX 2: PRE-1992 GLOBAL AGREEMENTS RELATED TO BIODIVERSITY

International legal instruments that are concerned with wider environmental issues, but which address at least one aspect of biodiversity, include:

- the Convention on the High Seas (Geneva, 29 April 1958);
- the Convention for the Conservation of Antarctic Seals (London, 1 June 1972);
- the Convention concerning the Protection of World Cultural and Natural Heritage (Paris, 23 November 1972);
- the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (Bonn, 23 June 1979);
- the United Nations Convention on the Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982);
- the International Tropical Timber Agreement (ITTA) (Geneva, 18 November 1983).[31]

International legal agreements that deal squarely with the conservation and management of the flora, fauna and habitat include:

- the Convention Relative to the Preservation of Fauna and Flora in their Natural State (London, 8 November 1933);
- the International Convention for the Regulation of Whaling (Washington DC, 2 December 1946);
- the International Convention for the Protection of Birds (Paris Convention) (Paris, 18 October 1950);
- the International Plant Protection Convention (IPPC) (Rome, 6 December 1951);
- the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 28 April 1958);
- the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) (Ramsar, 2 February 1971);
- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Washington DC, 3 March 1973).

of International Importance, Especially as Waterfowl Habitat (the Ramsar Convention); the Convention concerning the Protection of World Cultural and Natural Heritage (the Paris Convention); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and the Convention on the Conservation of Migratory Species of Wild Animals (CMS). While the first two are aimed at specific activities (CITES) or species (CMS), the latter focus on specific sites (Paris) or habitats (Ramsar). Lyster singles out these four particular treaties in his renowned book, *International Wildlife Law*[32] and Bilderbeek[33] cites these four treaties as 'positive sources of international law' on biodiversity. Each of these treaties took between 2 to 4 years to enter into force (in contrast to the CBD's 18 months) and the numbers of parties range respectively from 30 to 100 (in contrast to the CBD's near-universal membership).

Biodiversity-related agreements remain poorly integrated and could benefit from a significant organizational overhaul. However, the political processes underlying the various biodiversity MEAs are more important than the technical cooperation and memoranda of understanding agreed upon by their respective secretariats. Indeed, the group's diversity (constituent MEAs are administered by different bodies) and entrenched institutional history (biodiversity MEAs are championed by well-established constituencies and therefore subject to significant 'turf battles') make substantive coordination difficult. Moreover, the group is dominated by two treaties with very different approaches to biodiversity: while CITES is aimed at protecting specific species, the CBD takes a comprehensive and cutting-edge approach to biodiversity conservation, including the sustainable use of its components and benefit sharing. Many developing countries who saw their bargaining positions enhanced in the CBD negotiations would likely object to harmonization with other more traditional biodiversity-related conventions. Indeed, attempts to identify critical conservation areas, which are common to all or most other biodiversity-related agreements, have proven problematic and politically divisive under the CBD.

Current intergovernmental discussions aimed at improving environmental governance have focused on coordinating MEAs according to various criteria – ranging from substance (for example grouping MEAs with common issue areas, objectives or problem structures) and function (for example pooling activities common to many MEAs such as reporting and monitoring, scientific and environmental assessment, financial and technical cooperation) to location (either co-locating the secretariats of new MEAs or relocating existing ones) and legal status (for example renegotiating, with a view to merging existing MEAs into umbrella conventions).[34] One way forward has been to

[31] Although these last two instruments were concluded in the 1980s, negotiations began in the 1970s.

[32] See Lyster, n. 22 above.

[33] See S. Bilderbeek, *Biodiversity and International Law: The Effectiveness of International Environmental Law* (IOS Press, 1992).

[34] Given that each coordinating option has important institutional and organizational implications, additional research is needed to evaluate both their desirability (need) and feasibility (costs and benefits). For a critical analysis of these different coordinating mechanisms, see McGraw, n. 2 above.

TABLE 1 GLOBAL AGREEMENTS AND REGIMES RELATED TO THE CBD ACCORDING TO SCOPE AND OBJECTIVE/FOCUS

SCOPE:	*ENVIRONMENT* ⇐==========⇒ *ECONOMY/TRADE*			
OBJECTIVES/FOCUS	*CONSERVATION*	*SUSTAINABLE USE/DEVELOPMENT*	*BENEFIT SHARING*	*OTHER*
TIME PERIOD 1970s–1980s	• CITES • CMS • Wetlands • World Heritage • UNCLOS	• CITES • ITTA	• FAO International Undertaking on PGRFA • UNCLOS Deep Seabed Mining (both according to the Common Heritage of Mankind principle)	• Vienna Convention and Montreal Protocol • Basel Convention • Convention on Long-Range Transboundary Air Pollution
1990s	• CBD • UNCLOS (Fish Stocks) • ICRI	• CBD • UNFCCC • UNCCD • UNCLOS (Fish Stocks) • ICRI	• CBD • Revised integrated pollution prevention and control (IPPC)	• WTO trade-related intellectual property (TRIPs) • Basel Protocol • Kyoto Protocol
2000 and beyond	• Potential protocols under CBD	• Potential protocols under CBD	• Potential protocols under CBD • International Treaty on PGRFA	• Cartagena Protocol • Rotterdam Convention • Stockholm Convention

place the CBD into two groupings (or 'clusters'): one with the other biodiversity-related agreements (focusing on their common conservation element); and another which includes the UNFCCC and UNCCD (focusing on their common sustainable development objectives). Together, the three 'Rio agreements' enjoy a special status within the UN system, as they are among 25 treaties identified in the Secretary-General's *Millennium Report* as central to the UN's mission.

Not only is the CBD qualitatively different from previous biodiversity agreements, it also distinguishes itself from its more contemporary counterparts. Notably, unlike its sister agreements on climate change and desertification, the CBD enters a legal field crowded with global agreements. Legal instruments are particularly prolific in relation to the CBD's first objective, that of biodiversity conservation. In line with this goal, the CBD builds on pre-existing biodiversity conservation agreements such as the CMS, Paris and Ramsar Conventions and, to some extent, CITES. In relation to its second objective, that of sustainable use, the CBD echoes contemporaneous (1992) sustainable development regimes such as the UNFCCC and the UNCCD as well as subsequent agreements such as the International Coral Reef Initiative (ICRI) and the Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species negotiated under UNCLOS. As it seeks to address its third objective, benefit sharing, the Convention establishes a new regime for the international exchange of genetic resources. In so doing, it overlaps with regimes concerning extractive natural resources, such as the recently revised Food and Agricultural Organization International Undertaking on Plant Genetic Resources for Food and Agriculture (FAO International Undertaking on PGRFA) (see the discussion regarding this international treaty below) and the International Union for the Protection of New Varieties of Plants recently revised International Plant Protection Convention (IPPC).[35] The CBD also has implications for other

[35] Prior to their recent revision, these regimes had operated largely according to the principle of 'common heritage of mankind' (CHM) – a principle which views certain resources as public goods and, thus, not subject to access restrictions or usage fees. However, the proposition that biodiversity should be viewed as the common heritage of humankind was rejected at an early stage of the CBD's negotiation, on the grounds that biodiversity does not constitute a 'global commons' (as with the oceans and atmosphere). Indeed, most of its components are situated in areas under national jurisdiction or even on privately owned property. Instead, a firm emphasis was placed on sovereign rights over biological resources, while recognizing that biological diversity itself is a common *concern* of humankind. 'Common concern' implies a common but differentiated responsibility among developing and industrialized countries; it recognizes the international community's concern for biodiversity without making biological resources its common heritage, or indeed property. Thus, broadly speaking, biodiversity-rich countries and communities may restrict access to their biological resources to those who have

regimes in the areas of trade and intellectual property such as the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO).[36] With the adoption of the Cartagena Protocol on Biosafety, it remains to be seen whether the CBD facilitates the creation of a new biosafety regime or whether it simply extends or challenges existing regimes, particularly in the area of trade.[37] Table 1 opposite categorizes international agreements, which impact on at least one aspect of the CBD (and vice-versa) according to both subject matter and duration.

COMPREHENSIVENESS

The CBD's comprehensive rather than sectoral approach to conservation makes it a landmark treaty in the environmental field. The Convention goes beyond the conservation of biodiversity *per se* to encompass such issues as the sustainable use of biological resources,[38] access to genetic resources, the sharing of benefits from the use of genetic material, and access to technology, including biotechnology.[39] It has been argued that the Convention's central focus is on the conservation of biological resources, and that 'all the rest [of the Convention] is the methodology of how to conserve'.[40] By bringing these 'non-traditional' issues into the bargain, the CBD becomes a courageous political document, but also a rather clumsy and cumbersome legal text. Of course, some maintain that the CBD's near-universal membership is a reflection of its weakness; that countries sign on precisely because there is no effective way of monitoring or enforcing compliance provisions which have been described as 'vague and voluntaristic' (at best) and 'confusing and contradictory' (at worst).[41] Moreover, because so many different groups see their interests mirrored in the treaty, it has been dubbed the 'Omnibus Convention' or the 'Convention for all life on Earth'.[42]

The sheer proliferation of programmes and processes established under the CBD reflects both its breadth and depth. However, the very comprehensiveness which makes the CBD unique among global biodiversity agreements also makes it vulnerable to over-extension. The COP's over-crowded agenda (particularly in the first 4 years) and the proliferation of subsidiary bodies and processes have resulted in a diffusion of limited energy, attention and resources among State and non-State actors alike. If the issues and interests it encompasses are not carefully managed, the CBD could collapse under its own weight. Fortunately, the parties have taken steps to address these pitfalls. Not only have they organized a series of special meetings to examine the Convention's operations, a strategic plan is also being developed for adoption at COP-6 to be held at the Hague in April 2002.[43]

COMPLEXITY

A second feature of the CBD is the complexity (and, some would say, ambiguity) not only of the Convention text but also of the biodiversity issue-area itself. Two aspects of this complexity are 'issue salience' and the 'veil of uncertainty'.

ISSUE SALIENCE

The CBD reached its peak in popularity when the US announced it would not sign in Rio. Since that time, the Convention has received negligible coverage in the mainstream media – especially when compared to its ozone and climate change counterparts. If the CBD is indeed viewed as both less popular and less prestigious than these other agreements, it is in part due to the nature of the issue-area itself. Both the breadth and depth of biodiversity make it difficult to define a clear *problématique*. In essence, biodiversity lacks 'issue salience'.[44]

agreed to share the benefits arising from the use of these resources. Operationalizing this principle (and its qualifiers) into concrete arrangements has been the focus of protracted discussions and arrangements – bilateral as well as multilateral.

[36] For an analysis of the relationship between the CBD and the GATT, see D. Downes, 'The Convention on Biological Diversity and the GATT', in R. Housman *et al.* (eds), *The Use of Trade Measures in Select Multilateral Environmental Agreements* (UNEP, 1995), 197–251.

[37] For a regime analysis of the biosafety negotiations, see Vogler and McGraw, n. 19 above.

[38] According to Article 2 of the CBD, 'biological resources' include 'genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity'.

[39] 'Biotechnology', as defined in Article 2 of the CBD, means any 'technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use'.

[40] See McGraw interview with Tolba, n. 10 above.

[41] In this connection, it is worth noting that one of the reasons cited by the US for not signing the CBD in Rio was that the government took its international commitments seriously enough *not* to sign this particular treaty (see Chandler, n. 10 above).

[42] McGraw interview with A. Campeau (Montréal, Canada, 30 October 1997).

[43] For actions taken in this regard, see, for instance, Note by the Executive Secretary on the Strategic Plan for the Convention on Biological Diversity to the Open-Ended Inter-Sessional Meeting on the Strategic Plan, National Reports and Implementation of the CBD, UNEP/CBD/MSP/2 (Montreal, 19–21 November 2001), 1–8.

[44] An issue's saliency is derived from its simplicity, clarity, and/or familiarity. According to O.R. Young and G. Osherenko, '[s]uccess is often linked to the ability of those formulating proposals to draft simple formulas that are intuitively appealing or to borrow formulas or approaches from prior cases with which negotiators may already be familiar. The influence of salience lies in its capacity to facilitate the convergence of expectations in international bargaining'. See O.R. Young and G. Osherenko, *Polar Politics: Creating International Environmental Regimes* (Cornell University Press, 1993), at 14–15.

In essence, biodiversity does not offer an uncomplicated formula that advocates can explain to policy makers in straightforward terms and that journalists can encapsulate in headlines for public consumption. Whereas the impacts of atmospheric change, such as ozone depletion and global warming, are beginning to be understood by the average person, comprehending the 'web of life' – from microscopic organisms to entire ecosystems – is an extremely elusive matter, and indeed forms a topic of continuing research and discussion among ecologists. Even within the scientific community, the reality and potential repercussions of biodiversity loss have really only been recognized by ecologists, taxonomists and biologists. Moreover, even though a number of environmental groups are working to preserve 'nature', the biodiversity cause *per se* has yet to be championed by a popular group (environmental lawyers and taxonomists can hardly be said to capture the public's imagination). Again, this is in contrast to global atmospheric issues taken up by popular professionals such as astronauts and medical doctors.

The species-specific and site-specific treaties that pre-dated the CBD made it easier for the public to embrace 'charismatic animals', such as pandas and seal pups, and to explore 'exotic sites' such as the rainforests of Borneo and Brazil. When countries such as Brazil and Malaysia effectively neutralized the forests issue within the UNCED process and they (and others) opposed any lists of globally important species and spaces within the CBD (the term 'global' does not even appear in the agreed text),[45] many of the familiar connections that people had with biodiversity were lost.

Although the comprehensive manner in which the CBD addresses the biodiversity issue-area may be laudable from a substantive or scientific point of view, it also serves to magnify the issue's complexity and, consequently, to diminish both the Convention's general appeal and the political will necessary for its implementation. The remedy, however, is not necessarily to return to the traditional ways of conveying the importance of biodiversity. Indeed, conservation campaigns focusing on specific sites and species are best left to well-established conservation organizations. Instead, the CBD should focus on its unique nature or, in management terms, its 'core competency'. This entails the integration of the CBD's three key objectives of conservation, sustainable use and benefit sharing (as set out in Article 1 of the Convention).

The current lead-up to the World Summit on Sustainable Development presents an opportunity to showcase the CBD as a true sustainable development treaty. As one of two legally binding agreements to emerge from the 1992 UNCED, the CBD is well positioned to serve as a global focal point for measuring progress since the Rio Earth Summit. The standing of the CBD (and its Cartagena Protocol) as a sister agreement to the UNFCCC (and its subsequent Kyoto Protocol) should be emphasized. By clearly identifying and creating links with climate change and other issues that rank high on domestic agendas (such as health and safety) as well as international agendas (such as trade and security), the political and public profile of the CBD, and biodiversity in general, would be enhanced.[46]

Fortunately, the COP recognized the importance of these issues and, at its fifth meeting, called for the creation of a 'Consultative Working Group of Experts on Biodiversity Education and Public Awareness'. Although this joint CBD/UN Educational, Scientific and Cultural Organization initiative is to be applauded, it clearly illustrates the same conceptual ambiguities that continue to plague the CBD in general. This confusion arises primarily from the fact that the working group's mandate is too broad. Rather than develop initiatives that focus on the CBD, the group attempts to address all of biodiversity. This approach rests on the misguided view of the CBD as an umbrella convention (one that consolidates pre-existing biodiversity agreements) rather than as a framework sustainable development convention (which overlaps with agreements beyond the environmental realm). A cross-cutting education and communications strategy based on the CBD itself (as a first focal point of biodiversity) would allow for involvement by a range of relevant institutions and instruments beyond biodiversity conservation *per se*. In addition, the composition of the working group itself does not encompass the expertise required to effectively fulfill its own mandate. As with many processes established under the CBD, the 'expert group' itself reflects a narrow range of expertise, comprising mostly scientists, career diplomats and programme officers with little experience in developing education or communications programmes. Those in the group who do possess this expertise have developed it almost exclusively in relation to biodiversity conservation. Such a focus is likely to lead to educational and public awareness programmes which emphasize the CBD's first objective over the other two, rather than its key innovation – the interrelationship between conservation, sustainable use and benefit sharing.

[45] Although such opposition may be understood on purely political grounds, it has exacerbated the CBD's lack of issue saliency.

[46] At the November 2002 meeting of the Open-Ended Inter-Sessional Meeting on the Strategic Plan, National Reports and the Implementation of the Convention (MSP), the Government of Canada sponsored a panel on 'raising the public and political profile of the CBD', particularly in the lead-up to WSSD.

VEIL OF UNCERTAINTY

While the uneven scientific knowledge among diplomats involved in the CBD negotiations proved problematic, the lack of information (or 'veil of uncertainty'[47]) regarding the various values of biodiversity may have facilitated the negotiation process. Indeed, the bargaining position of the South was significantly strengthened by the negotiators' lack of data regarding the commercial value of biodiversity within their borders (*in situ*). While developing countries are the historic holders of biodiversity, many of the relevant products (in particular, plant genetic resources for food and agriculture or 'PGRFA') can be derived from the gene banks of the North (*ex situ*).[48] This fact has led some observers to conclude that any claim to victory by the South *vis-à-vis* the CBD is, in essence, a moral one.

Certainly, in the 10 years since the Convention's adoption, the implications of its provisions have come into sharper focus. Among other factors, current studies of the commercial value of biodiversity have in effect weakened biodiversity-rich countries' leverage in post-agreement negotiations. This author views the recently concluded negotiations aimed at harmonizing the 1983 FAO International Undertaking on PGRFA with the CBD as a case in point.[49] On 3 November 2001, after 7 years of protracted negotiations, the Thirty-First Session of the Conference of the FAO voted to adopt the International Treaty on Plant Genetic Resources for Food and Agriculture.[50] However, many of the guiding principles, such as 'farmers' rights'[51], found in the original G77 proposal, were diluted in order to secure an agreement. According to a non-government organization statement issued upon the treaty's adoption, the result is:

> a weak [t]reaty that poses few challenges to the dominant trade policy environment, technological developments and intellectual property rights regimes which tend to serve the interests of OECD countries.[52]

Furthermore, unlike the CBD with which the new treaty was initially intended to be harmonized, the agreement has been criticized for its lack of fairness, equity and comprehensiveness.[53] Notwithstanding these apparent 'weaknesses', the treaty was adopted with 116 votes in favour, none against, and only two abstentions from the US and Japan.

As the knowledge about issue-areas addressed under the CBD evolves (and as those issues themselves evolve and are operationalized through various mechanisms, including protocols), so too do the negotiating groups. Rather than following traditional UN regional groupings, unconventional alliances now form around specific interests and issue-areas.

Events leading up to the conclusion of the Cartagena Protocol on Biosafety provide a compelling illustration of this phenomenon. The biosafety negotiations avoided polarization along a strictly North–South axis. As negotiations clarified the outlines of a protocol, the essential unity of developing countries (which had characterized the negotiation of the CBD itself) began to erode. Countries with nascent biotech industries, or with interests in large-scale agricultural exporting, re-considered their interests and alignments. The most striking example of this evolution was the split within the group of Latin American and Caribbean countries (GRULAC): Argentina, Chile and Uruguay joined Australia, Canada and the United States to form the 'Miami Group'; while Brazil chose to retain its leadership role within Latin America and the rest of the developing world (the so-called Like-Minded Group). Industrialized countries also took up divergent positions (mainly according to their exporter/importer status), thus resulting in an important split within the OECD. The EU (notwithstanding major differences among its Member States) tended to move toward a more sceptical attitude regarding the benefits and safety of biotechnology and, in any event, defended its own precautionary procedures for living modified

[47] According to Young, parties involved in institutional bargaining regularly act under a 'veil of uncertainty' regarding the future distribution of benefits from a regime. However, since institutions are never easily changed once they are established, this 'veil' creates incentives for the parties to opt for institutional arrangements that are more equitable so that they are acceptable to countries with different positions, interests and resources (O.R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Cornell University Press, 1989); see also A. Hasenclever *et al.*, *Theories of International Regimes* (Cambridge University Press, 1997), at 73).

[48] Some countries, in particular the USA, claim that they recognized that the commercial value of *in-situ* biodiversity was overplayed during the CBD negotiations. This contention might help explain why American negotiators were less willing to give in to what they considered to be unreasonable demands by developing countries, with the Nordic Group often acting as mediators.

[49] The complex and critical issue of *ex-situ* collections of genetic resources acquired prior to the CBD's entry into force and the question of 'farmers' rights' were left unresolved by the Convention negotiators. Resolution 3 of the Nairobi Final Act recognizes the need to address effectively these matters and also recognizes the FAO as an appropriate forum to do so. Both issues remained major stumbling blocks in protracted negotiations (1994–2001) under the auspices of the FAO's Commission on Plant Genetic Resources for Food and Agriculture.

[50] To view the text of the Treaty, see the FAO Commission on Genetic Resources Secretariat website, available at <http://www.fao.org/ag/cgrfa/default.html>. See also the article by D. Cooper in this issue of *RECIEL*.

[51] Developing countries sought to establish an international benefit-sharing mechanism for ensuring farmers' rights, but the new treaty effectively subordinates these to national laws.

[52] See *Statement by Public Interest, Non-Profit Civil Society Organizations to the 31st FAO Conference* (3 November 2001), available at <http://www.iisd.ca/biodiv/iu.html>.

[53] Ibid. For an analysis of the treaty negotiations, see T. Barnes and S. Burgiel, 'IU-WG Final Summary', 9:213 *Earth Negotiations Bulletin*, 1–14. The article may be found at <http://www.iisd.ca/biodiv/iu.html>.

organisms (LMOs). The Miami Group maintained the view that anything more than a limited coordination of existing national regulations would amount to a restriction of trade based on unspecified dangers of LMOs.

As the veil of uncertainty (which favoured developing country interests during the initial CBD negotiations) lifted around biotech and other key issue areas under the Convention, old alliances are replaced with newer and, arguably, more innovative ones.[54] Indeed, it is doubtful that the CBD could have been concluded according to its existing terms in current conditions of greater issue clarity.

COMPROMISE

From the beginning of the biodiversity negotiations, it was clear that in order to ensure a successful outcome, the divisive issue of global economic disparities, which had historically characterized negotiations between the North and the South, would have to be addressed. The task was to convince developing countries that the industrialized world's apparent resolve to save the globe's fast disappearing biological resources reflected good faith rather than maintenance of the *status quo*. Equally essential was the task of getting industrialized countries to bind themselves to provide the necessary funds, technology and capacity upon which the practical implementation of the CBD would depend. To a great extent, the CBD succeeded in both tasks. Through a complex bargaining process, the CBD reflects a network of compromises. The Convention's adoption can be attributed not so much to the fact that both industrialized and developing countries found many areas of common ground; rather, it demonstrates that each negotiating group had a substantial portion of their respective vital demands met within the framework of the agreed text. As table 2 on negotiation trade-offs demonstrates, the CBD was the result of a distributive rather than integrative bargaining process.[55]

The focal issues of the biodiversity negotiations can be divided into two categories, according to the divergent interests that underlie them. The first category of issues consists of concessions or commitments by industrialized countries (with developing countries pressing for the strongest commitments possible). The second group of issues includes those issues that reflect concessions or commitments by developing countries (with industrialized countries pressing for the strongest commitments possible). A survey of key trade-offs (with corresponding CBD Articles) within the biodiversity negotiations is presented in table 2 below.

The ultimate compromises that were achieved are reflected in the text of the CBD itself. Trade-offs took place within individual Articles, between Articles, between contemporaneous conventions (such as the UNFCCC), and even with pre-existing ones (such as CITES or UNCLOS). While developing countries' concessions and commitments (such as access to genetic resources, conservation and sustainable use, impact assessment and national reporting) were largely negotiated in the first working group (WGI), those of industrialized countries (such as benefit sharing, financial resources, and scientific, technical and technology cooperation) were addressed in the second working group (WGII). On several occasions, progress in WGI was blocked or slowed when developing countries perceived lack of progress in WGII.[56] However, the fact that the converse was rarely true may demonstrate that, although the development of a biodiversity convention was originally a Northern government/non-government organization initiative, the South was better able to exercise its bargaining power throughout the negotiations.

CONCLUSION

Assessing the major trade-offs made by both developing and industrialized countries in the course of the CBD's negotiations highlights the ways in which often divergent positions were resolved (or not) within the CBD. Despite the apparent common interest in and 'perception of an integrated, interdependent ecosystem' which frame global environmental issues, the negotiation of the CBD accentuated many of the issues that divide these countries.[57] Indeed, the CBD represents a network of North–South compromises achieved through a complex bargaining process.

[54] The creation of the Compromise Group, itself accommodating various positions, was particularly instructive in this regard. One delegate described the group as an 'international lab' in which various proposals could be tested for broader agreement. Another innovation was the return to a diplomatic tradition called the 'Vienna Setting' – one which involves representation from all stakeholder groups at the negotiating table. The openness and transparency of the process made it difficult for any government or interest group to stall the process or disown the end result. Again, this outcome stands in stark contrast to the original CBD negotiations as reflected by reservations formally expressed by several governments upon the Convention's adoption.

[55] Whereas distributive or positional bargaining involves staking out definite positions which may be mutually exclusive (often resulting in 'zero-sum' outcomes), integrative or productive bargaining involves searching for mutually beneficial (or 'win-win') solutions (see O.R. Young, 'The Politics of International Regime Formation: Managing Natural Resources and the Environment', 43 *International Organization* (1989), at 361, 366–367).

[56] U. Svensson, 'The Convention on Biodiversity: A New Approach', in G. Sjöstedt and S. Uno, n. 11 above, 164–191.

[57] M. Miller, 'The Biodiversity Regime', in M. Miller (ed.), *The Third World in Global Environmental Politics* (Lynne Rienner Publishers, 1995), at 109.

TABLE 2 TRADE-OFFS BETWEEN INDUSTRIALIZED AND DEVELOPING COUNTRIES[58]

TYPES OF TRADE-OFFS	CONCESSIONS BY DEVELOPING COUNTRIES	CONCESSIONS BY INDUSTRIALIZED COUNTRIES
Trade-offs regarding the objectives of the CBD.	Objectives (Article 1): • Conservation and sustainable use • Access to genetic resources	Objectives (Article 1): • Benefit sharing • Technology transfer • Funding
Trade-offs between the principal sets of obligations under the CBD: • States have sovereign rights over their own biological resources, but they also have a responsibility to conserve and sustainably use these resources.	• General measures for conservation and sustainable use (Article 6) • Identification and monitoring (Article 7) • *In-situ* conservation (Article 8) • *Ex-situ* conservation (Article 9) Sustainable use of components of biodiversity (Article 10)	• Recognition of national sovereignty over natural resources (Article 15(1)) • Information exchange (Article 17) • Technical and scientific cooperation (Article 18)
Trade-offs between access to genetic resources (largely in the South) in exchange for access to the results and benefits of biotechnologies (developed largely in the North).	• Access to genetic resources (Article 15(2))	• Benefit sharing/biotechnology (Articles 15(6), 19(1)–(2))
Trade-offs between intellectual property rights (IPR) and patents (largely held by the multinational corporations and research agencies of the North)[59] and technology transfer and the rights of indigenous peoples' and local communities' rights, on the other.	• Protection of IPR (Article 16(2)–(3))	• Technology transfer (Article 16(3)–(5)) • Indigenous peoples and local communities (Artilce 8(j))
Trade-offs between the withdrawal of lists of globally-important biodiversity (Global Lists advocated by several industrialized countries) and the acceptance (by developing countries) of a scientific body to advise the COP (Article 25) along with their acceptance of national reporting (Article 26) and impact assessments (Article 14).	• Subsidiary Body on Scientific, Technical and Technological Advice (Article 25) • Reporting (Article 26) • Impact assessments (Article 14)	• No 'Global Lists'
Trade-offs regarding the financial resources of the CBD. Developing countries accepted both eligibility criteria and 'agreed incremental costs' in exchange for the North's provision of 'new and additional financial resources' (Article 20(2)).	• Eligibility criteria (Article 20(2)) • Agreed incremental costs (Article 20(2))	• Provision of new and additional financial resources (Article 20(2))
Trade-offs regarding the financial mechanism of the CBD. In exchange for the South's concession that no multilateral fund be explicitly mentioned, the North accepted Article 21's mechanism for the provision of financial resources to developing countries under the authority and guidance of the COP. The decision to designate the Global Environmental Facility (GEF) as the institutional structure to operate the financial mechanism on an interim basis is a compromise between North and South: the former had hoped that the GEF would be designated on a permanent basis, while the latter originally proposed the creation of a new and separate fund for the Convention.	• No multilateral fund explicitly mentioned • GEF explicitly mentioned (Article 39)	• Mechanism for the provision of financial resources to developing country parties under the authority and guidance of the COP (Article 21) • GEF only interim institutional structure (Article 39)

[58] Table adapted from V. Koester, 'The Biodiversity Convention Negotiation Process – And Some Comments on the Outcome', in E.M. Basse (ed.), *Environmental Law: From International to National Law* (Gad Jura, 1997), 205–258.

[59] The protection of IPR (Article 16(2)–(3)) is qualified both within the latter paragraph and by the two ensuing paragraphs ((4)–(5)) as well as by the rights of indigenous peoples and local communities (Article 8(j)).

In balancing divergent interests and positions, the final text of the CBD was more acceptable to the vast majority of States involved in its negotiation. Viewing the CBD as the best possible outcome, Veit Koester, the Chair of the Intergovernmental Negotiating Committee Working Group that negotiated the most contentious aspects of the CBD, concluded that 'the Convention represents a North–South compromise, therefore the art of the possible'.[60] Yet, opinion concerning both the process and outcome of the biodiversity negotiations is divided. According to the Chief Legal Advisor to the US Delegation:

> It is regrettable that a legal instrument as ambitious as the Biodiversity Convention should suffer from basic conceptual and drafting deficiencies. The structure of the negotiations, the haphazard way in which crucial issues were considered, and the pressures of time contributed to a legal instrument which should cause distress for international lawyers and policy-makers.[61]

By contrast, two environmental lawyers, who helped author the original IUCN draft convention, hailed the CBD as a 'landmark'.[62] Moreover, as argued by Swanson:

> the CBD came into existence because there exists a common interest in the coordinated management of domestic resources, not on account of a joint interest in a common resource. The recognition of this more complicated form of commonality is an achievement in itself.[63]

The CBD reflects the interaction of a variety of forces in the politics of its formation and, now, its operation. As elaborated above, the following factors played a key role in producing this outcome:

- the nature and salience of the issue area (particularly the complexity and breadth of biodiversity and the attendant difficulty in establishing causality regarding biodiversity loss);
- professional networks (particularly lawyers, economists, natural and social scientists);
- private-sector and non-profit lobby groups (or the notable lack of participation by non-State actors in pre-agreement negotiations in contrast with active non-government organization participation in post-agreement negotiations);
- leadership (structural, entrepreneurial, intellectual and/or moral);
- non-government, inter-government and intra-government coordination;
- regional and economic bloc positions (both within and among G-77 and OECD countries);
- previous, parallel and pending negotiation sets (such as CITES, the General Agreement of Tariffs and Trade, UNCLOS, UNCED and UNFCCC); and
- the evolution of international law (such as the framework protocol approach to developing multilateral environmental agreements).

Since many of the most contentious issues were left unresolved at the time of the CBD's adoption, the post-agreement negotiations have proven particularly challenging. The level of implementation and enforcement of the CBD will be the ultimate test of whether the compromise achieved during the Convention negotiations was a true success or merely an illusory one.

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[60] McGraw interview with V. Koester (Jakarta, 15 November 1995).
[61] Chandler, n. 10 above, at 174.
[62] Burhenne-Guilmin and Glowka, n. 15 above, at 17.
[63] T. Swanson, 'Why is there a Biodiversity Convention? The International Interest in Centralized Development Planning', 75:2 *International Affairs* (1999), at 281–282.