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What legal options for the international agreement on biodiversity in 2020? A first look at the possibilities

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The Convention on Biological Diversity (CBD) is struggling to deliver tangible results, or at least results in line with its ambition to halt biodiversity loss. Its current Strategic Plan ends in 2020, and most of the Aichi Targets¹ are far from being achieved. If the Parties to the CBD want to give the impression that they are doing more than simply postponing the targets they have failed to achieve, COP15 of the CBD, which will be held in Beijing in 2020, will undoubtedly need to reorganise the global framework for biodiversity in the post-2020 period in order to make it more effective. COP14 must determine the preparatory process, but little attention is currently given to the legal nature of this framework, whether in formal discussions or among civil society actors closely associated with the CBD. However, with a view to strengthening the momentum and the effectiveness of the CBD as an international convention, the discussions cannot afford to ignore the legal aspects. The various legal options that exist for the post-2020 framework will have different implications for the legal force and the architecture of the CBD regime, and thus potentially for its implementation.

¹ <https://www.cbd.int/doc/strategic-plan/2011-2020/Aichi-Targets-EN.pdf>

KEY MESSAGES

Different legal options are available to the Parties in order to define the future global targets for the CBD, as well as to make national measures more effective by linking them more closely to global targets.

At least three legal forms are possible for the post-2020 framework: an annex to the CBD, a protocol and a COP decision. The first two options have greater legal force, while a COP decision could be accompanied by strengthened monitoring and review procedures in order to offset its greater legal flexibility.

At least three options are available to increase the legal scope of national measures aimed at implementing global targets: (i) the Parties undertake to consolidate National Biodiversity Strategy and Action Plans (NBSAPs) through internal regulations making them enforceable under national law; (ii) the NBSAPs are partly transformed into "commitments", which would be covered by a specific implementation process within the CBD; (iii) a new "national contribution" type tool would be created and anchored either in an annex to the CBD or in a protocol to make it legally binding.

As a framework convention, the Convention on Biological Diversity (CBD) was supposed to be operationalised and clarified after its adoption in 1992 through subsequent commitments. Concerning biodiversity conservation, these commitments did not take the form of new treaties—protocols—but rather of strategic documents contained in decisions by the Conference of the Parties (COP). This is the case of the two strategic plans adopted in 2002 and 2010, with the latter defining the Aichi Targets, most of which, as we know, will not be met by 2020. This lack of effectiveness will therefore need to be addressed as a matter of urgency at COP15, to be held in Beijing in 2020.

Here, we explore the range of possibilities for the legal form of the agreement to be reached in Beijing. The term “agreement” should be understood here not necessarily as a new treaty, but as encompassing the legal arrangements, determined at the *international level*, intended to progressively increase the momentum and the effectiveness of the *national implementation framework*. This discussion is necessary, as the different possible options do not have the same legal effect and they do not follow the same negotiating processes.

After recalling that national measures are insufficiently articulated with global targets (section 1), we will examine the different options available to the Parties to strengthen this linkage and to thereby make the post-2020 strategic framework more effective (section 2).

1. OBSERVATION: A DISCONNECT BETWEEN GLOBAL TARGETS AND NATIONAL IMPLEMENTATION MEASURES

As early as 2002, the COP acknowledged the implementation gap for the CBD and identified a series of obstacles. To remedy this problem, emphasis was placed on an approach involving ten-year “strategic plans”, consisting in the definition of policy objectives to be adapted to the regional and national levels, and steering and galvanising state action.

A first Strategic Plan was drawn up in 2002. In 2010, during COP10 in Nagoya, the Parties painted a negative picture of its implementation and the COP adopted a new Strategic Plan for 2011-2020. The targets, which had so far been somewhat vague, were revised and refined. The new plan set out five “strategic goals” with the 20 Aichi Targets, some of which were quantified, to be met by 2015 or 2020. Subsequently, the COP10 decision “urges” the Parties to implement international targets, especially through the NBSAPs, which the Parties must develop pursuant to Article 6 of the Convention. At this point of time, more attention is also given to the implementation of the new strategy. The Parties must report to the COP through their fifth and sixth national reports. The COP “will review the progress towards the global targets” and “make recommendations to overcome any obstacles encountered”. In practice, national reports are subject to a global, non-individual analysis of progress made, conducted by the CBD Secretariat.

Although this plan represents real progress, most of the targets are a long way from being achieved in 2020. Many of them have not been translated at the national level and those that have are often less ambitious than the international targets.² In light of these findings, the question is how to strengthen the implementation of the Aichi Targets—and of their eventual successors. Progress in the implementation of *global* targets will depend on progress in *national* implementation. However, the architecture and content of the international legal framework have a role to play here. They must evolve in order to facilitate national progress away from an approach that has thus far been very top-down and has shown its limitations.

Could the Parties take inspiration here from the climate negotiations? The Paris Climate Agreement³ has a complex, composite legal form (a treaty, a COP decision, an online registry of national contributions) that has been subtly designed. The goal was to address the need for a change of approach for the post-2020 period within the United Nations Framework Convention on Climate Change (UNFCCC), which has many similarities with discussions underway in the context of the CBD. Reflecting renewed forms of international commitments by States, the diversified legal form of the Paris Agreement helped build the final consensus and made it possible to coordinate climate action on a new basis, from the global to the local and from the local to the global level. Without prejudging its actual success, this new climate architecture has revived the UNFCCC process, after the failure to reach an agreement at COP15 to the UNFCCC, in Copenhagen (2009). In view of the loss of momentum within the CBD, a similar process seems necessary in order to bolster the international governance of biodiversity. Whether implicitly or explicitly, the Paris Agreement is very present as a backdrop to the CBD process, although discussions from this viewpoint have so far been relatively limited.⁴

2. LEGAL OPTIONS FOR A RENEWAL OF THE POST-2020 FRAMEWORK

What can be done to ensure national instruments fully reflect the different international targets and with the same level of ambition? How can their implementation be facilitated? Would it be appropriate to change the legal scope of the Aichi Targets? Will it be necessary to strengthen and/or individualise international monitoring and review? If so, how? These different questions are underpinned by some key legal issues. The effectiveness of the agreement to be reached in Beijing will largely depend on the combined choice of the legal form of global targets (2.1.) and that of the “commitment” of each Party (2.2.).

² Doc CBD/COP/14/5, p. 4.

³ https://unfccc.int/sites/default/files/french_paris_agreement.pdf

⁴ <https://www.iddri.org/en/publications-and-events/blog-post/pyramids-great-wall-china-biodiversity-convention-crossroads>

2.1. What legal status for the post-2020 framework?

Three different legal instruments can be used to formulate the global targets.

A new annex to the CBD

The new global framework could be included in an annex to the CBD. It would then have the legal force of a treaty, and would clearly be binding, since an annex is an “integral part” of the Convention (art. 30§1). This new framework would thus be strengthened on the legal level. However, the introduction of a new annex would need to be accompanied by a modification of the Convention (art. 30§4), especially since “such annexes shall be restricted to procedural, scientific, technical and administrative matters” (art. 30§1). The revision procedure is lengthy, heavy and highly uncertain (art. 29). There is thus a real risk of differentiated legal situations—with some Parties bound by the amendment, and others by the unchanged CBD.

A new protocol to the CBD

The new global framework could also be included in a new protocol to the CBD (see article 28 of the CBD). Once again, its legal form would be consolidated, since it would clearly be binding. At the symbolic level, such a protocol would redress the balance in favour of nature conservation; and it could in fact be useful if it contributed to strengthening national implementation, especially by helping to act on the factors of biodiversity loss. After the adoption of the Cartagena⁵ and Nagoya⁶ protocols, such a protocol would be consistent with the threefold objective of the CBD, as set out in its article 1, and would give effect to its articles 6 to 9. However, since the treaty form is a source of tension for the Parties, its negotiation would be challenging. A composite form inspired by the Paris Agreement (a treaty setting out the major targets and/or essentially containing procedural obligations, a COP decision defining quantified targets and Party “commitments” which would then be left out of the treaty) could help to reduce some of the tension. Drafting a new protocol also has the advantage of building momentum in discussions. By providing a relatively clean slate, it can also help steer negotiations away from certain entrenched routines that have become unproductive. Once adopted, the protocol must then enter into force. To achieve this, the Parties must demonstrate their consent to being bound by ratifying, accepting and approving it or acceding to it. This could take time and remains uncertain. And again, some Parties to the CBD may not wish to be bound by such a protocol.

c. A COP decision

This is the form chosen for the two previous strategies and the weakest in legal terms. The targets are thus adopted in a COP

decision and are set out in an annex to this decision. The annex has the same legal value as the decision itself, which, despite being called a “decision”, is not legally binding for the Parties and seems to have only “recommendatory” value.

However, COP decisions are always *legal acts* that produce *legal effects*. Regarding recommendations by the International Whaling Commission, the International Court of Justice recently had the opportunity to point out that they “are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention”.⁷ Thus, a COP decision guides the Parties and can effectively influence the implementation of the targets of the Convention. A COP decision defining a global conservation strategy would also find a solid basis in the CBD text (art. 6, 10, 23§4). Thus, the Parties should at least strive to implement such a decision. Furthermore, they all accepted the establishment of a mechanism for the monitoring – albeit limited – of the national implementation of the Aichi Targets.

2.2. The legal force of national measures implementing global targets

Different options are available to the Parties to link national measures to global targets with greater legal force and political momentum. Three of these seem important to us, bearing in mind that the Parties are required to review and, where necessary, revise their NBSAPs in order to implement the Strategic Plan and the Aichi Targets, including Target 17.⁸

Strengthening the NBSAPs

Today, neither the Convention nor the COP decisions impose any particular legal form on the NBSAPs, or require that they should be established in a single document. The goal could therefore be to strengthen their effectiveness, by requiring the Parties to set out their targets and internal measures for the achievement of global targets in statutory instruments with legal and/or regulatory force in order to make them enforceable at the national level. In a context of greater transparency, the results obtained by these internal measures could be monitored and subject to a review inspired by the global stocktake of the Paris Agreement in order to determine whether, collectively, the priority targets and internal measures are sufficiently ambitious in view of the global targets, based on information communicated by Parties through national reports. This option could be adopted through a COP decision, pursuant to article 23 §4, a) and i) of the CBD.

The extrapolation of priority national targets in the NBSAPs into “commitments”

The goal here would be to extract the strategic dimension of the NBSAPs so as to present them as qualitative and quantitative

⁵ <https://bch.cbd.int/protocol>

⁶ <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>

⁷ Judgment of 31 March 2014, ICJ Rep. 2014, § 46.

⁸ “By 2015, each Party has developed, adopted as a policy instrument, and has commenced implementing, an effective, participatory and updated national biodiversity strategy and action plan.”

"commitments" made by each Party to contribute to achieving global targets, with milestones and a precise schedule for their implementation. This would be a tool linked to the NBSAPs, but separate from them, and the Party "commitments" would be entered into a registry established and maintained by the CBD Secretariat, in order to inform all other Parties as well as non-state actors of the level of ambition of each Party. Established in response to a COP decision, and set out in a clear, precise and unconditional manner, these would be unilateral commitments that the States would then be internationally "obliged" to respect.⁹ Taking account of progress made by each Party towards meeting these commitments through a strengthened transparency framework, they could be subject to a review inspired by the global stocktake of the Paris Agreement to determine whether, collectively, they are sufficiently ambitious in view of the global targets. This option could be simply adopted through a COP decision, pursuant to article 23 §4, a) and i) of the CBD.

c. The establishment of "national contributions"

This option would consist in asking Parties to establish national contributions, using as a model the provisions laid down by articles 3 and 4 of the Paris Climate Agreement. Contrary to option 2, in which the commitments stem from the NBSAPs provided for in article 6 of the CBD, the said national contributions would be chiefly inspired by global targets. The contributions, established according to a cycle (5 or 10 years), should reflect the highest level of ambition and effectiveness possible at the national level to accurately address each of the global targets. The Parties should take internal measures to achieve national contributions, which would be entered into a registry established and maintained by the CBD Secretariat. The results of each Party would be monitored and reviewed through a strengthened transparency framework, while all national contributions would be assessed in view of each global target set for 2030, taking account of the contribution to other global objectives (SDGs)

⁹ ICJ, judgment of 20 December 1974, Nuclear tests, Australia v. France, *ICJ Reports* 1974, p. 267.

and the 2050 Vision,¹⁰ in the context of a review inspired once again by the global stocktake under the Paris Agreement, which could associate non-state actors upstream. This approach should be adopted through a new protocol to the CBD (see above), or an amendment to the CBD (see above).

3. CONCLUSION

The Parties to the CBD will need to find the best combination between the legal form of global targets (binding or non-binding) and that of the "commitment" of each Party (strong or weak and with varying degrees of international regulation).

A protocol or an amendment to the CBD has advantages in terms of international and national legal force (through their ratification). A COP decision may perhaps seem more politically feasible, but would need to be accompanied by strengthened monitoring and review procedures in order to offset its greater legal flexibility. Whichever option is chosen, monitoring and review mechanisms will rapidly need to be proposed and discussed among Parties, right as from the consultation phase planned to start in early 2019.

The option involving the extrapolation of the national priority targets in the NBSAPs into "commitments" contributing to the achievement of global targets seems to correspond to the idea of voluntary commitments, as it is currently emerging in CBD negotiations. If this is indeed the option chosen at COP14, it will be necessary to rapidly tackle the issue of the content of commitments, the registry, the transparency framework, and the mechanisms for a global stocktake as well as for the regular assessment of the level of ambition.

In general, the strength of the agreement to be adopted in Beijing will largely depend on the monitoring and review mechanisms for the post-2020 period, as well as on international mechanisms to support the state in its implementation of national targets (international financing, scientific and technical cooperation, technology transfers, etc.).

¹⁰ <https://www.cbd.int/doc/meetings/sbstta/sbstta-21/official/sbstta-21-02-en.pdf>

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