

Rescue CBD from legal limbo - By S.Faizi

There is a perception held in some quarters that CBD is not a legally binding treaty, and this view has found its way into one of the Secretariat draft documents prepared for the meeting of the CBD Expert Group on Biodiversity and Poverty held in December 2010 which was challenged by S Faizi who is a member of the Expert Group. Excerpts from those interventions are presented here. S.Faizi was a negotiator in the CBD INC that formulated the CBD text, and is also a member of the CBD Alliance Board.

If CBD is not a legally binding treaty, then what is it? Is it an international declaration like the Rio Declaration, that countries may respect but are not obliged to implement? Is it like the World Charter for Nature, a solemn declaration by the UN GA, that countries have a moral/political obligation to follow but no legal obligation to implement? Is it like the World Conservation Strategy, a useful document the concepts of which were adopted by many countries voluntarily and through pressure from the environmental community? Is it like Agenda 21, negotiated by governments but are not legally obliged to implement though they have a political/moral obligation to follow? Is it a multilaterally agreed program like MAB which countries have no legal obligation to implement? CBD is none like these. It is a multilateral TREATY that the Parties are LEGALLY obliged to implement. Nor is it the framework convention that some players tacitly try to portray it as (framework convention was a very early idea to incorporate all the other existing biodiversity related conventions to the new CBD, which came up in the UNEP GC 1989 meeting but was rejected in the subsequent INC negotiations). The articles of CBD are there for enforcement and not for further negotiation (articles prefaced with *shall endeavour to, as far as possible,* however, are less enforceable). There are only two issues in the CBD that called for further development in order to be implemented: biosafety (Article 19.3) and liability and compensation beyond national jurisdiction (article 14.2). Furthermore, the Nairobi Final Act has called for addressing the issue of pre-CBD germplasm collections. The CBD explicitly states that it does not provide for exemptions; and it has also provided an in-built mechanism for dispute settlement (never yet activated).

The CBD was negotiated, adopted, signed, ratified, and came into force in line with provisions of the Vienna Convention on the Law of Treaties which sets the basis for all multilateral treaty making. G-77 had negotiated hard, in the INC CBD, to reach the present text of the treaty, and if the treaty's hard negotiated provisions are so readily regarded as legally non-binding, then it calls for the attention of the Parties. A legally binding treaty is undermined by straying into legally non-binding programs of work, strategic plans, formulation of new and selective targets and so on, and the whole process undermines the fairly clear and categorical provisions of the treaty. The US had correctly assessed the legal strength of the treaty, and feared that it could harm their economic ambitions and hence stayed away from the treaty. But the enforcement of CBD proved the US wrong - it has been rendered ineffective to combat the vested economic interests such as those engaged in biopiracy, which the provisions of the CBD makes an international offense.

It is not just the development NBSAP that is binding on the Parties, there are several other articles as well. For example, access to genetic resources is determined by the concerned Party(15.1), based on mutually agreed terms (15.4), and prior informed consent (15.5); these provisions are categorical and binding. What does this imply? An example: according to information released by the India's Ministry of Environment in 2010 over 2000 patents were taken abroad in the preceding year based on Indian genetic resources and traditional knowledge without the consent of the government. This continuing biopiracy is in glaring

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ECO is currently being published at the 4th WGRI held in Montreal, Canada. Coordinated by the CBD Alliance, the opinions, commentaries, and articles printed in ECO are the sole opinion of the individual authors or organisations, unless otherwise expressed.

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violation of the binding provisions of CBD, but even then the binding provisions of CBD are not invoked. There is no secretariat monitoring of infractions, or the CoP reviewing any infractions or non-compliance. Article 15.7 requires Parties to take legislative, administrative and policy measures for benefit sharing, yet in the past two decades the CoP has not reviewed or acted upon the failure of Parties to enact these enabling measures.

The weakening of the G-77 in CBD negotiations, that had played an effective role in the formative period of the treaty, has been central to the straying of the CBD process. The key reason why the CBD, despite being a progressive treaty, has failed to deliver, is the sidestepping of the legally binding nature of the treaty. Thus escalating biopiracy, no reduction in the loss of biodiversity, continuing alienation of Indigenous communities, and the creation of several sets of administrative, policy and legal measures required by the Convention remain neglected.

Treaties, even though they are legally binding, are implemented based on the interests of the powerful countries. The Nuclear Non-Proliferation Treaty is perhaps the most powerful legally binding multilateral treaty, but what has become of its Article VI, calling for the negotiated elimination of nuclear weapons even after 4 decades of existence of the treaty? And in spite of several UNGA resolutions, this Article is not allowed to be implemented though the massive majority of Parties stand for it. In the case of MEAs, the CBD process has a lot to learn from CITES whose legal status is exactly the same as CBD.

The CoP is expected to “keep under review the implementation of the Convention” but what has never been discussed by COP meetings are issues related to violations of the Convention by Parties and how to deal with them. I wonder when shall we have a CoP meeting whose agenda will have room for this critical discussion.

UN panel requests Japanese government to explain their Okinawa policy: Henoko and

Takae – *By Dr. Masami Kawamura, Citizens Network for Biodiversity, Okinawa, Japan*

The conservation of biodiversity is often mingled with issues of politics, local/ethnic identity, rights and justice; it requires a wide range of approaches. This is what is happening in Okinawa, Japan, where the construction of a US military base and helipads continues to threaten the valuable biodiversity of this Island prefecture against the principles of the Aichi Targets. The issues of military construction were brought up at the COP10 in Nagoya, Japan, garnering support from national and international communities including the International Indigenous Forum on Biodiversity (IIFB). Now, the issues have been taken to another United Nations body.

On February 20, 2012, the Association of the Indigenous Peoples of the Ryukyus (AIPR), Citizens' Network for Biodiversity in Okinawa (Okinawa BD) and the International Movement Against All Forms of Discrimination and Racism (IMADR) submitted a “Request to the Committee on the Elimination of Racial Discrimination (CERD) under the Early Warning Measures and Urgent Procedures Situation of U.S. Military Base Construction in Okinawa, Japan”. The request urged CERD to review the situation of construction plans of a new US base at Henoko/Oura Bay and six new helipads at Takae, Higashi Village, and to take the necessary action.

Located in the northern part of Okinawa Island, Henoko/Oura Bay presents a vulnerable ecosystem

while being one of the most biodiversity rich areas in Okinawa. The endangered Okinawa dugong, rare blue corals, and many other wild wonders inhabit the area and the livelihoods of local communities are closely connected to the environment. Takae is located in the Yanbaru forest, which is home to over 1,000 species of plants and 5,000 species of animals, including the endangered Okinawa Woodpecker and Okinawa Rail. 30% of the forest is already used as a US military training area and 22 US military helipads already exist there.

The NGOs argued that the construction is further burdening the people of Ryukyu/Okinawa and their environment, as 74% of US military bases in Japan are concentrated here, even though Okinawa consists of only 0.6 % of all Japanese territory.

At the NGOs's request, CERD sent a letter to the Japanese government, asking it to provide information on the situation of the two construction plans. The Japanese government is required to respond by July 31 this year, after which CERD will review Japan's response at an August meeting to examine whether these construction plans infringe the Convention on the Elimination of All Forms of Racial Discrimination. At this meeting, CERD will consider issuing a recommendation to the Japanese Government.