Brief Thoughts on COP-6

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When Delegates from nearly all of the 180 countries that are Contracting Parties to the Convention on Biological Diversity arrived in The Hague for their 6th Conference of the Parties (COP-6), few knew what to expect from the meeting. Certainly no one anticipated the meeting's final plenary and the series of decisions and procedural actions that left many fearing great harm to the Convention and its processes. Although their full significance remains unguessable at present, it is clear that these legal and procedural developments must be addressed and that the responses selected could have an enormous impact on the continued vitality of the Convention.

A Procedural Gap

At base, the COP-6 problems arose out of the fact that the COP's Rules of Procedure have never been finished. The Parties have never been able to break the impasse over the manner in which COP decisions are made.

When it was adopted, the CBD provided simply that "the Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish" (Article 23.3.). Accordingly, a nearly complete set of Rules were developed, and have been essentially unchanged since the first COP. They remain "interim" Rules, however, because one provision remains in square brackets – the manner in which the COP makes its decisions.

Rule 40 (which remains partially bracketed) contains the voting procedures for the COP. It divides the COP's deliberations into "substantive matters" and "procedural matters".

As to procedural matters, the COP may make decisions by majority vote of the parties present, and voting is on a one-party/one-vote basis.[1] In addition, the decision as to whether a matter is procedural or substantive is a matter to be decided by the President, supported by a majority of the non-abstaining Parties.[2] These principles have been generally agreed and are not in brackets.

As to substantive matters (Rule 40.1), however, there has been no agreement, and the text remains bracketed. The debate revolves around whether Resolutions on matters of substance must be approved by consensus (i.e., over no objection), or may be adopted by a majority or super-majority of the parties present and voting. On one hand, there is a fear that if its work is only to be on the basis of consensus, action by the COP can be prevented by the objection of a single delegation, even where all others approve. A majority or super-majority vote process, however, necessarily requires that there is a minority. These Parties will be bound by resolutions that they have formally opposed (the Rules do not allow Parties to enter reservations to COP decisions), if the majority of other Parties vote in favour of it. This could seriously compromise the Parties' national sovereignty, and presents a possibility of the situation which Alexis de Tocqueville referred to as the "tyranny of the majority".

Clearly, in adhering to the CBD, the Parties have not agreed to be bound by majority rule. Hence, unless and until they can come to agreement on Rule 40.1, the COP appears to be legally bound to operate by consensus basis as to matters of substance.

Issues at COP-6

It was clear before the meeting, of course, that there would be many issues of controversy and/or heated negotiation. Initial concerns focused on two known difficulties:

- First, the "Forest Workplan" which was to be finalised in COP-6 had been a topic of contentious debate in the earlier meeting of the Convention's Subsidiary Body on Technical and Technological Advice (SBSTTA.) Many elements of the workplan remained incomplete as of the opening of COP-6, and the open issues were known to be of major and controversial interest to many of the Parties.
- In addition, many eyes were focused on the groundbreaking proposal of "Draft Guidelines for Access and Benefit-sharing." The draft document was seen by many as the culmination of many years' work. The issue had received intensive attention in COPs 4 and 5, and been the subject of two meetings of an Expert Panel on Access and Benefit-sharing before the Adhoc Working Group on A/BS (AWGABS), which met in October 2001 to prepare the "Draft Guidelines." As the opening of COP-6 approached, word was out that many developing and "mega-diverse" countries were having "second thoughts" about the Draft Guidelines and might oppose their adoption.
- Beyond these expected areas of concern, the agenda was packed with issues which, it was hoped, would present less difficulty, including in particular a revision of the alien invasive species guidelines, which had been adopted as an interim document by COP-5. There was also to be a Ministerial segment, a stakeholder dialogue, and numerous issues relating to the operations of the convention.

Preliminary Consensus within the CBD Processes

Even before the COP began, there were many indicators that procedural and operational issues were in need of attention. In COP-5, many delegations had expressed concern about the proliferation of Working Groups, Contact Groups and Friends-of-the-Chair groups. The existence of so many overlapping action groups was operating to disadvantage delegations from developing countries, many of which consist of a single individual.

As a result, COP-5 decided that all meetings (COP,

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SBSTTA, intersessional meetings, etc.) would generally follow the following model: The entire group (Plenary) could be broken into no more than two Working Groups, for purposes of proceeding through the meeting's agenda; and each Working Group could have no more than two Contact Groups operating at any given time. Although this represented an improvement over the former method of operating, a delegation might still need to have at least six members, since Contact Groups sometimes operate contemporaneously with their Working Group. In addition, small delegations might still have trouble covering necessary "Friends-of-the-Chair" arrangements.

A similar concern had been raised concerning the role of "intersessional processes" (open-ended and other meetings of expert groups, *ad hoc* working groups, and other bodies between COPs). This concern arose out of the fact that, in the intersessional period between COPs 5 and 6 (a period of only 23 months), more than 70 such processes were held. The organisers of these meetings are required to ensure regional balance – a requirement that has resulted, in many of these meetings, in sponsorship of at least one delegate[3] from all developing countries that are Contracting Parties.

Courtesy: Secretariat of the CBD

In COP-6, the two-contact group limit began to break down, as the first created Contact Groups were unable to conclude their work on controversial issues in a timely fashion, preventing the formation of new Contact Groups to address other matters on the agenda.

The issue of full participation contact and working groups has been particularly controversial in several senses. On the most general level, it has been inexorably tied to concerns about "delay" in the CBD processes. On several occasions in the past, the final plenary's adoption of Resolutions recommended by Working Groups had been "delayed" by objections or concerns from parties who were asked "Why didn't you raise this issue in the Working Group?" Frequently, the answer was tied to the inability of one particular small delegation to cover concurrent activities.

The implication of the "delay" issue was that, if a Working Group had agreed on something, the Plenary's adoption of it should only be a formality. The fact that some delegations could not participate in all of the discussions was a confounding factor in this simple view. Hence, in the eyes of many, the "plenary delay" problem could be avoided, and plenaries be limited to formalities only, if the size of small delegations could be supplemented.

This problem was already reaching a critical point during the Working Groups' operations. Delegates were frequently castigated within the Working Group for raising points that had been "negotiated in Contact Groups".

Beyond this, the Parties were also experiencing a wider application of this controversy, hearing similar concerns voiced about intersessional processes. It was increasingly clear that many of these issues were becoming serious impediments to useful action. In discussions of Access and Benefit-sharing, and of the Forest Workplan, for example several Proponents of the existing draft documents were heard repeatedly to insist that there had been a pre-existing "consensus" reached at SBSTTA, or at the AWGABS. They emphatically argued that the prior "consensus" should be respected, and that the parties should not open up the "unbracketed' sections of the draft documents.

By contrast, many countries insisted on "reopening" numerous elements of the Draft Forest Workplan and the Draft A/BS Guidelines. These parties noted that the SBSTTA and AWGABS meetings were not "international negotiating sessions". Rather they were professional advisory groups, whose Terms of Reference were to provide *advisory* documents and reports. Hence their mandate is to provide "input and options" into the COP's decision, rather than trying to pre-decide the overall issue, or to prepare final "unbracketed" text.

As the arguments over such "prior consensus" became more heated, it became obvious that there was a need to clearly agree on the role, nature, procedures and impact of working groups and other intersessional processes (including SBSTTA).

Endgame

It is said that, in the fullness of time, all things come to pass. Finally, seemingly aeons after it began, COP-6 was ready for its final Plenary, which opened with the usual plea from the President to the delegates not to reopen the draft decisions that had been negotiated so carefully in the Working Groups.

As usual, of course, specific complaints were raised regarding particular decisions. In nearly every case, the President told the parties that, having failed to raise the issue in the Working Group, their only option was to have their concerns reflected in the "report of the meeting" (a document that is not referenced in the decisions, and generally difficult to find or research). This statement was only partially correct. The "report" option is only appropriate where a delegation's concern is not significant enough to cause it to oppose the proposed decision.

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Wherever this option has been used in the past, the delegation's permission has been first sought and obtained.

With few exceptions, this was the treatment of all objections raised during the plenary. Several changes requested by the EC and/or the Spanish delegation speaking on behalf of the EU, however, were clear and obvious exceptions. Each of these requests was instantly accepted by the President, without explanation of the deviation from her "rule" of no changes. This was unfortunate, given that the President was from the Netherlands, an EU member. As a result, this unexplained "special treatment" gives the implication of preference, even though there was a clear justification for these mostly minor non-substantive changes, which might easily have been explained.

These practices might have been explained away as the capriciousness of the President, if they had been applied only to minor points. Unfortunately, a few very serious and controversial points arose in the Plenary as well. These included especially the Forest Resolution (L. 27), the Aliens Resolution (L. 13), and the Finance Resolutions (L. 16 and 17). Each of these controversies exemplifies a different kind of problem. However, all were dealt with in the same manner as described above.

The problem relating to the Finance Resolution was based on the usual situation in which a small delegation could not cover all of the relevant meetings.[4] The objections to the Forest Resolution, however, arose from a serious misunderstanding. Although the working group believed that it had come to a complete consensus before it submitted its draft Resolution to the final plenary, in the end, it appeared that the Parties did not have a mutual understanding after all.[5] Here also, rather than resolve the misunderstanding, the President informed the objecting delegation that its only option was to have its concerns reflected in the report of the meeting.

The last of these problems arose in the context of the Resolution on Alien Invasive Species. The Australian delegation had been represented throughout the negotiation of this resolution, so that its objection was not based on lack of participation at an earlier stage. In addition, as the Australian spokesmen made clear, the objection did not arise from a misunderstanding, but was based on political and legal instructions received from the government of Australia. As soon as the Working Group had finished negotiating this document, the Australian delegation faxed it to their superiors and legal advisors, who reviewed it, and then sent comments and instructions to the Australian COP delegation.

Here also, the President stated that the Australian delegation's concerns could only be reflected in the report of the meeting, whereupon Australia regretfully restated his concerns as a *formal objection* to the proposed Recommendation. At this point, several things happened. While on one hand discussions were held, to attempt to resolve Australia's concerns, on the other, many delegations complained about inconsistencies in the way the decision process was taking place. Many delegates, including some with long experience in CBD processes, complained that the COP was being "hijacked" by a lone delegation.

Ultimately, the President terminated the discussions and would not allow amendment of the draft Resolution. Instead, disregarding the presence of a formal objection, she stated that there was a "significant consensus" (apparently misusing the word "consensus" to mean the same as "majority") on the basis of which she adopted the Resolution and ordered that Australia's concerns be reflected in the record of the meeting.

Following this decision, Australia was forced to read a statement into the record as a "reservation" from the COP's decision, something that is not at present allowed under CBD Rules of Procedure.

Significance

One result that must almost certainly be expected in response to COP-6's confusing final outcome is a clarification of the role of the Plenary. If the Plenary is a rubber-stamp of the decisions of the Working Groups, and the Working Groups in turn simply rubber-stamp of the work of the Contact Groups and intersessional processes, then it will be necessary to reconsider the nature and amount of international funding for developingcountry delegations to all CBD-related meetings. To be safe, each delegation may need to be represented by at least seven people. Moreover, it will be important to ensure that the delegates are international negotiators or lawyers, since there will be no viable basis or time for delegates to receive instructions from their central governments, Attorneys General or foreign affairs ministries.

These concerns suggest that in the end, rules of procedure should recognise that decisions of the Contact Groups, Working Groups, and intersessional processes must be considered only as "advice documents". The final Plenary will thus reassume its role as the forum at which all documents are either adopted *or rejected.*

In addition, it will be essential to determine and clarify what the Parties' options are, with regard to any COP decision, either to join in the consensus (either expressly or by their silence) or to object.

If there is no objection, there is a "consensus" and the resolution will be adopted.

Where there is an objection, however, there are several possible outcomes:

(1) the objector may propose a change to the proposed resolution. In this case –
   - if the other parties agree (or no party objects), the change will be adopted.
   - if the parties do not agree, the objector may try to convince the other parties, if allowed to do so by the President.

(2) the objector may agree to have his concerns reflected in the "report of the meeting". This is essentially a "grumbling agreement", i.e., the objector wants the world to know that it is not happy with the decision, but does not consider the matter important enough to raise a formal protest. The important factor here is that *the objector must agree* to have his concerns expressed in the report.

(3) the objector may express his concerns as a *formal*

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objection. At this point, there is officially "no consensus". The COP has *only* two possibilities, either –

- to negotiate a consensus, or
- to state that the proposed resolution could not be adopted due to lack of consensus.

Perhaps the most interesting outcome will be the manner in which the specific irregularities of COP-6's final plenary are addressed in future. The CBD's provisions for "arbitration and conciliation" have not yet been utilised, but appear to relate to disputes among parties, rather than to deciding the effect of abnormalities in COP decision-making procedures. It may be that other international processes will be necessary to resolve the issue. Either way, this may be international law "in the making".

Conclusion

Many COP delegations are headed by scientists and environmental professionals who do not have a complete understanding of the importance of these procedural issues. Hence, the full effect of the events of COP-6 were not fully understood by the majority of delegates.

Virtually all countries have been in the minority on some issue before a COP, and many have other reasons for concern regarding the preservation of sovereignty under the CBD. Few Parties, if any, send delegates with full plenipotentiary authority or the capacity to make final commitments on behalf of their countries. It is only after juridical and foreign affairs ministries are fully aware of these events that their full impact will be felt.

Notes:

[1] Rule 40.2.

[2] Rule 40.3.

[3] It should be noted, however, that the one-plenary/two-working-groups/two-contact-groups-per-working-group rule applies to open-ended intersessional meetings as well, so that full coverage of the meeting would require a minimum of six members in each delegation.

[4] The finance committee's meetings are additional to the two Working Groups with two contact groups approved under the above rule.

[5] A full explanation of these misunderstandings is complex and difficult. For the purposes of this paper, it is enough to note that all parties could see that there were two conflicting views relating to the resolution and the underlying meaning of the negotiations that produced it.