

Protection of Himalayan Biodiversity: International Environmental Law and a Regional Legal Framework

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Protection of Himalayan Biodiversity: International Environmental Law and a Regional Legal Framework

By Ananda Mohan Bhattarai.
New Delhi, India: Sage Publications,
2010. xix + 382 pp. £ 47.50, US\$
39.95. ISBN 978-81-321-0463-6.

Surely, few would dispute that any serious attempt at a comprehensive scholarly analysis of the protection of Himalayan biodiversity from a contemporary international legal perspective would represent a most welcome and overdue addition to the literature. For just as mountain ecosystems have as yet received far less than their due share of legal attention, whether from commentators or from treaty makers, Asia stands out as having been, of all the world's geopolitical regions, the most thoroughly neglected by those same constituencies. The year 2010, moreover, would seem at first sight to have marked an especially auspicious occasion for the appearance of such a work, given its designation by the United Nations as the International Year of Biodiversity. Yet it is doubtful whether Ananda Bhattarai's monograph, for all its merits, can be regarded as having adequately filled this particular niche. The primary source of these reservations lies in the fact that the work in question seems to encapsulate, not 1 analytical project, but 2 that have been rather unconvincingly grafted together and presented as if to form a coherent whole. The net result, unfortunately, assumes the aspect not merely of what is known in the motor trade as a "cut and shut" operation, but of one involving 2 quite different models of vehicle.

The author's principal enterprise, and the one that is, in general, more effectively realized, entails an analysis of the vexed question of access to the genetic (or biological) resources of the region and the distribution of the benefits accruing from their exploitation (commonly referred to as ABS,

short for access and benefit sharing). That this topic is indeed the centerpiece of his undertaking seems to be confirmed by the prefatory disclosure that this book originated with an invitation from the International Union for the Conservation of Nature to the author, who is a court of appeal judge in Nepal, to participate in a project to draft national legislation governing such access for adoption in that country. Accordingly, the issue is addressed in considerable detail in the 3 chapters entitled "Access to Genetic Resources and Benefit Sharing;" "Protection of Traditional Knowledge;" and "Biological Resources, Traditional Knowledge and Intellectual Property Rights." Even to those conservation lawyers for whom such matters do not constitute a prime focus of professional attention, these chapters will probably represent relatively well-trodden ground, for the topics have been extensively explored in the literature, rendering it difficult for anyone to make a distinctively original contribution to their elucidation. Nevertheless, the author offers a reasonably lively reiteration of the story of attempts by Western commercial concerns to appropriate for their own benefit the bio-resources of other regions, as well as their use of principles of intellectual property law (especially patents) and their recruitment of national and international technical organizations (preeminently the World Trade Organization) to further these ends. In addition, his consideration of the implications of these endeavors for the Himalayan nations specifically, and of their ongoing responses, helps to contextualize and give color to this familiar narrative. Some opportunities are arguably missed along the way, however, as where—to take but 1 example—the author fails to give adequate attention to the (now admittedly largely theoretical) question of whether the original attribution of common heritage status to plant genetic resources in the 1983 Undertaking by the Food and Agriculture Organization of the United Nations, if properly understood and

applied, might actually have been made to work to the distinct ultimate advantage of developing countries.

Yet the major limitation of this aspect of Bhattarai's account is largely the product of sheer misfortune with regard to the timing of its appearance. In particular, contrary to most expectations and his own pessimistic assessment that the development of an international ABS regime might "take years or even decades" (p 132) a protocol to the Convention on Biological Diversity (CBD) addressing that very question was adopted at the Nagoya Conference of the Parties to the CBD within months of the book's publication. This development had the inevitable effect not only of stealing its rhetorical thunder but simultaneously of leaving a considerable hole in its substantive argumentation.

This blow might have been softened if the book's other major theme—which is presaged in the opening chapters and developed more fully toward the close, in the form of a call for the adoption of an international legal regime to govern the region's biodiversity generally—had been pursued with greater conviction. Unfortunately, it emerges only as something of an afterthought, as it has certainly not been researched or explored in comparable depth. Thus, there is little sign of meaningful recourse to the literature relevant to this particular aspect, so that the author's discussion seems to lack a sufficiently substantial doctrinal foundation. In particular, the assumption that any such treaty operation could effectively be centered around the (necessarily ancillary) regime for ABS seems suspiciously akin to depositing the cargo intended for the cart in front of the horse, in the vain hope that it might somehow opt to do the loading and delivering of its own volition.

The difficulties begin with the author's attempts from page 38 onward to marginalize the contemporary significance of the many conservation treaties concluded prior to the adoption of the CBD, effected through the dubious expedient of

characterizing them as of unduly limited scope and as the product of merely sectoral thinking. This overlooks the fact that the CBD itself was actually predicated on a recognition of the continued primacy of these treaties in their particular fields, other than in the unlikely event of their proving counterproductive in conservation terms. In consequence, his discussion treats the CBD itself as the effective genesis of biodiversity regulation for most practical purposes. This leads him into various errors, such as describing the CBD as “the first hard law instrument that recognizes the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources” (p 170) when, by 1992, this dependence had in reality been the subject of special provision in international wildlife regulation for at least

100 years. More importantly, it causes him to disregard the vital potential of such instruments as the World Heritage Convention, the Ramsar Convention on Wetlands, the Convention on Trade in Endangered Species, and the Bonn Migratory Species Convention in advancing the cause of biodiversity conservation in the Himalayas. Equally, although cursory attention is given to existing regional arrangements concerning the European Alps and the Carpathians, this is not adequately informed by the available literature; moreover, no consideration is given to the (generally rather sobering) lessons to be learned from the various, more broadly based, conservation agreements that have already been negotiated for Africa, the Americas, the South Pacific, Europe, and Southeast Asia.

While the aggregated effect of these various problems is substantially

to undermine the overall utility of this work, it certainly contains sufficient content of value to engender the hope that a revised version might in due course be prepared. To be most useful, such a revision should evaluate in greater depth the possibility of negotiating a biodiversity convention for the Himalayan region and incorporate an updated discussion of global and regional approaches to ABS in its proper context as an important ancillary aspect of this broader conservation regime.

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