

SUMMARY OF THE SIXTH MEETING OF THE WORKING GROUP ON ARTICLE 8(J) OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 2-6 NOVEMBER 2009

The sixth meeting of the *Ad hoc* Open-ended Intersessional Working Group on Article 8(j) and related provisions of the Convention on Biological Diversity (CBD) was held from 2-6 November 2009 in Montreal, Canada. Over 300 participants attended the meeting, including 97 parties, approximately 80 indigenous and local community representatives, six inter-governmental organizations and 18 non-governmental organizations.

At the end of the week-long meeting, the Working Group on Article 8(j) adopted recommendations on: mechanisms to promote the participation of indigenous and local communities; the development of *sui generis* systems for the protection of traditional knowledge, innovations and practices; elements of an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities; and a multi-year programme of work on the implementation of Article 8(j) and related provisions. The Working Group's recommendations will be submitted to the tenth meeting of the Conference of the Parties (COP 10) to the CBD, to be held from 18-29 October 2010, in Nagoya, Japan.

Delegates also adopted "views" on the international ABS regime, based on elements from the expert reports on traditional knowledge and compliance that received the "broadest support" from the experts, for transmission to the eighth meeting of the *Ad hoc* Open-ended Working Group on Access and Benefit-sharing (ABS), to be held from 9-15 November 2009, in Montreal.

Tkariwaié:ri – the Mohawk term for the "right way of doing things" – pervaded the sixth session of the Article 8(j) Working Group, which was characterized by a constructive and congenial atmosphere. Delegates worked hard towards concluding negotiations on the ethical code, expressing detailed views on ABS, and devising an ambitious work programme focusing not only on traditional knowledge but also on sustainable use.

Overall this week's constructive debates and concrete results confirmed the important contribution that the Working Group can make to the three objectives of the Convention.

A BRIEF HISTORY OF THE CBD, ARTICLE 8(J) AND ABS

The CBD entered into force on 29 December 1993. There are currently 192 parties to the Convention, which aims to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources. The Convention's work under Article 8(j) (traditional knowledge) commenced at COP 3 (November 1996, Buenos Aires, Argentina). COP 4 (May 1998, Bratislava, Slovakia) adopted the terms of reference for an open-ended working group on Article 8(j).

ARTICLE 8(J) WG 1: At its first meeting (March 2000, Seville, Spain), the *Ad hoc* Open-ended Intersessional Working Group on Article 8(j) and related provisions considered elements for a programme of work on Article 8(j), and also addressed forms of protection for traditional knowledge.

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COP 5: At its fifth meeting (May 2000, Nairobi, Kenya), the COP extended the Working Group's mandate to review progress in implementation; explored ways for increasing participation; and adopted a programme of work on Article 8(j), comprising elements and tasks on participatory mechanisms, status and trends of traditional knowledge, traditional cultural practices for the conservation and sustainable use of genetic resources, benefit-sharing, exchange and dissemination of information, and monitoring and legal elements.

ABS 1: At its first meeting (October 2001, Bonn, Germany), the Working Group on Access and Benefit-sharing (ABS) developed the draft Bonn Guidelines on ABS and identified elements for a capacity-building action plan.

ARTICLE 8(J) WG 2: At its second meeting (February 2002, Montreal, Canada), the Working Group considered: an outline for the composite report on the status and trends of traditional knowledge; recommendations for the conduct of cultural, environmental and social impact assessments; participatory mechanisms; and the effectiveness of existing instruments impacting the protection of traditional knowledge, particularly intellectual property rights (IPRs).

COP 6: At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted the Bonn Guidelines on ABS and also considered the role of IPRs in the implementation of ABS arrangements. The COP identified actions to be taken with respect to the integration of Article 8(j) into the CBD thematic work programmes, and adopted the outline of the composite report.

WORLD SUMMIT ON SUSTAINABLE

DEVELOPMENT: In the Johannesburg Plan of Implementation, the UN World Summit on Sustainable Development (September 2002, Johannesburg, South Africa) called for negotiation, within the CBD framework, of an international regime on fair and equitable benefit-sharing.

ABS WG 2: At its second meeting (December 2003, Montreal, Canada), the Working Group debated the process, nature, scope, elements and modalities of an international ABS regime, and also considered measures to ensure compliance with prior informed consent (PIC) and mutually agreed terms (MAT), and capacity building.

ARTICLE 8(J) WG 3: At its third meeting (December 2003, Montreal, Canada), the Working Group considered: recommendations from the UN Permanent Forum on Indigenous Issues; potential socioeconomic impacts of genetic use restriction technologies (GURTs); elements for *sui generis* systems for the protection of traditional knowledge; participatory mechanisms; the Akwé: Kon guidelines for the conduct of cultural, environmental and social impact assessments; and the composite report.

COP 7: At its seventh meeting (February 2004, Kuala Lumpur, Malaysia), the COP adopted the Action Plan on capacity building for ABS, mandated the Working Group on ABS to negotiate an international regime on ABS and agreed on the terms of reference for such a negotiation. The COP also adopted the Akwé: Kon Guidelines.

ABS WG 3: At its third meeting (February 2005, Bangkok, Thailand), the Working Group initiated negotiations on an international regime on ABS. It also addressed: additional approaches to complement the Bonn Guidelines, such as an international certificate of origin/source/legal provenance; measures to ensure compliance with PIC and MAT; and options for indicators for ABS.

ARTICLE 8(J) WG 4: At its fourth meeting (January 2006, Granada, Spain), the Working Group considered, *inter alia*: collaboration with the Working Group on ABS; participatory mechanisms; elements for an ethical code of conduct for the respect of the cultural and intellectual heritage of indigenous and local communities; GURTs; and the composite report.

ABS WG 4: At its fourth meeting (February 2006, Granada, Spain), the Working Group considered: a draft text for the negotiation of the international ABS regime; additional approaches to complement the Bonn Guidelines, including an international certificate of origin/source/legal provenance; and measures to support compliance with PIC and MAT.

COP 8: At its eighth meeting (March 2006, Curitiba, Brazil), the COP instructed the Working Group on ABS to complete its work with regard to the international ABS regime at the earliest possible time before COP 10; and requested the Working Group on Article 8(j) to, *inter alia*, contribute to the mandate of the Working Group on ABS.

ABS WG 5: At its fifth meeting (October 2007, Montreal, Canada), the Working Group considered substantive elements of an international ABS regime and discussed two informal documents tabled by the Co-Chairs.

ARTICLE 8(J) WG 5: At its fifth meeting (October 2007, Montreal, Canada), the Working Group on Article 8(j) did not reach agreement on inputs to the negotiation of an international ABS regime, due to divergence of views with regard to both procedural and substantive issues.

ABS WG 6: At its sixth meeting (January 2008, Geneva, Switzerland), the Working Group focused on the main components of the international regime, including fair and equitable sharing of benefits, access to genetic resources, compliance, traditional knowledge and genetic resources, and capacity building. The Working Group made progress in producing a short and concise working document on the international regime.

COP 9: At its ninth meeting (May 2008, Bonn, Germany), the COP adopted a roadmap for the negotiation of the international regime before the 2010 deadline. The COP decided that the Working Group on Article 8(j) should work on: guidelines for documenting traditional knowledge, a plan of action for retention of traditional knowledge; participatory mechanisms for indigenous and local communities in the Convention; elements of *sui generis* systems; elements of the ethical code of conduct; and further work on the composite report.

EXPERT GROUP ON CONCEPTS, TERMS, WORKING DEFINITIONS AND SECTORAL APPROACHES: This group (December 2008, Windhoek, Namibia) addressed: the different ways of understanding biological resources, genetic

resources, derivatives and products and the implications of each understanding; different forms of utilization of genetic resources in relation to sectoral and sub-sectoral activities; sector-specific characteristics of ABS arrangements; and the range of options and approaches for taking these different characteristics into account that may bring coherence to ABS-related practices in different sectors.

EXPERT GROUP ON COMPLIANCE: This group (January 2009, Tokyo, Japan) considered measures to: facilitate access to justice by foreign plaintiffs; support recognition and enforcement of judgments across jurisdictions; and provide remedies and sanctions to ensure compliance with national ABS legislation. The group also addressed: voluntary measures to enhance compliance by users of foreign genetic resources; whether an internationally agreed definition of misappropriation and misuse could support compliance; compliance measures that take account of customary laws; and compliance measures for non-commercial research.

ABS WG 7: At its seventh session (April 2009, Paris, France), the Working Group focused on operational text on the objective, scope, compliance, fair and equitable benefit-sharing, and access. The meeting encountered several procedural obstacles, most of which related to the structure of the negotiating document. With regard to substance, the most controversial debate was whether to include viruses and pathogens in the scope of the regime.

EXPERT GROUP ON TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES: This group (16-19 June 2009, Hyderabad, India) addressed legal and technical issues concerning: the relationship between access to genetic resources and associated traditional knowledge; customary laws of indigenous and local communities regulating access to genetic resources and associated traditional knowledge; and measures to ensure compliance with PIC and MAT.

REPORT OF THE MEETING

On Monday, 2 November 2009, delegates opened the sixth meeting of the *Ad hoc* Open-ended Intersessional Working Group on Article 8(j) with an indigenous welcoming ceremony. Working Group Co-Chair Nicola Breier (Germany), for the COP 9 President, German Environment Minister Norbert Röttgen, highlighted the importance of the Article 8(j) multi-year programme of work and its possible focus on the implementation of Article 10(c) (customary use of biological resources), as well as the need for consensus on elements of the ethical code of conduct. Balakrishna Pisupati, on behalf of United Nations Environment Programme (UNEP) Executive Director Achim Steiner, stressed that the work on *sui generis* systems, the ethical code of conduct and indicators is critical to achieving the three CBD objectives. Ahmed Djoghla, CBD Executive Secretary, highlighted the contribution of indigenous and local communities to protecting biodiversity, and thanked India for offering to host COP 11 in 2012.

The International Indigenous Forum for Biodiversity (IIFB): requested devoting sufficient time to address the programme of work; and highlighted climate change as a threat to the survival

of indigenous peoples, and the need for a legally binding international ABS regime that protects traditional knowledge. Indigenous Nations and Human Rights Organizations in Canada advocated for the continuation of the Working Group on Article 8(j) and singled out three possible achievements for the current session: completion of negotiations on the ethical code of conduct; contribution to all substantive elements of the international ABS regime; and a realistic and robust programme of work. The International Forum of Local Communities (IFLC) recommended including climate change in the programme of work, and prioritizing the development and implementation of *sui generis* systems. The Indigenous Women's Biodiversity Network (IWBN) recommended consideration of women's role in the transfer of traditional knowledge in developing indicators and the programme of work.

ORGANIZATIONAL MATTERS: Delegates adopted the meeting agenda and organization of work (UNEP/CBD/WG8J/6/1 and Add.1/Rev.1) without amendment; elected Somaly Chan (Cambodia) as rapporteur of the meeting; and appointed Lucy Mullenkei, Shimreichon Luithui-Erni, Gunn-Britt Retter, Victoria Esther Camac Ramirez, Merle Alexander and Neva Collings as Indigenous Friends of the Bureau. Delegates further appointed Lucy Mullenkei as Co-Chair.

The plenary met throughout the week. Three contact groups were also set up: a contact group on the ethical code was established on Monday, co-chaired by Susanna Chung (South Africa) and indigenous representative Neva Collings, and met on Monday and Tuesday. A contact group on the work programme was established on Tuesday, co-chaired by Tone Solhaug (Norway) and indigenous representative Gunn-Britt Retter, which met on Tuesday and Wednesday. A contact group on the international ABS regime was established on Tuesday, co-chaired by Damaso Luna (Mexico) and indigenous representative Merle Alexander, which met on Wednesday and Thursday. This report outlines discussions and summarizes the outcome of negotiations according to the order of the agenda.

MECHANISMS FOR PARTICIPATION

Participatory mechanisms for indigenous and local communities in the work of the Convention (UNEP/CBD/WG8J/6/3) were first addressed in plenary on Monday. On Wednesday, the plenary discussed a draft recommendation (UNEP/CBD/WG8J/6/CRP.1), a revised version of which was adopted by plenary on Friday without amendment.

Delegates agreed to encourage capacity-building efforts "in anticipation of the adoption of an international regime on ABS and post-2010 implementation," including, as suggested by Niger, in support of the CBD Guidelines on Biodiversity and Tourism.

On development of communications, Guatemala and Thailand emphasized translation into indigenous and local languages. Uganda, India and others noted that the development of communication mechanisms should take into account indigenous and local communities' limited internet access, with Guatemala, Peru and Senegal pointing to the usefulness of radio communication. Canada also suggested clarifying that the

proposed Article 8(j) national focal points could support the CBD national focal points, facilitate communication with indigenous and local communities and promote effective development and implementation of the Article 8(j) work programme.

Final Recommendation: The recommendation on mechanisms to promote the effective participation of indigenous and local communities in the work of the Convention (UNEP/CBD/WG8J/6/L.2) includes sections on: capacity building; development of communication mechanisms and tools to facilitate the effective participation of indigenous and local communities in the CBD's work, including through the Voluntary Fund; and other initiatives.

The Working Group recommended, *inter alia*, to:

- welcome capacity-building efforts, especially in anticipation of an international ABS regime and post-2010 implementation;
- encourage the Secretariat to continue its efforts to facilitate the effective implementation of decisions regarding capacity building;
- request the Executive Secretary to continue to convene, subject to the availability of financial resources, regional and subregional capacity-building workshops and exchange of experience on issues relevant to Article 8(j), Article 10(c) and Article 15;
- request the Secretariat to continue to develop electronic, traditional and other means of community education, public-awareness materials, and communication, including in indigenous languages, and to invite parties to publicize such materials through community radio and other diverse media;
- request the Executive Secretary to continue to develop, update and translate the various electronic communication mechanisms;
- take note of the traditional knowledge information portal;
- invite parties to consider designating national focal points for Article 8(j) and related provisions in support of national focal points, to facilitate communication with indigenous and local community organizations and to promote the effective development and implementation of the Article 8(j) work programme; and
- invite parties, governments and relevant funding institutions to contribute to the Voluntary Fund.

SUI GENERIS SYSTEMS

Elements of *sui generis* systems for the protection of traditional knowledge (UNEP/CBD/WG8J/6/5) were first discussed in plenary on Monday, followed by a discussion in plenary on Thursday on a draft recommendation (UNEP/CBD/WG8J/6/CRP.2). On Friday, delegates adopted a revised draft recommendation with minor amendments.

The most contentious issue in the negotiations was reference to the World Intellectual Property Organization (WIPO) work on traditional knowledge. Sweden, for the European Union (EU), and Australia pointed to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) as the primary forum for

discussing intellectual property aspects of traditional knowledge protection, suggesting that the Working Group focus on sharing information on developing and implementing *sui generis* systems. Egypt stressed that WIPO should not discuss benefit-sharing and traditional knowledge issues. Malaysia argued that the WIPO General Assembly decision to negotiate an instrument for the protection of genetic resources and traditional knowledge should not prejudice the CBD work on developing *sui generis* systems. The EU, Australia, Canada and Switzerland proposed quoting verbatim the WIPO decision section saying that WIPO work should not prejudice work pursued in other fora. Brazil and Uganda proposed quoting the decision verbatim, as well as noting progress at CBD on *sui generis* systems. On Friday in plenary, Malaysia recommended that the paragraph on the WIPO General Assembly decision be an exact quote.

New Zealand supported reference to "knowledge holders," which was opposed by Brazil who preferred reference to indigenous and local communities. Delegates eventually agreed that *sui generis* systems be developed "with the full and effective participation, approval and involvement of indigenous and local communities."

The Quebec Native Women's Association reminded parties that the UN Permanent Forum on Indigenous Issues (UNPFII) recommended development of *sui generis* systems under the CBD to comprise traditional customary laws and meet the minimum standards of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), including prior informed consent. The IIFB and IWBN stressed the need to respect indigenous peoples' decision-making processes and customary laws.

On elements of *sui generis* systems, Canada stressed that not all elements should necessarily be included in every *sui generis* system. South Africa stressed the development of *sui generis* systems where indigenous peoples own the knowledge and control its dissemination. Brazil proposed that *sui generis* systems should be based on defensive protection, as well as endogenous protection tools aimed at combating the erosion of traditional knowledge.

Final Recommendation: In the recommendation on *sui generis* systems for the protection of traditional knowledge (UNEP/CBD/WG8J/6/L.3), the Working Group recommends, *inter alia*, to:

- note that elements of *sui generis* systems, as set out in the updated note of the Executive Secretary, include useful elements to consider as and when parties and governments develop *sui generis* systems;
- note that *sui generis* systems should be developed, taking into account customary laws, practices and community protocols, as appropriate, with the effective participation and approval and involvement of those communities;
- encourage parties that have not yet considered or developed *sui generis* systems to take steps to do so, as appropriate;

- request the Executive Secretary to continue to compile and make available through the Clearing-House Mechanism of the Convention, information on measures taken by the parties for the development of *sui generis* systems; and
- note the decision of the WIPO General Assembly to reach agreement to ensure the protection of genetic resources and traditional knowledge without prejudice to the work in other fora.

ETHICAL CODE

The revised draft elements of an ethical code of conduct to ensure respect for cultural and intellectual heritage of indigenous and local communities (UNEP/CBD/WG8J/6/4) were first discussed in plenary on Monday, and subsequently addressed in a contact group co-chaired by Susanna Chung (South Africa) and indigenous representative Neva Collings on Monday and Tuesday. A draft resolution (UNEP/CBD/WG8J/6/CRP.3) was discussed in plenary on Thursday, and eventually adopted with amendments in plenary on Friday.

On the title for the code, delegates initially agreed to use “The Montreal Code of Ethical Conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.” Following a proposal by the IIFB, supported by the EU, however, delegates finally agreed to propose “*Tkariwaié:ri*” (the right way) as a Mohawk title for the code.

On the nature and effects of the ethical code, India argued that its non-binding nature should not preclude the incorporation of its elements in national and international instruments for the protection of traditional knowledge. Egypt considered the code as a first step leading to a mandatory regime in the future, while Norway stressed that certain elements of the code should be reflected in national legislation. Canada and New Zealand stressed instead the non-legally binding nature of the code.

Three contentious issues emerged in the negotiations: references to “lands and waters traditionally occupied by indigenous and local communities”; references to PIC; and references to “knowledge holders.”

The expression “lands and waters traditionally occupied by indigenous and local communities” was opposed by Canada and Mexico. Notwithstanding requests from Burkina Faso, the African Group, Cuba and others to remove brackets, and the fact that delegates agreed to add a reference to the *Akwé: Kon* voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on lands and waters traditionally used or occupied by indigenous and local communities, delegates could not reach agreement.

On transparency, the EU, Brazil, Switzerland and Mexico favored reference to community PIC to proposed activities involving traditional knowledge, whereas Canada and New Zealand preferred referring to “approval and involvement.” No agreement could be reached on this point.

On “traditional knowledge holders,” New Zealand supported using this expression, pointing to the fact that in certain communities only certain individuals hold traditional knowledge and are therefore entitled to permit access, thus stressing the need to recognize the diversity of national circumstances. Brazil, supported by Mexico and the African Group, preferred instead referring to “indigenous and local communities” so as not to prejudice different situations in different communities. The EU proposed that, in applying the ethical code, the need to correctly identify traditional knowledge holders “should be observed,” suggesting dropping references to knowledge holders in the rest of the text. Malaysia, supported by the African Group, proposed that, in applying the code of conduct, “it is for the indigenous and local communities to identify the holders of knowledge for all practical purposes,” and New Zealand suggested adding “in accordance with customary law.”

In plenary on Friday, New Zealand reported on an informal agreement with Brazil and Malaysia to: delete references to “knowledge holders” throughout the text and refer to indigenous and local communities; delete text stating that “indigenous and local communities knowledge holders retain their existing rights, including intellectual property rights, over their traditional knowledge”; and add a new paragraph stating that “where consent or authority of indigenous and local communities is required with respect to traditional knowledge associated with the conservation and sustainable use of biodiversity, it is the right of indigenous and local communities, according to their customary law and procedures, to identify the relevant holders of their knowledge.”

The draft recommendation was adopted with these and other minor amendments, while brackets remained throughout the text around references to “lands and waters traditionally occupied” and “prior informed consent,” and around a sentence stating “indigenous and local communities ought to determine for themselves, the nature and scope of their respective traditional resource(s), according to their customary law(s).”

Final Recommendation: The recommendation on elements of an ethical code of conduct to ensure respect for cultural and intellectual heritage of indigenous and local communities (UNEP/CBD/WG8J/6/L.4) includes an annex containing the elements of the ethical code divided in sections on: rationale; ethical principles, including general ethical principles and specific considerations; and methods.

The Working Group recommends that the COP consider the annexed elements with a view to their possible adoption, and decides to entitle them “The *Tkariwaié:ri* Code of Ethical Conduct on respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.” The Working Group also recommends that the COP invite governments to make use of the elements as a model to guide the development of ethical codes, as requested by COP 5, according to the parties’ unique national circumstances and needs, and recognizing the rich cultural diversity of indigenous and local communities.

In the preamble to the annex containing the elements of the ethical code, it is clarified that “cultural and intellectual heritage” refers to cultural heritage and intellectual property of indigenous and local communities and is to be interpreted under the CBD as the knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity. The COP is also requested to recognize that traditional knowledge should be valued equally with and complementary to Western scientific knowledge, and to take into account a series of international instruments of relevance, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Bonn Guidelines, the Akwé: Kon voluntary guidelines and UNDRIP.

Rationale: This section clarifies that the elements are voluntary and intended to provide guidance on activities/interactions with indigenous and local communities and the development of local, national or regional ethical codes, with the aim of promoting respect, preservation and maintenance of traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biodiversity. The elements are further intended to provide guidance on establishing or improving national frameworks by governments, academic institutions, private sector developers and other potential stakeholders, as well as enabling indigenous and local communities to promote respect for their traditional knowledge and associated biological and genetic resources. Parties also clarified that where consent or authority of indigenous and local communities is required with respect to traditional knowledge associated with the conservation and sustainable use of biodiversity, it is the right of indigenous and local communities, according to their customary law and procedures, to identify the relevant holders of their knowledge.

General ethical principles: This section includes provisions on: respect for existing settlements and agreements, intellectual property, transparency/full disclosure, inter-cultural respect, safeguarding collective and individual ownership, fair and equitable sharing of benefits, protection, precautionary approach, and a principle with a bracketed title on “approval” or “prior informed consent.”

According to the general ethical principles:

- community and individual concerns over, and claims to, cultural and intellectual property relevant to traditional knowledge related to the conservation and sustainable use of biodiversity should be acknowledged and addressed in the negotiation with indigenous and local communities, prior to starting activities/interactions;
- indigenous and local communities should be adequately informed in advance about the nature, scope and purpose of any proposed activity/interaction carried out by others that may involve the use of traditional knowledge occurring or likely to occur on their sites;
- indigenous and local communities ought to receive fair and equitable benefits for their contribution to activities/interactions related to biodiversity and associated traditional

knowledge proposed to take place, or likely to impact on, their sites; and

- the prediction and assessment of potential harms to biodiversity should fully involve relevant indigenous and local communities.

Specific considerations: This section includes provisions on: recognition of sites, access to traditional resources, avoidance of arbitrary relocation, traditional guardianship/custodianship, recognition of community structures, restitution and/compensation, repatriation, peaceful relations, and support for indigenous research initiatives.

According to the considerations:

- the integral connection of indigenous and local communities to their sites and associated traditional knowledge and cultures is recognized;
- activities/interactions should not interfere with access to traditional resources, except with the approval of the community concerned;
- adverse consequences from activities/interactions affecting or impacting indigenous and local communities and their cultures should be avoided, or appropriately compensated or subject to restitution through MAT between indigenous and local communities and those undertaking activities/interactions; and
- efforts should be made to facilitate repatriation of information, to facilitate recovery of traditional knowledge.

Methods: This section includes provisions on: negotiations in good faith, subsidiarity and decision-making, partnership and cooperation, gender considerations, full and effective participation/participatory approach, confidentiality, and reciprocity. On confidentiality, information imparted by indigenous and local communities should not be used or disclosed for purposes other than those for which it was consented to, and cannot be passed on to a third party without consent of indigenous and local communities. Those working with indigenous and local communities should be aware that concepts such as “the public domain” may not adequately reflect the cultural parameters of many indigenous and local communities.

Brackets remained throughout the text around references to “lands and waters traditionally occupied” and “prior informed consent,” and around a sentence stating “indigenous and local communities ought to determine for themselves, the nature and scope of their respective traditional resource(s), according to their customary law(s).”

INTERNATIONAL ABS REGIME

Delegates began to exchange views on the international ABS regime (UNEP/CBD/WG-ABS/8/2 and UNEP/CBD/WG-ABS/7/3) in plenary on Tuesday. A contact group, co-chaired by Damaso Luna (Mexico) and indigenous representative Merle Alexander, convened on Wednesday and Thursday, focusing on the expert reports, but with the possibility to address other issues. On Thursday morning, the contact group reviewed a Co-Chairs’ text, to identify key elements or issues to be added to the text, and in the afternoon, discussed a revised

Co-Chair's text (UNEP/CBD/WG8J/6/CRP.4). On Friday, delegates in plenary adopted the outcome on provision of views on the international ABS regime to be transmitted to the ABS Working Group with some amendments.

The most contentious issues discussed were: procedure, the relationship between access and use of genetic resources and associated traditional knowledge, customary law and community-level procedures, and PIC.

Procedural issues: The EU, supported by Canada, proposed that the Working Group provide detailed and focused views on the outcome of the technical expert groups on traditional knowledge and compliance. Malaysia suggested that the Article 8(j) Working Group produce a consensus outcome on the questions put to the expert groups. Brazil expressed the need to look beyond the expert reports, highlighting other crucial issues related to ABS and traditional knowledge that should be addressed.

Regarding the chapeau of the draft outcome, citing the COP 9 mandate for the Article 8(j) Working Group to review the expert reports on traditional knowledge and compliance, Canada requested to specify that views were "identified by a majority of parties." Several delegates opposed, with Malaysia noting that many proposals had been supported by all parties, others by an overwhelming majority and some by all but one party. The EU proposed to include reference to the methodology used by the contact group, and parties agreed to state in the chapeau that parties and observers were invited to submit elements and concepts in the expert reports that they considered particularly important, focusing on elements and concepts that "in their view received the broadest support from the expert group."

On Friday in plenary, Malaysia opposed a paragraph on conveying to the ABS Working Group "concepts and elements that should be considered in fulfilling the elaboration and negotiation of the international regime," noting that it did not reflect the agreement reached by the contact group, and proposed replacing that language with "inputs to the work of" the ABS Working Group in the elaboration and negotiation of the international regime. Malaysia, supported by the African Group and Brazil, also noted that the language stating "neither the concepts, elements nor the specific wording" of paragraphs "were negotiated," should be placed in a footnote. Delegates agreed to these and other minor amendments on the chapeau of the outcome.

Relationship between access and use of genetic resources and associated traditional knowledge: Canada suggested that traditional knowledge should be dealt with separately in the international regime and not be included in the element on access nor in the element on benefit-sharing. Brazil, India and others argued that the international ABS regime needs to reflect the integral connectedness of genetic resources and traditional knowledge. The African Group called for a two-tiered approach to PIC, where national PIC is provided by the competent national authority subject to PIC of indigenous and local communities to be provided by a competent local authority. Brazil pointed to consensus on not restricting exchange of genetic resources

between indigenous and local communities for traditional purposes. The African Group, supported by community representatives, stressed that traditional knowledge in the public domain should also be part of the international ABS regime. The African Group further argued that the international regime should also cover also non-documented traditional knowledge, proposed including reference to co-evolved and bio-cultural systems and, supported by Malaysia, for the newly formed Like-Minded Asia-Pacific Region, the inseparability of traditional knowledge and genetic resources. The Like-Minded Asia-Pacific Region also proposed adding reference to: Article 8(j) as a stand-alone provision that protects all traditional knowledge of indigenous and local communities; the need for the international ABS regime to embrace traditional knowledge; and *ex situ* access to traditional knowledge and genetic resources. Australia, New Zealand, Japan and Canada argued that under the CBD there is no legally binding obligation on states regarding traditional knowledge. Malaysia underscored that the whole CBD is legally binding. The African Group noted that a reference to "biological resources" as "an umbrella term" should be included.

Community-level procedures and customary laws: Many delegates supported the view that the international ABS regime should provide basic principles to ensure respect for customary laws and community-level procedures. The African Group and Norway called for respect for customary laws and community protocols. The African Group supported recognition of defined community-level structures and authorities and the development of community protocols, as well as the creation of an ombudsperson to take action on behalf of indigenous and local communities. Australia and Canada stressed the need to allow for flexibility in the international regime due to the wide diversity of community-level procedures and national regulations, especially approaches to ownership of genetic resources. Several delegates requested inclusion of a PIC standard in relation to national decision-making processes. The African Group, with Guatemala, Mexico and indigenous representatives, highlighted the need to address ownership of documented traditional knowledge and highlighted that public availability of traditional knowledge in databases does not imply free access. The Like-Minded Asia-Pacific Region suggested that the international regime call on national legislation to recognize the right of indigenous and local communities "to PIC and benefit-sharing when their knowledge is accessed and utilized."

PIC: IIFB supported the expert report conclusion about the existence of a strong basis for the requirement of PIC of indigenous and local communities under international law, and stressed that PIC should be obtained according to customary laws. Malaysia and the African Group and indigenous representatives argued there is a clear basis in international law for PIC of indigenous and local communities, which should be reflected in the international regime.

Argentina recommended that the international regime include measures on PIC, with the African Group adding that PIC should be free of coercion. The EU stressed that even a community PIC requirement under the international regime could not

override national regulations with different standards. Noting that CBD Article 15 only refers to state PIC, Malaysia stated that there should be an equally mandatory obligation regarding community PIC, as set out in previous COP decisions and the Bonn Guidelines. The African Group and others considered Article 8(j) as the basis for a requirement that PIC be obtained from indigenous and local communities when their traditional knowledge is accessed. Canada opposed any requirement for PIC and MAT related to traditional knowledge under the international regime. Indigenous representatives requested reference to compliance with PIC and MAT rather than consultation requirements, and that national laws should respect customary laws and community-level procedures.

Indigenous representatives requested using the term “free” PIC throughout the document as set out in the UNDRIP. The African Group warned against introducing a concept that is not yet used under the CBD, and would need to be defined. Mexico and Malaysia supported the need for benefit-sharing arrangements for *ex situ* access to traditional knowledge, as well as the expert group’s list of desirable elements for PIC.

On Friday in plenary, Mexico stressed the need to clearly indicate that “the competent authority at the level of indigenous and local communities with a statutory authorization/mandate” should be the one “established by indigenous and local community authorities,” with Namibia adding “subject to national legislation.”

Other issues: In plenary on Friday, the African Group noted that references to “indigenous authorities” should be substituted with “indigenous and local authorities,” while Brazil suggested “authorities established by indigenous and local communities.” Brazil also proposed adding that Article 8(j) encourages the equitable sharing of the benefits arising from the utilization of traditional knowledge.

On transboundary traditional knowledge, Burkina Faso noted that this may involve more than two countries. The IIFB, supported by Malaysia and the African Group, proposed reintroducing text suggesting that the international regime should contain specific language on the rights of indigenous and local communities over their traditional knowledge and associated genetic resources.

The EU requested noting in the final report that the EU refrained from commenting on proposals made in plenary on Friday, because the document was not being negotiated.

Final Outcome: The views on the international ABS regime, to be submitted by the Article 8(j) Working Group to the ABS Working Group (UNEP/CBD/WG8J/6/L.5), include a chapeau setting out that:

- in accordance with the COP 9 mandate, the Article 8(j) Working Group reviewed the expert reports on traditional knowledge and compliance and provided a range of detailed and focused views as input into the ABS working group to assist in the further elaboration and negotiation of the international ABS regime related to traditional knowledge associated with genetic resources;
 - in elaborating views, parties and observers were invited to submit elements and concepts of the expert reports that they considered as particularly important, focusing on those elements and concepts that, in their view, received the broadest support at the expert meetings; and
 - in a footnote in the chapeau, the elements and concepts or the specific wording of the views on ABS were not negotiated.
- The concepts and elements listed include that:
- Article 15 (benefit-sharing) and Article 8(j) are mutually supportive and the development of the international regime should support respect and protection of traditional knowledge;
 - Article 8(j) is a stand-alone provision protecting traditional knowledge for the conservation and sustainable use of biodiversity within the CBD mandate, including traditional knowledge associated with genetic resources;
 - traditional knowledge and genetic resources are “inseparable” “when they are associated”;
 - traditional knowledge that provides the lead to properties of a genetic resource, although it may not be reflected in the end product, remains associated with that product;
 - there is not always a relationship between the owners of genetic resources and knowledge holders, and the relationship between access and use may vary depending on the nature of state sovereignty;
 - biological resources is an umbrella term used by some countries and communities in addressing access and benefit-sharing in order to encompass not only genetic resources, but also biochemical properties, etc.;
 - traditional knowledge is intrinsically linked to a genetic resource and the international regime should embrace traditional knowledge;
 - there is a need to address not only *in situ* but also *ex situ* traditional knowledge associated with genetic resources, including in databases or libraries, and to ensure benefit-sharing;
 - some characteristics of traditional knowledge include: a link to a particular culture or people, a long period of development, dynamic and evolving nature, the fact of being local in nature, and difficulty to identify the original creators;
 - the international regime should not restrict the exchange of genetic resources and traditional knowledge among communities for traditional purposes;
 - there is a wide variety of community-level procedures, which address access to genetic and biological resources, and customary laws that are relevant to the international regime;
 - when communities have well-defined structures and authorities, national regulations can rely on them; and, where they do not exist, their establishment would be desirable, community protocols being a useful approach in this respect;
 - the international regime needs to address the issue of ownership over traditional knowledge that is already documented in databases;

- the international regime should provide basic principles to ensure respect for customary laws and community-level procedures;
- competent national authorities and focal points have to inform applicants about access procedures and rights of indigenous and local communities;
- capacity building at the community level is required to develop clear procedures for access to traditional knowledge;
- the international regime should contain specific language on the rights of indigenous and local communities over their traditional knowledge and associated genetic resources;
- the international regime should call for state legislation to recognize the rights of indigenous and local communities to PIC and benefit-sharing, when their knowledge is accessed and used;
- the international regime could require that national law build on the Bonn Guidelines;
- a competent national authority could significantly contribute to promote compliance and ensure community PIC;
- legal certainty could be enhanced by including community PIC in the international regime;
- compliance measures that support community PIC regarding the use of their traditional knowledge associated with genetic resources, could include disclosure requirements concerning the origin or source of genetic resources;
- there is a progressive trend towards international law mandating a community PIC requirement for traditional knowledge associated with genetic resources;
- there are desirable elements for community PIC, including: competent national authority, competent authority at the level of indigenous and local communities with a mandate as established by indigenous and local community authorities subject to national legislation, PIC on the basis of MAT, and consultation processes with indigenous and local communities;
- incentives for establishing competent national authorities should be provided in the international regime;
- internationally recognized certificates could provide evidence that community PIC has been obtained in regard to traditional knowledge associated with genetic resources, to be issued by a competent national authority;
- the work of the WIPO IGC and its general conclusion that *sui generis* systems may be required to protect traditional knowledge were noted, that is the WIPO/IGC has developed *sui generis* draft provisions for the protection of traditional knowledge in light of increasing recognition that existing intellectual property tools are not fully adequate in protecting traditional knowledge;
- a critical distinction between traditional knowledge associated with genetic resources being in “the public domain” versus being “publicly available” was recognized;
- it cannot be assumed that traditional knowledge that has been made publicly available does not belong to somebody and PIC will still be required along with benefit-sharing;
- customary laws generally also address natural resources,

including genetic resources and associated traditional knowledge;

- the respect for the rights of indigenous and local communities will constitute the basis for PIC and MAT; and
- specific measures to promote compliance could include: establishment or recognition of indigenous competent authorities, an internationally recognized certificate of compliance, recognition of existing rights of indigenous and local communities in minimum and standard contractual terms for ABS arrangements, monitoring of use of traditional knowledge through checkpoints, and capacity building to facilitate community participation in PIC and MAT procedures.

MULTI-YEAR PROGRAMME OF WORK

The multi-year programme of work on the implementation of Article 8(j) and related provisions (UNEP/CBD/WG8J/6/2) was first discussed in plenary on Tuesday. Discussion continued on Tuesday afternoon and Wednesday in a contact group co-chaired by Tone Solhaug (Norway) and indigenous representative Gunn-Britt Retter. A draft recommendation (UNEP/CBD/WG8J/6/CRP.5) was discussed in plenary on Thursday. On Friday, a revised draft recommendation was adopted with amendments.

On priority tasks 7 (benefit-sharing), 10 (unlawful appropriation) and 12 (legislation and other implementation mechanisms), to be included in the work programme, the EU argued that a decision on this should be revisited upon completion of the negotiation of the international ABS regime, while Brazil argued that the COP mandated to undertake these tasks regardless of the status of that negotiation. On Friday, in plenary, delegates discussed whether the “priority” tasks should be initiated “pending the results of the negotiations on the international regime.” Noting that priority tasks have already been initiated, the EU suggested, and delegates agreed to, merging the “priority tasks” with ongoing ones.

On broadening the Working Group mandate, Canada, supported by the EU and others, favored a focus on conservation and sustainable use, especially on Article 10(c) (customary use). Delegates also discussed whether to introduce reference to Article 10(d) on supporting local populations to develop and implement remedial action in degraded areas where biodiversity has been reduced. Brazil, supported by the African Group and Argentina, but opposed by the EU and Norway, proposed deleting it, cautioning against broadening the focus of the Working Group. Delegates eventually decided to delete it.

On the in-depth dialogue on thematic areas and other cross-cutting issues, many stressed that benefit-sharing modalities should be the priority for future meetings. The EU suggested protected areas, and Norway and others suggested climate change. Delegates decided to delete detailed proposals on an in-depth dialogue on climate change, letting the COP decide on the priority theme for the in-depth dialogue.

On indicators, Brazil, supported by the EU, opposed a proposal by a community representative to insert references to land security. Delegates supported a proposal by a community representative on an indicator on status and trends of land-use

change and land security in traditional territories of indigenous and local communities. On Friday, in plenary, Brazil proposed and plenary agreed to delete the reference to “land security” and insert a new paragraph on the development of indicators on “secured land tenure.”

On guidelines for the repatriation of information and traditional knowledge to facilitate the recovery of traditional knowledge, delegates could not decide on whether to adopt draft terms of reference to develop the guidelines, with Canada favoring instead a compilation of views on best practices and the EU suggesting the establishment of a consultative process on this issue. Delegates agreed to annex to the draft recommendation the terms of reference for developing the guidelines, with the understanding that this is the text prepared by the Secretariat and does not reflect parties’ positions.

Final Recommendation: The recommendation on the multi-year programme of work on the implementation of Article 8(j) (UNEP/CBD/WG8J/6/L.6) includes sections on: progress reports, in depth-review and the revised multi-year programme of work, Article 10, the revised agenda for the Article 8(j) Working Group, indicators, participation, capacity building, technical guidelines for recording and documenting traditional knowledge, and UNPFII recommendations. The terms of reference for developing guidelines to facilitate repatriation of information, including cultural property, as presented in document UNEP/CBD/WG8J/6/2/Add.2 are annexed to the recommendations only for reference purposes.

The Working Group recommended that the COP, *inter alia*:

- decide to revise the work programme by, among other tasks, maintaining ongoing tasks, including 1 (capacity building), 2 and 4 (mechanisms for participation), 7, 10 and 12, and, based on the results of the work, identifying any future activities needed to fulfill these tasks;
- decide to include a new major component on Article 10, with a focus on Article 10(c) (customary use), and request parties, and indigenous and local communities to submit information regarding the implementation of this provision;
- authorize the Secretariat to convene, subject to availability of funds, an international meeting on Article 10 with a focus on Article 10(c) to provide advice on the content and implementation of the new major component;
- request the Working Group at its seventh session (WG 7) to develop a strategy to integrate Article 10, with a focus on Article 10(c), as a cross-cutting issue into the CBD work programmes and thematic areas, beginning with the protected areas work programme;
- request the Secretariat to continue to compile and analyze submissions from parties and other organizations on national and international approaches for repatriation, for consideration by the Working Group in order to establish best practice guidelines. In a footnote, the Working Group recommends that COP 10 consider the draft terms of reference annexed to the recommendation for ease of reference;
- decide to include a new agenda item for future meetings of the Article 8(j) Working Group entitled “in-depth dialogue

on thematic areas and other cross-cutting issues,” and that at WG 7 the in-depth dialogue will be on one of the following themes: benefit-sharing, protected areas, or biodiversity and climate change;

- decide to convene an *ad hoc* expert group meeting of local community representatives to identify common characteristics of local communities and gather advice on how local communities can more effectively participate in the CBD processes;
- invite parties, indigenous and local communities’ organizations and international organizations and relevant stakeholders to provide views on the development of indicators on secured land tenure; and
- request the Executive Secretary to continue collaborating with the UNPFII, UN Educational, Scientific and Cultural Organization and WIPO, to assist WIPO in completing its work on the development of the toolkit on the documentation of traditional knowledge.

CLOSING PLENARY

On Friday afternoon, Rapporteur Chan introduced the draft report of the meeting (UNEP/CBD/WG8J/6/L.1). Cuba requested to reflect the need for the international ABS regime to include a section on terms and definitions. Japan requested that the report indicate that the contact group on ABS had identified areas where “the broadest support” was received from the expert groups, rather than areas on which experts were “in agreement.” Delegates adopted the report with these amendments.

The African Group welcomed the views on ABS as a valuable contribution to the negotiations on the international regime, and expressed concern at difficulties in obtaining visas to attend CBD meetings in Canada, reserving their right to revisit the decision on the CBD seat in Montreal. Canada confirmed her full commitment to the CBD and its objectives.

The EU expressed great satisfaction with the substantial results of the Working Group, in particular the ethical code, and prioritized addressing threats of climate change to indigenous and local communities in the work programme. Haiti, for the Latin America and Caribbean Group, called for the adoption of an international ABS regime by 2010. Venezuela underscored that WIPO does not address human rights related to traditional knowledge.

IIFB expressed satisfaction with: the recognition of the importance of customary laws in developing *sui generis* systems; the focus on Article 10(c) in the revised work programme; and the potential of the views on ABS to provide the basis for strong language in the international regime on indigenous rights to knowledge, resources and PIC. In addition, IIFB expressed concern with: the lack of recognition by some parties of indigenous and local communities as owners of traditional knowledge; the lack of agreement on referring to “indigenous peoples” in the context of the CBD; and certain countries’ opposition to UNDRIP as a normative standard under the CBD. IWB Latin America stressed that: indigenous and local communities should be able to identify their authorities in

line with customary laws and practices; indigenous and local communities have proprietary rights over traditional knowledge, practices and innovations related to genetic resources; and the international regime on ABS should refer to “publicly available” traditional knowledge, to allow application of PIC and benefit-sharing.

IFLC, supported by Brazil, emphasized the “historic” decision to convene an *ad hoc* expert group meeting on local communities. Malaysia explained that the Like-Minded Asia-Pacific Region had been formed at this meeting to provide a forum for developing countries in the region with common interests, anticipating that the Region will participate actively in the ABS negotiations. Kiribati stressed the importance of close coordination between the Article 8(j) Working Group and ABS Working Group. Brazil encouraged continuing the work on *sui generis* systems.

Several delegates thanked the Working Group Co-Chairs for their able leadership, and India for offering to host COP 11; and praised the collaborative and friendly atmosphere of the meeting. CBD Executive Secretary Djoghlaif paid tribute to the late French anthropologist Claude Lévi-Strauss, congratulated participants on fruitful collaboration between country delegates and community representatives, and expressed hope that the number of CBD parties will grow in the near future. Co-Chair Breier congratulated delegates on the development of the work programme and the views on ABS, and invited parties to overcome their differences on bracketed text remaining in the ethical code by COP 10. Co-Chair Mullenkei encouraged delegates to go to COP 10 in Nagoya with the message of preserving Mother Earth for future generations. Co-Chair Breier gavelled the meeting to a close at 5:05 pm.

A BRIEF ANALYSIS OF THE MEETING

Tkariwaié:ri – the Mohawk term for the “right way of doing things” – inspired delegates flocking to Montreal for the sixth meeting of the Working Group on Article 8(j) (traditional knowledge) and preparing for the subsequent negotiations on access and benefit-sharing (ABS). The spirit of Tkariwaié:ri seemed to carry delegates through a constructive exchange of views on the traditional knowledge element of the international ABS regime, and help them conclude amicable negotiations on the revised Article 8(j) work programme and the elements for a code of ethical conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities. Such positive spirit infused new life into the Working Group and bode well for the upcoming ABS negotiations. This brief analysis will first provide an overview of the challenges at this session, and then concentrate on the ethical code and the views on ABS, looking both at the future of the Article 8(j) Working Group and at the upcoming session of the ABS Working Group.

LOOKING FOR DIRECTION

After work on many substantive items had stalled at its last two sessions, the Article 8(j) Working Group knew that this session was critical or its future may be in doubt. In one

of the meeting documents it was suggested to downgrade the Working Group into a cross-cutting think tank. This idea was, however, only briefly mentioned by one party, and not followed up on. Instead, parties appeared to be seriously committed to tackling the remaining tasks in the Article 8(j) work programme, demonstrating that the unique interactions between parties and communities in this forum can greatly contribute to all CBD objectives. In addition, parties and community representatives expressed warm support for an ambitious work programme, with Article 10 (sustainable use) becoming a new “major component.” While in the last few years ABS has dominated the discussions in the Working Group, the new work programme now allows for specific discussions of traditional sustainable use.

One long-standing task remains the elaboration of *sui generis* systems for the protection of traditional knowledge. The CBD had been expected to take a lead on this issue, but while its work stalled, negotiations gained momentum under the World Intellectual Property Organization (WIPO) on an international legal instrument or instruments to ensure the effective protection of genetic resources and traditional knowledge. In October 2009, the WIPO General Assembly instructed its Intergovernmental Committee on Traditional Knowledge and Folklore to undertake text-based negotiations and reach agreement by 2011 on an international legal instrument(s) to ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions. An increasing number of CBD parties have thus pointed to WIPO as the forum that should deal with intellectual property-related aspects of traditional knowledge protection. This approach, however, is not favored by the majority of indigenous representatives and some developing countries, who feel that the tools available to that forum are not sufficiently broad and informed by human rights standards. In the end, delegates kept the work on *sui generis* systems on the revised Article 8(j) work programme, hoping that the CBD can contribute with its focus on the role of customary laws to the elaboration of *sui generis* systems for the protection of traditional knowledge, complementing the negotiations under WIPO.

TKARIWAIÉ:RI ETHICAL CODE

The ethical code that indigenous delegates proposed to name after the Mohawk term “Tkariwaié:ri,” had been a long time in the making as a key contribution to ensure respect for the cultural and intellectual heritage of indigenous and local communities. Its adoption by COP 10 would be a significant success for the working group. Discussions on the substantive elements were constructive, but few parties still oppose references to “lands and waters traditionally occupied and used by indigenous and local communities,” and indigenous and community PIC, although the very same terms had already been agreed upon in the Akwe: Kon Guidelines and previous CBD decisions. As PIC and land rights are recognized in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), its adoption seemed to have further solidified support for indigenous rights among the vast majority of CBD parties. It may, however, have had the opposite effect on the two parties – Canada and

New Zealand – who openly oppose UNDRIP, and who appear more adamant than ever in opposing references to PIC and indigenous lands. Canada mentioned domestic law concerns in dealing with indigenous land claims, and with New Zealand insisted that consultations are sufficient to ensure “approval and involvement” of indigenous and local communities.

More generally, some parties now seem ready to use the human-rights expression “indigenous peoples” in the context of the CBD, which implies recognition of their specific international status based on the right to self-determination. The Working Group also recognized the need to draw a distinction between indigenous and “local communities” by establishing an expert group to identify the common characteristics of local communities. In the long term this distinction may help clarify the different priorities for these two different groups under the CBD, given that they have different legal status under national and international law.

The possible impacts of the ethical code, which is yet another voluntary instrument, vary significantly. If it follows the tracks of the Akwé: Kon Guidelines, it will end up being cited in the negotiations, but little known and rarely applied on the ground. A different fate can be associated with the Bonn Guidelines on ABS, which, albeit voluntary, have served as a stepping stone in developing what many expect to be a legally-binding instrument on ABS. The optimists at the meeting thus looked at the ethical code as a potentially influential soft-law instrument, hopeful that some of its elements will be incorporated in the international ABS regime, or at least in national legislation.

ABS VIEWS

The fact that several key ABS negotiators participated in the Article 8(j) meeting was a good indicator of the importance parties attach to the traditional knowledge element of the international ABS regime. The Co-Chairs of the ABS Working Group were also present throughout the ABS-related sessions of the Article 8(j) Working Group, making it clear that the views expressed at this session will influence the “official” negotiations on ABS next week.

The *Tkariwaié:ri* spirit was particularly evident in discussions on ABS, especially when compared with the previous Article 8(j) meeting in Montreal in 2007, when the working group could not reach consensus on its input into the ABS process. This time around, the Article 8(j) Working Group had a more limited mandate of “elaborating detailed and focused views as input to the ABS Working Group,” which made the procedure clear by excluding textual negotiations, and provided a substantive focus on the traditional knowledge elements of the international ABS regime. These clarifications allowed delegates to get down to work on the reports of the expert groups on traditional knowledge and compliance. Progress in the ABS negotiations since 2007 also contributed to the constructive debate, as delegates had also come to recognize that traditional knowledge will be a key element of the international ABS regime.

The work by the experts was notable in making a strong case for a basis in international law for a mandatory PIC requirement for indigenous and local communities. For the first time in a CBD meeting, this was supported by a vast majority of parties, with very few remaining categorically opposed to references to indigenous and community PIC. These parties, instead, proposed to deal with access to traditional knowledge associated with genetic resources through MAT, appearing to favor contractual arrangements with communities, leaving it to parties to define on a case-by-case basis the modalities of engaging indigenous and local communities.

At the crux of the debate seemed to be the issue of recognition of the integral connection of traditional knowledge to lands and all resources and whether indigenous rights over them should be recognized. A majority of parties seemed to support the holistic approach according to which indigenous peoples and local communities hold the traditional knowledge and have to provide PIC for access to genetic resources under their control. Other parties, however, wished to refer only to cases where traditional knowledge is clearly associated with specific genetic resources. The EU, instead, proposed to limit the traditional knowledge element of the international ABS regime to “uses” that are based on traditional knowledge. No matter which position prevails, the value of traditional knowledge should not, as one delegate noted, be underestimated since determining the uses of genetic resources without relying on traditional knowledge would be like looking for a needle in a haystack.

LOOKING INTO THE FUTURE

Overall, the constructive debates and concrete results achieved during the week demonstrated that the Article 8(j) Working Group is alive and well, and setting a course for the future. This is due in large part to the recognition of the importance of ensuring that traditional knowledge is integrated throughout the CBD work programme and themes, as well as the need for the Working Group’s continued contribution to all CBD objectives.

In the short term, the results and the cooperative spirit permeating discussions on the traditional knowledge element of the international regime in the Article 8(j) Working Group bode well for the ABS Working Group, where the traditional knowledge element will be negotiated. It has become clear that some CBD negotiators are looking for the “right way of doing this” - *Tkariwaié:ri*.

UPCOMING MEETINGS

ABS-WG 8: The eighth meeting of the CBD *Ad Hoc* Open Ended Working Group on Access and Benefit-Sharing meets from 9-15 November 2009, in Montreal, Canada. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/wgabs8/>

REGIONAL WORKSHOP FOR CENTRAL AND EASTERN EUROPE ON THE REVIEW OF IMPLEMENTATION OF THE PROGRAMME OF WORK ON PROTECTED AREAS: This workshop to propose

ways and means for strengthening the implementation of the programme of work on protected areas for consideration by the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) will be held from 27 November to 1 December 2009, on the Isle of Vilm, Germany. For more information, contact: International Academy for Nature Conservation; tel: +49-38-301-86-112; fax: +49-38-301-86-117; e-mail: Martina.Finger@bfn-vilm.de; internet: http://www.bfn.de/0603_kalender.html

THIRD BUSINESS AND THE 2010 BIODIVERSITY CHALLENGE CONFERENCE: This Conference will be held from 30 November to 2 December 2009, in Jakarta, Indonesia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/business3/>

WIPO IGC 15: The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) will be held from 7-11 December 2009, in Geneva, Switzerland. For more information, contact: WIPO Secretariat; tel: +1-41-22-338-9111; fax: +41-22-733-5428; internet: http://www.wipo.int/meetings/en/details.jsp?meeting_id=17585

FOREST ECOSYSTEMS WORKSHOP 3: The third workshop for indigenous and local communities in Latin America and the Caribbean on information technologies, tourism and biodiversity in forest ecosystems will be held from 9-11 December 2009, in Ecuador, at a venue to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

UNPFII EXPERT MEETING ON CULTURE AND IDENTITY: An international expert group meeting of Indigenous Peoples on Development with Culture and Identity: Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples will be convened by the UN Permanent Forum for Indigenous Issues (UNPFII) from 12-14 January 2010, at UN Headquarters in New York. For more information, contact: UNPFII Secretariat; tel: +1-917-367-5100; fax: +1-917-367-5102; e-mail: IndigenousPermanentForum@un.org; internet: <http://www.un.org/esa/socdev/unpfii/en/workshops.html>

CITES COP 15: The 15th Conference of the Parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) will be held from 13-25 March 2010, in Doha, Qatar. For more information, contact: CITES Secretariat; tel: +41-22-917-8139; fax: +41-22-797-3417; e-mail: info@cites.org; internet: <http://www.cites.org>

ABS WG 9: The ninth meeting of the CBD *Ad Hoc* Open Ended Working Group on Access and Benefit-sharing is scheduled from 18-24 March 2010, in Colombia, at a venue to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/meetings/>

UNPFII 9: UNPFII ninth session will be held from 19-30 April 2010, at UN Headquarters in New York. For more information, contact: UNPFII Secretariat; tel: +1-917-367-5100; fax: +1-917-367-5102; e-mail: IndigenousPermanentForum@un.org; internet: http://www.un.org/esa/socdev/unpfii/en/session_ninth.html

CBD SBSTTA 14: The 14th meeting of the Subsidiary Body on Scientific, Technical and Technological Advice will be held from 10-21 May 2010, in Nairobi, Kenya. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/doc/?meeting=SBSTTA-14>

WGRI 3: The third meeting of the CBD *Ad Hoc* Open-ended Working Group on Review of Implementation of the Convention will be held from 24-28 May 2010, in Nairobi, Kenya. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/doc/?meeting=WGRI-03>

EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES: The third session of the UN Expert Mechanism on the Rights of Indigenous Peoples will be held from 12-16 July 2010, in Geneva, Switzerland. For more information, contact: Office of the High Commissioner for Human Rights; tel: +41-22-928-9676; fax: +41-22-928-90-66; e-mail: expertmechanism@ohchr.org; internet: <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm>

CBD COP 10: The tenth Conference of the Parties to the CBD will be held from 18-29 October 2010, in Nagoya, Japan. COP 10 is expected to: assess achievement of the 2010 target to reduce significantly the rate of biodiversity loss; adopt an international ABS regime; and celebrate the International Year of Biodiversity 2010. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@cbd.int; internet: <http://www.cbd.int/doc/?meeting=COP-10>

GLOSSARY

ABS	Access and Benefit-sharing
CBD	Convention on Biological Diversity
COP	Conference of the Parties
GURTs	Genetic Use Restriction Technologies
IFLC	International Forum of Local Communities
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IIFB	International Indigenous Forum on Biodiversity
IPRs	Intellectual Property Rights
IWBN	Indigenous Women's Biodiversity Network
MAT	Mutually Agreed Terms
PIC	Prior Informed Consent
UNDRIP	UN Declaration on the Rights of Indigenous People
UNPFII	UN Permanent Forum on Indigenous Issues
WIPO	World Intellectual Property Organization