

CONVENTION ON BIOLOGICAL DIVERSITY

The Convention on Biological Diversity (CBD) is an international treaty under the United Nations. The CBD has three objectives: to conserve biodiversity, to promote its sustainable use and to ensure the equitable sharing of the benefits arising from its utilization.

The Convention has developed programs of work on thematic issues (such as marine, agricultural or forest biodiversity) and cross-cutting issues (such as traditional knowledge, access to genetic resources or protected areas). All these programs of work have a direct impact on indigenous peoples' rights and territories. The CBD recognizes the importance of indigenous knowledge and customary sustainable use for the achievement of its objectives (articles 8(j) and 10(c)) and emphasises their vital role in biodiversity.

The International Indigenous Forum on Biodiversity (IIFB) was established in 1993, during COP3, as the indigenous caucus in the CBD negotiations. Since then, it has worked as a coordination mechanism to facilitate indigenous participation in, and advocacy on, the work of the Convention through preparatory meetings, capacity-building activities and other initiatives. The IIFB has managed to get many of the CBD programs of work to consider traditional knowledge, customary use or the effective participation of indigenous peoples, and has been active in the negotiations regarding access to genetic resources in order to defend the fundamental rights of indigenous peoples that should be included therein.

CBD negotiations during 2010 were subordinated to the elaboration and negotiation of a binding Protocol on access to genetic resources and the sharing of the benefits arising from their utilization. This instrument was finally adopted at the 10th COP. It is the second Protocol under the CBD and is known as the Nagoya Protocol.¹

2010 was a very important year for the CBD as it was the deadline for achieving the objectives that the Parties had adopted in 2002, including the so-called *2010 Biodiversity Target* (Target 2010), the aim of which was “to achieve, by 2010, a significant reduction in the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth”. This target was later adopted by the UN World Summit on Sustainable Development² and by the UN General Assembly and was incorporated as a new target into the Millennium Development Goals.

An assessment of the progress made in achieving Target 2010, conducted by Global Biodiversity Outlook,³ showed that it had been a failure. The CBD had begun a process to establish a new Strategic Plan for the period 2011-2020. The adoption of this plan, and the allocation of the financial resources needed to implement it, was linked to the adoption of the Nagoya Protocol. Despite extremely tense moments in the negotiations, COP10 did finally adopt a new Target and Strategic Plan, a resource mobilisation plan and the Nagoya Protocol, along with decisions on the implementation of some other articles.⁴

Negotiation of the Nagoya Protocol: process and results⁵

The work of the WGABS⁶ at its eighth meeting, in 2009, had produced an unworkable negotiation document (the Montreal annex).⁷ In an attempt to find converging positions through informal meetings, the Co-chairs⁸ (Timothy Hodges, Canada, and Fernando Casas, Colombia) called an initial meeting of the “Friends of the Co-chairs” in January 2010 in Montreal. Two representatives of the indigenous and local communities were invited to that meeting, which was part of a process encompassing intra- and inter-regional preparatory meetings for the ninth meeting of the WGABS, at which substantial agreements would have to be made if the Protocol was to be adopted by COP10.

The WGABS-9 met in Cali, Colombia, in March 2010. Following the failure of several contact groups, the Co-chairs decided to establish an Inter-regional Negotiating Group (ING) comprising five representatives per UN region plus two representatives per group of observers (indigenous and local communities, industry, public sector and civil society). The International Indigenous Forum on Biodiversity (IIFB) appointed representatives (one per biocultural region) who could rotate at the negotiation table. The remaining indigenous representatives

attended the meetings as observers and consultants to the negotiators. The Co-chairs made use of their prerogative to submit a Co-chairs' text to replace the unworkable Montreal annex. All the Parties, whilst expressing reservations, accepted the text as a basis for negotiations. However, Cali again showed the deep differences between the positions of the Western countries (particularly Canada, Australia, New Zealand and the European Union), together with other developed industrialized countries such as Japan and Korea, and those held by developing countries, grouped in the African Group, the Like-Minded Megadiverse countries from Asia Pacific and GRULAC.⁹

In the contact groups, in the meetings with the Co-chairs and with the Parties and in the Inter-regional Negotiating Group (ING), the IIFB expressed its disappointment with the Co-chairs' text, requesting, as a minimum: (1) full respect for indigenous peoples' and local communities' rights; (2) that their free, prior and informed consent should be obtained before accessing traditional knowledge and that this could not be subject to national legislation; (3) recognition of indigenous peoples' and local communities' rights over their genetic resources; (4) that traditional knowledge and indigenous peoples' rights should be fully considered throughout the whole Protocol, particularly under the compliance section; and (5) recognition of indigenous peoples' customary law.¹⁰

The Cali meeting did not manage to agree on a negotiated text. A new roadmap was set for the continuation of the negotiations, now based on the "Cali annex", and the meeting was postponed until the following July in Montreal, where it would form an ING meeting. In this second part of the WGABS-9 meeting, no substantial advances were made on key issues and so, after a week of intense work, the meeting was adjourned once more, to be reconvened in September. There were intense contacts among the Parties in the interim period but the September meeting was again unable to reach agreement on the issues at hand. The main issues of concern had, nonetheless, now been pinpointed, the proposals and positions of the groups had been identified and the basic structure of the Protocol had been laid. Parties would have to wait for Nagoya to find out if the process would deliver a binding instrument to be adopted by COP10 or not.

The WGABS-9 reconvened in Japan, as an ING meeting, five days before the start of the COP, and preceded by informal consultations. In the closing plenary of the meeting, the longest WG meeting in the history of the CBD (from April to October), the Co-chairs announced that, in spite of some progress, no

agreement had been reached. The COP instructed the Co-chairs to continue the negotiations during the COP and to report back on progress to the Plenary, so the negotiators' group worked parallel to the COP during the two weeks of its duration. The final agreement, to some extent forced by Japan as Conference host, was only achieved on the very last day of COP10. As the adoption of the Protocol was, for many developing countries, a prerequisite to accepting the Strategic Plan for 2011-2020, together with sufficient funding provision, it was not until early in the morning of October 30 that all the decisions could be jointly adopted.

Although a careful analysis is needed to adequately assess the content of the Nagoya Protocol in terms of indigenous peoples' rights, it can be seen that the Protocol does establish a framework for regulating access to genetic resources in provider countries and ensures there is an equitable sharing of the benefits arising from the utilization of those resources, as well as prescribing measures for monitoring, compliance, access to justice, awareness raising and capacity building. The Nagoya Protocol is ambiguous in the description and obligatory nature of many of these measures, so both Parties and observers have pointed out that it is only a starting point, a first step, in the fight against the misappropriation of genetic resources and associated traditional knowledge.¹¹

In terms of indigenous rights, the text of the Protocol is equally weak.¹² The recognition of rights is highly qualified, and linked to recognition within national regulatory frameworks (laws, policies and other measures) that now need to be developed. Although the Protocol takes note of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) within its preamble and states in its objective that the Protocol will respect "all rights" to resources, the various articles referring to indigenous peoples are quite limited in the recognition of rights. For the provisions on respect for indigenous peoples' prior and informed consent, their rights of ownership over their resources and knowledge, and their right to equitable benefit-sharing to be applied in accordance with indigenous rights, indigenous peoples will need to work to develop measures deemed appropriate both within their territories and at the national level. It is vital that indigenous peoples know about and analyze the Protocol and the processes that are now bound to commence in their countries and their own territories to ensure that their rights are fully recognized and respected in this regard.

The Protocol will be open for signature and ratification on 15 February 2011. It will enter into force after the 50th ratification. An Intergovernmental Committee has been established, which is due to meet for the first time in June 2011 to put in place some of the mechanisms envisaged in the articles (such as the clearing-house,¹³ the multilateral mechanism for sharing of the benefits arising from the utilization of resources for which consent cannot be obtained,¹⁴ etc.). Later on, once the Protocol has entered into force, its compliance will be assessed in Meetings of the Parties (MOP) of the Conference of the Parties (COP) to the Convention.

Other decisions taken by COP10

Besides the adoption of the Nagoya Protocol, COP10 adopted a new Strategic Plan 2011-2020. The Strategic Plan includes a specific target on the protection of traditional knowledge.¹⁵ The new Strategic Plan will influence not only the implementation of the CBD over the coming years but also many aspects of global and national policies on conservation, such as the protected areas policies. The Plan incorporates indicators to be used to measure progress towards the objectives and targets, including indicators of great importance to indigenous peoples, such as those referring to traditional occupations or land use. The implementation of the Strategic Plan could potentially form a framework within which indigenous peoples can work to obtain affirmation of their rights.

COP10 also adopted several decisions on Article 8(j), on indigenous peoples' traditional knowledge. One very interesting issue is the attention Parties are going to pay to one of the so-called related provisions: Article 10 (c). Article 10 (c) states that the Parties will protect and encourage the "customary sustainable use" of biological diversity. In order to assess how this very important article could be implemented, an expert seminar will be held to advise the WG8J¹⁶ on possible implementation activities, including a program of work. In addition, the WG8J will also work to implement the pending tasks in its program of work. The elements of a code of ethical conduct to ensure respect for indigenous peoples' heritage were also adopted.¹⁷ ○

Notes

- 1 The other Protocol adopted under the CBD is the Cartagena Protocol on Biosafety (adopted 29 January 2000, entered into force 11 September 2003), which has a supplementary protocol on responsibility and redress also adopted in Nagoya (Kuala Lumpur – Nagoya Protocol).
- 2 World Summit on Sustainable Development, Johannesburg, 2002. Declaration and Program of Action in A/CONF.199/20.
- 3 See <http://gbo3.cbd.int/>
- 4 The texts of COP10 decisions at <http://www.cbd.int/nagoya/outcomes/>. Daily bulletins on the progress of the meeting at <http://www.iisd.ca/biodiv/cop10/>. Broadcasting of the Conference at <http://webcast.cop10.go.jp/ondemand.asp>. IIFB statements and activities at <http://iifb.indigenousportal.com>.
- 5 The protocol is one of the instruments of the International Regime on access to genetic resources and benefit-sharing, which also includes the CBD itself, the Bonn Guidelines and other complementary instruments.
- 6 Ad hoc Open-ended Intersessional Working Group on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization.
- 7 See *The Indigenous World 2009*.
- 8 Appointed as Co-chairs for the whole of the negotiation process in COP8. See *The Indigenous World 2008 and 2009*.
- 9 The eastern European region played a very low key role in the negotiations. The megadiverse countries, which had established a grouping that cut across regional divisions, broke up in Cali, where the Like-Minded Megadiverse countries from Asia-Pacific emerged, mainly led by Malaysia and the Philippines. The groupings of the Parties changed over the course of the process, as negotiations evolved.
- 10 IIFB, *Opening statement*, Cali 22 March 2010.
- 11 See, for instance, the statement by Namibia on behalf of the African Group at the closing plenary session, stating it was not the best of instruments they had hoped for but that they would try to work with it as a starting point and trusted that it would become useful in its implementation. Other Parties made similar statements.
- 12 The Protocol, like the Convention, uses the term “indigenous and local communities”. The IIFB insisted all through the process on the use of the term “indigenous peoples and local communities”, stating that the adoption of UNDRIP called for this change in terms. This was not accepted by the Parties on the grounds of language consistency with the CBD text. The term used did undoubtedly make the recognition of the specific rights of indigenous peoples in the Protocol more difficult.
- 13 Article 11, advance unedited version.
- 14 Article 7a, advance unedited version.
- 15 Strategic Goal E, Target 18: “By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.” Target 14, Strategic Goal D, states “By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being,

- are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.” (Decision X/2)
- 16 Ad hoc Open-ended Intersessional Working Group on Article 8(j) and Related Provisions.
 - 17 *The Tkarhwaïé:ri code of ethical conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities* (Decision X/42).

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