Access and Benefit Sharing: Indigenous Peoples Concerns in the Negotiations for an International Regime (2)

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Harvesting forest products for food. Photo by: Sean Rubis

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Executive Summary

Access and benefit sharing (ABS) is among the most contentious issues between developing and developed states within the Convention on Biological Diversity (CBD). As the Parties get closer to adopting an international regime on access and benefit sharing, the stakes get higher not only for states but also for Indigenous Peoples.

At the heart of the issue is protection of our medicines and seeds and the indigenous knowledge that our ancestors have passed down over generations. We have kin and spiritual relationships with many of the species whose genes are sought for commercial exploitation. Thus many Indigenous Peoples believe we have sacred responsibilities to uphold and protect the plants, animals and even microorganisms from our traditional territories. Although the language of the negotiations is often highly technical, we must engage in the processes in order to protect our rights and affirm our obligations to protect the integrity of all life forms.

Section 1 of this briefing paper explains basic terms and concepts on access and benefit sharing frequently used in CBD processes. It also provides the context, background and status of the negotiations on a proposed regime on ABS. It is critical for Indigenous Peoples to understand that the global trade context of the regime means what is being negotiated are rules for the buying and selling of genes and traditional knowledge. Having such a basic understanding will enable us to participate more fully and effectively in the CBD.

Section 2 summarizes the main components of the regime, including specific proposals on benefit sharing, access to genetic resources, compliance measures and traditional knowledge. It focuses in particular on discussions in the fifth and sixth Working Group on Access and Benefit Sharing and a review of relevant ABS issues in the fifth Working Group on Article 8(j). Further it discusses proposals in the draft decision for the ninth Conference of the Parties (COP9) related to the objective, scope and nature of the regime and raises special concerns for Indigenous Peoples within the text.

Finally, Section 3 provides recommendations and strategies for Indigenous Peoples to consider implementing at COP9 in order to have a substantive input on the indigenous rights that must be protected in an international regime. These include recommendations in relation to the text of the draft decision and the proposal of the International Indigenous Forum on Biodiversity (IIFB) to have an inter-sessional international expert meeting on traditional knowledge.

Access and Benefit Sharing

Understanding Terminology: What is access and benefit sharing? What are genetic resources?

Access and benefit sharing is CBD terminology for **bioprospecting** activity undertaken by corporate, academic, government or independent researchers to find commercially valuable genes within plants, animals or microorganisms to use for pharmaceutical, chemical, agricultural or industrial purposes. Researchers often follow leads for these from Indigenous Peoples' **traditional knowledge (TK)** about where to find and how to use such plants or animals. Indigenous Peoples have known bioprospecting as **biopiracy**, the theft of their knowledge and biodiversity. To many of them, biopiracy is "biocolonialism" – the extension of the old processes of colonization, including exploitation of Indigenous Peoples and their natural resources and imposition of foreign laws on biodiversity and associated Indigenous knowledge.

Developing countries, primarily in the South, are home to tremendous biodiversity, which industrialized countries of the North are seeking to research, develop into new products, and commercialize. The North-South tension over biopiracy has led to one of the three primary objectives of CBD: "fair and equitable sharing of the benefits arising out of the utilization of genetic resources."

Specifically, ABS is the acronym for **access (to genetic resources and associated traditional knowledge) and benefit sharing** from their utilization. **"Genetic resources"** refers to the genes that make up every living organism. Seen to have commercial value, such genes have thus become "resources" that can be bought and sold, along with all the other vast natural resources that originate in Indigenous Peoples' territories. It is these genetic resources that governments and industry want access to for commercial exploitation and economic development. The "**access"** in ABS refers to obtaining both genetic resources and associated traditional knowledge for the purpose of research and development of a pharmaceutical, chemical, agricultural or other product with hopes of commercialization.

The CBD recognizes states as sovereign over natural, including genetic, resources within their boundaries. Thus they have the right to control access to these, which is known as **"prior informed consent" (PIC).** Each state also has a right to benefit from sharing its genetic resources. Under the CBD, genetic material and profits, research opportunities or other benefits should supposedly be shared according to **mutually agreed terms (MAT)**, often through a written contract, between the providing country and user country.

"Benefit sharing" refers to monetary or non-monetary benefits (i.e, research opportunities) that researchers and biotechnology companies are expected to share with the country that provided the genetic resource, or the Indigenous Peoples whose traditional knowledge was used to lead researchers to a new product. During the research and development phase, scientists isolate genetic traits and proteins that create such traits within an organism. In this process, academic or other public research institutions and biotech companies claim invention over the isolated genes and obtain **patents.** A patent is an intellectual property right that confers ownership over the claimed "invention" and grants the patent holder the exclusive right for approximately twenty years to commercialize the invention. The biotech industry claims that without patents, there would be no profits, and therefore, no benefits to share. For many years, Indigenous Peoples and civil society have asserted there should be no patents on life.

What is the international regime on ABS? What is the status of the negotiations?

When negotiations first began on the CBD, developing states hoped to create an international legal instrument to stop biopiracy, by requiring developed countries and multinational corporations to share the benefits they were generating from genetic resources originally taken from the biologically diverse global South. Thus, the CBD's third objective on "fair and equitable sharing of the benefits arising out of the utilization of genetic resources." (Article 1)

In order to facilitate implementation of that objective and related provisions in the Convention, COP5 created the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing (WGABS). Initially the Working Group's primary focus was to develop non-binding guidelines on access to and benefit sharing from genetic resources and associated TK for consideration by COP. In 2002, COP6 adopted the "Bonn Guidelines" to assist Parties, Governments and stakeholders in establishing legislative, administrative or policy measures on ABS and/or when negotiating contractual agreements for ABS.

Discontented with a non-binding instrument, developing states have continued to call for a legally binding regime. In 2002 they were successful in their efforts to include in the World Summit on Sustainable Development Plan of Implementation a call to action to "negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources" (para 44 (o).

In 2004, COP7 began action on the WSSD call by deciding to mandate WGABS to "elaborate and negotiate an international regime on access to genetic resources and benefit sharing with the aim of adopting an instrument/instruments to effectively implement the provisions of Article 15 and Article 8(j)." COP7 set the terms of reference for the Working Group, which includes a list of possible elements for it to consider, known as "the annex to decision VII/19 D." To date the bulk of the actual negotiations regarding the international regime have occurred over four WGABS meetings (WGABS-3 to 6), which are summarized below.

Dyes from plants are used to color the skin of indigenous peoples from the Amazon.

Photo by: Jocelyn Therese

Working Group Meetings and Outcomes/Decisions

Meeting	Date and Place	Outcome
WGABS-3	February 2005 Bangkok, Thailand	• Compiled proposals from country blocs reflected as various options on nature, scope, objectives and elements of proposed regime[75] • Created matrix -- referred to as "the gap analysis" or "the matrix." -- a partial analysis of gaps in the CBD and existing international law relevant to ABS[76]
WGABS-4	February 2006 Granada, Spain	• Consolidated options developed in Bangkok (as African Group's proposed protocol on ABS was opposed by developed countries) • produced bracketed text for COP8, reflecting views from both developing and developed countries on nature, scope, objectives and elements[77] of proposed regime • text forwarded to COP8 as annex to WGABS-4 report; referred to as "the Granada text," "the annex from WGABS-4" or "the annex to decision VIII/4 A"
WGABS-5	October 2007 Montreal, Canada	(WGABS- 5 and-6 agenda organized as 2 sessions of single meeting) • Discussed key elements of regime: benefit sharing, access to genetic resources, compliance measures (including proposed internationally recognized certificate of compliance with national law), TK and capacity building.
WGABS-6	January 2008 Geneva, Switzerland	• Continued discussion on agenda items on main components of regime • Results of WGABS- 6 submitted for consideration by COP9 to be held in Bonn, Germany, from 19-30 May 2008

At COP8, held in Curitiba, Brazil, an impasse occurred in the negotiations between the developing and developed countries (see next section). The Parties thus decided to reconvene WGABS twice in the succeeding two-year inter-sessional period before COP9 and instructed it to complete work on an international regime before COP10 in 2010.[78] It designated two permanent Co-chairs (Tim Hodges from Canada, Fernando Casas from Columbia) for the future Working Group.

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[75] UNEP/CBD/WG-ABS/3/L.6, Annex I
[76] UNEP/CBD/WG-ABS/3/L.6, Annex II
[77] UNEP/CBD/WG-ABS/4/L.2
[78] UNEP/CBD/COP/8/L.34, Part A, para 6 and 7.

Who are the power brokers and what are their objectives?

- The **Like Minded Mega-Diverse** countries (mostly Latin American, Asian and African countries) and **the African Group** want a new binding treaty at COP10. They are often described as **"countries of origin"** or **"provider countries."**
- The industrialized/developed countries (**EU, JUSCANZ** including Canada, Australia, New Zealand, Japan, USA) prefer a non-binding regime and assert a need for gap analysis in existing laws. These countries are often referred to as **"user countries"** but can also be countries of origin and/or providers. JUSCANZ, in the interest of industry, assert the primacy of WTO TRIPs (World Trade Organization Trade-Related Intellectual Property Rights) Agreement and WIPO (World Intellectual Property Organization) patent treaties, over the CBD, as far as regulating patents.
- **Industry** (i.e, biotechnology corporations) are the primary beneficiaries of intellectual property rights over genetic resources and commercialization. Industry wants predictable guidelines for bilateral contracts and view burdensome regulation as a bar to access and also a limit to the amount of benefits that can be generated.

What rights do Indigenous Peoples have within the proposed international regime?

COP7 reaffirmed Article 15.1, of the CBD, stating that "the sovereign rights of States over their natural resources and that the authority to determine access to genetic resources rests with the national Governments and is subject to national legislation." This language sets a dangerous starting point for negotiations on the regime. States assert that they have absolute sovereignty over genetic resources, and therefore the countries **do not recognize Indigenous Peoples' rights to control access to their own territories.**

In the CBD system, Indigenous Peoples are merely regarded as affected third parties and mere observers in the process. Indigenous Peoples and local communities are considered "traditional knowledge holders" or "stakeholders" but not "**rights holders."** Nevertheless, IIFB has insisted that the international regime *shall* recognize the rights of Indigenous Peoples, with no qualifications. The COP7 decision merely states that "the international regime *should recognize* and *shall respect* the rights of indigenous and local communities." Indigenous peoples have consistently advocated for and made concrete proposals to assert respect for our territorial rights and traditional knowledge, as well as measures for fuller participation in all the processes related to ABS.

This primary concern of Indigenous Peoples to protect the full breadth of our rights under international law and our own customary and/or codified legal systems is of the utmost importance.

What does "protection of traditional knowledge" mean for states and for Indigenous Peoples?

Protection, from an intellectual property law perspective, means that the owner of a patent, a copyright, a trademark or some other piece of intellectual property has a legal right to exclude others from using or reproducing it. The IPR forms of protection for intellectual creations and innovations are time limited, individualistic, monopolistic and exist for economic benefit. When the states say they are willing to protect TK, they mean within the context of commercialization.

By contrast, when most Indigenous Peoples speak of protecting Indigenous knowledge, we mean it in a much broader sense that includes safeguarding its continued existence and developing and protecting the whole social, economic, cultural and spiritual context of that knowledge. Indigenous Peoples are seeking mechanisms that protect the holistic,

inalienable, collective and perpetual nature of Indigenous knowledge systems for purposes far more expansive than profit motives.

The WIPO and CBD proposals for protecting TK are termed as either "positive" or "defensive" protection. **"Defensive protection"** refers to amendment of existing law or regulatory procedures that would help prevent unauthorized IPR claims. For example, **databases of TK**, established to document TK, are proposed as a way to facilitate prior art searches of patent offices and thereby limit the scope of a patent claim, so as not to extend to traditional knowledge. At WG8j-3, the IIFB stated that

> *Databases of traditional and associated biological knowledge could be a means to facilitate access by external entities, making traditional knowledge vulnerable to exploitation. Further, databases and registries have not yet proven useful as a means to effectively stop the granting of patents on products derived from IK and genetic resources. Traditional knowledge is dynamic, not static and cannot simply be documented and "fixed in a tangible form" to suit intellectual property law standards.*

Another proposal for defensive protection is to require **disclosure of the origin of genetic resources and/or TK** relevant to the inventions claimed in patent applications. Developing states want this requirement in order to identify the legitimate country of origin or provider of genetic resources or originators of knowledge that have provided a lead to the creation of a product. Ultimately, disclosure requirements may assist in legitimating the claims of such sources to a share in the commercial profits that would otherwise unfairly benefit corporations that develop and market a product.

Under the proposed **certificate of origin** system, patent applicants (i.e, inventors/corporations) would have to obtain official documentation from countries of origin and/or provider countries that genetic resources and/or TK were acquired in compliance with national ABS laws requiring prior informed consent and benefit sharing. Thus, the discussions have evolved to a point where the Parties refer more often to this idea as a **"certificate of compliance."** These proposed certificates serve as a stamp of approval to proceed with commercialization.

"Positive protection" is understood as TK holders acquiring an IPR or some alternative right created under a new *sui generis* system, such as recording TK in a **register.** Registers differ from databases in that they do not merely compile and list information, but rather record a claim to the TK in order for the registrant to gain legal rights. The register itself does not grant any rights as such, but would work in tandem with a *sui generis* law that recognizes the registrant as the legal rights holder to such knowledge. Registers and certificates of origin of TK could work together, whereby the certifying authority, proposed at this point to be a national government agency, could look to a TK register for the legal knowledge holder. Some Parties have also proposed developing an international registry or database of TK. However, IIFB has strongly opposed this proposal, and it was dropped from WG8j recommendations submitted to COP8.

No matter the model, each of these proposals would only provide "protection" to TK within a commercial context, albeit under presumably fair and equitable terms. The states' push to develop IPR-based mechanisms to "protect" TK actually poses much more threat to our knowledge, as a whole, than it can ever claim to prevent.

What benefit is benefit sharing? What does it mean to commercialize Indigenous knowledge and genetic resources?

Within the international regime on access and benefit sharing, the pervasive proposal to Indigenous Peoples is that they should accept benefit-sharing arising from the utilization of their traditional knowledge associated to genetic resources. Although the Parties propose an economic inducement to participate in benefit sharing agreements, Indigenous Peoples must carefully evaluate the political, social and cultural costs of participating in the commercialization of their knowledge and genetic resources. Without prior recognition of their right to decide whether to allow access to genetic materials within their lands and waters, the offer of benefit sharing stands to jeopardize their communities by inducing them to sell not only their genetic material but also their traditional knowledge associated with this.

It must be stressed here, that in the proposed international regime, states offer Indigenous Peoples benefit sharing for the use of their traditional knowledge, but not genetic resources. In the commercialization process of genetic resources, TK is proportionately small in the profit scale. While TK may help identify potentially profitable genetic resources, it is the patent or IPR holders who will truly benefit from any innovation, product, or processes resulting from exploiting the genetic material. Although the TK that led to the invention should be identified as part of the prior art, because TK is prior knowledge, as opposed to a new invention, it should not be included in the patent or other IPR claim. Thus, the value of TK, if acknowledged at all, will likely be considered a minimal contribution to the commercialization process of genetic resources, as compared to the innovation contributed by the inventor/researcher to create a new product. The end result for Indigenous Peoples is minimal benefits at the expense of alienating our traditional knowledge.

Many indigenous varieties of seeds are no longer available for use by indigenous communities as they have been expropriated by research institutes.
Photo by: Collin Nicholas

Indigenous Peoples must also be aware that there is a growing proportion of patents being claimed over **microorganisms,** including in marine environments. A special niche of research is emerging on a class of microorganisms often referred to as **"extremophiles."** These microorganisms are sought by industry for their genetic traits that allow them to survive in extremely cold or hot environments, such as in the deep sea, icebergs, geysers, geothermal or hydrothermal vents, for chemical application. Industry asserts that where genetic material that is invisible to the naked eye is used, there is generally no tie to associated TK, and consequently, no requirement for benefit sharing with Indigenous Peoples, even though the microorganisms may have been collected in their territories and/or waters.

One biotech company, Diversa Corporation, has gained access to microbes that thrive in extremely hot environments, such as hot springs in Yellowstone National Park, in the US and the Russian Far East and volcano vents in Hawaii.

Benefit sharing arrangements are often promoted as a means of "poverty alleviation" without regard to the political, social and cultural costs/impacts to Indigenous Peoples. It is difficult to see how benefit sharing agreements that allow for monopolizing and alienating TK and genetic resources can bring them any meaningful long-term benefit. Certainly, these promise some potential income, which could make a difference in the lives of those terribly lacking in economic resources. But, at what cost? In the end, the benefits that come to Indigenous Peoples are likely to be quite insignificant compared to those reaped by industry, academic and other research institutions with which they are dealing.

By virtue of their inherent right of self-determination, it is the prerogative of each Indigenous peoples/tribe/nation to decide about benefit sharing agreements, consistent with economic development rights. Inevitably, some will decide to enter into such arrangements. Those who make such decisions, whether or not they recognize it, will be accepting western legal frameworks and concepts that do not respect Indigenous laws and customs, and which, in essence, may compromise their right of self-determination by permanently alienating resources and knowledge.[79]

The medicinal components of plants have long been known and utilized by indigenous communities. Photo above shows a plant from Samoa believed to cure AIDS. Photo by: Minnie Degawan

[79] For further perspectives on this position regarding benefit sharing, *see* Debra Harry and Le`a Malia Kanehe, *The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples*, in THE CATCH: PERSPECTIVES IN BENEFIT SHARING 81-120, 97-109 (Beth Burrows ed., 2005), *available at* http://www.edmonds-institute.org/thecatch.pdf or http://www.ipcb.org/publications/other_art/bsinabs.html.

Reflecting on WGABS -5, -6 and WG8j-5 with a view to COP9

This section provides a synthesized overview of key issues covered during WGABS-5, WG8j-5 and WGABS-6, as well as related reflections for Indigenous Peoples' work at COP9. The first part addresses the main components of an international regime; and the second, its objective, scope and nature.

A. Main Components of International Regime

The items on the agenda for WGABS-5 and WGABS-6 were categorized into possible broad elements of the international regime, namely benefit sharing, access to genetic resources, compliance (which include prior informed consent; international certificate of origin/source/legal provenance; monitoring, enforcement and dispute settlement), traditional knowledge, and capacity-building. A summary of the issues discussed over the course of both Working Group meetings is provided below with a particular focus on the draft decision text annexed to the WGABS-6 report contained in UNEP/CBD/COP/9/6.

The Working Group decided to organize the part of the document on Main Components according to two different categories under each component, namely, "Components to be further elaborated, with the aim of incorporating them in the international regime" and "Components for further consideration." The first are a series of bullet points that reflect areas of common commitment among Parties to further negotiate for inclusion in the final regime. The second is a list of other issues that different groups or Parties have asked to be left on the table for further consideration during the negotiations. These are discussed under each of the sub-items below.

1) Benefit-Sharing

The Working Group discussed and the Parties agreed that different forms of benefit sharing could be negotiated as part of mutually agreed terms. Thus both monetary and non-monetary benefits are mentioned in the bulleted list to be further elaborated for incorporation.

Parties discussed that **monetary benefits** could include upfront payments and royalty payments once commercialization begins. **Non-monetary benefits** could include technology transfer, co-development of value added products, economy enhancements to benefit inhabitants, sharing of research and development results, capacity building in research and development, participation in product development.

2) Access to genetic resources

The Working Group considered what measures would facilitate access to genetic resources, while recognizing the right of countries of origin and source countries to prior informed consent, based on their sovereignty over the natural resources within their boundaries, consistent with. Article 15 of CBD. The Article relates to state sovereignty over genetic resources, particularly for determining prior informed consent to access. This is an aspect to potential access components that is consistently agreed upon and first on the list aimed for incorporation in an international regime. It reads "Recognition of the sovereign rights and the authority of Parties to determine access." This is why Indigenous Peoples' interventions to include a component to ensure recognition and protection of Indigenous Peoples' rights, regarding access to traditionally used and occupied lands, waters and territories, is consistently ignored and does not appear on either list under access.

Parties also discussed whether conditions for access to genetic resources, derivatives and products should be dependent upon benefit sharing arrangements. This is now reflected in a component aimed for incorporation that reads "linkage of access to fair and equitable benefit sharing" under both benefit sharing and access to genetic resources.

States also discussed measures that allow provider countries to limit utilization of genetic resources for specific uses. For example, uses should be in line with CBD objectives, namely to further conservation of biodiversity or sustainable use of its components. Further, developing states urged that countries of origin should be able to restrict access to genetic resources where utilization is intended for non-conservation or sustainable use, such as biological warfare. This ended up being listed as a component for further discussion under benefit sharing, which reads "Benefits directed towards conservation and sustainable use of biodiversity and socio-economic development, in particular the Millenium Development Goals (MDGs) in accordance with national legislation."

3) Compliance

Highlights from each of the sub-parts of the agenda item are addressed separately below.

(a) Measures to support compliance with prior informed consent and mutually agreed terms

The Working Group discussed how relevant provisions of Article 15, on requirements for prior informed consent and mutually agreed terms, could be implemented in an international regime. Parties considered how the regime could address such measures on compliance, including the following:

- Measures to ensure compliance with national legislations on access and benefit-sharing, prior informed consent and mutually agreed terms;
- Measures to ensure compliance with mutually agreed terms on which genetic resources were granted and to prevent unauthorized access and use of genetic resources, consistent with the Convention on Biological Diversity;
- Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights. The EU has developed a proposal to support disclosure while other developed countries, particularly Australia, Canada, and New Zealand are fiercely opposed to it and state that the appropriate forum for any discussion is the WTO-TRIPs Council, not the CBD. Nearly all developing states support a proposal to amend the WTO-TRIPs Agreement to require disclosure of origin in patent applications. Because a disclosure requirement is not agreed upon, it is listed as a component for further consideration.

(b) Internationally recognized certificate of origin/source/legal provenance

A COP8 decision established a group of technical experts (GTE) to consider more deeply the options for an international certificate of origin/source/legal provenance of genetic resources and traditional knowledge. The GTE was held in January 2007 in Lima, Peru, and the participants forwarded the outcomes to WGABS-5 for consideration.

The underlying premise for creating an international certificate of origin/source/legal provenance is that national legal systems alone are not sufficient to guarantee benefit sharing once genetic resources have left the provider country. The GTE reasoned that the

basic role of the certificate is to provide evidence of compliance with national ABS regimes, and thus found it practical to refer to it as a certificate of compliance with national law.

The GTE further noted that a certificate could also help address a number of concerns of the Parties and therefore cover several other objectives including: Legal certainty; Transparency; Predictability; Benefit-sharing facilitation; Facilitation of legal access with minimal transaction costs and delay; Technology transfer; Preventing misappropriation; Minimizing bureaucracy; Supporting compliance with national law and mutually agreed terms; Enabling and facilitating cooperation in monitoring and enforcement of access and benefit-sharing arrangements; Facilitating development of national access and benefit-sharing frameworks; and Protection of traditional knowledge.

The GTE did not deal extensively with the issue of TK and, in fact, noted its complexity, in part due to its intangible nature.

An internationally recognized certificate is now entrenched as a component to be further elaborated for incorporation within the international regime as a tool to monitor compliance.

(c) Monitoring, enforcement and dispute settlement

Under this item, Parties discussed the necessity of establishing mechanisms for monitoring implementation as well as reporting procedures. However, most interventions related to the need for the international regime to ensure that mutually agreed terms and conditions are complied with and enforced, primarily outside the jurisdiction of the country of origin or source country. The existence of effective legal remedies in the user country is the primary means by which all ABS parties (especially source countries and other providers) obtain certainty about their rights and how they will be protected and applied.

Regarding dispute settlement, Parties discussed whether existing international dispute settlement mechanisms are sufficient, including those already available under Article 27 of the Convention, or whether new mechanisms need to be created.

Most of the options discussed under compliance remain as components for further consideration. It is also interesting to note that many of the components categorized as "tools to *encourage* compliance" are non-binding measures, including sectoral menus of model clauses for material transfer agreements, codes of conduct for important groups of users and identification of best practice codes of conduct. Clearly "encourage" reflects a best practice rather than a required action.

One of the key issues that is as yet not agreed upon, but which developing states strongly want is an "international understanding of misappropriation/misuse." This is something that developed states strongly oppose defining. This is also a consistent topic discussed at the World Intellectual Property Organization Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore.

4. Traditional knowledge and genetic resources

The Working Group heard interventions about whether the international regime will recognize a right of prior informed consent for traditional knowledge holders prior to utilization of their knowledge. Many interventions related to whether rights of Indigenous Peoples, including free prior informed consent, consistent with the United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS), would be recognized and protected. At WGABS-5 and WG8j-5 in particular, the three Parties that voted against the Declaration reiterated their reasons for opposing and denouncing it as an international standard for the protection of Indigenous Peoples' rights, stating it will not be recognized or

applied in their countries (Canada, New Zealand and Australia). Most Parties argue that recognition and protection of such rights should be subject to the national legislation of the countries where these communities are located.

Indigenous Peoples' interventions, on the other hand, focused on the need for any provisions of an international regime to be consistent with Article 31 of the Declaration.[80] They further addressed the need for customary law and traditional cultural practices of indigenous and local communities to be recognized and respected in the international regime. Fortunately, this issue has been listed under compliance among the list of components needing further consideration, which reads "Measures to ensure compliance with customary law and local systems of protection." A very positive development, it indicates that Parties may be beginning to understand that compliance with Indigenous peoples' own legal systems is essential and should apply beyond TK to include our laws regarding access to genetic resources.

There is a component for further elaboration that reads "Measures to ensure that access to traditional knowledge takes place in accordance with community level procedures." But it is important to note that none of the more agreed upon components refer to prior informed consent of Indigenous peoples. A component which states "prior informed consent of, and mutually agreed terms with, holders of traditional knowledge, including indigenous and local communities, when traditional knowledge is being accessed" is listed only as one for further consideration. This is a strong indication that Parties are currently uncomfortable with using the terminology "prior informed consent" in reference to Indigenous peoples' right to control access to and use of our own knowledge.

At this juncture, it is also important to reflect on the discussions at the **fifth meeting of the Working Group on Article 8(j) and Related Provisions** (WG8j-5), which had a specific agenda item on ABS. These reveal where the Parties are likely heading regarding TK aspects of an international regime.

Several COP decisions called for WG8j and WGABS to work more closely in relation to TK aspects of an international regime, whose scope includes both access to genetic resources and associated TK, and benefit sharing arising from their utilization.

1) COP7 decided to mandate WGABS, **with the collaboration of WG8j**, to elaborate and negotiate an international regime on access to genetic resources and benefit sharing, with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and its three objectives.[81]

2) COP7 decided "on appropriate mechanisms for better cooperation between the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing and the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention, in order to ensure the participation and involvement of indigenous and local communities in the Ad Hoc Open-ended Working Group on Access and Benefit-sharing."[82]

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[80] Article 31 states that,

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

[81] *See* decision VII/19 D.

[82] *See* decision VII/16 H, para 5.

The COP however did not specify what mechanisms should be used to facilitate better cooperation between the two Working Groups. As a result there was no clear interaction between WGABS-4 and WG8j-4, which occurred back-to-back in 2006 prior to COP8. By COP8 it was obvious that the Conference of the Parties had to send a clearer mandate to the two Working Groups about how they were to collaborate.

3) COP8 accordingly requested WG8j to provide views on the elaboration and negotiation of an international regime on access and benefit-sharing relevant to traditional knowledge, innovations and practices associated with genetic resources and to the fair and equitable sharing of benefits arising from their utilization.[83]

Under the terms of reference contained in the annex to that COP7 decision, five listed elements to be considered for possible inclusion in an international regime are closely related to Article 8(j). These are:

> "(x) Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j)
>
> "(xiv) Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights
>
> "(xv) Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated with genetic resources, subject to the national legislation of the countries where these communities are located
>
> "(xvi) Customary law and traditional cultural practices of indigenous and local communities
>
> "(xviii) Code of ethics/code of conduct/models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities"

The WG8j-5 was invited to discuss these possible elements and, in line with the COP8 decision, provide views to WGABS on how these could be addressed in the international regime. Not surprisingly, this agenda item was the most contentious at the meeting.

Developing and developed states, which continue to be polarized on many issues under negotiation in WGABS, brought the same polarization to WG8j-5. Parties could not agree on how to develop views on TK or what views to be transmitted to WGABS. By the afternoon on the final day, the drafting group could not come to agreement on three major issues:

- Whether or not WGABS should consider disclosure of origin of genetic resources and TK in intellectual property applications (with Brazil and Malaysia insisting that without this, they would not agree to any document);
- Whether or not WGABS should consider addressing "misappropriation," including possibly developing a definition that spells out what acts constitute such (with all developing states explaining that misappropriation is at the heart of biopiracy and must be addressed in an international regime); and
- Whether or not WGABS should consider recognizing and protecting the rights of Indigenous peoples and local communities in the international regime (with IIFB

[83] *See* decision VIII/5 C.

insisting this is a necessary cross-cutting issue, which was supported by developing states).

As a result of this impasse, WG8j did not adopt any document providing views to WGABS and accordingly failed to fulfill its mandate set by COP8. Although nothing was formally adopted, several interesting positions became clearer about what Parties believe regarding the nature of the TK aspects of an international regime. These positions include:

iii. Australia[84] objected to any discussion of *sui generis* systems for the protection of traditional knowledge. Australia, along with New Zealand, maintained that this is a national, not an international, issue. They will not discuss any international standard setting on this issue.

ii. Canada proposed that the Working Group should work on guidelines related to Indigenous peoples' traditional knowledge (consistent with Article 8(j) and genetic resources of Indigenous peoples and local communities (consistent with Article 15). They foresee this as an important element of the overall international regime but as a non-binding element that would merely "guide governments and indigenous peoples on developing and drafting legislative, administrative or policy measures on ABS and to provide guidance on responsibilities for users accessing TK and related genetic resources." Canada would like a devoted Sub-Working Group within WG8j to develop such guidelines. Australia and New Zealand supported the proposal for the development of guidelines.

iii. The EU sees codes of conduct, from different sectors of users of TK and genetic resources, as a valuable element of the international regime. These codes are those created by botanical gardens, ethnobotanists and other specific sectoral users.

iv. Australia objected to TK being included in an internationally recognized certificate of compliance system. They maintain that Article 8(j) is subject to national law and accordingly such an international certificate system should only relate to Article 15 (genetic resources).

Indigenous Women's vast knowledge about agricultural diversity has been instrumental in the survival of communities.

Photo by: IMPECT

[84] It is important to keep in mind that Australia had a change in government that is less conservative and has agreed to sign the UN Declaration on the Rights of Indigenous Peoples. Their delegates at WGABS-6 were rather silent on all issues. Thus, it remains to be seen whether Australia's positions at WGABS-5 and WG-8j-5, as explained in this section, will change in future ABS negotiations.

B. Objective, Scope and Nature

After WGABS-3 and 4, where Parties could not agree on the nature of the regime, the Co-Chairs for WGABS-5 and -6 decided to delay discussions on the objective, scope and nature, until the ideas on possible elements of its main substantive components were significantly discussed. Thus, it was not until the last few days of WGABS-6 that the Parties began to focus on these parts of the regime. The text that has been forwarded is heavily bracketed in the objective section and provides several options under scope and nature. It is important to remember that the text reflects proposals that were neither negotiated nor agreed upon, but rather, the various proposals submitted during the contact groups.

1) Objective

The draft text in the annex to the report is heavily bracketed and indicates the wishes of what are often polar positions of the Parties. For example, the developed states generally want the regime to *facilitate access* for researchers and industry to genetic resources, thus one of their objectives is "facilitating access to genetic resources." However, the Like-Minded Mega-diverse Countries and the African Group want to *regulate access* to genetic resources, derivates (which the CANZ group strongly opposes) and associated traditional knowledge.

The second bullet point under this section indicates a bracketed text which shows that developing states want the international regime to *ensure conditions and measures* for fair and equitable benefit sharing, as well as to *prevent misappropriation and misuse* of genetic resources, derivatives and associated TK. The third bullet point also reflects the LMMC and African Group's advocacy for the regime to *secure compliance in user countries with the national laws of the country of origin or the Party that has acquired those resources in accordance with the CBD.*

The strongest language for Indigenous peoples in this section is bracketed and indicates that the objectives must *take into account all rights over those resources, including the rights of indigenous and local communities, and ensuring compliance with PIC.* The first part of this language is drawn from Article 1 of the Convention itself, where the objectives of the Convention are stated, while the second part interprets that Indigenous peoples are one of the rights holders over genetic resources.

2) Scope

The scope section of the annex represents a compilation of proposals about what subject matter the international regime will cover. The first proposal, submitted by the WGABS Co-Chairs, attempts to capture the range of views from Parties. Their recommendation states, "All genetic resources, and associated traditional knowledge, covered under the Convention on Biological Diversity and the benefits resulting from their use."

The second section under scope provides seven options that were submitted in writing but were not discussed, negotiated or agreed upon. In general, the developing states seem to want to throw their net as wide as possible regarding scope. For example Option 2 lists biological resources, genetic resources, derivatives, products and associated traditional knowledge, as well as all benefits arising from any of that list. Several options try to specifically carve out those genetic resources that are already subject to the International Treaty on Plant Genetic Resources for Food and Agriculture, while option 2 simply indicates that the regime would apply to all genetic resources and associated TK "subject to other international obligations." Others mention other treaties and processes that may already be covering specific subject matter such as the International Union for the Protection of New Varieties of Plants (UPOV), Antarctic Treaty, and WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.

Because none of these options were discussed or negotiated during the WG, it is likely that these will be revisited and the Parties will try to come to agreement on some negotiated text that compresses these options into one statement on the regime's scope.

3) Nature

The section on nature of the draft recommendation similarly lists options from the Co-Chairs and five other options, based on proposals submitted in writing and neither discussed, negotiated or agreed upon. The nature of the regime is always contentious and falls into three general possible categories:

1) One legally binding instrument;
2) A combination of legally binding and non-binding instruments; or
3) A non-binding instrument.

The developing states argue that a non-binding instrument already exists in the Bonn Guidelines and that has not been sufficient. Thus they propose that the international regime must be a single legally binding instrument. Although Canada, Australia and New Zealand have, since COP7, been noncommittal to a legally binding regime, they seem to have moved their position slightly, as they have joined the EU proposal for a mixture of complementary binding and non-binding measures. For example, while the EU is willing to accept prior informed consent and mutually agreed terms, they prefer a "menu" of options for terms that could be incorporated into a contract, rather than a strict set of minimum standards, which the African Group has argued for in the past.

The draft decision in paragraph 6 lists three options which could set the mandate for WGABS over the next two years. Option A would require the Working Group to draft the legally binding provisions of the international regime. Option B would have the Working Group draft a mix of legally and non-legally binding provisions. Finally, Option C would mandate the Working Group to draft non-legally binding provisions. This will undoubtedly be an area of core contention during the COP.

What Indigenous peoples need to scrutinize carefully is whether issues that involve recognition and protection of or respect for our rights are placed in the binding or non-binding categories of the regime. As mentioned in the discussion regarding WG8j-5, the EU has advocated for codes of conduct for different sectors of users of TK, which would be non-binding codes that encourage certain best practices. Further, Australia and Canada have both staunchly argued that Article 8(j) is a matter subject to national legislation; and therefore, all an international regime could do is set up non-binding guidelines that encourage national governments to respect, preserve and maintain traditional knowledge.

But as the International Indigenous Forum on Biodiversity has stated before, "*Our rights are not negotiable; our rights are inherent and inalienable and recognized in international human rights law.*" (Working Group ABS-4, Granada, Jan. – Feb. 2006). Therefore, to the extent that an international regime attempts to include within its scope our resources and knowledge we must advocate that the states have obligations, not options, under existing law to protect our rights to decision-making regarding access to and utilization of these resources and knowledge.

Senai children. Negotiations at the international level should be aware of the consequences at the local level. Photo by: Collin Nicholas

Recommendations for COP9

The target completion for the international regime is COP10. Thus, for COP9 the focus of negotiations will likely be on setting the process and parameters of the Working Group's mandate over the next two years. Undoubtedly, one of the key modes for setting that course is for the Parties to decide on the objective and nature of the regime so that the main components can be crafted appropriately (i.e, mandatory or not). Therefore, the IIFB should be prepared to lobby for inclusion of language that ensures that the regime shall achieve the objectives of protecting the rights of Indigenous Peoples with regards to access and utilization of our genetic resources and/or associated traditional knowledge. Furthermore, obligations to uphold these rights must be included in the binding parts of the regime.

Indigenous peoples' primary strategy has been to advocate for implementation of the relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in the CBD, in the context of access and benefit sharing. Within a preambular paragraph of the draft decision is text within brackets, indicating it is not accepted language, that refers to the Declaration; it states,

> [*Welcoming*][*Taking note of*] the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly on 13 September 2007, [considering that some of the rights identified in the Declaration, particularly its Article 31 that relates to traditional knowledge and genetic resources will facilitate and guide Parties in their understanding of their commitments under the Convention on Biological Diversity,]

Preambular language has no binding effect, and it would therefore be better to have reference to a commitment to the minimum standards of the Declaration, within an operative paragraph. Nevertheless, this is strong language and welcoming of the Declaration could minimally set a positive course for future advocacy by Indigenous Peoples with the Parties. Thus, every effort should be made to "lift the brackets" from this text.

Another main goal must be to ensure that we have components in the list, that will be further elaborated, with the aim of inclusion in the regime.

We should also continue to press the IIFB proposal for the Executive Secretary to organize an international expert meeting on how Indigenous peoples' rights to genetic resources and associated traditional knowledge must be recognized and protected in any future ABS regime. The expert group should include Indigenous peoples, states and stakeholders. The IIFB proposed this as a measure to address the failure of WG8j-5 to fulfill its COP mandate to provide views to the WGABS on possible elements related to TK in the regime.

Such a process for consultations would serve as an important and necessary process to bring more input from Indigenous Peoples to bear in the states' elaboration and negotiation of the international regime. It is also crucial that national and regional consultations be organized to feed into the international meeting. The following issues, which incorporate some of the possible elements set out in decision VII/19 D, should be addressed at such preparatory meetings and the international expert meeting:

- Compliance with free prior informed consent of Indigenous Peoples holding traditional knowledge;

- Recognition and protection of the rights of Indigenous Peoples over genetic resources and associated traditional knowledge originating in their lands, territories and waters;
- TK aspects of a certificate of origin/source/legal provenance related to genetic resources, which was not adequately evaluated and analyzed at the Group of Technical Experts meeting held in Lima;
- Sui generis system**s** for the protection of Indigenous Peoples' knowledge based on customary laws; and
- Sui generis system for the protection of Indigenous Peoples, at an international level, based on internationally recognized minimum standards for the protection of traditional knowledge.

This proposal currently exists in brackets in the draft recommendation text for COP9 as two points under paragraph 9, option B:

[10. *Requests* the Executive Secretary to convene an international expert meeting/seminar on traditional knowledge prior to the seventh meeting of the Ad Hoc Open-ended Working Group on Access and Benefit Sharing;]

[11. *Invites* indigenous and local communities, Parties, donors, and other interested bodies to support national and regional workshops, the input of which shall feed into the international expert meeting/seminar;].

Therefore, it will be important for Indigenous Peoples to lobby for the brackets to be lifted. However, we will also need to have a proposal for terms of reference of the international expert meeting/seminar, regarding what issues should be covered, what categories of experts should be invited, and to ensure sufficient monies are allocated in the Executive Secretary's budget to accomplish the task. It is crucial that there is a broad range of Indigenous experts at this meeting, which should be open to all Indigenous Peoples who wish to attend, whether through support from the CBD or other sources.

Indigenous Women have been active participants in the ABS negotiations.
Photo by: ITS-Alliance.

Conclusion

The International Indigenous Forum on Biodiversity has always formed interventions and taken positions based on Indigenous Peoples being rights holders, not mere stakeholders. We have inherent rights that are upheld in international law. Our birthrights are non-negotiable. As the negotiations proceed, it will become increasingly harder to maintain that ground. However, we must keep in mind that this international regime will be one that applies to all Parties and accordingly will impact Indigenous Peoples in almost every country of the world. We must remain conscious that the decisions we make within the Parties' negotiations will affect not only our own peoples but all Indigenous Peoples and for all of our future generations.

The CBD negotiations serve to compliment other forms of struggles being waged by indigenous peoples to defend their lands and resources. Photo by: Sean Rubis