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# CBD COP 10: TOWARDS THE POST-2010 IMPLEMENTATION OF THE CBD

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The tenth meeting of the Conference of the Parties (COP-10) to the Convention on Biological Diversity (CBD) was a momentous one for the Convention, as it led to consensus on several environmental policy and legal matters of critical importance to set the international community on a renewed path towards the effective conservation and sustainable use of biodiversity, following the failure to reach the global target to reduce the rate of biodiversity loss by 2010.

COP 10 adopted 49 decisions, the majority of which are quite notable in timely addressing new and emerging issues, firmly determining the role the Convention in contributing to the work of other Multilateral Environmental Agreements and international processes, and clearly indicating a plan for more effective implementation and more systematic mainstreaming of biodiversity policy and law at the local, national and international level. This note provides an overview of the outcomes of COP 10, focusing on its main successes besides the adoption of the Nagoya Protocol on Access and Benefit-Sharing.

#### **OVERVIEW**

The third edition of the Global Biodiversity Outlook, 1 released in mid 2010, provided definite scientific evidence that the global target to significantly reduce the rate of biodiversity loss by 2010 had not met. Against this background and following an intense intersessional period, the CBD COP 10 met from 18-29 October 2010 in Nagoya, Japan, with a high-level segment from 27-29 October 2010. The agenda of the COP was particularly dense: on the one hand, the COP was called upon to provide a vision for the immediate future of the Convention, based on an assessment of the progress in achieving the 2010 global target, the adoption of a new strategic plan and a multi-year programme of work for the Convention for the period 2010-2020, and related administrative, procedural and financial issues. On the other hand, the COP was expected to address a series of substantive issues of a thematic or cross-cutting nature, such as: CBD Article 8(j) (traditional knowledge); in-depth reviews of the implementation of the programmes of work on mountain biodiversity, inland waters biodiversity, marine and coastal biodiversity, protected areas (PAs), biodiversity and climate change, and Article 10 (sustainable use); agricultural biodiversity, including biofuels; biodiversity of dry and sub-humid lands; forest biodiversity; invasive alien species (IAS); the Global Taxonomy Initiative; and the Global Strategy for Plant Conservation.

Among all these issues, the most prominent one during the parallel and late-night negotiations that occurred during COP  $10^2$  related to: the package including the new strategic plan, the resource mobilization strategy and the budget, with significant

<sup>1</sup> CBD and UNEP-WCMC, May 2010; available online at: http://gbo3.cbd.int/.

<sup>&</sup>lt;sup>2</sup> For an overview, see S. Jungcurt, T. Kantai, E. Morgera, E. Recio, N. Schabus and E. Tsioumani, Summary of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity: 18-29 October 2010, *Earth Negotiations Bulletin*, vol. 9, n. 534, 1 November 2010, available online at: http://www.iisd.ca.

controversy surrounding innovative financial mechanisms; and climate-change related issues, with prolonged discussions surrounding geo-engineering, cooperation with the Rio Conventions, biofuels, and reducing emissions from deforestation and forest degradation, the conservation of forest carbon stocks and the sustainable management of forest and forest carbon stocks (REDD+). On matters related to traditional knowledge (CBD Article 8(j)), the COP adopted a 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, and included innovative elements in the multi-year programme of work for its Working Group on Article 8(j). COP 10 also addressed several other important issues, such as synthetic biology for the first time, as well as marine and coastal biodiversity, invasive alien species, protected areas and the future establishment of Intergovernmental Platform on Biodiversity and Ecosystem Services.

#### PLANNING FOR THE POST-2010 PERIOD

COP 10 adopted a series of decisions to set the CBD, its parties and its international partners, notably the biodiversity-related conventions, on a path of renewed commitment to achieve the CBD three objectives, taking into account the lessons learnt and individual successes in relation to the 2010 global target.

## Strategic Plan 2011-2020

The new Strategic Plan for the period 2011-2020 (UNEP/CBD/COP/10/L.44)<sup>3</sup> is expected to fulfill three functions in that respect: serve as an overarching framework for coordinating all the activities of the CBD under its programme areas; assist in mainstreaming biodiversity across all human activities, also by valuing ecosystems services; and facilitate the setting of targets at different levels, that are adapted to regional, national and sub-national contexts and capacities.<sup>4</sup> To these ends, the Plan, titled "Living in harmony with nature" comprises a shared vision, a mission, strategic goals and targets that are expected to inspire broad-based action by CBD parties and stakeholders. The vision states that by 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people. The mission provides for taking effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication, through, inter alia, restoration, biodiversity mainstreaming and the application of the precautionary approach.

Several of the strategic goals and headline targets contained in the new Strategic Plan have policy or legal implications. This is the notable case, for instance, of 2020 headline targets to: integrate biodiversity values into national and local planning, and national accounting; and eliminate, phase out or reform incentives, including subsidies, harmful to biodiversity, and develop and apply positive incentives for the conservation and sustainable use of biodiversity, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions. Other relevant targets refer to the protection of coral

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<sup>&</sup>lt;sup>3</sup> This and all other outcomes of the CBD COP 10 can be found, in an advance unedited version, at http://www.cbd.int/nagoya/outcomes/.

<sup>&</sup>lt;sup>4</sup> See Analysis, in ENB 9/452, n. 2 above, at 27.

reefs; natural habitat loss (which includes a specific reference to forests); sustainable and legal exploitation and management of fish; invasive alien species and their pathways; protected marine and terrestrial areas; species extinction; restoration and safeguard of essential ecosystem services such as those related to water, health, livelihoods and well-being; ecosystem resilience and restoration; and traditional knowledge. Only two of these targets are accompanied by a numerical indication: target 11 provides that by 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascapes; and target 15, according to which by 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification.

It should also be noted that three targets have a 2015 deadline: the entry into force and operationalization of the Nagoya Protocol on Access and Benefits Sharing, consistent with national legislation; the development and implementation by each party of an effective, participatory and updated national biodiversity strategy and action plan; and the minimization of anthropogenic pressures on coral reefs and other vulnerable ecosystems impacted by climate change or ocean acidification.

Finally, it should be noted that the decision on the Strategic Plan and a headline target make the dependence of reaching the targets on the provision of financial resources explicit: according to target 20, by 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan 2011-2020 from all sources and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization should increase substantially from the current levels. This target will be subject to changes contingent to resources needs assessments to be developed and reported by parties.

## **Strategy for Resource Mobilization**

The Resource Mobilization Strategy was addressed in a package with the Strategic Plan (and the ABS Protocol) at the initiative of the group of developing countries, with a view to ensuring that sufficient new and additional financing is effectively provided to developing countries on the basis of the principle of common but differentiated responsibility. The item proved particularly contentious in two respects: first, the setting up of a monitoring mechanism for the strategy, as significantly divergent views arose in the definition of targets to this end. Compromise was reached in the end as to providing a "roadmap" for the adoption of targets at COP 11. In the decision (UNEP/CBD/COP/10/L.45), the COP nevertheless adopts indicators for monitoring the implementation of the strategy, such as aggregated financial flows of biodiversity-related funding per annum, avoiding double-counting (the latter qualification may be particularly significant for the use of climate financing used to achieve biodiversity co-benefits); the amount of funding provided to the Global Environment Facility and allocated to biodiversity; the number of international financing institutions and other international organizations with biodiversity as a cross-cutting policy; the amount of financial resources from developed to developing countries to contribute to the CBD objectives; and the resources mobilized from the removal, reform or phase out of incentives harmful to biodiversity including subsidies. The COP also decides that COP 11 will adopt targets to that end, provided that baselines have been identified and an effective reporting framework has been adopted.

The second hotly debated issue was reference to innovative financial mechanisms, and in particular the creation of a "green development fund" modelled after the Clean Development Mechanism to reward trade-certified "land areas managed in compliance with the CBD" in accordance with requirements for offsets and restoration for the private sector.<sup>5</sup> Fundamentally, developing countries wished to ensure that innovative financial mechanisms would be considered supplementary, and not replaceable with, the CBD financial mechanisms, which was reflected in the decision on the resource mobilization strategy. On the other hand, draft text on innovative financial mechanisms was withdrawn altogether during the final plenary.<sup>6</sup>

## Budget and CBD multi-year programme of work

The budget for 2011-2012 was also, during the closing plenary, made part of the package at the initiative of the European Union in the final plenary. The relevant decision (UNEP/CBD/COP/10/L.48) indicates a core budget of almost USD 12 millions for 2011 and of almost USD 13 millions for 2012, so as to provide for two meetings of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), a meeting of the CBD Working Group on Article 8(j) and one for the CBD Working Group on Review of Implementation; and two meetings of the intergovernmental Committee for the ABS protocol. It is understood that this represents a 4.3% increase to the core budget. It should be noted that the decision also includes an annex with revised administrative arrangements between the CBD Secretariat and the UN Environment Programme (UNEP).

The decision on the CBD multi-years programme of work (UNEP/CBD/COP/10/L.8) places significant emphasis on implementation and monitoring on COP 11 and COP 12, by placing on their agenda the review of progress in the implementation of the Strategic Plan and the Resource Mobilization Strategy, and in the provision of assistance and support to developing country parties. In addition, COP 11 is to undertake an in-depth review of the CBD work programme on island biodiversity, and identify ways and means to support ecosystem restoration, including through the development of practical guidance. COP 12 will in turn further consider how the CBD implementation contributes to the achievement of the Millennium Development Goals. Other matters arising from the work of the CBD SBSTTA will certainly be added to the agendas of the two next meetings of the CBD Conference of the Parties.

## **CLIMATE CHANGE-RELATED ISSUES**

Climate change-related issues were addressed in several of the decisions adopted by COP 10, especially in those related to the thematic work programmes of the CBD.

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<sup>&</sup>lt;sup>5</sup> See Analysis, ENB 9/452, n. 2 above, at 27.

<sup>&</sup>lt;sup>6</sup> ENB 9/452, note 2 above, at 13-14.

<sup>&</sup>lt;sup>7</sup> Ib., at 24-25.

Delegates' efforts, however, were mostly devoted to the negotiations of the long, cross-cutting decision on the CBD work programme on biodiversity and climate change (UNEP/CBD/COP/10/L.36), as well as of the decision on biofuels and biodiversity (UNEP/CBD/COP/10/L.41).

## Moratorium on geo-engineering

One of the most visible successes of the CBD COP 10 has been the adoption of a moratorium on geo-engineering. The issue had been addressed for the first time only a few months before the COP, at the May 2010 meeting of the CBD SBSTTA, where parties discussed whether to expand the approach adopted by COP 9 on ocean fertilization (COP Dec. IX/16 C), with the relevant recommendation remaining in brackets. During COP 10, a small group discussed this item, with inputs from NGOs and research representatives, focusing on: the wording of the moratorium on geo-engineering; a definition or understanding of geo-engineering; an exception for scientific research; and the need for further study.

The wording of the moratorium that was crafted as a compromise package can be found at paragraph 8(w) in the decision on biodiversity and climate change, were the COP invites parties and governments, according to national circumstances and priorities "to ensure, in line with decision IX/16 C on ocean fertilization, in the absence of science-based, global, transparent and effective control and regulatory mechanism for geo-engineering, and in accordance with the precautionary approach and CBD Article 14, that no climate change-related geo-engineering activities that may affect biodiversity take place, until there is an adequate scientific basis on which to justify them and appropriate consideration of the associated risks for the environment and biodiversity and associated social, economic and cultural impacts." While the chapeau of the provision is framed in voluntary terms, the wording of the paragraph is nevertheless very clear in setting out two cumulative conditions for the lifting of the moratorium, that are to be interpreted in the light of the precautionary principle and the obligations under CBD Article 14 related to impact assessment. It should be noted, in this respect, that some parties initially wished to make the development of a global monitoring and regulatory mechanism for geo-engineering as a condition for lifting a moratorium, but given the diverge of views as to which international forum or fora would be the appropriate one to engage in such development, as well as due to uncertainties as to the time needed for such development, the international framework was rather mentioned as an important factor in the setting up of the moratorium.

The scope of the moratorium is quite broad. One of the most contentious topic was therefore the delimitation of the concept of biodiversity-related geo-engineering to which the CBD moratorium would apply. In that respect, contention surrounded the question as to whether to exclude carbon capture and storage (CCS) from the definition of geo-engineering, which was eventually agreed to and reflected into a footnote to paragraph 8(w), which clarifies that, "without prejudice to future deliberations on the definition of geo-engineering activities, the COP understands that any technologies that deliberately reduce solar insolation or increase carbon sequestration from the atmosphere on a large scale that may affect biodiversity (excluding CCS from fossil fuels when it captures carbon dioxide before it is released

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<sup>&</sup>lt;sup>8</sup> Ib., at 20.

into the atmosphere) should be considered as forms of geo-engineering which are relevant to the CBD until a more precise definition can be developed." During the closing plenary, Bolivia requested to clarify that such exclusion could be interpreted as an acceptance of such activities under the CBD, pending full consideration by the COP of its impacts on biodiversity in general. The statement was to be included in the meeting report.

One specific exception is carved out from the moratorium, that is subject to certain detailed conditions: small scale scientific research studies may be conducted in a controlled setting in accordance with CBD Article 3, only if they are justified by the need to gather specific scientific data and are subject to a thorough prior assessment of the potential impacts on the environment. The reference to CBD Article 3 (the general prohibition to cause environmental damage to areas under the jurisdiction of other States or beyond national jurisdiction) was inserted to avoid the crafting of specific language on the territorial scope of the moratorium.

Additional action was called for by the COP in relation to geo-engineering, to complement the moratorium and firmly embed discussions on geo-engineering within the UN System and the Convention. The CBD Secretariat is mandated to: compile scientific information and the views of indigenous and local communities (ILCs) and other stakeholders on the possible impacts of geo-engineering techniques on biodiversity and associated social, economic and cultural considerations, and options on definitions and understandings of climate-related geo-engineering relevant to the CBD; and undertake a study on gaps in existing science-based global, transparent and effective control and regulatory mechanisms for climate-related geo-engineering relevant to the CBD, bearing in mind that such mechanisms may not be best placed under the Convention on Biological Diversity.

## **Cooperation among the Rio Conventions**

Another particularly divisive issue was an increased and more programmatic institutional interactions between the Rio Conventions, and particularly between the CBD and the UNFCCC, which was discussed in the context of the in-depth review of the programme of work on biodiversity and climate change, but had implications for several other decisions before the COP. It seems useful to recall that at the SBSTTA 14 meeting in May 2010, parties had decided to abandon discussions the possible substantive aspects of a proposed work programme, and rather focus on the procedural steps that would be needed to ensure that the governing bodies of each of the three independent conventions agree to such an endeavor. Such discussions had particular visibility, given the approaching 20<sup>th</sup> anniversary of the Rio Conference on the Environment and Development and the convening in 2012 of a UN Conference on Sustainable Development by the General Assembly.

Discussions at the COP followed similar lines to those already made clear at SBSTTA: certain countries were not so much concerned with the idea of enhancing synergies among the Rio Conventions, as to over-burdening the already crowded agenda of the climate change regime. Some were also worried that establishing a clear substantive mandate on climate change issues that are related to biodiversity for the

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<sup>&</sup>lt;sup>9</sup> E Morgera, "CBD SBSTTA 14 and WGRI 3: Integration and Implementation in Focus," (2010) 40/4 *EPL* 154-157, at 155.

CBD would compromise the delicate bargaining under the UNFCCC, by exporting issues that are still under negotiations in the climate change regime into a different setting where other substantive elements of the climate negotiations are not addressed at all. 10

Following negotiations in a small group, consensus wording reached at the COP can be found in paragraph 13 of the decision on climate change and biodiversity (UNEP/CBD/COP/10/L. 36), where the COP requests the CBD Secretariat to convey a "proposal to develop joint activities between the Rio Conventions to their Secretariats," therefore abandoning completely the more specific idea of a joint programme. The COP invites the COPs of the UN Framework Convention on Climate Change (UNFCCC) and of the UN Convention to Combat Desertification (UNCCD) to collaborate with the CBD Secretariat, through their Joint Liaison Group, in: considering the proposed elements on joint activities on climate change, biodiversity, land degradation and ecosystem-based approaches to climate change mitigation and adaptation; exploring the possibility of convening a joint preparatory meeting between the Rio Conventions on possible joint activities; and consulting the Bureau of the preparatory process of the Rio+20 Summit and exploring together with the Bureau how to make use of the preparatory work in connection with Rio+20. The latter was a concession to those parties that were hoping for a decision explicitly supporting the convening of a joint high-level session of the Rio Conventions in connection with the Rio+20 summit. 11

References to the possible substantive content of the joint activities can be found scattered across various decisions, such as: the interaction between oceans and climate change and alternatives for mitigation and adaptation strategies, in the decision on marine biodiversity; the role of protected areas and that of dry and subhumid lands in the decisions on the respective thematic work programmes of the CBD; and biodiversity concerns in connection with REDD+, in the decision on biodiversity and climate change itself.

#### **REDD+**

Discussions on REDD+ were initially entertained both under the draft decision on forest biodiversity and that on climate change, mostly focusing on the role of the CBD vis-à-vis the development and implementation of biodiversity safeguards and safeguards related to ILCs. Similarly to discussions on collaboration between the Rio Conventions, and actually in an inter-related manner to those discussions, the item was addressed in a small group, where the negotiating dynamics already evidenced at SBSTTA 14 re-emerged, notably resistance based on the fact that negotiations on REDD+ are still ongoing under the international climate change regime, the lack of an internationall agreed of biodiversity safeguards, and the uneasiness at negotiations questions related to REDD+ in a forum where other climate-related forest questions (notably LULUCF) are not also addressed. 12

The issue could not be resolved in the contact group and consensus text only emerged from ministerial consultations at the very end of the meeting. As a result, in the

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<sup>&</sup>lt;sup>10</sup> ENB 9/452, note 2 above, at 19-21.

<sup>11</sup> Ib., at 20.

decision on biodiversity and climate change the COP requests the CBD Secretariat to identify possible indicators to assess the contribution of REDD to reaching the CBD objectives, in addition to assessing potential mechanisms to monitor impacts on biodiversity, without pre-empting any future decision taken under UNFCCC. Significantly, the COP also established a clear mandate for the CBD to provide advice on the application of relevant safeguards for biodiversity, for approval by COP 11, based on effective consultations with CBD parties and the participation of indigenous and local communities, so that actions are consistent with the CBD objectives and negative impacts on biodiversity are avoided, and benefits on biodiversity are enhanced. In that respect, the COP also reiterated the need not to pre-empt future decisions under the UNFCCC.

#### **Biofules**

As anticipated at SBSTTA 14, discussions on biofuels were made difficult by the entrenched positions of importer and exporter countries about a possible normative role of the CBD, and in particular the possible development of a "toolkit" for voluntary use consisting of available standards and methodologies to assess direct and indirect effects and impacts on biodiversity of biofuel production and use, as well as impacts on biodiversity that would affect socio-economic conditions, food security and energy security. 13 At the COP, delegates eventually agreed to request the Secretariat, in the decision on biofuels (UNEP/CBD/COP/10/L.41), only to compile, analyze and summarize "information on tools for voluntary use, including on available standards and methodologies to assess direct and indirect effects and impacts on biodiversity of biofuel production and use, in their full life cycle as compared to that of other types of fuels, and impacts on biodiversity that affect related socio-economic conditions." The COP made some progress, however, in tackling the question of land security and other social issues linked to the biofuels and biodiversity, by including in the understanding of biodiversity-related socio-economic conditions that can be impacted by biofuel production and use, not only food and energy security, but also "the consideration of land tenure and resource rights, including water, where relevant for the CBD implementation, and in particular the implications for ILCs." The COP also urged parties and other governments to ensure that the sustainable agricultural practices and food and energy security of ILCs are addressed and respected, subject to national legislation, taking into account ILCs' customary laws, where applicable.

A third area of contention concerned the recommendation to encourage CBD parties to develop inventories and identify critical ecosystems and areas important to indigenous and local communities as no-go areas for biofuel production, as well as areas with low biodiversity value or degraded that could be used for sustainable biofuel production. The COP eventually found agreement on inviting governments and relevant organizations, bearing in mind ecosystem functions and services, to develop national inventories to identify areas of high biodiversity value, critical ecosystems, and areas important to ILCs, and assess and identify areas and, where appropriate, ecosystems that could be used in, or exempted from, biofuel production.

### INDIGENOUS AND LOCAL COMMUNITIES

<sup>&</sup>lt;sup>13</sup> ENB 9/452, n. 2 above, at 22.

The most discrete achievement of COP 10 in relation to indigenous and local communities is the adoption of the code of ethical conduct, although several other decisions also significantly support the protection of traditional knowledge and the full and effective participation of ILCs in critical areas of work of the CBD. These developments should be contrasted with the limited progress achieved, instead, on the question of *sui generis* systems for the protection of traditional knowledge, on which the COP limited itself to encourage parties to take steps to consider or develop such systems, and to submit relevant information to the CBD Secretariat on local, national and regional measures in that regard (UNEP/CBD/COP/10/L.7).

## **Code of ethical conduct**

COP 10 adopted "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" (UNEP/CBD/COP/10/L.38 – Tkariwaié:ri is the Mohawk term for the "right way of doing things"). Most of the code had been approved at the intersessional meeting of the CBD Working on Article 8(j), although delegates still disagreed as to whether to refer to "prior informed consent" in the light of the UN Declaration on the Rights of Indigenous Peoples or "approval and involvement of ILCs." At the COP, delegates compromised by referring to "PIC and/or approval and involvement of ILCs," as well as by indicating in the rationale that "the code should not be interpreted as altering the domestic laws, treaties and other constructive arrangements that may already exist." The latter allowed Canada to withdraw reservations to references to "lands and waters traditionally used and occupied by ILCs." "14"

The code is expected to be used as a model to guide the development of ethical codes by CBD parties, according to their unique national circumstances and needs, and recognizing the rich cultural diversity of indigenous and local communities, as well as to establish or improve national frameworks by governments, academic institutions, private sector developers and other potential stakeholders.

In the preamble to 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, practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity. The section on rationale clarifies that the elements are voluntary and intended to provide guidance on activities/interactions with indigenous and local communities. 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 include: respect for existing settlements, intellectual property, non-discrimination, transparency/full disclosure, prior informed consent and/or approval and involvement, inter-cultural respect, safeguarding collective and individual ownership, fair and equitable sharing of benefits, protection, and precautionary approach. Accordingly, indigenous and local communities ought to

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<sup>&</sup>lt;sup>14</sup> Ib., at 23.

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. Specific considerations concern: recognition of sites that are sacred, culturally significant and traditionally used and occupied; access to traditional resources; avoidance of arbitrary removal and relocation; traditional guardianship/custodianship; recognition of community social structures; restitution and/or compensation; repatriation; peaceful relations; and support for indigenous research initiatives. Among these, it is provided that 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 mutually agreed terms 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 identified in the draft code include: negotiations in good faith, subsidiarity and decision-making, partnership and cooperation, gender considerations, full and effective partnership and cooperation, gender considerations; full and effective participation/participatory approaches; confidentiality; and reciprocity. confidentiality, it is clarified that 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. Accordingly, 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.

### Multi-year programme of work on Article 8(j)

The COP also adopted a decision on the multi-year programme of work on Article 8(j) (UNEP/CBD/COP/10/L.39), which contains several innovative elements such as a new major component on CBD Article 10 (sustainable use of biodiversity), with a focus on Article 10(c) (customary use), with a view to developing further guidance on sustainable use and related incentive measures for ILCs and consider measures to increase ILCs' engagement at national and local levels in the implementation of Article 10 and the ecosystem approach. The COP also tasked the CBD Working Group on Article 8(j) to: develop a strategy to integrate sustainable use, particularly customary use, as a cross-cutting issue into the CBD work programmes and thematic areas, beginning with the work programme on protected areas; and hold an in-depth dialogue on ecosystem management, ecosystem services and protected areas at its seventh meeting.

It is also notable that the COP has implicitly decided to explore for the first time the dividing line between indigenous communities and local communities: the expression "indigenous and local communities" so far has been taken as an indivisible whole under the Convention, without reference being made to "indigenous peoples" as the concept adopted in international human rights instruments. In an unprecedented move, therefore, COP 10 convened an *ad hoc* expert group meeting of local-community representatives to identify the common characteristics of local communities, and gather advice on how local communities can more effectively participate in the Convention processes, including at the national level.

#### **OTHER ISSUES**

#### **Synthetic Biology**

Another notable success of the CBD can be considered consensus language on a highly contentious and novel issue – synthetic biology. This was addressed for the first time by SBSTTA 14, at the initiative of the Philippines, both in the context of new and emerging issues and that on biofuels. Following intense negotiations, <sup>15</sup> COP 10 agreed to urge governments to apply the precautionary approach to the field release of synthetic life, cell, or genome into the environment, acknowledging parties' entitlement, in accordance with domestic legislation, to suspend the release of synthetic life, cell, or genome into the environment. This call can be found both in the decision on new and emerging issues, which also foresees that SBSTTA will consider information submitted from parties on this matter at its next meeting (UNEP/CBD/COP/10/L.26), and in that on biofuels, where the COP further recognizes that SBSTTA will provide guidance and clarity on synthetic biology on the basis of information provided by parties.

### **Marine Biodiversity**

While common ground had already been identified at SBSTTA 14 with regards to the recommendation on coastal and marine biodiversity, <sup>16</sup> extended small-group negotiations took place on this item at the COP, mostly focusing on the interaction between the CBD and the UN General Assembly on marine biodiversity in areas beyond national jurisdiction.

On ecologically or biologically significant areas (EBSAs) in open-ocean waters and deep-sea habitats in need of protection – an expression used to define the "scientific and technical" role of the CBD in global ocean governance - the proposal from SBSTTA to increase the profile of the CBD scientific work on marine protected areas, by recommending the creation of a CBD global inventory of EBSAs in areas beyond national jurisdiction was opposed at the COP. In the decision on marine biodiversity (UNEP/CBD/COP/10/L.42), delegates eventually agreed to establish, in collaboration with relevant international organizations and governments, a repository for scientific and technical information related to the application of the scientific criteria on EBSAs identification and other relevant nationally and internationally agreed scientific criteria. The COP also used notably cautious language as to the use of other instruments developed in the framework of the CBD, by: noting that the application of the CBD scientific criteria for identifying EBSAs is a tool that parties and competent intergovernmental organizations may choose to use to progress towards the implementation of ecosystem approaches in relation to areas within and beyond national jurisdiction; and specifying that the identification of EBSAs and selection of conservation and management measures is a matter for states and competent intergovernmental organizations. Furthermore, the COP limited itself to invite more efforts to improve the coverage and representativity of the global system of marine protected areas, further efforts to ensure the full and effective participation of ILCs to this end as a direct contribution to poverty alleviation.

COP 10 also invited the General Assembly and its working group on marine biodiversity in areas beyond national jurisdiction to expedite its work on approaches

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<sup>&</sup>lt;sup>15</sup> Ib., at 22.

<sup>&</sup>lt;sup>16</sup> Morgera, n . 9, above, at 155.

to promote international cooperation and coordination for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction, and consideration of issues of marine protected areas, and urged CBD parties to take action as necessary to advance the work of the Working Group. The COP also called for organizing an expert workshop to identify practical and innovative ways towards accelerating progress on the establishment and effective management of marine protected areas in under-represented areas.

The decision on marine biodiversity also points to several areas for future work by the CBD, including on: synthesizing scientific information on anthropogenic underwater noise and its impacts on biodiversity; identifying elements to integrate traditional knowledge and social and cultural criteria in the identification of EBSAs; developing voluntary guidelines for the consideration of biodiversity in environmental assessments in marine and coastal areas; and convening an expert workshop on the role of marine biodiversity and ecosystems in climate change mitigation and adaptation, as inputs for the development of joint activities among the Rio Conventions.

#### **Invasive alien species**

On invasive alien species, contentious discussions also centered on a proposed normative role of the CBD, with specific regard to the possible development of international standards on invasive alien species (IAS) introduced as pets, aquarium and terrarium species, as well as live bait and live food. The decision on IAS (UNEP/CBD/COP/10/L.35) establishes an *ad hoc* technical expert group to provide scientific and technical information, advice and guidance on the possible development of standards by appropriate bodies that can be used at an international level to avoid the spread of IAS that current international standards do not cover. The expert group will therefore be convened in the framework of the CBD, but the question as to the competent international body to take action on the basis of the recommendations of the group remains open. In the same decision, the COP also urges parties to apply the precautionary approach with regard to the introduction, establishment and spread of IAS for agricultural and biomass production, including biofuel feedstocks, and for carbon sequestration, following the CBD guiding principles on IAS.

## **Protected areas**

Most of the provisions that were debated at the COP in the decision on protected areas (UNEP/CBD/COP/10/L.32) were related to climate change responses and climate change funding. As a result, COP 10 invites parties to identify and manage areas that are important for both biodiversity conservation and climate change mitigation or adaptation; finance the conservation and management of protected area systems in contributing to carbon sequestration and maintenance of carbon stocks, as well as to ecosystem-based approaches to adaptation; and explore how climate change funding opportunities could contribute to the implementation of the CBD work programme on protected areas. In addition, the COP reminds the UNFCCC COP to pay attention to the impact on, and role of, protected areas in adaptation and mitigation strategies with the appropriate social and biodiversity safeguards, ensuring that national adaptation and mitigation action involving the expansion of protected area networks can receive financial and technical assistance through financial mechanisms. The COP further urges parties to increase the effectiveness of the protected area systems in biodiversity

conservation and enhance their resilience to climate change, through increased efforts in restoration of ecosystems and habitats and including connectivity tools.

On protected areas governance, the COP invites parties to establish clear mechanisms and processes for equitable costs and benefit-sharing and for the full and effective participation of indigenous and local communities, related to protected areas, in accordance with national law and international obligations; recognize the role of indigenous and community conserved areas, as well as areas conserved by other stakeholders, collaborative management and diversification of governance types; and include ILCs in multi-stakeholder advisory committees and in national reviews of the effectiveness of protected area systems.

#### **IPBES**

COP 10 also discussed and expressed support for the proposed establishment of an Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), emphasizing the need for IPBES to be responsive to the needs of the Convention and strengthen SBSTTA. The question of how the CBD will make the best use of IPBES remains to be address at a later stage (UNEP/CBD/COP/10/L.25).

### **CONCLUSIONS**

COP 10 has certainly produced a significant level of consensus on the urgency of international, national and sub-national action to tackle biodiversity loss, with unprecedented emphasis on biodiversity mainstreaming, the need for restoration in addition to conservation and sustainable use, and the systematic economic valuation of biodiversity and ecosystem services, also on the basis of the Economics of Ecosystems and Biodiversity (TEEB) study. The Parallels may certainly be drawn with the rapid evolution of the international climate change regime, with climate change mainstreaming having become a glaring reality across the UN System and increasingly at the national and sub-national sectoral levels, the increasing importance of adaptation and the lasting impacts of the Stern Review on the Economics of Climate Change.

Climate change has also clearly become a key cross-cutting component of the work of the CBD, in two respects: climate change impacts and to a certain extent climate change responses may pose significant threats to biodiversity, and are therefore addressed across the board of the CBD activities. On the other hand, climate change approaches to mitigation and adaptation may bring with them the promise of a new powerful vehicle for the application of the ecosystem-based approach. From either perspective, climate change seems to significantly contribute to highlighting the need for synergies among the various thematic and cross-cutting areas of work of the CBD, <sup>18</sup> as well as the need for the CBD to effectively and systematically interact with the international climate change regime and with international climate change negotiators to ensure that biodiversity concerns and biodiversity co-benefits are fully taken into account in the development of the post-2012 regime. It is clear that CBD parties are still ambivalent as to the extent to which substantive synergies should be

<sup>&</sup>lt;sup>17</sup> See www.teebweb.org/.

<sup>&</sup>lt;sup>18</sup> Morgera, n . 9, above, at 154.

attempted between the two international frameworks: one can only contrast the bold and wide-encompassing moratorium on geo-engineering with the more cautious approach adopted for identifying joint actions among the Rio Conventions. The wording agreed on REDD+, in turn, represents a sort of mid-way approach: a clear mandate has been given to the CBD to provide advice on biodiversity safeguards, with the caution that this will not pre-empt decisions within the UNFCCC.

Looking more broadly towards the future, it can be affirmed that COP 10 succeeded in setting out an ambitious and balanced plan for international cooperation, as well as national and sub-national action. The decision on the implications of the third Global Biodiversity Outlook for the CBD implementation (UNEP/CBD/COP/10/L.38) provides useful indications in this respect. Future strategies to tackle biodiversity loss require: recognition of the benefits of biodiversity and their reflection within economic systems; urgent action to curb direct drivers of biodiversity loss (habitat change, over-exploitation, pollution, invasive alien species, and climate change); measures to enhance the benefits from biodiversity, contributing to local livelihoods and climate change responses; measures to protect sustainable customary use; and restoration of degraded ecosystems.

At the same time, COP 10 has dramatically highlighted the dependence on sufficient financial flows and effective dialogue with related international processes for the effective implementation of the Convention. On the other hand, worries about the seemingly limitless expansion of the CBD mandate resurfaced at COP 10, in particular with regards to water security, human well-being and indigenous peoples' rights (as opposed to the protection of biodiversity-related concerns of indigenous and local communities). These tensions between the urgency of ambitious action needed for countering biodiversity loss, on the one hand, and the practical need for resources for national and local implementation, as well as political and legal barriers to international synergies, on the other hand, will certainly continue as the Convention moves into a new phase more targeted at the balanced and holistic implementation of its three objectives.