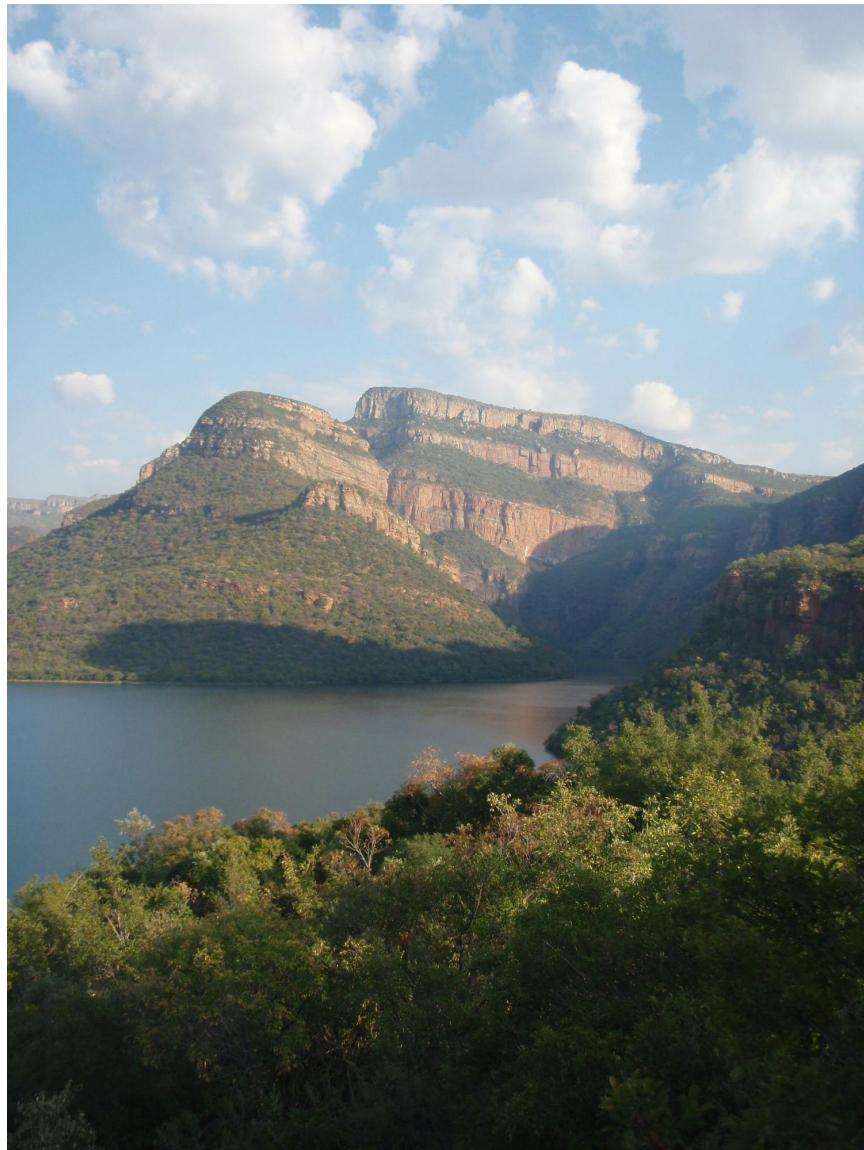


NATURAL JUSTICE

**ANNUAL REPORT
2008 - 2009**



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Cover photograph: Swadini Dam in the Kruger to Canyons Biosphere Reserve

DIRECTORS' OVERVIEW

*We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
Through the unknown, unremembered gate
When the last of earth left to discover
Is that which was the beginning;
T.S Eliot (Little Gidding)*

This directors' overview is a reflexive exercise - it asks with no small degree of incredulity 'how did we make it this far?' Did all the meandering, soul searching, self-doubting conspire to bring us to this place? The same place from where we started and yet so different because we have been transformed by the journey.

When we started Natural Justice, everything was new. We were enthusiastic, with heads full of ideas and with the certainty of the newly converted. We believed we had all the answers and we would succeed if only we could get others to see our point of view. Somewhere during the journey, we no longer had any answers, we were not even sure we were asking the right questions, and began to wonder whether we were in way over our heads. It was like being given a Zen *koan* or logically absurd riddle to meditate upon, whose very objective is to push the seeker beyond perceiving the world as neat pre-defined categories.

The first couple of years of Natural Justice's work were like being possessed by such a *koan*. We started out with an orderly theoretical construct that communities would benefit from 'access and benefit sharing' (ABS) agreements. The international legal landscape was rapidly changing and 'ecosystems and the knowledge related to them' were increasingly being transformed from free public goods to regulated scarce goods. We saw Natural Justice as an organisation that would use the changing laws to assert proprietary rights of communities over their resources and knowledge and thereby get the market to pay for its use. Our plan was simple, ABS was the new frontier in the groundswell of 'payment for ecosystem' laws and if we could facilitate good ABS agreements between communities and commercial users of community resources, we would have found a lasting solution to the problem of poverty of indigenous communities.

But our best laid plans were confounded by ground realities that most lawyers choose to ignore: communities are neither homogenous nor do they have unified interests, and the biggest crisis that communities faced was not economic poverty but social and cultural annihilation caused from the erosion of a way of life and the undermining of their value system's foundations. The market on the other hand was also fickle. There were no guarantees there - what the market demanded today was unfashionable tomorrow. The success or failure of products based on community resources and knowledge depended on factors such as R&D, investment and

consumer interest, and to tie the fortunes of a community to the vicissitudes of the market was to further destabilise communities.

From payment for ecosystem services to the ecosystem as a service provider:

The world's most primitive people have a few possessions, but they are not poor. Poverty is not a certain amount of goods, nor is it just a relation between means and ends; above all it is a relation between people. Poverty is a social status. As such it is the invention of civilization.

Marshall Sahlins (Stone Age Economics)

Our certainty about ABS agreements being the magic bullet for disempowered indigenous communities was badly shaken the more we worked with communities. We had been taken in by the tired parade of the same old popular ABS examples that did not hold up when observed at close quarters. Internationally there was desperation to believe that commodifying indigenous biological resources and knowledge and putting it on the market would be the lasting solution to the problems of indigenous communities. However the ABS fervour in its obsession with market driven solutions had missed out on asking the most fundamental question - if indigenous communities were in Sahlins' terms the 'original affluent societies', what had caused their breakdown? Before we came up with the idea of 'payment for ecosystem services' how did these communities live? Whatever happened to the fact that the ecosystem has always been the greatest and most reliable service provider to these communities and has sustained them for hundreds of years? The loss of rights over their ecosystems and disrespect for their ecologically sustainable way of life has led to their present predicament.

The solution to the market caused problems of privatising communal lands, massive deforestation, widespread monocultures, pollution of waters and poisoning of lands was not using 'more market' as a corrective, but rather 'more rights'. We discovered that the solution was not 'more ABS agreements' but rather securing rights of communities to their lands and cultures through ABS agreements. We needed a paradigm shift from looking at ABS agreements as good contracts in a market for trade in ecosystem services to looking at them as a way of fortifying community's rights to their lands, waters and cultures.

A Biocultural approach:

Arriving where we started and knowing the place for the first time

Collective biocultural heritage is the knowledge, innovations and practices of indigenous and local communities which are collectively held and are inextricably linked to: traditional resources and territories; local economies; the diversity of genes, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities.

IIED

Meditating on the logical absurdity of a Zen *koan* is supposed to result in a breakthrough or *satori* that cuts through our foundational assumptions about the self and the world, bringing us face to face with the truth that conceptual categories are contingent and not absolute. They aid us in negotiating the world and must be understood as tools and not mistaken for reality; they are at best topographical maps and we mistake the map with the world at our own peril.

We had a similar ecological *satori* in Natural Justice when we realized the logical absurdity of our misplaced understanding of ABS. The market delusion about ABS understood traditional knowledge, biological and genetic resources, land, custom, spirituality and community as separate categories. Community life was not seen as a complex web but could be reduced to its constituent building blocks. Traditional knowledge for example was separate from land and land was separate from community and somehow the sale of traditional knowledge would result in the wellbeing of the community and affirm a way of life.

Our ABS failures had brought us to the point where we began to understand the interlinkage between the 'bio' and 'culture' - a community territory was not just a landscape but also culturescape, the trees, mountains and rivers were replete with cultural and spiritual meaning that resulted from a biocultural way of life. It was this biocultural lifestyle that had sustained indigenous communities for generations long before any of our quick fix market based solutions.

The Biocultural Dimension: Community Protocols

What is man without the beasts? If all beasts were gone, man would die from great loneliness of spirit, for whatever happens to the beasts also happens to man. All things are connected. Whatever befalls the Earth, befalls the sons of the Earth.

Chief Seattle's speech in 1850 addressed to President Franklin Pierce

We now had a compass, and the test of whether we were on the right track in our work with communities was to ask ourselves - a simple question - does a course of action that we intend to take protect and promote a biocultural way of life? Using the biocultural compass, led us to review our ABS work. We realized that the categorical imperative prior to any ABS agreement was for the community to develop a biocultural community protocol that is an outcome of a deeply reflective and widely consultative process within the community, thus affirming a way of life and the ecological and customary values that sustained it. Any 'payment for ecosystem services' agreement such as ABS would have to be underpinned by an assertion of community rights to the 'ecosystem as the community's primary service provider'. The terms of any ecosystem related agreement would be set by the biocultural values of the community and not by the market.

With the conviction and second wind that arises from clarity Natural Justice has over the last year striven to develop 'biocultural community protocols' with communities in Africa and India and to get these protocols recognized by governments in national law and policy and by the country negotiators developing international law in the

form of an International Regime on ABS. We have been surprisingly successful and much of our impact has resulted from 'biocultural community protocols' being an idea whose time has come. Biocultural protocols articulate within a legal framework what communities have consistently argued at the national and international levels: that their wellbeing and that of the ecosystem rests primarily on securing the rights to the landscapes that they have protected and nurtured for generations. The market of course can provide services to communities but cannot replace the ecosystem as the most consistent of service providers.

In the year to come Natural Justice seeks to explore the application of biocultural protocols in a range of contexts involving communities and ecosystems such as forest management in the context of climate change, marine environments and biosphere management among others. Of course the last three years have taught us that having good ideas is not a solution to the bread and butter problems of ensuring that we have enough money to run the organization. We still spend more time than we care to admit in writing funding proposals and applying for grants but this must be done. We are hopeful and have taken to heart Gandhi's encouraging words 'find purpose, the means will follow'.

A final note of thanks. This year 'means' meant two things: good advice and financial support. We dedicate our initial success to those who believed in the possibility of new approaches to old problems, giving us the time we wanted and the advice we needed. Deep gratitude goes to Andreas Drews at GTZ for funding an evolving idea. 2008-2009 was a year of exploring new approaches. The focus until the Conference of the Parties in November 2010 is to further develop practical ways to strengthen the legal case for communities' environmental rights and ensure that the incumbent international regime on access and benefit sharing reflects the biocultural dimension.

Kabir Bavikatte and Harry Jonas

9 July 2009

1 EXECUTIVE SUMMARY

This report consists of four main sections, covering all aspects of the organization's current operation.

The first section presents the project work and publications Natural Justice has undertaken this year. It sets out the projects within a programmatic framework, namely:

- Community projects in South Africa, Africa and India;
- National and international advisory work; and
- Publications.

Each sub-section provides an overview of the overall programme, including its future prospects, and is followed by a detailed account of the work we have undertaken.

The second section focuses on the organization, providing details about the constituent elements of Natural Justice's governance structure and provides an update on the internship and research programmes.

The third section is an overview of the financial position and outlines Natural Justice's future fundraising strategy. The Fourth Section is a look ahead at the prospects for the period 2009-2010.

SECTION I

2 COMMUNITY PROJECTS

Natural Justice's primary focus is using the law to assist communities to protect the integrity of their environment and to benefit from their natural resources and traditional knowledge. Working to empower communities, their leadership and the CBOs that work with them is the most direct way to provide this type of assistance. For geographical reasons, we have focused on direct and extended community engagement in South Africa, and the provision of technical support to community based organizations (CBOs) and non-governmental organizations (NGOs) who work with communities in other regions.

In South Africa we have directly engaged with the San community over the year and have begun working with communities in the Kruger to Canyons UNESCO Biosphere Reserve. Internationally, we have worked with the Raika community in Rajasthan, North West India, and are about to work with the Maasai in Kenya as well as other communities in both Africa and Asia.

2.1 South African Community Projects

Natural Justice has been involved in two community projects in South Africa, working with the San on preparing their governance structures for the receipt of financial benefits from the Hoodia agreement, and with communities in the Kruger to

Canyons Biosphere Reserve. We are about to begin working with communities near Alice in the Eastern Cape.

2.1.1 San-Hoodia Governance

i. Overview of activities

In April 2008, Natural Justice began work on a 3 year project, funded by GTZ, to provide governance assistance to the Hoodia Trust and San Council of South Africa to assist them to establish structures and systems with which to manage the expected monies from a benefit sharing agreement between the San and CSIR.

Over the first year, Natural Justice:

- supported a crucial annual general meeting (AGM) of the Working Group on Indigenous Minorities of Southern Africa (WIMSA - the San's overarching body);
- facilitated three Hoodia Trust meetings dealing with Hoodia governance; and
- hosted a multi-stakeholder conference to look at the current situation relating to the future of Hoodia's cultivation and commercialization.

Significant progress was made in evaluating the governance arrangements that the Hoodia Trust would have to put in place to manage the expected funds, as well the funding guidelines and procedures necessary to ensure the efficient and transparent provision of funds to San bodies and community members.

But in November 2008, Unilever (the company that was licensed to commercialize Hoodia products) decided to terminate the license. The effect on the San has been to deny them any income from the CSIR benefit sharing agreement for the foreseeable future. Hoodia Trustees and the San's lawyer agree that despite the good progress on the Trust's financial governance, Unilever's decision has undermined the reason for focusing capacity building on the Hoodia Trust.

A meeting of Hoodia stakeholders was convened at short notice by Natural Justice, part-funded by GTZ, and held at Khwa ttu (the San Cultural Centre) from 22-23 January 2009, near Cape Town. It led to the identification of a number of activities important to the future of Hoodia benefits from the San. These include:

1. Supporting the San-Nama and San-HOGRAN BSA negotiations and the renegotiation of the San-SAHGA BSA;
2. Coordinating the work of the Hoodia Working Group and providing input to their meetings; and
3. Working with PhytoTrade Africa to explore the future market of Hoodia.

ii. Latest developments

Natural Justice intervened in a process that has been developing since the San entered into the benefit sharing agreement with CSIR. This constrained the work we undertook: the Trust was already constituted and its membership and operating procedures agreed. Importantly, the Trust was established to manage Hoodia funds only, and no provision had been made to increase its role to manage monies from the SAHGA agreement or other ABS deals.

In the meantime, the South African San have entered into another benefit sharing agreement, this time relating to TK about Sceletium, a plant that induces feelings of wellbeing. The funds from that deal go directly to the South African San Council. Natural Justice identifies some trends in the way San TK is being managed:

- Deals are being agreed without reference to a broader San vision for their TK;
- Negotiations are not as transparent as they could be;
- The types of benefits that the leaders are negotiating for have not been discussed at a community level; and
- Because each agreement specifies a different San body to receive the financial benefits, there is duplication of effort in managing the funds which is also causing confusions for San communities.

Essentially, there has been no work undertaken by San bodies or support NGOs to understand the different San communities' views about shared TK, their vision for its protection and management, what kinds of activities they would want it being used for, and what benefits they want to derive from any agreements. The system, as it stands today, is fragmented and lacks community legitimacy.

GTZ has been party to the discussions Natural Justice has been having about the lessons we are learning from the San-Hoodia case. Linked to what we have set out above, we argue that unless communities are involved in defining the principles that should govern their TK, and are clear about which institution(s) will manage the TK, agreements will be entered into in an *ad hoc* fashion according to a range of immediate (financial) exigencies. Opportunism is also fostered.

A paper we wrote was recently published on the UNU's TKI website (www.unutki.org) entitled Shifting Sands of ABS Best Practice, sets out the above thoughts in more depth.

Responding to this, Natural Justice had proposed using the cessation in Hoodia monies to take the opportunity to conduct a study with San communities of their views on TK, with a view to developing a holistic picture of San communities' current understanding of their TK, concomitant rights, and about how and by whom they want their TK to be managed. We had planned to work to establish and capacitate a San Heritage Council, to be an integral part of the Working Group for Indigenous Minorities in Southern Africa (WIMSA), to protect and promote San heritage in a consolidated manner.

However, as we submitted a proposal of this nature to GTZ, the current coordinator of WIMSA resigned, casting a long shadow over the future of WIMSA. Whilst Natural Justice is committed to working with the San to protect and promote their TK, our critical assessment of WIMSA's current predicament leads us to the conclusion that it is not the right time to invest in an institution that has its future tied to WIMSA.

Natural Justice remains invested in the San community, by supporting a Khomani San woman (Annetta Bok), through a Fellowship, to identify ways forward for the community on issues of TK (especially on women's empowerment), towards addressing the lack of representation and transparency of the leadership that is having such a devastating impact on the way the community's traditional knowledge is being managed. *See more on the Fellowship in section 5.4.*

2.1.2 Kruger to Canyons Biosphere Reserve

Linked to the above, we have over the course of Natural Justice's work on the Hoodia issue been theorizing about how communities can best respond to the incumbent international regime on ABS. We have drawn extensively from our practical involvement in the Hoodia case, as well as from our work at the international level and the experience gained through our inputs to the ABS Capacity Building Initiative for Africa (*see section 2.2.1*). Our latest thinking is encapsulated in a booklet we launched at the 7th meeting of the Working Group on ABS in Paris, April, 2009 (*see section 3.2*). It sets out our proposed community "biocultural approach" (linking biodiversity to culture/livelihoods) to the opportunities and challenges posed by ABS and details the ways in which communities can use biocultural protocols to affirm their environmental and cultural rights and assist them to negotiate for agreements that benefit the community. *An abbreviated version of the booklet appears in Appendix I and sets out the biocultural approach to ABS.*

We were invited by UNESCO to pilot the bio-cultural approach in the K2C Biosphere Reserve in Eastern South Africa and conducted a field visit on 16-19 February 2009. Since then we have held three more meetings/workshops in the K2C and we are now developing a biocultural protocol (*see Appendix I*) with a group of traditional healers that we hope will lead to livelihood opportunities for the healers and the formation of a Medicinal Plants Conservation Area in the canyon core zone. We are also looking at how the biocultural approach can help biosphere communities to approach benefits from ecosystem services associated with the Swadini hydropower project.

Natural Justice intends on deepening its work in the K2C, to ensure that the local communities are best placed to benefit from the conservation and sustainable use aspects of the biosphere.

Natural Justice submitted on behalf of the K2C an application for this project to the SEED awards, and in May 2009 the project was selected as one of the 20 winners. The award is for USD 5,000 worth of consultancy which we are using in partnership

with the Biosphere Committee to develop a business model around medicinal plants and the hydroelectric power project.

2.1.3 Alice Community / Pelargonium

Natural Justice is providing technical assistance to the African Centre for Biosafety to assist their work with communities near Alice in the Eastern Cape of South Africa.

Those communities have historically produced tinctures from the roots of pelargonium to treat respiratory infections and diseases, including tuberculosis. Based on their traditional knowledge Schwabe Pharmaceuticals now manufactures a syrup called Umckaloabo from the same roots to treat respiratory tract infections such as bronchitis and common coughs and colds. Marketed as a unique African natural remedy, Umckaloabo is the 20th most sought after medicine in Germany.

The African Center for Biosafety, has asked Natural Justice to run a training of trainers session for a number of their staff so as to be able to work with the community towards developing a biocultural protocol to help the community to negotiate a benefit sharing deal with Schwabe.

2.2 African Projects

Natural Justice has been working with the ABS Capacity Building Initiative for Africa since its inception and through that work has been exposed to the fullest extent of ABS in Africa. With African indigenous and local communities (ILCs) and in partnership with the Initiative, Natural Justice is about to develop an African ILC Biocultural Declaration which will be the precursor to a range of work with African ILCs and their local CBOs and NGOs.

2.2.1 ABS Capacity-Building Initiative for Africa

The ABS Capacity-Building Initiative for Africa is a multi donor initiative that has for over three years delivered technical and legal capacity building to a range of stakeholders across Africa. The Initiative provides training to implementing partner countries on best practice of ABS regulation implementation, extensive workshop opportunities to discuss localised issues as they affect ABS, and also a platform on which governments and other bodies can address ABS issues peculiar to the African context.

Natural Justice has been providing its resources and know-how to the form of training and advice to the Initiative. Through that work we have become advisors to the African Group and have been involved in drafting operational text for the 7th meeting of the Working Group on ABS. We also report on the workshops and produce ABS case studies for the Initiative's website (<http://www.abs-africa.info/>).

2.2.2 African Biocultural Community Protocols

Considering the fact that the African Group spearheaded the biocultural approach to ABS at the international level by including community protocols in their OT at ABS 7 (see section 3.2), Natural Justice wants to work with a number of African ILCs to develop protocols and to assist them and the CBOs they work with to use the protocols to greatest effect.

In September 2009 we will work with the Masaai in Kenya, together with one of their support CBOs, to develop a biocultural protocol with them to uphold their rights as livestock keepers and to protect their traditional knowledge. In addition, we intend to work with African ILCs, the Initiative, Indigenous Peoples' of Africa Coordinating Committee, the African Biodiversity Network and biotrade organizations to identify African ILCs who have a close relationship with critical (animal or plant) biodiversity and associated TK. Over the year Natural Justice will work with up to 4 other African ILCs and their CBOs to develop biocultural protocols and to assist them to use the protocol to better conserve their biodiversity while protecting and promoting their TK.

We will use the first part of this experience to inform the meeting of African ILCs in Nairobi between the 14-18th of September 2009 and to provide technical input to the development of an African ILC Biocultural Declaration. This is a significant initiative, driven by Natural Justice. Natural Justice will also develop a training of trainers manual and course for the biocultural approach, specifically adapted for the African context.

2.3 Indian Projects

In June 2009 Natural Justice developed a biocultural protocol with the Raika, pastoralists living in Rajasthan, India. The protocol has been well received by the community, other NGOs working with pastoralists, as well as a number of other organizations and governmental bodies. From that work, as well as from meeting a series of other NGOs and government officials, we have been asked to engage with a range of work in India over the coming year. Natural Justice is actively considering ways to meet that need.

2.3.1 Raika Biocultural Protocol

The Raika are a pastoral community living in Rajasthan. The particular breeds of camels and sheep that they keep are considered to be important animal genetic resources and their way of life conserves Rajasthan's forests. Natural Justice worked with LPPS (www.lpps.org) to develop a biocultural protocol to address the Raika's exclusion from forest areas that is threatening their livelihoods, culture and traditional knowledge.

Natural Justice attended a series of community meetings as well as drafting sessions with members of the LIFE Network and Drynet. The protocol has been drafted and

initial responses have been extremely favourable. From that work, we understand that a protocol is a type of participatory management tool, whereby the redrafting of it on an annual basis provided the community a focal point around which to contemplate and address their most pressing issues. Our work on this protocol led directly to the Masaai protocol (see *section 2.2.2*).

2.3.2 Indian Protocols

During the visit to develop the Raika community protocol, we attended meetings at the National Biodiversity Authority, the Foundation for Revitalization of Local Health Traditions (FRLHT) and the Rashtria Guni Mission. Natural Justice was also recently chosen as an international expert by the Secretariat of the Convention on Biological Diversity to represent international civil society organisations to contribute to the Expert Meeting on Traditional Knowledge in Hyderabad, India. The report of the Expert Meeting will contribute to the negotiations towards the International Regime on ABS at the 8th Meeting of the ABS Working Group.

The net result is that Natural Justice has been asked to work with the FRLHT and the Rashtriya Guni Mission to develop biocultural protocols with a series of communities that they work with. Natural Justice is actively looking at ways that we can expand our work to assist Indian communities and their CBOs/NGOs to use the biocultural approach to ABS to conserve biodiversity and protect their TK.

In the long term Natural Justice has been exploring ways to partner with the Indian National Biodiversity Authority to provide support in implementing the National Biodiversity Act and Regulations. Specifically Natural Justice has been asked by the National Biodiversity Authority to provide support in 2010 for the development of biocultural protocols to complement its peoples biodiversity registers across the country.

3 LEGAL ADVICE

3.1 National Advisory

Natural Justice has been actively exploring ways to provide guidance to the South African Department of Environment and Water Affairs on matters relating to ABS, as well as to intergovernmental agencies and other NGOs working at the national level. We have submitted a tender to the Department of Environment and Water Affairs to provide advice on the benefits sharing agreements currently pending the Department's approval.

Natural Justice co-hosted a workshop for Department of Environment officials in Botswana, focusing on African experiences of ABS and national approaches. We recently presented at a Department of Science and Technology sponsored First National Bioprospecting Stakeholders Meeting and are looking to increase our involvement in their Farmer to Pharma programme and National Bioprospecting Platform. In March 2009 Natural Justice also co-hosted a workshop on ABS for

Department of Environment officials in Botswana, focusing on African experiences of ABS and national approaches. Early this year Natural Justice also provided support to the Kenyan Department of Environment in reviewing their Access and Benefit Sharing laws and regulations.

Natural Justice continues to look for ways to assist national governments and implementing agencies to develop ABS laws and policies and to assist with their implementation.

3.2 International Advisory

As noted above, Natural Justice has been involved in the Initiative's capacity development on ABS issues in Africa. As part of this work, we were asked to assist with the drafting of the African Operational text which was submitted, along with other groups' submissions, as the basis of work for 7th meeting of the Working Group on ABS, held in Paris in April 2009. In particular, the African text included reference to "community protocols". Before the meeting, Natural Justice held consultations with ILCs, NGOs and users of genetic resources, and launched a booklet on bio-cultural community protocols at a side event hosted by UNESCO and GTZ.

Over the week, the ILCs increasingly referenced community protocols and included them in the text they submitted to the Secretariat under compliance, mirroring the African Group's text. Although the final text remains heavily bracketed, there were no delegations that explicitly opposed inclusion of reference to community protocols, and it was supported by New Zealand, among others, and remains in the draft international regime. We are particularly happy about the way an idea that emerged from the work we have been doing with San communities has gained international recognition for an innovative community-based legal tool.

Natural Justice recently attended the meeting of the Group of Legal Experts on TK, held in Hyderabad, India in June 2009. Natural Justice submitted answers to the key questions and the key recommendation to include community protocols as a means to protect communities' TK has been adopted in the report.

Natural Justice will work at a number of levels at the Working Group on Article 8(j) and the 8th meeting of the Working Group on ABS to promote the approach, including advising the African Group, partnering with UNEP to host a half day seminar, hosting a number of side events and releasing a book. We will engage in similar activities at ABS 9 in April 2010.

Additionally, Natural Justice suggested the creation of a community protocols clearing house mechanism (web-based) and UNEP has decided to develop the idea with our input.

Finally, Kabir Bavikatte was recently asked to act as an expert on a UNEP web-based platform to facilitate exchange of expertise on various areas of ABS. In this role he will assist UNEP in providing continued support to the current negotiation process on

developing the international regime on ABS and building capacity of stakeholders. This role will greatly strengthen relational links between UNEP and Natural Justice, providing international exposure and networking within the ABS professional community.

Natural Justice continues to look for opportunities to provide our international legal expertise and local experience to influence the formation of law and policy at the international level.

4 PUBLICATIONS

Natural Justice is continually reflecting on its work and experiences. We have produced a number of published works this year, including:

- *Shifting Sands of ABS Best Practice*, published by the UN University on their Traditional Knowledge website (www.unutki.org);
- *Beyond Traditional Knowledge: Bio-cultural Protocols as a community response to access and benefit sharing*, which was released at ABS 7 Paris, side event;
- *Traditional Knowledge and Economic Development*, to be published by UN University as a chapter in a forthcoming book on TK;
- *From Global to Local: The ABS Capacity Development Initiative for Africa: An informative brochure* written as an introduction to the work of the Initiative. This brochure was released at an ABS 7 Workshop in Paris at a side event; and
- *ABS Wiki*, which are a series of case studies on the ABS Wiki blog that provide a broad introduction to ABS case studies.

We have been commissioned by UNEP to write a book on the biocultural approach to ABS, and to explore the various uses of biocultural protocols under the broad rubric of payment for ecosystem services - ranging from ABS to REDD and biotrade. This book will be published by UNEP and launched at the 8th meeting of the Working Group on ABS in Montreal, November 2009.

SECTION II

5 GOVERNANCE

5.1 Executive members

Leslie Liddell, former director of Biowatch, served as an Executive Member of Natural Justice from its inception until the AGM in 2009. During that time she saw the organization through its critical first two years. She has retired from the executive membership and has been replaced by Adele Wildschut and Hennie van Vuuren.

Adele Wildschut is a Senior Manager of the Synergos Institute (Southern Africa). Previously she served as Development Director of Catholic Welfare and Development, and served for five years as the Director of the Centre for Rural Legal Studies. She serves on a number of other non-profit boards and is a human rights activist with a particular leadership role in indigenous peoples' networks.

Hennie van Vuuren is the Head of the Corruption and Governance Programme at the Institute for Security Studies. His focus is on countering corruption in South and Southern Africa as well as broader continental initiatives.

Kabir Bavikatte and Harry Jonas remain as Executive Members.

5.2 Directors

Since founding the organization, Kabir Bavikatte and Harry Jonas have both been working on every aspect of the organization's development, each with their own specialization: while Kabir Bavikatte has engaged on the international advisory aspects Harry Jonas has focused on the community projects. Together they have conceptualized the biocultural community approach to ABS, and worked to increase its implementation at the local level and acceptance at the international level. Most recently they are exploring its application to other legal frameworks, such as forest management under the climate change regime and payment for ecosystem services.

5.3 Associates & Consultants

While Natural Justice is still not in a position to provide full time employment, we are increasing the number of Associates. Associates are individuals with a specialization in law or ecology. Whilst they are not employed by Natural Justice, they work within the organization to provide their expertise to specific programmes.

Natural Justice welcomed Johanna von Braun as an associate in January 2009. Dr. Johanna von Braun is a Post-Doctoral Fellow based at the University of Cape Town. We also welcome Jen Newenham who is an ecologist with extensive experience of the UNESCO biosphere framework through her work establishing the K2C (see section 2.1.2), and Dr. Peter Wood, a forest expert with a focus on climate change.

Scott Dunlop is a consultant who provides technical support to the organization, including reporting, logistics and communications. Scott has also worked for the Social Justice Movement during the spate of xenophobic attacks in 2008.

5.4 Fellows

Fellows are people from the communities we work in who Natural Justice has chosen to engage with particularly closely. We aim to provide specific capacity building needs and support their own community based initiatives to drive endogenous processes.

Annetta Bok is a Khomani San woman who has had experience at the international level as an Indigenous Peoples of Africa Coordinating Committee representative. Her specific focus is working with women in the Khomani San community to address a number of concerns relating to the management of their TK (see section 2.1.1).

5.5 Advisory Board

Natural Justice has three international advisors who are acting in honorary capacity, providing assistance with key areas of legal advice, organizational management and fundraising.

Brendan Tobin is currently pursuing his PhD on customary law of indigenous peoples and human rights at the Irish Centre for Human Rights, National University of Ireland, Galway. Previously he was a Research Fellow at UNU-IAS with the Biodiplomacy Initiative, contributing research on bioethics, bioprospecting, traditional knowledge and intellectual property rights and ABS. In 1997, Tobin was awarded an Ashoka Fellowship for Social Entrepreneurs for his work with indigenous people in Peru.

Tomme Young is an international consultant, assisting countries and international secretariats in addressing the technical challenges of environmental and social development in law, and in implementing multilateral and bilateral international agreements. Previously the Senior Legal Officer of the IUCN International Environmental Law Centre, Tomme Young has published widely on biodiversity related issues and continues to be a leader in critical thinking. She is the Managing Editor of Environmental Policy and Law.

6 INTERNSHIP & RESEARCH PROGRAMME

Since January 2009, interns have run an internship program which involves legal research and producing resource papers among, other tasks. The programme aims to give work experience to students studying within the framework of environmental law or sustainable development, while at the same time benefiting from relationship-building with individuals and organisations. To date, three interns have participated, and three more are due to take part in the second half of 2009.

Natural Justice also runs a research programme, where we assist researchers who are studying issues we are involved in. This involves, where appropriate, assisting them to think through the specific research focus, providing primary and secondary research materials, and giving them community or NGO contacts and/or interviews. So far we have helped a number of PhD and Masters' candidates in this regard.

SECTION III

7 FINANCIAL OVERVIEW

CMDS, a Cape Town based accountancy firm that specializes in NGO accounts, are our accountants. On the basis of financial reports produced each quarter, requests have been made to the primary funder, GTZ (Deutsche Gesellschaft für Technische Zusammenarbeit), for disbursement of funds according to the contract signed in April 2008.

That grant has allowed for the operation of our South African community projects (section 2.1). The total for the grant is €221,502. Out of the total income of ZAR 957,960 for the period January 2008 to May 2009, we expended ZAR 730,552. We are currently renegotiating the contract to be able to use the remainder of the grant for the reconfigured South African work as well as the African community projects (section 2.2).

Jan- June 2008:

Income:	264,746
Grants received	244,489
Donations	20,000
Interest earned	257
	(264,746)
Expenditure:	89,640
Personnel costs	38,625
Administration costs	10,039
Bank charge	976
Project travel	20,000
Workshops	20,000
	(89,640)
Surplus/(deficit) for the year	175,106

July 2008- May 2009

Income:	693,214
Grants received	591,928
Donations	100,000
Interest earned	1,286
Expenditure	640,912
Personnel costs	231,874
Administration costs	123,072
Bank charge	1,704

Project travel	154,452
Workshops	129,810
	(640,912)
Surplus/(deficit) for the year	52,302

Looking ahead, Natural Justice has been provided a USD 25,000 grant by UNEP to: develop the biocultural community protocols clearing house mechanism (website); host a half day seminar between WG on 8(j) and ABS 8; and write a book on BCPs and release it at a side event at ABS 8. We have also recently met with the GEF Small Grants Programme who have indicated that we can apply for up to USD 50,000 for work in the K2C.

SECTION IV

8 PROSPECTS FOR 2009

Overall, Natural Justice has established the seeds of substantial community programmes in South Africa, regionally and in India, as well as establishing a role for the organization as informing the process with innovative legal thought based on practical experience. While Natural Justice has been successful in creating opportunities for future work, we have created corresponding challenges. This section sets out the vision for each area of work over the year, with a final section on the challenges that will need to be overcome to deliver successful projects.

Core focus: The focus until November 2010, is working to fully evaluate the strengths and weaknesses of biocultural protocols within the context of the ABS regime. This means working with communities and their CBOs to develop protocols, and to fully evaluate the approach. At the same time, we are increasingly interested in the application to BCPs to lesser emphasised aspects of ABS, such as animal and marine genetic resources, as well as communities' engagement with other international and national regimes dealing with natural resources, such as Reducing Emissions through Deforestation and Forest Degradation in developing countries (REDD), the UN Convention to Combat Desertification, and payments for ecosystem services.

We realize from our work that we have put a heavy emphasis on the process that leads to the development of a protocol, and that is well founded. But we have not yet fully explored the range of activities that should follow a protocol. This is linked to the fact that we have had experience of developing protocols, but not yet worked on post-protocol processes. One recent suggestion from our partners in the Raika protocol, is that communities redevelop the protocol every year, making the protocol a rights based participatory management tool. These types of ideas command attention.

South Africa: Natural Justice plans to deepen its work in the K2C, to include the Hydropower project's benefit sharing elements and the GEF-SGP proposal will focus

on the K2C. We hope to be working closely with the Department of Environment and Tourism to implement the Bioprospecting Regulations and with the Department of Science and Technology to further define the interface between users and knowledge holders.

Africa: We have agreed funding from GTZ to work with up to 5 communities and their CBOs to develop BCPs over the next year. We plan to draw in a number of varied partners to the projects, including IPACC, the Union for Ethical Biotrade, and to work with communities who have TK relating to either plant, animal or marine resources.

India: UNEP has funded the development of two protocols in India by November 2009. During that visit, Natural Justice will meet further with the Foundation for the Revitalization of Local Health Traditions to explore how we can develop a broad spectrum framework for protecting TK using the biocultural approach. We are planning on using the K2C as a beginning to focusing on Biosphere Reserves and plan to work in an Indian BR: Nilgiri. We are also proposing to UNEP that we assist with the implementation of the Biodiversity Act being supported by a GEF grant. Depending on how the work goes, Natural Justice may require a permanent Indian presence within the year.

UNESCO Biosphere Reserves: Natural Justice believes the Biosphere Reserve framework is a highly beneficial perspective to take to any community-environmental scenario. As above, we want to work closely with UNESCO to develop critical thinking on the links between biodiversity and cultural diversity. In that vein, we will contribute to an international Congress on the subject planned for mid-2010, to be held in Montreal.

Advisory: We will continue to work at the international level. We will advise the African Group in ABS 8 and 9, through to COP 10 in November 2010. Towards that end we will focus on regional approaches, such as the African Community Biocultural Declaration we are developing in September 2009.

At the national level, we are deepening our involvement with the Department of Water Affairs and Environment and the Department of Science and Technology. We will continue to explore how we can assist with the implementation of the Bioprospecting Regulations, *inter alia*.

We will continue to work closely with the ABS Capacity Development Initiative for Africa, and through them hope to be able to develop training of trainer manuals for the African context, as well as increase the number of case studies and other materials.

Research and internship programmes: We hope to attract more local students for the internship programme in the forthcoming year, and forge official links with UCT. As part of this, one of the ideas Natural Justice wants to pursue is developing an online academic self-learning programme. The idea is to draw on Natural Justice's collective academic backgrounds and experience to develop a highly progressive collection of articles, resources and materials (including questions for thought provocation) to develop interested individual's critical thought on the law-development-environment nexus. Once established, we aim to work towards holding courses/summer schools at local institutions (Africa or India) to host students and practitioners to look at these issues as a precursor to a more permanent future institutional arrangement.

Governance: Natural Justice will benefit greatly from our two new Executive Members, as well as our three international advisors. As the scope of our work increases, the collective wisdom of this group will become increasingly important to the sustainable development of the organization.

The new associates, it is hoped, will open up new areas of work for the organization, simultaneously forging links with the exiting programmes.

Funding: we continue to evaluate new sources of funding, and now that we have a track record, are in the course of making a number of proposals for core costs. Whilst GTZ has agreed the new budget that provides funding for the K2C work and a number of African communities, we are actively looking to cover more of our African work from other sources. GEF-SGP may be one potential funder, who is interested in funding K2C work and on Natural Justice becoming a partner, meaning that we provide them advice on certain environmental legal issues on an *ad hoc* basis. We will continue discussions with UNEP about how we can assist in implementing their 2010 priorities in both Africa and India.

Challenges: If the main aim is doing quality work with communities and creating lasting change, the challenge is not to take on too many projects. Our haste to extend must be tempered by an acknowledgement that the advances we have made thus far issue from a deep focus on a core issue, not from skipping from one issue and one community to another. Natural Justice will have to contemplate the immediacy of the term sustainable development if it is to continue to do good community work, contribute to critical legal thought and influence international law.

We must remain alert to our own critique of market based approaches as they relate to communities - and internalize. We argue that to sacrifice core values for short

term gains is inherently counterproductive, and instead communities are advised to approach new challenges in ways that reaffirm their values. Thus far, our sheer focus has led us to begin to make a valid contribution. In these terms, Natural Justice is well advised to meet the challenge of deepening the organizations' involvement with communities and achieving impacts at the national/international levels by striving to retain the quiet to listen and stillness to think.

9 APPENDICES

APPENDIX I

BIO-CULTURAL PROTOCOLS: A COMMUNITY RESPONSE TO ABS

Published April 2009

INTRODUCTION

The ABS regime is a double edged sword for communities. On the one hand it provides an opportunity to be rewarded for their stewardship of the biological diversity within their landscape and generate livelihoods. On the other, it establishes a neutral trade framework characterized by great disparities in bargaining power between parties, in which communities are by far the weakest players.

The international community has endeavoured to protect communities from entering into unsound ABS agreements by developing the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization. The Guidelines' emphasis on user requirements is an important element of ABS best practice, but they fail to consider communities as active participants in the ABS process, able to determine for themselves when and on what terms to engage users.

From Natural Justice's work on ABS, we have witnessed firsthand the potential of ABS, as well as its pitfalls. One overriding lesson from our experience is that communities are best placed to make informed decisions where they fully understand the ABS framework and view any request for access to their TK within the context of their collective bio-cultural heritage and modern aspirations.

Users will also benefit from communities' clarity on their approach to ABS. "Community protocols" as they are referred to in the African Group operational text submitted for negotiation at ABS-WG 7, will assist users of TK to interact with communities because they articulate the ethical framework that governs their TK and details other factors such as customary procedures for providing free prior informed consent.

Thus, bio-cultural protocols are a community-based tool to facilitate the interface between communities that want to engage in ABS on the one hand and ethical users of TK on the other. Their development helps communities to evaluate the value of ABS as a means to generate local livelihoods, and the protocol itself constitutes an articulation of their views in a form that assists ethical users of TK.

COMMUNITY-BASED CRITIQUE OF ABS 7

Parties to the CBD are meeting in Paris to discuss operational text at ABS 7. The shape of the incumbent regime, as set out at ABS WG 6 (the bricks and bullets) is based on the premise that the “protection of TK” will be achieved by facilitating trade in TK and ensuring that communities are involved in benefit sharing agreements. In this light, ABS is the financial mechanism of the CBD. It is promoted as a useful means to achieve the Convention’s objectives by establishing a facilitating framework for access to TK, and represents a potential driver of environmental, social and cultural gains.

Like other financial mechanisms, it establishes a regime with underlying equitable principles – in this case the requirements of free prior informed consent (FPIC), mutually agreed terms (MAT) and benefit sharing. Yet like the Clean Development Mechanism (CDM) in the context of climate change, the question of environmental additionality, and in this case cultural additionality are raised. Whilst the international regime facilitates ABS, it cannot legislate for agreements to be culturally and environmentally sound. It underwrites the value of TK, but does not guarantee that the commercialization of TK will drive social and environmental gains.

Climate change policy illustrates that the effectiveness of the CDM is contingent on the CO2 reductions of individual projects. Similarly, in the case of ABS, particular agreements will only have local gains where they are carefully calibrated to meet the specific needs of the local communities and their endemic environments. TK is the result of a communities’ connection to the land, expressed through their culture and spirituality, and recorded in their customary laws. Accordingly, for ABS to “protect TK” it must contribute to a virtuous cycle of secure land rights, cultural and spiritual recognition, and social and economic amelioration.

The net result is that the international regime on ABS will make communities responsible for brokering agreements with users of genetic resources that lead to the sustainable use of natural resources and promotes their culture.

The efforts by international policymakers to secure communities’ rights to their TK and enshrine notions of FPIC and MAT are critically important, but it should be acknowledged that the international regime will still leave communities exposed to potential exploitation of their TK in ways incommensurate with Articles 8(j) and 10(c).

WHY USERS BENEFIT FROM INFORMED COMMUNITIES

Whose responsibility is it to ensure that ABS deals go beyond a transaction based on the market value of TK, and instead further the objectives of the CBD? Business interests in the ABS negotiations have consistently underscored that whilst they support the principles upon which ABS is founded, they find engaging with traditional leadership and customary laws challenging and draw a line between activities driven by an ethical business model and philanthropy.

Users of TK have argued that negotiating with communities puts them under a number of related strains. They find it hard to identify how a particular type of TK has been developed, and which communities have been involved in the process. This is compounded where TK has been developed by a group, and disseminated throughout other communities, including across present national borders. Communities’ customary laws (or *sui generis* systems) that

regulate FPIC are often not recognized by national governments, introducing significant legal uncertainty into agreements signed directly with communities. The question of who constitutes a *bona fide* signatory in the community also proves difficulties to users, cautious not to enter into an agreement that may subsequently be challenged on grounds that the party/ies are too narrowly defined.

Researchers, companies involved in bio-trade and bio-prospectors have highlighted a need for better understanding of: which communities use particular TK and/or assert to be the original creators of the TK; communities' customary laws regulating the use of TK; the associated role and powers of traditional authorities concerning the use of TK; and what information communities require from them with which to make informed decisions.

In short, users understand that not all communities are interested in providing TK to users for research and/or commercial purposes. Yet they aspire to enter into agreements with communities who do want to engage them, and to do so in a more informed, transparent and legally certain manner. Communities will be in a position to meet this challenge and use ABS to their best advantage in situations where they have fully considered whether their interests can be served by ABS, understand their substantive and procedural rights, and provide users of TK with information that helps them to begin to interact.

COMMUNITIES AS THE DRIVERS OF ABS

While the international regime on ABS will be agreed at the earliest at COP 10 in Nagoya, benefit sharing deals continue to be entered into. Users of TK are guided by the Bonn Guidelines and the ABS Management Tool. Both instruments set out procedural requirements for users, but neglect to focus on the role of communities in brokering sound ABS agreements. The bio-cultural protocol draws on users' procedural requirements set out in the guidelines and approaches them from the community perspective. For example, rather than users providing certain information about the intended research of a community's TK because it is suggested by the Bonn Guidelines, communities can clearly set out in their bio-cultural protocols the types of information they require to be able to provide FPIC. The process is community-driven, providing a more constructive interface between themselves and the user.

BIOCULTURAL PROTOCOLS

By developing bio-cultural protocols, communities are better placed to make informed decisions about whether or not to engage with ABS, and where they do, to ensure that their interests are best served.

A. Process

Bio-cultural protocols provide communities an opportunity to focus on their development aspirations *vis-a-vis* ABS and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with potential users of their TK.

Communities consistently affirm that whilst users of genetic resources are interested in the value of their TK, it is their culture and landscape that has given TK its worth. Thus, by considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and TK, they are able to counter the present trend

that treats TK as an abstraction, relocating TK in the landscape of their environment and their culture. The process provides communities an opportunity to look at examples of bio-trade and bio-prospecting so as to determine for themselves how those processes may contribute to their development, including the conservation and sustainable use of their natural resources. It also allows for time to think through the process(es) of FPIC, as well as how the community's bio-cultural ethics should inform MATs and what benefits will provide most use.

If used effectively, ABS may provide livelihood generating opportunities, and contribute to communities' larger development and identity challenges. Thus the potential of ABS to contribute to the community's broader aims should be considered at the outset.

B. Protocol

With reference to the example set out in the addendum, the resultant protocol helps the communities to articulate their views on ABS and to communicate them to outside interests so as to facilitate the interface between themselves and potential users of their TK.

It serves a number of purposes. First, it establishes a high watermark of a community's understanding of its rights according to international, national and customary law, and of its understanding of the regime by which it can engage users. It enables communities to establish their TK's bio-cultural foundations and to set out the ethical framework with which it will approach any negotiations.

Second, it provides outside interests with information with which to approach a community, including specifics such as who governs the use of TK, what will constitute FPIC, possible formulations of MATs and types of benefits a community may be looking for, or put another way, challenges it would like financial or other assistance to overcome. Third, it can set out the status of TK that is shared between communities of the same ethnicity, across national borders boundary, and/or between tribal groups. Fourth, it provides an instrument with which to advocate for capacity assistance to manage its natural resources and TK, including dealing with outside interests who want to access those resources. Fifth, it sets out the requirements for social, cultural and environmental impact assessments, as set out in the Akwé: Kon Guidelines.

Sixth, from the user perspective, it provides detail on a community's understanding about ABS, helps them understand the community's larger challenges, and sets out specific information to assist users, such as by detailing the process of FPIC. In doing so it assists users to engage with communities in a process that is transparent and provides a higher degree of legal certainty.

CONSERVATION, ETHICAL ACCESS & COMMUNITY BENEFITS

Article 8(j) has been interpreted within the context of the CBD to suggest that because traditional lifestyles have conserved and sustainably used biological diversity, that culture and its associated TK should be protected. To reverse this reasoning: because a community's landscape has sustained their culture and associated TK, the land and a community's access to it, and the rights to manage the natural resources according to customary laws must also be protected. Through developing bio-cultural protocols, individual communities are able to use the focus on ABS to affirm their connection to their landscapes and underscore the basis of any broader demand for the full recognition of their rights.

The process provides each community with an opportunity to reflect on their TK as an integral part of their bio-cultural heritage, namely: the dynamic interaction between themselves and the land, as expressed through their culture, spirituality and endemic natural resource management, enshrined in their customary laws. The outcome document, the bio-cultural protocol, is a means by which the community can frame their TK within broader environmental and cultural dynamics and assists users by providing them with information that helps them to make ethical business decisions.