

# BIO-CULTURAL COMMUNITY PROTOCOLS

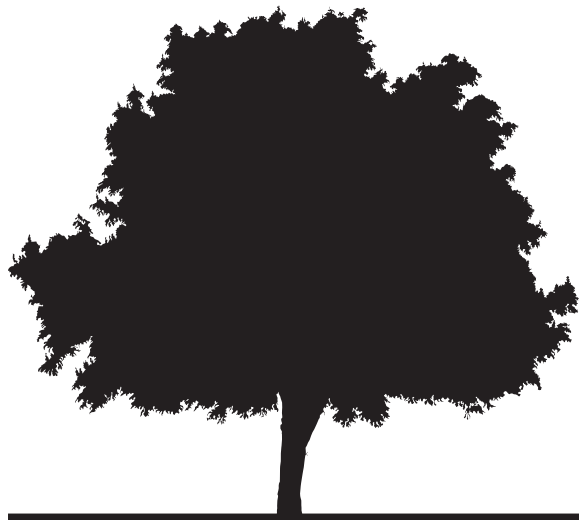
**NATURAL JUSTICE**

A Community Approach to Ensuring the  
Integrity of Environmental Law and Policy



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# ACRONYMS

ABS	Access and Benefit Sharing
BABS	Bio-prospecting and Access and Benefit Sharing
BCP	Bio-cultural Community Protocol
BMC	Biodiversity Management Committee
CBD	Convention on Biological Diversity
CBNRM	Community-based Natural Resource Management
CMPA	Collaboratively Managed Protected Area
COP	Conference of Parties
ESS	Ecosystem Services
FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility
FPIC	Free, Prior and Informed Consent
GIS	Geographic Information Systems
GPS	Global Positioning Systems
GR	Genetic Resources
ICCA	Indigenous and Community Conserved Area
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIED	International Institute for Environment and Development
ILC	Indigenous Peoples and Local Communities
ILO	International Labor Organization
IRABS	International Regime on Access and Benefit Sharing
IUCN	International Union for the Conservation of Nature
LCA	Long-term Cooperative Action
MAT	Mutually Agreed Terms
NGO	Non-Governmental Organization
PES	Payment for Ecosystem Services
PoWPA	Programme of Work on Protected Areas
REDD	Reducing Emissions from Deforestation and Forest Degradation
TK	Traditional Knowledge, which is a term for “knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity” as stated in article 8(j)
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
WGABS	Working Group on Access and Benefit Sharing

# INTRODUCTION



The next twelve months is an important period in the development of international environmental law that will have marked impacts on the lives of indigenous peoples and local communities (ILCs). Negotiations under the auspices of the United Nations Convention on Biological Diversity (CBD) and the UN Framework Convention on Climate Change (UNFCCC) are likely to culminate in two instruments that will have significant impacts on the lives of ILCs: the International Regime on Access and Benefit Sharing (IRABS) and the Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD), respectively. The IRABS will regulate the way traditional knowledge (TK) and genetic resources (GR) are accessed and how the benefits arising from their use are shared. REDD aims to contribute to the mitigation of climate change by facilitating payments for reducing deforestation in which ILCs live and depend on for their livelihoods.

In both the CBD and UNFCCC forums, ILCs and non-governmental organizations (NGOs) are questioning the ability of the respective instruments to adequately respect and promote communities' ways of life that have contributed to the conservation and sustainable use of biodiversity. While international regulatory frameworks are important for dealing with modern global concerns such as biodiversity loss and climate change, their implementation requires careful calibration at the local level to ensure the environmental gains and social justice they are intended to deliver. The local implementation of environmental legal frameworks is most likely to lead to environmental and social benefits when ILCs have the right of free, prior and informed consent (FPIC) over any activities undertaken on their lands or regarding access to their traditional knowledge, innovation and practices (also referred to collectively as TK) and when they are able to ensure that any activities or benefit-sharing agreements reflect their underlying bio-cultural values.

Without ILCs' input, there exists significant potential for laws intended to promote the overarching aims of the Rio Conventions to instead further undermine the communities that have most contributed to the protection of biodiversity and least contributed to climate change. The legal and bio-cultural empowerment of ILCs is therefore the indispensable condition of the local integrity of international environmental law.

Yet there is a concern that the development of international environmental laws and guidelines focus disproportionately on protecting the environment and access to ILCs' TK without also empowering ILCs to ensure the conservation and sustainable use of their natural resources and wider use of their TK according to their bio-cultural values. Although there is a significant body of work pertaining to *sui generis* systems of the protection of TK and associated GR, significantly less emphasis has been placed on devising means to ensure locally entrenched, holistic approaches to environmental law.

The development of bio-cultural community protocols (BCPs) by ILCs is one way in which communities can increase their capacity to drive the local implementation of international and national environmental laws. A BCP is a protocol that is developed after a community undertakes a consultative process to outline their core ecological, cultural and spiritual values and customary laws relating to their TK and resources, based on which they provide clear terms and conditions to regulate access to their knowledge and resources.

The process of developing a BCP involves reflection about the inter-connectedness of various aspects of ILCs' ways of life (such as between culture, customary laws, practices relating to natural resources management and TK) and may involve resource mapping, evaluating governance systems and reviewing community development plans. It also involves legal empowerment so community members can better understand the international and national legal regimes that regulate various aspects of their lives, such as ABS, REDD, protected area frameworks, and payment for ecosystem services schemes. Within the ABS framework, for example, a community may want to evaluate what the community's research priorities are, on what terms it would engage with potential commercial and non-commercial researchers wanting access to their TK, what the procedures relating to FPIC must be, and what types of benefits the community may want to secure.

By articulating the above information in a BCP, communities assert their rights to self-determination and improve their ability to engage with other stakeholders such as government agencies, researchers and project proponents. These stakeholders are consequently better able to see the community in its entirety, including the extent of their territories and natural resources, their bio-cultural values and customary laws relating to the management of natural resources, their challenges, and their visions of ways forward. By referencing international and national laws, ILCs affirm their rights to manage and benefit from their natural resources. They are also better placed to ensure that any approach to access TK or any other intended activity on their land, such as the establishment of a REDD project or a protected area, occurs according to their customary laws. Overall, BCPs enable communities to affirm their role as the drivers of conservation and sustainable use of biodiversity in ways that support their livelihoods and traditional ways of life.

This book illustrates the application of BCPs to a range of environmental legal frameworks. **Part I** focuses on the CBD and ABS. **Chapter 1** presents a bio-cultural critique of the CBD and ABS and international environmental law in general, highlighting their perceived strengths and practical weaknesses from a community perspective. Specifically, we detail how Article 8(j) presents a holistic vision of the protection of bio-cultural communities' ways of life and how, in contrast, the Working Group on Access and Benefit Sharing (WGABS) has focused on facilitating only the commercial application of TK. We argue that the narrow conception of Article 8(j) adopted by the IRABS could lead to ABS agreements further weakening communities' cultural and spiritual foundations. We highlight how the CBD has tried to curb free market excesses via the development of instruments such as the Bonn Guidelines to regulate users of TK and GR, yet suggest that the Guidelines' lack of mechanisms to empower communities to continue developing their TK and GR jeopardizes the local integrity of the IRABS. There is a danger that the international intention of ABS may falter at the local level, thus undermining its ability to implement Article 8(j).

In **Chapter 2**, we suggest that the development of BCPs is a means with which communities can respond to the challenges posed to them by the incumbent IRABS. We set out the process that leads to developing a protocol and, through examples of BCPs, illustrate how communities are using them to manage their TK, respond to various local challenges and promote self-

determined development plans. We draw on these examples to argue that BCPs are a practical way for communities to ensure that the IRABS generates the local environmental and social goals it is intended to promote.

**Chapter 3** illustrates how the concept of BCPs is gaining international recognition. It draws on the negotiations within the WGABS, as well as several subsidiary meetings held in 2009 between WGABS 7 and 8: the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources, the International Vilm Workshop on Matters Related to TK Associated with Genetic Resources and the ABS Regime, and the Pan-African Meeting of ILCs on ABS and TK.

**Part II** of the book looks more broadly at other frameworks to which BCPs can be applied by ILCs. **Chapter 4** focuses on REDD, making a case for the use of BCPs by forest-dependent communities to address the serious concerns ILCs have about the effects of REDD on their forests rights. **Chapter 5** explores the interplay between protected areas, ILCs and TK within the framework of the CBD and the Programme of Work on Protected Areas. Specifically, it evaluates the contribution that BCPs can make to improving ILCs' participation in two types of protected areas, namely, collaboratively managed protected areas and indigenous and community conserved areas. **Chapter 6** describes how payment for ecosystem services schemes operate and their potential to contribute to communities' livelihoods, and sets out how BCPs provide a means for ILCs to engage with and determine the shape of the schemes.

**Part III** draws on the book's overarching themes to look more broadly at the meaning of BCPs for environmental law. **Chapter 7** traces the emergence of bio-cultural jurisprudence, a nascent form of legal thought founded on the principles of self-determination and respect for customary laws. Bio-cultural jurisprudence challenges dominant notions of how to "protect TK" and suggests a paradigm shift is required within the law itself if ILCs are to be recognized as drivers of the conservation and sustainable use of biodiversity and the generation of culturally appropriate livelihoods.



# CHAPTER 1

## A Bio-cultural Critique of the CBD and ABS

Kabir Bavikatte and Harry Jonas <sup>1</sup>

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### 1. Introduction

Article 1 of the Convention on Biological Diversity (CBD) lists the three objectives of the Convention as: (1) the conservation and (2) the sustainable use of biological diversity and (3) the fair and equitable sharing of benefits that arise from the utilization of genetic resources. In 2004, the Working Group on Access and Benefit Sharing (WGABS) was tasked by the Conference of Parties (COP) to the CBD to negotiate an international regime on access and benefit-sharing (IRABS) to implement the provisions in Article 15 and Article 8(j) of the CBD and the three objectives of the Convention<sup>2</sup>. The WGABS is required by the COP to complete its negotiation of the IRABS by 2010. The WGABS is working towards a comprehensive international framework regulating all access to genetic resources and traditional knowledge, requiring the sharing of any benefits arising from the utilization of such genetic resources (GR) and traditional knowledge (TK) with those States or communities who have rights over them. This chapter critiques the way in which the WGABS has focused on facilitating the commercial application of TK as a way of implementing Article 8(j). We argue that Article 8(j) presents

a much more holistic vision of the protection of bio-cultural communities' ways of life and that the narrow conception adopted by the IRABS could lead to ABS agreements further weakening communities' cultural and spiritual foundations. We highlight the way the CBD has tried to curb free market excesses via the development of instruments such as the Bonn Guidelines to regulate users of genetic resources and TK, yet suggest that the Guidelines' lack of mechanisms to empower communities to direct development relating to their TK or GR jeopardizes the local integrity of the IRABS. By this we mean that there is a danger that the international intention of ABS may falter at the local level, undermining it as a mechanism to implement Articles 8(j) and 15. We conclude the chapter by asking two related questions: how can communities whose ways of life conserve biodiversity prepare themselves for and approach a regime that seeks to assist them to maintain their knowledge, innovations and practices mainly through the commercialization of their TK; and how can they also look beyond the IRABS to secure the foundations of their bio-cultural ways of life?

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1. Kabir Bavikatte and Harry Jonas are Co-Directors of Natural Justice: Lawyers for Communities and the Environment. Kabir Bavikatte is also a PhD candidate at the Department of Private Law, University of Cape Town.

2. Article 15: Access to Genetic Resources:

- Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
- Each Contracting Party shall endeavor to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.
- For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.
- Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.
- Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.
- Each Contracting Party shall endeavor to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.
- Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms."

## 2. The CBD and ABS

Article 8(j) should be read together with Article 10(c), which calls on parties to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” Article 8(j) is unprecedented to the extent that it acknowledges a symbiotic relationship between “*in situ* conservation” of biodiversity and the “traditional lifestyles” of indigenous peoples and local communities (ILCs)<sup>3</sup> These lifestyles however are manifested through the knowledge, innovations and practices (collectively referred to as traditional knowledge, or TK) of ILCs and States are asked to respect, preserve and maintain this TK and promote its wider application. Article 8(j) also states that any use of such TK should be based on the approval and involvement of the holders of such knowledge and that they should be entitled to a fair and equitable share of the benefits arising from the utilization of their knowledge.

The full and effective implementation of Article 8(j) requires equal consideration to be given to each of the following three components:

- Conservation of biological diversity is integrally linked to the traditional lifestyles of ILCs.
- TK is embodied in the traditional lifestyles of ILCs and the *in situ* conservation of biological diversity globally can be achieved through the protection, preservation and wider application of the TK of ILCs.
- The wider application of the TK of ILCs has to be based on their approval and involvement and any benefits arising from its utilization must be shared with the communities providing it.

Despite the wide-ranging implications of the nature of TK, the WGABS’s debate around Article 8(j) has focused narrowly on knowledge that may have commercial applications. Indeed, as we approach the two meetings of the WGABS before COP 10, the shape of the incumbent regime is becoming increasingly clear.<sup>4</sup> Users of GR will be expected

to fulfill a range of obligations in order to gain access to GR and associated TK. The three most important of these obligations are:

- Free, Prior and Informed Consent (FPIC): Article 15(5) of the CBD requires that access to GR shall be made subject to FPIC. The Bonn Guidelines (Para 26 (d)) specify that FPIC has to be obtained from all relevant stakeholders, including, where appropriate, from ILCs. Users also have to deliver evidence of FPIC before being granted access to GR.
- Mutually Agreed Terms (MAT): Article 15(7) of the CBD further calls on parties to implement benefit-sharing agreements on MAT, which have to be finalized in a written format. The Bonn Guidelines (Para 42) further expands on this requirement by giving guidance on how to implement MAT through different contractual mechanisms and specifies a range of subjects that have to be included in order for a benefit-sharing agreement to qualify as having MAT.
- Benefit-Sharing Agreements: Finally, the CBD demands the sharing of all benefits arising out of the use of GR. The Bonn Guidelines<sup>5</sup> (Paras 45-50) again provide more guidance on this matter, stating that all relevant stakeholders should receive a fair and equitable share of benefits and that the nature of the benefits and their distribution have to be agreed upon on a case-by-case basis.

The above stipulations regulate access of GR and associated TK by non-community stakeholders. Yet because the IRABS intends only to regulate and facilitate the trade in TK and GR, it largely ignores communities’ knowledge, innovations and practices that are not commercially attractive but still important for the conservation and sustainable use of genetic resources. Before looking more closely at concerns stemming from the WGABS’s overemphasis on commercialization, we turn to explore the subjects of Article 8(j): bio-cultural communities.

3. Indigenous peoples have repeatedly asked to be referred to as “Peoples,” as referenced in the Declaration on the Rights of Indigenous Peoples, and we acknowledge that the acronym “ILC” as recognized by the CBD refers to the full term.

4. A range of national governments in the meantime also have developed their own regimes, in anticipation of a future multilateral regime. These include, among others, South Africa, Uganda, Kenya, Ethiopia, the Andean Pact, Brazil, India, Malaysia, and the Philippines.

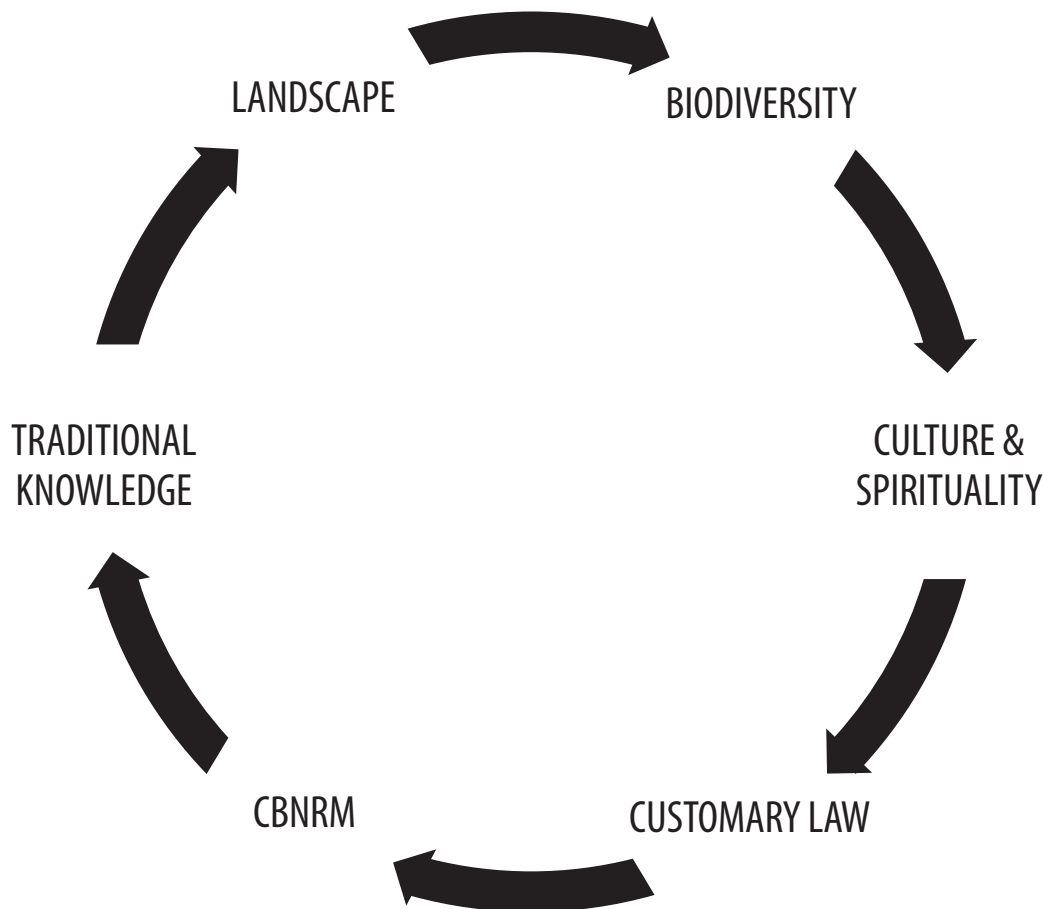
5. While the Bonn Guidelines are not a plenipotentiary instrument, they augment the CBD.

### 3. Bio-cultural Communities

ILCs' cultures are mega-diverse, yet share certain commonalities. Many ILCs living traditional lifestyles that have conserved ecosystems share a conception of the self not as a unit separate from the world over which they have proprietary rights, but rather an understanding of the self as integrated with the land and embedded within an ethical relationship. TK then is not a value-neutral piece of information but is interconnected with a way of knowing that is a result of an interaction between ILCs and the land that is rooted in cultural practices and spiritual values and enshrined in customary laws. Notably, it is this bio-cultural relationship (see Diagram 1), not their proprietary rights over TK, that has contributed to centuries of *in situ* conservation of biological diversity. ILCs have consistently highlighted their integral relationships with the environment at various international meetings

and have worked to integrate their views into international laws and other ILC declarations. The sections below outline several ILCs' declarations, all of which place emphasis on spiritual, cultural and reciprocal relationships with the land, interconnectedness with all forms of life, custodianship of territories and knowledge for future generations, ethical use and treatment of all forms of life, and opposition to understanding life and knowledge as property.

*Diagram 1: Illustrating the holistic nature of ILCs' relationship with ecosystems and the links between biodiversity, communities' culture & spirituality, customary laws, community-based natural resource management, TK, and the formation of landscapes.*



On September 14, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Article 25 of the Declaration states that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. A number of declarations by ILCs further articulate this relationship:

1. In May 2007, 44 indigenous peoples groups meeting in New York issued the Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge. They began the declaration by stating:

*We, the undersigned indigenous peoples and organizations, having convened during the Sixth Session of the United Nations Permanent Forum on Indigenous Issues, from 14 to 25 May 2007, upon the traditional territory of the Onondaga Nation, present the following declaration regarding our rights to genetic resources and indigenous knowledge:*

- *Reaffirming our spiritual and cultural relationship with all life forms existing in our traditional territories;*
- *Reaffirming our fundamental role and responsibility as the guardians of our territories, lands and natural resources;*
- *Recognizing that we are the guardians of the indigenous knowledge passed down from our ancestors from generation to generation and reaffirming our responsibility to protect and perpetuate this knowledge for the benefit of our peoples and our future generations*

2. On August 7, 1997, the Heart of the People Declaration was adopted by the North American Indigenous Peoples Summit On Biological Diversity and Biological Ethics. In the preamble, they stated that:

*We, the participants in the North American Indigenous Peoples Summit on Biological Diversity and Biological Ethics express our profound concern for the well being of our Mother Earth and the Indigenous Circle of Life known as "biological diversity".*

*We wish to add our voices to ongoing global discussions regarding the protection of biological diversity, the safeguarding of traditional knowledge and sustainable development practices, and the ethical use and treatment of all forms of life based on harmony, respect and the spiritual interconnectedness of the natural world.*

*Principles:*

*We endorse by consensus the following principles as a statement of our beliefs and a guide to our actions.*

- *Mother Earth and all human, plant and animal relatives are sacred, sovereign, respected, unique living beings with their own right to survive, and each plays an essential role in the survival and health of the natural world.*
- *Human beings are not separate from the rest of the natural world, but are created to live in relationship and harmony with it and with all life.*
- *The Creator has given us a sacred responsibility to protect and care for the land and all of life, as well as to safeguard its well being for future generations to come.*

*Conclusions:*

- *We uphold the sacredness of life and oppose ideas, systems, world views and practices, including global finance and patent laws, which define the natural world, its life forms and the knowledge of Indigenous Peoples as property or "commodities".*
- *We oppose the actions of government agencies, corporations, educational institutions, and religious bodies which promote the idea that the natural world is to be dominated and exploited by humanity using non-sustainable development practices that contaminate or destroy the natural world, species and habitats, sacred sites, and our communities and homes.*

3. On February 19, 1995, in Phoenix, Arizona, 18 indigenous peoples organisations adopted the Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project which began by stating:

- *We are the original peoples of the Western hemisphere of the continents of North, Central and South America. Our principles are based upon our profound belief in the sacredness of all Creation, both animate and inanimate. We live in a reciprocal relationship with all life in this divine and natural order.*
- *Our responsibility as Indigenous Peoples is to insure the continuity of the natural order of all life is maintained for generations to come.*
- *We have a responsibility to speak for all life forms and to defend the integrity of the natural order.*
- *In carrying out these responsibilities we ensure that all life in its natural process and diversity continues in a reciprocal relationship with us.*

- *We hold precious all life in its natural form. The harmonious progress of the natural order in the environment shapes and defines healthy genetic diversity.*
- *We oppose the patenting of all natural genetic materials. We hold that life cannot be bought, owned, sold, discovered or patented, even in its smallest form.*
- *We denounce and identify the instruments of intellectual property rights, patent law, and apparatus of informed consent as tools of legalized western deception and theft.*

These declarations constitute a statement of values that counter the legal subject with what can be called the “bio-spiritual self”. The bio-spiritual self is an expression of a “connective imagination,”<sup>6</sup> which is a way of being in the world that sees the self as embedded within a network of relationships with land, water, plants, and animals, expressed through culture and integrated into customary laws.<sup>7</sup> The results of this intimate relationship can be understood as forming a landscape in which humans have had to adapt to the land, and in doing so have also adapted the land. They emphasize that the bio-cultural foundations of their traditional knowledge cannot be seen as separate from the land and animals, their culture, and spiritual beliefs,

or outside the framework of their customary laws - in other words, each community's endemic way of life. Specifically, the knowledge, innovations and practices of ILCs have developed out of their interactions with nature and are indispensable to their ways of life. In Chapter 2, a number of communities speak to this issue, highlighting how important their TK is to their everyday lives, such as healing community members and animals, knowing where to find pasture in dry lands and using sustainable harvesting techniques among other means to support their ways of life. Thus TK is not an end product of a traditional lifestyle, but critical to communities' day-to-day lives.

Such a way of life is based on spiritual foundations and cultural practices that understand the self very differently from the legal subject that underlies the property rights discourse. The challenge then for the potential IRABS is to ensure that the effective implementation of the *in situ* conservation objective of Article 8(j) extends beyond acknowledging intellectual property rights of ILCs over their TK and towards affirming, safeguarding and promoting the foundations of their bio-cultural ways of life, such as access to and management of their natural resources, to which TK is integral.

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## 4. TK as a Commodity and its Impact on ILCs

The reduction of Article 8(j) in the current negotiations of the WGABS to a provision that grants intellectual property rights to ILCs over their TK and affirms their right to trade it in exchange for benefits is a result of conflating the legal subject under Article 15 with the bio-cultural self that Article 8(j) seeks to affirm.

The State as the legal subject under Article 15 is typical of the legal subject within contemporary jurisprudence as a self-enclosed bearer of proprietary rights over GR that it can use and transfer to others. Article 8(j), on the other hand, juxtaposes this legal subject with the bio-spiritual self that emerges from a bio-cultural way of life. As illustrated above, the bio-spiritual

self is rooted in an ethical framework that is oriented less towards affirming the proprietary rights of the subject over the ecosystem than towards upholding a bio-cultural relationship between the bio-spiritual self and nature.

Interpreting Article 8(j) as a provision that is restricted only to affirming the intellectual property rights of ILCs over their TK and not as a right to a bio-cultural way of life has had the adverse consequence of forcing ILCs to organize themselves along the lines of a legal subject, where the community identity is incorporated like any other corporation and their culture is commodified as a tradable good.

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6. Kakar, Sudhir, *Mad and Divine: Spirit and Psyche in the Modern World*, Penguin India: New Delhi, 2008, p.154.

7. This issue is further discussed in Chapter 7 that addresses Bio-cultural Jurisprudence.



Some of the ABS agreements reached between communities and commercial interests are very similar to commercial sale agreements, and in this case, it is TK that is being sold. The emergence of TK as a tradable commodity disembodies it from the bio-spiritual values and bio-cultural ways of life that produce it.

Commodification of TK essentially implies the transformation of the cultural and spiritual relationships that underlie it into relationships mediated by the market. Commodification simplifies TK by neglecting to acknowledge that is an outcome of the interactions between communities and their land, culture and spirituality, and supports ILCs' ways of life. This results in a kind of commodity fetishism in which aspects of lifestyles of ILCs that underpin and produce TK are ignored at the expense of valuing TK as a commodity.<sup>8</sup> This trend is highlighted by John and Jean Comaroff:

*Anthropologists have tended to treat culture as a taken-for-granted way of being in the world; that is precisely the opposite of commodity. And yet more and more ethnic groups across the planet are transforming their indigenous ways and means into private property, defining themselves as limited liability companies, and recasting the bases of their membership in bio-genetic terms that fly in the face of social constructionist understandings of identity.*

*A growing body of scholarship has pointed to the rising influence of the market on social identity and commodification of culture and its redefinition as intellectual property.*

*Of course, cultural objects and images have long been bought and sold, their commerce often having been part of colonial encounters. We seem though, to have entered an age in which signs of difference are not only exchanged as trophy or talisman. Identity itself – in particular, ethnic identity, the socially constructed assertion of shared blood, culture and being-in-the-world – is increasingly being claimed as a lawful possession by its living heirs who proceed to manage it, and its products, by corporate means.<sup>9</sup>*

The commodification of TK can also lead to situations of desperate exchange<sup>10</sup> in which ILCs dispossessed of their lands and culturally marginalized are left with little choice than to trade their TK at the best possible market price. Desperate exchanges are a moral double bind in which on the one hand for many ILCs, the sale of TK is a much needed source of income, but on the other hand it undercuts the spirit of Article 8(j) that seeks to affirm and promote a value system underlying the ways of life that have conserved and sustainably used biological diversity.

The current negotiations in the WGABS towards IRABS have focused on ensuring fair contracts with ILCs for the sale of their TK with little attention to the ecological and cultural relationships within which TK is embedded. TK is no longer seen as a product of an organic process but rather appears as an abstract object in itself, distinct and therefore separable from the community processes from which it arises. Such a reification<sup>11</sup> of TK creates a false objectification that paradoxically denies the foundations of TK in its attempts to protect it.

8. "the existence of things qua commodities, and the value-relation between the products of labour which stamps them as commodities, have absolutely no connection with their physical properties and with the material relations arising therefrom. There is a definite social relation between men, that assumes in their eyes, the fantastic form of relation between things... This I call fetishism... of commodities" Karl Marx, *Capital*, Chapter 1.

9. Comaroff, John and Jean, *Ethnicity Inc.*, Research Proposal, 2009.

10. The problem of desperate exchanges and the moral double bind of commodification was first comprehensively discussed by Margaret Jane Radin in her seminal article "Market Inalienability" as a response to the Chicago School of Law and Economics led by Richard Posner. 100 *Harv.L.Rev.*1849 (1987).

11. Lucacs, George, *Reification and the Consciousness of the Proletariat*, Viking Press, 1970; Lucacs argues that 'commodification stamps its imprint on the whole consciousness of man; his qualities and abilities are no longer an organic part of his personality, they are things which he can "own" and "dispose of" like various objects of the external world. And there is no natural form in which human relations be cast, no way in which man can bring his physical and psychic "qualities" into play without they being subject to this reifying process.'

## 5. The Importance of Local Integrity

Integrity, as a holistic concept, judges the quality of a system in terms of its ability to achieve its own goals. To judge a future IRABS by this measure is to examine the extent to which ABS promotes Article 8(j) at the local level. As we argue above, communities have a bio-cultural relationship with the environment and their ways of life depend on the health of the ecosystem. In acknowledgement, Article 8(j) asks for the safeguarding of their ways of life and promotion of the underlying bio-spiritual values that have ensured conservation and sustainable use of biological diversity. Yet the WGABS is addressing this aim by establishing the IRABS, a mechanism that promotes access and benefit-sharing agreements based on the sale of communities' TK to commercial interests in return for monetary benefits. This further promotes desperate exchanges and ignores the cultural, spiritual and environmental foundations of TK. This potential conflict between the aims of Article 8(j) and the method of achieving it, as is being negotiated by the WGABS, suggests that the incumbent IRABS may lack integrity at the local level.

A system that lacks integrity can be rectified if it is amenable to change in such a way that its aims are in accordance with its outcomes. Thus if communities are able to use the IRABS to promote the respect, preservation and maintenance of their TK, the IRABS retains integrity, at least for the communities that have been able to engage it to secure certain aspects of their bio-cultural heritage. Yet two tendencies inherent in the law further jeopardize the local integrity of the IRABS, namely, a top-down approach and the way in which it deals with whole subjects in a fragmentary manner. First, in the 1990s, we were told to "think globally, act locally." This is highly applicable to how one should conceptualize and implement environmental law. While international environmental laws are drafted to apply to regions or to nations, they are only effective when they make a difference at the local level. In the case of ABS, particular agreements will only have local gains when they are carefully calibrated to meet the specific needs of the local communities and their endemic environments.

First, natural resources law has tended to focus on controlling the users of natural resources or TK as they operate in local contexts, without also putting in place mechanisms to empower communities within those frameworks. The parties to the CBD, international organizations and NGOs have devised guidelines and other policy instruments to assist

users to understand and comply with the requirements of the CBD. Specifically relating to ABS, the following four voluntary guidelines and management tools were developed:

1. Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, adopted at COP 5 in 2000;
2. Bonn Guidelines on access to genetic resources and fair and equitable sharing of benefits arising out of their utilization, adopted at COP 6 in 2002 as a way of implementing Article 8(j);
3. The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, adopted at COP 7 in 2004; and
4. ABS Management Tool, developed by the International Institute for Sustainable Development among others and published in 2007.

All four of the instruments are subsidiary to the CBD, but share its broad intent: to promote the conservation and sustainable use of biodiversity with an emphasis on protecting ILCs whose lifestyles have preserved their local biodiversity. While the Bonn Guidelines on ABS and the ABS Management Tool focus solely on ABS, the Akwé: Kon Voluntary Guidelines and Addis Ababa Principles and Guidelines are broader in scope, but can be applied to ABS-related activities.

While the protective framework is of critical importance and the procedural guidelines are a much needed resource, they do not address the root of the matter. Each instrument approaches communities from the top down, purportedly shielding them from commercial activity incommensurate with the CBD, but without providing them a platform from which to advocate for their rights and community-specific values. From a community perspective, the guidelines and tools lack the ability to ensure the local integrity of the environmental laws they are underwriting.

Second, law is inherently fragmentary. As described above, the communities that Article 8(j) intends to assist are bio-cultural in the sense that their livelihoods, environment, culture, spirituality, and customary laws, among other aspects of their lives, are mutually dependent. Yet the law sees communities and the environment from a number of perspectives,

each one simultaneously focusing more on one particular aspect of their natural resources or livelihoods and ignoring others. From the ABS perspective, TK is viewed without its cultural and environmental foundations. The incumbent REDD regime has the danger of putting disproportionate emphasis on trees as vehicles of carbon sequestration and neglecting the value of biodiversity for human habitation and survival. This tendency leaves communities vulnerable to a series of single-issue remedial interventions that equate to less benefit than the sum of their parts because of their lack of coherence.

From the community perspective, the top-down emphasis of the Bonn Guidelines and the way in which environmental law fractures the otherwise interconnected nature of ILCs' ways of life weakens communities' ability to engage with the law in such a way that further strengthens their bio-cultural relationships. Lacking is a mechanism that empowers communities within the various environmental frameworks, allowing them to appraise which laws to use to best promote their endogenous development plans.

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## 6. Conclusion

The current crisis of Article 8(j) is that the perceived consensus on facts masks the real differences in values. The fact around which there seems to be an agreement in the WGABS is that TK is a commodity that can be traded, and that operationalizing Article 8(j) requires a sound ABS agreement between communities and commercial interests. The disagreement on values lies in what would constitute best practices and due process in a sound ABS agreement.

The problem however is that the moment we all agree on the "fact" that TK is a purely tradable commodity, we sever the linkage with its bio-cultural origins and thereby foreclose the discussion as to how ABS agreements can affirm bio-cultural ways of life of ILCs. To agree that TK is purely a commodity is to agree on a set of industrialist values that denies the very systems through which TK is produced and biodiversity is conserved and sustainably used.

From this perspective, the IRABS at best will protect communities from the misappropriation of their knowledge, but has the danger of doing little to "respect, preserve and maintain" other perhaps more fundamentally important aspects of their knowledge, innovations and practices relevant for the conservation and sustainable use of biodiversity, such as access to land and resources as well as respect for customary laws and practices. The question that we are now confronted with is whether it is possible for ILCs to ensure the local integrity of the IRABS by asserting their rights over their TK and

entering into good ABS agreements which uphold the spirit of Article 8(j), affirm a bio-cultural way of life and promote their bio-spiritual values. To put it differently, is it possible to have ABS agreements that foster the relationships communities have with their ecosystems and contribute to the security of their bio-cultural foundations? This question has great relevance to the debate about what constitutes a "good ABS agreement." We turn to that question in Chapter 2 after communities themselves speak to these issues in their bio-cultural protocols.

# CHAPTER 2

## Bio-cultural Community Protocols as a Community-based Response to the CBD

Kabir Bavikatte and Harry Jonas

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### 1. Introduction

In the first chapter, we critique the way in which the international regime on access and benefit sharing (IRABS), whilst purporting to implement Article 8(j), in fact only focuses on the commodification of knowledge, innovations, and practices (referred to here as traditional knowledge, or TK). We argue that this poses a number of challenges for bio-cultural communities who face serious and ever-escalating threats to their ways of life: desperate exchanges of their TK, which is perceived as tradable cultural goods under this regime, for benefits (usually limited income) without any corresponding respect for the inalienable aspects of their TK. This can further weaken the very bio-cultural foundations upon which TK is developed. We conclude that chapter by asking whether it is possible for indigenous peoples and local communities (ILCs) to assert their rights over their TK and achieve good access and benefit-sharing (ABS) agreements that uphold the spirit of Article 8(j) that seeks to affirm a bio-cultural way of life. In other words, we question whether it is possible for ILCs to use the IRABS further secure

their bio-cultural heritage, strengthen their management of local biodiversity and support the ways of life that generate TK in the first place.

In this chapter, we suggest that the development of bio-cultural community protocols (BCPs) are a means by which communities can respond to the challenges posed to them by the incumbent IRABS. A BCP is a protocol that is developed after a community undertakes a consultative process to outline their core cultural and spiritual values and customary laws relating to their traditional knowledge and resources, based on which they provide clear terms and conditions regulating access to their knowledge and resources. We set out the process that leads to developing a protocol and, through examples of BCPs, illustrate how communities are using them to respond to their challenges and promote their self-determined development plans. We draw on those examples to argue that BCPs are a practical way for communities to affirm their rights to manage their TK and natural resources.

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### 2. Process and Protocol

The development of a BCP assists communities to overcome the challenges presented in Chapter 1 in two broad ways. First, it promotes bio-cultural and legal empowerment by providing ILCs the opportunity to engage in a process of reflection and learning. It allows communities time to talk

about the interconnectedness of the various elements of their ways of life, including their landscape, GR, TK, culture, spirituality, and customary laws relating to the management of natural resources, among others. It subsequently facilitates a community-wide discussion about their endogenous

development plans and an assessment of common challenges. With input from community-based organizations and NGOs with legal expertise, communities are also able to learn about a variety of rights under international and national law that support their development plans and can help them to overcome their challenges. Drawing on specific laws, they may also want to further explore how they would engage with novel frameworks such as ABS or projects relating to reducing emissions from deforestation and forest degradation in developing countries (REDD)<sup>1</sup> This may lead to subsequent processes of defining culturally appropriate responses to such frameworks, with a view to setting out for other stakeholders the terms upon which they will engage with them.

The process of developing BCPs was different for each community with which Natural Justice worked, though generally they all engaged with five broad questions relating to ABS and affiliated international and national environmental legal frameworks, including:

1. What are the community's/ies' spiritual, cultural and ecological norms as well as traditional knowledge that ensure conservation of biological diversity?
2. How do they share knowledge among and between communities?
3. What are their local challenges?
4. How can the IRABS and concomitant national laws be used by ILCs to ensure the protection and promotion of their bio-cultural way of life?
5. Assuming ABS is only a partial answer to the above questions, what other laws and policies are available to the community/ies to realize the promise of Article 8(j)?

Through exploring these questions and their corollaries, five communities have developed BCPs from which we draw on below, namely:

- **Raika Pastoralists:** The Raika live in Rajasthan, India, and are the keepers of important animal genetic resources and custodians of significant ethno-veterinary knowledge. Their ways of life promote the conservation and sustainable use of local natural resources, and yet they are increasingly being excluded from traditional grazing areas.

- **Samburu Pastoralists:** The Samburu live in Samburu, Kenya, and are also pastoralists who have traditionally kept drought resistant breeds of indigenous livestock. Non-indigenous breeds introduced by a government program have fared badly during Kenya's reoccurring droughts and the Samburu have been negatively affected.
- **Vaidyas of the Malayali Hills:** The Malayali Hills are in Tamil Nadu, India, and form a common resource for a number of Vaidyas (traditional healers) who share a bio-spiritual understanding of local medicinal plants and collectively conserve the area's biodiversity.
- **Gunis and Medicinal Plants Conservation Farmers of Mewar, Rajasthan:** The Gunis (traditional healers) work together with farmers who grow sustainable quantities of medicinal plants in Rajasthan, India, to ensure their communities are healthy and their natural resources are maintained.
- **Bushbuckridge Traditional Healers:** Bushbuckridge is in the Kruger to Canyons UNESCO Biosphere Region in South Africa and the traditional healers of that region are suffering from the over-harvesting of medicinal plants by outside traders.

Although each protocol is distinct due to the biological and cultural diversity of the communities, the protocols referenced below cover the same general issues, which include:

- A self-definition of the group and its leadership and decision-making processes;
- How they promote *in situ* conservation of either indigenous plants or indigenous breeds of livestock and/or wildlife, with details of those natural resources;
- The links between their customary laws and bio-cultural ways of life;
- Their spiritual understanding of nature;
- How they share their knowledge;
- What constitutes free, prior and informed consent to access their lands or traditional knowledge;
- Their local challenges;
- Their rights according to national and international law; and
- A call to various stakeholders for respect of their customary laws, their community protocol and a statement of the various types of assistance needed by the community.

1. REDD is discussed in Chapter 4.

Overall, BCPs are a statement by ILCs of their intentions to self-determine their futures and explain to specific stakeholders how they either wish to engage them or be engaged. BCPs present an opportunity for communities to set out their customary laws relating to FPIC regarding access to their TK and/or GR and how they want to use new opportunities such as the establishment of a protected area, a REDD project, or a payments for ecosystem services scheme.<sup>2</sup> In doing so, ILCs provide clarity to other stakeholders, better enabling researchers of government agencies, for example, to work with them towards the community's proposals. Thus, BCPs provide communities an opportunity to focus on their development aspirations *vis-à-vis* legal frameworks such as ABS and to articulate for themselves and for others the processes that require support to protect their bio-cultural heritage, and therefore on what basis they will engage with potential users of their TK.

For example, Samburu livestock keepers from Kenya said the following about the reasons for developing a BCP:

*We are the Samburu, pastoralists living across a number of districts in Kenya. We are keepers of indigenous and exotic breeds of livestock and our lives are interlinked with and wholly*

*dependent on our animals. Our way of life also allows us to live alongside wildlife, promoting the conservation of our breeds and other living resources in our environment. Yet we feel that our way of life and our indigenous breeds have been consistently undervalued. The government-promoted breeding programs that sought to replace or improve our breeds have left us particularly vulnerable to the recurring droughts which are causing our people acute suffering.*

*This is our community protocol. It is an articulation of the integral role of our breeds in Samburu culture and their importance to the world. It seeks to establish the significance of our way of life and the value of our indigenous breeds, and that as the keepers of important livestock populations, we have a right to maintain our way of life. It clarifies for others on what terms we will permit activities to be undertaken on our land or regarding our indigenous breeds and traditional knowledge.<sup>3</sup>*

The next section below illustrates the types of issues highlighted by the communities as being important to their ways of life and also provides an overview of the way in which they have set out their values, concerns, challenges, and legal rights in BCPs.

## 3. Community Experiences with BCPs

### 3.1 Self-determination and Governance

New legal and policy frameworks are providing communities with new opportunities to use the law to protect their ways of life, but at the same time are posing corresponding challenges. The IRABS' focus on TK raises questions about its applicability to the way communities are defined and organized locally. A certain type of TK can be known by a subset of a community (traditional healers, for example), may be widely shared between communities or might be used across national borders. To respond to any issues relating to TK, the "community" of TK holders must first define themselves and consider who should make decisions relating to their bio-cultural heritage and overall governance.

The issue of applicability to the local context had the most impact on the traditional healers from Bushbuckridge in the Kruger to Canyons Biosphere Region. At first, the organization was introduced to a group of 6 people who run the Vukuzenzele Medicinal Plants Nursery to discuss their rights under the South African Bio-prospecting and ABS Regulations of 2008. It soon became evident that there were many more healers in the region who knew of each other but had never met formally to discuss mutual concerns. As a result, a larger group representing two different languages was invited to the next meeting to discuss their ideas. At that and subsequent meetings, they realized that they faced many of the same challenges, including a lack of access to medicinal plants because of over-harvesting by commercial harvesters, a lack of

2. Payments for ecosystem services are discussed in Chapter 6.

3. Samburu Bio-cultural Protocol (working draft). For more information contact Jacob Wanyama and Evelyn Mathias, LIFE Network (Africa) at [evelyn@mamud.com](mailto:evelyn@mamud.com)

understanding about the license process for accessing protected areas to collect medicinal plants and difficult relations with their traditional leaders. Over the course of 5 months of meetings, they formed themselves into a group with a governance structure to assist them to present their views to various stakeholders, including outsiders interested in their TK.

Linked to our comments in Chapter 1 about the importance of local integrity, all the communities we worked with reflected on the level at which they wanted to organize for the sake of maintaining their ways of life. While high-level organization has its benefits, such as through national traditional healers' associations, organizing cohesively around a common resource, type of knowledge or cultural grouping has other benefits. Each of the communities we worked with chose to organize at what could be described as the most local level possible. The boundaries they drew around their definition of community were linked to the concept of landscape or common knowledge, as opposed to simply political or even cultural affiliation. The Bushbuckridge traditional healers are from the Sepedi and Tsonga communities yet saw themselves as a group because of their specialist knowledge and reliance on the same medicinal plants. The two different groups of Indian traditional healers also chose to organize at a local level and around common resources.

Whilst talking with the groups about their conceptions of community, discussions surrounding their spiritual origins also emerged. The two pastoral communities in India and Kenya, the Raika and Samburu, respectively, both felt that the mythology relating to their origins was central to their present identity. The Raika state:

*At a spiritual level, we believe that we were created by Lord Shiva. The camel was shaped by his wife, Parvati, and it was brought to life by Lord Shiva. But the camel's playfulness caused a nuisance so Lord Shiva created the Raika from his perspiration to take care of the camels. Our spiritual universe is linked to our livestock breeding, and our ethnicity is inextricably intertwined with our breeds and way of life.*<sup>4</sup>

The Samburu explain: *Legend tells us that a man took three wives: one bore a Samburu, one a Maasai and one a Laikipia. Our name, Samburu, comes from a bag we carry in which we keep meat, called a "Samburr."*<sup>5</sup>

Self-determination is enshrined in Article 3 of the UN Declaration of the Rights of Indigenous Peoples and communities' self-definition in a protocol is an important aspect of their legal empowerment. It provides them a means through which to approach the law as a group that considers itself to be affiliated through a commonality (or commonalities) of subjective importance to the community. This issue is closely linked to the sharing of TK and free, prior and informed consent discussed at subsection 3.7.

### 3.2 The Links Between a Way of Life and Conservation of Biodiversity

Central to the formulation of the BCPs were discussions surrounding the way in which ILCs' ways of life are connected to the land, how their values contribute to the conservation and sustainable use of their resources and how their lives are contingent on a healthy ecosystem. The ILCs considered themselves a part of a dynamic interplay between the environment and their ways of life, animals (in the case of the livestock keepers), culture, and spirituality. Each group spoke generally about their way of life as well as specifically about how they either conserve the animal genetic resources they keep or the medicinal plants they use.

The Raika, for example, state the following in their BCP about their bio-cultural relationships:

*We are indigenous nomadic pastoralists who have developed a variety of livestock breeds based on our traditional knowledge and have customarily grazed our camels, sheep, goats, and cattle on communal lands and in forests. This means that our livelihoods and the survival of our particular breeds are based on access to forests, gauchar (village communal grazing lands) and oran (sacred groves attached to temples). In turn, our animals help conserve the biodiversity of the local ecosystems they graze within and we provide assistance to the area's local communities. In this way, we see our indigenous pastoralist culture as both using and benefiting from the forests in a virtuous cycle.*

*Our livestock has become integral to the animal diversity in forest areas. Predators such as panthers and wolves have traditionally preyed on our livestock and we consider the resulting loss of livestock as a natural part of our integral*

4. Raika Biocultural Protocol, for more information contact the Raika Samaj Panchayat, c/o Lokhit Pashu Palak Sansthan.

5. Supra note 2.

*relationship with the ecosystem. Studies in the Kumbhalgarh Sanctuary have shown not only how the panther population in the region has been sustained by our livestock, but also the negative impacts caused by the exclusion of livestock from the Sanctuary such as conflict over increased encroachment by panthers into villages.*

*Just as our breeds are unique because of the areas we graze them in, so the forests, gauchar and oran have evolved into particular kinds of pastoral-based ecosystems because of our long-term interaction with them. We are integral to the forests, gauchar and oran: we cannot survive without them and they will suffer without us.*<sup>6</sup>

The Samburu pastoralists in Kenya explain that they have a symbiotic relationship with the land, stating that as keepers of indigenous and exotic breeds of livestock, their lives are interlinked with and wholly dependent on their animals. Because their way of life also allows them to coexist with wildlife, they promote the *in situ* conservation of biodiversity. In their BCP, they say:

*We live in an area of the world that is incredibly rich in plants, wildlife and other environmental resources. Many parts of the world used to be populated by wild animals that ranged across the land, but have been depopulated because of the actions of man. In contrast, wherever possible we live alongside important animals such as lions, elephants, zebras, gazelles, klipspringers and wild dogs. Near watering holes you will also see bustards, the world's heaviest bird, as well as hornbills and birds of prey such as eagles.*

*We also have customary laws that guard against environmental degradation. For example, a recent decision by the Loisukutan Forest Committee has determined that, because of the importance of the forest for fruits, honey, water and wildlife, its use for grazing and wood must be limited. The committee also decides about access to seasonal grazing areas. Our pastoral way of life promotes the conservation of our important indigenous breeds of livestock alongside world renowned wildlife. We have a right to continue to live according to our values that promote the sustainable use of our livestock while ensuring conservation of the wider environment.*<sup>7</sup>

### 3.3 Conserving Medicinal Plants and Animal Genetic Resources

#### 3.3.1 Medicinal Plants and Culture

The traditional healers we spoke to all explained how they hold TK about the uses of certain plants, and as a result, they specifically set out to conserve the plants from which they sustainably harvested. In this case, TK leads directly to conservation. The Gunis of Rajasthan, for example, have three specific ways in which they conserve the medicinal plants they use. The following is an excerpt from their BCP:

*As a group, we conserve medicinal plants through home herbal gardens and dharam bageechas (self-managed medicinal plants development areas) and share our knowledge with each other and our students to ensure its continued development. In this way, the valuing of our knowledge by our communities leads to conservation, and the sustainable use of medicinal plants is leading to the development of traditional knowledge.*

**Herbal gardens:** *We each have our own herbal gardens at our houses in which we grow the most important plants. Often these gardens are up to half an acre in size. We feel that every home should have an herbal garden and promote the growing of the most widely used plants for common ailments by villagers near their homes and along the verges of fields. Presently, there are already over 10,000 herbal gardens in Rajasthan, but we want to promote a further increase in numbers.*

**Dharam Bageechis:** *Some of us have been given land by the village on which to grow medicinal plants in a wild setting, which we call dharam bageechis. Dharam is translated into English as meaning selflessness or selfless service, and bageechis is orchard. Thus dharam bageechis literally means "gardens of service." While we look after the areas, we see them as a community resource upon which we draw to treat community members. By closing the area to grazing, many medicinal plants grow leading to their regeneration to naturally abundant levels. We also specifically propagate certain species that are not initially found within the dharam bageechis or are particularly endangered.*

6. Supra note 4.

7. Supra note 2.



**Conservation farming:** *Through Gunis' knowledge, some of our community members have begun to grow medicinal plants for the local and regional market. While being distinct from Gunis, we include medicinal plants' conservation farmers in this group. We are able to buy low cost plants directly from the farmers. The farmers constitute 20 to 30 families who employ indigenous farming methods, including no use of pesticides or herbicides that adversely affect microorganisms and other life forms beneficial to the environment.*<sup>8</sup>

### 3.3.2 Animal Genetic Resources and Culture

Both the Samburu and the Raika expressed a deep connection to their livestock and explained how they sustained particular indigenous breeds. The Raika, for example, state the following:

*Through our interaction with the forests, gauchar and oran, and through selective breeding for generations we have created breeds that are particularly hardy, able to forage and digest rough vegetation, withstand the dry Rajasthani environment, and walk long distances – all attributes that "high performance" exotic breeds do not have. Local breeds need fewer inputs and are less susceptible to disease and are well-suited to harsh conditions. The animal genetic diversity they embody enables us to respond to changes in the natural environment, important attributes in the context of climate change adaptation and food security. Their genetic traits and our traditional knowledge associated with them will also be of use in breeding for disease resistance, and may provide us with other diverse economic opportunities under the forthcoming International Regime on Access and Benefit Sharing or a future International Treaty on Animal Genetic Resources for Food and Agriculture.*<sup>9</sup>

The Samburu echo this idea in their respective context:

*We keep the small East African Zebu cattle, Red Maasai sheep and East African goats. Our indigenous breeds are particularly suited to local conditions because of adaptation through natural selection, as well as our contribution to their genetic development through selective breeding. Until the recent introduction of exotic breeds, these were the only breeds we kept, representing hundreds of years of co-development*

*between our livestock, the environment and our way of life. We particularly value their abilities to withstand drought, to walk long distances and survive on small quantities of rough vegetation, as well as their strong resistance to disease. Because these breeds are integral to our lives, we also have a wealth of knowledge about them, including breeding methods and animal health knowledge.*

*Our indigenous breeds and their characteristics are the result of our relationship with the land, and as a result we see them as part of our cultural heritage. We have learned that our breeds are also considered important by others because of their hardiness and disease resistance.*

*Our culture and animal breeds are integral to who we are as a People. Without our indigenous breeds we will have lost a critical part of our collective bio-cultural heritage, and without our culture our indigenous breeds are less likely to be conserved.*<sup>10</sup>

### 3.4 Bio-spirituality

Closely linked to the above is the spiritual connection that all communities spoke about but that was most highlighted by the traditional healers. The Bushbuckridge traditional healers living in the Kruger to Canyons Biosphere Reserve state how their spirituality guards against the over-harvesting of any of their natural resources:

*Our harvesting of medicinal plants is guided by our spiritual values and is regulated by our customary laws that promote the sustainability of our natural resources. For example, we ask our ancestors as we harvest to ensure that the medicines will have their full effect, and believe that only harvested leaves or bark that are taken in ways that ensure the survival of the plant or tree will heal the patient. This means that we take only strips of bark or selected leaves of stems of plants, and always cover the roots of trees or plants after we have collected what we require. Also, we have rules linked to the seasons in which we can collect various plants, with severe consequences such as jeopardizing rains if they are transgressed. Because we harvest for immediate use, we never collect large scale amounts of any particular resource, tending to collect a variety of small samples. This inhibits over-harvesting.*

8. Biocultural Community Protocol of Gunis and Medicinal Plant Conservation Farmers of Rajasthan, India. For more information contact Bhawar Dhabai or Ganesh Purohit, Jagran Jan Vikas Samiti, [www.jjvs.org](http://www.jjvs.org).

9. Supra note 4.

10. Supra note 2.

*Our bio-spirituality is rooted in a relationship with nature that is both intimate and sacred. We experience a deep sense of kinship with the plants and animals and treat nature with love and respect. Our knowledge, dreams and intuitions, all of which are crucial for healing, are based on our ability to see ourselves integrally connected to nature, not separate from it.*<sup>11</sup>

The Vaidyas from the Malayali Hills in Tamil Nadu, India, also expressed their spiritual understanding of nature and explained how their beliefs lead them to harvest sustainably. They state:

*We believe that plants are sacred and the effectiveness of our plant-based medicines is integrally linked to us respecting the plants and caring for them.*

*We have a specific way of collecting our medicinal plants. We collect them in the early morning on Tuesdays, Fridays and Sundays, or during the full moon. We find that the curative properties of the plants are at their peak when they are collected at dawn. The day before we collect the plant, we pray to the plant and we tie a thread that has been dipped in Turmeric around the plant. The next day we chant a mantra up to 108 times before harvesting, using only our thumb and little fingers to pick the leaves and fruit to ensure that we cause as little harm to the plant as possible. One of the mantras we chant is: om mooli, maha mooli, jeeva mooli, un uver, un udalilinirka, swaha which is translated from Sanskrit as: 'O great living plant, let your life stay in you'. We only take roots and bark when absolutely necessary. Respecting the plant and reciting mantras leads to efficacious medicines. We also never touch the plant with our feet as that conveys disrespect. We also believe that a plant has the power to curse you if it is abused. It is a power endowed to plants by the first teacher (Siddha) of the Siddha system of medicine, Sage Agasthya. We do not harvest the medicinal plants to sell at the markets but we collect them primarily for our own healing practices.*<sup>12</sup>

### 3.5 Types of Traditional Knowledge

As noted in chapter I and as stated in Article 8(j), TK is a conglomeration of ILCs' knowledge, innovations and practices. The communities whose BCPs are referenced above confirmed this and made a distinction between different types of

knowledge, including ethno-veterinary knowledge, breeding practices, ecological knowledge, and knowledge about the use of plants to heal people. The Samburu communities spoke at most length of the first three types of knowledge:

*Our traditional knowledge has developed over time and continues to evolve as we face new challenges. We have three broad types of traditional knowledge: ethno-veterinary knowledge, breeding practices and an understanding of the ecology of the region that allows us to find water and grazing for our animals. Notably, these different types of knowledge are interdependent.*

**Ethno-veterinary knowledge:** *We have for centuries treated our animals for diseases and other ailments using our knowledge of the medicinal plants that grow on the plains and in the forests. While we share common knowledge, we have specializations among us. For example, men generally treat cows, and women care for sheep. Women's knowledge is focused on treating Red Maasai sheep and is less adapted to treating Dorper sheep. We also have traditional knowledge relating to treating infants and adults for a range of ailments. Each generation receives the earlier generation's knowledge and further develops it to tackle new challenges and according to each individual's skill as a healer.*

**Breeding practices:** *Because of the conditions in which we live, we carefully breed our animals so as to ensure that they suit our needs and preferences. We employ a number of methods, including choosing breeding bulls and rams by judging the mother's ability to withstand drought, her color, size, activity levels and the survival rate of the offspring. We also maintain our herds' and flocks' diversity by buying animals from our neighbors, or borrowing them. For example, when sharing rams, the agreement is based on the principle of reciprocity. If close by, we will provide it on the basis that the favor will be returned. If the trip is very far, then in the first instance we would send the animal with one other of our own herds and the pair will be returned together with another female animal as a gift.*

11. Bio-cultural community Protocol of the Traditional Health Practitioners of Bushbuckridge. For more information contact the Executive Committee of the Traditional Health Practitioners of Bushbuckridge, c/o Natural Justice: [www.naturaljustice.org.za](http://www.naturaljustice.org.za)

12. Bio-cultural Community Protocol of the Traditional Healers of the Malayali Tribes. For more information contact Tamil Nadu Parampara Siddha Vaidya Maha Sangam, c/o the Foundation for Revitalization of Local Health Traditions: [www.frllht.org](http://www.frllht.org)

*Cultural practices also contribute to the herd's diversity. For example, a husband is required by custom to give a dowry to the woman's family that includes a good milk producer. Similarly, when a young woman moves to her husband's home, she takes her animals to add to his. Over time this strengthens not only the herd but also the bond between the two families.*

**Environmental knowledge:** *Outsiders cannot live in the region the same way we do because they lack the knowledge of how to live within this environment. We are able to guide our livestock over long distances to provide grazing, water and salting resources for them. Without this understanding of Samburu and its surrounding districts, our lives would not be tenable.*

*Our ethno-veterinary knowledge keeps our livestock healthy, our breeding practices promote a strong herd consisting of selected livestock populations and our environmental knowledge underwrites our animals' survival in these harsh climatic conditions. We provide for our animals welfare, just as they provide for our livelihoods. Our relationship, therefore, is not one of provider and user, but of mutual-dependence and support.<sup>13</sup>*

It is interesting to note that much of the TK that the Samburu hold is critical to their way of life, not just an adjunct to it. Without the ethno-veterinary knowledge, breeding practices and environmental knowledge of the area, the Samburu would not be able to carry on their ways of life. Their knowledge, innovations and practices, in this regard, are integral to their lives and must be fostered to ensure the continuation of the Samburu's pastoralist lives.

The traditional healers spoke most about their knowledge relating to healing people. The Gunis of Rajasthan had this to say about their TK relating to healing community members, and the links to ethno-veterinary knowledge:

*We are based predominantly in rural Rajasthan where medical facilities are few. In any event, our communities have little available money for paying medical bills. When epidemics break out, our communities in the past received little to no support which has had tragic consequences, especially for the most vulnerable. We are therefore the*

*primary health care providers to the villagers. We have our own names for the various ailments and have particular ways of understanding them. We treat a range of seasonal, common and chronic ailments including coughs and colds, diarrhea, broken bones, skin diseases, jaundice, various types of asthma, pneumonia, wounds, snake bites, scorpion stings, scabies, stomach ache, malaria, lucoria, and gastritis. The women among us also assist with childbirth and pre- and post-natal care. Each one of us specializes in particular kinds of ailments, with overlaps of knowledge between us. When someone approaches one Guni with a particular illness that another Guni has more knowledge about, we refer them to that Guni.*

*We are also asked for advice on problems in family relationships, village disputes and spiritual matters because of our wisdom. The female Gunis are particularly respected in the communities, and have been able to use their status to change social customs, leading to empowerment of women.*

*Some of us also have ethno-veterinary knowledge for treating animals. Animal hospitals are few and far between and often when the animal falls ill it cannot walk and it is too expensive to transport it to the veterinary hospital. Thus the only realistic treatment is local. Notably, we treat some of the livestock keepers' important breeds of sheep and camels, and therefore can say that we help to conserve important animal genetic resources.<sup>14</sup>*

13. Supra note 2.

14. Supra note 8.

### 3.6 The Cultural Importance of TK and Indigenous Breeds

All communities greatly emphasized the cultural importance of their TK and where applicable, their indigenous breeds. The Bushbuckridge traditional healers, for example, explained how they perform a number of important roles as traditional healers that underpin their Sepedi or Tsonga cultures:

*As well as treating conventional illnesses, we perform a number of other culturally significant roles in the community. We connect community members to their ancestors in different ways, including assisting families when their newborn babies cry for their names, carrying out coming of age ceremonies, providing counseling for a range of issues, chasing away evil spirits through cleansing ceremonies, and determining when the ancestors are calling someone to become a traditional healer.*

*We also induct new traditional healers, providing initiation and training, thus passing on our knowledge and culture to future generations. All of the above contributes to healthy communities, builds leadership and morale, and promotes our culture.*<sup>15</sup>

Likewise, the Samburu set out a number of areas of their culture in which their breeds are important. They state:

*In addition to the sustenance our livestock provides us, they also play a significant role in our culture. A number of examples illustrate this point:*

- *Each clan's elders decide on the age set for initiating boys, and a bull is slaughtered to validate that age set;*
- *During the coming of age ceremony, boys are circumcised while wearing and sitting on Red Maasai sheep skins;*
- *As part of wedding ceremonies, the man must find a pure Red Maasai sheep (signified by its red color, long ears and clear eyes) and present it to his future Mother-in-Law who is then referred to as "Paker", literally meaning "the one who has been given sheep." Another sheep is slaughtered for the wedding;*
- *The bride is given a calabash full of milk and a gourd that is filled with the fat of from the tail of the Red Maasai sheep, drinking the milk to assuage her fears about going*

*to the new home and moisturizing her skin with the fat to relax her;*

- *When a child is born, a sheep is slaughtered, and when someone dies, sheep fat is smeared on their mouths as a sign of respect; and*
- *When we slaughter for warriors, we choose only one color which they say is straight, also when someone is sick, then they slaughter an animal that is healthy, with all the teeth and eyes. There is a special steer (castrated bull) that is slaughtered and a part of the skin is used as a ring. The color has to be accepted by the community and it must have all its teeth intact.*

*Notably, whilst mixed breeds can be used in lean times, the pure indigenous breeds are more highly valued for use in our ceremonies.*<sup>16</sup>

They concluded by saying: "Our culture and animal breeds are integral to who we are as a People. Without our indigenous breeds we will lose a critical part of our collective bio-cultural heritage, and without our culture our indigenous breeds are less likely to be conserved."

### 3.7 Traditional Knowledge, Sharing and Free, Prior and Informed Consent

In continuation of the last point, the idea of ABS and its constituent parts such as FPIC is novel to many communities. Communities need time to think through what prior informed consent to use their natural resources or TK really entails, especially when the idea of owning or selling resources or knowledge can be alien.

Natural Justice's approach has been to work with communities to think through the customary laws that relate to the sharing of TK and use of natural resources, helping communities to extend the values that underpin their TK or access to resources to other new stakeholders such as (non-) commercial researchers.

All the groups mentioned above discussed how they came to know their knowledge and how they share it with each other. In fact, the sharing of knowledge was presented by all groups as one of the most important

15. Supra note 8.

16. Supra note 2.

factors in the maintenance of their TK. At the same time, they also set out reasons why they have to ensure that their knowledge is only used by certain people and according to certain values. The traditional healers of Bushbuckridge present a good example of how a community holds and shares its knowledge:

*Each one of us has received a calling to become a healer and has been inducted and has studied with other healers. We gain our knowledge in four main ways: we are taught by our mentors, during our dreams we receive our ancestors' knowledge that is passed down through the generations, we innovate our knowledge, and we receive knowledge from other traditional health practitioners.*

*Whilst we share much common knowledge, each one of us has specialized areas of expertise and corresponding knowledge. Thus our knowledge is at the same time ancestral, common and individually held. If we give our knowledge to others without taking into consideration our ancestors and fellow healers, we will anger our ancestors and jeopardize the sanctity of our common knowledge. We can share our knowledge, but only after appropriate consultations and on the basis of reciprocity, including benefit-sharing. We lament the loss of knowledge that has already taken place, in most cases without any acknowledgement of the source of the knowledge and in the absence of benefit-sharing.<sup>17</sup>*

As a result of previous government interventions and the unregulated taking of knowledge, the communities that developed protocols felt that any further use of TK or animal genetic resources should be subject to FPIC and according to customary laws. The Raika, for example, stated this very clearly:

*Our community panchayat should be engaged any time outside interests take decisions that may affect our livelihoods or relate to our breeds and associated traditional knowledge. For example, before any of our access rights to customary grazing areas are altered, we must be consulted. Also, where researchers or commercial interests want to access our animal genetic resources and/or associated traditional knowledge, we must be given all relevant information with which to take a decision and given time to discuss the issues within the community panchayat as our breed diversity and traditional knowledge are collectively held and their ownership is not vested in any single individual. In cases where we decide to*

*grant access to our animal genetic resources or associated traditional knowledge, we have the right to negotiate a benefit-sharing agreement that includes mutually agreed terms.<sup>18</sup>*

The Gunis from Rajasthan went even further than this, setting out a series of principles central to the Guni dharma that governs any use of their TK:

*We feel we have a duty to ensure the preservation of our knowledge by sharing it with others. We do so with other Gunis and with students on the basis that it must not be misused. By this we mean that whoever uses our knowledge must do so according to our Guni dharma. We completely reject the use of our knowledge in ways that either degrade the environment or deny the poorest in society from receiving treatment. Either action is a form of exploitation that goes against our Guni dharma and has serious implications on society and the efficacy of the knowledge.*

**Free, prior and informed consent:** *We regularly share our knowledge amongst ourselves according to our customary norms that encourage the sharing of knowledge, but prohibit the transfer of knowledge to those who will misuse it by going against our Guni dharma.*

*If an outsider wants to access our knowledge, the Guni who is approached will inform Jagran Jan Vikas Samiti (JJVS), the Guni organization that has since 1994 assisted Gunis in Rajasthan and six other states to revitalize our traditions. We will then hold a meeting of our governing body, the appropriate Gunis, local conservation farmers, and other relevant community members. We will require full information about the intended use of the knowledge.*

*While we will assess each request on a case by case basis, any sharing of knowledge will be subject to our Guni dharma as set out in this protocol. In addition to the two core values of conserving nature and not denying access to healthcare to the poorest of our communities, our Guni dharma includes:*

- *No sharing of our knowledge with anyone who would try to make excessive profits. The benefits to the individual should be commensurate with those to the environment and society;*

17. Supra note 11.

18. Supra note 4.

- *The researchers and/or companies have to share some benefits with the community where the Guni is based, including recognition of our role in developing the traditional knowledge;*
- *We want to be involved in parts of the research;*
- *No patenting of the knowledge;*
- *Any use would be on the basis of a share alike license;*
- *The outcomes must be translated into our main languages: Marwadi and Hindi;*
- *Any subsequent change of use of the knowledge requires renewed consent (FPIC);*
- *We will not at this stage deal with foreign companies; and*
- *We want a continuing relationship with the user in terms of periodic reports.*

*To sum up, anyone who wants to engage with us must acknowledge our development of the knowledge and should be prepared to treat the environment with equilibrium such that there is no degradation and with reciprocity so that anything we provide is compensated in a like manner according to our values.<sup>19</sup>*

The Bushbuckridge healers from the Kruger to Canyons Biosphere Reserve decided to differentiate users of their knowledge along sectoral lines, providing each group with a clear guide as to how and on what terms they would decide to give FPIC. They state:

*We will base any consent to use our knowledge and access our indigenous biological resources on our customary laws and domestic regulations and the process of providing prior informed consent and deciding on the conditions for transfer will depend largely on the type of user. For example:*

*Students wanting to become healers: we want to assist anyone wanting to become a student of traditional health practices. Prospective students should make arrangements with any of us to set up a mentorship and can expect to pay a fee.*

*Healers from other areas who contact any of us for particular information will be directed to the Executive Committee who will conduct a process of community deliberation and ancestral consultation to decide whether the knowledge should be shared and on what basis.*

*Academic researchers must apply to the Executive Committee for any access to our traditional knowledge or indigenous biological resources. We will require, according to the [South African] Bio-prospecting and Access and Benefit Sharing Regulations and the BABS Amendment Regulations, to see the letter from the Department of Water and Environmental Affairs (DWEA) stating that they can conduct the research. The Executive Committee will conduct an information gathering process to ascertain the exact parameters of the intended research. With that information the Committee will, based on our customary laws, conduct a process of community deliberation and ancestral consultation to decide whether the knowledge should be shared and on what basis. Where access is granted, it will be on the condition that further consent is required if the intended use of the research is changed and for a range of non-monetary benefits including acknowledgement that we are the holders of the original knowledge. Any dealing with us must be conducted in total transparency.*

*Commercial bio-prospectors are welcome to engage us. They must first apply to our Executive Committee for any access to our traditional knowledge or indigenous biological resources. We will require, according to the BABS Regulations, any commercial bio-prospecting company to provide us with all information relating to the intended use of the knowledge and/or indigenous biological resource. With that information the Committee will, according to our customary laws, conduct a process of community deliberation and ancestral consultation to decide whether the knowledge should be shared and on what basis. That will form the start of a process of negotiation with the company towards a benefit-sharing agreement and material transfer agreement, if required. Benefits could include monetary and/or non-monetary benefits.<sup>20</sup>*

The Samburu added something further to the FPIC frameworks that the other groups developed. They saw FPIC as a dynamic process, going beyond a mere “yes” or “no” towards a benefit-sharing agreement that reveals that they consider themselves to be active stakeholders in any research that is carried out on their indigenous livestock. They state:

19. Supra note 8.

20. Supra note 11.

*While the knowledge we have is widespread throughout our community, we assert that as creators of this body of knowledge, we have a right to be consulted before it is used by any outsiders.*

*Elders make all the decisions in our communities. Decisions are made at the village level, clan level and district level depending on the scale of the issue or the types of resources involved. For example, decisions about areas to be used for grazing are taken by elders of the villages that share the grazing areas. This means that decisions relating to a common resource such as the Red Maasai would be taken by elders from the different clans across the region.*

*According to this principle of customary law, we must first be consulted before any activities that will impact us, such as research undertaken on our breeds, new breeding programs, use of our lands, and access to and use of our traditional knowledge.*

*Any newcomer to our areas must first establish a meeting with the local elders to explain what and who they intend to engage with and to answer any questions put to them. The committee of the respective group ranch will either take a decision, or if it is about a common resource, may seek wider counsel from other elders.*

*We should be involved in any decisions about research that involves our breeds and/or traditional knowledge. Any consent to research will be taken at the appropriate community level and will consider what tangible benefits the community will receive from the research. Reference will be made to the Environmental Management and Co-ordination (Conservation of Biological Resources, Access to Genetic Resources and Benefit Sharing) Regulations (2006) as well as to the emerging principles in the incumbent international regime on access and benefit sharing.<sup>21</sup>*

### 3.8 Challenges

In the context of Article 8(j), each of the communities is concerned about a number of factors that threaten their ways of life and

are undermining their abilities to preserve and maintain their TK as well as their plant and animal genetic resources. The Raika, for example, face exclusion from common grazing areas which is making their way of life increasingly untenable. They state:

*Despite this incredible genetic diversity and associated traditional knowledge that we have developed, we remain mainly landless people and are highly dependent on our customary grazing rights over forest and communal lands. Traditionally we have grazed our animals in Rajasthan's forests and in the gauchar and oran over the monsoon (July-September). Our exclusion from the forests and shrinkage of gauchar and oran severely threaten our entire existence and the co-evolved ecological system of these biodiversity-rich areas that have been developed through generations of complex interplay between livestock, livestock keepers and the local ecosystem.*

*With the sale of our livestock goes our traditional knowledge. As our herds diminish, so does the transmission of breeding techniques, medicinal practices and ecological understanding of the areas we used to graze on. The potential loss of the important animal genetic resources that we have developed in co-evolution with the Rajasthani ecosystem is significant for a world that is suffering from climate change and food shortages.*

*Our future: the continuing exclusion from areas for grazing raises serious doubts about the viability of our way of life. With it will disappear our livestock, our culture and the virtuous relationship between our herds and the Rajasthani landscapes we have sustained. We require grazing rights and a corresponding increase in the market for our products to continue to sustain our livelihoods and keep our unique breeds, including the camel.<sup>22</sup>*

The Samburu see climate change as their most serious threat, gravely affecting available pasture. They state:

*Like everyone in Kenya, we are suffering greatly from the reoccurring droughts that are debilitating the country. As pastoralists living in close dependence with the environment, we are highly sensitive to climatic variation and have a clear picture of the effects of climate change.*

21. Supra note 2.

22. Supra note 4.

*We have witnessed in the last decade a steady worsening in rainfall, such that this year is the worst drought conditions that any of us have seen in our lifetimes. We are being pushed to the absolute limits of existence. Climate change is forcing us to face a number of interlinked challenges that are compounding each other.*

*For hundreds of years we depended entirely on our livestock for our survival, drinking their milk and blood, and eating meat on special occasions. While many of us have built permanent homes, many are continuing to move according to the seasons to find the best grazing, or to avoid diseases or raiders. Because droughts are becoming more frequent and severe in Kenya, we are increasingly concerned that the exotic breeds cannot cope well with such conditions. As the level of inter-breeding rises, we now realize that the traits of the exotic breeds may be undermining our ability to continue our way of life.*

*All of the above raises questions about the long term tenability of our way of life. We are deeply concerned that these associated challenges are increasing in their severity to the point that our whole way of life will be threatened. Already many pastoralists in the North East of the country have been forced to abandon their livelihoods. The loss of our way of life would also adversely affect our indigenous breeds, much of our culture, our various types of traditional knowledge and the bonds between us, our land and the region's environment and living resources. The changing climate is heavily affecting us and so does the encroachment on our land.<sup>23</sup>*

### 3.9 Ways Forward

When the communities came to address their challenges and to set out their endogenous development plans, the two main issues they wanted to resolve for the protection of their ways of life were access to resources (medicinal plants or grazing areas) and to ensure that their TK is not misappropriated or used in ways incommensurate with their values. The very specific nature of their visions was notable, with the Bushbuckridge healers providing the following example:

*To ensure that we can continue to provide for our communities, we require continued access to medicinal plants, which means that over-harvesting in the communal areas must be tackled and access to conservation areas improved.*

*We want to work with traditional authorities to better regulate the access to communal lands by muti [medicinal plants] hunters. Their over-harvesting has to be better regulated or else there will be no medicinal plants for us to harvest from the communal areas. We want to explore how we can contribute to minimizing the environmental degradation being carried out by the herbalists, either through community education or establishing closer local controls.*

*Now that we are clear about the procedures for accessing plants from Mariepskop [a conservation area], we want to be recognized by the Department of Agriculture, Forest and Fisheries (DAFF) as both contributing to and benefiting from the region's biodiversity and to work with the Department to establish a system that facilitates our access to the resources under its management. We call on the DAFF to instigate a process towards establishing such a collaborative partnership, and to explore the establishment of a medicinal plants conservation and development area on Mariepskop to increase the in situ cultivation of the most important medicinal plants.*

*We also want to evaluate how to replicate successful community-run medicinal plants nurseries in the area, and seek the K2C Biosphere Committee's assistance in any future projects of this kind. We are considering beginning discussions with local traditional authorities as well as with the local government to evaluate whether we could have some land set aside for our purposes.<sup>24</sup>*

All the communities set out how they wanted to secure their bio-cultural futures. The Raika went one stage further and set out a series of commitments in their BCP regarding the conservation of the local forests. They state:

23. Supra note 2.

24. Supra note 11.



*We want to continue to graze our animals in forests, gauchar and oran in a way that sustains the natural plant and animal ecology of these areas, maintains our diverse breeds and sustains our rich traditional knowledge. We commit to protecting the biological diversity of the region, our animal genetic resources and associated traditional knowledge, by:*

- *Upholding our traditional roles as custodians of the forests and as sustainers of the co-evolved forest ecosystem of the region;*
- *Protecting the forest against fires by regulating the grass growth by grazing and by fighting forest fires when they break out;*
- *Sustaining the predator population in the forest through the customary offering of some of our livestock as prey;*
- *Continuing to increase forest growth through the customary manuring of the forest from the dung of our livestock;*
- *Ensuring strong tree growth by the customary pruning of the upper branches and twigs of trees by our camels;*
- *Grazing the fallen leaves on the forest floor thereby keeping the termite population in check;*
- *Combating illegal logging and poaching in the forest;*
- *Continuing our traditional rotational or seasonal grazing that facilitates forest growth;*
- *Eliminating invasive species in the forest; Promoting and sustaining the breed diversity of our livestock; and*
- *Preserving and practicing our traditional breeding and ethno-veterinary knowledge and innovations, and sustainable management of forest resources relevant to the protection of the co-evolved forest ecosystem of the region.*<sup>25</sup>

### 3.10 Affirming Rights

Because of the breadth of the communities' challenges and corresponding ways in which they wanted to deal with their concerns, Natural Justice provided information on a variety of domestic and international laws and declarations that support their local needs. The crucial point is that because communities consistently argued that to protect their TK, they required a broader approach than that proposed within the ABS regime, the rights they invoked also deal with the broader context of their ways of life. The Raika, for example, focused primarily on access

to grazing rights as the most pressing issue threatening their way of life and consequently their indigenous breeds and TK, and thus their protocol sets out their rights under Indian law to secure grazing areas. They also referenced the Declaration of Livestock Keepers' Rights and called on two international bodies and a national body to assist them with their challenges. Specifically, they stated:

We call upon the National Biodiversity Authority to:

- *Recognize our local breeds and associated traditional knowledge as set out in the Raika Biodiversity Register and to include it in the People's Biodiversity Register;*
- *Facilitate the setting up of Biodiversity Management Committees under the local bodies (Panchayats or Municipalities) where we live and to support these Committees in ensuring the conservation and sustainable use of our breed diversity and traditional knowledge;*
- *Strengthen in situ conservation of breeds of the Raika and include them in the BMC being initiated by the government;*
- *Advise the Central Government and coordinate the activities of the State Biodiversity Boards to protect the customary grazing rights of the Raika so as to safeguard our traditional lifestyles that ensure the conservation and sustainable use of our breed diversity, associated traditional knowledge and the local ecosystem; and*
- *Ensure that our prior informed consent (according to customary law) is obtained before any decisions are taken that affect our traditional way of life or access is granted to our breed diversity and associated traditional knowledge for research or for commercial purposes, and further ensure that we receive a fair and equitable share of the benefits arising from the utilization of our breeds and traditional knowledge according to mutually agreed terms.*

*We also call on the Secretariat of the UN Convention on Biological Diversity, specifically under Article 8(j) of the Convention, to recognize our contribution to the conservation and sustainable use of biological diversity. We also call on the UN Food and Agriculture Organization to acknowledge the importance of our animal genetic resources and to recognize livestock keepers' rights.*<sup>26</sup>

25. Supra note 4.

26. Ibid.

## 4. Lessons Learned and their Importance for IRABS and the Implementation of Article 8(j)

### 4.1 Communities

The bio-cultural and legal empowerment that the five communities engaged with lead to a series of important points about the implications of IRABS and the implementation of Article 8(j). As a result of developing a BCP, the ways in which the communities envisaged their bio-cultural futures became clearer. The importance of Article 8(j) is elicited through the analysis of the linkages between the biodiversity within which ILPCs live, their livelihoods, their spiritual beliefs and cultural understandings of nature, and the ways in which their customary rules and practices promote conservation and sustainable use of biodiversity. At the same time, witnessing the daily challenges they face and their general marginalization, especially in the case of the Samburu and the Raika, highlighted the limitations of the IRABS. Paradoxically, the communities are extraordinarily resilient yet vulnerable to ecological change and the interference of external forces. Whilst they could benefit from regulatory frameworks that can guarantee them increased bio-cultural security, they are also susceptible to being harmed by well-intentioned but badly implemented laws or ABS deals.

All five communities said they found the BCP process useful for a number of reasons and felt emboldened to know that their ways of life are considered important at the international level, even if the national action required of signatories to the CBD has not yet been seen at the local level. We draw on some of the key issues from the above excerpts of the communities' BCPs to highlight the importance of the development of BCPs to ILPCs in the context of the incumbent IRABS.

**First**, the communities had neither previously considered entering into an ABS deal nor thought through the whole range of associated issues that should be engaged with. Some, such as the Bushbuckridge traditional healers and Samburu pastoralists, had been visited by researchers in the past, but at most felt disgruntled by the lack of feedback they had received. They did not know that an international regime is being negotiated or that each of their respective countries (Kenya, India and South Africa) has domestic bio-prospecting regulations. There is a striking disparity between the

importance that their TK and genetic resources is being given under the international regime and their lack of awareness. It confirms the need for community-lead processes to highlight the importance with which the CBD views ILPCs' traditional ways of life and to explain the rights and remedies available to affirm them.

**Second**, each of the communities underscored their dependence on the local ecosystems for their livelihoods and explained how their TK is both an outcome of this relationship and something that allows them to continue their ways of life. The pastoralists' ethno-veterinary TK, for example, is crucial to the survival of the livestock on which their own lives depend. This issue, reflected by each community in their respective contexts, underscored the integral nature of TK to ILPCs' lives. Their TK in this sense has an incalculable worth with no tangible monetary value because they have never considered it as a tradable commodity. Working with communities to appreciate the worth of their TK, indigenous breeds and plant genetic resources is not new, but we found that such bio-cultural empowerment is vitally important in the context of IRABS. This point is amplified when one considers the different types of TK communities have and the over-emphasis that IRABS is placing on commercially viable knowledge over knowledge or ecological understanding that is more important for their ways of life.

**Third**, because the knowledge holders had received their TK from ancestors and others in the community, the idea of selling their TK or providing it to strangers from outside the community was a highly novel concept. Communities found it useful to approach new ideas such as the ownership or transfer of animal genetic resources and TK from the perspective of customary laws and practices that underpin the usual community-based sharing of these resources. The communities also emphasized the need for FPIC before the use of any of their TK and genetic resources as being a part of customary law, as opposed to something new that has emerged from the international negotiations. This interestingly highlights the fact that each community already has customary laws and practices relating to the transfer of genetic resources and TK within their own contexts in order to promote genetic

diversity and ensure that TK is only shared with people who will use it responsibly. Although they do not have specific laws to suit the new IRABS framework, they are able, with time and information, to build on the existing ethical frameworks to extrapolate and set out the values that should govern any potential access to TK and genetic resources.

Similarly, just as the IRABS poses new conceptual challenges about the values that should inform FPIC, it also raises issues for communities about the most appropriate governance level at which to deal with them. As we have illustrated above, each community approached the issue in its own way, with the Samburu providing the most nuanced framework. They directly acknowledged that while some knowledge is localized, the issue of outsiders accessing a common resource such as their Red Maasai sheep would have implications for all Samburu, meaning that governance of the issue must therefore be elevated to the regional level. TK also transcends communities, so processes that foster thinking about other holders of common TK and instigate intra- and inter-community discussions become increasingly valuable.

When a community is approached with a potential ABS deal, the terms of the negotiation may be set from the beginning by other parties, potentially skewing the way the community approaches it. Once a commercial framework is established, it becomes more difficult for a community that has never considered these issues before to work through the conceptual and practical considerations it needs to properly appraise the access request and offer of benefits from a more bio-cultural perspective. The values that underpin any sharing of TK and the level at which they choose to do so highlight the critical need for communities to have the time and relevant information to appraise IRABS from their perspectives, and to consider it within the framework of their endogenous development plans.

**Fourth**, all communities pointed strongly to certain issues that were either affecting or in some cases threatening their ways of life. Sustainability has roots in their spiritual understanding of nature and is ritualized in their cultural practices, yet their ways of life are becoming increasingly threatened by climate change, competition for land and over-harvesting, among other issues. The Samburu realized that as the Kenyan droughts continue, they need to increase the numbers of their indigenous breeds, as the exotic breeds are dying in droves. The Raika are now desperate for access

to forests if they are to continue their way of life, as every year they have to reduce their flocks of sheep and caravans of camels due to lack of grazing areas. The Bushbuckridge traditional healers require access to new areas to harvest medicinal plants if they are to continue to treat their communities' ailments. Yet none of them listed bio-piracy as a significant concern because the threat to their TK is not, *prima facie*, of paramount importance to them.

To these communities, therefore, the IRABS has only limited potential to deal with their core challenges and to promote Article 8(j) in their local contexts. **As a mechanism**, the IRABS will be useful to empowered communities that are able to use it according to their values to assist them to manage their TK. To most effectively implement Article 8(j), IRABS should be considered by cohesive and empowered communities as one of a number of different laws that provide them with rights from which they can draw depending on their endemic strengths, challenges and development plans. A BCP will assist them to engage with the framework to maximize its local potential whilst shielding them from the exigencies of the market. Notably though, as a mechanism it will remain largely redundant to other ILCs whose knowledge, innovations and practices are not of commercial value or whose challenges of securing the bio-cultural foundations of their ways of life, such as the pastoralists referenced above, cannot be assuaged by ABS.

**As a rights framework**, the IRABS makes a more significant contribution to all ILCs. By acknowledging the importance of ILCs' knowledge, innovations and practices to the conservation and sustainable use of biodiversity, the IRABS assigns a broad set of rights to communities under Article 8(j) to continue their ways of life. By developing BCPs in which communities set out those aspects of their lives that fall within Article 8(j), communities are claiming a broad spectrum of rights that are required to uphold that way of life, including rights to land tenure, manage their natural resources, have their customary laws and practices respected, and manage their TK according to their values.

ILCs are deserving of the bio-cultural and legal empowerment necessary to draw on their values and current challenges to understand their rights under a range of laws, including the IRABS, and to set out a self-determined way forwards. Communities are then better able to counter the tendencies of the law, as raised in Chapter I, to separate integrally linked aspects of communities' lives such as TK from their culture and spirituality.

## 4.2 Users

BCPs assist users to engage with communities on an ethical basis. 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 philanthropy and activities driven by the triple bottom line. For them, uncertainty surrounds a range of issues involved in ABS negotiations, such as properly determining the holders of TK, what constitutes FPIC, the uncodified nature of customary laws, and additional complicating factors such as trans-boundary resources. While the policy instruments we set out in Chapter I such as the Bonn Guidelines provide users with guidance on how to engage with communities, as we noted, they fail to empower ILCs to determine the terms of any negotiations.

By setting out details of traditional leadership, values that underpin FPIC and other issues such as local research priorities, potential users of communities' TK and GR are in a better position to appraise whether the community they intend on approaching is suitable for their particular needs. By detailing the community's bio-cultural realities, users are put on notice that the TK or GR they seek to access is something that constitutes more than just a tradable commodity and forms a part of the community's very existence. Increasingly, ethical users should find this level of clarity from ILCs to be a benefit as opposed to a bane. Moreover, meeting with empowered communities ensures a more level playing field for any subsequent negotiations and can contribute a heightened legal certainty to any subsequent access and benefit-sharing deals. As such, BCPs build a bridge between users and providers of GR and associated TK.

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## 5. Re-evaluating Local Integrity and Good ABS Agreements

In chapter I, we raise the issue of the importance of local integrity; in this chapter, this point was brought to the forefront by the communities' views provided above. We can discuss in abstract the pros and cons of an ABS regulatory framework, but the only way to assess the real worth of ABS is by measuring its tangible impacts at the local level. Those most able to determine whether ABS might assist to preserve and maintain ILCs' TK and promote the conservation and sustainable use of biodiversity are ILCs themselves, according to their local needs. Once it is accepted that the IRABS and national ABS frameworks are not a panacea and have some very serious limitations relating to the full implementation of Article 8(j), but will provide bio-cultural communities with certain rights and can assist with certain challenges, they will become more tangible from the community perspective. Empowered communities can then assess from their own contexts whether ABS offers them a means to tackle certain challenges they face and/or a way to promote the management of certain elements of their TK. Based on our work, we argue that the development of BCPs empowers communities to approach other stakeholders involved in ABS on a more level playing field, and thus enables them to use the legal framework towards their endogenous development plans and according to their customary values. Similarly, it helps them to avoid entering into ABS deals that lead them further from their bio-cultural ways of life as envisaged in Article 8(j).

At the start of this chapter, we touched on the subject of what constitutes a good ABS agreement. Just like the merits of ABS, much has been said on this subject. Most answers deal with specifics such as arguing that good ABS agreements are those with the following characteristics: communities are involved in the research; communities harvest wild plants (along a bio-trade model) and perhaps engage at some level in the processing of the plants; the deals are with smaller local companies as opposed to multinationals; and either no patents are taken over innovations based on the TK or the patent is jointly owned, among other stipulations. We agree with many of the increasingly nuanced approaches to ABS and understand the importance of learning from past agreements whose initial luster has faded. Though it is another subject entirely, considered support to communities before, during and after an ABS agreement is of utmost importance. However, put simply, we argue that a good ABS agreement is one that is negotiated by an empowered community according to its bio-cultural values and customary laws on FPIC relating to the sharing of its TK or GR, and that the terms of the agreement lead to tangible benefits to the community in line with Article 8(j). While BCPs are not a panacea, we feel that for many communities, engaging with the process of developing a BCP will improve their ability to assess whether ABS offers tangible benefits and if so, to negotiate such agreements.

# CHAPTER 3

## Community Protocols in the Negotiations of the International Regime on Access and Benefit Sharing

Kabir Bavikatte and Harry Jonas

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### 1. Introduction

“Community protocols”, as they are being referred to in the Working Group on Access and Benefit Sharing (WGABS), are being discussed in the negotiations of the international regime on access and benefit sharing (IRABS), having been introduced by the Africa Group in their operational text submitted prior to the 7th meeting of the Working Group (WGABS 7). Community protocols have also been raised at several subsidiary meetings held in 2009 between WGABS 7 and 8, including the following:

The Meeting of the Group of Technical and Legal Experts on Traditional Knowledge (TK) Associated with Genetic Resources (GR), the International Vilm Workshop on Matters Related to TK Associated with GR and the ABS Regime, and the Pan African meeting of indigenous peoples and local communities (ILCs) on ABS and TK. This chapter details the increasing reference being made to community protocols at the international level and asks what contribution they will make to ILCs’ ability to engage with the incumbent IRABS.

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### 2. African Group Submission to the WGABS

At the 9th Conference of Parties (COP 9), held in May 2008, Parties to the CBD resolved in Decision IX/12 that Annex 1<sup>1</sup> to the Decision would be the basis for further negotiations towards the IRABS. Decision IX/12 required Parties to submit operational text and explanations for the IRABS under each of the main components of Annex 1. Subsequent negotiations, beginning with ABS 7 in Paris in April 2009, have been based on the operational text submitted by the Parties. Under the heading “*Measures to Ensure Compliance with Customary Laws and Local Systems of Protection*”, which falls under the Compliance component, the African Group of countries introduced operational text that explained their attempts to challenge the dominant

paradigm within the WGABS that privileges traditional knowledge (TK) with commercial application over other knowledge, innovations and practices that promote the conservation and sustainable use of TK. Unique to the African text was its focus on ensuring the free, prior and informed consent (FPIC) of ILCs for accessing their TK and the sharing of benefits arising from its use, while also safeguarding the bio-cultural relations within which TK is embedded. The African Group suggested this was a strong basis for negotiations because ILCs could retain control over their TK and benefit from its entry into non-traditional sectors while ensuring that its use is not entirely divorced from the community processes that elicit it in the first place.

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1. <http://www.cbd.int/doc/decisions/cop-09/cop-09-dec-12-en.pdf>

Although other Parties at ABS 7 bracketed the text due to concerns about its form, they widely supported its essence. The International Indigenous Forum on Biodiversity, which is the formal representative of ILCs in negotiations, supported the mainstay of the African text as it responded to their criticisms of the current negotiations towards the IRABS. The chief concern of the African Group as highlighted in their explanation to the operational text was over the restrictive interpretation of Article 8(j) in the negotiations. The African Group argued that:

*Article 8(j)... is far wider in its reach and should be read in the broader context of the CBD, particularly its aims of conserving and sustainably using biodiversity. Article 8(j) is clear that the conservation and sustainable use of biological diversity in the context of indigenous and local communities is dependent on aspects of their TK which are rooted in their 'ecological values'... Such ecologically integral TK is based on a value framework that regulates the relationship between the cultures of ILCs and their lands. Thus TK relevant for the conservation and sustainable use of biodiversity rests on ecological values, which in turn rests on secure rights to land and culture. The truth of the matter is that ILCs have conserved and sustainably used biological diversity for thousands of years not because they have been able to trade in their TK but because they have been able to live on their traditional lands in accordance with their ecological values.*<sup>2</sup>

The African Group referred to the bio-spiritual virtues that underlie TK as the ecological values of ILCs and asserted that these virtues are dependent on secure rights to land and culture. The African Group reinforced the argument by adding that:

*ABS in the context of ILCs focuses inordinately on an agenda of TK protection that perceives TK outside of the relationships which generate it, divorcing it from the ecological values that lead to its formation. The relation that the ILCs have with nature is one of a perpetual dialogue between land and culture, each constituting and reconstituting the other. Ecological values are therefore rooted in an experience of relatedness between community and nature. Current IPR systems perceive TK in a manner that is quite similar to conventional property systems where land, for example, is viewed as a commodity separate from the network of*

*relations within which it operates. TK is also viewed as an object separate from the cultural and spiritual relationships with the land within which it is embedded.*

*TK in reality is the manifestation of a particular kind of relationship with nature. TK is not just information but a set of relations that is embodied in traditional lifestyles of ILCs, which ensure conservation and sustainable use of biodiversity. Currently there are no internationally agreed definitions of TK and all efforts towards defining it tend to treat it as a product rather than as a process.*

*Efforts to protect TK should be oriented less towards protection of knowledge as information and more towards sustaining the relationships based on ecological values that produce the knowledge. It is the ecological values that have sustained indigenous peoples within natural habitats, and the erosion of these values through the dispossession of indigenous lands and consequent annihilation of their cultures has seriously threatened biological diversity.*<sup>3</sup>

The African Group laid the foundations of "bio-cultural jurisprudence" in their submissions by stating that ABS agreements under Article 8(j) are not merely sale contracts for TK, but must affirm the bio-cultural relations that ILCs have with their land. The African Group elaborated on the idea by stating that:

*The process and outcome of the ABS negotiations must uphold the spirit of Article 8(j) and to do so, the emphasis should not just be on the sale of TK but focus equally on the conservation and sustainable use of biological diversity and protection and promotion of traditional lifestyles, including rights to land and culture. This implies ensuring that the ecological values of ILCs in question are central to all stages of the ABS negotiation, i.e. at the stages of FPIC, MAT and benefit-sharing. While the overarching framework of ecological values within which ABS agreements must be negotiated does not preclude monetary and non-monetary benefits to ILCs in exchange for the use of their TK, these benefits should not be the sole aim of ABS agreements. The process and the outcome of an ABS agreement between ILCs and the relevant stakeholders must affirm aspects of their traditional lifestyles that conserve and sustainably use biological diversity.*<sup>4</sup>

2. UNEP/CBD/WG-ABS/7/5 at p.52.

3. Ibid.

4. Supra n.17.

In pursuance of the above arguments, the African Group proposed community protocols as a community-based means to ensure that ABS agreements relating to TK affirm the bio-cultural ways of life of ILCs that Article 8(j) seeks to protect. They explained:

*A community protocol is an outlining of ecological values on which FPIC, MAT and benefit-sharing would be based. It enunciates a community's core values and while it remains a flexible instrument, it provides community members and outside interests a level of certainty about the principles upon which any ABS agreement will be negotiated.*

*Community protocols are perhaps the best chance for ILCs to ensure that their ways of life and values are respected and promoted. Merely relying on the benefits of ABS agreements without affirming their ecological values would reduce ILCs to sellers of TK who warm themselves on the embers of a lifestyle that is fast dying out.*<sup>5</sup>

As we turn to WGABS 8, to be held in Montreal in November 2009, the WG will be specifically discussing the provision on TK. The African Group has revised its submission to better order its text under the bricks and bullets. It has included reference

to community protocols under a Main Component D, including in operational text under the following bricks and bullets:

- Measures to ensure the fair and equitable sharing of benefits arising out of the utilization of TK with TK holders, in accordance with Article 8(j) of the CBD (brick D/1/1);
- Measures to address the use of TK in the context of benefit-sharing arrangements (brick D/1/3);
- Community-level distribution of benefits arising out of TK (bullet D/2/4);
- Access with approval of TK holders (brick D/1/7);
- No engineered or coerced access to TK (brick D/2/8);
- FPIC of and MAT with holders of TK, including indigenous and local communities, when TK is accessed (bullet D/2/1);
- Measures to ensure that access to TK takes place in accordance with community-level procedures (brick D/1/2); and
- Identification of best practices to ensure respect for TK in ABS-related research (brick D/1/4)

ABS 8 will define the shape of the IRABS as it relates to communities' TK, and the inclusion of community protocols in the text will determine the level of protection communities can exercise over their TK.

### 3. Group of Technical and Legal Experts on TK

There is a growing understanding internationally that the bio-cultural relationships between TK, communities and ecosystems have to be taken seriously to ensure conservation and sustainable use of biological diversity. The recent June 2009 report of the Meeting of the Group of Technical and Legal Experts on TK associated with GR in the context of the IRABS states:

*...8. In situations where traditional knowledge is associated to genetic resources... it was highlighted by many experts that traditional knowledge and genetic resources are inseparable. 9. Experts further clarified that there are two types of traditional knowledge, one that is highly specific and [one] that... is of a more general nature, related to the encompassing ecosystem and is the result of co-evolution. 10. In discussing the relationship between traditional knowledge and genetic resources, the history of co-evolution*

*(of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources. Furthermore, co-evolution suggests that there is traditional knowledge [that]... is highly specific and traditional knowledge [that]... is of a more general nature as the result of co-evolved, bio-cultural systems. Research shows that human ecosystem management and traditional knowledge promotes biological diversity and thus genetic diversity. ...18. It was also noted that Article 8(j) is a stand-alone provision that was not subservient to Article 15 but in fact they are mutually supportive and the development of the International Regime should support Article 8(j) in respecting, protecting and promoting traditional knowledge. It was noted that Article 15 speaks to the sovereignty of States over their genetic resources whereas Article 8(j) recognizes holders of traditional knowledge.*

5. *Supra* n.17.

*It was further emphasized that Article 8(j) as a standalone provision protects all traditional knowledge of indigenous and local communities within the mandate of the Convention on Biological Diversity, including traditional knowledge associated with genetic resources. Furthermore, associated traditional knowledge does not necessarily have to be associated with genetic resources, as it can also include the use of traditional knowledge associated with biological resources.*<sup>6</sup> The Expert Report also highlighted the importance of BCPs in regulating access to TK of ILCs when there is no clear customary law and local

systems of protection.<sup>7</sup> The Expert Report, like the African Operational Text, stated that national laws of countries party to the CBD should uphold BCPs as legitimate statements of the rights and wishes of ILCs. The Expert Report added that in situations in which TK is shared between ILCs or spread across national boundaries or ILCs with different values, customary norms, laws, and understandings, countries should encourage and support the development of BCPs in order to provide potential users of such associated TK with clear and transparent rules for acquiring FPIC.<sup>8</sup>

## 4. International Vilm Workshop on Matters Related to TK Associated with GR and the ABS Regime

BCPs were affirmed at the July 2009 International Vilm Workshop on Matters Related to TK Associated with GR and the ABS Regime<sup>9</sup>, which was organised by the German Federal Ministry of Environment, Nature Conservation and Nuclear Safety. The Workshop had invited ILC representatives to jointly prepare for and provide input to Parties in the forthcoming negotiations at WGABS 8 in Montreal in November 2009. The ILC representatives under the head of “*Measures to Ensure that Access to TK Takes Place in Accordance with Community-level Procedures*” proposed operative text for the IRABS that requires States to facilitate the development of BCPs with the full and effective participation of bio-cultural communities to prevent the misappropriation of their TK. They stated:

*The legitimate indigenous or local authorities shall provide potential users of traditional knowledge with clear information on how to obtain FPIC (free, prior and informed consent) and negotiate MAT to traditional knowledge based on community-level procedures, customary laws and/or community protocols. Parties shall, with the full and effective participation of the indigenous peoples and local communities concerned,*

*support and facilitate local, national and/or regional community protocols regulating access to genetic resources and associated traditional knowledge, taking into consideration the relevant customary laws and ecological values of indigenous peoples and local communities in order to prevent the misappropriation of their associated TK. If an agreement on access to genetic resources and/or traditional knowledge has been reached between an indigenous people or a local community and a user, when applicable through an Indigenous Peoples’ Competent Authority and/or the use of community protocols, the existence of the agreement shall be registered with the competent national authority.*<sup>10</sup>

Participants at the workshop debated the ILCs’ submission and despite questions relating to their exact operation and future standing under the IRABS, the concept garnered broad support.

6. UNEP/CBD/WG-ABS/8/2.

7. Ibid, para 35.

8. Ibid, para 60.

9. Workshop report forthcoming.

10. For a copy of the submission contact Natural Justice ([www.naturaljustice.org.za](http://www.naturaljustice.org.za))



## 5. The Nairobi Pan African ILC Preparatory Meeting on ABS and TK

The Pan African ILC meeting on ABS and TK was held in Nairobi in September 2009, with over 50 ILC representatives from across Africa. The meeting was organized by the Indigenous Information Network and the ABS Capacity Development Initiative for Africa. The ILC representatives concluded their 4-day meeting with two sets of recommendations: first, to the negotiators of the African Group on their negotiation on the International Regime on ABS; and second, to African States on the practicality of community (bio-cultural) protocols as a tool to ensure FPIC.

Specifically, in relation to the IRABS, the ILC representatives requested the following:

- The African negotiators should support the inclusion of BCPs as an essential component of the IRABS;

- The IRABS should require States to ensure that access to community GR and TK is done in accordance with their BCPs;
- The IRABS should require States to ensure that the development, management and control of BCPs is community-led; and
- The IRABS should establish a financial mechanism that includes in its objectives support for BCP awareness-raising and capacity-building.

The outcomes of the Vilm workshop and the recommendations of the Nairobi meeting and the Group of Technical and Legal experts on TK will inform the negotiations at the WGABS8. The respective participants' strong support for community protocols underscores the growing recognition that communities require means by which to engage with the IRABS.

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## 6. Conclusion

Whilst the theory and practice of ABS-related BCPs are still being developed, they are increasingly being recognized at the international level. The African Group's submission, supported by ILCs, NGOs and a number of Parties, is a significant attempt to ensure that any future ABS agreements are contingent on community protocols. Specific reference to community protocols would provide communities with the right to insist on being able to engage in types of bio-cultural and legal empowerment processes described in Chapter 2, and to approach any request for access to their TK or GR only after having informed and prepared themselves.

The further support given to community protocols by the Group of Technical and Legal Experts on TK, the Vilm workshop and African ILC meeting add further weight to the instrument's inclusion in the incumbent IRABS. For communities, the negotiations are at a significant turning point. ILCs require Parties' support of community-based mechanisms such as bio-cultural community protocols to ensure that they are protected against any misappropriation of their TK and will benefit from their knowledge, innovations and practices that promote the conservation and sustainable use of biodiversity.

# CHAPTER 4

## Bio-cultural Community Protocols and REDD

Peter Wood <sup>1</sup>

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### 1. Introduction

An increasing amount of attention has been paid in recent years to the relationship between forests and climate change, with the most alarming revelation being that deforestation and forest degradation constitute nearly 20% of all anthropogenic sources of greenhouse gases. This has given renewed impetus at the international level to save the world's forests, particularly those in the tropics and sub-tropics, and the carbon stored within them. One proposal currently being considered as part of a post- Kyoto climate agreement is a programme on reducing emissions from deforestation and forest degradation in developing countries that has come to be known as "REDD".<sup>2</sup> In essence, the intention of REDD is to channel payments from developed countries to developing countries in exchange for reductions in forest-related emissions.

However, forests ecosystems are diverse and dynamic, as are the indigenous peoples and local communities (ILCs) that depend on them for their livelihoods and traditional ways of life. Although much remains to be determined regarding the mechanics of REDD, a variety of stakeholders are raising significant concerns about its potential to negatively affect natural forest ecosystems and forest-dependent ILCs. Forest-dependent communities are some of the poorest on the planet and have a long history of being marginalized within governmental decision-making, and it is uncertain how their interests will be protected throughout the implementation of such a potentially powerful international mechanism

at the local level. While a great deal of attention has been paid to the international aspects of REDD, there has been much less focus on how it will affect forest-dependent communities.

Whilst ABS and REDD are distinct international mechanisms, there are numerous parallels in the way ILCs can engage with them. With the right safeguards and local-level empowerment, both mechanisms could bring much-needed benefits to developing countries. Yet they also pose significant challenges to ILCs and have the potential to lead to the further deterioration of the very bio-cultural foundations that underpin their ways of life. A thorough consideration of communities' forest rights in the context of REDD is required, with emphasis on community-based approaches that empower ILCs to ensure that they are not further marginalized by national-level REDD activities.

In this chapter we briefly examine the promise that REDD holds for saving the world's forests and the risks that it could present if designed and administered inappropriately. We also give an overview of how bio-cultural community protocols (BCPs) can play a role in reducing these risks and maintaining the local integrity of this international instrument.

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1. Peter Wood, PhD, Forest Policy Adviser, Global Witness, and Associate, Natural Justice: Lawyers for Communities and the Environment.

2. This is also referred to as "REDD-plus" by many in recognition of the expansion of the mechanism's mandate to include the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.

## 2. Background to REDD

### 2.1 UNFCCC

Although the connections between forests, carbon and climate change are well-established, the idea of paying countries to reduce deforestation has only recently been given serious consideration. The specific term “reducing emissions from deforestation and forest degradation” (REDD) was first proposed by the Coalition of Rainforest Nations in Montreal at the 11th Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC COP 11) in December 2005, and has since gained significant momentum. It has effectively eclipsed other forest-related processes and institutions in importance, largely because of the unprecedented levels of funding that are expected to flow from climate-related funds. However, from the outset, indigenous peoples and various NGOs have been concerned about the potential for REDD to create perverse incentives to further marginalize forest-dependent communities. These communities have proven their abilities to sustainably use forests over countless generations, but have often struggled to maintain access to the forests and their traditional ways of life in the face of national development schemes, which are often funded by international banks and organizations.

At UNFCCC COP 13 in December 2007, REDD first formally appeared in the negotiated text of the Bali Action Plan.<sup>3</sup> A major breakthrough in climate negotiations, the Bali Action Plan provides the basis for long-term cooperative action (LCA) to implement the UNFCCC up to and beyond 2012, when the Kyoto Protocol is set to expire. In contrast to the Kyoto Protocol, this new agreement would apply to all parties to the UNFCCC, not just the developed countries and those with economies in transition.<sup>4</sup> Most importantly for the forest sector, the Bali Action Plan calls for consideration of “policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries... and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.”<sup>5</sup>

The following year in Poznan, Poland (COP 14), indigenous groups had become much more organized and vocal about the lack of inclusion of reference to indigenous peoples' rights within REDD. The original omission was due to opposition by Canada, Australia, the US, and New Zealand, the same countries that did not sign on to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>6</sup> At present, UNFCCC parties are negotiating the terms of REDD as part of the LCA in a series of meetings leading up to COP 15 in Copenhagen in December 2009. After three rounds of discussions held in Bonn in April, June and August 2009, a negotiating text containing a range of options was produced and will be further discussed at subsequent meetings in Bangkok and Barcelona in September and November 2009, respectively. While the current work plan foresees a decision on REDD to be agreed upon at COP 15, there remain a number of contentious issues to be resolved, including the scope, objectives and financing, which raises questions about the likelihood of the former occurring.

### 2.2 The World Bank and UN-REDD

The Forest Carbon Partnership Facility (FCPF) was launched at UNFCCC COP 13 in Bali in December 2007, in order to build capacity for REDD and establish pilot programmes of performance-based incentive payments in select countries, with the intent to expand it into a much larger system in the future. The FCPF is composed of the Readiness Mechanism and the Carbon Finance Mechanism. The Readiness Mechanism will provide several forms of technical assistance and capacity-building in order to prepare countries to engage with REDD, including the following: determining forest carbon stocks and sources of forest emissions; developing strategies for preventing deforestation and forest degradation; and designing national monitoring, reporting and verification systems. The Carbon Finance Mechanism will select countries that have demonstrated “measurable and verifiable” progress towards REDD and award financing from the Carbon Fund based on a system of “compensated reductions.”

3. Here it was referred to reducing emissions from deforestation “in developing countries” instead of “degradation”.

4. These Parties are also known as Annex I Parties.

5. Bali Action Plan, paragraph 1b. Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007. Addendum Part Two: Action taken by the Conference of the Parties at its thirteenth session. (FCCC/CP/2007/6/Add.1.) 14 March 2008.

6. See: [http://www.tebtebba.org/index.php?option=com\\_content&view=article&id=41:hr-day-2008-a-sad-day-for-indigenous-peoples&catid=51:ip-declarations](http://www.tebtebba.org/index.php?option=com_content&view=article&id=41:hr-day-2008-a-sad-day-for-indigenous-peoples&catid=51:ip-declarations)

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02



01. Traditional healers from the Bushbuckridge area of the Kruger to Canyons Biosphere Region.

02. A Guni from Rajasthan, India.

03. Samburu woman and child.

04. The flower of a plant used for medicinal purposes by traditional healers of the Malayali Tribes, Tamil Nadu, India.

05. Samburu women working with NGOs to develop the Samburu Bio-cultural Protocol.

06. A Guni from Rajasthan with her husband standing in the Dharam Bageechis (medicinal plants conservation area) she tends.

07. A Raika boy from Rajasthan and buffalo.

08. Samburu women from pastoralist communities, Kenya.

09. Traditional leader of a Samburu community during the development of the Samburu Bio-cultural Community Protocol.

10. Sunset over Samburu District, Kenya.

11. A community meeting as part of the development of the Bio-cultural Protocol of the Traditional Healers of the Malayali Tribes.

12. Dallibai Raika, a Raika woman from Rajasthan and holder of ethno-veterinary knowledge.

13. Detail of Samburu women's jewelry.

14. A Raika community meeting.

15. A Raika man from Rajasthan with camels.

16. A Raika woman and camel.

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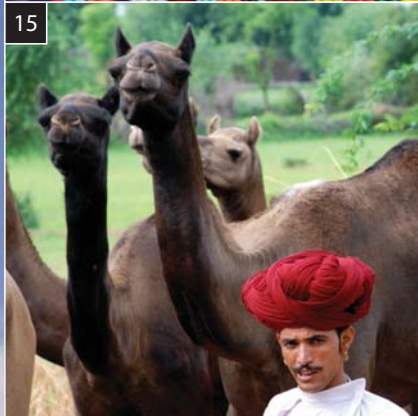


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Many ILCs have expressed concern regarding the FCPF, citing previous negative experiences with World Bank-initiated forest development programs.<sup>7</sup> The first major protest occurred outside the side event at COP 13 at which the Facility was launched, and it continues to attract criticism from ILCs. Further protests have emerged in response to various pilot projects that have been initiated, each with the underlying message, “No Rights, No REDD.”<sup>8</sup>

In September 2008, the FAO, UNEP and UNDP launched “UN-REDD,” a programme designed to “support countries to develop capacity to reduce emissions from deforestation and forest degradation and to implement a future REDD mechanism in a post-2012 climate regime.”<sup>9</sup> UN-REDD also coordinates the numerous international agencies that are relevant to these objectives. In June 2009, UN-REDD released the programme’s “Operational Guidance on the Engagement of Indigenous Peoples and Other Forest Dependent Communities,” which is meant to inform the design, implementation, monitoring, and evaluation of UN-REDD activities at the global and national levels. This document advocates a human rights-based

approach to consultation and upholds support for important international legal frameworks and norms, including UNDRIP, ILO Convention 169, CBD Article 8j, the Millennium Declaration, and the UN Charter itself.

UN-REDD’s objectives are very similar to those of the FCPF, and the two programmes are now working to harmonize document templates and operational guidance in order to facilitate countries’ participation in both programs.<sup>10</sup> However, several substantive differences exist. One of the key distinctions is that whereas UN-REDD upholds the principle of free, prior and informed consent as stated in the UNDRIP, the FCPF only requires free, prior and informed consultation, which is a lesser procedural requirement for proponents of REDD-related policies and projects.

Early reports emerging from REDD countries indicate that the participation of civil society and ILC organizations has been constrained by national governments’ lack of willingness to include them in discussions and national REDD programmes.

## 3. REDD: Potential and Pitfalls

### 3.1 Ensured Funding but Questionable Integrity

Forest-dependent communities are among the most politically and economically marginalized in their respective countries, which makes them extremely vulnerable to industrial natural resource extraction and other pressures that degrade forests.<sup>11</sup> There is a desperate need for development funding in these communities and high hopes have been pegged on REDD to deliver such benefits. A significant reason for the focus on REDD is the impressive sums of money it may generate for forest-related activities. According to UN-REDD, it may

provide up to US\$30 billion per annum,<sup>12</sup> an unprecedented level of funding, considering the total spent annually on international forest assistance has been about US\$750 million in recent years.<sup>13</sup>

The anticipated magnitude of this funding has the potential to engender as many obstacles as opportunities. It will undoubtedly attract a range of interested parties, including free-market entrepreneurs who want to profit from the mechanism without due consideration for the environmental or social benefits it is intended to generate.<sup>14</sup>

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7. Statement on the Announcement of the World Bank Forest Carbon Partnership Facility made by Victoria Tauli-Corpuz, Chair, UN Permanent Forum on Indigenous Issues, Bali, Indonesia, 11 December 2007: [http://www.tebtebba.org/index.php?option=com\\_docman&task=doc\\_download&gid=264&Itemid=27](http://www.tebtebba.org/index.php?option=com_docman&task=doc_download&gid=264&Itemid=27).
  8. See for example: REDD: Reaping Profits from Evictions, Land Grabs, Deforestation and Destruction of Biodiversity. Indigenous Environmental Network, 2009. Available at: <http://www.ienearth.org/REDD/index.html>. Accessed September 28, 2009.
  9. See UN-REDD website: <http://www.un-redd.org/UNREDDProgramme/tabid/583/language/en-US/Default.aspx>
  10. Activities include harmonizing the FCPF Readiness Plan and UN-REDD Joint National Program Document; developing a joint Roster of Experts; combined missions in REDD countries.
  11. PROFOR. 2008. Poverty and Forests Linkages: A Synthesis and Six Case Studies. World Bank Program on Forests, Washington, D.C.
  12. See UN-REDD website: <http://www.un-redd.org/AboutREDD/tabid/582/language/en-US/Default.aspx>. Accessed 5 September 2009.
  13. Rice, R., Sugai, C., Ratay, S., da Fonseca, G. 2001. Sustainable Forest Management: A Review of Conventional Wisdom. Center for Applied Biodiversity Science, Conservation International.
  14. Creagh, S. 2009. Forest-CO2 Scheme Will Draw Organised Crime: Interpol. Thompson Reuters, 1 June 2009. Available at: <http://planetark.org/wen/53152>. Accessed 2 June 2009.

These so-called “carbon cowboys” have been linked to “carbon fraud” or situations of “conflict carbon” in which carbon credits are generated by projects that are objected to by the local communities.<sup>15</sup>

Many forest-dependent communities are faced with the same double-edged sword as ILCs with commercially-lucrative TK in the ABS framework. A community’s participation in a REDD project may deliver much-needed income and development opportunities, but it may also result in their exclusion from the forest and the severance of linkages instrumental to the maintenance of both the forest and the community’s bio-cultural ways of life.

There are still major decisions to be made regarding the financing of REDD, including whether it will be financed by market-linked revenues such as the selling of carbon offset credits, by a fund based on contributions from developed countries or by some combination of the two. The integrity of both systems is in question. Similar to the challenges of using TK within the ABS framework, there are serious concerns about allowing the market to decide how forest carbon will be valued and how ILCs’ interests and rights will then be protected. As for a fund-based mechanism, it is unclear if and how REDD funds received by states will be distributed to forest-dependent communities that could benefit most.<sup>16</sup>

### 3.2 Governance and Land Tenure

Many of the countries that suffer from the highest rates of deforestation and forest degradation are also those with the poorest governance and highest levels of corruption. There are concerns that this will pose a major barrier to REDD funds reaching the communities that need it the most, allowing for further entrenchment of the political and social elites that have benefited the most from deforestation to date.

Forest communities often lack formal rights and title to their traditional territories and the forests that they depend on. This has led to concerns that they could be effectively excluded from the forests that are earmarked for reducing

deforestation and forest degradation. As observed by Cotula and Mayers (2009), much has yet to be determined regarding how REDD benefits will be allocated from the national to local level, but it is clear that resource tenure is critical to REDD’s ability to benefit ILCs.<sup>17</sup>

### 3.3 Disembodiment of Carbon

Another underlying issue with REDD is that it encourages a carbon-centric view of forests, which concerns ILCs that depend on forests for their livelihoods and have long played a role in their conservation. There is a risk that by viewing forest carbon as a tradable commodity, REDD could disembody it from ILCs’ bio-spiritual values and bio-cultural ways of life that have actively maintained the forests. As with ILCs that have developed TK over many generations, communities that have succeeded in maintaining forest cover have been able to do so not because of their proprietary rights, but because they maintain a way of life that is integrally linked to that of the forest. Thus, because the well-being of the forests (and the carbon stored within) is contingent on the well-being of forest peoples, REDD must enable those ILCs to continue to live according to their bio-cultural values.

### 4. The Potential Role BCPs in REDD

The potential pitfalls highlighted above illustrate the dangers that a regime intending to save forests may pose to ILCs. The large amount of available funds will inevitably serve as an incentive to establish REDD projects, which may lead to the further marginalization of ILCs by other stakeholders trying to minimize threats to the agreements being entered into. Like the future IRABS, REDD requires careful local calibration to ensure that it achieves both environmental and social justice. The development of bio-cultural protocols by forest-dependent ILCs is one way in which communities may be able to respond to and ensure the local integrity of REDD. This section explores the ways in which the development of a REDD community protocol could assist ILCs to prepare for REDD deals and to assert their rights to continue their ways of life.

15. Mongabay.com. 2008. Conflict in PNG between government and landowners over REDD carbon trading. November 17, 2008.

Available at: <http://news.mongabay.com/2008/1117-png.html>

16. At the time of writing, the most current version of the negotiating text was FCCC/AWGLCA/2009/INF.2. UNFCCC 2009. Ad hoc Working Group on Long-term Cooperative Action Under the Convention: Annex III C: Enhanced action on mitigation. Available at: <http://unfccc.int/resource/docs/2009/awglca7/eng/inf02.pdf> Accessed 27 September 2009.

17. Cotula, L and Mayers, J. 2009. Tenure in REDD – Start-point or afterthought? Natural Resource Issues No. 15. International Institute for Environment and Development. London, UK.

## 4.1 Bio-cultural and Legal Empowerment

International environmental laws and frameworks are inaccessible to many forest-dependent communities. Thus, ILCs require time and information to consider their options within their local contexts before they can be expected to make informed decisions within novel legal and policy frameworks. REDD must support a process that enables ILCs to reflect upon the inter-linkages and mutually reinforcing relationships between the forests and their culture, spirituality and customary laws, and to identify the bio-cultural foundations of their ways of life in a format accessible to other REDD stakeholders. ILCs also require information about REDD and their forest-related rights in order to better understand the options they have as communities living in areas that may be affected by REDD-related policy measures and projects. This will assist them in clarifying several things for other REDD stakeholders, including the following: the community's membership and traditional authority and territory; their customary laws relating to sustainable forest use and management; their rights under international and national law; circumstances under which they would be required to provide FPIC; and values that would inform any decisions taken as part of their FPIC. These issues are discussed in more detail below.

## 4.2 Mapping Traditional Territories

An important element of a REDD community protocol would likely be a mapping exercise through which the community members would identify their traditional territories and the forest resources they depend on using modern technologies such as geographic information systems (GIS) and global positioning systems (GPS). The use of mapping to help communities articulate their bio-cultural landscapes can be an empowering process.<sup>18</sup> The documentation of traditional land uses can help formalize this information in a format accessible to Western science and enable ILCs to disseminate it to other REDD stakeholders.

Mapping exercises introduce communities to the use of modern technologies that could subsequently enable their participation in the monitoring, reporting and verification activities that underpin REDD.

While this will not necessarily solve the problems related to resource tenure identified above, it may serve as a basis for a deeper level of ILC participation, inter-stakeholder communication and engagement.

## 4.3 Understanding What Conserves Forests

The relationship between ILCs and the forests they live in is dynamic, and in many cases, their local TK offers great insight into how to ensure the forest's conservation. By articulating aspects of their culture such as bio-spirituality and customary laws and practices that have helped conserve the forests, ILCs are able to directly refer to and call upon the international and national laws intended to support their traditional ways of life. A REDD community protocol can be used to express this relationship and examine the forests within a greater ecological and bio-cultural context, thus preventing the disembodiment of carbon.

## 4.4 Free, Prior and Informed Consent

Only legally empowered ILCs can make informed decisions about how to respond to important decisions relating to the granting of rights over the forests in which they live. The empowerment process should include information about international laws pertaining to forests, indigenous peoples and other frameworks that support ILCs such as the Convention on Biological Diversity. Rather than merely focusing on REDD, communities should gain the capacity to comprehend how various aspects of their lives are regulated by a number of laws and to draw on those most relevant to supporting their endogenous plans for development.

Responding directly to REDD, communities can set out for other stakeholders their views on the mechanism and assert their rights to culturally appropriate consultations towards their free, prior and informed consent (FPIC) to any REDD-related policy measures or projects. They can also go beyond merely stating that they do or do not want their traditional territory to be part of a REDD project by defining specific project elements to be included. ILCs can also identify the values by which they will assess any projects in order to further clarify their rights and priorities to other stakeholders.

18. See, for example, the Squamish Nation Land Use Plan in British Columbia, Canada, in which indigenous community members used a map to articulate their vision for their traditional territories. Available at: <http://www.squamish.net/aboutus/xaytemixw.htm>. Accessed 10 September 2009.



REDD investors are understandably looking for transparency and security in any future REDD projects, and it has been noted that achieving FPIC from ILCs improves local support for agreements and increases their overall stability and longevity.<sup>19</sup> By approaching REDD as more equal partners, ILCs are better able to engage with investors on their own terms and to negotiate according to their bio-cultural values. Subsequent agreement on the terms of REDD-related policy measures or projects and the provision of FPIC is also beneficial not only to ILCs but also to REDD investors and other stakeholders.

#### 4.5 Expressing Development Needs, Avoiding Exclusion

BCPs provide forest-dependent communities with an opportunity to define their development aspirations. REDD is premised on the idea that funds received will be directed towards the provision of alternative livelihoods to any ILCs whose activities were causing deforestation. Yet it remains unclear how these funds will be transferred from the national to local level. BCPs are an innovative and culturally sensitive way to articulate ILCs' needs and priorities and understand the underlying drivers of deforestation and degradation in their region.

There is a desperate need to ensure that ILCs are not excluded from the forests they inhabit throughout the course of national REDD-related initiatives to prevent deforestation or forest degradation. There is a widely-held view that a return to a "fines and fences, guns and guards" approach to forest protection must be avoided at all costs. By articulating the needs of communities in terms of traditional, non-destructive uses of forests that should be allowed to continue, BCPs can provide opportunities for ILCs to more visibly contribute to REDD objectives and potentially quantify the carbon benefits of such activities.

#### 4.6 A REDD BCP in Outline

Whilst every forest-dependent community is culturally diverse and lives in areas of biological diversity, the following outline of a REDD BCP is intended to set out a broad framework for the types of issues referenced above that a community may

want to set out in a BCP. It is intended as a illustrative guide and not as either a rigid framework or as a precedent.

##### *Who we are*

*A description of the community's cultural identity, milestones in the community's development and traditional authority.*

##### *Our traditional territory*

*With the aid of GIS and GPS technologies (which may involve provision of such technology and capacity building), the community will map out the land that they inhabit and depend on, including spiritually significant places, areas for collection of non-timber forest products, important hunting, fishing and grazing areas, etc.*

##### *Our customary laws that govern the use of our forests*

*A description of the rules that govern the people that live in the community, with emphasis on the rules that support conservation and sustainable use of the forest.*

##### *We face a number of pressures*

*A description of the underlying drivers of deforestation and forest degradation that the community faces (agricultural expansion, legal/illegal logging, fire, etc). This could also include an assessment of the governance systems they are engaged with (including relationships with national and sub-national governmental authorities, level of corruption, etc.).*

##### *This is our preferred development path*

*What economic activities are necessary to ensure the continued existence of the community? What is needed to maintain the unique relationship between the community and the forest (spiritual/sacred sustainability)? What activities would offset pressure on the remaining primary forests? This may also include a reflection on lessons learned from earlier development initiatives.*

19. Lewis, J. Freeman, L. and Borreill, S. 2008. Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin. Swiss Foundation for Development and International Cooperation/ Anthroscap.

### *These are our rights*

*An inventory of national and international laws and agreements that apply to the community. This will provide a framework that can be drawn upon to assert their rights (including relevant aspects of REDD, CBD, UNDRIP, UNFCCC, etc).*

### *Our views on REDD*

*What are the benefits they foresee by engaging in REDD? What are their concerns? Specifically, what information would the community require to consider a REDD-related policy measure or project, on which terms would the community want to engage in REDD and what are the guarantees they would require? The community could include the role it would like to play in reducing deforestation and forest degradation, as well as a declaration that such activities are not welcome.*

### *This is how we want to be consulted*

*Setting out the community process for granting FPIC, including details of the traditional leadership and the values that will guide their decisions.*

## 5. Reducing Risk, Increasing Certainty

The negotiation of the REDD mechanism is at a stage where many details remain undecided. Yet due to the significant sums of money that REDD will generate and the governance challenges in many of the counties in which large forests exist, it is reasonable to argue that REDD will become a struggle between profit on the one hand and environmental and social justice on the other. Safeguards are required to ensure that forest-dependent communities whose ways of life have conserved forests are supported instead of further marginalized by the mechanism. Like other environmental regulatory frameworks, the efficacy of REDD will be judged at the local level. BCPs offer a promising option for forest-dependent communities to take a proactive role in determining what REDD will look like on the ground and to assert their rights in what has become a very complex and politically charged environment.

From an investor's perspective, there are reputational risks associated with funding an initiative that does not have the support of the local communities. This applies both to country donors contributing to a fund and to private companies looking to buy carbon offsets. BCPs could promote transparency and lead to increased legal certainty by promoting the empowered engagement of ILCs with the REDD framework, specifically by assisting other stakeholders to engage with them according to their values and on their terms.

The use of community-based approaches to REDD such as BCPs could help ensure the local integrity of international efforts to save forests from degradation that contributes to climate change by rewarding ILCs for conserving their forests without excluding activities that they people rely upon for their livelihoods and bio-cultural ways of life.



# CHAPTER 5

## Bio-cultural Community Protocols and Protected Areas

Barbara Lassen, Gary Martin and Olivier Rukundo<sup>1</sup>

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### 1. People and Protected Areas: A Paradigm Shift

Significant changes have taken place in international conservation policies in the last few years. There is growing awareness of the role of indigenous peoples and local communities (ILCs) in the management of protected areas designated by governments, and equally, of the importance of sites and landscapes managed by communities themselves. The contribution of these communities and their traditional knowledge, innovations and practices (TK) to the conservation and sustainable use of biodiversity in and around protected areas is gradually being recognized. Yet this paradigm shift from exclusionary protection towards inclusive and local participatory management models poses many challenges. Integrating governmental and private conservation institutions and management practices with local values and customary governance of biodiversity is a complex task for all actors involved. It involves multifaceted issues of rights and responsibilities, land tenure, contemporary and customary knowledge, relevant institutions, and sharing of costs and benefits.<sup>2</sup> Bio-cultural community protocols (BCPs) can play a significant role at this interface of these issues, assisting ILCs to assert their bio-cultural values and rights to engage with protected area authorities and protect their TK.

This chapter briefly explores the interplay between protected areas, ILCs and TK within the framework of the Convention

on Biological Diversity (CBD) and the Programme of Work on Protected Areas (PoWPA). It then evaluates the contribution that BCPs can make to improving ILCs' participation in two types of protected areas, namely: collaboratively managed protected areas (CMPAs) and indigenous and community conserved areas (ICCAs).

#### 1.1 Protected Areas and Traditional Knowledge under the CBD: Making the Link

The UN Convention on Biological Diversity (CBD) situates protected areas as a central instrument to achieve *in situ* conservation. As stated in Article 2 of the CBD, a protected area is "a geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives". More specifically, Article 8 of the CBD clearly calls on each Contracting Party to:

(8a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(8b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity.<sup>3</sup>

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2. Kothari, Ashish, Protected areas and people: the future of the past, in: PARKS Vol. 17 No 2, 2008, p. 23-34.

3. Article 8a and 8b, text of the Convention available at, <http://www.cbd.int/convention/articles.shtml?a=cbd-08>.

To achieve this, the Parties agreed in 2004 on a PoWPA that features goals and activities that specifically relate to the rights of ILCs, especially through Element 2, which is premised on governance, participation, equity, and benefit-sharing.<sup>4</sup> In turn, the CBD Programme of Work on the Implementation of Article 8(j) on traditional knowledge includes a component that specifically refers to the management of protected areas by ILCs.<sup>5</sup>

The three goals of the CBD (conservation, sustainable use and fair and equitable sharing of benefits) and the resulting commitments are designed to be interrelated and mutually supportive. Thus, the provisions of the CBD have to be read and interpreted in a holistic and integrative manner. Commitments to promote the sustainable use of biological resources should, for instance, have direct bearing on the choice of strategies for the management of protected areas. Similarly, the obligation to support ILCs and protect TK applies to communities in and around protected areas, which in turn entails an obligation to take into account the rights of ILCs to their resources and TK in the elaboration of protected area policies. The provisions of the CBD on Access and Benefit Sharing (ABS), including those related to traditional knowledge associated with genetic resources, are of equal importance for their application to a range of activities that could take place within or in the vicinity of protected areas.

This point is affirmed when we look at the CBD's provisions from a community perspective. The Makuya community, for example, is situated on the northwest perimeter of the Kruger National Park in northeast South Africa. The Makuya live outside the park, but engage with the Kruger National Park officials in a *quid pro quo* relationship in which community members receive saplings and plants for a medicinal plants conservation area in return for community-based action against poaching. They also own the Makuya Nature Reserve, a community-run ICCA, and are also holders of a wealth of TK relevant for the conservation of biological diversity, about which they been approached by researchers. The Makuya, therefore, engage with all three elements of the CBD simultaneously, and each aspect – the Kruger park (protected area), the Makuya Nature Reserve (conservation and

sustainable use) and their TK (relevant for benefit sharing) – supports and promotes the others.

## 1.2 Governance of Protected Areas

The International Union for the Conservation of Nature (IUCN) defines a protected area as “an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means [emphasis added]”<sup>6</sup> This definition reflects an evolving view of conservation that can accommodate the social, economic and cultural interests, and values, rights and responsibilities of people living in and around protected areas. The revised IUCN Guidelines for Applying Protected Area Management Categories<sup>7</sup> further recognize that protected areas can be governed not only by state agencies, but also by a range of other actors, including ILCs. The IUCN distinguishes four broad protected area governance types according to who holds decision-making and management authority and responsibility: governance by government; shared governance; private governance; and governance by ILCs.

PoWPA invites parties to *recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves*.<sup>8</sup> This was reiterated at the 9th Conference of Parties to the CBD (Bonn, May 2008), at which parties adopted Decision IX/18 on protected areas with a recommendation to:

- improve and, where necessary, diversify and strengthen protected area governance types, leading to or in accordance with appropriate national legislation including recognizing and taking into account, where appropriate, indigenous, local and other community-based organizations; and
- recognize the contribution of, where appropriate, co-managed protected areas, private protected areas and indigenous and local community conserved areas within the national protected area system through acknowledgement in national legislation or other effective means.<sup>9</sup>

4. See Decision VII/28.

5. See Decision VI/10.

6. IUCN (1994). Guidelines for Protected Areas Management Categories. IUCN, Cambridge, UK and Gland, Switzerland.

7. Dudley, Nigel, editor. 2008. Guidelines for Applying Protected Area Management Categories. Gland, Switzerland, IUCN.

8. See, Conference of the Parties, Decision VII/28, full text of the decision is available at <http://www.cbd.int/decision/cop/?id=7765>.

9. See, Conference of the Parties, Decision IX/18, full text of the decision is available at <http://www.cbd.int/decision/cop/?id=11661>.

## 2. Bio-cultural Community Protocols and Protected Areas

BCPs can be of great use in the two governance types of protected areas in which ILCs have a say in decision-making: CMPAs, protected areas in which the governance is shared between communities and other actors, and ICCAs, protected areas governed by ILCs themselves.

### 2.2 Bio-cultural Community Protocols and Co-managed Protected Areas

CMPAs can be defined as “officially designated protected areas where decision-making power is shared between state agencies and other partners, including ILCs, and/or NGOs and individuals or private sector institutions”.<sup>10</sup>

CMPAs are based upon a negotiated joint decision-making approach and involve some degree of power-sharing and fair distribution of benefits among all institutional actors. Co-management arrangements involving ILCs often emerge when territories under their occupation or management, including ICCAs, are brought under the protected areas network either at the insistence of the communities or through government initiative.<sup>11</sup>

BCPs can be a valuable instrument to empower ILCs to participate effectively in the decision-making and management of CMPAs. First of all, the process of developing a BCP is an opportunity for the community to assess and articulate the bio-cultural values associated with the area under protection and to develop its own vision of its desired future. The BCP can also serve as a basis for dialogue with other institutions involved in the management of the protected areas by demonstrating the contribution of the community's TK to the conservation of the area and clarifying the needs of the community to access natural resources. Furthermore, the process of drafting a BCP raises the community's awareness about its rights under national and international law, which is essential to negotiating towards the equitable sharing of management authority. Finally, a BCP can clarify the expectations of the community for the sharing of benefits arising from the protected area, such as tourism revenues.

A major challenge for effective co-management arrangements involving ILCs is the recognition and co-existence of local or customary and governmental or formal institutions, policies and practices. By referring explicitly to the customary governance institutions, management rules and values of the community, BCPs can further facilitate the institutional and inter-cultural dialogue.

In some cases, lands and resources traditionally inhabited and used by ILCs have been incorporated into official protected areas without their consent or agreement. In such situations, BCPs could assist communities in demanding the restoration of traditional land and resource rights over all or part of an official protected area.

Co-management agreements are based in part on the recognition that ILCs have TK that allow them to play a significant role in protected area management. Ideally, these agreements should explicitly identify the specific areas and resources ILCs can access, and under what terms and conditions. For effective negotiation and proper monitoring of agreements involving TK, community ethno-ecological studies are required. Best practice dictates that community researchers conduct their own research, often in collaboration with representatives of external agencies, and include a variety of methodologies such as household surveys, mapping, biological collections, and detailing of TK of resources and landscapes.

Since the results of this community-based research will be disclosed to some extent to collaborating academics, government staff (such as rangers and wardens from park agencies) and civil society throughout the course of negotiating co-management decisions, a large corpus of information about local beliefs, knowledge, practices, and innovations will become publicly available.

Before any collaborative research begins, the community must ensure some degree of protection of its intellectual property and traditional resources rights through the

10. Kothari, Ashish, *Collaboratively Managed Protected Areas*. In: *Managing Protected Areas, a Global Guide*. Michael Lockwood, Graeme L. Worboys and Ashish Kotari (editors). IUCN, Earthscan, London, 2006, p. 528.

11. *Ibid.*

processes of free, prior and informed consent (FPIC) and community research agreements that establish mutually agreed terms (MAT). During the course of the study, there should be periodic participatory evaluations that assess the perspectives of a broad range of community members to ensure there is general agreement about the research approach, methods and results. A BCP can serve to establish the terms and conditions of any transfer of knowledge and resources outside the community, which should cover disclosure through internal reports, published materials and web-based bioinformatics and mapping approaches such as searchable ethno-biological databases and online mapping.

Bio-prospecting has yielded valuable commercial products in recent history and protected areas are seen as reservoirs of genetic materials that might serve important functions in agriculture or medicine. Bio-prospecting in protected areas is bound to increase as they contain much of the world's biodiversity and are likely to serve as increasingly important repositories of disappearing habitats, species and genetic resources.<sup>12</sup> As national ABS frameworks are developed, bio-prospecting agreements with protected areas are also likely to increase because management authorities see them as a promising source of sustainable financing. In this context, BCPs can be a crucial instrument to ensure that the rights of ILCs in and around protected areas over their resources and knowledge are respected, that bio-prospecting activities take place only after FPIC is established, and that ILCs receive a fair share of the benefits arising out of such agreements. BCPs can inform researchers about appropriate researcher behavior, the community's research priorities, local requirements for obtaining FPIC, and the types of benefits that should be shared.

### 2.3 Bio-cultural Community Protocols and Indigenous and Community Conserved Areas

ICCAs are defined as "natural and/or modified ecosystems containing significant biodiversity values, ecological services and cultural values, voluntarily conserved by indigenous

peoples and local communities – both sedentary and mobile – through customary laws or other effective means".<sup>13</sup> Territories and lands occupied or used by ILCs encompass a considerable proportion of areas important for biodiversity and wildlife conservation. They are found in both terrestrial and marine areas and range in size from sacred groves of less than 1 ha to over 30 000 km<sup>2</sup> indigenous territories in Brazil.<sup>14</sup> Many of these ICCAs encompass conservation knowledge and practices intertwined with local strategies for livelihoods, the spiritual and material values of ILCs and a variety of customary and legal collective rights over land and natural resources.

ICCAs have until recently largely been ignored, if not undermined, by formal conservation policies and many are under severe threat. However, the recent recognition of ICCAs at the international policy level is encouraging, and in some countries ICCAs have been recognized and incorporated into national protected area systems.

For example, about 20% of Australia's protected area consists of 20 indigenous protected areas.<sup>15</sup> Despite this, the interface between state-based institutions and the customary institutions of ILCs remains a challenging and complex arena. All too often, the official recognition of the conservation value of ICCAs and their incorporation into national protected area systems is achieved through the imposition of new institutions that undermine the very customary governance structures and bio-cultural values that conserve the ICCAs in the first place. Additionally, under the influence of rapid economic, demographic and cultural changes, the traditional knowledge, values and practices linked to ICCAs are often being abandoned or lost.

At the same time, public recognition of ICCAs can be crucial for some communities to be able to defend these areas against external threats or to seek various forms of support for the management of their natural resources. Indeed, the recognition of ICCAs needs to be based on the respect of the communities' strategies for conservation and sustainable use and their customary governance institutions. It should take into account the range of bio-cultural values that help conserve the area and the role these values play in the communities' ways of life.

12. United Nations University Institute of Advanced Studies (UNU/IAS), *Biodiversity Access and Benefit-Sharing Policies for Protected Areas, an Introduction*. UNU/IAS, Tokyo, 2003.

13. Borrini-Feyerabend, Grazia, *Recognizing and Supporting Indigenous and Community Conservation – Ideas and Experiences from the Grassroots*, IUCN CEESP. Briefing Note 9, September 2008.

14. See: Kothari, Ashish, *Community Conserved Areas: Towards Ecological and Livelihood Security*, in: *PARKS* 16, pp 14-20, 2006; and Berkes, Fikret, *Community Conserved Areas: Policy Issues in Historic and Contemporary Context*, in: *Conservation Letters* 2, pp 19-24, 2009.

15. Smyth, Dorneth, *Indigenous Protected Areas in Australia*, in: *PARKS* 16, pp 14-20, 2006.

It is also crucial that communities are allowed to decide for themselves whether and how they want their ICCAs to be recognized, whether that may be through self-declaration, listing in national or international databases or formal incorporation into a national system of protected areas.

BCPs can play an important role in communities' processes to gain such recognition. By elucidating the bio-cultural values of the communities conserving the ICCAs, their governance systems and management practices, and the conditions for access to resources and TK, BCPs can be a significant part of the interactions between ILCs and government institutions. Ideally, they can serve as the basis of agreements between communities and these institutions for the recognition, respect and support of the ICCAs. Moreover, the process of discussing and establishing BCPs can help communities halt the loss of the traditional values and knowledge that have conserved the ICCA over time.

Formal recognition of ICCAs, especially when it goes beyond self-declaration by the community, requires some level of disclosure of conservation strategies and TK. In Mexico, for example, certification of voluntary conserved areas by the National Commission of Natural Protected Areas requires that communities fulfill specific obligations such as developing an explicit environmental management program, conducting inventories of flora and fauna and carrying out environmental education programmes for residents and visitors.

Inclusion of ICCAs in public databases also requires that some amount of data collected by community members passes into the public domain. For example, the UNEP World Conservation Monitoring Centre is currently developing a global registry for ICCAs modeled on the World Database of Protected Areas but also including data on historical, cultural and governance aspects. An integral part of this project is to develop procedures for obtaining FPIC of the communities in concern before disclosing information at various levels.

Communities can control the flow of information to the outside by selectively revealing TK, achieving FPIC through consensual decision-making and regulating interactions with outsiders through community research agreements that are periodically reviewed in participatory evaluations. BCPs can play a role in this process by recording communities' bio-cultural values and asserting their rights under international or national law to manage and benefit from biodiversity and to protect and use their TK according to customary law and values.

Beyond being an instrument for public recognition of ICCAs, the BCP concept can also become an active driver of certification, joining mechanisms such as community forestry enterprises, community territorial planning and payment for ecosystem services, all of which are encouraging ILCs predisposed to declaring ICCAs to take the steps needed for formal recognition.

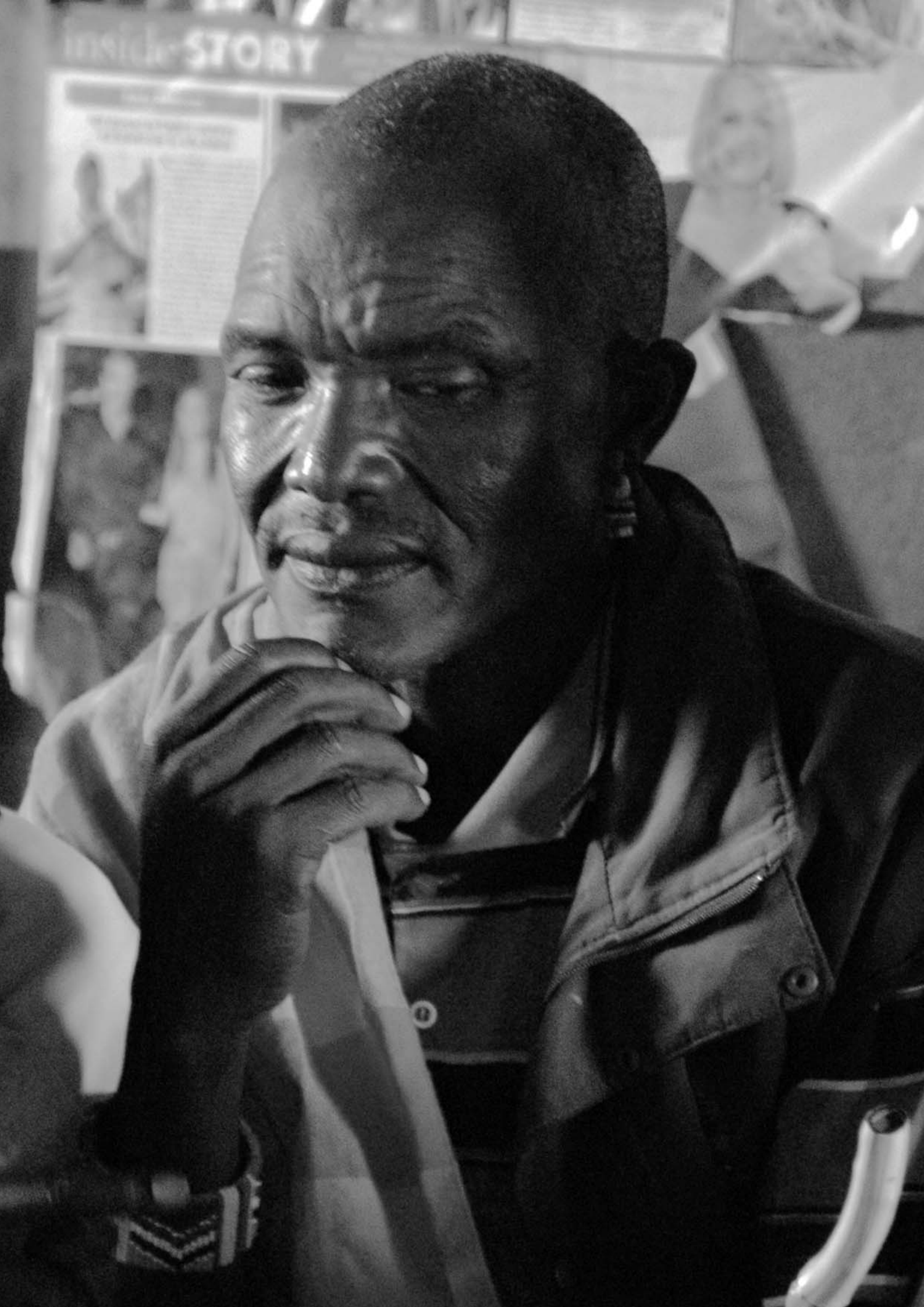
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### 3. Conclusion

The significant role of the TK of ILCs in conserving biodiversity is enshrined in the provisions of the CBD and is increasingly being recognized in protected area policies. However, the customary governance and knowledge systems of ILCs are still being threatened by a number of factors, including top-down conservation policies. At the same time, the current advancement of regulations for access and benefit-sharing is creating new roles for actors managing protected areas as providers of genetic resources and associated TK. Within this framework, it is crucial to develop instruments through which ILCs can interact with other actors in and around their protected areas to assert their rights over

resources and knowledge and to safeguard or develop their own systems for sharing this knowledge on their own terms. BCPs provide ILCs with a means to articulate the bio-cultural foundations of their ways of life and negotiate with other stakeholders on the basis of their customary laws and practices. By fostering dialogue between implementing agencies and ILCs, BCPs bridge the gap between local people and conservation policies, thus promoting the integrity of environmental laws and policy by improving the likelihood that the three goals of the CBD are integrated and achieved at the local level.





INSIDE STORY

# CHAPTER 6

## Bio-cultural Community Protocols in the Context of Payment for Ecosystem Services

Johanna von Braun<sup>1</sup>

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### 1. Introduction

Since the emergence of the concept of Payment for Ecosystem Services (PES), a vast array of literature has surfaced analysing its potential for promoting conservation whilst enabling livelihoods. At a time when nearly two-thirds of the provisioning, regulating, supporting, and cultural services provided by the environment on which human well-being depends are declining,<sup>2</sup> PES is being celebrated as an economic model that integrates environmental externalities into the market. At the same time, however, experts warn against the many challenges that are in place in order to make PES work in practice.

The list of challenges put forward is long, and includes: the difficulty of putting an economic value on ecosystem services; the required level of detailed scientific understanding of the nature of these services and their impact; the potentially prohibitive transaction and start-up costs; the necessity of the

existence of institutions that facilitate PES schemes; and the danger of PES schemes generating perverse incentives such as provoking a threat to an ecosystem in order to be subsequently integrated into a PES scheme.

In this chapter, we explore a further group of associated challenges relating to the implementation of PES schemes in community-based settings. While the concept of PES is not based on a specific legal framework that gives certain rights to indigenous peoples and local communities (ILCs), some of the challenges ILCs face when engaging in PES schemes are remarkably similar to examples that we reference elsewhere in this book. We suggest that bio-cultural community protocols (BCPs) can play an important role in addressing some of these challenges while ensuring an appropriate integration of communities into PES schemes.

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### 2. PES Schemes

#### 2.1 Background

Ecosystem Services (ESS) are the benefits that humans obtain from their environment, consisting of all plants, animals and microorganisms in their surroundings and their interactions

with the environment as a functional unit. Essentially, ESS are “processes which support human life.”<sup>3</sup> The Millennium Ecosystem Assessment classifies ESS into four main categories: provisioning services (such as wood, food and water), regulating services (such as water quality and

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1. Johanna von Braun, PhD, Post-Doctoral Fellow, Unit on IPR Research and Policy, University of Cape Town and Associate, Natural Justice: Lawyers for Communities and the Environment.

2. Markets for Ecosystem Services: A Potential Tool for Multilateral Environmental Agreements by Anantha Kumar Duraipappah, IISD, 2007.

3. Hemholtz Centre for Environmental Research, 2008, BESS – Biological Ecosystem Services, from last visited 2 June 2009.

flood and air control), cultural services (such as aesthetics, recreation and spirituality), and supporting services (such as the cycling of nutrients or other mechanisms that maintain the conditions for life on earth).<sup>4</sup> The Assessment exercise, which included more than 1,300 scientists from more than 95 countries, found that 60% of the resources examined were being degraded faster than they can recover.<sup>5</sup>

In the context of PES schemes, ESS are usually divided into the following related categories based on the type of service they are providing: carbon sequestration, biodiversity protection, watershed protection, and landscape beauty. The management or protection of one ecosystem often generates more than one type of service, which is referred to as the bundling of services. ESS can also be divided based on whether the spatial boundaries of the services are provided locally, regionally or globally.<sup>6</sup>

A landmark study by Robert Constanza et al. in 1998, which became the basis of a significant amount of thinking on ESS valuation, estimated the global value of ESS to over \$33 trillion per year, the vast majority of which remains outside the market.<sup>7</sup> Although the quantitative valuation of ESS is complex and susceptible to subjectivity<sup>8</sup> the economic value of ESS remains undisputed, with an increasing acknowledgement that such costs need to be integrated into the market in order to increase the protection of ecosystems generating ESS in the first place.

## 2.2 Payment for Ecosystem Services

The PES framework promotes the conservation of natural resources in the marketplace by providing incentives to incorporate sustainable practices into production and resource management. PES hinges on the principle that

“resources users and communities that are in a position to provide ESS should be compensated for the cost of their provision and those who benefit from these services should pay for them, thereby internalizing these benefits.”<sup>9</sup> PES agreements are mutually beneficial contracts between consumers of ESS and the suppliers of these services. A widely accepted definition of PES by Sven Wunder describes them as *...a voluntary transaction in which a well-defined environmental service (ES), or a form of land use likely to secure that service is bought by at least one ES buyer from a minimum of one ES provider if and only if the provider continues to supply that service (conditionality).*<sup>10</sup>

PES seeks to reward individuals who conserve their environment by offering them financial or other incentives in an effort to positively reinforce and improve their behavior.<sup>11</sup> The party supplying the environmental services, known as the provider, holds the property or related rights over an environmental good that provides a flow of benefits in terms of a certain ESS to the demanding party (user) in return for compensation. Interestingly, users of ESS are willing to pay a price lower than their welfare gain due to the services acquired, while providers are willing to accept a payment that is greater than the cost of providing the services.<sup>12</sup>

There is currently no commonly agreed-on definition of PES schemes, but there is a series of classifications under which PES schemes fall, based on the nature of the ESS provided, its geographical scope, the structure of the market, and the type of payment involved. There is a great diversity of existing models of PES schemes usually adapted to very specific conditions of each scheme and location.<sup>13</sup> The most common forms of PES are carbon storage and sequestration, wetlands conservation, watershed protection (including soil protection), and species, habitat and biodiversity conservation.<sup>14</sup>

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4. Millennium Ecosystem Assessment. 2005. Ecosystems and Human Well-Being. Synthesis Report. <http://www.millenniumassessment.org/en/index.aspx>
  5. UNEP, 2008, PES – A Primer. [http://www.unep.org/pdf/PaymentsForEcosystemServices\\_en.pdf](http://www.unep.org/pdf/PaymentsForEcosystemServices_en.pdf)
  6. “Payments for ecosystem services – issues and pro poor opportunities for development assistance” by Helle Munk Ravnborg, Mette Gervin Damsgaard and Kim Raben, DIIS Report, 2007:6.
  7. “The value of the world’s ecosystem services and natural capital” Robert Constanza et al. *Ecological Economics* 25 (1998) 3–15.
  8. See for example: Pagiola, S., von Ritter, K., and Bishop, J. 2004. How Much is an Ecosystem Worth? Assessing the Economic Value of Conservation. IUCN, TNC, The World Bank.
  9. Mayrand, Karel, and Marc Paquin, 2004, Payments for Environmental Services: A Survey and Assessment of Current Schemes, Uniféra International Centre, from
  10. Supra note 6.
  11. Oliver, J., Emerton, L., Smith, M., 2008, Design Payments for Ecosystem Services: Report from the East Asian Regional Workshop (Hanoi, April 2008), IUCN, last visited 5 June 2009.
  12. Bulte, E., Lipper, L., Stringer, R., Zilberman, D., 2008, “Payments for ecosystem services and poverty reduction: concepts, issues, and empirical perspectives,” *Environment and Development Economics*, 13, pp 245-254.
  13. Supra note 10.
  14. Ferraro, Paul, 2007, Regional Review of Payments for Watershed Services: Sub-Saharan Africa, Andrew Young School of Policy Studies Department of Economics at Georgia State University, from last visited 9 June 2009.

There are also many different types of PES deals, ranging from hundreds of small and private site-specific schemes to larger government-regulated schemes<sup>15</sup> and multilateral environmental agreements such as the Clean Development Mechanism under the Kyoto Protocol.

PES schemes have the potential to be more cost-efficient than regulatory and subsidized approaches to environmental conservation that rely heavily on public financial resources to function. PES schemes usually have flexible and need-based structures that can support themselves in the long run. Overall, PES schemes can be more adaptive and effective than a purely regulatory approach to conservation. For example, PES schemes can be implemented when the creation of protected areas would be impossible due to socio-economic or political contexts. They are easy to administer

and can be flexible with respect to which land uses are and are not allowed under its scheme, thus targeting its efforts towards local conservation and socio-economic development.<sup>16</sup>

In spite of the promising basis of the PES concept, many PES experts urge caution against accepting it as a panacea, arguing that the success of PES schemes are highly dependent on a large set of circumstances and demand substantial groundwork before they can succeed. In addition to the concern that PES systems only work in conditions with a clear market demand, they also seem to rely on well-organized providers and users with clear and secure property rights. Furthermore, transaction costs of a PES scheme must not be too high to offset any potential gains for both the user(s) and provider(s).<sup>17</sup>

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### 3. Community Engagement with PES Schemes

The principle objective of PES schemes is to establish an economic incentive to foster more efficient and sustainable use of biological resources and ecosystems.<sup>18</sup> Nevertheless, PES schemes can also contribute to poverty alleviation, particularly among rural communities whose livelihoods are highly dependent on the use of natural resources in surrounding areas. Population pressures or lack of economic opportunities based on anything other than short-term incentives can lead to unsustainable forest management or farming practices. PES schemes can mitigate this cycle by offering longer-term incentives for the sustainable use of resources through opportunities for low-income communities to gain additional employment or other economically valuable benefits for their conservation of ecosystems. Supporting livelihoods through small economic incentives over many years may offer an

important increase to net income in the community while functioning as impetus for adopting a more sustainable approach to land and ecosystem management.<sup>19</sup> However, it is not always the case that communities engage in unsustainable use of biological resources. Indeed, many examples exist in which local communities actively maintain and conserve the biodiversity on which their livelihoods and bio-cultural heritage depend. It is often highlighted how ILCs such as the Raika, discussed earlier in this book, contribute to and sometimes become leaders in the conservation of local biodiversity through their sustainable land use practices. In such cases, PES schemes can offer a reward for the maintenance of such services and an acknowledgement of the contribution of their bio-cultural practices to conservation.

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15. See for example the case of Costa Rica: "Payment for Environmental Services and Rural Communities: Lessons from the Americas" Herman Rosa, Susan Kandel, Leopoldo Dimas and Ernesto Mendez, PRISMA (Programa Salvadoreño de Investigación sobre Desarrollo y Medio Ambiente)

16. *Supra* note 10.

17. *Ibid.*

18. *Supra* note 6.

19. *Ibid.*

## 4. Challenges Faced by ILCs Regarding PES Schemes

As mentioned above, designing and implementing PES schemes is riddled with diverse challenges, including how to face transaction costs, the need for scientific and economic data, the real contribution and value of ESS, and the need for institutions that can manage and monitor the scheme. Furthermore, experts highlight a range of challenges that are particularly relevant when PES schemes include one or more ILCs as providers of ESS. This section provides an overview of these challenges and draws parallels to the ABS scenario where relevant. Finally, it will identify how PES schemes, similar to ABS agreements, can offer opportunities to the strengthening of conditions that allow ILCs to bring their bio-cultural values to the fore.

### 4.1 Participation and Capacity-building

Similar to the ABS context, in order to set up an effective PES scheme with an ILC, the community must be involved in its design and agree to the changes that it may bring to certain land use activities that the community is engaged in or depends upon. A precondition to entering into negotiations of a PES scheme is that community members understand the legal ramifications of such a scheme as well as the technical importance of the services they are going to provide. According to UNEP, the following criteria should be considered:

- The need for participatory processes as a basis of decision-making, ensuring adequate 'buy-in' from the community;
- The need for members of the community or community-based organizations to be experienced with project management and technical support;
- The need for analysis of whether the investments meet the goals of the larger community, including women and lower-income members; and
- The need for integrating members of the community into every level of the project, from design through implementation and monitoring.

Thus, in order to prepare for PES schemes that integrate the participation of local communities, a certain amount of capacity-building is needed. Communities first require information about the nature of the scheme, why it is important and how their land use generates ESS that are

of value to potential users. Only with this awareness will communities be able to negotiate PES schemes with potential users that will have long-term benefits to and the support of the greater community.

### 4.2 Representation and Governance

In the ABS framework, communities have to negotiate with potential users about the conditions under which they would be willing to share their TK. Similarly, communities in a PES context have to engage with potential users about the conditions under which they would be willing to maintain or change certain land use practices for the generation of certain ESS. Negotiations in both cases require an individual or committee to represent the rest of the community, which in turn requires the existence of a certain governance structure. Such a committee needs to have been given the authority to engage in negotiations on behalf of the entire community. Without local representation, the PES scheme may not only lead to negative consequences for a range of members of the community, particularly the most vulnerable, but is also likely to be unsustainable. In cases in which PES schemes have certain requirements of local land use practices, the community must collectively agree on the terms and conditions, otherwise it may be difficult to enforce and is likely to lead to internal community conflict.

### 4.3 Distribution of Benefits

Debates over how communities can benefit from PES schemes mirror similar debates within the ABS framework. Notably, PES schemes can take place in a range of forms, not just monetary payments, including the following identified by UNEP:

- Direct financial payments, including compensation for opportunity costs or loss of livelihoods incurred from changes in land use practices for ESS protection, such as the conversion of managed farmland to natural forest;
- Financial support for specific community needs, such as building of infrastructure like schools, boreholes or clinics to remunerate for ecosystem services;

- In-kind payments, such as the beehive-for-conservation payment transaction that Fundación Natura is making in Bolivia;<sup>20</sup> and
- Recognition of rights, such as increased land or access rights and increased participation in decision-making processes.<sup>21</sup>

Additional methods are also listed by UNEP, including a “pay per tree” scheme, forest protection or restoration schemes and payment through improved service delivery. There are many other options for PES schemes that could be adapted to the local needs of the involved provider communities.<sup>22</sup>

In order to identify the optimal form of PES scheme, there must be dialogue about the different options. This should include increasing the provider community’s understanding of the benefits of the different forms of PES available in order to strengthen its capacity to make effective decisions and increase its bargaining power in negotiations.

#### 4.4 High Transaction Costs of Community-based Negotiations

In a study on forest ESS and the impact of payment schemes for poor communities living in or near the forest, the International Institute for Environment and Development (IIED) warns: *...transaction costs are likely to be highest for small forest holders who lack basic organisational, forest management and marketing skills. Monitoring and certifying delivery of biodiversity management, for instance, will tend to be more expensive for a number of small plots than for larger landholdings. Where a minimum area is required to qualify for a biodiversity protection contract, additional costs are born by smallholders who must*

*co-ordinate amongst themselves before negotiating with buyers.*<sup>23</sup> Furthermore, overcoming any of the above-mentioned challenges that are a part of participatory engagement with communities will be time-consuming and expensive. Most potential ESS buyers will seek out negotiation partners with the lowest transaction costs, which tend to be larger landowners, minimizing the need for prolonged negotiations or pre-negotiations. This is a clear disadvantage for involving communities in PES schemes and donor funding may be necessary to cover the high initial transaction and set-up costs.

#### 4.5 The Need for a Clear Definition of Property Rights

While PES schemes are often set up privately and in the large majority of cases do not rely on a specific regulatory framework, it is important to remember that they also do not take place in a legal or political vacuum. For example, certain national fiscal policies or subsidies may run counter to the concepts of PES schemes and may prevent the introduction of alternative forms of land use in certain areas. Some countries such as Ecuador and Costa Rica have recently revisited their forestry laws precisely to update such national fiscal policies and facilitate the success of PES schemes.<sup>24</sup>

Furthermore, clarity of property rights is central to the functioning of any PES scheme.<sup>25</sup> In situations in which land ownership and tenure and access and use rights are ambiguous, it is unclear who is the provider of ESS and thus very difficult to create PES schemes. Particularly if PES schemes are to benefit small and local communities, it is of utmost importance to ensure that their rights to accessing the land are in place and clarified.

20. <http://www.naturabolivia.org/Informacion/Proy2.pdf>

21. Supra note 5.

22. Furthermore, communities are likely to also experience certain secondary benefits from engaging in PES schemes. These include: the transfer of technical skills such as mapping, surveying, and new, alternative and sustainable forms of land use. It may also lead to economic empowerment of communities that are seen as providing a service rather than engaging in ‘practice as usual’, and they may also gain experience in engaging with outside business. In cases in which communities already actively contribute to the maintenance of the local environment through sustainable harvesting practices, they should be rewarded for such activities as an incentive to maintain the status quo in the future. Indeed, as case studies in Costa Rica have shown, communities above all derive benefits from the secondary effects of PES schemes. This includes their engagement with the supporting organizations, such as training to develop forestry activities, strengthened organization and improved external linkages. When local landscape is transformed, it may also generate value for local communities through its impact on other ESS on which they depend, such as water quality and quantity. In turn, this may generate increased local tourism and scientific opportunities, which would also benefit them in the medium-term. See: “Payment for Environmental Services and Rural Communities: Lessons from the Americas” Herman Rosa, Susan Kandel, Leopoldo Dimas and Ernesto Mendez, PRISMA (Programa Salvadoreño de Investigación sobre Desarrollo y Medio Ambiente)

23. “Silver bullet or fools’ gold? A global review of markets for forest environmental services and their impact on the poor” Natasha Landell-Mills and Ina T. Porras March 2002, IIED. Page 62.

24. See for example: Pagiola, S. 2002. “Paying for Water Services in Central America: Learning from Costa Rica,” and Echevarría, M. 2002. “Financing Watershed Conservation: The Fonag Water Fund in Quito, Ecuador,” both in Pagiola, S. et al. “Selling Forest Environmental Services. Market-based Mechanisms for Conservation and Development.” London: Earthscan Publications Ltd (2002).

25. Supra note 11.

ILCs often have unresolved and insecure land rights. If this fundamental issue is not addressed, PES schemes are likely to only benefit large land owners who can influence the way the land is used and thus qualify for a PES scheme, which in turn may lead to further marginalisation of ILCs. PES schemes may also further undermine local communities by enabling more powerful actors to secure land tenure before ILCs can assert their rights based on customary law or a history of use.<sup>26</sup> Comparative studies between Mexico, where ILCs have access to and control over 80% of forest cover, and Brazil, where access to resources by local communities is much less secured, have highlighted the importance of affirming rights in making PES work for local communities.<sup>27</sup>

IIED makes a similar observation based on their work on forest ecosystems, warning that there is a risk of poor communities being negatively affected by PES schemes. As the market for ESS raises the value of biodiversity-rich areas, it may lead to competition for controls of these areas. If ILCs living in the area have no formal title to them, they are at risk of expulsion. In this sense, instead of empowering local communities, PES can actually lead to their further marginalization.<sup>28</sup>

However, the opposite can also occur. A Danish Institute for International Studies report found examples of how PES schemes have actually helped clarify communities' land use rights. As a result of community participation in the maintenance or strengthening of ESS through ecosystem management, communities' land tenure was actually strengthened.<sup>29</sup>

## 4.6 Preventing Perverse Outcomes

In addition to the above challenges implicit in PES schemes, there are concerns about the possibility of certain unintended consequences, including the following:

- PES schemes may prevent ESS providers from harvesting certain products or benefiting from certain ESS that are essential for the ILCs' livelihoods. Before entering into a PES deal, consultations need to be held to ensure that

all stakeholders have a holistic understanding of how resources are used before the introduction of any PES schemes in order to avoid unintended consequences such as depriving some members of the community of basic resources required for day-to-day survival;

- As a result of PES schemes and associated land use changes, ESS providers may suffer from loss of employment. PES schemes could also lead to the loss of control over and flexibility of local development policies, as they may limit land management options in the medium- to long-term future. Those involved in PES schemes must consider and calculate other opportunity costs as well; and
- Sometimes the provision of ESS can be inhibited by unexpected natural events such as droughts, wildfires or insect plagues. Communities have to ensure that either they offer a large variety of ESS that make them less vulnerable to times of "non-delivery", or that the PES scheme addresses how to deal with the risk of unforeseen circumstances beyond communities' control; and In some ILCs, the commodification of ESS through financial valuation may be culturally unacceptable. This may particularly be the case if a PES scheme leads to changes in land use that conflict with traditional resource use. Thus there is a need to examine the compatibility of PES schemes with the bio-cultural values of communities.

26. "Payment for Environmental Services and Rural Communities: Lessons from the Americas" Herman Rosa, Susan Kandel, Leopoldo Dimas and Ernesto Mendez, PRISMA (Programa Salvadoreño de Investigación sobre Desarrollo y Medio Ambiente)

27. Ibid.

28. Supra note 24.

29. Supra note 7.

## 5. The Options Provided by BCPs to Address these Challenges

While integrating communities into PES schemes will remain complex, the use of BCPs, as described in the context of ABS, could offer clear support in facilitating the process and enabling sustainable schemes that positively contribute to local livelihoods and strengthen their bio-cultural ways of life. The following section outlines some of the possible benefits that BCPs offer in the context of PES schemes.

### 5.1 The BCP Process as a Tool for Capacity Development

Similar to the ABS context, a BCP in a PES scheme would serve both as process and outcome. The process would help with the identification of the community and its different stakeholders. The development of the BCPs would set out who is included in the community, which resources and practices they rely on and other characteristics relevant to a PES scheme such as the community's bio-cultural values concerning land use. The process of engaging community members in the design of a BCP would also facilitate the sharing of information about the concepts of PES schemes and how they could be integrated into endogenous development planning. It would also allow community members to discuss the nature of individual PES schemes, their local adaptability and relevance and their accompanying opportunities and challenges, including how they may support their bio-cultural ways of life.

### 5.2 Affirmation of Local Decision-making Processes

In order to set up a PES scheme, a community has to enter into a negotiation process with one or more actors, such as other communities serving as ESS providers, possible users of ESS or intermediaries. To do so, the community has to decide on who should represent them in such negotiations, which could be existing representatives, local leaders who represent the community in other matters or new representatives. In communities that are well-organized and already have a history of negotiating the use of natural resources at the local level, the selection of such representatives is likely to be fairly easy. In other cases in which no such process has taken place before,

the selection of a representative to negotiate on behalf of the community will be more challenging. Either way, the process of developing a BCP will be beneficial as it will confirm existing representatives and give them the authority to negotiate a PES scheme on behalf of the community, or it will lead to the selection of a new group of representatives or committee. Through the BCP process, the representatives will be given a clear mandate about how to engage in the negotiations. The protocol itself will also help outsiders who would like to enter into negotiations with the community to identify a point of contact to approach.

### 5.3 Reducing Transaction Costs through Prepared Communities

One of the biggest challenges to making PES work is the high transaction costs associated with setting up and maintaining a PES scheme. If transaction costs outweigh the possible gains made by an ESS user for paying an ESS provider to maintain or improve land use practices, then the whole PES scheme is redundant. Thus, reducing transaction costs of setting up and maintaining a scheme is essential.

While BCPs will not be able to prevent all transaction costs, they have the potential to reduce some of the costs associated with negotiating with ILCs. First, communities that have developed BCPs are better prepared for entering into negotiations with visions of what they want to achieve from such a scheme. They will have also decided who will represent them in negotiations and will have given that representative a clear mandate. Furthermore, building local capacity and understanding the concept of PES through the BCP process will further facilitate the efficacy of negotiations. Finally, when several neighboring communities are integrated into one PES scheme, the joint formulation of a BCP can help participating communities collectively align their visions with respect to the scheme, thus reducing some of the transaction costs of working with different groups at the same time.

Other factors associated with the BCP process are likely to lower transaction costs directly or indirectly.



Similar to the ABS context, an informed and empowered community is in a much better negotiating position than one that is uninformed about its rights and opportunities. It is also likely that a PES scheme built on a strong foundation such as the one created through the BCP process would be sustainable in the medium- or long-term, thus preventing high costs of renegotiating previous deals.

## 5.4 Affirming Access and Land Rights

Many countries in the developing world are characterized by legal plurality in determining who has access to or ownership over land and associated natural resources. These rights are granted under different legal systems that are often a fusion of international, national and customary law. They may be as diverse as the UN Declaration on the Rights of Indigenous People<sup>30</sup>, formal land titles, rights through use, ancestral rights, or membership in community-owned or occupied land.<sup>31</sup>

One of the key contributions of a BCP in the context of PES schemes is the affirmation of ILCs' existing rights to land or land use by listing all relevant national and international legal frameworks. When ILCs are in danger of being marginalized by a PES scheme, BCPs can help them clarify and assert their existing rights. Highlighting these rights legally empowers communities to enter into such schemes with confidence and understanding of their values and priorities. Given the centrality of clear land rights to the establishment of effective PES schemes, BCPs could provide further clarity about the legal status of ILCs and their use of land and natural resources.

## 5.5 Determining Types of Payment

In cases in which ILCs do not have clear access or rights to land, official land tenure could be granted in exchange for their agreement to engage in sustainable land use practices. Kerr et al. describe an example in Indonesia in which informal forest occupants that had previously engaged

in detrimental agriculture agreed to refrain from such activities if they were given official land tenure and granted access to associated government services.<sup>32</sup>

Such non-monetary benefits are an example of the vast array of options available for the type of payments under PES schemes. Non-monetary benefits may be particularly useful in local contexts in which certain service provisions or the clarification of land tenure may be more important than monetary income. While many factors will influence the size and nature of payment possible, the visioning component of BCPs can help in establishing what type of payment would be most desired by ILCs.

## 5.6 Addressing Possible Secondary Effects through a Bio-cultural Analysis of Existing Use of Biological Resources

When entering into PES schemes, ILCs have to be aware of possible secondary effects such as the socio-economic impact of restricted future land use. While there is always a risk of unanticipated consequences emerging from the implementation of such schemes, the use of BCPs can reduce some of the associated risks.

Part of the BCP process is a discussion about the nature of the current resource use of all members of the community; within a PES context, it will also include discussion about how the conditions attached to a PES scheme will affect such resource use. The designers of the PES scheme can then use the BCP to ensure that community members will not be adversely affected by the scheme and, in cases in which local land use practices have to be changed or stopped, to ensure that any negative consequences are mitigated wherever possible. On top of that, highlighting the communities' bio-cultural values in this regard will further prevent cultural conflict emerging from certain land usage change.

30. Article 26 of the UN Declaration on the Rights of Indigenous People:

- Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

31. *Supra* note 7.

32. TRIP Report: Property Rights, Environmental Services and Poverty in Indonesia, by John Kerr et al., 2004: . Footnote 5 (UNEP 2008) also mentions land and access rights as a possible form of payment as part of a PES scheme.

## 5.7 Bio-cultural Checks and Balances Against Commodification of ESS and Towards ILCs' Rights to a Bio-cultural Way of Life

A final fundamental contribution of BCPs to the PES context lies in its facilitation of ILCs' expression of their bio-cultural values and knowledge. BCPs add an additional angle to ESS through the qualitative valuation of ecosystems' bio-cultural resources. In other words, BCPs describe ecosystems in terms of their bio-cultural rather than their economic value, which provides a much more holistic assessment of their true value. Even when bundled, ESS can only be measured in terms of the values they add to certain economic activities or to a certain user. Yet, ecosystems that generate economically valuable ESS do so much more than that in terms of the services they provide to the livelihoods of ILCs, which are rarely, if ever, measured economically. For example, a forest is not merely a carbon sink, but also provides ILCs with food, shelter, medicine, and spiritual guidance, all of which they have come to depend upon for their livelihoods and bio-cultural ways of life. It is for these reasons that ILCs such as

the pastoralist Raika community described in previous chapters has not only become dependent on having access to the land, but has also taken on the stewardship of the very ecosystem upon which it relies for survival. During a long history of interaction, the land and the community have co-evolved a symbiotic relationship in which they mutually reinforce each other's bio-cultural integrity.

Therefore, basing PES schemes on BCPs allows for the integration of bio-cultural values into a previously economically-valued system and further acknowledges the importance of bio-cultural values for the preservation of ecosystems that generate ESS in the first place. Therefore, BCPs generate a holistic approach to ESS that extends beyond an economic valuation and includes broader valuation criteria for the development of a PES scheme. PES schemes may become an additional mechanism through which ILCs can assert their rights and gain recognition for the bio-cultural principles of conservation and sustainable use entrenched in their traditional ways of life.

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## 6. Conclusions

While BCPs are not the panacea for making PES work, we argue that they can be highly supportive in integrating communities into PES schemes. What may otherwise seem too complex for possible users of ESS may become feasible through the BCP process.

BCPs can also serve as a capacity development mechanism for ILCs that are confronted with the opportunity to enter into a PES scheme. Participation, capacity development and increased awareness of what such a scheme entails leads to empowered communities that are much better prepared to not only enter into PES negotiations, but also to commit to the conditions of specific schemes. In addition, basing a

PES scheme on a BCP will highlight ILCs' bio-cultural values about the ecosystem in question and allow for a more organic community-based decision-making process than what typically occurs in a purely economic transaction.

Many other challenges exist, including the need that still exists for solid scientific and economic analyses to assign value to ESS. While BCPs will only address some of the challenges associated with this new and promising PES scheme, policymakers and entrepreneurs working in this field should strongly consider integrating them into their work as they collaborate with ILCs to design and implement long-term and effective PES schemes well into the future.



# CHAPTER 7

## Bio-cultural Jurisprudence

Elan Abrell,<sup>1</sup> Kabir Bavikatte & Harry Jonas

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### 1. Introduction

This book is intended to further amplify the call from indigenous peoples and local communities (ILCs) to be affirmed within international and national legal frameworks as custodians of their landscapes and to enjoy secure rights to manage their territories, natural resources and traditional knowledge, innovations and practices (TK) according to their values and customary laws. In the preceding chapters we detail a variety of legal and policy frameworks such as the international regime on access and benefit sharing (IRABS), programme on reducing emissions from deforestation and forest degradation in developing countries (REDD), protected areas and payment for ecosystems services (PES) that are being developed with the aims of delivering environmental gains and securing social justice. Whilst acknowledging the importance of the regulatory frameworks, we also highlight the potential each has to further marginalize ILCs as custodians of their landscapes.

Because the success of international regulatory frameworks of dealing with modern global concerns such as the appropriate use of TK, biodiversity loss or climate change depends on their careful implementation at the local level, ILCs are integral to the decision-making process relating to any of those activities. The local implementation of environmental legal frameworks is most likely to lead to environmental and social benefits when ILCs have the right of free, prior and informed consent (FPIC) over any activities that affect them. FPIC in this context also includes exercising the right to determine the types of use of their

TK, land, territories and natural resources and to influence the details of any intended projects or activities. In this context, ILCs' ability to articulate and assert their values, customary laws and practices becomes the indispensable condition for ensuring the local integrity of environmental law.

This book focuses on use of bio-cultural community protocols (BCPs) by ILCs as one way in which communities can increase their capacity to drive the local implementation of international and national environmental laws, with reference to the IRABS, REDD, protected areas and PES. Whilst we argue that this is a practical and immediately available tool for ILCs to assert their right to self-determination, we acknowledge that a more radical paradigm shift is required within the law itself if ILCs are to be recognized as drivers of the conservation and sustainable use of biodiversity and the generation of culturally appropriate livelihoods. This chapter sketches a nascent form of legal thought, namely, bio-cultural jurisprudence that marks a movement in that direction. It explores FPIC's twin foundations, namely, the right to self-determination and respect for customary laws and practices, and argues that bio-cultural jurisprudence places the values of ILCs at the heart of environmental law, initiating a radical rethink of the 'facts' of property jurisprudence that the law takes for granted.

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## 2. Free, Prior and Informed Consent

Within the context of the Convention on Biological Diversity (CBD), there is a tendency by parties to equate the idea of FPIC of ILCs only with the notion of consent in contract law. This perception is unduly limited. The right to FPIC in Article 8(j) in the context of bio-cultural communities rests on the twin foundations of the right to self-determination and customary law. The FPIC that Article 8(j) refers to is a consent that at its core affirms and furthers a bio-cultural way of life. Such consent stems from the bio-cultural values of ILCs, constituting an act of self-determination and affirming customary law. Article 8(j) indicates that the current environmental emergency is not a result of the inability of ILCs to freely alienate their 'physical and intellectual property' to the highest bidder but stems from their diminishing ability to use and share their TK, lands, territories and natural resources in accordance with their bio-cultural values - values that have ensured the conservation and sustainable use of biological diversity through history.

We turn briefly to explore each of the twin foundations of FPIC, namely, the right to self-determination and respect for customary laws and practices, and highlight their importance for ILCs to be able to secure their way of life.

### 2.1 Self-Determination

At the heart of the right to self-determination lies the challenge of articulating the 'self' that needs to be determined. The 'self' that gives consent in contract law is rooted in property jurisprudence, which at a fundamental level splits the world into legal subjects and objects that can be traded and alienated by such subjects. This begs the question of whether the determining 'self' of bio-cultural communities that Article 8(j) refers to is the same 'self' that gives consent in contract law and whether such consent can ensure a way of life that has conserved and sustainably used biodiversity.

The nature of the legal subject or the self in property jurisprudence is conceived of as an enclosed entity and the role of law is to resolve conflicts that arise out of competing rights between such entities and to safeguard their rights

over objects which include land, property, knowledge etc. The legal subject is therefore separate from the thing s/he has rights over and 'Nature' for e.g. is separate from the 'self' or the legal subject who has rights over it. The legal subject has no obligations towards Nature nor does Nature have corresponding rights over the legal subject. Nature in property jurisprudence is a commodity over which legal subjects exercise different sets of competing rights.

*The legal subject as separate from Nature emerges when a part of experience is cut from the general stream of experience and classified as the separate self. This allows for a different kind of relationship - one of self and other. Our ability to discriminate between self and Nature is merely one function of consciousness of splitting up our conscious universe into parts. But this ability to discriminate provides us with endless possibilities and not just a self/Nature binary.*

*The state of duality between self/Nature and the state of unity where Nature becomes an extension of the self is a tension that constantly needs to be maintained to have a holistic picture of reality. This tension is crucial since it comprehends the essence of our consciousness that cuts up the undifferentiated stream of experience into a variety of binary combinations of subject/object, thought/thing, knower/known etc. The problem of the legal subject is the privileging of the subject/Nature binary at expense of its interconnectedness - the legal subject as separate from Nature is not an absolute but a functional category and this functional separation from Nature should not deny our integral connectedness.<sup>2</sup>*

Article 8(j) poses a challenge to the classical notion of the legal subject as an insular bearer of property rights by juxtaposing it with the understanding that ILCs have of the 'self' as a bio-spiritual relationship with the ecosystem. The ILCs that Article 8(j) refers to are bio-cultural communities whose cultural practices and spiritual beliefs are integrally tied to the ecosystem. The wellbeing of the community is contingent on the wellbeing of the ecosystem and the cultural rituals and spiritual foundations of the community continually make sacred and affirm the self's connectedness to the land, its flora and fauna.

2. James, William, 'Does Consciousness Exist', *Essays in Radical Empiricism* (1904) ; Nishida, Kitaro, *An Enquiry into the Good*, New Haven: Yale University Press, 1990 and Banoobhai, Shabbir, *If I Could Write*,

It is the determination of such a bio-spiritual 'self' that Article 8 (j) seeks to protect and promote. The 'bio-spiritual self' that seeks to be determined through the act of free consent is constituted through its relations to the land rather than its proprietary rights over it. While property jurisprudence divides the world into subjects and objects and gives coherence to a title claim that 'this land is mine', bio-cultural jurisprudence that Article 8(j) seeks to develop, emphasizes on the connectedness of the bio-spiritual self to the land gives meaning to the statement 'this land is me'.

The bio-spiritual self that is determined in the act of providing FPIC poses an alternative conception of the self, which is more than just an insular bearer of property rights. It emphasizes less on rights in its engagement with the Nature and more on bio-spiritual virtues that foregrounds one's connectedness with nature rather than separateness through the practice of kindness, love, compassion and reciprocity towards the land. While justice from the point of view of the contemporary legal subject is the upholding of one's property rights, justice for the bio-spiritual self is the removal of any obstruction to this sense of virtuous connectedness with the land.

## 2.2 Customary Laws

In his 1924 classic essay 'The Gift', French sociologist Marcel Mauss addressed the issue of customary law and the moral universe it operates in when analyzing gift giving in traditional societies. Mauss's explorations provide us with a keen insight into a dimension of FPIC in bio-cultural communities that is often missed out in property jurisprudence. The act of consenting to sharing or use of knowledge, resources, land and territory in bio-cultural communities is circumscribed and regulated by their customary values and spiritual obligations. It is these values and obligations that Article 8(j) seeks to foreground in its affirmation of the right of FPIC of bio-cultural communities.

Mauss asked an important question that drove his enquiry into the anthropology of the gift: 'What power resides in the object that causes its recipient to pay it back?' Mauss was interested in looking at 'giving' as a 'total prestation' where gift exchanges in traditional societies are viewed as complete social movements and are at the same time economic, juridical,

moral, aesthetic, religious, mythological and socio-morphological phenomena- meaning can only be grasped if they are viewed as a complex concrete reality.<sup>3</sup>

In the context of ILC's lands, territories, natural resources or TK, Mauss's point about 'total prestation' becomes all the more urgent by asking two important questions: First, 'what is the total context from within which land, territories, natural resources or TK arises i.e. what are the customary and spiritual obligations that regulate its sharing and use? Second, how can these customary and spiritual obligations be manifested in ABS, REDD, payment for ecosystem services, protected areas or any other such agreements relating to the use of such land, territories, natural resources or TK? Both these questions are crucial because these customary and spiritual obligations are a part of a way of life that has conserved and sustainably used biological diversity and is the way of life that Article 8(j) seeks to protect and promote.

*A language of property is totalizing in the sense that it overwrites all other languages of social relations, which may have existed. If, for instance, a community had various norms through which it dealt with questions of the control over natural or cultural resources, these cannot coexist with a property claim. The introduction of property transforms diverse practices by rendering them illegitimate or erasing them from the official memory of the community.*

*When John Locke theorized the state of nature, one of the most important insights that he drew on was the idea that the state of nature lacked a regime of private property. And it was this lack of private property, for Locke that resulted in the unpredictable nature of life since there was no rule of law, which regulated society. It is important to note that Locke's state of nature was not merely an imaginary one. While writing about the state of nature, he really had in mind practices of indigenous and aboriginal people in Belize and Guyana. Under English common law, land that was already occupied or in possession of another could not simply be taken by force. But Locke helped redefine the concept of property ownership to overcome the legal bars to appropriation of land in the possession of the Aboriginals and to facilitate the colonial purpose of the European settlers.*

3. Evans-Pritchard, "Introduction" in *The Gift*, Marcel Mauss, Norton Library: New York, 1967, p. vii.

*Locke also remains one of the exemplar philosophers of the 17<sup>th</sup> and 18<sup>th</sup> century, a period in which many of our ideas of selfhood emerges. In many ways, the question of personal identity was the primary question that motivated Locke's enquiry...While the question of personal identity troubled many philosophers even before Locke, it was only with the publication of Locke's Two Treatises on Government and Essay Concerning Human Understanding that you have the establishment of the most coherent argument linking theories of identity to property. If property is both an extension and a pre requisite of personality then we should be aware of the possibility that different modes of property may be seen as generally encouraging different modes of personality.*<sup>4</sup>

Mauss in his work when analyzing the giving of gifts in traditional societies was emphasizing their inalienability from the giver. The gift can therefore never become a commodity that is separate from the person who gives it, but rather the very act of giving creates a social bond with an obligation to reciprocate on the part of the recipient. While property jurisprudence that underlies FPIC in contract law emphasizes the rights of the legal subject to alienate an object that s/he owns, the nature of the gift in traditional

societies is an example of customary law where a gift is an affirmation of a relationship that obliges reciprocation, the gift therefore can never become a commodity in the strict sense of the word since it is always tied to the giver through the obligations it creates in the receiver.

Mauss by observing the culture of gifts amongst the Maori and in Polynesia established the very opposite of commodification that 'the bond created between things is in fact a bond between persons, since the thing itself is a person or pertains to a person'. Hence it follows that to give something is to give a part of oneself. In this system of ideas one gives away what is in reality a part of one's nature and substance, while to receive something is to receive a part of someone's spiritual essence.<sup>5</sup> Social, cultural and spiritual bonds that underlie gifts in traditional societies also underlie relationships bio-cultural communities have with their knowledge, lands, territories and resources, which are the heart of their conservation and sustainable use practices. Therefore the right to FPIC in the context of Article 8(j) for it to truly affirm the way of life of bio-cultural communities has to underpin the right to consent in accordance with the customary laws and values of these communities<sup>6</sup>

### 3. Towards a Biocultural Jurisprudence

*The trade route is the Songline' said Flynn, 'Because songs, not things are the principle medium of exchange. Trading in "things" is the secondary consequence of trading in song'. Before the whites came, he went on, no one in Australia was landless, since everyone inherited as his or her private property a stretch of the Ancestor's song and the stretch of country over which the song passed. A man's verses were his title deeds to territory. He could lend them to others. He could borrow other verses in return. The one thing he couldn't do was sell or get rid of them.*

Bruce Chatwin, The Songlines

Property jurisprudence when dealing with ILCs is estranged. This estrangement taints even the best-intentioned efforts of the different international environmental laws and polices

that attempt to secure the interests of ILCs. Estrangement in environmental law and policy is generally manifested in paternalistic attempts at protecting the rights of ILCs, without addressing the root of the matter, which is securing the foundations that support a way of life i.e. self-determination and customary law.

It is possible that causes of legal estrangement are cognitive, due to certain habits of legal thinking that determine what is observed and what is ignored when property jurisprudence encounters ILCs. An effective counter to property jurisprudence is a bio-cultural jurisprudence that takes as its starting point the right of bio-cultural communities to determine their way of life in accordance with their customary and spiritual values.

4. Lawrence Liang et al. 'How Does an Asian Commons Mean?'. See also Etienne Balibar, *My self and My own: One and the Same?* In Bill Maurer & Gabriele Schwab, *Accelerating Possession: Global Futures of Property and Personhood*, New York: Columbia University Press, 2006.

5. Mauss, Marcel, *The Gift: Forms and Functions of Exchange in Archaic Societies*, Norton Library: New York, 1967, p.10.

6. Hyde, Lewis, *The Gift: Imagination and the Erotic Life of Property*, Random House: New York, 1983.

Bio-cultural jurisprudence seeks to identify and name those habits and devices of property jurisprudence that underlie environmental law and policy that estranges it from ILCs and proposes alternative habits and devices that help to adequately take on board bio-cultural values in law making.

The estrangement of property jurisprudence from bio-cultural communities is a result of it being unable to relate to these communities with its current legal concepts and definitions of 'owner' and 'property'. These legal concepts of property prevent the law from seeing enough to relate to. If the opposite of being estranged is to find a people believable, then bio-cultural jurisprudence seeks to counter the estrangement of property jurisprudence by making bio-cultural values believable not just by articulating them, but also by highlighting, historicizing and deconstructing the values of property jurisprudence that are hitherto taken for granted.<sup>7</sup>

*Traditional healers in Rajasthan who refer to themselves as Gunis have a strict virtue code on sustainably harvesting medicinal plants, caring for the land and not profiting from their TK but rather unconditionally serving those who are ailing. In fact the Sanskrit term 'guna' means both knowledge and virtue, and a guni is one who is both knowledgeable and virtuous. The gunis on a number of occasions have stated that one cannot be a true healer with*

*only knowledge and no virtue, for the very efficacy of one's knowledge depends on one being virtuous. The gunis have a saying that captures this sentiment clearly: 'In the guni only the guna/knowledge/virtue is worthy of respect, irrespective of the guni's gender or age'. Traditional healers of the forest dwelling Malayali tribes of Tamil Nadu, before harvesting pray to the medicinal plant asking it permission if they could harvest it and harvest it with their thumb and little finger to cause it as little harm as possible all the while thanking it for its medicinal properties and praying that the life within it stays strong after the harvest<sup>8</sup> They also collect the seeds of the plant, which they harvest and plant them elsewhere so as to conserve the plant.<sup>9</sup>*

Nature disconnected from the bio-cultural relationships that underlie it, is understood as property and this is presented as a self-evident fact in property jurisprudence. Facts are discourse dependent - they do not exist out there waiting to be discovered by us but rather what we describe as facts are based on our perception of the world. The dichotomy between facts and values is illusory to the extent that our values inform what we perceive as facts rather than the other way round.<sup>10</sup> Bio-cultural jurisprudence ultimately is an attempt to place the bio-cultural values of ILCs at the heart of environmental law making and therefore initiate a radical rethink of the 'facts' of property jurisprudence that the law takes for granted.

## 4. Biocultural Community Protocols as Bio-cultural Jurisprudence in Action

ILCs are increasingly reading their right to self-determination and customary laws into existing and emerging environmental laws and policies thereby actively creating bio-cultural jurisprudence. They do so by relying on the international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In both the ICCPR and the ICESCR, Article 1 states, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>11</sup>

While this right has been historically construed to apply to individuals, both the U.N. Human Rights Committee - the U.N.

7. Gearing, Fredrick O, *The Face of the Fox*, Sheffield Publishing Company: Wisconsin, 1970, pp 3-5.

8. "Om mooli, maha mooli, jeeva mooli, un uver, un udalilnirka Swaha" This Tamil prayer recited before harvesting a medicinal plant is roughly translated as 'O great living plant, let your life not be harmed by this harvest'. The healers believe that a plant has the power to curse them if not harvested respectfully.

9. Based on interviews with Gunis and the Malayali healers - interview transcripts with Natural Justice at [www.naturaljustice.org.za](http://www.naturaljustice.org.za)

10. Putnam, Hilary, Reason, Truth and History, cited in Margret Jane Radin "Market Inalienability", 100 *Harv.L.Rev.*1849 (1987), p.1882-1883.

11. The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976, and ICESCR, The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly on December 16, 1966, and entered into force on January 3, 1976.



body with the authority to interpret the ICCPR – and the UN Committee on Economic, Social and Cultural Rights have held that to the extent that an indigenous group constitutes a “people,” it does have the collective right to self-determination.<sup>12</sup> Article 3 of the Declaration of the Rights of Indigenous Peoples (UNDRIP) reinforces this view with its assertion that “[i]ndigenous peoples have the right to self-determination.”<sup>13</sup>

Article 3 of UNDRIP further states that by virtue of the right to self-determination, indigenous peoples “freely determine their political status and freely pursue their economic, social and cultural development,” while Article 4 adds that indigenous peoples “have a right to autonomy of self government in matters relating to internal affairs,” and Article 5 asserts that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.<sup>14</sup> In 1984 the IV General Assembly of the World Council of Indigenous Peoples ratified the Declaration of Principles of the World Council of Indigenous Peoples, the second principle of which declares, “All Indigenous Peoples have the right to self-determination. By virtue of this right they can freely determine their political, economic, social, religious, and cultural development.”<sup>15</sup>

If the right to self-determination is going to have any significance, it must be accompanied by an expansion of States’ recognition of ILCs’ customary laws. In fact, the right of ILCs to their customary legal systems is also recognized in the system of international human rights. Article 8 of the International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples (ILO 169) specifies that in applying national laws and regulations to indigenous peoples, “due regard shall be had to their customs or customary laws.”<sup>16</sup> The UNDRIP expands on this with Article 34, which asserts that indigenous peoples “have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”<sup>17</sup>

Of course, recognizing the importance of ILCs’ rights to self-determination and to the recognition of their customary legal systems to the protection of their way of life is not sufficient to ensure these rights are respected. As lawyer and author Brendan Tobin notes:

*Legal pluralism cannot be envisaged as mere acceptance of co-existence of legal regimes, with customary law applicable only to indigenous peoples within their territories and in relation to their own internal affairs. Rather it will require incorporation directly or indirectly of principles, measures and mechanisms drawn from a customary law within national and international legal regimes for protection of TK. Achieving such an end makes it imperative that full and effective participation of indigenous peoples is secured from the outset in the development, implementation, monitoring and enforcement of relevant law and policy.*<sup>18</sup>

As the preceding chapters show, ILCs are through their BCPs already doing what Tobin suggests. They are actively developing bio-cultural jurisprudence by using their BCPs as tools to read their bio-cultural values into environmental laws and policy, thereby exercising control over the interpretation and implementation of such laws and policy. The BCP at its core is a tool that ILCs have developed in an attempt to speak for themselves from their value position rather than be spoken for in laws that affect their cultures and their lands. More importantly however, BCPs are just one manifestation of a bio-cultural jurisprudence that seeks to stem the direct application of property jurisprudence into environmental law and policy.

The growth of support for BCPs internationally and the high possibility of the forthcoming IRABS providing legal recognition to BCPs is a jurisprudential landmark. If the law is a site of struggle where different interest groups lobby for space, then BCPs mark the emergence of ‘bio-cultural jurisprudence’ as a serious attempt at genuine legal pluralism.

12. Merle Alexander, Preston Hardison, Mathias Ahren, et. al., “Study on Compliance in Relation to Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law,” Consultancy Paper, p. 14.

13. Declaration of the Rights of Indigenous Peoples, United Nations document A/61/L.67, adopted by vote of the United Nations General Assembly on September 13, 2007.

14. UNDRIP, supra note 13.

15. The Declaration of Principles of the World Council of Indigenous Peoples, ratified by the IV General Assembly of the World Council of Indigenous Peoples in Panama on September 23-30, 1984.

16. International Labor Organization Convention No. 169 concerning Indigenous and Tribal Peoples (C169), adopted on June 27, 1989, by the International Labor Organization General Conference at its 26th session.

17. Supra note 13.

18. Brendan Tobin “Setting TK Protection to Rights: Placing Human Rights and Customary Law at the Centre of TK Governance,” draft article on file with author.

# APPENDIX

## The meaning of the Raika Bio-cultural Protocol for Livelihoods and Biodiversity Conservation

Ilse Köhler-Rollefson<sup>1</sup>

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The Raika (or Rebari) are the largest group of pastoralists in Western India and their roots can indirectly be traced back to Afghanistan. There is historical and folkloric evidence that the Rebari filtered into what is now Rajasthan and Gujarat in the turmoil and displacement that accompanied the Muslim incursions to the Thar Desert in the period from the 12th to the 17th centuries. The Maru Raika and Godwar Raika currently live across Rajasthan and several other groups live in Gujarat and across the border in the Tharparkar area of Pakistan. Especially in Rajasthan, their identity is closely linked to the camel and they were appointed by the Maharajahs of Bikaner, Jaisalmer and Jodhpur, and other kingdoms to take care of their camel breeding herds. This relationship lasted until India obtained Independence in 1947.

Looking at the larger social context in which Raika society is embedded, it is evident that they have a medium position in the caste-system - on a par with agricultural communities - and are not resource poor. As livestock is a self-replenishing resource they have always been able to generate cash by selling a few animals and because livestock can migrate to wherever rain has fallen, they have many advantages over the settled farming communities, at least as long as there were ample common grazing lands available.

Despite seemingly favourable factors, the Raika are commonly described as the most backward community in Rajasthan and have very low literacy levels, especially among women. Their general progress has been slow by comparison with some of the untouchable castes, such as the Meghwal, who have managed to get their people into ministerial positions, while the Raika do not have a single M.P. and only recently their first representative became elected into the Legislative Assembly of Rajasthan.

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1. Ilse Köhler-Rollefson, PhD, Projects Coordinator of League for Pastoral Peoples and Advisor to Lokhit Pashu-Palak Sanstan.

A notable feature of the community is the deep split that runs between its educated and non-educated members. On the one hand, Formal education has been inculcating a sense of disdain for traditional knowledge and lifestyles into the young people and political leaders appeal to herders to “stop running after the tails of their animals”. A group of well-educated Raika in elevated positions in society has established an educational trust that coaches young Raika to prepare them for professional careers. These efforts are necessary because the increase in population precludes every young Raika from becoming a pastoralist. Yet, the same group sees no merit in their pastoralist heritage and seems disinterested in promoting and preserving the community’s history and culture.

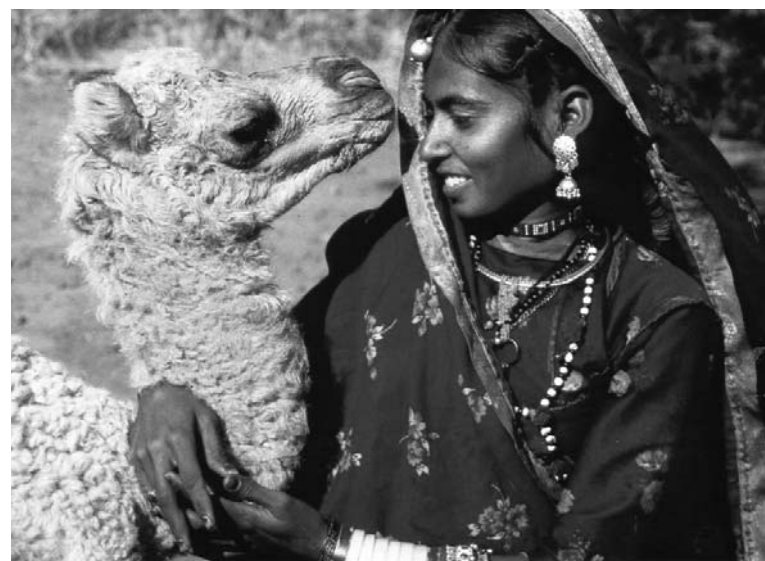
On the hand, active herders and especially the elders (panches) are very opposed to calls to abandon their animals and usually do not provide proponents with any political support. The panches revel in their traditional customs and their former glory as independent herders; and are also are in charge of sorting out community problems. While their decisions can be considered wise, they often mete out punishments which seem unwarranted to onlookers. For this reason, there is also widespread disgruntlement with these traditional institutions and in some locations they have been dissolved by the communities.

The Raika usually list three reasons why livestock keeping has become unattractive for them: loss of grazing areas, problems of animal diseases and lack of respect for their way of life and traditions. The group of Raika which established the bio-cultural community protocol (BCP) has especially suffered from the loss of their grazing rights in the Kumbalgarh Sanctuary which represents their traditional rainy season ground and for which they had grazing privileges during the times of the Maharajahs. With the help of Lokhit Pashu-Palak Sansthan, they have engaged in an extended legal battle to resurrect their rights, a battle with many ups and downs and that has been fought both at the Rajasthan High Court as well as at the Supreme Court in New-Delhi. The latest episode relates to the “Forest Rights Act” whose adoption by parliament as law was hailed as a major step forward since it was extended to include pastoralists after lobbying by the LIFE-Network. Unfortunately, there are powerful interests, including the wildlife lobby, against this Act and politicians, including some who purport to support the Raika and even hail from the community, have been conniving to undermine and ignore the implementation of this legal framework.

While the Raika currently have access to the Kumbalgarh Sanctuary, this is due to a silent agreement with local forest officials and without solid legal basis. It is this uncertainty about their legal position and status that makes it risky for the Raika to put focus solely on herding. It is also at this juncture where the process of establishing the BCP was of enormous importance because it made the Raika aware of the rights that they actually have and because the written version includes a summary of all relevant laws that can serve as a reference point for lawyers that they may hire.

Another crucial aspect of the BCP is that is highlights the international and global value attached to the knowledge and lifestyle of the Raika from the perspective of biodiversity conservation. It thereby sends a message to two groups of people: the educated Raika who would like nothing better than to dissociate themselves from their heritage and history and recast themselves as modern Indians. The second group is government officials, especially technical ones from the Department of Animal Husbandry who have traditionally looked down upon the Raika and their way of keeping animals.

Despite the lure of the city, herding traditions are still strong and at the time of writing huge deras (groups of Raika going on long distance migration with thousands of sheep, goats and camels) are walking south on the new four-lane highway to Udaipur in search for greener pastures. The Bio-cultural Protocol will support appreciation of this traditional way of life as an astute response to drought and climate change rather than a colorful but otherwise quaint and outdated phenomenon.



*A Raika woman and camel*

# Raika Bio-cultural Protocol

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## OVERVIEW

### This protocol specifically:

- Sets out our biocultural values and explains how we, the Raika, have developed and preserved unique breeds of livestock and traditional knowledge associated with them, and how our pastoral lifestyle has developed the co-evolved ecosystem of Rajasthan's forests which we have traditionally conserved and sustainably used;
- Details our customary decision making process involved in providing free prior informed consent to any actions that relate to our grazing rights, animal genetic resources and associated traditional knowledge;
- Illustrates the disastrous impacts that our exclusion from previously communal grazing areas and forests is having on our lives, livestock, genetic resources, traditional knowledge and the forest ecosystem itself;
- Articulates our forest access rights and rights over our genetic resources and associated traditional knowledge under Indian law;
- Calls upon the National Biodiversity Authority to:
  - Recognize our local breeds and associated traditional knowledge as set out in the Raika Biodiversity Register and to include it in the Peoples Biodiversity Register;
  - Facilitate the setting up of Biodiversity Management Committees under the local bodies (Panchayats or Municipalities) where we live and to support these Committees in ensuring the conservation and sustainable use of our breed diversity and traditional knowledge;
- Strengthen in situ conservation of breeds of the Raika and include them in the BMC being initiated by the government.
- Advise the Central Government and coordinate the activities of the State Biodiversity Boards to protect the customary grazing rights of the Raika so as to safeguard our traditional lifestyles that ensure the conservation and sustainable use of our breed diversity, associated traditional knowledge and the local ecosystem;
- Ensure that our prior informed consent (according to customary law) is obtained before any decision are taken that affect our traditional way of life or access is granted to our breed diversity and associated traditional knowledge for research or for commercial purposes, and further ensure that we receive a fair and equitable share of the benefits arising from the utilization of our breeds and traditional knowledge according to mutually agreed terms; and
- Calls on the Secretariat of the UN Convention on Biological Diversity, specifically under Article 8(j) of the Convention, to recognize the contribution of our traditional lifestyles to the conservation and sustainable use of biological diversity in Rajasthan; and calls on the UN Food and Agriculture Organization to recognize the importance of our animal genetic resources and to recognize livestock keepers' rights.

## OUR BIOCULTURAL VALUES

### Where we live:

We are the Raika, an indigenous pastoral community who live in Rajasthan, North West India. We number about 1m people, with the Maru Raika living across the State and the Godwad Raika living in Pali, Jalore and Sirohi.

Despite the arid climate and the region's dryland ecosystem, we have lived in the region for over 700 years rearing unique livestock and acting as custodians of the local environment.

### Our origins:

At a spiritual level, we believe that we were created by Lord Shiva. The camel was shaped by his wife, Parvati, and it was brought to life by Lord Shiva. But the camel's playfulness caused a nuisance, so Lord Shiva created the Raika from his skin and sweat to take care of the camels. Our spiritual universe is linked to our livestock breeding, and our ethnicity is inextricably intertwined with our breeds

and way of life. We have always considered ourselves a distinct indigenous community, a fact that is recorded, for example, in the 1891 Marwar census undertaken on behalf of the Maharaja of Jodhpur.

### Our traditional livelihoods:

We are indigenous nomadic pastoralists who have developed a variety of livestock breeds based on our traditional knowledge and have customarily grazed our camels, sheep, goats and cattle on communal lands and in forests. This means that our livelihoods and the survival of our particular breeds are based on access to forests, gauchar (village communal grazing lands) and oran (sacred groves attached to temples). In turn, our animals help conserve the biodiversity of the local ecosystems in which they graze and we provide assistance to the area's local communities. In this way, we see our indigenous pastoralist culture as both using and benefitting from the forests, in a virtuous cycle.

## WE PRESERVE UNIQUE ANIMAL GENETIC RESOURCES AND HAVE ASSOCIATED TRADITIONAL KNOWLEDGE

### Animal genetic resources:

Through our interaction with the forests, gauchar and oran, and through selective breeding for generations we have created breeds that are particularly hardy, able to forage and digest rough vegetation, withstand the dry Rajasthani environment and to walk long distances – all attributes that “high performance” exotic breeds do not have. Local breeds need fewer inputs and are less susceptible to disease and are well-suited to harsh conditions. The animal genetic diversity they embody enables us to respond to changes in the natural environment, important attributes in the context of climate change adaptation and food security. Their genetic traits and our traditional knowledge associated with them will also be of use in breeding for disease resistance, and may provide us with other diverse economic opportunities under the forthcoming International Regime on Access

and Benefit Sharing or a future International Treaty on Animal Genetic Resources for Food and Agriculture.

Specifically, we maintain the following breeds that are more fully described in Appendix I:

- Cattle: Nari and Kankrej;
- Sheep: Boti (officially the Marwari) and Bhagli (officially the Sonadi);
- Goat: Marwari and Sirohi;
- Camels: Mewari, Marwari, Malvi; Bikaneri, Jaisalmeri.

Many of our breeds are intrinsically migratory, and cannot be stall bred. Just as our lifestyles are suited to the conditions they require to survive, these breeds are suited to our biocultural realities.

### Traditional knowledge:

Our traditional knowledge relating to breeds and breeding has arisen from centuries of experience of tending these particular breeds in Rajasthan. We have traditional customs that ensure the genetic diversity of our breeds, such as the rotation of bulls between villages for stud. We have also developed extensive local treatment systems (ethno-veterinary knowledge) with which to care for wounded or ill animals, and much of this traditional knowledge is held by both the men and women of our community. We share our ethno-veterinary knowledge freely with other communities that own livestock and are perhaps the only veterinary care for livestock in remote areas of rural Rajasthan.

Women also take care of the newborn animals, make decisions about the sale or transfer of our livestock and sell milk. Our animal products are totally organic, attributes that are highly desired in some parts of India. The wool of our animals is used for making carpets, rope and blankets and they also provide draught.

### Spiritual understanding of our breeds:

Our breeds are more than just a livelihood. They form an integral part of our social fabric and are interwoven with spiritual meaning. A number of important holy days involve rituals that involve our animals and underscore the sacred ties between our livestock, the environment and our traditional knowledge.

## WE CONSERVE AND SUSTAINABLE USE RAJASTHAN'S BIODIVERSITY

We are integral to Rajasthan's forests, *gauchar* and *oran*. Our animals have contributed to the ecology of the region to such an extent that they cannot be separated from the "natural" state of the forests, *gauchar* and *oran*.

As our animals graze, they provide manure to otherwise infertile ground. At the same time, the seeds in the manure have a higher chance of germination, provide gestation and increase the natural propagation of local trees. Because our animals consume the foliage on the ground, it helps to keep termite numbers low. The feeding on ground fall and tall grass has also lowered the incidence of forest fires.

For generations we, the Raika, have acted as custodians of the forest. We have always fought forest fires, dealt with invasive species poisonous for animals (such as Angrezi Babul i.e. *Prosopis juliflora* and the Rukadi i.e. *Lantana camara*) and reported illegal logging and poaching. Our customary laws ban practices that degrade the environment, including the lopping of sacred trees, and heavy punishments are meted to community members who break the rules.

Our grazing patterns are based on our traditional ecological knowledge and establish a strict rotation based on the seasons over a five year period. At the same we stimulate tree growth by our practice of lopping of selected trees,

as well as by our camels that eat the twigs and leaves of the upper branches. Studies on our grazing patterns have shown stronger tree growth in areas where our livestock have traditionally grazed.

Our livestock has become integral to the animal diversity in forest areas. Predators such as leopards and wolves have traditionally preyed on our livestock and we consider the resulting loss of livestock as a natural part of our integral relationship with the ecosystem. Studies in the Kumbhalgarh Sanctuary have shown how the leopard population in the region has been sustained by our livestock and the negative impacts caused by the exclusion of livestock from the Sanctuary which include increased encroachment by leopards into villages leading to dangerous conflicts.

We also provide services to the villages near our grazing lands and migratory routes. We provide manure to farmers, either by keeping our animals on their land on a temporary basis, or by selling it to them directly. People from surrounding villages use the forest for a variety of needs, including collecting dry wood, fodder, agricultural nutrient inputs, medicines, thatch and famine foods. Villagers consider us to be their guardians in the forest, offering guidance and protection to them in an otherwise dangerous area.

Members of our community use the forest for the collection of medicinal plants that are used to provide free health assistance to our community and to people in other neighbouring villages.

Just as our breeds are unique because of the areas we graze them in, so the forests, *gauchar* and *oran* have evolved into particular kinds of pastoral based ecosystems because of

our long-term interaction with them. We are integral to the forests, *gauchar* and *oran*: we cannot survive without them and they will suffer without us.

We want to continue to graze our animals in forests, *gauchar* and *oran*, in a way that sustains the natural plant and animal ecology of these areas, maintains our diverse breeds, sustains our rich traditional knowledge.

## PRIOR INFORMED CONSENT & BENEFIT SHARING

Our animal genetic resources and our associated traditional knowledge about breeding and ethno-veterinary practices are collectively owned by the Raika.

We have customary laws that regulate decisions making in our communities. For issues that relate to all community members, we form a *samaj* (community) *panchayat* that is constituted by our elders who stretch from one to twenty four villages depending on the gravity and applicability of the decision. Our elders who constitute the community *panchayat* follow our customary laws and norms of decision making that have been followed for generations.

Our community *panchayat* should be engaged any time outside interests take decisions that may affect our

livelihoods or relate to our breeds and associated traditional knowledge. For example, before any of our access rights to customary grazing areas are altered we must be consulted. Also, where researchers or commercial interests want to access our animal genetic resources and / or associated traditional knowledge, we must be given all relevant information with which to take a decision and given time to discuss the issues within the community *panchayat* as our breed diversity and traditional knowledge are collectively held and their ownership does not vest in any single individual. In cases where we decide to grant access to our animal genetic resources or associated traditional knowledge, we have the right to negotiate a benefit sharing agreement that includes mutually agreed terms.

## WE ARE BEING EXCLUDED FROM CUSTOMARY GRAZING AREAS WITHOUT OUR PRIOR INFORMED CONSENT - AND BIODIVERSITY IS BEING LOST

Despite this incredible genetic diversity and associated traditional knowledge that we have developed, we remain mainly landless people and are highly dependent on our customary grazing rights over forest and communal lands. Traditionally we have grazed our animals in Rajasthan's forests and in the *gauchar* and *oran* over the monsoon (July-September). Our exclusion from the forests, and shrinkage of *gauchar* and *oran* severely threatens our entire existence and the co-evolved ecological system of these biodiversity rich areas that have been developed

through generations of complex interplay between livestock, livestock keepers and the local ecosystem.

### A. Forests

We have customarily grazed our livestock on a seasonal basis in Rajasthan's forests for centuries. The Kumbhalgarh Wildlife Sanctuary is a case in point. The Kumbhalgarh Wildlife Sanctuary is a 562 square kilometre range of reserved forest under the management of the Rajasthan State Forest Department.

We have been historically provided with grazing permits which have over the last few years been revoked and all grazing in the forest has been banned without due process by the Forest Department. We were neither consulted about the decision, nor compensated in any way.

We respect the need to conserve the Kumbhalgarh Sanctuary's biodiversity. Better than anyone, we understand the importance of the ecosystem because it has sustained our livestock and our communities just as we have contributed to its conservation. Our exclusion from the forest has deeply affected our livestock numbers and is having a negative effect on the forest ecosystem.

## B. Gauchar and oran

We have experienced the same fate regarding the shrinkage of *gauchar* (village communal grazing lands) *and oran* (sacred groves attached to temples). These areas have become increasingly diverted for other economic development projects. It is ironic that we - the very people who for centuries have been the custodians of biodiversity and whose traditional lifestyles have developed and sustained the biodiversity of the region - are now being denied access to it based on a limited understanding of the complex relationship between us, our livestock and the local ecosystem.

## C. The combined effect on our animal genetic resources and on the region's biological diversity

We are deeply concerned about the impacts that our exclusion from previously accessible communal areas for grazing our livestock is having on areas' biodiversity, our animal genetic resources and our future.

**Biodiversity:** Our exclusion from forested areas is changing the ecosystem and leading to a degraded ecology. The reduction in grazing is resulting in an excess of grass and foliage on the ground that is leading to an increase in the prevalence and severity of forest fires. The pits that are dug to inhibit the spread of forest fires are proving to be ineffective in combating this serious issue due to the dry grass that has begun to grow in these pits. The excess ground fall is leading to disequilibrium in termite numbers that can affect the health of the trees.

At the same time, we are unable to act as custodians of the forest, so illegal logging, poaching and crimes are being committed in areas that we once managed according to our customary laws. The continual work we undertook to eradicate harmful or invasive species has ceased, and with it precipitous increases in plants that are either harmful to animals or risk destabilizing the local ecology.

The reduction in available prey for wild predators has led to their encroaching on villages, causing conflict between communities and the wildlife. At the same time, we are unable to assist members of other communities who need to access the forest, which is reducing the ability of communities to benefit from the forests.

**Animal genetic resources:** due to the significantly decreased amount of grazing lands available to us, we have been forced to sell significant numbers of our livestock over the last 5 years. We are literally being forced to sell our livelihoods to feed ourselves. Our camel stocks have been hardest hit, suffering a 50% decrease in the last 10 years, and this drop represents a significant threat to the survival of the breed.

With the sale of our livestock goes our traditional knowledge. As our herds diminish, so does the transmission of breeding techniques, medicinal practices and ecological understanding of the areas we used to graze on. The potential loss of the important animal genetic resources that we have developed, in co-evolution with the Rajasthani ecology is significant for a world that is suffering from climate change and food shortages.

**Our future:** the continuing exclusion from areas for grazing raises serious doubts about the viability of our way of life. With it will disappear our livestock, our culture and the virtuous relationship between our herds and the Rajasthani landscapes we have sustained. We require grazing rights and a corresponding increase in the market for our products to continue to sustain our livelihoods and keep our unique breeds, including the camel.

Our children no longer want to carry on our traditional way of life because of the hardships associated with the lack of grazing but at the same time are returning frustrated from low paying jobs in cities where they went as unskilled labourers. We are caught in a no man's land of being unable to carry on their traditional occupations and unwilling to suffer the indignities of life as unskilled labourers.



## OUR RIGHTS UNDER INDIAN LAWS & POLICIES

### A. The Biological Diversity Act of 2002 and the Biological Diversity Rules of 2004

The Biological Diversity Act of 2002 in its efforts to fulfil India's commitments under the Convention on Biological Diversity provides for the conservation of biological diversity, sustainable use of its components and the fair and equitable sharing of benefits arising from the use of such biological diversity and associated traditional knowledge (TK). The Biological Diversity Act sets up the National Biodiversity Authority (NBA) and the Biological Diversity Rules of 2004 lists the functions of the NBA as including regulating access to biological resources and associated TK for commercial and research purposes. The NBA is also empowered to advise the Central Government on any matter relating to the conservation and sustainable use of biodiversity and associated TK and the fair and equitable sharing of benefits arising from the utilization of biological resources and associated TK. *The Biological Diversity Act among other things requires the Central Government under Section 36 to promote the conservation and sustainable use of biological diversity through in situ conservation and minimize the adverse effects on biological diversity of any project undertaken through environmental impact assessments that includes public participation.* The Central Government is tasked with ensuring respect and protection of associated TK of local communities in accordance with the recommendations of the NBA including registration of TK and other sui generis methods for its protection. *Under Sec 38 the Central Government is also required to preserve and protect those species that are on the verge of extinction.*

In order to ensure the effective fulfilment of the role of the NBA at a local level, local bodies such as the Panchayats or Municipalities are required under Sec 41 to set up Biodiversity Management Committees (BMCs) to promote conservation and sustainable use and documentation of biological diversity and associated TK. The NBA and the State Biodiversity Boards would consult with the BMCs while taking any decision relating to the use of biological resources and associated TK within the territorial jurisdiction of the BMC. Under Rule 22 (6) of the Biological Diversity Rules of 2004 the main function of the BMC is to prepare a Peoples Biodiversity Register in

consultation with the local people which shall contain comprehensive information on availability and knowledge of local biological resources and their associated TK. The Biological Diversity Act under Sec 21 envisages that the NBA will base its approval regarding any application for access to biological resources or associated TK on the whether a mutually agreed terms and fair and equitable benefit sharing has been negotiated with the local community that provides such resource or associated TK (benefit claimers according to Sec 2 (a) of the Biological Diversity Act). The local community or benefit claimers in question will be identified according to the Peoples Biodiversity Register under the territorial jurisdiction of the local BMC.

#### The Biological Diversity Act and Rules therefore provides certain rights to the Raika community:

- The right to consultation and public participation prior to any project that may affect the livelihoods of Raika, their animal breeds and associated TK;
- The right to conservation and sustainable use of our animal breeds;
- The right to give prior informed consent and negotiate mutually agreed terms when any Raika animal genetic resources or associated TK is accessed and share fairly and equitable in any benefits arising from the utilization of their animal genetic resources and associated TK;
- The right to a Peoples Biodiversity Register that will document Raika biological diversity and associated TK;
- The right to a BMC to advise the NBA on how the Raika biological resources and associated TK can be conserved and sustainably used; and
- The right to carry on the Raika traditional lifestyles which involves continued access to grazing lands in order to conserve the biological diversity of our breeds and associated TK.

## B. The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

The preamble of the Forest Rights Act in accordance with Art 8j of the Convention on Biological Diversity recognizes that the forest dwelling scheduled tribes and other traditional forest dwellers are integral to the survival of the forest ecosystem. The Forest Act seeks to address the long term insecurity of land tenure and of these communities and therefore recognizes the rights of forest dwelling tribes and other traditional forest dwellers, which include nomadic or settled pastoralists, on all forest lands.

### The Forest Rights Act therefore provides certain rights to the Raika community:

- The right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries (Section 3c)
- Community right of use or entitlements including grazing (both settled or transhumant) and traditional seasonal resource access, of nomadic or pastoralist communities (Section 3d)
- The rights in or over disputed lands under any nomenclature in any State where claims are disputed (Section 3f)
- The right to protect regenerate or conserve or manage any forestry resource which we have been traditionally protecting and conserving for sustainable use (Section 3i)
- The right of access to biodiversity and community right to intellectual property and TK related to biodiversity and traditional knowledge related to biodiversity and cultural diversity (Section 3k)
- The right to traditional rights customarily enjoyed by the Raika (Section 3l)

We acknowledge the limitation of these rights under Section 4 of the Act in cases where forests are designated as National Parks or Sanctuaries, but point out that the processes set out under Section 4(2) – such as ascertaining whether other reasonable options such as co-existence are not available - remain to be complied with.

## C. NATIONAL POLICY FOR FARMERS

The National Policy for Farmers (NPF – 2007) is an attempt to reorient agricultural policy to take a more holistic vision of agricultural production to include a focus on socio-economic wellbeing. Animal genetic resources and pastoralists are among the areas it focuses on to achieve *in situ* conservation according to the NBA.

The NPF acknowledges livestock keepers' inherent rights to continue to use and develop their own breeding stock and breeding practices and calls on the government to recognize these rights, acknowledge livestock keepers' contribution to the national economy, and adapt its policies and legal frameworks accordingly. As part of this effort, it underscores the need to document the local knowledge of pastoral communities about animal conservation, maintenance and breeding.

### To achieve these aims, the NPF calls for:

- Restoration of traditional grazing rights and camping rights in respect of forest areas and in those areas earmarked for grazing purpose in village common lands;
- Formalizing entitlements (including issue of permanent grazing cards) for traditional pastoralists/herders maintaining native animal breeds to enable free access to notified or demarcated grazing sites and migration routes;
- Conservation and expansion on grazing land and drinking water sources for livestock;
- Documentation of indigenous livestock breeds to recognize and protect the intellectual property rights of the local communities / individuals conserving these livestock breeds; and
- Involvement of pastoralists in all local natural resource management programs, including village forest committees and joint forest management.

## WE CALL ON THE NATIONAL BIODIVERSITY AUTHORITY

### We call on the National Biodiversity Authority to:

- Recognize our local breeds and associated traditional knowledge as set out in the Raika Biodiversity Register and to include it in the Peoples Biodiversity Register (under Rule 22(6) of the Biological Diversity Rules);
- Facilitate the setting up of Biodiversity Management Committees under the local bodies (Panchayats or Municipalities) where we live and to support these Committees in ensuring the conservation and sustainable use of our breed diversity and traditional knowledge (as per section 41 of the National Biodiversity Act);
- Strengthen in situ conservation of breeds of the Raika and include them in the BMC being initiated by the government (under sections 36 and 41 of the National Biodiversity Act).
- Advise the Central Government and coordinate the activities of the State Biodiversity Boards to protect the customary grazing rights of the Raika so as to safeguard our traditional lifestyles that ensure the conservation and sustainable use of the our breed diversity, associated traditional knowledge and the local ecosystem (under section 36 of the National Biodiversity Act).
- Ensure that our prior informed consent (according to customary law) is obtained before any decision are taken that affect our traditional way of life or access is granted to our breed diversity and associated traditional knowledge for research or for commercial purposes, and further ensure that we receive a fair and equitable share of the benefits arising from the utilization of our breeds and traditional knowledge according to mutually agreed terms (under section 21 of the national biodiversity Act);

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## WE COMMIT TO PROTECTING THE BIOLOGICAL DIVERSITY AND ASSOCIATED TRADITIONAL KNOWLEDGE

### We commit to protecting the biological diversity of the region, our animal genetic resources and associated traditional knowledge, by:

- Upholding our traditional roles as custodians of the forests and as sustainers of the co-evolved forest ecosystem of the region;
- Protecting the forest against fires by regulating the grass growth by grazing and by fighting forest fires when they break out;
- Sustaining the predator population in the forest through the customary offering of some of our livestock as prey;
- Continuing to increase forest growth through the customary manuring of the forest from the dung of our livestock;
- Ensuring strong tree growth by the customary pruning of the upper branches and twigs of trees by our camels;
- Grazing the fallen leaves on the forest floor thereby keeping the termite population in check;
- Combating illegal logging and poaching in the forest;
- Continuing our traditional rotational or seasonal grazing that facilitates forest growth;
- Eliminating invasive species in the forest;
- Promoting and sustaining the breed diversity of our livestock; and
- Preserving and practicing our traditional breeding and ethno-veterinary knowledge and innovations, and sustainable management of forest resources relevant to the protection of the co-evolved forest ecosystem of the region.

## OUR RIGHTS UNDER INTERNATIONAL LAW

We the Raika in our biocultural community protocol identify the following principles and rights based on international law, (that are further elaborated in Appendix II, namely:

### A. Principles

- We are creators of breeds and custodians of their animal genetic resources for food and agriculture;
- The Raika and the sustainable use of traditional breeds are highly dependent on the conservation of our ecosystem; and
- Our traditional breeds represent collective property, products of local knowledge and our cultural expression.

### B. Rights

We have the right to:

- Make breeding decisions and breed the breeds they maintain.
- Participate in policy formulation and implementation processes on animal genetic resources for food and agriculture.
- Receive appropriate training and capacity building and equal access to relevant services enabling and supporting us to raise livestock and to better process and market our products.

- Participate in the identification of research needs and research design with respect to our genetic resources, as is mandated by the principle of Prior Informed Consent.
- Effectively access information on issues related to our local breeds and livestock diversity.

We call on the Secretariat of the UN Convention on Biological Diversity, specifically under Article 8(j) of the Convention, to recognize our contribution to the conservation and sustainable use of biological diversity in the Rajasthan's forest ecosystem. We also call on the UN Food and Agriculture Organization to acknowledge the importance of our animal genetic resources and to recognize livestock keepers' rights.

### Our contact details

The Raika Samaj Panchayat  
c/o Lokhit Pashu-Palak Sansthan, Butibagh, Rajpura,  
Via Sadri 306702, Distt. Pali, India

### NOTE ABOUT THE PROCESS

This Biocultural Protocol was established and recorded by the Raika community around Sadri (District Pali, Rajasthan, India) from 8-13 June 2009. It was facilitated by Natural Justice, Lokhit Pashu-Palak Sansthan, and the League for Pastoral Peoples and Endogenous Livestock Development.

## APPENDIX I: RAIKA BIODIVERSITY REGISTER

Omitted. For more information contact LPPS.

## APPENDIX II: OUR RIGHTS UNDER INTERNATIONAL LAW

We the Raika in this Raika Biocultural Community Protocol identify the following principles and rights based on international law:

### **Principle 1: *The Raika are creators of breeds and custodians of their animal genetic resources for food and agriculture.***

Over the course of history, the Raika have managed and bred livestock, selected and used them, thus shaping them so they are well-adapted to our environment and its extremes. Keeping these breeds is a vital part of our culture and livelihoods. Yet these breeds and our livelihoods are under risk through loss of access to our traditional grazing lands. This has endangered our food security and our way of life. As recognised in the Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration on Animal Genetic Resources, livestock keeping communities are thus the creators and custodians of the breeds that they maintain. We have therefore earned certain custodianship rights over these breeds, including the right to decide how others use the genetic resources embodied in our breeds.

#### **Principle 1 is supported by:**

Point 9 of the Interlaken Declaration on Animal Genetic Resources recognizes *“that the genetic resources of animal species most critical to food security, sustainable livelihoods and human well-being are the result of both natural selection, and directed selection by smallholders, farmers, pastoralists and breeders, throughout the world, over generations”*.

Point 12 of the Interlaken Declaration on Animal Genetic Resources recognizes *“the enormous contribution that the local and indigenous communities and farmers, pastoralists and animal breeders of all regions of the world have made, and will continue to make for the sustainable use, development and conservation of animal genetic resources for food and agriculture”*.

Part I Point 10 of the Global Plan of Action for Animal Genetic Resources: *“all animal genetic resources for food and agriculture are the result of human intervention: they have been consciously selected and improved by pastoralists and*

*farmers since the origins of agriculture, and have co-evolved with economies, cultures, knowledge systems and societies. Unlike most wild biodiversity, domestic animal resources require continuous active human management, sensitive to their unique nature”*.

### **Principle 2: *The Raika and the sustainable use of traditional breeds are dependent on the conservation of our ecosystem.***

Our traditional breeds are developed through the interaction between our livestock, the Raika pastoralists and our natural environment. This natural environment is conserved, inter alia, through traditional practices of the Raika, and traditional breeds lose their specific characteristics once removed from this ecosystem. The Raika therefore have a right to access our natural environment, so as to ensure the sustainable use and conservation of our breeds and the environment.

#### **Principle 2 is supported by:**

Article 8 of the Convention on Biological Diversity: *“genetic resources should be conserved in the surroundings in which they have developed their distinct properties”*.

Article 10 (d) of the Convention on Biological Diversity demands that *“local populations are supported to develop and implement remedial action in degraded areas where biological diversity has been reduce”*.

Chapter 15 (5) (g) of Agenda 21: requires States to *“Take action where necessary for the conservation of biological diversity through the in situ conservation of ecosystems and natural habitats,... and the maintenance and recovery of viable populations of species in their natural surroundings.*

Principle 22 of the Rio Declaration: *“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development”*.

**Principle 3: *Our traditional breeds represent collective property, products of local knowledge and cultural expression of the Raika.***

While the Raika have collective custodianship rights over our breeds and the genetic traits of these breeds, it is crucial that these rights are supported and promoted by the government. Our government must therefore respect, preserve and maintain the knowledge, innovations and practices of the Raika embodying lifestyles relevant for sustainable use and conservation of livestock diversity.

**Principle 3 is supported by:**

Article 8 (j) of the Convention on Biological Diversity: *“Contracting parties shall...subject to national legislation, respect, preserve and maintain knowledge innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity...”*

Article 10 (c) of the Convention on Biological Diversity: *“customary use of biological resources is protected and encouraged in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements”...*

Chapter 15 (4) (g) of Agenda 21 calls on governments at the appropriate level *“to recognize and foster the traditional methods and knowledge of indigenous people and their communities... relevant to the conservation of biological diversity and the sustainable use of biological resources”.*

Chapter 15 (5) (e) of Agenda 21: Governments should *“subject to national legislation, take action to respect, record, protect and promote the wider application of the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles for the conservation of biological diversity and the sustainable use of biological resources ...”* Based on these principles articulated and implicit in existing legal instruments and international agreements, the Raika who belong to a traditional livestock keeping community and adhere to ecological principles of animal production affirm the following rights:

1. The Raika have the right to make breeding decisions and breed the breeds they maintain.

**This right is supported by:**

Article 10 (c) of the Convention on Biological Diversity: obliges Parties to *“protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements”.*

2. The Raika shall have the right to participate in policy formulation and implementation processes on animal genetic resources for food and agriculture.

**This right is supported by:**

Article 8 (j) of the Convention on Biological Diversity: obliges Parties to *“promote the wider application of the knowledge, innovations and practices of indigenous and local communities with their approval and involvement”.*

Article 14(1) (a) of the Convention on Biological Diversity: obliges Parties to *“introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and where appropriate allow for public participation in such procedures”.*

Article 3 (a) of the United Nations Convention on Desertification: compels Parties to *“ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels”.*

Article 10(2) (f) of the United Nations Convention on Desertification: obliges the *“effective participation at the local, national and regional levels of non- governmental organizations and local populations, both women and men, particularly resource users, including farmers and pastoralists and their representative organizations, in policy planning, decision-making, and implementation and review of national action programmes”.*

3. The Raika shall have the right to appropriate training and capacity building and equal access to relevant services enabling and supporting us to raise livestock and to better process and market our products.

This right is supported by:

Article 12 (a) of the Convention on Biological Diversity obliges Parties to *'establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components'*

Article 11 of the Convention on Biological Diversity obliges Parties to *'adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity'*

Article 19 (1) (e) of the United Nations Convention on Desertification obliges parties to promote capacity building *"by adapting, where necessary, relevant environmentally sound technology and traditional methods of agriculture and pastoralism to modern socio-economic conditions"*.

Strategic Priority 6 of the Global Plan of Action for Animal Genetic Resources requests governments to *"Support indigenous and local livestock systems of importance to animal genetic resources, including through the removal of factors contributing to genetic erosion. Support may include the provision of veterinary and extension services, delivery of microcredit for women in rural areas, appropriate access to natural resources and to the market, resolving land tenure issues, the recognition of cultural practices and values, and adding value to their specialist products."*

4. The Raika shall have the right to participate in the identification of research needs and research design with respect to our genetic resources, as is mandated by the principle of Prior Informed Consent.

This right is supported by:

Article 8 (j) of the Convention on Biological Diversity (see above) and Article 10 (d) which says Parties shall *"support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced"*. Chapter 15(4) (g) of Agenda 21 require states to *"Recognize and foster the traditional methods and the knowledge of indigenous people and their communities ... and ensure the opportunity for the participation of those groups in the economic and commercial benefits derived from the use of such traditional methods and knowledge"*.

5. The Raika shall have the right to effectively access information on issues related to our local breeds and livestock diversity.

This right is supported by:

Article 13 (a) of the Convention on Biological Diversity: obliges Parties to *"Promote and encourage understanding of the importance of and the measures required for the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes"*.







UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP)  
Division of Environmental Law and Conventions (DELIC).

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## NATURAL JUSTICE

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### LAWYERS FOR COMMUNITIES AND THE ENVIRONMENT

Natural Justice is a South Africa-based NGO facilitating the legal empowerment of indigenous peoples and local communities.

Natural Justice takes its name from the legal principle that people should be involved in decisions that affect them. Accordingly, we assist communities to engage with legal frameworks to secure environmental and social justice.

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