

Community Protocols for Environmental Sustainability:

A Guide for Policymakers



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Acknowledgements

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Foreword



I am pleased to introduce this guide on Community Protocols for Environmental Sustainability that policymakers and the wider stakeholders can use while interacting with indigenous peoples and their communities and other local communities (ILCs) in their efforts to manage protected areas or conserve and manage the broader environment. This guide also contains 5 case studies representing Asia, the Pacific, Latin America and Africa.

Scientists and advocates of ILCs agree that ILCs who are custodians of the environment have contributed to conservation and sustainable use of some of the remaining ecosystems found around the world today. It is in this context that we can ask: how did they manage this? One answer to this question can be attributed to their worldviews, beliefs, practices and procedures associated with the environment. Their centuries-old views, beliefs, practices and procedures have been developed into community protocols and applied to many themes including conservation and sustainable use; administration of relationships between and among themselves; interactions with outsiders; and interactions with their ecosystems. While most community protocols are in unwritten form, some ILCs are beginning to document them. Furthermore and despite their significant role in some of the areas mentioned above, community protocols have always existed in the informal setting until 2010 when they were recognized formally with the adoption of the Nagoya Protocol on Access and Benefit Sharing under the Convention on Biological Diversity.

You will read in this guide of the potential role community protocols can play in environmental sustainability. The Division of Environmental Law and Conventions (DELIC) of UNEP has been working with various partners to further elaborate on this new concept and enhance understanding among numerous stakeholders who can incorporate this useful concept in environmental legal and policy frameworks. This initiative forms part of the bigger work of UNEP on environmental law and governance and ecosystem management. Community protocols are perceived to be an emerging concept in environmental law and policy and in this regard this small but important work also contributes to UNEP's work on the progressive development of environmental law.

UNEP is indebted to the Government of Spain for providing the funds under the Spain-UNEP LifeWeb Partnership which has made this work possible. It is also indebted to ILCs who have contributed directly or indirectly to the development of the guide, case studies and the common underlying principles of community protocols. UNEP also acknowledges the work of its partner, EDO NSW, for the tireless effort invested in developing the guide and other materials on community protocols.

While this guide may not provide all the solutions to challenges faced in environmental conservation and sustainability and by ILCs, it intends to propose one useful approach that policymakers and interested stakeholders can use. I am sure this guide will serve as a valuable resource in your work.

A handwritten signature in black ink, appearing to read 'Bakary Kante'.

Bakary Kante

Director

Division of Environmental Law and Conventions, UNEP

Executive summary

This guide has been written to help policymakers and other stakeholders understand what community protocols are, why they are important, and how they can support their development and recognition within formal environmental legal and policy frameworks. It is also written for all interested in learning about community protocols, including: indigenous peoples and their communities and other local communities (ILCs), non-governmental organisations (NGOs), researchers, industry, and those working in government at the local, national and international levels.

Community protocols are an emerging concept in international environmental law and policy. The term encompasses a broad range of practices and procedures, both written and unwritten, developed by ILCs in relation to their traditional knowledge (TK), territories, and natural and other resources. These practices and procedures cover a range of matters, including how ILCs expect external actors to engage with them.

The documentation, development and use of community protocols have a range of potential benefits, including:

- conservation and sustainable use of biodiversity in both protected areas and beyond;
- protection of TK;
- regulating access to the traditional territories, natural and other resources and TK of ILCs;
- acting as an interface between customary law and formal legal and policy frameworks;
- education, capacity building and improved participation; and
- clarification of expectations and improved relationships between ILCs and external actors.

Community Protocols also have a range of broader benefits in a number of policy areas, including biodiversity, natural resource management, climate change, human rights, and planning and development.

Discussion is divided into five chapters:

Chapter 1 provides an introduction to community protocols. Discussion around the concept of community protocols has developed in the context of international frameworks seeking to protect ILCs and their TK, resources and culture. In particular, as part of the negotiations for the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biodiversity* (Nagoya Protocol). Community protocols document the customs, procedures and practices of ILCs. There often tends to be a trigger or an issue to which the community seeks respond, through the documentation and development of a community protocol. In documenting and developing community protocols, ILCs go through a community-led process of defining and working towards future plans according to local values and priorities, drawing on the strengths of customary laws and practices. This chapter also provides a discussion of the potential benefits of the documentation, development and use of community protocols.

Chapter 2 sets out five case studies as examples of the development and use of community protocols around the world in protected areas and areas conserved and managed by ILCs.

Chapter 3 examines some of the common underlying principles of community protocols, based on the five case studies. These principles include:

- authenticity, diversity and locality;
- respect, recognition and good faith;
- full and effective participation;
- collective custodianship;
- reciprocity and distributive justice;
- flexibility and responsiveness;
- equilibrium; and
- duality.

These principles may be useful in the documentation and development of new community protocols. They may also be useful for the development of guiding principles in a range of policy areas. It is likely that the common underlying principles of community protocols will be refined and developed over time, as the concept of community protocols and the knowledge around them continues to evolve.

Chapter 4 provides an overview of some of the relevant international principles, obligations and protocols relevant to community protocols, focussing on the most relevant hard law instruments (*the Convention on Biological Diversity (CBD)* and its Nagoya Protocol, and the *ILO Indigenous and Tribal Peoples Convention*), soft law instruments, as well as general principles of international law.

Currently, community protocols are explicitly recognised in the Nagoya Protocol to the CBD. Under Article 12.3(a), State Parties are encouraged to “endeavour to support” the development by ILCs of community protocols in relation to access to TK associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilisation of such knowledge. Community protocols are also indirectly recognised in certain other international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (for example, its reference to “procedures”: Articles 18, 30 and 31). To be fully effective, and to maximise their potential benefits, community protocols should be recognised within additional legal and policy frameworks at the national, regional and international levels.

Chapter 5 presents ideas of how community protocols can be recognised within local, national and regional legal and policy frameworks, such as:

- protected areas management;
- national access and benefit-sharing regimes under the CBD and its Nagoya Protocol;
- TK databases and registers;
- payment for ecosystem services;
- Reducing Emissions from Deforestation and Forest Degradation (REDD+ schemes);
- environmental development and planning assessment and approval processes; and
- strategies and action plans.

Other initiatives may also benefit from recognising and drawing on community protocols; this is an area for further research.

Acronyms and defined terms

ABS	Access and Benefit Sharing
Akwé: Kon Guidelines	Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities
Bushbuckridge Protocol	Bio-Cultural Community Protocol of the Traditional Health Practitioners of Bushbuckridge
CBD	Convention on Biological Diversity
CMPA	Collaboratively Managed Protected Area
FAO	Food and Agricultural Organization of the United Nations
FPIC	Free, Prior and Informed Consent
GR	Genetic Resources
IPBES	Intergovernmental Platform on Biodiversity and Ecosystem Services
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
ICCAs	Indigenous and Community Conserved Areas
IIED	International Institute for Environment and Development
ILCs	Indigenous peoples and their communities and other local communities
ILO	International Labour Organisation
IRABS	International Regime on Access and Benefit Sharing
Lingayat Protocol	Lingayat Bio-cultural Community Protocol
LMMA	Locally Managed Marine Area
MAT	Mutually Agreed Terms
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biodiversity

Navakavu LMMA	Navakavu Locally Managed Marine Area framework
NGO	Non-Governmental Organisation
PES	Payment for Ecosystem Services
PoWPA	Program of Work on Protected Areas, under the CBD
Potato Park ICA	Inter-Community Agreement for Equitable Benefit-Sharing in the Potato Park
REDD+	Global policy framework for Reducing Emissions from Deforestation and Degradation, including rewards for enhancing carbon storage through forest restoration, rehabilitation and afforestation/ reforestation
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
Tkarihwaié:ri Code	Tkarihwaié:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UN-REDD	United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
World Heritage Convention	Convention for the Protection of the World Cultural Heritage
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WIPO Intergovernmental Committee	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization
WTO	World Trade Organisation

Glossary of key terms

Bio-cultural diversity

“Bio-cultural diversity comprises the diversity of life in all of its manifestations – biological, cultural and linguistic – which are interrelated (and likely co-evolved) within a complex socio-ecological adaptive system” (Maffi and Woodley, 2010).

Biological diversity

The variability among living organisms from all sources, including among other things terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems (CBD, Article 2).

Collaboratively managed protected areas

“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.” (Kothari, 2006).

Community protocols

Community protocols are instruments embodying protocols, procedures, rules and practices, existing in both written and unwritten form, developed and used by ILCs in numerous contexts, such as interactions with their ecosystems, interactions within and between ILCs themselves, and in their interactions with external actors. Some tend to use a subset of the term which they refer to as bio-cultural community protocols (BCPs).

Customary laws

“Customary ‘laws’ include customary worldviews, principles or values, rules and codes of conduct, and established practices. They are enforced by community institutions, and can have sanctions attached. They are derived from natural resource use – some practices and beliefs acquire the force of law. They are locally recognised, orally held, adaptable and evolving.” (Swiderska et al., 2009).

External actors

Those outside ILCs, including researchers, industry, the media, government agencies, NGOs, and tourists.

Indigenous and community conserved areas

“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” (Borrini-Feyerabend, 2008).

Indigenous peoples and their communities and other local communities

Indigenous peoples and their communities and other local communities are two distinct groups, usually defined by a number of factors, including history. “Indigenous peoples” usually refers to the original peoples of a place, while “local communities” usually refers to communities other than original peoples that have migrated and settled in a place. Both dwell in a certain geographical location and may possess the same knowledge, practices, norms, values, etc. and at the same time contribute to various aspects of social, economic and ecological sectors. The term indigenous peoples and their communities and other local communities is used to be inclusive of the two groups.

Payment for Ecosystem Services

“A voluntary transaction in which a well-defined environmental service (ES) or 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)” (Wunder, 2007).

Policymakers

Those involved in the development of policy at all levels of government: local, national, regional and international.

Protected area

A “geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives” (CBD, Article 2). The IUCN adopts a broader definition: “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” (IUCN, 1994).

REDD schemes

Schemes under REDD, REDD+, and UN-REDD initiatives. “REDD” refers to the Reducing Emissions from Deforestation and Forest Degradation framework, which is the subject of ongoing international negotiations under the auspices of the UNFCCC. The scope of the framework has broadened over time, from focus solely on reducing emissions from deforestation (RED), to reducing emissions from deforestation and forest degradation (REDD), to REDD+, which also covers carbon sequestration through forest conservation, sustainable management, and afforestation and reforestation. REDD schemes use market mechanisms and financial incentives to channel payments from developed countries to developing countries, in exchange for reductions in forest-related carbon emissions in developing countries.

State Parties

States which have ratified or acceded to an international agreement, and are therefore bound by its provisions. Different terms are used in some international agreements, such as “contracting parties”.

***Sui generis* systems**

Sui generis is a Latin term meaning “of its own kind”. A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue, such as the protection of traditional knowledge, access and benefit sharing (ABS), or plant variety protection. For example, prior to the Nagoya Protocol, *sui generis* systems on the protection of TK and ABS were developed in the absence of an international framework. After the introduction of the Nagoya Protocol, national regimes on ABS are being developed under the Nagoya Protocol at the national level. *Sui generis* systems can now coexist in parallel or as part national regimes developed to meet obligations under the Nagoya Protocol.

Traditional knowledge

The term “traditional knowledge” (TK) refers to:

“the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry” (CBD, Undated).

About this guide

Purpose

This guide has been written to help policymakers and other stakeholders understand what community protocols are, why they are important, and how they can support their development and recognition within formal environmental legal and policy frameworks. It is also written for all interested in learning about community protocols, including: indigenous peoples and their communities and other local communities (ILCs), non-governmental organisations (NGOs), researchers, industry and those working in government at the local, national and international levels. It is hoped that this guide will also form the basis for further research about community protocols, and encourage discussions about the relevance of community protocols within a range of legal and policy initiatives.

Background and methodology

This guide forms part of United Nations Environment Programme (UNEP) work on community protocols, developed in recognition of the need to provide policymakers and other stakeholders with guidance on using community protocols, particularly as a tool for biodiversity conservation and sustainable use, including as part of protected areas management. The project has involved a desk-top study to develop and analyse case studies, draw out common underlying principles, and produce this guidance document on community protocols, as well as an information brochure outlining the underlying principles.

A desk-top research methodology was used, involving a literature review and desk study of:

- protocols developed and being developed by communities;
- existing literature on community protocols;
- relevant international and domestic legal and policy frameworks; and
- other initiatives relevant to community protocols.

From the literature review, community initiatives from different regions were selected to form the basis of five case studies. These case studies draw on work conducted by other organisations and communities, and in particular:

- the Bushbuckridge Community and Natural Justice;
- the San Juan communities and ASOCASAN, Instituto de Investigaciones Ambientales del Pacífico, the Programa de las Naciones Unidas para el Medio Ambiente of the UNEP Regional Office for Latin America and the Caribbean (PNUMA), Natural Justice: Lawyers for Communities and the Environment (Natural Justice), John Van Neumann Environmental Research Institute of the Pacific;
- the Potato Park communities, Asociación ANDES and IIED Colombia;
- the Lingayat Community, the League for Pastoral Peoples and Endogenous Livestock Development (LPPELD), SEVA; and
- the Navakavu Yavusa Indigenous community, the University of the South Pacific, and The Nature Conservancy.

Where possible, completed case studies were circulated to the supporting organisations for review. Comments on the case studies were received from Asociación ANDES, Natural Justice, and The Nature Conservancy.

CHAPTER 1

An introduction to community protocols



1.1 Background

Community protocols are an emerging concept in environmental law and policy. The term “community protocols” was introduced into the text of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Nagoya Protocol) as a measure for implementing some of its provisions, as proposed by the African Group of negotiators, and is closely linked to the work of the *Convention on Biological Diversity* (CBD). These developments originated in international efforts by ILCs to establish processes for access and benefit-sharing (ABS), including processes for free, prior and informed consent (FPIC), and to seek recognition of customary laws, including national ABS regimes for the protection of TK. However, although community protocols first entered into international negotiations in the context of ABS under the auspices of the CBD and its Nagoya Protocol, their relevance extends beyond ABS frameworks. Community protocols can also be useful in the broader environmental management and conservation context, including protected areas management. The concept of community protocols is also developing within ILCs to differing degrees around the world, for example being more popular at this stage in Africa than in Asia. Community protocols have long been developed and used by ILCs to guide their interactions within their communities, between communities, with external actors, and with the environment. The term “community protocols” includes a wide range of protocols, procedures, rules and practices developed and used within ILCs, whether or not they are named as such. Use of the term has grown in popularity amongst ILCs just prior to and after the adoption of the Nagoya Protocol, however many ILCs have focused on processes for

FPIC or recognition of customary laws and continue to do so. This reflects the fact that community protocols can go by different names. For example, some community protocols are referred to as “bio-cultural community protocols”, or “BCPs” (Bavikatte, and Jonas 2009). Community protocols have also been referred to as “community bio-cultural protocols” (ANDES, The Potato Park Communities, IIED 2012). These two latter terms are a subset of community protocols used to illustrate the inherent links between biological and cultural diversity. For the purposes of this publication, the term “community protocols” includes relevant written and unwritten protocols, procedures, rules and practices used within ILCs, whether referred to as “community protocols” or by another name. In recent years, NGOs and other supporting organisations have been working with ILCs to develop, document and use community protocols. As part of this process, some ILCs have chosen to record their community protocols in writing. There are now documented community protocols from all over the world (UNEP, Undated; Natural Justice, Undated; Natural Justice, 2012). This work has fed in to a growing literature on community protocols, including published examples of documented community protocols. International organisations have also begun to make links between their work and community protocols (see for example Timmermans, 2001). Already, some formal law and policy frameworks draw on and include community protocols. For example, certain protected areas governance frameworks draw on existing community protocols, such as the Navakavu Locally Managed Marine Area Framework (Navakavu LMMA) discussed as a case study in this guide. Also within the Asian region, communities have been developing processes for FPIC rather than community protocols per se, however these processes also draw on community protocols.

1.2 What are community protocols?

Community protocols encompass a broad range of protocols, procedures, rules and practices, both written and unwritten, developed by ILCs in relation to their traditional knowledge (TK), territories, and natural and other resources. They draw on the rich diversity of customary laws and practices, agreements and traditional ways of life which have existed in practice in communities for centuries. These protocols cover a range of matters, including how ILCs expect external actors to engage with them, ILCs' engagement with the environment, and what customary obligations may arise for external actors accessing and using TK. Although a growing number of community protocols are in writing, it is up to ILCs whether or not they choose to document the practices and procedures that constitute undocumented community protocols. External actors must respect the wishes of ILCs about whether or not to document protocols. Documenting protocols facilitates their use as a communications tool by ILCs within their community, between ILCs, and in their dealings with external actors. However, ILCs may choose not to document their protocols in light of concerns about recording details about GR and associated TK. The term "community protocols" does and should continue to represent both documented and undocumented protocols. Enabling organisations (such as NGOs or university partners) working with ILCs to document and develop protocols should ensure that they identify any undocumented protocols as part of their engagement with the community. Exercising caution in this way should be an obligation on the part of the enabling organisation or individual engaging with the ILCs. Documented community protocols may include any matters the community wishes to record, such as:

- descriptions of ILCs' ways of life, belief systems, cosmologies, traditional structures and customary laws and traditional ownership, occupation or use of natural and other resources;
- community priorities and concerns;
- statement of how the community will respond to the issue which has given rise to the community protocol process, and how the community envisions third parties will respond to that issue, including processes for prior and informed consent;
- principles and procedures for management and governance of traditional territories, natural and other resources, and TK by ILCs;
- statement of rights and obligations, including obligations for potential users of TK;
- summary of relevant customary, national and international laws, policies and institutions which articulate, support and otherwise affect their rights;
- expectations the community has about the way outsiders will interact with the community, for example procedures and conditions for other actors such as governmental institutions, conservation agencies, private sector representatives and researchers to follow; and
- relevant national or international laws, policies and instruments.

This is not an exhaustive list – community protocols may include a wide range of other features depending on the requirements of the particular community or communities. There is a distinction between community protocols, and institutional protocols or guidelines. Community protocols are community-driven, 'bottom-up' processes which focus on the desires of the community. Institutional protocols, although including consultation with communities, are generally

more 'top-down', and approached from the perspective of third parties approaching communities. For example, in Australia a range of community protocols have been initiated by government agencies on matters including Aboriginal and Torres Strait Islander land and sea management and for working with Aboriginal and Torres Strait Islander artists, arts workers and communities (see for example FATSILC, 2004, and list at UNEP, Undated). However, the development and use of institutional protocols can complement the development and use of community protocols. Community protocols vary in scope: they are developed by diverse ILCs, in response to a range of issues. Community protocols in turn reflect this diversity of ILCs and their traditional territories, both cultural and biological. Community protocols may be developed by a certain group of rights holders within the community, such as traditional healers, or they may be broader, covering a whole community or even a whole people, and be inclusive of different groups and interests. For example, different communities in the Potato Park, Peru worked together to develop a common community protocol (ANDES, the Potato Park Communities, and IIED, 2012 and 2011). Community protocols may also be inter-linked with other community protocols. For example, the Aguaruna of Peru have proposed that a national *sui generis* law on TK should be complemented by a network of protocols amongst communities to establish the process for engaging with them. This was based on their experience with negotiations on ABS and TK in 1994 and 1995 (IIED, 2012). Some of the issues which have led to the documentation, development and use of community protocols by ILCs are discussed in the next section.

1.3 Why are communities documenting protocols?

A key reason that ILCs are documenting protocols is to seek greater protection for their TK, traditional territories (including lands and waters) and other natural resources. The documentation of community protocols provides a clearer avenue for them to serve as an interface between ILCs, external actors, and a broad range of initiatives at the national and international levels, on the communities' own terms. The need for such an interface based on community perspectives addresses the historical injustices and lack of recognition of and respect for the rights of ILCs. Community protocols can assist in creating a level playing field from which ILCs can negotiate on their own terms and in an empowered way. Although ILCs have practices and procedures for dealing with outsiders, a globalised world has increased the pressures on them as an increasing number of external actors seek to engage with them over various matters including access to their territories, natural and other resources, and TK. ILCs also face a wide range of other pressures, from climate change to loss of access to traditional territories. ILCs use community protocols to respond to a range of issues (Argumedo, cited in IIED, 2012). These motivations can be defensive, proactive, or both (Natural Justice, 2012). Defensive, or responsive, reasons for developing a protocol may include responding to an existing, likely or perceived threat or issue affecting the community. For example, a community in Lamu, Kenya is currently working to develop a community protocol in response to a proposed infrastructure and port development in Lamu. Lamu communities are concerned about the potential impacts of the development on their local industries, the environment, and their way of life ("Save Lamu", Undated). Proactive or aspirational motivations also lead to

the development and use of community protocols. Communities use the process of developing a protocol as an opportunity to reflect on their development goals, to plan, and to build an understanding of rights and responsibilities within the community. Building this understanding often involves a revitalisation of customary laws and practices as communities set out clear rights and responsibilities under both customary and formal systems. Communities are currently documenting and using protocols as part of efforts to, for example:

- protect and revitalise cultural traditions and TK;
- promote conservation and customary sustainable use of natural resources, including medicinal plants and traditional breeds;
- seek recognition and protection of ILCs' genetic resources (GR) and associated TK;
- improve access to traditional territories to continue traditional practices;
- regulate access and benefit sharing of community resources and associated TK, both within the community and for third parties;
- repatriate genetic and biological resources associated with TK from gene banks;
- highlight community concerns about extractive industries and development projects;
- call for greater recognition of ethical natural resource extraction techniques and sustainable use;
- regulate the activities of third parties, such as commercial and non-commercial researchers, and the media;
- regulate the sharing of benefits associated with TK; and
- ensure FPIC to access traditional

territories, natural and other resources, or TK.

1.4 Process for developing community protocols

The development of a community protocol is a community-driven, 'bottom-up' process. The process is collaborative and inclusive, involving consultation with different members within the community, as well as between communities. A partnering organisation, such as an NGO, often works with the ILC to provide support. For example, the development of the Navakavu LMMA took place over a 10-year period in partnership with external governmental, NGO and academic partners. The focus of community protocols is on "process" rather than formal codification. The development of a community protocol starts an ongoing process within the community, and the protocol itself may evolve over time to reflect that process. Developing a community protocol usually takes place over a number of years, through an ongoing consultative process between the community, any supporting organisations, and any other relevant actors. For example, the Inter-Community Agreement of the Potato Park Communities in Peru (Potato Park ICA) was developed over a period of two to three years. Actual documentation and negotiation took 15 months. The process of developing a community protocol typically involves identifying, discussing and outlining:

- a description of the community developing the protocol;
- the geographical scope of the protocol;
- expectations for the protocol;
- the main issues or concerns to be dealt with by the protocol;
- expectations and obligations for external actors, including identifying processes

for ABS, FPIC and the establishment of mutually agreed terms (MAT);

- community resources and associated TK;
- core cultural, spiritual and ecological values;
- relevant customary laws and practices;
- governance systems and decision-making processes;
- community development plans;
- relevant international and national principles, laws, policies and initiatives; and
- any other relevant matters.

These matters are often set out in a written document, to facilitate communication with external actors. However communities may also choose a non-written method of outlining the matters to be covered by their protocol (Natural Justice, 2012). For more information on the development of community protocols, see the Toolkit developed by Natural Justice (Natural Justice, 2012).

1.5 Benefits and importance

The process of documenting, developing and using community protocols can see a range of benefits at the local, national, regional and international levels if appropriate processes and procedures are respected. We discuss some key benefits in this section. This is not an exhaustive list of benefits, and it is likely that further benefits of using community protocols will come to light as more work is done in this area. In addition to the benefits discussed in this section, some benefits of community protocols are specific to the particular policy initiatives within which they may be used. These are discussed in Chapter 5. For example, in relation to protected areas management, community

protocols can be used to promote dialogue between ILCs and other actors involved in management of the protected area.

Conservation and sustainable use of biodiversity in both protected areas and beyond

ILCs play an important role in biodiversity conservation and sustainable use, as recognised in the preamble of the CBD and through the substantial work under the CBD on Articles 8(j) and 10(c). The significant contribution that TK can make to sustainable development is also recognised in the Tkarihwaié:ri Code (Tkarihwaié:ri Code, Foreword):

Most indigenous and local communities inhabit areas where the vast majority of the world's genetic resources are found. Many of them have cultivated and used biological resources in a sustainable way for thousands of years. Some of their practices have been proven to enhance and promote biodiversity at the local level and aid in maintaining healthy ecosystems. However, the contribution of indigenous and local communities to the conservation and sustainable use of biological diversity goes far beyond their role as natural resource managers. Their knowledge, innovations and practices provide valuable information to the global community and can be useful for biodiversity policies. Furthermore, as on-site communities with extensive knowledge of local environments, indigenous and local communities are most directly involved with conservation and sustainable use.

Community protocols can help to conserve and promote the sustainable use of biodiversity by ILCs and other actors under a number of frameworks. Some protected areas governance frameworks already draw on existing community protocols. For example, the Navakavu LMMA draws on the Navakavu Yavusa community's practices in relation to customary no-take zones and customary decision-making concerning tribal land and the coastal zone. The practice of keeping a portion of a fishing ground closed off is a customary practice used by elders for many generations. The establishment of the Navakavu LMMA has revived and

developed this practice, which has seen a positive change in fish stock, increase in abundance and size of fish and invertebrates, and spillover effect to other marine areas (van Beukering et al., 2007). The Navakavu LMMA has also affected members of the Navakavu Yavusa community in a positive way by increasing fish stocks, improving food supply and providing a continued income source (van Beukering et al., 2007). Many community protocols also seek to protect biological and cultural diversity, assisting with ecosystem management. The significant contribution of ILCs and farmers to the conservation and development of plant genetic resources has already been recognised by the international community, such as under the *International Treaty on Plant Genetic Resources for Food and Agriculture* (TPGRFA) (Preamble and Article 9) (Argumedo et al, 2011). Community protocols can act as an interface between ILCs and external actors, so that ILCs can choose to share their TK about ecosystems management. For example, the Lingayat local community, a forest-dwelling community of the Bargur forest range of Tamil Nadu in southern India, seek to participate in the conservation and sustainable use of biodiversity in their local area through their community protocol (Lingayat Community, 2009). They maintain a vital role in forest management and conservation outcomes through land management practices such as noxious weed control and protecting native grasses whilst promoting genetic diversity of their cattle and buffalo stock.

Protection of traditional knowledge

The documentation, development and use of community protocols, including the customary laws and practices they reflect, “can ... be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of ILCs” (WIPO, 2013). This is relevant for the protection of TK

and GR. Despite the increasing interest in this area, national and regional ABS regimes, and other law reform initiatives, TK can remain largely unprotected outside of customary systems. International initiatives such as the Nagoya Protocol, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the expanded mandate of the World Intellectual Property Organization (WIPO), and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO Intergovernmental Committee), discussed in Chapter 4, have established the foundations for improved protection in the future (Tobin, 2013). National ABS regimes for the protection of TK and GR developed at the national and regional levels and other law reform processes are also beginning to improve protection. However, one of the key challenges in effectively protecting TK is finding ways to recognise customary law within formal legal frameworks without resorting to codification. Codification of customary law threatens its flexibility, continuity and legitimacy (Tobin, 2013). Community protocols provide a means to recognise customary law within formal frameworks, and highlight obligations arising from customary laws for external actors, in a way that allows the protocols to continue to develop and evolve over time.

Regulating access to the traditional territories, natural and other resources and TK of ILCs

Community protocols provide a possible means of regulating access to traditional territories, natural and other resources as well as associated TK. In their protocols, ILCs can specify the terms upon which they wish to engage with external actors, and their requirements for any ABS processes such as FPIC and MAT. For example, the San Juan Protocol (see Appendix) provides

a framework for improved dialogue and understanding amongst decision makers of the rights of San Juan communities to the customary management and use of natural resources in their territory. The San Juan Protocol is designed to be used as a first step in any consultation process regarding mining and forestry developments that impact on the use and enjoyment of the San Juan communities' traditional territories in accordance with their recognised traditional practices.

Clarification of expectations and improved relationships

Community protocols can assist in clarifying expectations and improving relationships: within an ILC, between ILCs, and between ILCs and external actors. This is particularly so in the case of documented community protocols, which articulate relevant information, such as customary authorities and FPIC requirements, to other stakeholders in an accessible manner. For example, the Bushbuckridge Protocol (see Appendix) has improved dialogue and relationships with government, academia and bio-prospectors by setting out clear procedures for third party interactions.

Interface between customary law and formal legal and policy frameworks

A major potential benefit of the documentation, use and recognition of community protocols is their ability to bridge customary law and formal legal and policy frameworks and create a level playing field for ILCs. Community protocols serve as an interface between local communities and national and international frameworks. They provide a practical way for communities to identify and assert their rights under national and international laws and policies. They also offer practical insights to policymakers seeking to implement international principles

and protocols that require action at the national level. There is a trend towards building collaborative mechanisms between national and community legal regimes, decision-making authorities and enforcement mechanisms (Tobin, 2013). Community protocols are one such collaborative mechanism. Many community protocols highlight particular rights or obligations they would like to see strengthened within national legal and policy frameworks. For example, the Lingayat Bio-cultural Community Protocol (Lingayat Protocol) calls on the National Biodiversity Authority in India to take specific steps under provisions of the National Biodiversity Act to protect their customary grazing rights, local breeds of cattle and associated TK, and to ensure FPIC is obtained (Lingayat Community, 2009). In addition to building links between national and community systems, community protocols also acts as an interface between ILCs and international institutions. Community protocols can complement efforts to implement the aims, principles and obligations across a range of international instruments. For example, the Potato Park ICA includes articles from human rights law, the right to food, the Food and Agricultural Organization of the United Nations (FAO) International Treaty, the CBD, and the Nagoya Protocol, and assists in the local implementation of these conventions (IIED, 2012). The international legal and policy setting for community protocols is discussed in Chapter 4.

Education, capacity building and improved participation

The process of developing a community protocol involves ILCs identifying relevant rights and obligations under national and international frameworks. This builds the knowledge of these rights in the community, and in turn their capacity to participate in these frameworks, to drive

the implementation of international and national laws, and to exercise their rights. The potential of community protocols to educate and build the capacity of ILCs and other stakeholders in this way is important, particularly where they are not aware of their rights. For example, many ILCs are not aware of the laws that aim to protect their rights in relation to TK, even in countries which have introduced national legislation (SEARICE, 2002). Although many international instruments recognise certain rights relevant to communities, how the local communities (or individuals) can actually participate and exert those rights is often not clearly defined, or not defined at all. For example, some of the challenges communities face in exercising rights over their traditional medicinal knowledge and granting access to their biological resources include (Timmermans, 2001):

- ILCs not being recognised as parties to the agreement or contract;
- an ILC's TK being ineligible for protection under intellectual property rights frameworks, especially patents;
- the absence of institutional mechanisms through which to assert rights;
- the absence of mandatory schemes for benefit sharing at the local level;
- a lack of, or ineffective community participation in FPIC engagements; and
- a lack of sanctions for breaking customary laws.

Community protocols alone will not be able to address the many challenges associated with the enforcement of the rights of ILCs. However, by documenting and recognising these rights, community protocols aim to increase community participation in decision-making processes at all levels of government, as well as with research institutions, companies, NGOs, and other actors (Natural Justice, 2012). The principle

of full and effective participation is discussed further in Chapter 3.

Case studies of community protocols in practice



This Chapter provides a review of five prominent community protocols.

From the literature review, community initiatives from different regions were selected to form the basis of five case studies. The case studies were selected based on a number of guiding criteria:

- quality of primary and secondary material available;
- ensuring different regions of the world are represented (accordingly, Africa, South America, Oceania and Asia are covered in this study);
- where possible, covering a range of marine, coastal and terrestrial ecosystems;
- covering both indigenous peoples' communities as well as local communities; and
- covering a selection of different issues addressed by community protocols, including protected areas governance, recognition of rights to traditional territories, natural and other resources and associated TK, conservation and sustainable use of biological and cultural resources, traditional medicines, and tourism.

These case studies draw on work conducted by other organisations and communities, and in particular:

- the Bushbuckridge Community, Natural Justice;
- the San Juan communities and ASOCASAN, Instituto de Investigaciones Ambientales del Pacífico, PNUMA (UNEP), Natural Justice, John Van Neumann Environmental Research Institute of the Pacific;
- the Potato Park communities, Asociación ANDES and IIED Colombia;
- the Lingayat community, League for

Pastoral Peoples and Endogenous Livestock Development, and SEVA; and

- the Navakavu Yavusa Indigenous community, the University of the South Pacific and the Nature Conservancy.

A broad case study template was developed to synthesise the material and identify common underlying principles. Where possible, completed case studies were circulated to the supporting organisations listed above for review. Comments on the case studies were received from Asociación ANDES, Natural Justice, and The Nature Conservancy.

Each case study sets out:

- key background facts in relation to each community, including the relevant community and bio-cultural issues;
- the legal framework;
- the background to, and key aspects of, the relevant community protocol; and
- key themes or principles reflected in the documentation, development and use of the protocols.

The Fiji case study serves as an example of a related framework (a Locally Managed Marine Area framework) which has many elements of a community protocol, although is not referred to as such.

The full case studies appear in the Appendix to this guide.

2.1 Bio-Cultural Community Protocol of the Traditional Health Practitioners of Bushbuckridge, South Africa

The Bushbuckridge Traditional Healers, located in the Bushbuckridge area of Mpumalanga in North East South Africa, provide healthcare for the community through the use of medicinal plants

collected in accordance with spiritual values, and promote the conservation and sustainable use of those plants. The Traditional Healers were being threatened by commercial overharvesting, denial of access to communal lands and the lack of arrangements surrounding access and benefit sharing in relation to their TK. The *Bio-Cultural Community Protocol of the Traditional Health Practitioners of Bushbuckridge* (Traditional Healers of Bushbuckridge, 2010) (the Bushbuckridge Protocol) provides a mechanism for dialogue between the Traditional Healers and government agencies, and establishes specific procedures for gaining access to, and for fair and equitable sharing of benefits arising from, the use of local plants and associated TK by third parties.

2.2 Bio-cultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan ASOCASAN. Tado, Chocó Department, Colombia

The San Juan Communities of the Chocó bioregion of Colombia practice traditional production and land management for the collective use of the resources in their territory. The *Bio-cultural Community Protocol for the Territory of the Supreme Community Council of San Juan* (ASOCASAN et al., 2010) (the San Juan Protocol) was developed in response to external pressures such as logging and mining which were damaging the environment and impacting traditional practices. The San Juan Protocol includes mechanisms that improve participation of the local communities in decision-making, particularly in relation to development proposals, and to promote formal recognition of collective rights, sustainable land use

and enforceable environmental standards through environmental impact assessment and consultation.

2.3 Inter-Community Agreement for Equitable Benefit-Sharing in the Potato Park, Peru

The Potato Park is home to six Quechua Indigenous communities who cultivate the native potato in line with indigenous traditions. In 2004 the International Potato Centre sought to repatriate potato varieties to the Potato Park, highlighting the need to formalise community level procedures for access and benefit sharing. The Potato Park ICA (ANDES, the Potato Park Communities, and IIED, 2012 and 2011) formalises prior and informed consent processes for requests to access the communities' GR and TK and provides an outline for the equitable sharing within the community of direct and indirect benefits derived from the biological and cultural resources of the Potato Park.

2.4 Lingayat Bio-cultural Community Protocol, Southern India

The Lingayat local community reside in the Bargur forest range of Tamil Nadu in southern India and practice traditional cattle husbandry and ethno-veterinary practices. The Lingayat local community suffer from a lack of consultation over decisions that impact on their communal grazing rights and a lack of prior informed consent to the use of their genetic resources and associated TK. The Lingayat Protocol (Lingayat Community, 2009) addresses these issues by promoting the formal establishment of mechanisms for recognition under law of their traditional practices and improving the understanding of their needs by decision makers.

2.5 Navakavu Locally Managed Marine Area Framework, Fiji

The Navakavu Yavusa Indigenous Community on the island of Viti Levu in Fiji rely on fishing as the main source of income and on subsistence fishing as their main food supply, and exercise customary control over their fishing grounds. The *Navakavu Locally Managed Marine Area* (the Navakavu LMMA) was established to address depleting fish populations from over fishing and other destructive practices impacting on the marine environment (van Beukering et al, 2007). The Navakavu LMMA implements a collaborative community-based approach focusing on effective management systems that complement customary decision-making.

Common underlying principles



Community protocols share some common themes or underlying principles which guide their documentation, development and use. This Chapter presents the following set of principles developed from the case studies (see Appendix), literature on community protocols and the protection of TK, and relevant international instruments (see Chapter 4):

- authenticity, diversity, and locality;
- respect, recognition, and good faith;
- full and effective participation;
- collective custodianship;
- reciprocity;
- flexibility and responsiveness;
- equilibrium; and
- duality.

These principles draw on some of the values, practices and procedures of ILCs, which are reflected in their community protocols. For example, Swiderska et al. notes that studies in China, India, Kenya, Panama and Peru, involving 11 ethnic groups and over 60 communities, have identified common customary values and practices including a holistic worldview, collective custodianship of knowledge, and the values of reciprocity, equilibrium, and duality (Swiderska et al., 2009). The principles also draw on broader concepts and values reflected in hard and soft international legal instruments, such as those discussed in Chapter 4. For example, the Tkarihwaie:ri Code, which provides a list of general ethical principles for interactions with ILCs.

The underlying principles set out in this Chapter may be useful in the documentation, development and use of community protocols. They could also be used to guide relevant policy initiatives, such as those set out in Chapter 5. Tobin notes that identifying underlying principles of customary law “offers the possibility of establishing a body

of guiding principles which can assist in building bridges with positive law regimes” (Tobin, 2013).

The principles are, on the one hand, complex, inter-related, and can be labelled and described in many different ways. On the other hand, the principles reflect some well-recognised principles which already guide many legal, policy, as well as social frameworks, such as respect, cultural sensitivity and procedural justice. The discussion in this Chapter is a general overview and one possible starting point. The principles will inevitably be refined and developed over time, as community protocols and the knowledge around them continue to evolve.

3.1 Authenticity, diversity, and locality

Community protocols are authentic: they are developed by ILCs at the community level, driven by communities themselves, and reflect their local systems and values.

Community protocols are unique to each ILC. They reflect the cultural, legal and political diversity of ILCs and their responses to issues or problems. Depicting this diversity, community protocols provide a description of the collective identity of relevant ILCs that may include their histories, shared values, traditional territories, knowledge, innovations and practices, customary sustainable use requirements and methodologies. This improves understanding amongst external actors, such as representatives from government, industry, research organisations and NGOs, and within or among different communities themselves.

The local nature of community protocols is also relevant at the implementation stage. Community protocols seek to resolve disputes according to the customary laws

and processes of the affected ILC. This is an application of what has been termed the principle of locality: “to resolve any disputes over the acquisition and use of indigenous peoples’ heritage according to the customary laws of the indigenous peoples concerned” (Daes, 2000; see also WIPO, 2013). Daes explains this principle as meaning “every people’s territory is unique and has its own laws, and is based in ILO Convention No 169 and the CBD” (Daes, 2000). The principle is linked to the right to self-determination, cultural rights, and the right to participation.

3.2 Respect and recognition

Through the development and use of community protocols, ILCs are seeking respect for and recognition of, amongst other things, their:

- substantive (including rights to natural resources and traditional territories) and procedural rights (see Chapter 4);
- knowledge, innovations and practices;
- customary laws, processes and ways of life; and
- culture and values.

Respect for ILCs is recognised in several hard and soft law instruments and principles of international law, as discussed in Chapter 4. For example, UNDRIP sets out the minimum standards for States to follow in their treatment of indigenous peoples. ILO Convention 169 also provides guidance as to the treatment of ILCs. Article 8(j) of the CBD requires respect for TK and the knowledge holders and traditional lifestyles and practices relevant to the conservation and sustainable use of biodiversity. Respect is also a key element of the Tkarihwaí:ri Code, which aims to promote respect, preservation and maintenance of TK, innovations and practices relevant for

the conservation and sustainable use of biodiversity (Article 1). For example, Article 12 on Inter-cultural respect provides that:

It is highly desirable that those interacting with indigenous and local communities respect the integrity, morality and spirituality of the cultures, traditions and relationships of indigenous and local communities and avoid the imposition of external concepts, standards and value judgments, in inter-cultural dialogue. Respect for cultural heritage, ceremonial and sacred sites, as well as sacred species and secret and sacred knowledge ought to be given specific consideration in any activities/interactions.

There are different ways of thinking about “respect”. One common definition of the term is “due regard for the feelings, wishes, rights, or traditions of others” (OUP, 2013). On a different interpretation, respect can be thought of in the sense of respecting (obeying) a law, respecting (upholding) the terms of an agreement, or respecting (not infringing) a person’s rights. “Recognition” is closely linked to respect. The notion of recognition is often thought of as “the act of acknowledging or respecting another being, such as when one “recognises” someone’s status, achievements or rights” (McQueen, 2011).

Respect is an important part of the development and implementation of community protocols, as this process often involves collaboration with external actors to provide advice and assistance. It is essential that such collaborations proceed on the basis of respect and related principles, including honesty, integrity, transparency, and social and cultural sensitivity to local processes and timeframes. The overriding objective should be to identify and articulate empowering outcomes that can be effectively implemented. Any external actors involved in the development of a community protocol (such as an NGO, or other supporting organisation), must make a commitment to follow through with any agreements to support the community and to not abandon the process mid-stream.

The manner of handling information is a key aspect of respect and social and cultural sensitivity. In particular, respect for confidentiality of information exchanged where appropriate, and ensuring attribution of knowledge holders.

3.3 Full and effective participation

Community protocols provide guidance to ILCs and external actors about the rights and expectations of ILCs in relation to their full and effective participation in matters affecting them. By providing this guidance, community protocols can be a means of empowerment for ILCs.

Full and effective participation in the development and implementation of community protocols involves the broader community in decision making in a way that is accessible and sensitive to local processes, in particular, recognising customary decision-making processes and supporting local representative institutions. Full and effective participation also reflects the principle of procedural justice, which has been linked to processes such as FPIC (Shroeder and Pisupati, 2010). Full and effective participation also involves gender equity and the inclusion of Elders and youth.

Certain bodies, such as the Expert Mechanism on the Rights of Indigenous Peoples of the United Nations Human Rights Council (EMRIP) (UNHCR, 2011), the Global Environment Facility (GEF) (GEF, 2012), the International Finance Corporation (IFC, 2012), and the Asian Development Bank (ADB, 2009) provide some guidance on matters relating to “full and effective participation”. For example, a report on indigenous peoples and the right to participate in decision-making released in 2011 by EMRIP notes indicators of good practice in relation to participation in

decision-making include the extent to which the process (UNHCR, 2011):

- involves indigenous peoples in the design of the process and the extent to which they agree to it;
- allows indigenous peoples to influence the outcome of decisions that affect them;
- realises indigenous peoples’ right to self-determination; and
- includes, as appropriate, robust consultation procedures and/or processes to seek indigenous peoples’ FPIC.

A more specific example is the GEF’s *Principles and Guidelines for Engagement with Indigenous Peoples* (GEF Guidelines). In applying the GEF’s Minimum Standard 4, the GEF Guidelines provide that full and effective participation should normally involve a process which (GEF, 2012):

- “begins early in the project cycle and is carried out on an ongoing basis throughout the project cycle;
- provides prior and timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people;
- is inclusive of those directly affected, with particular attention to the needs of women and vulnerable and/or disadvantaged groups;
- is free of external manipulation, interference, coercion or intimidation;
- allows the client to consider and respond to the views expressed, thereby enabling the incorporation of relevant views of affected people and other stakeholders into decision-making as appropriate; and
- is commensurate with the potential impacts and risks.”

Full and effective participation of ILCs in the development of community protocols requires broad consultation through a range of formats and mediums to ensure information is accessible to various age groups and socio-economic backgrounds and in the relevant language. Full and effective participation requires that relevant processes should be particularly attentive to the voices of ILC women. Sufficient timeframes are essential, including sensitivity to local processes that may span months to years in some cases to reach a final agreement. With the exception of the San Juan Protocol, which had established governance procedures in place and could therefore be expedited, each of the community protocols considered as case studies in this guide were developed over periods of years through a range of consultation formats including workshops, study groups, and in-field consultations. In some cases, external parties may suggest to ILCs that the community or communities may wish to consider developing a community protocol, but whether to go ahead with the development of a protocol is a question ultimately decided by the relevant community through their representative decision making processes. This may involve the establishment of entities to represent the community or collective, or the formalisation of customary decision-making processes, for example using these processes to administer permits and other decisions.

Full and effective participation carries through to the implementation stage when community protocols have been adopted so that the relevant ILCs are directly involved, for example in administration, advocacy data collection, and review. In some cases ILC representatives conduct consultations and facilitate meetings, and undertake monitoring and data collection to review the effectiveness of a protocol after it has been implemented. Capacity building and training of ILC representatives ideally complements

this process. This community driven approach promotes informed decision-making, clear identification of priorities and the development of strategies that reflect the ILC's own principles and development goals.

An important element of full and effective participation is the principle of FPIC, one of the most important principles for protecting the right to participation (OHCHR, 2011). Community protocols may include terms and conditions to document community level procedures for FPIC for interactions with external actors. Community protocols can also advocate for ILC's participation in government to decisions in relation to development proposals and other activities that directly affect the ILCs' use and enjoyment of their traditional territories and resources.

3.4 Collective custodianship

Many ILCs take a communal or collective approach to ownership, or custodianship, of traditional territories, natural and other resources, and TK. As Dutfield notes (Dutfield, 2006):

Traditional proprietary systems relating to scarce tangibles such as land, resources and goods, and to valuable intangibles like certain knowledge and cultural expressions, are often highly complex and varied. As a general rule, knowledge and resources are communally held and, although some specialised knowledge may be held exclusively by males, females, certain lineage groups, or ritual or society specialists (such as shamans), this does not necessarily give that group the right to privatise the communal heritage.

Community protocols reflect the collective custodianship of ILCs of their traditional territories, natural and other resources, and TK. Resources are often collectively held, and shared within the community. In the community protocols of certain ILCs, sharing is governed by the principles of reciprocity and distributive justice, discussed at 3.5.

As well as an ethos of sharing, collective

custodianship involves certain obligations of community members to act in a responsible manner toward collectively-held resources, such as natural resources. Customary systems of many ILCs consider obligations to and respect for natural resources as of equal importance to the right to use resources (RCGM H, 2001, cited in Hutchings, 2007).

In the context of TK and ABS, collective custodianship means that FPIC and ABS should also be collective, and may involve a whole ethnic or tribal group or groups of communities. Within ILCs, specialised TK may be held by a particular part of the community (for example, healers and Elders), but “must be used to address community needs” (Swiderska et al., 2009).

The principle of collective custodianship is also relevant for dispute resolution processes. Many issues affecting ILCs are dealt with collectively, rather than individually. For example, the principle of communitarianism and rules of consultation and consensus are used by some ILCs in Papua New Guinea to guide the resolution of issues (Kambu, 2007).

3.5 Reciprocity and distributive justice

Community protocols encourage reciprocity by promoting, among other things, mutually beneficial outcomes and the fair and equitable sharing of benefits. The principle of reciprocity applies to sharing both within the community, and between the community and a group or individual outside the community.

A common understanding of the meaning of reciprocity is that what is received must be paid back in fair or equal measure which is a customary practice of ILCs. What constitutes fair must be determined by the parties involved on a case-by-case basis and may mean different things to different actors.

Reciprocity can also mean that rights are balanced by responsibilities or obligations. For example, sharing of benefits in proportion to effort or, in other words, equitable benefit sharing.

Community protocols can describe mutual obligations between the communities and external actors to abide by in their dealings with each other to build constructive relationships and manage the territories sustainably. For example, an ILC’s access to traditional territories may be conditional upon conservation and sustainable use. Also, before allowing access to their traditional territories, an ILC may require state actors and developers to respect and acknowledge their rights and to ensure development approvals take into consideration impacts on their traditional territories and livelihoods. Reciprocity can also apply in the context of liability, compensation and remedies in the case of harm to the environment, where community protocols may provide guidance of how responsibility for any harm should be apportioned.

An additional theme where reciprocity becomes relevant is the principle of distributive justice. This simply means that a beneficiary must share with the benefactor the benefits accrued from the use of an item, good or thing that was exchanged. Reciprocity is linked to principles of distributive justice and justice in exchange. Distributive justice theory deals with the allocation of finite resources in a just way. It is practical, providing guidance for choices in relation to the distribution of goods. For example, the principles of distributive justice can be applied in decision-making processes to seek greater balance, or justice, in the distribution of economic benefits and burdens (Lamont and Favor, 2013). Some community protocols reflect principles of distributive justice, in sharing benefits between community members, as well as sharing benefits gained by external actors

with ILCs (see for example the Potato Park ICA in Appendix). Justice in exchange is a related principle which regulates the fairness of giving and receiving goods. An exchange is considered just if “all parties receive an appropriate return for their [voluntary] contributions”. FPIC is considered a part of justice in exchange (Schroeder and Pisupati, 2010).

3.6 Flexibility and responsiveness

Community protocols are flexible, and can be amended to adapt to ILCs’ needs over time. Although community protocols may be developed with a particular issue in mind, they can be amended and expanded over time. ILCs set out the initial framework for engagement, which may continue to change in response to other issues later on.

The flexibility of community protocols reflects the customary systems of which they form a part. Although some aspects of customary law are static and passed from generation to generation intact and unchanged, much customary law is flexible and adaptive by nature, and so any documentation of customary law must also allow for change. Flexibility is essential for community protocols to remain relevant to community, to meet community needs and expectations, and to respond to the variability of issues and threats and changing circumstances. Although the degree and nature of flexibility and responsiveness will vary, these concepts are also reflected in Western legal systems. Developed systems of law, whether Western or customary, have rules of change to counter inflexibility (Hart, 1961). There are many examples in both systems of law of responsiveness (Nonet and Selznick, 2001). The challenge for policymakers looking to incorporate community protocols into formal legal frameworks is to strengthen links between the two systems. The discussion of the principle of duality below is also relevant

in this context.

3.7 Equilibrium

The principle of equilibrium in relation to community protocols refers to the balancing of interests between ILCs, external actors and the environment. Community protocols recognise the link between customary sustainable use requirements of ILCs and conservation of the local environment upon which they depend and maintain through TK and traditional practices.

Equilibrium is linked to the holistic worldview which is a key feature of the belief systems of many ILCs (Swiderska et al., 2009). As part of this holistic worldview, ILCs view the world and its systems as an interconnected whole. For example, under this worldview, TK and bio-resources are (Swiderska et al., 2009):

- intrinsically linked and inter-dependent – they are used, developed and conserved together. This means recognising the rights of communities not only over TK, but over associated bio-resources.
- closely inter-linked with and inter-dependent on landscapes, spiritual beliefs, cultural values and customary laws. These are the key elements that sustain TK, which means that community rights over each element should be recognised.

This holistic worldview and the principle of equilibrium are also beginning to be reflected, and are compatible with, some of the formal frameworks dealing with issues addressed in community protocols. For example, it is recognised that the conservation of biodiversity requires balanced use and management of biological resources. CBD Articles 8(j) and 10(c) highlight the significance of TK, innovations and practices and customary use of biological diversity.

3.8 Duality

Community protocols can assist in identifying links between customary law and national, regional and international legal and policy frameworks. Some commentators note that “[d]uality means use of complementary systems – i.e. western science and law can be used alongside traditional systems” (Swiderska et al., 2009). This ability to act as an interface between customary and formal systems is one of the key benefits of community protocols and is relevant to a range of policy areas, as discussed in Chapter 1. For example, community protocols may help to improve consultation associated with environmental impact assessment, access and benefit sharing frameworks, protected areas joint management frameworks and similar regimes where the rights of ILCs may not be adequately recognised.

International legal and policy setting



Processes for documenting, developing and using community protocols are closely linked to the need for an interface between ILCs and national, regional and international legal and policy frameworks. Community protocols are useful tools in increasing recognition within these frameworks of:

- the rights and obligations ILCs in relation to their TK, territories and natural and other resources; and
- the international obligations that community protocols may assist in implementing.

A range of international legal and policy instruments are relevant to community protocols. A key instrument is the Nagoya Protocol, which expressly includes community protocols as a measure for implementing some of its provisions. However, protocols also fit within the scope of several other instruments which do not expressly include the term “community protocols”. For example, several articles of UNDRIP refer directly and indirectly to many of the features, principles and processes shared by community protocols. This Chapter identifies some of the relevant international principles, obligations and protocols relevant to community protocols, focussing on the most relevant hard law and soft law instruments and general principles of international law. In international law, hard law usually refers to instruments that have a legally binding effect. One of the primary characteristics of hard law is enforceability. This means that there are usually provisions within the binding instruments that provide for penalties or sanctions in the event of non-compliance of obligations of the parties to that instrument. In contrast, soft law refers to instruments that do not have any legally binding effect on the parties that establish them, such as declarations, guidelines and codes of conduct. However, soft law instruments embody high moral obligations

which are useful in guiding entities in their work. Both hard law and soft law instruments can play a vital role in shaping behaviours of their State Parties in a positive manner.

Also relevant to community protocols is the work of intergovernmental organisations. Two fora in particular are addressing the relationship between TK and customary protocols and laws: WIPO, and the CBD (Robinson, 2010).

The work of WIPO in relation to TK occurs primarily in the intellectual property context. Negotiations are currently underway in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore towards the development of an international legal instrument or instruments for the effective protection of traditional cultural expressions and TK, and to address the intellectual property aspects of access to and benefit-sharing in genetic resources.

The CBD has a broader mandate for work on TK of ILCs embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Of particular relevance is the work of the Working Group on Article 8(j), and the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing.

4.1 Convention on Biological Diversity

The primary objectives of the CBD are to conserve biological diversity, to sustainably use its components and to ensure fair and equitable sharing of benefits arising from the utilisation of genetic resources.

Community protocols are closely linked to some parts of the CBD Programme of Work. The most relevant articles of the CBD

in relation to community protocols are the requirements for State Parties to:

- Protect and encourage customary use of biological diversity in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (Article 10(c)).
- Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity, and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from their utilisation (Article 8(j)).
- Comply with certain obligations for access to genetic resources, such as the requirement for prior informed consent and mutually agreed terms (Article 15).

The CBD recognises that States hold sovereign rights over natural resources, and national governments hold the authority to determine access to genetic resources, subject to national legislation (Article 15). Relevant to the Nagoya Protocol, Article 15 of the CBD includes the requirements that:

- Access is to be subject to the FPIC of the State providing the resources (Article 15(5)).
- Arrangements must be made to fairly and equitably share benefits arising from the use of genetic resources with the State providing the resources (Article 15(7)).
- Access and sharing are to be on mutually agreed terms (Article 15(4) and 15(7)).

Other initiatives under the CBD relevant to community protocols include the Programme of Work on Protected Areas (PoWPA), and the development of biodiversity strategies and action plans, discussed in Chapter 5.

4.2 Nagoya Protocol

The Nagoya Protocol to the CBD was developed to fulfil the mandate of the third objective of the CBD: the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. The development of the Nagoya Protocol followed the adoption of the voluntary *Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization* in 2004. The Protocol was adopted by the Conference of the Parties to the CBD at its tenth meeting on 29 October 2010 in Nagoya, Japan.

The Nagoya Protocol regulates access to GR and associated TK for State Parties, requiring sharing of benefits arising from the utilisation of genetic resources and associated TK with the States or communities holding rights over them. Articles 5(5) and 7 of the Nagoya Protocol are the primary provisions that support this statement. These provisions indirectly vest the rights over TK with ILCs. In addition to the Nagoya Protocol, it is implied in Article 8(j) of the CBD that TK associated with GR, or “knowledge, innovations and practices of indigenous and local communities” vests with ILCs. Given this understanding, and as also stipulated in Article 7 of the Nagoya Protocol, in accessing TK, the Nagoya Protocol requires each Party to take necessary measures especially to ensure FPIC is sought and that ILCs are involved in the process of accessing TK.

Under the Nagoya Protocol, State Parties are encouraged to support the development

of community protocols by ILCs, in relation to accessing GR and associated TK and the fair and equitable sharing of benefits arising out of the utilisation of such knowledge (Article 12). Article 12 also requires customary law to be taken into consideration by provider and user countries of GR and associated TK. Article 21 lists awareness raising of community protocols and procedures of ILCs as a possible measure for State Parties to promote awareness of the importance of genetic resources and TK associated with genetic resources, and related access and benefit-sharing issues.

4.3 ILO Indigenous and Tribal Peoples Convention (No 169)

The *ILO Indigenous and Tribal Peoples Convention (No 169)* (ILO Convention) is the only legally binding international convention relating to indigenous rights, and currently binds 14 State Parties.

The Convention calls on governments to implement measures to promote the “full realization of the social, economic and cultural rights of [indigenous and tribal peoples in independent countries] with respect for their social and cultural identity, their customs and traditions and their institutions” (Article 2). It covers a wide range of issues, including land rights, access to natural resources, health, education, vocational training, conditions of employment and contacts across borders.

The ILO Convention recognises many rights of indigenous and tribal peoples, including:

- The right to self-determination (which is also recognised in UNDRIP, the *UN International Covenant on Civil and Political Rights* (ICCPR), the *UN International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *African Charter of Human and Peoples’ Rights*)

- Right to decide priorities for development (Article 7)
- Rights to retain customs and traditions (Article 8)
- Land rights (Article 14)
- Rights relating to the use, management and conservation of resources (Article 15)

Fundamental principles of the ILO Convention are that indigenous and tribal peoples should be consulted and fully participate at all levels of decision-making processes that concern them (Articles 4, 6 and 7).

Community protocols may serve to deal with a broad set of these ILO Convention objectives.

4.4 UN Declaration on the Rights of Indigenous Peoples

UNDRIP confirms the right of ILCs to maintain, control, protect and develop their TK. In contrast to the ILO Convention, UNDRIP is a non-legally binding instrument. However, it does have legal relevance. As a Declaration of the UN General Assembly, it reflects the collective views of the UN which must be taken into account by all members in good faith. Furthermore, it may reflect obligations of States under customary international law and general principles of international law (ILO, 2007).

UNDRIP emphasises the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. Article 34 notes 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. Other key rights set out in UNDRIP include:

- Self-determination (Article 3)
- Land rights (Articles 15-19)
- Consultation prior to granting rights to exploit resources (Article 15)
- Rights to institutional structures and customary law (Article 8)
- Right to land, territories and resources traditionally occupied or used (Articles 26 and 27)
- Rights to cultural heritage and intellectual property (Article 31)
- Due respect/recognition of customary law (several).

4.5 Tkarihwaié:ri Code

Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity (Tkarihwaié:ri Code) was adopted by the Conference of the Parties at its tenth meeting, in October 2010. The Tkarihwaié:ri Code was named after a Mohawk term meaning “the proper way”, to emphasise the ethical standards embodied in this instrument. The Tkarihwaié:ri Code is intended to provide a collaborative framework ensuring the effective participation and prior informed consent or involvement and approval of indigenous and local communities in activities, including research proposed, on their knowledge, territories and related resources (CBD Secretariat, 2011). The Tkarihwaié:ri Code provides a list of general ethical principles:

- respect for existing settlements;
- addressing intellectual property concerns and claims;

- non-discrimination;
- transparency/full disclosure;
- prior informed consent and/or approval and involvement;
- intercultural respect;
- safeguarding collective or individual ownership;
- fair and equitable sharing of benefits; and
- a precautionary approach.

4.6 Akwé: Kon Guidelines

The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (Akwé: Kon Guidelines) were under the CBD Programme of Work on Article 8(j). The name of the Akwé: Kon Guidelines comes from a Mohawk term meaning “everything in creation” to emphasise the holistic nature of this instrument. The Guidelines are intended to provide a collaborative framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments. Guidance is provided on how to take into account TK, innovations and practices as part of the impact assessment processes and promote the use of appropriate technologies (CBD Secretariat, 2004).

4.7 Other instruments relevant to community protocols

In addition to the CBD, Nagoya Protocol and ILO Convention, other hard law, or binding, instruments relevant to community protocols include:

- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)
- UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
- World Heritage Convention (1992)
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
- International Treaty on Plant Genetic Resources for Food and Agriculture (2002)
- International Union for the Protection of New Varieties of Plants Convention
- Berne Convention for the Protection of Literary and Artistic Works (1886)
- Patent Cooperation Treaty (2002)
- Ramsar Convention on Wetlands (1971)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973)
- UN Framework Convention on Climate Change (1992)
- UN Convention to Combat Desertification (1992)
- UN International Covenant on Civil and Political Rights (1966)
- UN International Covenant on Economic, Social and Cultural Rights (1966)

In addition to the Tkarihwaïé:ri Code and Akwé: Kon Guidelines, other soft law, or non-binding, instruments include:

- FAO Voluntary Guidelines on the

Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012)

- UNESCO Universal Declaration on Cultural Diversity (2001)
- UNESCO Universal Declaration on Bioethics and Human Rights
- Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)
- Declaration of Belém adopted at the First International Congress of Ethnobiology (1988)

4.8 Principles of international law

In addition to hard and soft law instruments, several principles of international law are also relevant to community protocols.

Principles 10 and 22 of the *Rio Declaration on Environment and Development* (Rio Declaration) have particular relevance to community protocols. Principle 10 has three pillars: promoting access to information, public participation, and access to justice. The implementation of Principle 10 is being promoted through The Access Initiative (TAI, Undated). The United Nations Institute for Training and Research (UNITAR) has also undertaken a project to provide support to countries to implement Principle 10. Principle 22 recognises the vital role that ILCs play in environmental management and development given their TK and traditional practices, and calls on States to “recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

Other general principles of international law that are relevant to community protocols include the principle of good faith, and equity, self-determination, other customary

principles of international human rights law, and principles of international environmental law such as sustainable development, the precautionary principle, and the principle of common but differentiated responsibility. These international law principles are also relevant to and consistent with some of the common underlying principles discussed in Chapter 3.

Recognising community protocols within local, national and regional frameworks



Currently, community protocols are only explicitly recognised in the Nagoya Protocol, with some indirect recognition in other international instruments such as UNDRIP. To be fully effective, and to maximise their potential benefits, community protocols need to be recognised within existing legal and policy frameworks at the local, national and regional levels.

Many of the documented community protocols identify potential links with formal legal and policy frameworks. It is hoped that this Guide, and particularly the ideas in this Chapter, will encourage policymakers to consider developing initiatives to recognise community protocols within these formal frameworks. Common underlying principles of community protocols can help to guide such initiatives, as discussed in Chapter 3.

This Chapter provides ideas of how community protocols may be recognised within and complement the following frameworks:

- protected areas management;
- National ABS regimes;
- databases and registers of biodiversity, TK and GR;
- payment for ecosystem services;
- REDD+ schemes;
- environmental development and planning assessment and approval processes; and
- policies, strategies and action plans.

This is not an exhaustive list of initiatives relevant to community protocols: a range of other policy frameworks are relevant to community protocols, including climate change, human rights, health, and tourism. These and other initiatives may also benefit from recognising and drawing on community protocols; this is an area for further research.

5.1 Protected areas management

Protected areas play an essential role in biodiversity conservation and sustainable use, and in implementing the CBD. Goals and activities relating to the rights of ILCs feature in the CBD PoWPA (see for example Element 2). Protected areas are a central measure for achieving *in-situ* conservation under the CBD and other biodiversity-related conservation conventions. State Parties to the CBD are required to:

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

Protected areas have been established over a range of ecosystem types, however there is a recognised need for increased attention to the representativity, connectivity and management effectiveness of protected areas. The CBD Strategy Plan for Biodiversity including the Aichi Biodiversity Targets for the 2011-2020 period provides that several conditions need to be met to satisfy Aichi Biodiversity Target 11 on protected areas, such as:

- increasing the area conserved;
- including areas of particular importance for biodiversity and ecosystem services, such as areas high in species richness or threatened species, threatened biomes and habitats, areas with particularly important habitats, and a range of ecologically representative areas;
- ensuring areas are effectively and equitably managed with planning measures in place to ensure ecological

integrity and the protection of species, habitats and ecosystem processes, with the full participation of ILCs and with fair sharing of costs and benefits of the areas; and

- increasing the connectivity to surrounding landscape or seascape, using corridors and ecological networks to allow connectivity, adaptation to climate change, and the application of the ecosystem approach.

Well-governed and effectively managed protected areas are a proven method for safeguarding both habitats and populations of species and for delivering important ecosystem services. The main goal of the Spain-UNEP Partnership for marine and terrestrial protected areas in support of the CBD LifeWeb Initiative is focused on representativity, connectivity and management effectiveness, together with major efforts regarding the improvement of government effectiveness. By providing technical and educational support to the effective management of protected areas, and subsequently developing local and regional public policies, the partnership is helping to contribute to sustainable development. Effective protected areas management can be enhanced globally, and consequently, there are also opportunities to share lessons learnt between protected areas. The direct participation of ILCs in these protected areas increases the likelihood of success and sustainability. Local protected areas can provide economic value and other benefits to ILCs.

A range of actors are involved in governing protected areas, including State agencies, ILCs, and others (Dudley, 2008). There are four broad protected area governance types: governance by government; shared governance; private governance; and governance by ILCs (IUCN, 1994). ILCs are involved in two of these governance types: shared governance, or collaboratively

managed protected areas (CMPAs), where governance is shared between communities and other actors; and governance by ILCs, or indigenous and community conserved areas (ICCAs), which are protected areas governed solely by ILCs.

Community protocols can empower ILCs to participate effectively in the management of protected areas, such as (Lassen, Martin and Rukundo, 2009) by:

- Promoting dialogue between ILCs and other actors involved in the management of the protected area (in the case of CMPAs).
- Demonstrating the contribution of ILCs TK to the conservation of the protected area.
- Recognising the need for ongoing access by ILCs to natural resources.
- Regulating the disclosure of knowledge to others, such as researchers in partnering institutions.
- Clarifying the expectations about sharing of benefits from the protected area, such as tourism revenues.

Community protocols can also play an important role in encouraging the recognition of protected areas within formal frameworks (Bavikatte and Jonas, 2009). For example, the Bushbuckridge Protocol calls on the Kruger to Canyons Biosphere Management Committee (K2C Management Committee) and Mpumalanga Tourism and Parks Agency to work with the Bushbuckridge community to identify new areas which they could access or that could be set aside for the purpose of conserving and sustainably using medicinal plants (Traditional Health Practitioners of Bushbuckridge, 2010 and see Appendix). As a result of this community protocol, there has been progress made towards establishing a medicinal plants conservation area, as part of a UNESCO-sponsored feasibility study. One of the aims

of the study is to assess how to develop a carbon offset program, under which tourists pay to offset their carbon emissions to travel to K2C. These payments would be made into a fund to be used to plant medicinal plants identified by the Bushbuckridge healers as under threat. The study is being undertaken in partnership with the K2C Management Committee and the traditional healers' association (Jonas, Bavikatte and Schrumm, 2010b).

As discussed above at 1.1, some of the governance frameworks for protected areas exhibit features in common with community protocols. The case study of the Navakavu Locally Managed Marine Area Framework in Fiji presented in Chapter 2 is one such example. The documentation of community protocols in marine areas is an area for further research, which can feed in to work on MPA governance (for an example of work on MPA governance, see Jones, Qiu and De Santo, 2011).

5.2 National ABS regimes

Sui generis systems for protecting and regulating access to TK and GR and benefit sharing have been developed at the national and regional level, which complement the Nagoya Protocol. National ABS regimes, as required to implement the Nagoya Protocol, are being developed by State Parties that have ratified the Nagoya Protocol as part of the CBD process.

National ABS regimes have been developed in countries including but not limited to Peru, India, Ethiopia, Kenya, Costa Rica, South Africa, Venezuela, Thailand, the Philippines and China. An example of a sub-national regime is the Amapa State Law No. 0388/97 in Brazil (Thornström and Björk, 2007; Wekesa, 2006; Tobin, 2013).

It is recognised that coordination is needed at least at the regional level for the effective

protection of TK and GR, for example in addressing unlawful appropriation of TK and associated GR (Dutfield, 2006). Relevant regional frameworks include the:

- *African Model Law on Access to Biological Resources;*
- *Regional Biodiversity Strategy for the Tropical Andean Countries; and*
- *ASEAN Framework Agreement on Access and Benefit-Sharing.*

Some documented community protocols now include the ILC's ABS requirements, for example FPIC procedures. These kinds of terms, processes and procedures in community protocols, are already starting to be respected and adhered to by third parties. For example, a local company in South Africa has responded to the terms of the Bushbuckridge Protocol, and worked with the community on the basis of this protocol to enter into a non-disclosure agreement for unlawful appropriation (Jonas, Bavikatte and Schrumm, 2010b).

Decision-makers under national ABS regimes could be required to consider any relevant community protocols when deciding whether or not to grant approval for access to GR and associated TK. This requirement could be written in to legislation or regulations under national ABS laws. Decision-makers could be required to consider whether third parties have conducted their dealings with TK holders in compliance with the applicable community protocol.

5.3 Traditional knowledge databases and registers

TK databases and registers have been proposed as a useful tool in TK protection, both in the context of positive protection and defensive protection (UNU-IAS, 2003). Numerous organisations including the

CBD, WIPO's IGC and United Nations University have dedicated some time and effort in the policy context, developing minimum standards for intellectual property protection and further informing ILCs and their advocates of the potential benefits and challenges associated with databases and registers. Given some usefulness of the databases and registers, they are being developed and populated at the local, national and regional levels. These registers contain information on local biological resources and associated TK. These registers are being developed and populated for several reasons, including the prevention of misappropriation, to address the loss of TK, and biodiversity conservation and research (Robinson, 2010). Databases and registers complement the national ABS regimes discussed above.

India has led the development of such databases. Peoples Biodiversity Registers (PBRs) are being prepared at the local level by State Biodiversity Boards and Biodiversity Management Committees established under India's Biological Diversity Act (2002) with the help of local communities (Gadgil, 2006). Over 400 PBRs have been developed in the State of Kerala alone (Kerala State Biodiversity Board, 2010). Another initiative in India is the Traditional Knowledge Digital Library, which aims to provide information on TK in India in a format that is easily understandable to patent officers at international patent offices, to prevent the grant of "wrong patents" (ICSIR, Undated; Robinson, 2010).

Community protocols can assist in the development of databases and registers by providing an extra resource to policymakers to draw upon in identifying the interests of ILCs in particular TK and GR, as well as insights into local biodiversity and TK. Formal recognition of community protocols within these databases and registers would promote awareness and complement the

recognition of community protocols within national ABS regimes for the protection of TK and GR. Documented community protocols have already begun to call for such recognition. For example, the Lingayat Protocol calls on the National Biodiversity Authority in India to "Recognise our Bargur cattle, Malai Erumai (hill buffalo) and associated TK as set out in the Lingayat Biodiversity Register and to include it in the Peoples Biodiversity Register (under Rule 22(6) of the Biological Diversity Rules" (Lingayat Community, 2009 and see Appendix)).

5.4 Payment for ecosystem services

Payment for Ecosystem Services schemes (PES schemes) provide incentives through market mechanisms to conserve and sustainably manage natural resources. A working definition of a PES scheme is "a voluntary, conditional agreement between at least one 'seller' and at least one 'buyer' over a well-defined environmental service" (Wunder, 2007). Types of PES schemes include carbon storage and sequestration, wetlands conservation, watershed protection and species, habitat and biodiversity conservation (von Braun, 2009).

Community protocols can be used under PES schemes to (von Braun, 2009):

- build the capacity of the community to effectively participate;
- distribute benefits;
- establish frameworks for negotiations between communities and potential buyers of ecosystem services;
- clarify ownership of community resources; and
- address potential perverse outcomes, such as land use change or loss of employment.

In this way, community protocols can assist ILCs in engaging in the development and implementation of PES schemes.

5.5 REDD schemes

A global framework on Reducing Emissions from Deforestation and Forest Degradation (REDD+) is the subject of ongoing international negotiations under the auspices of the UNFCCC. REDD+ is an initiative that aims to use market and financial incentives to reduce emissions from forest loss and degradation in developing countries. REDD+ aims to channel payments from developed countries to developing countries, in exchange for reductions in forest-related carbon emissions.

The scope of the framework has broadened over time, from focus solely on reducing emissions from deforestation (RED), to reducing emissions from deforestation and forest degradation (REDD), to REDD+, which also covers carbon sequestration through forest conservation, sustainable management, and afforestation and reforestation. There is also the collaborative United Nations initiative, UN-REDD. All REDD+ and UN-REDD schemes are referred to here as “REDD schemes”.

Despite the absence of a successor agreement to Kyoto and a formalised framework for REDD, strategies and pilot projects have already been developed at the national level (Nhantumbo and Rolington, 2011). REDD+ has gained support from actors in many sectors (Levin et al, 2008). However, considerations of who owns, uses and depends on forests have received little attention within formal REDD+ policy processes (Doherty and Shroeder, 2011). Concerns have been raised about the implementation of existing and future REDD schemes. Several of these concerns relate to the rights and equity of ILCs and other forest-dwelling communities. For example,

there is a concern that communities without formal rights and title to their territories could risk being excluded from their forests (Wood, 2009).

Community protocols can be used under the REDD framework to (Wood, 2009):

- ensure the continued customary use of resources by indigenous and local communities;
- require and regulate FPIC;
- involve communities in the design of REDD projects; and
- involve communities in monitoring and evaluation of REDD projects.

5.6 Environmental development and planning assessment and approvals

Community protocols could be a consideration that decision makers are required to take into account when deciding whether or not to grant approval for development projects under environmental development and planning legislation or regulations. For example:

- Decision-makers could be required to consider whether, or to ensure that, development applications are in compliance with a community protocol that is in place in the area.
- Community protocol processes could be used as part of, or to complement, formal consultation processes under environmental impact assessment (EIA) processes.
- Community protocols could also complement strategic planning more broadly.

Community protocols can assist decision makers and other external actors, such as project developers, by providing details of

requirements specific to particular ILCs and local areas. Community protocols can also complement the Akwé:Kon Guidelines which provide guidance on the incorporation of cultural, environmental and social considerations of ILCs into new or existing impact assessment procedures. Community protocols can be used together with these and other relevant guidelines to guide impact assessment processes.

The process of documenting and developing a community protocol can assist ILCs in navigating environmental development and planning processes in a range of different contexts.

For example, communities in Lamu, Kenya have been developing a community protocol to engage with the Government and other stakeholders to seek information and to be involved in adequate consultation processes regarding the proposed infrastructure and port development in Lamu (Natural Justice, 2011b; "Save Lamu", Undated).

Community protocols may also assist ILCs who are affected by extractive industries. For example, the process of documenting a community protocol can help ILCs to understand their rights and build their capacity to participate in relevant consultative and decision-making processes for development projects such as the creation or expansion of mines. The San Juan Protocol seeks to address issues affecting the territories of the San Juan community in Colombia, including extractive activities. The San Juan Protocol calls for extractive activities to "operate in ways that are technically, environmentally, economically and culturally sustainable and appropriate" and for small-scale mining to be recognised, protected and promoted "as a culturally and environmentally viable production method" (ASOCASAN et al., 2010). The San Juan Protocol sets out the community's requirements for activities in their territories, calling for these activities to be based on

collective property rights (ASOCASAN et al., 2010, Appendix 5, paragraph 4); the right to control the territory's existing natural resources; the concept that collective lands are inalienable, imprescriptible and immune from seizure; and the community's right to free, prior and informed consent (ASOCASAN et al., Appendix 5).

5.7 Policies, strategies and action plans

Community protocols contain a wealth of local information, as well as principles and procedures which can assist policymakers in developing policies, strategies and action plans in areas such as TK, biodiversity, environmental development and planning, climate change, human rights, health, and tourism. Common underlying principles from community protocols could be used to develop bodies of guiding principles for use within relevant policy frameworks, as discussed above in Chapter 3.

Community protocols are relevant to a range of different policies, strategies and action plans at the local, national and regional level. Two examples are Biodiversity Strategies and Action Plans (BSAPs) and National Adaptation Programmes of Action (NAPAs).

BSAPs are being developed at the sub-national, national and regional level under the auspices of the CBD. National Biodiversity Strategies and Action Plans (NBSAPs) are the principal instruments for implementing the CBD at the national level (CBD, Article 6). Under Aichi Biodiversity Target 17, by 2015 all State Parties to the CBD will have developed, adopted as a policy instrument, and commenced implementing, a NBSAP. Community protocols could be recognised within BSAPs as a measure to work towards the achievement of targets on, for example:

- the protection of TK and GR;
- the documentation of biological and

- cultural diversity; and
- *in-situ* conservation.

Community protocols could also be recognised within National Adaptation Programmes of Action (NAPAs) under the UNFCCC framework. NAPAs provide a process for Least Developed Countries (LDCs) to identify priority activities and projects that respond to their urgent and immediate needs for climate change adaptation. Community protocols could be drawn upon in many of these activities and projects. For example, community protocols can foster traditional methods of resource management and be used as part of consultation, education and capacity-building initiatives about climate change.

5.8 Institutional support for community protocols

A key role for policymakers in moving towards the recognition of community protocols in law and policy frameworks, such as those discussed above, is to support their documentation, development and use. The Nagoya Protocol encourages State Parties to endeavour to support the development of community protocols for ABS by indigenous and local communities (Article 12). Support, both monetary and non-monetary, should be encouraged from government agencies, research institutions and NGOs.

Support could be in the form of:

- education and capacity building (including supporting NGOs to provide this kind of support);
- bringing together various stakeholders;
- financing and partnership initiatives;
- pilot projects;
- encouraging further research on community protocols; and
- developing databases and registers of community protocols.

Support may also be available under the GEF to fund initiatives to encourage the documentation, development and use of community protocols. Current GEF funding is focused on a number of thematic areas and shifts with priorities and needs of countries. While community protocols are not part of the current package of thematic areas eligible for the GEF, they are a crucial component of the environmental governance framework that can be considered for funding. The consideration can be taken up within the current thematic areas of priority for the GEF such as biodiversity issues or under new funding mechanisms designed specifically for community protocols. For example, GEF funding is available for the development of BSAPs and NAPAs. While setting up new mechanisms may take time, opportunities such as the Small Grants Programme could identify community protocols and a priority area of focus.

As Tobin notes (Tobin, 2013):

Considering the status of current negotiations at the CBD, IGC and the WTO, as well as ongoing regional and national efforts to develop TK law and policy, provision of such support to indigenous peoples and local communities should be prioritised. The Global Environment Facility (GEF), international aid agencies, governments and international institutions as well as the research and private sector should all be called upon to make funding available to support the development by indigenous peoples and local communities of such protocols. In the long run this may prove one of the most effective tools for securing effective TK protection and appropriate respect and recognition for customary law.

The provision of support and resources should not take away from community ownership of the process of developing a protocol. As noted, processes for documenting, developing and using community protocols are and should be community-led, and the participation of others should be at the invitation of the community.

Conclusion

Community protocols provide an important way of recognising and protecting the rights, values and cultures of ILCs, facilitating their engagement with external actors, and promoting environmental sustainability.

Community protocols seek to address some of the many difficult issues faced by ILCs, such as recognition of their rights to traditional territories and resources. Some commentators have questioned whether community protocols empower ILCs “enough” to fully address these issues (Pierre du Plessis, cited in IIED, 2012). Community protocols are not a panacea for the many issues they seek to address: they are one mechanism that has potential to be used as part of broader efforts to improve the ability of communities to address and engage with the challenges they face. The strength of community protocols is that they are developed at the community level, and as such can help to bring the voices of ILCs into national, regional and international discussions. They also provide a practical way to respectfully draw on the TK of ILCs in efforts to improve environmental sustainability, while protecting that TK through appropriate mechanisms such as MAT and ABS processes. One example given in this Guide has been the role community protocols can play in protected areas governance.

The effectiveness of existing and future community protocols will depend to a large extent on the level of institutional recognition they receive, and on the degree to which policymakers and other stakeholders begin to integrate them into their thinking and practices. Part of this will be recognising community protocols within specific policy initiatives, such as those discussed in Chapter 5. This will in turn increase

understanding and awareness of community protocols and their potential role within these various frameworks, and of their benefits.

Policymakers may encounter some challenges in recognising, implementing and drawing on community protocols. Some of these challenges include: maintaining sufficient flexibility; documenting customary laws without misrepresenting or threatening them; cost; and time. Some thinking has already been done about these challenges (see for example IIED 2012; Jonas, Shrumm and Bavikatte, 2010a). This is an area for further research. The potential benefits to ILCs and external actors, from greater certainty in ABS processes, to improved conservation and sustainable use, will hopefully inspire policymakers to persevere in overcoming any challenges.

The concept of community protocols is likely to continue to develop as more protocols and their diverse processes are documented and developed by ILCs. Further research on community protocols will be useful as both individual protocols and the broader concept continue to evolve.

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Appendix – Case studies



CASE STUDY 1:

Bio-cultural Community Protocol of the Traditional Health Practitioners of Bushbuckridge, South Africa



CASE STUDY 2:

Bio-cultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan Asocasan Tado, Chocó Department, Colombia



CASE STUDY 3:

Inter-Community Agreement for Equitable Benefit-Sharing in the Potato Park, Peru



CASE STUDY 4:

Lingayat Bio-Cultural Protocol, Southern India



CASE STUDY 5:

Vueti Navakavu Locally Managed Marine Area Waqainake, Viti Levu, Fiji

Bio-Cultural Community Protocol of the Traditional Health Practitioners of Bushbuckridge, South Africa¹



1 For further information see: Sibuye, R., Uys, M., Cocciaro, G. and Lorenzen, J. (2012). *The Bushbuckridge BCP: Traditional healers organise for ABS in South Africa*. In Participatory Learning and Action 65, Chapter 8, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013); Traditional Health Practitioners of Bushbuckridge (2010). *Biocultural Protocol of The Traditional Health Practitioners of Bushbuckridge*. Natural Justice and Kruger to Canyons Biosphere, South Africa, http://community-protocols.org/wp-content/uploads/documents/South_Africa-Bushbuckridge_Biocultural_Protocol.pdf (last accessed 29 August 2013); UNESCO (2010). *The Bushbuckridge Healers' Path to Justice*. In A World of Science, Vol. 8, No. 1, January– March 2010, <http://unesdoc.unesco.org/images/0018/001865/186519E.pdf> (last accessed 29 August 2013); and, Natural Justice (2011). *Working towards the Legal Recognition of Bio-Cultural Community Protocols within National Policies*. Report on the African Bio-Cultural Community Protocol Initiative Inception Meeting 11-12 April 2011, Cape Town, South Africa, http://naturaljustice.org/wp-content/uploads/pdf/African_BCP_Initiative_Inception_Meeting_Report-april2011.pdf (last accessed 29 August 2013).

1. INTRODUCTION

The *Bio-cultural Community Protocol of the Traditional Health Practitioners of Bushbuckridge* (the Bushbuckridge Protocol) was initiated by the Bushbuckridge traditional healers (the Traditional Healers) to maintain and improve access to medicinal plants necessary for healing practices that were being threatened by commercial overharvesting in communal areas, and to secure improved access to communal lands closer to their homelands for harvesting. The Traditional Healers were concerned that access and benefit sharing agreements, prior informed consent and mutually agreed terms were not being considered in relation to the use of their knowledge and resources.

The Bushbuckridge Protocol was finalised in 2009 and developed specific strategies for access and benefit sharing of traditional knowledge, and access to lands for harvesting. It was developed collaboratively with supporting organisations and with the full participation of the Traditional Healers Bushbuckridge Association (The Traditional Healers Association) that represents the interests of the Traditional Healers.

The Bushbuckridge Protocol has improved dialogue and relationships with government, academia and bio-prospectors by setting out clear procedures for third party interactions and resulted in improved access of the Traditional Healers to conservation areas to continue harvesting medicinal plants for their practice.

2. BACKGROUND / CONTEXT

2.1 Bushbuckridge Traditional Healers

2.1.1 Basic Facts

The Traditional Healers live in the Bushbuckridge area of Mpumalanga in North

East South Africa in the southern portion of the Kruger to Canyons UNESCO Biosphere (the K2C Biosphere) that borders Kruger National Park.

The K2C Biosphere is a significant area of biological, cultural and genetic diversity within the region and one of the largest in the world spanning more than four million hectares. It is managed under UNESCO's 'Man and the Biosphere Programme' and balances biodiversity conservation and sustainable development. Part of the area is government managed but the majority is communal grazing land where access is regulated by traditional leaders who impose high and often unaffordable monetary payments to access the lands.

The region has one of the highest population densities in South Africa with a high growth rate of 2.4%. The population of 1.6 million people is from diverse ethnic and linguistic backgrounds with the lowest per capita income in South Africa.² Unemployment in the Bushbuckridge area is estimated to be 63% and the average household income is US\$110 per month.³ There is a reliance on health services provided by the Traditional Healers within the community.

The population density and low socio-economic status of the broader local population places significant pressures on habitat for medicinal plants required by the Traditional Healers for ongoing practice and maintenance of associated traditional knowledge.

2.1.2 Cultural Values, Knowledge and Beliefs

The Bushbuckridge Protocol describes the cultural values, knowledge and beliefs of the

2 Sibuye, R., Uys, M., Cocciaro, G. and Lorenzen, J. (2012). *The Bushbuckridge BCP: Traditional healers organise for ABS in South Africa*. In *Participatory Learning and Action* 65, Chapter 8, at 103, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 5 July 2013).

3 Ibid at p. 103

Traditional Healers who are from the Sepeda and Tsonga language groups and regard themselves as a single group because of their shared specialist knowledge, shared values and shared reliance on the same medicinal plants.⁴ The Traditional Healers provide healthcare for the community through the use of medicinal plants collected locally from plants growing in communal areas around villages. They connect the community to the local environment by promoting traditional values through their role as custodians of traditional knowledge of local plants.⁵

The Traditional Healers harvest medicinal plants in accordance with spiritual values and regulated by customary law. They promote conservation and sustainable use of these plants, only harvesting for immediate use and never collecting large-scale amounts of any particular resource.⁶ Strips of bark or selected leaves are taken and roots of trees or plants are covered over after harvesting to ensure the survival of the plant or tree.⁷ It is their belief that only harvested leaves and bark taken in ways that ensure the survival of the plant or tree will heal the patient.⁸ The Traditional Healers protect biodiversity by guarding against veld fires and discouraging poaching of plants by hunters.⁹

Customary law determines when plants can be harvested in particular seasons and there are “severe consequences such as jeopardizing rains if breached”.¹⁰ If knowledge is taken without consent and misused, and without taking into consideration ancestors and fellow healers, ancestors will be angered. This would

jeopardise the sanctity of their common knowledge.¹¹

Traditional knowledge of medicinal plants and healing practices is “ancestral, common and individually held”¹² and shared so the “wealth of knowledge will not die”.¹³ Knowledge is transferred in four main ways: it is taught by mentors; acquired during dreams when ancestors’ knowledge is passed on; through innovation; and, received from other health practitioners.

2.1.3 Bio-cultural Values

The K2C Biosphere is one of the most culturally and linguistically diverse areas in South Africa spanning more than 4 million hectares and encompassing savannah woodland, afro-montane forests and grasslands.

The Traditional Healers are custodians of the complex knowledge of plants growing in the K2C Biosphere and tend to their community’s health needs through traditional medicine and cultural ceremonies.

Bio-prospectors and researchers visit the Traditional Healers to learn their traditional knowledge, however few details are provided on how the knowledge will be used or the identity of those visiting. At the time of writing the Bushbuckridge Protocol, no formal access and benefit sharing agreements had been entered into with the Traditional Healers despite statutory requirements for prior and informed consent according to mutually agreed terms for the

4 UNESCO (2010). *The Bushbuckridge Healers’ Path to Justice*. In *A World of Science*, Vol. 8, No. 1, January– March 2010, at 18, <http://unesdoc.unesco.org/images/0018/001865/186519E.pdf> (last accessed 29 August 2013).

5 Ibid

6 Ibid at 19

7 Ibid at 18

8 Ibid

9 Ibid

10 Ibid

11 Traditional Health Practitioners of Bushbuckridge (2010). *Biocultural Protocol of The Traditional Health Practitioners of Bushbuckridge*. Natural Justice and Kruger to Canyons Biosphere, South Africa, at 2, http://community-protocols.org/wp-content/uploads/documents/South_Africa-Bushbuckridge_Biocultural_Protocol.pdf (last accessed 29 August 2013).

12 Ibid

13 Natural Justice (2011). *Working towards the Legal Recognition of Bio-Cultural Community Protocols within National Policies*. Report on the African Bio-Cultural Community Protocol Initiative Inception Meeting 11-12 April 2011, Cape Town, South Africa, at 8, http://naturaljustice.org/wp-content/uploads/pdf/African_BCP_Initiative_Inception_Meeting_Report-april2011.pdf (last accessed 29 August 2013).

use of their knowledge.

2.2 Legal Framework

The Bushbuckridge Protocol provides a framework to improve recognition of the rights of the Traditional Healers.

2.2.1 International Law

South Africa has ratified the *Convention on Biological Diversity* (the CBD) and more recently ratified the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (the Nagoya Protocol). Under the Nagoya Protocol the government of South Africa has produced a model material transfer agreement and a model benefit sharing agreement to aid implementation.

2.2.2 Domestic Law

The Traditional Healers are formally recognised in South Africa through the *South African Traditional Health Practitioners Act 2007* which defines traditional practice as “performance of function, activity, process or service based on a traditional philosophy that uses indigenous African techniques and principles”. However there are problems with recognition of the Traditional Healers by police. In particular, police often arrest the Traditional Healers if a patient dies in their care. This reinforces the need for improved dialogue and understanding amongst government agencies of their legitimate and recognised role as healers.

The *National Environmental Management Biodiversity Act 2004* (the Biodiversity Act) provides for management and conservation of South Africa’s biodiversity and includes provision for the protection of species and ecosystems, the sustainable use of indigenous biological resources and the fair

and equitable sharing of benefits arising from bioprospecting involving indigenous biological resources.

The *Bio-prospecting, Access and Benefit Sharing Regulations 2004* (the ABS Regulations) implement the Nagoya Protocol and recognise the right of traditional knowledge holders to engage with users of indigenous biological resources and/or traditional knowledge according to the principle of free, prior and informed consent and to enter into benefit sharing agreements according to mutually agreed terms for a variety of monetary and non-monetary benefits.

The absence of access and benefit sharing agreements being entered into with the Traditional Healers at the time the Bushbuckridge Protocol was developed highlights the need for improved implementation of the ABS Regulations. The terms of the Bushbuckridge Protocol respond to the ABS Regulations with specific terms and conditions.

3. THE BUSHBUCKRIDGE PROTOCOL

3.1 Status and Impetus

The Traditional Healers initiated the development of the Bushbuckridge Protocol in response to concern at the loss of culture and identity caused by over harvesting of medicinal plants by commercial harvesters and their difficulty in accessing communal lands to continue traditional harvesting practices and to protect traditional knowledge from misappropriation without consent and benefit sharing.¹⁴ For the Traditional Healers, healing is not just a livelihood but a way of life that they were called upon to fulfil and embody.

¹⁴ Ibid

The Traditional Healers were concerned that the numbers of plants were falling due to over-harvesting by herbalists or hunters who collect large quantities using unsustainable methods.¹⁵ Further, there was a desire of the Traditional Healers to access communal lands closer to their homelands.

Access to medicinal plants is hindered by over harvesting and lack of access to conservation areas in close proximity to their communities. The Traditional Healers are excluded from the Mariepskop Reserve that is closer to their communities. They are also unsure about harvesting restrictions in other conservation areas and whether they are permitted to harvest medicinal plants. There are logistical and cost issues with travelling to those areas far from their homelands.

The Traditional Healers were also concerned that when researchers visit their communities to gather information, knowledge and resources, they fail to disclose who they are or what they are going to do with the knowledge. This has resulted in a feeling of mistrust and reticence to share information. The Bushbuckridge Protocol describes guidelines for such interactions.

3.2 Methodology For Developing The Bushbuckridge Protocol

3.2.1 Community Driven Collaborative Approach

The Bushbuckridge Protocol was initiated by the Traditional Healers in response to a range of threats to their healing practices. During the development of the Bushbuckridge Protocol the representative body, the Traditional Healers Association, became the Kakula Traditional Health Practitioners Association of Bushbuckridge

(KTHPA). The Bushbuckridge Protocol was developed with the full participation of the Traditional Healers through the KTHPA in collaboration with the Kruger to Canyons Biosphere Management Committee (BMC). Support was provided by Natural Justice, a non-governmental environmental legal centre with expertise in community-based approaches to access and benefit sharing mechanisms such as bio-cultural community protocols. Researchers were then engaged by the BMC to learn how trees, firewood and grasses are collected within the K2C Biosphere and to link traditional methods of gathering with conservation.¹⁶

Following the initial scoping study, a small meeting was convened between representatives of the Traditional Healers, a medicinal plants nursery in Vukuzenele and representatives of the BMC to “investigate the potential for initiating a bio-cultural protocol process with traditional healers”.¹⁷

A further meeting was then convened with a larger group of the Traditional Healers, Natural Justice and the BMC to discuss the concerns of the Traditional Healers regarding habitat loss and instances of biopiracy.¹⁸

Regular meetings were then convened bringing together more than eighty healers over a period of five months to share views and learn more about South African plants and the protection of traditional knowledge.¹⁹

Throughout the process the consultation

15 UNESCO (2010). *The Bushbuckridge Healers' Path to Justice*. In *A World of Science*, Vol. 8, No. 1, January– March 2010, at 19, <http://unesdoc.unesco.org/images/0018/001865/186519E.pdf> (last accessed 29 August 2013).

16 Sibuye, R., Uys, M., Cocciaro, G. and Lorenzen, J. (2012). *The Bushbuckridge BCP: Traditional healers organise for ABS in South Africa*. In *Participatory Learning and Action* 65, Chapter 8, at 104, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 5 July 2013).

17 Ibid

18 Biopiracy is defined as “the industrial practice of privatising and patenting the traditional knowledge or genetic resources of indigenous peoples, without obtaining authorisation from or providing compensation to source countries.”

19 UNESCO (2010). *The Bushbuckridge Healers' Path to Justice*. In *A World of Science*, Vol. 8, No. 1, January– March 2010, at 18, <http://unesdoc.unesco.org/images/0018/001865/186519E.pdf> (last accessed 29 August 2013).

methodology was inclusive²⁰ with partnerships that involved the direct participation of members of the KTHPA, the BMC, and Natural Justice.²¹

3.2.2 Capacity Building

Capacity building is an important component of the prior informed consent and decision making process. During the meetings, participating traditional healers learned about access and benefit sharing laws under the CBD and the Biodiversity Act.²² Advice was sought from Natural Justice to provide the Traditional Healers with information about legal rights in order to decide on appropriate conditions for sharing their knowledge that would depend on the particular user. For example, a student wishing to become a healer would pay a fee and enter into mentorship whereas an academic researcher or a commercial bio-pro prospector would be approved by the Executive Committee of the KTHPA with a letter from the relevant government agency to confirm approval was granted to conduct research.

Once the final draft was agreed by the KTHPA the Bushbuckridge Protocol was presented to local authorities, owners of private game reserves and other stakeholders in the K2C Biosphere.

3.2.3 Local Institutions and Governance

During the process of developing the Bushbuckridge Protocol a governance structure was developed to represent the Traditional Healers which became KTHPA. KTHPA started out with 80 members and grew to a membership of over 350 who are mostly women. There is a Management Committee which has 26 people and

20 Sibuye, R., Uys, M., Cocciaro, G. and Lorenzen, J. (2012). The Bushbuckridge BCP: Traditional healers organise for ABS in South Africa. In *Participatory Learning and Action* 65, Chapter 8, at 102, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 5 July 2013).

21 Ibid at 101

22 Ibid at 104

an Executive Committee of 6 elected representatives with each committee requiring annual elections.

3.3 Improve dialogue and Understanding

Internally, the process of developing the Bushbuckridge Protocol helped the community to define themselves as a group with shared values and priorities, and with a resolve to work collaboratively to tackle common challenges.

Externally, the Bushbuckridge Protocol improves dialogue and understanding amongst government agencies to achieve improved access to communal lands where medicinal plants are harvested. The Bushbuckridge Protocol has helped to demonstrate to authorities that over-harvesting is actually caused by commercial harvesters, and not the Traditional Healers.²³

Prior to developing the Bushbuckridge Protocol the Traditional Healers had difficulty accessing certain areas to harvest plants. Since the implementation of the Bushbuckridge Protocol, access to medicinal plants has improved.²⁴ One key strategy has been establishing a medicinal plants conservation and development area to increase *in situ* cultivation of the most important medicinal plants.

3.4 Procedures for Protecting and Sharing Traditional Knowledge

The Bushbuckridge Protocol details specific procedures for gaining access and fair and

23 Sibuye, R., Uys, M., Cocciaro, G. and Lorenzen, J. (2012). *The Bushbuckridge BCP: Traditional healers organise for ABS in South Africa*. In *Participatory Learning and Action* 65, Chapter 8, at 107, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 5 July 2013).

24 Natural Justice (2011). *Working towards the Legal Recognition of Bio-Cultural Community Protocols within National Policies*. Report on the African Bio-Cultural Community Protocol Initiative Inception Meeting 11-12 April 2011, Cape Town, South Africa, at 8, http://naturaljustice.org/wp-content/uploads/pdf/African_BCP_Initiative_Inception_Meeting_Report-april2011.pdf (last accessed 29 August 2013).

equitable sharing of the benefits arising from the use of local plants and associated traditional knowledge by third parties in accordance with customary law.

As a result of the Bushbuckridge Protocol, the Traditional Healers have started to engage in partnerships with companies that are interested in using local plants and associated traditional knowledge for commercial purposes²⁵ and government agencies have met with the community to ascertain ways of connecting local communities with conservation schemes and bio-prospecting opportunities.

3.5 Joint Implementation of Conservation and Livelihood Projects

The Bushbuckridge Protocol advocates for joint implementation of conservation and livelihood projects in the K2C Biosphere and for the Traditional Healers to participate in biodiversity outcomes and maintain and preserve traditional knowledge in connection with communal lands.

4. UNDERLYING PRINCIPLES

Authenticity

The Bushbuckridge Protocol's success lies in its ability to convey threats and strategies, with government agencies responsible for protecting the rights of the Traditional Healers also responsible for implementing relevant law as signatories to instruments detailed in the Bushbuckridge Protocol.

The authenticity of the Bushbuckridge Protocol is underpinned by a community driven approach in response to genuine threats to the traditional knowledge of the Traditional Healers. The Bushbuckridge Protocol develops practical and tangible

solutions to the issues they face as a group represented through their Traditional Healers Organisation to negotiate on their behalf.

Good Faith, Respect and Integrity

The development of the Bushbuckridge Protocol involved collaboration with several organisations, in particular the Biosphere Management Committee and Natural Justice on the basis of respect for the Traditional Healers and their important role in the broader community in providing healthcare. The partner organisations have a history of involvement with the Traditional Healers and in developing community protocols. They were also motivated to improve access by the Traditional Healers to communal lands to harvest medicinal plants out of genuine concern at the impact of commercial overharvesting of plants in the K2C Biosphere. The partner organisations were committed in the long term to positive outcomes.

Broad Participation

The development of the Bushbuckridge Protocol was a community driven participatory process through the establishment of the Traditional Healers Association with a mandate to negotiate on behalf of its Traditional Healer members. Community meetings were convened to discuss the Bushbuckridge Protocol and the issues of concern, and Natural Justice assisted to provide legal advice and help the Traditional Healers make informed decisions.

By identifying as a collective, the Traditional Healers could be defined as a community based on shared resources, knowledge and values. Previously they had not necessarily identified as a community. Such identity assisted in not only addressing their issues but also solved the problem of government in identifying the traditional owners of shared knowledge.

²⁵ Ibid

Reciprocity

The Bushbuckridge Protocol promotes reciprocity by improving access for the Traditional Healers to medicinal plants necessary for their traditional healing practices and in turn allows continued traditional healing practices of benefit to the local community for accessible and affordable healthcare.

The Bushbuckridge Protocol also promotes terms and conditions for access to traditional knowledge by third parties in accordance with customary law in exchange for fair and equitable benefits that arise. The Traditional Healers have started to engage in partnerships with companies that are interested in using local plants and associated traditional knowledge for commercial purposes²⁶. Government agencies have also met with the community to ascertain ways of connecting local communities with conservation schemes and bio-prospecting opportunities.

Reciprocity is also evident in the sustainable practices of the Traditional Healers in their harvesting techniques and a responsibility to conserve the plants that are harvested for future generations.

Flexibility

The Bushbuckridge Protocol is administered by the KTHPA and is an expression of the priorities and development goals of the Traditional Healers. The Bushbuckridge Protocol can be amended over time to respond to ongoing problems or issues experienced by the Traditional Healers.

Equilibrium

Biodiversity requires balanced use and management of natural resources. The Bushbuckridge Protocol promotes conservation and sustainable use of natural

resources by the Traditional Healers to continue harvesting medicinal plants required for maintaining their traditional health practices and traditional knowledge. In developing the Bushbuckridge Protocol, the Traditional Healers were motivated to reduce the unsustainable impacts of overharvesting of medicinal plants by commercial operators and promote their own traditional harvesting practices. These traditional practices minimise impacts and ensure regeneration of plants that are used, for example covering the roots of plants after collecting bark and leaves.

²⁶ Ibid

Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan Asocasan Tado, Chocó Department, Colombia²⁷



27 For further information see: Lopez Piedrahita, T., HeilerMosquera, C. (2012). *Defending our territory: the biocultural community protocol of Alto San Juan, Colombia*. In Participatory Learning and Action 65, Chapter 11, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013); and, ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado, Chocó Department, Colombia*, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

1. INTRODUCTION

The *Biocultural Community Protocol for the territory of the Supreme Council of the San Juan* (the San Juan Protocol) was initiated in 2010 by the San Juan local communities (the San Juan Communities) whose territory (the San Juan Territory) is located in the basin of the Alto San Juan River in Colombia. The San Juan Protocol aims to safeguard the cultural traditions and traditional management practices of the San Juan Communities while promoting conservation and customary sustainable uses. The San Juan Protocol provides a framework for improved dialogue and understanding amongst decision makers of the rights of the San Juan Communities of the customary ways of managing and using natural resources of the San Juan Communities. Consideration of the San Juan Protocol should be the first step in any consultation process regarding mining and forestry developments that impact on the living cultural traditions of the San Juan Communities and the San Juan Territory.²⁸

2. BACKGROUND

2.1.1 Basic Facts

The San Juan Territory is located in the municipalities of Tado and Rio Iro in the Chocó bioregion of Colombia and home to forty Afro-Colombian descendent communities.

The San Juan Communities' shared history, culture and customs are distinct from other

ethnic groups in Colombia and they have maintained traditional production and land management practices for collective use of the resources in their territory since 1530.²⁹ The San Juan Communities were granted inalienable collective title to their territories in 2001 and permanently occupy 54 571 hectares of which 4 625 hectares is for traditional land use.³⁰

The development of the San Juan Protocol was facilitated by the Alto San Juan Community Council (ASOCASAN) which is an ethno-territorial non-profit organisation established in accordance with Law 70 (1993) as a system of self-government.³¹ Representation of the ten San Juan Communities through ASOCASAN is by way of an elected representative advocating on their behalf. The mandate of ASOCASAN is to promote integrated development of the San Juan Territory involving state institutions, bodies and organisations to improve inter-institutional relationships, a primary objective of the San Juan Protocol.

2.2.2 Community Values, Beliefs and Practices

The relationship of the San Juan Communities with the San Juan Territory is inextricably linked to the historical-cultural process of developing knowledge about the San Juan Territory's environment and natural resources. It is through this collective identity that collective land title has been conferred and of rights to soil and forest resources in the San Juan Territory have subsequently been recognised.

The San Juan Communities share common values, traditions, customs and beliefs that define their identity including knowledge

28 For further information see: Lopez Piedrahita, T., HeilerMosquera, C. (2012). *Defending our territory: the biocultural community protocol of Alto San Juan, Colombia*. In Participatory Learning and Action 65, Chapter 11, <http://pubs.iied.org/pdfs/146181IED.pdf> (last accessed 29 August 2013); and, ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

29 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 9, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

30 Ibid at 10

31 Article 3 of Decree 1745 (1995)

and practice of traditional medicine and traditional production systems, all unique ways of working.³² The family is the centre of production systems and labour is differentiated between men, women and children with customary principles for the exchange of services between families.³³

Traditional production systems practiced by the San Juan Communities are described by the San Juan Protocol as a 'multi-option system' that combines farming, fishing, mining, forestry, animal husbandry, hunting and crafts³⁴ and involve zoning of land for distinctive forms of land use.³⁵ These cultural traditions, management practices and knowledge have been passed down through generations, contributing to conservation of natural resources and enabling self-development.

Traditional artisanal mining is a significant part of the cultural identity of the San Juan Communities and approximately 80% of the local community is involved in small-scale mining using low impact localised techniques. Artisanal mining is carried out in secondary forest areas and only superficial ore is extracted down to approximately fifteen metres below ground level, without the use of contaminants. Mining is rotational and integrates agricultural reclamation of land and nurseries for native species and medicinal plants used by traditional healers.³⁶ This low impact mining technique is certified as "Green Gold", the first of its kind in the world. Green Gold certification is recognised for its high fair trade standard and is determined by a voluntary system with

ten sustainability criteria.³⁷ The availability of certification enhances the recognition of traditional practices and promotes the collective work of the community.

Domestic and traditional logging of forest timber is permitted by Article 6 of Law 70 (1993) using low impact techniques such as traditional cutting and harvesting methods to promote regeneration. Densely wooded areas are recognised as community conservation areas and timber can be exploited for domestic purposes such as canoes, housing, paddles, mining pans and home utensils.³⁸

Other areas of forest are zoned as low intervention which means they are designated for collective use, public amenity and social interest, and can be important areas for traditional healers. There are also community forest areas used for low intensity production and which are preserved to ensure autonomy of the community.

Medicinal plants are cultivated in gardens that are specially maintained gene-banks known as *zoteas*. Men and women maintain *zoteas* according to the lunar calendar whereby women are responsible for sowing and maintenance while men are the keepers of knowledge and prepare the medicines using the medicinal plants.

2.2.3 Biocultural Values

The San Juan Territory has significant flora, fauna and mineral resources such as gold and platinum which the communities depend on for their livelihoods and derive a range of direct and indirect benefits from artisanal mining, small scale farming, fishing and the use of non-timber products for domestic

32 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 9, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

33 Ibid at 12

34 Ibid at 11

35 Ibid at 12

36 Ibid at 14

37 Certification of 'Green Gold' is under the organisation Oro Verde, available at <http://www.greengold-ovoverde.org> (accessed 5 July 2013)

38 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 15, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

use and sale of surplus. The use of soil and timber resources is a recognised statutory right.

The San Juan Communities maintain the soil and forest biodiversity through their traditional practices and customary sustainable use to create a “productive and natural mosaic of land use practice according to traditional knowledge”.³⁹ This practice is described by the San Juan Protocol as ‘integrated territorial management’.

2.3 Legal Framework

The Protocol is a mechanism to improve recognition and implementation of the statutory and internationally recognised rights of the San Juan Communities. The Protocol aims to promote customary sustainable use of natural resources in the San Juan Territory and the participation of the San Juan Communities in decision-making concerning their territories and resources.

2.3.1 Rights to Natural Resources

Traditional artisanal mining is recognised in Article 2 of Law 70 (1993). Use of forest timber resources is recognised in Article 19 of Law 70 (1993) including the use of forest timber to build homes and craft canoes, stakes, paddles, punts, mining pans and a variety of home utensils by using traditional practices relating to tools and cutting methods that allow the forests to regenerate.

The right of the San Juan Communities to customary sustainable use of soil and forest resources in their territories⁴⁰ is conditional upon sustainable management and consideration for ecological fragility recognised by the Constitutional Court. In turn the State has a reciprocal responsibility to protect the cultural identity and rights

of the San Juan Communities as an ethnic group, to foster their economic and social development and to provide capacity building and training,⁴¹ such as protecting traditional production practices; for example, agriculture, mining, forest extraction, grazing, hunting, fishing and general harvesting activities.⁴²

2.3.2 Territorial Rights

The San Juan Protocol is an instrument of the community to improve their enjoyment of territorial rights and natural resources, and participation in associated decision making.

Domestically, Colombia granted the right of collective ownership of the San Juan Territory to the San Juan Communities in 2001.⁴³

Colombia has ratified the International Labour Organisation’s *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) that recognises the rights of indigenous peoples to benefit from the commercial use of their traditional knowledge and natural resources.

2.3.3 Right to Consultation

The Colombian Constitutional Court in 2003 recognised as a ‘fundamental right’ the right of prior consultation in relation to projects involving the exploitation of renewable and non-renewable natural resources in collective territories.⁴⁴

However, communities are not always consulted in relation to large-scale projects that have an impact on their territory. Through their San Juan Protocol, the San Juan Communities request that proposed legislative or administrative measures

41 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 40, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

42 Ibid

43 INCORA Resolution 2727 of 27th December 2001

44 Judgment C-620 of 2003.

39 Ibid at 8

40 Article 6 of Law 70 of 1993

that will impact directly on the San Juan Communities are carried out in good faith using appropriate procedures⁴⁵ including exploitative projects which affect the natural resources of collective territories.⁴⁶

2.3.4 Protection of Cultural Heritage

The UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage* was adopted into Colombian law in Law 1037 (2006) and declared enforceable by the Constitutional Court in Judgment C-120 of 13 February 2008 and which came into force on 19 June 2008. In Law 1037 (2006) 'Intangible cultural heritage' refers to the 'the practices, representations, expressions, knowledge, skills that communities, groups and, in some cases, individuals recognise as part of their cultural heritage.'⁴⁷

Law 70 (1993) was developed as part of Provisional Article 55 of the Constitution with the purpose of creating mechanisms for protecting the cultural identity and rights of the Black Communities of Colombia such as the San Juan Communities as an ethnic group and to foster their economic and social development.

3. THE SAN JUAN PROTOCOL

3.1 Status and Impetus

The San Juan Communities initiated and developed their protocol in response to external pressures on and around the San Juan Territory having a negative impact on their territories, livelihoods and traditional practices caused by broad scale mining and illegal logging. This was resulting in

drastic changes in land use and pollution.⁴⁸ These impacts could be reduced by prior consultation processes and environmental impact assessment to mitigate impacts and provide compensation in an integrated and participatory way.⁴⁹ Additionally, illegal activities were not being investigated or punished nor were the environmental impacts being measured or compensated.⁵⁰

The San Juan Communities were frustrated by their lack of participation in administrative decision-making processes for development proposals for natural resources that were impacting on the use and enjoyment of their territory. This was in spite of the State granting territorial rights to the San Juan Communities to collective ownership of the San Juan Territory, including rights to consultation and rights to economic and social development.

Through the development of the San Juan Protocol, the San Juan Communities identified criterion for consultation with their communities in recognition of their collective territorial rights, rights to customary sustainable use of natural resources and traditional management systems and rights to specialised traditional knowledge.

The San Juan Communities were highly motivated to ensure high environmental standards are maintained to enable on-going sustainable use of their lands and resources.⁵¹ Its primary aim was for:

"Recognition of customary ways of managing and using natural resources from the starting point of any consultation process with third parties regarding development projects...to reduce the

45 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 42, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

46 Ibid

47 Ibid at 40

48 Lopez Piedrahita, T., HeilerMosquera, C. (2012). *Defending our territory: the biocultural community protocol of Alto San Juan, Colombia*. In *Participatory Learning and Action* 65, Chapter 11, at 132, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013).

49 Ibid

50 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 18, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

51 Ibid at 17

*imbalance of power, promote a participative focus and ensure equitable distribution of resulting benefit".*⁵²

3.2 Methodology for Developing the San Juan Protocol

The San Juan Protocol was initiated and developed by the San Juan Communities through the representative organisation ASOCASAN, in collaboration with the United Nations Environment Program (UNEP), the NGO Natural Justice, and the Environmental Research Institute of the Pacific (Instituto de Investigaciones Ambientales del Pacifico (IIAP)). The process commenced in August 2010 and was finalised in April 2011.

The methodology for developing the San Juan Protocol was endorsed by the major council of ASOCASAN. This comprised the following stages:

- (i) Dissemination of information and meeting with the community to discuss expectations and identify the main environmental problems of concern;
- (ii) Defining the values, challenges and relationships with natural resources;
- (iii) Identifying the main problems, significant resources and associated traditional knowledge and management practices. This component was facilitated by IIAP and Natural Justice.

Broad community consultation ensured the largest number of community interests could be considered⁵³ through a series of workshops. Three workshops were run with community representatives and ASOCASAN council members that brought together a broad cross section of the community with different levels of knowledge about traditional activities. Participants included young people, women and men, traditional

miners, farmers, traditional doctors and teachers. Direct interviews were carried out with artisanal workers by IIAP and ASOCASAN.

Community workshops were convened to provide information on the process and to facilitate an informed decision whether to proceed with the San Juan Protocol. The community was invited to identify issues and priorities with their territories and the relationships with their natural resources. On this basis the criteria for prior and informed consent and for managing natural resources were established and agreed.⁵⁴

With the support of IIAP and Natural Justice the content and structure of a draft protocol emerged from this consultative process and there was general consensus that illegal mining and extraction of natural resources in the community forests were the major concerns. The final document was approved by consensus at a general assembly of ASOCASAN.

3.3 Objectives and Functions of the San Juan Protocol

The San Juan Protocol promotes genuinely participative processes and requests consultation on all proposals, actions, intervention activities and legislation. The San Juan Protocol facilitates dialogue between the San Juan Communities through ASOCASAN and external actors with the aim of ensuring a planning process capable of responding to their rights.

Through the San Juan Protocol, the San Juan Communities have developed criterion to encourage municipal development and planning processes, including environmental impact assessment, to take into consideration their collective rights and their internal regulatory processes and to undertake prior consultation.

⁵² Ibid at 7 quoting *Aristo Mosquera, Legal representative of the Supreme Community of Alto San Juan.*

⁵³ Ibid

⁵⁴ Appendices 4 and 8 of the Protocol.

3.3.1 Procedures for Consultation and Prior and Informed Consent

The San Juan Protocol requests a guarantee for “genuinely participative and appropriate participation processes and for ASOCASAN to be consulted regarding all proposals, actions, intervention activities and legislation that affects the integrity of San Juan Territories”.⁵⁵ The inability of the San Juan Communities to effectively participate in administrative decision-making processes regarding development and exploitation that impact on their territories causes conflict and adverse impacts.⁵⁶ The San Juan Protocol states this can be reduced by “properly collectivizing projects and implementing suitable prior consultation processes and compensation in an effective, integrated and participatory way.”⁵⁷

The Appendices of the San Juan Protocol set out consultation and consent procedures to improve relationships and understanding with key State institutions and external actors during the planning and implementation of development projects, or research in the San Juan Territory.⁵⁸ Specifically the San Juan Protocol requests any research into the traditional knowledge of the San Juan Communities be carried out with prior informed consent taking into account the guidelines for access, compensation and equitable benefit sharing.⁵⁹

3.2.2 Community Criteria For Managing Natural Resources

The San Juan Protocol promotes criterion for Green Gold Certification of traditional artisanal mining. This includes conditions that there will be no large-scale ecological destruction and no use of mercury or cyanide. Mined areas must be ecologically stable within three years of the mining activity commencing and operators must obtain consent from community councils for mining activities. The San Juan Communities request the right to define ‘special nature reserves’ in their territories to be included as mining zones where mining cannot be carried out due to the special cultural, social and economic significance of the site.⁶⁰

The San Juan Protocol also promotes forest management criterion that are based on the cultural beliefs and principles of the San Juan Communities to ensure the lowest impact of activities to guarantee the survival of forest fauna and flora species which have cultural value to the community. This includes consideration of culturally important dates, times of day and lunar cycles when felling trees.

4. UNDERLYING PRINCIPLES

Authenticity

The San Juan Protocol was initiated by the representative body of the San Juan Communities in response to genuine threats to customary sustainable use of natural resources in their territories. The identification of priorities and responses was participatory and involved a broad cross section of the San Juan Communities.

The San Juan Protocol identifies in detail the traditional knowledge, innovations and practices of the communities, and details the historical and ongoing customary

55 Ibid at 21

56 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 20, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

57 Ibid

58 Lopez Piedrahita, T., HeilerMosquera, C. (2012). *Defending our territory: the biocultural community protocol of Alto San Juan, Colombia*. In Participatory Learning and Action 65, Chapter 11, at 131, <http://pubs.iied.org/pdfs/146181IED.pdf> (last accessed 29 August 2013).

59 ASOCASAN et al. (2010). *Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan AsocasanTado. Chocó Department, Colombia*, at 17, http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf (last accessed 29 August 2013).

60 Ibid at 37

practices of artisanal gold mining that have been practiced for hundreds of years integral to their identity, livelihoods and inter-generational transfer of bio-cultural knowledge.

Good Faith

The San Juan Protocol was initiated and facilitated by ASOCASAN which represents the San Juan Communities and has a mandate to advocate on behalf of the San Juan Communities. Project partners included UNEP and Natural Justice that supported development of the San Juan Protocol with a commitment to respecting the full and effective participation of the San Juan Communities in the process.

Full and Effective Participation

The San Juan Communities participated in the development of the San Juan Protocol through a direct consultative methodology that was facilitated by the Communities' representative body ASOCASAN. Three community workshops were convened during its development and direct interviews were held with members of the community.

Harmonisation

The San Juan Protocol promotes alignment between recognised statutory and common law rights of San Juan Communities to the San Juan Territory and relevant international law. These rights extend to participation in consultation in decisions concerning extractive industries that impact on their social and cultural identity. Ongoing threats point to the need for a San Juan Protocol to improve dialogue with government and industry, and to provide clear guidelines in accordance with customary principles.

Reciprocity

The right of San Juan Communities to the use of the resources in their territories is conditional upon sustainable management practices. The reciprocal obligation of the State is to protect the cultural identity and rights of the San Juan Communities as an ethnic group and to foster their economic and social development and to provide capacity building and training.

Flexibility

The San Juan Protocol is an adaptable document developed by the San Juan Communities' representative body ASOCASAN and can therefore be adjusted according to emerging priorities of the San Juan Communities and in response to changes in national law in consultation with the communities.

Inter-Community Agreement for Equitable Benefit-Sharing in the Potato Park, Peru⁶¹



61 For further information see: ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013); ANDES, The Potato Park Communities and IIED (2011). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Summary Report*, <http://pubs.iied.org/G03168.html> (last accessed 29 August 2013); Argumedo, A. (2012). *Decolonising action-research: the Potato Park biocultural protocol for benefit-sharing*. In *Participatory Learning and Action* 65, Chapter 7, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013); Argumedo, A. and Pimbert, M., IIED (2006). *Protecting Indigenous Knowledge Against Biopiracy in the Andes*, <http://pubs.iied.org/14531IIED.html> (last accessed 29 August 2013); Argumedo, A. and Pimbert, M., IIED (2005). *Traditional Resource Rights and Indigenous People in the Andes*, <http://pubs.iied.org/14504IIED.html> (last accessed 29 August 2013); and, Argumedo, A. and Stenner T., IIED (2008). *Association ANDES: Conserving indigenous biocultural heritage in Peru*, <http://pubs.iied.org/pdfs/14567IIED.pdf> (last accessed 29 August 2013).

1. INTRODUCTION

The *Inter-community Agreement for Equitable Benefit-Sharing in the Potato Park* (the Potato Park ICA) is a functioning community protocol for access and equitable sharing of monetary and non-monetary benefits derived from potatoes and other natural resources and associated traditional knowledge of indigenous communities in the Potato Park in Písaq Cusco, Peru. The Potato Park ICA formalises community level procedures for access and benefit sharing and demonstrates how local participation and control of development processes achieve sustainable rural livelihoods, resilience and indigenous self-determination.

The Protocol was developed through indigenous institutions with the support of external agencies as a community driven and initiated process.

2. BACKGROUND

2.1 Quechua Indigenous Peoples

2.1.1 Basic Facts

The Potato Park encompasses the territories of the Quechua indigenous peoples located in Písaq, Peru which is the sacred land of the Incas. There are six communities located in the Potato Park who are subsistence farmers with a population of 4000 people of which 99% are indigenous. The Potato Park spans 10,000 hectares with a population density of 443.87 people per square kilometre with a small majority of women.⁶²

62 ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 11, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

2.1.2 Beliefs, Values and Cultural Systems

The Potato Park is “dedicated to the protection of native potato via indigenous territoriality traditions”.⁶³ The objective of Quechua indigenous communities in creating the Potato Park is described by the Potato Park ICA as *Sumaq Causay* which is an Andean philosophy meaning ‘harmonious existence’ or ‘a way of living together’⁶⁴ which recognises the interdependence of humans and the natural world.⁶⁵

‘Sumaq Causay’ includes customs, celebrations, agricultural practices, the use of local products, sharing and putting into practice the memories and knowledge that come from the ancestors, the use of traditional dress, music, food and rituals. Subsistence mechanisms and social relations have developed by adapting to the natural environment.

The customary laws and principles of the Quechua indigenous peoples are embodied in three underlying principles referred to in the Potato Park ICA as the Andean Principles: reciprocity, duality and equilibrium.⁶⁶

- The principle of ‘reciprocity’ refers to mutually benefit sharing so that what is received is paid back in equal measure. This is evident in seed exchanges among the communities and in the distribution of agricultural work, and in the sharing of benefits in proportion to effort.
- The principle of ‘duality’ refers to

63 Ibid at 8.

64 Argumedo, A. (2012). *Decolonising action-research: the Potato Park biocultural protocol for benefit-sharing*. In *Participatory Learning and Action* 65, Chapter 7, at 17, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013).

65 ANDES, The Potato Park Communities and IIED (2011). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Summary Report*, at 3, <http://pubs.iied.org/G03168.html> (last accessed 29 August 2013).

66 ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 34, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

rights and obligations that should be maintained equally, recognising the complementary yet distinct division of labour between men and women, and the transmission of agricultural knowledge where the roles of women and men are also complementary.

- The principle of ‘equilibrium’ refers to the balance and proportion between nature, the sacred world and the community. This principle relates to the “apportionment and distribution of benefits in response to capabilities, needs and contribution of efforts, and in conflict resolution and decision-making”.⁶⁷

The Potato Park ICA was developed on the basis of the Andean Principles.

2.1.3 Biocultural Values

The Quechua indigenous peoples have collective title to their territories and in 1998 established the Potato Park. It is described as an Agrobiodiversity Conservation Area for its unique traditional agroecosystem, indigenous culture and as the primary source of native potato diversity in the world. The vast majority of the world’s potato varieties originate from Peru.

‘Potato’ is an Andean cultural expression and a ‘flagship species’ for the efforts of the communities to “restore local habitats and ecosystems, ensure cultural survival and promote local rights and livelihoods.”⁶⁸

The Potato Park has the largest number of wild potatoes in the world with 700 cultivars of potato and 410 varieties repatriated from

the International Potato Centre.⁶⁹ There are also many medicinal plants and crops in the area including many native Andean crops. This genetic diversity can be largely attributed to the traditional knowledge, innovations and practices of the Quechua indigenous peoples through their agrarian traditions that have developed over millennia.⁷⁰ For hundreds of years, Andean civilisations and their descendants have carefully propagated wild plants, selecting particular strains for desirable qualities and breeding them.⁷¹ This has resulted in many new potato and other varieties of plants adaptable to a wide range of microclimates that has significant value for food security.

2.2 Legal Framework

2.2.1 International Law

The Peruvian Government has ratified the International Labour Organisation’s *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) that recognises the rights of indigenous peoples to benefit from the commercial use of their traditional knowledge and natural resources and an obligation to consult with indigenous peoples.

Peru has also ratified the *Convention on Biological Diversity* (the CBD) and more recently signed the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (the Nagoya Protocol).

67 Argumedo, A. (2012). *Decolonising action-research: the Potato Park biocultural protocol for benefit-sharing*. In Participatory Learning and Action 65, Chapter 7, at 94, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013).

68 ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 9, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

69 Argumedo, A. (2012). *Decolonising action-research: the Potato Park biocultural protocol for benefit-sharing*. In Participatory Learning and Action 65, Chapter 7, at 92, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013).

70 ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 17, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

71 Argumedo, A. and Pimbert, M., IIED (2006). *Protecting Indigenous Knowledge Against Biopiracy in the Andes*, at 2, <http://pubs.iied.org/14531IIED.html>

2.2.2 Domestic Law and Policy

The Constitution of Peru upholds the right of indigenous peoples to practice customary laws on their lands. Peru's Biodiversity Law 27811 of 24 July 2002 recognises traditional knowledge as part of the cultural heritage of indigenous communities (article 12) the rights to which are 'inalienable and indefeasible' (article 12). Access to traditional knowledge requires the prior and informed consent of indigenous peoples (article 6). However the protection afforded under Biodiversity Law 27811 does not extend to traditional knowledge in the public domain.

3. THE POTATO PARK INTER-COMMUNITY AGREEMENT

3.1 Status and Impetus for the Inter-community Agreement

The impetus for developing the Potato Park ICA was in response to the repatriation of lost potato varieties back to Peru from the International Potato Centre in 2004. The repatriation and establishment of the Potato Park ICA resulted in a range of direct and indirect benefits for the Quechua indigenous communities. It also resulted in requests to access genetic resources and associated traditional knowledge from outside parties.

The Potato Park ICA creates a structure to formalise distribution of benefits amongst the communities. It establishes measures and mechanisms to protect the genetic resources and associated traditional knowledge of the Quechua indigenous communities from misappropriation in accordance with their established *sui generis* systems and customary decision-making processes.

The Potato Park ICA was initiated by the Quechua-Aymara Association for Nature and Sustainable Development (ANDES) with the support of the International

Institute for Environment and Development (IIED). ANDES is an indigenous NGO located in Cusco, Peru that is governed by, and collaborates with, community-level organisations in the development of strategies including "adaptive management of Indigenous Biocultural Heritage and strategies which affirm the rights and responsibilities of communities and prioritize food sovereignty, health, and local livelihoods".⁷²

A further motivation for all interested parties in the establishment of the Potato Park ICA was to share information and experiences with other communities throughout the world who are developing culturally sensitive schemes, and demonstrate the practical application of an integrated 'Biocultural System Approach'.⁷³

The Potato Park ICA was adopted by the Quechua indigenous communities in 2009.

3.2 Methodology

The Potato Park ICA was developed 'inter-communally' amongst the six Quechua indigenous communities of the Potato Park from the planning stage to final negotiation and validation through a 'bottom-up' in-depth participatory approach.

The Potato Park ICA integrates the Andean principles, customary laws and traditional governance systems of the Quechua indigenous communities and provides alternative and legitimate protection of biocultural heritage and associated traditional knowledge.

72 ANDES, The Potato Park Communities and IIED (2011). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Summary Report*, at 10, <http://pubs.iied.org/G03168.html> (last accessed 29 August 2013).

73 ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 37, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

This integrated approach is described as a Biocultural System which contains:

*knowledge, innovations and practices of Indigenous and local communities, collectively maintained; and which also incorporates the traditional resources and territory itself, including the diversity of genes, variety of crops, species and ecosystems, and the cultural and spiritual values and laws developed within the socio-ecological context of the communities.*⁷⁴

The first step in the process was to identify existing prior informed consent processes for benefit sharing so that communities agree among themselves according to their customary norms how benefits will be distributed through their local institutions. Using a community driven approach empowers communities and their institutions and ameliorates the potential imbalance between internal and external negotiating parties.⁷⁵

The development of the Potato Park ICA occurred in three phases:

- Phase 1: Identifying Community Norms and Customary Law;
- Phase 2: Consultation, Discussion, Revision and Negotiation of the Potato Park ICA; and,
- Phase 3: Final Consultation and Validation of the Potato Park ICA.

3.2.1 Phase 1: Identifying Bio-cultural Values: customary laws, cultural values and traditional practices

During Phase 1 a draft protocol was written that identified common interests, objectives and scope of the protocol based on customary laws and practices.

The communities identified methodological

requirements based on customary laws, cultural values and traditional practices for administering cultural and biological resources. This enabled the ICA to build upon *sui generis* systems that were already in place and avoided the risk of imposing benefit sharing schemes which may have ultimately been rejected.⁷⁶ Hence the Potato Park ICA is “embedded in the traditional values, ethical norms, customary uses, and cultural and spiritual practices associated with the bio-cultural resources of the Park.”⁷⁷

A series of thematic workshops, study groups and participant observations were conducted, facilitated by Quechua indigenous peoples trained to carry out this role. A broad cross section of the communities participated resulting in representation of different ages, genders and roles to discuss their traditional knowledge, customary laws and values, and inter-community relationships.

Flexible methods were utilised for collecting and validating information that recognised both written and oral knowledge. For example, materials used during consultations were in the Quechua language to explain each possible clause of the agreement and compile outstanding issues for discussion.⁷⁸

Indigenous researchers and facilitators played an integral role and provided a link between Western and indigenous knowledge systems.⁷⁹ This community driven and direct participatory approach is described as ‘emancipatory methodology’ for its involvement with indigenous researchers and indigenous facilitators.

The thematic working groups identified the main themes, and discussions focused on principles and practices identified in an earlier research project “Protecting Community Rights over Traditional

⁷⁴ Ibid

⁷⁵ ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 23, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

⁷⁶ Ibid

⁷⁷ Ibid at 5

⁷⁸ Ibid at 16

⁷⁹ Ibid at 29

Knowledge". Study groups within the communities gathered and analysed existing knowledge and new knowledge emerged.⁸⁰

It was observed during the consultations that the customary laws of the Quechua indigenous peoples are not written but rather practiced and observed in their daily lives. Indigenous researchers examined traditional practices for administering cultural and biological resources including "distribution of seeds, inheritance of land, and transmission of knowledge at the individual, communal, regional and generational levels",⁸¹ as well as customary principles for benefit sharing. The three Andean Principles were identified and integrated into all aspects of the Potato Park ICA: methodology for the process, prior informed consent procedures, repatriation, exchange of bio-cultural resources, fair and equitable benefit-sharing procedures, conservation measures, governance, and external and internal conflict resolution.

3.2.2 Phase 2: Consultation, discussion, revision and negotiation of the inter-community agreement

During Phase 2 of developing the Potato Park ICA, consultations and community participation focused on proposed articles and implementation options, and involved local authorities and community members.⁸² Participants were identified by ANDES using the 'Social Analysis System' method to determine the social network of actors

involved.⁸³ This method involved identifying social networks of actors involved with the Potato Park and developing a list of people to be consulted who were representative of those networks. Participants who agreed to join the process were then divided into groups and met regularly to discuss the draft protocol and provide input.

As with Phase 1, indigenous facilitators led the workshops and discussions using a range of methods to explain aspects of the Quechua indigenous culture. Video and power-point presentations in the Quechua language explained legal terms and new concepts. Information was shared equally amongst participants.

3.2.3 Phase 3: Final Consultation and Validation of the Potato Park ICA

During Phase 3 the draft Potato Park ICA was validated, finalised and adopted. Indigenous facilitators led discussions through study groups. The Potato Park ICA identified rights and responsibilities with regard to benefit sharing as well as objectives and beneficiaries. Before adoption of the Potato Park ICA it was reviewed by a 'group of experts', including a lawyer with expertise in customary law. It was then adopted by a large majority vote in a community assembly in each of the six communities.

3.2.4 Review and Adjustment

The Potato Park ICA was amended after two years to adjust its terms and conditions in relation to benefit sharing procedures. It was felt by communities that the Andean Principles were not sufficiently integrated because some members of the community were not receiving benefits, such as the

⁸⁰ Ibid at 30

⁸¹ ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms*, Detailed Case Study, at 31, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

⁸² Argumedo, A. (2012). *Decolonising action-research: the Potato Park biocultural protocol for benefit-sharing*. In Participatory Learning and Action 65, Chapter 7, at 96, <http://pubs.iied.org/pdfs/14618IIED.pdf> (last accessed 29 August 2013).

⁸³ ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms*, Detailed Case Study, at 31, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

aged and widows.

3.3 Empowering Local Institutions

The development and implementation of the Potato Park ICA strengthens inter-community cohesion, inter-community institutions and decision-making capacity⁸⁴ using formal and traditional or customary authorities. This dual approach enables incorporation of the Andean principles in all aspects of the management of the Potato Park and variation in the application of norms in the six communities depending on the needs and traditions of each.⁸⁵

The Association of Communities of the Potato Park (the Association) is the umbrella organisation that governs the Potato Park and represents the six Quechua indigenous communities that form the Potato Park. Each community has formal legal recognition through communal land titles. Elected members from each community comprise the Board of Directors of the Association.

Various economic collectives also contribute to the development of the Potato Park and contribute to livelihoods based on the conservation and sustainable use of biocultural heritage.

3.4 Equitable Benefit Sharing

The Potato Park ICA is a 'broad outline' for sharing direct and indirect benefits derived from the biocultural resources of the Potato Park amongst the Quechua indigenous communities in accordance with the Andean Principles.

Benefits are generated out of a range of sectors through the application and development of technical skills and

traditional knowledge systems. Monetary benefits include those arising from the marketing of native potato and biological resources, and those from the use of goods and activities within the Potato Park (such as those derived from the agreement with the International Potato Centre and payment for entry to the Potato Park). A range of economic collectives have emerged that include:

- six traditional medicine centres;
- a cottage industry of natural products based on potatoes and natural plants;
- a culinary potato sanctuary and hands-on cropping activities;
- a handicraft centre;
- third-party use of biological resources, seeds and traditional knowledge of the Potato Park;
- repatriation of seeds, especially those derived from an agreement with the International Potato Centre;
- activities undertaken in the Potato Park, such as research, ecotourism and other related services (e.g. restaurant lodging facilities); and
- donations, projects or similar activities.

In apportioning benefits according to the Andean Principles, benefit sharing is a function of the distribution of work so that each member of the community receives benefits according to the amount of work and effort carried out.⁸⁶ Members of the community who are most directly involved in the activities of the Potato Park receive most benefits. However this does not preclude people in need for whom there is also provision of monetary benefits, reflecting the principles of duality and equilibrium.

The Potato Park ICA minimises the risk of conflict over resources and unfair distribution of benefits with contingency planning. As

⁸⁴ Ibid

⁸⁵ ANDES, The Potato Park Communities and IIED (2011). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Summary Report*, at 3, <http://pubs.iied.org/G03168.html> (last accessed 29 August 2013).

⁸⁶ Ibid at 41

revenues from the Potato Park increase they are reinvested into a communal fund that sustains the park's agro-ecosystem where the potatoes are grown.

3.5 Access

The Potato Park ICA formalises prior informed consent processes for requests to access the Potato Parks' genetic resources and traditional knowledge and thereby strengthens the capacity of communities to negotiate access and benefit sharing agreements with external parties.

Communities maintain the free flow of resources and traditional knowledge, innovations and practices amongst them and recognise that potatoes repatriated are the collective heritage of the six communities. Traditional knowledge and bio-genetic resources can only be exploited with the prior informed consent of the six communities.

Local Biocultural Databases have been developed through the use of the traditional Andean system to collect and store information related to biological resources as a tool for conserving, promoting and protecting local knowledge.⁸⁷ This adaptive system allows the "capture, registration, storage and administration of indigenous knowledge based on Andean traditional science and technology."⁸⁸

4. UNDERLYING PRINCIPLES

Authenticity

The Potato Park ICA is an instrument developed by the Quechua indigenous

communities for priorities and outcomes they have identified, based on their own cultural and spiritual values and principles, which are documented in the ICA from their own perspective. In particular, procedures for benefit sharing within and amongst the Quechua indigenous communities, procedures for granting access to traditional knowledge, innovations and practices and associated genetic resources, and the use of knowledge registers that are based on obligations arising out of customary law.

Broad Participation

The methodology for developing the Potato Park ICA is directly participatory and facilitated by the ANDES, the elected representative body of the Quechua peoples and their communities.

Layered community consultations were facilitated by Quechua indigenous peoples in their local language over a sufficient timeframe, and with a strong capacity building and training component to improve direct participation of the indigenous community in developing and implementing the Potato Park ICA and carrying out research.

ANDES, IIED and other experts assisted during the negotiation of the Potato Park ICA and prior to the signing of the protocol to ensure the indigenous communities were informed for the ultimate benefit of the six communities in the Potato Park.

Empowerment

In Peru the government actively promotes the rights of indigenous peoples, in particular through ratification of ILO 169. The Potato Park ICA promotes free prior and informed consent in respect of requests from external actors to access traditional knowledge and genetic resources of the community i.e. potato varieties, traditional agrarian practices, gastronomy etc.

87 ANDES, The Potato Park Communities and IIED (2012). *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Among the Communities of the Potato Park based on Quechua Customary Norms, Detailed Case Study*, at 14, <http://pubs.iied.org/G03340.html> (last accessed 29 August 2013).

88 Ibid

Promoting International Minimum Standards and International Customary Law

The Potato Park ICA promotes minimum international standards and customary law relevant to indigenous peoples. In particular the ILO 169, the United Nations Declaration on the Rights of Indigenous Peoples and the CBD are identified in the ICA. On this basis the Potato Park ICA articulates a range of measures and mechanisms that align with relevant international standards and customary law to improve the recognition and protection of the knowledge, innovations and practices of the Quechua indigenous peoples and associated resources.

Reciprocity

The Potato Park ICA promotes *ex-situ* and *in-situ* conservation and sustainable use outcomes on the basis of reciprocity through repatriation of potatoes and reciprocal seed exchanges of emerging potato varieties. Within the Quechua indigenous communities of the Potato Park, reciprocal arrangements are evident in the distribution of agricultural work, and in the sharing of benefits in proportion to effort.

Equilibrium

The Quechua indigenous peoples promote the principle of equilibrium as a fundamental principle of Andean culture which promotes sustainable resource use, equal exchange of information and gender balance. This is reflected in the objectives of the Potato Park ICA for conservation and sustainable use of resources, and the methodology for developing and implementing the Potato Park ICA by encouraging equal exchange of information during community consultations.

Flexibility

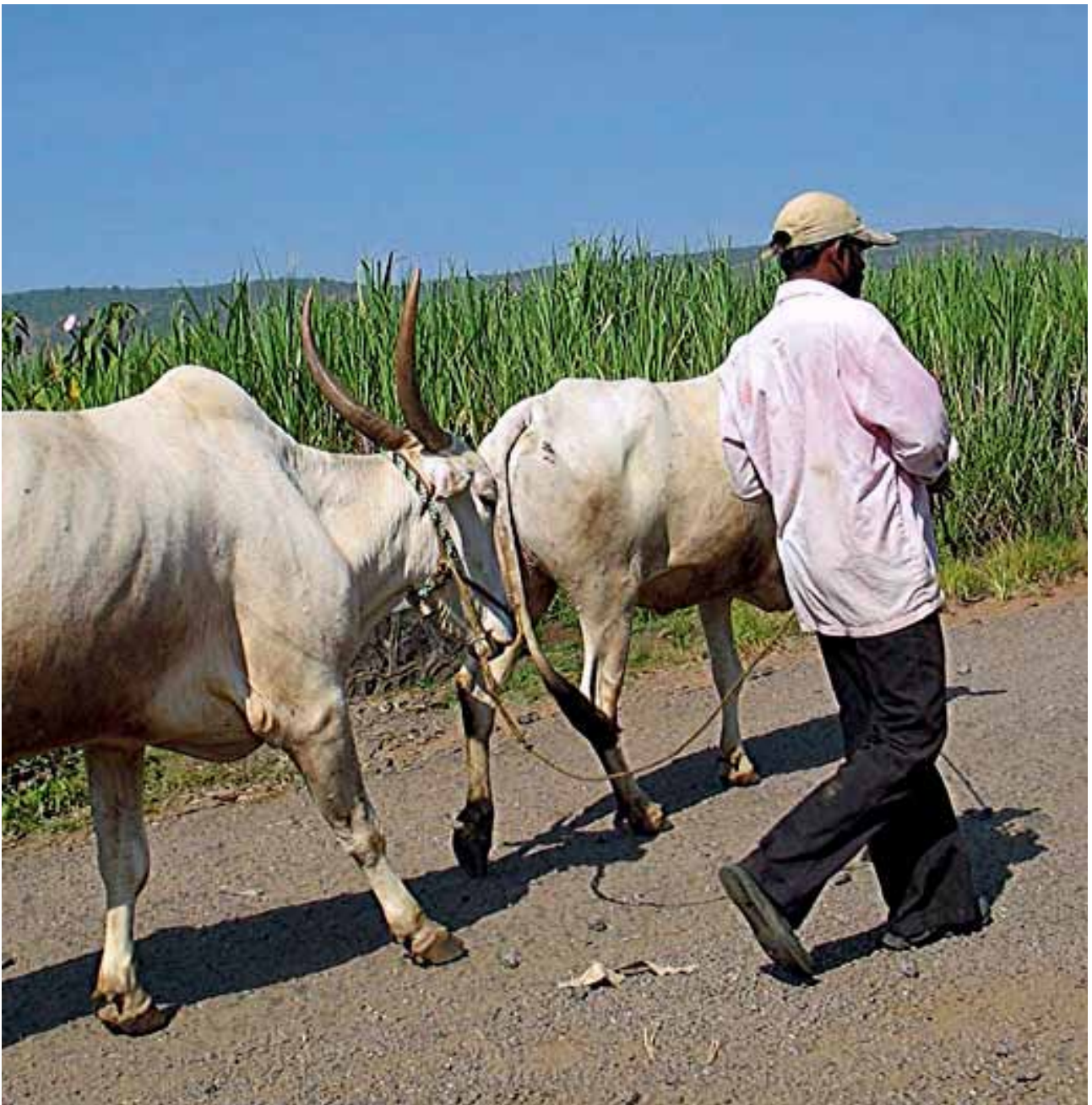
The Potato Park ICA is a flexible document that was amended two years after it was validated to change the rules for benefit sharing within the communities. The Potato Park ICA can continue to be amended as required in response to emerging issues internally and externally through community level decision-making procedures and the Association which is a representative body for all six communities within the Park.

Duality

See 2.1.2

CASE STUDY 4

Lingayat Bio-Cultural Protocol Southern India⁸⁹



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⁸⁹ For further information see: Lingayat Community (2009). *Lingayat Biocultural Protocol*, facilitated by SEVA and League for Pastoral Peoples and Endogenous Livestock Development, www.community-protocols.org/wp-content/uploads/documents/India-Lingayat_Biocultural_Protocol.pdf (last accessed 29 August 2013).

1. INTRODUCTION

The Lingayat Bio-cultural Protocol (the Lingayat Protocol) was developed by the Lingayat local community in Southern India to enable recognition of their rights as livestock keepers to their genetic resources and associated traditional knowledge, and to improve access to grazing lands in the Bargur Forests. Access to grazing lands is a precondition for the continuation of traditional livestock husbandry practices and ethno-veterinarian practices.

The Lingayat Protocol documents the knowledge, innovations and practices of the Lingayat local community that has resulted in the development of their unique breeds of cattle and associated traditional knowledge. The continuation of the Lingayat local community's traditional livestock husbandry practices are under threat as access to communal grazing lands is lost and farmers can no longer keep their herds.

Through the Lingayat Protocol, the Lingayat local community has devised strategies to improve their access to grazing lands and methods to improve protection and recognition of their genetic resources and associated traditional knowledge, innovations and practices. Specifically, through the Lingayat Protocol the Lingayat local community proposes the formal inclusion of their Bargur Biodiversity Register (which documents their knowledge, innovations and practices in association with their livestock) in the national register of traditional knowledge and genetic resources, the Peoples Biodiversity Register. Inclusion in the Peoples Biodiversity Register would trigger an obligation to seek the consent of knowledge holders for any request to access their resources and knowledge and will validate their right to access the grazing lands necessary for the cattle's continued survival.

2. BACKGROUND

2.1 The Local Community

2.1.1 Basic Facts

The Lingayat local community are a forest dwelling community who have lived in the Bargur forest range in the Western Ghats of Tamil Nadu, Southern India for the past 400 years and who breed unique and rare breeds of Bargur Cattle and Hill Buffalo. These breed of cattle have been genetically bred over the past 400 years to be specifically suited to their forest environment. The Lingayat have also developed specialised husbandry and ethno-veterinary practices to maintain the cattle, and undertake remedial land management in grazing areas to improve grazing.

There is a commercial interest in Bargur Cattle and Hill Buffalo for their unique attributes adapted to mountainous terrain with high milk yield. There is also an interest in the Lingayat local community's ethno-veterinary knowledge to treat a range of ailments that can also be used to treat people.

Today the Lingayat local community comprises around 10, 000 people living in 36 hamlets. The land area owned by the average Lingayat family is 1–3 acres which is used for cropping.⁹⁰ Herders will have a herd of around 50–100 that are penned at night and taken to the forests during the day to graze away from the croplands. Each year during the monsoon period the cattle are moved from inundated fields to the forests to graze until the wet season is over.

The Lingayat local community is committed to the protection of biodiversity in the region to sustain their livestock and grazing

90 Lingayat Community (2009). *Lingayat Biocultural Protocol*, facilitated by SEVA and League for Pastoral Peoples and Endogenous Livestock Development, at 4, www.community-protocols.org/wp-content/uploads/documents/India-Lingayat-Biocultural_Protocol.pdf (last accessed 29 August 2013).

practices which are part of their spiritual and cultural belief systems and livelihoods. They have maintained a vital role in forest management and conservation outcomes through land management practices such as noxious weed control and promoting native grasses whilst promoting the genetic diversity of their stock. However in recent years the Lingayat local community have lost access to these important communal grazing lands in the forests and Bargur livestock populations have declined significantly.

2.1.2 Cultural Values and Belief Systems

Cattle are regarded by the Lingayat local community as a gift of nature and loved by the people. Each family has one or two animals dedicated to the deity Shiva worshipped by the community that roam freely near the temple. At the steeple of each temple is a symbol of a lying cow⁹¹ and all cattle are allowed to rest on Monday and none will be milked with the exception of suckling young. Bulls will also rest from ploughing or any other work. Traditional medicines are only administered on Sundays as the sun sign is regarded as auspicious.⁹²

Customary laws regulate decision-making in the Lingayat local community and have been followed for generations. Issues or disputes involving the whole community are resolved by a community assembly constituted by elders from all 36 hamlets.

2.1.3 Biocultural Assets

There are two livestock breeds developed by the Lingayat local community: Bargur Cattle; and, 'MalaiErumai' known as Hill Buffalo.⁹³ Bargur Cattle are intrinsically migratory and excellent for rough terrain. They are intelligent, sturdy and easy to handle, and have a high milk yield. The distinguishing

feature of Bargur Cattle is that the bullocks do not need to be shod with iron shoes for pulling carts as they have strong hoofs and feet. Hill Buffalo are brown in colour and accustomed to hill climbing. Both breeds are intrinsically migratory and if stall-fed lose their vigour, and require the forest ecosystem and migratory grazing to survive.⁹⁴

The Lingayat local community maintains collective ownership of their genetic resources and associated traditional knowledge, innovations and practices. Their husbandry and ethno-veterinary knowledge healing practices are still practiced today and documented in the Bargur Biodiversity Register appended to the Lingayat Protocol. The Bargur Biodiversity Register details the attributes of the breeds and how they were exclusively developed over a long period.

The Lingayat local community regard themselves as an integral part of the Bargur Forest ecosystem which they look after and protect from wildfire, and remove noxious weeds such as Lantana.⁹⁵ Traditional land management practices associated with herding livestock contributes to biodiversity conservation and forest regeneration whilst promoting genetic diversity. Their practices are increasingly threatened by conservation measures that restrict access to communal areas and forests to graze cattle.

As a result, over the past twenty years the population of Bargur Cattle has fallen drastically. According to the Bargur Biodiversity Register in 1991 the population was estimated at around 100, 000 but by 2009 only 2529 animals remained of which 1109 were breedable females. The cause of this decline can be attributed to the loss of access to communal grazing lands in the forests and the subsequent decision of many farmers to sell their animals and cease grazing. Another pressure on available grazing land is the presence of alien invasive

91 Ibid at 3

92 Ibid at 5

93 Ibid at 6

94 Ibid at 4

95 Ibid at 5

species which cover large tracts of grazing land.

2.2 Legal Framework

2.2.1 Biological Diversity Act of 2002 and Biological Diversity Rules of 2004

The Biological Diversity Act of 2002 (the Act) requires the Government of India to promote sustainable use of biodiversity and associated traditional knowledge of local communities associated with biological diversity. The Act creates a National Biodiversity Authority (the Authority) to regulate access to biological resources and associated traditional knowledge for commercial and research purposes.

The Authority also advises the Government of India on matters relating to conservation and sustainable use of biological diversity and associated traditional knowledge and fair and equitable benefit sharing. At the local level, Biodiversity Management Committees (BMCs) are the vehicle for achieving these objectives in accordance with section 41 of the Act. The main function of the BMCs is to create a Peoples Biodiversity Register to detail local biological resources and associated traditional knowledge including registration of traditional knowledge and other *sui generis* methods for its protection.⁹⁶

The benefit of inclusion on the Peoples Biodiversity Register is that the Authority is required to consult with the relevant BMC regarding any request to access genetic resources and associated traditional knowledge. The Authority will only approve the request for access when mutually agreed terms and fair and equitable benefit sharing have been negotiated. The beneficiaries of any agreement are identified in the Peoples Biodiversity Register.

The Act also requires the Government

of India to promote conservation and sustainable use of biological diversity through *in situ* conservation and minimise the adverse effect on biological diversity of any project undertaken through environmental impact assessments that include public participation.⁹⁷ Under section 38 of the Act the Government of India is required to preserve and protect species that are on the verge of extinction. The Lingayat local community asserts that the rapidly declining numbers of Bargur Cattle indicate that the species fall within this category.⁹⁸

Recognition and protection of the traditional knowledge and associated genetic resources (Bargur Cattle and Hill Buffalo) of the Lingayat local community could be improved by formal inclusion of their knowledge and resources in the Peoples Biodiversity Register and the establishment of a BMC in Bargur Panchayat where the Lingayat local community reside. This formal recognition is a key objective of the Lingayat Protocol.

2.2.2 National Policy for Farmers 2007

The National Policy for Farmers, approved by the Government of India in 2007, has a holistic approach to agricultural production and focuses on socio-economic wellbeing. It acknowledges the inherent rights of livestock keepers to “continue to use and develop their own breeding stock and breeding practices” and requests recognition of such rights in policy and legal frameworks.

2.2.3 The Scheduled Tribes and other Traditional Dwellers (Recognition of Forest Rights) Act of 2006

The Scheduled Tribes and other Traditional Dwellers (Recognition of Forest Rights) Act of 2006 recognises that traditional forest dwelling scheduled tribes are “integral to the

96 Ibid

97 Ibid at 8

98 Ibid

survival of the forest ecosystem”⁹⁹ and seeks to address the long-term insecurity of land tenure.

The rights of the Lingayat local community under this Act include:

- the right to traditional rights customarily enjoyed by the Lingayat local community¹⁰⁰ and rights to intellectual property and traditional knowledge related to biodiversity;¹⁰¹
- entitlements to graze and access communal lands during the changing seasons;¹⁰² and,
- the right to eradicate alien species like lantana, regenerate or conserve or manage any forestry resources which have been traditionally protected and conserved for sustainable use.¹⁰³

3. THE LINGAYAT PROTOCOL

3.1 Status and Impetus

The Lingayat Protocol was initiated by the Lingayat local community in 2009 to secure rights to prior informed consent to the use of their genetic resources and associated traditional knowledge, and to any actions that impact on their grazing rights and traditional practices the loss of which has resulted in rapidly declining Bargur Cattle populations.¹⁰⁴

There is a perception by regulatory bodies that the grazing practices of the Lingayat local community are having a negative impact on forest biodiversity whereas the Lingayat local community has co-existed

in harmony with the forest ecosystem for centuries.

The Lingayat Protocol cites a lack of consultation with the community over decisions that impact on their grazing rights. For example the consultation associated with the decision to close the forests through the Joint Forest Management programme was not with the Lingayat local community but with a village committee that does not represent their community. This village committee did not raise issues of importance to the Lingayat local community that impact on their herding practices such as tree planting, fencing and restrictions on rotational grazing of cattle.

As a result of forest closures, the forest ecosystem is changing with a rapid encroachment of lantana throughout the forest. Over the past twenty years this encroachment has suppressed native grasses essential for grazing, and promoted foliage at risk of severe forest fires. With the loss of access to grazing land, Lingayat local community herders are selling their stock and abandoning their traditional practices. Young people are losing interest in agricultural and husbandry practices due to the hardships and moving to the cities for alternative employment and livelihoods. Consequently, traditional knowledge is being lost.

3.2 Methodology

The development of the Lingayat Protocol occurred in two stages during 2007 and 2009 with the assistance of SEVA and the League for Pastoral Peoples and Endogenous Livestock Development.

Initial development of the Lingayat Protocol was established and recorded by SEVA on 26-31 December 2007 during Padhyatra and convened within the local area.

The Lingayat Protocol was further developed in February 2008 during a Regional

99 Ibid at 9

100 Section 3l

101 Section 3k

102 Section 3d

103 Section 3i

104 Lingayat Community (2009). *Lingayat Biocultural Protocol*, facilitated by SEVA and League for Pastoral Peoples and Endogenous Livestock Development, at 6, www.community-protocols.org/wp-content/uploads/documents/India-Lingayat-Biocultural_Protocol.pdf (last accessed 29 August 2013).

Workshop on “Traditional Livestock Keepers, Indigenous Knowledge and Biodiversity Conservation” in Madurai that was organised by SEVA in collaboration with the Authority. A further workshop was convened in September 2009 to finalise the Lingayat Protocol.

3.3 Procedures for Prior Informed Consent and Benefit Sharing

The main objective of the Lingayat Protocol is to secure formal recognition by the Authority of the right to prior and informed consent by the Lingayat local community to the use of their genetic resources and associated traditional knowledge, and to any actions that impact on their traditional practices and grazing rights.

It is anticipated this can be achieved by improving the understanding of decision makers of the rights of the Lingayat local community to their collective ownership of animal genetic resources and associated traditional knowledge and their important role in maintaining biodiversity in the region.

The Act recognises the right to prior and informed consent to grant access to genetic resources and associated traditional knowledge. However, this recognition can only be achieved through use of the mechanisms under the Act.

The mechanism for guaranteeing prior and informed consent to access and benefit sharing is inclusion of the Bargur Biodiversity Register in the Peoples Biodiversity Register which then triggers the requirement for consultation with knowledge holders before access can be granted by the Authority. To achieve this there must first be the establishment of a local BMC with the authority to transmit the Bargur Biodiversity Register for inclusion on the Peoples Biodiversity Register.

At the date of print, a local BMC had not been established nor has the Bargur

Biodiversity Register been included on the Peoples Biodiversity Register.

3.3.1 Bargur Biodiversity Register

The Bargur Biodiversity Register is used by the Lingayat local community to demonstrate their authenticity and legitimacy as a forest dwelling tribe with statutory rights. The Register is an appendix to the Lingayat Protocol and documents their genetic resources and associated traditional knowledge, occupation of the area, land management, animal husbandry, and ethno-veterinary healing practices.

The Bargur Biodiversity Register identifies the attributes of the Bargur Cattle and Hill Buffalo breeds and the manner in which traditional knowledge has been applied over hundreds of years to maintain the breeds and develop ethno-veterinarian knowledge.

The Bargur Biodiversity Register identifies specific healing practices and treatments for a range of ailments for both cattle and humans. For example, for poisonous bites the ground root and bark of local plants are applied and administered internally. For sore ears of animals the bark of the Neerium and chilli are applied. For diarrhoea in calves, a combination of local plants, garlic, ginger, black pepper and cumin are taken with milk. There is also a herbal medicine administered to bulls to ensure the desired attributes in offspring. In order to maintain the vigour and serviceability of bulls a specific concoction of local plants and other ingredients are given to the animals. There is one formula for grey coloured bulls and another for Bargur bulls.

4. UNDERLYING PRINCIPLES

Authenticity

The Lingayat Protocol is an initiative of the Lingayat local community to improve

recognition and protection of their rights, and part of this process is to describe who they are as a community and their knowledge, innovations and practices that are under threat. To this end, the Lingayat Protocol details the history of the occupation of the Lingayat local community in the Bargur Forest region and their role in developing unique breeds of cattle and associated ethno-veterinary practices central to their identity and the basis for recognition of their rights within the statutory framework in India.

Empowerment

The Lingayat local community developed their protocol with a view to protect their genetic resources and associated traditional knowledge from misappropriation. By developing the Lingayat Protocol and documenting their knowledge and practices, this may result in formal recognition in the Peoples Biodiversity Register and have their right to prior and informed consent recognised.

The Lingayat Protocol also assists the community in their negotiations to establish a local BMC in their areas to advocate on their behalf.

Promoting International Minimum Standards and International Customary Law

The Lingayat Protocol promotes international minimum standards for recognising and protecting the rights of the Lingayat local community to their traditional knowledge and genetic resources.

The relevant standards identified by the Lingayat Protocol include the Convention on Biological Diversity and which are reflected in domestic law and policy of India through the Act, the establishment of BMCs, and through the consultative mechanisms associated with the Peoples Biodiversity Register. To this end, the Lingayat Protocol

develops a pathway for harmonising inconsistencies between the experiences of the Lingayat local community and international and domestic standards.

The Lingayat Protocol provides a detailed description of relevant international minimum standards for the protection of their rights and relevant domestic law that could potentially recognise their rights to be consulted when third parties are seeking access to their traditional and genetic resources. Under the Act, inclusion of the Bargur Biodiversity Register in the Peoples Biodiversity Register will trigger a right to prior consultation when third parties are accessing their knowledge and resources.

Reciprocity

The Lingayat Protocol promotes reciprocity with a commitment of the Lingayat local community to protect biological diversity in communal lands where they graze livestock, and remove noxious weeds to maintain areas for cattle.

The Lingayat Protocol promotes reciprocity between the providers and users of traditional knowledge and genetic resources by ensuring recognition of the rights of the Lingayat local community to their knowledge and resources. The Lingayat Protocol promotes equitable benefit sharing for the use of the knowledge and resources of the Lingayat local community by third parties by documenting their knowledge and seeking recognition of their right to consultation when requests are made to access their traditional knowledge and genetic resources through the Peoples Biodiversity Register (when included).

CASE STUDY 5

Vueti Navakavu Locally Managed Marine Area Waqainake, Viti Levu, Fiji¹⁰⁵



105 For further information see: van Beukering, P. et al (2007). *Case Study 1: Yavusa Navakavu Locally Managed Marine Area (Fiji): The role of marine protected areas on contributing to poverty reduction*. The Nature Conservancy, Australian Government Department of the Environment and Water Resources and the Poverty Reduction and Environment Management Program at Vrije Universiteit, Amsterdam, www.premonline.org/archive/19/doc/Country%20Report%20Navakavu%20_Fiji_.pdf (last accessed 29 August 2013); Leisher, C., van Beukering, P. and Scherl, L. M. (2007). *Nature's Investment Bank: How Marine Protected Areas Contribute to Poverty Reduction*. The Nature Conservancy, Australian Government Department of the Environment and Water Resources and the Poverty Reduction and Environment Management Program at Vrije Universiteit, Amsterdam. Available at http://www.nature.org/media/science/mpa_report_a4.pdf; Hubert, A. (2007). *Improving knowledge and management of coral reef ecosystems, Final Report, Use of Fisherman Perception in Participative Resource Management; Case study in Navakavu (Fiji)*, CRISP, http://www.crisponline.net/Portals/1/PDF/Fishermen_perception.pdf (last accessed 29 August 2013); and, Thaman, R.R., Fong T., and Balawa, A., (2008). *Technical Report: Biodiversity and Ethnobiology of Fin fishes of Vanua Navakavu*. CRISP, http://www.crisponline.net/Portals/1/PDF/C2A2_USP_Finfish.pdf (last accessed 29 August 2013).

1. INTRODUCTION

The Vueti Navakavu Locally Managed Marine Area (Navakavu LMMA) in Fiji is a participatory resource management framework developed by the Navakavu Yavusa indigenous community in collaboration with institutional scientific partners. The framework was developed in response to significantly declining fish stocks in the local marine area upon which the community depends for its livelihood and subsistence.

The Navakavu LMMA was established in 2002 as one of more than 180 marine managed areas in Fiji and part of a formal network of locally managed marine areas that are used as a tool for fisheries management throughout Fiji.

The establishment of the Locally Managed Marine Area (LMMA) as a community managed marine protected area formalises customary sustainable management and use

of the fishery with the direct participation of the indigenous community in recognition of their intimate knowledge of the local marine environment.

2. BACKGROUND

2.1 Nakakavu Yavusa Indigenous community

2.2.1 Basic Facts

The Navakavu Yavusa indigenous community is located on Viti Levu Island in Fiji, 13km from the capital of Suva within the Rewa province of Suva. Navakavu Yavusa is a traditionally linked clan that consists of three villages and two settlements: Muaivusu, Nabaka, Waiqanake, Namakala and Ucuivanua. The territory is formally owned by the community in accordance with tribal law where 80% of the Fiji is under formal



Figure 1: Navakavu Yavusa Indigenous Community.

tribal ownership.¹⁰⁶

The Navakavu Yavusa people are rural with a population of approximately 670 people covering an area of 583 square kilometres of land and 18.5 square kilometres of sea of which 3.8 square kilometres are permanently closed to fishing as a no-take zone.¹⁰⁷

Fishing is the main source of income and subsistence fishing the mainstay for food supply and nutrition. Every family relies on the sea for part of their diet, with fish or invertebrates.¹⁰⁸ When fish are caught, families are fed smaller fish before the surplus larger fish are sold at the market. Sea urchins are also a significant income for families also sold at the markets. A range of different fishing techniques are used and nearly all fishermen own a boat.

There is significant poverty in the Navakavu Yavusa indigenous community and in 2007 the average household income per month was less than half of the Fijian average (US\$251 equivalent versus US\$508 equivalent).

Prior to the construction of a main road in 1994 the community was only accessible by boat. In 2006 the community was connected to the power grid which enabled families to freeze catches of fish and increase commercial sales of fish.

There is a small stream that supplies fresh water to the community, a primary school and several Methodist churches.¹⁰⁹

106 Hubert, A. (2007). *Improving knowledge and management of coral reef ecosystems, Final Report, Use of Fisherman Perception in Participative Resource Management; Case study in Navakavu (Fiji)*, CRISP, at 9, http://www.crisponline.net/Portals/1/PDF/Fishermen_perception.pdf (last accessed 29 August 2013).

107 Ibid

108 vanBeukering, P. et al (2007). *Case Study 1: YavusaNavakavu Locally Managed Marine Area (Fiji): The role of marine protected areas on contributing to poverty reduction*. The Nature Conservancy, Australian Government Department of the Environment and Water Resources and the Poverty Reduction and Environment Management Program at Vrije Universiteit, Amsterdam, at 10, www.premonline.org/archive/19/doc/Country%20Report%20Navakavu%20Fiji.pdf (last accessed 29 August 2013).

109 Ibid at 9

2.1.2 Beliefs, values, cultural and other systems

The Navakavu Yavusa indigenous community possess considerable knowledge of fish species within the marine environment of their territories, and have maintained customary no-take zones prior to the establishment of the LMMA. Their local knowledge of the marine environment is integral to the management of the Navakavu LMMA.

Customary decision-making concerning tribal land and the coastal zone are made by the Great Chief who is the owner and guardian of the land, seas and resources collectively known as the *vanue*. Terrestrial land is divided between the sub-clans whereas all members of the sub-clan have fishing rights over the whole marine area within the sub-clan's territory known as the *Qoliqoli*.¹¹⁰ Below the Great Chief each sub-clan village has its own customary chief.

Commercial fishermen obtain a fishing licence from the committee governing the *Qoliqoli* which enables fishing in the *Qoliqoli* and commercial selling at the markets. Not all fisherman selling at the markets have a licence. However commercial fisherman from outside the *Qoliqoli* must have a licence to fish within its borders. This prevents overfishing and loss of fish stocks, a threat due to the close proximity of the community to Suva.

The practice of keeping a portion of a fishing ground closed off is a customary practice used by elders for many generations. The establishment of the Navakavu LMMA has revived this practice and improved on it in a way that has affected the lives of the people in a positive way by increasing fish stocks, improving food supply and enabling continuity of livelihoods for the community.

110 Customary fishing rights area.

2.1.3 Cultural and environmental assets

The Navakavu Yavusa indigenous community possesses significant knowledge of fish species, different growth stages, breeding and feeding habits, preferred habitat and fishing methods and strategies.¹¹¹ There are approximately 226 names for 682 species, from 250 genera in 85 different families¹¹² and include 11 shark species, 7 ray species, and 21 eel species. This in-depth knowledge is only applicable to fish that have subsistence or commercial value to the community and fish that have limited or no use do not have a local name.

2.2 The Relevant Legal Framework

2.2.1 Constitution of Fiji

Article 6(b) of the Constitution of Fiji recognises tribal ownership of native lands which are held by native Fijians according to native custom evidenced by usage and tradition. The coastal zone is considered part of tribal land and indigenous communities are referred to as *vanua* which are made up of one or several clans. The right to customary management of resources in the *vanua* is also recognised by the Constitution so long as such practices are not inconsistent with any law or governing principle of the State.

While customary management is recognised by the State, customary laws do not apply automatically and must be expressly recognised in national legislation. Therefore, any customary dispute resolution procedure for managing and enforcing the Navakavu LMMA will not be formally recognised unless legislation is passed to that effect.¹¹³

111 Thaman, R.R, Fong T., and Balawa, A., (2008). *Technical Report: Biodiversity and Ethnobiology of Finfishes of Vanua Navakavu*. CRISP, at 6, http://www.crisponline.net/Portals/1/PDF/C2A2_USP_Finfish.pdf (last accessed 29 August 2013).

112 Ibid at 6-7

113 Section 186 of the Constitution.

2.2.2 Fisheries Act 1991

The *Fisheries Act 1991* (the Act) enables limited community involvement in coastal marine management through community governance of the coastal zone and application of customary law. However, the Navakavu LMMA as a customary marine protected area is not formally recognised or registered by the government, and in the absence of enabling legislation cannot be legally enforced.¹¹⁴ Furthermore, in Fiji it is not possible to create a marine protected area under the Act where fishing is completely prohibited which precludes the Navakavu LMMA from recognition under the Act. The Act is further limited in that the definition of fish does not include non-living marine resources which therefore do not benefit from any protections under the Act.

The Navakavu LMMA is therefore self-regulated and monitoring is undertaken by the community with the assistance of the Institute of Applied Science of the University of the South Pacific (USP) which is a key partner in the resource management framework.

2.2.3 Customary Management of the Marine Environment

Community consent is required for commercial and subsistence fishing in the Navakavu LMMA. Commercial and non-commercial harvesters are required to obtain a permit from the customary owner of the *Qoliqoli*.¹¹⁵ Harvesters from outside the community are required to obtain a permit from the District Commissioner with concurrent approval of the local Chief.

There are exceptions to the permit requirement for non-commercial harvesters

114 Hubert, A. (2007). *Improving knowledge and management of coral reef ecosystems, Final Report, Use of Fisherman Perception in Participative Resource Management; Case study in Navakavu (Fiji)*, CRISP, at 21, http://www.crisponline.net/Portals/1/PDF/Fishermen_perception.pdf (last accessed 29 August 2013).

115 Section 13 and Regulation 4.

who can fish without a permit if they use a hook and line, spear or small portable fish trap. The Act creates fish wardens from the community whose function is to protect the jurisdiction of customary rights holders in the *Qoliqoli* area.

3. THE MANAGEMENT FRAMEWORK

3.1 Status and impetus

One of the villages of Vueti Navakavu, Muaivuso, initially pursued the development of a LMMA with the support of the USP in response to falling fish stocks and increasing rarity of certain fish species within the territory. This was having negative impacts on livelihoods, nutrition and health in the community. There were a number of causes of declining fish populations including overfishing, destructive fishing practices such as dynamite and poison, lessening alternative livelihoods, pollution, poaching, destruction of corals, beach litter and overharvesting of resources in the mangroves.

The interested communities decided to develop and implement an LMMA to promote restoration of fish stocks and sustainable use marine resources within the communities. A key strategy was the establishment of a no-take zone and to control external fishers from outside the territory from harvesting without consent.

The Navakavu LMMA is a customary marine protected area (MPA) or 'no-take zone' that covers 3.8 square kilometres, around 18% of the total customary marine area. However illegal fishing, poaching and night spear fishing are on-going problems that threaten the conservation of marine resources and the livelihoods and wellbeing of the community. Fishing wardens under the Act monitor the no-take zone however there are no statutory

enforcement measures in the absence of formal recognition of the area under the Act, which is not currently possible.

3.2 Methodology for Developing the LMMA

3.2.1 Community Driven Collaborative Approach

The Navakavu LMMA was developed over a ten-year period from 1992 to 2002 in partnership with the USP and external governmental agencies. This has been described as a top-down / bottom-up approach to conservation and resource management.

From the outset, the community were assisted by the USP to develop the Navakavu LMMA in the planning, design and evaluation of resource management strategies to deal with threats to the *Qoliqoli*, and to recognise the knowledge and socio-political capabilities of the community.¹¹⁶

The design and planning of the Navakavu LMMA was developed through a series of workshops to determine the willingness of the whole community to proceed with a LMMA and to identify the roles within the community and the role of external partners to implement the management systems. The Navakavu LMMA builds upon a model LMMA developed by the Fiji LMMA network that incorporates locally specific management tools and monitoring systems identified by the community and partners.¹¹⁷

Overall management of the site is undertaken by a community committee known as the '*Qoliqoli* Committee' that was established to administer the management systems and approvals processes, and which incorporates the customary decision-making processes of the communities.

¹¹⁶ Ibid at 6

¹¹⁷ 2007 at p. 12

The USP has an ongoing monitoring role which is welcomed by the community who regard this assistance as 'precious' and critical to the functioning of the management system.¹¹⁸ A scientist of USP is always present when the *Qoliqoli* Committee meets and collects the data gathered by the community for entry into a database for analysis. The results are communicated back to the community and can be used to adapt the management plan.

Other project partners include the Fisheries Department which sponsors some community projects, the district Bureau and the Provincial Bureau which provides fishing permits to harvesters outside the community in consultation with the Great Chief.

3.2.2 Capacity Building and Education

Through the Navakavu LMMA, management systems are participatory and community members are provided capacity building and training for certain roles, such as data collection and monitoring of marine species.

Community education is identified as a strategy to improve environmental awareness amongst the villagers about the impacts of their fishing practices. Schools play a role in bringing environmental awareness to school children and the church encourages the villagers to follow regulations established by the *Qoliqoli* Committee during services. A youth theatre group was created in 2005 to sensitise the community to environmental problems. The *Qoliqoli* Committee has also distributed a poster explaining the management measures being developed.

In May 2003, the LMMA Learning Framework was introduced and a series of workshops were organised by the *Qoliqoli*

Committee to train community members to undertake socio-economic surveys and the biological monitoring.¹¹⁹

3.3 Collaborative Management Systems

The Navakavu LMMA identifies a range of roles and functions for individuals within the community and specific roles for project partners.

The management of the Navakavu LMMA at the community level is the *Qoliqoli* Committee which collaborates with the partnering USP scientists to determine the management plan, itemise problems and develop solutions. The *Qoliqoli* Committee coordinates the work related to the Navakavu LMMA at the village level, issues fishing permits, and advocates on behalf of the *Qoliqoli* owners to relevant institutions concerning environmental issues.¹²⁰ The *Qoliqoli* Committee consists of eight members, fishermen, fishing wardens, monitoring supervisors and the Great Chief, and makes decisions only after consultation with local people through village council meetings. Villagers are able to express themselves directly or through a proxy during public meetings which include fortnightly village meetings and meetings of the whole community once a month. The chiefs of the villages take decisions to the community level and "foster respect for the management plan".¹²¹

There is a monitoring team who are members of the *Qoliqoli* Committee with responsibility for biological monitoring and socioeconomic surveys. Fishing wardens oversee fishing practices during the day and alternate patrolling the Navakavu LMMA at night and can arrest poachers.

118 Hubert, A. (2007). *Improving knowledge and management of coral reef ecosystems, Final Report, Use of Fisherman Perception in Participative Resource Management; Case study in Navakavu (Fiji)*, CRISP, at 22, http://www.crisponline.net/Portals/1/PDF/Fishermen_perception.pdf (last accessed 29 August 2013).

119 Ibid at 13

120 Ibid at 14

121 Ibid at 15

Disputes are resolved through the *Qoliqoli* Committee which is the mediator and negotiator and the Great Chief of the Navakavu meets with the whole community to detect problems, discuss and facilitate resolution.

3.4 Monitoring and Review

Members of the community carry out day to day monitoring of the Navakavu LMMA in collaboration with project partners who play a supervisory role. By closely monitoring resources the community can promptly respond to immediate environmental threats.¹²² Furthermore, regular reporting of the effectiveness of the Navakavu LMMA to the broader community promotes respect for the durability of the management measures and respect for the decisions taken by the *Qoliqoli* Committee without which the management system will fail.¹²³

Reviews of the Management Plan are to be carried out annually by the *Qoliqoli* Committee to evaluate the effectiveness of the management measures and whether to make any changes to management systems. A socio-economic survey is to be carried out every two years with data collected from every household, key persons and a small representative group from the community.

Overall the management system put in place in the Navakavu LMMA has been accepted by the villagers because it is a source of income and also because it is effectively conserving marine resources for future generations.

Although availability of biological data is limited, assessments of the Navakavu LMMA reveal positive outcomes including improved social cohesion within the community and improved condition of the environment. The assessments also conclude that the community's understanding of the values of

their marine environment has improved, and that the average catch per unit of effort has increased and therefore increased income levels.

Local fishermen are effectively respecting the rules and the use of poison has been eliminated and the commercial exploitation of the mangrove area has ceased. However, poaching from outside fishermen still occurs, as does the use of living bedrock from the mangrove area, and the cutting of wood from mangroves for firewood.

The effectiveness of the Navakavu LMMA in achieving its stated objectives rests with the Navakavu Yavusa indigenous community and requires broad support of the community who directly participate in the marine area management system. As the no-take zone is not formally recognised by the Fijian Government, it is not possible to discipline poachers under Fijian law. There is resistance to punishing offending villagers due to concern with keeping "good social relations within the community."¹²⁴

4. UNDERLYING PRINCIPLES

Authenticity

The Navakavu LMMA is an authentic framework developed by the indigenous community to achieve conservation and sustainable use outcomes on the basis of their cultural values, priorities and decision-making procedures for managing the marine environment.

Good faith, Respect and Integrity

The Navakavu LMMA has been developed in good faith between indigenous community and partner organisations through a collaborative framework the success of which relies upon values and agreed

¹²² Ibid at 6

¹²³ Ibid at 19

¹²⁴ Ibid at 20

outcomes shared by all involved and ongoing, long-term partnerships to develop, implement and monitor the framework.

The Navakavu Yavusa indigenous community has the ongoing assistance for the management of the Navakavu LMMA including overall monitoring by USP, a role that is expressly welcomed by the community.

Partner organisations (such as the Fisheries Department which has a history of assisting communities to develop marine resource management frameworks) assist the community and provide training for community members who are tasked with carrying out specific roles to monitor the marine environment.

Empowering

The Navakavu LMMA empowers the community to improve the management of their marine environment and identify their own management strategies, including the establishment of a no-take zone and permit system. The effectiveness of the framework can be attributed to the fact that the community consent to it and participate in its development and implementation because it is in their best interest to do so.

The community can decide to abandon the no-take zone if they so choose and there is no obligation to continue with the Navakavu LMMA. In this way it is a consensual framework that achieves conservation outcomes and improves the availability of resources outside the no-take zone for sustenance and livelihoods. The community is responsible for monitoring the Navakavu LMMA and can directly observe the improvements in fish stocks and other resources.

Broad Participation

The establishment of the Navakavu LMMA was a community driven process. The

community carried out the primary role in implementation, monitoring and compliance in collaboration with partner organisations that had expertise in establishing LMMAs. These partner organisations were also committed to the process in the long term, and promoted community driven management through a 'top-down, bottom-up approach'.

The support of the community and their ongoing active role in its implementation is key to its success, and which relies upon local institutional capacity and capacity building for members of the community involved in implementation and monitoring.

Customary decision making and community level procedures are integrated into the framework so that the governing body, the *Qoliqoli* Committee, is responsible for administering the framework including monitoring, issuing permits, compliance and community education.

Reciprocity

The Navakavu LMMA is a reciprocal framework where a right to sustainable use of the marine environment also requires a responsibility to protect and conserve the marine environment. The community manages their resource to maintain and improve their resources. This has resulted in improved livelihoods and improved health and nutrition for the community as a whole.

Flexibility

The Navakavu LMMA is a flexible framework evaluated on a regular basis and can respond to the changing priorities and needs of the community. The success of the Navakavu LMMA is evident in improved fish catches, improved livelihoods and improved health of the community, and which therefore has broad community support and involvement.



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