

OVERVIEW

Biodiversity and
culture: exploring
community protocols,
rights and consent

Community protocols and free, prior informed consent – overview and lessons learnt



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Introduction

Indigenous, traditional and local communities have sustainably used and conserved a vast diversity of plants, animals and ecosystems since the dawn of humankind (Posey, 1999). For many rural communities in the global South – including some 370 million indigenous peoples – biodiversity and traditional knowledge (TK) continue to play an important role in livelihoods, food security, healthcare and well-being, whether they are farmers, pastoralists, forest dwellers or fisherfolk. Biodiversity is also closely linked to cultural and spiritual values (Box 1).

Indigenous peoples and local communities have helped to create and enhance this rich biocultural heritage, for example by

domesticating and improving thousands of native crops and livestock breeds, and developing related knowledge and practices.¹ However, with the loss of biodiversity in rural areas, valuable resources such as climate-resilient crops, medicinal plants and wild foods are disappearing.² Cultural diversity is also being lost at an unprecedented rate and with it, ancestral knowledge of how to use and conserve biodiversity.³

The causes of this ‘double extinction crisis’ include habitat change due to the expansion of commercial agriculture, industry and infrastructure and the over-exploitation of natural resources such as minerals and timber.⁴ This, in many cases, also results in loss of land or natural resources for communities.

¹ Biocultural heritage is the knowledge, biodiversity, landscapes, cultural values and customary laws of indigenous peoples and local communities. Its components are inter-dependent and together sustain local economies. See: www.bioculturalheritage.org

² Species extinction is occurring at 100 times the natural rate, and is likely to accelerate in the coming decades, according to the Global Environment Outlook 4 (see: www.unep.org/geo/geo4.asp). The Food and Agriculture Organization of the United Nations (FAO) has estimated that we have lost 75% of our crop diversity over the last century. During the last six years alone, 62 livestock breeds became extinct (FAO, 2007).

³ It is estimated that up to 90% of all languages, an indicator of cultural diversity, will be lost by 2100 (UNESCO, 2003).

⁴ For more information about the causes of biodiversity loss, see Global Biodiversity Outlook 3. Online: www.cbd.int/gbo3/

Box 1: Biodiversity and culture

Biodiversity refers to diverse crop and livestock varieties which provide food, nutrition and resilience to climate change, medicinal plants which provide healthcare, wild plants which provide foods and resources for plant breeding, and landscapes which provide vital ecosystem services such as water. Biodiversity also provides options for income generation (e.g. health foods, herbal medicines, natural products, seeds, eco-tourism).

Biodiversity and culture are closely linked and inter-dependent. Cultural and spiritual values are enshrined in sacred bio-resources (e.g. coca leaves or special rice varieties used in rituals), ecosystems (e.g. sacred forests or mountains) and ancestral landscapes (e.g. sacred valleys). These values and beliefs help to sustain biodiversity and related traditional knowledge; while the use of diverse biological resources helps to sustain traditional knowledge and cultural values (Swiderska *et al.*, 2009).

Even where biodiversity is not lost, **access** to biodiversity resources may be restricted by intellectual property rights (e.g. commercial patents on seeds), or conservation initiatives such as strict protected areas. These pressures are making it ever harder for communities to secure their basic needs and continue their customary role and responsibilities as stewards of biodiversity.

Indigenous peoples, who make up a third of the world's poor and account for most of the world's cultural diversity (5,000 different cultures), are under particular pressure. They often inhabit areas of high biological diversity and share a spiritual, cultural, social and economic relationship with their traditional lands. Their customary laws and practices reflect an attachment to land and a responsibility for preserving these lands for future generations. Yet, they often face marginalisation, displacement from their lands, territories and resources, denial of land rights, and adverse impacts from large-scale development (UN Permanent Forum on Indigenous Issues, 2010).

This special issue of *Participatory Learning and Action* explores two important participatory tools that indigenous people and local communities can use to

help defend their biocultural heritage against these pressures and threats, and assert their rights over resources and traditional knowledge.

- **Community protocols (CPs)** are charters of rules and responsibilities in which communities set out their customary rights to natural resources and land, as recognised in customary, national and international laws.

- **Free, prior informed consent (FPIC)** involves processes in which communities decide whether or not to allow projects affecting their land or resources to go ahead, and on what terms.

In this overview article to the issue, written by the guest editors, we first set the scene, exploring CPs and FPIC further, emphasising the importance of community-level participatory processes in their development and highlighting the dangers of using them in a top-down, mechanistic way. We then consider recent changes in international law that have given these tools official support.

Next we turn to the special issue itself, introducing the process we used to develop it, the objectives we hope to achieve, and outlining the structure of the issue. We finish by identifying key lessons and conclusions on how to effectively support FPIC/PIC and CPs to maximise positive impacts for biodiversity and livelihoods, drawing on the articles in this issue.

Community protocols

Many indigenous peoples and local communities have their own orally held rules and procedures, also known as protocols, to regulate conduct and interactions within their communities, with outsiders, and with the territories and areas on which they depend. These are often rooted in customary laws and rights which have sustained biodiversity and biocultural heritage for generations (Box 2).

However, it is external actors (e.g. government agencies, researchers, companies or NGOs) who tend to define the terms

Photo: Khanh Tran-Thanh



Guest editor Krystyna Swiderska at IIED's information tent at the CBD 10th Conference of Parties in Nagoya, Japan (2010). The tent provided a meeting point for IIED partners and other visitors to the conference as well as a resource for information on IIED's work with biodiversity and conservation.

Box 2: Customary laws, rights and responsibilities

Customary laws are locally recognised principles, norms and rules, which are orally held and transmitted and are applied by community institutions (e.g. councils of elders) to internally govern or guide all aspects of life. They include rules and norms to control access to natural resources and ensure sustainable use, and codes of ethics for proper use and transmission of traditional knowledge (Swiderska, 2006). Many indigenous customary law principles or values also promote equity – for example the Quechua principle of reciprocity, or equal exchange (Swiderska *et al.*, 2009). However, the extent to which customary principles are still observed in practice varies, and in some cases, focusing on existing customs may further entrench existing power asymmetries such as the exclusion of women and youth in community decision-making processes (Natural Justice, 2009).

Customary rights are acquired by custom, and belong to all the inhabitants of a particular place. Indigenous peoples' customary rights often emphasise collective rather than individual rights, and stewardship rather than outright ownership.

of engagement, often imposing projects or plans which threaten local livelihoods or do not reflect local priorities. As a result, there is growing recognition of the need to articulate communities' rules and protocols in forms that can be understood by others. These new forms of protocols

(often written) are called community protocols (CPs) or biocultural community protocols (BCPs). They communicate the importance of their lands and resources for a community's livelihoods and way of life, their roles as stewards of land and resources, and their customary rights and how these are recognised in international and national law. Protocols can help communities to:

- assert and defend their customary rights in the face of external threats, e.g. from mining (Guri *et al.*; López and Heiler);
- negotiate access to customary resources (e.g. grazing rights in strict protected areas), and gain recognition from policy makers (Köhler-Rollefson *et al.*);
- promote constructive dialogue and equitable partnerships with others (e.g. NGOs or companies), which support the communities' plans and priorities (Lewis and Nkuintchua; Oliva *et al.*);
- improve organisation, representation and cohesion between communities (Sibuye *et al.*; Argumedo); and
- establish local systems and institutions in relation to access and benefit-sharing (ABS) arrangements provided for under the Convention on Biodiversity (CBD), in accordance with their customary laws,

livelihood needs and worldviews (Argumedo).⁵

In many cases, they serve a combination of these functions. For outsiders, such as companies seeking access to genetic resources, they can provide legal certainty and clarity, minimise potential conflicts with and amongst communities, and help to build long-term partnerships (Oliva *et al.*). Community protocols can also establish representative organisations and procedures for those seeking FPIC.

CPs started to gain prominence in 2008, as a community-based response to the CBD. Natural Justice and the LIFE Network facilitated their development as tools for legal empowerment, with support from the ABS Capacity Development Initiative and UNEP (Natural Justice, 2009).^{6,7} In November 2009, the African Group (a negotiating group made up of African countries) proposed the inclusion of CPs in the Nagoya Protocol on access and benefit-sharing (see Box 4, p. 30). Subsequently, COMPAS started supporting CPs, building on community initiatives for endogenous development (COMPAS, 2010), with the

support of the ABS Capacity Development Initiative to the BCP Africa project of COMPAS, Natural Justice and the Ghanaian NGO CIKOD, which has been testing the development of CPs in different settings.⁸ Also in 2011, GIZ funded the CP project of UEBT and Natural Justice, exploring how CPs could facilitate dialogue and partnership between communities and the private sector in the biotrade arena. These efforts build on earlier initiatives, such as the development of community protocols facilitated by indigenous organisations ANDES (Peru) and the Fundacion Dobo Yala (Panama), with support from IIED and IDRC (Canada), and by the NGO SEARICE (Southeast Asia Regional Initiatives for Community Empowerment) in the Anti-Biopiracy Programme in Southeast Asia funded by HIVOS, DANIDA and GIZ (1998-2001).⁹ They also build on previous efforts to support community participatory processes to defend customary rights, such as work by Kalpavriksh Environmental Action Group in India.¹⁰ Many of these organisations have contributed to this special issue.

⁵ The Convention on Biodiversity (CBD) is an international agreement for the conservation and sustainable use of biodiversity, signed in 1992 and ratified by 193 countries. Its third objective requires countries which use genetic resources (industrialised countries) to share the benefits they derive fairly and equitably with countries that provide access to genetic resources. This is referred to as access and benefit-sharing or ABS. Genetic resources are used commercially in a range of sectors: biotechnology, plant breeding, pharmaceuticals, herbal medicines, cosmetics and industrial processes. In the past communities have received few benefits, if any, when their traditional knowledge and genetic resources have been used to develop new products which are patented – hence the term ‘biopiracy’. The CBD also requires countries to encourage the sharing of benefits with communities for the use of traditional knowledge, innovations and practices.

⁶ Formed in 2000, the Local Livestock for Empowerment of Rural People (LIFE) Network is an international action-research and advocacy network promoting the sustainable use of local breeds to support the livelihoods of pastoralists and ecological livestock keepers.

⁷ Founded in 2006, the ABS Capacity Development Initiative is currently funded by the Governments of Denmark, Germany and Norway, as well as the European Commission and the Institut de l’Energie et de l’Environnement de la Francophonie (IEEP), and implemented by GIZ. See: www.abs-initiative.info. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (German Development Cooperation) is an enterprise owned by the German Federal Government. See: www.giz.de/en. UNEP is the United Nations Environment Programme.

⁸ The COMPAS (COMPARing and Supporting Endogenous Development) Network has members in 15 countries and is coordinated by ETC COMPAS in the Netherlands.

⁹ Asociación ANDES is a civil non-profit conservation and development association working in poverty alleviation, biodiversity management and supporting traditional rights to biocultural resources. See: www.andes.org.pe/en. The International Development Research Centre (IDRC) is a public corporation created by the Canadian government to help communities in the developing world find solutions to social, economic and environmental problems. See: www.idrc.ca. Protocols were developed as part of the IIED project ‘Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices’ 2005-2009. See: <http://biocultural.iied.org/tools/community-biocultural-protocols>.

¹⁰ Kalpavriksh Environmental Action Group is an Indian NGO, based in Maharashtra. It believes that a country can develop meaningfully only when ecological sustainability and social equity are guaranteed, and a sense of respect for, and oneness with nature, and fellow humans is achieved.

Free, prior informed consent (FPIC)

FPIC has become a fundamental part of indigenous peoples' efforts and demands to assert their right to self-determination over the last two to three decades – in response to growing threats to their land, territories and waters, and violation of their customary rights, by large-scale development projects, mining and forestry.

FPIC enables communities to decide on proposed developments or projects on a case-by-case basis, based on full prior information and discussions and deliberations at community level. Crucially, FPIC allows communities to deny consent or veto proposals – without this, communities have far more limited influence over decision-making (Ritter).

Community-level participatory processes

Participatory processes form a critical part of these rights-based tools, for analysis, deliberation and coming to agreement. They help ensure that:

- resource development decisions are considered thoroughly and community resources are not sold off 'on the cheap', without considering potential impacts on the needs of all community members, and on cultural values and heritage (Ramdas);
- benefits negotiated reflect the needs of all community members and are fairly shared to maximise poverty reduction impacts, spread incentives for conservation and avoid conflicts (Argumedo), avoiding 'elite capture';
- women, who are often most dependent on biocultural resources and play a key role in the maintenance of traditional crops, wild foods and medicinal plants, are included. Their role is increasing with male out-migration to urban areas and the feminisation of agriculture, making it all the more important to ensure women's participation.

Institutional arrangements for FPIC and community protocols also need to facilitate participation. Top-down

approaches based on western bureaucratic norms are likely to undermine customary institutions and community governance of biocultural heritage, and limit community participation (Buxton; Ritter).

On the other hand, where communities play an active role in designing and facilitating community protocol and FPIC processes, these tools can be very empowering, building capacity, organisation and confidence (Pimbert; Lewis and Nkuintchua; Guri *et al.*; Argumedo; Sibuye *et al.*; John *et al.*).

Recent developments in international law that support CPs and FPIC

CPs and FPIC have been given official support through two recent pieces of international law:

- The UN Declaration on the Rights of Indigenous Peoples (UNDRIPs, 2007), requires the free, prior informed consent of indigenous peoples for any proposed development which affects them (Box 3).
- The Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing (2010) requires the prior informed consent (PIC) of indigenous and local communities for access to traditional knowledge and genetic resources held by them; and support for the development of community

Box 3: The UN Declaration on the Rights of Indigenous Peoples (UNDRIPs)

Although UNDRIPs is a non-binding or 'soft' law, it was adopted by 144 states and is widely supported by indigenous peoples. The Declaration requires that: *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources* (Article 32).

The requirement for PIC to be 'free' responds to experiences where indigenous peoples have been coerced into giving their consent, rather than being allowed to give it freely or deny consent. For indigenous peoples therefore, a PIC process would always need to be FPIC to retain its integrity.

Box 4: The Nagoya Protocol

The Nagoya Protocol (2010) was developed to implement the Convention on Biodiversity's third objective on access to genetic resources and benefit-sharing. Its objective is:

... the fair and equitable sharing of benefits arising from the utilisation of genetic resources, including by appropriate access to genetic resources. ... thereby contributing to the conservation of biological diversity and the sustainable use of its components.

The Protocol will enter into force after 50 ratifications. See: www.cbd.int/abs

The Nagoya Protocol requires parties to:

- Take measures to ensure the **prior informed consent (PIC)** or approval and involvement of indigenous and local communities (ILCs) for access to traditional knowledge, and for access to genetic resources where they have the established right to grant access (Article 6.2).
- Set out criteria and/or processes for obtaining PIC or approval and involvement of ILCs for access to genetic resources (Article 6.3f).
- Endeavour to support the development by ILCs, including women, of **community protocols** for access to traditional knowledge and equitable benefit-sharing (Article 12.3a).
- Take into consideration ILC's customary laws, community protocols and procedures in implementing their obligations on traditional knowledge (Article 12.1).

protocols for ABS by indigenous and local communities (Box 4).

While these are important developments, they also have some limitations. UNDRIPs is non-binding, so although FPIC has been incorporated in a few national laws and institutions (Buxton), many countries still do not require it. However, companies in the mining, oil exploration and forestry sectors are increasingly going above the minimum standards required in national law to obtain a 'social licence to operate', i.e. to gain the support of local communities. In the forestry sector, respect for FPIC is seen as corporate best practice, as a means of averting and resolving conflicts with communities. Companies as varied as the US oil exploration company Talisman Oil and the Singapore-based pulp and paper giant APRIL have made public statements endorsing FPIC (Colchester, 2010).

Although the Nagoya Protocol introduces new requirements to ensure the PIC of indigenous and local communities, these are significantly weakened by the clauses 'in accordance with domestic law' and 'as appropriate'. In relation to genetic resources these measures are only required, 'where they have the established right to grant access'. Thus, the impact of these provisions depends to a large extent on existing national legislation, and how the Protocol is implemented and interpreted by national governments.

In Latin America and the Caribbean region, most ABS legislation requires PIC of indigenous and local communities for access to genetic resources on land owned or managed by them (Cabrera *et al.*, 2011). But in other countries, such as India, there is no such requirement in national ABS legislation. Community protocols for ABS are also not widely recognised, although they are now included in draft ABS legislation in Malaysia (Sabah) and Namibia; and in Bhutan's policy on ABS.

There are also concerns about the ABS framework within which these rights are recognised. The overall premise of the Protocol rests on obtaining economic benefits from biodiversity and traditional knowledge. Many ILCs have raised ethical arguments as to whether a seed or knowledge that is commonly-held heritage should be accessed by private or individual interests for commercial development and protected by exclusive intellectual property rights (e.g. patents) (Ramdas).

Furthermore, the scope of these laws is somewhat limited. The Nagoya Protocol only requires support for community protocols for ABS, whereas community protocols focus on many other issues. UNDRIPs, on the other hand, only applies to indigenous peoples, and does not require FPIC for non-indigenous communities.

About this special issue of *PLA*

This special issue reviews the experiences of communities in Asia, Latin America and

Box 5: Developing this special issue of PLA

The issue was initiated by IIED in May 2011, to share experiences of these new rights-based tools with the broader biodiversity and development communities, and to promote awareness of the need to avoid top-down blueprints in responding to the Nagoya Protocol requirements. The articles were selected on the basis of abstracts submitted. The guest editors from IIED, Kalpavriksh, Natural Justice, COMPAS and Ethical Biotech put together abstracts based on their own experiences and invited others in their networks to do so. The call for abstracts was circulated mainly amongst the biodiversity community. A broader call was not issued due to limited capacity for review. The abstracts were reviewed by the guest editors and selection decisions made on the basis of the relevance to the theme, the potential for learning lessons, the degree of participation and the diversity of experiences represented. The articles went through an extensive peer review process – first by the guest editors, and then by participation practitioners.

The process of compiling this issue has stimulated a great deal of mutual learning amongst biodiversity researchers and legal experts supporting community protocols and FPIC, and has brought this community of practice closer together. It has also deepened their understanding of participatory approaches, helping to steer these rights-based tools onto a more participatory path.

Africa with developing and using CPs, and with FPIC processes, mainly within the biodiversity community. It covers a range of contexts, including: developing mechanisms for access and benefit-sharing (ABS) for genetic resources and traditional knowledge; confronting threats from mining and protected areas; and improving forestry partnerships. It also looks at some government experiences of establishing institutional processes for FPIC and benefit-sharing. It identifies practical lessons and guidance based on these experiences. The issue also includes some cases from the forestry and mining sectors, where there is quite a bit of experience with FPIC. Box 5 explains how the issue was developed.

Objectives of the issue

CPs and FPIC are relatively new, and understanding and capacity to support them in

practice is still limited. This special issue aims to strengthen the capacity of a range of actors (e.g. local organisations, practitioners, NGOs, donors and governments) to support these rights-based tools effectively in practice. It also aims to highlight the need to support bottom-up processes designed by communities, and avoid pre-defined processes and procedures imposed from outside which do not reflect the distinct and diverse cultural norms of communities. This is important for the implementation of the Nagoya Protocol, where governments and donors may be tempted to adopt rigid, top-down procedures which fit more easily with their ways of working and the interests of business.

By promoting understanding of CPs and FPIC, and capacity to support them, the issue will help inform the implementation of the Nagoya Protocol provisions on prior informed consent and community protocols, and the UN Declaration on the Rights of Indigenous Peoples, as well as other situations and legal contexts where CPs and FPIC are of value, for example to claim rights under indigenous rights laws in India (Ramdas).

Structure of the issue

The issue is divided into four parts.

Part I: Setting the scene: research partnerships and ABS from the perspective of communities highlights the need for community participation beyond FPIC, throughout the research and development cycle (Pimbert). It also explains the limitations of the Nagoya Protocol from the perspective of indigenous communities in India (Ramdas).

Part II: Institutional innovations for FPIC and benefit-sharing reviews experiences with national laws and institutional mechanisms for FPIC and benefit-sharing (Buxton; Ritter). It also explores how participatory plant breeding and related ABS contracts with farmers in China are helping to promote institutional change (Li and Jiggins with Song).

Part III: Community protocols for genetic resources and ABS reviews the Quechua farmers' inter-community benefit-sharing protocol based on customary laws (Argumendo); the Bushbuckbridge healers' protocol for securing access to medicinal plants and seeking commercial benefits (Sibuye *et al.*); and livestock keepers' protocols for securing grazing rights, recognition of their conservation role and commercial benefits (Köhler-Rollefson *et al.*).

Part IV: Community protocols and FPIC: mining, protected areas and forest partnerships explores the development and use of community protocols to defend sacred groves and territorial rights against mining in Ghana and Colombia (Guri *et al.*; López and Heiler) and the development of a protocol to assert customary rights in a protected area in Borneo (John *et al.*). It also reviews the use of FPIC and community protocols to strengthen community ownership of a project to monitor illegal logging in Cameroon (Lewis and Nkuintchua); and to improve a partnership with an ethical company for trade in non-timber forest products in Peru (Oliva *et al.*).

Lessons for supporting FPIC

Looking across the articles in this issue, a number of practical lessons can be drawn on how to support FPIC (see also Tips for Trainers).

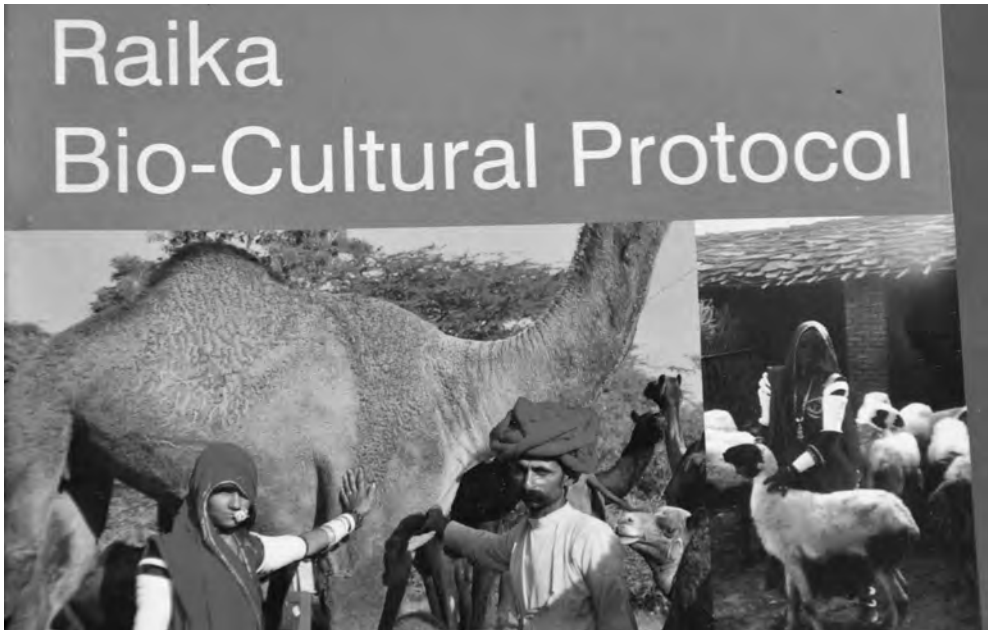
Importance of community-designed processes

As Pimbert and Lewis and Nkuintchua show, a community-designed FPIC process can not only build trust and ownership of a project but can also be empowering for marginalised communities. Dalit women in India organised open-ended discussions lasting almost three months, enabling the emergence of FPIC on their own terms and in their own time. Baka and Bantu communities in Cameroon were consulted in extended discussions, tailored to each

community and local context. In both cases, the communities were allowed to define the terms of engagement in the project and the modalities of implementation and went on to take control of the project, which was very empowering. And in both cases this was facilitated by the use of accessible technologies – understanding the role of icon-based handheld GPS was central to making FPIC more concrete for Baka and Bantu; while using video to document research enabled dalit women to take control of the research process.

Participatory design of government structures and procedures

Top-down structures and procedures established by national law for FPIC in Canada, and for benefit-sharing in Australia, have made participation difficult for communities and weakened traditional structures (Buxton; Ritter). As Buxton suggests, implementing the 'spirit of FPIC' rooted in self-determination implies participation in decision-making. This requires power-equalising which can only be achieved when indigenous practices, structures and norms are incorporated in the design of FPIC structures and processes. Even where there is equal representation of indigenous communities and other experts, acceptance of the validity of traditional knowledge and influence over decisions, there may be western bureaucratic norms, heavily reliant on written rules, complex documentation (in English) and hierarchical structures (e.g. in Canada). This conflicts with the informal processes, oral communication (low literacy) and egalitarian structures that are common in aboriginal communities. This means that 'participation is conditional on people being able to act like western bureaucrats, and that is a real problem' (Buxton). The key is for institutions to incorporate flexibility that allows them to evolve to reflect indigenous perspectives based on learning and the development of shared values.



The Raika are the largest pastoral community of western Rajasthan in north-west India. The Raika BCP is thought to be the first BCP ever completed by livestock keepers. It was developed with the support of international NGO Natural Justice and Lokhit Pashu-Palak Sansthan (LPPS).

Recognising the power to veto

As noted by Ramdas, indigenous communities may not want to participate in an ABS agreement if it means commoditising their resources and knowledge which are sustained through a collective, spiritual relationship, or losing resources which are vital for their health and survival. In Cameroon (Lewis and Nkuintchua), communities were informed that they can give, refuse or withdraw their consent for the whole project or certain activities at any time. This was empowering as being explicit about their right to refuse made the negotiation with outsiders more equal.

Conversely, if communities are denied the right to veto, FPIC becomes a tool which merely facilitates resource development, rather than giving traditional communities the capacity to decide whether or not to participate on a case-by-case basis. Australia's Native Title Act, which brought the right to negotiate with mining companies, but not to veto development, has brought millions of dollars to indigenous people. But evidence remains

mixed and ambiguous as to whether this has resulted in any improvement in social or economic well-being of the communities in question. Not having the power to veto also limited their bargaining power when negotiating with companies (Ritter).

Avoiding misunderstandings

Ensuring that communities fully understand the information provided about the proposed activity is critical for FPIC to be meaningful. The FPIC forms in Lewis and Nkuintchua provide questions to check community understanding of the objectives of the project, the benefits of participation and the potential risks. If any of the answers demonstrate a lack of understanding, these aspects have to be explained again until the answers demonstrate full understanding.

A good relationship between those seeking consent and the community is important for avoiding misunderstanding. If there is no previous relationship, FPIC could be refused or granted simply because

of false expectations. Where patron-client relations exist, it may be best not to compensate communities during FPIC to avoid consent being granted purely for immediate and insignificant benefits. And in other cases, FPIC could be granted not because the proposal is understood, but simply because the people making it are trusted (Lewis and Nkuintchua). Certain protocols and ways of behaving can help minimise the misunderstanding and friction associated with cross-cultural communication between indigenous and non-indigenous people (Ritter). As well as facilitation by a local organisation trusted by the community, the support of an anthropologist may be required.

Allowing enough time and money

A number of articles stress the need for unhurried processes and flexible design. Putting a time limit on FPIC may be desirable for companies seeking consent but risks rendering FPIC meaningless by preventing full understanding and deliberation, and bottom-up design based on customary institutions. Even where communities are participating in an NGO project which aims to support their livelihoods and rights, the process can take nearly three months (Pimbert). When new and complex issues are introduced where communities may be divided, more time may be required to develop understanding and consensus. These processes of deliberation are vital for communities to decide their best interests. What may appear an attractive proposition to youth, for example, may not be best for safeguarding community subsistence needs or cultural heritage (Ramdas).

As a number of articles point out, getting dispersed communities together is often costly. Even if communities themselves are not paid, the cost of facilitation will also need to be covered. Added to this, is the cost of legal support and representation for communities, particularly if benefit-sharing agreements are negotiated with companies. In Australia's native title

process (Ritter), the negotiation of benefit-sharing agreements for mining took a minimum of six months, often longer, and involved a number of experts. Given the lack of government support, companies often provided funding for FPIC, but this could lead to co-option of the process.

Lessons for supporting community protocols

A participatory process is an essential core element for developing community protocols which represent the negotiated majority view or common interest of the community as a whole and which are really owned by the community. While the main purpose of a protocol may be to communicate customary rules and rights, a participatory process is vital to build the capacity and confidence of communities to negotiate with more powerful actors so that these rules and rights are recognised. In some cases, community protocols have led to new inter-community representation structures which can facilitate FPIC (e.g. Sibuye *et al.*; Argumedo). They can also enable potential problems with a project or partnership to be identified in advance (Lewis and Nkuintchua), and help to build long-term partnerships based on trust (Oliva *et al.*).

Maintaining a flexible focus

Whatever the initial purpose for developing a community protocol, it is important to maintain flexibility in terms of objectives, focus and process design. For example, a community protocol for access and benefit-sharing typically sets out the community's customary values and rights relating to traditional knowledge and biodiversity and requirements for PIC and equitable benefit-sharing. However, ABS issues may not be the only or most pressing priority for communities. Discussions to develop a protocol will inevitably bring up other issues that communities need to address, such as securing their own access to biodiversity resources and defending

their resources and land against development threats.

Recognising the impacts of the process and supporting community facilitators

Generally speaking, there seem to be two types of protocols in this issue: those that focus on achieving impact and empowerment primarily through use of the document; and those that also see the process as a means for empowerment and change. In the latter, communities have played a leading role in the design and facilitation of the process and the community-level process has been more extensive. In the former, external facilitators have tended to play a greater role in facilitation, documentation and drafting. In both cases, the process has improved community organisation.

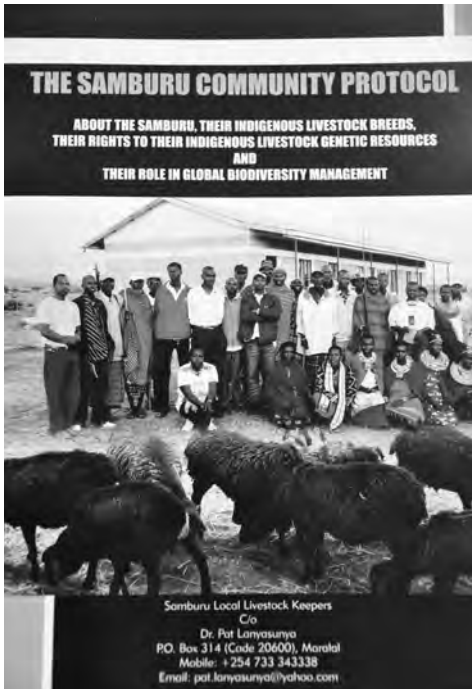
However, where community members have been trained to take the lead in the design of the process, in conducting the research and facilitation, and in developing the content of protocols, these processes have been very empowering, building capacity and confidence (Guri *et al.*; Argumedo; Sibuye *et al.*; John *et al.*) This has led to greater continuity and use of the protocol by the communities themselves after the process has ended – whether externally (Sibuye *et al.*) or internally (Argumedo). Training community facilitators may require more time and resources. In one case, it was not possible due to the limited timeframe imposed by the donor contract (nine months) (López and Heiler). While communities may be empowered and mobilised by the process, continuity of support by an external organisation may still be needed to promote impact once the protocol has been developed.

Key steps in developing a community protocol

There is no set formula for developing a community protocol. The form it takes and the methods to develop it should come from and reinforce the local biocultural

Box 6: Key steps in developing a community protocol

- Identification of a local organisation and community facilitator trusted by the community to facilitate the process. Existence of a community representative organisation will make the protocol process easier. An FPIC process to obtain the consent of the community to take part in the process is the first step for developing the community protocol.
- Research to understand the community, its bio-resources, customary laws and institutions. This can be a time-consuming process, particularly if such studies have not been conducted before. Ideally, it should be conducted and facilitated by the communities themselves. In Ghana, documentation of cultural and biological resources by the community was key to their revaluing these resources which were taken for granted. It revitalised sacred groves, traditional crops and built respect for traditional authorities (Guri *et al.*). In the Potato Park, Peru, research on customary laws was designed and conducted by community facilitators and formed the basis of the protocol (Argumedo).
- Internal discussions and consultations amongst the community to develop the protocol content on cultural values, roles and responsibilities of communities, customary laws and resource rights. This step can also include broader reflection processes on community priority needs and the actions required to address them (Guri *et al.*).
- Legal research on national and international laws and bylaws that support the customary rights and community priorities identified. This requires legal experts and can also take time if such research has not yet been done. A challenge here is to ‘translate’ the legal language to make it accessible to communities so that they can use the protocol.
- Drafting, review and agreement by the community, in the local language. External support will often be needed for drafting the protocol, but the greater the involvement of the community as a whole in shaping its content, the greater the ownership and continuity, and hence potential impact of the community protocol. This may be a challenge in dispersed communities – a travelling ‘roadshow’ was used to reach as many people as possible in a protected area in Borneo (John *et al.*).
- Using BCPs for negotiation. Once protocols have been agreed upon, they can be used for negotiation with others, either individually or in multi-stakeholder platforms where community representatives (ideally a broader range of communities together) engage with formal and state-level stakeholders and/or external parties. In this negotiation process, while being aware of power dynamics, the communities have ideally undergone a capacity-building process to understand how to operate in the process (Brouwer *et al.*).



The Samburu are Kenyan pastoralists. Their BCP elaborates indigenous knowledge and breeding practices, in particular for Red Maasai sheep, an endangered indigenous breed with commercial potential that has attracted attention from scientists.

system and situation of the community – of which there is a huge diversity. That said, most community protocols will entail certain steps (see Box 6) but some may be more limited in terms of their process and contents, for example, when the protocol is developed after an FPIC process to set out the modalities for engaging in a project (Lewis and Nkuintchua).

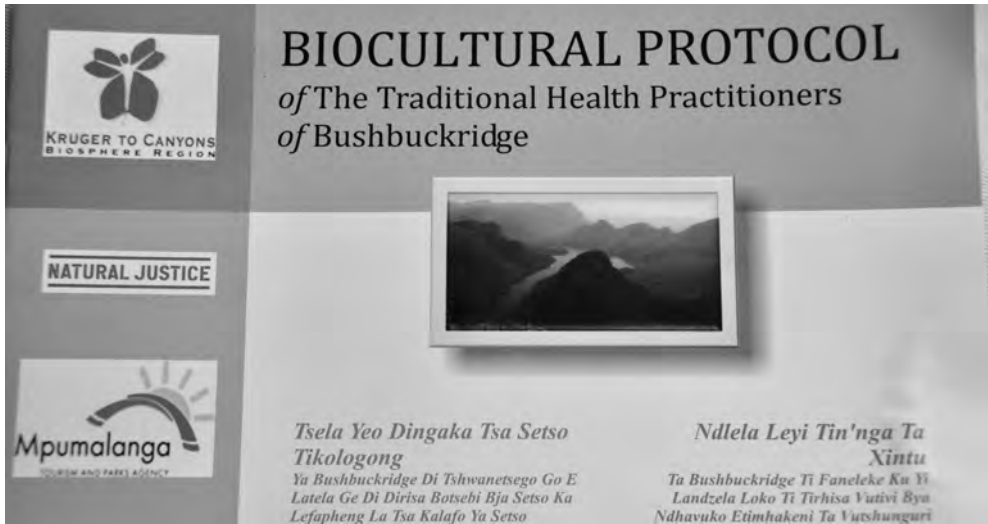
Impacts of community protocols and facilitating factors

Some protocols have had significant impacts, both internal and external. The Bushbuckridge BCP, for example, (Sibuye *et al.*) fostered a sense of identity amongst dispersed healers of two different language groups, resulting in a registered healers' association with 300 members, mainly women, actively negotiating and pursuing their needs. The process was facilitated by a group of healers and the BCP drafted with their active participation. The proto-

col has increased awareness of protected area authorities that local healers are not overharvesting. This has enabled the healers to negotiate some access to medicinal plants in a protected area which had been completely sealed off. Overharvesting has been reduced due to improved awareness generated by the process. The association has signed an agreement with a cosmetics company, which could lead to an ABS agreement – and, after extensive discussion, the healers decided to pool some of their knowledge so that benefits would reach the group as a whole. The association has appointed a committee to negotiate with external actors on its behalf.

In Ghana, the Tanchara community protocol not only revitalised stewardship of biodiversity but also succeeded in getting a mining company that threatened to destroy its sacred sites and pollute its drinking water to postpone mining until 2013. This impact was facilitated by a local NGO which started a dialogue between the communities and the mining company and conducted a study on community perspectives on mining. In addition, the local NGO has helped gain the support of the local government for the CP by involving officials in the development of the protocol and taking them to visit affected communities. Involving local government in the development of community protocols is vital to get institutional backing and work towards the legal recognition of CPs (Guri *et al.*).

In the case of Alto San Juan in Colombia, the novelty of the community protocol instrument has hampered its political recognition by local government – hence a follow-up phase is needed to promote its recognition, or develop community protocols on a region-wide basis, in order to defend territorial rights in the face of illegal mining. The development of community protocols will be facilitated in communities which have supra-community representation (e.g. the ASOCASAN council represents 30 communities) (López and Heiler).



The Bushbuckridge BCP is considered a living document by the Kukula Traditional Health Practitioners Association and they periodically review the aims and challenges outlined in their original document.

In the case of Peru's Potato Park (Argumedo), the biocultural protocol establishes a framework for equitable benefit-sharing amongst five communities based on customary laws and was signed as an inter-community agreement. As it applies to benefits that are already being derived, it is one of the few community protocols for ABS which is actually functioning in practice to guide the distribution of benefits. The process to develop it took about 15 months and was designed and led by the communities themselves. It has resulted in new inter-community governance structures and improved community cohesion. The agreement is guiding the way benefits are shared and used, ensuring they contribute to biodiversity conservation and poverty reduction. It has also enhanced capacity for PIC and negotiation of equitable ABS agreements.

Challenges to be addressed with CPs and FPIC

Despite the positive outcomes described above, it should be noted that community protocols are not a panacea. While they can help to mobilise and better equip communities to take action, their external impact may be limited if they are not recognised

by government legislation and institutions, as is often the case.

Similarly, the extent to which PIC procedures are recognised in practice depends on the extent of devolution of decision-making powers to communities. Thus, in many cases, community protocols and international law such as UNDRIPs and the Nagoya Protocol will provide tools for communities to advocate for their customary rights to be recognised, but will not achieve their objectives until more fundamental changes in law, governance and political processes are in place at national level.

Until then, significant efforts will be needed not only to support communities to develop CPs, but also for communities to use them for advocacy and negotiation and to raise awareness of their legitimacy.

Community-based monitoring and evaluation of the approach will be critical in learning and improving these tools and gaining external recognition. It should include monitoring of the process-based impacts. The growing challenge to assist communities to determine whether and how to develop community protocols needs to be addressed by inter-community lesson-sharing, good practice guidelines and rigorously tested methodologies

(Jonas, Bavikatte and Shrumm, 2010).

While broader acceptance of the need for FPIC is beginning to emerge (Colchester, 2010) there is still limited appreciation of the role and value of community protocols amongst governments, commercial companies and donors, even within the biodiversity community. As well as defending rights, community protocols have huge potential for improving governance and conservation of biodiversity at the local level, and for strengthening biocultural systems for resilience to climate change (Argumedo, Sibuye *et al.*; Guri *et al.*)

Efforts are needed to improve understanding of community protocols, of how to effectively support them in practice and of the benefits for different stakeholders, including government and business, across different sectors. At the same time, we need to avoid coming up with blueprints for these rights-based tools, and ensure that

external actors provide flexible support rather than setting standard procedures which prevent real community participation. We hope that this special issue will serve as a first step in this endeavour – by sharing the lessons from a diversity of experiences and participatory processes.

Last thoughts

There are undoubtedly many more NGOs and indigenous organisations undertaking similar initiatives with CPs and FPIC, building on earlier attempts at participatory processes for community empowerment, documentation and organising to defend customary rights. We hope that this issue will support and inform these practitioners, and inspire them to reflect on these potentially emancipatory tools, and to share their experiences with others. The resources section of this issue lists some platforms for sharing on CPs and FPIC – join the debate!

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