

Biocultural Community Protocols: Dialogues on the Space Within



Sanjay Kabir Bavikatte
Executive Director
The Christensen Fund



Daniel Francis Robinson
Senior Lecturer, Institute of Environmental Studies
The University of New South Wales



María Julia Oliva
Senior Coordinator for Policy and Technical Support
Union for Ethical BioTrade

Abstract: This paper starts by explaining “the space within” – the ethical grammar and code by which indigenous peoples use and steward nature. It then explains the inextricable links with nature demonstrated by a number of communities with which we have worked, and their experiences in the ABS context. It discusses the importance of processes of prior informed consent, before then discussing the possibility of “tools of conviviality” that may act as bridges between the fundamental ecological principals of indigenous peoples, and the researchers and companies that seek to utilize biodiversity and knowledge within community control. In the final sections, we explore the use of both community protocols and Ethical BioTrade, with some examples, and their potential role as tools of conviviality – opening up dialogues between actors from vastly different worldviews. While we do not see community protocols as a panacea for the rights of indigenous peoples and local communities, we have seen them act as an

important step towards the protection of indigenous knowledge and the recognition of legal pluralisms.

Keywords: Biocultural, biotrade, community, protocols

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Setting the Stage

*Thirty spokes share the wheel's hub;
It is the centre that makes it useful.
Shape clay into a vessel;
It is the space within that makes it useful.
Cut doors and windows for a room;
It is the holes that make it useful.
Therefore profit comes from what is there;
Usefulness from what is not there.*

- Lao Tzu, Tao Te Ching¹

The international legal landscape of the rights of indigenous peoples and local communities is gathering momentum around the protection of their traditional knowledge and genetic resources. This momentum is simultaneously engendering complementary trajectories in national law and policy making, with terms like “access and benefit sharing,” “*sui generis*,” and “protection of traditional knowledge” becoming the new phrases of choice for speaking about community rights in the context of biodiversity.

The impetus for this emerging discourse on community rights to traditional knowledge and genetic resources can be traced to the Convention on Biological Diversity (CBD). The CBD breaks new ground in international treaty law with its 194 State Parties committing to the conservation and sustainable use of biodiversity and the fair and equitable sharing of its benefits. What is unprecedented about the CBD is its recognition of the role of indigenous peoples and local communities in conserving biodiversity and the obligation it puts on states to ensure the in-situ conservation of the knowledge, innovations, and practices of these communities. The CBD makes an explicit link between the traditional lifestyles of indigenous peoples and local communities and biodiversity

conservation.

Under the CBD, the task of articulating and operationalizing the rights of indigenous peoples and local communities has, since 1998, been undertaken by the Working Group on Article 8j and related provisions (WG8j) and by the Working Group on Access and Benefit Sharing (WGABS), which led to the Intergovernmental Committee for the Nagoya Protocol (ICNP). The tenth Meeting of the Conference of the Parties (COP) to the CBD in October 2010 in Japan led to the successful adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS). The Nagoya Protocol is the first legally binding international instrument to formally encourage states to respect the rights of indigenous peoples and local communities.

Specifically, Article 12 requires Parties to consider indigenous peoples and local communities' "customary laws, community protocols and procedures" with respect to traditional knowledge associated with genetic resources. Despite some criticisms that this Article is limited by the use of ambiguous language (eg. "as appropriate," "in accordance with domestic law") (Harry 2011), it nevertheless expands the corpus of internationally recognized indigenous rights and is likely to have important impacts within its jurisdiction. Importantly, the Nagoya Protocol also works to ensure that indigenous people and local communities give prior informed consent "for access to genetic resources where they have the established right to grant access to such resources" (Article 6(2)). It also requires Parties to seek prior informed consent from indigenous peoples and local communities when traditional knowledge associated with genetic resources is being accessed (Article 7).

While there are still some ambiguities in the Protocol's text and much to be left to the interpretation of the countries implementing it, there is a general agreement that indigenous peoples and local communities have rights to their knowledge, innovations, and practices.² Therefore, these communities have the right to give or withhold consent to the utilization of such knowledge, commercial or otherwise. They also have the right to share in any benefits that could accrue from such utilization. Some countries have expressly recognized the rights of communities over their genetic resources in their ABS legislation, thus adding to a growing chorus of voices supporting community rights that include rights to land and

resources as well as rights to traditional knowledge.. In fact, Article 6 of the Nagoya Protocol requires each Party to take measures to secure the consent of indigenous peoples and local communities in order to access genetic resources where there exists an established right over such resources. An established right could be a right established under domestic law, such as laws relating to land, property, or protected areas, or through judicial decisions.

While the treaty is not legally binding, the WG8j has nevertheless crafted a set of resolutions and guidelines that are slowly creating a discourse of community rights to their territories, biodiversity, and ways of life. The Akwe: Kon Guidelines³ on the conduct of social, cultural, and environmental impact assessments of developments on the lands of indigenous peoples and local communities is a case in point. The Takrihwaieri Ethical Code of Conduct⁴ for respecting the cultural and intellectual heritage of indigenous peoples and local communities currently being negotiated within the WG8j is another example of the emerging discourse on community rights.

For a discerning observer, what comes through is a growing corpus of customary international law being generated within the WG8j that makes strong links between the rights of indigenous peoples and local communities to their traditional knowledge and their rights to their lands, way of life, and resources. In contexts such as ABS and Ethical BioTrade, which we will discuss in this article, there are new tools such as community protocols that can help begin the process of relationship-building between researchers, companies, and communities. While these protocols serve as a legal interface that articulates the rights of the community, they are also able to communicate the richness of the community “space within.” It is this depth that makes the community protocol a pedagogical tool that accompanies external stakeholders in their journey of beginning to know a community. While we do not see community protocols as a panacea for the rights of indigenous peoples and local communities, they act as an important step towards the protection of indigenous knowledge and the recognition of legal pluralisms.

This paper starts by explaining “the space within” – the ethical grammar and code by which indigenous peoples’ use and steward nature. It then explains the inextricable links between nature and individual communities, and their

experiences in the ABS context. It explains the importance of processes of prior informed consent, before discussing the possibility of “tools of conviviality” that may act as bridges between the fundamental ecological principals of indigenous peoples and the researchers and companies that seek to utilize biodiversity and knowledge within community control. In the final sections, we explain the use of both community protocols and Ethical BioTrade and their potential role as tools of conviviality – opening up dialogues between actors with vastly different worldviews.

The Reasoning

The philosophy behind the growing recognition of the rights of indigenous peoples and local communities to their ways of life, culture, and lands has its roots in the concern over the rapid loss of biodiversity and the future of “spaceship earth.” Mounting evidence shows that the “fines and fences” approach of the 1970s and 1980s, which sought conservation by relocating communities living in biodiversity rich regions, failed miserably. The “fines and fences” reasoning was based on Garrett Hardin’s idea of the “tragedy of the commons” (Hardin 1968) Hardin argues that individuals acting as rational maximizers of self-interest, thereby ultimately destroying common property resources.

Therefore, governments began to increase state control or allow privatization of areas that had previously been managed by communities. The real “tragedy of the commons” began when areas that, had been conserved by communities for generations through a complex system of customary laws and responsibilities began to erode because they were being managed by the state or private actors who neither understood nor shared the cosmovision⁵ (Ishizawa 2009) of the communities that had nurtured these lands for centuries.

The “tragedy of commons” approach began to wane and it was eclipsed by the Nobel Prize winning work of Elinor Ostrom⁶ who, through solid empirical data, unequivocally proved that under certain conditions biodiversity is better conserved by communities living in and around it rather than the state or private institutions. She outlined these conditions as the eight design principles that were pre-requisite for the stable management of common-pool resources.⁷

Article 8j⁸ of the CBD under “In Situ Conservation” marks the shift from the “fines and fences” attitude to conservation to an approach that recognizes the role of traditional lifestyles and knowledge of indigenous and local communities in conservation of biodiversity. Article 8j and Article 10c⁹ of the CBD oblige Parties to recognize and safeguard the integral link between conservation of biodiversity and the ways of being and knowing of these communities.

The aforementioned negotiations within the WG8j, the WGABS (pre-Nagoya), and ICNP (post-Nagoya) seek, among other things, to safeguard this integral link between the ways of life of indigenous peoples and local communities and conservation of biodiversity. The Nagoya Protocol on ABS seeks to do this through a system of rights and incentives. The Protocol recognizes the rights of communities over their traditional knowledge by requiring Parties to take measures to ensure their prior informed consent is sought before any access and utilization of such knowledge, albeit “in accordance with domestic law.” It also seeks to incentivize communities to carry on their ecologically sustainable ways of life by requiring business and research interests that utilize traditional knowledge to share the benefits of such utilization with the communities providing the knowledge.

While much has been made of the “benefit sharing” aspects of the Nagoya Protocol, the fact remains that for many communities the ecosystem is the greatest and most reliable service provider, ensuring food, shelter, and health care in situations where it is not possible for governments to provide them. The loss of biodiversity and associated traditional knowledge results in the loss of livelihoods and the erosion of cultures and communities that are intertwined with these ecosystems.¹⁰ In many situations, the destruction of ecosystems has less to do with communities not “profiting” from their knowledge and more to do with the non-recognition of their rights by states¹¹ .

This brings us back to the poem from the Tao Te Ching, which nearly twenty four hundred years ago wisely stated: “shape clay into a vessel/ It is the space within that makes it useful.” All the emphasis on ABS and fair and equitable benefit sharing tends to miss the important truth that Ostrom unequivocally established – common-pool resources are conserved not because individuals in communities act as rational maximizers of self-interest seeking to profit from biodiversity, but because of certain kinds of customary systems of governance. Indeed, some of the

Western misunderstandings about “biopiracy” concerns focus on a perception that indigenous people are seeking economic gain as a primary outcome of their complaints. In fact, many have taken issue at the cultural offense caused by a breach of customary laws or norms, including the internalization of physical/tortious injury (Robinson et al. 2014). While Ostrom’s approach is distinctly economic, in the spirit of the Tao, we ask about the “space within.” The real lessons from the community “space within” lie in understanding the ethical grammar of the relationships communities have with their ecosystems – a grammar that is coded in culture, values, practices, and customary laws.

The next section will explore the nature of the “space within.” The success or failure of even the most enlightened laws and policies seeking to protect community rights to their cultural and material resources and territories hinges on this understanding.

Thinking about “Thinking about Nature”

Lack of experience diminishes our power of taking a comprehensive view of the admitted facts. Hence those who dwell in intimate association with nature and its phenomena are more able to lay down principles such as to admit of a wide and coherent development; while those whom devotion to abstract discussions has rendered unobservant of facts are too ready to dogmatize on the basis of a few observations.

- Aristotle¹²

The word “idiot” comes from the Greek word *idios*, which means “private,” and an *idiotes* means a private or self-enclosed person, as opposed to a person in his/her public role. The public role as opposed to the private or self-enclosed role requires an engagement with the world and an active concern for others. The antidote to “idiocy” or “self-enclosure” is what psychologists refer to as “metacognition,” which is to step outside one’s own thoughts and think about one’s “way of thinking”. Metacognition is the process of interrogating whether the manner in which one has conceptualized a problem itself is true or whether one could be mistaken. Metacognition requires what Iris Murdoch calls an “unselfing” – or selflessness, which is to think outside the narrow confines of one’s own interests and anxieties (Crawford 2009).

Returning to Aristotle's idea of "dwelling in intimate association with nature and its phenomena," the reason that some indigenous peoples and local communities have been able to ensure the conservation of ecosystems within which they live is because of an intimacy with it – an intimacy that is only possible through un-selfing, or engaging with nature on its own terms. The philosopher Albert Borgmann makes a distinction between a "commanding reality" and a "disposable reality." Nature becomes a "commanding reality" when one relates to it by respecting its own inherent qualities. Nature, on the other hand, becomes a disposable reality when one engages with it as an *idiot*, when one's own interests dominate and nature is viewed as a resource to be effectively managed and consumed by humans.

The Navajo form of naturalism is an example of nature as a "commanding reality." The Navajos use what nature provides while recognizing that humans cannot and should not seek to "master" it. This idea contradicts the dominant approach to nature, which has its roots in the theories of Francis Bacon. Bacon argues that nature is unruly and dangerous and needs to be contained and harnessed for the benefit of humans. The Navajo relationship with nature is based on the principle of *hozho*, which is roughly translated as harmony with nature. *Hozho* is the kind of harmony that is based on an intimate and unselfish relationship that embraces the inherent value of all creation, as opposed to a perspective that is purely based on "use value" (Phillips 2004, 25).

To approach Nature as a disposable reality is to understand it as a device, something to be consumed or purely as a means to the satisfaction of human wants. Borgmann gives an example of how a disposable reality has eclipsed a commanding reality by explaining that people these days are less inclined to learn a musical instrument, which requires hard practice and an understanding of the instrument on its own terms. Instead, people would rather buy an iPod, which grants them the ultimate power of being able to consume virtually any kind of music with no effort on their part. With a musical instrument, an effort must be made to build a relationship, to step outside of one's self-enclosure. With an iPod, on the other hand, no such relationship need be built because the iPod is designed to be consumed according to the whims of the user (Borgmann 2003, 31). The link that the CBD makes between the "traditional lifestyles" of indigenous peoples and local communities and the conservation and sustainable use of

biodiversity is precisely one of an un-selfish relationship, or intimacy, with nature as a commanding reality. The un-selfing that Murdoch speaks about means that the self is not *idios*, or self-enclosed, but rather is relational. For pastoralists like the Maldharis of the Rann of Kutch or the Raika of Rajasthan¹³, their relationship with nature is not based on abstract knowledge but a knowledge that is embodied – a knowledge that is not cerebral but knowledge of the hands, feet, sight, sound, and smells. In fact, their perception itself is a dialogue between their bodies and the world. What they perceive is neither an empirical fact, nor a judgment, but a learnt competence or embodied knowledge (Merleau-Ponty 1962, 153).¹⁴

The indigenous peoples and local communities that the CBD refers to have an embodied competence about Nature; they do not think about nature as an economist or businessman would, but rather they think through nature, or as nature itself. This embodied competence is evident in both physical activity and social interactions. Customary laws, cultural norms, language, and rituals practiced by these communities are social manifestations of an intimate relationship with nature where the self and nature are not separate but intertwined. The Gunis are traditional healers in Central and Western India; the word ‘*guna*’ means both healing and virtue, and the Gunis stress that the efficacy of their healing practice is integrally linked to a compassionate and virtuous relationship with the plants and nature as a whole. They argue that a person who does not have such a relationship with nature could use the same plant in the same manner that the Gunis use it, but would be unable to heal their ailment.¹⁵ In similar interviews, healers in Karen communities in Chiang Mai Province in northern Thailand have expressed near identical beliefs. Indeed, some of the Karen and Hmong healers say that they would get sick and internalize/embody injury if certain plants were misused (Robinson 2013).

The use of nature is highlighted in the difference between a “relationship of intimacy” and a “relationship of use”. Environmental educationist Chet Bowers notes that the relationship we have with Nature informs our “root metaphors” and vice versa. Root metaphors constitute our cosmovisions and, while the central root metaphor of the indigenous cosmovision is that of a “web of life,” the root metaphor of the modern cosmovision is one of a mechanism in which the world is understood as a machine. Other iconic metaphors, such as the “brain is like a computer,” are based on the root metaphor, which gives rise to a mechanistic way

of thinking in which nature is seen as a resource that must be measured and used efficiently (Bowers 1997, 204-6).

Acknowledging the “Space Within” in the Utilization of Biodiversity

In the context of ABS and other frameworks dealing with access to and use of biodiversity, the “space within” approach emphasizes the need for critical doubt. It asks for the momentary lapse of a purely economics based “incentives approach” in order to engage with communities in the use of their biological or genetic resources and associated traditional knowledge. Instead, it demands reconciling equity – the ethical dimension of ABS or similar frameworks – with the ethics of conservation of indigenous peoples and local communities. How can the sourcing of biological resources, the utilization of genetic resources, and associated traditional knowledge, protect the “space within” of these communities? The challenge emerges in laws and regulations dealing with ABS. These rules attempt to identify rights-holders and other stakeholders, define procedures for engagement, and outline parameters for what is balanced, fair, and equitable in engagement with communities. These rules are also central in the growing body of voluntary norms addressing ABS, which establish good practices for specific types of organizations utilizing biodiversity, from research institutions to biotechnology enterprises.¹⁶

Such experiences also show how legal and ethical requirements linked to the use of biodiversity can, and should, be reconciled with the role and relationship of communities in respect to their lands, resources, and knowledge. In particular, Ethical BioTrade, which outlines a set of best practices for the ethical sourcing of natural ingredients derived from biodiversity, creates an interesting context for analyzing how commercial ventures are able to go beyond use value and incentives and focus on relationships. Ethical BioTrade has also provided a useful testing ground for some of the tools seeking to address some of the tensions and synergies between approaching biodiversity as a resource and approaching biodiversity as part of a community’s culture and heritage, as is discussed later in this article. As context for the discussion relating to Ethical BioTrade, it is useful to consider its rationale and main features. Cosmetics, food, and pharmaceutical companies source biological resources extensively, relying on biodiversity to create new, innovative ingredients for their products. Thus, how companies manage their

sourcing practices greatly affects not only the long-term quantity and quality of their ingredients, but also the ecosystems and communities involved in or adjacent to these activities. The notion of Ethical BioTrade thus emerged to promote and characterize the ethical sourcing of biodiversity. Ethical BioTrade sets criteria for environmental, social, and economic sustainability of activities of collection, cultivation, research, development, and commercialization of natural ingredients and the species from which they are derived (UEBT 2014a).

The criteria for ethical sourcing practices are established in the Ethical BioTrade Standard of the Union for Ethical BioTrade (UEBT 2012a). In line with the CBD and other international agreements, the Ethical BioTrade Standard includes requirements for the conservation and sustainable use of biodiversity, as well as for fair and equitable benefit sharing, respect for the rights of all actors, compliance with international and national rules, and clarity on land tenure and rights over natural resources. For example, Principle 3 of the Ethical BioTrade Standard requires that negotiations on the sourcing of ingredients are balanced, informed, and transparent. Even in cases in which there are no applicable legal requirements for ABS, Ethical BioTrade also requires that companies obtain prior, informed consent and arrange mutually agreed upon terms to be respected in any biodiversity-based research and development activities.

It is relevant to note that companies must implement these requirements along all supply chains dealing with natural ingredients. By joining the Union for Ethical BioTrade (UEBT), which manages the Ethical BioTrade Standard, companies commit to the gradual implementation of these requirements to their entire portfolio of natural ingredients. UEBT members thus establish targets for their ethical sourcing practices, prepare work plans, and report annually on progress. Their implementation of Ethical BioTrade is also checked through periodic and independent audits.

In this manner, the development and implementation of the Ethical BioTrade Standard, as well as supportive documents such as a set of guidelines for company engagement with communities, are examples of approaches aiming to explore how “ethical” sourcing practices relate to the “ethics” of indigenous peoples and local communities. This brings us back to the issue at hand, which is one of engendering a true dialogue between the utilization of biodiversity and indigenous peoples and

local communities. For such a dialogue to be genuine, it must both acknowledge and go beyond incentives or benefit-sharing. It must also emphasize engagement with the different epistemology or cosmovision of these communities, thereby entering into a relationship that protects and nurtures “the space within.”

Locking Technologies and the Challenges of Free and Prior Informed Consent

It is said that there are two cardinal rules of dialogue: the first rule is to listen and the second rule is to listen some more. If we are speaking about moving beyond a purely “incentives and benefit-sharing” approach and engendering a dialogue between different epistemologies, we are essentially speaking of the “art of listening.”

The debate between universalism and cultural relativism is a tired one. On one hand, claims of universal values have disastrous consequences; universalist claims that all human beings are “rational maximizers of self-interest” have led to the state control or privatization of the commons, causing untold misery and loss of biodiversity. On the other hand, cultural relativist claims have led to a non-reflexive form of radical individualism where anything goes, including lifestyles that are increasingly devoid of any respect for Nature.

Communitarian theorists such as Michael Walzer, Alisdair MacIntyre, and Michael Sandel have stepped outside the false debate of universalism versus cultural relativism by carefully arguing that communities are neither insular nor homogenous. On the contrary, history has shown that communities are porous and heterogeneous. The debate of universalism versus cultural relativism makes the false assumption that communities are insular and unchanging. The reality is that most communities are dynamic and constantly dealing with both internal and external pushes and pulls. The very survival of communities depends on their ability to adequately engage with processes of change within and without.¹⁷

The real issue at hand is one of “good process.” Good process asks the questions: how can two different epistemologies or cosmovisions engage and dialogue as equals? If the objective of the interaction between communities and other actors is to learn from and benefit each other, how can we do so without running the risk of

imposing the values of the dominant group on the weaker group? We need to be pragmatic enough to acknowledge that the engagement between communities and other actors takes place in the context of the “real world” where the playing field is not level. Therefore, there is the added “duty of care” or “burden of good faith” on persons or organizations involved in the utilization of biodiversity to listen and then listen some more.

Moving to the realm of practice, there is a significant challenge that lawmakers/regulators and businesses face amidst the changing legal landscape, which has begun to acknowledge community rights to their biodiversity and knowledge. This is a challenge of getting free and prior informed consent of communities before the utilization of their biodiversity or knowledge. The challenge is a layered one with questions ranging from who gives consent for something that is communally owned to what does “free” and “informed” mean in the context of free and prior informed consent. The answers to many of these questions can only arise in context and there are no universal answers to them. However, what is imperative is good process and the foundation of good process is a genuine dialogue amongst equals.

The limits of the emerging law on prior informed consent of communities are the limits of state law itself. The French post-development thinker Andre Gorz makes a distinction between “locking” and “open” technologies. Open technologies facilitate communication and sharing and rely on the personal and creative energies of their recipients, making them both users and creators (Gorz 2010). Locking technologies, on the other hand, are those that come pre-set and work on a principle of command and control; their development and deployment is centralized and they provide their recipients little or no freedom to adapt it to their local needs and context. While Gorz attempts to understand how technology shapes society, it would be useful to apply these ideas to law and understand legal systems as a kind of technology that could either be an open technology or a locking one.

How we approach the problem of free and prior informed consent is significantly informed by how we understand the technology of law itself. While a state could pass a law requiring businesses to get the consent of communities before accessing their plants or knowledge, how the lawmaker or regulator verifies whether the

consent is free and informed and how the business goes about getting this consent makes all the difference. The key question here is one of good process – does the process ensure a genuine engagement with the cosmovision of the community in question, thereby protecting the “space within,” or does the process impose a set of external values on the community that erodes the “space within” or the cosmovision of the community, which has nurtured the ecosystem in the first place.

Accompaniment and the Making of Convivial Law

The word “process” is an open ended one. It signifies something that is ongoing; it signifies a relationship. We need to make a paradigm shift from perceiving interactions between communities and actors engaged in the utilization of biodiversity as a series of disparate, solitary one-off events to understanding these interactions as the building blocks of a long-term relationship. While consent, in law, is a one-off event, there is growing recognition in realms such as ABS and Ethical BioTrade that consent, in fact, is an ongoing process. The success or failure of an interface between communities and other actors is based on building sustainable relationships, which, in turn, hinges on a process of “accompaniment.”

In the context of accompaniment it is necessary to consider how communities and other actors can accompany each other in order to learn about the “space within,” how the requirements and procedures of ABS and Ethical BioTrade open themselves to this kind of learning, and if developing technologies of engagement allow for this kind of accompaniment and learning or if they are all about efficiency and profit.

Can the process and the form undertaken by communities to provide consent facilitate the process of dialogue and accompaniment? Can this process mark a break from the locking technologies of state law and create an open technology of community law making? Answers to questions such as these can be found by exploring the impediments to dialogue and accompaniment.

The impediments to a process of dialogue or accompaniment lie in conflating our understanding of corporate persons with our understanding of communities. Corporate persons or companies, like communities, are aggregates of individuals

that own assets and manage them according to certain, agreed upon rules. However, this is where the similarity ends. The values, the internal dynamics, and the decision-making processes between corporations and communities are, for the most part, radically different. However, as far as state law is concerned, communities and companies are considered to be the same for the purposes of providing consent. For example, if a business wants to access the traditional knowledge of a community, then prior informed consent must be obtained (see Hayden 2007).¹⁸ However, a legal contract signed by the chief of the community in exchange for certain benefits might be accepted as good evidence of consent, even if there might be issues of representational politics (Greene 2004).¹⁹

That is why voluntary norms, such as the Ethical BioTrade Standard, have sought to complement legal requirements through putting process at the core of ethical practices and prior informed consent. For example, in Principle 3 of the Ethical BioTrade Standard, which deals with equitable benefit sharing, a requirement outlines the process of negotiating issues related to prices and other conditions of the sourcing of natural ingredients, as well as access to genetic resources or associated traditional knowledge for the purpose of research and development. The aim is to ensure that producers and communities have the opportunity and necessary information to make free and informed decisions about their engagement in sourcing, research, and development activities. To this end, negotiations must take into account customary law and practices, provide spaces and mechanisms for the active contribution of all actors, and be based on information that is clear, relevant, and complete.

Thus, companies working towards Ethical BioTrade need to recognize the particular nature of communities and their relationship with their ecosystems, along with their inherent rights, interests, and concerns. This requires measures to address information asymmetries and participatory processes that involve the broader community as well as producers. It also demands a relationship based on rules of engagement that recognizes inherently distinct discussion and decision-making procedures between companies and communities.

These rules of engagement, not only in the Ethical BioTrade context but also much more broadly, are increasingly defined by the communities themselves. The obligation of defining adequate processes for dialogue and engagement, in many

ways, falls on the community. Many communities now have begun to use this “right to consent” to begin to develop a language of interface that can communicate their epistemology. They have begun to develop what Ivan Illich (1973) called “convivial tools.” Illich used the term “conviviality tools” to describe tools that give each user the greatest opportunity to enrich the environment with the fruits of his or her vision. Industrial tools, according to Illich, deny this possibility to those who use them and allow their designers to determine the meaning and expectations of others (Illich 1973).

Situations where the idea that a community can give consent with a signature on a contract ignores the fact that consent requires a relationship of respect and learning. However, if actors invest time and energy, a relationship could be far more sustainable in the long run than a signature on a piece of paper.

Legal technologies tend to disguise and reinforce existing relationships of inequality. For example, one could well argue that if the chief of the community signs a contract that permits a business to utilize the traditional knowledge of a community, the community has given prior and informed consent. However, this model does not ensure that consent was an outcome of customary processes within the community, the values of the community, and an understanding of the implications of consent.

Community Protocols as Tools of Conviviality

If the first part of the “art of a dialogue” is the “art of listening,” communities have begun to develop tools that exemplify the second part of good dialogue, which is the “art of speaking.” The art of speaking is a delicate balancing act of speaking with one’s own voice and articulating one’s deepest concerns and desires while, at the same time, communicating in a manner that the listener can understand. The art of speaking puts the burden of simultaneously doing justice to oneself and the listener on the speaker.

Current legal technologies that have been developed to secure the free and prior informed consent are not convivial. They are pre-fabricated, giving little space to community ways of speaking. To make matters worse, the state decides whether an issue has been adequately communicated and comprehended. For example, in

places such as Australia, Vanuatu, South Africa, AND India, emerging ABS legislation increasingly gives the authority to the local regulator to determine whether or not a community has given consent for the use of its traditional knowledge. The problem with such authority is that it is unfettered and undefined; there is no way for the regulator in question to know whether the consent was informed and resulted from a consultative, value-based process within the community. The plight of the regulator is also the plight of the organization seeking access to genetic resources or traditional knowledge. This organization requires consent, and consent must be given in a form that is sufficient for regulatory approval. Whether this consent has the backing of the community and whether the person who consented is the chosen representative of the community are questions that remains unanswered.

This sort of circumstance is well illustrated by a recent case in Australia relating to the Kakadu plum, which emerged in 2009. On March 10, 2009, Senator Rachel Siewert of Western Australia raised concern about a patent application in the Australian Senate (Question 1172). She was concerned that current development plans for commercial activities utilizing the plant might be stopped by the patent, particularly in relation to cosmetic or skin care products. The patent in questions was WO/2007/084998 on “compositions comprising Kakadu plum extract or açai berry extract,” which was filed by representatives of Mary Kay Inc., a cosmetics company, on January 19, 2007. This international patent application had subsequent national examinations, including in Australia (Australian patent application number 2007205838). In 2010, further publicity was raised surrounding the attempted patent, its validity in the light of prior art and traditional uses, and the issues it might cause in developing industries (Robinson 2010). Several indigenous organizations and Aboriginal corporations were contacted to jointly submit letters to the company to seek withdrawal of the patent applications both in Australia and abroad. In addition, a pre-grant opposition was filed by one of this paper’s authors under Section 27 of the Australian Patents Act, regarding aspects of novelty and obviousness.

Aside from questions surrounding the validity of the claims in the patent application, this was an important test case relating to the Australian ABS system, as well as the potential for ethical sourcing of the plum. Given the attempt to obtain a patent, the company is making a de facto claim to have undertaken

innovation through research and development – the trigger for ABS. To contextualize, the Kakadu plum is endemic to northern Australia, found mainly in the Northern Territory, the far north of Western Australia, and also, to a limited extent, in the far north of Queensland. This means that these regions have the potential to capitalize on their endemic “natural capital” in useful products. Given that the Kakadu plum has been used by several Aboriginal communities as a high energy food, it has since been investigated by researchers and industry and found to be one of the world’s highest sources of ascorbic acid (Vitamin C) (Gorman and Whitehead 2006). Because of its potential anti-oxidant effect of the ascorbic acid, it has been used in a number of food, skin care, cosmetic, and hair care products.

These states and territories have ABS laws and regulations in place. In the Northern Territory, where the Kakadu plum is found and harvested, the Northern Territory Biological Resources Act (2006) requires prior informed consent from local providers of a biological resource used for bioprospecting as well as traditional-knowledge holders. Also of potential relevance are the ABS requirements under Part 8A of the EPBC Regulations (2000), which requires permits for access with the intent to conduct research and development on biological resources in Commonwealth Areas, such as Kakadu National Park, where the plum is found; informed consent if the biological resources are on indigenous owned land or native title held land; (EPBC Regs. 2000, 8A.10(1)); and consultations with indigenous land councils. Several relevant companies and Aboriginal corporations were contacted by one of the authors (Robinson, pers. Comms., 2010-2015), and these corporations denied supplying Kakadu plums to Mary Kay and providing consent to the cosmetics company. Also, based on several interviews and communications, there is no evidence that Mary Kay obtained permits from the Northern Territory, Queensland, or Commonwealth governments either (Robinson 2010).

In an interview with SBS World News Radio in 2011, Crayton Webb of Mary Kay claimed that they had ethically obtained Kakadu plums from a supplier in the Northern Territory, under a license issued by the Australian Government (Atkinson 2011). However, there does not appear to be any such license listed on the Australian Department of the Environment’s website, suggesting that access for trade and commercialization is being conflated with access for research and development. The supplier has not yet been publicly named, so it is not possible to

determine if indigenous people are involved in supply of the plum, or if there are substantial employment and income benefits. Without an ABS agreement, it seems there are no other benefits likely.

The Gundjeihmi Aboriginal Corporation, which represents the Mirarr, said people in the area had used the plum for longer than anyone could remember: "The Kakadu plum has been an important source of food and medicine for the Mirarr" (Powell and Murdoch 2010). Geoff Kyle of the Gundjeihmi Aboriginal Corporation indicated that the Mirrar were not necessarily seeking benefits, but rather were keen to be informed and consulted about such activities (Powell and Murdoch 2010; Atkinson 2011). Several similar statements were issued by Aboriginal organizations and the Northern Land Council. Subsequently, a number of these organizations also came forward expressing the desire to develop community protocols.²⁰

If some of the Aboriginal communities had developed and publicly conveyed clear procedures for when and how they expect to be engaged in such negotiations, then there may have been few or no criticisms of this venture, and it may have benefited indigenous populations more directly and explicitly. As in other cases we have seen, several of the communities that utilize the Kakadu plum have cultural associations with the plant and are able to derive some economic benefits from it. The development of such community protocols would represent an "art of speaking" tool, which would communicate the desires of these specific communities about their values, concerns, and interests. Such protocols could help ensure that the communities are involved in any future consultations relating to the Kakadu plum or other biological resources; are able to benefit from the sourcing, research, and development of this resource; and are able to document their values and beliefs with respect to their traditional knowledge and stewardship of biodiversity.

The "art of speaking" tools that communities have begun to develop are, at their core, "tools of conviviality." They are tools, as Illich points out, that are developed and controlled by communities and provide communities with the greatest opportunity to enrich a dialogue with their vision. They ensure that communities can articulate their "space within" in their own voice, while accompanying the listener on his/her journey of understanding the community, its values, and its

needs.

A community protocol is a convivial legal tool that is collectively developed by a community. It is aimed at those who want to engage the community and it seeks to articulate to the community's way of life, history, customs, and decision-making processes. It begins a dialogue that goes beyond a purely instrumentalist or use-value interaction and embarks on building a relationship. Through its community protocol, a community says to the listener: if you want access to our lands, biodiversity, and knowledge, then you need to hear our story, you need to understand what these things mean to us, what our values are, and how we make decisions. By engaging with our protocol, we step outside the prescribed roles of "willing buyer" and "willing seller" and begin the process of accompaniment.

Community Protocols: Towards a People's History of the Law

Indigenous peoples and local communities have always had customary laws and norms through which they regulate the use of their lands and knowledge. Stable governance of commonly shared lands and knowledge, as Ostrom points out, is based on the knowledge of these laws and norms within and amongst communities that partake of these lands and knowledge. Community protocols, however, are convivial tools that are dialogic in their purpose. They represent the community and its cosmovision in a manner that allows for engagement that goes beyond the superficiality of a market transaction. While they are clearly not a panacea, community protocols take the community and their partners on a journey, including negotiation processes, towards more equitable research or commercial arrangements – for example, e.g. for tourism, cosmetics, and other industries. Community protocols are also strategic in their deployment and are emblematic of the "agency" of indigenous peoples and local communities. For the most part, communities are not passive victims of external social, economic, and legal forces, but are active agents who critically analyze these forces and strategically engage them to secure rights.

In his classic work *The Making of the English Working Class*, the English historian E.P. Thompson marshals rich evidence to disprove what he calls "the enormous condescension of posterity" (1963) where history is written as if it is a result of great figures or global forces, erasing the struggles of the ordinary people who

have resisted and informed these forces. History, according to Thompson, is not just made by the forces of the market but also by the struggles, aspirations, and hopes of ordinary people, striving to influence the condition of their lives (Thompson 1963).

A community protocol in the international legal landscape is an example of the agency of indigenous peoples and local communities to write their history into the process of law making. They seek to address the lack of community participation in the development and implementation of laws and policies that affect communally managed biodiversity and traditional knowledge. The existing soft laws relating to indigenous peoples rights, such as the United Nations International Labor Organization's Indigenous and Tribal Peoples Convention (ILO 169) and the Declaration on the Rights of Indigenous Peoples, are outcomes of years of struggle by indigenous peoples. At the same time, indigenous peoples and local communities have begun to advocate for the recognition of these soft law rights in treaty law, and the achievement of the Nagoya Protocol may now be utilized as a lever towards further recognition of rights (Bavikatte and Robinson 2011).

Communities argue that if Article 8(j), and now the Nagoya Protocol, recognize their right to give consent for the use of their knowledge, then their consent will be given according to their customary laws and community protocols, which must be recognized by states. Community protocols as tools of interface and dialogue were developed to strategically respond to concerns of states and external stakeholders that it would be difficult for non-community members to know what the customary norms or laws of a community were.

The experience of states stepping in to make decisions on behalf of communities or businesses entering into rough and ready agreements with select individuals in the community who lack the mandate, has been chastening. Indigenous peoples and local communities in the international ABS negotiations have repeatedly pointed out that communities who share biodiversity or knowledge can come together on the basis of common cause, shared values, or collective decision making to develop community protocols that provide the legal certainty and clarity that external stakeholders need. The next section provides some examples of these, and explains their practical relevance in the context of Ethical BioTrade and ABS.

Experiences with Community Protocols

Although it is very early in their history, there are several community protocols that have been developed around the world of relevance to our discussion here (see Table 1). These protocols reflect the growing concern amongst communities about the respect of their basic rights (land rights, cultural rights, use of natural resources), customary laws and norms, and their engagement with outside parties, like companies, researchers and government agencies, on fairer and more ethical terms.

Table 1. Recently-Developed Community Protocols and Main Focal Areas

Source: Authors; Natural Justice's Community Protocols

(www.community-protocols.org); Swiderska (2012)

Community	Location	Date Protocol Finished	Main Areas of Focus
Peruvian Potato Park Quechuan Communities	Pisac, Cusco, Peru	2009 (started consultations in 2007)	ABS, TK and GRs, trade, tourism
Bushbuckridge Traditional Health Practitioners	Bushbuckridge area of the Kruger to Canyons UNESCO Biosphere Reserve in South Africa	2009 (started in 2009)	ABS, TK and GRs, sustainable use of biodiversity
Raika Pastoral Community	Rajasthan, India	June 2009	ABS, TK and GRs, sustainable use of biodiversity
Samburu Pastoralists	Various districts in Kenya	2009	ABS, TK and GRs, sustainable use of biodiversity
Vaidyas (healers) from the Malayali Tribe	Vellore District of Tamil Nadu, India	August 2009	ABS, TK and GRs, sustainable use of biodiversity
Gunis and Medicinal Plant Conservation	Mewar Region of Rajasthan, India	August 2009	ABS, TK and GRs,

Farmers			sustainable use of biodiversity
Tingandem	Tanchara community, Upper West Region, Ghana	2010	Mining, FPIC, sacred sites
Maldhari Pastoralists	Banni grasslands of Kachchh, India	2010	Endogenous development, TK and GRs, ABS
Ulu Papar Protocol	Penampang, Sabah (Borneo), Malaysia	March 2012 (started consultations in 2010)	FPIC, engagement, land
Melangkap community Protocol	Melangkap cluster of villages, Kinabalu, Borneo, Malaysia	Under development in 2014	Endogenous development
Khoe Community Protocol	Bwabwata National Park, Kavango and Zambezi Regions, West Namibia	Under development in 2014	Land, genetic resources, ABS

The main areas of focus in Table 1 provide only a snapshot of the values and concerns expressed by these communities – these protocols cover more thematic concerns than we can easily describe here. Although it would be difficult to try to compare and evaluate the impact of these protocols at such an early stage, there is some growing evidence from these communities of the benefits (Swiderska 2012; Argumedo 2011). As the table suggests, most of these have been developed with biodiversity in mind, with many of the protocols responding to the three main objectives of the CBD: conservation of biodiversity, sustainable use of biodiversity, and fair and equitable sharing of benefits arising from the utilization of the basic elements of biodiversity. With the advent of the Nagoya Protocol in 2014, it seems likely that we will see the development of many more community protocols, and that we will have the opportunity to see how they impact external parties and to monitor the emergence of potential disputes. Indeed, it will be important to see how state and international bodies respond to these grass-roots expressions of customary law and legal pluralism. Already, community protocols are developing legal and moral force as a prerequisite for ensuring free and prior informed consent, not only in ABS and biotrade agreements, but also in REDD+

and payments for ecosystem services.²¹

The relevance of community protocols in Ethical BioTrade was explored through a joint project conducted by UEBT, Natural Justice, and GIZ from 2011 to 2012. This project looked at the potential role of community protocols as tools to facilitate and strengthen community engagement in Ethical BioTrade activities. In particular, the project included three test cases in Peru, Brazil, and Madagascar, which involved UEBT members and their indigenous or local (UEBT 2012b). In these cases, suppliers participated in internal discussions on issues such as their rights over biological resources and associated traditional knowledge, related governance structures, social and cultural values, and the specific vision, expectations, and commitments pertaining to existing commercial relationships. These points were later described in one or more documents, which, in one of the cases described above, eventually became a community protocol.

Moreover, the test cases in Ethical BioTrade involved an additional step: a dialogue between the UEBT member and the suppliers, based on the outcomes of the internal discussion process. This dialogue facilitated a balanced and participatory exchange of information about each group's respective context, values, decision-making procedures, expectations, and commitments. The outcome was a joint understanding of the rules of engagement that guide the relationship between company and community, as well as the particular challenges of the relationship and ways to address them moving forth.

This project reaffirmed the value of community protocols – and their rationale and underlying concepts more generally – in promoting the “art of dialogue” in the context of Ethical BioTrade. Indeed, these lessons have been included in a recently-published UEBT (2014b) guide to Dialogues in Ethical BioTrade: How to establish respectful, balanced, and inclusive discussions in the sourcing of natural ingredients. This guide, which supports UEBT members in meeting requirements of the Ethical BioTrade Standard, describes the core elements of a dialogue, including respect, participation, and information-sharing. It also outlines the measures necessary for establishing a dialogue, including clarifying rights and obligations, determining local needs and expectations, understanding the biocultural context, and establishing rules of engagement jointly with local actors.

Conclusion

Indigenous peoples and local communities around the world have begun to highlight their existing protocols or develop new protocols in an effort to occupy this unprecedented opening in international legal space. They have begun to hold up their protocols as examples of how communities can self-determine the terms and conditions of access to their lands and knowledge by external stakeholders, in accordance with customary norms and values. By doing so, communities have undercut the old argument that communities are incapable of engaging with external stakeholders without state intervention and make a resounding case for legal pluralism.

Brendan Tobin, a lawyer for indigenous peoples, notes:

Legal pluralism cannot be envisaged as the mere acceptance of co-existence of legal regimes, with customary law applicable to indigenous peoples within their territories and in relation to their own internal affairs. Rather it will require incorporation directly or indirectly of principles, measures and mechanisms drawn from customary law within national and international legal regimes for the protection of traditional knowledge. (Tobin 2009, 110)

Therefore, community protocols are a way to incorporate principles of customary law into national and international law. This is done by securing national and international legal recognition of these protocols as a clear representation of a community's values, decision making structure, and set of terms and conditions for engagement with the community.

In contexts such as ABS and Ethical BioTrade, community protocols begin the process of relationship building. While they are legal interface documents, they are also able to communicate the richness of the community "space within." It is this depth of a community protocol that makes it a pedagogical tool that accompanies external stakeholders in their journey of beginning to know a community. Ultimately, a community protocol is a way of doing business "the old fashioned way." A community protocol says: before we negotiate any terms, let's talk awhile, let us tell you a little more about ourselves so you can understand our way of life and what we hold most dear to our hearts. And, when you know what is in our

hearts, perhaps you will value what we value and join us in protecting the “space within.”²²

Notes

¹ Cited by Lehman, Karen. 1997, 354.

² The traditional knowledge referred to here is ‘traditional knowledge associated with genetic resources’ which is the dominant interpretation by State Parties of the term ‘knowledge, innovations and practices’ referred to in Article 8(j) of the CBD.

³ See www.cbd.int, accessed September 8, 2015.

⁴ See www.cbd.int, accessed September 8, 2015.

⁵ The term ‘cosmovision’ has to do with basic forms of seeing, feeling and perceiving the world. It is made manifest by the forms in which a people acts and expresses itself. This means that a cosmovision does not necessarily correspond to an ordered and unique discourse (cosmology) through which it can be described/explained and understood. In some cases the only way to understand a cosmovision is through living it- by sharing experiences with people who sustain that mode of living and that life-world (Ishizawa 2009, 118).

⁶ For example, Ostrom 1995

⁷ There are also other useful examples, such as those in Fisher (2008).

⁸ Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity 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 the utilization of such knowledge innovations and practices.

⁹ Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

¹⁰ The loss of biodiversity and the loss of cultural diversity are integrally linked because cultures of rural communities are integrally tied to their resource-dependent ways of life. For example, indigenous peoples represent the largest portion of cultural diversity on earth. Linguistic diversity can be considered a measure of cultural diversity; nearly 5000 of the over 6000 languages in the world are spoken by indigenous peoples and 90% of the world’s languages will be extinct in the next 100 years. Language extinction is linked to cultural extinction, which is in turn linked to species extinction. Lack of secure rights to sustainable livelihoods is rendering many indigenous communities extinct. See www.terralingua.org, accessed September 8, 2015.

¹¹ For example, see Forsyth 2011, an example of community rights in the Pacific.

¹² Cited in Crawford (2009).

¹³ The intimacy that the Raika and the Malधारis have with their animals and nature is articulated in their community protocols available at www.community-protocols.org. Accessed September 8, 2015.

¹⁴ Our efforts to understand how some communities relate to Nature are best explained by the French philosopher Maurice Merleau-Ponty. He asks the question: ‘is what we perceive is based on an empirical fact or our own judgment?’ To apply his question in our context- “Is our perception of Nature based on observing Nature as a ‘fact out there’ or is it based on what ‘we judge’ Nature to be?” He answers this question using the popular optical illusion of the picture, which is both the profile of a young girl and an old woman depending on the perception of the viewer. . In the picture if we see a young girl, we don’t see the old woman and vice versa. So according to him, reality is not just an empirical fact, based on what we perceive- because our perception could be limited. On the other hand reality is not just a judgment either because even if we are told that there are two images in the picture, we cannot just judge that until our eyes are able to work out the two images. Perception then is neither what we plainly perceive nor our judgment but a conversation between the body and the world. Perception is a learnt competence or an embodied knowledge like driving a car. The embodied knowledge incorporates the internal space of the car, such as the brakes, the accelerator, clutch and steering wheel and also the external space of the car such as its dimensions, speed etc. The car in many ways becomes incorporated into one’s body rather than separate from it where one does not think about the car, but rather thinks through it or as it. See, Merleau-Ponty, Maurice. 1962, 153.

¹⁵ In the community protocol of the Gunis on the resources page of www.naturaljustice.org. Accessed September 11, 2015.

¹⁶ In Article 20, the Nagoya Protocol encourages the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing.

¹⁷ ‘...the search for an alternative paradigm has to be a search for a new basis of unity, not merely the assertion of a diversity of cultures....The philosophical perspective that should guide such an endeavor should steer clear of both imperialist claims to universality and the normless striving for relativity: it should affirm both the principle of *autonomy* of each entity (human as well as social) to see out its own path to self-realization and the principle of *integration* of all such entities in a common framework of interrelationships based on agreed values.’ From Rajni Kothari in Alvares, Claude. 1980, xii-xiii.

¹⁸ This has been described as a process of ‘collectivization’ for the sake of benefit-sharing in Hayden (2007). It is also worth noting another of Hayden’s articles with regards to community inclusions and exclusions in the bioprospecting activities of the International Cooperative Biodiversity Groups (ICBG) Latin American projects in Hayden (2003a).

¹⁹ See interesting discussions about indigenous representation, conflicting ideas about prior informed consent and its interruption of bioprospecting activities, in Greene (2004) and also Hayden (2003b).

²⁰ Interviews and meetings by Robinson in 2010, 2011 and 2015.

²¹ See <http://www.community-protocols.org/community-protocols>. Accessed September 14, 2014.

²² The authors note the opinions expressed in this article are not necessarily those of the institutions they represent.

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