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TOWARDS A PEOPLE'S HISTORY OF THE LAW: BIOCULTURAL
JURISPRUDENCE AND THE NAGOYA PROTOCOL
ON ACCESS AND BENEFIT SHARING

Kabir Bavikatte and Daniel F. Robinson

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1

INTRODUCTION

The English Marxist historian E.P Thompson in his classic work 'The Making of the English Working Class'¹ marshals rich evidence to disprove what he called 'the enormous condescension of posterity' 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's argument to view events not merely as results of the systemic juggernaut but as outcomes of a dialectic between social and political 'structures' and the 'agency' of people resisting and challenging these structures offers a good lens through which to critically view the Nagoya Protocol.²

We proffer that the Nagoya Protocol should be analysed with the aid of three guiding questions:

- 1) What was the status quo prior to the Nagoya Protocol?
- 2) What did indigenous peoples and local communities seek to achieve through the Nagoya Protocol and how did they go about doing this?
- 3) What is the outcome of these community efforts in the Nagoya Protocol?

Our analysis of the Nagoya Protocol comes from an understanding of the law as neither a neutral terrain nor an impregnable system of vested interests. Instead

we approach law as a 'site of struggle'³ where different groups lobby for their interests. Some of these groups are clearly more powerful than others, which explain the reticence of State law regarding rights of indigenous peoples and local communities. However it is critical to acknowledge that power begets resistance and that indigenous peoples and local communities have not just been passive victims of the law but on the contrary have fought strategic and pitched battles to stem and sometimes turn the legal tide. They have used a variety of arenas that range from streets and courtrooms to supranational forums such as negotiations towards multilateral environmental agreements.

In answering the three questions we have posed, we will attempt cartography of the emerging biocultural rights of indigenous peoples and local communities under the Convention on Biological Diversity (CBD)⁴ and thereby also map their struggles specifically within the Working Group on ABS and the Working Group on Art 8j and other related provisions. Through this we hope to have taken the first step towards writing a peoples history of the Nagoya Protocol. The objective of such cartography is to trace the trajectory of the activism of indigenous peoples and local communities in the CBD processes thereby providing us with a political compass with which to strategise on the nature, direction and the terrain of the fight to come.

1.1 Background to Bioprospecting, Access and Benefit Sharing

The interest in establishing rules to ensure that scientific collecting activities (particularly commercial activities) 'give back' to the various communities involved in biodiversity conservation culminated in language on 'facilitated access' and 'fair and equitable benefit sharing' in relation to genetic resources within the 1992 Convention on Biological Diversity (CBD). The term

1 E.P. Thompson, *The Making of the English Working Class* (London: Gollancz, 1963).

2 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, available at <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

3 See J.C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven CT: Yale University Press, 1990) and his discussion of public and hidden transcripts in chapter one (pp 1-16); and Nick K. Blomley, *Law, Space and the Geographies of Power* 7-59 (NY: Guildford Press, 1994) particularly chapters one and two which discuss law as a site of struggle, and the many spaces or geographies of legal struggle.

4 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79; 31 ILM 818 (1992).

'bioprospecting', which was likely coined by Eisner in a number of his papers between 1989 and 1992, triggered much expectation about the scientific use of biological materials, particularly where they were associated with indigenous knowledge and uses of the materials.

The bioprospecting concept is based on recognition of the importance of natural product discovery for the development of new crops and medicines, often based on traditional knowledge. For example in many developing countries, a large part of the population depends upon traditional medicines for their primary health care needs. In India, 65 per cent of the population has access to traditional systems of medicine, and in Africa 80 per cent of the population uses traditional medicines⁵. Much of this knowledge has not been examined using the most advanced scientific methods, however this is rapidly changing. As Laird and Wynberg⁶ note, natural products continue to play a dominant role in the discovery of new leads for the development of drugs. They contribute significantly to the bottom lines of large pharmaceutical companies: between January 1981 and June 2006, for example, 47 per cent of cancer drugs and 34 per cent of all small molecule new chemical entities for the treatment of all disease categories were either natural products or directly derived therefrom⁷. Research into specific natural products is usually directed by existing knowledge, often directly from indigenous or local communities, but now in many cases as transferred through the 'public domain'.⁸

The book *Biodiversity Prospecting* by Reid et al.,⁹ describe bioprospecting as: 'the exploration of biodiversity for commercially valuable genetic and biochemical

resources'. For these authors, when conducted appropriately bioprospecting can:

... contribute greatly to environmentally sound development and return benefits to the custodians of genetic resources – the national public at large, the staff of conservation units, the farmers, the forest dwellers, and the indigenous people who maintain or tolerate the resources involved.

The book generally champions a 'win-win' scenario of 'benefit sharing' and respect for indigenous or traditional knowledge, and also a boon for humanity through scientific research. The authors do note that there have been past instances where resource exploitation has had negligible or harmful effects on biodiversity conservation and local communities. Therefore they premise their suggestions on the need for appropriate policies and institutions 'to ensure that the commercial value obtained from genetic and biochemical resources is a positive force for development and conservation.'¹⁰ It was this premise, as well as the push for language on the 'sustainable use of biodiversity' that saw the CBD text include elements on 'access and benefit-sharing' (ABS) and then documents such as the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilisation,¹¹ which have been used to clarify ethical approaches to prior informed consent and mutually agreed terms on which to gain access and establish benefit-sharing when accessing genetic resources and associated traditional knowledge. Due to the voluntary nature of the Bonn Guidelines, and without clear national systems of ABS in a number of countries, many users of genetic resource and associated traditional knowledge (whether commercial and industrial researchers or academics) have not necessarily felt obliged to follow principles of prior informed consent and benefit-sharing.¹² As a result,

5 World Health Organization, *WHO Traditional Medicine Strategy 2002-2005* (Geneva: WHO, 2002); K. Timmermans, 'Intellectual Property Rights and Traditional Medicine: Policy Dilemmas at the Interface' 57/4 *Social Science and Medicine* 745 (2003).

6 Sarah Laird and Rachel Wynberg eds., *Access and Benefit Sharing in Practice: Trends in Partnerships Across Sectors* 12, Convention on Biological Diversity Secretariat, Montreal: Technical Series, No. 38 (2008).

7 D.J. Newman and G.M. Cragg, 'Natural Products as Sources of New Drugs Over the Last 25 Years' 70/3 *Journal of Natural Products* 461 (2007).

8 Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* 11 (Earthscan: London, 2010).

9 W.V. Reid et al., *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* 1 (Washington DC: World Resources Institute, 1993).

10 *Id.* at 2-3.

11 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization, in Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/6/20 (2002), available at <http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>.

12 As noted by Evanson Chege Kamau, Bevis Fedder and Gerd Winter, 'The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and What are the Implications for Provider and User Countries and the Scientific Community?' 6/3 *Law, Environment and Development Journal* 24 (2010).

many of the bio-diverse developing countries as well as indigenous peoples had sought to develop binding international obligations that build upon the principles enshrined in the Bonn Guidelines.

This then led to several sessions of the 'Ad Hoc Working Group on ABS', which has sought to balance various interests in biodiversity (commercial exploitation, conservation, sustainable use, indigenous peoples and local community (IPLC) use and conservation) through the lens of bioprospecting. This was paralleled by a Working Group on Article 8(j) and Related Provisions, which has had a traditional knowledge focus, and which has gradually transferred indigenous peoples and local communities viewpoints and interests into the ABS Working Group. Before exploring these in more detail, it is worth raising some of the deeper theoretical contexts surrounding ABS and the development of the Nagoya Protocol.

1.2 Theoretical Contexts

There are two main theoretical contexts for which we believe it is important to explore and understand the concept of ABS, and the development of the Nagoya Protocol. They can probably be described most simply as:

1. The neoliberalisation (particularly the privatisation and marketisation) of nature, which, in the ABS context has seen many different stakeholders trying to balance use values, exchange values and intrinsic values of biodiversity;
2. The concept of (subaltern) 'cosmopolitan legality', which posits law as a site of struggle and implicates a grass-roots movement that 'seeks to expand the legal canon beyond individual rights and focuses on the importance of political mobilisation for the success of rights-centered strategies.'¹³

First, whilst there is clearly no consensus on what exactly is meant by the 'neoliberalisation of nature', there is

¹³ Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito, 'Law, Politics and the Subaltern in Counter-Hegemonic Globalization', in Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* 1, 15 (Cambridge: Cambridge University Press 2005).

definitely an expansive literature on the topic that has been surveyed comprehensively by Castree.¹⁴ Presenting an ideal-typical characterisation of the elements of neoliberalisation, Castree¹⁵ describes two key elements of privatisation and marketisation as such:

Privatisation (that is, the assignment of clear private property rights to social or environmental phenomena that were previously state-owned, unowned, or communally owned. New owners of hitherto unprivatised phenomena can potentially come from anywhere across the globe).

Marketisation (that is, the assignment of prices to phenomena that were previously shielded from market exchange or for various reasons unpriced. These prices are set by markets that are potentially global in scale, which is why neoliberalism is often equated with geographically unbounded 'free trade').

Certainly bioprospecting evokes elements of both the privatisation and marketisation of biodiversity either directly or indirectly. The privatisation of biological resources is occurring through international agreements such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires some form of intellectual property protections in all Member countries for biological resources.¹⁶ This typically allows for patent or plant variety protections over biological materials and plants (and often associated traditional knowledge) that have been bioprospected, researched and are being commercialised. This then leads to new marketisation of biological resources and associated traditional knowledge – new modes of ownership and market exchange over the intangible or value-added aspects of these resources or knowledge

¹⁴ Noel Castree, 'Neoliberalising Nature: The Logics of Deregulation and Reregulation' 40/2 *Environment and Planning A*, 142 (2008).

¹⁵ N. Castree cites Brenner and N. Theodore, 'Cities and the Geographies of 'Actually Existing Neoliberalism'' 34 *Antipode* 349 (2002); J. Peck and A. Tickell, 'Neoliberalizing Space' 34 *Antipode* 380 (2002); J. McCarthy and S. Prudham, 'Neoliberal Nature and the Nature of Neoliberalism' 35 *Geoforum*, 276 (2004).

¹⁶ Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C to the Marrakech Agreement establishing the WTO, 1995).

sees them commodified in new ways.¹⁷ This has obviously resulted in various concerns from indigenous communities, bio-diverse developing countries, farmer's and peasant groups, and conversely, there are champions of bioprospecting. On bioprospecting, Castree¹⁸ also notes that:

'rival theoretical discourses on the 'selling nature to save it' approach to environmental conservation... currently *de rigueur* in mainstream global environmental organizations, is touted by its advocates in the academic and policy world as an effective tool for 'green developmentalism'. For a cohort of university-based left critics, however, bioprospecting is one more troubling example of 'post-modern ecological capital' in action, representing the further commodification of nature for profit purposes.

The ABS negotiations which seek to regulate bioprospecting activities internationally have sought to find compromise and balance between the various ways that biodiversity can be valued, privatised and marketised, and importantly on what terms. Thus we examine the terms of this balance and the terms of the Nagoya Protocol with an evaluation of the resistances made by some of the potentially most vulnerable groups and also potential beneficiaries to the Protocol – indigenous peoples and local communities.

This leads to the second theoretical note, that the Nagoya Protocol is the result of an ongoing struggle to assert the rights of indigenous peoples and local communities to their natural resources. This might be described by de Sousa Santos and Rodriguez-Garavito (2005) as a 'counter-hegemonic' movement, at least in part, against the neoliberal institutionalisation of biological resources that are conserved by indigenous peoples and local communities and also to protect their knowledge from the same.¹⁹ The Nagoya Protocol could certainly be seen

as an expansion of 'cosmopolitan legality' which, we argue, has led/is leading to what could best be called new forms of 'bio-cultural jurisprudence'.

There has been a considerable push for recognition of community rights over natural resources, with attempts to see 'decentralisation' of government control as well as the recognition of forms of legal pluralism or customary/community control.²⁰ Aspects of the Nagoya Protocol have taken this a step further, with formal international recognition of community protocols and customary laws in relation to indigenous peoples and local communities traditional knowledge. Although there are limits regarding the extent of traditional knowledge protection that the Nagoya Protocol provides, the resulting text appears to provide new opportunities for ILPCs to assert their rights over traditional knowledge associated with genetic resources, and to resist misappropriation or biopiracy.

2

THE CALM BEFORE THE STORM: STATUS QUO PRIOR TO THE NAGOYA PROTOCOL

The decision of the Seventh Conference of Parties (COP) to the CBD in 2004 in Kuala Lumpur was a significant one. The specific paragraph of the COP Seven decision that sowed the seed of the Nagoya Protocol read:

17. See Kathleen McAfee, 'Neoliberalism on the Molecular Scale, Economic and Genetic Reductionism in Biotechnology Battles' 34/2 *Geoforum*, 203 (2003) and Kathleen McAfee, 'Selling Nature to Save it?' 17/2 *Environment and Planning D: Society and Space* 133 (1999).

18. Noel Castree, 'Bioprospecting: From Theory to Practice (And Back Again)' 28/1 *Transactions of the Institute of British Geographers* 35, 38 (2003).

19. See Santos and Rodriguez-Garavito, note 13 above.

20. See J.F. McCarthy, 'Between *Adat* and State: Institutional Arrangements on Sumatra's Forest Frontier', 33/1 *Human Ecology* 57 (2005); J.C. Ribot, A. Agrawal and A.M. Larson, 'Recentralizing While Decentralizing: How National Governments Reappropriate Forest Resources' 34/11 *World Development*, 1864 (2006); J.C. Ribot, 'Authority Over Forests: Empowerment and Subordination in Senegal's Democratic Decentralization' 40/1 *Development and Change* 105 (2009); S. Randeria, 'Cunning States and Unaccountable International Institutions: Legal Plurality, Social Movements and Rights of Local Communities to Common Property Resources' 44/1 *Arch. Europ. Sociol.* 27 (2003); R.J. Fisher, 'Devolution and Decentralization of Forest Management in Asia and the Pacific' 50/4 *Unasylva* 1 (1999).

'Decides to mandate the Ad Hoc Open-ended Working Group on Access and Benefit-sharing with the collaboration of the Ad Hoc Open ended Inter-Sessional Working Group on Article 8(j) and Related Provisions, ensuring the participation of indigenous and local communities, non-governmental organizations, industry and scientific and academic institutions, as well as intergovernmental organizations, to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention?'

The COP Seven decision was a result of intensive lobbying by developing countries that gathered momentum with the adoption of the Bonn Guidelines by the Sixth COP at the Hague in 2002.²¹ Their primary concern was that since the coming into force of the CBD in 1993, user countries²² had done little to meet their compliance obligations under the CBD thereby effectively nullifying its third objective which is 'fair and equitable benefit sharing'. The inclusion of Article 8(j) as an article that would need to be implemented along with Article 15 is in itself a testimony to the efforts of indigenous peoples and local communities.

For indigenous peoples and local communities Article 8(j) was the seemingly benign Trojan horse, which once introduced into the citadel of the Protocol negotiations would beget a range of community rights to genetic resources and traditional knowledge. To get a sense of the status quo prior to the Nagoya Protocol is to comprehend the innocuous and limited nature of Article 8(j) of the CBD. Article 8(j) reads:

Each contracting Party shall as far as possible and as appropriate, subject to its 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.

From a purely rights perspective Article 8(j) is weak. It presents itself as an outcome of politically fraught negotiations with States peppering it with a number of 'exit clauses'. It begins with the words '*...shall as far as possible and as appropriate, subject to its national legislation...'*'. In negotiations speak, words like this are hard fought 'get out of jail free' passes designed to weaken State obligation and to limit any inroads into national sovereignty. The watering down of State obligations continues with the words '*...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...'*'. Note that nowhere does Article 8(j) speak of the mandatory nature of the 'prior informed consent' and 'benefit sharing' when it comes to the utilisation of traditional knowledge (knowledge, innovations and practices) of indigenous peoples and local communities- something that has been gradually becoming an established norm through the encouragement of use of the Bonn Guidelines on ABS.

Article 15, which is the main article the implementation of which the Seventh COP asked the Working Group on ABS to negotiate, makes no mention of any rights of indigenous peoples and local communities over genetic resources. It begins with an unassailable '*Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation'*'. There are no 'exit clauses' here and compared with Article 8(j) and States wanted to eliminate any doubts and establish irrefutably their absolute rights over their genetic resources.

Jurisprudentially speaking, the rights of communities within the CBD prior to the commencement of the negotiations of the Working Group on ABS were enervated. This pre-negotiations state of play begs our second question: What did indigenous peoples and local communities seek to achieve through the Nagoya Protocol and how did they go about doing this?

2.1 The Arts of Resistance: Negotiating Towards the Nagoya Protocol

In his insightful work 'Domination and the Arts of Resistance', James C. Scott, labels as 'masks of power'

21 See, for example, Manuel Ruiz Muller, *Thinking Outside the Box: Innovative Options for an Operational Regime on Access and Benefit Sharing* 3-5 (Geneva: International Centre for Trade and Sustainable Development, 2010) on the incorporation of 'Traditional Knowledge into the draft Protocol text.

22 Parties to the Convention Biological Diversity in whose jurisdictions a predominant number of commercial users of genetic resources were located.

public performances that are designed to placate both the dominant and the subordinate groups. But what goes on behind the scenes or what Scott calls the 'hidden transcripts' reveal the real nature of resistance. From this perspective, the setting of the Working Group on ABS is a theater, where an elaborate charade is enacted with diplomats referring to each other by the names of the States they represent, giving politely indignant speeches about the scope of the CBD and with indigenous peoples and local communities abiding by UN rules clearly biased towards States. But witnessing these negotiations tells us little about the hidden transcripts of feverish lobbying, threats, deal making and the political sleight of hand that happens behind the scenes.

While the negotiations within the Working Group on ABS from 2004 onwards proceeded with regularity, they lacked direction, since there was very little agreement amongst Parties as to even the primary elements of an international agreement on ABS. Decision IX/12²³ of Ninth CBD COP in Bonn marked a radical departure from this state of affairs thanks to four significant points of convergence amongst Parties. They were:

- 1) The agreement on Annex 1 of Decision IX/12 which for the first time since 2004 provided the framework and the elements of an 'international regime' on ABS. The elements were divided along a 'bricks' and 'bullets' formula, where 'bricks' were those elements of an 'international regime' whose inclusion in the regime Parties agreed upon but which still needed further elaboration. 'Bullets' on the other hand were those possible elements, which required further consideration because there was no consensus as to whether they should be included in the 'international regime'.
- 2) An agreement to begin text based negotiations through an invitation to Parties, inter-governmental organisations, indigenous peoples and local communities and other relevant stakeholders to submit operational

text and explanations based on the elements listed in Annex 1 of Decision IX/12.

- 3) The establishment of three Groups of Technical and Legal Experts to advise the Working Group on ABS on i) Concepts, terms, working definitions and sectoral approaches ii) compliance and iii) traditional knowledge associated with genetic resources
- 4) The agreement on escalating the pace and the intensity of the negotiations through the scheduling of three meetings of the Working Group on ABS, each for an extended period of seven days to ensure the completion of the negotiations towards an international regime on ABS in time for the deadline of the tenth COP in Nagoya, Japan.

The first crucial opportunity for indigenous peoples and local communities to substantially influence the negotiations of the WG on ABS presented itself in Hyderabad at the July 2009 meeting of the Group of Technical and Legal Experts (GTLE) on Traditional Knowledge associated with Genetic Resources that was set up at the Ninth COP in Bonn by the Working Group on ABS.²⁴ The Ninth COP also set up two other GTLEs on 'Concepts, Terms and Definitions' and 'Compliance'. The setting up of the GTLE nearly broke the negotiations with the Like Minded Mega Diverse Countries (LMMC) grouping threatening to walk out of the negotiations arguing that GTLEs were a time wasting tactic by the developed countries. The African Group however supported the establishment of GTLEs with the express intent of getting expert views on some of the issues that were deadlocked.

Countries and other stakeholders (CSOs, IPLCs, research and the business sector) were asked to nominate 'experts' on issues relating to traditional knowledge for the meeting of the GTLE on Traditional Knowledge. Based on the list of nominations the Secretariat of the

23 CBD Secretariat, Access and Benefit-Sharing, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting, 19-30 May 2008, IX/12, UNEP/CBD/COP/DEC/IX/12.

24 See CBD Secretariat, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing. Ad Hoc Open-Ended Working Group on ABS, Eighth Meeting, Montreal, 9-15 November 2009, UNEP/CBD/WG-ABS/9/2, regarding the 15 July 2009 meeting in Hyderabad.

CBD identified a pre-specified number of experts bearing in mind proportional regional representation. The final decision on choosing the experts for the GTLE meeting, amidst the large pool of individuals nominated, rested with the Secretariat of the CBD.

It is interesting to note that the Secretariat of the CBD in narrowing down the final list of country nominated experts, chose nominees who were well versed with community concerns rather than individuals who were just technically versed or represented State interests. This was fortuitous since the experts who had a good grounding on community issues were also sympathetic to community concerns. Except for the experts who represented Canada and industry, the rest of the experts knew each other and tended to agree on virtually every issue. Furthermore a sizeable number of chosen experts nominated by countries were from indigenous communities some of who chaired the different sessions of the GTLE thereby palpably shifting the balance of power towards community interests.

The Working Group on ABS had provided the GTLE with a set of questions to be answered, and it was in answering these questions that the first cache of community rights within the Trojan horse of Article 8(j) emerged. The GTLE achieved a jurisprudential feat by expansively interpreting Article 8(j) in a way that had never been done before. There were five critical victories for indigenous peoples and local communities through the GTLE process the fruits of which are seen in the Nagoya Protocol. They were:

- 1) An inseparable link between genetic resources and traditional knowledge was established thereby paving way for a discourse on the rights of communities over genetics resources.
- 2) The absolute requirement for prior informed consent and benefit sharing in relation to traditional knowledge of indigenous peoples and local communities was read into Article 8(j) effectively closing the 'exit clauses' that States had given themselves.
- 3) The need to comply with customary laws and community level procedures when accessing community resources and knowledge was affirmed, introducing the element of self-determination into Article 8(j).

- 4) The 'subject to national law' component within Article 8(j) was substantially weakened by interpreting it as the duty of States to facilitate the rights of indigenous peoples and local communities and not giving States the discretion to decide whether or not to uphold these rights.
- 5) Clear reference was made to the importance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)²⁵ in interpreting the provisions of the CBD for the purposes of the Protocol.

In the fifteen months from July 2009 to Nagoya in October 2010, there were a number of negotiations that ranged from the Working Group on ABS meetings to Friends of the Co-Chairs meetings to the Inter-regional Negotiating Group sessions to the Co-Chairs Informal Inter-regional Consultations. Indigenous peoples and local communities to shore up the victories that resulted from the GTLE meeting on traditional knowledge strategically used every one of these negotiations. Their methods ranged from intensively lobbying delegates during the negotiations to working closely with governments sympathetic to indigenous issues in the inter-sessional period to networking with indigenous peoples groups across the world to convince them to lobby their governments.

At the Ninth Meeting of the Working Group on ABS in Cali, the Co-Chairs provided the Parties with a Co-Chairs text to break the stalemate that had plagued the negotiations until then.²⁶ The Co-Chairs presented their text as a 'package deal' that balanced the interests of the different Parties and asked the Parties to begin their negotiations based on this text. While the Co-Chairs text was carefully drafted to cut the Gordian knot of the negotiations, for indigenous peoples and local

²⁵ United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295, 13 September 2007, available at <http://www.un.org/esa/socdev/unpfi/en/drip.html>.

²⁶ See CBD Secretariat, Report of the First Part of the Ninth Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, Ninth Meeting, Cali, Colombia, March 2010. UNEP/CBD/WG-ABS/9/3, (2010) and note 21 above.

communities it was the first step towards locking in the gains from the GLTE report.²⁷

The Co-Chairs text was avowedly minimalist- it ensured prior informed consent and benefit sharing provisions vis-à-vis communities when their traditional knowledge is used. It also required Parties to ensure that such consent and benefit sharing is in accordance with community's customary laws and community protocols. However the text was completely silent on compliance provisions obliging Parties to prevent the misappropriation of traditional knowledge. It also made no mention of rights of communities over genetic resources. The first omission was in favor of the EU's position that the WIPO Intergovernmental Committee should deal with all compliance provisions relating to traditional knowledge and the second omission had to do with no Party supporting rights of communities to genetic resources.

The Co-Chair's text was fiercely negotiated. When the second resumed session of the Inter-regional Negotiating Group (ING) met on 13 October 2010 in Nagoya for the final round of negotiations, it had before it a heavily bracketed draft Protocol that had come out of the ING meeting in Montreal a month before. The term 'subject to national law' had been reintroduced by India and China into the provision requiring prior informed consent of indigenous peoples and local communities before their traditional knowledge is accessed. Furthermore references to customary laws and community protocols were bracketed by the EU acting at the behest of France.

Indigenous peoples and local communities reintroduced into the preamble section a reference to the UNDRIP which was immediately bracketed by Canada. They also introduced a provision on the rights of communities over their genetic resources, which some Parties based on their comfort levels transformed into three possible text options all of which were promptly bracketed by other Parties. In fact this provision was so fiercely contested by the Group of Latin American Countries (GRULAC) in the September 2010 round of

negotiations in Montreal that after hours of discussion the co-chairs of the small group negotiating the provision suggested to drop it altogether. This resulted in a walk out by the representatives of the International Indigenous Forum on Biodiversity (IIFB) stating that this was a redline issue as far as they were concerned. In the seemingly inevitable face of the continued privatisation of biodiversity, community rights over genetic resources were sought by indigenous representatives in resistance to dominant state and corporate control, which has led to many issues of biopiracy. Outcome of these politically charged negotiations was that Parties in the small group agreed to keep these options and take them back to the ING for a resolution.

How did indigenous peoples and local communities overcome these odds that were so heavily stacked against them? The odds weren't just relating to some Parties' white-knuckled reactions to what they perceived as a 'rights overreach' of the limited scope Article 8(j). The most insurmountable of odds was the cold fact that indigenous peoples and local communities as per UN rules could participate in the negotiations, but would require the explicit support of a Party for any text that they wanted to introduce or retain in the Protocol. As the COP 10 deadline loomed, the negotiations got increasingly frenetic and Parties began to make compromises, which exacerbated the danger that community concerns would be lost as collateral damage.

3

THE OPTIMISM OF WILL AGAINST THE PESSIMISM OF INTELLECT: THE GAINS OF NAGOYA

When the final round of negotiations began in Nagoya, indigenous peoples and local communities were clear that they had to secure five key positions in a potential ABS Protocol for it to have any rights potential. These key positions were:

1. To eliminate the Article 8(j) term 'subject to national law' out of the Protocol provisions dealing with rights of communities over their

²⁷ Some background to this can be found in Daniel Robinson and Brendan Tobin, 'Dealing with Traditional Knowledge under the ABS Protocol' 4/3 *Bridges BioRes Review: Special Nagoya Issue* 8 (October 2010) and Kabir Bavikatte and Brendan Tobin, 'Cutting the Gordian Knot: Resolving Conflicts over the Term 'Utilisation'' 4/3 *Bridges BioRes Review: Special Nagoya Issue* 3 (October 2010).

traditional knowledge and genetic resources before it became a legal ‘term of art’ and started being used in other COP resolutions.

2. To retain references to compliance with customary laws and community protocols of communities in the text of the Protocol thereby securing in treaty law obligations of States to respect community systems of governance.
3. To secure rights of indigenous peoples and local communities over their genetic resources in the Protocol thereby creating a precedent of dynamic interpretation of the CBD in the light of the UNDRIP.
4. To ensure reference to the UNDRIP in the preamble of the Protocol thereby locking in the jurisprudential opportunity to interpret the provisions of the Protocol from the perspective of the UNDRIP.
5. To prevent the forum shifting to WIPO of compliance provisions relating to traditional knowledge and affirm that the Protocol is the main instrument to enforce CBD related rights over genetic resources and associated traditional knowledge.

These key positions had two dimensions to them:

Firstly they were ends in themselves as significant ‘rights victories’ that secured the rights of communities over their traditional knowledge and genetic resources.

Secondly, hard-nosed pragmatism understood that the outcomes of Nagoya would not be perfect but these positions should be viewed as levers to open up greater gains in the long run under the CBD and related WIPO, WTO and UNFCCC processes.

3.1 The ‘Subject to National Law’ Sleight of Hand

The elimination of the term ‘subject to national law’ was a crucial hurdle to overcome. It had found itself back into the Co-Chair’s text in Montreal and some Parties were sticking to their guns about the provision being retained. Interestingly though, countries like New

Zealand and Canada had begun to have reservations about the term since it undermined the treaties that they had with their indigenous peoples which were not ‘subject to national law’ but were akin to agreements between nations.

The African Group of countries proposed a way out by replacing this term with a more temperate ‘in accordance with national law’. This would retain the facilitative role of the State in situations where Parties argued that communities within their jurisdiction needed State protection against exploitation. At the same time it would affirm the GTLE interpretation of Article 8(j) that the rights of communities under the CBD are not dependent on the discretion of States. This way forward was readily accepted by New Zealand and Canada and Article 7 in the Nagoya Protocol finally read:

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

While Article 7 was not perfect, it had clearly achieved what it set out to do- It had eliminated the term ‘subject to national law’, reinterpreted Article 8(j) in favor of community rights and created a new legal ‘term of art’ that could henceforth be used in other parts of the Protocol and future COP decisions instead of the Article 8(j) wording ‘subject to national law’. This new term ‘in accordance with domestic law’ was clearly a lever that would reap big gains in the future.

3.2 Recognising Customary Laws and Community Protocols

The next hurdle was the retention of the references to ‘customary laws and community protocols’ in the text of the Protocol. France at a rather late stage in the negotiations had received instructions from their foreign ministry to under no circumstances agree to any references to ‘customary laws, community protocols and indigenous and local community laws’ that were prevalent in the draft Protocol text.²⁸ They argued that

²⁸ Based on anonymous conversations with EU negotiators at the Convention on Biological Diversity Conference of Parties.

this would affect the interests of France vis-à-vis their overseas territories and it would create a new precedent of references to customary laws in an international treaty between States- something that hadn't been done before.

It was clear that a direct and complete state acceptance of 'legal pluralism' as far as France was concerned was out of the question and through France's insistence, the rest of the EU had to back this position. France proposed the term 'community level procedures' as an alternative to 'customary laws and community protocols'. This was rejected by the African indigenous peoples organisations with the support of the African Group arguing that 'community level procedures' were a euphemism for State control and lacked the authenticity of genuine community processes.²⁹ However the final wording in the Nagoya Protocol in Art 12.1 now reads:

In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

How did indigenous peoples and local communities manage to retain references to customary laws and community protocols despite the opposition?

The short history of this un-bracketed text is that an agreement was reached in the margins of the negotiations between France, the African Group and the IIFB about the retention of the term 'customary laws and community protocols' in exchange for the removal of reference to 'indigenous and local community laws'. The African Group and the IIFB felt that the words customary laws would in any case cover 'indigenous and local community laws'. France was also placated by the addition of the term 'in accordance with domestic law'- the term that had replaced 'subject to national law' and was now beginning to reap dividends.

France in return had to agree to the use of the term 'Parties shall' at the beginning of the Article, thereby

²⁹ Susanna Chung, South African ABS Delegate emphasised the importance of customary laws and community protocols for African indigenous peoples and local community organisations in the ABS Working Group. She based her views on the submissions made to the African Group by the Meeting of the pan- African indigenous peoples and local community organizations in September 2010.

making it a binding obligation on Parties to take into consideration 'customary laws and community protocols' in implementing their obligations under the Protocol. Thanks to some very fancy footwork, the door in international law to legal pluralism and self-determination of indigenous peoples and local communities was now ajar. In years to come, this achievement could see increased community rights and control over natural resources where they are the appropriate 'owners' or resource-holders.

3.3 Securing Rights over Genetic Resources

The next crucial step was to secure the rights of communities over their genetic resources. This had always been a long shot in the negotiations since the CBD made no provision for such a right and if there was one thing that was clear in the September ING in Montreal, it was that no Party would stick its neck out to support this claim. On the penultimate day of the negotiations in Nagoya, there was still no support for this claim and the Co-Chairs constituted a small closed group restricted only to Parties to discuss provisions relating to communities that were still bracketed. A suggestion was made to drop this provision altogether. The African Group however on behalf of the IIFB suggested that a decision such as this should not be taken within a closed group but must be discussed within the larger group.

In the larger group Parties reiterated that while they are willing to recognise the rights of communities over genetic resources, this right had to be strictly restricted to national discretion especially since there were no CBD obligations to recognise such a right. Communities on the other hand stated that they had emerging rights over genetic resources through the UNDRIP which despite being a UN General Assembly resolution and therefore non-legally binding had the moral authority that obliged countries to take it seriously. Communities further stated that while they were willing to live with references to their rights over genetic resources in national law, they also wanted a clear reference to their rights in international law. This argument was promptly rejected by the GRULAC.

Finally a compromise text was developed and agreed to by all Parties and is now in the Nagoya Protocol. Article 6.2 reads:

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

There are two legal sleights of hand, which are worthy of note here. Firstly, the sentence begins with ‘in accordance with domestic law’ thereby eliminating the ‘subject to law’ term and making this a facilitative provision. The obligation on Parties is a ‘shall’ obligation that makes it mandatory. The sentence ends with ‘where they have the established right to grant access to such resources’. Note, that the words ‘established right’ are unqualified thereby leaving it to interpretation as to whether these rights are established in national or international law. In negotiations speak this is known as a ‘strategic ambiguity’- it is a shrewd silence, that leaves enough room for interpretation and jurisprudential growth. The use of ‘established right’ may mean that communities will have to prove that they are the rightful ‘owners’ or ‘authorities’ in relation to the conservation of that genetic resource such that it is ‘in accordance with domestic law’. For example, in the context of the Native Title legislation in Australia, to achieve recognition as a native title-holder for limited traditional land use rights, the individuals have to demonstrate continued lineage and traditional use of that particular area or nation. A similar process may be required by some states in terms of the relationship between indigenous peoples and local communities, endemic genetic resource and the land (or sea) upon which it can be found.

Nevertheless, if we approach the law as a site of struggle, Article 6.2 of the Nagoya Protocol is a monumental achievement by communities. It is a testimony to six years of hard work and careful lobbying and has extended the scope of Article 8(j) in ways that were inconceivable in 1993. It had capitalised on the important victory in the GLTE report on traditional knowledge- that for indigenous peoples and local communities, there is an inseparable link between genetic resources and traditional knowledge. What is more is that the preamble to the Nagoya Protocol explicitly recognises this link with in the paragraph:

Noting the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities

The last two trials for communities were to ensure that compliance provisions relating to traditional knowledge were retained in the Protocol and that the Protocol made reference to the UNDRIP in its preamble. For both these provisions communities had a significant amount of support by Parties.

3.4 Reference to UNDRIP

Regarding the reference to the UNDRIP in the preamble of the Protocol- Canada ended up being the only Party that refused to accept it. In order to goad Canada to agree to un-bracket this provision, it was made more agreeable by phrasing it as:

Noting the United Nations Declaration on the Rights of Indigenous Peoples

On the last day of the negotiations in Nagoya, Canada finally relented to un-bracket this text after late night consultations with their capital. This un-bracketing owes a great debt to the media releases, press conferences and lobbying that Canadian indigenous peoples’ organisations undertook in Canada and Japan during the negotiations to force Canada’s hand. In many ways Canada’s acceptance of this paragraph, has also contributed to the recent Canadian endorsement of the UNDRIP.

3.5 Compliance Measures Relating to Traditional Knowledge

Regarding the compliance provisions relating to traditional knowledge, a deal was finally made with the EU that in exchange for a paragraph in the COP 10 decision that required the Parties to the Protocol to take note of the developments at the WIPO IGC, the EU would agree to un-bracketing these provisions. The agreed text in the Nagoya Protocol under Article 16 reads:

1. *Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as*

required by domestic access and benefit sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.

2. *Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1.*
3. *Parties shall, as far as possible and as appropriate cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1.*

Notably, the provisions for monitoring in Article 13, which will affect knowledge of compliance and non-compliance, were left quite vague as to the appropriate checkpoints for collection of information including certificates of compliance. Despite the efforts of the LMMC to include mention of patent offices as designated checkpoints in the draft versions of the Protocol, this has not been included in the final version. This is somewhat disappointing because it could have helped increase pressure in forums such as the WTO TRIPS Council towards an internationally binding disclosure of origin patent requirement that could help mitigate the many cases of patent-related biopiracy. For several years, since the CBD COP 4, there have been bio-diverse countries raising calls for a disclosure of origin requirement. It has also been mentioned in the Bonn Guidelines that user countries should take into account measures to promote the disclosure of origin of genetic resources and the origin of knowledge, innovations, and practices in IPR applications (16.d.ii).³⁰ This leaves the Nagoya Protocol falling significantly short in dealing with intellectual property and biopiracy concerns, with the text remaining a compromise that would allow delegates in other forums such as the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC), and the WTO TRIPS Council to pick up concerns from many

³⁰ Jorge Cabrera Medaglia, *The Disclosure of Origin Requirement in Central America: Legal Texts, Practical Experience and Implementation Challenges 2* (Geneva: International Centre for Trade and Sustainable Development, June 2010).

countries about the need for a disclosure of origin patent requirement.³¹

4 FIELD NOTES FROM THE FRONTLINE: THE EMERGENCE OF BIOCULTURAL JURISPRUDENCE

The previous sections endeavored to take seriously E.P Thompson's advice of avoiding the 'profound condescension of posterity' by engaging in cartography of community rights gains in the Protocol resulting from six years of incredibly painstaking negotiations. The rights of communities we see in the Nagoya Protocol today cannot be attributed to manna from heaven or the munificence of Parties but are a result of hard fought battles by the IIFB over every comma and word. With the strong support of sympathetic Parties especially the African Group and Norway, communities gained significant ground vis-à-vis their rights over traditional knowledge and genetic resources and the recognition of their customary laws.

The oft-quoted homily in the ABS negotiations was 'perfection is the enemy of the good'. While there were times when it sounded trite, it rings true when analysing the Nagoya Protocol. The rights that were gained by communities in the Nagoya Protocol may not be perfect, but they are undeniably a giant leap from the tame provisions of Arts 8(j) and 10(c) of the CBD. Going back to the guiding questions that we posed at the outset to truly understand the colossal achievement of the Nagoya Protocol with regard to the rights of

³¹ See Jorge Cabrera Medaglia, *The Political Economy of the International ABS Regime Negotiations: Options and Synergies with Relevant IPR Instruments and Processes 4, 14* (Geneva: International Centre for Trade and Sustainable Development, July 2010) and the WTO Trade Negotiations Committee Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group calling for *Draft Modalities for TRIPS Related Issues*, WTO doc. TN/C/W/52, 19 July 2008.

communities, we must learn to see how far we have come since 1993. Slowly but surely indigenous peoples and local communities have started transforming their non-binding rights in the UNDRIP into binding rights in treaty law relying on nothing more than the moral force of the Declaration. This has also been a win for indigenous peoples and local communities in terms of their ability to control or prevent access to and unwanted privatisation of, plants, animals and associated traditional knowledge. There will be many interested and concerned groups monitoring the effectiveness of the Nagoya Protocol in preventing biopiracy in the years to come.

Every gain in the Nagoya Protocol is not an end in itself but the flat end of a lever to insert into the interstices of other negotiations to pry open community rights under TRIPS, WIPO IGC, FAO and the UNFCCC. From the perspective of negotiations, this is the fine art of cross-leveraging rights- i.e. to take rights gains from one Convention dealing with one subject matter and insist that they be respected in another Convention dealing with another subject matter. This emphasis by communities on a rights based approach to all multilateral environmental negotiations is an effective nostrum against the tendency of the law to fragment the holistic nature of community life by splitting it up into different legal subjects such as land rights, intellectual property rights, cultural rights etc. On this, it is important to note that legal pluralism that works for indigenous peoples and local communities should reflect the sort of diverse range of communitarian ethics that they hold. It should not be an artificial fragmentation of rights for the sake of individualised neoliberal ambitions as per the way the global intellectual property institutions divides their discussions on potential rights in cultural expressions, folklore, traditional knowledge and genetic resources. Put simply, it is important that these indigenous peoples and local communities are able to self-determine their community rights over natural resources.

So how do we begin to make sense of this emerging rights discourse? To make sense of this growing phenomenon is to first name it. By being thrown into the general grab bag of rights, the potential of these new hard-fought rights have been insufficiently understood by both community lawyers and organisations. This has led to their inadequate use in domestic activism, which has paved the way for States to ignore their international commitments in the

development and implementation of their national law and policy relating to communities and their ecosystems.

To being the naming process- in the last two decades, through the movement for indigenous peoples' rights, we are witnessing the growth of the discourse of third generation rights called 'group rights or collective rights' which are different from the first generation civil and political rights and the second-generation social and economic rights. While 'group rights' cover the gamut of rights required for the survival and flourishing of indigenous peoples and ethnic groups, a sub-set of third generation rights have emerged unnoticed as an offshoot of 'group rights'. This sub-set of rights is what we term as 'biocultural rights'.³²

5 CONCLUSION: MINDING BIOCULTURAL RIGHTS

Two monks were arguing about a ũag. One said, 'The ũag is moving'. The other said, 'The wind is moving'. The sixth patriarch, Zeno, happened to be passing by. He told them, 'Not the wind, not the ũag; mind is moving'.

Biocultural rights are group rights but they differ from the general category of 'third generation' rights through their explicit link to conservation and sustainable use of biological diversity.³³ Their unsung arrival in the international legal landscape has three important reasons:

- 1) The justificatory premise of biocultural rights had less to do with 'group rights' and more to

³² The term 'biocultural rights' is a classificatory term that we use here to distinguish this set of rights from the gamut of 'group rights'. As of yet, this term does not have common usage.

³³ Biocultural community protocols have been one attempt to ensure indigenous peoples and local community self-determination of rights to conservation and sustainable use of biodiversity and can be seen as a subset of biocultural rights. See Kabir Bavikatte and Harry Jonas eds, *Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy* 20 (Nairobi: United Nations Environment Program, 2009).

do with the crisis of biodiversity loss and its ramifications on food, health and economic security. As a result of intensive lobbying by environmental groups and a growing mountain of empirical evidence, States have had to make a policy U-turn from the disastrous ‘fines and fences’ approach to conservation – an approach that involved disenfranchising communities who had historically been stewards of common lands in favor of State control or private ownership. This policy U-turn essentially meant that to ensure conservation and sustainable use of biodiversity, States needed to affirm and secure the rights of communities who have been the custodians of ecosystems for generations.

- 2) Biocultural rights were born as the shadow twin of third generation ‘group rights’, but unlike ‘group rights’, which carried the undertone of self-determination that made States nervous, biocultural rights were predominantly lobbied for under the Rio Conventions as ‘environmental rights’ of communities to ensure biodiversity conservation. They initially appeared in benign forms like ‘farmers rights’, ‘livestock keepers rights’ and rights to traditional knowledge, which though were hard won, were not seen as a threat to State sovereignty.
- 3) Biocultural rights were advocated in international environmental negotiations as a defense against ‘biopiracy’, with communities essentially demanding State protection against corporate theft of their knowledge and resources. With the politically fraught legal landscape of the TRIPS negotiations, developing countries supported biocultural rights as State assertions using communities as proxies of the same kind of intellectual property rights that companies and individuals claimed, albeit in a *sui-generis* form.

As a subset of third generation rights, biocultural rights have elements of the third-generation group rights but differ from the latter in their explicit commitment to conservation and sustainable use of biodiversity. In many ways, biocultural rights through their innocuousness have achieved greater legal recognition than group rights

thereby acting as a bulwark for the more difficult third generation rights claims. Indigenous peoples and local communities who assert biocultural rights, base their claims on two foundations:

- 1) Conservation and sustainable use of biological diversity by communities is reliant on a ‘way of life’, and biocultural rights must protect this ‘way of life’.
- 2) The ‘way of life’ relevant for conservation and sustainable use of biological diversity is linked to secure land tenure, use rights and rights to culture, knowledge and practices.

‘Biocultural rights’ make the link between the community or what we refer to here as ‘peoplehood’ and ‘ecosystems’. This link however is worked out through the assertion of a bundle of ‘property rights’. It is critical that we understand the spirit of biocultural rights as not a pure property claim by a hitherto excluded group in the typical market sense of property being universally commensurable, commodifiable and alienable. This is something that indigenous peoples and local communities have often resisted as per the Kari-Oca Declaration and Indigenous People’s Earth Charter, amongst many other indigenous statements and declarations. On the contrary biocultural assertions of property rights are property claims in the form of use, stewardship and fiduciary rights. The ‘peoplehood’ of biocultural communities is integrally linked to the rights to stewardship of their lands and concomitant traditional knowledge through a complex system of customary use rights and fiduciary duties.³⁴

Biocultural jurisprudence then is the theory and practice of applying a biocultural rights framework to law and policy, when such law and policy affects a community whose peoplehood is integrally tied to their traditional stewardship role and fiduciary duties vis-à-vis their lands and concomitant knowledge.

Much of the international law dealing with biocultural rights has emerged out of the CBD COP- path breaking rights work has also been done in the Working Group on Article 8(j) resulting in the Akwe: Kon Guidelines on the conduct of social, cultural and environmental

³⁴ The link between peoplehood and land, and the importance of stewardship rights has been carefully developed, *See* Angela Riley, Sonia Katyal and Kristen Carpenter, ‘In Defense of Property’ 118 *Yale Law Journal* 1022 (2009).

impact assessments on developments on the lands of indigenous and local communities. The recent Takrihwaieri Ethical Code of Conduct for respecting the cultural and intellectual heritage of indigenous and local communities adopted by COP 10 is another case in point.

While the discourse of group rights addresses the range of rights of indigenous peoples as exemplified by the UNDRIP and the ILO 169, CBD COP decisions have specifically dealt with biocultural rights of indigenous peoples and local communities. Currently there exists no research that has comprehensively reviewed the CBD COP decisions and supporting resolutions over the last 20 years and mapped the nature and content of the 'biocultural rights' emerging there from. Most approaches to the CBD COP decisions are piecemeal and refer to isolated COP resolutions or reports of the Working Groups without tracing the trajectory of the emerging international law relating to biocultural rights that is affirmed through the consensual resolutions of the 193 Parties to the CBD.

From a rights perspective, this is a crisis of significant proportions. Little or no effort has been made to consolidate this biocultural jurisprudence into a body of knowledge relating to biocultural rights that can be effectively used and implemented by the very indigenous peoples and local communities who struggled for it and whose interests these rights seek to defend. To begin this process of rights cartography is the task before us now. We need to begin telling and retelling the story of biocultural rights starting with the Rio Conventions to make them real. It is only by repeated public declamation and proactive use of these bio-cultural rights will they come alive. It is also the only way we will truly know how far we have come and where we need to go.

The Nagoya Protocol is a significant event in the story of biocultural jurisprudence and it is only by celebrating its gains can we truly honor indigenous peoples and local communities who have made it happen.

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