

Possibilities and Limitations for a Biocultural Protocol(s)

in Countries in the Andes and Amazon Basin

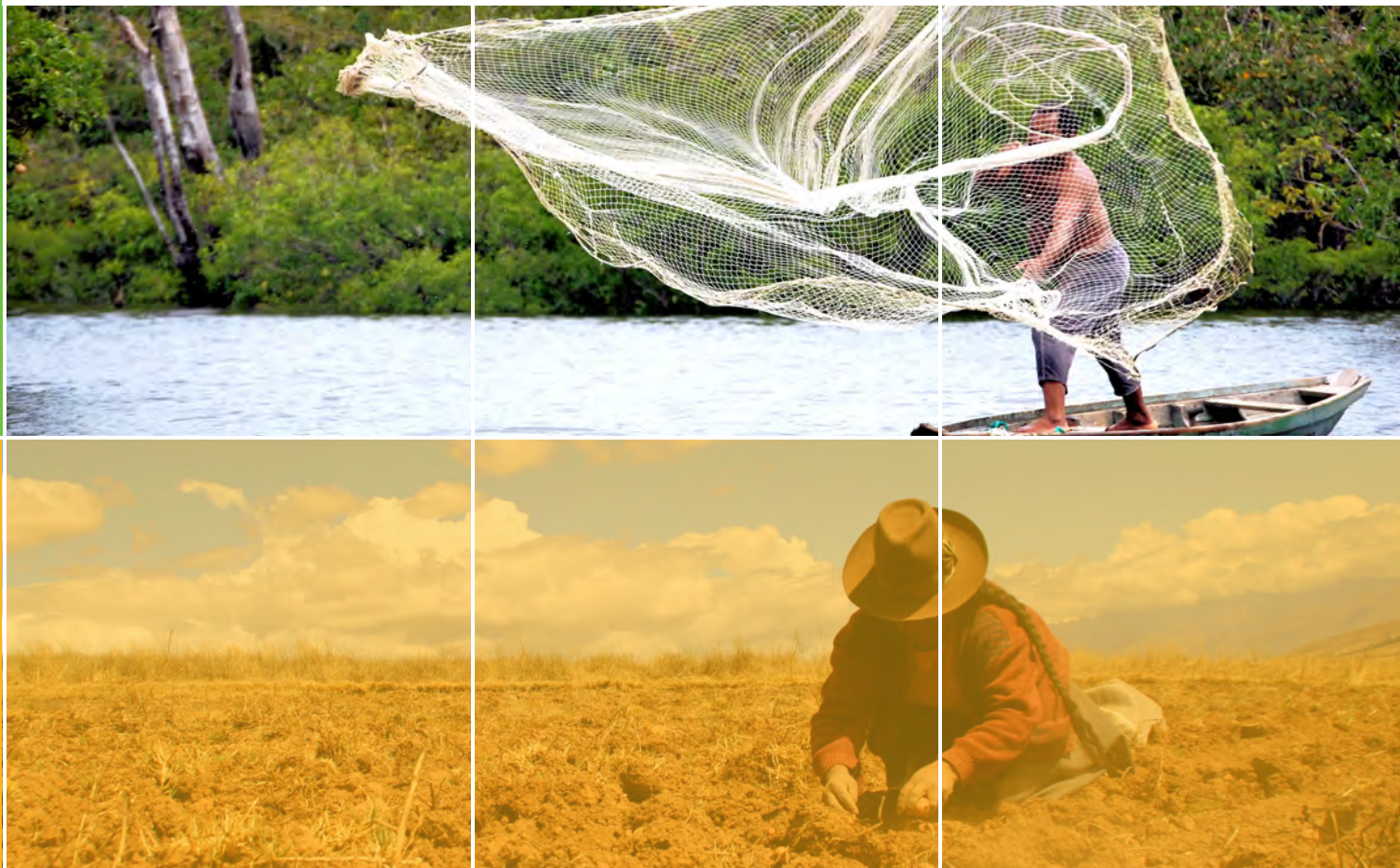


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Acronyms

ABS	Access to Genetic Resources and the Fair and Equitable Sharing of Benefits
ACTO/OTCA	Amazon Cooperation Treaty Organisation
CAN	Andean Community
COICA	Coordinator of Indigenous Organisations of the Amazon Basin
CBD	Convention on Biological Diversity
GEF	Global Environmental Facility
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP	Intellectual Property
MAT	Mutually Agreed Terms
PIC	Prior Informed Consent
TK	Traditional Knowledge
WIPO	World Intellectual Property Organisation



Executive summary

This paper offers an overview of bio-cultural or community protocols as tools created to support indigenous peoples and community rights, in particular with regard to natural resources, biodiversity and traditional knowledge. The reference to protocols in the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing (2010) offers an initial foundation for their recognition, further development and implementation at national level. The main conclusion of this paper is that bio-cultural or community protocols are useful tools for the following objectives: to secure and affirm indigenous peoples' rights; to support community participation in decision making processes; to ensure balanced and informed community involvement in research and projects; to foster legal certainty; and in particular to facilitate interaction between communities and third parties. However, how these protocols are developed, at what level (i.e. nationally or regionally), how detailed they are, how well they are reflected in national law and how they relate to biodiversity and TK protection, depends on country/region-specific circumstances. The paper also offers summaries (see boxes) with examples of existing protocols in South America, Asia and Africa and their basic content.

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Author's note

In discussions and reflection concerning indigenous peoples and communities, generalisations may be necessary, but should be viewed with caution. Even though there are broad common claims and interests among indigenous peoples (i.e. with regard to their rights to land and self-determination), there are also profound differences in their organisation, their levels of 'traditionality', economy and development, expectations, needs, interaction with markets, resource and knowledge generation and management processes, etc. These differences have a bearing on how protocols develop in countries and regions and should therefore be taken into account when these instruments and tools are created and promoted.

Introduction



It is clear that the adoption of the Convention on Biological Diversity (CBD, 1992), signalled the beginning of a series of global and national processes and activities related to conservation and the sustainable use of biodiversity. This is apparent, for example, with regard to the preservation of natural protected areas, the development and implementation of biodiversity strategies and action plans, the commitment of financial resources for forest and other ecosystem conservation, the development of public policies related to genetic resources, the protection of traditional knowledge and biosafety and the creation of the Global Environmental Facility (GEF).

This 'trigger' effect of the CBD has been especially evident in relation to the debates concerning access to genetic resources and the fair and equitable sharing of benefits (ABS) and the protection of knowledge, innovations and practices of local and indigenous peoples and communities, also known as 'traditional knowledge' (TK).

As part of an agenda driven by the countries of the South, these discussions have resulted in a number of international policy and legal processes, the most notable being the adoption of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (FAO IT, 2001), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits (Nagoya, 2010), as well as negotiations by the Intergovernmental Committee of the World Intellectual Property Organisation (WIPO) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC, 2001), to develop an international legal regime for the protection of TK.

Furthermore, national and regional post-CBD policy agendas have also been stimulated, thereby producing a range of proposals, projects, laws and instruments related to ABS and the protection of TK (see Box No. 1 for examples).

However, in terms of the broader agenda of indigenous peoples, ABS and TK are but a part, albeit an important one, of their continued claims for recognition of specific rights over their land (territories) and self-determination. This suggests the need to read ABS and TK claims in conjunction with other international instruments (especially important in South America) including the International Labour Organisation (ILO) Convention 169 on the Rights of Indigenous and Tribal Peoples in Independent Countries (1991) and the United Nations Declaration on the Rights of Indigenous Peoples (2007).

Box 1. Some legal norms, instruments and proposals related to ABS and TK in Latin America

Norm/instrument	Content of ABS	Content of TK
Andean Community Decision 391 on a Common Regime on Access to Genetic Resources (1996).	Conditions of access to and use of genetic resources and derived products of CAN countries.	Recognition of the value of TK and the rights of indigenous peoples to decide over its use.
Regulation of Decision 391 (Supreme Decree 24676) of Bolivia (1997).	Specific provisions on access and sharing of benefits.	Basic legal elements for the protection of traditional knowledge.
Law 7788, Biodiversity Law of Costa Rica (1998).	Conditions of access to and use of genetic and biochemical elements.	Protection of sui generis community intellectual rights
Central American Draft Protocol on Access to Genetic and Biochemical Resources and Traditional Knowledge (1998).	Minimum general principles on access to and use of genetic and biochemical elements in Central America.	Protection of knowledge, innovations and practices of indigenous peoples
Law 4780, Law of Biological Diversity of Venezuela (2000).	Regulations on access to genetic resources and sharing of benefits.	Protection and recognition of TK.
Provisional Measure 2186 on access to the biodiversity patrimony in Brazil (2001).	Conditions to access the genetic patrimony of Brazil.	Conditions to access and use indigenous TK.
Law 27811 on a Protection Regime for the Collective Knowledge of Indigenous Peoples in Peru (2001).	N/A	Norms and procedures on the protection of indigenous innovations related to biodiversity.
Regulation of the Biodiversity Law of Costa Rica (DAJ-D-020-2003-MINAE) (2003).	Specific conditions on access to and use of genetic and biochemical elements, and the institutional framework.	Protection of sui generis community intellectual rights.
Supreme Decree 003-2009-MINAM, Regulation of Decision 391 of Peru.	Specific norms on access to and use of genetic resources and derived products and the institutional and administrative framework.	N/A

Alongside these advances, NGOs, experts and indigenous representatives have been proposing a number of tools and alternatives to safeguard the interests of local indigenous peoples and communities, in relation to biodiversity conservation and the maintenance of their traditional lifestyles, including ABS and TK.

These proposals include, for example, *moratorium declarations* regarding access to and use of biodiversity components and TK on indigenous peoples' land and territories, the development of *sui generis* systems to protect TK, wider application of *licenses for the use of TK*, the development of *bio-cultural heritage areas* to protect spaces and sites of interest for indigenous peoples and the use of *bio-cultural protocols* or *community protocols* to determine and express the traditions, management practices and overall customary practices of indigenous peoples in relation to their land and natural resources.¹

This report analyses the nature and possibilities (and constraints), for the wider use and better understanding of bio-cultural and community protocols, mainly applied to ABS and TK, in terms of the interests of indigenous peoples and local communities. It is divided into five sections. The first provides a summary review of the conceptual background to and fundamentals of bio-cultural protocols. The second offers examples of bio-cultural protocols and their application around the world. Section three describes the policy, legal, and institutional frameworks offered by the Andean Community (CAN), the Coordinator of Indigenous Organisations of the Amazon Basin (COICA) and the Amazon Cooperation Treaty Organisation (ATCO/COICA), as fora in which to debate, create, acknowledge and promote bio-cultural protocols. Sections four and five analyse the viability (potential and limitations) of bio-cultural protocols as management tools and for the affirmation of the rights of local indigenous peoples and communities. Finally, recommendations are made on how to optimise the drafting and possible implementation of bio-cultural protocols.

This is neither an academic nor an exhaustive exercise, but rather one which seeks to offer an initial approach to bio-cultural protocols in order to promote a more informed debate at national and regional levels, especially in Andean and Amazon countries. A series of references and links are suggested as sources of further information. Finally, examples of bio-cultural protocols in Africa, South America and Asia are listed at the end of this report.

¹ The recently adopted Nagoya Protocol on Access to Genetic Resources and Benefit Sharing (2010) makes explicit reference to community protocols. Both community and bio-cultural protocols have essentially the same meaning and scope.

1. The notion of 'bio-cultural protocols': a brief background



The concept

There is no universal or legal definition of 'bio-cultural' or 'community protocol'. Not many definitions of the concept exist at all. However, Natural Justice, an NGO that has been studying and developing these instruments over the past few years, defines them as follows: *"A protocol that is developed after a community undertakes a consultative process to outline their core ecological, cultural and spiritual values and customary laws relating to their TK and resources, based on which they provide clear terms and conditions to regulate access to their knowledge and resources"*²

In essence, the term describes the values and perceptions of indigenous peoples and communities, with regard to how to put into practice and inform procedures on ABS and the protection of TK, the basic principles of Prior Informed Consent (PIC), Mutually Agreed Terms (MAT) of the CBD and mechanisms for fair and equitable sharing of benefits. regulate access to t resources"³

² Natural Justice. *Bio-cultural Community Protocols. A Community Approach to Ensuring the Integrity of Environmental Law and Policy*. UNEP, Natural Justice. South Africa, October, 2009.

Bio-cultural protocols can therefore be analysed based on their constitutive elements:

- a) The reference to a *protocol* in the above definition suggests a set of norms and procedures with a hierarchy and binding nature. In other words, it is proposed as a legal instrument or tool, but which also serves internal (community) cultural, social and management purposes.
- b) This instrument is developed once a community undertakes an internal consultation, which implies that the instrument is also the *result* of a process in which the community itself (a group of communities, indigenous peoples as a whole or any other associative form³) decides on a certain issue – including options for self-development – based on their own needs, different types of values, interests, traditional ways of adopting decisions, etc.
- c) An important element of this definition is the reference to customary law/rights, understood as those that define the community's internal organisation, management practices, responses etc. These protocols apply and refer to the natural resources of the communities and their associated traditional knowledge.
- d) Finally, the content (provisions) of a protocol determines the conditions of access to and use of natural resources and associated knowledge.

As a result of this approach to bio-cultural protocols, three points should be highlighted. First, they are an instrument created to *affirm the rights* of indigenous peoples and communities and *empower* them in their development and use. To an important extent, protocols express indigenous peoples' and communities' wishes and needs with regard to how and under what conditions their resources and knowledge are to be shared with and used by third parties. This is valid both within the community and with regard to external actors.

Second, bio-cultural protocols adopted by indigenous peoples and communities render their desires, aspirations, interests and expectations more visible, therefore making them clearer and more explicit for actors and parties outside indigenous communities but with an interest in the natural resources located in their lands and territories. In some ways, this also contributes to creating transparency and legal certainty between the respective communities and interested parties. It is important to note that over time, indigenous peoples and community representatives have been very clear in their view that whereas TK and ABS are critically important issues, they are also part of a broader agenda which ultimately rests in recognition of their land and territories as the only effective manner to safeguard culture, traditions and livelihoods. No land means no culture or TK.

Third, bio-cultural protocols establish a bridge between the formal State legal regime and the specificities of customary practices and law. This bridge may be explicit, when recognised in a Constitution or law/regulation or indirect, based on a broad interpretation of rights enshrined in existing (international and national) policy or legal frameworks.

The Association Andes (Cusco) on the other hand, suggests that bio-cultural protocols “*provide a holistic vision for the protection of traditional knowledge, and also seek to protect and strengthen the interconnec-*

³ The existing examples of bio-cultural protocols (see attached examples), indicate they are mostly developed and used by one small individual community or communities, who share similar values, ethnic features, problems, decision-making procedures, strong cultural and historical integration and critical reliance on land and territories to sustain their livelihoods. This report does not discuss the issue or meanings of ‘indigenous’, ‘indigenous peoples’ or ‘communities’. This will vary considerably among countries but the features above more or less encapsulate the substantial content of these concepts.

1. The notion of 'bio-cultural protocols': a brief background

ted components of traditional knowledge systems, such as culture and economy". Under this concept, the desire to incorporate cultural, spiritual and economic considerations as part of these instruments again becomes evident⁵.

A word of caution with regard to bio-cultural protocols and natural resources: for legal certainty to operate in practice, the rights invoked and recognised by indigenous peoples and communities in these instruments and formal constitutional and legal systems must complement and positively inform each other. If not, in situations where a community claims rights over land or certain natural resources in a bio-cultural protocol (in terms of their own Customary Laws and practices) but the Constitution or legal framework of the country in question suggests there may be other rights at play, this will almost certainly generate tensions between the approach of the State and third parties, and that of the indigenous peoples and communities claiming the rights⁶. Legal boundaries then become blurred. This can be verified in practice very easily where social and environmental conflicts arise between indigenous peoples and a State or companies in search of natural resources – timber, minerals, oil, etc. – on indigenous lands and territories. Indigenous peoples and communities claim rights which are legitimate in their own legal and customary context, but which are not specifically recognised in national law.

It is possible to argue that, in practice, indigenous peoples and communities already have bio-cultural protocols in place in order to guide their lives and activities and to enable third parties to understand their interests and expectations. An (unwritten) social, cultural and spiritual order and 'contract' or protocol guides their day-to-day activities. However, the novelty of bio-cultural or community protocols is that they are *written, explicit instruments that codify* these orders and patterns and make them available to 'the outside world'. This is no minor achievement in a context (especially in South America) where non-written and oral traditions are the norm.

Policy and legal background

It is not clear exactly when the concept of 'bio-cultural protocols' emerged, but in formal terms (as a negotiation item) it would appear that the notion came into more common use between 2007 and 2008, with regard to activities of the CBD Ad Hoc Open-ended Working Group on Article 8(j) and under the framework of the negotiation process of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits

The debates on ABS and TK, and the participation of indigenous representatives, as well as the proactive voice of certain regional groups such as the African Group, have drawn attention to the need to address these issues from a broader, more culturally sensitive, perspective. This approach called for debates to include elements of land and territorial rights and tenure, the cultural and spiritual values of genetic resources, biodiversity and TK, culture as a determinant factor in conservation and the sustainable use of biodiversity by indigenous peoples and communities. In short, it was suggested that there was a need engage in debates within a broader conceptual framework, not only limited to the technicalities and

⁴ Report from the Research Partner's Workshop, *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices*. IIED, Association Andes, ICIPE. Panama, November 2007.

⁵ A closely related issue is how customary law is recognised at Constitutional or legal levels in each country. There is ample literature available in respect of Customary Rights. On the relation between customary law, genetic resources, intellectual property and TK, see Tobin, Brendan, Taylor, Emily. *Across the Great Divide: a Case Study of Complementarity and Conflict Between Customary Law and TK Protection Legislation in Peru*. Research Documents. Initiative for the Prevention of Biopiracy. SPDA, IDRC. Year IV, No. 11, May 2009. Lima, Peru. <http://www.spda.org.pe>

reductionism of ABS and TK.

In the year 2007 during the Research Partner's Workshop, Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws & Practices, which took place in the Kuna territory in Panama, specific reference was made to the concept of 'bio-cultural protocols', mainly based on conceptual proposals developed by the Association Andes in the Potato Park, in Cusco, Peru⁷.

It was the African Group which proposed specific language incorporating the concept of 'bio-cultural protocol', during the Seventh Meeting of the Ad Hoc Open-Ended Working Group on ABS (2009).

Representatives of indigenous peoples and communities participating in the Workshop on Issues Related to Traditional Knowledge Associated with Genetic Resources and the ABS-Regime (Vilm, Germany, 2009), also raised their concerns with regard to the need for the international regime on ABS (the Nagoya Protocol) to establish provisions obliging States to encourage the development of bio-cultural protocols with the active participation of indigenous peoples and communities. This would, in turn, facilitate clear and timely information on how to access TK, PIC, MAT and the distribution of benefits as understood in indigenous contexts.

The African Group maintained a similar position, and during the Pan African Preparatory Meeting on ABS and TK (2009), it was recommended that bio-cultural protocols become part of the ABS international regime (in particular with regard to TK).

Protocols have been expressly recognised in the Nagoya Protocol on ABS. Article 12(1), establishes that in order to comply with its provisions, Contracting 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."

Furthermore, article 13(3)(a) determines that Parties shall endeavour to support the development by indigenous peoples and communities of *"Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilisation of such knowledge."* Protocols in this context are sharply focused as instruments to make ABS and TK regimes operational as part of the implementation process of the Nagoya Protocol. This recognition of protocols is not a minor issue: it offers countries and communities a solid legal foundation for the development of *ad hoc* instruments to secure the interests of indigenous peoples and communities with regard to genetic resources and related traditional knowledge.

⁶ From 2002 onwards, Association Andes has proposed the concept of Bio-cultural Patrimony or Heritage to integrate cultural and biological values of indigenous peoples and communities in the Potato Park, in Pisac, Cusco, and streamline them into broader policy debates. <http://www.parquedelapapa.org>

1. The notion of 'bio-cultural protocols': a brief background

Box 2. The Nagoya Protocol: process and implementation

Milestone	Year
CBD COP Decision V/26 established an Ad Hoc Open-Ended Working Group on ABS to develop guidelines and approaches on ABS	2000
CBD COP Decision	2002
Cancun and Cusco Declarations of the Group of Like Minded Megadiverse Countries call for the development of an international regime on ABS	2002
Plan of Implementation of the World Summit of Sustainable Development (Johannesburg) acknowledged the need to develop an international regime on ABS	2003
CBD COP Decision VII/19 provided with mandate to elaborate and negotiate an international regime on ABS	2004
The Ad Hoc Working Group recommended a draft elements text for an international regime to CBD COP 9, taken up in Decision IX/12	2008
Nagoya Protocol adopted – currently 23 countries have signed/ratified the Protocol	2010





2. Examples of bio-cultural protocols around the world

In some places around the world, practical efforts have been undertaken to build and develop bio-cultural protocols. These represent a form of ‘organisational constitution’ for most indigenous peoples and communities with regard to the management of their natural resources and TK.

The pastoral community of Raika, in the Rajasthan area in North-Western India, has lived in an arid and dry ecosystem for centuries. They have a very strong and profound religious tradition (based on the cult of Shiva) and are nomad shepherds, with extensive TK of their surroundings and resources (animals, seeds, forests, etc.) and practices that have enabled them to survive over time.

During 2009, the Raika community (with the support of Natural Justice) engaged in an effort to develop and implement a bio-cultural protocol. See Box 3 for a summary of its content.

Box 3. The Raika Bio-cultural protocol

The Raika Bio-cultural Protocol is structured as follows:

- Overview
- Declaration of our bio-cultural values
- Preservation of unique animal genetic resources and associated traditional knowledge
- Prior informed consent and fair and equitable distribution of benefits
- Exclusion from customary grazing areas without prior informed consent – biodiversity is being lost
- Our rights under Indian laws and policies
- A call to the National Biodiversity Authority
- The commitment to protect biological diversity and associated traditional knowledge
- Our rights under international law
 - o The Raika Biodiversity Register
 - o Rights under international law
 - o Bibliography
 - o Note on the process

A review of this specific instrument offers useful insights. First, it is both a *policy* and a *management* instrument. It is a policy instrument in the sense that it calls on the National Biodiversity Authority of India and the CBD Secretariat to recognise substantial elements of the instrument. It is also a very specific and elaborate management instrument, detailing what the Raika own in terms of resources and TK, and outlining their desires with regard to these resources and possible access to them by third parties. Second, a thorough analysis of the *legal and institutional framework* is undertaken, thus justifying the need for a

protocol and invoking the CBD, FAO International Treaty and the internal and institutional frameworks of India for that purpose. Third, it is also an instrument of scientific/ethno-biological value, as it contains detailed descriptions of the Raikas' genetic, animal, plant, forest resources, and the knowledge and practices applied to their conservation. Fourth, this protocol specific also identifies the problems and challenges facing the Raika and describes how various exogenous forces are affecting biodiversity and their ecosystems. This Bio-cultural Protocol constitutes a sort of 'plan of life' applied to different aspects of Raika activities and their livelihoods.

Box 4. Community protocol of the traditional health practitioners of Bushbuckridge

The Bushbuckridge Protocol includes:

- An explicit acknowledgement of their contribution to biodiversity conservation
- An express call to counteract prior situations where their knowledge and biodiversity has been used in research with no benefits accruing back to communities
- A process through which their traditional knowledge related to medicinal plants can be accessed and used in full respect of customary laws, prior informed consent and national laws – this includes procedures for students, healers from other areas, academic researchers and commercial bioprospectors
- An appeal to the national government (Department of Water Affairs and Environment and the Department of Science and Technology) to establish a balanced interaction between the communities and commercial interests (multi-stakeholder approach)

Other interesting examples include the Bio-cultural Community Protocol of the Gunis and Medicinal Plant Conservation Farmers in Mewar (India), the Bio-cultural Community Protocol of Bushbuckridge Traditional Health Practitioners (South Africa), the Bio-cultural Community Protocol of the Traditional Healers of the Malayali Tribes (India), and the Bio-cultural Protocol of the Samburu Indigenous Livestock Breeds and their Rights to their Genetic Resources and Role in Global Biodiversity Management (Kenya).

As in the case of the Raika, these protocols serve as instruments and tools of affirmation, empowerment and the expression of community interests, rights and expectations with regard to resources, ecosystems, and forms of traditional knowledge, among others. While they establish rules of access and use, they also call upon authorities to encourage and contribute to the management of specific resources on the land and territories of indigenous peoples and communities (the texts of these protocols are attached to this report).

2. Examples of bio-cultural protocols around the world

Box 5. Bio-cultural community protocol of the Malayali Tribes traditional healers

The Malayali Protocol includes:

- A description of the identity of the Malayali and how their medicinal and curative knowledge has been handed down over generations
- A description of the ailments treated through Siddha tradition, such as eczema, scabies, boils, migraine, fever, piles, hernia, diabetes, paralysis, ulcers, kidney pains, diarrhoea, etc.
- A description of spiritual and ecological values, including conservation
- An acknowledgement regarding sharing of knowledge between the Malayali but the need to ensure prior informed consent if third parties want to access and use it
- A recognition of the challenges faced regarding overharvesting of medicinal plants in communal land and the deteriorating relationship with the Forest Department
- A description of Malayali rights under Indian Law, including the Biodiversity Act (2002) and its complementary Rules (2004) – these rights refer to consultation, conservation, register of biodiversity, maintaining traditional lifestyles, etc.
- An appeal to the National Biodiversity Authority to formally recognise their TK and include it in the Peoples' Biodiversity Register, facilitate the establishment of Biodiversity Management Committees, strengthen in situ conservation of biodiversity, ensure prior informed consent (according to Customary Law) when decisions are made affecting their livelihoods, and ensure the fair and equitable sharing of benefits arising from the use of Malayali breeds and TK according to mutually agreed terms

The bio-cultural protocols in these practical examples are also a standard which – if accounted for in national laws – countries could use to act as verification tools for the international ABS regime under the Nagoya Protocol. In the case of the certificate of compliance which needs to be developed as part of the international regime, such a protocol (or a reference or abstract from it), could serve as proof that basic procedures and principles regarding access to and use of genetic resources and TK from a certain community (or indigenous peoples' group) have been complied with. The role and status of a protocol could be defined in national law and regulations if specificities are required.



**Box 6. Bio-cultural community protocol for territories
of the Community Council of Alto San Juan - ACOASAN (Colombia)**

This Bio-cultural Community Protocol includes:

- A description of the Alto San Juan Community, including self-recognition as Afro-Colombians
- A description of their understanding of land and collectiveness, culture and community and their relation with natural resources, including biodiversity and mineral resources
- A description of how their forest resources, including non-timber resources, are used and managed
- A description of how traditional medicinal practices are observed and promoted
- An analysis of how to address future challenges with regard to illegal mining, illegal forestry activities, misappropriation of medicinal traditional knowledge, an participation in regional and national policy making processes
- A call for the recognition of the Bio-cultural and Community Protocol as a basis for negotiations with national and regional authorities with regard to social, economic and development aspects that may affect ACOASAN interests and rights acknowledged in the Protocol
- This includes participation in benefits that may derive from activities undertaken in ACOASAN communities and recognition of customs and practices
- A description of Prior Informed Consent (PIC) and consultation as key conditions under which their resources and knowledge can be accessed and used
- A detailed description of the expectations of ACOASAN in terms of relations to authorities including the municipality, the environmental authority, the Ministry of Mines, the Ministry of the Environment, among others
- Annexes to the Bio-cultural and Community Protocol include detailed criteria on how natural resources are to be managed in ACOASAN jurisdiction, an explicit interpretation of their land and resource rights, rights over their biological diversity and traditional knowledge, including in accordance with national and international legal frameworks (CBD, ILO, Nagoya Protocol, UNESCO, etc.)

Note: This protocol has not been made public as yet; the actual text is therefore still in draft form. We have only highlighted some of its key elements.

For example, in the case of the Andean Community, disclosure requirements in IP legislation with regard to access to and use of biodiversity and TK⁸ may be satisfied if a simple, signed document can constitute proof of acceptance that principles and provisions in a specific protocol between the community and applicant have been agreed.

All the examples of existing protocols refer to PIC as the key condition for accessing not only biodiversity and TK but natural resources and gaining entry to lands and territories in general. How exactly

⁸ Decision 486 of the Andean Community on a Common Regime on Access to Genetic Resources establishes that prior to processing a patent application, the applicant needs to demonstrate the legal origin of genetic resources which may be used in the innovation (i.e. through an access contract) and the legal origin of the TK. This may be demonstrated and evidenced by a specific bio-cultural protocol, if for instance, a law or regulation. For a detailed analysis of user measures in the context of IP regimes, see Chouchena Rojas, Martha, Ruiz, Manuel, Vivas, David, Winkler, Sebastian. 2005. *Disclosure Requirements: Ensuring Mutual Supportiveness Between the WTO TRIPS and the CBD*. IUCN, Gland and Cambridge, UK.

2. Examples of bio-cultural protocols around the world

PIC operates in each protocol is not fully described, except for references to the customs, traditions and customary decision-making that guide the PIC process. What is important to highlight is that PIC is already an international principle (recognised in the CBD and the Nagoya Protocol), a regional principle (recognised in regional ABS legislation such as in the Andean Community) and a national principle insofar as legislation also makes express recognition of it.

Implementation of this principle, in the Andean Community for example, calls for involvement of the State but also of indigenous peoples and communities themselves (at least with regard to ABS and TK). Prior Informed Consent is therefore a three-level process involving a legal relation between the State and a potential interested party (in biodiversity and related TK on indigenous lands), plus a second relation between this party and the community (or its representative body). Bio-cultural or community protocols offer a vehicle which can offer guidance as to how PIC is implemented at the community level and thus comply with international and national principles and provisions.

These protocols also refer to benefit sharing in general and the need to ensure that if and when their resources (including biodiversity and TK) are used, monetary and non-monetary benefits are equitably distributed. As in the case of PIC, there is no specific mechanism or provisions to describe procedural aspects for benefit sharing. However, these can be defined on a case by case basis, mainly through agreements (expressing PIC and MAT) and according to interrelations between actors involved, i.e. communities and third parties interested in biodiversity and TK.

Another important element in these protocols is that there is, at least in some of them, an explicit effort to link their content and justify their existence and mandates, based on existing national legislation and regulations. For example, both the Bushbuckridge Community Protocol and the Malayali Protocol refer to rules under the Biological Diversity Act (2002), competences of the Biodiversity Management Committees and Biological Diversity Rules (2004). They thus reflect the implementation of national legal frameworks, giving them an additional relevance and political and legal weight. In the case of the ACOASAN protocol, there are also very specific references to the Colombia Constitution and national laws and regulations, which gives this instrument a firm legal standing, even if these are not specifically referred to as *protocols* as such.

It is also important to indicate that in all the protocols examined, biodiversity and TK are but two elements of a broad set of considerations addressed. They are part of a whole, recognisable and distinct, but also part of a cultural context. This may have important ramifications with regard to negotiations over TK and biodiversity components (i.e. genetic resources), as it counters prevailing and some may argue perverse *reification* tendencies which tend to separate TK and genetic resources from their cultural context and commodify them⁹. Whilst this latter phenomenon may constitute a practical approach, facilitating the drafting of laws and negotiations of agreements, it impacts significantly on indigenous peoples' cultural spiritual and religious contexts.

Finally, certain protocols make reference to the registering of biodiversity and TK (i.e. the Raika and Malayali), which can be seen as a tool within a tool to ensure the preservation of certain types of TK and the maintenance of traditional nomenclatures or taxonomies. But registers (contained in some sort of database) are one of a broad range of instruments which may serve to preserve, maintain, enhance, develop, and protect biodiversity and TK.

⁹ This is very well described and explained by Jonas and Bavikatte in Chapter 1. A Bio-cultural Critique of the CBD and ABS. In: Natural Justice. *Bio-cultural Community Protocols. A Community Approach to Ensuring the Integrity of Environmental Law and Policy*. UNEP, Natural Justice. South Africa, October, 2009. pg. 12 - 17



3. The Andean and Amazon institutional context: possibilities within CAN, OTCA and COICA

The CAN¹⁰, OTCA¹¹ and the COICA¹² offer institutional fora (of different natures and with a variety of objectives), that can be used to promote and debate the formal recognition of bio-cultural protocols at both regional and more localised level.

Over the past decade or so, CAN and its member countries have been particularly active in relation to the development of policy processes on ABS and TK. In fact, it was during CAN discussions that post-CBD policies and norms on access and the protection of traditional knowledge first emerged. These discussions proposed the need to link ABS and TK systems with intellectual property instruments.

The concepts of ‘disclosure of origin’ and ‘legal provenance’ were ‘invented’ in CAN and nowadays form part of the policy landscape in many IP-related fora¹³. The receptiveness of CAN to new issues, together with the establishment of a Consultative Council of Indigenous Peoples (created by Decision 674, 2007), provide a favourable and ‘approachable’ setting for advancements on these issues and new proposals, including bio-cultural protocols. Another interesting feature of CAN is the binding and mandatory nature of its norms (Decisions and Resolutions).

One potential area where protocols may become interesting and useful in CAN is in the implementation of Decision 391. This legislation calls for the use of Accessory Contracts when linking applicants/users of genetic resources and TK with communities. Bio-cultural protocols and their acceptance by a user/applicant could serve as a type of Accessory Contract based entirely on indigenous peoples’ own perceptions, needs and interests with regard to their genetic resources and TK. This could serve to confirm the relationship between the community and those interested in accessing and/or using their resources and TK and thus link neatly with the Andean ABS regime.

¹⁰ The Andean Community or CAN, is a regional integration block founded in 1969. At present it consists of Bolivia, Colombia, Ecuador and Peru. See: <http://www.comunidadandina.org>

¹¹ OTCA is a cooperation treaty adopted in 1978, focusing on cooperation in scientific, environmental, social and cultural issues. It is formed by countries of the Amazon River Basin: Brazil, Bolivia, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela. See: <http://www.otca.org>

¹² COICA was founded in 1984 and forms a broad regional network and coordinating body for the main indigenous organisations in the Amazon, including: AIDESEP, CIDOB, COFENAE, APA, ORPIA, ORPIAC, OIS, FOAG and APA. COICAs main mission is the defence of the interests and rights of indigenous peoples of the Amazon. For more information see: <http://www.coica.org.ec>

¹³ The position of CAN regarding genetic resources, IP and TK is reflected in: Ruiz, Manuel, Rosell, Monica. *Lineamientos Técnicos. Apoyo a la Negociación Internacional de los Países Miembros de la Comunidad Andina en Materia de Acceso a Recursos Genéticos y Conocimientos Tradicionales*. Andean Community. Andean Development Corporation. Lima, September 2006. Available at: <http://www.comunidadandina.org>

The ATCO/OTCA is another institutional setting specifically interested in promoting the conservation and sustainable use of biodiversity in the Amazon. Unlike the CAN, OTCA does not have a regulatory mandate. Since the early 1990s, OTCA has incorporated access to genetic resources and the protection of TK in its institutional and working agenda, furthering research, training processes and policy advocacy, awareness in general, etc. Its different commissions (Environment, Indigenous Matters, Science, Technology and Culture, etc.) are its formal institutional bodies where protocols may be discussed and promoted as policy and management tools. Such bodies could be used to recognise these tools, develop basic general contents or frameworks and serve to follow and monitor their application by indigenous communities.

In fact, the OTCA 2004-2012 Strategic Plan¹⁴ incorporates elements whose references to biodiversity conservation and the protection of traditional knowledge offer a general framework that is appropriate and flexible enough to incorporate and encourage activities related to the development of protocols, although they do not explicitly identify or address bio-cultural protocols in particular.

In the case of a regional approach in OTCA (and CAN as well), promoting useful instruments to support indigenous peoples' interests may include developing a 'model' or 'best practice' type document which includes some of the basic elements which a bio-cultural protocol should take into consideration. This involves engagement in policy processes and with relevant institutional bodies, to ensure appropriate incorporation of protocols into these organisations' internal agendas.

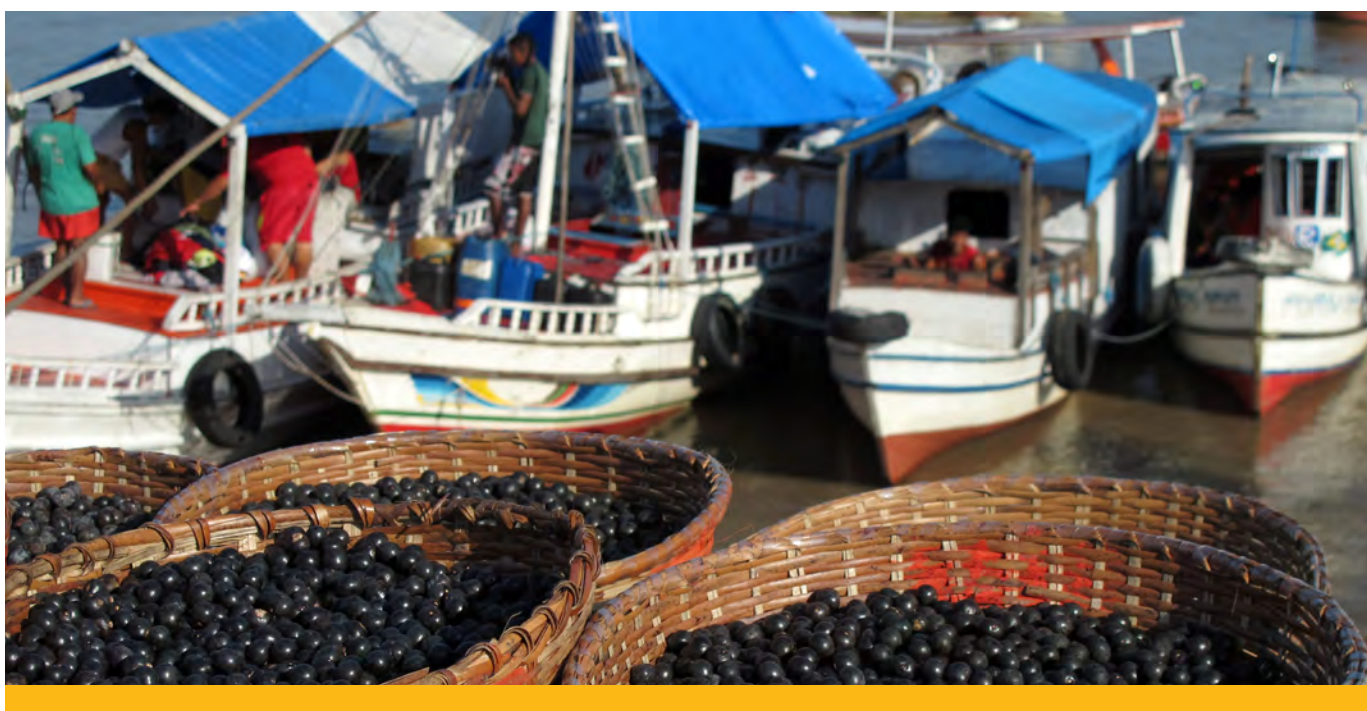
Existing examples offer sufficient common ground to undertake this task – at regional level. One important issue here is not to limit the scope of what may or may not be included in a Protocol, but ensure that ABS and TK-related aspects are a core element of its content.

Last but not least, COICA is another institutional setting at regional level, representing various indigenous organisations of the Amazon. It is a network of indigenous organisations that has developed its own agenda on ABS and TK and proposed specific ideas and positions to be considered within the CAN, the OTCA and international forums such as the CBD, WIPO, among others. A key element to this agenda is the claim for recognition of territorial rights, on which the life and development possibilities of indigenous peoples of the Amazon are based.

To summarise, an institutional and regional best practice or guiding document could establish the basic general structure and content of a protocol, as a means to inform more specific and concrete protocols at community level.

¹⁴ Plan Estratégico OTCA 2004-2012: <http://www.otca.org.br>

4. The benefits of a bio-cultural protocol



It must be stressed that even the examples of protocols addressed in this paper are very new instruments which have not been fully tested in practice. They are only at a very initial stage of development and implementation. However, lessons can already be learnt and shared. Within this context, a simple but important element concerns the value added and advantages of a community or bio-cultural protocol with regard to existing 'classic' instruments such as contracts. Initial consideration of this suggests the following:

Internal organisation and management based on customary practices and law (and an international mandate in the Nagoya Protocol). A bio-cultural or community protocol offers the possibility to make the expectations, interests and norms which govern indigenous peoples and communities' natural resources and TK visible and explicit. It turns general international mandates, obligations and principles (including those in the Nagoya Protocol), into *positive* provisions, in the sense that they become expressed in writing, but are at the same time informed by practices, local tradition and customary law, as a form of community social organisation. Indirectly, they are also a useful tool for broad social awareness, among academics, State officials, the private sector, etc.

Cultural (and positive) affirmation of indigenous peoples and communities. In the process of creating bio-cultural protocols, indigenous peoples and communities can affirm their cultural values and express their perceptions of the relationship between man and nature, in a written text, to serve as a guiding instrument within communities and between them and society as a whole.

Affirmation of rights and empowerment. Likewise, a bio-cultural protocol allows indigenous peoples and communities to affirm their rights and empowers them with a tailored instrument, outlining what they (and third parties) can and cannot do. Furthermore, indigenous and local communities can *a priori*, 'get organised' to confront potential cases of bio-prospecting for example, or have a tool at hand which enables them to respond appropriately when a bio-prospecting situation arises. Or to any situation regarding an interest in using their natural resources, biodiversity and TK.

Adaptability and flexibility of the instrument. A bio-cultural protocol acts as a foundational instrument ('constitution') that, given its dynamism, flexibility and adaptability, can contribute to the management of sites, resources and the TK of indigenous peoples and communities, including their genetic resources. A possible role for a bio-cultural protocol is to serve as a PIC instrument to create a formal and binding relationship between a potential user of genetic resources or TK and a community or indigenous group.

Voluntary nature of the instrument. Although a protocol may be of a voluntary nature (until formally and 'externally' recognised as a binding instrument by the State), it does possess (at least in the cases examined) mandatory 'internal' characteristics, reflecting the commitment of indigenous peoples and communities to accept and subscribe to its framework and mandates. Third parties can also voluntarily commit themselves to its content.

The interpretation of indigenous peoples and communities. A bio-cultural protocol allows indigenous peoples and communities to define the meaning of PIC and MTA principles and work out how to internally distribute benefits in a fair and equitable manner with those who are interested in accessing their natural resources (biodiversity and its components) and TK. In summary, a bio-cultural protocol is a tool and instrument that contributes to the implementation of a series of international obligations and principles, based on their recognition in national legislation. It also helps to understand the specific perspectives of indigenous peoples and communities and adapt practices (i.e. bioprospecting, access to and use of TK) to these interests and expectations.

Regional v. Local Protocols. Existing examples of protocols refer to the specific communities (Raika, Quechua, Malayali, etc.) which develop and adopt the protocols. However, existing flexibilities in these policies and instruments could also consider broader protocols which may represent interests and expectations of groups of communities or indigenous peoples nations and broader groups in general. They need not be confined to a *single* community or group therein, though this feature does provide a level of specificity and implementation possibilities which may be limited in the case of broader and more extensive protocols. But this depends considerably on circumstances and the wishes of indigenous peoples and communities on the ground. Protocols may be valid for a single community but also for larger groups of communities or indigenous nations, ethnic groups, etc. **Legal certainty.** Ultimately, though bio-cultural may not (at this stage) offer 100% legal certainty with regard to relations between communities, States and other interested parties, they make a very important contribution to building appropriate tools with which to define and consolidate these relations – from the bottom up. The question of whether they would stand up in court is very difficult to determine, but it could be strongly argued that inasmuch as they are already legally recognised at international level, they could be considered by courts or in administrative procedures, especially in South America, where indigenous rights are widely recognised and upheld in a variety of legal instruments and frameworks (i.e. Constitutions, Decision 391, national biodiversity strategies, TK legislation, etc.). Furthermore, as mentioned above, third parties could commit to respecting their content and thus create a binding, mandatory relationship that would stand up in a court of law.

5. Limitations of a bio-cultural protocol



Extent of content and material. Existing literature on and examples of bio-cultural protocols (see boxes above and references) indicate they have very broad and diverse content – much more comprehensive than the specific ABS and TK-related issues considered by, for example, the Nagoya Protocol. However, these specific elements could form an integral (and featured) part of a protocol with wider coverage, which serves community organisation and management with regard to land, natural resources, biodiversity, etc.

Multiplicity of bio-cultural protocol models. Although it may be realistically impossible to try and standardise structures and much less content in the case of bio-cultural protocols, it is important to consider certain common structures and minimum content, in order to help interested parties understand the indigenous world and make comparative analyses and horizontal evaluations. A basic model, template or guiding best practice document, at national or regional level, could very well establish a minimum standard under which specific protocols could be developed.

Limited dissemination and awareness with regard to protocols. Bio-cultural protocols are at an initial stage of conceptual elaboration, legal evaluation and dissemination of their purpose and content, as a possible resource management instrument for communities. In this regard, the literature is limited and there are few opportunities to reflect and debate on their potential and practical results

Limited legal recognition. The legal *status* of bio-cultural protocols is still unclear. In cases where they remain ‘internal’ – within the community – they are legitimised according to customary law norms, while their ‘external’ recognition (for example by formal State law), has yet to be defined. This varies from country to country. However, the Nagoya Protocol, in Article 12, explicitly mentions community protocols in relation to access to genetic resources and TK. This is a critical element as protocols are inserted within national ABS/TK regimes and compliance and enforcement measures are adopted. Ideally, if bio-cultural protocols seek to be unequivocally acknowledged as truly legal, binding instruments, national laws (or regulations) should specifically and explicitly refer to and recognise them as such. However, it may also be argued – with some justification – that their recognition in the Nagoya Protocol *already* offers sufficient legal basis for communities to start developing and using them in practice. Furthermore, accepting and committing to a protocol is legally binding on parties to a contractual, bi-lateral relationship.

The more bio-cultural protocols are developed, the more pressure is placed on national policy processes to further recognise them.

Who can realistically develop them? The few existing examples of bio-cultural protocols demonstrate that in their present state of development, they require an important investment of time, resources and efforts, including the participation of NGOs, who have collaborated in their creation. Generally speaking, these processes (in general) have not been triggered (at least hitherto) on the initiative of indigenous peoples and communities. Support in strengthening their capacities is therefore required as a means to build capacity and encourage and stimulate such initiatives at community level, even though this might still require technical assistance from NGOs and experts.

Languages. It is known that knowledge and tradition transmission among indigenous peoples and communities is mainly oral. To systematise and codify ‘plans of life’ or more specific rules would imply a new exercise, and the need for communities to be appropriately consulted.

Comments and recommendations

Community and bio-cultural protocols enable Customary Law, or the customs, interests, expectations of communities, to become enshrined in text. This occurs in a context in which, even though Customary Law is invoked in many international agreements and national processes, it has been very difficult to translate and specifically reflect in tangible and understandable terms for a wider and more extended audience.

More specifically:

1. The recognition of ‘community protocols’ by the Nagoya Protocol on ABS already offers an important legal foundation for possible national and international activities and interventions regarding the development and implementation of these instruments. Their voluntary or binding nature will depend on specific policy and legal contexts in each country. In South America in particular, most constitutions and legal frameworks already specifically acknowledge the pluri-cultural nature of the nations, customary practices and traditions of indigenous peoples as well as their right to self-determination, etc. Furthermore, the ILO Convention 169 (binding) and United Nations Declaration on the Rights of Indigenous Peoples (non-binding), which recognise a wide range of rights, have been ratified by Brazil, Bolivia, Colombia, Ecuador, Peru and Venezuela and approved by Peru, Bolivia, Brazil, and most Latin American states, with the exception of Colombia.

5. Limitations of a bio-cultural protocol

2. Although indigenous peoples and communities are clearly highly diverse and their local contexts demand varied responses, it would be advisable to develop general guidelines and examples of best practices in order to inform the main structure and content of more specific protocols. This should be done with the informed participation and involvement of indigenous and community organisations, as a means to ensure that leaders act as champions and promoters of protocols. This can also help in the development of comparable instruments, similar in structure (as far as possible), with clearly delimited essential contents. These efforts would ideally be undertaken regionally (i.e. COICA, CAN, OTCA), although working directly through national organisations such as (AIDSEP, CIDOB, CONAIE)¹⁵, may also generate positive responses.
3. The development of pilot processes to create bio-cultural protocols (in three communities of the Amazon, and three communities of the Amazon, and three communities in the Andean region), may help in the identification of elements for these guidelines, based on actual practical efforts. This could guarantee the success of a future bio-cultural or community protocol movement¹⁶. Up-scaling and further promotion of protocols will critically depend on the extent to which relevant representative organisations of these communities are informed and participate, from the start, in these processes. At least in the case of Ecuador, Peru and Bolivia, the involvement of CONAIE, AIDSEP and CIDOB (and if possible COICA at regional level) will ensure the success of more comprehensive initiatives and efforts.¹⁷ Alongside these pilot efforts, promoting the development of regional standards or guidelines with COICA or CAN could also help trigger and streamline bio-cultural protocols as part of a more comprehensive dynamic throughout the region. This entails a two-tier approach, working with communities and representative organisations, and regional/national organisations where possible.
4. These pilot processes may be centred initially on the development of protocols specifically directed to the establishment of principles and conditions for access to and use of biodiversity and its components, whilst also leaving them flexible enough to incorporate ABS and TK related principles¹⁸. All protocols examined to date have tended to broaden their scope *beyond* ABS and TK considerations, based on the requests and wishes of indigenous peoples and communities, which is ultimately what should guide actions and supporting activities. Emphasis could be placed on ABS and TK as part of pilot projects and protocol development, when requested by communities and indigenous peoples. This, in the light of existing examples of protocols, will almost certainly be the case on a regular basis.
5. Involving supra-regional bodies such as CAN and ATCO (or OTCA), may help to generate room in their institutional agendas for debate and the promotion of these instruments. However, as mentioned in point 3 above, working with other national/regional organisations, such as COICA, CONAIE in Ecuador, AIDSEP in Peru, CIDOB in Bolivia, ISA in Brazil, etc. may also be an option if CAN and OTCA agendas are initially overburdened with plans and activities. The important aspect

¹⁵ CIDOB (Consejo Indígena de Bolivia), AIDSEP (Asociación Inter-étnica de Desarrollo de la Selva Peruana), CONAIE (Consejo Nacional Indígena del Ecuador).

¹⁶ Natural Justice and the Union for Ethical Biobanking (UEBT) are currently coordinating efforts to launch pilot bio-cultural protocol efforts in the context of biobanking activities in Amazon communities (Personal conversation with Johanna von Braun, Natural Justice, March 2011).

¹⁷ COICA (Coordinadora de Organizaciones Indígenas de la Cuenca Amazónica)

¹⁸ Johanna von Braun, Natural Justice, also indicated that in the various exercises of creating protocols in Africa, Asia and South America, there have been clear indications by indigenous peoples and communities that they'd like protocols to cover biodiversity and natural resources in general and not only address ABS and TK related issues.

is to engage these actors in advance preparatory work as much as possible, and generate the tools and guidance to support local level action by communities. This again may vary and require specific action with each organisation and according to national and institutional realities.

6. These 'protocol development processes' should be accompanied by prior consultation, awareness and capacity building efforts at the level of representative organisations, as a means to build the capacity of leaders (potential trainers) and stimulate the development of protocols, in a cost-effective manner.
7. An important issue is whether bio-cultural protocols emerge as a result of the specific request of an interested party to access natural resources, biodiversity, TK, etc. or *a priori*, through indigenous peoples' own initiatives, before any specific interest is shown and expressed. At the moment, it seems that their development is driven by a more general interest, rather than the existence or otherwise of projects, plans or activities among indigenous peoples' or communities' lands and territories. This *a priori* approach has the advantage of providing time for a carefully considered, reflective and informed response with regard to what indigenous peoples and communities expect from bio-cultural and community protocols. Ideally, these processes should be launched by the indigenous peoples and communities themselves and, failing that, jointly by indigenous peoples and supporting organisations.
8. The outcomes of the process (a bio-cultural or community protocol) should be available and accessible in the local language and three or four official languages of the United Nations. In the case of South America and in terms of the proven interests of companies and institutions in accessing resources in indigenous and local communities' lands and territories, these protocols should if possible be translated into English, Spanish and French. This would help third parties to understand the internal dynamics and expectations of the region's indigenous peoples and communities.
9. It is essential to undertake an analysis of each specific protocol's legal status with regard to formal national law and its relationship with customary law and, specifically, to evaluate the proposals made by the protocol with regard to property and possible rights and interests on natural resources and biodiversity components in particular.
10. A final recommendation refers to the possibility for a national authority of maintaining a publicly available register (database) of the different protocols that may be developed by indigenous peoples and communities, as a way to facilitate third party review, consideration, assessment and even research regarding these special instruments.



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<http://www.naturaljustice.org.za>

<http://www.andes.org.pe>

<http://www.parquedelapapa.org>

Examples of bio-cultural protocols

Raika Bio-cultural Protocol (India)

http://www.pastoralpeoples.org/docs/Raika_Biocultural_Protocol.pdf

Bio-cultural Community Protocol of the Gunis on Medicinal Plant Conservation in Mewar (India)

http://www.unep.org/communityprotocols/PDF/GuniMedical_BCP.pdf

Bio-cultural Community Protocol of Bushbuckridge Traditional Health Practitioners (South Africa)

<http://www.kruger2canyons.org/Biocultural%20Protocol%20-%20final%20BCP%20in%203%20languages%20-%20low%20res.pdf>

Bio-cultural Community Protocol of the Traditional Healers of the Malayali Tribes (India)

<http://www.unep.org/communityprotocols/PDF/MalayaliVaidyasBCP.pdf>

Bio-cultural Community Protocol of the Samburu concerning Indigenous Livestock Breeds, their Rights to Indigenous Livestock Genetic Resources and their Role in Global Biodiversity Management (Kenya).

http://www.pastoralpeoples.org/docs/Samburu_Biocultural_Protocol_en.pdf

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